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TRANSPORT LAW IN THE GLOBALIZATION ERA(*)

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1 . — Transport has been the field of a long process of world-wide uniform law and uniform commercial terms spread all over the world[1]. We could say that Transport Law is going to be the first in history, and, may be, the main field to test a globalized law[2]. There is a large corpus of uniform law (which influenced also domestic legislation[3]), but there is a lack of uniformity in their interpretation[4], which constitutes a problem in international trade[5].

On the other hand, as it will be shown, the overlap of international conventions has driven towards a progressive disuniformity in sectors once characterized by a strong degree of uniformity. The effort of codification of the law of the sea dates from the second part of 20th century[6]: to have an organic legislation, we had to wait till the UNCLOS III, the United Nations Convention on the Law of the Sea, signed in Montego Bay on the 10th December 1982[7], which regulated together, inter alia, the freedom of navigation, the coastal State claims, as well as environmental matters[8].

2 — At very beginning, we had maritime law. Still in the XIX century, shipping has been regulated on the base of national laws and customs. After all, the law of sea has been mainly founded on customary law up to the end of century XX[9].

Carriage by rail was chronologically the first field to test the approach of an uniform law of transport: first International Convention concerning the Carriage of Goods by Rail dated from the year 1890[10].

Carriage by air and by road received their first juridical regulation under uniform law only in subsequent times. The first was regulated by the Warsaw Convention of 1929[11] (which was only the beginning of a complex history of uniform legislation), while the public law of the air was the field of the Paris Convention of 1919[12], although its applicability was circumscribed to a certain number of States (it was never ratified by United States)[13]. The latter was regulated by the Geneva Convention of 1956 (so-called C.M.R.)[14].

The attempt to adopt an uniform-law convention to regulate multimodal carriage [15] has not been successful till now[16], though the field is covered by some agreements at regional level[17], including one under the umbrella of Andean Community[18]. Nevertheless, still waiting the entry into force of an uniform-law convention, model rules of 1992 for multimodal transport developed by a joint UNCTAD/ICC[19] Committee have to be mentioned as an effort of standardization through clauses to be incorporated into private contracts[20].

3 — Maritime and air carriage have been for a long time the field of the top-level uniformity world-wide[21]. Since many centuries, maritime law has been characterized by an high decree of uniformity[22], as it is happened for air law since the twentieth

century[23].

The core of maritime law may be still summarized in a sentence by a famous Italian jurist, Pasquale Stanislao Mancini, in his inaugural lesson at University of Turin [24], as quoted in a recent speech by Dr. Patrick J. S. Griggs, President of the Comité Maritime International (CMI)[25], that sounds still relevant: *«The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of juridical regime»*[26]*.* The consequence is that «*those involved in the world of maritime trade need to know that wherever they trade the applicable law will, by and large, be the same»*[27].

4 — As an example of ancient-law basically still in force for shipping, I have to mention, at least the most famous and well known regulation of general average, whose basic principle of distribution of risk among every people participating the maritime venture is still in force in many legislations and which arrived till now back from a body of laws adopted, according to tradition, in the Greek island of Rhodes between the Second and the Third century B.C., and accepted by Roman law[28].

At present, some-one may not be afraid to be considered an heretical, and may express some doubts about the present real justification to maintain such a regulation, according to which cargo-owner must contribute to expenses and damages afforded in the aim to grant the salvation of the expedition in danger to be lost, even though that danger was caused by a fault of the servants and agents of the carrier[29].

That may sound deeply unfair if we consider that (according to the Hague Rules and Hague-Visby Rules, still in force in many Countries all over the World) the carrier might be able to exonerate himself of damages caused to the cargo by that fault (in the navigation, or in the management of the ship) which provoked the danger for the expedition[30].

The majority of maritime law writers has been considering general average as a rule of equity. Such a regime of distribution of the risk had (in deed) some (strong) logical reasons in traditional sailing era, but we could doubt about the persistency of any justification in an era of technological navigation, where the ship is not anymore at the mercy of winds and waves, and where safety was improved by the introduction of new navigational aids, like radar[31], GPS[32], AIS[33], that have brought to a dramatic abatement of unforeseen events, and where security problems in most Seas are not worse than those related to other modalities of transportation. It has been observed that *«General average was a useful concept before the advent of marine insurance. It has grown far beyond its original parameters and has become more and more oriented in favour of shipowners and the average adjusting profession»*[34].

5 — Tradition may not be the only reason to justify a specific legislative institute, though in such a sensitive-to-tradition field like maritime law. As a matter of fact, other legislative institutes, once typical of maritime law and world-wide diffused, which found their origin in consideration of the (once) typical (strong) risk of navigation (*«risicum maris et gentium»*) are not still in force anymore in most legal systems[35]. A good example of such point may be found in bottomry, the ancient *fenus nauticum,* or *pecunia traiecticia,* which had its roots in customs of Mediterranean trade before Roman era, in force of which a ship-owner might borrow money to carry on the expedition from a lender who accepted the ship as a security for the repayment, with the stipulation that if the ship should be lost in the course of the voyage by any of the perils enumerated in the contract, the lender also shall loose his money[36]. It seems significant to me that bottomry has been considered at the origins of maritime insurance[37]. The use of bottomry bonds declined greatly in the 19th century, both for their relatively low priority among other liens and for the development of modern contracts of maritime insurance[38].

We may even expect, in future, to see narrowing the still today wide range of monetary limitations granted to carriers, shipwoners and operators. A certain tendency

in that direction started, as we are going to see, with the dereliction of monetary limitations related to carrier liability for death and bodily injury of passengers[39].

6 — What we have to point out now is that General Average Rules are a sort of anomaly, because they are a rare, if not unique, heritage of old Mediterranean legislation of navigation in modern Maritime law.

The other (and even more significant) peculiarity of general average rules is that they are world-wide still in force as standard contractual terms, being incorporated in almost every maritime contract by way of standardized contractual forms, and they are a sort of customary rules, though in many national legislations, like Italian code of navigation[40], there is a correspondent legislative discipline of general average[41].

As a matter of fact, maritime world has been characterized since many centuries by standardized contracts and customary rules. According to the most accredited point of view, even the well-known *«Consolato del mar»* (*«Consulate of the Sea»*)[42] was nothing else than a collection of customary rules developed in Catalonia between the end of XIII century and the beginning of XIV century[43].

7 — The only body involved in promoting uniformity in maritime private law has been for about seven decades the already-mentioned C.M.I. - Comité Maritime International, a non-governmental international organisation, established in 1897[44], joined by national associations of maritime law of most important maritime countries [45]. Because of its origins and composition, C.M.I. has traditionally taken care of reason of maritime transport industry. It was only after the accident of *Torrey Canyon* of 1967 that the Inter-Governmental Maritime Consultative Organization (established in 1948, as a specialized agency of United Nations, and renamed in 1982 the International Maritime Organisation – IMO) created its Legal Committee, which was charged to develop a new legal regime of liability and compensation for pollution caused by tankers. As a matter of fact, in the aim of that goal, IMCO Legal Committee cooperated with C.M.I., leading to the Diplomatic Conferences which approved *C.L.C.*[46] and the *Intervention* Convention[47].

The role of the I.M.O. has been considered controversial, because it has been charged by environmental lobbies to be too close to reasons of maritime transportation industry. According to a picturesque comment referred to environmental activities, it would play the same role of a fox in guarding the chickens[48].

The influence of Maritime Countries is not so strong in other specialized agencies of United Nations, involved as well in the unification of maritime law, such as the United Nations Conference on Trade and Development (UNCTAD), established by United Nation assembly in 1964, and the United Nations Commission on International Trade Law (UNCITRAL), established in 1966. Different structures and origins of such organizations are the reasons why sometimes their goals seems to be not strictly coincident.

8 — There is quite a lot of other inter-governmental and non-governmental organizations potentially involved with the process to uniform law in the field of carriage, transport and navigation.

We have to mention at least ICAO, the International Organization of Civil Aviation, which succeeded to activities in standardization of law previously performed by the *Comité international technique d'experts juridiques aériens,* previously operating in the same field, on the basis of the first International Conference of private air law [49]. ICAO was established on the base of Chicago Convention of 7 December 1944 [50], which superseded the Paris Convention of 1919. Under its auspices, was, *inter alia,* adopted the Montreal Convention of 1999[51], destined to supersede the Warsaw Convention of 1929[52] and its Protocols[53], as well as the supplementary Convention of Guadalajara[54].

Quite an important role has been played in aviation by the organization of airlines, the I.A.T.A., International Air Transportation Association[55], which negotiated

the Montreal Agreement of 1966 with the Civil Aeronautical Board of United States, to increase the level of liability-limits for damages to passengers and to introduce a basic strict-liability for liability of carrier towards passengers in air carriage which could involve United Stated, in the aim to maintain United States in the Warsaw System[56].

Its standardized conditions of carriage are virtually of general application world-wide, as they are adopted by the largest majority of leading airlines.

Besides, under auspices of I.A.T.A. a couple of Intercarrier Agreements was adopted, for the unilateral renunciation of liability limits in case of death and bodily injury of passengers, before the entry in force of Montreal Convention of 1999[57].

We have also to mention the Intergovernmental Organisation for International Carriage by Rail (OTIF), established on 1 May 1985 as a consequence of the Convention concerning International Carriage by Rail of 9 May 1980 (COTIF), which superseded Central Office for International Carriage by Rail which was set up in 1893, on the base of the already mentioned first International Convention concerning the Carriage of Goods by Rail of 1890.

Last but not least, we have to mention the International Organization of Labour, whose activity deals may be quite relevant for shipping, dealing with matters such as recruitment and placement, minimum age, hours of work, safety, health and welfare, labour inspection and social security[58].

9 — Finally, we have to consider the very relevant role of Organization of Regional Integration, such as European Community, stressed in some of the most recent conventions of uniform law, with the provision of their ratification, though such a ratification was not considered to be computed in the aim of the entry in force conditions.

Since the Treaty of Rome of 1957 (the foundation Treaty of the European Community), E.C. transport policy has been focused on removing obstacles at the borders between Member States in the aim to facilitate the free movement of persons and goods. Subsequent to the advent of the single market among Member States, the common transport policy moved towards abolition of frontiers and other liberalisation measures[59], including liberalisation of cabotage, both in maritime[60] and in air carriage[61].

As a part of its politics of liberalization in transport, European Community introduced in the legal systems of each Member-State a regulation anticipating the effects of the Montreal Convention of 1999 for the liability of European air carriers towards passengers (and then, it has extended for every European air carriers the core of the 1999 Montreal Convention liability regime for passengers, also to carriages non falling in the aim of that Convention[62]).

European Community is also working to introduce a similar regime for maritime carriage of passengers. In the past, it has introduced a regime for compensation for denial of boarding in air passenger transportation[63], partially enlarged to cover also delay and cancellation of the flight[64], and it has generally promoted a wider consumer protection approach in air transport[65]. Its role in implementing and improving maritime environmental legislation has been fundamental: we have to mention, at least, the role played by E.U. Commission in political suasion to introduce a third tier of compensation for oil pollution carried in a bulk, finally adopted under I.M.O. umbrella by the London Protocol of 16 May 2003 on the Establishment of a Supplementary Fund for Compensation for Oil Pollution Damage, additional to the C.L.C. and Fund Conventions[66].

A similar role seems to be played here by the Andean Community. At this subject, we can mention, at least, the decisions of the Commission of the Cartagena Agreement on the Integration of Air Transport in the Andean Subregion[67] and on the Multimodal Transportation[68].

10 — To understand the development of maritime private law, we have also to consider a basic difference between the main categories of maritime contracts related to the employment of ships. We have charter-parties, where at least till a decade ago, it was possible to observe a substantial balance of economic power between ship-owners and charterers, and on the other hand, we have other contract of carriage of cargo and passengers (basically, carriage performed by liners). Within those types of contracts the negotiating position of passengers and cargo owners has always been at least feeble in front of strong economic power of carriers.

11 — Fragmentation of fleets of oil-carrier, due to the outsourcing of activity of oil transportation, once performed by oil industry, which had its own fleet, called ship-owners (very often one-ship owners) to play a different and feebler role in front of oil industry[69]. We have to anticipate that some among real reasons of that outsourcing have to be found both in the goal of a shortage of costs and in an attempt to escape liability allocated on ownerships carrying oil by domestic (U.S. O.P.A. of 1989[70]) and uniform legislation (C.L.C. system[71]), with increasing levels of liability, under the pressure of public opinion become aware of environmental problems under the emotion of catastrophic oil escapes[72].

So we are able to recognize a paradox of maritime environmental legislation, that is the other side of the problem of the sustainability of navigation and carriage activities [73], in the perspective of sustainable development[74]. Fragmentation of fleets because of increasing levels of liability (implementation of the *«polluter pays»* principle [75]) might have the (unwanted) consequence of growing of sub-standard ships, with an increased risk for environment, as well as for safety and security in general[76]. A one-ship owner, who sails under a flag of convenience may be not able to perform the same safety and security standards once performed by shipping branches of big oil companies, although sailing as well under flag of convenience[77].

We have incidentally to consider another step of the present involution of the discipline of the shipping, not circumscribed just to environmental aspects or to oil-carrier fleets. If it is true that UNCLOS III requires a genuine link as condition for the registration of a ship in a determined State[78], it is also true that then it submits the specification of the content of such a genuine link to the national legislation of that State of registration[79].

The attempt performed by the international community to determine requisites for registration of ships by uniform rules had no result, since the 1974 Geneva Convention on the conditions of registration of ships[80] has never gone in force, as it was nor sufficiently ratified, probably because of the resistances of the lobbies of the maritime industry.

12 — The other side of the freedom of navigation traditionally recognized to each ship of every flag of the World[81] was that the State of the flag had to be responsible of the safety of navigation[82]. This is not possible for most States granting flags of convenience (whenever they would want), at least because they have no experience and no organization to perform the opportune controls.

The corollary is that Port States are going to be called to assume even more responsibilities in the field of safety and security of navigation, also in the environmental perspective, increasing Port-State-Control (P.S.C.) procedures to make up for deficiencies in control by Flag States[83].

What's even surprising, is that States and international Organization entrusted with air transport seem to be unaware of the previous negative experience on the safety and security of the maritime navigation because of the diffusion of the flags of convenience. As a part of politics of deregulation and liberalization of air transport, the principle of the national substantial ownership of airplanes[84] and air companies as condition for the attribution of the nationality and, consequently, for the admission to the line air services seems to be left behind in the last five-year periods[85]. This way

started a new course in comparison to the system delineated by the Convention of Chicago of 1944 and subsequent bilateral agreements of air navigation[86].

It does not seem just casual that problems very similar to those shown for shipping, referred to the use of flag of convenience, are going to be highlighted also in the field of air navigation, with the necessity to introduce controls of the airport State, that are able to make up for the deficiencies in controls operated by States of registration[87].

13 — In XVIII Century, English maritime carriers, when English mercantile fleet was almost a monopolist in maritime traffics on North Atlantic Ocean, were able to escape most liabilities by imposing in their contracts the so called *«negligence clause»* (exonerating the carrier *«even for its own negligence»*[88]*),* so departing from the principle of strict liability falling on common carrier by English law[89][90], not far-away from the rule of liability falling on *nautae* in Roman law, at least according to the traditional (not uncontroversial) interpretation of the *«actio de recepto»*[91].

Maritime carriers used to bind themselves the less they could, that often meant almost nothing. First attempt to react to such a situation was made by US legislator by the famous Harter Act of 1893, according to that carriers could escape liability only in specific circumstances related to the so-called *«perils of the sea»* (excepted perils), only if he had exercised due diligence to make the vessel seaworthy[92]. When adopted, it was quite a good compromise between cargo interests and maritime transportation industry.

If we read that list of circumstances at the present, may be we can feel a little disappointed, because it does not contemplate just a narrow range of exceptional situations. That list of excepted perils allowing exoneration of maritime carriers from liability went through the Hague and Hague-Visby rules in uniform law of international maritime carriage under bill of lading[93], which (in its original or amended text) is still in force in many maritime countries, as well as national legislations inspired by those principle, like the Italian code of navigation. A new Convention, more favourable for cargo-interest, Hamburg Convention of 1978[94], has not reached till now the same success of ratification that Brussels Convention of 1924 used to have.

So, we have today, as we have seen, a large dis-uniformity of the discipline of the maritime carriage of goods, likewise it has previously happened for the discipline of the air carriage[95], because of the contemporary different texts of Warsaw Convention were contemporary in force (the original text, the text amended by the 1955 Hague Protocol; the text amended by the 1975 fourth Montreal), eventually integrated, for those Countries that have ratified that, by the 1961 Guadalajara additional Convention. Such situation has driven towards the instance to replace the whole previous discipline with a new convention, that could be an acceptable compromise among States concerned with air carriage: on such bases the 1999 Montreal Convention has been adopted. We might expect that an analogous solution will also be adopted finally for the carriage of goods by sea[96]. In fact, works for the adoption of a new text of uniform law on the carriage of goods (wholly or partly) by sea are in progress under UNCITRAL auspices[97].

14 — The history of unification of law in the field of maritime carriage of passenger is more recent. After two unsuccessful conventions of Brussels of 1961[98] and (never entered in force) 1968[99], a new convention was signed in Athens in 1974, the so called PAL Convention, but in its original text, as well as in its text amended by Protocols of 1976 and 1990 (never entered in force) it was not so successful. The texts of Athens Convention, as amended by Protocol of London of 2002[100], and strongly influenced by the new already mentioned 1999 Montreal Convention[101], seems to have a better opportunity to be successful, also because it is supposed to constitute the basis of the future EC regulation on maritime carriage of passengers[102], in the same manner in which 1999 Montreal Convention was the basis of the EC regulation on air

carriage of passengers[103].

15 — If I had to try to make a synthesis of my speech, I would say that the field of transport strongly requires an uniform legislation, because of the potential plurality of legal systems involved in an operation of carriage and of the difficulty, in absence of an uniform law, to focus a specific legislation to be applied.

Uniform law is based on solutions of compromise among several legal systems. Unfortunately, quite often reducing legal protection in favour of feebler parts, and taking care mainly of the enterprises' point of view makes such a compromise. One may find that element in the whole uniform law history and, therefore, in particular, in the development of transport law. Rights agreed under domestic laws are denied or, at least, ignored, by uniform law. Quite an interesting example of that kind of problems may be found in the extension of damages recoverable under 1999 Montreal Convention. The Montreal Convention expressly excludes the recoverability of «punitive, exemplary or any other non-compensatory damages», although in some of the Countries parties to the Convention (not Italy) a claim for such damages could be granted. The final result of the unification in the field of transportation law is often not consumer-friendly.

We have also to pay attention, at least, to those generalized extensions of uniform law operated by many national legislators (including the Italian one[104]) with reference to air carriage, do not translate themselves in a cut of the rights of passengers, not justified by the exigency to find a way of compromise with other Countries.

It is necessary however to avoid that the uniform legislation or its (not always to be agreed) interpretation might be used in a way to suffocate the rights of feebler parties and, particularly, those of passengers or those of damaged parties, as it regards liability in tort.

In such contest, it seems meaningful to remember, as it regards the interpretation of uniform law instruments, with specific reference to the 1929 Warsaw Convention, the attempts (supported by different American and English Courts) to exclude compensation for damages suffered by the passenger for all the hypotheses (although consequential from the fault of the servants and agents of the carrier) not complying with the notion of «accident» contemplated by the Article 17 of the same Warsaw Convention, or its (sometimes too restrictive) interpretation, on the base of a supposed principle of exclusivity of the cause of action that would derive (according to such opinion) from the subsequent Article 24 of Warsaw Convention[105].

The same kind of problems will be found by the interpreter in the exegesis of Article 29 of 1999 Montreal Convention[106]. As a matter of fact, it would have been preferable that the uniform law legislator had better clarified such point under the new Convention. On the other hand, we could also make the same consideration for other points, with reference to severe doubts in the interpretation of Warsaw Convention. I have to mention at least the problem of the compensation for pure emotional distress. Although the matter had been considered in the preparatory works, the definitive text of the Convention doesn't have kept an express regulation of them, still maintaining the problem of their compensation[107].

We have also to consider hypothesis of incompatibility of international conventions with norms of constitutional level of members-States. In such direction, we have to mention the historical decision of the Italian Constitutional Court No. 132 of 1985 that affirmed the illegitimacy of very law limits for the compensation of the death damage in carriage by air of passengers under Warsaw Convention[108] (with consequent inapplicability in Italy of those limits). It was the first step of the evolution that has brought to the world-wide dereliction of the liability limits for bodily injury suffered by the passengers under Montreal Convention of 1999, anticipated by some national legislations[109], by the EC regulation no. 2027 of 1997[110], and even by the two already mentioned I.A.T.A. intercarrier agreements[111]. We have also recognize a

line of tendency that has also inspired the most recent revision of the 1974 Athens Convention on the carriage of passengers by sea[112]. On the other hand, I would say that we could not exclude the possibility of a pronunciation of the illegitimacy of the unbreakable limits for air cargo damages, which the carrier can invoke even in case of willful misconduct, under the fourth Protocol of Montreal of 1975[113], or under the new Montreal Convention of 1999[114]. I have just to mention that a similar unbreakable limit in Italian code of navigation[115], although inspired by the original un-amended text of Hague Rules, has been held illegitimate by a recent decision of the Italian Constitutional Court[116].

(*) Speech given at III Congreso Internacional de las Ciencias Politicas y Juridicas «Derecho Sin Fronteras» organizado por la Fundación Tribuna Jurídica (Cali, Colombia, 30 August 2006).

[1] Italian Code of navigation of 1942, elaborated according to the theoretical view of Antonio Scialoja regulates together maritime and air navigation (after SCIALOJA, *Sistema del diritto della navigazione,* Roma, 1933). It has been considered abroad an anomaly by most scholars for several decades (see RODIÈRE, *Code italien de la navigation,* trad. de l'ital., Paris, 1968, p. 9; ID., *Le particularisme du droit maritime,* in *D.M.F.,* 1974, 195, sub note 1; DE JUGLART, *Traité de droit aérien,* I, Paris, 1989, 47). The recent evolution of uniform law of transport shows a tendency to give homogenous legislative solutions to similar problems in the whole field of transportation. On this basis, the opportunity to offer a homogeneous reconstruction of transport law has been suggested by ROMANELLI, *Diritto aereo, diritto della navigazione e diritto dei trasporti,* in *Riv. trim. dir. e proc. civ.,* 1975, I, 1331; ID, *Principi comuni del diritto uniforme dei trasporti,* in *Studi in memoria di Gino Gorla,* Milano, 1994, 1315. In the perspective of the need to harmonize the rules relating to the various modes of transport, see RAMBERG, *The future of international unification of transport law,* in *Dir. mar.,* 2001, 643; ID., *The law of carriage of goods – attempts at harmonization*,, in *E.T.L.,* 1974, 2. *Contra,* recently: GARCÍA PITA Y LASTRE, *Arrendamientos de buques y derecho maritímo (con especial referencia al «derecho de formularios»),* Valencia, 2006, 56 et seq.; SEQUERA DUARTE, *Derecho aeronáutico,* Bogotá, 2004, 14.

[2] With specific reference to maritime private law, see (on uniformization and its techniques): TETLEY, *Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention*, in *Tul. Mar. L. J.*, 24/2000, 775. See also BRUNETTI, *Diritto marittimo privato italiano*, I, Torino, 1929, 43 et seqq.; RIGHETTI, *Trattato di diritto marittimo*, I, Milano, 1987, 249. With reference to air law, see MAPELLI LOPEZ, *De la Internacionalidad a la Uniformidad del Derecho Aeronáutico*, in *Aviacion comercial turismo derecho aeronautico y espacial*, edited by Folchi, Buenos Aires, n.d., 137. See also (on the project of a Latino-American Aeronautical code): FOLCHI, *La Unificación Legislativa del Derecho Aeronáutico en América y el Proyecto de Código Aeronáutico Latinoamericano*, in *40 Años de ALADA*, edited by Folchi, Buenos Aires, n.d., 137.

[3] See, with reference to air carriage, GUINCHARD, *L'influence de la convention de Varsovie sur les règles de droit interne relatives à la responsabilité du transporteur aérien*, in *Rev. fr. dr. aér.*, 1957, 189; ROMANELLI, *Il trasporto aereo di persone - Nozione e disciplina*, Padova, 1959, 194; DE JUGLART, *Traité de Droit aérien*, edited by Du Pontavice, Dutheil de la Rochère and Miller, t. II, Paris, 1992, at 306; SARMIENTO GARCIA, *Influencia del sistema de Varsovia en el derecho aeronautico latino-americano*, in *Dir. trasp.*, 1992, 473.

[4] On interpretation of uniform law, see, inter alia: BARIATTI, *L'interpretazione delle convenzioni internazionali di diritto uniforme*, Padova, 1986; DU PONTAVICE, *L'interpretation des Conventions internationales portant loi uniforme dans les rapports internationaux (A propos de la Convention relative au transport aérien international signée à Varsovie en 1929)*, in *A.A.S.L.*, 1982, 3; F. BERLINGIERI, *Sulla interpretazione delle convenzioni internazionali e sull'esonero per danni da incendio*, in *Dir. mar.*, 1987, 380.

[5] It has been observed that «The approval of a particular convention or uniform law constitutes only the first, albeit important, stage in the process of unification. Furthermore, the process requires not only the incorporation of the contents of the convention or uniform rules into the domestic law of each of the states concerned, but also their uniform interpretation by national judges and their actual application by those operating in the affected economic sectors» (BONELL, *International Uniform Law in Practice - Or Where the Real Trouble Begins*, in *Am. Journ. of Comp. Law*, 38/1990, 865, 866. See also BERLINGIERI, *Interpretazione uniforme delle convenzioni internazionali*, in *Dir. mar.*, 2004, 594.

[6] See, in general, VÁZQUEZ CARRIZOSA, *El nuevo derecho del mar – Evolución y proyecciones econonómicas,* Bogotá, 1976, 29 et seqq.; SALOMON FRANCO, *Pasado y presente del derecho del mar,* Santa Fe de Bogotá, 2004, 27 ss.

[7] See, in general, SALOMON FRANCO, *Pasado y presente del derecho del mar,* Santa Fe de Bogotá, 2004, 45 ss. According to my knowledge, Colombia has signed but not yet ratified UNCLOS III. With reference to maritime claims in Colombian legislation, see Act No. 10 of 4 August 1978 establishing rules concerning the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf and regulating other matters and Decree No. 1436 of 13 June 1984 (1)partially regulating article 9 of Act No. 10 of 1978.

[8] With reference to coastal States and environmental matters, see, in general, ZAMBONINO PULITO, *La protección jurídico-administrativa del medio marino: tutela ambiental y transporte marítimo,* Valencia, 2001, at 131 et seqq.; BEURIER, *La sécurité maritime et la protection de l'environnement: évolutions et limites,* in *DMF,* 2004, 99, at 110. We have also to mention several regional agreements dealing with environmental matters at sea under the auspices of U.N.E.P. - United Nations Environment Programme within the framework of its Regional Seas Programme (see DÉJEANT-PONS, *Les principes du P.N.U.E. pour la protection des mers régionales,* in *Droit de l'environnement marin – Développements récents,* Actes du colloque organisé les 26 et 27 novembre 1987 à la faculté de droit et de scienses économiques de Brest, Paris, 1988, 63; AKIWUMI – MELVASALO, *UNEP's regional seas programme: approach, experience and future plans,* in *Mar. policy,* 22/1998, 229). The two most successful in that field are the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution signed on 16 February 1976 (revised in Barcelona, Spain, on 10 June 1995 as the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean) and the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, signed on 24 March 1983 at Cartagena des Indias, commonly known as the «Cartagena Convention»: see *amplius* SHEEHY, *International Marine Environment Law: a Case Study in the Wider Caribbean Region,* in *Geo. Int'l Envtl. L. Rev.,* 16/2004, 441.

[9] The first general approach to the law of the sea may be found in the League of Nations Conference for the Codification of International Law (1930, The Hague), which dealt with the breadth of the territorial sea, the contiguous zone, the high seas, the continental shelf, fishing and the conservation of living resources.

[10] Convention for goods transport by rail adopted on 14th October 1890 in Berne.

[11] Convention for the Unification of Certain Rules relating to the International Carriage by Air, signed at Warsaw on 12th October 1929.

[12] International Convention relating to the regulation of aerial navigation done at Paris on the 13th day of October, 1919. See VIDELA ESCALADA, *Manual de derecho aeronautico,* Buenos Aires, 1996, 32 et seqq.

[13] It was followed by some other conventions of regional application, such as Ibero-American Convention of Madrid of 1 October 1926 and Pan American Convention of Havana of 20 February 1928.

[14] Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956), today amended by the Geneva Protocol of 5 July 1978. Colombia is not part to that Convention.

[15] See in general SILINGARDI – LANA, *El transporte multimodal,* Bogotá, 1998.

[16] United Nations Convention on International Multimodal Transport of Goods, signed at Geneva on 24 May 1980, never entered in force, not signed by Colombia.

[17] See amplius CROWLEY, The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem, in Tul. L. Rev. 79 /2005, 1461 at 1498.

[18] See *amplius* SARMIENTO GARCÍA, *Estudios de Responsabilidad Civil,* Bogotá, 2002, p. 257

[19] ICC is the acronym for International Chamber of commerce. See JIMÉNEZ, The International Chamber of Commerce: Supplier of standards and instruments for international trade, in Un. Law Rev., 1996, 284.

[20] See amplius KINDRED – BROOKS, Multimodal Transport Rules, The Hague, 1997; CAPRIOLI, Considérations sur les nouvelles régles CNUCED/CCI applicables aux documents du transport multimodal, in D.M.F., 1993, 204.

[21] Maritime law has been the first and (for many centuries) the main part of the corpus of mercantile law, which is defined the *«lex mercatoria»* by a little bit anachronistic Latin expression. See remarks by DONAHUE, *The Empirical and Theoretical Underpinnings of the Law Merchant: Medieval and Early Modern Lex mercatoria: An Attempt at the probatio diabolica,* in *Chi. J. Int'l L.,* 5/2004, 21. According to the knowledge we have, earlier Sumerian laws related to maritime commerce date back to about 2200 B.C.: see VERSTEEG, *Early Mesopotamian Commercial Law,* in *U. Tol. L. Rev.*, 30/1999, 183.

[22]

With reference to the Consulate of Sea, see CASAREGIS, *Discursus legales de commercio*, disc. 213, 211, t. II, Venice, 1740, at p. 363: «*in materiis maritimis tanquam universalis consuetudo habens vim legis, inviolatiter attendenda est apud omnes provincias et nationes*».

[23] On the movement for the uniformization of air law, with specific reference to the contribution given by the Italian jurist Amedeo Giannini, see ROMANELLI, *Contributo della dottrina italiana all'unificazione del diritto della navigazione aerea,* in *Arch. giur. «Filippo Serafini»,* 1986, 261.

[24] The reference is to P.S. MANCINI, *Prelezione al corso di diritto pubblico marittimo insegnato nella R. Università di Torino nell'anno 1852-1853*, speech given on 29 November 1852, in P.S. MANCINI, *Diritto internazionale – Prelezioni con un Saggio su Machiavelli*, Naples, 1873, 93, at 105-106.

[25] GRIGGS, *Obstacles to Uniformity of Maritime Law, The Nicholas J. Healy Lecture*, in *J. Mar. L. & Com*. 34/2003 191 at 192.

[26] English translation of the sentence quoted by P. J. S. Griggs is by LILAR - VAN DEN BOSCH, *Le Comité Maritime International* 1897-1972, Antwerpen, 1972, at 6..

[27] Words by GRIGGS, *Obstacles to Uniformity of Maritime Law*, *ibidem*.

[28] D. 14, 2.

[29] TETLEY, *General Average Now and in the Future*, in *Roger Roland. Liber Amicorum*, Brussel, 2003.

[30] According Article 4, § 2, lett. a of Hague Rules, «*Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from .... Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship*» (not amended by Hague Visby Rules).

[31] See the relevance given to that navigation aid by the co called COLREG (Convention on the international regulation for preventing collisions at sea London, 1972). See MURPHY, *The Legal Implications of Marine Radar,* in *J.M.L.C.* 7/1975-76, 573. In Italian legal literature, see SPASIANO, *Aspetti giuridici dell'impiego del radar,* in *Riv. dir. civ.,* 1957, I, 589.

[32] See EPSTEIN, *Global Positioning System (GPS): defining the legal issues of its expanding civil use*, in *J.A.L.C.* 61/1995, 243.

[33] AIS is the acronym for Automatic Identification System. It is mandatory under Regulation 19 of SOLAS Chapter V. SOLAS is the acronym of Safety of Life at Sea Convention (Convention of London of 1st November 1974; Colombia has deposited its instrument of accession on 31 October 1980).

[34] Words by TETLEY, *General Average Now and in the future,* http://www.mcgill.ca/files/maritimelaw/genaverage.pdf, at 38. On the relationship between general average regime and the evolution of insurance, see A. LA TORRE, *Riflessioni sulla storia dell'avaria comune,* in *Dir. mar.,* 1987, 687; ID., *L'assicurazione nella storia delle idee – La risposta giuridica al bisogno di sicurezza economica: ieri e oggi,* Milano, 2000, at 32 et seqq.

[35] It was incorporated in Roman legislation, as it is mentioned in the *Digest*: D. 15, 1, 38; D. 22, 2, 1.

[36] See DE MARTINO, *Sul foenus nauticum*, in *Riv. dir. nav*., 1935, I, 217.

[37] See PERSICO, *Le assicurazioni marittime*, I, Genova, 1947, 3; STONE, *Canada's Admiralty Court in the Twentieth Century*, in *McGill L.J.*, 47/2002, 511, at 530.

[38] Though a discipline of bottomry (*«prestito a cambio marittimo»*) was contemplated by the Italian code of commerce of 1882 (Articles 590 to 603) as well as in the previous Italian code of commerce

of 1865 (Articles 426 to 445), that was not reproduced in the Italian code of navigation of 1942, still in force. The French discipline of bottomry (*«prêt à la grosse»*) (artiche 317 of French Code de Commerce of 1807) has not been formally abrogated till a few times ago. Although English maritime law still maintains a maritime lien for bottomry, evolution in trade has made that virtually obsolete. On the relationship between the evolution of insurance and the bottomry, see A. LA TORRE, *L'assicurazione nella storia delle idee – La risposta giuridica al bisogno di sicurezza economica: ieri e oggi,* Milano, 2000, 76 ss.

[39] See International Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Montreal on 28 May 1999.

[40] See Italian code of navigation, Article 469 et seqq.

[41] See Colombian code of commerce, Article 1517 et seqq.

[42]
Text reproduced in the famous work by PARDESSUS, *Collection des lois maritimes,* II, Paris, 1834, at p. 49 et seqq.

[43]
See ZENO, *Storia del diritto marittimo italiano*, Milano 1946, at p. 199. See also BOUCHER, *Consulat de la mer ou Pandectes de droit commercial et maritime*, Paris, 1808, sub I.2, 9, at p. 45

[44] See VON ZIEGLER, *The Comité Maritime Internationale (CMI): the voyage from 1897 into the next millenium*, in *Un. Law Rev*., 1997, 728.

[45] According to its constitution (article 1), the object of the organization is «to contribute by all appropriate means and activities to the unification of maritime law in all its aspects».

[46] Brussels Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage, successively integrated by the Brussels Convention of 18 December 1971 on the Establishment of an International Fund for Compensation for Oil Pollution Damage, to form the *C.L.C. System.* Text of Fund Convention today replaced by the London Protocol of 27 November 1992.

[47] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties signed at Brussels on 29 November 1969, amended by the Protocol of 2 November 1973. Colombia is not part to that Convention. On the co-operation between I.M.O. and C.M.I., see in general: MENSAH, *The co-operation between the Comité Maritime International (CMI) and the International Maritime Organization (IMO) in the development of uniform international maritime law,* in *Dir. mar.,* 1999, 153.

[48] For such a consideration, see the web page of Greenpeace referred to the incident of the *Prestige:* http://www.greenpeace.org/international/news/prestige-one-year-on.

[49] Paris, 27 October – 7 November 1925.

[50] Colombia has deposited its instrument of adherence on 31 October 1947.

[51] International Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Montreal on 28 May 1999. Colombia has deposited its instrument of ratification on 28 March 2003 (date of entry in force: 4 November 2003). On that specific Convention, see COMENALE PINTO, *Reflexiones sobre la nueva Convencion de Montreal de 1999 sobre transporte aéreo,* in *Revista de derecho privado*, 6/2000, 183; PARADA VÁZQUEZ, *Derecho aeronáutico*, Madrid, 2000, at 591 ss.; on ICAO role, see KOTAITE**,** *El Desarrollo del Derecho Aéreo Internacional en los 50 Años de Vida de la OACI,* in *La aviacion civil internacional y el derecho aeronautico hacia el siglo XXI,* edited by Folchi, Buenos Aires, n.d., 11.

[52] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929. Colombia has deposited its instrument of ratification (together with the ratification of the Hague Protocol of 1955 to the Convention) on 15 August 1966 (date of entry in force of the Convention, as amended by the Hague Protocol: 13 November 1966). On Warsaw Convention of 1929 and its evolution, see, inter alia: PARADA VÁZQUEZ, *Derecho aeronáutico,* Madrid, 2000, at 561 et seqq.; VIDELA ESCALADA, *Manual de derecho aeronautico,* Buenos Aires, 1996, at 533 et seqq.; MORSELLO, *Responsabilidade civil no transporte aéreo,* São Paulo, 2006, at 53 seqq.; TAMAYO JARAMILLO, *El contrato de transporte,* Santa Fé de Bogotá, 1996, at 42 ss.; COMENALE PINTO, *La responsabilità del vettore aereo dalla Convenzione di Varsavia del 1929 alla Convenzione di Montreal del 1999,* in *Rivista del diritto commerciale e delle obbligazioni,* 2002, 67. With reference to cargo carriage, see also ESPINOSA

PEREZ, *Transporte internacional de mercancias,* Bogotá, 1990, at 11 seqq.

[53] 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; Protocol 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 Guatemala City, on 8 March 1971 (never entered in force); Protocol No. 1 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, Signed at Montreal, on 25 September 1975; Protocol No. 2 to Amend 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; Protocol No. 3 to Amend 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 and at Guatemala City on 8 March 1971, Signed at Montreal, on 25 September 1975; Protocol No. 4 to Amend 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. Colombia has ratified the Hague Protocol (see *supra),* as well as Protocols of Montreal No. 1 and No. 2 (with reference to both, deposit of the instrument of ratification: 20 May 1982; entry in force: 15 February 1996); and the Protocol of Montreal No. 4 (deposit of the instrument of ratification: 20 May 1982; entry in force: 14 June 1998). Colombia has ratified neither the Guatemala City Protocol of 1971 nor the Protocol No. 3 of Montreal (both never entered in force).

[54] 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 in Guadalajara on 18 September 1961 (not ratified by Colombia).

[55] See CLARKE, *IATA: the First 50 Years - What's Past Is Prologue*, in *A.A.S.L*., XX/1995, I, 29; See VIDELA ESCALADA, *Manual de derecho aeronautico*, cit., 233 et seqq.

[56] 1966 Montreal Agreement - Agreement CAB 18900. It was an agreement of private nature, as remarked by U.S. Supreme Court: *Air France v. Saks,* 470 U.S. 392 (1985).

[57] IATA Intercarrier Agreement of 31 October 1995 (IIA and Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA). See BÖCKSTIEGEL, *A Historic Turn in International Air Law: the New IATA Intercarrier Agreement on Passengers Liability Waives Liability Limits,* in *Z.L.W.,* 1996, 18; HEDRICK, *The New Intercarrier Agreement on Passenger Liability: Is It a Wrong Step in the Right Direction?* in *A.A.S.L.,* 1996, II, 135; MARTIN, *The 1995 IATA Intercarrier Agreement: Proposed Special Contract Amendments to the Warsaw Convention - Will They Work?,* in *Air Law,* 1996, 17; SABA*, The IATA Intercarrier Agreement: a Constructive Step Toward an Improved Liability Regime from a Policy Perspective,* in *A.A.S.L.,* 1997, 289. Avianca signed both Agreements on 24 December 1997.

[58] Colombia is a founding member of the ILO, at the Versailles Peace Conference in 1919, presently a specialized Agency of United Nations.

[59] On the present EC transport policy, see *European transport policy for 2010: time to decide,* document by Commission of the European Communities COM(2001) 370 final (Brussels, 12th September 2001).

[60] See Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

[61] See Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, as a part of the «third package» for liberalisation of air transport.

[62] 1999 Montreal Convention, like Warsaw Convention, applies ex se only to «international carriage», that is a carriage between to Countries both party of that Convention, or even between two point of the same Country, but with a stop in a foreign Country, tough not party to the Convention. The main field of application of such a EC Regulation seems to be that of domestic flights.

[63] See Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, abrogated by the successive Regulation (EC) No 261/2004.

[64] See Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91. See

ROSAFIO, *Il negato imbarco, la cancellazione del volo e il ritardo nel trasporto aereo di persone: il regolamento n. 261/2004/CE,* in *Giust. civ.,* 2004, 469.

[65] See Commission Communication of the 21 June 2000 to the European Parliament and to the Council regarding the protection of air passengers in the European Union [COM(2000) 365 final].

[66] Colombia (part to the C.L.C. and Fund Conventions) is not part to that Protocol.

[67] Decision 297 of 16th May 1991.

[68] Decision 331 of 4th March 1993.

[69] On the other hand, it has also to be remarked the progressive disappearing of the traditional family-owned or single purpose shipping company. *See* considerations by GOLD, *Learning from Disaster: Lessons in Regulatory Enforcement in the Maritime sector,* in *Review of European Community and International Environmental Law,* 8/1999, 16, at 17. See also BUHLER, *Les affréteurs et la sécurité des transports maritimes,* in *D.M.F.,* 1999, 597 and (with reference to the *«split up»* policy in shipping world finalized to escape liability) GARCÍA PITA Y LASTRE, *Arrendamientos de buques y derecho maritímo (con especial referencia al «derecho de formularios»),* Valencia, 2006, at 73 et seqq.

[70] 33 U.S.C. 2701 et seq. ; see in general RÈMOND-GOUILLOUD, Marées noires: les Etats-Unis à l'assaut (L'Oil Pollution Act 1990), in DMF, 1991, 339 ; RANDLE, The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects, in Oil Pollution Deskbook – The Envronmental Law Reporter, Washington (D.C.), 1991, 3.

[71] The already mentioned system of Brussels Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage, successively integrated by the Brussels Convention of 18 December 1971 on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Colombia has deposited its instruments of accession of both Conventions in their original text, on 26 March 1990; effective date of denunciation: 25 January 2006. Instrument of accession CLC Protocol of 1976 by Colombia has been deposited on 26 March 1990; instrument of accession Fund Protocol of 1976 by Colombia has been deposited on 13 March 1997. Both C.L.C. 1976 and Fund 1976 Protocols were denounced by Colombia on 25 January 2006. CLC and Fund Protocols of 1992 entered in force on 30 May 1996, having been ratified by Colombia on 19 November 2001).

[72] See ROBERT, *L'Erika: responsabilités pour un désastre écologique*, Paris, 2003; GALIANO, *In the Wake of the PRESTIGE Disaster: Is an Earlier Phase-Out of Single-Hulled Oil Tankers the Answer?*, in *Mar. Law*., 28/2003, 113; KISS, *L'affaire de l'Amoco-Cadiz, responsabilité pour une catastrophe écologique*, in *Journ dr. internat*., 1985, 575.

[73] UNCLOS III deals with the marine environment primarily in Part XII. According to the introducing Article of that part, Article 192, *«States have the obligation to protect and preserve the marine environment».*

[74] The concept was defined in the report of the World Commission on Environment and Development (the so called Brundtland Report) in 1987 as *«development that meets the needs of the present without compromising the ability of future generations to meet their own needs».*

[75] The Polluter Pays Principle was first widely discussed in the United Nations Conference on Environment and Development held in Rio de Janeiro of Brazil in June 1992.

[76] See CLARKE, *Port state control or sub-standard ships: who is to blame? what is the cure?*, in *LCMLQ* 1994, 202.

[77] For duties falling on State of registration with reference to environmental protection, see UNCLOS III, art. 217.

[78] UNCLOS III, art. 91, § 1, second sentence.

[79] UNCLOS III, art. 91, § 1, first sentence.

[80] United Nations Convention on Conditions for Registration of Ships, signed at Geneva, on 7 February 1986, not signed by Colombia. See in general ZUNARELLI, *La convenzione di Ginevra per la registrazione delle navi,* in *Dir. mar.,* 1986, 853.

[81] See UNCLOS III, article 87, dealing with «*Freedom of the high seas*», recognized to every State. The right to navigate is provided by Article 90.

[82] See UNCLOS III, Article 94.

[83] See ÖZÇAYIR, *Port State Control,* London, 2004.

[84] See VIDELA ESCALADA, *La nacionalidad de las aeronaves: una vision hacia el futuro*, in *Aviacion comercial turismo derecho aeronautico y espacial*, edited by Folchi, Buenos Aires, n.d., 185.

[85] In this line of tendency see the judgments of the European Court of Justice on 5th November 2005: Nrs. C-466/98 *Commission vs. United Kingdom;* C-467/98 *Commission vs. Denmark;* C-468/98 *Commission vs. Sweden;* C-469/98 *Commission vs. Finland;* C-471/98 *Commission vs. Belgium;* C-472/98 *Commission vs. Luxembourg;* C-475/98 *Commission vs. Austria;* C-476/98 *Commission vs. Germany.*

[86] As a consequence of abovementioned decision of European Court of justice on bilateral agreements on air services, European Union and United States are negotiating to replace existing agreements between individual Member States and the US with a single comprehensive EU/US agreement, establishing an «Open Aviation Area» between the two territories.

[87] Directive 2004/36/EC of the Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports introduced a harmonized approach to the effective enforcement of international safety standards in the Community by harmonizing the rules and procedures for ramp inspections of third-country aircraft landing at airports located in the Member States.

[88] In re Missouri Steamship Company (1889) 42 Ch D 321.

[89] With reference to the position of the «common carrier» , see GORTOM, *The Concept of Common Carrier in Anglo-American Law,* Göteborg, 1971.

[90] With reference to «negligence clause», its origin and compatibility with civil law systems, see RICCARDELLI, *La colpa nautica,* Padova, 1965, 18 ss. It was considered to be null and void by many U.S. Federal Court decisions on the Second Half of the 19th Century, because «*against public policy*»: *Railroad Co v Lockwood* 84 U.S. 357 (1873); *Phoenix Insurance Co v Erie and Western Transportation Co* 117 U.S. 312 (1886); *Liverpool and Great Western Steam Co v Phenix Insurance Co* 129 U.S. 397 (1889); *Compania de Navigacion la Flecha v Brauer* 168 U.S. 104 (1897).

[91] D. 4, 9, 1.

[92] In the perspective of a jurist of civil law tradition, see MONTIER, Le Harter Act: son interprétation par les cours américaines et françaises. Paris, 1932.

[93] International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, Brussels, 25th August 1924; Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, February 23, 1968. Colombia is not part of that Convention.

[94] United Nations Convention on the Carnage of Goods by Sea, Hamburg, March 31, 1978, not signed by Colombia.

[95] See, among others, BENTIVOGLIO, *International Air Carriage of Passengers and Cargo: from Warsaw (1929) to Montreal (1975) and Beyond*, in *Thesaurus Acroasium*, X/1981, 289, at 302; KOTAITE, *La Convention de Varsovie, une sexagénaire qui se porte bien*, in *Liber amicorum honouring/en hommage à Nicolas Mateesco Matte*, edited by Rinaldi Baccelli, Montreal, 1989, 161; ROMANELLI, *Uniform Rules of Air Carriage* (speech given at International Conference on Current Issues in Maritime Transportation), in *Dir. mar.*, 1992, 1036.

[96]

See BERLINGIERI, *Uniformité de la loi sur le transport maritime. Perspectives de succès*, in *Dir. mar.*, 2001, 949.

[97] See United Nation, General Assembly, doc. A/CN.9/594 of 24 April 2006, Report of Working Group III (Transport Law) on the work of its seventeenth session (New York, 3-13 April 2006).

[98] International Convention for the unification of certain rules relating to Carriage of passengers by sea, signed at Brussels on 29th April 1961. Colombia is not part of that Convention.

[99] International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage at Sea, signed at Brussels on 27th May 1967. Colombia is not part of that Convention.

[100] See Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, signed on 13 December 1974 (so called PAL 1974) as amended by the Protocol adopted at London on 1st November 2002 (so called PAL Prot 2002). Colombia is not part of that Convention.

[101]

See BERLINGIERI, *L'adozione del Protocollo 2002 alla Convenzione di Atene del 1974 sul trasporto per mare di passeggeri e loro bagagli*, in *Dir. mar*., 2002, 1498; GRIGGS, *Le protocole d'Athènes*, in *D.M.F*., 2002, 291, 298.

[102] As regards maritime transport, the Commission has already proposed that the Community and the Member States become contracting parties to the Athens Protocol relating to the carriage of passengers and their luggage by sea. Nevertheless, European Commission proposed to extend the discipline of the Athens Convention, as amended by 2002 Protocol, to other transport of passengers by sea not directly covered by the Convention: see Proposal for a Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland waterways in the event of accidents, doc. COM(2005) 592 final, of 23 November 2005.

[103] EC Regulation 2027/97, as amended by EC Regulation 889/02.

[104] See, with reference to carrier liability towards passengers, the new (and ambiguous) text of Article 941 of Italian code of navigation, as amended by legislative decrees no. 96 of 2005 and no. 151 of 2006. According its paragraph 1, air carriage of passengers and baggage, including carrier liability for personal injuries of passengers, is regulated by international and EC rules in force in the Republic. A similar (and similarly ambiguous) rule is provided for air carriage of cargo under the new text of Article 951 of Italian code of navigation, as amended by legislative decree no. 151 of 2006.

[105] See the famous decision of U.S. Supreme Court in the case Tseng v. El Al Israeli Airlines, 525 U.S. 155 (1999). See (in Italian language) the critical commentary by ROSAFIO, *In tema di ammissibilità di azioni risarcitorie*, in *Dir. trasp*., 2000, 205.

[106] See WILSON – GERAGHTY, *The Progeny of Tzeng*, in *Air & Sp. L*., XXV/2000, 62, at 72; FOLCHI, sub *Artículo 29*, in *Transporte Aereo Internacional – Convenio para la unificacion de ciertas reglas para el transporte aéreo internacional – Montreal 1999*, edited by Folchi, Buenos Aires, 2002, 297.

[107] See, in a critical view, FIELD, *Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated*, in *Dalhousie L.J*. 28/2005, 69, at 84; SARMIENTO GARCIA, *Estructura de la responsabilidad del transportador aéreo en el Convenio de Montreal de 1999*, in *Dir. trasp*., 2004, 687, 702 et seqq.

[108] Italian Constitutional Court, decision of 6th May 1985, No. 132, in *Foro ita-*, 1985, I, 1586. See remarks by ROMANELLI, *Problémes de légitimité constitutionelle dans la législation italienne sur les limites des dommages-intérets dans le systéme de Varsovie*, in *Liber Amicorum Honouring Nicolas Mateesco Matte*, edited by Rinaldi Baccelli, Paris, 1989, 269.

[109] Since 1996, the Australian Carriers' Liability Act has provided a A$500,000 liability limit for Australian domestic carriers and 260,000 Special Drawing Rights (SDRs) for Australia's international carriers. It has to be mentioned also the Japanese airlines initiative in November 1992 to unilaterally abandon liability limits (see SEKIGUCHI, *Why Japan was Compelled to opt for Unlimited Liability*, in *A.A.S.L.*, 1995, II, 337).

[110] Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents. For a commentary, see ROMANELLI, *Il regime di responsabilità del vettore aereo per infortunio al passeggero,* in *Studi in memoria di Maria Luisa Corbino,* Milano, 1999, 749. See also M. BOTANA AGRA, *La ilimitación de la responsabilidad del transportista aéreo comunitario por daños a los pasajeros en caso de accidente: un estudio del Reglamento (CE) 2027/1997,* Madrid, 2000.

[111] IIA and MIA.

[112] Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, done at London on 1st November 2002, not yet in force.

[113] Warsaw Convention, Article 22, § 2.

[114] Montreal Convention of 1999, Article 22, § 3.

[115] Article 423 of Italian Code of navigation, as interpreted by most Courts: See, e.g., Italian

Court of cassazione, 27 April 1984, No. 2643, in *Dir. mar.*, 1984, 864.

[116] Italian Constitutional Court, decision No. 199 of 26 May 2005.