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THE MONTREAL CONVENTION AND THE PREEMPTION OF AIR PASSENGER HARM CLAIMS

MARC McDONALD

INTRODUCTION

The aim of this article is to examine the evolution and present state of the law governing the preemption of passenger claims for compensation for harm arising from international air travel under the Montreal and Warsaw Conventions. The direction of preemption law towards extreme or “total” preemption of non-Convention actions for non-Convention harm in English-speaking states was established in a series of last resort US and UK decisions in the late 1990s and followed in other jurisdictions. Case law since has largely focused on the working out of the consequences of these decisions. Some of the consequences involve the denial of any cause of action for harmed air passengers and appear questionable. A decade or so on seems an appropriate time to take stock of preemption law to see, in particular, whether the present direction of preemption law is legally sustainable or whether a different approach or interpretation is required.

Part II of this article presents a descriptive overview of preemption law. It is somewhat lengthy, both because of the complexity of the subject and because of the scant literature on the subject. It assumes some familiarity with the basics of Convention law. Part III traces the rise of preemption law, particularly the triumph of total pre-emption, and lists the consequences of this. Part IV critically analyses the case law favouring total preemption. Part V undertakes a *de novo* analysis of Montreal to see if total preemption under Montreal is different from that under Warsaw and notes the likely influence of decisions by the European Court of Justice (ECJ). Part VI summarises and concludes. The overall conclusion is that total preemption of non-Convention actions for non-Convention harm is not legally sustainable.

DESCRIPTIVE OVERVIEW OF PREEMPTION LAW

The general understanding in English-speaking states of art.29 of the Montreal Convention¹ on air carrier liability (Montreal) is that it excludes, displaces, forbids or bans (preempts, a judicial, not a Convention, term) any national or

1. Formally titled “Convention for the Unification of Certain Rules for International Carriage by Air” done at Montreal, May 25, 1999. Implemented in Ireland by the Air Navigation and Transport (International Conventions) Act 2004, s.4(1), (2) and Sch.3.

local (non-Convention) causes of action² by passengers against an airline for compensatory damages for injury or loss (harm) arising out of the international carriage of passengers by aircraft.³ Article 29 is also understood to have the same scope and effect (preemptive reach) as art.24 of the Warsaw Convention⁴ (Warsaw), its predecessor.⁵

The present text of art.29 (with significant changes from the original art.24, italicised) now reads:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action punitive, exemplary or any other non-compensatory damages shall not be recoverable.

The immediate aim of art.29/24 is to channel all relevant causes of action against an airline through the Conventions and to ban non-Convention causes

Implemented in the European Union by Regulation 2027/97, OJ L 285/1, October 17, 1997, as amended by Regulation 889/2002, OJ L 140/2, April 13, 2002. The text of the Convention is available at OJ L194/39, July 18, 2001.

2. Such as breach of contract and various forms of negligence based on failures to warn/assist/provide care, including necessary equipment in working order, negligent or even international infliction of emotional distress, fraud—*Mbaba v Air France* 457 F 3d 496, 2006 US App Lexis 18663; wilful misconduct, intentional denial of medical assistance and other claims for breach of statutory duty—*Brandt v American Airlines* 2000 US Dist Lexis 3164; *Turturro v Continental Airlines* 128 F Supp 2d 170, 2001 US Dist Lexis 360; *Waters v Port Authority and Alitalia* 158 F Supp 2d 415, 2001 US Dist Lexis 11790; assault, battery, invasion of privacy—*Brandt v American Airlines* 2000 US Dist Lexis 3164 at 7; false imprisonment, conspiracy to commit false imprisonment, defamation—*Turturro v Continental Airlines* 128 F Supp 2d 170, 2001 US Dist Lexis 360; slander—*Schroeder v Lufthansa* 875 F 2d 613, 1989 US App Lexis 7515; loss of consortium—*Krys v Lufthansa* 119 F 3d 1515, 1997 US App Lexis 22644; and bailment—*Emery Air Freight v Nerine Nurseries* [1997] 3 NZLR 723.
3. Some US courts—e.g. *Singh v American Airlines* 426 F Supp 2d 38, 2006 US Dist Lexis 19745 at 9—have also considered as preemption the converting of a non-Convention claim into a Convention one, but this, it is suggested, is a unique US jurisdictional question related to whether to sue in a state or federal court. Further, most courts, when dealing with preemption questions, have no difficulty in “converting”, if necessary, a non-Convention claim into a Convention one.
4. Formally titled “Convention for the Unification of Certain Rules for International Carriage by Air”, done at Warsaw, October 12, 1929. Implemented in Ireland in its original form by the Air Navigation and Transport (International Conventions) Act 2004, s.4 (1), (2) and Sch.1 and in its amended form by Sch.2 of the 2004 Act. Amendments derive from The Hague Protocol of 1955 and Protocol No. 4 of Montreal, 1975.
5. For an account of preemption law in a general text on airline liability under the Conventions, see Shawcross and Beaumont, *Air Law*, edited by J. McClean, et al., Looseleaf, VII, pp.369–377.

of action,⁶ thereby supporting the greater aim of ensuring global uniformity of rules governing air carrier liability. Thus, in its various articles, which create Convention causes of action—art.17(1) dealing with death or bodily injury, art.17(2) dealing with damage, loss or destruction of baggage and art.19 dealing with passenger delay—Montreal provides the only legal basis for actions for damages by passengers.

The need for preemption

If Montreal/Warsaw (the Conventions) did not contain an explicit preemption clause, such as art.29/24, some such clause would have to have been implied. The Conventions' aim of creating unified rules would have been thwarted if states were free to allow non-Convention causes of action to be used alongside Convention ones in situations covered by the Conventions.⁷ However, the drafters of the Warsaw Convention were well aware when creating a new liability regime for international air travel that they would have to address its relationship with existing developing national or local law.⁸ Two approaches could have been taken—defining the *scope* of Convention causes of action and/or defining any *residual scope* of national causes of action. Often, law-makers in comparable situations define the former and leave the latter to be determined by implication. With the Conventions, both approaches were taken. Articles 17 and 19 establish, albeit vaguely, the Convention's causes of action. Article 29/24 defines the scope of residual non-Convention causes of action, though the wording of both has always caused dispute, as will be seen, over whether the language used was actually ambiguous and, if it was, how it should be interpreted. It would not have been impossible to have devised a set of words for total preemption (if that was the aim) along the following lines—"No cause of action of any kind for compensatory damages, other than ones provided under this Convention, may be taken in respect of any loss or injury of any type, howsoever caused, arising out of international carriage by aircraft."

Reasons why passengers try to avoid the Conventions

Preemption is only important because passengers try to sue outside the Conventions. Under Warsaw there appear to have been five main reasons why litigants sought to bring claims outside the Convention:

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6. "It's a very important stipulation which touches the very substance of the Convention, because this excludes recourse to common law; originally, it was a separate article.", UK Delegate Dennis at 213, Second International Conference on Private Aeronautical Law, October 4–12, 1929, Warsaw, Minutes, trans. R. Horner & D. Legraz, Fred B. Rothman, New Jersey, 1975 ("Warsaw Minutes").
 7. "Uniformity requires, however, that passengers be denied access to the profusion of remedies that may exist under the laws of a particular country, so that they must bring their claims under the terms of the Convention or not at all.", *King v American Airlines* 284 F 3d 352, 2002 US App Lexis 4611 at 6.
 8. Warsaw Minutes at 176.

- to avoid the low limits on the amounts of compensation awardable for injury, baggage loss or delay where a claim falls within the Convention;
- to avoid the low limits which apply when courts give a broad meaning to “embarking”⁹ and “disembarking” in art.17, with the result that a greater range of injuries are subject to the low limits;
- to avoid the exclusion of claims involving internally originated or other physical injury to passengers during normal air operations due to the narrow definition of “accident” in art.17¹⁰;
- to avoid the exclusion under art.17 of claims for mental injury where there is no physical injury¹¹; or
- to avoid the short limitation period of two years which applies to Convention causes of action.¹²

As Montreal replaces Warsaw, a number of these reasons may no longer have the same force. The first-mentioned reason will no longer apply to personal injury claims because Montreal contains no limits on the amount of compensation awardable. Indeed, since art.17(1) of Montreal now contains a combination of conditional absolute liability up to a certain amount and presumed fault liability for amounts above that, there are now no compensation limits at all—features which make a Convention claim more attractive than many non-Convention claims—and could even lead to airlines and not passengers trying to avoid Montreal, most likely by claiming there was no accident.

Further, there is now an increased awareness of other forms of passenger harm, aside from death and bodily injury, mental injury and stress type harm mainly focused on in-cabin treatment of passengers by airlines, which are also affected by preemption. A list of these harms is provided in Pt III and it is the focus of current concern. As and when mental injury per se becomes more actionable under Montreal in English-speaking states (and especially in Ireland and the UK by virtue of being subject to the jurisdiction of the European Court of Justice as regards Montreal), another significant passenger reason for trying to bring non-Convention causes of action will be removed. Already there are signs that this may not be far off.¹³ Compensation limits still apply, however, to

9. *Day v TWA* 528 F 2d 31, 1975 US App Lexis 11339.

10. Finally decided in the US by the Supreme Court in *Saks v Air France* 470 US 392, 1985 US Lexis 62. See also *Metz v KLM* 1979 US Dist Lexis 8375—heart attack during a flight was not an accident; *Abramson v JAL* 739 F 2d 130, 1984 US App Lexis 20346—alleged aggravation of hernia injury not an accident.

11. Finally decided in the US by the Supreme Court in *El Al v Tseng* 525 US 155, 1999 US Lexis 505.

12. As in *Burke v Aer Lingus* [1997] 1 I.L.R.M. 148; *Wolgel v Mexicana Airlines* 821 F 2d 422, 1987 US App Lexis 8033; *Fishman v Delta Air Lines* 132 F 3d 138, 1998 US App Lexis 23; *Sassouni v Olympic Airways* 769 F Supp 537, 1991 US Dist Lexis 10239; and *Seguritan v Northwest Airlines* 440 N.E.2d 1339, 1982 N.Y. Lexis 3686.

13. See *Walz v Clickair* C-63/09, May 6, 2010, and the discussion in Pt V of this article.

claims for baggage loss and delay, so preemption remains important in these areas, as it also does regarding the Convention's short limitation period of two years.

While art.29 is a significant source of Montreal's preemptive reach, its literal words have been held, as will be seen in Pt III, not to be the sole source of that reach. English-speaking courts have adopted a purposive approach to art.29 with the result that other provisions and purposes of Montreal have been used to help define its preemptive reach. For this reason, it is possible to talk of Montreal's preemptive reach without necessarily referring to art.29, although art.29 remains at least a convenient figurehead.

Types of preemption

There appears to be two types of preemption—partial and total. Total can be sub-divided into real and false total preemption, with the former used in the case of aircraft incidents and the latter used for airport terminal incidents. It is not clear if this further sub-division helps much. Partial preemption arises when the facts of a claim fall fully inside the elements of liability of one of the Convention causes of action. For example, with art.17(1) where there is a plane-related¹⁴ accident and it causes bodily injury, there is no legal or policy difficulty in saying the non-Convention claim is preempted; “partial” in this sense means that the facts in a claim fully (and not partially) dovetail with the facts required by a Convention cause of action. It is true the word “partial” is not ideal as it might (wrongly) suggest that preemptive effect is less than full. However, the use of “partial” is well established, especially in US jurisprudence.

Total preemption refers to the banning of a non-Convention claim where the facts of the claim do not fall fully within the elements of a Convention claim, either because the incident took place on board a plane but does not fit inside all the elements of, say, art.17(1), or the incident arose outside the plane and still does not fit inside art.17(1).

In addition to the preemption of non-Convention causes of action, there is a range of other preemption issues associated with Warsaw/Montreal. These are:

- claims can only be brought in jurisdictions allowed by the Convention¹⁵;
- types of damages which are outside the purview of the Convention, such as punitive damages, cannot be awarded¹⁶;
- recovery against a carrier is preempted to the extent that there has already been recovery from the carrier's agents or employees¹⁷;

14. This phrase is used as shorthand for on board an aircraft or while embarking or disembarking. It is also used to include helicopters and other forms of aircraft.

15. *Roberts v Guyana Airways* (1998) 41 OR (3d) 653.

16. *Re Lockerbie* 928 F 2d 1267, 1991 US App Lexis 4779. Since Montreal, the ban is now explicit in the last sentence of art.29—“In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.”

17. Article 30 (2). See *Sompo v NAC* 2008 US App. Lexis 7834 at 9.

- depending on allocation of court jurisdiction within a state, particularly federal states, claims may only be heard in a competent court¹⁸;
- proof of recklessly caused damage with knowledge aforethought under art.22(5) of Montreal only lifts Convention limits and does not allow non-Convention causes of action¹⁹; and
- state burden of proof rules are preempted by Montreal's burden of proof rules.²⁰

This article will focus only on the first-mentioned aspect of Montreal—the preemption of non-Convention causes of action.²¹ It does not focus on the related but distinct preemption issue concerning domestic flights where a state chooses to apply all or part of the Conventions to non-international flights, but has the freedom to adopt variations of art.29.²² The EU law-maker has applied Montreal to all domestic flights, including flights inside a Member State, because it is “appropriate to have the same level and nature of liability in both national and international transport.”²³ Nor does this article focus on statutory

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18. As in the US, although some federal courts still consider that state courts can hear Convention claims—*Rogers v American Airlines* 192 F Supp 2d 661, 2001 US Dist Lexis 17541; *Serrano v American Airlines* 2008 US Dist Lexis 40466; *Nanki v Continental Airlines* 2010 US Dist Lexis 11879. In the EU, as will be seen, (where there are no Community courts, except for the European Court of Justice and Court of First Instance), Regulation 2027/97, which implements Montreal, must be litigated in state (local) courts. In other English-speaking states, such as Australia and Canada, which implement the Convention by domestic legislation (as opposed to constitutional provisions, as in the US), thereby giving local courts the jurisdiction to hear claims under the Convention, the issue of competing court jurisdictions and laws which “American courts have struggled with”—*Re Lockerbie* at 9—does not arise.
 19. Cases on predecessor, art.25 Warsaw, noted in *Brandt v American Airlines* 2000 US Dist Lexis 3164 at 8. Under Montreal, see *Booker v BWIA* 2007 US Dist Lexis 33660 and 307 Fed Appx 491, 2009 US App Lexis 523.
 20. ICAO, International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air), Montreal, May 10–28, 1999, Vol.I, Minutes at 137 (Montreal Minutes).
 21. Most of the cases cited in this article are US federal cases, most of which involved pre-trial hearings where courts assumed facts alleged to be true for the purposes of the hearing. This article likewise assumes the alleged facts to be true.
 22. Domestic preemption law, at least in the EU, has itself now been largely, but not totally, preempted by Montreal preemption law, since the adoption of Montreal at Community level (and its application to Community air carriers in the internal aviation market) “extends the application of [Montreal’s] provisions to carriage by air within a single Member State”—art.1 of Regulation 2407/92 on the licensing of air carriers, OJ L 240/1, August 24, 1992. Under this Regulation, a Community air carrier must have a valid operating licence. But under art.1(2), certain flight activities are exempt from the need for an operating licence—“The carriage by air of passengers, mail and/or cargo, performed by non-power driven aircraft and/or ultra-light power driven aircraft, as well as local flights not involving carriage between different airports, are not subject to this Regulation.” Domestic preemption law therefore continues to apply to such flights. See *Laroche v Spirit of Adventure* [2008] EWHC 788.
 23. Recital 4 of the Preamble to Regulation 2022/97.

attempts, not necessarily to create new non-Convention causes of action, but to alter the conditions and limits under which Convention causes of action operate, although it is clear that such attempts might, in certain circumstances, be deemed invalid as being contrary to a Convention party's obligations under the Convention.²⁴

Where preemption ends

Preemption under the Conventions has its limits. No matter how widely or narrowly courts construe key Convention terms like "accident", "bodily injury", "embarking"/"disembarking", or "delay", if passenger harm or delay occurs outside these parameters and outside the Convention, a non-Convention claim is not preempted by art.29/24 and can be pursued.

Instances of claims beyond the Conventions include those where there is a complete non-performance of a flight contract by the carrier, such as where the passenger never leaves the airport. Non-Convention claims in instances of this kind are not preempted,²⁵ though the distinction between non-performance and delay (which is pre-empted) is not settled.²⁶ Further, events inside the airport terminal not proven to be linked to embarking or disembarking²⁷—say, after check-in and between the security check and the departure gate,²⁸ or while on an escalator in transit,²⁹ or after arrival when released from airline control into the public area of a terminal and taken into custody by airport authority officials,³⁰

24. In *R (IATA) v Secretary of State for the Environment* [1999] 1 C.M.L.R. 1287, the English High Court found that the interim Community measure (Regulation 2022/97 in its original form) which in effect altered Warsaw's compensation limits, amongst other matters, was in conflict with Warsaw but was not invalid because its effect was in suspense due to the fact that, under the EC Treaty, Community law did not affect pre-membership agreements with third states. See N. Grief, "Challenging the EC Regulation on air carrier liability" (2000) J.B.L. 92. The issue is now moot since the amended Regulation 2022/97 declares that Montreal contains the liability rules for Community air carriers.

25. *Wolgel v Mexicana Airlines* 821 F 2d 422, 1987 US App Lexis 8033; *O'Callaghan v ARM* 2005 US Dist Lexis 12889.

26. Contrast *Atia v Delta Airlines* 2010 US Dist Lexis 18806 and *Okeke v Northwest Airlines* 2010 US Dist Lexis 17607. Further discussion of delay and preemption is beyond this article.

27. *Kotsamabsis v Singapore Airlines* [1997] NSWSC 303; *Curran v Aer Lingus* 1982 US Dist Lexis 15937. A test of being linked with embarkation allows an expansive view of embarkation so as to include pre-embarkation. Embarkation is literally the process of actually entering a plane. Although US case law is to the contrary, embarkation arguably should not include any period when a passenger still has to go through a check or control which could result in refusal of entry. The Australian judge in *Kotsambasis* said "there must be a tight tie between an accident and the physical act of entering an aircraft." Note how Reporter de Vos put the matter during the 6th Session of the Warsaw Conference when reporting back to the plenary session: "The period of carriage commences beginning from the time of embarkation of persons *on board* the aircraft" (emphasis added)—Warsaw Minutes at 166.

28. *Haley v Air Canada* (1998) 171 N.S.R. 289; 1998 Can LII 1140 where the injury claim was litigated through negligence and breach of contract.

29. *Dick v American Airlines* 476 F Supp 2d 61, 2007 U.S. Dist Lexis 19349. Decision

or while in the baggage pick-up area,³¹ or while returning to the airport to pick up delayed luggage³²— will all usually be outside the scope of the Conventions, excluding events on the tarmac after an emergency evacuation.³³

The widest parameter of the Convention's application is that passenger harm must be related to "aircraft". Article 1(1) of Montreal says the Convention applies to carriage by "aircraft". Subject only to later Convention articles which extend its liability reach to acts ancillary to getting on or off a plane and to the collection of passenger baggage in the terminal, the further one goes from an aircraft, the more likely that harm is beyond the Convention's reach.

Most procedural rules and some substantial ones (relating to who can sue and what types of loss are compensatable) are also beyond the Conventions.³⁴

Claims by a passenger³⁵ or airline staff³⁶ against a passenger, the airport, police, etc proceed independently of the Convention, because both the text and history of the Convention make clear that it deals only with claims against air carriers, not anyone else. Claims against a carrier by its employees (or their survivors) for employee harm during a flight while acting in the course of their employment are also not subject to the Convention. Working carrier employees are not passengers,³⁷ although claims by non-carrier employees working during a flight specifically organised for that working purpose may be treated as passenger claims.³⁸ Further, a claim can be brought under non-Convention law against a carrier for harm the carrier procures to a passenger arising from police

criticised (wrongly, one suggests) in case note G. Tompkins, "The Preemptive Effect of the Warsaw Convention and the Distinction between the Applicability of the Convention to a Claim and Liability under the Convention for the Claim" (2007) *Air & Space Law* 226.

30. *Turturro v Continental Airlines* at 10.

31. *Martinez Hernandez v Air France* 545 F 2d 279, 1976 US App Lexis 6147 where a terrorist attack in the baggage pick-up area of the airport terminal was held to be outside the Convention; *Mac Donald v Air Canada* 439 F 2d 1402, 1971 US App Lexis 11128, where a passenger fall on the ground in the baggage area was deemed to have occurred after disembarking; *Donkor v British Airways* 62 F 2d 963, 1999 US Dist Lexis 12503, where a loss claim arising from a possible failure to warn a transit passenger of the possible need for a transit visa, independently of any airline delay, was regarded as not being preempted by the Convention.

32. *Fournier v Lufthansa* 191 F Supp 2d 996, 2002 US Dist Lexis 2137.

33. *Jack v TWA* 854 F Supp 654; 1994 US Dist Lexis 2878 at 9.

34. In the words of the US delegate to the Montreal conference: "Since 1929 and to this day, it had been up to local jurisdictions to decide such matters as which classes of persons, which orders of relatives, what types of persons or non-natural persons, etc and what elements of the measure of damages were." Montreal Minutes at 189.

35. In *Stone v Continental Airlines and John Doe* 905 F Supp 821, 1995 US Dist Lexis 17840, an unprovoked attack by one passenger on another was held not to be an "accident" because there had been no act or omission by the airline linking it to the assault.

36. *Rooney v Coutts, Irish Times*, May 2, 2008, where it was reported that the Irish High Court, in an oral decision, awarded €56,000 to an air steward who sued a passenger for assault.

37. *Sulewski v Federal Express* 749 F Supp 506, 1990 US Dist Lexis 13925.

38. See *Herd v Clyde Helicopters* 1997 SC(HL) 86, which, although involving a domestic internal flight, was still decided under national law by reference to Convention principles.

detention and search which takes place after disembarkation in a terminal building.³⁹

Claims against employees and agents of carriers

It is likely that claims, not against a carrier, but against its employees⁴⁰ or agents⁴¹ or even sub-contractors of agents,⁴² are not preempted by art.29 of Montreal,⁴³ though under art.30 they are still subject to the Convention's limits of liability. However, the benefit of the limits of liability only apply when sued by a passenger (or cargo consignor), but not by an airline.⁴⁴ Some pre-Montreal US courts have gone further and held that non-Convention claims against agents are preempted and claims can only be brought if based on one of the Convention's liability-creating articles.⁴⁵

THE EMERGENCE OF TOTAL PREEMPTION

The rise of preemption

Preemption of non-Convention causes of action was not controversial for as long as courts held or accepted, as some did,⁴⁶ that Warsaw did not create its own causes of action, but merely made the operation of non-Convention causes subject to its conditions and limits of liability. Then it was actually necessary to plead non-Convention causes of action in order to make a claim.

39. *Schroder v Lufthansa* 870 F 2d 613, 1989 US App Lexis 7515, although on the facts the airline was found not liable under local law for procuring the alleged false detention and search of a passenger falsely accused of having a bomb.

40. *Reed v Wiser* 555 F Supp 2d 1079, 1977 US App Lexis 13660. See also Singapore case *Seagate v Changi International* [1997] 3 S.L.R. 1 at para.20.

41. *Kabbani v ITS* 805 F Supp 1033, 1992 US Dist Lexis 15898.

42. *Waxman v Mexicana de Aviacion* 13 F Supp 2d 508, 1998 US Dist Lexis 10572.

43. It may have been the intent of the drafters of Warsaw that no claims would be brought against agents and that all relevant claims would be channelled through carriers. During the 1929 Warsaw conference, when dealing with the cargo waybill, Reporter de Vos remarked that "in order that there be no erroneous interpretation, we have eliminated everywhere the word 'agent'. The words 'consignor' and 'carrier' cover the person himself and any person who can act in his name by virtue of any kind of agency relationship"—Warsaw Minutes at 157. However, the insertion of the predecessor of art.30 may have frustrated this intent.

44. As in *Sabena v United Airlines* 773 F Supp 1117, 1991 US Dist Lexis 12023. Same principle applies to carrier-on-carrier claims—*Connaught Laboratories v Air Canada* (1978) 15 Av Cas (CCH) 17,705, where the Ontario High Court stated: "none of the articles of [Warsaw] regulate or purport to regulate claims of carriers one against the other", quoted in *Sabena* at 5.

45. *Kabbani v ITS* 805 F Supp 1033, 1992 US Dist Lexis 15898; *Croucher v WFS* 111 F Supp 2d 501, 2000 US Dist Lexis 13655; *Waters v Port Authority* 158 F Supp 2d 415, 2001 US Dist Lexis 11790.

46. See *Hasserl v Swiss Air* 388 F Supp 1238, 1975 US Dist Lexis 13920 at 4.

However, as it became accepted that Warsaw did create its own causes of action,⁴⁷ the question naturally arose whether, in the context of international air transportation, non-Convention causes could still be used alongside Convention ones (when the facts were within one of the Convention's own causes of action) or even instead of Convention ones (when the facts were outside one of the Convention's own causes of action). It was relatively straightforward and non-controversial for courts to hold that non-Convention causes were indeed preempted when facts were squarely within a Convention cause of action (partial preemption).⁴⁸ However, it was, and remains, more controversial to decide that preemption also operates when facts are outside a Convention cause of action but are still linked to international air travel (total preemption).

During this time, common law jurisdictions typically allowed any of a range of causes of action to be pleaded in injury claims linked to international air travel.⁴⁹ Airline defendants contested this, claiming that the Convention's intent was to channel all passenger claims against airlines into one avenue, the Convention's own causes of action. Article 29/24 became pivotal in deciding who was right.

First impressions on reading art.29/24 do suggest non-Convention causes of action are not preempted, only channelled or conditioned. The phrase "however founded" seemed to imply that non-Convention causes of action were still allowed,⁵⁰ subject to the Convention's conditions and limits.

The alternative view of art.24

A second and different view of art.24 was also put forward. "The second interpretation is that a plaintiff, whatever his damages, cannot circumvent the Convention by bringing any action other than one under art.17."⁵¹ This expresses a broad view of art.24 and is not, it would seem, based on a literal reading of the Article. A detailed discussion of the reasons for this view is set

47. *Benjamins v BEA* 527 F 2d 913, 1978 US App Lexis 12288; *Boehringer-Mannheim v Pan Am* 737 F 2d 456, 1984 US App Lexis 20389.

48. See *Re Lockerbie* 928 F 2d 1267, 1991 US App Lexis 4779. Some examples of cases within the terms of a Convention cause of action where non-Convention claims were preempted are *Boehringer-Mannheim v Pan Am* 737 F 2d 456, 1984 US App Lexis 20389; *Fishman v Delta Air Lines* 132 F 3d 138, 1998 US App Lexis 23; *Paradis v Ghana Airways* 348 F Supp 2d 106, 2004 US Dist App Lexis 25238; *Shirbokova v CAS Czech Airlines* 376.

49. As happened in a number of US cases—*Krys v Lufthansa* 119 F 3d 1515, 1997 US App Lexis 22644; *Abramson v JAL* 739 F 2d 130, 1984 US App Lexis 20346; *Metz v KLM* 1979 US Dist Lexis 8375; *Fischer v Northwest Airlines* 623 F Supp 1064, 1985 US Dist Lexis 12846; *Tandon v United Air Lines*; *Walker v Eastern Air Lines* 775 F Supp 111, 1991 US Dist Lexis 13402; *Schroeder v Lufthansa* 875 F 2d 613, 1989 US App Lexis 7515; *Re Lockerbie* 928 F 2d 1267, 1991 US App Lexis 4779.

50. *Benjamins v BEA* 527 F 2d 913, 1978 US App Lexis 12288, see dissenting judgment of Van Graafeiland J.

51. *Re Lockerbie* 928 F 2d 1267, 1991 US App Lexis 4779 at 16.

out in Pt IV. Part of the difficulty in deciding whether art.24 required partial or total preemption was that the English text of art.24 of Warsaw was not the official text; French was, and disputes arose over the correct way to translate various art.24 terms, such as “cas”⁵² (in the original version) and “conditions et limits” from French into English. If “cas” was incorrectly translated as “cases” and more correctly translated as “facts” or “situations”, this meant that art.24 had a wide preemptive scope. The opening words in the original version of art.24(2) would have been referring “generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking”.⁵³

One US judge plausibly suggested that the direct translation of “conditions et limits” may also have obscured the drafters’ intent that art.24 was really meant to have a total preemption effect and to allow only claims under arts 17, 18 or 19. The judge stated:

“In French, Article 24 states that actions ‘ne peut etre exercee que dans les conditions et limites prevues par la presente Convention.’ ... ‘Conditions’ has a number of meanings in French, including ‘the fundamental basis,’ e.g., Larousse de Pouche 117 (1990), and if ‘basis’ or ‘terms’ are more accurate translations, then Article 24 means that actions ‘however pleaded’ will be considered to have been brought on the basis of the Convention—i.e., that the Warsaw Convention’s cause of action is exclusive.”⁵⁴

There could be no such thing as remedies, only preemption. It was cause-of-action preemption.

The preference for partial preemption

Until the 1990s, there was a long-standing divergence of judicial opinion in the US regarding the actionability of facts related to air travel that lay beyond Warsaw’s liability reach. Most judicial authority was in fact against total preemption and in favour of allowing non-Convention causes for non-Convention harm.⁵⁵ One US judge stated:

“The overwhelming consensus of the courts that have addressed the issue is that an airline passenger may institute a claim under [non-Convention] law for death or injury sustained on an international flight when an [Article 17] accident is not involved.”⁵⁶

52. *Re Lockerbie* at 16.

53. *Tseng v El Al* 525 US 155, 1999 US Lexis 505 at 13.

54. *Jack v TWA* 820 F Supp 1218, 1993 US Dist Lexis 692 at 5. This judgment contains the most detailed analysis of the pre-Warsaw drafting history of art.24.

55. As in, among others, *Abramson v JAL* 739 F 2d 130, US App Lexis 20346 noting previous cases; *Fischer v Northwest Airlines* 623 F Supp 1064, 1985 US Dist Lexis 12846; *Re Lockerbie* 928 F 2d 1267, 1991 US App Lexis 4779; *Walker v Eastern Air Lines* 775 F Supp 111, 1991 US Dist Lexis 13402.

56. *Walker* at 7.

A variety of plausible reasons were advanced in the cases in support of this position. These included:

- the lack of explicitness in the law on preemption—“Article 24 (2) of [the original version of Warsaw] does not by its express terms limit maintenance of actions brought under local law.”⁵⁷
- the ease of drafting a total preemption clause if total preemption had been the drafter’s intent—“it would have been a simple matter to preclude all relief for other ‘unenumerated’ types of injuries; but no article to that effect was incorporated.”⁵⁸
- the words “however founded” imply that non-Convention causes of action may still be used—“Article 24 clearly excludes any relief not provided for in the Convention ... It does not, however, limit the kind of cause of action on which the relief may be founded; rather it provides that any action based on the injuries specified in Article 17, ‘however founded’, i.e., regardless of the type of action on which relief is founded, can only be brought subject to the conditions and limitations established by the Warsaw system. Presumably, the reason for the use of the phrase ‘however founded’ is twofold: to accommodate all of the multifarious bases on which a claim might be founded in different countries, whether under code law or common law, whether under contract or tort, etc.; and to include all bases on which a claim seeking relief for an injury might be founded in any one country ... In other words, if the injury occurs as described in Article 17, any relief available is subject to the conditions and limitations established by the Warsaw system, regardless of the particular cause of action which forms the basis on which a plaintiff could seek relief. Hence, [plaintiff’s] alternative causes of action sounding in tort and in contract are perfectly proper.”⁵⁹
- The words “subject to the conditions and limits set out in this Convention” only “sets limits and renders uniform certain of the aspects of the relationship ... Thus, it would seem to follow that if the Convention ‘applies’, it applies to limit—not eliminate—liability; if it does not apply, it leaves liability to be determined according to traditional common law rules.”⁶⁰
- The weight of authority, especially where no accident is involved.⁶¹
- The injustice of leaving a passenger without a remedy for an alleged wrong—“I am very reluctant to assume, absent compelling authority, that established [non-Convention] causes of action ... have been extinguished in cases where no other remedy is available.”⁶²

57. *Abramson* at 6.

58. *Husserl v Swiss Air* [Husserl II] 388 F Supp 1238, 1975 US Dist Lexis 13920 at 7.

59. *Husserl II* at 6. For similar views about art.29 of Montreal see *Serrano v American Airlines* 2008 US Dist Lexis 4046 at 4 and *Nankin v Continental Airlines* 2010 US Dist Lexis 11879 at 6.

60. *Husserl v Swiss Air* [Husserl I] 351 F Supp 702, 1972 US Dist Lexis 11294 at 5.

61. *Walker* at 7.

62. *Metz v KLM* 1979 US Dist Lexis 8375 at 3.

- The need for clarity before extinguishing prior rights—“Furthermore, the [Warsaw drafters] must have been aware that to extinguish pre-existing rights their intent and expression must be clear; ambiguity or silence is rarely, if ever, sufficient.”⁶³

Together, these reasons present a formidable case against the banning of claims whose facts do not match the elements of a Convention cause of action, both because of what art.29/24 actually says and also because of what it was/is intended to do. It would not have made sense to list all affected national causes of action or to seek to describe how they were to be curtailed. Thus, it could plausibly have been intended that a passenger could plead either a Convention or a non-Convention cause of action, but that their resolution would be subject to the conditions and limits of the Convention.

It is true that under such an approach there might be difficulty in figuring out exactly how Convention conditions and limits would affect non-Convention causes of action and there does not appear to be any common law judgment giving definitive guidance on this.

Sidhu, Tseng and progeny

The arguments in favour of confining the Convention’s preemptive reach to partial preemption only did not prevail. Last resort courts in the UK and US settled matters against allowing any non-Convention causes of action for harm arising out of international air travel—total preemption. In *Sidhu v British Airways* in 1997,⁶⁴ and in *Tseng v El Al* in 1999,⁶⁵ last-resort courts in the UK and US respectively opted for total preemption, and this has set a trend. Citing particularly *Sidhu*, courts in Australia,⁶⁶ New Zealand,⁶⁷ Singapore⁶⁸ and Hong Kong⁶⁹ have followed suit. In Nigeria, the position appears uncertain,⁷⁰ while in Canada, courts in partial preemption situations have approved *Sidhu*, but there is no clear decision on *Sidhu* in a total preemption situation. A Canadian judge stated: “What is readily apparent from this review of the case law is that, at least in Ontario, the state of the law regarding the scope of the Convention is unsettled. [While partial preemption is accepted law it] is not, however, plain and obvious that the Convention is exhaustive of all causes of action against a

63. Husserl II at 7.

64. [1997] A.C. 430.

65. 525 US 155, 1999 US Lexis 505.

66. *Magnus v South Pacific Air* (1998) A.L.R. 441.

67. *Emery Air Freight v Nerine Nurseries* [1997] 3 N.Z.L.R. 723; *Vinotica v Air New Zealand* [2004] D.C.R. 786.

68. *Seagate v Changi International* [1997] 3 S.L.R. 1.

69. *Ong v Malaysian Airlines* [2008] HKCU 441.

70. See F. Majiyagbe and A. Dalley, “The Exclusivity of the Warsaw Convention Regime vis-à-vis Actions and Remedies in International Carriage by Air under Nigerian Law” (2006) *Air & Space Law* 196.

carrier in respect of damages incurred during international carriage by air.⁷¹ In Ireland, *Sidhu* has been judicially noted but there is no binding decision.⁷² Overall, a great deal of law now rests on the strength of the leading judgment in *Sidhu*, that of Lord Hope.

Both *Sidhu* and *Tseng* involved claims for mental injury unrelated to physical injury. In English-speaking states, such claims are typically regarded as falling outside the facts of a Convention cause of action. In *Sidhu*, a passenger was in Kuwait airport terminal during a scheduled stopover, awaiting re-boarding on a flight from London to Malaysia, when Iraqi troops invaded Kuwait, took control of the airport, and the passenger, as a consequence, did not reach home until some time later. *Sidhu* and other passengers took cases in the UK and the issue which came before the House of Lords was whether they could maintain a claim outside the Warsaw Convention for the mental injury arising from their ordeal. In *Tseng*, the plaintiff, before boarding a flight from New York to Tel Aviv, claimed that she was subjected to a wrongful invasive body search by airline security personnel which caused her mental injury. Neither *Sidhu* nor *Tseng* could show “bodily injury” or an “accident” as required by art. 17. Both sued outside the Convention. Both airlines resisted the claims, arguing that art. 17 provided the sole and exclusive remedy for passenger harm and if a claim could not be brought under art. 17 it could not be brought at all.

Before outlining the courts’ reasoning in both cases, it is necessary to note some of their preliminary features, which may cast some doubt on whether the courts correctly identified them as falling inside the Convention. In *Tseng*, the body search took place before check-in,⁷³ but the US Supreme Court treated it as an embarkation situation.⁷⁴ In *Sidhu*, the detention of the passenger took place inside the terminal building after disembarkation.⁷⁵ Both locations are typically treated as lying outside⁷⁶ of the Convention’s reach.

However, the reason as to why both courts treated the claims as involving Convention situations was that in both cases the parties agreed to have their claim treated as arising from international carriage by aircraft⁷⁷ (rather than being outside it), thereby invoking (wittingly or unwittingly) the preemptive rule of the Convention. This was perhaps not the soundest basis on which to

71. *Kandiah v Emirates* 2007 CanLII 23911 (ON S.C.) at para.23.

72. *APH Manufacturing v DHL* [2001] IESC 71, at para.34.

73. See account of facts in first instance judgment at 919 F Supp 155, 1996 US Dist Lexis 3060.

74. *Tseng* at 12.

75. “The passengers disembarked into the transit lounge of the airport terminal”—*Sidhu* at 436.

76. Terminal “accidents” are typically outside the Convention’s reach unless closely related to embarkation—*Pacitti v Delta Air Lines* 2008 US Dist Lexis 27046 and cases discussed therein.

77. In *Sidhu*, the Lords were able to treat the facts as raising an art. 17 situation because the passengers based their legal claims exclusively on “decisions taken while the aircraft was in the air” and not on what happened to them in the airport terminal.

rest an important legal analysis, as it leaves open the possibility that courts might in the future avoid the rulings by holding on the facts that the parties did not agree that the harm arose out of international travel by aircraft,⁷⁸ or by parties being careful to plead a cause of action based only on pre-embarkation or post-disembarkation facts. For example, in France, by contrast, where, as will be seen, the Sidhu incident was also litigated by French passengers (with the minor difference that those passengers were in the airport hotel when taken captive), the legal claim was not based on events in the plane and the Cour de Cassation held that the facts were beyond the Convention's reach. Liability was based and imposed on a French non-Convention cause of action.⁷⁹

Nevertheless, the authority of both decisions is such that it cannot be ignored and the analysis relied on in the two cases as supporting total preemption needs to be stated. Much of that authority derives from the widely quoted schematic analysis of the underlying purposes of Warsaw provided by Lord Hope in *Sidhu* which is examined below in Pt IV.

Both US and UK courts adopted broadly similar approaches to resolving the same question, using a mix of literal, purposive, historical, comparative and mischief techniques of treaty interpretation. Each court decided (without much examination) that the words of art.24 were not clear. According to the US Supreme Court: "That prescription is not a model of the clear drafter's art. We recognize that the words lend themselves to divergent interpretation."⁸⁰ Each court then felt free to take a purposive approach to determine preemptive reach and to construe other matters, such as the Preamble and overall scheme of Warsaw, analyzing how its provisions sought to balance the interests of passengers and airlines (balancing limiting amounts of compensation against curtailing carrier freedom to contract out; widening the range of places to sue against limiting the time period for suing).

The US court, perhaps, emphasised more the mischief which the Convention was designed to deal with and the anomalies which would arise if total preemption was not allowed. The UK court emphasised the significance of the word "all" in art.1(1), the scope-defining provision of the Convention—"This Convention applies to all international carriage of persons ... by aircraft for reward"—and also the inroad made into carrier freedom of contract. Both courts also emphasised what many courts had emphasised,⁸¹ namely, a major principle of the Convention was the desire of the Convention-makers to create

78. As happened in *Acevedo-Reinoso v Iberia* 449 F 3d 7, 2006 US App Lexis 12610, discussed later.

79. *Mohamed v British Airways*, Cour de Cassation, Chambre Civile I, June 15, 1999, No 97-10.268, Bulletin 242, p.156; Cour d'Appel de Paris (1997) 51 R.F.D.A.S. 155; Tribunal de Grande Instance (1997) R.F.D.A.S. 147. Discussed further below.

80. *Tseng* at 12.

81. *Re Lockerbie* at 7—"The Convention had two primary goals: first, to establish uniformity in the aviation industry [and secondly and] clearly the overriding purpose—to limit air carriers potential liability"; *Boehringer-Mannheim v Pan Am* 737 F 2d 456, 1984 US App Lexis 20389 at 5—"An obvious major purpose of the Warsaw Convention was to secure uniformity of liability for air carriers."

uniform rules to which all international air travel would be subject. In *Tseng*, the US court uttered the much-quoted statement: “The cardinal purpose of the Warsaw Convention, we have observed, is to ‘achieve uniformity of rules governing claims arising from international air transportation.’”⁸² What both courts did was to offer a solution to the question before them, not from the text of Warsaw but from its purposes—as they saw them. A crucial step, common to the reasoning of both courts, was to equate the general scope of Warsaw, as set out in art.1(1), with the scope of its liability provisions as set out particularly in art.17(1). If art.1 of Warsaw provided that the Convention applied to “all” international travel by aircraft, what this meant, then, was that its preemptive reach extended to all claims arising from international travel by aircraft, even those not included in its liability provisions.

The arrival of Article 29

The replacement of art.24 of Warsaw by art.29 of Montreal did not lead to a clearer set of preemption words or, as will be seen, to a change in preemptive reach. During the Montreal Conference the wording was not seen as a contentious matter and was not particularly discussed by delegates.⁸³ The only direct and not very illuminating statement on the draft art.29 was issued by the conference chairman who stated:

“The purpose behind Article [29] was to ensure that, in circumstances in which the Convention applied, it was not possible to circumvent its provisions by bringing an action for damages ... in contract or in tort or otherwise. Once the Convention applies, its conditions and limits of liability were applicable.”⁸⁴

Besides some verbal changes and condensing the two paragraphs of art.24 into one, the only notable change made by Montreal for passengers and their baggage was the insertion of “whether under this Convention or in contract or in tort or otherwise” after “however founded”; “however” is already a term of wide scope and arguably gained little by providing examples.

Whether art.29 signals a change from the preemptive reach of Warsaw has already been addressed in a number of US cases. In light of the similarity of language with art.24 it is not surprising that courts have said there is no change. In the first case under Montreal—*Paradis v Ghana Airways* in 2004—a court had to decide whether the possible preemption of a passenger’s claim had to be judged under Warsaw or Montreal. The court decided that it did not matter. The preemptive effect of both was the same. The change of Convention made no difference. The court stated:

82. *Tseng* at 13.

83. Montreal Minutes at 111.

84. Montreal Minutes at 235.

“Nevertheless, the Court need not determine which convention applies, because they have substantially the same preemptive effect; Article 29 of the Montreal Convention simply clarified the language of the Montreal Protocol’s amendment to Article 24(1) of the Warsaw Convention. See Article-by-Article Analysis of the Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal ... (describing Article 29 of the Montreal Convention as having been “taken from” Montreal Protocol No. 4). Here, the preemptive effect is identical regardless of whether the Montreal Convention or the Warsaw Convention (together, “the Conventions”) applies; thus, the Court need not decide which Convention controls.”⁸⁵

If the reach was the same then Warsaw case law would also apply to art.29. Following *Paradis*, another US court stated:

“The court noted that the exclusivity provisions of the Montreal and Warsaw Conventions are very similar and that ‘the preemptive effect is identical ...’ Thus, to supplement the scarce case law on the Montreal Convention, this Court will look to cases analyzing the older Warsaw Convention for guidance.”⁸⁶

The prevailing US view to date (in the absence of any last-resort decision) is that Montreal has made no change to preemption law, and pre-Montreal precedent is applicable under Montreal. The addition of the extra words “whether under the Convention or in contract or in tort or otherwise” after “however founded” has not been held in most cases to mean that non-Convention causes of action are allowable.

Deprived of a remedy by total preemption

The position resulting from *Sidhu, Tseng* and their progeny (assuming for the moment that Montreal has not changed matters) is a harsh one for passengers. All claims for compensation against air carriers (regardless of the type of harm) arising out of international air carriage must now be based on or mediated

85. *Paradis v Ghana Airways* 348 F Supp 2d 106, 2004 US Dist Lexis 25238 at 6. Relied on in *Igwe v Northwest Airlines* 2007 US Dist Lexis 1204 at 6 and *Weiss v El Al* 433 F Supp 2d 361, 2006 US Dist Lexis 32563 at 6. See also, the comments of the legal advisor during the Montreal conference to one of the airline trade bodies (IATA)—quoted in Wetger J., “The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention” (2006) *Air & Space Law* 133 at 136: “The drafters added the words ‘or in contract or in tort or otherwise’ in Article 29 to make it clear that where [Montreal] is applicable, the causes of action for damages created by [Montreal] ... are exclusive of all other causes of action, whether based on national/local law or any other law.”

86. *Knowlton v American Airlines* 2007 US Dist Lexis 6882 at 6. See also *Schaefer-Condulmari v US Airways* 2009 US Dist Lexis 114723 at 5.

through the Conventions or not at all.⁸⁷ Many types of harm otherwise actionable under local law are now, and will in the future be, non-actionable and left uncompensated.⁸⁸ The court in *Tseng* may have been aware that its decision carried the risk that lower courts would shut out many claims because they would not fit inside the Warsaw's key concepts. It warned, firstly, that claims not covered at all by the Convention could still be litigated under non-Convention law and, secondly and more importantly, it warned that the key art.17 concept, "accident", should be interpreted "flexibly"⁸⁹—presumably to lessen the risk of shut-out.

Since *Sidhu* and *Tseng*, some US courts have diligently applied the total preemption principle and, in the process, produced some strange decisions. They have analysed any passenger claim connected with international travel by aircraft, even where no physical injury, property loss or delay is involved, in terms of whether it fits inside art.17(1) concepts of plane-related, accident and bodily injury. If it does not fit inside any or all of these, the claim is deemed preempted.

This reasoning has produced (or would be likely to produce⁹⁰) the following results in compensation claims arising from international carriage by air:

On board/during embarkation or disembarkation ("real" total preemption)

- Airline causing mental injury unrelated to physical injury to passenger during a search while embarking a plane,⁹¹ or during an emergency evacuation,⁹² or while refusing to allow passenger and his child in different classes to exchange seats because the child was in pain due to an earache,⁹³ goes uncompensated.
- Airline racially motivated selection of passenger for denied boarding inside a bus bringing passengers to a plane for embarkation, goes uncompensated.⁹⁴
- Airline wrongful removal of passenger prior to departure because of false suspicion that he had a firearm, goes uncompensated.⁹⁵

87. For a review of relevant US cases in the immediate aftermath of *Tseng*, see D. Westwood and J. Geraghty, "The Progeny of *Tseng*" (2000) *Air & Space Law* 62.

88. A case note on *Sidhu*—S. Phippard, "Exclusivity of the Warsaw Convention" (1997) *The Aviation Quarterly* 394 at 396, warns that *Sidhu* "if taken at its most literal, may give rise to injustice."

89. 525 US 155, 1999 US Lexis 505 at 14.

90. Some of the cases below are pre-*Tseng* and were litigated as non-Convention causes of action. Post-*Tseng* it is suggested this would not be allowed.

91. *Tseng*, fn.65.

92. *Alvarez v American Airlines* 1999 US Dist Lexis 13656, 2000 US Dist Lexis 1254.

93. *Carey v United Airlines* 255 F 3d 1044, 2001 US App Lexis 14834.

94. *King v American Airlines* 284 F 3d 352, 2002 US App Lexis 4611. See also *Atia v Delta Air Lines* 2010 US Dist Lexis 18806 and *Molefe v KLM* 602 F Supp 2d 485, 2008 US Dist Lexis 108910.

95. *Hermano v United Airlines* 1999 US Dist Lexis 19808.

- Airline breach of contract during a flight by not providing a promised free breakfast, goes uncompensated.⁹⁶
- Airline defamatory statements on the plane's public address that an "unruly passenger" was leaving the plane and by the pilot on the plane to police regarding the plane's return to departure gate to let off a passenger suffering a panic attack, go uncompensated.⁹⁷
- Airline default in not preventing sexual assault by one passenger on another on board the plane, probably goes uncompensated.⁹⁸
- Airline discriminatory treatment of wheelchair passenger in not providing appropriate "meet and assist" service on boarding plane and failing to assign appropriate seating, goes uncompensated.⁹⁹

In the airport ("false" total preemption)

- Airline causing mental injury to transit passengers by placing them in airport terminal where they are taken prisoner by invading army, goes uncompensated.¹⁰⁰
- Airline cancellation of part of a return flight while passenger awaits in airport terminal, and when passenger books alternative flights after waiting several hours with no assurance of securing a return flight with original airline, goes uncompensated.¹⁰¹
- Airline intentional misrepresentation in the terminal to a transit passenger about the closure of another airport to incoming flights from which the passenger was to catch a connecting flight, probably goes uncompensated.¹⁰²
- Airline fraud and deception during check-in regarding the size of excess baggage fees payable by a passenger, goes uncompensated.¹⁰³

96. *Knowlton v American Airlines* 2007 US Dist Lexis 6882. Noted by G. Tompkins, "The Case of the Missing 3 Dollar Breakfast and the Preemptive Effect of the Montreal Convention" (2007) *Air and Space Law* 229.

97. *Turturro v Continental Airlines* 128 F Supp 2d 170, 2001 US Dist Lexis 360 at 10.

98. This view is based on a combination of two decisions—the US case of *Wallace v Korean Airlines* 214 F 3d 293, 2000 US App Lexis 12245, where a passenger-on-passenger sexual assault was treated as an accident, and the UK case of *Morris v KLM* [2001] EWCA Civ 790: [2001] 3 All E.R. 126, where another passenger-on-passenger assault (caressing thigh) was characterised as a mental injury and not compensatable under art.17 of Warsaw. Morris did not raise a preemption issue, as only a Convention cause of action was pleaded.

99. *Waters v Port Authority* 158 F Supp 2d 415, 2001 US Dist Lexis 11790.

100. *Sidhu v British Airways* [1997] A.C. 430.

101. *Paradis v Ghana Airways* 348 F Supp 2d 106, 2004 US Dist Lexis 25238.

102. *Hill v United Airlines* 520 F Supp 1048, 1983 US Dist Lexis 9787, a pre-*Tseng* decision which would probably be decided differently now.

103. *Mbaba v Air France* 457 F 3d 496, 2006 US App Lexis 18663. For a case comment criticising this decision for failing to hold that the case lay beyond the reach of the Convention's liability reach, see S. Mann, "Airline Liability—The Warsaw Convention—the Fifth Circuit rules that holding a passengers baggage for ransom is not actionable under the Warsaw Convention: *Mbaba v Air France*" (2007) 72 *J. Air L. & Com.* 401.

- Airline failure to prevent baggage staff in terminal, after passenger check-in, attaching a passenger's name to a bag containing illegal drugs leading to passenger arrest after disembarkation and imprisonment for nine months, goes uncompensated.¹⁰⁴
- Airline fraud and deceitful denial after passenger disembarked regarding the making of a claim for lost checked baggage,¹⁰⁵ goes uncompensated.
- Airline false statement from plane to ground crew that a passenger smoked marijuana in the airplane lavatory which led to passenger arrest and search after disembarkation, probably goes uncompensated.¹⁰⁶

The third last case in this list, *Singh v North American Airlines*, is a striking illustration of the injustice of the present law. In addressing the plaintiff's negligence claim in relation to his arrest and imprisonment, the court examined the claim as if it was a claim for personal injury under art.17. It held that the mislabeling of the name on the drugs bag took place while the passenger was embarking the plane (though the passenger never embarked with the drugs bag, nor—if it came to it—was there any evidence of a time correspondence between the mislabeling and the passenger's embarkation). This finding was enough to bring the facts within the Convention and the non-Convention negligence claim was therefore deemed preempted. There is little doubt that this reasoning twisted “embarking” into an almost unrecognizable shape and highlights the absurdity of requiring that all claims must typically fit inside art.17 or there is no claim at all.

Given this state of affairs, it is small wonder that counsel in one case was driven to assert: “An airline could, if it chose, even line up passengers on an international flight and rob them at gunpoint without fear of any civil liability to the victims whatsoever.”¹⁰⁷ Or, in another case, after hearing the plaintiff's argument that preemption would allow airlines to escape liability for “egregious acts of discrimination” (even though the court surmised that some

104. *Singh v American Airlines* 426 F Supp 2d 38, 2006 US Dist Lexis 19745.

105. *Cruz v America Airlines* 193 F 3d 526, 1999 US App Lexis 25354. Cruz tried to avoid art.18 of the Convention by claiming to sue, not for lost luggage, but for fraud by the airline in dealing with their claim of lost luggage. The court held the two claims were so closely linked as to be indistinguishable and the common law claim for fraud was deemed preempted. However, to illustrate when a common law claim would not be preempted, the court added, at 6: “To be sure, if American's agent had hit Cruz with a baseball bat when rejecting Cruz's claim we would not think Cruz's tort claim would be preempted by the Warsaw Convention. Perhaps even a slanderous statement uttered by an American employee in a heated argument over lost luggage would be actionable.”

106. *Curley v American Airlines* 846 F Supp 280, 1994 US Dist Lexis 2588, a pre-*Tseng* art.17 decision, which would now probably not be litigated as a non-Convention cause of action.

107. *Mbaba* at 6. The judge did not comment on this expression of opinion. In his case comment on *Mbaba* Mann, fn.103 at 407, observed: “Taken to its logical conclusion, this holding makes airlines essentially immune from deceptive trade practices actions brought by travelling passengers”.

acts of discrimination might constitute an accident under art.17), the court stated: “the Convention already massively curtails damage awards for victims of horrible acts such as terrorism, the fact that the Convention also abridges recovery for the lesser offense of discrimination should not surprise anyone.”¹⁰⁸

A wide range of other airline acts not yet reported in the cases might be added to the list above—refusal on board a plane to provide drinks, headsets, blankets or pillows, otherwise available, to a passenger, or directing passengers to sit apart from others or providing incorrect information about various matters such as immigration requirements, transit visas, reasons for delays, time of arrival, connection gates and times, length of stopovers, alternative routes, bringing a passenger to the wrong destination and causing immigration difficulties¹⁰⁹ and, generally, breach of contract claims relating to quality of service provided on board. Since *Tseng*, these complaints would all seem to fall to be judged by art.17(1) as if they were claims for bodily injury and, since they are not, they will, in most if not all English-speaking states, fail. Passenger harm in these instances is likely to be some form of mental injury or contract loss, neither of which amounts to bodily injury.

There are occasional exceptions to total preemption, cases where the particular facts enable a judge to say the case falls outside Montreal. In a US case, *Acevado-Reinoso v Iberia* in 2006,¹¹⁰ a Cuban passport-holder with US residency was wrongly told at check-in that he did not need a visa to enter Spain. His subsequent state law claim against the airline after he was refused entry, arrested and deported on arrival in Spain was dismissed at first instance on the basis that, since he was engaged in international air travel, the case was governed by Warsaw and his state law claim was preempted. On appeal, however, the decision was reversed, the appellate court holding that Warsaw did not apply because the giving of the false visa information occurred before embarkation and the subsequent arrest and deportation occurred after disembarkation. The root of the problem, according to the appellate court, was that “the district court erroneously conflated the applicability of the Convention with liability under the Convention.” In other words, the court disentangled Convention-reach and liability-reach.

Persuasive as this decision might be, it is not clear that it will attract wide support. It focused only on factually differentiating itself from *Tseng* and did not address the wider legal arguments supporting total preemption.

108. *Turturro* at 10.

109. While a delay claim may be possible under art.19, it would not address the various extra harms suffered if a passenger is arrested, detained and deported for not having a visa. See the Nigerian case of *Otutuizu v Cameroon Airlines* (2005) 9 NWLR Part 929 CA 202.

110. 449 F 3d 7, 2006 US App Lexis 12610.

CRITICAL ANALYSIS OF CASE LAW FAVOURING TOTAL PREEMPTION

The need for a critical analysis of Sidhu and Tseng

The list of remediless passenger harm in Part III demonstrates that total preemption is harsh on passengers and lenient on airlines. Although aware that there are limits to the Convention's liability reach, many US courts since *Tseng* appear either unable to see the limits or consider the Convention's liability-reach and its overall reach to be the same.

The present law derives essentially from the analysis in *Sidhu* and *Tseng* of three central issues:

- Lord Hope's analysis in *Sidhu*, based on art.24 and on the scope of Warsaw, based the word "all" in art.1(1) and, on the balance of advantages and disadvantages created by Warsaw,
- the fear of destabilising the Convention's compensation limits if only partial preemption was allowed, and
- the view that uniformity requires total preemption of non-Convention claims.

These issues will now be examined. A fourth issue—whether a purposive analysis of Montreal produces the same result as the *Sidhu* and *Tseng* courts analysis of Warsaw—must also be addressed, for the obvious reason that regardless of whether *Sidhu* or *Tseng* were rightly or wrongly decided, a new Convention requires a new analysis based on its own terms. Technically, *Sidhu* and *Tseng* are not precedents for the interpretation of Montreal. The *de novo* analysis is in Part V.

Lord Hope's views

The key to understanding Lord Hope's analysis in *Sidhu* is to identify the approach he used to interpret Warsaw. When this is done, his reasoning and conclusion are more easily seen. By disregarding the sources he examined in his speech and did not find useful—the travaux préparatoires of Warsaw and decisions of other courts (with the exception of the French litigation arising from the same incident which will be referred to later)—and concentrating instead on the sources he did rely on, namely, the text and purpose of Warsaw, his analysis becomes more apparent. In dealing with these matters, Lord Hope relied primarily on literal and purposive techniques of interpretation, which, in principle, cannot be faulted. The somewhat subtle but key question, however, is whether he got the balance between both techniques right; that is, whether he paid insufficient attention to the literal meaning of art.24, and too much to the policy he perceived to underlie it.

His preference for a purposive approach was discernible from the outset. Near the end of his account of the case preliminaries (its history, facts and competing arguments) he addressed the issue of how to construe Warsaw and

stated that the English text of Warsaw “plainly is the primary source to which we must turn for a solution to the point raised in this case. It may be convenient, however, to record at this point that all parties were agreed, as they were in the courts below, that the Convention should receive a purposive construction.”¹¹¹

Lord Hope and Article 24

What Lord Hope thought of the words in art.24 can be seen in the following excerpt:

“The reference in the opening words of article 24(2) to ‘the cases covered by articles 17’ does, of course, invite the question whether article 17 was intended to cover only those cases for which the carrier is liable in damages under that article. The answer to that question may indeed be said to lie at the heart of this case. In my opinion the answer to it is to be found *not by an exact analysis of the particular words used* but by a consideration of the whole purpose of the article. In its context the purpose seems to me to be to prescribe the circumstances—that is to say, the only circumstances—in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air.”

The phrase “the cases covered by article 17” extends therefore to all claims made by the passenger against the carrier arising out of international carriage by air, other than claims for damage to his registered baggage, which must be dealt with under art.18, and claims for delay, which must be dealt with under art.19. The words “however founded”, which appear in art.24(1) and are applied to passenger’s claims by art.24(2), support this approach. The intention seems to be to provide a secure regime, within which the restriction on the carrier’s freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier’s liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.”¹¹² (Emphasis added).

111. *Sidhu* at 444.

112. See fn.111.

What stands out in this remarkable passage is that Lord Hope never actually considered, interpreted or analysed, either individually or collectively, the words contained in art.24, the one provision most relevant to the question he had to decide. He did mention two of its key phrases, but the first one he addressed not by its literal meaning, but rather by its purpose in context, and the second, “however founded”, he explained not by its meaning, whether literal or in context, but according to his view of the intention underlying its use.

This represents, in this writer’s view, a quite inadequate analysis of art.24. It is submitted that Lord Hope glossed over the meaning of the words in the article. He failed, in the process, to identify the different possible meanings of those words; he failed to identify reasons why one or other meaning might or might not be preferred; and he failed to identify sufficient ambiguity in the words to justify embracing a purposive interpretation. Furthermore, Lord Hope’s speech contains no analysis of the US authorities on the interpretation of art.24.

One might go so far as to suggest that Lord Hope ignored the legal obligation under public international law to pay serious attention to the words used in a treaty, especially when, as here, it is clear from the Warsaw conference Minutes that over the four years of their work, the Convention-makers choose the words in the Convention with some deliberation. There was also an added reason why the Convention words deserved particular attention. Warsaw was a treaty which purported to affect pre-existing national rights to compensation. It curtailed some existing ones and created some new ones. Such a task would not—indeed could not—have been undertaken by the Convention-makers without great deliberation and careful choice of language.

So, against the backdrop of the always delicate question of how quickly a judge should move from a literal to a purposive treaty interpretation and how much ambiguity there needs to be before doing so, it is arguable that Lord Hope moved much too quickly. The authority of his judgment is, thereby, weakened as a result.

Article 1(1)

Lord Hope stressed the significance of “all” in art.1(1) of Warsaw, the provision which states that the treaty applies to all international carriage by aircraft, to support his view in favour of total preemption. He stated: “The word ‘all’ is important, simply because it is so all-embracing. It indicates that the framers of the Convention were looking for solutions ... which could be regarded as acceptable for universal application in all cases.”¹¹³ He drew a supporting inference from the Convention’s liability rules, identifying them as a compromise between airlines and passengers. He instanced how art.23 (banning Convention opt-outs) and art.24 (preempting non-Convention claims) seemed consistent with the idea of an all-embracing, no-exceptions view of the Convention.

113. *Sidhu* at 444.

In considering the extent to which this approach was justified, one must firstly note that there is an *in-between* area between “all” international travel by aircraft and such travel where a plane-related accident gives rise to bodily injury. Since the Conventions do not explicitly preempt local law claims in this area, the question is whether Lord Hope’s use of “all” to suggest the Convention is exclusive in liability terms is justified. Secondly, there are in fact two indicators of the intent of the drafters of Warsaw as to whether non-Convention causes of action are or are not allowed in this in-between area: where there is total non-performance by the carrier¹¹⁴ and where hand luggage goes missing on board a plane. The latter is the more significant indicator of intent because it occurs on board a plane. Loss of hand luggage is as logically intrinsic to international air travel as bodily injury. One would therefore expect it to be a Warsaw issue, yet it is not part of Warsaw, and Warsaw conference delegates deliberately choose not to create a Convention cause of action for it. They treated it as subject to local law, but in accord with the principle of limited compensation, made any claim (under local law) subject to a specific compensation limit under the Convention.¹¹⁵ A peculiar approach, it might be thought, but one which nonetheless clearly shows that conference delegates wished non-Convention causes of action to continue to apply to an issue connected with passenger harm on board an aircraft. While Montreal probably does, now, create a specific hand luggage cause of action in art.17(2), the significant point regarding preemption is that delegates at Warsaw, despite envisaging that the Convention would apply to all international air travel, did not envisage that all harm arising during international air travel would have to be litigated either as a Convention cause of action or not at all.

Lord Hope’s analysis involves, in fact, the implausible notion that, if the Convention-makers did not expressly allow recovery in the in-between area, this was because they did not want recovery (under the rules they were making) for the in-between area, and they also did not want recovery for the in-between area under any local law either, even if such laws already existed (or had the potential to emerge). Warsaw’s drafters wanted this important legal rule to be identified, not expressly, not by clear and unambiguous language, but by subtle inference or implication, which they surely knew ran the grave risk (which has duly materialised) of variable interpretation by the courts.

Lord Hope also cited the careful balance of interests which underpinned Warsaw and which would be disturbed by recognizing non-Convention causes of action. However, it is far from clear how there could be a careful balance of

114. Warsaw Minutes at 76. Further discussion on this is appropriate to a discussion on preemption and delay which is beyond this article.

115. Warsaw Minutes at 22 and 253. This was not spotted by the court in *Kabbani v ITS* 805 F Supp 1033, 1992 US Dist Lexis 15898, where the court struggled to decide how to deal with theft from carry-on baggage temporarily taken charge of by an airline agent during a terminal security check. The court eventually decided the theft would be treated as if it was checked baggage but would be subject to the compensation limit for unchecked baggage.

interests when, as part of the balance, but unknown to anyone because it was not mentioned in Warsaw's Minutes, passengers were giving up the right to sue for a wide and significant range of passenger harm.

The misplaced emphasis by Lord Hope on the word "all" reflects, it might be said, a more than occasional tendency among judges to speak of the liability reach of Warsaw/Montreal in terms of "international air transport" or "international air travel" rather than "international carriage by aircraft". The latter phrase is preferable because it is less likely to lead judges astray.

Destablising the Convention

Lord Hope's analysis in *Sidhu* did not rest only on the importance of art.(1). He also referred to the fear of destabilising the Convention and its liability caps if non-Convention causes of action were allowed. Was this a legitimate fear?¹¹⁶ Both the *Sidhu* and *Tseng* courts felt it would destabilise the Convention, because otherwise it would encourage "artful pleading" to avoid the Convention and undermine Warsaw's liability regime, especially its compensation caps, and would cause anomalies.¹¹⁷

It is striking to note that no evidence was tendered in either *Sidhu* or *Tseng* to show that allowing non-Convention causes would destabilise Warsaw. It should have been possible to tender such evidence. For example, airlines in both cases could have selected jurisdictions, such as the UK and France or Germany,¹¹⁸ or the US and Brazil, where different views apply on the actionability of mental injury per se under the Convention. Comparisons could have been made regarding the impact on airline and passenger activity in each state and an assessment made as to whether the differences had any discernable effect, such as whether airlines were sued more often by passengers, were found liable more often or paid out more compensation and generally suffered greater trading losses or reduced levels of commercial activities.

Another comparison could have been made between differing federal circuits in the US, where total and partial preemption operated. For example, for three years, between 1996 and 1999 (the *Tseng* year), there was a clear split of opinion between the Third Circuit¹¹⁹ and the Fifth Circuit¹²⁰ regarding the actionability under local law of non-accident injuries during an international flight. It should have been possible for airlines to obtain international passenger,

116. Admittedly, the question is now academic, because such limits no longer exist as such under Montreal. But courts still quote *Sidhu* and *Tseng*, so the question must be posed, because its response is central to whether the *Sidhu* analysis remains valid and to whether courts should continue to treat both decisions as authoritative.

117. *Sidhu* at 446; *Tseng* at 14.

118. See ICAO, *International Conference on Air Law*, Montreal, May 10–28, 1999, Vol.I, Minutes at 68.

119. *Abramson v JAL* 739 F 2d 130, 1984 US App Lexis 20346. Difference referred to in *Tseng* at 10, fn.3.

120. *Potter v Delta Air Lines* 98 F 3d 881, 1996 US App Lexis 29492.

flight and other statistics for both circuit areas, to have made comparisons and drawn, however tentative or imperfect, conclusions as to whether destabilisation had occurred. Further, the Third Circuit had taken this view since 1984, and another comparison could have been made, this time between it and the rest of the US, to see whether international passenger and flight activity and airline profitability in the area covered by the Third Circuit had lagged behind the rest of the US because its different view had destabilised Warsaw.

None of this was done. The *Tseng* and *Sidhu* courts assumed that destabilisation was a danger without examining it. In fact, common experience suggests airlines do not differentiate in their operations between differing US federal circuits or indeed between states, on the basis of how their courts view the scope of preemption. Most likely, the *Sidhu* and *Tseng* courts fears of destabilisation were more theoretical than real and, in the absence of evidence, should have been discounted.

Uniformity and Preemption

Uniformity is a judicial principle of interpretation of Warsaw (and Montreal) reflecting a supposed desire by Convention-makers to create a single set of liability rules for all international air travel and to leave no claims outside that set of rules, except when the Convention clearly says so. Uniformity was centrally relied on in *Tseng* and *Sidhu* and, indeed, in courts before and since, to justify the total preemption of non-Convention causes of action. There are, however, significant doubts as to whether uniformity can carry the weight of total preemption that has been imposed on it.

The most oft-quoted statement on the importance of uniformity was by the US Supreme Court in *Tseng*:

“The cardinal purpose of the Warsaw Convention, as we have observed, is to ‘achieve uniformity of rules governing claims arising from international air transportation.’ ... the Conventions signatories, in the treaties preamble, specifically ‘recognised the advantage of regulating in a uniform manner the conditions of ... the liability of the carrier.’”¹²¹

Uniformity is said to support preemption, in that Warsaw’s Preamble cites as its aim the unification of certain rules of liability regarding international carriage by aircraft. The chapters of Warsaw express or record this desire in specific ways. The value of these uniform rules would be undermined if local rules outside the Convention were still available to harmed passengers. Article 24 deals with this risk by banning non-Convention causes of action for non-Convention harm.

121. *Tseng* at 13.

Real and meaningful uniformity?

When courts refer to uniformity in the context of Warsaw and Montreal there are only two types of uniformity they can be referring to. One is a shared desire among Convention-makers to create common liability rules for all states—uniformity of *rules*. The other is a shared desire to apply the rules in the same way in all states—uniformity of *interpretation and application*. The first type, uniformity of rules, was achieved when Warsaw was agreed in 1929 (and when Montreal was agreed in 1999). Each text represents the shared articulated desire of State parties as to the areas they wished to address and the rules they wanted to make. They are the only rules they unified. This means that uniformity of rules was achieved, and has been achieved, for a long time, by the time of *Sidhu and Tseng*. By the 1990s, uniformity was, by definition, a spent force, an exhausted policy driver, no longer capable of supporting the making of new rules and certainly not ones by judges who were not Convention-makers in Warsaw.¹²²

Some judges, however, seem to overlook this fact or, at least, use language which suggests this. The passage from the US Supreme Court quoted earlier uses the verb “achieve”—“The cardinal purpose of the Warsaw Convention, as we have observed, is to ‘achieve uniformity of rules governing claims arising from international air transportation.’” The verb “achieve” gives the misleading impression that there is an on-going, post-1929 Convention purpose of creating uniform rules which courts must act on. Of course, the Convention says no such thing. “Record” would perhaps have been a more accurate word to use. It conveys more succinctly the reality that the Convention recorded the only degree of uniformity that the Convention-makers agreed to. Uniformity cannot give a mandate to judges to create rules that the Convention did not create.

Uniformity of interpretation

If uniformity of rules is not a permissible driver of Convention interpretation, then even if they are not explicit about it, courts must be taken as referring to uniformity of interpretation and application of rules. That is, they are articulating a desire that the Convention-makers wanted their courts to interpret and apply the Convention in the same way in all state-parties so as to ensure that all facts produce the same legal outcomes.

Uniformity of interpretation and application of an international treaty like Warsaw/Montreal, however, faces such formidable challenges as to be, in this writer’s opinion, and under present circumstances, practicably unattainable. To ensure the Conventions have the same effect in the courts of all ratifying states

122. See *Jack v TWA* 854 F Supp 654, 1994 US Dist Lexis 2878 at 9. See also J. Tyler in *Hussler v Swiss Air* 388 F Supp 1238, 1975 US Dist Lexis 13920 at 6: “Although the original motivation for establishing the international agreement no longer exists, it is clear beyond peradventure that the [state parties] still adhere to the treaty’s express purpose; uniformity with respect to the liability of the carrier is still desired, if for reasons somewhat different from the motivating ones.”

would require the same degree of judicial discipline in an international context as applies in a domestic one. This does not exist.

Consider the following:

1. Neither Warsaw nor Montreal contain any mechanism for ensuring their consistent and universal interpretation and application. There is no (and there never has been) a Montreal or ICAO court which can be referred to for binding rulings on the interpretation of the Conventions.¹²³ An Irish judge remarked in this regard that “(t)here is no system of reference of questions of interpretation for rulings to bind the courts of the contracting states as there is under the Treaty Establishing the European Community.”¹²⁴
2. The fact that Montreal now comes as authentic in six languages poses entirely new challenges of interpretation. These challenges were already daunting with one official language under Warsaw (witness the trauma which the two words “leison corporelle” have caused in English-speaking states). With six, all of equal validity, the risk of differing interpretation is much greater,¹²⁵ although at least in the EU the Court of Justice has much experience in resolving linguistic differences in legal texts.¹²⁶ Already, during the conference preceding Montreal, the challenge of ensuring linguistic equivalence across all versions of Montreal was apparent.¹²⁷
3. The practical difficulties in ensuring uniformity of interpretation are formidable. Case law is the only way of elucidating the meaning of the Convention. However, there are jurisdictions which do not approve of judges looking at other cases, preferring instead that the judge look only at the Convention.¹²⁸ Typically, the most that can be expected is that references will be made to foreign courts with similar linguistic and legal cultures.¹²⁹

123. The International Court of Justice in The Hague may be available in an inter-state dispute over Montreal.

124. *APH Manufacturing v DHL* [2001] IESC 71 at para.32. Nor is there an official database of, say, decisions of last resort, let alone higher-level courts, of State parties to the Conventions. If such existed it would have to be in all of the official languages of Montreal—English, Arabic, Chinese, French, Russian and Spanish.

125. According to Cheng B, “A New Era in the Law of International Carriage by Air: from Warsaw to Montreal” (2004) *I.C.L.Q.* 833 at 856: “The six equally authentic texts, without any prevailing text in case of inconsistency, can prove a veritable Aladdin’s cave for all the litigants, encourage litigation, and produce conflicting applications ... There is much to be said for one of the texts to be given priority in case of inconsistency, notwithstanding national pride.”

126. *easyCar v Office of Fair Trading*, C-336/03, [2005] E.C.R. I-1947.

127. See Montreal Minutes at 59, 67, 69, 97, 103 and 220.

128. According to the French delegate at Montreal, requiring courts to take account of pre-Montreal jurisprudence “would constitute an attack on the separation of powers ... Judges must be free to take their decisions on the basis of the Convention itself, without having earlier jurisprudence imposed on them”, Montreal Minutes at 220.

129. Historically, this is what has largely happened in English-speaking states (with the exception of references to French and some other courts, because French was the only authentic language of Warsaw. See e.g. *Ehrlich v American Airlines* 360 F 3d 366, 2004

There is, in effect, a linguistic “box” which significantly hinders cross-language referencing to foreign court interpretations of the Conventions. At best, what may exist is a mere possibility of uniformity of interpretation across similar language states.

4. Further, as and when courts do choose to look outside their “linguistic box”, various factors and reasons can be found for disregarding the foreign decision or interpretation. *Sidhu* itself provides a good example of this. To briefly recap the facts: a French first instance court¹³⁰ treated the capture of a passenger (in an airport hotel, rather than in the terminal) by an invading army during a flight stop-over as actionable under a non-Convention cause of action because the disembarking had finished at the relevant time. The House of Lords paid little attention to this decision. Lord Hope noted that it was a first instance decision, and the judgment “does not contain a close analysis of the Convention, nor is there any reference to previous decisions on the issue in the French courts or elsewhere. The reasons given do not disclose a detailed examination of the issues raised by the defence.”¹³¹

What transpired in France following the observations of Lord Hope in *Sidhu* is revealing. As he himself noted in his speech, the French decision was, at the time, under appeal.¹³² The inference to be drawn from this was that the appellate court could well adopt a more rigorous approach. In fact, the court upheld the decision of the Tribunal de Grande Instance,¹³³ and this in turn was upheld on appeal by France’s highest civil court, the Cour de Cassation. None of the French appellate decisions engaged in the kind of analysis of Warsaw’s purpose, history and case-law that Lord Hope engaged in. Clearly, the French courts did not regard this as necessary. Nor did either of the French appellate courts refer to *Sidhu* or *Tseng* or even, for that matter, to previous French decisions.

The law as it developed in English-speaking jurisdictions following the French litigation is also instructive. Courts in other English-speaking states

US App Lexis 4403 at 19 where, under the heading “Judicial Decisions of Sister Signatories”, the court referred to decisions in Australia and the UK, only the latter of which was a party to the original Warsaw Convention.

130. See fn.79 for French case references.

131. *Sidhu* fn.64 at 453.

132. Although the first French appeal decision was given on November 12, 1996, that is, between the end of the House of Lords hearing on October 16, 1996 and the court judgment delivered on December 12, 1996.

133. The difference between the French and UK approaches (“fondamentalement différent”) was noted in an oddly-timed and largely descriptive account of *Sidhu* and *Mohamed* by de E. Montlaur- Martin, “La Convention de Varsovie exclut-elle toute action de droit commun en dommages-intérêts? Conséquences des disparités de la jurisprudence au Royaume-Uni et en France sur l’indemnisation des otages du Koweït” (1997) R.F.D.A.S. 253. The article appeared before the Cour de Cassation decision and between the decisions of the Second US Circuit Court of Appeal and the US Supreme Court in *Tseng*.

have continued to cite *Sidhu* as authoritative,¹³⁴ but not one of them has cited or examined the outcome of the French litigation and clearly did not regard doing so as being in any way relevant, either to uniformity of interpretation generally, or to the law on total preemption in particular. It is a striking example of the linguistic box in operation and of the impossibility of uniformity of interpretation.

5. Moreover, Montreal now authorises non-uniform interpretation. When states could not, after much deliberation,¹³⁵ agree at the conference preceding Montreal on making an alteration to the phrase “bodily injury” so as to make mental injury on its own actionable, the following statement was adopted by the conference:

“the expression ‘bodily injury’ is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development ...”¹³⁶

This is nothing less than a recipe, an official recipe, for non-uniform interpretation of Montreal. States which, before Montreal, interpreted bodily injury as encompassing mental injury per se may continue to do so, while states which did not do so may also continue to do so.¹³⁷ This constitutes a clear acceptance by the Convention-makers that under Warsaw there was no uniformity of interpretation of a key liability issue and that under Montreal there will also be none.¹³⁸

134. See cases mentioned at fnn.66–69.

135. Montreal Minutes, e.g. at 68–80.

136. Montreal Minutes at 243.

137. As in Canada, see *Plourde v Service Aérien FBO (Skyservice)* 2007 QCCA 739, where the court held that Montreal made no change on the Warsaw position.

138. Other examples of lack of uniformity of interpretation include: according to S. Gates, “The New International Passenger Liability Regime” (1997) I.I.L.R. 123 at 125: “At the one end of the scale, the death of a Japanese passenger on an aircraft appears axiomatically to amount to wilful misconduct [under Article 25 of Warsaw] on the part of the carrier and at the other end of the scale, the most rigorous tests are applied in the United Kingdom in determining wilful misconduct ... In France the Convention is presently non-exclusive, in the United Kingdom it is exclusive and in the United States it may be.” According to J. Wetger, “The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention” (2006) *Air & Space Law* 133 at 135: “civil law jurisdictions in Latin America ... do not apply the exclusivity arguments of *Sidhu* and *Tseng*”. Note also that objects falling from an opened overhead bin and injuring a passenger underneath is an “accident” under art.17 in the US (according to *Maxwell v Aer Lingus* 122 F Supp 2d 210, 2000 US Dist Lexis 17206) but not a bag falling while being put into an overhead bin in the Netherlands (decision of Amsterdam Court of Appeal, August 28, 2003, SES 2004, 56 cited in H. Manuel, “The Montreal Convention in the European Context: A Passenger’s Paradise?”, conference paper presented at First IFTTA Europe Workshop, Budapest 2008.

Summarising the analysis of Sidhu and Tseng

To summarise the analysis of the legal reasoning used in *Sidhu* and *Tseng* on total preemption of non-Convention causes of action—the facts on which total preemption can be found can, in some cases, be readily avoided—there was a significant lack of balance in the choice of interpretive techniques used by Lord Hope in his analysis in *Sidhu*, there was insufficient attention paid to the words used in art.24, his emphasis on “all” in art.1(1) was misplaced, the Convention destabilization argument was never proven, and the principle of uniformity cannot support total preemption because uniformity of rules has been achieved and uniformity of interpretation is a practical impossibility.

DE NOVO ANALYSIS OF MONTREAL

The analysis in *Sidhu* and *Tseng* was based on the Warsaw Convention only. Warsaw is gradually being replaced by Montreal, a separate and distinct legal instrument. Total preemption as deduced from Warsaw does not necessarily mean the same for Montreal. The fact that some US courts, though not the US Supreme Court, have decided that the preemptive reach of both Conventions is the same¹³⁹ does not necessarily mean that they are correct or render a *de novo* analysis of Montreal unnecessary. The US courts in question considered themselves bound by the precedent of *Tseng*'s Warsaw analysis.

The question which must now be posed is whether a purposive analysis of Montreal, akin to that of Lord Hope in *Sidhu*, reveals the same desire to deny airline liability under non-Convention law for non-Convention harm, that is, in the *in-between area* between all passenger harm suffered during international air travel and the limited passenger harm actionable under art.17.

This analysis must be conducted under arts 31 and 32 of the Vienna Convention on the Law of Treaties,¹⁴⁰ which sets out how a treaty should be interpreted. One must also bear in mind the interpretive approach of the European Court of Justice in the European Union, as it is this court that now has the final say on how Montreal is to be interpreted.¹⁴¹ In its decisions so far on Montreal,¹⁴² the court has engaged in a close textual analysis of key terms on their own and in context and also in different languages. It has also relied on the aims of Montreal as set out in its Preamble and referred to the balance of

139. See fnn.85 and 86 above. Supported by academic comment: see D. Westwood and J. Geraghty, fn.87 at 72.

140. United Nations, Treaty Series, Vol.1155, p.331, especially arts 31 and 32. Warsaw predated this and was not subject to it, but to its un-codified equivalent.

141. Due to the adoption of Montreal by the EU as a binding legal instrument in Regulation 2027/97, OJ L 285/1, October 17, 1997, as amended by Regulation 889/2002, OJ L 140/2, April 13, 2002.

142. See *R (IATA) v Department of Transport* C-344/04, [2006] E.C.R. I-403; *Wallintin-Hermann v Alitalia* C-549/07, [2008] E.C.R. I-11061 and *Walz v Clickair* C-63/09, May 6, 2010.

interests underpinning Montreal. The aim of the present analysis is to search for possible clues one way or the other in the text, Preamble, policies and travaux préparatoires of Montreal for an underlying purpose or intent regarding total preemption.

The backdrop to Montreal

The mischief technique of interpretation allows one to identify underlying purposes by referring to the prior problems that a new law is designed to address. The backdrop to the conference preceding Montreal is evident from the conference Minutes.¹⁴³ The Warsaw system had become fragmented; inter-carrier agreements were supplanting Warsaw in important respects; the introduction of electronic ticketing was being slowed down by Warsaw insistence on paper tickets; and compensation caps were too low to provide fair compensation to passengers.

Responding to these concerns, the Montreal Preamble specifically recognises “the importance of ensuring the protection of the interests of consumers” as well as “the need for the equitable compensation of passengers in accordance with the principle of restitution” (more of which later). Linking Warsaw to Montreal, the Preamble expresses the desirability of “an orderly development of international air transport operations.” It is noteworthy that uniformity of interpretation is not mentioned as an aim of the Convention, although the unification of rules is mentioned as the ultimate objective. The Montreal Preamble records the Convention-makers’ belief that the rules they were making represent “the most adequate means of achieving an equitable balance of interests” between the affected parties. On foot of this, certain balances of interest mentioned by Lord Hope remain valid. Carriers are not allowed to exclude any of the Convention’s provisions, and passengers are not allowed to sue outside the Convention for harm covered by the Convention. Equally, passengers must accept a shorter limitation period for suing, but, on the other hand, have a greater range of jurisdictions in which to sue.

Montreal’s changes

Beyond these specific balances, the general balance of interests under Montreal is significantly different and seems to clearly favour passengers. In establishing a conditional form of absolute liability for carriers on claims up to 100,000 SDRs,¹⁴⁴ combined with a reversal of the burden of proof for amounts above this, there is recognition of the obvious dangers to passengers of commercial flying. In the removal of compensation limits there is recognition of the need for full recovery.

143. See fn.20.

144. An SDR is a reserve asset used by the International Monetary Fund and exchangeable against currencies. See <http://www.imf.org/external/np/exr/facts/sdr.htm> [Last Accessed August 21, 2010]. The figure of 100,000 was recently increased to 113,100 by the Air Navigation and Transport (International Conventions) Act 2004 (Revision of Limits of Liability) Order (S.I. No. 390 of 2010).

These are radical changes from Warsaw which can be seen as reflective of the principle of restitution mentioned in Montreal's, and not Warsaw's, Preamble. They consign to history a major aim of Warsaw, namely, the protection of a fledgling industry from disastrous litigation and unsustainable insurance costs. They also suggest the makers of Montreal were not afraid of the financial impact of the changes being made on the airline industry. This could be a telling indicator of underlying intent as regards total preemption. The sole recognition of carrier interest is that absolute liability for bodily injury is still conditional on there being a plane-related accident causing bodily injury.

Of further note is that the new compensation rules under Montreal (as regards bodily injuries) are now likely to be at least, if not more, attractive to injured passengers than non-Convention ones. This also suggests a lack of fear about the financial impact on airlines, which in turn would allow the use of non-Convention causes of action for non-personal injuries.

Article 1(1) is unchanged

However, the indicators in Warsaw that State parties intended a wide coverage for the Convention are also present in Montreal. Article 1(1) reiterates that the Convention applies to *all* international carriage by aircraft.¹⁴⁵ Further, while the balance of interests' argument under Montreal is more favourable to passengers for personal injury claims, this is not the case for harm to passenger property. The Warsaw balance for checked baggage remains undisturbed, albeit updated, while for passenger hand luggage one might even say the balance is struck more in favour of the airline. In addition, by creating for the first time a Convention cause of action for loss of hand luggage, it can be said that this reinforces a desire to ensure that Montreal provides the sole legal remedy for all passenger harm.

Article 29 is different

Two further points are important, and may even be decisive in the discussion. Since English is now an official Convention language, the interpretation of art.29 need no longer be bedeviled as to whether its terms are accurate translations from French. There is, therefore, no longer any excuse for ignoring its plain terms and, as regards those terms, there is no gainsaying that art.29 is now a different article from art.24. The inclusion of new words "in contract or in tort or otherwise" in art.29 appears to more openly and unambiguously acknowledge that non-Convention actions "in contract or in tort or otherwise" can indeed be brought for Convention harm, albeit subject to Montreal's conditions and limits. These extra words might be seen as compounding the unhappy experience with the phrase "however caused", but they would have been a strange choice if total preemption was the aim. More direct language

145. Supported by art.2, which includes flights by states, and art.57, which includes certain non-commercial state flights and even certain military flights.

(like “no action for harm arising from international carriage by aircraft can be brought outside the Convention”) would have been appropriate for total preemption.

Restitution and preemption

Courts must now interpret Montreal in accordance with the principle of restitution. This follows from its inclusion as an explicit Preamble principle. Restitution is a somewhat vague concept which is not defined by Montreal. Yet, some matters seem clear. It is an equitable concept applicable here to restoring consumer loss and is based on fairness and justice. Unless its impact is specifically described in a legal text, it requires a case-by-case analysis of facts to determine its application. It finds its clearest expression in art.17 of Montreal in the altered liability rules for bodily injury. Nonetheless, by virtue of being an explicit Preamble principle, it must also be applied to all relevant issues of the interpretation of Montreal, especially those involving ambiguities, including, in this instance, the scope of preemption.

What follows from this seems reasonably clear. Denying compensation for plane-related non-accident and/or non-bodily injury passenger harm, which results from a deliberate or careless act or omission of an airline and which would be actionable if it happened elsewhere, can hardly be regarded as consistent with the principle of restitution. It is arguably the inverse. Passenger harm is left un-restituted.

The ECJ and non-material damage

A recent decision by the European Court of Justice (ECJ) on the interpretation of Montreal may suggest that the day is not far off when total preemption may lose much of its impact as regards claims for mental injury per se. While the ECJ has not directly addressed the question of whether “bodily injury” in art.17(1) encompasses mental injury, in *Walz v Clickair*,¹⁴⁶ the court held that the word “damage” must be given the same meaning in all of Ch.III of Montreal (the liability rules chapter). It specifically held that in art.22(2) (dealing with claims for lost or damaged checked baggage) damage includes non-material as well as material damage. It is not a big step from this to hold that “bodily injury” also includes non-material damage.

For the foregoing reasons, it is suggested that an analysis of Montreal should result in a different outcome to that of a purposive analysis of Warsaw. The principle of restitution is the key difference. Restituting harmed passengers is very different from protecting airlines against full harm recovery. Restitution suggests that the purposive analysis used by Lord Hope in *Sidhu* cannot apply to Montreal and that a different analysis is required. US judges who have deemed the preemptive reach of Warsaw and Montreal to be the same have not paid enough attention to the principle of restitution.

146. *Walz v Clickair* C-63/09, May 6, 2010.

CONCLUSION

The view of some US judges that the change from Warsaw to Montreal has made no difference to the standing of the principle of total preemption is, it is suggested, incorrect. The purpose of Montreal is significantly different from the purpose of Warsaw, even if many of the key concepts remain unchanged. The new principle of restitution most likely requires the interpretation of ambiguous Convention language (if art.29 is indeed ambiguous) so as to ensure passengers are not denied access to causes of action, whether Convention or non-Convention.

The triumph of total preemption in English-speaking states, which has led to wrongs being left without a remedy, may be short-lived. The assumption by the ECJ of last-resort jurisdiction on the interpretation of Montreal for the entire European Union is likely to lead to a significant curtailment of the impact of preemption.

Total preemption was never a desirable policy standpoint. As the French Cour d'Appel said in the French equivalent of *Sidhu* when rejecting the wide view of the Convention's preemptive reach, it did not wish to "consacrer le principe de l'irresponsabilité du transporteur aérien dans les situations non prévues par cette Convention."¹⁴⁷

Specifically, the following legal position is suggested, which is that, taking art.17(1) and art.29 together, the preemptive reach of Montreal does not touch non-Convention passenger harm comprising:

- a) plane-related non-accident and/or non-bodily injury harm; and
- b) non-plane-related passenger harm.

147. (1997) 51 R.F.D.A.S. 155 at 160. Author's translation—"the court did not wish to approve of a principle of airline non-responsibility in situations not covered by the Convention".