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“DOOR-TO-DOOR” APPLICATION OF THE INTERNATIONAL AIR LAW CONVENTIONS: COMMERCIALY CONVENIENT, BUT DOCTRINALLY DUBIOUS

Dr George Leloudas

This article examines the multimodal aspects of the international air law conventions in carriage of goods. It suggests that their unimodal philosophy and text, albeit nominally unimodal, have been used by the judiciary to create “air plus” liability regimes, to the eminent satisfaction of both air carriers and freight forwarders. In essence, unimodal conventions have quietly morphed into multimodal ones without much fanfare, and this development continues. In that respect, international air law conventions are not the odd ones out of multimodal transport any more. Despite their marginalisation in the multimodal discussions, they have been adapted to provide seamless “door-to-door” cover, and in the process have done enough to emasculate the existing domestic and international liability systems for road transport.

I. INTRODUCTION

International carriage of goods by air occupies a peripheral role in the literature and practice of (unimodal and multimodal) transport law. Aviation lawyers snub it for the lucrative practice of passengers’ carriage; drafters of air law conventions habitually put passengers in the front seat of any discussions. Non-aviation lawyers consider the Montreal Protocol No 4¹ and the Montreal Convention 1999² as the *enfants terribles* of transport law. Their high limits of liability, despite being unbreakable, and the strict channelling of risks to the air carrier are considered innovations that threaten to unsettle the much more carrier-friendly maritime conventions.³

Inevitably, the drafting philosophy of the Montreal Protocol No 4 and the Montreal Convention 1999 hindered consensus in regulating multimodal transport, since the unusual paradigm which they represented required accommodation.⁴ To the further annoyance of multimodalists the Montreal philosophy proved remarkably successful in practice. It was widely adopted and it significantly reduced litigation even in the USA.⁵ Its very success made a strong case for moving it to the centre of any multimodal discussions.

However, that never happened. The non-aviation world regarded the high Montreal liability limits as anathema: possibly tailor-made for the expensive cargoes carried by air, but unsuited to any other mode of transport. This dismissive view ironically focuses on one aspect of Montreal that might well have been adjustable, yet its effects have been so strong that the benefits of the liability system of the Montreal Protocol No 4 and the Montreal Convention 1999 have never been studied properly in

Senior Lecturer in Law, Institute of International Shipping and Trade Law, Swansea University

¹ Additional Protocol No 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air Signed At Warsaw on 12 October 1929 as Amended By the Protocol Done at the Hague on 28 September 1955, Signed at Montreal on 25 September 1975 .

² Convention for the Unification of Certain Rules for International Carriage by Air Signed at Montreal on 28 May 1999

³ See the comments of the Delegate of Norway in International Civil Aviation Organization (“ICAO”), *International Conference on Air Law at Montreal*, Vol. 2-Documents (Doc 9154-LC/174-2, 3 to 25 September 1975), 107.

⁴ See G Leloudas “Multimodal Transport under the Warsaw and Montreal Convention Regimes: A Velvet Revolution?”, ch 5 of B Soyer and A Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in 21st Century* (2014), 78-86 (“Leloudas”).

⁵ As of 12 January 2015, 109 States have ratified the Montreal Convention 1999 and 58 States have ratified the Montreal Protocol No 4. There are no published statistics on air cargo litigation rates, yet the consensus in the aviation community is that these two legal instruments have reduced litigation: “...the consequence has been a notable diminution in the area of litigation seeking recovery for damages or delay to cargo [fn omitted]. This in turn has resulted in comparatively fewer claims being presented for indemnification under a carrier’s all risks policy, with many claims now falling within the insured carrier’s policy deductible – typically US\$5,000-10,000”:K Posner, T Marland, P Crystal, *Margo on Aviation Insurance*, 4th edn (2014), [14.04].

a multimodal context or played a significant part in multimodal discussions.⁶ Surprisingly, this marginalisation has not impeded the quiet conversion of the international air law conventions into legal instruments regulating multimodal transport. With the support of the judiciary, the Montreal Protocol No 4, as well as the Warsaw Convention 1929⁷ and the Hague Protocol 1955⁸ have tacitly insinuated themselves into road transport under what can be called the “Warsaw Convention system”. Moreover, the judicial treatment of the Montreal Convention 1999 so far indicates that this trend is here to stay.

This article examines the multimodal aspects of the international air law conventions in carriage of goods. It suggests that their unimodal philosophy and text, albeit nominally unimodal, have been used by the judiciary to create “air plus” liability regimes, to the eminent satisfaction of both air carriers and freight forwarders. In essence, unimodal conventions have quietly morphed into multimodal ones without much fanfare, and this development continues. In that respect, international air law conventions are not the odd ones out of multimodal transport any more. Despite their marginalisation in the multimodal discussions, they have been adapted to provide seamless “door-to-door” cover, and in the process have done enough to emasculate the existing domestic and international liability systems for road transport. However doctrinally questionable, this development is here to stay and needs to be incorporated into any discussion of the future of multimodal regulation.⁹

This coverage is divided into four main parts. Part II reviews the operational considerations that underpin this expansion. Parts III, IV and V consider the text and the intention of the drafters of the international air law conventions with respect to their limits of application. Parts VI and VII review the English and American cases that demonstrate good practice in this respect. Lastly, in Part VIII the various ways that American courts are using to expand the scope of application of the air conventions are critically analysed.

II. OPERATIONAL CONSIDERATIONS

The expansion of the air law conventions to cover “air plus” transport is predicated on the use of the air waybill (“AWB”) as a document of multimodal transport.¹⁰ Arrangements vary, but two stand out. First, where the air carrier deals directly with a consignor, it may undertake both aerial and land segments (usually via a subcontractor), issuing an AWB to cover both. Secondly, when a freight forwarder or consolidator is involved, it will issue a house air waybill (“HAWB”) to the consignor covering the entire carriage of the goods (usually “door-to-door”). The subcontracted air carrier then

⁶ See T. Nikaki, “Bringing multimodal transport into the new century: is the uniform liability system the way forward?” (2013) 78 J Air L & Com 69.

⁷ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929.

⁸ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955.

⁹ The only recommendation for a multimodal regulation that looked carefully into the liability system of the Montreal Protocol No 4 and the Montreal Convention 1999 is the non-mandatory draft regime proposed to the European Commission by M. Clarke, R. Herber, F. Lorenzon, J. Ramberg, “Integrated services in the intermodal service (ISIC). Final Report Task B: Intermodal Liability and Documentation” (Southampton, 2005).

¹⁰ Resolution 600b of the International Air Transport Association (“IATA”) contains the standard text of the Conditions of Contract of AWBs and the Notice that appears on the face of AWBs. Resolution 600a of IATA contains, among other things, the form and instructions for filling the AWBs. The Resolutions have mandatory application to IATA’s member air carriers (250 members as of 12 January 2015), as well as to non-member air carriers which interline with IATA’s members. The most recent amendment of Resolution 600b was published on 1 July 2010. Unless otherwise indicated, any references to AWB in the text are to the version of July 2010. See M Clarke and D Yates, *Contracts of carriage by land and air*, 2nd edn (2008), 3.671ff.

issues a master air waybill (“MAWB”) to the freight forwarder covering the aerial segment (usually “airport-to-airport”). The MAWB identifies the freight forwarder as consignor and consignee.¹¹

These arrangements are not the only possible ones in aviation. Yet they seem to be the arrangements of choice of both air carriers and freight forwarders. In the first, the AWB is used as a means of limiting the exposure of the air carriers, who, being “in charge” of the goods during both aerial and road segments, are potentially liable under two different liability regimes. To control this exposure, the standard AWB imposes a liability limit of 19 SDRs per kg irrespective of the mode of transport used or the route travelled.¹² However, it refrains from imposing a liability system for non-Warsaw Convention system or non-Montreal Convention 1999 carriage, leaving its determination to the courts.

In the second arrangement, freight forwarders may qualify as contracting carriers under the Warsaw Convention system or the Montreal Convention 1999.¹³ As such, they are subjected to a mandatory liability regime sacrificing the flexibility of their standard terms and conditions,¹⁴ but as a *quid pro quo* get the advantage of the unbreakable limits of liability and well-identified rights and obligations vis-à-vis the actual air carrier. At the same time, the air carrier’s period of responsibility lasts only from the moment it receives the goods from the freight forwarder (usually) in a warehouse inside or near the airport to the time when it delivers the goods to the freight forwarder at the airport of destination. In this arrangement, the MAWB is used in its original role as a document of carriage by air. However, its unimodal role is undermined, since it forms part of a wider transaction that uses the HAWB as a document of multimodal transport.

Air carriers would opt for the second arrangement, leaving the first one for the occasions that they deal directly with consignors. By doing so, they enjoy the following three benefits: (a) they avoid the liability of transporting goods over land; (b) they take advantage of the protection of the international air law conventions with the ensuing insurance benefits; and (c) they retain the freight forwarder as their direct client. This last consideration is important because freight forwarders more often than not exercise their recourse rights by reference to commercial considerations rather than a strict application of the legal principles.

What is striking in both arrangements is the absence of the consignment note, the document of choice of the CMR.¹⁵ The consignment note, for all intents and purposes, has been replaced by the AWB even in CMR routes that follow or precede the aerial segment. The CMR tells us that this substitution does not (or at least shall not) affect its applicability.¹⁶ Yet the deliberate omission of the consignment note indicates the desire of air carriers and freight forwarders to oust national and/or international road transport provisions in favour of the applicability of the Montreal Protocol No 4 or the Montreal Convention 1999.

In essence, their argument is that the AWB evidences a contract of multimodal transport covering both land and aerial segments. The entire “door-to-door” trip is thus governed by the law of the dominant mode of transport, *i.e.* the international air law conventions, or, failing that, by the

¹¹ See W Müller-Rostin in E Giumulla and R Schmid (eds), *Montreal Convention* (2010), 4-2/4-3 (“Müller-Rostin Montreal”) and H-J Schramm, *Freight forwarder’s intermediary role in multimodal transport chains. A social network approach* (Berlin 2012), 70-71.

¹² Condition 4.

¹³ See Montreal Convention 1999, Arts 39-48 and the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Signed at Guadalajara on 18 September 1961 (“Guadalajara Convention 1961”). A detailed analysis of the conditions under which freight forwarders qualify as contracting carriers is outside the scope of this article.

¹⁴ See Montreal Convention 1999, Art 47 and Guadalajara Convention 1961, Art IX.

¹⁵ Convention on the Contract for the International Carriage of Goods by Road Signed at Geneva on 19 May 1956.

¹⁶ See CMR, Art 4.

provisions of the AWB. Insurers happily endorse these arrangements, since their exposure is identical across the entire trip and limited by reference to the unbreakable limits of the Montreal Convention 1999 or the contractual limits of the AWB. This is a familiar argument to shipping lawyers.¹⁷ Yet it has not been adequately explored in an aviation context probably because of the commercial considerations mentioned above: freight forwarders quite often (and especially when the loss falls within their deductible) take the hit by compensating the cargo-interests without seeking indemnity from air carriers, hence preserving their highly preferential rates agreements.

In any case, the bottom line is that both air carriers and freight forwarders attempt to expand the applicability of the Montreal Protocol No 4 and the Montreal Convention 1999 over multimodal transport. For air carriers this is not a recent trend. It goes back to the Warsaw Convention 1929, where despite the vulnerability of the liability limits,¹⁸ they were desperate to expand its applicability to the road segment in order to avoid the uncertainties of domestic and international laws governing it. These attempts were particularly tenacious in the USA, which retained the (admittedly outdated) Warsaw Convention 1929 for most of the twentieth century. Freight forwarders, by contrast, were not initially keen to join the Warsaw Convention 1929 because their conditions of contract gave them more flexibility regarding the exclusions of liability.

When the Guadalajara Convention 1961 came into force, subjecting freight forwarders acting as principals to the mandatory liability regime, feelings were mixed. The Argentina delegate at the Guadalajara International Conference even suggested excluding freight forwarders from its scope entirely.¹⁹ His suggestion was turned down, but it reflected the mixed feelings of freight forwarders towards the then international air law conventions. These feelings were reversed, however, with the unbreakable limits of the Montreal Protocol No 4 and the Montreal Convention 1999. Today freight forwarders issuing a HAWB undoubtedly prefer to qualify as carriers to take advantage of the convention limits. At the same time, they also support the expansion of the international air law conventions to the road segment, so as to be subject to a seamless liability regime with unbreakable limits for the whole duration of the transport.

Commercially sensible as this practice is, it leaves a lot of unanswered questions about the limits of application of the international air law conventions. It also raises a number of questions regarding the practice of using two sets of AWBs to cover a single instance of multimodal carriage. The former issue involves the limits of application of the mandatory international rules, while the latter raises questions of how contractual agreements can be used to extend these mandatory rules to create “air plus” regimes. However, courts are not always willing to distinguish between the scope of application of the conventions and that of the AWBs. This blurring inevitably results in extending the provisions of the conventions on the back of the geographical scope of the AWB.

As such, it is important to identify the formal limits of application of the international conventions before examining whether they can be extended for the sake of commercial convenience. This is the aim of the next Part by reference to their text and the *travaux préparatoires*.

III. THE UNIMODAL PHILOSOPHY AND TEXT OF THE WARSAW CONVENTION SYSTEM

Multimodal applications of the air law conventions are predominantly driven by the need of air carriers and freight forwarders (and their insurers) for legal certainty in their operations. This need was evidenced as early as 1929. The French delegate at the Warsaw International Conference

¹⁷ See W. Tetley, *Marine Cargo Claims*, 4th edn (2008), 25-72 (Vol. 1) and 2255 – 2284 (Vol. 2) (“Tetley”).

¹⁸ Breakable in the case of “wilful misconduct”: Warsaw Convention 1929, Art 25.

¹⁹ ICAO, *International Conference on Private Air Law at Guadalajara, Minutes* (Doc 8301-LC/149-1, August-September 1961), 41.

proposed that the Warsaw Convention 1929 covers “door-to-door” shipments, *i.e.* from the moment of taking in charge by the air carrier to that of delivery at the consignee’s premises.²⁰ Such an arrangement would have created a pioneering “air plus” convention that would satisfy the modern needs of air carriers and freight forwarders, with road segments automatically covered by it.

But it was eventually turned down: both the Rapporteur and the British delegate argued that the aim of the Warsaw Convention 1929 should be the regulation of the carriage of goods by air in a strict sense.²¹ Any expansion beyond the airport would intrude into the regulations of other modes of transport and would create the following paradox: “Let us imagine a truck which transports goods from London to Croydon; if it’s a question of an ordinary truck, along the route it is subject to national laws; if the truck belongs to the air carrier is going to be subject to the Convention. Then you will have two systems of liability, because it is well stipulated that any transport other than air carriage is placed under the regime of the common law”.²²

The antipathy of the majority of the drafters to the creation of an “air plus” regime is not surprising, as unimodalism was then the accepted paradigm. For that reason, the limits of application of the Warsaw Convention system could not have been made clearer on paper. Firstly, the Warsaw Convention 1929 provides that “[t]he carriage by air ... comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of landing outside an aerodrome, in any place whatsoever”.²³ This provision, which can found with minor linguistic amendments in all versions of the Warsaw Convention system,²⁴ sets two conditions that need to be satisfied before the air carrier is held liable: the goods must be lost, damaged or destroyed while in an air carrier’s charge and they must be in the carrier’s charge either on board an aircraft or inside an airport (absent an emergency landing). In essence, therefore, the Warsaw Convention system provides unambiguously for “airport-to-airport” cover.²⁵

Secondly, the Warsaw Convention system reinforces this by stating in all versions that “[t]he period of carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome”.²⁶ This provision could not be clearer in rejecting the French delegate’s proposal to apply the convention to the land carriage of a shipment that is destined for international carriage by air. The air carrier’s liability for goods that are damaged, destroyed or lost during the land segment falls to be decided by either domestic laws, international laws governing the land segment or the contractual provisions of the AWB.

Thirdly, Art 31(1) of the Warsaw Convention system makes express reference to multimodal transport and provides, in all versions, that “in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1”. One could argue that this provision is superfluous in light of the two previous ones. Yet a closer look reveals that this is not the case. The two previous provisions set the geographical limits of application of Art 18. This provision clarifies that the issuance of an AWB to cover both the aerial and the land segment must not be interpreted as a

²⁰ G. Ripert in R. Horner and D. Legrez (trans), *Second International Conference on Private Aeronautical Law* (New Jersey, 1975), 72-73 (“*Warsaw Convention 1929 Minutes*”).

²¹ H. De Vos in *Warsaw Convention 1929 Minutes*, 77.

²² Sir A Dennis in *Warsaw Convention 1929 Minutes*, 77.

²³ Art 18(2).

²⁴ Hague Protocol 1955, Art 18(2); Montreal Protocol No 4, Art 18(4).

²⁵ This is a familiar arrangement to maritime lawyers. Art 4.1 of Hamburg Rules provides that a sea carrier bears responsibility for the goods from the port of loading to the port of discharge. Despite the unpopularity of the Hamburg Rules this arrangement has been described as an improvement over the “tackle-to-tackle” approach of the Hague-Visby Rules : see N Gaskell, R Asariotis, Y Baatz, *Bills of lading: law and contract* (London, 2000), 8.32 (“*Gaskell*”).

²⁶ Hague Protocol 1955, Art 18(3) and Montreal Protocol No 4, Art 18(5).

means of expanding the mandatory application of the air law conventions over the non-aerial segments. A contract of multimodal international carriage might be evidenced in an AWB, with the aerial segment falling into the ambit of the Warsaw Convention system: but the Warsaw Convention system is to resist the temptation of expanding its ambit beyond the aerial segment.

And lastly, the role of the AWB as a facilitator of multimodal transport is evidenced in Art 31(2), found in all versions of the Warsaw Convention system: “[n]othing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air”. This provision explicitly authorises the use of the AWB as a document of multimodal transport by allowing conditions referring to different modes of transport to be included in it. Most importantly, however, it reinforces Art 31(1) by creating a level-playing field between the two modes of transport. It makes clear that any such conditions should not intrude into the applicability of the Warsaw Convention system, simultaneously reiterating what we knew all along: the Warsaw Convention system applies to the aerial segment alone, with “aerial segment” meaning “airport-to-airport”.

These four provisions taken together give a strong unimodal tone to the Warsaw Convention system. Their drafting is clear, leaving no loose ends (on paper at least) regarding the geographical limits of the air carrier’s liability. While clearly acknowledging the operational dependency of air transport on ancillary road carriage, they are not the result of the multimodal short-sightedness of their drafters, but rather the product of an intentional choice between an “air” and an “air plus” regime. The Warsaw Convention system is designed to apply to the aerial segment of a multimodal transport without at the same time intruding into the territory of the accompanying means of transport.²⁷

The Warsaw Convention system’s acceptance of multimodalism is also evident in its provision on unlocalised loss, damage or destruction (“LDD”) of the cargo: “If, however, such carriage [*i.e.* carriage by land, by sea or by river performed outside an aerodrome] takes place in the performance of a contract for carriage by air, for the purposes of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air”.²⁸ This is the only situation that the text of the Warsaw Convention system explicitly provides for its application outside the boundaries of the airport. This “plus” application is permitted only under three strict conditions: the non-aerial segment must be covered by a contract for carriage by air, the non-aerial segment must be performed with the aim of delivering the goods to the consignee, loading them on an aircraft or transshipping them, and the event causing the LDD must be unable to be localised on either the aerial or the non-aerial segment. Of these, the third one is the most important one from a multimodal perspective. This is so because it leaves no doubt that the aim is not to expand the scope of application of the Warsaw Convention system outside the airport. Instead, it is a provision that gives an easy way out of the unlocalised loss predicament by applying the provisions of the Warsaw Convention system in situations where there is no evidence as to where the LDD took place. If one can prove that the LDD occurred during the non-aerial segment, the Warsaw Convention system will not apply. The result will be the same even if an AWB covers both segments and the non-aerial segment is being performed in order to load, deliver or tranship the goods. In essence, the said provision creates a rule of evidence rather than a rule as to scope: when in doubt, apply the Warsaw Convention system.

It is important to note that the operational and legal growth of multimodalism during the second part of the twentieth century did not affect the multimodal provisions of the Warsaw Convention system.

²⁷ This is in contrast to the CMR which has been recently found in more than one continental jurisdictions to be ill-prepared for such application: see BGH 17.7.2008, I ZR 181/05, TranspR 2008 and Hoge Raad 1.6.2012, SS 2012, No 95.

²⁸ Hague Protocol 1955, Art 18(3) and Montreal Protocol No 4, Art 18(5).

The Montreal Protocol No 4 revolutionised the carriage of goods by air in 1971 by permitting the use of e-AWBs and providing for a system of strict liability with unbreakable limits. Yet its drafters refrained from revolutionising its multimodal provisions, if by revolution we mean providing for “air plus” or even “door-to-door” cover. The aforementioned provisions were left intact, avoiding as a result a legislative expansion of the limits of the Warsaw Convention system to the non-aerial segment.

IV. WHAT IS AN AIRPORT?

Before going through the multimodal provisions of the Montreal Convention 1999, it is important to look into the term “airport” as it is the boundary of application of the Warsaw Convention system. The Warsaw Convention system does not explain the term and courts have dealt with it in multiple occasions.

A general consensus has been built worldwide supporting a strict interpretation of what counts as an airport. In most cases the physical perimeter fence is identified as the boundary of the aerial segment.²⁹ Any LDDs occurring outside that fence are not covered by the Warsaw Convention system, even if the goods were in the charge of an air carrier at the time and even if the LDD occurred within the functional area of the airport. This strict interpretation with its closed universe leaves little uncertainty as to the limits of application of the Warsaw Convention system, but it does not take into consideration the operational realities of modern airports, where “[it is virtually impossible to crowd] all the unloading and delivery facilities of every carrier into the geographical confines of busy airports”.³⁰ To cater for this commercial reality, an alternative interpretation has been advanced which sets the limits of the Warsaw Convention system at the functional rather than the physical boundaries of the airport. As yet a minority view, it has the potential to play a crucial role in the interpretation of the Montreal Convention 1999.³¹ In this Part, an attempt to raise its profile will be attempted by clearing up a few misconceptions about its scope.

The two main ambassadors of the functional interpretation are (a) Judge Van Graafeiland in his dissenting opinion in the American *Victoria Sales Corp v Emery Air Freight Inc*,³² and (b) Morrison J in the English decision *Rolls Royce plc v Heavylift-Volga DNEPR Ltd*.³³ Both Judges concluded that LDDs occurring in a warehouse outside the perimeter fence, but within the operating airport area fell into the Warsaw Convention system.

The misunderstandings about the functional interpretation of the term airport stem from the opinion of Judge Van Graafeiland in *Victoria Sales*. Neither the opinion nor the reported judgment clarify whether the warehouse, where the loss occurred, was located within the airport area. The reported decision only states that the said warehouse was located “less than one-quarter mile outside of the airport....near but nonetheless outside the boundaries of Kennedy Airport”.³⁴ Did it refer to the physical boundaries or the functional boundaries of the airport? If it referred to the former, the follow up question then arises: was it located within the functional boundaries of the airport? And if outside, was the loss within the scope of the Warsaw Convention system?

Most importantly, Judge Van Graafeiland made the following controversial statement in his dissenting opinion: “if the carrier is performing the normal functions of an airport facility in its handling of cargo, the general intent of the framers would be to bring it within the ‘transportation by air’ provisions of

²⁹ For a review of the relevant cases see J McClean (ed), *Shawcross and Beaumont on Air Law*, issue 144 (2015), Division VII, [862] (“*Shawcross*”).

³⁰ *Victoria Sales Corp v Emery Air Freight Inc* 917 F.2d 705 (2nd Cir. 1990), at 710 per Judge Van Graafeiland (dissent).

³¹ See next Part of the article.

³² 917 F.2d 705 (2nd Cir. 1990).

³³ [2000] 1 All ER (Comm) 796.

³⁴ *Victoria Sales*, 706 per Judge Meskill.

the Convention”.³⁵ Taken literally, it provides for an open-ended application of the Warsaw Convention system: if handling of cargo by the carrier prescribes the boundaries of functionality without any geographical limitation, a loss occurring in the warehouse of an air carrier tens of miles away from an airport would still fall within the Warsaw Convention system.

This expansive ambit is not what the Warsaw Convention system intends and certainly not what the functional interpretation of the term “airport” is about. Sensing the inadequacies of such an interpretation, Morison J in *Rolls Royce* rightly distinguished it, making a clear distinction between warehouses located airside, automatically within the Warsaw Convention system by virtue of their location within the fence, and premises landside, covered by the Warsaw Convention system only if they were within the functional limits of the airport. The functional limits of an airport depended according to Morison J, on a mix of geographical and operational factors: “...the cargo shed fell within the area commonly known as East Midlands Airport...[A] person when entering the airport passes a sign announcing that fact. There are byelaws which apply to the roadway where the accident occurred. The land where the accident happened is owned by the airport operating company. The cargo shed is used for the carriage by air of freight and, if within an aerodrome, the contract of carriage would start, or end, there. The shed is a part of the facilities required for the operation of any airport and for the international carriage by air of cargo. Although there are facilities within the airport which are generally available to the public, such as a hotel or petrol station, the fact that some buildings are merely peripheral to the operation of the airport does not alter the character of the airport...”³⁶

It is striking how sophisticated this analysis is compared to that in *Victoria Sales*. They share an operational aspect: the warehouse must be used to store goods delivered from or destined to international carriage by air and function as if it were airside. What Morrison J added was the geographical limitation: the warehouse must be near the airside boundary and in the area that the average commercial man would regard as an airport. The functional approach of Morison J is no doubt reflective of the realities of carriage by air. It enables the application of the same liability regime in what currently is considered an airport, but also retains a strong link to the aerial segment. It is submitted that Judge Van Graafeiland in *Victoria Sales* had a similar approach in mind, even though his broad statement needs to be qualified by reference to the geographical limitations imposed by Morrison J.

However, the strict approach is preferable from a multimodal perspective as it provides a clear cut-off point of application of the Warsaw Convention system. Commercially sensible as the functional approach is, its drawback is uncertainty of regimes: it leaves the limits of the Warsaw Convention system to be determined on an “airport-by-airport” basis. The preference of the majority of courts for the strict interpretation supports the undoubted unimodal character of the Warsaw Convention system. It also creates a simple rule of application: the Warsaw Convention system covers LDD to goods in the carrier’s charge if and only if it took place during the period of transport from the fence of the airport of departure to the fence of the airport of destination.

This strict rule serves the Warsaw Convention system well.³⁷ Yet the implementation of the Montreal Convention 1999 brings the functional interpretation into the focus for the reasons that are analysed in the following Part.

³⁵ *Ibid.*, 711.

³⁶ *Rolls Royce*, [32].

³⁷ The drafters of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“the Rotterdam Rules”) opted for a geographical delimitation in Art 1.7 and Art 19 on the basis that it is the simpler solution; see A/CN.9/544, [30]. However, they left the definition of port to domestic laws, since providing such a definition in the Rotterdam Rules could “pose considerable difficulties”, see A/CN.9/544, [30]. Concerns were raised that leaving the determination to national laws “could result in unnecessary and expensive litigation”, yet it was endorsed as the lesser of two evils; see A/CN.9/621, [148]. Lessons from the interpretation of the term airport in the international air law conventions can be learned.

V. THE NOT SO CLEAR TEXT OF THE MONTREAL CONVENTION 1999: A MORE MULTIMODAL PHILOSOPHY?

The drafters of the Montreal Convention 1999 spent little time discussing the cargo provisions during its *travaux préparatoires*.³⁸ By that time, a consensus already existed that the Montreal Protocol No 4 was a successful legal instrument that required merely some light polishing. A proposal to re-open the discussion regarding unbreakable limits of liability met with wide disapproval on the basis that “it had become a well-established practice within the international air cargo industry to make liability limits unbreakable”.³⁹ At the same time, the freight forwarders documented their new-founded love for the Montreal Convention 1999. FIATA and IATA advanced a common stand against breakable limits of liability arguing that “[r]everting to breakable limits would foster needless litigation over whose insurer should pay for any claim in excess of the new limit”.⁴⁰

The multimodal provisions of the Montreal Convention 1999 as a result reflected amendments in two respects only, one that went almost unnoticed at the time and one which, although momentous, is outside the scope of this article.⁴¹ The unnoticed amendment can be found in Art 18(3). The requirement of the Warsaw Convention system that the goods shall be in the air carrier’s charge “...in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever” disappeared. Instead, carriage by air for the purposes of Art 18(1) comprised the period during which the goods are in the charge of the carrier. If one views this provision in isolation, it causes a major upheaval, since it has the potential to create a “door-to-door” scope for the Montreal Convention 1999. If a carrier arranges transport from the consignor’s premises to the airport of destination, or through to the consignee’s premises from the airport of departure, it is in charge of the goods for both segments: without the Warsaw airport limitation, it can thus be argued that the Montreal Convention 1999 covers the entire “door-to-door” transport.

However, this is to ignore the first sentence of Art 18(4) which was carried over from the Warsaw Convention system: “[t]he period of carriage by air does not extend to any carriage by land, by sea or by inland waterways performed outside the airport”. Since the land carriage from the consignor to the departure airport or from the airport of destination to the consignee constitutes “carriage by land performed outside the airport” under Art 18(4), it must be outside the Montreal Convention 1999, even when the goods are in the air carrier’s charge. There is nothing in the text of the Montreal Convention 1999 (or the Warsaw Convention system) to give priority to Art 18(3) over the first sentence of Art 18(4). Reading them together, we must surely avoid making the first sentence of Art 18(4) otiose. Still, the purpose of the deletion of the airport limitation in Art 18(3) is an enigma. The *travaux préparatoires* are unhelpful: the delegates simply took the draft provision for granted and did not discuss it. From a drafting perspective, the wording of Art 18(3) and Art 18(4) acquires a symmetry, as it avoids the repetition of the geographical limitation that can be found in two consecutive paras of Art 18 in the Warsaw Convention system.⁴² In that respect, the Montreal Convention 1999 reaches the same result as the Warsaw Convention system in a more elegant manner. Art 18(3) sets the basic rule that the carrier shall be held liable while it is in charge of the goods. Art 18(4), containing

³⁸ ICAO, *International Conference on Air Law at Montreal. Convention for the Unification of Certain Rules for International Carriage by Air, Volume 1- Minutes* (Doc 9775-DC/2, 10-28 May 1999) (“*travaux préparatoires* of the Montreal Convention 1999”).

³⁹ *Ibid.*, 99 (Japanese Delegate).

⁴⁰ *Ibid.*, 98 (IATA).

⁴¹ The addition can be found in the third sentence of Art 18(4) which provides as follows: “If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air”.

⁴² Hague Protocol 1955 Art 18 (2) and Art 18(3); Montreal Protocol No 4, Art 18(4) and Art 18(5).

multimodal-related provisions, sets the limitations of para. 3: carriage by air does not extend to any non-aerial segment performed outside an airport.

Reading Art 18(3) as devoid of any limitations would contradict both Art 18(4) and Art 38(1) (which, reproducing Art 31(1) of the Warsaw Convention system, states that in case of combined carriage the Montreal Convention 1999 applies only to the carriage by air, *i.e.* the period while the goods are in the carrier's charge other than in the course of carriage by land, sea or inland waterways outside an airport). The fact that Art 38(1) is subject to Art 18(4) reinforces this conclusion. Art 38(1) is subject to the second and third sentences of Article 18(4) which exceptionally provide for the application of the Montreal Convention 1999 outside the aerial segment in the cases of unlocalised LDD (second sentence) and unauthorised substitution of mode of transport (third sentence).

This reading of the Montreal Convention 1999 respects its text and retains its unimodal philosophy. LDD is subject to it provided that the goods are in the charge of the carrier and that the event causing it takes place during the aerial segment. There is nothing in the Montreal Convention 1999 to suggest that the barrier has moved away from the airport as its limit of application, or that it covers "door-to-door" transport. Indeed, it is noteworthy that IATA did submit a proposal at the Montreal International Conference to move the barrier to cover off-airport warehouses,⁴³ but this was specifically turned down. Having said that, the deletion of the airport limitation from Art 18(3) is not trivial. On the contrary: it creates its own paradox. Land movement of the goods by an air carrier from the airport to a warehouse outside it is not subject to the Montreal Convention 1999; yet the actual storage of the goods by the air carrier in the warehouse is subject to it, since they are in charge of the carrier (Art 18(3)) and warehousing is not subject to the airport limitation of the first sentence of Art 18(4). In essence, the Montreal Convention 1999 is disapplied from the moment the truck passes the perimeter fence of the airport and reapplied as soon as the goods are unloaded in the air carrier's warehouse. Surely, this result could not have been the intention of its drafters: it certainly does not make any commercial sense.

One way of resolving this paradox would be to treat this land movement as ancillary to aerial operations: in other words, not as land carriage at all, but as air carriage subject to the Montreal Convention 1999. This way a seamless liability system would be created between the aircraft and the warehouse of the air carrier. This is an interpretation that finds support in the "absorption doctrine" of multimodal transport which essentially argues that "subordinate aspects of the contract are 'absorbed' into this main element".⁴⁴ The land transport here is of minor importance. It would not have happened but for the aerial transport and the safekeeping by the air carrier, and as such, it ought to be absorbed by one of them: it matters not which, since in both cases the Montreal Convention 1999 will apply.⁴⁵

However, this escape is problematic for two reasons. Firstly, there is no indication of it in the text or *travaux préparatoires* of the Montreal Convention 1999. Being a convention for the unimodal transport of goods by air, there was no need to delve into such discussion and it does not seem that Art 18 was drafted with this doctrine in mind, unlike Art 1(1) of the 1980 UN Multimodal Convention.⁴⁶ If it had been, the delegates would have accepted IATA's proposal to make land carriage to

⁴³ See ICAO, *International Conference on Air Law. Convention for the Unification of Certain Rules for International Carriage by Air. Montreal, 10-28 May 1999, Volume 2, Documents* (Doc 9775-DC/2, 1999), 76-77 per IATA.

⁴⁴ M.Hoeks, *Multimodal transport law. The law applicable to the multimodal contract for the carriage of goods* (the Netherlands, 2010), 71-72.

⁴⁵ A different solution is given in the Hague-Visby rules. The prevailing judicial and academic view is that their "tackle-to-tackle" scope of application is expanded to cover losses occurring while the goods are stored ashore awaiting transhipment, provided that a bill of lading covering the entire trip has been issued. See *Mayhew Foods v Overseas Containers Ltd* [1984] 1 Lloyd's Rep. 317 and *The Anders Maersk* [1986] 1 Lloyd's Rep 483. This is also the opinion of J Wilson, *Carriage of goods by sea*, 7th edn (2010), 182-183 ("*Wilson*"); *Tetley (Vol 1)*, 30-31 and *Gaskell*, [9.20-9.22].

⁴⁶ United Nations Convention on International Multimodal Transport of Goods Signed at Geneva on 24 May 1980.

warehouses outside the airport subject to the Montreal Convention 1999. As it is, the term “carriage by land, sea or by inland waterways” is used in a generic manner without any qualifications.

Secondly, if one applies this doctrine to the Montreal Convention 1999, which are the limits of its applicability? Can one argue that loading or delivery operations fall to be absorbed by the Montreal Convention 1999 on the basis that they are too supplementary to the aerial segment, especially if they cover short distances? And if so, what is the role of the airport delimitation of the first sentence of Art 18(4)? Would the incorporation of such a doctrine in the Montreal Convention 1999 not convert it to a “door-to-door” convention by the back door? Such an interpretation would also make the second sentence of Art 18(4) on unlocalised losses irrelevant, since it would be applicable any time the air carrier was in charge of the goods during aerial or land transport. In addition, it would contradict the first sentence of Art 18(4), since it would apply it during carriage by land outside an airport. In short, it is submitted that the “absorption doctrine” can have no place in the Montreal Convention 1999.

Having said that, there is little doubt that courts will find it tempting to bring commercial sense in this issue by applying the Montreal Convention 1999 to the land movement between the aircraft and the off-the-airport warehouses. It is probable that they will expand its scope in a controlled manner to cover the land movement towards such warehouses on the basis that the textual amendment of Art 18(3) demonstrates a relaxation of its limits. However, it is to be hoped that this interpretation will not give a *carte blanche* to courts to create an “air plus” regime.

A better (though partial) solution to the paradox mentioned above is to apply the functional interpretation of the term “airport”. This would retain the integrity of the text of the Montreal Convention 1999, make sense of the change in the wording of Art 18(3), and nevertheless retain the Convention’s unimodal philosophy. The air carrier would be liable while in charge of the goods inside an airport-related area extending past the airport fence; any land movement within this area (e.g. from the aircraft to the air carrier’s warehouses outside the fence) would be covered by the Montreal Convention 1999. This would be the result not of the “absorption doctrine”, but instead of the fact that the land movement took place within airport limits. The moment goods were moved by land past the functional limit of the airport, whether for delivery, loading or for moving to a warehouse, the first sentence of Art 18(4) would disapply the Convention.

The functional interpretation does not have a plausible response to the question of what regime to apply to goods stored in a carrier’s warehouse outside the functional limits of the airport. Art 18(3) might suggest that the Montreal Convention 1999 was applicable, since the goods would still be in the carrier’s charge (although without being moved). It is nevertheless submitted that this question should be resolved against the application of the Montreal Convention 1999. Applying an international convention on carriage by air to storage in a warehouse in the middle of nowhere is a step too far. To escape this conclusion, the term “in charge” in Art 18(3) should, it is suggested, be read in the context of the aim of the Montreal Convention 1999 to regulate carriage by air within an airport, interpreting “airport” to mean the functional area of the airport rather than its physical fence. This would accommodate carriers’ warehouses inside the functional area of an airport without resorting to domestic theories of multimodal transport, simultaneously excluding warehouses miles from any airport by reference to the unimodal philosophy of the Montreal Convention 1999. That way the Convention would remain a unimodal convention that is prepared for the multimodal realities of the international carriage of goods by air. It would not replace the international conventions and domestic rules on land transport or create a “door-to-door” cover. Instead, it would, as intended, create two segments, the aerial and the non-aerial, leaving each to its own legal devices.

However, the best laid plans of mice and men gang aft agley. Air carriers, and courts, often simply ignore the unimodal philosophy and the text of the Warsaw Convention system and the Montreal Convention 1999. The attitude of air carriers vis-à-vis the land segments of their operations is evident in a relatively old statement of IATA in the ICAO deliberations of one of the drafts of the 1980 UN

Multimodal Convention: "...in virtually every case the air cargo moves also by road to provide the shipper with 'door-to-door' service. These road arrangements are essentially incidental and ancillary to the principal movement by air and such pick-up and delivery service by truck should not be regarded as an intermodal transport and should be excluded from the scope of applicability of the draft convention..."⁴⁷

This statement advocates a blunt incorporation of the "absorption doctrine" into the air law conventions, and should be rejected for two reasons. Firstly, the fact that an AWB covers the entire transport is neither here nor there; the geographical limit of liability of the air carrier under the conventions depends on the terms, not of any AWB, but of the relevant convention: that is whether the air carrier is in charge of the goods in the air or within an airport or its hinterland. Secondly, the fact that the operations of loading or delivery are ancillary to the air segment does not mean that they cannot be subject to different legal regimes. Neither the Warsaw Convention system nor the Montreal Convention 1999 provide for the absorption of land carriage within air transport.

The views of IATA are not isolated. Instead, they are part of a wider trend to create an "air plus" regime for the sake of commercial convenience, however much this distorts the text and the philosophy of the air law conventions. This trend also affects sea carriage, and indeed is the inevitable result of the failure to agree on a multimodal convention to provide seamless legal cover for the entire duration of a transport operation. Initially this development was confined to the USA, but it has now expanded to European jurisdictions, where it threatens with extinction the international and domestic laws governing road transport that form part of a multimodal carriage. The next three Parts critically examine this trend in the aviation context. Parts VI and VII cast a fresh eye on two well-known aviation cases relevant to the issues discussed so far. Both demonstrate good judicial practice with respect to the limits of applications of the air law convention. In Part VIII a number of cases in the USA are analysed that demonstrate bad practice with regards to the limits of the Warsaw Convention system and the Montreal Convention 1999. The aim is to identify the deficiencies in their reasoning.

VI. GOOD JUDICIAL PRACTICE: THE ENGLISH APPROACH

English courts have so far demonstrated a strict adherence to the unimodal character of the Warsaw Convention system by setting its boundaries firmly at the airport. While they support a functional interpretation of the term "airport", the consensus is that the Warsaw Convention system cannot be expanded to provide "door-to-door" cover. Most recently, this approach was confirmed in the decision of the Court of Appeal in *Quantum Corporation Ltd v Plane Trucking Ltd*,⁴⁸ as well as in that of the House of Lords in *Datec Electronics Holdings Ltd v United Parcels Service Ltd*, albeit in passing.⁴⁹

Much has been written about *Quantum* and the interrelation between CMR and the Warsaw Convention system. What has not received as much attention is the attitude of both the High Court and the Court of Appeal towards the boundaries of the Warsaw Convention system. For Mance LJ (as he then was) setting the boundaries of the Warsaw Convention system at CDG airport in Paris was the inevitable result of his conclusion that the CMR applied to the road leg between CDG and Dublin, the ultimate destination. He did not elaborate on the preferred interpretation of the term "airport", since it had no bearing on the case. Yet his conclusion that the road carrier took over the goods at CGD, and thereby triggered the applicability of Art 1 of the CMR, automatically limits the application of the Warsaw Convention system at the airport, under either the functional or the strict interpretation of the term.

What is often overlooked is that Tomlinson J (as he then was) had explicitly reached the same conclusion in the High Court in *Quantum*. His judgment is better known for its multimodal-friendly

⁴⁷ Legal Committee of ICAO, *Report and Minutes of the 24th Session at Montreal* (Doc 9394-LC/184, 7-18 May 1979), 19.

⁴⁸ [2002] EWCA Civ 350; [2002] 1 W.L.R. 2678. For the first instance judgment see [2001] Lloyd's Rep. 133.

⁴⁹ [2007] UKHL 23; [2007] 1 W.L.R. 1325.

approach that was based on the overall characterisation of the contract of carriage as an aerial one that leaves no room for the coexistence of the CMR and the Warsaw Convention system.⁵⁰ With respect to the boundaries of the Warsaw Convention system, however, he made a sharp (and correct) distinction between the application of the Convention and of the AWB.⁵¹ The claimants, the owners of a cargo stolen during international transit by road following an Air France flight from the Far East, had argued that the loss in question should be covered by the Hague Protocol 1955. This was for two reasons: first, that condition 2.1 of the AWB subjected any non-domestic carriage to the Hague Protocol 1955 and secondly, that condition 11.1 of the AWB extended the period of responsibility of the carrier to “the period during which the cargo is in the charge of the carrier, or in the charge of its agent”. Their argument was that the combination of these two contractual provisions changed the boundaries of the Protocol: since the goods had been stolen while in the charge of Air France’s agent, the liability system of the Hague Protocol 1955 should apply.

Tomlinson J did not accept this argument and rightly described it as “fallacious”.⁵² For him the liability system laid down in condition 11 of the AWB (a fault-based system) applied to the extent that it did not conflict with the Hague Protocol 1955. There being “material differences” between it and the Protocol, “it cannot apply in circumstances where Warsaw itself applies...It applies to any areas of Air France’s liability which are not covered by Warsaw”.⁵³ As such, the extended period of responsibility in condition 11.1 did not affect the boundaries of the Hague Protocol 1955. Instead it covered any period when the carrier was in charge of the goods outside the scope of the Hague Protocol 1955. What was the benefit of this arrangement for the air carrier? Tomlinson J succinctly described it: the air carrier “wishes to ensure that it has one or more regimes of limited liability which will apply at all stages of its custody of the goods, i.e. that there will be no period during which it cannot rely on either Warsaw or its own General Conditions. By plugging any gaps in the Warsaw coverage with such a regime on terms similar but not identical to Warsaw it achieves that object”.⁵⁴

Not surprisingly, Tomlinson J held that the Hague Protocol 1955 was inapplicable, since the truck had been well outside any airport at the time of the theft, and that liability fell to be determined by reference to the contractual scheme in condition 11 of the AWB. In particular, Tomlinson J was at pains to distinguish the application of the Hague Protocol 1955 outside an airport by virtue of its contractual incorporation from the limits of its application as dictated by its own terms.⁵⁵ Even if the Hague Protocol 1955 were contractually incorporated, he said, “...it would not by its terms extend to carriage on land outside the confines of an aerodrome”.⁵⁶

Although his judgment was overturned on a different issue, namely the scope of the CMR (which he had held inapplicable),⁵⁷ his analysis on the boundaries of the Warsaw Convention system has to be complimented for refusing to create an “air plus” regime. However desirable a single seamless scheme of liability might be for multimodal transport, Tomlinson J demonstrated that a multimodal-friendly philosophy shall not constitute a *carte blanche* for turning the Warsaw Convention system into a “door-to-door” convention. In that respect, the judgments of the High Court and the Court of Appeal in *Quantum* converge. They both agree in setting the boundary of the Warsaw Convention system at

⁵⁰ In a nutshell, Tomlinson J held that in a contract for the carriage of goods by air the goods could only be taken over once and that this had happened in Singapore at the moment the goods were delivered to the air carrier. Legally speaking, the road carrier did not take over the goods at CDG. As such Art 1 of the CMR could not be satisfied; it followed that for the Paris-Dublin stretch neither the CMR nor the Hague Protocol 1955 applied.

⁵¹ The AWB in question was an older version of the current IATA one.

⁵² Tomlinson J in *Quantum*, [29].

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ He questioned the US case of *B.R.I. Coverage Corp v Air Canada* [1989] 725 F. Supp. 133

⁵⁶ The judgment of the High Court in *Quantum*, [30] per Tomlinson J.

⁵⁷ A point on which the German and Dutch Supreme Courts have recently supported him rather than the Court of Appeal: see BGH 17.7.2008, I ZR 181/05, TranspR 2008 and Hoge Raad 1.6.2012, SS 2012, No 95. See also Leloudas, 98-101.

the airport, explicitly denying that it provides for “door-to-door” cover; the only disagreement being as to which regime should apply following the departure from the arrival airport.⁵⁸

The judgment of the Court of Appeal in *Quantum* was later endorsed by the House of Lords in *Datec*. In connection with a contract of carriage entailing road transport from Milton Keynes to Luton airport, a flight to Cologne and then on-carriage by road to Amsterdam, Lord Mance approved *Quantum* and applied the CMR to events occurring in the segment Cologne to Amsterdam. In so doing, he confirmed that the unimodal approach of the judgment of the Court of Appeal in *Quantum* remained under English law. By endorsing *Quantum*, *Datec* also lends indirect support to the airport delimitation of the Warsaw Convention system. This is so because the unimodal approach of Lord Mance can only work if the two respective conventions do not have overlapping areas of application. Such clean-cut division can only be achieved if the Warsaw Convention system applies within the airport’s boundaries with the CMR taking over upon departure from them.

Having said that, there is one particular situation where the two Conventions might end in conflict even under the unimodal approach of the judgment of the Court of Appeal in *Quantum*. What if the loss occurs while the goods are on board a truck that is still within the (strict or functional) boundaries of the airport and is destined for a CMR route?; What if the theft in *Quantum* had taken place inside the airport while the truck was moving towards the exit? Would the Warsaw Convention system or the CMR apply?

The initial reaction would be to apply the Warsaw Convention system on the basis that the airport is its boundary. However, the answer is not straightforward, since the CMR provides in Art 17.1 that the road carrier is liable from the moment he takes over the goods until delivery. From the standpoint of the CMR, its application starts inside the airport since the goods had been taken over by the road carrier by the time the loss occurred. Is the Warsaw Convention system amenable to such application? It has been argued that it should give here way to the application of the CMR.⁵⁹ Yet there is a strong argument favouring the continuing application of the Warsaw Convention system: the term “carriage by air”, while it is only defined in Art 18(2), is used in a number of other Articles, most prominently in Art 19 (delay) and Art 31 (multimodal transport). Its use in Art 31 has not been seriously explored. But its use in Art 19 has been the subject of considerable attention, the preferred view being that it falls to be defined by reference to Arts 18(2) and (3).⁶⁰

If one defines the term “carriage by air” in Art 31 by reference to Art 18(2) (*i.e.* as including the case where the goods are in the carrier’s charge inside the airport), the Warsaw Convention system does not give way to the CMR. Under this interpretation, there is a conflict with the CMR that is difficult to solve as both conventions attempt to appropriate the same geographical area. If one takes the multimodal-friendly character of the Warsaw Convention system as the starting point, Art 31 should be restrictively interpreted to allow in the CMR. If, conversely, one sees the airport as part of the air law universe, then the Warsaw Convention system should prevail (though this interpretation poses a major question as to how to interpret the “taking over the goods” in Art 1 of the CMR). It is a close call: but perhaps interpreting the Warsaw Convention system in a manner to fit the CMR creates less doctrinal awkwardness than the alternative.

Would this analysis change under the provisions of the Montreal Convention 1999? No cases on the boundaries of the Convention have been reported in England, so much of the following analysis is speculative. Considering the current preference of English courts for the unimodal approach, an expansion of the ambit of the Montreal Convention 1999 on the basis that the airport delimitation has been omitted from Art 18(3) is unlikely for two reasons. Firstly, such expansion would (as stated

⁵⁸ See Leloudas, 92-101.

⁵⁹ *Ibid.*, 95-97.

⁶⁰ Although in the case of Art 18(2) it is explicitly stated that its use is to interpret Art 18(1): see *Shawcross*, Division VII, [1007].

above) contradict the first sentence of Art 18(4) where it is expressly stated that the period of carriage by air does not extend to any carriage by land outside an airport. Secondly, the term “carriage by air” in the first sentence of Art 18(4) does not contain any qualifications regarding the operations of pick-up or delivery, or short transport to or from an air carrier’s warehouses. It is unlikely that an English court will entertain arguments stemming from a convention never ratified (*i.e.* the 1980 UN Multimodal Convention) to treat these operations as part of the carriage by air. At the same time it is equally unlikely that an English court will introduce the “absorption doctrine”, a largely German law theory, to interpret a provision of private international law, as it did not inform the drafting discussions of the Montreal Convention 1999 or the Warsaw Convention system.

In that respect, it is likely that an English court will treat the boundaries of the airport as the limit of application of the Montreal Convention 1999. At the same time, it is likely that they will follow the functional interpretation of the term airport in the *Rolls Royce* case.⁶¹ This way they will be able to bring short transits to or from air carriers’ warehouses into the ambit of the Montreal Convention 1999 without upsetting its text and unimodal philosophy. To this extent the *Rolls Royce case*, a minority view as it is worldwide, is a fine example of case-law that has the potential to evolve the interpretation of the Montreal Convention 1999 to fit into the realities of modern airport logistics. Unfortunately, the functional interpretation does not give a solution to the paradox with respect to the movement of goods to warehouses outside the functional limits of the airport and their safekeeping in such warehouses. How likely it is that an English court would apply the Montreal Convention 1999 to such road movement or storage?

In addition to the doctrinal objections that were raised in Part V, it is suggested that this is highly unlikely, if only because it opens a Pandora’s box with respect to the applicability of the CMR. Following the judgment of the Court of Appeal in *Quantum*, a trans-border road movement from an airport in a CMR country to a warehouse in a different CMR country, no matter how short, is subject to the CMR. Expanding the boundaries of the Montreal Convention 1999 would immediately create a conflict with the CMR which would be unlikely to be solved in favour of the Montreal Convention 1999, at least given the way things currently stand in England. If the warehouse is located in the country of the airport of arrival, the temptation to apply the Montreal Convention 1999 to the road segment might be stronger considering the commercial benefits of such solution and the lack of a potential clash with the CMR. One thing is clear, however: the solution of suspending the application of the Montreal Convention 1999 until reaching the warehouse it is not the industry’s preferred option.

There are two alternative means available to an English court to deal with this problem. The first one involves reading the airport delimitation in the first sentence of Art 18(4) as subservient to Art 18(3), and hence extending the application of the Montreal Convention 1999 to cover such road movements. If a court goes down that route, it is important that this interpretation is always kept in check and used only to cover road transport between airport and warehouse for the purpose of avoiding the suspension and resurrection of the Montreal Convention 1999. Otherwise the Montreal Convention 1999 would become a “door-to-door” convention by the back door, which we do not want. For this and other reasons, it is submitted that this is the least attractive option.

The second possibility in essence reinstates the airport delimitation in Art 18(3) by reference to the first sentence of Art 18(4). Instead of suggesting that the drafters intentionally omitted the airport delimitation in Art 18(3), it can be argued that it was the result of deficient drafting. Whatever the aim of the amendment could have been (if any), the text has failed to reflect it. Since the airport delimitation is retained with respect to the surface movement of the goods, it makes no sense to expand the application of the Montreal Convention 1999 to the safekeeping of the goods outside the airport. Such interpretation only leads to the “paradox” that was not the intention of the drafters. The best way to solve the paradox, while retaining the unimodal character of the Montreal Convention

⁶¹ [2000] 1 All ER (Comm) 796.

1999, is to retain the airport delimitation for both the road movement and the safekeeping of the goods, replicating essentially the Warsaw Convention system. This way one avoids both the “suspension and resurrection” difficulty and also the risk of indirectly turning the Montreal Convention 1999 into a “door-to-door” convention. It might not be the most orthodox way of interpreting an international convention, but provides the most elegant arrangement and fits better than any alternative to the unimodal attitude of English courts.

Would this analysis on the boundaries of the Montreal Convention 1999 be relevant had the opinion of Tomlinson J in the judgment of the High Court in *Quantum* been endorsed on appeal? As Tomlinson J made clear the fact that the AWB was evidencing a predominantly air carriage contract does not stop the inquiry about the boundaries of the air law conventions. It is true that the CMR does not have a role to play in his multimodal philosophy with the inevitable result that any conflicts between the Montreal Convention 1999 and the CMR have been eradicated. Yet this development does not (or shall not) open the door for the Montreal Convention 1999 to expand to surface transport and/or become a “door-to-door” convention. In that sense, the inquiry about the boundaries of application of the Montreal Convention 1999 shall be retained and performed diligently.

As such, the analysis on the boundaries of the Montreal Convention 1999 remains relevant under the multimodal-friendly philosophy of Tomlinson J. However, the pressure to expand the Montreal Convention 1999 to cover road transport will be greater than before. With respect to the road carriage to warehouses located inside the functional limits of the airport, the *Rolls Royce* case can be used to legitimately apply the Montreal Convention 1999. The temptation to expand the scope of the Convention will mostly come when dealing with road transport to warehouses located outside those limits. Here, it will not be surprising if an English court applies the Montreal Convention 1999 to this surface transport on the basis that its new Art 18(3) relaxes its limits, even if this would be an unfortunate mistake.⁶²

This misguided argument in favour of relaxation results from the combination of two factors in particular. One is the inapplicability of the CMR to regulate the road transport element. The other one is the absence of a prescribed liability system in the current IATA AWB for non-Montreal Convention carriage; with the AWB only setting the limit of liability for such a carriage at 19SDRS per kg. The argument used to justify extension is that with the CMR out of the equation, the conflict (if any) is between the provisions of the AWB and the Montreal Convention 1999. Since the AWB in its current form does not provide for a liability system to be applied to non-Montreal Convention carriage, it is not in conflict with the Convention. Instead, it extends its boundaries of application to match the AWB’s scope. The argument continues that this construction satisfies the desire of air carriers which use the AWB to be regulated by a seamless legal framework, that of the Montreal Convention 1999, whenever they are in charge of the goods.

It is submitted that this argument has a number of drawbacks. One is that it ignores the airport delimitation in the first sentence of Art 18(4). Whether the CMR is applicable to a surface movement is irrelevant to the question whether the Montreal Convention 1999 is, or should be, applicable to carriage by land performed outside the airport. The second is that an artificial expansion of the scope of the Montreal Convention 1999 would blur the lines between its application as a matter of contract, and its applicability by force of law. There is a strong argument that the new standard AWB successfully incorporates the Montreal Convention 1999 as a matter of contract by virtue of condition 2/2.1 which subjects the carriage provided in the AWB to the rules of the Warsaw Convention system or the Montreal Convention 1999, as the case may be.⁶³ However, arguing that the transport of goods

⁶² For a review of the relevant German case law see W Müller-Rostin, “Rechtsprechungsübersicht. Luftfrachtrechtliche Entscheidungen von 2007 bis 2011” (2012) ZLW, 209-228, especially case notes 6 and 8 (“Müller-Rostin ZLW”).

⁶³ Condition 2/2.1 provides as follows: “Carriage is subject to the rules relating to liability established by the Warsaw Convention or the Montreal Convention unless such carriage is not “international carriage” as defined by the applicable Conventions”.

to the external warehouses under such an AWB is therefore governed by the Montreal Convention 1999 is mistaken because it equates contractual incorporation to the scope of application of an international convention. These two issues must remain distinct; otherwise we run the risk of treating the Montreal Convention 1999 as a genuine “door-to-door” convention, a trend that American courts seem to have long set and that will be analysed in Part VIII.

It is to be hoped that English courts will clearly make this distinction if (or when) the multimodal philosophy of Tomlinson J prevails in this legal system. It is a fine but very important consideration for the future of multimodal regulation. The second case that demonstrates good practices comes from the US and it is the subject of the next Part.

VII. GOOD JUDICIAL PRACTICE: THE US CASE THAT (INADVERTENTLY) SOLVES THE PARADOX OF THE MONTREAL CONVENTION 1999

The often-quoted majority opinion of *Victoria Sales* is a fine example of applying Art 18 of the Warsaw Convention 1929.⁶⁴ We have already analysed the dissenting opinion in Part IV; but it is equally important to refer to the majority opinion of the Court of Appeals. The goods were covered by a HAWB from Frankfurt to New York issued by a freight forwarder and a MAWB from Schiphol airport in Amsterdam to JFK airport in New York issued by the defendant air carrier. They arrived at JFK but they were lost from the air carrier’s warehouse less than a quarter of a mile outside the airport before they could be collected. The court held that the term “airport” as used in Art 18 of the Warsaw Convention 1929 referred to the airport’s physical boundaries, and that, as such, the loss was not covered by the Convention. Acknowledging that a functional interpretation fitted better with the modern reality of airport logistics, the majority was not prepared to move away from the language of the Warsaw Convention 1929.

This is the flagship US case on the boundaries of the Warsaw Convention system. It is important for the purposes of this article for one of the reasons that the majority advanced to justify its decision: “[u]nder the dissenter’s view, even if there is undisputed evidence, as here, that the loss occurred outside of the airport during transport by land, the Convention governs as long as the land transport was part of the carriage contract. This interpretation would effectively render nugatory Article 18’s command that ‘[t]he period of the transportation by air shall not extend to any transportation by land ... performed outside an airport.’ This cannot be the result intended by the Convention’s drafters”.⁶⁵

This is a remarkable statement because the majority opinion (a) treated this loss as if it occurred during transport by land; and (b) rejected the extended interpretation of the Warsaw Convention system by reference to a provision that is found in identical terms in both the Warsaw Convention 1929 (Art 18(3)) and the Montreal Convention 1999 (Art 18(4)). For the majority, the first sentence of Art 18(3) of the Warsaw Convention 1929 was not to be disregarded or to be treated as subservient to Art 18(2)(Art 18(3) of the Montreal Convention 1999). Similarly, the transport to the warehouse could not be absorbed by the definition of carriage by air on the basis that it is a secondary operation of dependent character. At the same time, the safekeeping of the goods at the warehouse of the air carrier outside the airport is being absorbed by the actual transport by road and treated as an integral part of it.

This is an important judgment for the Montreal Convention 1999 for two reasons. Firstly, it reinforces the central role of the first sentence of what is now Art 18(4) Montreal Convention 1999. The majority in *Victoria Sales* could have reached the same conclusion by taking the easier route of relying on the term “airport” as used in Art 18(2) of the Warsaw Convention 1929. Their choice demonstrates the central role that Art 18(3) of the Warsaw Convention 1929 occupies. It should not be ignored on the

⁶⁴ 917 F.2d 705 (2nd Cir. 1990).

⁶⁵ *Victoria Sales*, 707 per Judge Meskill.

basis of commercial convenience and it should be interpreted literally, *i.e.* encompassing any carriage by land irrespective of its operational importance.

Secondly, it provides a third solution to the paradox of Art 18 of the Montreal Convention 1999 that supplements the second solution advanced in Part VI. The boundaries of the Montreal Convention 1999 are set at the airport and any movement outside the airport is not subject to it. At the same time, the safekeeping of the goods by the air carrier outside the airport is also absorbed by the land carriage; neither it nor the safekeeping are subjected to the Montreal Convention 1999. This solution is as tidy as the second one in that it replicates the clear boundaries of the Warsaw Convention system. At the same time, it offers an alternative regarding the safekeeping of the goods by the air carrier that has not featured in the literature or in Montreal Convention 1999-judgments yet, namely that the safekeeping is absorbed by the land carriage and both are treated as outside the scope of the Convention.

Admittedly, this interpretation does not explain the omission of the airport delimitation in Art 18(3) of the Montreal Convention 1999. Yet none of the other two interpretations explain it and all one is trying to achieve is to find one that fits better with the philosophy of the Montreal Convention 1999. The benefits of this interpretation is that it provides a unimodal-friendly way out of the paradox. The safekeeping is absorbed by the land carriage on the basis that the goods would have never reached the warehouse without the land segment. In that sense, the land carriage takes priority over the safekeeping and leaves both out of the scope of the Montreal Convention 1999.

Among the cases that endorsed the decision in *Victoria Sales* is the judgment of the Court of Appeals of Florida in *Aerofloral Inc v Rodricargo Express Corp*⁶⁶ and that of the US Court of Appeals for the Ninth Circuit in *Read-rite Corp v Burlington Air Express Ltd*.⁶⁷

In *Aerofloral* the loss occurred while the goods were at the warehouse of a consolidator (considered an indirect carrier for the purposes of the Warsaw Convention 1929) located one mile outside the boundary of the Miami International Airport. The carriage was covered by an AWB and the loss occurred prior to departure to Colombia. This is a noteworthy decision because the Court of Appeals distinguished between the application of the Warsaw Convention 1929 and the AWB and, endorsing *Victoria Sales*, held that the loss inside the warehouse was not subject to the Warsaw Convention 1929, because its boundary was the airport.

Similarly, the Court of Appeals in *Read-rite* drew the boundaries of the Warsaw Convention 1929 at the airport. The goods in question were damaged while in the air carrier's warehouse outside London Heathrow airport (LHR) in London. A HAWB was issued by the freight forwarder to cover the entire transport from Portsmouth to San Francisco with an MAWB issued by the carrier to cover the transport from LHR to San Francisco. The Court of Appeals had no hesitation to endorse *Victoria Sales* and held that the loss was not subject to the Warsaw Convention 1929, since "Article 18(3) of the Convention states that it 'shall not extend to any transportation by land, by sea or by river performed outside an airport'".⁶⁸

The respective Courts of Appeals refused to accept (a) that an AWB incorporating the Warsaw Convention 1929 in fact covered the loss, and (b) that the warehousing of the goods was absorbed in the actual carriage by air and hence subject to the same legal regime. Instead, they both treated the loss in the warehouses as part of the transport by land, using, therefore, the first sentence of Art 18(3) in a proper manner: carriage (which includes warehousing) performed outside the airport is not subject to the Warsaw Convention 1929. It is submitted that the majority opinion in *Victoria Sales* together with the decisions in *Aerofloral* and *Read-rite* can be used as a guide for the interpretation

⁶⁶ 756 So. 2d 234 (2000) ("*Aerofloral*").

⁶⁷ 186 F 3d 1190 (1999) ("*Read-rite*").

⁶⁸ *Read-rite*, 1194 *per* Judge Fletcher. The judgment of the District Court can be found in 1998 U.S. Dist. LEXIS 21523.

of Art 18 Montreal Convention 1999 by setting its boundaries of application at the boundaries of the airport. This interpretation will rightly leave any transport by road performed outside the airport to the regulation of domestic laws, international conventions on road transport or the provisions of the AWB. Whether courts will embrace it, considering the safekeeping as part of the carriage by land, remains to be seen. It is a radical one, yet it is the one that fits better with the unimodal philosophy of the Montreal Convention 1999.

VIII. THE REDRAFTING OF ARTICLE 18 OF THE INTERNATIONAL AIR LAW CONVENTIONS

a. Academic redrafting

US courts demonstrate various tendencies with respect to the boundaries of the international air law conventions. This is one result of the fact that most of the alternative interpretations of Art 18 have at one time or another been advanced before them. A good number of US judgments are also (indirectly) influenced by the judicial approach evidenced in judgments of the US Supreme Court on the multimodal character of bills of lading and the scope of application of the maritime conventions applicable in the US.⁶⁹ The combination of these two factors creates an intriguing legal landscape that is not always easy to analyse as a result of the brevity of some of the US decisions.

The picture of harmony that the three US cases analysed in the previous Part paint is not entirely accurate. There is also a line of authorities in the US which do not hesitate to apply the Warsaw Convention system on the “door-to-door” movement of the goods. Most of these cases are decisions of lower courts, yet they keep receiving positive judicial treatment. These cases have the capacity to influence the interpretation of the Montreal Convention 1999 on a worldwide basis by making it a “door-to-door” legal instrument. Therefore, it is important that they are analysed so that they are put in the proper perspective.

The “door-to-door” application of the international air law conventions has considerable academic support in North America. The majority opinion in *Victoria Sales* has been criticised on the basis that the Warsaw Convention 1929 was applicable courtesy of the through air waybills that were issued: “[s]ome US courts have sunk their teeth tenaciously into the first sentence of Article 18 [3 Warsaw Convention 1929], seemingly refusing to comprehend the import of the second sentence...The court [in *Victoria Sales*] ignores the fact that it had moved under a through air waybill on Emery’s aircraft to Emery’s trucks and into Emery’s warehouse for further transshipment”.⁷⁰ It is difficult to see how the loss in *Victoria Sales* could have satisfied the unlocalised presumption in Art 18(3) of the Warsaw Convention 1929 as it was proved beyond doubt that the loss occurred on the land outside the airport.

What this line of thinking suggests is that the second sentence of Art 18(3) of the Warsaw Convention 1929 should be read as an extension of the first one. Any carriage by land outside the airport is not subject to the air law conventions, unless the carriage took place under an AWB for the purposes of loading, delivery or transshipment and the goods are in the carrier’s charge at all times. This was also the view of Judge Graafeiland in *Victoria Sales*:⁷¹ as long as the goods are in the charge of the air carrier during the transport outside the airport the international air law conventions apply; proving that the goods are not in its charge during the out-of-airport transport brings the application of the Warsaw Convention system to an end.

Both these opinions disregard the position of the term “subject to proof to the contrary” in the second sentence of Art 18(3) of the Warsaw Convention 1929 (Art 18(4) of the Montreal Convention 1999). It

⁶⁹ *Norfolk Southern Railway Co v James N. Kirby Pty Ltd* 543 US 14 (2004) and *Kawasaki Kisen Kaisha v Regal-Beloit Corp* 561 US 89 (2010).

⁷⁰ P. Dempsey and M. Milde, *International air carrier liability: the Montreal Convention of 1999* (Montreal 2005), 170.

⁷¹ *Victoria Sales*, 710 per Judge Van Graafeiland.

is situated right in the middle of the third part of the sentence between “damage is presumed...[and]...to have been the result of an event which took place during the carriage by air.” It could have been omitted considering that the word “presumed” is used. Yet its inclusion demonstrates that the drafters were keen to clarify that this sentence is treated as a presumption about the location of the damage. Otherwise, they would not have inserted it right next to the word “damage” and they would not have linked it to the period of transport. What they are trying to say is two-fold: (a) If there is land carriage outside the airport that is covered by an AWB, there is a presumption that the damage to the goods took place during transport by air and as such the air law conventions apply; and (b) If it can be proved that the loss occurred during the land transport, the air law conventions do not apply. The second sentence of Art 18(3) of the Warsaw Convention 1929 and Art 18(4) of the Montreal Convention 1999 shall be treated as an exception to the first sentence. It does not aim to expand the scope of the air law, as the alternative interpretation suggests, but it provides an easy way out of the unlocalised loss predicament, by providing a tidy solution that does not intrude into the space of other conventions or domestic laws.

The alternative interpretation is not supported by the text of the Article. If the intention was for the Convention to cover any land transport that is covered by an AWB, the following positive statement would make more sense: “If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is the result of an event which took place during the carriage by air”. Alternatively, the second sentence of Art 18(3) could have been incorporated into the first one: “The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome, unless such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment”.

Furthermore, the suggestion of Judge Van Graafeiland that the presumption refers to the identity of the carrier that is in charge of the goods requires to read the “subject to proof to the contrary” in isolation from the rest of the sentence, and also to link it to Art 18(2) of the Warsaw Convention 1929, *i.e.* subject to proof to the identity of the carrier. Admittedly, this is a rather a large notional leap that cannot be justified, since a realistic alternative interpretation is available. However, it has found its way into mainstream US case law as a result of its operational-friendliness and has the potential to become the majority opinion in the US under Art 18(3) of the Montreal Convention 1999 that lacks the reference to the airport delimitation.

b. Judicial redrafting: the *Magnus Electronics* route

The two cases that laid the foundations of the expansive interpretation of the Warsaw Convention system are *Magnus Electronics Inc v Royal Bank of Canada*⁷² and *Jaycees Patou Inc v Pier Air International Ltd.*⁷³

In *Magnus Electronics* the goods were delivered to the notification party without the seller/claimant having received full payment for them due to a fault of the bank-consignee, the air carrier or both. The court was asked to decide whether the seller’s claim for improper delivery falls within the Warsaw Convention 1929. The District Court held that it did.

Judge Shadur justified his decision by employing an interpretation that presaged the dissenting opinion of Judge Van Graafeiland in *Victoria Sales*: as the air carrier was contractually required to deliver the goods to the buyer’s bank at the country of destination, the loss occurred during the period of transport by air. For him the loss-causing event was the non-transport by land to the bank that would have been performed by the air carrier, it would have been covered by the AWB and would have taken place for the purposes of delivery. It should, thus, have been covered by the Warsaw

⁷² 611 F. Supp. 436 (ND Ill. 1985) (“*Magnus Electronics*”).

⁷³ 714 F.Supp. 81 (SDNY 1989) (“*Jaycees Patou*”).

Convention 1929. How could an air carrier escape liability under the second sentence of Art 18(3) of the Warsaw Convention 1929? According to the Judge “...by proof that someone else was responsible”, i.e. an independent trucker.⁷⁴

He also noted that unless one follows this interpretation, claims for non-delivery would fall outside the ambit of the Conventions.⁷⁵ This is, with respect, an erroneous argument. Claims for non-delivery fall within Art 18 of the Warsaw Convention system or the Montreal Convention 1999 on the basis that the occurrence which caused the non-delivery took place while the goods were in the carrier’s charge inside the airport. The decision to ignore the instructions on the AWB (the occurrence) was taken when the goods arrived at the airport and while they were in the carrier’s charge. The occurrence that caused the loss did not take place during the land carriage. As such, cases of misdelivery or non-delivery can be brought into the scope of the international air law convention without the need to refer to (and mis-read) the second sentence of Art 18(3) of the Warsaw Convention 1929.

Furthermore, this judgment is also in line for criticism for the following open-ended statement: “So long as the goods remain in the air carrier’s actual or constructive possession pursuant to the terms of the carriage contract, the period of ‘transportation by air’ does not end”.⁷⁶ This statement has been extensively reproduced out of context in subsequent decisions and has formed the basis for the wrongful expansion of the second sentence of Art 18(3) of the Warsaw Convention 1929 to cover land transport performed by the air carrier. If one takes this statement in isolation, it demonstrates a complete disregard for the airport delimitation of Art 18(2) and Art 18(3) of the Warsaw Convention system, setting the scene for the “door-to-door” application of the international air law conventions. If they apply whenever the goods are in charge of the air carrier, any road transport performed by the air carrier automatically falls into the ambit of the Warsaw Convention system or the Montreal Convention 1999. As it is explained in Part VIII.a., it is submitted that this is an oversimplified reading of Art 18 that distorts both its actual text as well the unimodal philosophy of the international air law conventions.

The decision of the District Court for the Southern District of New York in *Jaycees Patou* provides a good example of how the statement mentioned above – that air transport continued as long as the air carrier was directly or indirectly in possession of the cargo - has distorted the interpretation of the air law conventions. Here, goods were transported from France to the US under a freight forwarder’s “door-to-door” HAWB. The air carriage from Paris to JFK was undertaken by TWA (presumably under a MAWB although the judgment does not specify its scope) and Pier Air International, the agent of the freight forwarder, delivered the cargo to the claimant-consignee in New York where its damage was realised. The Court was not persuaded by the claimant’s submission that the damage had occurred during the road transport to New York. As a result, it found the Warsaw Convention 1929 applicable.

The Court initially treated the claim as one for unlocalised damage.⁷⁷ This would have been a legitimate application of the presumption in Art 18(3) of the Warsaw Convention 1929, since the road carriage was covered by the HAWB, it was undertaken with the aim of delivering the goods to the consignee and the damage was unlocalised. However, the Court then took an unfortunate turn and linked its decision to the aforementioned extract from *Magnus Electronics*. For Judge Kram the damage falls within the Warsaw Convention 1929 because the road carriage was governed by a “door-to-door” AWB. The goods were in the charge of the freight forwarder via its agent, the road carrier, during the surface carriage that was covered by a HAWB: “the single air waybill in this case serves to

⁷⁴ *Ibid.*, 440 per Judge Shadur.

⁷⁵ *Ibid.*, 439 per Judge Shadur.

⁷⁶ *Ibid.*

⁷⁷ “[p]laintiff’s only ‘proof’ is that the Carrier’s Certificate indicates that ten cartons were damaged, whereas the Pier Air Delivery Order indicates that 15 damaged cartons were received...This ‘proof’ certainly is not sufficient to overcome the presumption in Article 18 that the damage occurred during the period of air transport”: *Jaycees Patou*, 82 per Judge Kram.

extend the presumptive liability period of 'transportation by air' through delivery to Patou's premises in Manhattan".⁷⁸ For the Judge the second sentence of Art 18(3) of the Warsaw Convention 1929 was designed to apply to any situation where the land carriage was covered by an AWB and at the time the goods were in the air carrier's or the freight forwarder's charge. Only when a road carrier acting for the consignee or an independent carrier got hold of them, would the application of the air law conventions come to an end.

The decision in *Jaycees Patou* is unfortunate because the court could have legitimately applied the Warsaw Convention 1929 to the road segment on the basis of unlocalised damage. Instead, it applied it by expanding its scope to cover the "door-to-door" movement of the goods. To support its conclusion the District Court used *Magnus Electronics* as a guide, avoiding any discussion of the text of Arts 18(2) and Art 18(3) of the Warsaw Convention 1929 and/or its multimodal features. It is submitted that the decision is highly dubious. Yet it demonstrates how a questionable decision (*Magnus Electronics*) can turn into a bad decision (*Jaycees Patou*) with both in turn influencing a good share of US cases.

Most recently the rationale of *Jaycees Patou* was applied in the case of *Jean-Claude Levy v UPS*.⁷⁹ A painting went missing during a Paris to New York carriage, without the claimants being able to identify the location of the loss. From the minimal factual information reported, it seems that the paintings were transported under a "door-to-door" AWB and the loss was identified on delivery of the rest of the cargo to the consignee. The US District Court for the District of New Jersey rightly argued that this was a situation of unlocalised loss and hence the presumption in Article 18 was applicable. However, the Court resorted to *Jaycees Patou*: "[w]hen a contract for transportation includes door-to-door transportation under a single air waybill and the goods remain in the carrier's actual or constructive possession, courts hold that the presumptive period of carriage by air is extended until the time of delivery".⁸⁰

It is noteworthy that the District Court did not apply the presumption, but instead the presumption's interpretation by *Jaycees Patou*. The end result might be correct, yet it demonstrates that US courts prefer a simplified (and incorrect) version of the presumption. The *Levy* case comes as a warning that the cases of *Magnus Electronics* and *Jaycees Patou* are not two outdated and isolated examples. Instead, it confirms that they are still influencing the US jurisprudence by imposing a "door-to-door" application of the international air law conventions.

c. Judicial redrafting: the *Commercial Union* route

A second method of expanding the scope of the Warsaw Convention 1929 can be found in the decision of the Court of the Appeals for the Second Circuit in *Commercial Union v Alitalia Airlines SpA*,⁸¹ a case of unlocalised loss. This case is also important because it provides an early support to the now prevailing (though, as suggested above, incorrect) opinion that the air segment of a multimodal contract absorbs the road segment.

A "door-to-door" HAWB was issued by the freight forwarder (Gava SpA) to cover the entire transport of a pasta-making machine from the Italian warehouse of Illapak SpA to its US warehouse in Pennsylvania. In turn, Alitalia issued a MAWB to cover the actual air carriage from the airport in Florence to JFK, New York. Gava SpA was named as consignor in the MAWB and Gava USA as consignee. Upon arrival at JFK the packaged pasta-making machine was picked up by Gava USA and transported by road to the Pennsylvania warehouse of Illapak under the HAWB. Following delivery, it

⁷⁸ *Ibid.*, 84 per Judge Kram.

⁷⁹ 2008 U.S. Dist. LEXIS 11543 ("*Levy*")

⁸⁰ *Ibid.*, 6 per Judge Hockberg.

⁸¹ 347 F.3d 448 (2nd Cir. 2003) ("*Commercial Union*").

was realised that it sustained significant damage, the time of occurrence was unclear. Illapak's insurers sued the freight forwarders and Alitalia for the damage under the Warsaw Convention 1929.

The most important question (for the purposes of this article) was whether the Warsaw Convention 1929 applied. Circuit Judge Cardamore, who delivered the unanimous judgment, rightly looked into Art 18(3) of the Warsaw Convention 1929 for an answer, and correctly set the boundaries of the Convention at the airport's perimeter fence.⁸² Dealing with a case of unlocalised loss, he then turned his attention, again rightly, to the presumption of Art 18(3). Alitalia argued that the presumption was not applicable for two reasons, however. Firstly, it said, the road carriage from JFK to Pennsylvania was not incidental to the air carriage. Instead it constituted the land segment of a multimodal contract of transport and, because of Art 31, was not be subject to the Warsaw Convention 1929. Furthermore, Alitalia argued, the MAWB was the operative document from which its liability fell to be determined. Since the MAWB ("airport-to-airport") did not provide for carriage by road, the presumption was not applicable as the land segment had not taken place in performance of a contract for carriage by air.

The Court of Appeals was not convinced by either arguments and found the presumption in Art 18(3) applicable. The road carriage had taken place (a) under the HAWB; and (b) for the purpose of delivering the goods to the final consignee. As such, it had been incidental to the air carriage and did not fall within Art 31. In reaching this conclusion the Court of Appeals noted that "[n]othing in the Convention text or drafting history suggests that the airline itself needed to have provided for this ground transport".⁸³ What the Warsaw Convention 1929 was looking for was, it was said, "[a] contract for carriage by air": no more and no less. For the Court of Appeals the actual carriage by air (under the MAWB) had been performed in furtherance of the HAWB which was the operative document of carriage. As such, the question to be asked was whether the HAWB was "a contract for transport by air".⁸⁴ For the Court of Appeals there was little doubt that this was the case on the basis that "[a]s an agent of Alitalia, Gava S.p.A. had the authority to create a contract for *air* carriage, and by virtue of the agency relationship, Alitalia was made party to this contract[fn omitted]".⁸⁵

It is submitted that the analysis of the Court of Appeals is marginal. It constitutes a legitimate compromise between the commercial realities of air carriage and the philosophy/text of the international air law conventions. Admittedly, the text or the *travaux préparatoires* of the conventions do not clarify what is meant by "a contract for carriage by air" in the presumption. This is not surprising since the practice of issuing both a HAWB and a MAWB for the same carriage was not as developed in the 1920s as it is today. An argument can be made that had the drafters intended to limit the presumption to the MAWB a more precise wording should have been deployed, maybe by using the article "the" instead of "a". Yet this cannot be a conclusive argument by itself and it has to be cautiously considered.

Having said that, the decision of the Court of Appeals does not impinge on the multimodal philosophy of the international air law conventions. As the Court noted, the aim of the presumption is to provide the applicable law in a dispute that falls through the cracks of the unimodal transport conventions. In that respect, the Court's construction assists in achieving this aim without illegitimately expanding the scope of the Conventions. Instead it enables the presumption to achieve its full potential. Was the Court of Appeals right to argue that Alitalia was bound by the HAWB? It most probably was on the basis that the freight forwarded issued the HAWB as an agent of Alitalia. Alitalia, thus, became party to the "door-to-door" HAWB. The Court took for granted the agency relation on the basis of the HAWB, so one cannot evaluate it further.

⁸²*Ibid.*, 464 per Judge Cardamore.

⁸³*Ibid.*, 465 per Judge Cardamore.

⁸⁴ *Ibid.*, 468 per Judge Cardamore.

⁸⁵ *Ibid.*

What would have been the conclusion had the freight forwarder acted as a principal when issuing the HAWB, with the air carrier issuing the MAWB by way of authority from the forwarder? The freight forwarder would then qualify as a contracting carrier with the air carrier being the actual carrier. The liability of the freight forwarder would extend to the “door-to-door” movement, whereas the liability of the air carrier would be limited to the carriage that it actually performed. In the case of unlocalised loss the damage would be treated as if it occurred during carriage by air. In this eventuality both the contracting carrier and the actual carrier would be liable under either the Montreal Convention 1999 or the Warsaw Convention system and the claimant would have an independent (as opposed to a right of action based on agency) right of action against both carriers.

One could argue that in both scenarios the HAWB evidences a “contract for carriage”. The air carrier in the first one, and the freight forwarder in the second, give “an undertaking to see that the goods are carried by various carriers from the initial point of reception to destination”.⁸⁶ Whether it constitutes a “contract of carriage by air” requires further consideration. It is submitted that the HAWB evidences a multimodal contract in that it provides for two modes of transport that might be subject to different liability regimes, if the location of the loss can be ascertained. It does qualify as a “contract of carriage by air” as used in the presumption, because the drafters used the term indiscriminately to describe an AWB that provides for road transport of minimum importance, *i.e.* loading, delivery or transshipment, in the aftermath or prior to the carriage by air. They were not technical about it: and not surprisingly so, in an era where multimodalism, as a distinct category of operations, was in its infancy and the practice of freight forwarders issuing HAWB was still developing.

However, there are difficulties with the wide-ranging statement of the Court, that a contract which mostly provides for aerial carriage shall be characterised as a contract for carriage by air at all times. Such a conclusion would contradict the philosophy of the judgment of the Court of Appeal in *Quantum* which (it has been suggested) most faithfully reflects the intention behind the air carriage conventions. True, the HAWB could qualify as a “contract of carriage by air” for the purposes of the presumption in Art 18. Yet it would be erroneous to use this application as a general statement in support of the proposition that an AWB which provides for road transport must always be treated as an undivided contract governed by one and the same legal framework.

Where the Court of Appeals unjustifiably stretched the limits of the air law conventions was when it applied the final condition of the presumption, namely that the road carriage must have been performed for the purpose of delivering the goods. The Court rightly acknowledged the drafters’ intention behind the presumption: it applied to land carriage of minimum importance. It also rightly noted that the drafters did not clarify what “carriage of minimum importance” was. As such the Court provided its own version of what such carriage entailed: “...that there be a contract for carriage that contemplates primarily air transport, but where some ground transport is also performed – the damage to the cargo therefore presumptively occurred during flight”.⁸⁷

For the Court the deciding factor was that an AWB has been issued to cover the land segment. In such case the road transport had to be considered incidental to the air carriage and would qualify as done for delivery. The distance of the land carriage should not, it was said, play a decisive role in answering the question whether what was involved was indeed a mere delivery operation. This part of the decision has an operational appeal. As long as there is unlocalised loss under an AWB there will be an easy way out of the predicament by resorting to the international air law conventions. As such this interpretation makes the most of the presumption by utilising it to cover most cases where an unlocalised loss occurs following air carriage.

Did the Court here go too far? Arguably it did, because this interpretation has the potential to qualify long –distance *Quantum*-type road carriages (in that case from Paris to Dublin) as deliveries for the

⁸⁶ *Tetley Vol 2*, 2265.

⁸⁷ *Commercial Union*, 468 per Judge Cardamore.

purposes of the presumption. Under this logic, if the *Quantum*-loss was unlocalised, the Hague Protocol 1955 could have applied since the road segment was covered by an AWB and was performed for the purpose of delivering the goods to the consignee. Under the interpretation of *Commercial Union* the fact that the road carriage was international and substituted an aerial carriage (which did not take place as a result of the operational constraints of Air France) shall not be taken into consideration when applying the presumption.

This is, with respect, a long way from anything the drafters intended. Linking the “delivery” or “loading” to the scope of the AWB has the potential to abuse the presumption by making it applicable to what are effectively independent road segments, such as the one in *Quantum*. This expansion ought not, it is submitted, to be allowed. Operations of loading or delivery should be considered for what they essentially are: “transportation to the final place of destination from the nearest [or a nearby] airport with the technical installations and flight connections suitable for the carriage by air”.⁸⁸ In that respect, the distance travelled cannot be regarded *a priori* as being of little or no importance: it might not be the only factor, but it does need to be taken into consideration when identifying what amounts to carriage of minimum importance.

Was the decision in *Commercial Union* to treat the road carriage from JFK to Pennsylvania as delivery to be expected? The answer is probably yes, considering the tendency of US courts to treat “door-to-door” AWBs as expanding the scope of the international air law conventions. The *Commercial Union* aligned with this underlying philosophy in two respects. Firstly, it treated the HAWB as a contract for carriage by air despite its multimodal character. Secondly, it identified what carriage of minimum importance was by reference to the HAWB, although there was no obvious link between them other than the desire to create a seamless transport regime.

In that respect, the decision is part of the philosophy that reads the AWB as defining the scope of application of the international air law conventions. The Court resorted to an interpretation that fitted the commercial needs of the industry, because it essentially covered every situation of unlocalised loss where a HAWB or a MAWB covered the road segment before or after the air segment. However, it is difficult to see how the drafters’ requirement of a road segment of “minimum importance” can be linked to the issuance of an AWB without any further query as to the distance of the carriage and the nature of the road segment.

If this part of the decision in *Commercial Union* is read literally, there is a risk that the requirement of “loading or delivery” is downgraded to a mere formality. Any road segment covered by an AWB can qualify, as long as the goods are destined to the consignee or taken by the consignor. This construction certainly simplifies the search for the boundaries of the international air law conventions; yet it is entirely foreign to their philosophy. Looking for “some ground transport [to be] performed” opens up the potential for some odd results considering both the extensive distances covered by land and the prevalent use of AWB to cover the ground segment.⁸⁹ This interpretation does not provide for any control mechanisms to limit the open-ended application of the presumption, and in effect negates the search for a carriage of minimum importance. The issuance of an AWB comes at the forefront of the considerations and it is used as a means of expanding the scope of the international air law conventions in the case of unlocalised losses.

Having said that, the Court of Appeals rightly did not accept this “door-to-door” philosophy in its entirety: “[t]he language’s [of Art 18(2) and the first sentence of Art 18(3)] clear import is that the Convention does not apply to non-aircraft losses occurring outside an airport, absent special circumstances, such as an emergency landing”.⁹⁰ Although in dicta, the Court seems to accept the basic proposition that in situations of localised losses outside the airport the AWB covering the land

⁸⁸ *Müller-Rostin Montreal*, 18-35.

⁸⁹ *Commercial Union*, 468 per Judge Cardamore.

⁹⁰ *Ibid.*, 471 per Judge Cardamore.

segment does not extend the scope of the Warsaw Convention 1929. As such, the Court of Appeals distinguishes itself from the philosophy of *Magnus Electronics* and *Jaycees Patou* with respect to localised losses.

d. The repercussions of the judicial redrafting

The two opposing views of the limits of the WCS were witnessed in the recent case of *Kuropatkin v TRT International Ltd*,⁹¹ one of the few cargo cases decided in the USA under the Hague Protocol 1955. The claimant paid TRT to ship two cars from the USA to Russia and their original title-documents. TRT employed FedEx to carry the titles to Moscow, which requested an extra fee to courier the documents from Moscow to the Krasnodar region, where the cars were located. TRT failed to pay the extra fee because it could not contact the claimant to get approval and subsequently FedEx destroyed the documents in its warehouse well away from any airport in Moscow. As a result the cars were confiscated. In the ensuing action TRT and FedEx argued that the Hague Protocol 1955 applied with its liability limitation provisions.

The case was initially remanded to Magistrate Judge Sallas.⁹² The defendants argued, citing *Levy* and *Jaycees Patou*, that the loss was within the Hague Protocol 1955, since the documents had been in the possession of the carrier at the time of the loss: it was irrelevant that the loss had occurred outside the airport. MJ Salas rightly did not accept this argument. She thought that the Hague Protocol 1955 did not apply, as this was a case of localised loss in a warehouse outside the airport. However, the District Court rejected her view and reverted to the line of interpretation advanced in *Magnus Electronics* and *Jaycees Patou*. Judge Sheridan quoted Article 18(2) of the Hague Protocol 1955 (which expressly refers to the airport delimitation). Yet he read this provision by reference to the quote referred to above from *Magnus Electronics*,⁹³ and proceeded to apply the Hague Protocol 1955 on the simple basis that the documents had been in the charge of the carrier when destroyed.

Furthermore, Judge Sheridan criticised the argument of the claimants that the first sentence of Art 18(3) set the boundaries of application of the Hague Protocol 1955 at the airport and that the second sentence only applied in situations of unlocalised losses. He regarded such an interpretation as misconceived: for him, these provisions do not define the scope of application of Article 18. Instead, they had to be read together in the manner the *Magnus Electronics* case suggested: any LDD was covered provided the carrier had been in charge of the goods at the time the damage had occurred. The weaknesses of this interpretation have been identified in Part VIII.a.

Even more disturbingly, Judge Sheridan manipulated Art 18(2) Hague Protocol 1955 to fit this philosophy: “even if Article 18(3) is applicable, Plaintiff’s reading contradicts the definition of ‘carriage by air’ set forth in Article 18(2), which includes ‘the period during which the luggage or goods are in charge of the carrier,’ regardless of their physical whereabouts”.⁹⁴ This statement simply misreads Article 18(2). The remainder of the sentence in Art 18(2) that provides for an airport delimitation (“whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever”) is simply ignored to fit into the “door-to-door” philosophy. Without doubt this reading constitutes a redrafting of the international air law conventions.

Most recently, this conviction was evidenced in the long-running case of *Danner v International Freight Systems of Washington LLC*,⁹⁵ one of the first cargo cases under the Montreal Convention 1999

⁹¹ 2010 U.S. Dist. LEXIS 60788 (“*Kuropatkin District Court*”).

⁹² 2010 U.S. Dist. LEXIS 50279 (“*Kuropatkin Magistrate Court*”).

⁹³ “So long as the goods remain in the air carrier’s actual or constructive possession pursuant to the terms of the carriage contract, the period of ‘transportation by air’ does not end” in *Kuropatkin District Court*, 8 per Judge Sheridan.

⁹⁴ *Ibid.*, 10 per Judge Sheridan.

⁹⁵ The latest chapter in the Denis Danner saga is the judgment of Judge Hollander 2013 U.S. Dist. LEXIS 1233 (“*Danner Hollander*”). The article will also analyse the earlier summary judgment of Judge Bennett *Danner et al v International Freight Systems of Washington, LLC, et al* 2010 U.S. Dist. LEXIS 86024 (“*Danner Bennett*”).

in the USA. Following a hunting trip in South Africa, the claimants shipped lion skins from South Africa to Montana via Luxembourg and Seattle. Rex, a South African freight forwarder, acting as agent of the claimants, arranged for carriage by Cargolux under an “airport-to-airport” AWB. International Freight was the claimants’ freight forwarder in the USA and was named as the consignee in the AWB of Cargolux. Once the goods were cleared at Seattle-Tacoma Airport, they were picked up by Even-Rock, a warehousing company instructed by International Freight, which stored them briefly waiting for collection by another trucking company that would have taken them to their final destination in Montana. When the second trucking company attempted to pick up the goods from the warehouse of Even Rock, the containers could not be located. Following extensive investigations, the containers were found in a warehouse in Vancouver that was operated by Menzies, the ground handler of Cargolux in Vancouver, who had no idea how they had got there. Cargolux did not fly at the time to Vancouver but was operating frequent trucking services from Seattle to Vancouver. Upon discovery of the containers, Cargolux arranged for their land transport to Seattle where it was realised that two of the three lion skins were damaged. The remaining one was finally transported to Montana. The claimants initially filled claims against most of the parties involved in the transport, which were summarily dismissed,⁹⁶ but for the ones against Cargolux and its airport agent, CAS. They went to full trial on the evidence that CAS did not load the containers with the lion skins on the trucks of Even Rock, but instead on a different trucker that took them to Vancouver.

Judge Hollander of the US District Court for the District of Maryland held that the loss was caused by the negligence of Cargolux and its agent.⁹⁷ As such the issue that she had to decide was whether the Montreal Convention 1999 was applicable to the loss. The background for her decision was set in the judgment of Judge Bennett who rejected the request of Cargolux to summarily dismiss the claim.⁹⁸ He did not decide whether the Montreal Convention 1999 is applicable to the loss in question, pending discovery regarding the location of the loss, and he acknowledged that Cargolux issued an “airport-to-airport” AWB. Still, he felt the need to support the interpretation advanced in *Magnus Electronics* and *Jaycees Patou*: “[w]hen an air waybill provides for door-to-door delivery from a foreign country to a recipient’s premises in the United States, the period of carriage by air generally lasts until the recipient receives the goods”.⁹⁹ In a typical fashion, Judge Bennett did not refer to the linguistic differences between Art 18(2) of the Warsaw Convention 1929 and Art 18(4) of the Montreal Convention 1999 and also he did not refer to the airport delimitation. Instead, he gave precedence to the contractual arrangements of the parties over the text of the conventions: only when the AWB provides for the “airport-to-airport” transport of goods the limit of the air law convections is the airport.

Judge Hollander held that the Montreal Convention 1999 was applicable. She argued that the event which caused the destruction of the two lion skins in Vancouver (*i.e.* the delivery to the wrong trucker) occurred while the goods were in the charge of Cargolux and CAS.¹⁰⁰ In that respect, one could argue that Judge Hollander applied the paradox created by the change of wording in Art 18(3) Montreal Convention 1999 and the first sentence of Art 18(4) Montreal Convention 1999: the damage-causing event took place while the goods were in the carrier’s charge in a warehouse and they were not moving inland.

However, Judge Hollander did not provide such an elaborate analysis, but reverted to a reasoning that resembles the recipe of *Magnus Electronics* and *Jaycees Patou*: “...Article 18 of the Montreal Convention provides that the period of carriage by air includes the period during which the cargo is in the charge of the carrier, and establishes a rebuttable presumption that any damage that occurs during carriage by land outside of an airport in the performance of a contract for carriage by air is

⁹⁶ The summary judgments dismissing the claims can be found at *Danner v International Freight Systems of Washington LLC* 2010 U.S. Dist. LEXIS 58945 and *Danner v International Freight Systems of Washington LLC* 855 F. Supp. 2d 433.

⁹⁷ *Danner Hollander*

⁹⁸ *Danner Bennett*

⁹⁹ *Danner Bennett*, 14 per Judge Bennett.

¹⁰⁰ *Danner Hollander*, 62 per Judge Hollander.

caused by an event that occurred during the carriage by air. As I see it, that presumption has not been rebutted in this case”.¹⁰¹

This is a blank statement that leaves a lot of loose ends with respect to her preferred interpretative approach. Does she apply the Montreal Convention 1999 on the basis of the paradox or as a result of a blind application of the philosophy in *Magnus Electronics* and *Jaycees Patou*? Admittedly, Judge Hollander does not express any concern either about the changed wording in the Montreal Convention 1999 or about the boundaries of the Montreal Convention 1999 and whether they are different from the boundaries of the Warsaw Convention system. However, if one looks carefully into her statement will realise that she does not favour a wholeheartedly application of the philosophy of *Magnus Electronics*.

She did state the basic principle behind the decisions in *Magnus Electronics* and *Jaycees Patou*, i.e. that the period of carriage by air is identified by reference to the carrier being in charge of the goods. Yet she qualified this principle by arguing that is subject to a rebuttable presumption that damage occurred during the land carriage under a contract of carriage by air. As such, she suggested that the boundaries of the Montreal Convention 1999 remain at the airport, courtesy of the first sentence of Art 18(4).¹⁰² Any expansion of the Montreal Convention 1999 to land carriage outside these boundaries should not be automatic as the *Magnus Electronics* and *Jaycees Patou* cases suggest. Having found that the Montreal Convention 1999 applied to the loss which occurred in a warehouse operated by the air carrier outside the airport, the only way of reading her qualification is that she applied the paradox.

It is submitted that Judge Hollander put a dent to the philosophy of *Magnus Electronics* and *Jaycees Patou*. Nowhere in her judgment had she entertained their basic premise that the cut-off point of the air law conventions was the entrustment of the goods in question to an independent road carrier. She read Arts. 18(3) and (4) in a manner that respected both the text of the Montreal Convention 1999 and the multimodal-friendly philosophy of the international air law conventions. Having said that, it is important to note that the statement of Judge Hollander on the presumption shall be supplemented by the requirement that the land carriage is performed for the loading, delivery or transshipment of the goods in question.

It is only to be hoped that the reasoning of Judge Hollander will put doubt about the correctness of *Magnus Electronics* and *Jaycees Patou*. Alternatively, courts can simply ignore her judgment. This is what Judge Haynes, Jr did in *Tata AIG General Insurance Co v British Airways plc*.¹⁰³ British Airways undertook to carry pharmaceuticals from London to Memphis via Pennsylvania and issued a corresponding AWB. Upon arrival at Pennsylvania the pharmaceuticals were transported by road to Memphis by a subcontractor of British Airways but were damaged *en route* by flooding. The question for the District Court was whether the Montreal Convention 1999 applied. British Airways argued that it did as a result of the change in the wording of Art 18(3): the goods had been in its charge via its subcontractors. The Court held the Montreal Convention 1999 inapplicable, but (it is suggested) for all the wrong reasons.

Judge Haynes, Jr held that the correct interpretation of Art 18(3) and Art 18(4) was that in the dissenting opinion in *Victoria Sales* and the opinion of Judge Bennett in the *Danner* case: as long as the loss took place while the goods were in the air carrier’s charge under a contract of carriage by air, the conventions applied.¹⁰⁴ Here, however, the Montreal Convention 1999 did not apply, since the road carrier fell to be treated as an independent subcontractor because there was no reference to its

¹⁰¹ *Ibid.*, 63 per Judge Hollander.

¹⁰² *Ibid.*, 51 per Judge Hollander.

¹⁰³ 2013 U.S. Dist. LEXIS 89830 (“*Tata AIG*”).

¹⁰⁴ *Ibid.*, 36-43.

identity in the AWB,¹⁰⁵ and thus delivery to it brought the application of the international air law conventions to an end.

The latter holding seems doubtful: but what is more important is that it is difficult to agree with the reasoning on the applicable regime. Even if one assumes that the road carrier was the agent of British Airways, the localised loss in question cried out for the straightforward application of the first sentence of Art 18(4) which limits the application of the Montreal Convention 1999. Trying to use the presumption in the second sentence of Art 18(4) to bring the loss into the ambit of the Montreal Convention 1999 was a wholly unjustified manipulation of the text of the conventions.¹⁰⁶ That sentence should have been restricted in its import to cases of unlocalised losses.

Interestingly enough, Judge Haynes, Jr ignored the judgment of Judge Hollander in *Danner* referring instead to the earlier judgment of Judge Bennett in the same case and he also ignored the argument of British Airways that the different wording of Art 18(3) requires special attention and differentiation from the Warsaw Convention 1929 cases. In that respect, it is clear that the “old” cases of *Victoria Sales* (dissent), *Magnus Electronics* and *Jaycees Patou* continue to carry a lot of weight in US air cargo litigation. US courts so far continue to rely on the interpretation of Art 18 provided by the said cases, avoiding any discussion on the text or the history of the international air law conventions. Admittedly, most aviation cargo cases do not end up in Federal Court of Appeals or the Supreme Court where the levels of scrutiny are higher. Even so, there is a clearly identifiable trend to hold the international air law conventions applicable as long as (a) the AWB covers the land segment and (b) the land segment is undertaken by an agent of the air carrier.

This extensive application of the international air law conventions also explains the reason that US courts pay lip service to the distinction between localised and unlocalised losses. Since both the land and the aerial segments are subject to the same legal framework, any loss is automatically treated as part of the air carriage and subject to the international air law conventions. As long as the loss occurred within the ambit of the AWB, it is presumed to have occurred during carriage by air. This is a very convenient arrangement from an operational perspective, yet it is based on judicial activism rather than an appropriate reading of the provisions of the international air conventions

It is submitted that this interpretation follows a trend to expand the scope of the Hague Rules to land carriage in the USA by using through bills of lading.¹⁰⁷ This interpretation of the US Supreme Court in *Norfolk Southern Railway Co v James N. Kirby Pty Ltd*¹⁰⁸ and *Kawasaki Kisen Kaisha v Regal-Beloit Corp*¹⁰⁹ gives a strong indication of the direction that the multimodal-friendly interpretation of the unimodal conventions takes. Air law cases make no direct reference to the aforementioned decisions of the US Supreme Court. Yet it is difficult to ignore the fact that they follow a similar trend by expanding the scope of the air law unimodal conventions to land carriage by utilising the document of carriage as the Trojan horse. The victim of such expansion is inevitably the domestic or international regulation of land carriage which is considered ancillary to the dominant modes of transport. The operational interdependency has now been translated into legal interdependency. Do the provisions of the Warsaw Convention system or the Montreal Convention 1999 provide for such expansion? They most certainly do not. Yet the judicial analysis in the aviation cases does not differentiate between the application of the AWB and the application of the Conventions. US Courts spend little time examining whether the conventions are incorporated into the AWBs and do not make a clear distinction between

¹⁰⁵ *Ibid.*, 43 per Judge Haynes, Jr.

¹⁰⁶ See Parts VIII.a. and VIII.b.

¹⁰⁷ See Leloudas, 107-109.

¹⁰⁸ 543 US 14 (2004).

¹⁰⁹ 561 US 89 (2010).

their respective scopes of application in the manner that Tomlinson J did in the judgment of the High Court in *Quantum*.¹¹⁰

On the contrary, the Conventions are interpreted by reference to the scope of the AWB rather than the other way round. The is the reason that the IATA AWB does not provide for a special liability system to be applied to non-Convention transport, setting only the carrier's limitation of liability at 19 SDRs per kilogram.¹¹¹ This way the AWB is turned into a document of multimodal carriage which leaves the applicable liability system to ad hoc determination which (if the US trend is factored in) will point towards the application of the international air law conventions where the AWB provides for "door-to-door" transport. Still, the AWB in its current form remains a document of carriage that is hostile to the application of the CMR and impliedly supports the application of the international air law conventions to the land segment of the transport.¹¹² The CMR does not permit for a higher than 8.33 SDRs per kg limit, unless a special declaration under Arts 24 or 26 is being made, which is not the case under the AWB. In that respect, the CMR cannot be applied via the AWB, but instead it shall prevail over its provisions. Considering that the philosophy of the judgment of the Court of Appeal in *Quantum* provides a clear cut distinction between the application of the CMR and the air law conventions, the AWB is not designed to accommodate it.

X. CONCLUDING THOUGHTS

The polemic directed against the "door-to-door" application of the Warsaw Convention system and the Montreal Convention 1999 is predominantly driven by the text and the drafting philosophy of the said conventions that since 1929 support unimodalism; with the rule that "[t]he period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport" playing a profound role in restricting their multimodal aspirations.¹¹³

The said rule has been rightly criticised as a thing of the past: it "reflects the practices of the early years of carriage by air and is ill adapted to the much modern practice and the intermodal carriage of unit loads. It is not obvious now why an air carrier, who may routinely operate road vehicles in an integrated intermodal movement, should move from one liability regime to another when the vehicle crosses the airport perimeter".¹¹⁴ As such, air carriers and freight forwarders are faced with a legal regime that is designed for the unimodal carriage of goods in a multimodal world; with the drafters of the Montreal Convention 1999 losing a once-in-a-lifetime opportunity to revamp its multimodal provisions to accommodate the operational changes. Instead, they opted for a half-hearted amendment of Art 18(3) that has created its own problems without moving the Montreal Convention 1999 any closer to multimodalism.

It comes as no surprise then that air carriers and freight forwarder have questioned (and undoubtedly will continue to question) the limits of application of the Warsaw Convention 1929 and the Montreal Convention 1999. Their aim is a clear one: to apply both legal regimes on a "door-to-door" basis. In support they have advanced creative, yet doctrinally questionable, interpretations of Art 18. For them the expansion of the international air law conventions is justified by the commercial benefits it creates. The (international or domestic) laws that are applicable on the carriage before/after the air segment and are disregarded under these interpretations are the inevitable victims of commercial convenience.

¹¹⁰ For a detailed discussion on the contractual incorporation of the air law conventions see the Australian case of *Siemens v Schenker* [2004] HCA 11.

¹¹¹ Condition 4.

¹¹² Condition 2 of the AWB is no of no assistance, since it applies "[t]o the extent not in conflict with the foregoing [*i.e.* the application of the Montreal Convention 1999 or the Warsaw Convention system]".

¹¹³ Art 18(3) Warsaw Convention 1929 and Hague Protocol 1955; Art 18(5) Montreal Protocol No 4; Art 18 (4) Montreal Convention 1999. See also M. Clarke, *Contracts of Carriage by Air*, 2nd edn (2010), 105 ("*Clarke*").

¹¹⁴ *Clarke*, 105.

US courts have been mostly receptive to this expansion with a clear trend developing to apply the Warsaw Convention system and the Montreal Convention 1999 on the basis of the geographical scope of the AWB. It is submitted that this is an erroneous interpretation of the conventions, but there is no doubt that it is here to stay. Tacitly, US courts view the application of the international air law conventions as a betterment over their domestic regime: with the Carmack Amendment not applicable to continuous land transport preceding or following domestic or international air transport, federal common law is otherwise applicable on the land segments.¹¹⁵ In that respect, the US operational and legal landscape is unique. Consequently, the interpretation of US courts shall be approached with caution and not be reproduced without factoring in the said special characteristics, despite the implications of such recommendation on the uniform interpretation of Art 18.

Such expansion was until recently unthinkable in Europe where the CMR had a strong presence. Courts were subscribing to the airport delimitation of the Warsaw Convention system on the basis of its text, but also in order to avoid an intrusion into the scope of the CMR, that was essentially acting as a deterrent to any “door-to-door” expansion. The questionable amendment of Art 18(3) of the Montreal Convention 1999 together with the undermining of the CMR in a multimodal context advanced by German and Dutch courts has been regarded as an opening up of the borders of the Montreal Convention 1999. English courts so far remain loyal to the judgment of the Court of Appeal in *Quantum* which constitutes bad news for the supporters of the multimodal scope of the Montreal Convention 1999. Still, the update from Germany is that the said developments have made German courts question the airport delimitation of the Montreal Convention 1999.¹¹⁶ They have not gone as far as US courts applying the Convention on a “door-to-door” basis, yet they demonstrate for the first time flexibility as to its boundaries bringing into its scope road transport to warehouses away from the airport.

This article demonstrates that both the Warsaw Convention system and the Montreal Convention 1999 are not designed for multimodal transport, let alone for “door-to-door” transport. If one wants to remain truthful to the text and the philosophy behind them, the airport delimitation shall remain intact under both legal instruments; with the functional interpretation of the term airport advanced in *Rolls Royce* being the preferred one. Any expansion to multimodal transport would require an amendment to Art 18 and Art 38 of the Montreal Convention 1999, one that is not in the plans for the foreseeable future. Yet there is no doubt that air carriers and freight forwarders will continue to push hard for such expansion, especially in the USA where courts are more accommodating. If history is any indication, the end result of this struggle between commercial convenience and legal principle is not hard to predict.

¹¹⁵ 49 USCS §13506 (a)(8)(B).

¹¹⁶ Müller-Rostin ZLW, 209-228.