

**AIRBUS - ARMAVIA AIRLINES réf. 2008-0091**

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**BRIEF OF AMICUS CURIAE PAUL STEPHEN DEMPSEY**

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**INTEREST OF AMICUS CURIAE PAUL STEPHEN DEMPSEY**

As a practitioner, an academic, and a scholar in the area of aviation law for more than thirty-five years, I, Paul Stephen Dempsey, am interested in ensuring that the Warsaw Convention is interpreted in a uniform manner as intended by its drafters, and the States Parties to the Convention. I have taught Transportation Law in the United States and Canada for more than thirty years. I have published 20 books and nearly 100 scholarly articles on issues related to those discussed herein.

## INTRODUCTION

This case grew out of the crash of an Airbus aircraft flown by Armavia, the largest airline of Armenia, from Yerevan in Armenia to Sochi, in Russia. Armavia flight 967 crashed on May 2, 2006, into the territorial waters of the Russian Federation, killing all 113 persons aboard (105 passengers and eight crew members). The aircraft manufacturer (Airbus) was sued in the civil court of Toulouse, France, on product liability grounds by the estates of 59 passengers and six crew members.

In turn, a recourse action seeking indemnification was brought by Airbus against the air carrier, Armavia. The instant proceeding focuses on that recourse action. The essential question is whether the Warsaw Convention has any bearing on an action for indemnification filed by an aircraft manufacturer against an airline. I respectfully submit that it has no bearing on such a suit.

Where an airline is a defendant in a case involving international carriage, the Warsaw Convention or the Montreal Convention sometimes applies.<sup>1</sup> The U.S.S.R., predecessor of the Russian Federation, ratified the Warsaw Convention in 1934, and the Hague Protocol in 1957; Armenia ratified the Warsaw Convention in 1998. Neither State has ratified the successor Montreal Convention of 1999. Hence, the unamended Warsaw Convention would apply in a suit brought by a passenger (for death, personal injury or delay, or loss, damage or delay of his luggage) or a shipper of goods (for loss, damage or delay) on international transportation from Armenia to Russia performed on a contract of carriage or air waybill against an air carrier.

Both Article 28(1) of the Warsaw Convention<sup>2</sup> and Article 33(1) of the Montreal Convention<sup>3</sup> provide, *inter alia*, that “[a]n action for damages must be brought, at the option of the plaintiff”, in one of the specified *fora*. During the negotiations of the draft Convention, it was proposed that the State in which the accident occurred should be the proper venue for trial. This proposal was rejected by the Convention’s drafters upon arguments advanced by the French delegate, Mr. Ripert, who observed:

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<sup>1</sup> However, the Conventions do not apply to contribution and indemnity claims brought by manufacturers against air carriers. *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*, 340 F. Supp. 2<sup>nd</sup> 240, 244 (E.D.N.Y. 2004).

<sup>2</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw, on 12 October 1929, 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838.

<sup>3</sup> Convention for the Unification of Certain Rules for International Carriage by Air, Signed at Montreal, on 28 May 1999, ICAO Doc. 9740.

The jurisdiction of the place of accident is justified when the victim is a third party who is a stranger to any contract of carriage and who has the right to be protected against the carrier. But when it's a question of a consignor of goods or a traveler who has made a contract, and who, for that reason, is placed under the ambit of the Convention and of the law of the contract, there is no reason why this person should go to plead before some court which happens to be, by chance, the court of the place of accident.<sup>4</sup>

Hence, jurisdiction follows the contract of carriage for suits brought by passengers or consignors of goods against air carriers. The drafters thereby rejected the proposal that the State where the accident occurs should have jurisdiction over the claim (as it would under tort law), and instead limited the venue appropriate under the Warsaw Convention to four specified *fora*:

- (1) the domicile of the carrier;
- (2) the carrier's principal place of business;
- (3) a place of the carrier's business through which the contract was made; or
- (4) the place of destination.

If, in the instant case, the action had been brought for damages by the passengers (or their estates) against the air carrier, the Warsaw Convention would apply. Armavia is domiciled and its principal place of business is in Armenia; the contracts were concluded in Armenia and Russia; and the place of destination was Russia. Therefore, France would not be a jurisdiction for which venue would be proper in a suit brought by the passengers and their estates under Article 28 of the Warsaw Convention.

The instant case, however, is *not* an action brought by passengers against an air carrier for death or bodily injury. The fundamental question at issue here is whether the Warsaw Convention applies to an indemnity action brought by a manufacturer against an air carrier.

At the outset, it is important to understand the issues and parties to which the Warsaw Convention applies. Article 1 of the Warsaw Convention specifies that the Convention applies to "international carriage of persons, luggage or goods" under a "contract" for carriage where "the place of departure and the place of destination" are within "the territories of two High Contracting Parties" or between two points within a single "High Contracting Party" if there is an "agreed stopping place" in another State even if it has not ratified the Convention. The "contract" of carriage, or equivalent language,<sup>5</sup> is explicitly referred to in 22 of the 41 sections of the Warsaw Convention.<sup>6</sup>

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<sup>4</sup> Minutes of the Second International Conference on Private International Law, Warsaw, Oct 4-12, 1929, translated by Robert Horner & Didier Legrez (Rothman \* Co., South Hackensack, N.J. 1975), at 115.

<sup>5</sup> When addressing the transportation of goods, the Convention refers to the "air consignment note".

| Today, we would refer to the "air waybill." In either event, both are contracts of carriage.

The *travaux préparatoires* of the Warsaw Convention confirms that the contract of carriage is the Rock of Gibraltar on which the Warsaw Convention rests. On this point, the Convention's Reporter, Mr. Henri De Vos, observed:

Before examining the articles of the preliminary draft, it is important to bring out that in this matter an international agreement can only be reached if it is limited to certain determined problems. *The text applies, therefore, only to the contract of carriage in its formal appearances first of all, and in the legal relationships which arise between the carrier and the persons carried or the people who ship. It regulates no other question that transport operations could give rise to.*<sup>7</sup>

Hence, the contract of carriage is the foundation upon which the Warsaw Convention was constructed. The treaty, in effect, is appended to the contract of carriage, to limit carrier liability and to provide certain uniform rules of law liability actions brought against a carrier by a passenger (or his estate) or a shipper (consignor, consignee, or subrogee) for death, injury or delay (in the case of a passenger), for loss, damage or delay (in the case of luggage or cargo).

The fact that the treaty adheres to the contract also is reflected in the fact that two passengers seated side-by-side on the same flight that crashes can find themselves under differing liability regimes dependent upon the origin and destination of their through itineraries as expressed in their contracts of carriage; had instead, a tort emphasis been employed by the treaty draftsmen, all passengers killed or injured on a single flight would fall under the same liability regime. French courts also have recognized that the Convention applies only when there is a contractual relationship between the plaintiff and defendant.<sup>8</sup>

Specifically, the Warsaw Convention applies to cases of air transportation under an international contract of carriage involving:

- A suit brought by a carrier or other person against the consignor because of damage caused by the irregularity, incorrectness or incompleteness of the air consignment note (Article 10(2));

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<sup>6</sup> Warsaw Convention Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33.

<sup>7</sup> Report Presented in the Name of the International Technical Comm. of Aeronautical Legal Experts by Mr. Henri De Vos, Reporter, on the Preliminary Draft of a Convention Relating to Documents of Air Carriage to the Liability of the Carrier in International Carriage by Aircraft, in Minutes of the Second International Conference on Private International Law, Warsaw, Oct 4-12, 1929, translated by Robert Horner & Didier Legrez (Rothman \* Co., South Hackensack, N.J. 1975), at 246 [emphasis supplied].

<sup>8</sup> See Paul Stephen Dempsey, *Aviation Liability Law* § 9.46 (Lexis Nexis 2010), citing *Languedoc c. Ste. Hermu-Peron*, [1976] RFDA 109 (C.A. Paris, 17 November 1975), *Ministere Public c. Billet*, [1964] RBAE 257, *aff' d* [1965] RGAE 408 (C.A. Paris, 25 June 1965), and two treatises on point.

- A suit brought by a person in possession of the air consignment note against the carrier for failing to obey the orders of the consignor for disposition of the goods without requiring production of the air consignment note (Article 12(3));
- A suit brought by a carrier against a consignor for damages caused by the absence, insufficiency or irregularity of information or documents necessary to meet the requirements of customs or police authorities (article 16(1));
- A suit brought by a passenger against a carrier for death or bodily injury (Article 17);
- A suit brought by a passenger against a carrier for loss or damage of luggage (Article 18);
- A suit brought by a shipper against a carrier for loss or damage of goods (Article 18); and
- A suit brought by a passenger or shipper for delay (Article 19).

Note that a suit brought by an aircraft manufacturer against a carrier for indemnification is nowhere mentioned in the treaty. This omission is of no surprise, of course, since the aircraft manufacturer does not enter into a contract of carriage with a carrier. Instead, the aircraft manufacturer enters into a contract of sale with an air carrier. Absent a contract of carriage of persons, luggage, or goods, the Convention does not apply. A contract of sale is a commercial relationship for which the Warsaw Convention is wholly irrelevant. Hence, the Convention does not apply to an indemnification suit brought by a manufacturer against an air carrier, for there is no contract of carriage between them.<sup>9</sup>

### COMPARABLE JURISPRUDENCE

The jurisprudence most strongly on point is *In Re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*,<sup>10</sup> involving an action against an air carrier and a manufacturer. In *Nantucket*, the court granted defendant EgyptAir's motion to dismiss for lack of subject matter jurisdiction claims brought by the estates of two passengers who died in the crash, but denied EgyptAir's motion to dismiss for lack of subject matter jurisdiction the cross-claims and third party claims of Boeing and Parker Hannifan, the aircraft's manufacturers, seeking contribution and indemnity from EgyptAir. The Court concurred with EgyptAir that:

Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), specifies that actions against the carrier arising out of international transportation must be brought in one of four fora: "1)

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<sup>9</sup> "The Warsaw Convention . . . does not apply to the aircraft manufacturer." Douglas A. Latta and Dorothea M. Capone, *Update on TWA Flight 800 And Swissair Flight 111*, 2 Ann.2001 ATLA-CLE 1691 n. 17 (2001).

<sup>10</sup> 340 F. Supp. 2d 240 (E.D.N.Y. 2004).

where the carrier is domiciled; 2) where the carrier has its principle place of business; 3) where the contract of transportation was made; or 4) the place where the transportation was to end.”

The estates of the two Egyptian passengers which have sued EgyptAir do not come within the embrace of any of the four Article 28 fora: EgyptAir is neither domiciled, nor does it have its principal place of business, in the United States; the contract of transportation for these passengers was made in Egypt, and the place where transportation was to end for these passengers was Egypt. Accordingly, the Court does not have subject matter jurisdiction over these claims . . . .<sup>11</sup>

The court noted that, “The suits brought by the Egyptian, Canadian and Syrian plaintiffs against Boeing and Parker Hannifin triggered Boeing's and Parker Hannifin's contribution and indemnity claims against EgyptAir. EgyptAir argues that because subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier's liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” However, the Court denied EgyptAir's motion to dismiss the contribution and indemnity cross-claims and third party claims of Boeing and Parker Hannifin against EgyptAir because:

The identity of the parties is central to the Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. See *El Al Israel*, 525 U.S. at 171-72, 119 S.Ct. 662 (“the convention addresses and concerns, only and exclusively, the airline's liability for passenger injuries occurring ‘on board the aircraft or in the course of any of the operations of embarking or disembarking.’”) (quoting *Warsaw Convention*, Art. 17, 49 Stat. 3018). See also *Second International Conference On Private Aeronautical Law, Minutes, Warsaw 1929* at 246 (“[I]t is important to bring out that in this matter an international agreement can only be reached if it is limited to certain determined problems. The text applies, therefore, only to the contract of carriage in its formal appearances first of all, and in the legal relationships which arise between the carrier and the persons carried or the people who ship.”). The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such

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<sup>11</sup> Id. at 242. See Paul Stephen Dempsey, *Aviation Liability Law* § 10.11 (Lexis Nexis 2010).

claims. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.<sup>12</sup>

In so concluding, the Court rejected EgyptAir's arguments that the airplane manufacturers' claims were coextensive with the underlying passenger claims. The Warsaw Convention “. . . would not bar United States jurisdiction over defendant Boeing's contribution and indemnity claims against third-party airline”.<sup>13</sup>

*In re Air Crash at Agana, Guam*,<sup>14</sup> is the only other case in which a U.S. federal court explicitly addressed the issue of whether Article 28 applies to manufacturer contribution and/or indemnity claims against the carrier. There, the United States government took the position that “claims for indemnity do not fall within the scope of the Warsaw Convention. The Warsaw Convention is a treaty which governs the relationship between passengers, air carriers and shippers. . . . It does . . . foreclose . . . claims for indemnity and contribution.” The United States pointed to the *travaux preparatoires* of the Warsaw Convention, that provided, *inter alia*: “The text [of the Warsaw Convention] applies, therefore, *only to the contract of carriage* in its formal appearances first of all, and in the legal relationships which arise *between the carrier and the person carried* or the people who ship. *It regulates no other question that transport operations could give rise to*”.<sup>15</sup>

In *Agana*, the Court agreed, concluding, “[T]he Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. Thus, the question of what pigeon-hole to put the indemnity claim in becomes important. It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28.”<sup>16</sup>

The United States Supreme Court has held that an indemnity action “springs from an independent contractual right” distinct from the underlying tort claim.<sup>17</sup> A

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<sup>12</sup> 340 F. Supp. 2d at 243-44.

<sup>13</sup> *In re Air Crash Near Athens, Greece on August 14, 2005*, 479 F.Supp.2d 792, 801, Prod.Liab.Rep. (CCH) P 17,720 (N.D. Cal. 2007).

<sup>14</sup> No. 1238, No. 98-ml-7211, slip op. (C.D. Cal. Jan. 25, 1999).

<sup>15</sup> Citing: Report presented in the name of the International Technical Committee of Aeronautical Legal Experts by Mr. Henri De Vos, Reporter, on the Preliminary Draft of a Convention relating to documents of air carriage and to the liability of the carrier in international carriage by aircraft (emphasis added).

<sup>16</sup> No. 1238, No. 98-ml-7211, slip op. (C.D. Cal. Jan. 25, 1999), at 3.

<sup>17</sup> *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124, 130, 76 S.Ct. 232, 100 L.Ed. 133 (1956). See also, *Professional Computer Consultants v. Porter Intern.*, 683 F. Supp. 742 (C.D.Cal. 1988) (Warsaw Convention does not apply to shipping broker's indemnity cross counterclaim against air carrier in seller's suit for breach of contract and fraud). See also, *Kane v. Magna Mixer Corp.*, 71 F.3d 555, 560-61 (6th Cir. 1995);

Canadian court also has found the provisions of the Warsaw Convention inapplicable to an action for indemnity or contribution.<sup>18</sup>

A similar rationale was employed in *Compania Panamena De Aviacion, S.A. v. Gerstein*,<sup>19</sup> where the court found the Warsaw Convention's venue provisions applicable to passenger claims only to certain defendants. Quoting Lee Kreindler's treatise on *Aviation Accident Law*,<sup>20</sup> the court noted that, "The Warsaw Convention only limits the liability of air carriers.... [T]here is no question but that it does not limit the liability of ... manufacturers . . . ." <sup>21</sup>

## QUESTIONS

- Does Article 24, al. 1, of the Warsaw Convention, which provides that "any action for damages, however founded" against the carrier is to be made in accordance with the limits and conditions of the Convention (and, in particular, regarding jurisdiction and time limitation), apply to claims by manufacturers against carriers?

A manufacturer may properly bring a claim against an air carrier without subjecting itself to the rules set in the Warsaw Convention.

An aircraft manufacturer would almost never be a proper defendant under the Warsaw Convention, though manufacturers often are sued along with airlines in mass disaster litigation, particularly in U.S. courts, which are viewed by many attorneys as among the most plaintiff-friendly of venues. Judicial economy suggests that the suits should be consolidated so that one set of facts are developed, and in addition to recovery for death and personal injury, any cross-litigation for contribution and indemnification are resolved as well.<sup>22</sup> Typically, a court will apply Warsaw

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*Carter v. Derwinski*, 987 F.2d 611, 616 (9th Cir. 1993); *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 99 (2d Cir. 1991).

<sup>18</sup> *Connaught Laboratories v. Air Canada*, 23 O.R. (2d) 176, 94 D.L.R. (3d) 586 (Ontario High Court 1997). *Connaught* recently was followed in *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding*, 634 F.3d 1023 (9th Cir. 2011).

<sup>19</sup> 645 So.2d 55 (Fla.App. 1994).

<sup>20</sup> Lee S. Kreindler, *Aviation Accident Law* § 11.02[7], at 11-34 (1993).

<sup>21</sup> 645 So.2d 55 (Fla.App. 1994).

<sup>22</sup> "This is clearly a circumstance in which supplemental jurisdiction is appropriate. The claims against Airbus arise out of the very same facts that the cases against American Airlines and Baker arise out of, and judicial economy favors exercising supplemental jurisdiction." *In re Air Crash at Belle Harbor, NY, on November 12, 2001*, Not Reported in F.Supp.2d, 2003 WL 21032034, at \*6 (S.D.N.Y. 2003). "The Court agrees that if jurisdiction is proper in the United States pursuant to the Warsaw Convention over any of the claims presented herein, then the Court may in its discretion, exercise supplemental jurisdiction over any other claims arising out of the same air crash that may be brought in the United States." *In re Air Crash Disaster of Aviateca Flight 901 Near San Salvador, El Salvador on Aug. 9, 1995*, 29 F.Supp.2d 1333, 1338-39 (S.D.Fl.1997).

Convention jurisprudence to the air carrier, and negligence and/or products liability law to the aircraft manufacturer.

If jurisdiction is appropriate, the air carrier's liability will be determined under the Warsaw Convention (or the more recent Montreal Convention). Aircraft manufacturers sometimes are sued as defendants in aircraft disaster litigation; but courts have concluded that the Warsaw Convention is inapplicable to manufacturers, and instead apply domestic law (such as negligence, breach of warranty, or strict products liability law) to them. Indeed, suits are sometimes brought by plaintiffs against aircraft manufacturers specifically in order to avoid the Warsaw Convention's niggardly limitations on liability.<sup>23</sup> Suits also are sometimes brought by insurers who have paid claims for loss and damage to shipper policyholders under principles of subrogation. Moreover, airlines sometimes seek indemnification and contribution against manufacturers, and manufacturers seek the same against airlines, in order to recover sums paid for damages suffered by passengers, employees or property owners.<sup>24</sup>

The air carrier is the defendant contemplated under the Convention.<sup>25</sup> A manufacturer could be a proper party under the Warsaw Convention if it had entered

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<sup>23</sup> "The Warsaw Convention only governs liability of the air carrier and its agents acting within the scope of their employment. Product liability claims, however, against aircraft and parts manufacturers . . . are outside the scope of the liability and fault provisions of the Convention." Paul Stephen Dempsey, *Air Cargo Liability and the Tower of Babel*, 36 Geo. Wash. Int'l L. Rev. 239 n. 216 (2004).

<sup>24</sup> Sometimes courts consolidate cases revolving around the same facts in order to foster judicial economy.

<sup>25</sup> "[T]he Warsaw Convention applies only to the air carrier. Thus, causes of action against a manufacturer or other entity are not precluded or addressed by the Warsaw Convention." Ladd Sanger & Vickie S. Brandt, *Flying and Crashing on the Wings of Fortuosity: The Case for Applying Admiralty Jurisdiction To Aviation Accidents Over Navigable Waters*, 68 J. Air L. & Com. 283, 316 (2003). Randi Lynne Rubin, *The Warsaw Convention: Capping the Value of Life?*, 12 Temp. Int'l & Comp. L.J. 189, 217-18 (1998).

"[T]he aviation industry is a very complex industry, involving manufacturers, air service suppliers, airport employees, air traffic controllers, governmental agencies, and manufacturers of suppliers of aircraft facilities. The Warsaw Convention and the subsequent Protocols only cover liability against air carriers, not manufacturers or other third parties. . . . *In re Paris Air Crash* shows that plaintiffs can avoid air carrier liability limitations by suing manufacturers on products liability claims, even though they, unlike Warsaw Convention cases, ultimately require the plaintiffs to prove fault. If the plaintiffs prove strict liability, the claim will result in high damage awards against the manufacturers. Meanwhile, the airlines are safely protected under the shield of limited liability of the Warsaw Convention."

Id. at 217-28. Certain essential aviation functions outsourced by the carrier to other companies sometimes (but not always) have been held to fall within the Convention, such as maintenance, baggage handling and catering. See Paul Stephen Dempsey, *Aviation Liability Law* §§ 9.42, 9.43, 9.47 (Lexis Nexis 2010), and cases cited therein. The Warsaw Convention provisions have been applied to various third-parties when they are acting "in furtherance of carriage." See *Baker v. Lansdell Protective Agency*, 590 F. Supp. 165, 170 (S.D.N.Y.1984) (airport security provider); *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611, 613 (S.D.N.Y.1955) (airport entrance ramp provider); *Lear v. New York Helicopter Corp.*, 190 A.D.2d 7, 12, 597

into a contract of carriage (i.e., air waybill) for the shipment of goods and brought an action as a plaintiff shipper against the carrier for cargo loss, damage or delay under Articles 18 or 19.<sup>26</sup> That is not the case in the instant proceeding.

Article 24 does provide that “any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.” But Article 24 explicitly limits its application to Article 17 (addressing carrier liability for “death or wounding of a passenger or any other bodily injury suffered by a passenger”), Article 18 (addressing carrier liability for “destruction or loss of, or of damage to, any registered luggage or any goods”), and Article 19 (addressing carrier liability for “delay in the carriage by air of passengers, luggage or goods”). These Articles do not address indemnification actions brought by third parties.<sup>27</sup> Hence, Article 24 is inapplicable to such actions, as indeed, is the entire Warsaw Convention.

- *If yes, would such an interpretation invalidate forum selection clauses, indemnity clauses, and arbitration agreements entered into by manufacturers and carriers before an accident (in particular in view of Article 32 of the Convention that invalidates all pre-accident agreements between the manufacturer and carrier that are inconsistent with the Convention)?*

Article 32 provides, “Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.” But as noted above, the Warsaw Convention does not apply to indemnification suits brought by manufacturers against air carriers. Therefore, Article 32 has no application in such litigation.

Article 24 of the Warsaw Convention does not apply to the relationship between the manufacturer and the airline, but applies only to the relation between the passengers or shippers and the airline. The same seems to be true for Article 32 where the “parties” are the parties to the contract of carriage. Moreover, Article 32 should be read in the context of the treaty in its entirety, which addresses contracts and

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N.Y.S.2d 411, 414 (1993) (maintenance and repair company); *Julius Young Jewelry Mfg. Co. v. Delta Air Lines*, 67 A.D.2d 148, 149, 414 N.Y.S.2d 528, 529 (1979) (baggage transfer provider); *Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V.*, 13 F.Supp.2d 508, 513-15 (S.D.N.Y.1998) (aircraft cleaning subcontractor); *Carroll v. United Airlines*, 325 N.J.Super. 353, 739 A.2d 442 (N.J.Super.A.D. 1999) (airport wheelchair service provider); *In Re Air Crash Disaster Near Peggy's Cove, Nova Scotia On September 2, 1998*, 2002 U.S. Dist. LEXIS 3308 (E.D. Pa. 2002).

<sup>26</sup> See e.g., *Read-Rite Corporation and American Homes Assurance Co. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9<sup>th</sup> Cir. 1999); 1999 U.S. App. LEXIS 18692; *Victoria Sales Corporation v. Emery Air Freight*, 917 F.2d 705 (2<sup>nd</sup> Cir. 1990); 1990 U.S. App. LEXIS 18487, and *Seagate Technology LLC, v. Dalian China Express International Corp. Ltd.*, 169 F. Supp. 2d 1146 (N.D. Cal. 2001); 2001 U.S. Dist. LEXIS 15275.

<sup>27</sup> A similar conclusion was reached recently by the U.S. Court of Appeals for the Ninth Circuit in *Chubb Ins. Co. v. Menlo Worldwide Forwarding*, 634 F.3d 1023, 1026-27 (9<sup>th</sup> Cir. 2011) (holding that the Montreal Convention of 1999 did not apply to third-party complaint seeking indemnification and contribution).

agreements between passengers and carriers, and between shippers and carriers for international transportation. This article has no relevance to contracts and agreements between manufacturers and air carriers for the sale of aircraft.

Courts have routinely upheld clauses in purchase or lease agreements between sophisticated parties that limit liability for personal injury, even in the international aviation context. The leading case is *Philippine Airlines v. McDonnell Douglas Corp.*<sup>28</sup> The case involved an aborted takeoff in Manila of a DC-10 manufactured by McDonnell Douglas. Suit was brought against the air carrier, Philippine Airlines, by injured passengers in the courts of California. The airline attempted to cross-claim the manufacturer, seeking indemnification for personal injury liability. The manufacturer raised as a defense the warranty clause in the purchase agreement, limiting liability to repair, replacement, or correction of any defective part. The warranty further provided, “the obligations and liabilities of the seller . . . are exclusive and in lieu of, and buyer waives all other remedies, warranties, guarantees or liabilities, express or implied, with respect to each aircraft . . . arising by law or otherwise (including without limitation, any obligation or liability of the seller arising from negligence . . . or consequential damages).”<sup>29</sup> Philippine Airlines argued that under the Warsaw Convention, “the ultimate consumer – here the passenger – is provided with a streamlined remedy against the carrier.” Despite the presumptions against exculpatory clauses from personal liability which mandate strict construction of its terms and resolution of ambiguities against the drafting party, the court held that the indemnity clause clearly provided that the aircraft purchaser was waiving all rights to seek indemnity for payments made to personal injury claimants, and that the clause was not against public policy, but was instead a “private, voluntary transaction in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.”<sup>30</sup> Hence, liability limitation provisions in aircraft sales contracts do not fall within the Article 32 prohibition, for they lie outside the Warsaw Convention altogether.

Moreover, the application of Article 32 to aircraft sales agreements between manufacturers and airlines would lead to absurd results, as it would expand the scope of the Warsaw Convention to invalidate forum selection clauses, indemnity clauses, and arbitration agreements entered into between commercially sophisticated parties in

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<sup>28</sup> 234 Cal. Rptr. 423, 189 Cal.App.3d 234 (Cal. Ct. App. 1987).

<sup>29</sup> Id. at 424.

<sup>30</sup> Id. at 426. This case is discussed in Thad Dameris, T. Craig Wagner & David J. Weiner, *Apportioning Liability Between the Commercial Aircraft User and the Commercial Aircraft Manufacturer*, in *Litigating the Aviation Case: From Pre-Trial to Closing Argument* 93, 99-101 (3<sup>rd</sup> ed. ABA, A. Harakas, ed. 2008), who conclude, “courts are reluctant to displace a contract provision that sophisticated parties freely accepted.” Id. at 101. See also, *Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519 (9<sup>th</sup> Cir. 1987) (crash on takeoff at Los Angeles International Airport), *In re Air Crash Disaster at Detroit Metropolitan Airport on Aug. 16, 1987*, 757 F. Supp. 804 (E.D.Mich.,1989), and *Delta Air Lines v. Douglas Aircraft Co.*, 238 Cal.App.2d 95, 47 Cal.Rptr. 518 (Cal.Ct.App.1965).

contracts involving the sale of all tangible *goods* purchased by airlines, such as commercial aircraft. In contrast, the Warsaw Convention is intended to protect passengers and shippers in their purchases of the *services* of international air carriage, by prohibiting carriers from unilaterally limiting their liability or otherwise imposing oppressive terms upon their customers. The Warsaw Convention is limited to claims for damages that occur in "international carriage," defined as requiring an "agreement between the parties."<sup>31</sup> Aircraft and component manufacturers are not parties to agreements for international carriage, and therefore do not consent to such carriage nor to any of the Conventions' limitations. In *Philippine Airlines*, the court did not expressly address whether Article 32 precluded the carrier and manufacturer from entering into a pre-accident agreement to govern commercial liability relationships between themselves. Rather, the court took it as a given that these parties, "consistent with the public interest," had the authority to agree in advance to limits on the manufacturer's liability.<sup>32</sup>

- Does Article 28.2 of the Warsaw Convention, which provides that jurisdictions will apply domestic procedural provisions, allow the Toulouse court to retain jurisdiction pursuant to Article 333 of the French civil Code?

Article 333 provides: "The third party against whom proceedings have been issued shall be bound to proceed before the court seized of the original claim without being able to challenge the territorial jurisdiction of the court even by relying upon an argument of specific jurisdiction attributable to another forum."

Under both the Warsaw Convention, and its reformulation in the Montreal Convention, most rules of procedure are left to the jurisdiction of the court seized of the case (*lex fori*).<sup>33</sup> Recently, the U.S. Court of Appeals for the Ninth Circuit concluded:

While the Montreal Convention does not create a cause of action for indemnification or contribution among carriers, it does not preclude such actions as may be available under local law. See *In re Air Crash at Lexington, Ky.*, No. 5:07-CV-316, 2007 WL 2915187 (E.D.Ky. Oct.5, 2007) (holding that the Montreal Convention does not preempt a local law cause of action for apportionment among joint tortfeasors); cf. *Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., Ltd.*, 522 F.3d 776, 785-87 (7th Cir.2008) (holding the same for the Warsaw Convention).<sup>34</sup>

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<sup>31</sup> Warsaw Convention Art. 1(2).

<sup>32</sup> 234 Cal. Rptr. 423, 189 Cal.App.3d 234 (Cal. Ct. App. 1987).

<sup>33</sup> Paul Stephen Dempsey, *Aviation Liability Law* § 11.2 (Lexis Nexis 2010).

<sup>34</sup> *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding*, 634 F.3d 1023, 1026-27 (9th Cir. 2011). Paul Stephen Dempsey, *Aviation Liability Law* § 7.50 (Lexis Nexis 2010).

Article 42 of the French Code of Civil Procedure provides that venue is appropriate in the court of the place where the defendant lives, and if there are several defendants, the plaintiff may, at his discretion, bring his case before the court where any one of the defendants live. Article 46 provides that in a torts case, the plaintiff may alternatively bring his action in the place of the event causing liability, or the place where the damage was suffered. Hence, the plaintiff has wide discretion in France in his choice of legal venues.<sup>35</sup>

In 1997, the French Cour de Cassation allowed French jurisdiction to be exerted over Pakistan International Airlines (PIA) into a suit brought against Airbus and PIA involving a crash in Katmandu, Nepal, in 1992. The court held that since the Convention provided no guidance as to what jurisdictional rules applied when there were multiple defendants, local French municipal law would apply. Applying French law, PIA was allowed to be joined as a co-defendant.

In 2006, the Cour de Cassation revisited the issue and concluded that the Warsaw Convention should be strictly and literally applied, reversing the decisions issued in first and second instances which had granted jurisdiction.<sup>36</sup> Thereafter, in France, a passenger claiming against an air carrier operating in international aviation could not claim jurisdiction in French courts absent fulfillment of the Convention's venue requirements.<sup>37</sup>

The French Cour de Cassation reasserted this ruling in *D.A. Moubarak el Dousri v. EIG Airbus Industrie*<sup>38</sup>. Again, the court dismissed the passenger suit against the carrier (Gulf Air) on grounds that French courts were not an appropriate venue under Article 28 of the Warsaw Convention. This case is clearly distinguishable from a suit not falling under the Convention, such as an indemnity action by a manufacturer seeking contribution from an airline for a potential products liability judgment.

The instant proceeding is distinguishable from the Gulf Air decision in that an indemnity action does not fall under the Convention. Therefore, in an indemnity action brought by an aircraft manufacturer against an air carrier, suit is not restricted to the four venues specified in Article 28, because such a suit does not arise under a contract of carriage triggering application of the Montreal Convention.

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<sup>35</sup> Alain Cornec & Julie Losson, *French Supreme Court Restates Rules on Jurisdiction, Recognition and Enforcement of Foreign Decisions*, 11 Fam. L.Q. 83, 91 (Spring 2010).

<sup>36</sup> *Gulf Air Company v. GIE Airbus, M. El D. et autres*, Cour de Casation, RFDA 2006, 319; *Kenya Airways v. GIE Airbus, Epoux B. et autres*, Cour de Casation, RFDA 2006, 321.

<sup>37</sup> Discussed in Rod Margo, *IATA International Liability Reporter* (2007) at 27-28, along with *The owners of the cargo lately laden on board the ship Tairy v. The owners of the ship Macief Rataj*, [1994] EU C-406/92.

<sup>38</sup> [2011] I.L.Pr. 3 French Cour De Cassation (Supreme Court)(First Civil Chamber) Cass. Civ. 1ère, 12 November 2009, n°08-15269.

## CONCLUSION

The Warsaw Convention governs suits brought by passengers and shippers against air carriers. It adheres to the contract of carriage for international air transportation. The Convention has no bearing with respect to contracts for the sale of aircraft, or contribution and indemnification claims brought by aircraft manufacturers against air carriers.

Respectfully submitted,

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### Response to

### **Opinion of Pablo Mendes de Leon on Airbus' indemnification and contribution claim against Armavia Airlines before the Toulouse Court of Appeal**

by

Professor Paul Stephen Dempsey

McGill University Institute of Air & Space Law

This case focuses on the procedural question of whether the Warsaw Convention applies to a suit for indemnification brought by an aircraft manufacturer against an airline. If it applies, then the venue provision of the Convention would preclude suit being brought in France. Article 28 of the Convention limits venue to:

“ . . . the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident,

or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.”

The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

“For the purposes of this Convention the expression ‘international carriage’ means any carriage in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.”<sup>39</sup>

The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7, Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not

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<sup>39</sup> (English translation of the official French version; emphasis supplied).

apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, “The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier.” (His footnote 3). Despite the explicit requirements of Article 1, he writes, “It is a question of the transport itself and not of the contract (relating to this transport), . . .” that triggers the Convention’s applicability.” (His para. D3). He correctly states, in paragraph B3, that the passengers were injured during “international carriage”. In paragraph B4, he states that the Warsaw Convention is “applicable to this carriage and to the liability of the air carrier.” But that is true only as to a suit brought by passengers against the carrier, which is not the case in this litigation.

In paragraphs C5 and C6, Professor de Leon insists that the Convention is the “main, dominant and exclusive” and “exclusive and exhaustive” regime for subjects and actions falling “within its field of application.” However, its field of application is limited by the treaty’s jurisdictional provisions. There must be a contract of carriage for international air transportation between the parties to litigation. There was no contract of carriage between the passengers and Airbus; there was no contract of carriage between Airbus and Armavia. Hence, the Warsaw Convention is inapplicable.

Assume two passengers are seated side-by-side on a flight that crashes. One passenger holds a domestic ticket, and the other holds an international ticket. If a passenger holds a ticket for domestic transportation, the treaty does not apply to him, despite the fact that the treaty would apply to a passenger seated next to him holding a ticket for international transportation. (This point I made on page 4 of my amicus brief, a point which Prof. de Leon does not refute). Hence, the flight flown does not determine the applicability of the treaty. The contract of carriage does. There is no contract of carriage between a passenger and an aircraft manufacturer. There is no contract of carriage between an aircraft manufacturer and an air carrier. The Convention, therefore, does not apply. The Warsaw Convention applies only to disputes between airlines and their customers (i.e., passengers and shippers).

In paragraph D15 of his brief, Prof. de Leon concludes that “as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention, namely the personal injuries of passengers, in alleging that these injuries resulted from

the transport, this recourse is subject to the Convention.” This sentence falls by its own weight. The litigation brought by passengers against Airbus was a products liability claim for defective design and/or manufacture of the aircraft in which they were flown. These claimants did not allege that the “injuries resulted from the transport”, but alleged that the injuries resulted from a defective aircraft – claims for which Warsaw has no relevance. Warsaw does not apply to all personal injury claims; it applies to personal injury claims brought by passengers (or shippers) against air carriers.

As I point out on pages 4-5 of my amicus brief, the Warsaw Convention in Articles 10, 12, 16, 17, 18 and 19 specifies the types of suits that may be brought pursuant to it. Prof. de Leon fails to refute my conclusion (at page 5 of my amicus brief) that “a suit brought by an aircraft against a carrier is nowhere mentioned in the treaty.” Under the principle of interpretation of *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”), the drafters considers what suits could be brought pursuant to its application and addressed them explicitly; suits not explicitly mentioned therefore cannot be allowed.

Unfortunately, Professor de Leon does not point to any provision in the treaty that allows its application to an indemnification suit brought by an aircraft manufacturer against an airline. He does not explain how an action for “an indemnity for the damages caused to these passengers . . . falls within the exclusive field of application of the Convention and in particular within its terms in relation to jurisdiction.” (His para. B9) He provides no citation to the treaty or jurisprudence to sustain his conclusion that, “there is a question of jurisdiction in a dispute in relation to indemnification and contribution claims involving a few defendants, but this question cannot be separated from the liability claim. The Convention does not allow it.” (His para. D10). What provision in the Convention does not allow the indemnification claim to be separated from the Article 17 claims for death or bodily injury against the carrier? What provision of the Convention supports his thesis that, “as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention . . . this recourse is subject to the Convention”? (His para. D15). Many of his footnotes merely repeat the text.

At paragraph D2, Professor de Leon cites Rapporteur Henri De Vos in the *travaux preparatoires* as stating that Chapter 3 of the Convention “makes provision for the content: the liability of the carrier”. It is unclear how this contradicts, as Prof. de Leon claims, my assertion that the “contract of carriage is the foundation upon which the Warsaw Convention was constructed”. Indeed, in paragraph D3, Prof. de Leon fails to refute my quotation (on page 4 of my amicus brief) of Mr. De Vos, where he wrote that,

“the text applies . . . only to the contract of carriage . . . and in the legal relationships which arise between the carrier and the persons carried . . . .” Prof. de Leon merely claims he could not find the source.<sup>40</sup>

At para. D7, Professor de Leon contends that in *In re Air Crash Near Nankucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier's liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>41</sup>

Professor de Leon claims (again in Para. D7) that, “the passengers in the Nankucket Island matter did not obtain anything either from Egyptair or from the manufacturers.” Yet, in a subsequent *Nantucket* decision, the court summarized the salient facts: “Flight 990 was flying from the United States to Cairo when it crashed. After the crash, numerous lawsuits were commenced against EgyptAir and/or Boeing; in every suit

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<sup>40</sup> As a minor point, at the end of paragraph D3, Prof. de Leon also exhibits confusion as he refers to my footnote 8 referring to “two treaties . . . without details.” My footnote refers to “two treatises”, not “two treaties.”

<sup>41</sup> 340 F.Supp.2d 240, 243.

against Boeing, a third-party complaint or cross-claim was brought by Boeing against EgyptAir seeking indemnification and contribution.”<sup>42</sup>

Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

In his amicus brief (at para. D7, and in his Conclusion para. 1), Professor de Leon cites to the U.S. Supreme Court decision in *El Al v. Tseng*. He erroneously quotes *Tseng* as follows: “the United States Supreme Court said in its famous Judgment *Tseng* , the creation of a uniform regulation of the third party liability of the carrier – without pointing out to whom in this regard”. The U.S. Supreme Court said no such thing. Instead, the Court wrote: “Recourse to local law, we are persuaded, would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster.”<sup>43</sup> *Tseng* was not a case involving indemnification or products liability. It addressed a suit brought by a passenger against an airline for a vigorous security inspection at check-in. The only point at which the Supreme Court addressed third party liability was in this paragraph:

“The British House of Lords, in *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193, considered the same history, but found it inconclusive. Inclusion of the word “certain” in the Convention’s title, the Lords reasoned, accurately indicated that “the [C]onvention is concerned with certain rules only, not with all the rules relating to international carriage by air.” *Id.*, at 204. For example, the Convention does not say “anything ... about the carrier’s obligations of insurance, and in particular about compulsory insurance against third party risks.”

Hence, the U.S. Supreme Court in *Tseng* does not, as Professor de Leon erroneously states, address uniformity of third party liability. The Court did hold that, in order to effectuate the Convention’s purpose of achieving global

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<sup>42</sup> 392 F.Supp.2d 461, 466 (E.D.N.Y. 2005).

<sup>43</sup> 525 U.S. 155, 160. In the summary preceding the decision, it is written: “Recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention was designed to foster.” 525 U.S. 155, 156.

uniformity of law, the “opinions of our sister signatories” are “entitled to considerable weight”,<sup>44</sup> a position undermined by Prof. de Leon’s suggestion (in para. D6) that U.S. case law should be disregarded because of the differences between the common law of the U.S. and the civil law of France, or because “legal or factual circumstances can be different.”

In *Agana*, the Court found that passenger claims against an airline were subject to the Warsaw Convention, but that passenger claims against other parties were not, nor were indemnity claims brought by other parties against an airline. The Court in *Agana* also addressed *Tseng*:

The *El Al [v. Tseng]* case resolves a long pending dispute as to whether the Convention is the sole source of passenger injury or death claims against airlines, the answer being yes. However, it does not provide guidance as to whether an equitable implied indemnity claim said to “derive” from the passenger claim or is an independent claim. This is important for the Warsaw Convention because the Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. . . . It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28. . . . Thus, the Convention's language suggests that it is only concerned with suits by passengers and shippers.

The court did place one limitation on damages, to not allow recovery beyond the limits of the Montreal Convention:

It is accepted that an indemnity suit is not a passenger or shipper action governed by the Convention and may, therefore, be filed in any court which has personal jurisdiction of the parties. However, to the extent that the indemnity claim is for protection from passenger damage claims which exceed the limits of liability provided under the Convention for personal injuries to passengers, the indemnity

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<sup>44</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999).

claim must be limited by the convention to the amount that the carrier has to pay under those limits.

Prof. de Leon (in Para. D8) does point to the anomaly in the court's Solomon-like splitting of the Convention, holding the venue provisions do not apply but the limitation on liability provisions do. This is an inconsistency that the court fails to explain.

In para. D13, Prof de Leon cites, *In re Air Crash Over Mid-Atlantic on June 1, 2009*,<sup>45</sup> for the proposition that, "If Air France can be sued by the Manufacturing Defendants as a third-party Defendant it creates tension with the MC in two ways. First, Air France, though a party, would not be presumptively liable to the Plaintiffs as contemplated by the MC. . . . Second, Air France's presence as a third-party Defendant would undercut the MC's jurisdictional restrictions because Air France will end up indirectly litigating the passengers' claims outside one of the five forums expressly provided for in the MC."<sup>46</sup>

This discussion appears in a portion of the court's opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, "That tension exists regardless of whether the Manufacturing Defendants' third-party claims are barred by the MC."<sup>47</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

*Olaya v. American Airlines*, (cited by Prof. de Leon in para. D14) can be distinguished on its facts. There, a husband sued an airline and funeral home for delayed delivery of his wife's remains. The defendant funeral home sought indemnification against the airline, and the airline sought indemnification against the funeral home. All the claims arose out of the same event – delay of delivery of goods. The husband failed to meet the written

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<sup>45</sup> 760 F.Supp.2d 832 (N.D. Cal. 2010).

<sup>46</sup> *Id.* at 846-47.

<sup>47</sup> *Id.* at 846.

notice claim requirements of the Montreal Convention, so the court dismissed the claim and cross-claims. As there was no recovery, the indemnification claims became moot, and were therefore dismissed. Moreover, delay is explicitly covered under the Montreal Convention. Products liability actions, such as those that gave rise to Airbus' indemnification claim, are not.

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The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7, Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, “The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier.” (His footnote 3). Despite the explicit requirements of Article 1, he writes, “It is a question of the transport itself and not of the contract (relating to this transport), . . .” that triggers the Convention’s applicability.” (His para. D3). He

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At para. D7, Professor de Leon contends that in *In re Air Crash Near Nantucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and

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indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier’s liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>50</sup>

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Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

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<sup>50</sup> 340 F.Supp.2d 240, 243.

<sup>51</sup> 392 F.Supp.2d 461, 466 (E.D.N.Y. 2005).

In his amicus brief (at para. D7, and in his Conclusion para. 1), Professor de Leon cites to the U.S. Supreme Court decision in *El Al v. Tseng*. He erroneously quotes *Tseng* as follows: “the United States Supreme Court said in its famous Judgment *Tseng*, the creation of a uniform regulation of the third party liability of the carrier – without pointing out to whom in this regard”. The U.S. Supreme Court said no such thing. Instead, the Court wrote: “Recourse to local law, we are persuaded, would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster.”<sup>52</sup> *Tseng* was not a case involving indemnification or products liability. It addressed a suit brought by a passenger against an airline for a vigorous security inspection at check-in. The only point at which the Supreme Court addressed third party liability was in this paragraph:

“The British House of Lords, in *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193, considered the same history, but found it inconclusive. Inclusion of the word “certain” in the Convention's title, the Lords reasoned, accurately indicated that “the [C]onvention is concerned with certain rules only, not with all the rules relating to international carriage by air.” *Id.*, at 204. For example, the Convention does not say “anything ... about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks.”

Hence, the U.S. Supreme Court in *Tseng* does not, as Professor de Leon erroneously states, address uniformity of third party liability. The Court did hold that, in order to effectuate the Convention’s purpose of achieving global uniformity of law, the “opinions of our sister signatories” are “entitled to considerable weight”,<sup>53</sup> a position undermined by Prof. de Leon’s suggestion (in para. D6) that U.S. case law should be disregarded because of the differences between the common law of the U.S. and the civil law of France, or because “legal or factual circumstances can be different.”

In *Agana*, the Court found that passenger claims against an airline were subject to the Warsaw Convention, but that passenger claims against other parties were not, nor were indemnity claims brought by other parties against an airline. The Court in *Agana* also addressed *Tseng*:

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<sup>52</sup> 525 U.S. 155, 160. In the summary preceding the decision, it is written: “Recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention was designed to foster.” 525 U.S. 155, 156.

<sup>53</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999).

The *El Al [v. Tseng]* case resolves a long pending dispute as to whether the Convention is the sole source of passenger injury or death claims against airlines, the answer being yes. However, it does not provide guidance as to whether an equitable implied indemnity claim said to “derive” from the passenger claim or is an independent claim. This is important for the Warsaw Convention because the Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. . . . It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28. . . . Thus, the Convention's language suggests that it is only concerned with suits by passengers and shippers.

The court did place one limitation on damages, to not allow recovery beyond the limits of the Montreal Convention:

It is accepted that an indemnity suit is not a passenger or shipper action governed by the Convention and may, therefore, be filed in any court which has personal jurisdiction of the parties. However, to the extent that the indemnity claim is for protection from passenger damage claims which exceed the limits of liability provided under the Convention for personal injuries to passengers, the indemnity claim must be limited by the convention to the amount that the carrier has to pay under those limits.

Prof. de Leon (in Para. D8) does point to the anomaly in the court’s Solomon-like splitting of the Convention, holding the venue provisions do not apply but the limitation on liability provisions do. This is an inconsistency that the court fails to explain.

In para. D13, Prof de Leon cites, *In re Air Crash Over Mid-Atlantic on June 1, 2009*,<sup>54</sup> for the proposition that, “If Air France can be sued by the Manufacturing Defendants as a third-party Defendant it creates tension with

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the MC in two ways. First, Air France, though a party, would not be presumptively liable to the Plaintiffs as contemplated by the MC. . . . Second, Air France's presence as a third-party Defendant would undercut the MC's jurisdictional restrictions because Air France will end up indirectly litigating the passengers' claims outside one of the five forums expressly provided for in the MC.”<sup>55</sup>

This discussion appears in a portion of the court’s opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, “That tension exists regardless of whether the Manufacturing Defendants' third-party claims are barred by the MC.”<sup>56</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

*Olaya v. American Airlines*, (cited by Prof. de Leon in para. D14) can be distinguished on its facts. There, a husband sued an airline and funeral home for delayed delivery of his wife’s remains. The defendant funeral home sought indemnification against the airline, and the airline sought indemnification against the funeral home. All the claims arose out of the same event – delay of delivery of goods. The husband failed to meet the written notice claim requirements of the Montreal Convention, so the court dismissed the claim and cross-claims. As there was no recovery, the indemnification claims became moot, and were therefore dismissed. Moreover, delay is explicitly covered under the Montreal Convention. Products liability actions, such as those that gave rise to Airbus’ indemnification claim, are not.

## Response to

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<sup>55</sup> Id. at 846-47.

<sup>56</sup> Id. at 846.

**Opinion of Pablo Mendes de Leon on Airbus' indemnification and contribution claim against Armavia Airlines before the Toulouse Court of Appeal**

by

Professor Paul Stephen Dempsey

McGill University Institute of Air & Space Law

This case focuses on the procedural question of whether the Warsaw Convention applies to a suit for indemnification brought by an aircraft manufacturer against an airline. If it applies, then the venue provision of the Convention would preclude suit being brought in France. Article 28 of the Convention limits venue to:

“ . . . the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.”

The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

“For the purposes of this Convention the expression ‘international carriage’ means any carriage in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High

Contracting Party is not deemed to be international for the purposes of this Convention.”<sup>57</sup>

The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7, Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, “The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier.” (His footnote 3). Despite the explicit requirements of Article 1, he writes, “It is a question of the transport itself and not of the contract (relating to this transport), . . .” that triggers the Convention’s applicability.” (His para. D3). He correctly states, in paragraph B3, that the passengers were injured during “international carriage”. In paragraph B4, he states that the Warsaw Convention is “applicable to this carriage and to the liability of the air carrier.” But that is true only as to a suit brought by passengers against the carrier, which is not the case in this litigation.

In paragraphs C5 and C6, Professor de Leon insists that the Convention is the “main, dominant and exclusive” and “exclusive and exhaustive” regime for subjects and actions falling “within its field of application.” However, its field of application is

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<sup>57</sup> (English translation of the official French version; emphasis supplied).

limited by the treaty's jurisdictional provisions. There must be a contract of carriage for international air transportation between the parties to litigation. There was no contract of carriage between the passengers and Airbus; there was no contract of carriage between Airbus and Armavia. Hence, the Warsaw Convention is inapplicable.

Assume two passengers are seated side-by-side on a flight that crashes. One passenger holds a domestic ticket, and the other holds an international ticket. If a passenger holds a ticket for domestic transportation, the treaty does not apply to him, despite the fact that the treaty would apply to a passenger seated next to him holding a ticket for international transportation. (This point I made on page 4 of my amicus brief, a point which Prof. de Leon does not refute). Hence, the flight flown does not determine the applicability of the treaty. The contract of carriage does. There is no contract of carriage between a passenger and an aircraft manufacturer. There is no contract of carriage between an aircraft manufacturer and an air carrier. The Convention, therefore, does not apply. The Warsaw Convention applies only to disputes between airlines and their customers (i.e., passengers and shippers).

In paragraph D15 of his brief, Prof. de Leon concludes that "as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention, namely the personal injuries of passengers, in alleging that these injuries resulted from the transport, this recourse is subject to the Convention." This sentence falls by its own weight. The litigation brought by passengers against Airbus was a products liability claim for defective design and/or manufacture of the aircraft in which they were flown. These claimants did not allege that the "injuries resulted from the transport", but alleged that the injuries resulted from a defective aircraft – claims for which Warsaw has no relevance. Warsaw does not apply to all personal injury claims; it applies to personal injury claims brought by passengers (or shippers) against air carriers.

As I point out on pages 4-5 of my amicus brief, the Warsaw Convention in Articles 10, 12, 16, 17, 18 and 19 specifies the types of suits that may be brought pursuant to it. Prof. de Leon fails to refute my conclusion (at page 5 of my amicus brief) that "a suit brought by an aircraft against a carrier is nowhere mentioned in the treaty." Under the principle of interpretation of *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others"), the drafters considered what suits could be brought pursuant to its application and addressed them explicitly; suits not explicitly mentioned therefore cannot be allowed.

Unfortunately, Professor de Leon does not point to any provision in the treaty that allows its application to an indemnification suit brought by an aircraft manufacturer

against an airline. He does not explain how an action for “an indemnity for the damages caused to these passengers . . . falls within the exclusive field of application of the Convention and in particular within its terms in relation to jurisdiction.” (His para. B9) He provides no citation to the treaty or jurisprudence to sustain his conclusion that, “there is a question of jurisdiction in a dispute in relation to indemnification and contribution claims involving a few defendants, but this question cannot be separated from the liability claim. The Convention does not allow it.” (His para. D10). What provision in the Convention does not allow the indemnification claim to be separated from the Article 17 claims for death or bodily injury against the carrier? What provision of the Convention supports his thesis that, “as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention . . . this recourse is subject to the Convention”? (His para. D15). Many of his footnotes merely repeat the text.

At paragraph D2, Professor de Leon cites Rapporteur Henri De Vos in the *travaux préparatoires* as stating that Chapter 3 of the Convention “makes provision for the content: the liability of the carrier”. It is unclear how this contradicts, as Prof. de Leon claims, my assertion that the “contract of carriage is the foundation upon which the Warsaw Convention was constructed”. Indeed, in paragraph D3, Prof. de Leon fails to refute my quotation (on page 4 of my amicus brief) of Mr. De Vos, where he wrote that, “the text applies . . . only to the contract of carriage . . . and in the legal relationships which arise between the carrier and the persons carried . . .” Prof. de Leon merely claims he could not find the source.<sup>58</sup>

At para. D7, Professor de Leon contends that in *In re Air Crash Near Nantucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier's liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

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<sup>58</sup> As a minor point, at the end of paragraph D3, Prof. de Leon also exhibits confusion as he refers to my footnote 8 referring to “two treaties . . . without details.” My footnote refers to “two treaties”, not “two treaties.”

“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>59</sup>

Professor de Leon claims (again in Para. D7) that, “the passengers in the Nankucket Island matter did not obtain anything either from Egyptair or from the manufacturers.” Yet, in a subsequent *Nantucket* decision, the court summarized the salient facts: “Flight 990 was flying from the United States to Cairo when it crashed. After the crash, numerous lawsuits were commenced against EgyptAir and/or Boeing; in every suit against Boeing, a third-party complaint or cross-claim was brought by Boeing against EgyptAir seeking indemnification and contribution.”<sup>60</sup>

Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

In his amicus brief (at para. D7, and in his Conclusion para. 1), Professor de Leon cites to the U.S. Supreme Court decision in *El Al v. Tseng*. He erroneously quotes *Tseng* as follows: “the United States Supreme Court said in its famous Judgment *Tseng*, the creation of a uniform regulation of the third party liability of the carrier – without pointing out to whom in this regard”. The U.S. Supreme Court said no such thing. Instead, the Court wrote: “Recourse to local law, we are persuaded, would undermine the uniform regulation of international air carrier liability that the Warsaw Convention

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was designed to foster.”<sup>61</sup> *Tseng* was not a case involving indemnification or products liability. It addressed a suit brought by a passenger against an airline for a vigorous security inspection at check-in. The only point at which the Supreme Court addressed third party liability was in this paragraph:

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Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. . . . It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28. . . . Thus, the Convention's language suggests that it is only concerned with suits by passengers and shippers.

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<sup>63</sup> 760 F.Supp.2d 832 (N.D. Cal. 2010).

<sup>64</sup> *Id.* at 846-47.

This discussion appears in a portion of the court's opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, "That tension exists regardless of whether the Manufacturing Defendants' third-party claims are barred by the MC."<sup>65</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

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**Response to**  
**Opinion of Pablo Mendes de Leon on Airbus' indemnification and contribution**  
**claim against Armavia Airlines before the Toulouse Court of Appeal**

by

Professor Paul Stephen Dempsey

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<sup>65</sup> Id. at 846.

This case focuses on the procedural question of whether the Warsaw Convention applies to a suit for indemnification brought by an aircraft manufacturer against an airline. If it applies, then the venue provision of the Convention would preclude suit being brought in France. Article 28 of the Convention limits venue to:

“ . . . the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.”

The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

“For the purposes of this Convention the expression ‘international carriage’ means any carriage in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.”<sup>66</sup>

The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7,

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Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, “The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier.” (His footnote 3). Despite the explicit requirements of Article 1, he writes, “It is a question of the transport itself and not of the contract (relating to this transport), . . .” that triggers the Convention’s applicability.” (His para. D3). He correctly states, in paragraph B3, that the passengers were injured during “international carriage”. In paragraph B4, he states that the Warsaw Convention is “applicable to this carriage and to the liability of the air carrier.” But that is true only as to a suit brought by passengers against the carrier, which is not the case in this litigation.

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At para. D7, Professor de Leon contends that in *In re Air Crash Near Nantucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier's liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity

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claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>68</sup>

Professor de Leon claims (again in Para. D7) that, “the passengers in the Nankucket Island matter did not obtain anything either from Egyptair or from the manufacturers.” Yet, in a subsequent *Nantucket* decision, the court summarized the salient facts: “Flight 990 was flying from the United States to Cairo when it crashed. After the crash, numerous lawsuits were commenced against EgyptAir and/or Boeing; in every suit against Boeing, a third-party complaint or cross-claim was brought by Boeing against EgyptAir seeking indemnification and contribution.”<sup>69</sup>

Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

In his amicus brief (at para. D7, and in his Conclusion para. 1), Professor de Leon cites to the U.S. Supreme Court decision in *El Al v. Tseng*. He erroneously quotes *Tseng* as follows: “the United States Supreme Court said in its famous Judgment *Tseng*, the creation of a uniform regulation of the third party liability of the carrier – without pointing out to whom in this regard”. The U.S. Supreme Court said no such thing. Instead, the Court wrote: “Recourse to local law, we are persuaded, would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster.”<sup>70</sup> *Tseng* was not a case involving indemnification or products liability. It addressed a suit brought by a passenger against an airline for a vigorous security inspection at check-in. The only point at which the Supreme Court addressed third party liability was in this paragraph:

“The British House of Lords, in *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193, considered the same history, but found it inconclusive. Inclusion of the word “certain” in the Convention's title, the Lords

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<sup>68</sup> 340 F.Supp.2d 240, 243.

<sup>69</sup> 392 F.Supp.2d 461, 466 (E.D.N.Y. 2005).

<sup>70</sup> 525 U.S. 155, 160. In the summary preceding the decision, it is written: “Recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention was designed to foster.” 525 U.S. 155, 156.

reasoned, accurately indicated that “the [C]onvention is concerned with certain rules only, not with all the rules relating to international carriage by air.” *Id.*, at 204. For example, the Convention does not say “anything ... about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks.”

Hence, the U.S. Supreme Court in *Tseng* does not, as Professor de Leon erroneously states, address uniformity of third party liability. The Court did hold that, in order to effectuate the Convention’s purpose of achieving global uniformity of law, the “opinions of our sister signatories” are “entitled to considerable weight”,<sup>71</sup> a position undermined by Prof. de Leon’s suggestion (in para. D6) that U.S. case law should be disregarded because of the differences between the common law of the U.S. and the civil law of France, or because “legal or factual circumstances can be different.”

In *Agana*, the Court found that passenger claims against an airline were subject to the Warsaw Convention, but that passenger claims against other parties were not, nor were indemnity claims brought by other parties against an airline. The Court in *Agana* also addressed *Tseng*:

The *El Al [v. Tseng]* case resolves a long pending dispute as to whether the Convention is the sole source of passenger injury or death claims against airlines, the answer being yes. However, it does not provide guidance as to whether an equitable implied indemnity claim said to “derive” from the passenger claim or is an independent claim. This is important for the Warsaw Convention because the Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. . . . It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28. . . . Thus, the Convention's language suggests that it is only concerned with suits by passengers and shippers.

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<sup>71</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999).

The court did place one limitation on damages, to not allow recovery beyond the limits of the Montreal Convention:

It is accepted that an indemnity suit is not a passenger or shipper action governed by the Convention and may, therefore, be filed in any court which has personal jurisdiction of the parties. However, to the extent that the indemnity claim is for protection from passenger damage claims which exceed the limits of liability provided under the Convention for personal injuries to passengers, the indemnity claim must be limited by the convention to the amount that the carrier has to pay under those limits.

Prof. de Leon (in Para. D8) does point to the anomaly in the court's Solomon-like splitting of the Convention, holding the venue provisions do not apply but the limitation on liability provisions do. This is an inconsistency that the court fails to explain.

In para. D13, Prof de Leon cites, *In re Air Crash Over Mid-Atlantic on June 1, 2009*,<sup>72</sup> for the proposition that, "If Air France can be sued by the Manufacturing Defendants as a third-party Defendant it creates tension with the MC in two ways. First, Air France, though a party, would not be presumptively liable to the Plaintiffs as contemplated by the MC. . . . Second, Air France's presence as a third-party Defendant would undercut the MC's jurisdictional restrictions because Air France will end up indirectly litigating the passengers' claims outside one of the five forums expressly provided for in the MC."<sup>73</sup>

This discussion appears in a portion of the court's opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, "That tension exists regardless of whether the Manufacturing Defendants' third-party claims

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<sup>72</sup> 760 F.Supp.2d 832 (N.D. Cal. 2010).

<sup>73</sup> *Id.* at 846-47.

are barred by the MC.”<sup>74</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

*Olaya v. American Airlines*, (cited by Prof. de Leon in para. D14) can be distinguished on its facts. There, a husband sued an airline and funeral home for delayed delivery of his wife’s remains. The defendant funeral home sought indemnification against the airline, and the airline sought indemnification against the funeral home. All the claims arose out of the same event – delay of delivery of goods. The husband failed to meet the written notice claim requirements of the Montreal Convention, so the court dismissed the claim and cross-claims. As there was no recovery, the indemnification claims became moot, and were therefore dismissed. Moreover, delay is explicitly covered under the Montreal Convention. Products liability actions, such as those that gave rise to Airbus’ indemnification claim, are not.

## **Response to**

### **Opinion of Pablo Mendes de Leon on Airbus’ indemnification and contribution claim against Armavia Airlines before the Toulouse Court of Appeal**

by

Professor Paul Stephen Dempsey

McGill University Institute of Air & Space Law

This case focuses on the procedural question of whether the Warsaw Convention applies to a suit for indemnification brought by an aircraft manufacturer against an airline. If it applies, then the venue provision of the Convention would preclude suit being brought in France. Article 28 of the Convention limits venue to:

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<sup>74</sup> Id. at 846.

“ . . . the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.”

The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

“For the purposes of this Convention the expression ‘international carriage’ means any carriage in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.”<sup>75</sup>

The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7, Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was

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<sup>75</sup> (English translation of the official French version; emphasis supplied).

flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, "The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier." (His footnote 3). Despite the explicit requirements of Article 1, he writes, "It is a question of the transport itself and not of the contract (relating to this transport), . . ." that triggers the Convention's applicability." (His para. D3). He correctly states, in paragraph B3, that the passengers were injured during "international carriage". In paragraph B4, he states that the Warsaw Convention is "applicable to this carriage and to the liability of the air carrier." But that is true only as to a suit brought by passengers against the carrier, which is not the case in this litigation.

In paragraphs C5 and C6, Professor de Leon insists that the Convention is the "main, dominant and exclusive" and "exclusive and exhaustive" regime for subjects and actions falling "within its field of application." However, its field of application is limited by the treaty's jurisdictional provisions. There must be a contract of carriage for international air transportation between the parties to litigation. There was no contract of carriage between the passengers and Airbus; there was no contract of carriage between Airbus and Armavia. Hence, the Warsaw Convention is inapplicable.

Assume two passengers are seated side-by-side on a flight that crashes. One passenger holds a domestic ticket, and the other holds an international ticket. If a passenger holds a ticket for domestic transportation, the treaty does not apply to him, despite the fact that the treaty would apply to a passenger seated next to him holding a ticket for international transportation. (This point I made on page 4 of my amicus brief, a point which Prof. de Leon does not refute). Hence, the flight flown does not determine the applicability of the treaty. The contract of carriage does. There is no contract of carriage between a passenger and an aircraft manufacturer. There is no contract of carriage between an aircraft manufacturer and an air carrier. The Convention, therefore, does not apply. The Warsaw Convention applies only to disputes between airlines and their customers (i.e., passengers and shippers).

In paragraph D15 of his brief, Prof. de Leon concludes that "as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention,

namely the personal injuries of passengers, in alleging that these injuries resulted from the transport, this recourse is subject to the Convention.” This sentence falls by its own weight. The litigation brought by passengers against Airbus was a products liability claim for defective design and/or manufacture of the aircraft in which they were flown. These claimants did not allege that the “injuries resulted from the transport”, but alleged that the injuries resulted from a defective aircraft – claims for which Warsaw has no relevance. Warsaw does not apply to all personal injury claims; it applies to personal injury claims brought by passengers (or shippers) against air carriers.

As I point out on pages 4-5 of my amicus brief, the Warsaw Convention in Articles 10, 12, 16, 17, 18 and 19 specifies the types of suits that may be brought pursuant to it. Prof. de Leon fails to refute my conclusion (at page 5 of my amicus brief) that “a suit brought by an aircraft against a carrier is nowhere mentioned in the treaty.” Under the principle of interpretation of *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”), the drafters considered what suits could be brought pursuant to its application and addressed them explicitly; suits not explicitly mentioned therefore cannot be allowed.

Unfortunately, Professor de Leon does not point to any provision in the treaty that allows its application to an indemnification suit brought by an aircraft manufacturer against an airline. He does not explain how an action for “an indemnity for the damages caused to these passengers . . . falls within the exclusive field of application of the Convention and in particular within its terms in relation to jurisdiction.” (His para. B9) He provides no citation to the treaty or jurisprudence to sustain his conclusion that, “there is a question of jurisdiction in a dispute in relation to indemnification and contribution claims involving a few defendants, but this question cannot be separated from the liability claim. The Convention does not allow it.” (His para. D10). What provision in the Convention does not allow the indemnification claim to be separated from the Article 17 claims for death or bodily injury against the carrier? What provision of the Convention supports his thesis that, “as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention . . . this recourse is subject to the Convention”? (His para. D15). Many of his footnotes merely repeat the text.

At paragraph D2, Professor de Leon cites Rapporteur Henri De Vos in the *travaux préparatoires* as stating that Chapter 3 of the Convention “makes provision for the content: the liability of the carrier”. It is unclear how this contradicts, as Prof. de Leon claims, my assertion that the “contract of carriage is the foundation upon which the Warsaw Convention was constructed”. Indeed, in paragraph D3, Prof. de Leon fails to

refute my quotation (on page 4 of my amicus brief) of Mr. De Vos, where he wrote that, “the text applies . . . only to the contract of carriage . . . and in the legal relationships which arise between the carrier and the persons carried . . . .” Prof. de Leon merely claims he could not find the source.<sup>76</sup>

At para. D7, Professor de Leon contends that in *In re Air Crash Near Nankucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier's liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>77</sup>

Professor de Leon claims (again in Para. D7) that, “the passengers in the Nankucket Island matter did not obtain anything either from Egyptair or from the manufacturers.” Yet, in a subsequent *Nantucket* decision, the court summarized the salient facts: “Flight 990 was flying from the United States to Cairo when it crashed. After the crash, numerous lawsuits were commenced against EgyptAir and/or Boeing; in every suit

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against Boeing, a third-party complaint or cross-claim was brought by Boeing against EgyptAir seeking indemnification and contribution.”<sup>78</sup>

Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

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Hence, the U.S. Supreme Court in *Tseng* does not, as Professor de Leon erroneously states, address uniformity of third party liability. The Court did hold that, in order to effectuate the Convention’s purpose of achieving global

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This discussion appears in a portion of the court's opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, "That tension exists regardless of whether the Manufacturing Defendants' third-party claims are barred by the MC."<sup>83</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

*Olaya v. American Airlines*, (cited by Prof. de Leon in para. D14) can be distinguished on its facts. There, a husband sued an airline and funeral home for delayed delivery of his wife's remains. The defendant funeral home sought indemnification against the airline, and the airline sought indemnification against the funeral home. All the claims arose out of the same event – delay of delivery of goods. The husband failed to meet the written

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The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

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The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7, Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, “The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier.” (His footnote 3). Despite the explicit requirements of Article 1, he writes, “It is a question of the transport itself and not of the contract (relating to this transport), . . .” that triggers the Convention’s applicability.” (His para. D3). He

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At para. D7, Professor de Leon contends that in *In re Air Crash Near Nantucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and

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indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier’s liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>86</sup>

Professor de Leon claims (again in Para. D7) that, “the passengers in the Nankucket Island matter did not obtain anything either from Egyptair or from the manufacturers.” Yet, in a subsequent *Nantucket* decision, the court summarized the salient facts: “Flight 990 was flying from the United States to Cairo when it crashed. After the crash, numerous lawsuits were commenced against EgyptAir and/or Boeing; in every suit against Boeing, a third-party complaint or cross-claim was brought by Boeing against EgyptAir seeking indemnification and contribution.”<sup>87</sup>

Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

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<sup>86</sup> 340 F.Supp.2d 240, 243.

<sup>87</sup> 392 F.Supp.2d 461, 466 (E.D.N.Y. 2005).

In his amicus brief (at para. D7, and in his Conclusion para. 1), Professor de Leon cites to the U.S. Supreme Court decision in *El Al v. Tseng*. He erroneously quotes *Tseng* as follows: “the United States Supreme Court said in its famous Judgment *Tseng*, the creation of a uniform regulation of the third party liability of the carrier – without pointing out to whom in this regard”. The U.S. Supreme Court said no such thing. Instead, the Court wrote: “Recourse to local law, we are persuaded, would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster.”<sup>88</sup> *Tseng* was not a case involving indemnification or products liability. It addressed a suit brought by a passenger against an airline for a vigorous security inspection at check-in. The only point at which the Supreme Court addressed third party liability was in this paragraph:

“The British House of Lords, in *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193, considered the same history, but found it inconclusive. Inclusion of the word “certain” in the Convention's title, the Lords reasoned, accurately indicated that “the [C]onvention is concerned with certain rules only, not with all the rules relating to international carriage by air.” *Id.*, at 204. For example, the Convention does not say “anything ... about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks.”

Hence, the U.S. Supreme Court in *Tseng* does not, as Professor de Leon erroneously states, address uniformity of third party liability. The Court did hold that, in order to effectuate the Convention’s purpose of achieving global uniformity of law, the “opinions of our sister signatories” are “entitled to considerable weight”,<sup>89</sup> a position undermined by Prof. de Leon’s suggestion (in para. D6) that U.S. case law should be disregarded because of the differences between the common law of the U.S. and the civil law of France, or because “legal or factual circumstances can be different.”

In *Agana*, the Court found that passenger claims against an airline were subject to the Warsaw Convention, but that passenger claims against other parties were not, nor were indemnity claims brought by other parties against an airline. The Court in *Agana* also addressed *Tseng*:

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<sup>88</sup> 525 U.S. 155, 160. In the summary preceding the decision, it is written: “Recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention was designed to foster.” 525 U.S. 155, 156.

<sup>89</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999).

The *El Al [v. Tseng]* case resolves a long pending dispute as to whether the Convention is the sole source of passenger injury or death claims against airlines, the answer being yes. However, it does not provide guidance as to whether an equitable implied indemnity claim said to “derive” from the passenger claim or is an independent claim. This is important for the Warsaw Convention because the Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. . . . It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28. . . . Thus, the Convention's language suggests that it is only concerned with suits by passengers and shippers.

The court did place one limitation on damages, to not allow recovery beyond the limits of the Montreal Convention:

It is accepted that an indemnity suit is not a passenger or shipper action governed by the Convention and may, therefore, be filed in any court which has personal jurisdiction of the parties. However, to the extent that the indemnity claim is for protection from passenger damage claims which exceed the limits of liability provided under the Convention for personal injuries to passengers, the indemnity claim must be limited by the convention to the amount that the carrier has to pay under those limits.

Prof. de Leon (in Para. D8) does point to the anomaly in the court’s Solomon-like splitting of the Convention, holding the venue provisions do not apply but the limitation on liability provisions do. This is an inconsistency that the court fails to explain.

In para. D13, Prof de Leon cites, *In re Air Crash Over Mid-Atlantic on June 1, 2009*,<sup>90</sup> for the proposition that, “If Air France can be sued by the Manufacturing Defendants as a third-party Defendant it creates tension with

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<sup>90</sup> 760 F.Supp.2d 832 (N.D. Cal. 2010).

the MC in two ways. First, Air France, though a party, would not be presumptively liable to the Plaintiffs as contemplated by the MC. . . . Second, Air France's presence as a third-party Defendant would undercut the MC's jurisdictional restrictions because Air France will end up indirectly litigating the passengers' claims outside one of the five forums expressly provided for in the MC.”<sup>91</sup>

This discussion appears in a portion of the court’s opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, “That tension exists regardless of whether the Manufacturing Defendants' third-party claims are barred by the MC.”<sup>92</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

*Olaya v. American Airlines*, (cited by Prof. de Leon in para. D14) can be distinguished on its facts. There, a husband sued an airline and funeral home for delayed delivery of his wife’s remains. The defendant funeral home sought indemnification against the airline, and the airline sought indemnification against the funeral home. All the claims arose out of the same event – delay of delivery of goods. The husband failed to meet the written notice claim requirements of the Montreal Convention, so the court dismissed the claim and cross-claims. As there was no recovery, the indemnification claims became moot, and were therefore dismissed. Moreover, delay is explicitly covered under the Montreal Convention. Products liability actions, such as those that gave rise to Airbus’ indemnification claim, are not.

## Response to

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<sup>91</sup> Id. at 846-47.

<sup>92</sup> Id. at 846.

**Opinion of Pablo Mendes de Leon on Airbus' indemnification and contribution claim against Armavia Airlines before the Toulouse Court of Appeal**

by

Professor Paul Stephen Dempsey

McGill University Institute of Air & Space Law

This case focuses on the procedural question of whether the Warsaw Convention applies to a suit for indemnification brought by an aircraft manufacturer against an airline. If it applies, then the venue provision of the Convention would preclude suit being brought in France. Article 28 of the Convention limits venue to:

“ . . . the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.”

The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

“For the purposes of this Convention the expression ‘international carriage’ means any carriage in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High

Contracting Party is not deemed to be international for the purposes of this Convention.”<sup>93</sup>

The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7, Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, “The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier.” (His footnote 3). Despite the explicit requirements of Article 1, he writes, “It is a question of the transport itself and not of the contract (relating to this transport), . . .” that triggers the Convention’s applicability.” (His para. D3). He correctly states, in paragraph B3, that the passengers were injured during “international carriage”. In paragraph B4, he states that the Warsaw Convention is “applicable to this carriage and to the liability of the air carrier.” But that is true only as to a suit brought by passengers against the carrier, which is not the case in this litigation.

In paragraphs C5 and C6, Professor de Leon insists that the Convention is the “main, dominant and exclusive” and “exclusive and exhaustive” regime for subjects and actions falling “within its field of application.” However, its field of application is

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<sup>93</sup> (English translation of the official French version; emphasis supplied).

limited by the treaty's jurisdictional provisions. There must be a contract of carriage for international air transportation between the parties to litigation. There was no contract of carriage between the passengers and Airbus; there was no contract of carriage between Airbus and Armavia. Hence, the Warsaw Convention is inapplicable.

Assume two passengers are seated side-by-side on a flight that crashes. One passenger holds a domestic ticket, and the other holds an international ticket. If a passenger holds a ticket for domestic transportation, the treaty does not apply to him, despite the fact that the treaty would apply to a passenger seated next to him holding a ticket for international transportation. (This point I made on page 4 of my amicus brief, a point which Prof. de Leon does not refute). Hence, the flight flown does not determine the applicability of the treaty. The contract of carriage does. There is no contract of carriage between a passenger and an aircraft manufacturer. There is no contract of carriage between an aircraft manufacturer and an air carrier. The Convention, therefore, does not apply. The Warsaw Convention applies only to disputes between airlines and their customers (i.e., passengers and shippers).

In paragraph D15 of his brief, Prof. de Leon concludes that "as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention, namely the personal injuries of passengers, in alleging that these injuries resulted from the transport, this recourse is subject to the Convention." This sentence falls by its own weight. The litigation brought by passengers against Airbus was a products liability claim for defective design and/or manufacture of the aircraft in which they were flown. These claimants did not allege that the "injuries resulted from the transport", but alleged that the injuries resulted from a defective aircraft – claims for which Warsaw has no relevance. Warsaw does not apply to all personal injury claims; it applies to personal injury claims brought by passengers (or shippers) against air carriers.

As I point out on pages 4-5 of my amicus brief, the Warsaw Convention in Articles 10, 12, 16, 17, 18 and 19 specifies the types of suits that may be brought pursuant to it. Prof. de Leon fails to refute my conclusion (at page 5 of my amicus brief) that "a suit brought by an aircraft against a carrier is nowhere mentioned in the treaty." Under the principle of interpretation of *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others"), the drafters considered what suits could be brought pursuant to its application and addressed them explicitly; suits not explicitly mentioned therefore cannot be allowed.

Unfortunately, Professor de Leon does not point to any provision in the treaty that allows its application to an indemnification suit brought by an aircraft manufacturer

against an airline. He does not explain how an action for “an indemnity for the damages caused to these passengers . . . falls within the exclusive field of application of the Convention and in particular within its terms in relation to jurisdiction.” (His para. B9) He provides no citation to the treaty or jurisprudence to sustain his conclusion that, “there is a question of jurisdiction in a dispute in relation to indemnification and contribution claims involving a few defendants, but this question cannot be separated from the liability claim. The Convention does not allow it.” (His para. D10). What provision in the Convention does not allow the indemnification claim to be separated from the Article 17 claims for death or bodily injury against the carrier? What provision of the Convention supports his thesis that, “as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention . . . this recourse is subject to the Convention”? (His para. D15). Many of his footnotes merely repeat the text.

At paragraph D2, Professor de Leon cites Rapporteur Henri De Vos in the *travaux préparatoires* as stating that Chapter 3 of the Convention “makes provision for the content: the liability of the carrier”. It is unclear how this contradicts, as Prof. de Leon claims, my assertion that the “contract of carriage is the foundation upon which the Warsaw Convention was constructed”. Indeed, in paragraph D3, Prof. de Leon fails to refute my quotation (on page 4 of my amicus brief) of Mr. De Vos, where he wrote that, “the text applies . . . only to the contract of carriage . . . and in the legal relationships which arise between the carrier and the persons carried . . .” Prof. de Leon merely claims he could not find the source.<sup>94</sup>

At para. D7, Professor de Leon contends that in *In re Air Crash Near Nantucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier's liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

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“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>95</sup>

Professor de Leon claims (again in Para. D7) that, “the passengers in the Nankucket Island matter did not obtain anything either from Egyptair or from the manufacturers.” Yet, in a subsequent *Nantucket* decision, the court summarized the salient facts: “Flight 990 was flying from the United States to Cairo when it crashed. After the crash, numerous lawsuits were commenced against EgyptAir and/or Boeing; in every suit against Boeing, a third-party complaint or cross-claim was brought by Boeing against EgyptAir seeking indemnification and contribution.”<sup>96</sup>

Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

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was designed to foster.”<sup>97</sup> *Tseng* was not a case involving indemnification or products liability. It addressed a suit brought by a passenger against an airline for a vigorous security inspection at check-in. The only point at which the Supreme Court addressed third party liability was in this paragraph:

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Hence, the U.S. Supreme Court in *Tseng* does not, as Professor de Leon erroneously states, address uniformity of third party liability. The Court did hold that, in order to effectuate the Convention’s purpose of achieving global uniformity of law, the “opinions of our sister signatories” are “entitled to considerable weight”,<sup>98</sup> a position undermined by Prof. de Leon’s suggestion (in para. D6) that U.S. case law should be disregarded because of the differences between the common law of the U.S. and the civil law of France, or because “legal or factual circumstances can be different.”

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Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. . . . It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28. . . . Thus, the Convention's language suggests that it is only concerned with suits by passengers and shippers.

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<sup>99</sup> 760 F.Supp.2d 832 (N.D. Cal. 2010).

<sup>100</sup> *Id.* at 846-47.

This discussion appears in a portion of the court's opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, "That tension exists regardless of whether the Manufacturing Defendants' third-party claims are barred by the MC."<sup>101</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

*Olaya v. American Airlines*, (cited by Prof. de Leon in para. D14) can be distinguished on its facts. There, a husband sued an airline and funeral home for delayed delivery of his wife's remains. The defendant funeral home sought indemnification against the airline, and the airline sought indemnification against the funeral home. All the claims arose out of the same event - delay of delivery of goods. The husband failed to meet the written notice claim requirements of the Montreal Convention, so the court dismissed the claim and cross-claims. As there was no recovery, the indemnification claims became moot, and were therefore dismissed. Moreover, delay is explicitly covered under the Montreal Convention. Products liability actions, such as those that gave rise to Airbus' indemnification claim, are not.

**Response to**  
**Opinion of Pablo Mendes de Leon on Airbus' indemnification and contribution**  
**claim against Armavia Airlines before the Toulouse Court of Appeal**

by

Professor Paul Stephen Dempsey

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<sup>101</sup> *Id.* at 846.

This case focuses on the procedural question of whether the Warsaw Convention applies to a suit for indemnification brought by an aircraft manufacturer against an airline. If it applies, then the venue provision of the Convention would preclude suit being brought in France. Article 28 of the Convention limits venue to:

“... the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.”

The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

“For the purposes of this Convention the expression ‘international carriage’ means any carriage in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.”<sup>102</sup>

The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7,

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Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon.

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At para. D7, Professor de Leon contends that in *In re Air Crash Near Nankucket Island, Massachusetts on October 31, 1999* (he must have meant Nantucket) “The legal and factual circumstances were very different from the circumstances of this matter . . . .” In fact, they were highly similar cases. *Nantucket* involved a contribution and indemnity claim brought by an aircraft manufacturer against an airline, Egyptair, whose aircraft crashed killing all aboard. Making claims similar to those made by Armavia in this case, Egyptair argued: “subject matter jurisdiction would not exist in the United States if these plaintiffs had sued EgyptAir, jurisdiction cannot exist over the contribution and indemnity claims because ‘[t]he carrier's liability, if any, with respect to such contribution or indemnity claims is coextensive with, and cannot be different from, its liability with respect to the underlying passenger claim.’” The court rejected this argument, concluding:

“The identity of the parties is central to the [Warsaw] Convention. The express purpose of the Convention was to regulate litigation between passengers and carriers. . . . The Convention is silent as to contribution and indemnification claims between manufacturers and carriers and, indeed, as to manufacturers generally; nor has EgyptAir pointed to anything in the drafting history of the Convention that would suggest it meant to cover such claims. For the Court to apply the Convention to contribution and indemnity

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<sup>103</sup> As a minor point, at the end of paragraph D3, Prof. de Leon also exhibits confusion as he refers to my footnote 8 referring to “two treaties . . . without details.” My footnote refers to “two treatises”, not “two treaties.”

claims of manufacturers would expand the reach of the Convention beyond its intended scope.”<sup>104</sup>

Professor de Leon claims (again in Para. D7) that, “the passengers in the Nankucket Island matter did not obtain anything either from Egyptair or from the manufacturers.” Yet, in a subsequent *Nantucket* decision, the court summarized the salient facts: “Flight 990 was flying from the United States to Cairo when it crashed. After the crash, numerous lawsuits were commenced against EgyptAir and/or Boeing; in every suit against Boeing, a third-party complaint or cross-claim was brought by Boeing against EgyptAir seeking indemnification and contribution.”<sup>105</sup>

Portions of Prof. de Leon’s brief are incomprehensible. For example, in para. D7, he writes: “In the Nankucket Island matter, the Court explicitly blamed the derestriction of the indemnity limits of the Warsaw Convention by plaintiffs who claimed against a third party to obtain a supplemental indemnity in addition to the one given by (the limits of) this Convention .” I do not understand what point he is trying to make. Unfortunately, he provides no citation in the opinion to where the court explicitly blamed anything.

In his amicus brief (at para. D7, and in his Conclusion para. 1), Professor de Leon cites to the U.S. Supreme Court decision in *El Al v. Tseng*. He erroneously quotes *Tseng* as follows: “the United States Supreme Court said in its famous Judgment *Tseng*, the creation of a uniform regulation of the third party liability of the carrier – without pointing out to whom in this regard”. The U.S. Supreme Court said no such thing. Instead, the Court wrote: “Recourse to local law, we are persuaded, would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster.”<sup>106</sup> *Tseng* was not a case involving indemnification or products liability. It addressed a suit brought by a passenger against an airline for a vigorous security inspection at check-in. The only point at which the Supreme Court addressed third party liability was in this paragraph:

“The British House of Lords, in *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193, considered the same history, but found it inconclusive. Inclusion of the word “certain” in the Convention's title, the Lords

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<sup>104</sup> 340 F.Supp.2d 240, 243.

<sup>105</sup> 392 F.Supp.2d 461, 466 (E.D.N.Y. 2005).

<sup>106</sup> 525 U.S. 155, 160. In the summary preceding the decision, it is written: “Recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention was designed to foster.” 525 U.S. 155, 156.

reasoned, accurately indicated that “the [C]onvention is concerned with certain rules only, not with all the rules relating to international carriage by air.” *Id.*, at 204. For example, the Convention does not say “anything ... about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks.”

Hence, the U.S. Supreme Court in *Tseng* does not, as Professor de Leon erroneously states, address uniformity of third party liability. The Court did hold that, in order to effectuate the Convention’s purpose of achieving global uniformity of law, the “opinions of our sister signatories” are “entitled to considerable weight”,<sup>107</sup> a position undermined by Prof. de Leon’s suggestion (in para. D6) that U.S. case law should be disregarded because of the differences between the common law of the U.S. and the civil law of France, or because “legal or factual circumstances can be different.”

In *Agana*, the Court found that passenger claims against an airline were subject to the Warsaw Convention, but that passenger claims against other parties were not, nor were indemnity claims brought by other parties against an airline. The Court in *Agana* also addressed *Tseng*:

The *El Al [v. Tseng]* case resolves a long pending dispute as to whether the Convention is the sole source of passenger injury or death claims against airlines, the answer being yes. However, it does not provide guidance as to whether an equitable implied indemnity claim said to “derive” from the passenger claim or is an independent claim. This is important for the Warsaw Convention because the Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here). The airlines liability to or from others for tort or, contract is not governed by the Convention. . . . It is concluded that the indemnity claim is independent of the passenger's claim and that, therefore, it is not governed by the requirement of Article 28. . . . Thus, the Convention's language suggests that it is only concerned with suits by passengers and shippers.

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<sup>107</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999).

The court did place one limitation on damages, to not allow recovery beyond the limits of the Montreal Convention:

It is accepted that an indemnity suit is not a passenger or shipper action governed by the Convention and may, therefore, be filed in any court which has personal jurisdiction of the parties. However, to the extent that the indemnity claim is for protection from passenger damage claims which exceed the limits of liability provided under the Convention for personal injuries to passengers, the indemnity claim must be limited by the convention to the amount that the carrier has to pay under those limits.

Prof. de Leon (in Para. D8) does point to the anomaly in the court's Solomon-like splitting of the Convention, holding the venue provisions do not apply but the limitation on liability provisions do. This is an inconsistency that the court fails to explain.

In para. D13, Prof de Leon cites, *In re Air Crash Over Mid-Atlantic on June 1, 2009*,<sup>108</sup> for the proposition that, "If Air France can be sued by the Manufacturing Defendants as a third-party Defendant it creates tension with the MC in two ways. First, Air France, though a party, would not be presumptively liable to the Plaintiffs as contemplated by the MC. . . . Second, Air France's presence as a third-party Defendant would undercut the MC's jurisdictional restrictions because Air France will end up indirectly litigating the passengers' claims outside one of the five forums expressly provided for in the MC."<sup>109</sup>

This discussion appears in a portion of the court's opinion addressing whether public interest factors of *forum non conveniens* jurisprudence should be invoked to transfer the case to French courts. The court did not, in fact, hold that the Montreal Convention precludes the indemnification claims before it, but only concluded that they would be more conveniently resolved in France. In the paragraph preceding that quoted above, the court observed, "That tension exists regardless of whether the Manufacturing Defendants' third-party claims

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<sup>108</sup> 760 F.Supp.2d 832 (N.D. Cal. 2010).

<sup>109</sup> *Id.* at 846-47.

are barred by the MC.”<sup>110</sup> Hence, the court did not hold that third-party claims are barred by the Montreal Convention.

*Olaya v. American Airlines*, (cited by Prof. de Leon in para. D14) can be distinguished on its facts. There, a husband sued an airline and funeral home for delayed delivery of his wife’s remains. The defendant funeral home sought indemnification against the airline, and the airline sought indemnification against the funeral home. All the claims arose out of the same event – delay of delivery of goods. The husband failed to meet the written notice claim requirements of the Montreal Convention, so the court dismissed the claim and cross-claims. As there was no recovery, the indemnification claims became moot, and were therefore dismissed. Moreover, delay is explicitly covered under the Montreal Convention. Products liability actions, such as those that gave rise to Airbus’ indemnification claim, are not.

This case focuses on the procedural question of whether the Warsaw Convention applies to a suit for indemnification brought by an aircraft manufacturer against an airline. If it applies, then the venue provision of the Convention would preclude suit being brought in France. Article 28 of the Convention limits venue to: “. . . the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.”

The key jurisdictional provision is Article 1(2) of the Warsaw Convention, which provides:

“For the purposes of this Convention the expression ‘international carriage’ means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.”

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<sup>110</sup> *Id.* at 846.

The term “contract”, or its equivalent, is referred to in Articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 22, 23, 28, 30, 32, and 33 of the Warsaw Convention. The contract of carriage with the air carrier is the jurisdictional threshold for the application of the Convention. While there was a contract of carriage between the passengers on the Armavia flight and Armavia Airlines, there was none between those passengers and Airbus, and there was none between Airbus and Armavia Airlines. In Paragraph B7, Professor de Leon concedes that the suits underlying the indemnity action were products liability suits: “The beneficiaries of some passengers . . . sought Airbus’ liability due to a defective aircraft.” Neither the Warsaw nor the Montreal Convention has ever been applied to products liability litigation between a passenger and an aircraft manufacturer. Sometimes, plaintiffs sue both the air carrier and the aircraft manufacturer, but no court has applied the Convention’s rules to an aircraft manufacturer. Under Article 1(2), there was no contract of international carriage between a passenger and the manufacturer of the aircraft on which the passenger was flown; therefore the treaty does not apply. Since the Warsaw Convention does not apply to the underlying products liability suit which is the basis of the indemnity claim, it is unclear how it could apply to an indemnity action based thereon. Professor de Leon seems to believe that because the deceased passengers were on an international flight, and that Airbus seeks indemnification for damages sustained by them, that the Warsaw Convention and its venue provisions govern the suit for indemnification. Professor de Leon confuses the issue when he insists that, “The applicability of the Warsaw Convention . . . depends on the journey of the passengers as agreed with the carrier.” (His footnote 3). Despite the explicit requirements of Article 1, he writes, “It is a question of the transport itself and not of the contract (relating to this transport), . . .” that triggers the Convention’s applicability.” (His para. D3). He correctly states, in paragraph B3, that the passengers were injured during “international carriage”. In paragraph B4, he states that the Warsaw Convention is “applicable to this carriage and to the liability of the air carrier.” But that is true only as to a suit brought by passengers against the carrier, which is not the case in this litigation. In paragraphs C5 and C6, Professor de Leon insists that the Convention is the “main, dominant and exclusive” and “exclusive and exhaustive” regime for subjects and actions falling “within its field of application.” However, its field of application is limited by the treaty’s jurisdictional provisions. There must be a contract of carriage for international air transportation between the parties to litigation. There was no contract of carriage between the passengers and Airbus; there was no contract of carriage between Airbus and Armavia. Hence, the Warsaw Convention is inapplicable. Assume two passengers are seated side-by-side on a flight that crashes. One passenger holds a domestic ticket, and the other holds an international ticket. If a passenger holds a ticket for domestic transportation, the treaty does not apply to him, despite the fact that the treaty would apply to a passenger seated next to him holding a ticket for international transportation. (This point I made on page 4 of my amicus brief, a point which Prof. de Leon does not refute). Hence, the flight flown does not determine the applicability of the treaty. The contract of carriage does. There is no contract of

carriage between a passenger and an aircraft manufacturer. There is no contract of carriage between an aircraft manufacturer and an air carrier. The Convention, therefore, does not apply. The Warsaw Convention applies only to disputes between airlines and their customers (i.e., passengers and shippers).

In paragraph D15 of his brief, Prof. de Leon concludes that “as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention, namely the personal injuries of passengers, in alleging that these injuries resulted from the transport, this recourse is subject to the Convention.” This sentence falls by its own weight. The litigation brought by passengers against Airbus was a products liability claim for defective design and/or manufacture of the aircraft in which they were flown. These claimants did not allege that the “injuries resulted from the transport”, but alleged that the injuries resulted from a defective aircraft – claims for which Warsaw has no relevance. Warsaw does not apply to all personal injury claims; it applies to personal injury claims brought by passengers (or shippers) against air carriers.

As I point out on pages 4-5 of my amicus brief, the Warsaw Convention in Articles 10, 12, 16, 17, 18 and 19 specifies the types of suits that may be brought pursuant to it. Prof. de Leon fails to refute my conclusion (at page 5 of my amicus brief) that “a suit brought by an aircraft against a carrier is nowhere mentioned in the treaty.” Under the principle of interpretation of *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”), the drafters considered what suits could be brought pursuant to its application and addressed them explicitly; suits not explicitly mentioned therefore cannot be allowed.

Unfortunately, Professor de Leon does not point to any provision in the treaty that allows its application to an indemnification suit brought by an aircraft manufacturer against an airline. He does not explain how an action for “an indemnity for the damages caused to these passengers . . . falls within the exclusive field of application of the Convention and in particular within its terms in relation to jurisdiction.” (His para. B9) He provides no citation to the treaty or jurisprudence to sustain his conclusion that, “there is a question of jurisdiction in a dispute in relation to indemnification and contribution claims involving a few defendants, but this question cannot be separated from the liability claim. The Convention does not allow it.” (His para. D10). What provision in the Convention does not allow the indemnification claim to be separated from the Article 17 claims for death or bodily injury against the carrier? What provision of the Convention supports his thesis that, “as soon as the manufacturer seeks the liability of the carrier for damages aimed at by the Convention . . . this recourse is subject to the Convention”? (His para. D15). Many of his footnotes merely repeat the text.

At paragraph D2, Professor de Leon cites Rapporteur Henri De Vos in the travaux préparatoires as stating that Chapter 3 of the Convention “makes provision for the content: the liability of the carrier”. It is unclear how this contradicts, as Prof. de Leon claims, my assertion that the “contract of carriage is the foundation upon which the Warsaw Convention was constructed”. Indeed, in paragraph D3, Prof. de Leon fails to refute my quotation (on page 4 of my amicus brief) of Mr. De Vos, where he wrote that,

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