

Reforming the Liability Provisions of the
Warsaw Convention: Does the IATA
Inter-carrier Agreement Eliminate the Need to
Amend the Convention?

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Abstract

This Note examines recent attempts to resolve over sixty years of criticism of the Warsaw Convention's liability limits. Part I discusses the Warsaw Convention, the international community's efforts to expand the liability provisions of the Warsaw Convention, and judicial treatment of the Warsaw Convention's liability limits in the United States. Part II describes recent proposals to resolve the issue of liability limits, including the IATA Intercarrier Agreement, the DOT's proposed conditions to the IATA Intercarrier Agreement, the EC Proposal on air carrier liability, and the ICAO's draft of a new international convention. Part III argues that the IATA Intercarrier Agreement does not eliminate the need to amend the Warsaw Convention's liability provisions because contractual agreements such as the IATA Intercarrier Agreement cannot achieve the dual goals of uniform liability limits and systematic legal procedures foreseen by the Warsaw Convention's drafters. This Note concludes that global adoption of a new international convention is the best means of regulating air carrier liability given the complexities of the worldwide aviation industry today.

NOTES

REFORMING THE LIABILITY PROVISIONS OF THE WARSAW CONVENTION: DOES THE IATA INTERCARRIER AGREEMENT ELIMINATE THE NEED TO AMEND THE CONVENTION?

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INTRODUCTION

To protect the still-developing aviation industry,¹ the delegates of twenty-three nations² enacted the Convention for the Unification of Certain Rules Relating to International Transportation by Air³ ("Warsaw Convention") in 1929.⁴ Politicians, legal

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1. See 1 LEE S. KREINDLER, AVIATION ACCIDENT LAW § 10.01[2], at 10-3 (1996) [hereinafter 1 KREINDLER] (discussing status of international aviation industry in 1929). In 1929, Pan American Airlines, the only international air carrier in the United States, limited its international flights to the route between Havana, Cuba and Key West, Florida. *Id.* Air France confined its flights to France, England, and North Africa. *Id.* Air carriers did not transport passengers at night. *Id.* During the period between 1925-29, domestic and international air carrier operations totaled 400 million passenger miles, with a fatality rate of 45 deaths per 100 million passenger miles. See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967) (discussing international aviation during period between 1925-29). Twenty years later, the fatality rate was 0.55 deaths per 100 million passenger miles. *Id.* at 498 n.3. Larger aircraft carrying 15-20 passengers could travel at about 120 miles per hour over distances of approximately 550 miles. *Id.* at 498.

2. See 1 STUART M. SPEISER & CHARLES F. KRAUSE, AVIATION TORT LAW § 11:4, at 634 (1978 & Supp. 1996) [hereinafter 1 SPEISER & KRAUSE] (discussing enactment of Warsaw Convention). The Warsaw Convention is a set of liability rules aimed at governing the risks involved in international air transportation. *Id.* at 637. The majority of the original signatory countries to the Warsaw Convention were European, including Germany, France, Great Britain, Italy, and Switzerland. *Id.* at 634. More than 110 countries currently adhere to the Warsaw Convention. U.S. DEP'T OF STATE, TREATIES IN FORCE (1996).

3. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]. The preamble to the Warsaw Convention indicates that its signatories "recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier . . ." *Id.*, pmb., 49 Stat. at 3014, 137 L.N.T.S. at 15.

4. *Id.* The Warsaw Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." *Id.* art. 1(1), 49 Stat. at 3014, 137 L.N.T.S. at 15. Article 1(2) defines international transportation as:

scholars, and lay commentators have widely criticized the Warsaw Convention as being outdated,⁵ primarily because it limits air carrier liability in air disasters to US\$75,000 per passenger,⁶ unless a passenger proves willful misconduct on the part of an air carrier.⁷ Trying to prove willful misconduct for death or bodily injury in aviation accidents usually leads to long, costly litigation yielding compensation incommensurate with the amount passengers seek.⁸

On November 12, 1996, the U.S. Department of Transportation⁹ ("DOT") approved a new intercarrier agreement¹⁰ ("IATA Intercarrier Agreement") to increase the liability limits of the Warsaw Convention.¹¹ Under the IATA Intercarrier Agreement,

[A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

Id. In both the United Kingdom and the United States, a High Contracting Party is not merely a signatory country, but rather a country that has ratified the Warsaw Convention. 1 SPEISER & KRAUSE, *supra* note 2, § 11:13, at 661-62.

5. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:17, at 669-70 (noting dissatisfaction with Warsaw Convention among Congressional representatives, lawyers, and lay commentators).

6. See Christopher Carlsen, *Recent Developments in Aviation Law*, 32 TORT & INS. L.J. 231, 231 (1997) (discussing liability limits under Warsaw Convention). The Warsaw Convention originally limited air carrier liability for passenger injury or death to approximately US\$8,300 in 1929 dollars. *Id.* In 1966, dissatisfaction with this liability limit led to the adoption of a private agreement between the United States and air carriers serving the United States that raised the liability limit to US\$75,000. *Id.* After adjusting for inflation, this amount would currently exceed US\$300,000. *Id.*

7. Warsaw Convention, *supra* note 3, arts. 25(1), 25(2), 49 Stat. at 3020, 137 L.N.T.S. at 27; see Susan Carey & Leslie Scism, *Airlines: Old Liability Limits May Not Apply in TWA Crash*, WALL ST. J., July 24, 1996, at B1 (discussing liability limits under Warsaw Convention).

8. See Carey & Scism, *supra* note 7, at B1 (explaining increased cost and delay involved in litigation when plaintiffs attempt to prove that air carrier acted with willful misconduct).

9. I.H. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW § 2, at 11 & n.6-A (1988). In the United States, the Department of Transportation ("DOT") regulates the conduct and safety of the aviation industry. *Id.*

10. INTERNATIONAL AIR TRANSPORT ASSOCIATION, INTERCARRIER AGREEMENT ON PASSENGER LIABILITY, *open for signature* Oct. 31, 1995 (on file with the *Fordham International Law Journal*) [hereinafter IATA INTERCARRIER AGREEMENT].

11. DEP'T OF TRANSP., ORDER APPROVING INTERNATIONAL AIR TRANSPORT ASSOCIATION: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION; AIR TRANSPORT ASSOCIATION OF AMERICA: AGREEMENT RELATING TO LIABILITY LIMITATIONS

domestic and international air carriers must waive the Warsaw Convention's liability cap.¹² Instead of the current liability limit, strict liability¹³ would apply to the amount of a claim that does not exceed 100,000 Special Drawing Rights¹⁴ ("SDRs"), recently valued at approximately US\$146,000.¹⁵ Furthermore, unless an air carrier proves it was not negligent, passengers could conceivably recover additional damage amounts.¹⁶ Under the IATA Intercarrier Agreement, passengers no longer have to prove willful misconduct on the part of an air carrier.¹⁷

The IATA Intercarrier Agreement, jointly proposed by the International Air Transport Association¹⁸ ("IATA") and the Air Transportation Association of America¹⁹ ("ATA"), had the support of many domestic and international air carriers,²⁰ the Asso-

OF THE WARSAW CONVENTION, Order No. 96-11-6 (Nov. 12, 1996), available in WESTLAW, Ftran-dot Database [hereinafter Order Approving Agreements].

12. See *DOT Proposes Waiver of Liability Limits for Injury or Death on International Flights*, U.S. Dep't of Transp. News Release, Oct. 4, 1996, at 1, available in WESTLAW, Ftran-nr Database [hereinafter *DOT Proposes Waiver*] (discussing IATA Intercarrier Agreement).

13. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 75, at 534 (5th ed. 1984 & Supp. 1988) [hereinafter *PROSSER & KEETON*] (explaining doctrine of strict liability). Under the doctrine of strict liability, a court can find a defendant liable for negligence whether or not the defendant intended to interfere with a legally protected interest or breached a duty to exercise reasonable care. *Id.*

14. JOHN DOWNES & JORDAN ELLIOT GOODMAN, *FINANCE & INVESTMENT HANDBOOK* 487 (3d ed. 1990). The International Monetary Fund regulates Special Drawing Rights ("SDRs"), a currency unit linked to the world's main currencies and informally called "paper gold." *Id.* The use of SDRs helps preserve balance in the foreign exchange market. *Id.* For example, if the U.S. Treasury notices that the British pound's value has fallen sharply in comparison to the U.S. dollar, it can use its supply of SDRs to purchase surplus British pounds in the foreign exchange market, thus increasing the value of the remaining amount of British pounds. *Id.*

15. See *DOT Approval Allows Liability Limits to be Abolished*, AIR SAFETY WK., Nov. 18, 1996, available in WESTLAW, Airsafw Database [hereinafter *DOT Approval*] (providing estimated valuation of SDRs as of Oct. 1996).

16. *DOT Proposes Waiver*, *supra* note 12, at 1.

17. *Id.*

18. DIEDERIKS-VERSCHOOR, *supra* note 9, § 13.2, at 35 (1988). Almost all air carriers are members of the International Aviation Transport Association ("IATA"), a private trade association with strong ties to international governmental aviation authorities. *Id.* IATA's goals include fostering safe, economical commercial air transportation for an international public and furnishing a mechanism for cooperation among international air carriers. *Id.*

19. Lee S. Kreindler, *Goodbye to Liability Limitations*, N.Y.L.J., Feb. 20, 1997 at 3. Similar to international air carriers, U.S. flag air carriers have their own trade association, the Air Transportation Association of America ("ATA"). *Id.*

20. Matthew L. Wald, *Step to Raise Liability Limit in Air Crashes: U.S. Acts to Remove Ceiling of \$75,000*, N.Y. TIMES, Oct. 5, 1996, at 39.

ciation of Trial Lawyers of America²¹ ("ATLA"), and the International Chamber of Commerce.²² Nevertheless, the DOT has contemplated attaching additional conditions to the IATA Inter-carrier Agreement which are likely to attract widespread criticism in the future.²³ Concurrently, the European Community²⁴ has developed its own set of regulations on air carrier liability ("EC Proposal").²⁵ In addition, the Legal Committee of the International Civil Aviation Organization²⁶ ("ICAO") has drafted a new international convention to replace the Warsaw Convention.²⁷

21. See *Trial Lawyers Back Passenger Liability Limit Increases*, AVIATION DAILY, Aug. 26, 1996, at 320 [hereinafter *Trial Lawyers*] (explaining that Association of Trial Lawyers of America ("ATLA") urged approval of IATA Inter-carrier Agreement because it would improve passenger liability standards).

22. See *ICC Urges DOT Approval of Higher Airline Liability Limits*, AVIATION DAILY, Aug. 22, 1996, at 306 [hereinafter *ICC Urges DOT Approval*] (quoting Jeffrey Shane, Chairman of International Chamber of Commerce's Air Transport Commission, as stating that IATA Inter-carrier Agreement "will effectively end the need for litigation. Airlines will provide fair compensation without limit, without the need to prove fault and without delay.").

23. *DOT Faces Wide Opposition to its Liability Limit Conditions*, AVIATION DAILY, Oct. 28, 1996, at 154.

24. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). Until 1995, the twelve European Union Member States were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. TEU, *supra*, pmbl. On January 1, 1995, Austria, Finland, and Sweden became European Union Member States. See Hugh Carney, *Sweden Gives Clear Yes to EU: Vote in Favour of Membership Keeps Enlargement Timetable on Course*, FIN. TIMES, Nov. 14, 1995, at 1 (reporting accession of new Member States).

25. See Commission of the European Communities, Proposal for a Council Regulation (EC) on Air Carrier Liability In Case of Accidents, COM (95) 724 Final, at 18 (1995) [hereinafter EC Proposal].

26. See LAWRENCE B. GOLDBIRSCHE, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 3-4 (1988) (describing International Civil Aviation Organization ("ICAO") and its duties). The ICAO, an agency of the United Nations located in Montreal, Canada, governs the administration of the Warsaw convention and its associated treaties. *Id.*

27. *International Effort to Update 68-year Old Treaty on Passenger Liability Picks Up Momentum*, AIRLINE FIN. NEWS, May 19, 1997, available in WESTLAW, Airfin Database [hereinafter *International Effort*] (reporting ICAO efforts to reform Warsaw Convention's liability limits).

This Note examines recent attempts to resolve over sixty years of criticism of the Warsaw Convention's liability limits. Part I discusses the Warsaw Convention, the international community's efforts to expand the liability provisions of the Warsaw Convention, and judicial treatment of the Warsaw Convention's liability limits in the United States. Part II describes recent proposals to resolve the issue of liability limits, including the IATA Intercarrier Agreement, the DOT's proposed conditions to the IATA Intercarrier Agreement, the EC Proposal on air carrier liability, and the ICAO's draft of a new international convention. Part III argues that the IATA Intercarrier Agreement does not eliminate the need to amend the Warsaw Convention's liability provisions because contractual agreements such as the IATA Intercarrier Agreement cannot achieve the dual goals of uniform liability limits and systematic legal procedures foreseen by the Warsaw Convention's drafters. This Note concludes that global adoption of a new international convention is the best means of regulating air carrier liability given the complexities of the worldwide aviation industry today.

I. *THE WARSAW CONVENTION, SUBSEQUENT
INTERNATIONAL EFFORTS TO MODIFY THE WARSAW
CONVENTION, AND JUDICIAL INTERPRETATIONS OF THE
WARSAW CONVENTION*

The Warsaw Convention regulates the liability of air carriers involved in international aviation.²⁸ Subsequent to 1929, criticism of the Warsaw Convention's low liability limits resulted in a collection of international treaties and contractual agreements which eroded the uniform liability limits desired by the Warsaw Convention's drafters.²⁹ In addition, judicial interpretations of the Warsaw Convention have played havoc with the legal system for resolving international aviation disputes that the drafters anticipated setting up sixty years ago.³⁰

28. See 1 KREINDLER, *supra* note 1, § 10.01, at 10-2 (noting that Warsaw Convention establishes legal procedures controlling rights of passengers against international air carriers).

29. See David I. Sheinfeld, Comment, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653, 656-57 (1980) (noting inequities created by amendments to Warsaw Convention).

30. *Id.*

A. *The Warsaw Convention*

Aiming to ensure the growth of the developing aviation industry, the drafters of the Warsaw Convention assembled a uniform set of liability limits and systematic methods for settling legal claims resulting from international air travel.³¹ The provisions of the Warsaw Convention govern the extent of an air carrier's liability for both passenger and cargo claims resulting from international aviation accidents.³² Shortly after ratification, widespread criticism of the Warsaw Convention's liability limits led to discussions concerning possible revisions.³³

1. Purposes of the Warsaw Convention

In 1929, twenty-three nations enacted the Warsaw Convention³⁴ as a result of two conferences, one held in Paris³⁵ and another in Warsaw.³⁶ These conferences aimed at aiding the developing international aviation industry.³⁷ The drafters' goals³⁸ in-

31. See Lowenfeld & Mendelsohn, *supra* note 1, at 498-99 (setting forth goals of Warsaw Convention drafters).

32. See 1 KREINDLER, *supra* note 1, § 10.01, at 10-2 (describing nature of legal claims treatment under Warsaw Convention).

33. See Lowenfeld & Mendelsohn, *supra* note 1, at 502-03 (detailing widespread criticism of Warsaw Convention throughout international aviation community).

34. Warsaw Convention, *supra* note 3, 49 Stat. at 3023-25, 137 L.N.T.S. at 33-37. Delegates from Germany, Austria, Belgium, Brazil, Denmark, Spain, France, Great Britain, Australia, South Africa, Greece, Italy, Japan, Latvia, Luxembourg, Norway, the Netherlands, Poland, Rumania, Switzerland, Czechoslovakia, the Union of Soviet Socialist Republics, and Yugoslavia signed the Warsaw Convention on October 12, 1929. *Id.* 49 Stat. at 3023-25, 137 L.N.T.S. at 33-37.

35. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, Oct. 4-12, 1929, at 18 (Robert C. Horner & Didier Legrez trans., Fred B. Rothman & Co. 1975) [hereinafter MINUTES]. The Paris Conference created the Comité International Technique d'Experts Juridiques Aériens ("CITEJA"), a permanent group of legal experts charged with developing a draft convention on international air carrier liability. *Id.* at 18-19. As the aviation industry began to grow during the 1920's, national governments and commercial air carriers both began to explore the consequences of an air carrier accident. See Sheinfeld, *supra* note 29, at 657 (discussing Paris Conference). Due to this concern, the French Government convened the First International Conference on Private Aeronautical Law in Paris in 1925. *Id.*

36. MINUTES, *supra* note 35, at 18. Thirty countries, the League of Nations, and the International Commission of Air Navigation sent delegates to the Warsaw Conference. *Id.* at 5-10. The United States sent a nonvoting observer rather than a voting delegate. *Id.* at 10.

37. See *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 410-11 (9th Cir. 1978) (describing aviation industry's early problems). One of the industry's main problems was obtaining capital while contending with enormous risks because, without limited liability, a single accident might eliminate a large capital investment. *Id.*; see also 1 KREI-

cluded the establishment of uniform liability limits for death and bodily injury in aviation accidents³⁹ and systematic procedures for resolving legal claims associated with international air travel.⁴⁰ By providing uniform liability limits, the drafters sought to ensure that the aviation industry could obtain the necessary capital for its future growth.⁴¹ Theoretically, limited liability would attract investors and insurance underwriters who might otherwise fear the possible bankruptcy resulting from a catastrophic accident.⁴² Systematic procedures for handling international air transport claims would help simplify an industry poten-

NDLER, *supra* note 1, § 10.01, at 10-3 (noting financial requirements of aviation industry in 1920s).

38. MINUTES, *supra* note 35, at 13. Karol Lutostanski, Dean of the Faculty of Law at the University of Warsaw, during the opening session of the Warsaw Conference, declared that the delegates had:

[G]athered in order to improve life, in order to render a legal text that daily life urgently requires. International air carriage is multiplying, international lines are being created, air travelers pass from country to country and even to distant continents Common rules to regulate international air carriage have become a necessity. Besides, it is necessary to fix rules of liability rightly considered by the CITEJA as intimately bound up with the problem of transportation.

Id.

39. See Lowenfeld & Mendelsohn, *supra* note 1, at 498-99 (discussing goals of Warsaw Conference). The delegates considered limiting air carrier liability as the more important of the two goals. MINUTES, *supra* note 35, at 205. Regarding Articles 17, 18, and 19 providing for air carrier liability for passengers, baggage, and damage due to delay, Mr. Giannini, President of the Warsaw Conference Preparatory Committee, pointed out that "[a]s our colleagues certainly recall, these are perhaps the most important articles of the Convention." *Id.*

40. MINUTES, *supra* note 35, at 11. During his opening remarks at the Warsaw Conference, Mr. Zaleski, Minister of Foreign Affairs of the Republic of Poland, declared that "[t]oday the air is conquered; beside communication by land transport and by sea, air navigation has become a reality. But this new means of communication requires not only organization, it requires further the creation of provisions of law analogous to those which regulate the other means of communication." *Id.*; see also Lowenfeld & Mendelsohn, *supra* note 1, at 498-99 (discussing goals of Warsaw Conference).

41. Lowenfeld & Mendelsohn, *supra* note 1, at 498-500.

42. *Id.* When he delivered the Warsaw Convention to the U.S. Senate in 1934, Secretary of State Cordell Hull wrote that:

[T]he principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but . . . it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, *Message from the President of the U.S. Transmitting a*

tially complicated by the use of different languages and customs.⁴³

The Warsaw Convention came into effect on February 13, 1933,⁴⁴ ninety days after ratification by five High Contracting Parties.⁴⁵ Twelve countries, including most of Europe, were parties to the Warsaw Convention by the end of 1933.⁴⁶ The United States became a party to the Warsaw Convention on July 31, 1934,⁴⁷ after the advice and consent of the U.S. Senate.⁴⁸

2. Warsaw Convention Provisions

Unless a court reaches a finding of willful misconduct on the part of an air carrier, the liability provisions of the Warsaw Convention severely curtail the amount and kind of damages recoverable from the air carrier for the death or bodily injury of a passenger.⁴⁹ The Warsaw Convention restricts passengers to one of four jurisdictional fora for purposes of filing claims against air carriers.⁵⁰ The purpose behind the Warsaw Convention's notice provisions is to ensure that air carriers provide passengers with sufficient time to make informed decisions regarding the purchase of additional air travel insurance.⁵¹

Convention for the Unification of Certain Rules, S. EXEC. DOC. NO. G., 73d Cong., 2d Sess. 3-4 (1934), reprinted in 1934 U.S. Aviation Rep. 239, 242.

43. Lowenfeld & Mendelsohn, *supra* note 1, at 498-99. The delegates believed that it was necessary to establish uniformity regarding tickets, waybills, and procedures for handling legal claims because the delegates perceived the aviation industry as servicing and connecting many countries with different languages, customs, and legal systems. *Id.*

44. *Id.* at 501-02.

45. Warsaw Convention, *supra* note 3, art. 37, 49 Stat. at 3022, 137 L.N.T.S. at 31.

46. See Lowenfeld & Mendelsohn, *supra* note 1, at 501-02 (discussing ratification process).

47. Warsaw Convention, *supra* note 3, pmbl., 49 Stat. at 3013.

48. See Lowenfeld & Mendelsohn, *supra* note 1, at 501-502 (discussing U.S. adherence to Warsaw Convention). The Constitution gives the President of the United States the power to make treaties "by and with the Advice and Consent of the Senate, provided two-thirds of the Senators present concur." U.S. CONST. art II, § 2, cl. 2.

49. See 1 KREINDLER, *supra* note 1, §10.05[4], at 10-76 to 10-77 (explaining effect of Article 25 on air carrier's ability to take advantage of Warsaw Convention's liability limit protections).

50. Warsaw Convention, *supra* note 3, art 28(1), 49 Stat. at 3020-21, 137 L.N.T.S. at 27-29.

51. See 1 KREINDLER, *supra* note 1, § 10.05[1], at 10-66 (explaining goal of Article 3 ticketing requirement).

a. Liability Provisions

Article 17 imposes liability on air carriers if an accident causing death or bodily injury to a passenger occurs while a passenger is on board a plane or is embarking or disembarking.⁵² If an air carrier proves that it took all necessary steps to avoid damage, Article 20 excuses the air carrier from liability.⁵³ Similarly, if an air carrier establishes that a passenger's actions contributed to his or her injury or death, a forum court's⁵⁴ law on contributory⁵⁵ or comparative negligence⁵⁶ will apply to reduce the extent of the air carrier's liability.⁵⁷

Article 22 of the Warsaw Convention limits an air carrier's

52. Warsaw Convention, *supra* note 3, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 25. Article 17 provides that:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Id. at 3018, 137 L.N.T.S. at 25.

53. *Id.* art. 20, 49 Stat. at 3019, 137 L.N.T.S. at 25. Article 20 provides as follows:

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Id. at 3019, 137 L.N.T.S. at 25.

54. See BLACK'S LAW DICTIONARY 655 (6th ed. 1990) [hereinafter BLACK] (defining forum court as particular court of justice, judicial tribunal, or place of jurisdiction where plaintiff seeks judicial or administrative remedy for legal complaints).

55. See PROSSER & KEETON, *supra* note 13, § 65, at 451 (canvassing current law on contributory negligence). Contributory negligence is behavior by the plaintiff, contributing as a legal cause to the injury he has suffered, which falls below the standard which he is required to follow for his own safety. *Id.*

56. See *id.* § 67, at 471-72 (examining law on comparative negligence). Under the doctrine of comparative negligence, a plaintiff's contributory negligence decreases his damages in proportion to how much his own behavior contributed as a legal cause to his injury. *Id.*

57. Warsaw Convention, *supra* note 3, art. 21, 49 Stat. at 3019, 137 L.N.T.S. at 25. Article 21 states that "[i]f the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." *Id.* at 3019, 137 L.N.T.S. at 25. A court trying a Warsaw Convention case must apply its own law because each country has its own rules on contributory negligence or comparative negligence. See GOLDHIRSCH, *supra* note 26, at 97 (discussing requirements of Article 21 of Warsaw Convention).

liability for each passenger to 125,000 Poincaré francs,⁵⁸ valued in 1929 at approximately US\$8300.⁵⁹ Despite the limited liability provisions, Article 22 allows air carriers to contract with passengers to pay a higher amount of damages.⁶⁰ Article 23, however, prohibits an air carrier from contracting with passengers to pay a lower amount of damages.⁶¹ Under Article 25, an air carrier or his agent will not receive the protection of limited liability if a court finds the air carrier or his agent liable for willful misconduct.⁶² Accordingly, a passenger may recover beyond the liabil-

58. Warsaw Convention, *supra* note 3, art. 22(1), 49 Stat. at 3019, 137 L.N.T.S. at 25. Article 22(1) provides that:

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.

Id. at 3019, 137 L.N.T.S. at 25.

59. See GOLDBIRSCHE, *supra* note 26, at 95-96 (providing valuation of Poincaré francs as adjusted for 1929). The delegates chose to use the French gold standard of the Poincaré franc for the Warsaw Convention's liability limits as a means of avoiding the consequences of a possible devaluation in any local currency. *Id.* A French court could easily convert a damage award into local currency because the Poincaré franc and the French franc had equivalent values in 1929. *Id.* Courts outside of France had to calculate damage awards in local currency units based on the value of the Poincaré franc. *Id.*

60. Warsaw Convention, *supra* note 3, art. 22(1), 49 Stat. at 3019, 137 L.N.T.S. at 25; see 1 KREINDLER, *supra* note 1, § 10.01[3], at 10-6 (explaining ability of air carriers to opt out of Warsaw Convention's liability scheme).

61. Warsaw Convention, *supra* note 3, art. 23, 49 Stat. at 3020, 137 L.N.T.S. at 27. Article 23 provides as follows:

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Id. at 3020, 137 L.N.T.S. at 27.

62. *Id.* art. 25, 49 Stat. at 3020, 137 L.N.T.S. at 27. According to Article 25:

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Id. at 3020, 137 L.N.T.S. at 27. The use of the term *wilful misconduct* in Article 25 resulted from debate among the drafters concerning the correct translation of the French term *dol*. MINUTES, *supra* note 35, at 59-62. The drafters faced a dilemma because no such concept as *dol* existed in common law jurisdictions. See GOLDBIRSCHE,

ity limits by proving that an air carrier engaged in willful misconduct.⁶³

b. Jurisdiction Provisions

Under Article 28, plaintiffs may sue for damages in only one of four fora, including the state of the air carrier's domicile,⁶⁴ the air carrier's principal state of business,⁶⁵ the state where the passenger contracted for air travel, or the state of the passenger's destination.⁶⁶ Article 32 prohibits any alteration of the Warsaw Convention's jurisdictional provisions, even by mutual agreement between a passenger and an air carrier.⁶⁷ Article 29

supra note 26, at 121 (discussing use of term *dol* in official French text of Warsaw Convention). The term *dol* suggests "an act or omission that was done intentionally to cause a harm." *Id.* The common law concept closest to *dol* is willful misconduct which does not require intent. *Id.* Willful misconduct can involve "a reckless act or omission with the knowledge, sometimes implied, that harm will occur." *Id.* It is therefore more difficult for a plaintiff to prove *dol* than willful misconduct because intent is not a required element for willful misconduct. *Id.*

63. Warsaw Convention, *supra* note 3, arts. 25(1), 25(2), 49 Stat. at 3020, 137 L.N.T.S. at 27.

64. See 1 KREINDLER, *supra* note 1, § 10.06, at 10-90 (discussing interpretation of domicile in Article 28(1)). The domicile of the air carrier is the air carrier's place of incorporation. *Id.*

65. See GOLDBIRSCHE, *supra* note 26, at 145 (explaining interpretation of air carrier's principal place of business in Article 28(1)). An air carrier has only one principal place of business. *Id.* An air carrier's principal place of business is that place where the air carrier transacts the majority of its business. See DIEDERIKS-VERSCHOOR, *supra* note 9, at 67 (discussing interpretation of air carrier's principal place of business in Article 28(1)).

66. Warsaw Convention, *supra* note 3, art. 28(1), 49 Stat. at 3020-21, 137 L.N.T.S. at 27-29. Article 28 provides that:

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Id. at 3020-21, 137 L.N.T.S. at 27-29. The destination of a flight is the final stop indicated on the ticket regardless of whether more than one air carrier provided transportation to the passenger. See DIEDERIKS-VERSCHOOR, *supra* note 9, at 68 (discussing interpretation of destination in Article 28(1)).

67. Warsaw Convention, *supra* note 3, art. 32, 49 Stat. at 3021, 137 L.N.T.S. at 29-31. According to Article 32:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

requires plaintiffs to file suit within two years of the date of an accident.⁶⁸

c. Notice Provisions

Under Article 3, air carriers must provide air travelers with tickets setting forth the Warsaw Convention's liability provisions,⁶⁹ the air carrier's name and address,⁷⁰ the location and date of ticket issuance,⁷¹ the place of departure and destination,⁷² and any interim stops.⁷³ If an air carrier issues an inaccurate ticket or a passenger loses a ticket, the provisions of the Warsaw Convention still apply.⁷⁴ If an air carrier fails to deliver the prescribed ticket to an air traveler, the air carrier may not benefit from the Warsaw Convention liability limits.⁷⁵

3. Criticism of the Warsaw Convention

The Warsaw Convention came under criticism almost immediately after ratification, mainly for its liability provisions.⁷⁶ Proponents of increased liability limits noted that, in countries such as the United States, Great Britain, and France, damage awards

Id. at 3021, 137 L.N.T.S. at 29-31.

68. *Id.* art. 29, 49 Stat. at 3021, 137 L.N.T.S. at 29.

69. *Id.* art. 3(1)(e), 49 Stat. at 3015, 137 L.N.T.S. at 17.

70. *Id.* art. 3(1)(d), 49 Stat. at 3015, 137 L.N.T.S. at 17.

71. *Id.* art. 3(1)(a), 49 Stat. at 3015, 137 L.N.T.S. at 15.

72. *Id.* art. 3(1)(b), 49 Stat. at 3015, 137 L.N.T.S. at 15.

73. *Id.* art. 3(1)(c), 49 Stat. at 3015, 137 L.N.T.S. at 17. Article 3(1)(c) further provides that "[t]he carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character." *Id.* at 3015, 137 L.N.T.S. at 17.

74. *Id.* art. 3(2), 49 Stat. at 3015, 137 L.N.T.S. at 17. Article 3(2) provides that:

The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Id. at 3015, 137 L.N.T.S. at 17.

75. *Id.*

76. Lowenfeld & Mendelsohn, *supra* note 1, at 502. CITEJA began discussing potential revisions to the Warsaw Convention in 1935. *Id.* at 502. In addition, the ICAO's Legal Committee extensively discussed proposed changes to the Warsaw Convention. *Id.* Politicians, legal scholars, practitioners, and lay commentators also criticized the Warsaw Convention. See 1 SPEISER & KRAUSE, *supra* note 2, §§ 11:17, 11:18, at 669-70 (discussing dissatisfaction with Warsaw Convention's liability provisions).

in personal injury and death actions exceeded the limits permitted by the Warsaw Convention.⁷⁷ In contrast, many Latin American countries declined to adhere to the Warsaw Convention because they asserted that the liability limits were set too high.⁷⁸

B. *Subsequent Efforts to Modify the Warsaw Convention Regarding its Liability Provisions*

In 1955, the Hague Protocol⁷⁹ raised the Warsaw Convention's liability limits.⁸⁰ In 1966, continued criticism of the Warsaw Convention and the Hague Protocol liability limits⁸¹ led to the adoption of a contractual agreement ("Montreal Interim Agreement")⁸² that subjected signatory air carriers to absolute liability up to a limit of US\$75,000.⁸³ Signatories to the Guatemala Protocol⁸⁴ further increased the liability limit to approximately US\$120,000 in 1971.⁸⁵ Shortly thereafter, delegates to an ICAO diplomatic conference substituted SDRs for the gold standard as the basis of payment for the Warsaw Convention's liability limits.⁸⁶ As a result of a more recent contractual agreement, a

77. Lowenfeld & Mendelsohn, *supra* note 1, at 504. As air safety improved over time, air carriers could obtain liability insurance at reduced rates. *Id.* Critics of the Warsaw Convention's low liability limits also argued that increased insurance expenses would represent only a small portion of an air carrier's cost of operations. *Id.*

78. *Id.* In many countries, the value of the Poincaré gold franc had increased due to the global departure from the gold standard, thus raising the value of the Warsaw Convention liability limits. *Id.*

79. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol].

80. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:18, at 671-72 (discussing Hague Protocol). In order to preserve the Warsaw Convention's original goal of uniformity, the delegates to the Hague Conference purposely decided to adopt a protocol to the Warsaw Convention instead of rewriting the treaty. *Id.*

81. See Ray B. Jeffrey, Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM., 805, 812 (describing criticism of limited liability under Warsaw Convention and Hague Protocol).

82. Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, CAB Agreement 18900, adopted on May 13, 1966, 49 U.S.C. § 1502 (1988) [hereinafter Montreal Interim Agreement].

83. *Id.*

84. 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, Mar. 8 1971, 64 Dep't St. Bull. 555 [hereinafter Guatemala Protocol]

85. *Id.* art. VIII, at 556-57.

86. See Sheinfeld, *supra* note 29, at 677-78 (discussing concerns over gold standard in early 1970s)

group of Japanese air carriers abandoned the Warsaw Convention's liability limits in 1992.⁸⁷

1. The 1955 Hague Protocol

Delegates of twenty-six countries attended a diplomatic conference at The Hague in 1955⁸⁸ ("Hague Conference") to consider either raising the liability limits or narrowing the conditions for unlimited air carrier liability.⁸⁹ The resultant Hague Protocol doubled the Warsaw Convention's liability limits for death or injury to a passenger to 250,000 Poincaré francs, or approximately US\$16,600.⁹⁰ The delegates also added a provision allowing courts to award litigation expenses to passengers according to local law.⁹¹ In addition, the Hague Protocol defined willful misconduct to mean that air carriers would be subject to unlimited liability for intentional or reckless acts causing injury or death.⁹²

87. See Naneen K. Baden, *The Japanese Initiative on the Warsaw Convention*, 61 J. AIR L. & COM. 437, 453 (1996) (describing Japanese air carrier abandonment of Warsaw Convention liability limits).

88. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:18, at 670-71 (discussing Hague Conference). The ICAO's Legal Committee convened the International Conference on Private Air Law in September 1955. *Id.*

89. See Lowenfeld & Mendelsohn, *supra* note 1, at 505 (discussing Hague Conference).

90. Hague Protocol, *supra* note 79, art. XI, 478 U.N.T.S. at 381. Article XI replaces Article 22 of the Warsaw Convention. *Id.*

91. *Id.*, art. XI, 478 U.N.T.S. at 381. Article XI, which replaces Article 22 of the Warsaw Convention, states:

The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Id. at 381. The U.S. delegation to the Hague Conference pressed for the inclusion of this provision because it sought maximum recoveries for injured passengers or their survivors. See Lowenfeld & Mendelsohn, *supra* note 1, at 507-08 (discussing proposal to raise liability limits).

92. Hague Protocol, *supra* note 79, art. XIII, 478 U.N.T.S. at 383. Article XIII, which replaces Article 25 of the Warsaw Convention, 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

Despite its participation at the Hague Conference, the United States never ratified or adhered to the Hague Protocol.⁹³ The United States remained dissatisfied with the Hague Protocol's revised liability limits.⁹⁴ Accordingly, the original version of the Warsaw Convention, including its liability limits of US\$8300, remained applicable in the United States.⁹⁵ Over time, more than 100 countries, including the majority of Europe, became parties to the Hague Protocol.⁹⁶

2. The 1966 Montreal Interim Agreement

At the time of the Hague Conference, the international aviation industry was well established and financially stable.⁹⁷ Given the industry's profitability and significant safety records, opponents of the Hague Protocol argued that air carriers no longer required the protection of special liability limits.⁹⁸ Proponents of the Hague Protocol, however, noted the advantages to passengers of the Hague Protocol's provision allowing courts to award litigation expenses⁹⁹ and more generally avoiding confusion due to the existence of conflicting laws in the absence of an international treaty.¹⁰⁰ These types of criticism of the Warsaw Convention and the Hague Protocol liability limits continued unabated during the ten-year period following the Hague Conference.¹⁰¹

In 1961, while the United States considered whether to formally denounce the Warsaw Convention,¹⁰² the U.S. Department

omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Id. at 383.

93. 1 KREINDLER, *supra* note 1, § 11.01, at 11-2. The Hague Protocol went into effect on August 1, 1963, 90 days subsequent to ratification by 30 countries. *Id.*

94. *Id.* U.S. persistence regarding higher liability limits was a major reason for holding the Hague Conference initially. *Id.*

95. *Id.*

96. *Id.* § 11:03[04], at 11-11.

97. See Sheinfeld, *supra* note 29, at 660-61 (discussing status of international aviation industry at time of Hague Conference).

98. See Jeffrey, *supra* note 81, at 811-12 (canvassing opposition to Hague Protocol).

99. Hague Protocol, *supra* note 79, art. XI, 478 U.N.T.S. at 381.

100. See Lowenfeld & Mendelsohn, *supra* note 1, at 510 (discussing debate over merits of Hague Protocol).

101. See Jeffrey, *supra* note 81, at 812 (discussing criticism of the Warsaw Convention's and Hague Protocol's liability provisions).

102. Warsaw Convention, *supra* note 3, art. 39, 49 Stat. at 3022, 137 L.N.T.S. at 33. Article 39 provides as follows:

(1) Any one of the High Contracting Parties may denounce this conven-

of State requested that the Interagency Group on International Aviation¹⁰³ ("IGIA") review the Warsaw Convention and the Hague Protocol.¹⁰⁴ Instead of recommending denunciation of the Warsaw Convention, the IGIA attempted to secure an agreement between the five principal U.S. international air carriers and the ATA to voluntarily raise liability limits to US\$100,000.¹⁰⁵ Thus, the IGIA proposal would have taken advantage of Article 22 of the Warsaw Convention, which provides that an air carrier and its passengers may agree by special contract to raise liability limits.¹⁰⁶ Although the ATA air carriers rejected the IGIA proposal,¹⁰⁷ in September 1965 the international air carriers of the IATA approved their own counter-proposal with a liability limit of US\$50,000.¹⁰⁸ IATA made the terms of the counter-proposal contingent on U.S. ratification of the Hague Protocol.¹⁰⁹

Despite the IATA counter-proposal, on November 15, 1965,

tion by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Id. at 3022, 137 L.N.T.S. at 33; see BLACK, *supra* note 54, at 435 (defining denunciation of treaty as "act of one nation in giving notice to another nation of its intention to terminate an existing treaty between the two nations"). At the same time as the administration had serious misgivings regarding the Warsaw Convention, the U.S. Department of State was also concerned that denunciation of the Warsaw Convention might antagonize international governments to the detriment of American aviation interests abroad. See Lowenfeld & Mendelsohn, *supra* note 1, at 533 (discussing Kennedy administration concerns regarding the Warsaw Convention denunciation).

103. Lowenfeld & Mendelsohn, *supra* note 1, at 533. During its review of the Warsaw Convention and the Hague Protocol, the Interagency Group on International Aviation ("IGIA") also considered recommending a mandatory insurance program as a supplemental proposal to ratification of the Hague Protocol. *Id.* at 535.

104. *Id.*

105. *Id.* at 547. In return, the IGIA proposed that the Kennedy administration urge Congress to ratify the Hague Protocol. *Id.*

106. Warsaw Convention, *supra* note 3, art. 22(1), 49 Stat. at 3019, 137 L.N.T.S. at 22; see Lowenfeld & Mendelsohn, *supra* note 1, at 547 (discussing IGIA proposal to raise Warsaw Convention liability limits).

107. Lowenfeld & Mendelsohn, *supra* note 1, at 547-48. The IGIA proposal failed because some of the air carriers refused to raise the liability limits higher than US\$50,000, while others refused to approve any increase unless all domestic and international air carriers agreed to raise the limits to the same amount. *Id.*

108. *Id.* at 547-49 (discussing IATA approval of US\$50,000 liability limit).

109. See *id.* at 549. The U.S. administration viewed the IATA proposal as an indication that most air carriers did not comprehend how seriously the U.S. government viewed the need to raise liability limits. *Id.*

the United States formally denounced the Warsaw Convention.¹¹⁰ In its Notice of Denunciation, the U.S. Department of State indicated that the United States would withdraw its denunciation if, before May 15, 1966, there was a plausible possibility for an international agreement temporarily raising liability limits to US\$75,000, followed by a subsequent increase to US\$100,000.¹¹¹ The U.S. position on increased liability limits prompted fifty-nine countries,¹¹² including the United States, to send delegates to an international conference held in Montreal, Canada in February 1966 ("Montreal Conference").¹¹³ Although the delegates could not reach an agreement before the end of the conference,¹¹⁴ the United States and the international air carriers continued negotiations, with IATA acting as an intermediary.¹¹⁵ Finally, the United States and the international air carriers reached a compromise in the form of the Montreal Interim Agreement, one day before the effective date of the United States' Notice of Denunciation, May 15, 1966.¹¹⁶ Consequently, the United States withdrew its Notice of Denunciation of the

110. C.A.B. Order E-22984, Dec. 15, 1965, 53 DEP'T ST. BULL., at 923-25. The American Embassy in Warsaw sent a diplomatic note to the Polish government, as the depositary government for the Warsaw Convention, to formally register the United States' denunciation. See Lowenfeld & Mendelsohn, *supra* note 1, at 551 (discussing denunciation of Warsaw Convention).

111. See Lowenfeld & Mendelsohn, *supra* note 1, at 552 (discussing Notice of Denunciation of Warsaw Convention). May 15, 1966 was the effective date of the U.S. Notice of Denunciation because, under Article 39 of the Warsaw Convention, a High Contracting Party's denunciation would not take effect until six months after November 15, 1965, the filing date of the Notice of Denunciation with the Polish Government. Warsaw Convention, *supra* note 3, art. 39, 49 Stat. at 3022, 137 L.N.T.S. at 33.

112. See Lowenfeld & Mendelsohn, *supra* note 1, at 563 (discussing Montreal Interim Agreement). Twenty-eight countries sending delegates to Montreal were parties to both the Warsaw Convention and the Hague Protocol, twenty-two countries were parties only to the Warsaw Convention, and nine countries were present due to their membership in ICAO. *Id.* at 563 n.224.

113. See *id.* at 563 (discussing international conference held in Montreal, Canada in February 1966 ("Montreal Conference")).

114. See *id.* at 564-66 (discussing reactions of delegates attending Montreal Conference). While many of the countries at the Montreal Conference were prepared to acknowledge that the liability limits were too low, most of the countries viewed the U.S. proposal for a US\$100,000 per passenger limit as immoderate. *Id.* at 565. The rationale for this view was that, if an individual was really worth that much money, he should manage to insure himself. *Id.*

115. See 1 KREINDLER, *supra* note 1, § 12.02[4], at 12-7 (describing roles of the United States and IATA at Montreal Conference).

116. See *id.* (discussing Montreal Interim Agreement).

Warsaw Convention.¹¹⁷

The Montreal Interim Agreement is a contractual agreement between air carriers who have signed the agreement and passengers with tickets having points of departure, destination, or agreed stopping places in the United States.¹¹⁸ The basis for the Montreal Interim Agreement is Article 22 of the Warsaw Convention which allows an air carrier and its passengers to agree by special contract to raise liability limits.¹¹⁹ Due to its contractual nature, the Montreal Interim Agreement does not amend the provisions of the Warsaw Convention or the Hague Protocol.¹²⁰ The Montreal Interim Agreement applies to any international air travel that has a place of departure, agreed destination, or agreed stopping place in the United States.¹²¹ It imposes absolute liability upon participating air carriers up to US\$75,000.¹²² It also requires contracting air carriers to include notice of the new liability limits on airline tickets issued to passengers.¹²³ Although the United States intended the Montreal Interim Agreement to be a temporary arrangement,¹²⁴ the Montreal Interim Agreement and the Warsaw Convention remain in effect in the United States today.¹²⁵

3. The 1971 Guatemala Protocol

After the United States withdrew its Notice of Denunciation, it continued its efforts to change the Warsaw Convention's limited liability provisions because it viewed the Montreal Interim Agreement as a temporary, non-governmental solution.¹²⁶ In

117. See Lowenfeld & Mendelsohn, *supra* note 1, at 596 (discussing U.S. withdrawal of Notice of Denunciation of Warsaw Convention).

118. See Goldhirsch, *supra* note 26, at 7 (discussing Montreal Interim Agreement).

119. Warsaw Convention, *supra* note 3, art. 22(1), 49 Stat. at 3019, 137 L.N.T.S. at 25.

120. See 1 KREINDLER, *supra* note 1, § 12.03, at 12-7 (discussing legal framework of Montreal Interim Agreement).

121. Montreal Interim Agreement, *supra* note 82. See DIEDERIKS-VERSCHOOR, *supra* note 9, at 76 (discussing applicability of Montreal Interim Agreement).

122. Montreal Interim Agreement, *supra* note 82. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:19, at 679 (discussing provisions of Montreal Interim Agreement).

123. Montreal Interim Agreement, *supra* note 82, art. 2. See 1 KREINDLER, *supra* note 1, § 12.02[5], at 12-7 (discussing provisions of Montreal Interim Agreement).

124. See Jeffrey, *supra* note 81, at 814 (discussing Montreal Interim Agreement).

125. See 1 KREINDLER, *supra* note 1, § 10.01[5], at 10-11 (describing current status of Montreal Interim Agreement).

126. See Nicolas M. Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8

March 1971, following a conference held in Guatemala City,¹²⁷ representatives from the United States and twenty other countries signed the Guatemala Protocol.¹²⁸ The Guatemala Protocol increased the Warsaw Convention's liability limits for passenger death or personal injury to 1,500,000 Poincaré francs, or approximately US\$120,000.¹²⁹ The Guatemala Protocol also provided for periodic reviews of liability limits,¹³⁰ strict liability in cases of death or personal injury,¹³¹ and the possibility of supplemental national insurance plans to further protect air travelers.¹³² Additionally, the Guatemala Protocol provided that courts could impose legal fees on an air carrier who refuses to settle a claim within a six-month period after receiving written notification of a settlement amount.¹³³ Although the Guatemala Protocol's drafters intended these provisions to appease the United States, the U.S. administration never submitted the Guatemala Protocol to the Senate for ratification because the Guatemala Protocol

ANNALS OF AIR & SPACE L. 151, 157-58 (1983) (discussing Montreal Interim Agreement and Guatemala Protocol).

127. INT'L CIVIL AVIATION ORG., INTERNATIONAL CONFERENCE ON AIR LAW, GUATEMALA CITY, FEBRUARY-MARCH 1971, ICAO Doc. 9040-LC/167-1,167-2 (1972).

128. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:20, at 680 (discussing Guatemala Protocol).

129. Guatemala Protocol, *supra* note 84, art. VIII, at 556-57.

130. *Id.* art. XV, at 558.

131. *Id.* art. VI, at 556. The Guatemala Protocol provides a strict liability standard instead of a negligence standard. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:20, at 683 n.40 (discussing Guatemala Protocol's revisions of Warsaw Convention).

132. Guatemala Protocol, *supra* note 84, art. XIV, at 557. Article XIV states that a supplemental national insurance plan shall meet the following conditions:

a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required to do so;

c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.

Id. The last condition of the Guatemala Protocol's provision for supplemental national insurance plans broadened the reach an air carrier's liability. See Sheinfeld, *supra* note 29, at 673-74 (discussing Guatemala Protocol provision for supplemental insurance plan).

133. Guatemala Protocol, *supra* note 84, art. VIII(3), at 556-57; see Matte, *supra* note 126, at 157 (discussing provisions of Guatemala Protocol).

linked liability limits to the fluctuating price of gold.¹³⁴ The Guatemala Protocol is not in force anywhere in the world because the language of its ratification clause, requires, in effect, ratification by the United States as a necessary prerequisite of the Guatemala Protocol ratification process.¹³⁵

4. The 1975 Montreal Protocols

Due to fluctuations of gold prices in the international monetary system,¹³⁶ the ICAO convened a diplomatic conference¹³⁷ ("ICAO Conference") in Montreal in 1975.¹³⁸ The resultant four protocols¹³⁹ ("Montreal Protocols") substituted SDRs¹⁴⁰ for

134. See Matte, *supra* note 126, at 158 (discussing Nixon administration's decision not to seek ratification of Guatemala Protocol).

135. Guatemala Protocol, *supra* note 84, art. XX(1), at 558. According to the Guatemala Protocol, thirty countries must ratify the Guatemala Protocol and:

[T]he total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines of five States which have ratified this Protocol, [must equal] at least 40% of the total international scheduled air traffic of the airlines of the member States of the International Civil Aviation Organization in that year.

Id. The drafters included this requirement to avoid the possibility that, similar to the Hague Protocol, only a small number of states would ratify the Guatemala Protocol, resulting in two different sets of liability limits existing concurrently in the international aviation industry. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:20, at 681 n.35 (discussing Guatemala Protocol ratification process).

136. See Sheinfeld, *supra* note 29, at 677-78 (discussing worries over value of gold in early 1970s). Weakness in the value of gold had caused concern in the foreign exchange markets and created the need for an alternative basis for the liability limits of the Warsaw Convention other than the Poincaré gold franc. *Id.*

137. See *id.* at 678 (discussing ICAO diplomatic conference held in Montreal in 1975 ("ICAO Conference")).

138. *Id.*

139. Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage By Air): Montreal Protocols 3 and 4 Providing Higher Liability Limits, Sept. 25, 1975, ICAO Doc. 9147, 9148 [hereinafter Montreal Protocols]. The Montreal Protocols amended the Warsaw Convention's liability limits for passengers, baggage, and goods. Francis Lyall, *The Warsaw Convention — Cutting the Gordian Knot and the 1995 Intercarrier Agreement*, 22 SYRACUSE J. INT'L L. & COM. 67, 74-75 (1996). In addition, the fourth Montreal Protocol, which the ICAO Conference delegates signed concurrently, addressed air cargo liability limits. *Id.* at 75.

140. DOWNES & GOODMAN, *supra* note 14, at 487. The International Monetary Fund ("IMF") created the SDR in 1970 in response to concerns of monetary officials that the supply of gold and U.S. dollars, the two principal reserve assets, would fail to meet world demand and cause the U.S. dollar's value to increase excessively. *Id.* Originally, the IMF set the value of one SDR at a one-to-one ratio with the U.S. dollar and at the dollar equivalent of other major currencies on January 1, 1970. *Id.* When world governments switched to the current system of floating exchange rates, the SDR's value

the gold standard as the basis for the Warsaw Convention's liability limits.¹⁴¹ The International Monetary Fund¹⁴² ("IMF") bases the SDR currency unit on the currencies of France, Britain, Japan, Germany, and the United States.¹⁴³ By using SDRs, the delegates sought to address criticism of the Warsaw Convention for not considering the effect of inflation on liability limits.¹⁴⁴

The ICAO Conference delegates intended the third Montreal Protocol¹⁴⁵ ("Montreal Protocol No. 3") to incorporate all prior amendments to the Warsaw Convention.¹⁴⁶ Accordingly, Montreal Protocol No. 3 incorporated by reference the Guatemala Protocol's provision for a supplemental national insurance plan.¹⁴⁷ The ICAO Conference delegates set the liability limits in Montreal Protocol No. 3 at 100,000 SDRs, or approximately US\$120,000.¹⁴⁸

Montreal Protocol No. 3 remained in the U.S. Senate For-

shifted as compared to the "basket" of key currencies. *Id.* Greater dependence on SDRs in settling international accounts corresponded to a decrease in the importance of gold as a reserve asset. *Id.* The SDR's intrinsic stability relative to any one currency has made it useful for determining the value of private contracts and international treaties. *Id.*

141. See Matte, *supra* note 126, at 158 (discussing adoption of SDRs for Warsaw Convention's liability limits). A gold standard is a monetary system under which currency units are exchangeable for set quantities of gold as an anti-inflationary device. DOWNES & GOODMAN, *supra* note 14, at 299-300.

142. See BLACK, *supra* note 54, at 816 (defining International Monetary Fund ("IMF") as agency of United Nations). The IMF is responsible for reducing trade barriers and stabilizing foreign currencies. DOWNES & GOODMAN, *supra* note 14, at 322-23.

143. See GOLDBIRSCH, *supra* note 26, at 97 (discussing SDR currency unit).

144. See Baden, *supra* note 87, at 446 (discussing SDR monetary unit).

145. Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage By Air): Montreal Protocols 3 Providing Higher Liability Limits, Sept. 25, 1975, ICAO Doc. 9147 [hereinafter Montreal Protocol No. 3].

146. *Id.* art. I, ICAO Doc. 9147 at E-1. Article I states that "[t]he convention which the provisions of the present Chapter modify is the Warsaw Convention as amended at The Hague in 1955, and at Guatemala City in 1971." *Id.* at E-1; see Matte, *supra* note 126, at 158 (discussing Montreal Protocols).

147. Montreal Protocol No. 3, *supra* note 145, art. IV, ICAO Doc. 9147 at E-2.

148. *Id.* art. II(1), at E-1. Article II(1) provides:

In the carriage of persons the liability of the carrier is limited to the sum of 100 000 [sic] Special Drawing Rights for the aggregate of the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed 100 000 [sic] Special Drawing Rights.

Id.; see Sheinfeld, *supra* note 29 at 678 (discussing provisions of Montreal Protocol No. 3).

eign Relations Committee and finally went before the Senate in 1983.¹⁴⁹ Although the U.S. Senate Committee on Foreign Relations urged ratification of the Montreal Protocols,¹⁵⁰ the Senate itself failed to ratify the Protocols in 1983,¹⁵¹ primarily due to the Senate's preference for unlimited air carrier liability.¹⁵² In addition, the Senate objected to the idea of a supplemental insurance plan which appeared to imply that injured passengers would effectively pay for their own damages.¹⁵³

5. The 1992 Japanese Initiative

On November 20, 1992, ten Japanese air carriers voluntarily waived the Warsaw Convention's liability limits ("Japanese Initiative").¹⁵⁴ The Japanese Initiative relied on Article 22(1) of the Warsaw Convention which allows air carriers to contractually agree to pay passengers higher liability amounts than those specified in the Warsaw Convention.¹⁵⁵ To execute their withdrawal from the Warsaw Convention, the Japanese air carriers added appropriate language concerning passenger liability on international flights to their conditions of carriage.¹⁵⁶

149. Matte, *supra* note 126, at 159. The Senate Foreign Relations Committee held hearings on Montreal Protocol No. 3 in July 1977 and September 1981, but took no action until February 1983 when the Committee recommended the Protocol to the Senate for ratification. *Id.*

150. S. EXEC. REP. NO., at 1 (1983).

151. David Shribman, *Air Liability Treaty Rejected by Senate*, N.Y. TIMES, Mar. 9, 1983 at D6 (reporting Senate failure to ratify Montreal Protocols due to dissatisfaction with Protocols' low liability limits).

152. See Matte, *supra* note 126, at 159-60 (describing Senate opposition to liability limits as determining factor in Senate decision not to ratify Montreal Protocols). During the Senate debate, for example, Senator Ernest F. Hollings stated that:

In 1980, the Air Law Committee of the International Law Association recommended unlimited liability for personal injuries or death to individual passengers. This Air Law Committee consists of 38 distinguished international scholars, many of whom have been instrumental in the development of the Warsaw convention and its progeny of treaties When a group such as this puts it [sic] support behind the proposition that airlines in international aviation should be subject to unlimited liability, one would be hard-pressed to justify a treaty to the contrary.

129 CONG. REC. S2,245 (daily ed. Mar. 7, 1983) (statement of Sen. Hollings).

153. Laurie M. McQuade, Note, *Tragedy as a Catalyst for Reform: The American Way?*, 11 CONN. J. INT'L. L. 325, 331-32 (1996).

154. See Baden, *supra* note 87, at 453 (discussing Japanese air carrier abandonment of Warsaw Convention liability limits).

155. Warsaw Convention, *supra* note 3, art. 22(1), 49 Stat. at 3019, 137 L.N.T.S. at 25.

156. See Baden, *supra* note 87, at 455 (discussing Japanese Initiative). The Japa-

The Japanese air carriers made their decision to raise liability limits after the 1985 crash of a Japan Air Lines ("JAL") Boeing 747 which killed over 500 people.¹⁵⁷ The 1985 JAL accident drew attention to an inconsistency in Japanese airline regulations.¹⁵⁸ Passengers traveling on domestic flights in Japan were entitled to unlimited liability, while passengers with international tickets traveling on the same aircraft were entitled only to limited liability.¹⁵⁹ Additionally, private settlements between the victims' families and JAL in the 1985 disaster averaged US\$800,000 per passenger.¹⁶⁰ Many Japanese regarded the disparity between the amount of such private settlements and the size of judicial awards capped by the Warsaw Convention's liability limits as dishonorable.¹⁶¹

The less adversarial Japanese legal system favors settlement arrangements over litigation.¹⁶² Civil suits occur only as a last resort because filing a complaint against someone in Japan creates societal discord.¹⁶³ During the period of 1977-82, for exam-

nese air carriers added the following two paragraphs to their conditions of carriage as printed on each passenger ticket:

Each airline shall not apply the applicable limit of liability in Article 22(1) of the Warsaw convention in defense of any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of the convention.

Each airline shall not use any defense for negligence as stated in Article 20(1) of the Warsaw Convention up to 100,000 SDRs . . . but will use those defenses thereafter, excluding legal costs awarded by a court.

Stacy Shapiro, *Debate Rages on Airline Liability Caps*, *BUS. INS.*, Mar. 15, 1993, at 3 (noting changed language of conditions of carriage due to Japanese Initiative).

157. See Baden, *supra* note 87, at 453 (discussing Japanese air carrier abandonment of Warsaw Convention's liability limits); see Shapiro, *supra* note 156, at 3 (noting that 1985 JAL air disaster led to adoption by Japanese air carriers of changed conditions of carriage).

158. See Shapiro, *supra* note 156, at 3 (explaining disparity in Japanese airline regulations).

159. *Id.*

160. See Baden, *supra* note 87, at 454 (discussing private settlements in the 1985 JAL air disaster).

161. See *id.* at 454 (reviewing Japanese reaction to private settlements in 1985 JAL disaster).

162. See ROBERT C. CHRISTOPHER, *THE JAPANESE MIND* 164-65 (1983) (discussing Japanese police negotiations of financial settlements between parties to traffic collision at accident scene). So frequent is the settlement arrangement approach that the number of civil lawsuits filed in Japan annually equals a fraction of comparable U.S. statistics. *Id.* at 165.

163. *Id.* at 165-66.

ple, fifty-seven passengers died in two JAL crashes.¹⁶⁴ Yet none of the victims' relatives filed a complaint against JAL as a consequence.¹⁶⁵

Aviation industry observers originally theorized that other air carriers would follow the Japanese example because the Japanese Initiative could reduce litigation.¹⁶⁶ These observers hypothesized that such a reduction in litigation would result from allowing victims' families to settle directly with air carriers who could then seek reimbursement from aircraft manufacturers.¹⁶⁷ Other international air carriers did not adopt the Japanese Initiative's provisions because of fear that insurance costs would increase as a result of such industry-wide action.¹⁶⁸

C. *Judicial Interpretations of the Warsaw Convention*

Dissatisfaction with the low liability limits of the Warsaw Convention has led to various judicial methods of skirting those limits over the years.¹⁶⁹ U.S. courts have questioned whether the Warsaw Convention demands an independent basis for a cause of action.¹⁷⁰ The Warsaw Convention's limitation of damage recoveries has resulted in strict factual scrutiny by courts to determine whether a passenger's injury or death depended upon the occurrence of an accident that took place while the passenger

164. *Id.* at 165.

165. *Id.* The majority of the victims' families arranged private settlements with JAL for various amounts of compensation based upon the victim's age, salary, and family responsibilities. *Id.*

166. See Robert Rice, *Crash Liability Question Still Up in the Air*, FIN. TIMES, Nov. 29, 1996, at 3 (predicting that popularity of Japanese Initiative would force other air carriers to follow suit); Peter Martin & Trevor French, *Blown Cover: Japanese Airlines Have Unilaterally Opted for Unlimited Passenger Liability*, AIRLINE BUS., Feb. 1993, at 44 (anticipating popularity of Japanese Initiative); Yumiko Ono & Bridget O'Brian, *Japan's Airlines Waive Limits for Accidents; Move on Victim Payments May Help Bring About Simpler Global System*, WALL ST. J., Nov. 23, 1992, at A11 (discussing likelihood that other countries would follow Japanese Initiative).

167. See Robert Rice, *Business and the Law: Airlines Opt to Fly on a Wing and a Prayer - Compensation Leaves Travellers Cold*, FIN. TIMES, Nov. 23, 1993, at 16 [hereinafter *Compensation Leaves Travelers Cold*] (discussing advantages of Japanese Initiative); *Japan's Carriers Announce They'll Scrap Treaty's Liability Limits*, AIR SAFETY WK., Dec. 7, 1992, available in WESTLAW, Airsafw Database [hereinafter *Japan's Carriers*] (discussing settlement possibilities after Japanese Initiative).

168. See *Compensation Leaves Travelers Cold*, *supra* note 167, at 16.

169. See GOLDHIRSCH, *supra* note 26, at 97 (describing judicial discontent with Warsaw Convention liability limits).

170. See *id.* at 56 (reviewing judicial debate over Warsaw Convention's cause of action).

was on board, embarking, or disembarking from an aircraft.¹⁷¹ Court procedure has fluctuated for the adjudication of a legal claim depending upon a passenger's choice of jurisdiction for filing a suit under the limitations of Article 28.¹⁷² Judicial interpretations of willful misconduct have varied under Article 25, leading to a lack of uniformity in the results of such cases.¹⁷³

1. Cause of Action

Article 17 of the Warsaw Convention provides for a cause of action against an air carrier for death or bodily injury caused during embarkation or disembarkation or while a passenger is on board an aircraft.¹⁷⁴ Despite this provision, early decisions by U.S. courts interpreted the Warsaw Convention as requiring an independent basis for a cause of action.¹⁷⁵ Accordingly, U.S. plaintiffs had to base their causes of action on domestic law rather than on the Warsaw Convention itself.¹⁷⁶

In *Benjamins v. British European Airways*,¹⁷⁷ the U.S. Court of Appeals for the Second Circuit overturned earlier Second Circuit decisions that had held that the Warsaw Convention does

171. Warsaw Convention, *supra* note 3, art. 17, 49 Stat. 3018, 137 L.N.T.S. at 23.

172. See GOLDHIRSCH, *supra* note 26, (discussing judicial effect of jurisdiction under Article 28).

173. See 1 KREINDLER, *supra* note 1, § 10.05[4], at 10-77 (describing effect of difficulty in translating term *dol* in Article 25).

174. Warsaw Convention, *supra* note 3, art. 17., 49 Stat. at 3018, 137 L.N.T.S. at 23.

175. See GOLDHIRSCH, *supra* note 26, at 56 (discussing Warsaw Convention's cause of action) In countries like the United States, a federation of states with a state and federal court structure, the kind of action upon which a lawsuit is grounded sometimes determines the jurisdiction of the court. *Id.* The cause of action may also decide who can assert a legal claim, who can recover and the possible damages. *Id.*

176. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 679-80 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957) (holding that Warsaw Convention does not create its own independent cause of action); *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393, 401 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954) (holding that Warsaw Convention does not create its own independent cause of action). In common law countries, such as the United Kingdom, Canada, and Australia, legislation implementing the Warsaw Convention eradicated most such problems. See *DIEDERIKS-VERSCHOOR*, *supra* note 9, at 67 (discussing Warsaw Convention cause of action). In the United States, where there is no statutory implementation of the Warsaw Convention, courts had to interpret the Warsaw Convention itself to determine whether it established a cause of action. *Id.* The question did not arise in civil law countries where a cause of action could be based either on contract or tort law. *Id.*

177. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

not create an independent cause of action.¹⁷⁸ In *Benjamins*, a Dutch citizen permanently residing in California appealed the dismissal of a wrongful death suit which he had brought against British European Airways ("BEA") when the BEA aircraft on which his wife, also a Dutch citizen permanently residing in California, was a passenger crashed in England.¹⁷⁹ The Eastern District Court of New York had dismissed the suit for lack of federal jurisdiction based upon the earlier Second Circuit precedent that the Warsaw Convention only conditions and limits causes of action founded on other principles of domestic law.¹⁸⁰ The *Benjamins* court stressed the Warsaw Convention's goal of creating a uniform system for handling legal claims associated with international aviation.¹⁸¹ The court further noted that courts in other countries party to the Warsaw Convention, such as the United Kingdom, had held that the Warsaw Convention created its own independent cause of action.¹⁸²

Benjamins resolved the debate over whether the Warsaw Convention established its own independent cause of action.¹⁸³ The *Benjamins* court did not decide the issue of whether a Warsaw Convention cause of action can exist concurrently with state law-based claims or whether that cause of action is exclusive.¹⁸⁴ The difficulty that U.S. courts have faced concerning exclusivity results from the Warsaw Convention's failure to address the issue.¹⁸⁵ Furthermore, to date, the U.S. Supreme Court has not ruled on whether the Warsaw Convention provides an exclusive cause of action.¹⁸⁶

178. *Id.* at 916-17 (discussing *Komlos* and *Noel*).

179. *Id.* at 914-15.

180. *Id.* at 915.

181. *Id.* at 917. By consulting the minutes of the two conferences which led to the drafting of the Warsaw Convention, the court discovered that "[w]hat is made quite clear is the extent to which the delegates were concerned with creating a uniform law to govern air crashes, with absolutely no reference to any national law (except for the questions of standing to sue for wrongful death, effects of contributory negligence and procedural matters . . .)." *Id.*

182. *Id.* at 918-19.

183. See Luis F. Ras, *Warsaw's Wingspan over State Laws: Toward a Streamlined System of Recovery*, 59 J. AIR L. & COM. 587, 591-92 (1994) (discussing exclusivity of Warsaw Convention's cause of action provision).

184. *Id.*

185. See *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988 (Lockerbie I)*, 928 F.2d 1267, 1273 (2nd Cir.), cert. denied, 502 U.S. 920 (1991) (noting that Warsaw Convention does not address issue of exclusivity).

186. See *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 553 (1991) (declining to

Federal courts in the United States have issued conflicting decisions regarding the exclusivity of the Warsaw Convention cause of action.¹⁸⁷ In *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*¹⁸⁸ ("Lockerbie I"), a U.S. appeals court held that a Warsaw Convention cause of action is exclusive.¹⁸⁹ The *Lockerbie I* court based its decision on several factors, including the drafters' emphasis on uniformity in international aviation law and the need for a common rule on questions such as the recoverability of punitive damages.¹⁹⁰

In *In re Mexico City Aircrash of October 31, 1979*,¹⁹¹ the Ninth Circuit concluded that the language of Article 24(1)¹⁹² supports the position that the Warsaw Convention's drafters did not intend a Warsaw Convention cause of action to be exclusive.¹⁹³ According to the *Mexico City* court, the drafters did not want state causes of action to result in the award of varying measures of damages to claimants in different states.¹⁹⁴ The delegates used Article 24(1) to ensure that courts would apply the Warsaw Convention's liability limits consistently, regardless of the forum where the case was heard.¹⁹⁵

2. Elements of a Claim

The Warsaw Convention will not limit recovery of damages if a court decides that a passenger's injuries are not attributable to an accident which took place while the passenger was on

decide question of exclusivity because lower court never addressed exclusivity issue); *Air France v. Saks*, 470 U.S. 392, 408 (1985) (declining to decide question of exclusivity because plaintiff had not clearly raised exclusivity issue before the lower court).

187. See *Boehringer Mannheim-Diagnostics, Inc. v. Pan Am World Airways*, 737 F.2d 456, 458 (5th Cir. 1984) (holding that Warsaw Convention cause of action is exclusive), *appeal dismissed and cert. denied*, 469 U.S. 1186 (1985); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 418 (9th Cir. 1983) (holding that Warsaw Convention cause of action is not exclusive).

188. 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 502 U.S. 920 (1991).

189. *Id.* at 1273-74.

190. *Id.* at 1274.

191. 708 F.2d 400 (9th Cir. 1983).

192. Warsaw Convention, *supra* note 3, art. 24(1), 49 Stat. 3020, 137 L.N.T.S. at 27. Article 24(1) states that "[i]n the cases covered by articles 18 and 19 any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention." *Id.* at 3020, 137 L.N.T.S. at 27 (emphasis added).

193. 708 F.2d at 414 n.25.

194. *Id.*

195. *Id.*

board, embarking, or disembarking from an aircraft.¹⁹⁶ Recovery of damages depends, in part, upon status as a passenger.¹⁹⁷ Some courts scrutinize a passenger's activities, his location relative to the aircraft, and the extent to which an air carrier had control over his movements to decide whether a passenger is embarking or disembarking at the time of an accident.¹⁹⁸ The goal of the notice provisions of the Warsaw Convention is to allow a passenger sufficient time to make an informed decision about the purchase of additional flight insurance.¹⁹⁹

a. Definition of an Accident

If a passenger's injury or death is not the result of an accident that occurs on board or while embarking or disembarking from the aircraft, the passenger may escape the liability limitations of Article 17 by proving negligence.²⁰⁰ The U.S. Supreme Court has held that an accident occurs only when external, unexpected events injure or kill a passenger.²⁰¹ To hold an air carrier liable, an accident must be the proximate cause²⁰² of a passenger's injury.²⁰³ U.S. courts have found that accidents occurring either on board an aircraft, or at the time of embarkation or

196. Warsaw Convention, *supra* note 3, art. 17, 49 Stat. 3018, 137 L.N.T.S. at 23.

197. *Id.*

198. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975, *cert. denied*, 429 U.S. 890 (1976)).

199. *See* 1 KREINDLER, *supra* note 1, § 10.05[1], at 10-66 (explaining rationale behind Warsaw Convention's Article 3).

200. Warsaw Convention, *supra* note 3, art. 17, 49 Stat. 3018, 137 L.N.T.S. at 23; *see* Eloise Cotugno, Comment, *No Rescue in Sight for Warsaw Plaintiffs From Either Courts or Legislature—Montreal Protocol 3 Drowns in Committee*, 58 J. AIR. L. & COM. 745, 762 (1993) (discussing elements of Warsaw Convention claims).

201. *See Saks*, 470 U.S. at 405-06 (1985) (finding that plaintiff's deafness due to normal aircraft pressurization was not accident); *see also* *Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111, 115-16 (S.D.N.Y. 1991) (holding that passenger's death from natural causes was not accident), *reargument denied*, 785 F. Supp. 1168 (S.D.N.Y. 1992); *Margrave v. British Airways, Inc.*, 643 F. Supp. 510, 511 (S.D.N.Y. 1986) (holding that passenger's back injury due to sitting aboard airplane during extended delay was not accident).

202. *See* PROSSER, *supra* note 13, § 42, at 278 (explaining doctrine of proximate cause). In tort law, proximate cause generally means an act or an omission which played a substantial part in causing an injury and, but for a particular event the injury would not have occurred. *Id.*

203. *Margrave*, 643 F. Supp. at 512-13. Due to a bomb threat, a delay in the departure of a British Airways flight forced a passenger to remain seated for many hours, during which period the passenger suffered continual back pain. *Id.* at 513. Subsequently, doctors discovered that the passenger suffered from vertebral fractures which her prolonged sitting aboard the aircraft may or may not have caused. *Id.*

disembarkation, have satisfied the provisions of Article 17²⁰⁴ in the context of terrorist attacks,²⁰⁵ hijackings,²⁰⁶ and bomb threats.²⁰⁷

In *Curley v. American Airlines, Inc.*,²⁰⁸ a passenger sued for negligence and false imprisonment after Mexican customs authorities detained and searched him when the flight captain reported that the passenger had been smoking marijuana in the airplane's lavatory.²⁰⁹ The defendant air carrier moved for summary judgment,²¹⁰ arguing that the Warsaw Convention preempted the plaintiff's state court complaint.²¹¹ The *Curley* court held that, under Article 17, the accident must happen during the course of normal services.²¹² The *Curley* court found the Warsaw Convention inapplicable to the incident because being wrongly accused of smoking marijuana in an aircraft lavatory was unrelated to the normal services which a passenger could expect during a flight's operation, embarkation, or disembarkation.²¹³

Similar to the *Curley* court, in *Pittman v. Grayson*,²¹⁴ a U.S. district court held that the Warsaw Convention did not apply when the father of a minor child sued an air carrier, Icelandair, Inc., for false imprisonment and intentional interference with custodial rights.²¹⁵ The child's father based the suit on the air carrier's alleged role in the smuggling by the plaintiff's estranged wife of the plaintiff's daughter out of the United

204. See 1 KREINDLER, *supra* note 1, § 10.04[2a], at 10-41 (discussing meaning of accident in Article 17).

205. See *Day*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (involving terrorist attack); *Evangelinos v. Trans World Airlines, Inc.* 550 F.2d 152 (3d Cir. 1977) (involving terrorist attack).

206. See *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) (involving hijacking); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (involving hijacking).

207. See *Salerno v. Pan Am. World Airways*, 606 F. Supp. 656 (S.D.N.Y. 1985) (involving bomb threat).

208. 846 F. Supp. 280 (S.D.N.Y. 1994).

209. *Id.* at 281.

210. See BLACK, *supra* note 54, at 1435 (defining summary judgment as procedural mechanism available for timely disposition of controversy without trial when no conflict as to material facts of controversy exists or when only question of law is present).

211. 846 F. Supp. at 281.

212. *Id.* at 283.

213. *Id.*

214. 869 F. Supp. 1065 (S.D.N.Y. 1994).

215. *Id.* at 1071.

States.²¹⁶ The *Pittman* court found the possibility that aircraft personnel would violate a court order by smuggling a minor child on board the aircraft unrelated to normal expected activities during air travel.²¹⁷

b. Definition of a Passenger

Status as a passenger on the defendant air carrier is a prerequisite to recovery under the Warsaw Convention.²¹⁸ Article 1(1) requires that a passenger must be a person who has either paid for his transportation on the aircraft or is transported gratuitously.²¹⁹ In *Adamsons v. American Airlines, Inc.*,²²⁰ a passenger attempting to fly from Haiti to New York for medical care filed suit after an air carrier refused to grant her passage on the flight because of her medical state.²²¹ Due to a forty-eight hour delay before the passenger could leave on another flight, her medical condition deteriorated significantly.²²² The defendant air carrier argued that the Warsaw Convention's liability limits should apply to limit its liability.²²³ The *Adamsons* court disagreed, finding that the Warsaw Convention did not apply because the air carrier, by refusing to allow the passenger onto the aircraft, had never accepted her as a passenger.²²⁴

Not every individual injured in an accident on board an aircraft is deemed a passenger under Article 17 of the Warsaw Convention.²²⁵ In *Sulewski v. Federal Express Corporation*,²²⁶ the U.S.

216. *Id.* at 1067.

217. *Id.* at 1071.

218. Warsaw Convention, *supra* note 3, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23.

219. *Id.* art. 1(1), 49 Stat. at 3014, 137 L.N.T.S. at 15. Article 1(1) states that the Warsaw Convention "shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise." *Id.* at 3014, 137 L.N.T.S. at 15; see Cotugno, *supra* note 200, at 764 (discussing status of passenger requirement under Article 17 of Warsaw Convention).

220. 433 N.Y.S.2d 366 (N.Y. Sup. Ct. 1980), *aff'd*, 449 N.Y.S.2d 487 (N.Y. App. Div. 1st Dep't), *rev'd on other grounds*, 457 N.Y.S.2d 771 (N.Y. 1982), *cert. denied*, 463 U.S. 1209 (1983).

221. *Id.* at 368. The passenger was suffering from a progressive paralysis of her lower extremities which puzzled the local doctors. *Id.*

222. *Id.* The passenger was almost totally paralyzed by the time she arrived at Columbia Presbyterian Hospital in New York. *Id.*

223. *Id.*

224. *Id.* at 369.

225. See GOLDBIRSCH, *supra* note 26, at 57 (discussing passenger-status requirement of Article 17).

Court of Appeals for the Second Circuit considered the issue of whether an air carrier's own employee is a passenger for Warsaw Convention purposes.²²⁷ In *Sulewski*, the wife of an airline mechanic filed suit when the cargo plane on which her husband was traveling crashed in Kuala Lumpur, Malaysia.²²⁸ The *Sulewski* court found that the mechanic's mere presence on board the cargo plane was insufficient to satisfy the Warsaw Convention's passenger-status requirement.²²⁹ According to the *Sulewski* court, the Warsaw Convention only applies to people on board, boarding, or disembarking as a result of a contract of carriage with the air carrier for travel purposes.²³⁰

c. Embarkation, Disembarkation, and Events On Board

In *Day v. Trans World Airlines, Inc.*,²³¹ the U.S. Court of Appeals for the Second Circuit devised a three-part test to ascertain whether passengers are embarking or disembarking when an accident occurs.²³² The three-part test considers the passenger's activities,²³³ the distance between the passenger and the aircraft,²³⁴ and the amount of control the air carrier had over the passenger at the time of the accident.²³⁵ In *Day*, the passengers had already gone through passport control and were lining up for the requisite hand luggage search prior to boarding a plane at the Athens, Greece airport when terrorists attacked the air-

226. 933 F.2d 180 (2d Cir. 1991).

227. *Id.* at 182-83.

228. *Id.* at 181.

229. *Id.* at 184. The court stated that "[c]arrier liability for the injuries or deaths of 'passengers' . . . requires something more than the person's presence aboard the carrier." *Id.*

230. *Id.* According to the *Sulewski* court, carrier liability "requires, first, that the person board the carrier pursuant to a contract of carriage and, second, that the carriage be undertaken for the primary purpose either of going from one place to another or for the recreational enjoyment of the journey itself." *Id.*; see *Mexico City Air Crash*, 708 F.2d 400, 417-18 (9th Cir. 1983) (holding that personnel working on board aircraft as flight attendants are not passengers, thereby precluding them from recovery under Warsaw Convention).

231. 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

232. *Id.* at 33-34.

233. *Id.* In *Day*, the court considered whether the passengers' actions were part of the embarkation process. *Id.* at 33.

234. *Id.* At the time of the terrorist attack, the *Day* passengers were standing in line adjacent to the passenger gate. *Id.*

235. *Id.* The *Day* passengers were not at liberty to roam at will throughout the terminal. *Id.* The air carrier's agents compelled them to stand in line for the purpose of undergoing a weapons inspection as a requirement of boarding. *Id.*

port, injuring several passengers.²³⁶ The *Day* court held that the Warsaw Convention applied because the passengers were following crucial steps involved in embarking onto the aircraft and were not free to wander at will through the terminal.²³⁷

The phrase *on board* has generated little litigation in the context of Article 17.²³⁸ In *Herman v. Trans World Airlines, Inc.*,²³⁹ a fourteen year-old child suffered physical injuries while hijackers held the child hostage on the aircraft in flight and also for a week on the ground in the desert outside Amman, Jordan.²⁴⁰ The *Herman* court held that the Warsaw Convention applied to limit the air carrier's liability because the hijackers prevented the child from disembarking the aircraft by continuing to hold her on board during the incident.²⁴¹ In the *Herman* court's view, because the child had not disembarked during the hijacking, she was still on board the aircraft.²⁴²

Similarly, a U.S. district court had to determine the issue of passenger status on board an aircraft in *Husserl v. Swiss Air Transport Co., Ltd.*²⁴³ In *Husserl*, an Arab terrorist group hijacked an aircraft after takeoff from Zurich, Switzerland and instructed the pilot to land in a desert area near Amman, Jordan.²⁴⁴ After holding the passengers on board the aircraft for twenty-four hours under less than ideal conditions, the hijackers moved the passengers to a hotel in Amman where the passengers remained

236. *Id.* at 32. Three people died and more than 40 others suffered injuries when two Palestinian terrorists tossed three grenades and released a salvo of small-arms fire into a line of passengers waiting to board TWA Flight 881 to New York. *Id.*

237. *Id.* at 33-34. Other courts have applied the *Day* test in determining whether passengers are in the process of embarkation or disembarkation. See, e.g., *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 317-18 (1st Cir. 1995) (applying *Day* test and determining that passenger was not embarking when she fell on escalator in airport's common area); *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10-11 (2d Cir. 1990) (applying *Day* test and determining that passenger was in airport's public area and not embarking when terrorist attack occurred); *Martinez Hernandez v. Air France*, 545 F.2d 279, 282-83 (1st Cir. 1976) (applying *Day* test and determining that passengers who had left aircraft, gone through immigration, and were in airport's main baggage area had completed disembarking when terrorist attack occurred), *cert. denied*, 430 U.S. 950 (1977).

238. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:33, at 733 (noting that cases contesting meaning of passenger presence *on board* aircraft have been rare).

239. 330 N.Y.S.2d 829 (N.Y. Sup. Ct. 1972).

240. *Id.*

241. *Id.* at 832-33.

242. *Id.* at 833.

243. 388 F. Supp. 1238 (S.D.N.Y. 1975).

244. *Id.* at 1242.

for several days before being flown to Nicosia, Cyprus and eventually to New York, their original destination.²⁴⁵ The *Husserl* court held that injuries claimed by hijacked passengers for their time on board the aircraft as well as for the period in the hotel in Amman, Jordan were within the scope of Article 17 because the passengers had embarked in Zurich, Switzerland and had not yet disembarked in New York.²⁴⁶

d. Notice

Under Article 3, an air carrier that accepts a passenger without providing the passenger with an appropriately worded ticket forfeits the limited liability protection of the Warsaw Convention.²⁴⁷ U.S. courts have interpreted this provision to mean that an air carrier must deliver a ticket to a passenger before air travel begins so that the passenger may make an informed decision about purchasing additional flight insurance.²⁴⁸ In *Mertens v. Flying Tiger, Inc.*,²⁴⁹ the U.S. Court of Appeals for the Second Circuit observed that it would be illogical to allow ticket delivery to take place after a plane had taken off, when a passenger could no longer purchase additional flight insurance or reconsider his or her decision to fly.²⁵⁰ In *Manion v. Pan Am. World Airways, Inc.*,²⁵¹ the New York Court of Appeals held that delivery of a ticket for the second leg of a trip was inadequate under Article

245. *Id.*

246. *Id.* at 1247-48. The *Husserl* court reasoned that the Warsaw Convention's drafters "undoubtedly assumed that the time 'on board the aircraft' included all of the time between embarkation at the origin of a flight and disembarkation at a scheduled destination of a flight." *Id.* at 1247.

247. Warsaw Convention, *supra* note 3, art. 3(2), 49 Stat. at 3015, 137 L.N.T.S. at 17.

248. Compare *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 498 (9th Cir. 1965) (holding that ticket delivery at foot of ramp just prior to boarding aircraft deprived passengers of opportunity to read ticket or purchase additional insurance before boarding) with *Domangue v. Eastern Air Lines, Inc.*, 531 F. Supp. 334, 339 (E.D. La. 1981) (holding that passenger had enough time to protect himself where ticket delivery occurred at ticket counter). The reason for this provision is to give the passenger time to read the ticket and to understand the impact of its limited liability notice for purposes of deciding whether to purchase additional insurance. See 1 KREINDLER, *supra* note 1, § 10.05[1], at 10-66 (discussing reasoning behind Article 3 ticketing requirement).

249. 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

250. *Id.* at 856-57. The *Mertens* court noted that "the delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air." *Id.* at 857.

251. 449 N.Y.S.2d 693 (N.Y. 1982).

3.²⁵² In *Manion*, a passenger was traveling from New York to Saudi Arabia, with an initial stop in Rome, Italy where terrorists injured her in a firebomb attack.²⁵³ Although the air carrier eventually delivered a ticket to the passenger in Rome, the *Manion* court held that the air carrier's failure to deliver a ticket to the passenger upon the passenger's embarkation in New York rendered the Warsaw Convention's liability limits inapplicable.²⁵⁴

Under the Montreal Agreement, air carriers must notify passengers of the Warsaw Convention's liability limits in writing in print size no smaller than ten-point type at the time of ticket purchase.²⁵⁵ In 1965, in *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*,²⁵⁶ an air carrier used very small print to indicate the notice provisions concerning the Warsaw Convention's liability limits on passengers' tickets.²⁵⁷ The *Lisi* court held that the air carrier could not benefit from the Warsaw Convention's liability limits where notice of those limits appeared in a type-size that was too small for passengers to read easily.²⁵⁸

Not until 1989, in *Chan v. Korean Air Lines, Ltd.*,²⁵⁹ did the U.S. Supreme Court hold that failure to provide notice in ten-point type did not invalidate the limited liability provisions of the Warsaw Convention.²⁶⁰ Justice Scalia's majority opinion found that Article 3 of the Warsaw Convention requires only timely delivery of the ticket to the passenger.²⁶¹ Accordingly, an irregularity in the ticket, such as the use of eight-point type rather than ten-point type, did not negate its delivery.²⁶² In his concurrence, Justice Brennan asserted that the Montreal Agree-

252. *Id.* at 694.

253. *Id.*

254. *Id.*

255. Montreal Interim Agreement, *supra* note 82. See 1 KREINDLER, *supra* note 1, § 12.03, at 12-08 (discussing ticket requirements).

256. 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968).

257. *Id.* at 513-14. The *Lisi* court agreed with the lower court's descriptions of the notice provisions as "camouflaged in Lilliputian print . . . ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed." *Id.* at 514.

258. *Id.* at 514.

259. 490 U.S. 122 (1989).

260. *Id.* at 128.

261. *Id.* at 128-29.

262. *Id.*

ment's type-size requirement could not amend the Warsaw Convention because the Montreal Agreement was a private agreement among airline companies, not a formal amendment to the Warsaw Convention.²⁶³

3. Jurisdiction

Under Article 28 of the Warsaw Convention, the appropriate fora for filing suit include an air carrier's domicile, an air carrier's principal place of business, the place of business where an air carrier made the air travel contract with a passenger, or the location of a passenger's destination.²⁶⁴ The four fora listed in Article 28 refer to a contracting party's entire territory, not solely to one of its national subdivisions, such as one specific state.²⁶⁵ If a claimant cannot bring suit in one of the four fora, jurisdiction does not exist and the court must dismiss the claim.²⁶⁶ By limiting the number of fora, the drafters sought to prevent plaintiffs from filing suit in locations that would be inconvenient for an air carrier.²⁶⁷

When applying the Article 28 criteria, U.S. courts have found that an air carrier's domicile is its place of incorpora-

263. *Id.* at 150.

264. Warsaw Convention, *supra* note 3, art. 28(1), 49 Stat. at 3020, 137 L.N.T.S. at 27-29.

265. See *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 855 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965) (discussing geographical location of Warsaw Convention High Contracting Parties).

266. See *Swaminathan v. Swiss Air Transport Co.*, 962 F.2d 387, 390 (5th Cir. 1992) (holding that air carrier's domicile in Switzerland or passenger's destination in Senegal, and not United States, were proper fora for suit); *In re Air Disaster Near Cove Neck, New York* on Jan. 25, 1990, 774 F. Supp. 718, 725 (E.D.N.Y. 1991) (holding that air carrier's domicile in Columbia, and not United States, was proper forum for suit); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977) (holding that air carrier's domicile in France or air carrier's place of business through which contract was made in Israel and not United States were proper fora for suit).

267. MINUTES, *supra* note 35, at 114-15. At the Warsaw Conference, Mr. Orme Clarke, the delegate representing Great Britain, Australia, and South Africa, pointed out that:

In long trips, such as the trip from London to India, you pass by countries where the courts are not at all organized and where you will have formidable difficulties in bringing an action, for example, such as before the courts of Persia or Mesopotamia. The carrier would have enormous difficulties in defending a trial which could be instituted in these distant countries, where the courts are indeed not well organized.

Id. at 114.

tion.²⁶⁸ Courts have also determined that an air carrier may have only one principal place of business.²⁶⁹ Although an air carrier can have only one principal place of business under Article 28, it may be difficult to determine which of the air carrier's places of business is its principal one, for example, when the carrier has its executive offices at one location, the majority of its employees or aircraft at another location, and its busiest ticket office at yet another location.²⁷⁰

For purposes of the third forum, the place of business where an air carrier made the air travel contract with a passenger, the Court of Appeals for the Second Circuit dealt with the issue of whether air carriers who conduct their ticketing business through interline agreements with other air carriers, or through agreements with independent travel agencies, consequently have a place of business in the United States.²⁷¹ In *Eck v. United Arab Airlines, Inc.*,²⁷² a member of a ski group that flew from Los Angeles to Europe on a charter flight operated by Scandinavian Airlines System ("SAS") planned to take a side trip to the Middle East as part of her vacation.²⁷³ The passenger purchased a ticket from an SAS agent in Oakland, California for a United Arab Airlines ("UAA") flight from Europe to the Middle East.²⁷⁴ The SAS agent collected the ticket fare and forwarded it to the UAA home office in Cairo.²⁷⁵ Under UAA's customary business practices, the passenger could have purchased the ticket for the side trip at UAA's offices in New York, Los Angeles, or at one of the

268. See *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971) (stating that air carrier's domicile is its place of incorporation); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 809 (2d Cir. 1966) (stating that air carrier's domicile is its place of incorporation); *In re Air Disaster Near Cove Neck, New York*, on Jan. 25, 1990, 774 F. Supp. 718, 720 n.5 (E.D.N.Y. 1991) (stating that air carrier's domicile is its place of incorporation).

269. See *Canadian Pac. Airways*, 452 F.2d at 802 n.13 (stating that an air carrier has only one principal place of business); *Eck*, 360 F.2d at 809 n.9 (stating that an air carrier has only one principal place of business); *Air Disaster Near Cove Neck*, 774 F. Supp. at 722 (stating that an air carrier has only one principal place of business); *Nudo v. Société Anonyme Belge D'Exploitation*, 207 F. Supp. 191, 192 (E.D. Pa. 1962) (stating that air carrier has only one principal place of business).

270. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:42, at 797 (discussing jurisdictional fora of Article 28).

271. *Eck*, 360 F.2d 804 (2d Cir. 1965).

272. *Id.*

273. *Id.* at 807.

274. *Id.* at 807-08.

275. *Id.* at 807.

ticket counters of almost any other air carrier operating in the United States.²⁷⁶ The passenger filed suit in the U.S. District Court for the Southern District of New York to recover damages for personal injuries she suffered when the UAA aircraft on which she traveled crashed in the Sudan.²⁷⁷ The district court granted UAA's motion for dismissal of the suit on the grounds that the district court lacked jurisdiction under Article 28.²⁷⁸ The Second Circuit reversed, holding that UAA had a place of business in the United States through which the air carrier contracted with the passenger because UAA had complete control over its business decision to sell its tickets through other air carriers in the United States, even though UAA maintained its own regular ticketing offices in the United States.²⁷⁹

The Second Circuit distinguished the facts in the *Eck* case from those in *Smith v. Canadian Pacific Airways, Ltd.*²⁸⁰ In *Smith*, a passenger purchased a ticket in Vancouver, British Columbia for a Canadian Pacific flight to Tokyo, Japan.²⁸¹ In contrast to *Eck*, although Canadian Pacific Airways maintained a place of business in the United States, it did not allow other air carriers to sell its tickets in the United States.²⁸² Accordingly, the *Smith* court held that U.S. courts lacked jurisdiction over the suit pursuant to Article 28 of the Warsaw Convention.²⁸³

The fourth enumerated forum, the location of a passenger's destination, provides the broadest potential jurisdiction of the four fora.²⁸⁴ Although an air carrier may have only one domicile and one principal place of business, a passenger's destination

276. *Id.* at 807-08.

277. *Id.* at 806.

278. *Id.* at 807.

279. *Id.* at 813-14. The Second Circuit based its holding on the conclusion that "[t]he central purpose of Article 28(1)'s third provision was to make venue always proper in the country where the ticket was purchased—assuming it is a High Contracting Party—if, but only if, the defendant has a place of business there." *Id.* at 814.

280. 452 F.2d 798, 802 (2d Cir. 1971).

281. *Id.* at 799.

282. *Id.* at 803.

283. *Id.*

284. See James D. MacIntyre, *Where Are You Going? Destination, Jurisdiction, and the Warsaw Convention: Does Passenger Intent Enter the Analysis?*, 60 J. AIR L. & COM. 657, 673 (1995) (explaining how extent of possible passenger destinations defines the range of destination as jurisdictional forum). Article 1 defines international travel according to the place of departure and the place of destination. *Id.* at n.77. Where the two places are the same, Article 1 bases international travel upon the location of a stopping place that is outside the territory of the place of departure and destination. *Id.* For the War-

may be within the territory of any High Contracting Party to the Warsaw Convention.²⁸⁵ For jurisdictional purposes, a passenger's destination is his or her last intended stop, even if the defendant is not the air carrier responsible for the final leg of the passenger's trip.²⁸⁶

A number of cases have arisen interpreting the meaning of final destination.²⁸⁷ In *Sopcak v. Northern Mountain Helicopter Service*,²⁸⁸ the Court of Appeals for the Ninth Circuit held that the parties' intention as indicated on the airline ticket determines the passenger's final destination.²⁸⁹ The Ninth Circuit's holding agreed with previous holdings in the Second and Fifth circuits.²⁹⁰ At least one court has held that a party may rebut the presumption that a passenger's final destination is the one listed on the ticket by proving the absence of mutual consent to the final destination.²⁹¹

saw Convention to apply, therefore, international travel requires the existence of a destination. *Id.*

285. Warsaw Convention, *supra* note 3, art. 1(2), 49 Stat. at 3014, 137 L.N.T.S. at 15.

286. *See In re Alleged Food Poisoning Incident v. British Airways, Inc.*, 770 F.2d 3, 6 (2d Cir. 1985) (finding United States had no jurisdiction over suit against British Airways where passenger's ticket listed Saudi Arabia as final destination); 1 KREINDLER, *supra* note 1, § 10.06, at 10-94 (discussing last stop as jurisdictional forum under Article 28).

287. *See Sopcak v. Northern Mountain Helicopter Service*, 52 F.2d 817, 819 (9th Cir. 1995) (holding that destination shown on airline ticket indicates parties' intent and determines destination); *Swaminathan v. Swiss Air Transport Co.*, 962 F.2d 387, 389 (5th Cir. 1992) (finding that parties' objective intent as shown on airline ticket, and not passenger's undisclosed subjective intent, determines destination); *In re Air Crash Disaster Near Warsaw, Poland*, on May 9, 1987, 760 F. Supp. 30, 32 (E.D.N.Y. 1991) (finding that passenger's destination is location where passenger intended to arrive and would have arrived had airline disaster not happened); *Petrire v. Spantax, S.A.*, 756 F.2d 263, 265-66 (2d Cir. 1985) (holding that passenger's destination is determined by reference to whether parties intended single contract of undivided transportation where air carrier issued two ticket booklets), *cert. denied*, 474 U.S. 846 (1985).

288. 52 F.3d 817 (9th Cir. 1995).

289. *Id.* at 819.

290. *See Swaminathan*, 962 F.2d at 389 (parties objective intent, as shown on airline ticket, and not passenger's subjective intent, determines destination); *Petrire*, 756 F.2d at 265 (passenger's destination is determined by reference to whether parties intended single contract of undivided transportation where air carrier issued two ticket booklets).

291. *See Air Crash Disaster Near Warsaw*, 760 F. Supp. at 32 (holding that destination of passenger is place where passenger intended to arrive and would have arrived but for occurrence of airline disaster). In *Air Crash Disaster Near Warsaw*, two Polish citizens who died in an air disaster incorrectly believed that a Polish law requiring Polish citizens to purchase roundtrip tickets applied to them despite their status as permanent U.S. permanent residents. *Id.* at 32. The court held that the evidence supported a

4. Liability Provisions

An air carrier can lose the Warsaw Convention's safeguards limiting compensatory or other types of damages if a passenger can prove willful misconduct on the part of the air carrier.²⁹² The results in willful misconduct cases vary according to the law of the court in which a passenger files a complaint against an air carrier.²⁹³ The Warsaw Convention's lack of specificity as to the nature of damages collectible in air carrier disasters has led some courts to deny punitive damage awards in situations where other courts have granted such recoveries.²⁹⁴ With regard to judicial disagreement concerning air carrier liability for emotional distress, the Supreme Court has decided that the language of Article 17 does not contemplate such recoveries in the absence of bodily injury.²⁹⁵

a. Compensatory Damages

Under Article 25 of the Warsaw Convention, an air carrier or its agent will lose the benefit of the Warsaw Convention's limited liability provisions if the air carrier or its agent engaged in willful misconduct.²⁹⁶ The Warsaw Convention does not define willful misconduct.²⁹⁷ Article 25(1) allows courts to apply their

finding that the two victims intended the United States to be their ultimate destination. *Id.*; see also MacIntyre, *supra* note 284, at 691-92 (discussing passenger intent and destination under Article 28).

292. Warsaw Convention, *supra* note 3, arts. 25(1), 25(2), 49 Stat. at 3020, 137 L.N.T.S. at 27.

293. See Cotugno, *supra* note 200, at 773 (crediting latitude inherent in Article 25's language as cause of dissimilar results in willful misconduct cases).

294. See Barbara J. Buono, Note, *The Recoverability of Punitive Damages Under the Warsaw Convention in Cases of Wilful Misconduct: Is the Sky the Limit?*, 13 *FORDHAM INT'L. L.J.* 570, 582 (1990) (describing effect of Warsaw Convention's failure to define type of damages awardable in international aviation disasters).

295. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991).

296. Warsaw Convention, *supra* note 3, arts. 25(1), 25(2), 49 Stat. at 3020, 137 L.N.T.S. at 27.

297. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:37, at 770 (discussing term willful misconduct in common law countries' translation of Article 25). Willful misconduct is the translation used in common law countries for the term *dol* which the official French version of the Warsaw Convention uses. *Id.* Under common law there is no equivalent for the civil law concept of *dol*. See 1 KREINDLER, *supra* note 1, § 10.05[4], at 10-77 (discussing term *dol* in official French version of Warsaw Convention). In civil law countries, some translators have used the term gross negligence to translate the term *dol* into English. *Id.*

own law in defining willful misconduct.²⁹⁸ The plaintiff has the burden of proving willful misconduct, which is a question of fact²⁹⁹ for a jury.³⁰⁰

Different definitions of willful misconduct lead to various results in willful misconduct cases because, under Article 25, the definition of willful misconduct is dependent upon the law of the court trying the case.³⁰¹ In *In re Air Disaster at Lockerbie, Scotland Dec. 21, 1988*³⁰² ("*Lockerbie II*"), the Second Circuit defined willful misconduct as meaning that an air carrier took action which it knew would probably lead to injury or death, or that an air carrier consciously or recklessly ignored the fact that death or injury would probably result from its actions.³⁰³ U.S. courts have not typically required an intent to do harm as a requirement for willful misconduct.³⁰⁴ A pattern of acts or omissions may provide evidence of willful misconduct, even if each single act or omission does not prove willful misconduct when viewed in isola-

298. Warsaw Convention, *supra* note 3, art. 25(1), 49 Stat. at 3020, 137 L.N.T.S. at 27. Article 25(1) provides that

[t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, *in accordance with the law of the court to which the case is submitted*, is considered to be equivalent to willful misconduct.

Id. at 3020, 137 L.N.T.S. at 27 (emphasis added).

299. See BLACK, *supra* note 54, at 1246 (defining question of fact as concerning resolution of factual dispute within jury's province, in contrast to question of law).

300. See 1 SPEISER & KRAUSE, *supra* note 2, § 11:37, at 771-72 (discussing willful misconduct under the Article 25). In a jury trial setting, the correct procedure is to submit the evidence to the jury along with instructions from the judge on the question of what amounts to willful misconduct, and allow the jury make a separate determination, by a separate verdict, as to whether or not the defendant or his agent committed willful misconduct. *Id.*

301. See Cotugno, *supra* note 200, at 773 (attributing disparity of findings in willful misconduct cases to ambiguity of Article 25 provision allowing law of forum court to define meaning of willful misconduct).

302. 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

303. *Id.* at 812. According to the *Lockerbie II* court, "[w]illful misconduct under the Convention means that a carrier must have acted either 1) with knowledge that its actions would probably result in injury or death, or 2) in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions." *Id.*

304. See *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 124 (2d Cir.) (explaining that intention to do harm is not required for willful misconduct finding), *cert. denied*, 341 U.S. 951 (1951). In *Pekelis*, the Second Circuit, in approving the lower court's jury charge, stated that willful misconduct "does not mean that the defendant, or any of its employees, had a deliberate intention to kill [the passenger] or to wreck this airplane." *Id.* at 124; 1 KREINDLER, *supra* note 1, § 10.05[4], at 10-80 (discussing lack of requirement to do harm as element of willful misconduct).

tion.³⁰⁵

U.S. Courts have found willful misconduct in a variety of circumstances.³⁰⁶ In *Ospina v. Trans World Airlines, Inc.*,³⁰⁷ the Court of Appeals for the Second Circuit reversed a lower court's finding of willful misconduct in a case involving a bomb explosion on an aircraft which was landing in Athens, Greece.³⁰⁸ The *Ospina* court found an absence of willful misconduct because the air carrier had followed standard federal aviation procedures and local laws.³⁰⁹

In 1991, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a lower court finding of willful misconduct in a case involving a Korean Air Lines ("KAL") aircraft which flew off course into Soviet airspace.³¹⁰ A Soviet Union SU-15 interceptor aircraft shot down the KAL aircraft over the Sea of Japan.³¹¹ The court found that the plaintiffs properly presented evidence of previous KAL errors in programming flight paths.³¹² The evidence also suggested that the flight crew decided to continue their flight rather than risk disciplinary action by returning to Anchorage, Alaska, the flight's last refueling stop.³¹³

In *Lockerbie II*, a Pan American World Airways aircraft exploded over Lockerbie, Scotland due to a bomb hidden inside a radio-cassette player packed in a suitcase.³¹⁴ At the time, the risk of a bomb, hidden inside a radio packed in interline baggage,

305. See *Lockerbie II*, 37 F.3d at 824 (holding "willful misconduct causing an accident may be established by inference from . . . totality of the circumstances"); In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1481 (D.C. Cir.) (finding that sufficient evidence existed "from which to decipher a pattern of conduct giving rise to liability"), *cert. denied*, 502 U.S. 994 (1991); 1 KREINDLER, *supra* note 1, § 10.05[4], at 10-85 (discussing fact pattern giving rise to willful misconduct findings).

306. See 1 KREINDLER, *supra* note 1, § 10.05[4], at 10-82 (noting variety of different circumstances under which plaintiffs have proven willful misconduct).

307. 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993).

308. *Id.* at 37. In finding that the air carrier had complied with governmental aviation procedures, the Second Circuit noted that "if TWA had searched the place where the bomb was hidden, the bomb would have been discovered. That would be true in any case involving a hidden bomb. However, the test for willful misconduct is not 20-20 hindsight." *Id.*

309. *Id.*

310. In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1490 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

311. *Id.* at 1476.

312. *Id.* at 1483-84.

313. *Id.* at 1483.

314. 37 F.3d at 811.

was well known to the aviation industry.³¹⁵ The *Lockerbie II* court found that the plaintiffs had produced enough evidence to indicate that the air carrier's personnel repeatedly ignored warnings indicating that its security measures were deficient.³¹⁶

b. Punitive Damages

The Warsaw Convention and the Montreal Agreement do not specify the type of damages courts may award to plaintiffs.³¹⁷ *Hill v. United Airlines*³¹⁸ was the first U.S. case to discuss the possibility of awarding punitive damages under the Warsaw Convention.³¹⁹ In *Hill*, passengers sued an air carrier for the tort of intentional misrepresentation when the air carrier allegedly misrepresented that authorities had closed the connecting airport to which the passengers were flying due to inclement weather.³²⁰ When the passengers finally arrived at the connecting airport, the air carrier's agent informed them that a lack of equipment had prevented the air carrier from taking the passengers to the connecting airport.³²¹ The passengers claimed that, had the air carrier told the passengers the truth, they could have made their connection by taking a different air carrier to the connecting airport.³²² The passengers maintained that, as a consequence of missing their connecting flight, a vital business deal was delayed for one month.³²³ The *Hill* court indicated that proof of the alleged intentional misrepresentation would constitute willful misconduct on the part of the air carrier under the Warsaw Convention, which would warrant the award of both compensatory and punitive damages.³²⁴

315. *Id.* at 819. In 1985, an Air India aircraft exploded over the North Atlantic due to a bomb hidden inside a radio and packed in an unaccompanied interline bag, killing all persons on board. *Id.* Consequently, in 1986, the FAA adopted heightened safety regulations requiring air carriers to physically inspect any unaccompanied luggage before loading. *Id.* at 813.

316. *Id.* at 819.

317. Cotugno, *supra* note 200, at 777.

318. 550 F. Supp. 1048 (D. Kan. 1982).

319. *Id.* at 1055-56; see Buono, *supra* note 294, at 593 (discussing punitive damage recovery under Warsaw Convention).

320. 550 F. Supp. at 1050.

321. *Id.*

322. *Id.*

323. *Id.* at 1050-51.

324. *Id.* at 1055-56. The *Hill* court found that although "the Warsaw Convention is basically the controlling law in this case, plaintiffs have properly invoked the provisions

U.S. courts have divided over whether to award punitive damages in cases of willful misconduct.³²⁵ In January 1990, in *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on Sept. 5, 1986*,³²⁶ a U.S. district court held that the Warsaw Convention does not bar recovery of punitive damages for willful misconduct.³²⁷ In contrast, that same month, another U.S. district court held that the Warsaw Convention does prohibit punitive damages, regardless of willful misconduct.³²⁸ The following year, when it affirmed the decision in the latter case, the U.S. Court of Appeals for the Second Circuit disagreed with the *Karachi* court's decision allowing punitive damages for willful misconduct.³²⁹ The Second Circuit based its finding on the meaning of the phrase *dommage survenu* in the original French text of Article 17.³³⁰ Determining that the appropriate translation of *dommage survenu* was *damages sustained*,³³¹ the Second Circuit concluded that Article 17 envisions only monetary or compensatory damages.³³² From its review of the drafting history of the Warsaw Convention and the drafters' failure to mention punitive damages, the Second Circuit deduced that punitive damages did not constitute the intended form of recovery.³³³ The Second Circuit found that awarding

of Article 25(1), which make an exception to defendant's limited liability and might entitle plaintiffs to recover actual and punitive damages . . . if they prove the elements of intentional misrepresentation." *Id.* at 1056.

325. Buono, *supra* note 294, at 582.

326. 729 F. Supp. 17 (S.D.N.Y. 1990), *rev'd*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

327. *Id.* at 19-20. The *Karachi* court found that "[p]unitive damages are a part of common law tort remedies . . . and no language in the Convention expressly preempts or precludes such claims, although consistent with Article 22, all damages, including punitive damages, cannot exceed \$75,000." *Id.* at 19.

328. *In re Air Disaster in Lockerbie, Scotland on December 21, 1988*, 733 F. Supp. at 549-50. The *Lockerbie* court stated that "[s]ince the application of local law to punitive damage claims would be inconsistent with the primary goal of the Warsaw Convention, this Court may not find that the treaty's mere silence authorized punitive damage claims to be governed by local law." *Id.* at 550.

329. *Lockerbie I*, 928 F.2d at 1270, 1288.

330. *Id.* at 1281.

331. *Id.*

332. *Id.* The court was "convince[d] that the proper translation is 'damage sustained' and deduce[d] therefore that Article 17 contemplate[d] monetary damages only." *Id.*

333. *Id.* at 1284. The court concluded that "[n]othing in this drafting history suggests that the drafters ever considered that they might be allowing a contracting party to impose punitive damages." *Id.*

punitive damages would undermine the drafters' goals by preventing uniformity, limiting insurability of the aviation industry, and promoting increased litigation.³³⁴

c. Damages for Emotional Distress

Article 17 of the Warsaw Convention refers to the death or bodily injury of a passenger in the event of an accident on board an aircraft or while embarking or disembarking.³³⁵ U.S. courts initially disagreed as to whether the Warsaw Convention included liability for emotional distress in the absence of physical injury.³³⁶ In *Rosman v. Trans World Airlines*,³³⁷ the New York State Court of Appeals held that Article 17 did not provide for recovery for emotional distress without the concurrent presence of physical injury.³³⁸ The *Rosman* court based its holding on its analysis of the phrase *bodily injury* used in Article 17.³³⁹ In comparison, in *Husserl*,³⁴⁰ the U. S. District Court for the Southern District of New York found that the drafters of the Warsaw Convention anticipated recovery for mental injuries under Article 17.³⁴¹ After analyzing the intentions of the Warsaw Convention's drafters, the *Husserl* court found no evidence that the drafters

334. *Id.* at 1287. The court concluded that:

Interpreting the Convention to allow such recovery would severely hobble most of the aims the Convention sought to accomplish: establishing a uniform carrier liability regime, limiting carrier liability to ensure a viable industry, ensuring the carriers' ability to insure against losses, and adequately compensating injured passengers quickly and with a minimum of litigation.

Id.

335. Warsaw Convention, *supra* note 3, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23.

336. *See* Cotugno, *supra* note 200, at 780 (discussing whether emotional distress falls within scope of Warsaw Convention).

337. 34 N.Y.2d 385 (N.Y. 1974).

338. *Id.* at 399-400.

339. *Id.* The court explained that:

The claim must . . . be predicated upon some objective identifiable injury to the body. In addition, there must be some causal connection between the bodily injury and the 'accident.' In our view, this connection can be established whether the bodily injury was caused by physical impact, by the physical circumstances of the confinement or by psychic trauma. If the accident . . . caused severe fright, which in turn manifested itself in some objective 'bodily injury,' then we would conclude that the Convention's requirement of the causal connection is satisfied.

Id.

340. 388 F. Supp. 1238 (S.D.N.Y. 1975).

341. *Id.* at 1250.

intended to exclude mental injury from recovery.³⁴²

The U.S. Supreme Court resolved the conflict over damages for mental injuries in *Eastern Airlines, Inc. v. Floyd*³⁴³ by reviewing the original French text of the Warsaw Convention.³⁴⁴ The Court found that the term *lesion corporelle* in Article 17 translated into *bodily injury*.³⁴⁵ The *Floyd* court decided that the Warsaw Convention did not provide recovery for emotional distress without the presence of physical injury.³⁴⁶ The Court further concluded that this construction of Article 17 supported the Warsaw Convention's goal of creating uniformity in handling legal claims associated with international aviation disasters.³⁴⁷

II. PROPOSALS FOR LIABILITY LIMIT REFORM

The prevailing view throughout much of the world that the Warsaw Convention's liability limits have resulted in under-compensation of passengers involved in international aviation disasters has led to the most recent wave of efforts to ameliorate the situation.³⁴⁸ The majority of these attempts, including the IATA Inter-carrier Agreement, the DOT's proposed additional conditions to the IATA Inter-carrier Agreement, and the EC Proposal, have been concerned with raising the Warsaw Convention's liability limits by means of contractual agreements having the advantage of avoiding the lengthy ratification process involved in

342. *Id.* The *Hussert* court concluded that "[t]o effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are, therefore, comprehended by Article 17." *Id.*

343. 499 U.S. 530 (1991).

344. *Id.* at 535.

345. *Id.* at 536-37.

346. *Id.* at 552.

347. *Id.* The *Floyd* court noted that the legal systems of many countries require a high degree of proof for recovery of mental distress. *Id.* For example, U.S. courts require evidence of extreme and outrageous conduct by the tortfeasor, British courts restrict recovery through the requirement of foreseeability, and French courts demand proof of fault and confirmation that damage is direct and certain. *Id.* Because the Warsaw Convention as modified by the Montreal Agreement, subjects air carriers to absolute liability for Article 17 injuries suffered on flights connected with the United States, the Court chose not to subject international air carriers to "strict liability for purely mental distress." *Id.*

348. See Ludwig Weber & Arie Jakob, *Current Developments Concerning the Reform of the Warsaw Convention*, 21 *ANNALS AIR & SPACE L.* pt. 2, at 303 (1996) (describing efforts in 1990s to reform liability limits of Warsaw Convention).

the adoption of a new international treaty.³⁴⁹ Nevertheless, many of these measures call for further efforts on the part of the ICAO and the world's governments aimed at providing multilateral treaty reform of the Warsaw Convention's liability limits.³⁵⁰

A. *The IATA Intercarrier Agreement*

Modernizing the Warsaw Convention's liability limits was the goal of the drafters of the IATA Intercarrier Agreement.³⁵¹ By signing the IATA Intercarrier Agreement, participating air carriers agreed to waive the Warsaw Convention's liability limits.³⁵² As a result, the drafters of the IATA Intercarrier Agreement anticipated eliminating the lengthy and expensive process of proving an air carrier's willful misconduct which passengers must undergo to evade the Warsaw Convention's liability limits.³⁵³ For that reason, legal and lay commentators have viewed the IATA Intercarrier Agreement as a welcome improvement.³⁵⁴

1. Background

In February 1995, the DOT granted antitrust immunity to IATA for intercarrier discussions regarding increases in the Warsaw Convention's liability limits.³⁵⁵ In June 1995, representatives of sixty-seven international air carriers attended an IATA confer-

349. *Id.*

350. *Id.* at 306.

351. See James J. Brashear, *IATA Airline Liability Conference: Carriers Prepare to Modernize the Warsaw System*, 10 AIR & SPACE LAW. 1, 1 (Fall 1995) (discussing IATA Airline Liability Conference of June 1995).

352. See Carlsen, *supra* note 6, at 231-32 (explaining effect of IATA Intercarrier Agreement on signatory air carriers).

353. IATA, APPLICATION OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION FOR APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY AND RELATED EXEMPTION RELIEF 4 (July 31, 1996) (on file with the *Fordham International Law Journal*) [hereinafter IATA APPROVAL APPLICATION].

354. See *Trial Lawyers*, *supra* note 21 (reporting ATLA anticipation of reduced legal costs due to IATA Intercarrier Agreement's elimination of need to prove willful misconduct by air carriers); *ICC Urges DOT Approval*, *supra* note 22 (noting ICC expectation of reduced legal costs due to IATA Intercarrier Agreement).

355. DEP'T OF TRANSP., INTERNATIONAL AIR TRANSPORT ASSOCIATION: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION, Order 95-2-44 (Feb. 22, 1995) (on file with the *Fordham International Law Journal*) [hereinafter February 1995 Immunity Order]. The DOT immunity order required any agreement reached by air carriers serving the United States to meet two conditions. *Id.* at 3. First, air carriers would offer prompt compensation on a strict liability basis to passengers ticketed in the United States with no per-passenger liability limits and with damages measured similarly to those available in U.S. domestic aviation cases. *Id.* Second, air carriers would make

ence in Washington, D.C.³⁵⁶ The purpose of the conference was to discuss ways in which to modernize the Warsaw Convention's liability limits for passengers injured or killed in international aviation accidents.³⁵⁷ As a result of continued discussions held subsequent to the June 1995 meeting, IATA adopted the IATA Intercarrier Agreement at its Annual General Meeting held in Kuala Lumpur, Malaysia, in October 1995.³⁵⁸ On July 31, 1996, IATA and the ATA jointly filed for approval from the DOT for the IATA Intercarrier Agreement along with two implementation agreements.³⁵⁹ The DOT issued a show cause order³⁶⁰ for the three agreements on October 3, 1996,³⁶¹ to be followed by a notice and comment period lasting until October 24, 1996.³⁶² The DOT subsequently approved these agreements on November 12, 1996.³⁶³

2. Significant Provisions

The IATA Intercarrier Agreement is an umbrella agreement which establishes general rules compelling each participating air carrier to waive the Warsaw Convention's liability limits by November 1, 1996.³⁶⁴ The goal of Paragraph 1 of the IATA Inter-

comparable compensation available to all U.S. citizens and permanent residents traveling internationally by air on tickets not issued in the United States. *Id.*

356. See Brashear, *supra* note 351, at 1 (explaining goals of drafters of IATA Intercarrier Agreement).

357. *Id.* The air carriers attending the IATA conference feared another denunciation of the Warsaw Convention by the United States. *Id.* at 21. The air carriers wanted to create a carrier-driven interim agreement rather than a solution produced by governments because the world's governments had proved unable to ratify the Guatemala Protocol and the Montreal Protocol No. 3. *Id.*

358. See Carlsen, *supra* note 6, at 231-32 (discussing IATA Intercarrier Agreement).

359. *Id.* By July 31, 1996, fifty-six of the world's major air carriers had signed the IATA Intercarrier Agreement. *Id.* at n.8; see *World's Airlines Move Closer to Ease Liability Limits*, AIR SAFETY WK., Aug. 5, 1996, available in WESTLAW, Airsafw Database [hereinafter *World's Airlines*] (discussing IATA Intercarrier Agreement).

360. See BLACK, *supra* note 54, at 1379-80 (defining show cause order as directing interested party to present such justification which party possesses as to why particular order should not take effect).

361. DEP'T OF TRANSP., INTERNATIONAL AIR TRANSPORT ASSOCIATION: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION; AIR TRANSPORT ASSOCIATION OF AMERICA: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION, Order No. 96-10-7 (Oct. 3, 1996), (on file with the *Fordham International Law Journal*) [hereinafter Show Cause Order].

362. *Id.* at 17-18.

363. Order Approving Agreements, *supra* note 11, at 1.

364. See Carlsen, *supra* note 6, at 231-32 (discussing IATA Intercarrier Agreement).

carrier Agreement is to eliminate any obstruction under Article 22(1) of the Warsaw Convention to the recovery of those compensatory damages for which a passenger otherwise would be eligible under the law of that passenger's domicile.³⁶⁵ Paragraph 2 permits a signatory air carrier to waive any of the Warsaw Convention Article 20(1) or Article 21 defenses, either in total or up to a particular amount of compensatory damages.³⁶⁶ Paragraph 3 reserves the right of an air carrier responding to Warsaw Convention Article 17 claims to seek contribution or indemnity from other potentially responsible parties.³⁶⁷ Paragraph 4 states the intent of participating air carriers to urge non-participating air carriers to adopt the provisions of the IATA Intercarrier Agreement in order to achieve uniform, global modification of the Warsaw Convention without the need for government intervention.³⁶⁸

Under a separate implementation agreement, participating IATA member air carriers agree to put the rules established by the IATA Intercarrier Agreement into place by including appropriate provisions in their conditions of carriage and tariffs.³⁶⁹ Paragraph I.1 of the IATA Implementation Agreement requires

365. IATA INTERCARRIER AGREEMENT, *supra* note 10, ¶ 1, at 1. Paragraph 1 states that signatory air carriers agree:

To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

Id.; see IATA APPROVAL APPLICATION, *supra* note 353, at 8 (discussing paragraph 1 of IATA Intercarrier Agreement).

366. IATA INTERCARRIER AGREEMENT, *supra* note 10, ¶ 2, at 1. Paragraph 2 states that signatory air carriers agree "[t]o reserve all available defences . . . including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant." *Id.*; see IATA APPROVAL APPLICATION, *supra* note 353, at 8 (discussing Paragraph 2 of IATA Intercarrier Agreement).

367. IATA INTERCARRIER AGREEMENT, *supra* note 10, ¶ 3, at 1. Paragraph 3 states that signatory air carriers agree "[t]o reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier." *Id.*; see IATA APPROVAL APPLICATION, *supra* note 353, at 8-9 (discussing Paragraph 3 of IATA Intercarrier Agreement).

368. IATA INTERCARRIER AGREEMENT, *supra* note 10, ¶ 4, at 1. Paragraph 4 states that signatory air carriers agree "[t]o encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage." *Id.*; see IATA APPROVAL APPLICATION, *supra* note 353, at 9 (discussing Paragraph 4 of IATA Intercarrier Agreement).

369. See Carlsen, *supra* note 6, at 232 (discussing IATA Intercarrier Agreement).

signatory air carriers to incorporate in their conditions of carriage a provision waiving the Warsaw Convention's Article 22(1) liability limits for compensatory damages regardless of the applicable law designated by the forum court or agreed to by the parties.³⁷⁰ Paragraph I.2 requires air carriers to incorporate in their conditions of carriage a waiver providing for strict liability for any portion of a claim up to the amount of 100,000 SDRs.³⁷¹ As an alternative to Paragraph I.2, a signatory air carrier may incorporate into its conditions of carriage Paragraph II.2, which allows an air carrier to vary the amount over 100,000 SDRs for which the air carrier agrees to be strictly liable on a route-by-route basis as approved by appropriate governmental authorities.³⁷² Paragraph II.1 is an optional provision which, at an air carrier's choice, prevents the air carrier from opposing a claimant's effort to have the law of a passenger's domicile determine the amount of compensatory damages.³⁷³

370. IATA, IATA AGREEMENT ON MEASURES TO IMPLEMENT THE IATA INTERCARRIER AGREEMENT ¶ I.1, at 1 (*opened for signature* May 1996) (on file with the *Fordham International Law Journal*) [hereinafter IATA IMPLEMENTATION AGREEMENT]. Paragraph I.1 requires a signatory air carrier to incorporate into its conditions of carriage a provision indicating that the air carrier "shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention." *Id.*; see IATA APPROVAL APPLICATION, *supra* note 353, at 9-10 (discussing Paragraph I.1 of IATA Implementation Agreement).

371. IATA IMPLEMENTATION AGREEMENT, *supra* note 370, ¶ I.2, at 1. Paragraph I.2 requires a signatory air carrier to incorporate into its conditions of carriage a provision indicating that the air carrier "shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs [unless option II(2) is used]." *Id.*; see IATA APPROVAL APPLICATION, *supra* note 353, at 10 (discussing Paragraph I.2 of IATA Implementation Agreement).

372. IATA IMPLEMENTATION AGREEMENT, *supra* note 370, ¶ II.2, at 1. Paragraph II.2 allows a signatory air carrier the option of incorporating into its conditions of carriage a provision indicating that the air carrier "shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs, except that such waiver is limited . . . as may be authorized by governments concerned with the transportation involved" to specified amounts for particular routes. *Id.*; see IATA APPROVAL APPLICATION, *supra* note 353, at 10 (discussing Paragraph II.2 of IATA Implementation Agreement).

373. IATA IMPLEMENTATION AGREEMENT, *supra* note 370, ¶ II.2, at 1. Paragraph II.2 allows a signatory air carrier to choose whether to incorporate into its conditions of carriage a provision indicating that the air carrier "agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger." *Id.*; see IATA APPROVAL APPLICATION, *supra* note 353, at 11 (discussing Paragraph II.2 of IATA Implementation Agreement). This provision gives the choice of law governing compensatory damages to a passenger because the law of the domicile, even in the United States, may not always favor the passenger's claim. *Id.*

Concurrent with IATA's efforts, the ATA developed its own implementation agreement for participating U.S. air carriers.³⁷⁴ The ATA designed its implementation agreement as a means of discontinuing a signatory air carrier's participation in the 1966 Montreal Interim Agreement.³⁷⁵ Under the ATA's implementation agreement, participating ATA member air carriers agree to put the mandatory provisions of the IATA's Implementation Agreement into place by including appropriate provisions in their conditions of carriage and tariffs.³⁷⁶ Unlike the IATA Implementation Agreement, U.S. air carriers signing the ATA Implementation Agreement must agree that the law of a passenger's domicile may determine how to calculate compensatory damages, if a passenger so chooses.³⁷⁷

3. Industry and World Reaction

In support of its application for DOT approval, IATA argued that the IATA Inter-carrier Agreement would reduce the costly and time-consuming practice in the United States of trying to prove willful misconduct in order to circumvent the Warsaw Convention's liability limits.³⁷⁸ IATA claimed that the IATA Inter-carrier Agreement would improve the well-being of passengers throughout the international aviation industry regardless of their citizenship.³⁷⁹ IATA also argued that approval of the IATA Inter-carrier Agreement would further significant U.S. foreign policy and international comity goals and expedite international improvement of passenger rights while maintaining the benefits

374. Carlsen, *supra* note 6, at 232.

375. See ATA, APPLICATION OF AIR TRANSPORT ASSOCIATION OF AMERICA FOR APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY AND FOR OTHER RELIEF 6 (July 31, 1996) (on file with the *Fordham International Law Journal*) (discussing ATA's implementation agreement) [hereinafter ATA APPROVAL APPLICATION].

376. *Id.* at 6.

377. ATA, ATA PROVISIONS IMPLEMENTING THE IATA INTERCARRIER AGREEMENT TO BE INCLUDED IN CONDITIONS OF CARRIAGE AND TARIFFS ¶ I.4, at 1 (*opened for signature* May 16, 1996) (on file with the *Fordham International Law Journal*) [hereinafter ATA IMPLEMENTATION AGREEMENT]. Paragraph I.4 requires a signatory air carrier to incorporate into its conditions of carriage a provision indicating that the air carrier "agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger." *Id.*; see ATA APPROVAL APPLICATION, *supra* note 375, at 6 (discussing ATA Implementation Agreement).

378. IATA APPROVAL APPLICATION, *supra* note 353, at 4.

379. *Id.* at 5-6.

otherwise obtainable under the Warsaw Convention.³⁸⁰ Among the eighty-five air carriers who became signatories to the IATA Inter-carrier Agreement by May 12, 1997, fifty-three air carriers had also signed the IATA Implementation Agreement.³⁸¹

The ATA argued that approval of the ATA Implementation Agreement would lead to damage awards for death or injury in international aviation accidents consistent with those available in domestic U.S. aviation accident cases.³⁸² Compensatory damages would be comparable to those obtainable in U.S. domestic aviation accident cases, because, under the ATA Implementation Agreement, signatory air carriers would allow the passenger to decide if the law of the passenger's domicile should dictate damage awards.³⁸³ Approval of the ATA Implementation Agreement would avoid unnecessary disagreements with U.S. aviation trading partners, since it anticipates that signatory air carriers would urge widespread voluntary acceptance by non-signatory air carriers.³⁸⁴

The International Chamber of Commerce³⁸⁵ ("ICC") supported the IATA Inter-carrier Agreement because the ICC anticipated that the Agreement would reduce the need for litigation in aviation disasters.³⁸⁶ The ICC also noted that approval of the IATA Inter-carrier Agreement would be unlikely to adversely impact competition because air carriers would not vie with each other for business on the basis of compensation provided in avia-

380. *Id.* at 12-13.

381. See Stacy Shapiro, *Rates May Take Off With IATA Agreement*, *BUS. INS.*, May 12, 1997, at 3 [hereinafter *Rates May Take Off*] (describing insurance underwriters' expectation of increased liability insurance costs due to number of air carriers signatory to IATA Inter-carrier Agreement). By the summer of 1997, IATA anticipates that 100 air carriers will have signed the IATA Inter-carrier Agreement and 75 air carriers will have put its provisions into place by signing the IATA Implementation Agreement. *Id.*

382. ATA APPROVAL APPLICATION, *supra* note 375, at 2.

383. *Id.* at 10.

384. *Id.* at 2.

385. See ICC, CONSOLIDATED COMMENTS OF THE INTERNATIONAL CHAMBER OF COMMERCE (Aug. 21, 1996) (on file with the *Fordham International Law Journal*) [hereinafter AUGUST 1996 ICC COMMENTS] (describing International Chamber of Commerce ("ICC") support of IATA Inter-carrier Agreement). Founded in 1919, the ICC is a non-governmental association of thousands of companies and business organizations located in more than 130 countries. *Id.* at 2. The ICC's Commission on Air Transport periodically publishes position papers on crucial issues in international aviation. *Id.* at 3.

386. *Id.* at 6-7; see *ICC Urges DOT Approval*, *supra* note 22, at 306 (discussing ICC's positive reaction to IATA Inter-carrier Agreement).

tion accidents.³⁸⁷ The ICC expressed the view that it would prefer to maintain the Warsaw Convention's goal of harmonizing global legal systems to a complete rewrite of the Warsaw Convention.³⁸⁸

ATLA also urged the approval of the IATA Inter-carrier Agreement.³⁸⁹ Under the IATA Inter-carrier Agreement, plaintiffs would not have to prove willful misconduct, therefore ATLA predicted a reduction in long and costly litigation.³⁹⁰ Nevertheless, ATLA still would prefer the addition of a fifth jurisdiction for filing suit, that of the passenger's domicile.³⁹¹

The Aerospace Industries Association³⁹² ("AIA") urged DOT approval of the IATA Inter-carrier Agreement due to the inequitable effect which occurs when passengers or their families file claims against third parties, such as AIA members, in an bid to obtain appropriate compensation for their losses.³⁹³ The AIA noted that approval of the IATA Inter-carrier Agreement would give international passengers the advantage of a liability system superior to that available to domestic U.S. passengers because domestic passengers must prove that an air carrier neglected to exercise the highest degree of care.³⁹⁴ By comparison, the IATA Inter-carrier Agreement would give the international passenger

387. AUGUST 1996 ICC COMMENTS, *supra* note 385, at 7.

388. *Id.* at 5; *ICC Favours Revision, Not Rewrite, of Warsaw Convention Liability Rules*, AVIATION EUR., Mar. 14, 1996, at 3.

389. ATLA, COMMENTS BY THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA ON THE APPLICATION OF INTERNATIONAL AIR TRANSPORT ASSOCIATION FOR APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY AND RELATED EXEMPTION RELIEF (Aug. 21, 1996) (on file with the *Fordham International Law Journal*) [hereinafter AUGUST 1996 ATLA COMMENTS]; see *Trial Lawyers*, *supra* note 21 at 320 (discussing ATLA reaction to IATA Inter-carrier Agreement).

390. AUGUST 1996 ATLA COMMENTS, *supra* note 389, at 2; see *Trial Lawyers*, *supra* note 21 at 320 (discussing ATLA's reaction to IATA Inter-carrier Agreement).

391. AUGUST 1996 ATLA COMMENTS, *supra* note 389, at 2. ATLA noted that Article 28 of the Warsaw Convention may force the survivors of a U.S. citizen who was traveling overseas and who died on a flight between foreign points to file their claim overseas. *Id.*; see *Trial Lawyers*, *supra* note 21, at 320 (discussing ATLA reaction to IATA Inter-carrier Agreement).

392. See AIA, AEROSPACE INDUSTRIES ASSOCIATION'S MEMORANDUM IN SUPPORT OF APPLICATIONS FILED BY IATA AND ATA FOR APPROVAL OF AGREEMENTS RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION (Aug. 21, 1996) (on file with the *Fordham International Law Journal*) [hereinafter AUGUST 1996 AIA COMMENTS] (describing Aerospace Industries Association ("AIA") organization). Fifty-two suppliers of commercial aircraft, their engines, and other component parts belong to the AIA. *Id.* at 1.

393. *Id.*

394. *Id.*

an absolute right to recover damages up to 100,000 SDRs and a presumed right to recover full damages, except where an air carrier can prove that it took all requisite steps to prevent the accident.³⁹⁵

Although the Victims Families' Associations³⁹⁶ urged the DOT to approve the IATA Intercarrier Agreement, these organizations wanted the DOT to further modify the IATA Intercarrier Agreement's provisions.³⁹⁷ The Victims Families' Associations wanted the DOT to require either an unlimited waiver by air carriers of the Article 20(1) defenses or a limited waiver set at an amount greater than 100,000 SDRs.³⁹⁸ The Victims Families' Associations also wanted the DOT to require that air carriers flying to and from the United States agree to the establishment of a fifth jurisdiction for filing claims based upon the domicile of the passenger so that passengers could obtain damage awards in U.S. courts, regardless of the ticket purchase location.³⁹⁹

B. *The DOT Proposal*

Due to the optional nature of some of the provisions included in the IATA and ATA implementation agreements, the DOT proposed the inclusion of additional provisions to further protect U.S. citizens involved in international air transportation.⁴⁰⁰ Among other requirements, the DOT proposed that a passenger should have the option of filing suit against an air car-

395. *Id.*

396. VICTIMS FAMILIES' ASSOCIATIONS, RESPONSE OF THE VICTIMS FAMILIES' ASSOCIATIONS TO APPLICATION OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION FOR APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY AND RELATED EXEMPTION RELIEF AND MOTION FOR LEAVE TO FILE LATE PLEADING (Aug. 22, 1996) (on file with the *Fordham International Law Journal*) [hereinafter AUGUST 1996 VICTIMS FAMILIES' COMMENT]. The Victims Families' Associations include the relatives of passengers who died in the 1983 Korean Air Lines Flight 007 air disaster, in addition to relatives of victims of the Pan-Am 103 air disaster at Lockerbie, Scotland and the TWA 800 Disaster at Long Island, New York. *Id.* at 1 n.1. The American Association for Families of KAL 007 Victims was the first significant lobbying group organized by relatives of the victims of an international air disaster. See Jan Hoffman, *In His Daughter's Memory; Grieving Father's 14-Year Crusade Helps Air Crash Victims*, N.Y. TIMES, Mar. 31, 1997, at B1 (describing protracted efforts of Hans Ephraimson-Abt, Chairman of American Association for Families of KAL 007 Victims, to convince U.S. air carriers to effect changes aimed at faster resolution of air disaster lawsuits). *Id.*

397. See AUGUST 1996 VICTIMS FAMILIES' COMMENT, *supra* note 396, at 2.

398. *Id.* at 10.

399. *Id.* at 12.

400. Show Cause Order, *supra* note 361, at 9.

rier in a fifth forum, that of the jurisdiction of the courts of the passenger's domicile or residence.⁴⁰¹ IATA predicted that non-U.S. air carriers which had previously signed the IATA Intercarrier Agreement would withdraw those prior consents in reaction to the imposition of the DOT's additional provisions.⁴⁰² In addition, the insurance industry became concerned that the DOT's additional provisions would have an inflationary effect on aviation industry insurance rates.⁴⁰³

1. Background

When it granted discussion authority to IATA in February 1995, the DOT stated that it was doing so with certain expectations.⁴⁰⁴ In situations where air carriers ticketed passengers in the United States, the DOT expected that IATA would develop an intercarrier agreement which would compensate passengers in a timely manner on a strict liability basis with no per passenger limits and with damage awards comparable to those obtainable in U.S. domestic aviation cases.⁴⁰⁵ The DOT also expected that air carriers would extend similar coverage to U.S. citizens traveling internationally in situations where air carriers ticketed such passengers in locations outside the United States.⁴⁰⁶ With these objectives in mind, the DOT reacted to the optional nature of some of the provisions included in the IATA and ATA implementation agreements by proposing the inclusion of additional provisions.⁴⁰⁷

2. Significant Provisions

In its show cause order, the DOT proposed that the optional application of the law of the domicile provision become mandatory for all air travel to or from the United States.⁴⁰⁸ An

401. *Id.* at 13.

402. IATA, OBJECTIONS OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION 1-2 (Oct. 24, 1996) (on file with the *Fordham International Law Journal*) [hereinafter OCTOBER 1996 IATA OBJECTIONS].

403. See *DOT Conditions Could "Derail" World Liability Agreement*, AIR SAFETY WK., Oct. 14, 1996, available in WESTLAW, Airsawf Database [hereinafter *DOT Conditions*] (discussing aviation industry insurance rates).

404. February 1995 Immunity Order, *supra* note 355, at 3.

405. *Id.*

406. *Id.*

407. Show Cause Order, *supra* note 361, at 9.

408. *Id.* at 9-10.

additional DOT proposal included requiring air carriers traveling to or from the United States to either ensure that all interlining air carriers were parties to the IATA Inter-carrier Agreement or to agree to assume liability for the entire trip.⁴⁰⁹ The DOT also proposed establishing a requirement that air carriers make previously existing liability provisions which were more generous than those required by the IATA Inter-carrier Agreement available to passengers traveling to or from the United States.⁴¹⁰ Finally, the DOT proposed that air carriers submit to the jurisdiction of the courts of the passenger's domicile or residence.⁴¹¹

3. Industry and World Reaction

IATA objected to the DOT's proposed additional provisions, stating that imposition of these provisions would force the non-U.S. air carrier signatories to withdraw their prior consents to the IATA Inter-carrier Agreement and the IATA Implementation Agreement.⁴¹² IATA pointed out that passengers would not be able to enforce the DOT's proposed additional provisions because such provisions would conflict with several existing provi-

409. *Id.* at 10. The DOT proposed that:

For transportation to and from the U.S., the provisions of the agreement would apply with respect to any passengers purchasing a ticket on an airline party to the agreements, including interline travel on carriers not party to the agreements. The carrier ticketing the passenger, or, if that carrier is not a party to the [a]greements, the carrier operating to or from the United States, would have the obligation either to ensure that all interlining carriers were parties to the [a]greements, as conditioned, or to itself assume liability for the entire journey.

Id.

410. *Id.* at 11. The DOT proposed:

To require that all tariffs, contracts of carriage or other similar provisions applied by any carrier, in any jurisdiction, to the extent any such provision would be more favorable to its passengers with respect to recoveries for passenger deaths and injuries . . . than the provisions of the IATA and ATA Agreements . . . shall apply equally to all passengers on services to and from the United States. To the extent that the carrier has agreed, whether pursuant to Governmental regulation or otherwise, to liability provisions favorable to passengers, albeit limited to certain jurisdictions, or certain classes of passengers, the failure to extend the same benefits to U.S. citizen or permanent resident passengers . . . traveling in international air transportation would constitute unjustifiable and unreasonable discrimination . . . and could not be accepted for operations to and from the United States.

Id.

411. *Id.* at 13.

412. OCTOBER 1996 IATA OBJECTIONS, *supra* note 402, at 1-2.

sions of the Warsaw Convention.⁴¹³ IATA argued that the Warsaw Convention does not provide for deviation from filing suits in any jurisdictional forum other than the four fora listed in Article 28.⁴¹⁴ IATA also argued that the DOT's proposed provision requiring air carriers to either ensure that all interlining air carriers were parties to the IATA Intercarrier Agreement or to agree to assume liability for the entire trip contravened Article 30 of the Warsaw Convention.⁴¹⁵ IATA asserted that only an amendment to the Warsaw Convention would serve to implement the DOT's proposed additional provisions.⁴¹⁶ The ATA argued that approval of its implementation agreement without conditions would permit signatory air carriers to offer immediate benefits to passengers.⁴¹⁷ Interim approval would help the ATA's efforts to influence non-signatory air carriers to sign the ATA Implementation Agreement because such air carriers would be more likely to sign an agreement that already had DOT approval.⁴¹⁸

The AIA also urged unconditional approval by the DOT as a means of preventing the Warsaw Convention's existing liability limits from remaining in place to the detriment of passengers as well as third parties such as the commercial aircraft suppliers who are the AIA's members.⁴¹⁹ The Association of European

413. *Id.* Annex B, at 4-5. Article 32 of the Warsaw Convention provides that: Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Warsaw Convention, *supra* note 3, art 32, 49 Stat. at 3021, 137 L.N.T.S. at 29-31.

414. OCTOBER 1996 IATA OBJECTIONS, *supra* note 402, Annex B, at 5-6.

415. *Id.* at 7-8. Article 30 of the Warsaw Convention regulates an air carrier's liability where different successive air carriers transport passengers, baggage, or goods. Warsaw Convention, *supra* note 3, art. 30(1), 49 Stat. at 3021, 137 L.N.T.S. at 29. Under Article 30(2), "[i]n the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey." *Id.* art. 30(2), 49 Stat. at 3021, 137 L.N.T.S. at 29.

416. OCTOBER 1996 IATA OBJECTIONS, *supra* note 402, Annex B, at 8.

417. ATA, COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA ON DOT ORDER 96-10-7 AND FOR INTERIM APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY AND FOR OTHER RELIEF 6 (Oct. 24, 1996) (on file with the *Fordham International Law Journal*) [hereinafter OCTOBER 1996 ATA OBJECTIONS].

418. *Id.* at 7-8.

419. AIA, THE AEROSPACE INDUSTRIES ASSOCIATION'S COMMENTS ON ORDER 96-10-7 REGARDING APPLICATIONS FILED BY IATA AND ATA FOR APPROVAL OF AGREEMENTS RELAT-

Airlines urged unconditional approval by the DOT because this association viewed the IATA Inter-carrier Agreement as the best consensus achievable by the international aviation industry.⁴²⁰ The Regional Airline Association⁴²¹ ("RAA") objected to the DOT's proposed additional provisions as especially detrimental to regional air carriers.⁴²²

The aviation and insurance industries disagreed as to whether the IATA Inter-carrier Agreement would cause insurance premiums to rise for air carriers.⁴²³ Representatives of the insurance industry felt that the DOT had underestimated the anticipated effect of the DOT's proposed additional provisions on aviation industry insurance rates.⁴²⁴ Although aviation insurance costs had decreased recently,⁴²⁵ insurance underwriters were un-

ING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION 1-2 (Oct. 24, 1996) (on file with the *Fordham International Law Journal*).

420. AEA, ANSWER OF THE ASSOCIATION OF EUROPEAN AIRLINES IN SUPPORT OF IATA OBJECTIONS TO ORDER TO SHOW CAUSE 96-10-7 at 1 (Oct. 31, 1996) (on file with the *Fordham International Law Journal*). The Association of European Airlines commented to the DOT that only treaty action by the world's governments could bring about any further improvements beyond those of the IATA Inter-carrier Agreement. *Id.*

421. RAA, ANSWER OF REGIONAL AIRLINE ASSOCIATION 1 (Oct. 31, 1996) (on file with the *Fordham International Law Journal*). The Regional Airline Association ("RAA"), the trade association of the regional air carrier industry, consists of 70 member air carriers whose aircraft transport 94% of the total number of passengers traveling on regional air carriers of any kind. *Id.*

422. *Id.* at 1-2. As an example, the RAA pointed out that:

If a passenger moves on hypothetical Regional Airlines from the U.S. to Canada then on hypothetical Transoceanic Airlines from Canada to Africa and, finally, between two points in Africa on hypothetical Safari Airlines and is killed on Safari, the passenger could sue Regional Airlines for unlimited damages if Safari Airlines is not a party to the agreements. Regional carriers could not reasonably assume such liability for all the reasons mentioned by ATA, but magnified by the small size of these airlines.

Id. at 2-3. The RAA noted that the DOT defines regional carriers as small businesses when such air carriers provide air transportation in small aircraft having up to 60 seats and an 18,000 pound payload capacity. *Id.* at 3.

423. Edward Unsworth, *Airline Group Moves to Lift International Liability Limits: U.S., E.C. Approval Still Needed*, *BUS. INS.*, Aug. 5, 1996, at 40.

424. LLOYD'S AVIATION UNDERWRITERS' ASSOCIATION & AVIATION INSURANCE OFFICES ASSOCIATION, JOINT COMMENTS OF LLOYD'S AVIATION UNDERWRITERS' ASSOCIATION AND AVIATION INSURANCE OFFICES ASSOCIATION 2 (Oct. 24, 1996) (on file with the *Fordham International Law Journal*). According to the Joint Comments, research on aviation industry insurance rates indicated that the aviation industry could anticipate an increase in claims costs as a result of implementing the IATA Inter-carrier Agreement. *Id.* The DOT's proposed additional provisions would likely increase claims costs even further. *Id.*

425. Lee S. Kreindler, *The End of Airline Liability Limits*, *N.Y.L.J.*, Aug. 30, 1996, at 3 [hereinafter *End of Liability Limits*]. Today, the aviation industry has grown very large,

sure whether the Trans World Airlines Flight 800 disaster of July 1996 would reverse this trend.⁴²⁶ IATA originally believed that insurance rates would not automatically increase subsequent to DOT approval of the IATA Inter-carrier Agreement because a given air carrier's insurance claims record influences its insurance rates.⁴²⁷ The DOT's proposed additional provisions radically changed those assumptions.⁴²⁸

In reaction to public commentary regarding its show cause order, the DOT deferred action on most of its proposed additional provisions.⁴²⁹ Nevertheless, the DOT did insist on including its additional proposed provision that the optional application of the law of the domicile provision become mandatory for all air travel to or from the United States.⁴³⁰ Many international air carriers hesitated at the prospect of having U.S. law govern the calculation of compensatory damages for airline disasters involving U.S. passengers.⁴³¹ At IATA's request, the DOT reconsidered this condition to the IATA Inter-carrier Agreement.⁴³² IATA argued that a significant number of international air carriers would not adhere to the IATA Inter-carrier Agreement if the DOT did not remove the condition providing for mandatory determination of compensatory damages under the law of the passenger's domicile for all air travel to or from the United States.⁴³³ Persuaded by IATA's argument, the DOT removed this

while the number of major accidents is comparatively small, resulting in relatively low insurance costs for air carriers. *Id.*

426. See Unsworth, *supra* note 423 (discussing aviation industry insurance rates). On July 17, 1996, directly after its departure from New York's John F. Kennedy Airport, Trans World Airlines' Paris-bound Flight 800 crashed into the Atlantic Ocean, killing all 230 persons aboard. *Id.*

427. *Id.*

428. See *DOT Conditions*, *supra* note 403 (discussing aviation industry insurance rates).

429. Order Approving Agreements, *supra* note 11, at 6.

430. *Id.* at 7.

431. See Rice, *supra* note 166, at 3 (discussing IATA Inter-carrier Agreement).

432. DEP'T OF TRANSP., INTERNATIONAL AIR TRANSPORT ASSOCIATION: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION; AIR TRANSPORT ASSOCIATION OF AMERICA: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION, Order No. 97-1-2 (Jan. 8, 1997), available in WESTLAW, *Furan-dot Database* [hereinafter Reconsideration Order].

433. IATA, INTERNATIONAL AIR TRANSPORT ASSOCIATION'S PETITION FOR RECONSIDERATION OF ORDER 96-11-6 at 5 (Dec. 20, 1996) (on file with the *Fordham International Law Journal*). IATA noted that many signatory air carriers objected to this provision because "there is no international aviation treaty precedent for the law of the domicile

provision when it modified its approval of the IATA Intercarrier Agreement on January 8, 1997.⁴³⁴

C. *The EC Proposal*

Dissatisfaction with the Warsaw Convention's liability limits prompted representatives of the European Community, in addition to Norway and Sweden, to gather in 1993 to debate passenger liability limits.⁴³⁵ Among other provisions, the most recent version of the EC Proposal provides for an air carrier to disburse a nonrefundable advance payment to a passenger or his family within ten days of an airline disaster.⁴³⁶ Several air carriers have reacted with concern that compliance with the terms of the EC Proposal could prove more of a hardship than compliance with the IATA Intercarrier Agreement.⁴³⁷ A further criticism of the EC Proposal has been that the European Commission risked complicating already existing reform efforts such as the IATA Intercarrier Agreement by not waiting longer to present its own proposal.⁴³⁸

1. Background

In January 1993, representatives of the European Community, in addition to other countries such as Norway and Sweden, met in Brussels, Belgium to discuss the inappropriateness of the Warsaw Convention's liability limits.⁴³⁹ The representatives were concerned about the effect that increased liability limits would

provision and many carriers believe that any harmonization of choice of law should be undertaken at intergovernmental level." *Id.* at 4.

434. Reconsideration Order, *supra* note 432, at 5.

435. See Bruno Bertucci, *A European Perspective on Air Carrier Liability*, 9 *AIR & SPACE LAW* 1 (Summer 1994) (explaining concerns which prompted January 1993 conference regarding Warsaw Convention liability limits).

436. See Official Journal of the European Communities, Amended Proposal for a Council Regulation (EC) on Air Carrier Liability In Case of Accidents, COM (96) 663 Final, O.J. C 29/04, art. 3.2, at 14 (1997) [hereinafter Amended EC Proposal].

437. See Stacy Shapiro, *Part of EC Proposal Has Airlines Balking: Proposal Goes Beyond IATA Agreement*, *BUS. INS.*, May 12, 1997, at 14 [hereinafter *Airlines Balking*] (noting that terms of EC Proposal are more extensive than IATA Intercarrier Agreement).

438. *EU: EU/Transport*, Reuter Textline, Dec. 31, 1996, available in LEXIS, Inlaw Library, Txtec file.

439. See Bertucci, *supra* note 435, at 1 (discussing January 1993 conference regarding Warsaw Convention liability limits). The Directorate General of the European Commission responsible for Transport Policy convened the meeting out of concern about the Warsaw Convention's low liability limits. *Id.*

have on aviation industry insurance premiums.⁴⁴⁰ A study commissioned by the representatives concluded that insurance premiums would not rise drastically because less litigation would result from an increase in the Warsaw Convention's liability limits to a level suitable for accommodating claims.⁴⁴¹

Concurrent with the meeting of the European Community representatives, the European Civil Aviation Conference⁴⁴² ("ECAC") created a task force to propose changes to the Warsaw Convention liability limits.⁴⁴³ In addition to suggesting an increase of liability limits from 100,000 SDRs to 250,000 SDRs,⁴⁴⁴ the ECAC task force recommended the prompt payment of a nonrefundable sum to an injured passenger or his nearest relative in the event of death.⁴⁴⁵ ECAC decided that the easiest method of implementing such an arrangement was by means of an intercarrier agreement.⁴⁴⁶

On December 20, 1995, the European Commission⁴⁴⁷ finalized its proposal for increased air carrier liability.⁴⁴⁸ The European Commission recommended waiving all liability limits, in addition to providing for strict liability up to 100,000 European Currency Units ("ECUs").⁴⁴⁹ The European Commission advocated providing a victim or his relatives with a nonrefundable advance payment within ten days of an airline disaster.⁴⁵⁰ The European Commission also proposed allowing passengers to choose which jurisdiction in which to file legal claims against air

440. See EC Proposal, *supra* note 25, at 5 (discussing January 1993 conference on Warsaw Convention).

441. *Id.*

442. See Bertucci, *supra* note 435, at 14 (describing European Civil Aviation Conference ("ECAC") task force on Warsaw Convention). Civil aviation directors representing most European governments belong to ECAC. *Id.*

443. See *id.* at 14 (describing European Civil Aviation Conference ("ECAC") task force on Warsaw Convention liability limits).

444. *Id.*

445. *Id.*

446. *Id.*

447. JOHN McCORMICK, THE EUROPEAN UNION: POLITICS AND POLICIES 10 (1996). The chief executive body of the European Union, the European Commission, is responsible for the proposal and implementation of European Union laws and policies. *Id.*

448. EC Proposal, *supra* note 25.

449. *Id.* at 7. The European Currency Unit ("ECU") is a currency unit linked to a weighted basket of European currencies. McCORMICK, *supra* note 447, at 234. The member states anticipate using the ECU as a common currency in an effort to achieve future monetary stability by the end of this century. *Id.* at 237.

450. EC Proposal, *supra* note 25, art 4(1), at 12.

carriers, including the jurisdiction of the passenger's domicile.⁴⁵¹

The Economic and Social Committee of the European Commission tentatively approved the EC Proposal, subject to clarifying amendments.⁴⁵² The Economic and Social Committee requested more information concerning how and when air carriers would make advance payments to victims and their relatives.⁴⁵³ The Committee was also concerned about the possible effects of higher costs on smaller airlines.⁴⁵⁴ It therefore suggested that a passenger should have to prove fault on the part of an air carrier in order to qualify for higher liability payments.⁴⁵⁵

The European Parliament⁴⁵⁶ subsequently endorsed the EC Proposal in September 1996, subject to amendments.⁴⁵⁷ Shortly thereafter, the European Union Transport Ministers also endorsed the EC Proposal.⁴⁵⁸ On January 30, 1997, the European Commission amended the EC Proposal to provide for strict liability up to 120,000 ECUs.⁴⁵⁹ The revised EC Proposal also provided that the amount of the air carrier's nonrefundable advance payment should be sufficient to meet the immediate economic requirements of the victim or his relatives.⁴⁶⁰ As of May 12, 1997, the Amended EC Proposal remained subject to review by the European Parliament.⁴⁶¹

2. Significant Provisions

The EC Proposal eliminates liability limits altogether and calls for strict liability for damages up to 120,000 ECUs.⁴⁶² In

451. *Id.*

452. Opinion of the Economic and Social Committee on the "Proposal for a Council Regulation (EC) on Air Carrier Liability In Case of Air Accidents," O.J. C 212/09 (1996), at 38-40 (May 1996).

453. *Id.* art. 4.3.1, at 39.

454. *Id.* art. 4.3.2, at 39.

455. *Id.*

456. McCORMICK, *supra* note 447, at 10. The European Parliament acts as the legislative body of the European Union. *Id.*

457. *EU: Proposal - Amended Draft Regulation Re Air Carrier Liability*, Reuter Textline, Jan. 24, 1997, available in LEXIS, Intlaw Library, Txtec file.

458. *EU Transport Ministers Agree on Liability Reform*, AVIATION DAILY, Dec. 16, 1996, at 433.

459. Amended EC Proposal, *supra* note 436, art. 3.2, at 14.

460. *Id.* art. 4.1, at 14.

461. See *Airlines Balking*, *supra* note 437, at 14 (noting that European Parliament could approve Amended EC Proposal as early as June 1997).

462. Amended EC Proposal, *supra* note 436, art. 3, at 14. Article 3 provides that:

addition, it requires an air carrier to tender a nonrefundable advance payment in an amount sufficient to satisfy immediate economic need to a victim or his or her family within ten days of an airline disaster.⁴⁶³ This amount could be offset later against the amount of a final settlement.⁴⁶⁴ Furthermore, the EC Proposal provided for a fifth jurisdiction, that of the passenger's domicile, in addition to the four existing jurisdictions in which plaintiffs can file legal claims against air carriers.⁴⁶⁵ The EC Proposal's provisions would be compulsory only for EC member state air carriers.⁴⁶⁶ Non-EC air carriers must notify passengers that the EC Proposal does not apply to such air carriers.⁴⁶⁷ The EC Proposal would require non-EC carriers to inform passengers at the time of ticket purchase that the EC Proposal would not protect

1. The amount of the pecuniary compensation that a Community air carrier has to sustain in the event of the death, wounding or any other bodily injury suffered by a passenger shall not be subject to any legal, conventional or contractual limits.

2. For any damages up to the sum of ECU 120,000 the Community air carrier shall not exclude or limit his liability by proving that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

3. If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law exonerate the carrier wholly or partly from his liability.

Id.

463. *Id.* art 4(1), at 14. Article 4(1) provides that [t]he carrier shall without delay, and in any event not later than ten days after the identity of the person entitled to compensation has been established make such advance payments as may be required to meet immediate economic needs. *Id.*

464. *Id.* art. 4(2), at 12. Article 4(2) provides that "[t]he payments under paragraph 1 shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of the Community air carrier liability, but are not returnable under any circumstances." *Id.*

465. *Id.* art. 7, at 15. Article 7 provides that "[a]n action for damages in the case of accidents involving Community air carriers may, in addition to the rights conferred by Article 28 of the Warsaw Convention, be brought before the courts of the Member State where the passenger at the time of the accident had his domicile." *Id.*

466. *Id.* art. 5, at 14-15.

467. *Id.* art. 5(3), at 15. Article 5(3) provides that:

Air carriers established outside the Community, operating to, from and within the Community and not subject to the obligations referred to in Articles 3 and 4 shall expressly and clearly inform the passengers thereof, at the time of purchase of the ticket at the carrier's agencies, travel agencies, or check-in counters located in the territory of a Member State. Air carriers shall on request provide the passengers with a form setting out their conditions. The fact that the limit is indicated on the ticket document does not constitute sufficient information.

Id.

passengers on non-EC carriers' flights.⁴⁶⁸

3. Industry and World Reaction

The European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest criticized the EC Proposal in December 1996.⁴⁶⁹ This association's position was that the EC should have waited for the outcome of other international initiatives such as the IATA Intercarrier Agreement.⁴⁷⁰ Otherwise, proponents of the EC Proposal risked complicating and counteracting already existing reform efforts.⁴⁷¹

Air carriers have expressed concern that the EC Proposal could become more burdensome than the IATA Intercarrier Agreement.⁴⁷² Article 4(1) of the EC Proposal, requiring advance payments to a victim or his relatives within ten days, could prove onerous due to the difficulty in proving to whom an air carrier owes such payments.⁴⁷³ In addition, the air carriers were afraid that the notice provisions of Article 5(3) of the EC Proposal would have the effect of forcing non-EC air carriers to advertise the fact that they do not provide the same liability coverage as EC member state air carriers.⁴⁷⁴

D. *The ICAO Draft Proposal for a New International Convention*

On May 9, 1997, the Legal Committee of the ICAO approved a draft text of a new international convention reforming the Warsaw Convention's liability limits.⁴⁷⁵ In comparison to attempts made by other entities, the goal of the ICAO's draft convention was to maintain the Warsaw Convention's basic structure as an instrument of international law while responding to concerns about modernizing passenger liability limits.⁴⁷⁶ The draft

468. *Id.*

469. *EU: EU/Transport*, Reuter Textline, Dec. 31, 1996, available in LEXIS, Intlaw Library. Txttec file.

470. *Id.*

471. *Id.*

472. *Airlines Balking*, *supra* note 437, at 14.

473. *Id.*

474. *Id.*

475. *International Effort*, *supra* note 27 (describing ICAO efforts to reform Warsaw Convention's liability limits).

476. *See Weber & Jakob*, *supra* note 348, at 313 (describing purposes behind ICAO's draft convention).

convention provides for a two tiered liability system based upon strict liability up to 100,000 SDRs and unlimited fault-based liability beyond that limit.⁴⁷⁷ Insurance industry representatives anticipate that such provisions would result in a nominal rise in insurance premium costs.⁴⁷⁸ Legal practitioners have recognized the benefit which the ICAO draft convention would have as a legal instrument backed by the force of international law as compared to contractual agreements such as the IATA Intercarrier Agreement.⁴⁷⁹

1. Background

In an effort to accelerate the reform of the liability limits of the Warsaw Convention, the ICAO conducted a socio-economic study analyzing air carrier liability limits throughout the world.⁴⁸⁰ The results of the study indicated that dissatisfaction with air carrier liability limits was not confined to isolated geographic areas of the world.⁴⁸¹ Furthermore, the study showed that raising the Warsaw Convention's liability limits would necessitate increasing liability insurance costs for air carriers by nominal amounts averaging below US\$2 per round-trip air ticket.⁴⁸²

Upon the release of the study results in January 1996, the ICAO established a Secretariat Study Group to assist the ICAO Legal Bureau in developing an ICAO instrument whose purpose would be to advance the reform of the Warsaw Convention's liability limits.⁴⁸³ The Secretariat Study Group sought to incorporate those elements of the Warsaw Convention that had been able to withstand the test of time over the previous sixty years while simultaneously reforming the more outdated aspects of the Warsaw Convention's liability limits.⁴⁸⁴ As a result of the ef-

477. *See id.* at 312 (describing liability provisions of ICAO draft convention).

478. *See International Effort, supra* note 27 (reporting insurance industry reaction to ICAO draft convention).

479. *See id.* (noting uncertainty expressed by legal practitioners over contractual nature of IATA Intercarrier Agreement, in comparison to ICAO draft convention).

480. *See Weber & Jakob, supra* note 348, at 306-07 (detailing ICAO efforts to canvass international governmental satisfaction with Warsaw Convention's liability limits).

481. *Id.* at 307.

482. *Id.*

483. *Id.* at 308.

484. *See id.* at 311 (explaining goal of Secretariat Study Group). The Secretariat Study Group viewed the new convention it drafted as a means of replacing "the current complex situation of protocol-to-protocol amendments while, at the same time, preserv-

forts of the ICAO Legal Bureau, assisted by the Secretariat Study Group, the Legal Committee of the ICAO met from April 28 to May 9, 1997 to review a draft text of a new international convention reforming the Warsaw Convention's liability limits.⁴⁸⁵ The ICAO Legal Committee approved the draft text on May 9, 1997, in preparation for adoption by delegates from ICAO member states at a diplomatic conference scheduled for 1998.⁴⁸⁶ Ratification of the convention by ICAO member states could occur as soon as 1999.⁴⁸⁷

2. Significant Provisions

The ICAO draft convention maintains the general structure of the Warsaw Convention while integrating provisions of other legal agreements such as the Hague and Montreal Protocols as a means of sustaining established judicial precedents wherever feasible.⁴⁸⁸ The ICAO draft convention creates a two-tier liability system providing for strict liability for death or bodily injury up to an amount of 100,000 SDRs.⁴⁸⁹ Above that level, the amount of second tier liability depends upon a passenger proving that an air carrier was negligent, an air carrier proving it was free of fault, or an air carrier proving it carried out all possible steps to thwart the occurrence of the air disaster.⁴⁹⁰ The ICAO draft convention also provides for a fifth jurisdiction, that of a passenger's domicile, for filing claims against an air carrier.⁴⁹¹

3. Industry and World Reaction

Insurance underwriters believe that the liability provisions of the ICAO draft convention would necessitate only nominal air ticket cost increases to cover air carriers' additional insurance

ing the vast body of judicial precedents through the application of the operative parts of the Warsaw System." *Id.* at 312.

485. *Id.* at 312-13.

486. See *International Effort*, *supra* note 27 (reporting ICAO efforts to reform Warsaw Convention's liability limits).

487. *Id.*

488. See Weber & Jakob, *supra* note 348, at 312 (describing motivation behind structure of ICAO draft convention).

489. *Id.*

490. *Draft Treaty In Progress*, AIRLINE FIN. NEWS, May 19, 1997, available in WESTLAW, Airfin Database [hereinafter *Draft Treaty*] (describing liability limits of ICAO draft convention).

491. *International Effort*, *supra* note 27 (noting ICAO draft convention provision for fifth jurisdiction for filing of passenger claims against air carriers).

requirements.⁴⁹² The DOT would probably advocate U.S. Senate ratification of the ICAO draft convention because it provides fifth jurisdiction rights by allowing a passenger to file a claim against an air carrier in the country of the passenger's domicile.⁴⁹³ Some legal practitioners have voiced apprehension that the provisions of the ICAO draft convention requiring a passenger to prove an air carrier's negligence could lead to increased difficulties in collecting damages in comparison to the provisions of the IATA Inter-carrier Agreement.⁴⁹⁴ Other legal practitioners favor the ICAO's requirement of proof of air carrier negligence because such a provision aligns with current tort law.⁴⁹⁵ In addition, the requirement of proving willful misconduct as a judicial means of escaping the liability limits of the Warsaw Convention has influenced efforts on the part of aviation industry constituents to achieve increased levels of safety and security.⁴⁹⁶ Also, legal practitioners have noted the advantage which the ICAO draft convention, a legal instrument, would have over contractual agreements such as the IATA Inter-carrier Agreement.⁴⁹⁷ A new convention incorporating many of the provisions of the

492. *See id.* (reporting comment by John Westcott, director of underwriting at London-based Hill Aerospace Syndicate, anticipating additional US\$0.50 cost per air ticket to accommodate air carriers' increased insurance premium costs).

493. *See id.* (reasoning that DOT would favor fifth jurisdiction of ICAO draft convention).

494. *See id.* (reporting concerns of Robert Warren, general counsel for ATA, about increased difficulty in collecting damages under provisions of ICAO draft convention).

495. *See End of Liability Limits, supra* note 425, at 3 (noting that ICAO draft convention requirement of proof of negligence for damage recoveries in excess of 100,000 SDRs favors international air passengers over domestic air passengers because provision for strict liability up to the first 100,000 SDRs is benefit unavailable to domestic air passengers).

496. *See Goodbye to Liability, supra* note 19, at 3 (describing effect of IATA Inter-carrier Agreement elimination of fault system on aviation industry safety standards). The requirement of proving negligence for second tier liability under the provisions of the ICAO draft convention would prevent aviation industry safety experts from relaxing such efforts in the future. *Id.*

497. *See International Effort, supra* note 27, (noting apprehension expressed by Lee Kreindler, New York law firm partner, over legal uncertainty associated with IATA Agreement due to its contractual nature). An air carrier who has paid damages to a passenger under the provisions of the IATA Inter-carrier Agreement may have difficulty trying to subsequently recoup a contribution from a manufacturer because of the contractual nature of the IATA Inter-carrier Agreement. *See Goodbye to Liability, supra* note 19, at 3 (noting that Article 17 of Warsaw Convention providing for air carrier's liability is legal in nature while air carrier's waiver of the liability limit under IATA Inter-carrier Agreement is contractual agreement). The manufacturer could dispute its liability for contribution by arguing that the air carrier has no remedy against the manufacturer

IATA Inter-carrier Agreement would add the strength of international law to an agreement achieved through the efforts of IATA, an organization representing the majority of the world's air carriers.⁴⁹⁸

III. *THE IATA INTERCARRIER AGREEMENT DOES NOT ELIMINATE THE NEED TO AMEND THE WARSAW CONVENTION*

Despite its relative success in reforming the Warsaw Convention's liability limits, the IATA Inter-carrier Agreement has failed to reach the goal of uniformity to which the drafters of the Warsaw Convention aspired in 1929.⁴⁹⁹ The chief disadvantage of the IATA Inter-carrier Agreement is its contractual nature. It is far easier for a signatory air carrier to opt out of a contractual agreement than to avoid the legal consequences of a convention ratified by the majority of the world's governments. By contrast, the main advantage of the ICAO draft convention is the force of international law that it has as a legal instrument. Global adoption of the ICAO draft convention presents the best means of regulating future air carrier liability because the ICAO draft convention would attain the dual goals of uniform liability limits and systematic legal procedures to which the Warsaw Convention's drafters originally aspired.

A. Neither the IATA Inter-carrier Agreement, the DOT Proposal, nor the EC Proposal Achieve the Uniformity Envisioned by the Drafters of the Warsaw Convention

The IATA Inter-carrier Agreement does not fulfill the Warsaw Convention's dual goals of uniform liability limits and standardized procedures for resolving legal claims arising from international air travel.⁵⁰⁰ Although many air carriers have signed the IATA Inter-carrier Agreement, fewer air carriers have signed the IATA Implementation Agreement.⁵⁰¹ Furthermore,

because the air carrier paid the passenger voluntarily, rather than by virtue of the law.
Id.

498. See *International Effort*, *supra* note 27 (explaining legal advantage of ICAO draft convention over IATA Inter-carrier Agreement).

499. See *supra* notes 37-43 and accompanying text (explaining goals of Warsaw Convention's drafters).

500. *Id.*

501. See *supra* note 381 and accompanying text (reporting that every air carrier

although the IATA Implementation Agreement gives signatory air carriers the option of agreeing that the law of a passenger's domicile may determine how to calculate damages,⁵⁰² the ATA Implementation Agreement makes that provision mandatory for its signatory air carriers.⁵⁰³ As a result of such confusing and conflicting provisions, the IATA Inter-carrier Agreement and the two implementation agreements associated with it have added to the already existing uncertainty related to air carrier liability in international aviation accidents.

The DOT Proposal makes the possibility of establishing standardized legal procedures for the international aviation industry even more remote. The DOT Proposal contemplates compelling a signatory air carrier transporting passengers to or from the United States to assume liability for any portion of a passenger's trip that is flown on aircraft belonging to a successive non-signatory air carrier.⁵⁰⁴ Consequently, current non-signatory air carriers to the IATA Inter-carrier Agreement are less likely to become future signatories as a means of avoiding the risk of assuming liability for the actions of other non-signatory air carriers. In this manner the DOT Proposal reduces the likelihood of achieving further consensus regarding increased liability limits within the international aviation industry.⁵⁰⁵

The EC Proposal also does not achieve the Warsaw Convention's goals of uniform liability limits and systematic legal procedures. Although the EC Proposal provides that the law of the passenger's domicile may determine the calculation of damages,⁵⁰⁶ such a provision could not achieve worldwide uniformity because the EC Proposal would only be compulsory for EC mem-

who has currently signed IATA Inter-carrier Agreement has not yet implemented its provisions).

502. See *supra* note 373 and accompanying text (describing provisions of IATA Implementation Agreement).

503. See *supra* note 377 and accompanying text (noting mandatory provision of ATA Implementation Agreement requiring signatory air carriers to agree that passenger may choose to have law of passenger's domicile determine amount of compensatory damages).

504. See *supra* note 409 and accompanying text (setting forth DOT provision regarding liability of interline air carriers)

505. See *supra* notes 417-20 and accompanying text (explaining aviation trade associations' hopes of influencing non-signatory air carriers to implement IATA Inter-carrier Agreement).

506. See *supra* note 465 and accompanying text (noting provision of EC Proposal allowing passenger to file claim against air carrier in court of passenger's domicile).

ber state air carriers.⁵⁰⁷ Similarly, the EC Proposal's requirement that air carriers disburse nonrefundable advance payments to injured passengers or their survivors⁵⁰⁸ would also apply only to EC member state air carriers.⁵⁰⁹ Furthermore, this advance payment requirement would create an added judicial burden. The possible difficulty involved in proving to whom an air carrier might owe such a payment and in quantifying immediate economic need makes such a provision an invitation for increased litigation.

*B. Contractual Agreements Such as the IATA Intercarrier Agreement
Cannot Successfully Alleviate Passenger Confusion
Regarding Liability Limits*

Contractual agreements such as the IATA Intercarrier Agreement, the Montreal Interim Agreement,⁵¹⁰ and the Japanese Initiative⁵¹¹ make it easier for air carriers to opt out of such arrangements than would be possible if such contracts were legal instruments backed by the authority of the world's governments. Due to its contractual nature, the IATA Intercarrier Agreement only applies to signatory air carriers.⁵¹² Furthermore, without an amendment to the Warsaw Convention, some courts may not necessarily uphold certain provisions of such contractual agreements as the IATA Intercarrier Agreement and the DOT Proposal where such provisions contravene the articles of the Warsaw Convention.⁵¹³

507. *See supra* note 466 and accompanying text (describing limited authority of EC Proposal).

508. *See supra* notes 463-64 and accompanying text (describing nonrefundable advance payment provision of EC Proposal).

509. *See supra* notes 466-67 and accompanying text (explaining limited authority of EC Proposal).

510. *See supra* notes 97-125 and accompanying text (describing Montreal Interim Agreement).

511. *See supra* notes 154-68 and accompanying text (describing Japanese Initiative).

512. *See supra* notes 497-98 and accompanying text (describing concerns of legal practitioners about contractual nature of IATA Intercarrier Agreement).

513. *See supra* notes 413-16 and accompanying text (discussing IATA concerns regarding future judicial support for provisions of DOT Proposal which contravene articles of Warsaw Convention).

C. *The ICAO Draft Convention Presents the Best Hope for Achieving the Goals of the Warsaw Convention's Drafters*

An international convention adopted by the majority of the world's governments would be a more effective means of informing passengers of the risks involved in international aviation than the fragmentation created by the best intentions of individual trade associations like IATA. The average passenger now has too much difficulty discovering whether the air carrier on whose aircraft he has chosen to fly is a signatory to one of the agreements implementing the IATA Inter-carrier Agreement. On a given flight, two passengers sitting side by side may have very different liability limit coverage if both passengers failed to purchase their tickets from air carriers who are signatories to the IATA Inter-carrier Agreement.

As compared to a contractual agreement, a new convention would have a more far-reaching effect due to the force of international law behind it.⁵¹⁴ The IATA Inter-carrier Agreement eliminates the need to prove willful misconduct on the part of an air carrier in order to circumvent the Warsaw Convention's liability limits.⁵¹⁵ As a result, the aviation industry risks losing a strong incentive to continually seek higher safety standards.⁵¹⁶ By contrast, the ICAO draft convention's second-tier liability provision continues to place the burden of proof upon a passenger to prove negligence on the part of an air carrier.⁵¹⁷ At the same time as this is a lesser burden of proof than is willful misconduct, it is likely to prove to be a sufficient incentive for air carriers to continue to seek future security improvements for their industry.⁵¹⁸

514. See *supra* notes 497-98 and accompanying text (noting concerns of legal practitioners about contractual nature of IATA Inter-carrier Agreement).

515. See *supra* notes 370-73 and accompanying text (setting forth provisions of IATA Implementation Agreement).

516. See *supra* note 496 and accompanying text (discussing influence of requirement of proving willful misconduct under Warsaw Convention had on aviation industry safety standards).

517. See *supra* notes 489-90 and accompanying text (describing two-tier liability system of ICAO draft convention).

518. See *supra* note 496 and accompanying text (explaining influence of requirement of proving willful misconduct under Warsaw Convention had on aviation industry safety standards).

CONCLUSION

Over sixty years of sincere efforts on the part of aviation trade associations and various governmental authorities throughout the world have not resolved widespread criticism of the Warsaw Convention's liability limits. In addition, various judicial attempts at circumventing the Warsaw Convention's liability limits have further compromised the dual goals of uniform liability limits and systematic legal procedures which the Warsaw Convention's drafters envisaged as a means of coping with the complexities of international aviation. Although the IATA Inter-carrier Agreement is one of the more commendable efforts at reforming the liability provisions of the Warsaw Convention to emerge in recent years, a new international convention adopted by the majority of the world's governments would clearly be a better solution.