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## Warsaw Convention Limitation on Liability: The Need for Reform After *Coccia v. Turkish Airlines*

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# Warsaw Convention Limitation on Liability: The Need for Reform After Coccia v. Turkish Airlines

Anita Khosla

## **Abstract**

This Note argues that a new uniform limitation on aviation liability must be internationally recognized to address the concerns raised by the Coccia decision. Part I of this Note will discuss the history and purpose of the Warsaw Convention's limit on liability and the Italian Constitution Court's rejection of this provision in Coccia. Part II will discuss the international legal ramification of the Coccia decision. Part III will analyze the need to reform Article 22(1) to rationally relate the limit on liability to the development of international air transportation. This Note concludes that a new liability limit must be formulated to ensure the adequacy and certainty of damage compensation.

WARSAW CONVENTION LIMITATION ON LIABILITY:  
THE NEED FOR REFORM AFTER *COCCIA v.*  
*TURKISH AIRLINES*

INTRODUCTION

Article 22(1) of the Warsaw Convention,<sup>1</sup> as amended by Article XI of the Hague Protocol<sup>2</sup> ("the Convention"), sets a uniform limitation on airlines' liability for the personal injury and death of passengers. In *Coccia v. Turkish Airlines*, the Italian Constitution Court has declared Article 22(1) unconstitutional while upholding the remaining provisions of the Convention.<sup>3</sup> *Coccia* has focused international attention on the need to update Article 22(1) of the Convention to reflect the changing economic structure of the airline industry.

This Note argues that a new uniform limitation on aviation liability must be internationally recognized to address the concerns raised by the *Coccia* decision. A uniform limit would avoid forum shopping and the comparison of differing domes-

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1. The Warsaw Convention is the informal title for Convention of the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]. The Convention was the result of two conferences, the first in Paris in 1925, and the second in Warsaw in 1929. Article 22(1) of the Convention reads:

In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Warsaw Convention, 49 Stat. 3000, 3019, T.S. No. 876, at 990, 137 L.N.T.S. 11, 25.

2. Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, at Warsaw on 12 October 1929, Sept. 28, 1955, 478 U.N.T.S. 371 (1963) [hereinafter Hague Protocol]. The Hague Protocol came into force on August 1, 1963.

Article XI(1) amended Article 22(1) as follows:

In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 250,000 francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

*Id.* at 381.

3. *Coccia v. Turkish Airlines*, 108 Foro It. I 1586, 1591 (Corte Cost. 1985), *reprinted in* 10 AIR L. 294, 297 (English tr. 1985).

tic laws. The Convention limit must be raised to ensure both the certainty and adequacy of compensation. Part I of this Note will discuss the history and purpose of the Warsaw Convention's limit on liability and the Italian Constitution Court's rejection of this provision in *Coccia*. Part II will discuss the international legal ramifications of the *Coccia* decision. Part III will analyze the need to reform Article 22(1) to rationally relate the limit on liability to the development of international air transportation. This Note concludes that a new liability limit must be formulated to ensure the adequacy and certainty of damage compensation.

## I. COCCIA AND THE WARSAW CONVENTION LIMITATION ON LIABILITY

The liability limit as set by the Convention no longer serves the function of providing a uniform standard of recovery. Signatories of the Convention have established independent limits that destroy the efficacy of the system established by the Convention drafters. The decision in *Coccia* is representative of an outdated system that no longer provides adequate damage compensation to air travelers.

### A. *The History and Purpose of Article 22(1) of the Warsaw Convention*

In 1929, the drafters of the Warsaw Convention set a liability limit for death and injury resulting from aviation accidents at 125,000 Poincare francs (US\$16,000), to aid in the development of the then-infant air transportation industry.<sup>4</sup> The limitation afforded carriers a more definite and equitable basis on which to obtain insurance rates and thus resulted in the reduction of carrier operating expenses.<sup>5</sup> This uniform body of worldwide liability rules was intended to supersede the scores of differing domestic laws and thereby set a uniform, reliable, and consistent basis for recovery for injury or damage to persons.<sup>6</sup> This limit has since been revised to US\$58,000 pursu-

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4. See Report of United States Secretary of State Cordell Hull, [1934] U.S. AVIATION REV. 240, 242.

5. *Id.*

6. See *Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

ant to the Hague Protocol.<sup>7</sup>

Today, however, aviation is a multibillion-dollar industry with sufficient insurance coverage to render unnecessary the protection intended by the drafters of the Convention.<sup>8</sup> Indeed, no more than a few major states continue to honor an unmodified Convention liability limit.<sup>9</sup> There is a trend among signatory nations to raise the liability limit by legislative enactment. Several countries have set monetary limits in excess of the ceiling contained in Article 22(1).<sup>10</sup> For instance, carriers operating in the United States are subject to a liability limit of US\$75,000 pursuant to the 1966 Montreal Agreement.<sup>11</sup> Although such differentiation is allowed under the special contract provisions of the Warsaw Convention, it renders Article 22(1) a nullity. The Convention is subverted when certain signatories independently establish liability limits.<sup>12</sup>

7. Hague Protocol, *supra* note 2, 478 U.N.T.S. 371, 381.

8. See Note, *Warsaw Convention Limitations on Air Carrier Liability: A Critical View*, 17 U. MIAMI INTER-AM. L. REV. 577, 592 (1986).

9. Cohen, *Montreal Protocol*, 8 AIR L. 146, 167 (1983).

10. This principle of increased liability limits in excess of the Warsaw ceiling has been followed by these carriers and countries, which offer or mandate limits equal to or exceeding US\$58,000: Air Afrique, Austrian Airlines, Sabena, Burma Airways, Scandinavian Airlines System, TACA, Finnair, Air France, Air India, U.T.A. Lufthansa, Condor Flugdienst, Irish Government for all Irish Carriers, El Al, Japan Airlines, Alia Royal Jordanian Airlines, Middle East Airlines, Luxair, Malaysian Airlines, K.L.M., Martinair, Transvia, Air New Zealand, Norwegian Government for all Norwegian Airlines, Air Panama, Singapore International Airlines, South African Airways, Iberia, Sweden for all domestic and international flights by Swedish Carriers, Switzerland as a licensing condition, Thai International Airlines, and Tunis Air. *Id.* at 157.

11. The Montreal Agreement of 1966 increased the per passenger liability limitation to US\$75,000. It affects only the cases of international transportation that, according to the contract of carriage, include a place in the United States as a point of origin, a point of destination, or an agreed stopping place. This agreement is the last widely accepted amendment of the Warsaw Convention. 31 Fed. Reg. 7302 (1966).

The Montreal Agreement is a private agreement signed by the airlines under the auspices of the International Air Transport Association (IATA) and the Civil Aeronautics Board (CAB). *Id.*

12. The special contract provision is under the authority of Article 22(1) of the Warsaw Convention, which provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability." Warsaw Convention, *supra* note 1, art. 22(1), 49 Stat. 3000, 3019, T.S. No. 876, at 990, 137 L.N.T.S. 11, 25.

B. *The Italian Constitution Court Response to Worldwide Disaffection with the Article 22(1) Limit in Coccia v. Turkish Airlines*

In *Coccia v. Turkish Airlines*,<sup>13</sup> the Italian Constitution Court declared Article 22(1) unconstitutional.<sup>14</sup> In *Coccia*, the plaintiffs' daughter was killed on a Turkish Airlines flight from Turkey to Italy.<sup>15</sup> Plaintiffs initiated legal proceedings before the Tribunal of Rome,<sup>16</sup> claiming full compensation for damages.<sup>17</sup> The Tribunal subsequently referred the matter of the constitutionality of Article 22(1) to the Constitution Court, which has jurisdiction over questions relating to the legitimacy of formal laws.<sup>18</sup>

The Constitution Court held that the limit established by Article 22(1) violated equal protection guaranteed under the Italian Constitution and provided for inadequate levels of compensation.<sup>19</sup> The Court reasoned that air travelers are denied the compensation available to the users of other equally dangerous means of transport, such as sea and rail transport.<sup>20</sup> In

13. 108 Foro It. I 1586 (Corte Cost. 1985), reprinted in 10 AIR L. 294 (English tr. 1985).

14. *Id.* at 1591, reprinted in 10 AIR L. 294, 305.

15. *Id.* at 1586, reprinted in 10 AIR L. 294, 294.

16. The Constitution Court, operating since 1956, reviews the constitutionality of laws. Del Duca, *The Expanding Role of International and Comparative Law Studies—An Overview of the Italian Legal System*, 88 DICKINSON L. REV. 221, 233 (1983).

When a constitutional issue is raised by a party or a court in a civil, criminal, or administrative proceeding, the referring court first determines that the constitutional issue is relevant to the decisions of the case and is not manifestly unfounded. The issue is then referred directly to the Constitution Court. The initial proceeding remains suspended until the Constitution Court decides the constitutional issue.

*Id.*

17. 108 Foro. It. I at 1586, reprinted in 10 AIR L. 294, 294.

18. *Id.*

19. *Id.* at 1591, reprinted in 10 AIR L. 294, 305. Article 3 of the Costituzione provides:

All citizens are invested with equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions, and personal or social conditions. It is the responsibility of the Republic to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens prevent the full development of the individual and the participation of all workers in the political, economic and social organization of the country.

COST. art. 3, reprinted in E. PEASLEE, CONSTITUTIONS OF NATIONS 500 (3d ed. English tr. 1985) [hereinafter CONSTITUTIONS OF NATIONS].

20. 108 Foro It. I at 1587, reprinted in 10 AIR L. 294, 298.

addition, the Court stated that the Article 22(1) limit violated Article 2 of the Italian Constitution, because it contains an inadequate certainty of compensation, thereby impairing the inviolable safeguard of the person.<sup>21</sup>

Thus, at present no effective liability limits in international air transport apply to Italy; full compensation is very likely to be awarded in future decisions.<sup>22</sup> However, it was not the Constitution Court's intention to destroy completely the notion of a limit on liability as promulgated by the drafters of the Convention.<sup>23</sup> Currently, the Italian legislature is considering a bill<sup>24</sup> that would implement limits in the international air transport of passengers.<sup>25</sup> The proposed bill provides a liability limit at the level envisaged by the 1975 Protocol of Montreal No. 4.<sup>26</sup> The Protocol sets a liability limit of 100,000 Special Drawing Rights ("SDRs"), a unit based on a basket of currencies.<sup>27</sup> However, the Protocol was not ratified because several countries deemed the international SDR limit of 100,000 too low.<sup>28</sup> Therefore, the bill's proposed limit has al-

21. *Id.* at 1588, reprinted in 10 AIR L. 294, 301. Article 2 of the Costituzione provides: "The republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression, and imposes the performance of unalterable duties of a political, economic and social nature." COST. art. 2, reprinted in CONSTITUTIONS OF NATIONS, *supra* note 19, at 500, 501.

22. Note, *The Italian Proposal to Reinstate Air Carriers' Limits of Liability*, 11 AIR L. 123 (1986).

23. *Id.*

24. Bill on the Limitation of Liability in the International Carriage of Passengers by Air [hereinafter Bill], reprinted in 11 AIR L. 95 (1986).

25. *Id.*

26. Additional Protocol No. 4 to Amend the 1929 Convention for Unification of Certain Rules Relating to International Carriage by Air, as amended in 1955 [hereinafter Montreal Protocol No. 4], Cmnd. 6483. This Protocol provides for a change from the Poincare gold franc to Special Drawing Rights ("SDRs"), as established by the IMF. It also allows for maximum recovery in case of personal injury per passenger to 100,000 SDRs as provided in Article 2. Article 2 also provides for states not a party to the IMF to establish a limit on liability based on their own monetary system in which the monetary unit is defined as sixty-five and a half milligrams of gold of minimal fineness 900. Thirty states must ratify this protocol for it to become effective, but only three have ratified to date. *Id.*

27. See *infra* note 69.

28. The Montreal Protocol failed ratification because even with the proposed increase, the liability limitations were viewed as too low. See Kreindler, *Montreal Protocols Defeated*, N.Y.L.J., Apr. 4, 1983, at 1, col. 1; see also Hollings, *Defeat of the Montreal Protocols: Victory for Airline Passengers*, TRIAL, May 1983, at 20; Hollings, *The Montreal Protocols: A Threat to the American System of Jurisprudence*, TRIAL, Sept. 1982, at 69.

ready failed to gain international acceptance. The proposed bill also complies with the directive of the Constitution Court in *Coccia*, which states that compensation must be "adequate and certain" when the "supreme asset of life" has been impaired.<sup>29</sup> All air carriers must take out an insurance coverage of up to 100,000 SDRs for each passenger.<sup>30</sup>

The proposed bill is evidence of the intent on the part of the Italian legislature to restore functionality to the system created by the Warsaw Convention. The *Coccia* decision has cast doubt on the efficacy of Article 22(1) of the Convention. It highlights the need for a solution that would implement an internationally acceptable liability limit and ensure the availability of compensation. However, the manner in which the Italian court unilaterally chose to obviate Article 22(1), while adhering to the remaining provisions of the Convention, has disrupted the equilibrium and harmonious relationship between the different provisions of the Convention, thereby resulting in such aberrations as forum shopping.<sup>31</sup>

## II. INTERNATIONAL LEGAL RAMIFICATIONS OF COCCIA

### A. *The Reasons Why Coccia Violates the Law of International Treaties by Unilaterally Declaring Article 22(1) Unconstitutional*

Italy cannot remain a signatory to the Convention in declaring Article 22(1) unconstitutional while upholding the remaining provisions of the Convention.<sup>32</sup> If Italy wishes to impose a higher limit of liability, it must denounce the Convention under the authority of Article 39 therein.<sup>33</sup> Italy is a

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29. 108 Foro. It. I at 1587, *reprinted in* 10 AIR L. 294, 295.

30. Article 3 provides that all air carriers take out an insurance coverage of no less than 100,000 SDRs for each passenger. *See* Bill art. 3, *supra* note 24, *reprinted in* 11 AIR L. 95, 96.

31. Bill, *supra* note 24, *reprinted in* 11 AIR L. 95. The Convention was predicated upon instituting a uniform liability limit. The Italian position of no liability limit results in complex forum shopping possibilities.

32. Hague Protocol, *supra* note 2, 478 U.N.T.S. 371, 385.

33. Warsaw Convention art. 39, *supra* note 1, 49 Stat. 3000, 3022, T.I.A.S. No. 876, at 983, 994, 137 L.N.T.S. 11, 32, *as amended by* Hague Protocol art. XXIV, *supra* note 2, 478 U.N.T.S. 371, 389. Article XXIV of the Hague Protocol states:

(1) Any Party to this Protocol may denounce the Protocol by notification addressed to the Government of the People's Republic of Poland.  
(2) Denunciation shall take effect six months after the date of receipt by the



signatory to the Vienna Convention on the Law of Treaties,<sup>34</sup> which requires that a signatory to a multilateral treaty must adhere to the amendment provisions contained within the respective treaty;<sup>35</sup> any amendment of the Convention must be made under Article XXIV.<sup>36</sup> Article 40 of the Vienna Convention states that all contracting states must be notified of any proposal to amend a multilateral treaty.<sup>37</sup> Each Contracting State then has the right to take part in any decision proposing to modify the treaty and in the negotiation and conclusion of such modification.<sup>38</sup> In addition, Article 41 of the Vienna Convention provides that two or more parties to a multilateral treaty can act among themselves to amend that treaty.<sup>39</sup> However, by establishing procedures through which modifications are made, the Warsaw Convention implicitly excludes unilateral action by signatories.<sup>40</sup>

Italy could properly have denounced the entire Convention under the authority of Article 39 of the Warsaw Convention.<sup>41</sup> Denunciation would allow the Italian legislature to set any liability limit separate and independent from the Convention limit without violating the Vienna Convention on the international law of treaties. Italy would no longer be a signatory to the Convention.

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Government of the People's Republic of Poland of the notification of denunciation. (3) As between the Parties to this Protocol, denunciation by any of them of the Convention in accordance with Article 39 thereof shall not be construed in any way as a denunciation of the Convention as amended by this Protocol.

*Id.* In order to denounce the Convention, Italy would have to denounce both the Warsaw Convention and the Hague Protocol.

34. U.N. Doc. A/CONF. 39/11, 27, 8 I.L.M. 679, 694 (1969) [hereinafter Vienna Convention].

35. *Id.*

36. Hague Protocol, art. XXIV, *supra* note 33.

37. Vienna Convention art. 40, *supra* note 34, 8 I.L.M. 679, 694.

38. *Id.*

39. Vienna Convention art. 41, *supra* note 34, 8 I.L.M. 679, 695.

40. Hague Protocol, *supra* note 2, 478 U.N.T.S. 371, 385.

41. Hague Protocol, *supra* note 2, 478 U.N.T.S. 371, 389. Italy could have followed the steps taken by the United States, which denounced the Convention on November 15, 1965. CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966). After claiming that the liability limitation for personal injury was too low, the United States withdrew the notice of denunciation in return for the airlines' signatures to the Montreal Agreement, which raises the monetary limit to US\$75,000. *Id.* at 7302. Denunciation by a signatory such as Italy might facilitate an exchange between Italy and the other contracting parties concerning a new uniform limit of liability.

The United States Supreme Court has held that unilateral abrogation of the Convention would not be allowed in United States courts in *Trans World Airlines v. Franklin Mint Corp.*<sup>42</sup> Cited as international precedent,<sup>43</sup> *Franklin Mint* is inconsistent with the decision of the Italian Constitution Court that abrogates the provisions of the Warsaw Convention. *Franklin Mint* reviewed the cargo limit on liability as expressed in Article 22(2) of the Warsaw Convention.<sup>44</sup> In upholding the Convention, the Supreme Court declared that the cargo liability limit remains enforceable in the United States.<sup>45</sup> The Supreme Court recognized that the lack of a liability limit would expose international carriers to unlimited liability in U.S. courts.<sup>46</sup>

The fact that the current Italian court declared Article 22(1) of the Convention unconstitutional, while adhering to the remaining provisions of the treaty, is unacceptable. Italy's unilateral action must not be emulated on an international scale in the future. This breach of the Vienna Convention on the international law of treaties should not go unnoticed.

B. *Forum Shopping After Coccia: Jurisdiction is Determinative of Liability Limits*

By eliminating the liability limitation, the *Coccia* decision encourages forum shopping. The liberal venue provisions of Article 28(1) of the Convention<sup>47</sup> allow a plaintiff to bring an action in four alternative fora: (1) the domicile of the carrier; (2) the carrier's principal place of business; (3) the carrier's place of business through which the contract was made; or (4) the place of destination.<sup>48</sup> Since *Coccia*, if an Alitalia jet were to crash anywhere in the world, plaintiffs would desire to bring the action in Italy so as to maximize the chances of a higher damage compensation than that in force under the Convention.<sup>49</sup> A forum shopping problem would also be cre-

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42. 466 U.S. 243, 251-52 (1984).

43. *Franklin Mint v. T.W.A., Inc.*, 2 LLOYD'S REP. 432 (1984).

44. 466 U.S. at 243.

45. *Id.* at 253.

46. Note, *supra* note 8, at 582.

47. Warsaw Convention, *supra* note 1, art. 28(1), 49 Stat. 3000, 3020, T.I.A.S. No. 876, at 983, 992, 137 L.N.T.S. 11, 27.

48. *Id.*

49. *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 657, 660 (S.D.N.Y. 1986) (where Kuwait Airways Corporation did not meet any of the venue provisions to bring

ated if a foreign air carrier crashed in Italy, or if Italy were the place in which the contract for air transport was made, since plaintiffs would bring an action in the Italian courts to take advantage of the absence of limit on liability.<sup>50</sup> The Warsaw Convention was designed to prevent this sort of comparison of the varying domestic laws.<sup>51</sup> The *Coccia* decision breeds forum shopping, complex litigation, and an overcrowding of the Italian courts, thereby creating an administrative nightmare.

### III. UPDATING THE WARSAW CONVENTION'S LIABILITY LIMITATION PROVISIONS

*Coccia* is representative of the worldwide disaffection with the liability limit provided in the Convention. The governments of the signatories must approve a new protocol that would institute a new universal liability limit. In seeking to avoid the more controversial aspects of the unratified Montreal Protocol No. 4, an analysis should be made of whether the SDR is the appropriate conversion factor. In addition, each carrier should be required to carry an amount of insurance coverage that mirrors the liability limit and thereby ensures adequate compensation. A clarification of the Law of Treaties is necessary to eliminate future unilateral modification of a multilateral treaty.

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suit in the United States as (i) KAC was domiciled in Kuwait since it was organized and operated under the laws of Kuwait; (ii) KAC's principal place of business is in Kuwait since KAC's corporate and operational headquarters are in Kuwait, a large majority of its employees work in Kuwait, and all its aircraft are registered there; (iii) the contract was made where the decedents' airline tickets were purchased and issued; and (iv) the place of destination was Karachi, Pakistan). See also *In re Air Crash Disaster at Malaga, Spain*, 577 F. Supp. 1013 (E.D.N.Y. 1984), *aff'd sub nom. Petrire v. Spantex, S.A.*, 756 F.2d 263 (2d Cir. 1985).

50. For like situations in aviation law leading to forum shopping and misapplication of the Convention, see *Smith v. Canadian Pacific Airways*, 452 F.2d 798, 799 (2d Cir. 1971); *Recumar, Inc. v. KLM Royal Dutch Airlines*, 608 F. Supp. 795, 797 (S.D.N.Y. 1985); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 809 n.9 (2d Cir. 1966). Forum shopping undermines the Convention, which was designed to provide uniform recoveries for claimants. Forum shopping is discouraged on an international scale not only in the United States but also in England, Scotland, and the other Commonwealth jurisdictions. See *Spiliada Maritime Corp. v. Consulex Ltd.*, 3 W.L.R. 971, 1 Lloyd's Rep. 1 (H.L. 1986); see also *Union Industrielle et Maritime v. Petrosul Int'l Ltd.*, 26 B.L.R. 309 (Can. Fed. Ct. Trial Div. 1984).

51. *Reed v. Wisner*, 555 F.2d 1079, 1090 (2d Cir. 1977).

A. *Necessity for a Worldwide Liability Limit*

Coccia raises the question whether the current liability limitations of Article 22(1) are rationally related to the underlying policy of aiding the development of international air transportation.<sup>52</sup> A comparison of the airline industry of 1929 to that of the present is instructive in analyzing this issue.

The Convention was drafted with the aim of protecting the then-infant airline industry by not imposing absolute liability.<sup>53</sup> At that time, a single catastrophic accident would have bankrupted an air carrier because extensive aviation insurance was not yet available.<sup>54</sup> Thus, the drafters' aim was to reduce the operating expenses of the carrier by passing protective legislation.<sup>55</sup> This protection did not extend, however, "to grossly negligent misconduct," in which case the carriers were subject to no limit on liability.<sup>56</sup> Today, in contrast, assets of

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52. Dolan, *Warsaw Convention Liability Limitations: Constitutional Issues*, 6 Nw. J. INT'L L. & Bus. 896, 903 (1984).

53. Sir Alfred Dennis of Great Britain, one of the drafters of the Convention, stated:

What can one demand of the air carrier? A normal organization of his operation, a judicious choice of his personnel, a constant surveillance of his agents and servants, a rigorous control of his aircraft, spare parts and raw material.

One must indeed admit that those who use aircraft are not ignorant of the risks inherent in a mode of transportation which has not yet attained the point of perfection that one hundred years has given to railroads.

It is therefore just not to impose absolute liability upon the carrier, but to relieve him of all liability when he has taken reasonable and normal measures to avoid damage.

R. HORNER & D. LEGREZ, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES, WARSAW, 1929, at 31, 49 (1975) (Third Session, Oct. 6th Morning).

54. Note, *supra* note 8, at 591.

55. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499-500 (1967).

56. Penalties for grossly negligent misconduct are provided for in Article XIII of the Hague Protocol, which states:

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Hague Protocol art. XIII, *supra* note 2, 478 U.N.T.S. 371, 383; see Price, *Goldman v. Thai Airways Int'l Limited: Article 25 the Warsaw Convention Meaning of Recklessly*, 8 AIR L. 171 (1983).

the larger airlines are measured in billions of dollars apiece and full insurance coverage is available.<sup>57</sup>

Currently a number of signatory nations are establishing higher thresholds of recovery under the special contract provisions of the Convention.<sup>58</sup> There is a plethora of mandated limits and "voluntary" limits.<sup>59</sup> It is becoming difficult to find more than a few major states where an unmodified Warsaw Convention limitation is still in effect.<sup>60</sup> As one commentator has suggested, "[i]f this is the real world in the 1980's then let the treaty so reflect it."<sup>61</sup> In contrast, some commentators argue that the liability limits should be totally discarded.<sup>62</sup> Specifically, each nation or state should be free to establish whatever minimum liability requirements are deemed suitable for its citizens.<sup>63</sup> This national minimum liability requirement would apply on all air traffic from or to the particular state.<sup>64</sup> The Warsaw Convention would not have to specify the limits of liability but only state that the limits established by a party to the Convention would apply.<sup>65</sup> Continued international cooperation in all other provisions of the Convention could thus continue.

However, a uniform liability limit is essential to set a reliable and consistent basis for recovery. If the desire for uniformity is indeed the mortar that ensures the efficacy of the Warsaw Convention, all of the contracting parties to the Convention should agree on a new worldwide liability limit. This limit should supersede existing or future national supplemental compensation plans or agreements such as the 1966 Montreal

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57. Note, *supra* note 8, at 592.

58. Hague Protocol, *supra* note 2, 478 U.N.T.S. 371, 381.

59. Cohen, *supra* note 9, at 146, 167 (1983).

60. *Id.*

61. *Id.*

62. Studies by the International Chamber of Commerce, by an Air Law Working Group under Professor K-H Bockstiegel (which has called for the immediate ratification of Montreal Additional Protocol No. 4 1975, 36 R.F.D.A. 364 (1982), cited in C. SHAWCROSS & M. BEAUMONT, *AIR LAW*, VII 41; see International Law Association Report of 59th Committee Under Professor Bin Cheng Which Advocate the Compensation of Personal Injuries Through a System of Unlimited and Absolute Liability, cited in C. SHAWCROSS & M. BEAUMONT, *AIR LAW*, VII 41; see also DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71 (1983).

63. DeVivo, *supra* note 62, at 71.

64. *Id.*

65. *Id.*

Agreement.<sup>66</sup> It would provide uniform recoveries for claimants and foreseeable, insurable liabilities for airlines. In this scheme, the possibility of forum shopping would be effectively extinguished.

Proposals for setting a new uniform liability limit should follow the general guidelines first set forth in the Montreal Protocol No. 4,<sup>67</sup> which was never ratified by a required thirty signatories.<sup>68</sup> The Protocols express all liability limitations in terms of the SDR, a unit based on an international basket of currencies.<sup>69</sup> Under the Montreal Protocol No. 4, the limitation on liability for personal injury or death would have increased from 75,000 to 100,000 SDRs.<sup>70</sup> Neither of the Protocols has been ratified by a required majority of the parties to the Convention because (1) the liability limitations are unbreakable even in cases of willful misconduct, which gives rise to unlimited recovery under Article 25(1) of the Convention;<sup>71</sup> and (2) the liability limitations are viewed as inadequate.<sup>72</sup> To gain international acceptance, a subsequent protocol should eliminate provisions that undermine Article 25(1) of the Convention and increase the liability limit.

### B. *The SDR as an Appropriate Conversion Factor*

The drafters of the Convention expressed the liability limit in terms of the gold franc.<sup>73</sup> Today, SDRs have replaced

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66. Montreal Agreement, *supra* note 11, at 425.

67. Montreal Protocol No. 4, *supra* note 26, at 75.

68. *See supra* note 28.

69. The five currencies are: the Japanese yen, the U.S. dollar, the British pound, the West German mark, and the current, as opposed to the Poincare, French franc. R. EDWARDS, INTERNATIONAL MONETARY COLLABORATION 167, 179 (1985).

70. Montreal Protocol No. 4, *supra* note 26.

71. Dolan, *supra* note 52, at 898 n.14. Montreal Protocol No. 4 would have made the liability limit unbreakable even in the case of willful misconduct, thereby abolishing Article 25(1) of the Convention. Such a provision should be avoided in a subsequent protocol in order to aid in achieving universal consensus.

72. *Id.*

73. In order to ensure that the limits of liability under the Convention would remain uniform and stable, the drafters of the Convention expressed the limitation in terms of the French Poincare gold franc, which was defined as consisting of 65-1/2 milligrams of gold of millesimal fineness 900. *See Asser, Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COM. 645, 645 (1974). The use of a gold franc clause as a medium of conversion is readily understandable when it is considered in light of the international gold exchange system in existence when the Convention was drafted. When the Warsaw Convention

gold as the international monetary function.<sup>74</sup> The SDR is a stable international unit of account, is valued on the basis of a basket of five national currencies, and does not have a competing use as a commodity.<sup>75</sup> SDRs are thus insulated from free-market speculation and other difficulties that have led to instability in the price of gold and to gold's ultimate breakdown as an international unit of account.<sup>76</sup> Employed as a medium of exchange between governments, central banks, and the International Monetary Fund<sup>77</sup> ("IMF"), SDRs "serve as the cornerstone of the new international system of finance."<sup>78</sup> Basing the Warsaw limitation on the market price of gold has led to a widely fluctuating limit on liability that varies substantially from week to week or even day to day.<sup>79</sup> Using SDRs would fully comply with the intent of the framers of Article 22 since

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was adopted, currencies were either expressed or easily convertible to gold using an official rate.

In 1968, most states instituted procedures that set the stable official price of gold side by side with a continuously fluctuating commodity price for gold. The market price of gold did not differ significantly from the official rate of US\$35 per ounce until 1970, when the situation began to change radically because of the instability in the commodity price. In late 1973, when the official price of gold in the United States was fixed at \$42.22 an ounce, the commodity price rose to \$200 an ounce. In order to relieve the severe economic pressures resulting from the instability in the price of gold, the International Monetary Fund formulated the Jamaica Accords to replace the official function of gold with Special Drawing Rights. See Silard, *Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules*, 10 J. MAR. L. & COM. 13 (1978); see also *The Warsaw Convention and the Two-Tiered Gold Market*, 17 J. WORLD TRADE L. 129 (1973).

74. SDRs are insulated from free-market speculation and other difficulties that led to instability in the price of gold and to the ultimate breakdown of gold as an international unit of account. Employed as a medium of exchange between governments, central banks, and the IMF, SDRs have replaced gold's international monetary function. See P. SAMUELSON, *ECONOMICS* 612 (11th ed. 1980); see also Gold, *Gold in International Monetary Law: Change, Uncertainty, and Ambiguity*, 15 J. INT'L L. & ECON. 323, 354 (1981). As a result, "the SDR has first claim to recognition as the unit of account to replace gold in universal international organizations." Gold, *SDRs, Currencies and Gold*, IMF PAMPHLET SERIES No. 33, at 96 (1980) [hereinafter IMF PAMPHLET].

75. IMF PAMPHLET, *supra* note 74, at 5-6.

76. *Id.*

77. The IMF is affiliated with the United Nations. It was organized at the Bretton Woods Conference in 1944 to promote international monetary cooperation, to facilitate the growth of international trade, and to assist in the establishment of a multilateral system of payments for currency transactions among member states. R. EDWARDS, *INTERNATIONAL MONETARY COLLABORATION*, 4, 11 (1985).

78. IMF PAMPHLET, *supra* note 74.

79. Asser, *supra* note 73, at 646.

they would result in a stable and predictable limitation of liability.<sup>80</sup>

The current problem with the SDR is that some countries have adopted the SDR and others have not.<sup>81</sup> Thus, non-SDR countries adjust their currencies to the SDR as they see fit.<sup>82</sup> This unilateral decision to adjust to the SDR is subject to any change in the law of the state regarding the conversion of monetary units into its national currency.<sup>83</sup> Hence, despite its relative stability, the SDR has not fostered the kind of uniform adoption and application that is necessary.

The initiative to arrive at a universal liability limit rests with the governments of the signatories and particularly with the United States, which has still ratified only the original 1929 text of the Warsaw Convention.<sup>84</sup> The failure of the United States to ratify Montreal Protocol No. 4 has thrown the Warsaw system into a shambles.<sup>85</sup> The Senate should decide on an acceptable liability limit and present the other signatories with a new protocol for universal ratification.<sup>86</sup> The limit of 100,000 SDRs, as stated in Montreal Protocol No. 4, needs to be raised in this effort, as it has already been criticized as inadequate.<sup>87</sup>

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80. A Warsaw limit using SDRs as the unit of account is intended to be as faithful a translation as possible of Poincare francs at the "old" official price for gold. McGilchrist, *Four New Protocols to the Warsaw Convention*, 1976 LLOYD'S MAR. & COM. L.Q. 186, 187.

81. DeVivo, *supra* note 62, at 115.

82. One commentator has stated:

Such states may at the time of ratification or accession to a Protocol declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a certain quantity of 'monetary units' which are defined in exactly the same way as were the Poincare francs previously, that is sixty-five and one-half milligrammes of gold of millesimal fineness nine hundred.

*Id.*

83. *Id.*

84. The Supreme Court chose the gold standard as the valuation standard in the *Franklin Mint* decision. Note, *supra* note 8, at 586 n.61. The Court felt that to abandon gold for an artificial standard such as the SDR would be to rewrite the treaty. Therefore, the courts need to be persuaded to alter this viewpoint and accept the internationally recognized monetary standard, the SDR.

85. See I C. SHAWCROSS & M. BEAUMONT, AIR LAW, VII 36 - VII 38 (1985).

86. *Id.* at VII 41 - VII 42. The Senate rejected Montreal Protocol No. 4 on March 8, 1983. See 129 CONG. REC. S2279 (daily ed. Mar. 8, 1983).

87. Kreindler, *supra* note 28, at 1, col. 1.



### C. *Relevant Insurance Considerations*

The Convention should also be amended to require more extensive insurance coverage per passenger. Such coverage should equal the extent of liability, to ensure certainty and guarantee adequate compensation. Such reform is advocated by the bill proposed by the Italian legislature<sup>88</sup> and the Montreal Protocol No. 4.<sup>89</sup> However, it has not been well received.<sup>90</sup> While this is a stringent provision, it is well within the intent of the drafters of the Convention since it guarantees the certainty of compensation. The recent string of near collisions among aircraft<sup>91</sup> highlights the necessity of providing adequate coverage. It seems unlikely that if two jumbo jet airliners were to collide, carriers would have enough insurance to meet the per passenger liability limit.

### D. *A Clarification of the Law of International Treaties*

Lastly, a subsequent protocol should explicitly state that any signatory's unilateral action to modify any provision of the Convention is a violation of the law of multilateral treaties as expressed in the Vienna Convention.<sup>92</sup> Such action would discourage forum shopping and avoid the general confusion that has ensued following *Coccia*. A new clause should be added to the Convention that provides that unilateral modification would result in the signatory's automatic dismissal without a hearing. Thus, violating parties would no longer be able to change a certain provision while continuing to benefit from the remaining provisions.

## CONCLUSION

*Coccia* has far-reaching international implications. This case highlights the need to update Article 22(1) of the Convention to reflect the current economic status of the airline industry. On the other hand, it is a breach of international protocol

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88. Bill, *supra* note 24, reprinted in 11 AIR L. 95, 95-96.

89. Montreal Protocol No. 4, *supra* note 26, at 75.

90. Kreindler, *supra* note 28, at 1.

91. See *Stiff Rules Asked in the Navigating of Ocean Flights: Upgraded Procedure Sought Because Two Jets Nearly Collided Over Atlantic*, N.Y. Times, Sept. 4, 1987, at A1, col.1; *Open Questions - Time for Debate (Midair Collision Over Los Angeles)*, L.A. Daily J., Sept. 8, 1986, at 4, col. 1.

92. Vienna Convention, *supra* note 34, 8 I.L.M. 679, 694.

to modify a treaty unilaterally. *Coccia* has disturbed the delicate balance in civil aviation liability by giving rise to complex forum shopping possibilities. To preserve a uniform body of worldwide liability rules to govern international aviation, a new limit must be formulated and the SDR should be used as the value. In addition, to ensure certainty and adequacy in damage compensation, carriers should be required to obtain an equivalent requirement of insurance. Such reform measures will rationally relate the limit on liability to the development of international air transportation.

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