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THE INTERNATIONAL REGIME OF CARRIAGE OF PASSENGERS

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THE INTERNATIONAL REGIME OF CARRIAGE OF PASSENGERS (1)

1. *General overview.*

Different purposes are pursued by the regulation of international contracts for the carriage of passengers. Firstly, the selection as the governing law of rules having a significant connection with the contract and being adequate to its nature. Secondly, the achievement of uniformity, so that similar contracts are treated in the same way in as many as possible different States.

In addition to these, which are common to all international contracts, a third purpose is pursued by the regulation of international contracts for the carriage of passengers, namely the protection of the passenger as the weak party to the contract.

These different (and to some extent conflicting) purposes are pursued at different levels. The first level is that of conflict of laws rules; as it will be seen below, these are now provided by Regulation (EC) no. 593/2008 ("Rome I Regulation"). The second level is that of uniform law instruments; more specifically the 1999 Montreal Convention for carriage by air, the 1974 Athens Convention, as amended, lastly by the 2002 London Protocol, for carriage by sea, the COTIF-CIV 1980 Berne Convention, as amended by the 1999 Vilnius Protocol, for carriage by rail.

(1) This article reproduces, with amendments and additions, the entry "Carriage of passengers" in the European Encyclopedia of Private International Law (J. Basedow, F. Ferrari, P. de Miguel Asensio, G. Rhul eds.).

The third level is that of European legislation, which has taken an ever increasing role in the regulation of carriage of passengers. On the one hand, European regulations anticipated and extended the application of uniform law instruments and completed their provisions: see Regulations (EC) no. 2027/1997, 889/2002, 785/2004 and 285/2010 for carriage by air, no. 392/2009 for carriage by sea and no. 1371/2007 for carriage by rail. On the other hand, consumer oriented legislation provided additional protection for passengers in areas which were not covered by uniform law instruments: see Regulations (EC) no. 295/1991, 261/2004, 2111/2005, 1107/2006 for carriage by air, no. 1177/2010 for carriage by sea and no. 1371/2007 for carriage by rail.

2. *Conflict of law rules.*

2.1. *Connecting factors.*

In theory several different connecting factors could be used for the purpose of selecting the governing law of a contract for the international carriage of passengers (or for determining the scope of application of a uniform law instrument) (2).

Historically the law of the State of registration of the ship or aircraft (the "law of the flag") enjoyed a certain favour, but in more recent times it has been criticized as not being expression of a significant connection, particularly in view of the widespread use of "flags of convenience". However, it still remains as one of the alternative criteria to define the scope of application of the 1974 Athens Convention.

The place where the contract has been concluded also does not seem to be a really significant connection: it may be merely casual, it can be manipulated, it is often difficult to establish, the more so with the recent diffusion of on-line transactions. Nevertheless it still remains relevant for the purpose of the 1974 Athens Convention. A different, more favourable view of the place where the contract was concluded as a connecting factor could be taken to the extent that it coincides with the permanent residence of the passenger or with the place where the carrier has established a permanent branch.

The most relevant and appropriate connecting factors in relation to contracts for the carriage of passengers seem to be the principal place of business of the carrier (being the party who effects the characteristic performance of the contract) and the place of performance of the contract,

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(2) See S.M. Carbone, *Conflits de lois en droit maritime*, Leyden-Boston, 2010; S.M. Carbone - M. Maresca, *Trasporto marittimo (dir. int. priv.)*, in *Enc. Dir.* XLIV, Milan, 1992, p.1231; P. Bonassies, *La loi du pavillon et les conflits de droit maritime*, Rec. cours t.128, 1969, p. 505.

which could be either the place of departure or the place of destination. As we shall see below, these connecting factors are used both in the Rome I Regulation and in uniform law instruments.

Freedom of choice would of course play a role as a connecting factor, as for any international contract; such role however is somewhat curtailed by material considerations pertaining to the protection of the passenger.

2.2. *The Rome I Regulation.*

a) The Rome I Regulation has a specific rule dedicated to contracts for the carriage of passengers, namely art. 5.2. ([3]).

In this respect there is a substantial difference between the Rome I Regulation and its ancestor, the 1980 Rome Convention. Art. 4.4 of the 1980 Rome Convention applied only to contracts for the carriage of goods, whilst art. 5.4 excluded contracts for the carriage of passengers from the scope of application of the rules dictated for consumer contracts. This was found to be unsatisfactory.

According to item 32 of the preamble to the Rome I Regulation, "owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders". Whether this purpose has been fully achieved remains, as it will be seen below, somewhat questionable. Contracts for the carriage of passengers are not defined in art. 5.2 of the Rome I Regulation. In practice, however, there should be no difficulties in distinguishing them from similar contracts or mixed contracts involving also the carriage of persons; the most common situation would be that of package tours, which are covered by Directive 90/314/EEC.

b) Art. 5.2 of the Rome I Regulation allows freedom of choice of the governing law also in respect of contracts for the carriage of passengers, although not to the same broad extent allowed by art. 3 for the generality of contracts. The choice is in fact restricted to the law of the State where (*a*) the passenger has his habitual residence; or (*b*) the carrier has his habitual residence; or (*c*) the carrier has his place of central administration; or (*d*) the place of departure is situated; or (*e*) the place of destination is situated.

The purpose of these restrictions is apparently that of providing a degree of protection to the passenger; it is doubtful however that this purpose has been effectively achieved.

([3]) See G. Contaldi, *Il contratto internazionale di trasporto di persone*, in N. Boschiero (ed.), *La nuova disciplina comunitaria della legge applicabile ai contratti*, Turin, 2009, p. 359; G. Biagioni, *commentary to Art.* 5, in *NLCC*, 2009, p. 725; S. Tonolo, *La legge applicabile ai contratti di trasporto nel Regolamento Roma I*, in *Riv. dir. int. priv. proc.* 2009, p. 321.

Firstly, there is no provision, equivalent to those in artt. 6.2 or 8.1 in relation to consumer contracts or individual employment contracts, to the effect that the choice of law may not have the result of depriving the "weak" party of the protection afforded by provisions, which can not be derogated, of the law which would be applicable in the absence of a choice of law. Secondly, it is extremely unlikely that in practice the choice of law would be negotiated between the parties; what would almost invariably happen is that the choice of law clause is in the carrier's standard form of contract and is therefore "imposed" by the carrier to the passenger; the result would be that in most cases the law of the principal place of business of the carrier would be selected as a result of the choice of law clause.

c) In the absence of a valid choice of law, art. 5.2 provides for a combination or succession of connecting factors. The contract for the carriage of passengers will thus be governed, in the first place, by the law of the State where the passenger has his habitual residence, but only if the place of departure or the place of destination are also situated in such State. If such coincidence does not occur, the contract for the carriage of passengers will be governed by the law of the State where the carrier has his habitual residence.

The reference to the habitual residence of the passenger as a connecting factor is meant to favour the passenger by making the contract subject to a law with which he is familiar, but its practical impact may be reduced by the requirement of an additional connecting factor. On the other hand, reference to the law of the State where the carrier has his habitual residence would have the advantage of making all individual contracts relating to the same voyage or line subject to the same law and thus producing simplification and reduction of transactional costs.

d) In the same way as art 4 does for the generality of contracts, art. 5.3 provides for an escape clause also in relation to contracts for the carriage of passengers, whereby if it is clear from all the relevant circumstances that the contract is «manifestly more closely connected» with a different country, in the absence of a choice of law, the law of such country will apply.

e) As it has been noted above (see *General Overview*), the conflict of laws rules laid down in art. 5.2 of the Rome I Regulation coexist with several uniform law instruments in the field of international carriage of passengers and it is generally thought that the latter should take precedence. Different explanations have been provided for such precedence (4). One is based on art. 25.1 of the Rome I Regulation, where the reference to international conventions which lay down conflict of law rules is construed

(4) See G. Biagioni, cit., p.718; P. Franzina, *commentary to Artt.. 25-26*, in *NLCC*, 2009, p. 935; S. Tonolo, cit., p.311.

so as to include the provisions in uniform law instruments which define the scope of application of such instruments. Another one is based on the assertion that conflict of law rules and uniform law instruments operate on different levels, so that the former would become necessary only in those situations which do not fall within the scope of application of latter.

The necessity to resort to the conflict of law rules of art. 5.2 of the Rome I Regulation would therefore arise only in rather limited circumstances, i.e. either for those contracts which are not within the scope of a uniform law instrument or for those aspects of a contract which are not covered by such an instrument (including those case where the uniform law instrument itself refers to domestic law).

3. *Uniform law instruments.*

3.1. *Carriage by air.*

a) The history of uniform law instruments regarding carriage by air begins in 1929 with the Warsaw Convention; it is interesting to note that carriage of passengers and carriage of cargo are covered within the same instrument and this will remain a feature throughout, up to the most recent instrument, namely the 1999 Montreal Convention (5).

The rapid developments of carriage of passengers by air and the substantial changes in its socio-economical as well as technological aspects, required frequent updates of the relevant uniform law rules. The first of such updates was the 1955 Hague Protocol, which inter alia increased the limits of compensation. There followed the 1971 Guatemala Protocol and the 1975 Montreal Protocols. The 1961 Guadalajara Convention introduced in the uniform law on carriage by air the notion of "actual carrier" and regulated his liability. In particular, over the years, the rule providing for limited compensation in respect of death or injury claims came under increasing criticism and was challenged for public policy reasons (6). Eventually, the uniform law regarding carriage of passengers by air was

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(5) For an overview of the 1999 Montreal Convention see M. Brignardello - E. Rosafio, *Il contratto di trasporto aereo di persone*, in F. Morandi (ed.), *I contratti del trasporto*, I, Bologna, 2013, p. 3; G. Mastroandrea, *Trasporto aereo di persone (responsabilità del vettore nel)*, in M. Deiana (ed.), *Dizionari di diritto privato - Diritto della navigazione*, Milan 2010, p.478; L. Tullio (ed.), *La nuova disciplina del trasporto aereo*, Naples 2006; G. Romanelli, *Diritto uniforme dei trasporti e Convenzione di Montreal del 1999*, in *Il nuovo diritto aeronautico*, Milan 2001, p. 581; S. Busti, *Contratto di trasporto aereo*, Milan 2001, p. 399; J. Hermida, *The new Montreal Convention: the international passenger's perspective*, in *Air Space Law* 2001, p. 150; T. J. Halen, *The new Warsaw Convention: the Montreal Convention*, in *Air Space Law*, 2000, p. 12; M. Comenale Pinto, *Riflessioni sulla nuova Convenzione di Montreal del 1999*, in *Dir. mar.* 2000, p. 399.

(6) See Italian Constitutional Court 6.5.1985 no. 132, Coccia v. Turkish Airlines, in *Dir. mar.* 1985, p. 75.

reorganized in the 1999 Montreal Convention, which so far remains the final point of its evolution.

b) The 1999 Montreal Convention defines its scope of application at art. 1. The Convention applies to the international carriage of passengers; for the purpose of this provision "international" means that the place of departure and the place of destination must be situated, according to the agreement between the parties, in two different States; in addition, both such States must be contracting States to the Convention. Carriage between two places situated in the same contracting State can also be considered "international" if there is an agreed intermediate stopping place in another State (which does not need to be a contracting State).

c) Following the pattern laid down by the 1961 Guadalajara Convention, the 1999 Montreal Convention deals with the liability of both the contracting carrier (i.e. the person who, as a principal, makes a contract of carriage with a passenger) and the actual carrier (i.e. the person who, by virtue of an authorization from the contracting carrier, performs the whole or part of the carriage). There are in practice various situations where the contracting carrier is not also the actual carrier, e.g. in the cases of wet lease and of code sharing agreements. The liability of both the contracting carrier (for the whole carriage) and the actual carrier (for the part which he performs) is subject to the Convention. The contracting carrier and the actual carrier are jointly liable towards the passenger, who can sue either or both at his choice. The provisions of the Convention apply also to the liability of the servants or agents of the contracting and actual carrier, acting within the scope of their employment.

d) Art. 29 of the 1999 Montreal Convention states that any action for damages, against either the contracting or the actual carrier or their respective servants or agents, "can only be brought subject to the conditions ... as are set out in this Convention". It is debated whether this means that no action at all can be brought against the carrier on the basis of a national law or whether an action based on a national law could be admissible for those heads of damages which could not be recovered under the Convention. The former view has been upheld in relation to the equivalent provision in the 1929 Warsaw Convention (7).

e) The 1999 Montreal Convention does not define the contract of carriage in relation to similar contracts; it only requires carriage to be "for reward" or, if gratuitous, to be performed by an air transport undertaking. In terms of space and time, the carriage of passengers to which the provisions of the Convention apply extends to "any of the operations of

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(7) See US Supreme Court 12.1.1999, El Al Israel Airline v. Tsui, in *Dir. trasp.* 2000, 205 and House of Lords 14.10.1996, Sidhu v. British Airlines, in [1997] *2 Lloyd's Law Rep.*, 76.

embarking and disembarking"; these are not defined and in practice can create some uncertainty.

According to art. 38.1, in the case of combined carriage performed partly by air and partly by some other mode of transport, the provisions of the Convention shall apply only to the carriage by air (provided that, by itself, it would be subject to the Convention).

f) The provisions of the 1999 Montreal Convention governing the liability of the carrier are mandatory. Any contractual clause tending to lessen the liability of the carrier, including choice of law or choice of forum clauses, is therefore null and void.

g) The liability of the carrier of passengers as laid down by the 1999 Montreal Convention is often described as a "two tier" system. In the first "tier", the carrier is under a strict liability towards the passenger for death or bodily injury up to the amount of 100,000 SDR (now increased, pursuan to art. 24 of the Convention, to 113,100 SDR); liability arises by the mere fact that the accident which caused the death or injury took place on board the aircraft or during the operations of embarking or disembarking. In the second "tier", the carrier would be able to avoid liability for amounts in excess of 113,100 SDR if he can prove that the damage was not caused by his, or his servants' and agents', negligence or wrongful act or that such damage was solely due to the negligence or wrongful act of a third party.

h) Art. 17.1 of the 1999 Montreal Convention requires, for the carrier's liability to arise that the death or bodily injury of the passenger be caused by an "accident". The notion of "accident" is not defined in the Convention; it is generally held that it must be an "anomaly" in the operation of the aircraft i.e. something unexpected and unusual (8). As it was decided in the "deep vein thrombosis" cases (9) a pre-existing health condition of the passenger is not an "accident"; on the other hand negligence by the carrier in failing to care for such health condition, if made known to him, would constitute an "accident" (10).

i) Under art. 17.1 of the 1999 Montreal Convention the carrier is liable for the death or "bodily injury" of the passenger. Therefore, purely mental injuries, i.e. those mental injuries which neither are consequences of a bodily injury nor produce a physical alteration, can not be compen-

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(8) See J. Chambers, *The meaning of accident in the air*, in *LMCLQ*, 2010, p. 19; L. Cobbs, *The shifting meaning of "accident" under Article 17 of the Warsaw Convention*, in *Air Space Law* 1999, p. 121; M. Comenale Pinto, *Nozione di "incidente" e condotte omissive del vettore e dei suoi preposti nel trasporto aereo internazionale di persone*, in *Dir. trasp.* 2006, 609.

(9) House of Lord 8.12.2005, Deep Vein Thrombosis and Air Travel Group Litigation, in *Dir. Mar.* 2006, 923; see also Cass. 15.2.2006 no. 3285, Colelli v. Alitalia, in *Dir. trasp.* 2007, 507.

(10) See US Supreme Court 24.2.2002, Olympic Airways v. Husain, in *Dir. mar.* 2006, 930.

sated under the Convention (11). It remains an open question (see *d)* above) whether compensation for purely mental injury, which is not admissible under the Convention, could still be obtained under a national law, or whether this would be precluded by art. 29 of the Convention.

j) The 1999 Montreal Convention does not state which consequences of the death or bodily injury must be compensated nor how such compensation should be calculated. The only uniform rule in this respect is a negative rule in art. 29 whereby punitive, exemplary or other non compensatory damages can not be recovered. Apart from this negative rule, the admissible heads of damages and the amount of compensation are to be determined by the applicable national law. It is generally accepted, and it has been recently confirmed by the ECJ (12) that compensation can include both material and non-material damages (such as pain and suffering, loss of enjoyment, loss of health etc.).

k) Art. 28 of the 1999 Montreal Convention provides, in case of accidents resulting in death or injury of passengers, that the carrier shall make advance payment "if required by its national law". Within the EU the relevant rules are now laid down by EU Regulation 889/2002 (see below).

l) According to art. 50 of the 1999 Montreal Convention, "States Parties shall require their carriers to maintain adequate insurance covering their liability". Uniform rules in this respect within the EU are now dictated by EU Regulation 285/2010 (see below).

m) Under art. 19 of the 1999 Montreal Convention the carrier is also liable for delay in the carriage of passenger, unless he proves that he and his servants and agents took all reasonable measures to avoid such delay or that it was impossible to take such measures. The carrier's liability for delay in the carriage of passengers is limited to 4,150 SDR. (now increased to 4,694 SDR).

n) Liability for loss of or damage to the passenger's checked baggage is governed by artt. 17.2 and 22.2 of the 1999 Montreal Convention. If the event which caused the loss or damage occurred on board the aircraft or during any period when the checked baggage was in his charge, the carrier is liable except in the cases of inherent defect, quality or vice of the baggage. In respect of unchecked baggage, the carrier is liable only if damage resulted from his or his servants' or agents' fault.

Liability for loss of or damage to baggage is limited to 1,000 SDR

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(11) See House of Lords 28.2.2002, King v. Bristow Helicopters, in *Dir. trasp.* 2003, 977 and US Court of Appeals (2nd Circuit) 8.3.2004, Erlich v. American Airlines, in *Dir. tur.* 2005, 51; see also A. Mercer, *Liability of the air carrier for mental injury under the Warsaw Convention*, in *Air Space Law*, 2003, p. 147 and A. Zampone, *Sulla risarcibilità del danno psichico nel trasporto aereo internazionale di persone*, in *Dir. trasp.* 2003, 1012.

(12) Judgement 6.5.2010, case C-63/09, Walz v. Clickair, in *Dir. mar.* 2011, 421; see also L. Tullio, *Il danno risarcibile nel trasporto aereo: il danno morale*, in *Dir. trasp.* 2011, p. 777.

(now increased to 1,131 SDR) for each passenger unless a special declaration of interest has been made.

o) Claims for loss of life or bodily injury, as well as claims for delay or for loss of or damage to baggage, become time-barred if an action is not brought within two years from the date of arrival at destination (or from the date when the aircraft should have arrived or from the date when carriage was stopped).

3.2. *Carriage by sea.*

a) The first attempts to achieve a uniform regime for the international carriage of passengers by sea, namely the 1961 and 1967 Brussels Conventions, were not met by success. The next step was the 1974 Athens Convention, which was subsequently amended with the 1976 London Protocol, the 1990 London Protocol and, more substantially, with the 2002 London Protocol ([13]).

b) The 1974 Athens Convention, as amended by the 2002 London Protocol, (hereinafter the PAL Convention) applies to contracts for the international carriage of passengers and their luggage; for this purpose, carriage is "international" when it takes place between ports located in two different States or between ports located in the same State with an intermediate call at a port in a different State.

In addition to the carriage being "international", there must also be a connecting factor with a contracting State. More precisely, either (i) carriage is performed by means of a ship registered in a contracting State, or (ii) the contract has been concluded in a contracting State, or (iii) the place of departure or destination, according to the contract, is located in a contracting State. Connecting factor (iii) does not require any comment, whilst (i) and (ii) are open to some criticism. The flag of the ship may be a "flag of convenience", having little or no real connection with the business activity of the carrier. The place where a contract is concluded may be difficult to identify (e.g. when tickets are purchased on line) and, to some extent, can also be manipulated.

c) Domestic law, to be identified on the basis of the relevant conflict

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([13]) For a general overview of the 1974 Athens and its 2002 Protocol see A. Zampone, *Il trasporto marittimo di persone*, in F. Morandi (ed.), *I contratti del trasporto*, I, Bologna 2013, p. 469; M. Lopez de Gonzalo, *La responsabilità del vettore marittimo di persone dal Codice della Navigazione al Regolamento (CE) 392/2009*, in *Dir. mar.* 2012, p. 756; S. Zunarelli - A. Romagnoli, *Contratto di trasporto marittimo di persone*, Milan, 2012, p. 292; G. Boi, *Trasporto marittimo di persone (responsabilità del vettore nel)*, in M. Deiana (ed.), *Dizionari di diritto privato - Diritto della navigazione*, Milan, 2010, p. 531; F. Berlingieri, *Le convenzioni internazionali di diritto marittimo e il Codice della Navigazione*, Milan 2009, p. 1131; S. Pollastrelli, *Il contratto di trasporto marittimo di persone*, Milan 2008, p. 193; P. Griggs, *Le Protocol d'Athens*, in *Dr. mar. fr.* 2002, p.291; I. Arroyo, *Notas sobre el contrato de pasaje*, *An. der. mar.* 1993, p. 273.

of law provisions, of course will apply to those contracts which are not subject to the PAL Convention. Even when the PAL Convention applies, some aspects would still be governed by domestic law. More precisely, the Convention refers to the lex fori (i) in art. 6 for the relevance of contributory fault of the passenger, (ii) in art. 7 for the possibility of awarding damages in the form of periodic payments, (iii) in art. 16 for determining the grounds for suspension or interruption of limitation periods.

d) Following the model of the law of carriage by air, the PAL Convention deals with the liability of both the "carrier" (i.e. the contractual carrier) and the "performing carrier" (which is basically the same concept than the "actual carrier" in the 1999 Montreal Convention). The liability of both the carrier and the performing carrier (for the part of the carriage which he actually performs) is subject to the Convention. The carrier and the performing carrier are jointly liable towards the passenger.

The provisions of the Convention apply also to the liability of the servants or agents of the carrier and of the performing carrier, acting within the scope of their employment.

Art. 14 of the PAL Convention states that no action for damages can be brought against a carrier or performing carrier "otherwise than in accordance with this Convention". It therefore becomes irrelevant whether the passenger's claim is framed as in contract or in tort.

e) The PAL Convention does not define the contract of carriage in relation to similar contracts. It would seem that the only requirement is that there must be a contract (which would exclude carriage performed merely out of courtesy), whilst there is no requirement that such contract implies a monetary reward.

Art. 2.2 provides that the Convention shall not apply when the carriage is subject to another uniform law instrument, relating to a different mode of carriage, to the extent the provisions of the latter have mandatory application to the carriage by sea.

The carriage by sea to which the provisions of the Convention apply extends to the period during which the passenger is on board or in the course of embarkation or disembarkation, including carriage by water from land to the ship and vice-versa (if included in the fare or otherwise provided by the carrier), but excluding the period during which the passenger is in a terminal or other port installation.

f) The provisions of the PAL Convention governing the liability of the carrier are mandatory. According to art. 18 of the Convention, any contractual provision purporting to exclude or lessen the liability of the carrier is null and void.

g) A prominent feature of the PAL Convention is that the liability of the carrier for death or "personal injury (which, incidentally, seems to be a broader notion than the "bodily injury" of the 1999 Montreal Convention) is subject to two different regimes, depending on whether or not the

passenger's death or injury was due to a "shipping incident". Although the Convention is silent on this point, it is generally held that the burden of proving that a shipping incident was the cause of damage is on the passenger.

h) "Shipping incident" is defined in art. 3.5 of the PAL Convention as meaning "shipwreck, capsizing collision or stranding of the ship, explosion or fire in the ship or defect in the ship". This list of events is to be considered a closed list, i.e. not capable of being expanded by analogy. The consequence is that certain events, although they could be considered as expression of the inherent risk of navigation, would not constitute a "shipping incident", as it is illustrated by a case (14) where a passenger fell overboard in circumstances which remained unknown and died and the Court had no hesitation to hold that it was not a shipping incident. The last item in the definition of shipping incident, i.e. "defect in the ship" also requires some comment: it is defined in detail in sub-paragraph c) of art. 3.5 and again such definition does not seem capable of being expanded by analogy, which means that "defect in the ship" can not be taken to be synonymous of "unseaworthiness" nor to include e.g. defects in the qualification or training of the crew.

i) The carrier's liability for damages arising from a shipping incident is based on a "two tier" system, set out in art. 3, which clearly resembles (although with a significant difference, as it will be said below) that of 1999 Montreal Convention for the carriage of passengers by air. Up to the amount of 250,000 SDR there is an almost strict liability, i.e. the carrier is liable for death or personal injury unless he proves that the incident (i) resulted from an act of war, hostilities, civil war, insurrection (which notably does not include terrorism) or from a natural phenomenon of an exceptional, inevitable and irresistible character or (ii) was wholly caused by an act or omission by a third party done with the intent to cause the incident.

Above this first tier the carrier is liable unless he proves that the incident which caused the loss occurred without his fault or neglect.

j) When death of or personal injury to a passenger are not caused by a shipping incident, the carrier is liable only if the claimant proves that damage was caused by the fault or neglect of the carrier. It has been noted that this shifting of the burden of proof upon the damaged party seems to follow the pattern of liability in tort (rather than in contract).

k) In all cases, i.e. whether or not the death or personal injury was caused by a shipping incident, the liability of the carrier is limited (pursuant to art. 7 of the PAL Convention) to 400,000 SDR (which marks a

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(14) QBD Commercial Court, 1.3.2005, Davis v. Stena, in [2005] *2 Lloyd's Law Rep.*, 13.

significant difference from the 1999 Montreal Convention on carriage by air, which has no upper limit). Contracting States may enact a higher limitation by domestic law.

The right to limit the carrier's liability is lost if damage resulted from an act or omission of the carrier done with the intend to cause such damage or recklessly and with knowledge that such damage would probably result.

l) Like the 1999 Montreal Convention, also the PAL Convention does not state which consequences of the passenger's death or personal injury must be compensated, nor how such compensation should be calculated. These issues are therefore to be determined under the applicable national law, with only the negative limit, provided by art. 4.5.d of the Convention that punitive or exemplary damages are not admissible.

m) Art. 4 *bis*, which was added to the PAL Convention by the 2002 London Protocol, sets out in detail the requirements for compulsory insurance in connection with the carriage of passengers by sea. Any carrier who actually performs the whole or part of the carriage (be it a "contracting" or "actual" carrier) must maintain insurance or other financial security, to cover liability for death or personal injury under the Convention, for an amount being not less than 250,000 SDR per passenger. This provision applies to carriage of passengers on board ships registered in a Contracting State and licensed to carry more than twelve passengers. Contracting States shall issue certificates attesting that insurance or other financial security is in place as required by the Convention and shall not permit (i) a ship under their flag to operate without a certificate and (ii) ships with a different flag to enter or leave a port in their territory without a certificate. Claims for compensation of damages covered by the insurance or other financial security can be brought directly against the insurer or other person providing financial security.

n) The liability of the carrier for loss of or damage to the passenger's luggage is based on fault but with some difference (i) between cabin luggage and other luggage and (ii) for the former, depending on whether such damage was caused by a shipping incident. The fault or neglect of the carrier is presumed in relation to loss of or damage to non-cabin luggage and to loss of or damage to cabin luggage caused by a shipping incident, whilst the burden of proof is on the passenger in relation to loss of or damage to cabin luggage not caused by a shipping incident.

The liability of the carrier is limited to (i) 2,250 SDR, per passenger, for loss of or damage to cabin luggage, (ii) 12,700 SDR per vehicle, per carriage, for loss of or damage to vehicles, (iii) 3,375 SDR per passenger, per carriage for loss of or damage to other luggage.

o) Claims for death or personal injury as well as claims for loss of or damage to luggage become time-barred after a period of two years. Art. 16.3 of the PAL Convention refers to the law of the Court seized in order to determine the grounds for suspension and interruption of the limitation

period. According to art. 16.4 the limitation period may be extended by a written agreement or unilateral declaration of the carrier.

3.3. *Carriage by rail.*

a) The first achievement in the direction of uniform regulation of international carriage by rail dates back to the end of the XIX century, with a convention signed at Berne in 1890 concerning the international carriage of goods by rail. The first uniform law instrument dealing with international carriage of passengers by rail was the 1923 Berne Convention. At present, the uniform law of international carriage of passengers by rail is made of the 1980 Berne Convention (COTIF), with its Appendix A (CIV), as amended by the 1999 Vilnius Protocol (15).

b) Carriage by rail has traditionally been performed by State monopolies, which also owned and managed the relevant infrastructure; only in recent times a liberalization process has been developing in Europe. The massive involvement of public authorities has also influenced the structure of the international regulation of carriage by rail, where uniform rules for the contract of carriage are set within a framework of inter-governmental and administrative provisions. Such framework is provided by the COTIF Convention, which establishes an international organization (OTIF). OTIF is then entrusted, inter alia, with the task of drafting uniform rules for the international carriage of passengers by rail (art. 2.1 of the COTIF Convention); such uniform rules are to be found in Appendix A to the COTIF Convention, namely the CIV Rules.

c) The CIV Rules apply to all contracts (whether or not with a monetary reward) for the carriage of passengers between a place of departure and a place of destination located in two different contracting States.

The uniform rules also apply when a single contract for the international carriage by rail includes (i) a leg of transport by road or inland navigation within a contracting State or (ii) a leg of transport by sea or by international inland navigation, provided that such services have been registered in a list pursuant to art. 24.1 of the COTIF Convention.

d) The provisions on liability of the CIV Rules apply, irrespective whether the action is framed in contract or in tort, both to the "carrier" (i.e. the carrier who concluded the contract or successive carrier who is liable on the basis of the contract) and to the "substitute carrier" (i.e. a carrier

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(15) See A. Gaggia, *Il trasporto ferroviario di persone*, in F. Morandi (ed.), *I contratti del trasporto*, II, Bologna 2013, p. 1425; M. Comuzzo, *La responsabilità del vettore ferroviario di persone*, in R. Lobianco (ed.), *Compendio di diritto ferroviario*, Milan, 2012, p. 103; S. Busti, *Contratto di trasporto terrestre*, Milan, 2007, p. 341: G. Mutz, *Vers un nuoveau droit de transport international ferroviaire*, in *Rev. dr. unif* 1996, p. 442.

who has not concluded the contract but to whom the carrier has entrusted, in whole or in part, the performance of the carriage), as well as to their respective servants or agents and to the manager of the infrastructure on which the carriage is performed. Recourse actions between the various carriers who have taken part in the carriage are governed by artt. 62-64 of the CIV Rules.

e) As stated in art. 5, the CIV Rules are mandatory and any stipulation which, directly or indirectly, purports to derogate from them shall be null and void.

f) Pursuant to art. 26 of the CIV Rules, the carrier is liable for death of or personal injury or "any other physical or mental harm" to, a passenger which (i) was caused by an accident arising from the operation of the railway and (ii) happened while the passenger was in the railway vehicle or entering or alighting from it; accordingly, there is no restriction to purely "bodily" injury, like the one in art. 17.1 of the 1999 Montreal Convention on carriage by air. Under art. 26.2, the carrier can be relieved from liability only if the accident (i) was caused by circumstances, not connected with the operation of the railway, which in spite of having taken the care required in the circumstances of the case, he could not avoid and the consequences of which he was unable to prevent, (ii) was caused by fault of the passenger, (iii) was caused by the behaviour of a third party, which the carrier, in spite of having taken the care required in the circumstances of the case, could not avoid and the consequences of which he was unable to prevent. In the case of concurring liability of the carrier and of a third party, the former remains liable in full (subject to the limitation provided in art. 30.2, for which see below), without prejudice for his right of recourse towards such third party.

g) Unlike other instruments of uniform law concerning the international carriage of passengers, the CIV Rules set out in some detail which heads of damage, being consequence of the passenger's death or injury, must be compensated under the uniform rules. Under art. 27, in case of death, damages shall include (i) costs, such as those for the transport of the body and funeral expenses, (ii) if death is not immediate, damages as per the following art. 28, (iii) compensation for loss of economic support in favour of those persons whom the passenger had a duty to maintain. In case of personal injury, art. 28 states that compensation shall include (i) costs, such as those for treatment or transport and (ii) financial loss due to reduced working capacity or increased needs.

Other heads of damages, different from those listed in artt. 27 and 28 of the CIV Rules, such as loss of economic support by persons whom the passenger maintained without having a legal duty to do so, can be compensated on the basis of national law (i.e. the lex fori).

h) The liability of the carrier for death or personal injury under the CIV Rules is limited to 175,000 SDR. Such limitation however applies only

if the national law provides for a lower limitation; therefore if the national law provides for a higher limitation, or no limitation at all, the national regime more favourable to the passenger shall apply.

According to art. 48 of the CIV Rules, the carrier shall lose his right to limitation if the death or personal injury resulted from an act or omission of the carrier which were committed either intentionally or recklessly and with knowledge that damage would probably result.

i) Liability for delay is dealt with in art. 32 of the CIV Rules. Liability arises when, "by reasons of cancellation, late running of a train or a missed connection" the passenger's journey can not be continued the same day; the damages to be compensated include the reasonable costs of accommodation and those for notifying the persons expecting the passenger. The carrier is relieved from liability only in the same circumstances set out by art. 26.2 in respect of liability for death or personal injury (see above).

j) Detailed provisions relating to the carrier's liability in respect of hand luggage, animals, registered luggage and vehicles are set out in artt. 33-47 of the CIV Rules.

k) Claims for death or personal injury become time-barred if a notice of the accident is not given within twelve months to one of the carriers involved in the carriage as specified in art. 55. However the claim will not be time-barred in the circumstances set out in art. 58.2, namely when (i) the carrier who is liable has learned of the accident in some other way, (ii) notice of the accident has not been timely given as a result of circumstances not attributable to the claimant, (iii) the claimant proves that the accident was caused by the carrier's fault.

4. *European law.*

4.1. *Carriage by air.*

a) The intervention of European law in the area of international carriage of passengers by air has taken two directions. In the first place it anticipated and extended the application of uniform rules on the liability of the carrier. On a different level, it increased the protection for the passenger as a consumer.

b) The first line of action was initially pursued by Regulation no. 2027/97 (16). Considering the provisions of the 1929 Warsaw Convention, even if amended by 1955 Hague Convention and by the 1961 Guadalajara

(16) In addition to the Authors at footnote 5, see R. Tranquilli Leali - E. Rosafio (eds.), *Il trasporto aereo tra normativa comunitaria ed uniforme*, Milan 2011; B. Franchi - S. Vernizzi (eds.), *Il diritto aeronautico tra ricodificazione e disciplina comunitaria*, Milan 2007; N. Deleuze, *La responsabilité du transporteur aérienne dans la Communauté*, Montpellier 2001.

Convention, to be inadequate, Regulation no. 2027/97 imposed to all EC air carriers (as defined in Regulation no. 2407/92) the application of liability rules in respect of death of or injury to the passenger which basically corresponded to what would then become the 1999 Montreal Convention, namely (i) unlimited liability and (ii) strict liability up to a first tier of 100,000 SDR.

Other provisions of Regulation no. 2027/97 concerned (i) the duty of the carrier to provide, not later than 15 days from identification of the entitled person, advance payments, of no less than 15,000 SDR in case of death and (ii) the duty of the carrier to include in its standard terms and conditions a clear statement reflecting the liability rules to be applied pursuant to the Regulation itself.

c) When the Montreal Convention was eventually signed in 1999, the EC not only ratified it but also, by means of Regulation no. 889/2002, made its provisions on the carrier's liability applicable also to domestic flights within the EU.

d) Both Regulation no. 2027/97 and Regulation no. 889/2002 ruled in rather imprecise terms the obligation of the carrier to be insured in respect of its liability towards passengers. More clarity was made in this respect by regulation no. 785/2004, then amended by Regulation no. 285/2010, which fixed the minimum level of mandatory liability insurance at 250,000 SDR per passenger.

e) The first step on the other line of action (i.e. consumer protection) was Regulation no. 295/91 on denied boarding, which was then replaced by Regulation no. 261/2004 "establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights" (17). As it appears from its title, Regulation no. 261/2004 deals with three malfunctionings of the air carriage of passengers, which, even if they do not cause major injuries or losses, still frequently distress passengers: namely (i) denied boarding (mainly due to overbooking), (ii) cancellation of flight and (iii) long delay.

Regulation no. 261/2004 applies to all passengers departing from an airport located in a Member State as well as to passengers departing from an airport located in a non-member State with destination to an airport in

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(17) See K. Arnold - P. Mendes de Leon, *Regulation (EC) 261/2004 in the light of the recent decisions of the European Court of Justice*, in *Air Space Law* 2010, p. 91; F. Rossi dal Pozzo, *Servizi di trasporto aereo e diritti dei singoli nella disciplina comunitaria*, Milan 2008, p. 183; M. Lopez de Gonzalo, *La tutela del passeggero nel Regolamento CE n. 261/2004*, in *Riv. it. dir. pubbl. com.* 2006, p.223; L. Masala - E. Rosafio (eds.), *Trasporto aereo e tutela del passeggero nella prospettiva europea*, Milan 2006; M. Deiana (ed.), *Studi su: negato imbarco, cancellazione del volo e ritardo nel trasporto aereo*, Cagliari 2005; M. Wouters, *A new European Regulation 261/2004 on compensation and assistance in the event of denied boarding, cancellation or long delay of flights extends the rights of air passengers*, in *Eur. Tr. Law* 2004, p.151.

a Member State if the flight is operated by an EU carrier (unless benefits and assistance are made available in the State of departure).

f) The remedies which are made available to affected passengers are (i) reimbursement of the ticket or re-routing, (ii) right to assistance in the form of meals, refreshments, hotel accomodation and local transport, as appropriate, (iii) in the cases of denied boarding and cancellation also monetary compensation; in case of cancellation, however, compensation is not due if the carrier proves that such cancellation was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken".

The duty to provide such remedies is imposed upon the operating carrier, without prejudice to his right of redress against any other responsible party.

Art. 15 of Regulation n. 261/2004 clarifies that the provisions determining the passengers' rights are mandatory and accordingly such rights can not be waived or limited by contractual clauses.

The remedies afforded by the Regulation do not prevent passengers from seeking further compensation (under the national or international rules governing the contract of carriage).

g) The ECJ has been called on numerous occasions to decide issues relating to Regulation no. 261/2004. The first and perhaps most important decision was the one ([18]) where the ECJ ruled that Regulation no. 261/2004 was not inconsistent with the 1999 Montreal Convention and therefore could not be held to be invalid: the ECJ found that the remedies provided by Regulation no. 261/2004 operate on a different level than those of the 1999 Montreal Convention and therefore should be considered complementary rather than inconsistent with the latter.

In other decisions the ECJ extended the protection offered by Regulation, e.g. by finding that in certain circumstances delay must be considered equivalent to cancellation ([19]), by giving a narrow construction of the "exceptional circumstances" which exonerate the carrier from compensation ([20]), by construing "denied boarding" as not limited only to overbooking ([21]).

h) Regulation no. 2111/2005 ([22]) instituted a "black list" of air

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([18]) ECJ judgement 10.1.2006, case C-344/04, The Queen v. IATA, in *Dir. tur.* 2006, 154.

([19]) ECJ judgements 19.1.2009, case C-402/07, Sturgeon v. Condor Flugdienst, in *Dir. mar.* 2011, 106 and 23.10.2012, case C-581/10, Nelson v. Lufthansa, in *Riv. dir. int. priv. proc.* 2013, 192.

([20]) ECJ judgement 22.12.2008, case C-549/07, in *Dir. trasp.* 2009, 801 and 12.5.2011, case C-294/10, Eglatis v. Latvijas, in *Dir. mar.* 2012, 852.

([21]) ECJ judgement 13.10.2011, case C-83/10, Rodriguez v. Air France, in *Dir. mar.* 2012, 857.

([22]) See B. Franchi, *La tutela del passeggero aereo nel Regolamento CE 2111/2005*, in *Dir. tur.* 2006, p. 219.

carriers who are not allowed to operate to and from EC airports and then imposed on the contractual carrier (or on the tour operator when the flight is included in a holiday package) an obligation to provide information as to the identity of the actual carrier.

i) Regulation no. 1107/2006 ([23]) deals with the rights of disabled or reduced mobility passengers. Pursuant to art. 3 booking or boarding can not be denied because of the disability or reduced mobility of a passenger; the only exceptions allowed are those listed in art. 4.

4.2. *Carriage by sea.*

a) The developments of European law in the area of international carriage of passengers by sea followed a pattern which is very similar to the one described in relation to carriage of passengers by sea.

Regulation no. 392/2009 ([24]) incorporates the provisions of the PAL Convention and makes them applicable to international carriage (as defined in the Convention - see above) as well as to domestic carriage (when performed by ships of classes A and B under art. 4 of Directive no. 98/18/EC), provided that there is a connecting factor with a Member State in the same terms as required pursuant to art. 2.1 of the PAL Convention. The provisions of the PAL Convention incorporated in Regulation no. 392/2009 are supplemented by the IMO Reservation and Guidelines for Implementation of the Athens Convention adopted on 19 October 2006, which are therefore made binding.

b) The liability regime is therefore that resulting from artt. 3 to 16 of the PAL Convention and the insurance provisions are those of art. 4 bis of the same Convention but, as an effect of the IMO Guidelines being also incorporated in the Regulation, liability insurance is required also in relation to war risks as defined in art. 2.2 of the Guidelines (i.e. also including terrorism) and the carrier's liability in respect of death or personal injury caused by such risks is limited to 250,000 SDR per passenger or 340,000,000 SDR overall per ship on each distinct occasion.

c) Other provisions of Regulation no. 392/2009 concern (i) the liability of the carrier in the event of loss of or damage to equipment used

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([23]) See G. Camarda, *Il trasporto di disabili - Profili giuridici pluriordinamentali*, in *Dir. mar.* 2011, p. 749; N. Luongo, *Persons with disabilities and their right to fly*, in *Air Space Law* 2009, p. 149.

([24]) In addition to the Authors at footnote 13, see F. Berlingieri, *The Athens Convention on the carriage of passengers and their luggage by sea and the European Parliament Regulation (EC) no. 392/2009*, in *Dir. mar.* 2011, p. 1125; M. Comenale Pinto, *Le tendenze unificatrici nella disciplina del trasporto di persone*, in *Scritti in onore di F. Berlingieri*, Genova, 2010, p. 385; E. Rosoeg, *New laws on passengers' rights*, in *Scandinavian Inst. Mar. Law.* 2010, p. 325; F. Persano, *Problematiche concernenti l'incorporazione della Convenzione di Atene del 202 in materia di responsabilità dei vettori marittimi di persone nel diritto comunitario*, in *Dir. comm. int.* 2007, p. 205.

by passengers with reduced mobility, which is made subject to the same rules provided by art. 3.3 of the PAL Convention in respect of cabin luggage, (ii) the duty of the carrier who actually performed the carriage, in case of death or personal injury caused by a shipping incident, to make an advance payment, which in case of death must be no less than 21,000 SDR, (iii) the duty of the carrier to provide passengers with "adequate and comprehensible information" regarding their rights under the regulation.

d) Following a pattern similar to that adopted with Regulation no. 261/2004 in relation to carriage by air, Regulation no. 1177/2010 deals with the rights of passengers when travelling by sea or inland waterway ([25]).

Regulation no. 117/2010 applies (i) to passenger services where the port of embarkation is in a Member State, (ii) to passenger services where the port of embarkation is in a non-member State but the port of disembarkation is in a Member State and the carrier is established in a Member State or offers passenger services operated to or from a Member State, (iii) cruises where the port of embarkation is in a Member State.

The Regulation deals with the rights of passengers in the event of interrupted travel, i.e. cancelled or delayed departures. Denied boarding was not considered to be relevant in connection with carriage of passengers by sea.

e) The remedies which are made available to passengers are (i) re-routing or reimbursement of the ticket, (ii) assistance in the form of meals, refreshment and accommodation (on board or ashore), (iii) monetary compensation in an amount which varies depending on the extent of the delay. Accommodation is not due when the cancellation or delay is caused by weather conditions endangering the safe operation of the ship. Monetary compensation is not due when the cancellation or delay is caused by weather conditions (as above) or by other extraordinary conditions "which could not have been avoided even if all reasonable measures had been taken".

The duty to provide such remedies is imposed, in the first place, on the contractual carrier; however, art. 5.2 states that also the performing carrier shall be subject to the provisions of the Regulation.

The provisions of Regulation no. 1177/2010 determining the passengers' rights are mandatory and accordingly such rights can not be waived or limited by contractual clauses.

The remedies afforded by the Regulation do not preclude passengers

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([25]) See S. Zunarelli, *Il Regolamento (UE) n. 1177/2010 sui diritti dei passeggeri che viaggiano per mare: obblighi di vettori e di operatori terminalisti e problemi applicativi*, in *Dir. mar.* 2012, p. 779; M. Brignardello, *I diritti dei passeggeri nel trasporto marittimo e nelle altre modalità: uniformità e differenze*, in *Dir. mar.* 2012, p. 786.

from seeking further damages in accordance with the applicable law (including Directive 90/314/EEC).

f) Artt. 7 to 15 of Regulation no. 1177/2010 deal with rights of disabled or reduced mobility passengers. In particular, under art. 7, they can not be denied reservations, tickets or embarkation because of their condition; the only exceptions, provided in art. 8, relate to safety requirements and to the design of ships or port infrastructure and equipment.

g) Other provisions of Regulation no. 1177/2010 deal with the duty of the carrier (i) to provide adequate travel information, (ii) to inform passengers of their rights under the Regulation, (iii) to set up an accessible mechanism for the handling of complaints by passengers.

4.3. *Carriage by rail.*

a) Following a similar pattern to that of Regulation no. 889/2002 in respect of carriage by air, Regulation no. 1371/2007 ([26]) implemented the provisions of the CIV Rules within the European Union.

The Regulation in fact applies "to all journeys and services throughout the Community provided by one or more railway undertaking licensed in accordance with Council Directive 95/18/EC". Art. 11 of the Regulation provides that the liability of the railway carrier in respect of passengers and their luggage shall be governed by the relevant provisions of the CIV Rules.

b) The provisions of the CIV Convention regarding the carrier's liability are then supplemented by further specific provisions of the Regulation, concerning mandatory insurance in respect of liability towards passengers (art. 12) and advance payments to be made if a passenger is killed or injured, within fifteen days and, in case of death, in an amount not less than Euro 21,000.

c) Chapter IV of Regulation no. 1371/2007 deals with the liability of the carrier for delay, missed connections and cancellations. The model is that of Regulation no. 261/2004 for carriage by air, although there are some differences in the relevant events and in the available remedies.

Art. 15 of Regulation no. 1371/2007 refers to the relevant provisions of the CIV Rules, but additional remedies are available under the Regulation.

In case of an expected delay in the arrival at final destination exceeding 60 minutes, art. 16 of the Regulation gives to the passenger the choice between reimbursement of the ticket or re-routing. Under art. 17 of the

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([26]) See V. Piccinini, *L'entrata in vigore del Regolamento CE n. 1371/2007 sui diritti e gli obblighi dei passeggeri nel trasporto ferroviario*, in *Giur. mer.* 2010, p. 1773; L. Carpaneto, *Il diritto comunitario dei trasporti tra sussidiarietà e mercato - Il caso del trasporto ferroviario*, Turin 2009, p. 304; I. Bon Garcin, *L'evolution du droit de transports en Europe*, in *Rev. dr. tr.* 2008, p. 10.

Regulation, in case of delay for which the ticket has not been reimbursed pursuant to art. 16, the passenger is entitled to monetary compensation in an amount between 25% of the ticket price for a delay between 60 and 119 minutes and 50% of the ticket price for a delay of 120 minutes or more. The ECJ ([27]) ruled that the compensation provided by art. 17 of the Regulation is due also when delay is due to force majeure or another exonerating circumstance as per art. 22.2 of the CIV Rules.

In case of delay exceeding 60 minutes the passenger is also entitled to meals, refreshments, accommodation and, if the train is blocked on the tracks, transport to a railway station.

d) The rights of disabled persons or persons with reduced mobility are set out in Chapter V of Regulation no. 1371/2007. Reservations and tickets must be offered to disabled or reduced mobility persons at no additional costs and a railway carrier can not refuse to accept a reservation from or issue a ticket to a disabled or reduced mobility person.

e) The provisions of the Regulation determining the passengers' rights are mandatory and can not be waived or derogated by contract.

f) Art. 29 requires railway undertakings to inform passengers about their rights under the Regulation.

5. *Jurisdiction.*

5.1. *Regulations no. 44/2001 and no. 1215/2012.*

Neither EU Regulation no. 44/2001 ("Brussels I") nor its successor Regulation no. 1215/2012 contain any specific provision in respect of carriage of passengers. The jurisdiction rules laid down for consumer contracts are in fact expressly stated not to apply to contracts of transport (unless transport is included in a package tour).

Apart from the very general provisions establishing jurisdiction for the Courts of the places where the defendant has its domicile (art. 2 of Regulation no. 44/2001 and art. 4 of Regulation no. 1215/2012) or "a branch, agency or other establishment" (art. 5.5 of Regulation no. 44/2001 and art. 7.5 of Regulation no. 1215/2012), reference must therefore be made to the rules applying to "matters relating to a contract" (art. 5.1 of Regulation no. 44/2001 and art. 7.1 of Regulation no. 1215/2012).

b) Art. 5.1.b of Regulation no. 44/2001 (and in the same manner art. 7.1.b of Regulation no. 1215/2012) states that in contracts for the "provision of services", as the contract of carriage is to be considered,

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([27]) ECJ judgement 26.9.2013, case C-509/11, OBB Personenverkher, not (yet) published in Italy, available on *http://curia.europa.eu*.

disputes can be brought before the court of the place "where, under the contract, the services were provided or should have been provided".

In relation to Regulation no. 261/2004 (see above), the ECJ (28) construed art. 5.1.b of Regulation no. 44/2001 as referring to both the place of departure and the place of arrival of the aircraft (the option between the two being on the plaintiff). It is doubtful whether this conclusion would apply also to other claims under a contract for the carriage of passengers, such as in particular, claims for death or personal injury.

c) The jurisdiction rules laid down by Regulation no. 44/2001 (or Regulation no. 1251/2012) will however be often superseded by specific rules in the uniform law instruments dealing with international carriage of passengers, provided that such jurisdiction rules comply with basic principles of predictability and sound administration of justice (29).

5.2. *Uniform law instruments.*

a) All uniform law instruments include provisions on jurisdiction, the purpose of which is to enhance the protection afforded to passengers by giving them a wide range of alternative, easily accessible, jurisdictions where an action can be brought (30).

b) Art. 33.1 of the 1999 Montreal Convention on the carriage of passengers by air provides that actions for damages can be brought "at the option of the plaintiff", before a Court in a contracting State either (i) in the place where the carrier has its domicile or (ii) in the place where the carrier has its principal place of business or (iii) in the place where the carrier has a place of business through which the contract was made or (iv) in the place of destination of the flight.

An additional jurisdiction is provided by art. 33.2 in respect of claims for damages resulting from death or personal injury: in these cases the carrier can be sued also before the Court of the place where the passenger has his permanent residence, provided that the carrier operates services to or from such place and conducts his business there from owned or leased premises.

Art. 47 of the 1999 Montreal Convention states that, when an actual

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(28) ECJ judgement 9.7.2009, case C-204/08, Rehder v. Air Baltic, in *Riv. dir. int. priv. proc.* 2009, 1025.

(29) ECJ judgement 4.5.2010, case C-533/08, TNT Express v. AXA, in *Riv. dir. int. priv. proc.* 2010, 1041; see also C. Tuo, *Regolamento Brussels I e convenzioni su materie particolari: tra obblighi internazionali e primauté del diritto dell'Unione Europea*, in *Riv. dir. int. priv. proc.* 2011, p. 377.

(30) See M. Lopez de Gonzalo, *Giurisdizione civile e trasporto marittimo*, Milan 2005, p. 115; S. M. Carbone, *Criteri di collegamento giurisdizionale e clausole arbitrali nel trasporto aereo: le soluzioni della Convenzione di Montreal del 1999*, in *Riv. dir. int. priv. proc.* 2000, p. 5.

carrier is involved, actions can be brought "at the option of the plaintiff", either before one of the Courts which are competent in respect of the contractual carrier or before the Court of the place where the actual carrier has its domicile or its principal place of business.

Pursuant to art. 49, clauses "altering the rules as to jurisdiction" are declared to be null and void.

c) The 1974 Athens Convention on carriage of passengers by sea, as amended by the 2002 Protocol, provides that actions can be brought "at the option of the claimant" and provided that the Court is located in a contracting State, either (i) in the place where the defendant has its permanent residence or its principal place of business, or (ii) in the place of departure or of destination according to the contract of carriage, or (iii) in the place of permanent residence of the claimant, provided that the carrier has a place of business in such place, or (iv) the place where the contract was made, provided that the carrier has a place of business in such place.

Agreements on a different jurisdiction or on arbitration are admissible only if concluded after the occurrence of the incident which caused the damage.

d) Art. 57 of the CIV Convention on carriage of passengers by rail states that actions can be brought before the Court in a contracting State designated by agreement between the parties or before the Court in a contracting State either (i) in the place where the defendant has its domicile or habitual residence or its principal place of business or, (ii) in the place where the defendant has a branch or agency through which the contract was concluded.