

The Modernization of the Warsaw Convention and the New Liability Scheme for Claims Arising Out of International Flight

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Introduction

The rights and liabilities of passengers for injuries sustained during international flights has been primarily governed by a set of liability rules and limits established by a multinational treaty in 1929. From its inception, the Warsaw Convention has been subject to vigorous criticism, yet various efforts to change or amend the limitations have met with little success due largely to the inertia of multi-government negotiations. With the recent culmination of certain inter-carrier agreements, and particularly the Montreal Convention of 1999, a sustained effort has been made to modernize Warsaw. Indeed, the Montreal Convention of 1999 subsumes the six different legal instruments comprising the Warsaw system into one instrument

which, if adopted by the world governments, will serve to greatly rationalize what is otherwise a fragmented method of dealing globally with international air travel injury claims. This article traces the various efforts to expand and clarify the liability rules under Warsaw, including the proposed Montreal Convention of 1999, the European Community Regulation, as well as the recent IATA intercarrier agreements now primarily governing international injury claims.

The Warsaw Convention

Since 1933, an international air carrier's liability for personal and cargo injury and damage has been governed by the *Convention for the Unification of Certain Rules Relating to International Transportation by Air* (the Warsaw Convention or Convention).¹ The Warsaw Convention is an international treaty which was signed at Warsaw in 1929 and came into force in 1933. It has been ratified by 127 countries.²

The Convention emerged due to the differences among the world's countries as to liability rules governing air transportation accidents. It would not be uncommon for airline carriers to exclude or disclaim liability in their contract for carriage (ticket) provisions.³ The objectives of the Convention were to achieve uniformity in air carriers' liability and documentation for transportation, to avoid convoluted conflicts of laws problems, protect the fledgling air international transportation business, and to facilitate transactions between countries around the world.⁴

1. 49 Stat. 3000, 876 U.N.T.S. 11 (1934), reprinted in 49 U.S.C. app. §40105 (1988) (Warsaw Convention).

2. Twenty-three nations enacted Warsaw after conferences in both Paris and Warsaw.

3. Second International Conference on Private Aeronautical Law,

Minutes, Oct. 4-12, 1929, 42, 47 (Robert C. Horner & Didier Legrez transl., Fred B. Rothman & Co. 1975) (1929 Warsaw Minutes).

4. See Warsaw Convention, *supra* note 1, at preamble; see Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-500 (1967).

The fundamental provisions of the Warsaw Convention are as follows:

Carriers agreed to presumed liability for damages sustained as a result of an "accident" in "international transportation" which included "accidents" resulting in injury or death on board the aircraft or which occurred while the passenger was in the process of embarking or disembarking the aircraft (Article 17);

The carrier's liability was limited for injury, death or damage to 125,000 francs (or about \$8,300.00) (Article 22);

The monetary limit could be overcome only if (i) the carrier failed to deliver the ticket to the passenger (Article 3(2)) or (ii) the claimant established "willful misconduct" on the part of the carrier (Article 25);

The carrier's presumed liability would not be imposed if the carrier could prove that it took all necessary measures to avoid the damage or that it was impossible to take such measures (Article 20); and

The carrier could avoid or reduce its presumed liability if it was able to prove that the injured party was contributorily negligent (Article 21).

The Convention bars carriers from utilizing exculpatory contract language in their contract of carriage that conflicts with the Convention.⁵ Further, since it is a treaty, neither a country nor a carrier can alter the Convention, as it can only be amended through a government by government agreement. Important, however, is Article 22(1), which allows for the carrier and passenger to agree to a higher limit of liability. This provision has proved crucial, as it has been repeatedly invoked due to the long-standing dissatisfaction with the established limits, especially in the United States.⁶ Suit must also be brought within two years of the accident.⁷

Importantly, there had been a conflict as to whether the Convention provided an independent cause of action. Many courts, in earlier decisions, held that the Convention did not provide for an independent cause of action requiring claimants to litigate their claim under some other substantive law subject only to the rules and limitations of the Convention.⁸ Other courts, including the First Circuit in 1964,⁹ held otherwise. It

is now universally recognized that the Convention provides for a cause of action. As a result, courts must look solely to the Convention's instruction as to the disposition of claims, which, in turn, requires interpretation of the text of the governing instrument or instruments and their legislative history and intent.¹⁰ Further, since it is an international treaty, the "post ratification understanding of the contracting parties" may also be considered in interpreting its provisions. Somewhat complicating these principles is the fact that the French text of the Warsaw Convention is the official text, as it was the one ratified and adopted by the United States Senate.¹¹

The Warsaw Liability Scheme for Personal Injuries

Under Warsaw's liability scheme, a passenger can recover damages for any injury or death if the following is established: (a) the claimant was a passenger of an international flight; (b) the claimant suffered an "accident;" (c) the accident occurred aboard the international flight or in the course of embarking or disembarking the international flight; and (d) the accident caused the passenger to suffer "death, wounding, or bodily injury." Warsaw also provided for two primary defenses, namely contributory negligence on the part of the claimant and carrier exoneration where it undertook "all reasonable measures" to avoid the accident. Finally, the monetary limit could be broken by showing that the carrier engaged in willful misconduct. A review of the necessary elements of a cause of action under the original Warsaw and the two primary defenses is set forth below.

Jurisdiction

Jurisdiction under the Convention is set out in Article 28 and is limited to four forums: the country of the carrier's domicile or place of business, the country of destination or the country where the contract for air travel was made.¹² The intention was to ensure that claimants would not initiate suit in a forum that was inconvenient to the carrier. The absence of a provision allowing an injured passenger to bring suit in his or her domicile or permanent residence subsequently became a major issue of contention and has been a centerpiece in the various modern reform efforts. Noteworthy, and

5. *Warsaw Convention*, *supra* note 1, at art. 32. Article 32 prohibits any alteration of the Convention's jurisdictional provisions, even by agreement between passenger and an air carrier.

6. *See* Lowenfeld & Mendelsohn, *supra* note 4, at 499-500.

7. *Warsaw Convention*, *supra* note 1, at art. 29.

8. *Saiyed v. Transmediterranean Airways*, 509 F. Supp. 1167, 1169 (W.D. Mich. 1981) (discussing history).

9. *Seth v. British Overseas Airways Corp.*, 329 F.2d 302, 305 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964).

10. *See* *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167-69 (1999); *Zicherman v. Korean Airlines Co., Ltd.*, 516 U.S. 217, 221-28 (1996).

11. *See* *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991).

12. *Warsaw Convention*, *supra* note 1, at art. 28(1).

unlike the monetary cap, the jurisdiction provision cannot be altered even if agreed to by passenger and carrier.¹³

Passenger and International Travel

In order to prevail on a personal injury claim under Warsaw, the claimant must be a passenger on an international flight.¹⁴ A passenger is a person who has either paid for his transportation on the aircraft or is transported gratuitously.¹⁵ Individuals never accepted as passengers do not qualify, nor do airline employees traveling in the course of their employment.¹⁶ An "international flight" is defined as any transportation where the place of departure and the place of destination, according to the contract made by the parties, are located within two signatory countries.¹⁷ The domestic portion of international travel qualifies as international flight if both the passenger and air carrier are reasonably aware of the international nature of the transportation.¹⁸ Similarly, transportation "shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to ... [one] High Contracting Party."¹⁹

Accident

In the United States, "accident" has been defined as an "unexpected or unusual event or happening that is external to the passenger." An injury which results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft is not the result of an accident and therefore not compensable under Warsaw.²⁰ The leading case is the 1985 Supreme Court decision in *Air France v. Saks*.²¹ There, the High Court held that a passenger who suffered deafness in

one ear as a result of the depressurization of the passenger cabin during flight could not recover under Warsaw as she had not suffered an accident.²² It was undisputed that the pressure change within the cabin was not the result of any abnormal operation or malfunction of the plane. Instead, the injury was found to be the product of the passenger's own internal reaction to the normal operation of the aircraft.²³ The court made clear that an accident does not mean an "occurrence" and that "it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone."²⁴ It admonished that the definition was to be applied "flexibly," "after assessment of all the circumstances," and that the passenger need only prove "that some link in the chain was an unusual and unexpected event external to the passenger."²⁵

It has been traditionally held that Warsaw covers inherent risks to air travel. Hijackings and terrorist attacks have been found to be such risks.²⁶ A Warsaw accident has been also held to cover such injuries as those caused by the full recline of a seat when the claimant sought and was denied assistance by airline personnel,²⁷ a prick by a hypodermic needle missed by air maintenance personnel,²⁸ a stewardess' application of an overly hot compress,²⁹ contact by a piece of galley equipment that had broken,³⁰ a spill of hot coffee,³¹ and a slip and fall on water on steps into the airplane.³² No "accident" has been found where the passenger claimed an injury as a result of a landing,³³ prolonged sitting due to delay,³⁴ attempting to avoid a sleeping passenger,³⁵ or the passenger's own excessive consumption of alcohol.³⁶

Significant debate remains as to whether an "accident" under Warsaw requires there be some connection to the *abnormal operation* of the aircraft; whether it includes actions or conduct of fellow passengers;

13. *Id.* at art. 32.

14. *Id.* at art. 1(1).

15. *Id.*

16. *See* Sulewski v. Federal Express Corp., 933 F.2d 180, 185 (2d Cir. 1991).

17. *Warsaw Convention*, *supra* note 1, at art. 1(2).

18. *Manion v. American Airlines, Inc.*, 17 F. Supp. 2d 1, 4 (D.D.C. 1997).

19. *Hermano v. United Airlines, Inc.*, 1999 WL 1269187, #3 (N.D. Cal. 1999) (quoting *Warsaw Convention*, *supra* note 1, at art. 1(3)); *Sotheby's v. Federal Express Corp.*, 2000 WL 628708 (S.D.N.Y. 2000)

20. *Air France v. Saks*, 470 U.S. 392, 404-05 (1985).

21. *Id.*

22. *Id.* at 406

23. *Id.* at 395.

24. *Id.* at 399.

25. *Id.* at 405.

26. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33-34, 37-38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Evangelinos v. Trans World*

Airlines, Inc., 550 F.2d 152, 156 (3rd Cir. 1977).

27. *Schneider v. Swiss Air Transp. Co., Ltd.*, 686 F. Supp. 15, 17 (D. Me. 1988). *Compare* *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 202 (D. Mass. 1998).

28. *Waximan v. C.I.S. Mexicana De Aviacion, S.A.*, de C.V. 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998).

29. *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141-42 (2nd Cir. 1998).

30. *Gilbert v. Pan Am World Airways, Inc.*, 21 Av. Cas. (CCH) 18, 177 (S.D.N.Y. 1989).

31. *Lugo v. American Airlines, Inc.*, 686 F. Supp. 373, 375 (D.P.R. 1988).

32. *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 (9th Cir. 1993).

33. *Salce v. Aer Lingus Airlines*, 19 Av. Cas. (CCH) 17, 377 (S.D.N.Y. 1985).

34. *Margrave v. British Airways*, 643 F. Supp. 510, 512 (S.D.N.Y. 1986).

35. *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 884 (5th Cir. 1996).

36. *Padilla v. Olympic Airways*, 765 F. Supp. 835, 838 (S.D.N.Y. 1991).

whether it includes medical emergencies involving a passenger's preexisting medical condition; and whether it encompasses injuries related to security measures like searches. Up to now, the debate has centered upon whether a restrictive or expansive interpretation is to be accorded and whether the particular injury or event was intended to be covered under the liability scheme. As set forth below, there have been efforts to change the term accident to "event," which would greatly expand an international carrier's liability and which proposals have so far been rejected. The historical context, however, supports the notion that a fundamental aim of the Convention was to address those risks that are characteristic of air travel and not to impose absolute liability for any harmful occurrence.³⁷

Embarking or Disembarking

The Warsaw scheme also requires that the accident or injury take place on board the aircraft or during the process of embarking or disembarking. The sound majority of the courts have traditionally construed embarkation or disembarkation somewhat narrowly.³⁸ Indeed, the First Circuit requires that there be a close "temporal and spatial relationship" with the international flight.³⁹ A three-part inquiry is applied which includes examination of the passenger's activity at the time of the injury, his or her whereabouts when injured, and the extent to which the carrier was exercising control at the moment of injury.⁴⁰ According to the First Circuit, a "tying" concept is also important for injuries related to boarding operations, in that for Article 17 liability to attach, "the passenger must not only do something that, at the particular time, constitutes a necessary step in the boarding process, but also must do it in a place not too remote from the location at which he or she is slated actually to enter the designated aircraft."⁴¹

Courts have held that where the injury occurred after the passenger surrendered his or her ticket, passed through passport control and queued up at the departure gate; the passenger was sufficiently in the embarkation process to meet Article 17.⁴² Article 17 has been held inapplicable where the passenger had deplaned and the accident occurred in a common passenger corridor of the airport,⁴³ and, in three First Circuit cases, where

the passengers were injured after traveling by bus or on foot from the aircraft to the terminal,⁴⁴ where the passenger was injured while proceeding on an escalator in the terminal's common area, a considerable distance from the departure gate and before any actual embarkation was possible,⁴⁵ and where the passenger had walked from the airplane to the baggage delivery area.⁴⁶

Injury

Liability under Article 17 requires that the international passenger sustain "death, wounding, or bodily injury." The definition and contours of the requisite "bodily injury" has long been subject to litigation and disagreement among the courts. In 1991, the Supreme Court in *Eastern Airlines v. Floyd*⁴⁷ resolved some of the long-standing debate by holding that Article 17 does not permit recovery for purely mental or psychological injuries. The court did so after examining the applicable law, history and purposes of the original convention, concluding that the "bodily injury" language was intended to have a "narrow meaning excluding purely mental injuries," the purpose being "to limit the types of recoverable injuries."⁴⁸ According to the court in *Floyd*, "bodily injury" requires physical injury or physical manifestation of injury to be compensable.⁴⁹

The lingering debate is whether a passenger can recover for mental injuries which are accompanied by physical injuries, an issue expressly left open by *Floyd*. Courts are split on the issue, with some allowing for complete recovery for all emotional distress damages if accompanied by physical injuries, and others limiting recovery for emotional distress damages to that which flows from the physical injury.

Compensable Damages

The Warsaw Convention does not define what damages are recoverable to an injured claimant. The only reference is Article 17's wording that the carrier is liable for "damage sustained." Further, and importantly, Article 24 provides that an action for damages under Article 17 can only be brought subject to the conditions and limits set out in the Convention, "with-

37. Daniel Goedhuis, *National Air Legislations and the Warsaw Convention*, The Hague 200 (M. Nijhoff 1937).

38. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 316 (1st Cir. 1995).

39. *Id.* at 317.

40. *Id.*; *Evangelinos*, 550 F.2d at 155; *Day*, 528 F.2d at 33-34.

41. *McCarthy*, 56 F.3d at 317.

42. *Day*, 528 F.2d at 33.

43. *Maugnie v. Campagnie Nationale Air France*, 549 F.2d 1256, 1262

(9th Cir.), *cert. denied*, 431 U.S. 974 (1977).

44. *Martinez Hernandez v. Air France*, 545 F.2d 279, 282 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

45. *McCarthy*, 56 F.3d at 317-18.

46. *MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971).

47. 499 U.S. 530 (1991).

48. *Id.* at 542, 543.

49. *Id.* at 552.

out prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." Substantial conflict developed over whether compensable damages under the Convention should be determined by domestic law and, if so, which domestic law.⁵⁰

Debate also ensued as to whether punitive damages were available. Up until the recent intercarrier agreements and the Montreal Convention of 1999, courts were conflicted, with a majority of the more modern decisions holding that punitive damages are not recoverable.⁵¹

Contributory Negligence

The carrier can likewise either reduce or avoid liability depending upon local law (i.e., particular country or state) by establishing that the injured party was contributorily negligent.⁵² The burden of proof is on the carrier to establish contributory negligence, and the offset is not available where the carrier failed to comply with the Convention's ticket notification requirements or where it engaged in willful misconduct.

All Reasonable Measures Defense

The carrier's only complete defense under the original Warsaw scheme is Article 20(1), which, prior to its abolition through certain later modifications, provided:

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.

This provision was interpreted to require the carrier to establish that it took all reasonably available measures which were reasonably calculated to prevent the loss. The carrier is obligated to prove that the accident was caused by something beyond its control. Without doubt, this is a difficult undertaking and has rarely been successfully invoked by a carrier in defense to an Article 17 claim for damages. Indeed, almost everything that takes place during air transportation is within the control of some agent of the carrier. Further, if the carrier cannot prove the cause of the acci-

dent, then it cannot rely on this defense. In essence, if the carrier cannot even show the cause of the accident, it will not be able to prove it took all reasonable measures to avert it.⁵³

Monetary Cap and Willful Misconduct

Under the original Convention, recoverable damages are capped at \$8,300.00. This cap could not be exceeded unless the particular air carrier had specially contracted with the passenger to pay a higher amount or it could be shown that the accident was the result of the carrier's willful misconduct.⁵⁴ The original Convention did not define willful misconduct.⁵⁵ Courts subsequently interpreted the term consistently with the common law understanding,⁵⁶ i.e., "the intentional performance of an act with knowledge that the ... act will probably result in injury or damage or the intentional performance of act in such a manner as to imply reckless disregard of the probable consequences."⁵⁷ The willful misconduct component became a heated point of litigation as it was the only means by which the cap could be broken. The lengthy and costly litigation that resulted placed the issue in the spotlight, and the provision was later changed as part of the recent reform efforts.⁵⁸

Choice of Law

The Warsaw Convention does not set forth the general choice of law governing the size and scope of damages. The Convention does set forth the place of suit as the governing law for contributory negligence, standing, and calculation of time limits. As to determining damages, it is left to the conflict of law rules of the court where the suit is brought. The lack of a clear and uniform rule governing the applicable law as to the determination of damages remains a heated topic of debate.

Exclusivity

Unlike the new Montreal Convention of 1999, the original Convention is silent as to whether it provides an exclusive remedy. Not surprisingly, courts split over the issue of whether claimants could resort to state or federal based claims for injuries or incidents arising

50. *In re Air Crash Disaster at Gander, Newfoundland* on Dec. 12, 1985, 684 F. Supp. 927, 933 (W.D. Ky. 1987).

51. *In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 928 F.2d 1267, 1273 (2nd Cir.), cert. denied, 502 U.S. 920 (1991), overruled on other grounds by *Zicherman*, 516 U.S. at 229.

52. *Warsaw Convention*, supra note 1, at art. 21.

53. Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* (Martinus Nijhoff 1988).

54. See *Warsaw Convention*, supra note 1, at arts. 22(1), 25(1).

55. *Id.*

56. *In re. Air Disaster at Lockerbie*, 37 F.3d at 812.

57. *Koirala v. Thai Airways Intern., Ltd.*, 126 F.3d 1205, 1209 (9th Cir. 1997) (citation omitted).

58. Matthew R. Pickelman, *Draft Convention for the Unification of Certain Rules for International Carriage By Air: the Warsaw Convention Revisited for the Last Time*, 64 J. AIR L. & COM. 273, 275-76 n.9 (1998).

during international flights. Indeed, many courts addressing the issue found that the original Convention did not preclude resort to alternative state or federal based remedies.⁵⁹

In January, 1999, however, the Supreme Court held that the Convention provided for an exclusive remedy and that claimants could not resort to state or federal based remedies even where the incident aboard the international flight did not constitute an "accident" or the claimant did not suffer a "bodily injury" as defined and interpreted under Article 17.⁶⁰ It is too early to gauge the effect of this ruling, although courts may be more inclined to expansively interpret the breadth of "accident" and "injury" under Article 17 to ensure a remedy for the claimant. As it stands, if the incident or event at issue took place during an international flight or in the process of embarking or disembarking from an international flight, the only remedy is under the Convention.

Modifications to the Convention

Since its inception, there have been a number of modifications to the Convention primarily attempting to address and raise the liability limits. These modifications are referred to as the 1955 Hague Protocol, the 1966 Montreal Agreement, the 1971 Guatemala City Protocol, the Supplemental Guadalajara Supplementary Convention of 1961, the 1975 Montreal Protocols, the 1992 Japanese Initiative, the 1996 Intercarrier Agreement, and the more recent 1999 Montreal Convention. The centerpieces to these reform efforts have been the low liability limits, the time consuming and expensive litigation surrounding claimants' attempts to break the liability limits by showing willful misconduct on the part of the carrier, and the belief that the compensatory scheme should allow a passenger to be compensated according to his or her own country's laws.

A. The Hague Protocol of 1955

In 1955, a conference was held at the Hague to address the liability limits of Warsaw. Twenty-six

countries participated and put together the Hague Protocol.⁶¹ Under the Hague Protocol, the liability limits were doubled to 250,000 francs, or \$16,600.00.⁶² Also, a provision was added allowing recovery of litigation expenses according to local law and defining "willful misconduct" to mean intentional or reckless acts causing injury or death.⁶³ The United States did not adopt the Hague Protocol due to its dissatisfaction with the still low limits. One hundred and eleven countries are currently parties to the Hague Protocol.⁶⁴

B. The Guadalajara Supplementary Convention of 1961

In 1961, another international convention was held in Guadalajara. The result was an amendment to Warsaw to bring all carriers of an international flight (actual or contracting) within the purview of Warsaw.⁶⁵ The actual and contracting carrier would be different many times in charter, interlining or package holiday travel. The Guadalajara Convention made the contracting carrier jointly and severally liable with the actual carrier and subject to the Warsaw limits and rules.

C. The 1966 Montreal Interim Agreement

In 1965, the United States, dissatisfied with the liability limits, invoked Article 39 of the Convention and filed a notice of its intent to denounce the Convention.⁶⁶ As a result, a total of 60 countries participated in a conference in Montreal, Canada in February, 1966. At that conference, the United States was seeking limits of \$100,000.00 per passenger, which was felt by many other countries to be excessive. One day before the denunciation was to become effective, a compromise was brokered. Namely, an intercarrier agreement was formed increasing the limits to \$75,000.00 per passenger for all carriers servicing the United States.⁶⁷ In addition, the participating carriers agreed to waive the "all necessary measures" defense provided by Article 20 and to include notice of the new liability limits on airline tickets. The basis for the agreement was Article 22(1), which allows carriers by

59. *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997), *cert denied*, 522 U.S. 111 (1998); *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3rd Cir. 1984), *cert denied*, 470 U.S. 1059 (1985), *abrogated by El Al Istael Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999); *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1997), *rev'd*, 525 U.S. 155 (1999).

60. *Tseng*, 525 U.S. at 176.

61. 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*), *reprinted in IATA, International Aviation Documents* (1999) (hereinafter *IATA, Aviation Documents*).

62. *Hague Protocol*, *supra* note 61, at art. XI.

63. *Id.* at art. XIII.

64. *Hague Protocol*, *supra* note 61 *reprinted in IATA, Aviation Documents*, *supra* note 61 at 116.

65. Guadalajara Convention of 1961, *reprinted in IATA, Aviation Documents*, *supra* note 61 at 45.

66. Article 39 allows for any of the High Contracting Parties to denounce the Convention by giving notice to the Polish Government. Denunciation takes place six months thereafter. *See also* C.A.B. Order E-22984 (Dec. 15, 1965).

67. The Agreement applies to any international air travel that has a place of departure, agreed destination, or agreed stopping place in the United States. *See* 14 C.F.R. §203 (1999).

special contract to raise the liability limits, which is accomplished by the carrier filing tariffs raising the limit of liability accordingly.

The Montreal Interim Agreement of 1966 remains in force today to the extent not usurped by the International Aviation Transport Association Intercarrier Agreements. Nonetheless, it applies only to flights with a point of origin, destination, or an agreed stopping point in the United States.⁶⁸ Further, pursuant to Article 25 of Warsaw, the new limit set by the Montreal Interim Agreement could be broken if the passenger could establish reckless or willful conduct of the carrier.

D. The Guatemala City Protocol of 1971

The United States continued its efforts to raise the liability limits, viewing the earlier Montreal Agreement as an interim, non-governmental provision. The Guatemala City Protocol of 1971⁶⁹ was signed by 21 countries including the United States and made the following changes: (a) increased the liability limits to approximately \$100,000.00;⁷⁰ (b) established absolute liability for injury or death up to the \$100,000.00 limit, which could not be overcome by a showing of willful misconduct;⁷¹ (c) allowed for recovery of litigation costs including attorney's fees if allowed for by the national law and if an air carrier refused to settle a claim within six months of receiving notice;⁷² (d) allowed jurisdiction to be had where the passenger was domiciled or had permanent residence, if the carrier had a place of business there;⁷³ and (e) allowed any country to create a supplemental compensation plan, funded by passenger contributions, and payable for injury or death to the passenger in amounts exceeding the absolute limit of \$100,000.00.⁷⁴

Noteworthy was the additional provision requiring carriers to compensate for any "event" as opposed to "accident" in Article 17, thereby greatly expanding a carrier's compensatory obligation.⁷⁵ Article 17 was also amended by the signatories to the Guatemala con-

vention to provide that the carrier was exempt from liability if the death or injury to the passenger resulted "solely from the state of the health of the passenger."⁷⁶

The governing Nixon administration never submitted the Protocol to the Senate for ratification due to the Protocol's linking the liability limits to the gold standard.⁷⁷ The Guatemala Protocol has never been in force as it has never been ratified by the necessary 30 countries.⁷⁸

E. The 1975 Montreal Protocols

The Guatemala Protocol was followed by the unsuccessful Montreal Protocols of 1975.⁷⁹ Four Protocols were drafted, with Protocol Nos. 1 and 2 being technical in nature. Protocol No. 3 incorporated the Hague and Guatemala provisions (absolute liability with an unbreakable limit, a settlement inducement clause and supplemental compensation plan) and substituted "SDRs" (Special Drawing Rights) for the gold standard.⁸⁰ The SDR was created by the International Monetary Fund (IMF), which was concerned about the supply of gold and the United States dollar to meet world demand. The SDR currency unit is based upon or calculated on the currencies of France, the United States, Germany, England, and Japan. The Protocol set a 100,000 SDR limit (approximately \$117,000.00 at that time) and included the Guatemala supplemental compensation plan funded by passenger contributions.⁸¹ The use of the SDR in the Protocol addressed concerns over the failure of the original Convention to consider the effects of inflation.

Protocol No. 4 primarily concerned the simplification of rules pertaining to cargo liability, although it changed Article 25 governing when the established limit could be broken. Instead of willful misconduct, it identified an "act or omission" of the carrier or its agents committed "with intent to cause damage or recklessly and with knowledge that damage would result" as the proof needed to escape the liability limit.⁸² Protocol No. 4 likewise amended Article 24,

68. Pursuant to 14 C.F.R. §203 (1999), all carriers operating to and from the United States are deemed to be parties to the Montreal Interim Agreement.

69. 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 (hereinafter *Guatemala City Protocol of 1971*), reprinted in IATA, *Aviation Documents*, *supra* note 61 at 140.

70. *Guatemala City Protocol of 1971*, *supra* note 69, at art. VIII.

71. *Id.* at art. VI.

72. *Id.* at art. VIII(3).

73. *Id.* at art. XII.

74. *Id.* at art. XIV.

75. *Id.* at art. IV.

76. *Id.*

77. Nicolas M. Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 ANNALS OF AIR & SPACE L. 151, 158 (1983).

78. It was only ratified by eleven countries.

79. Montreal Protocol Nos. 1, 2, 3, and 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 (hereinafter *Montreal Protocols*), reprinted in IATA, *Aviation Documents*, *supra* note 61 at 117-26, 147.

80. *Montreal Protocol No. 3*, art. IV.

81. Currently, 100,000 SDRs is approximately \$130,000.00.

82. *Montreal Protocol No. 4*, art. 25.

making expressly clear that the Convention precluded passengers from bringing actions under local law when they cannot establish air carrier liability under the Treaty.

The Montreal Protocols of 1975 lingered in Senate subcommittees until 1983, when they finally reached the Senate for vote.⁸³ The Senate failed to ratify the Protocols due to the Senate's preference for unlimited liability and dissatisfaction with the supplemental insurance plan (i.e., Protocol No. 3). However, in September of 1998, the United States ratified Protocol No. 4, which entered into force in March, 1999.⁸⁴ It was ratified because of the widespread adoption by most carriers of the IATA Agreements in 1996 wherein the carriers waived Warsaw Article 22(1)'s "all reasonable measures" limitation of liability. The new IATA Agreements and the absence of Protocol No. 3 paved the way for its adoption, as there was less concern over any diminution of passengers rights.⁸⁵ Moreover, the Senate was not concerned with the change to Article 25, as it was informed by the State Department and the Department of Transportation that the new language when applied in the United States would not change already existing interpretations of Article 25 in that case law had established that the new language was the common law definition of "willful misconduct" that already existed.⁸⁶

Modern Attempts to Modernize Warsaw

A. Early Unilateral Attempts to Increase Limitation

In the '70s and '80s, there were various efforts by individual countries to modernize the Warsaw limitations. Indeed, by 1981 Britain required all British airline license holders to provide a minimum of 100,000 SDRs as a liability limit to each passenger.⁸⁷ Other agreements also emerged creating increased liability limits in excess of the Warsaw limitations not involving the United States (i.e., non-Montreal Agreement flights). Italy increased to 100,000 SDRs in 1988, and British Airways unilaterally provided for a limit of 130,000 SDRs.⁸⁸ By 1990, all Japanese airlines were voluntarily applying a limit of 100,000 SDRs.⁸⁹ With

limited exceptions, however, most non-U.S. carriers did not waive the benefits of the all necessary measures defense provided by Article 20. By 1995, the applicable limits ranged from \$75,000.00 in the United States, to \$350,000.00 in Australia, and to \$150,000.00 in most of Europe.⁹⁰

B. The Japanese Initiative of 1992

The failure of the Montreal Protocols of 1975 to gain acceptance and the 1985 crash of a Japan Air Lines Boeing 747 which killed 529 people caused 10 Japanese airlines to voluntarily waive the Convention's limits under Article 22. Specifically, in November, 1992, the 10 Japanese carriers eliminated the liability limits under the Convention and restricted application of the Article 20(1) "all necessary measures" defense to portions of claims in excess of 100,000 SDRs.⁹¹ As a result, a two-tiered system was created with absolute liability up to 100,000 SDRs and unlimited liability under a presumption of negligence. However, the concern over a drastic increase in insurance rates prevented other airlines from following suit.⁹²

C. IATA Intercarrier Agreement

IATA is a private organization whose membership is comprised of international air carriers and whose purpose is to "promote safe, regular, and economic air transport."⁹³ In 1994, IATA moved to obtain agreement from its member airlines to raise, by intercarrier agreement, the liability limits under Warsaw for passenger death or injury. The participating air carriers desired a carrier-based interim agreement rather than a governmental resolution, as the world governments had failed to ratify the prior Guatemala and Montreal Protocols.

The IATA effort was intended not only to raise the monetary limits in keeping with the times, but to likewise eliminate the willful misconduct provision which had proved costly and time-consuming to resolve. At the forefront of debate and attention was whether the liability scheme should be amended to allow a claimant passenger to resort to his home country as the governing law as to damages. On October 31,

83. Matte, *supra* note 77 at 159.

84. Lee S. Kreindler, *Aviation Accident Law* §10.05[5], at 10-91 (Matthew Bender June, 1999).

85. *Id.*

86. *Id.* at 10-92 (citing S. Exec. Rep. No. 105-20, at 15 (1998)).

87. Federico Ortino & Gideon R.E. Jurgens, *The IATA Agreements and the European Regulation: the Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air*, 64 J. AIR L. & COM. 377, 386 (1999).

88. *Id.* at 387 n.38.

89. *Id.* (citation omitted).

90. *Id.* at 387.

91. Naneen K. Baden, *The Japanese Initiative on the Warsaw Convention*, 61 J. AIR L. & COM. 437, 453-56 (1996).

92. Andrea L. Buff, *Reforming The Liability Provisions of the Warsaw Convention: Does The IATA Intercarrier Agreement Eliminate The Need to Amend The Convention?*, 20 FORDHAM INT'L L.J. 1768, 1791 (1997).

93. For more information see their website at <http://www.iata.org>.

1995, after previously obtaining antitrust immunity from the United States Department of Transportation (DOT), IATA adopted a resolution entitled the "Inter-carrier Agreement on Passenger Liability."

The IATA Inter-carrier Agreement is comprised of three related but separate agreements: (1) the IATA Inter-carrier Agreement on Passenger Liability (generally known as IIA or the Umbrella Accord); (2) the IATA Agreement on Measures to Implement the IATA Inter-carrier Agreement (generally known as the MIA or the IATA Implementing Agreement); and (3) the Air Transport Association's⁹⁴ Provisions Implementing the IATA Inter-carrier Agreement (generally known as IPA). The agreements, while separate, are intended to operate in conjunction with one another.

1. *The IATA Umbrella*

The IATA Umbrella Accord is an inter-airline agreement that finds its basis in Article 22(1) of the Convention and does not need governmental approval for enforcement. The Umbrella Accord—which is essentially a statement of purpose—provides the following:

(a) that the signatory carriers agree to take action to waive all liability limitations on recoverable compensatory damages in Article 22(1) of Warsaw, so that recovery may be determined and awarded by reference to the law of the domicile of the passenger;

(b) that the carriers are entitled to all available defenses under Warsaw (i.e., Article 20(1) and Article 21), but may waive such defenses, including the waiver of any defense up to a specified monetary amount;

(c) that carriers reserve the right to seek indemnification or contribution from other responsible parties; and

(d) that participating carriers will urge non-participating carriers to adopt the provisions of the Umbrella Accord.⁹⁵

This accord was a compromise among the IATA members, giving them the option of adopting a two-tiered system akin to the Japanese initiative — i.e., unlimited and absolute liability up to a certain amount. It does not require absolute liability but only affords the carrier the option of waiving the Article 20(1) defense (i.e., no liability if carrier took "all necessary measures" to avoid the damage or if it was impossible to do so) up to a sum certain. Further, signatory airlines

only agreed "to waive the limitation so that recoverable compensatory damages may be determined by reference to the law of the domicile of the passenger."⁹⁶

2. *IATA Implementation Agreement (MIA)*⁹⁷

The IATA Implementation Agreement (MIA) is intended to implement the Umbrella Accord by having signatory carriers incorporate into their conditions of carriage and tariffs the following:

(a) waiver of Warsaw's Article 22(1) liability limitation as to any compensatory damages under Article 17 of Warsaw;

(b) a waiver providing for strict liability with respect to any claim under Article 17 which does not exceed 100,000 SDRs unless, at the option of the carrier, the 100,000 is raised for some routes, if authorized by the government to which the routes pertain;

(c) at the option of the carrier, the carrier agrees that compensatory damages may be determined by the law of the domicile or permanent residence of the passenger; and

(d) neither the waiver of the limits nor the waiver of the defenses shall be applicable to claims made by public social insurance or similar bodies.

3. *IPA Implementing Agreement*

The IPA Implementing Agreement,⁹⁸ adopted by the Air Transportation Association ("ATA"),⁹⁹ was designed to implement the Umbrella Accord for its member carriers and offer a means of discontinuing a signatory carrier's participation in the 1966 Montreal Interim Agreement. Similar to the IATA Implementing Agreement (MIA), the IPA requires signing carriers to incorporate into their tariffs the following:

(a) waiver of the Warsaw Article 22(1) defenses to any claim for compensatory damages arising under Article 17 of Warsaw;

(b) waiver of the Warsaw Article 20(1) defense with respect to that portion of the claim which does not exceed 100,000 SDRs;

(c) reservation of all other defenses under Warsaw and preservation of the right of recourse against any third party for contribution or indemnification; and

(d) agreement that the recoverable compensatory

94. The Air Transport Association of America (ATA) is a private organization of carriers primarily representing the interests of U.S. carriers.

95. IATA, *Aviation Documents*, *supra* note 61, at 51-53.

96. *Id.*

97. *Id.* at 55-56.

98. *Id.* at 57-59.

99. ATA is the trade association for the U.S. flag carriers.

damages may be determined by reference to the law of the domicile or permanent residence of the passenger.

The IPA also requires the carrier to furnish each passenger notice as to damage recovery under Warsaw and that its implementation constitutes withdrawal from the Montreal Interim Agreement. Unlike the MIA, the IPA requires signatory carriers to allow the law of the passenger's domicile to govern damages, if so selected by the passenger. All major United States carriers are signatories to the IPA, as it constitutes the "special contract" by which the U.S. carriers will implement the IATA and MIA into their conditions of carriage and tariff filings and thereby terminate their participation in the Montreal Interim Agreement of 1966.

As of February, 2000, the IATA Umbrella Agreement has 122 carrier signatories, while the MIA and IPA Implementing Agreements have 90 and 20 carrier signatories, respectively.

4. The IATA Liability Scheme

The three agreements result in the carrier's waiver of all limits of liability for passenger injury and death except for Article 20(1)'s "all necessary measures" defense for that portion of the claim exceeding 100,000 SDRs. There is thus no longer any requirement that the claimant establish willful misconduct in order to recover more than the established limits under Warsaw. A passenger claimant is entitled to provable damages up to 100,000 SDRs on the basis of strict liability. The claimant can recover provable damages in excess of 100,000 SDRs if the carrier fails to establish that it took "all reasonable measures" to avoid the damage, or that it was impossible to take such measures. Significant also is that the new agreements allow the passenger to look to the law of his domicile or permanent residence in determining recoverable damages. The carriers are not subject to punitive damages and retain their "all reasonable measures" defense to claims over 100,000 SDRs.

Significantly, the standard for liability remains the same under IATA as under the original Warsaw scheme. Specifically, the IATA scheme leaves untouched the need to establish an international flight, an "accident" on board or during embarking or disembarking, cau-

sation, and bodily injury. Indeed, the signatories rejected the term "event" adopted by the signatories to the Guatemala Convention. Further, a carrier can still reduce or even avoid liability — depending upon national law — based on the passenger's contributory negligence.

Troublesome Issues Under the IATA Scheme

The IATA scheme was readily embraced by most carriers and many commentators, as it updated the long outdated limits and incorporated the SDR format, which provides a globally fairer means of compensation. It likewise discarded the willful misconduct component under Warsaw, which is hoped to greatly reduce litigation costs.

Nonetheless, the IATA scheme has troublesome aspects. For instance the MIA makes the application of the law of the passenger's domicile an *option of the carrier*, while the IPA allows such law to apply at the *option of the passenger*. Further, given the three agreements, the scheme has only made matters more confusing in many respects. American carriers have signed all three, while many IATA carriers have signed the IIA and MIA but not the IPA. Consequently, there is a question as to which airlines have signed which agreements, resulting in a difference from carrier to carrier as to the applicability of the law of the passenger's domicile.

Further, there is the question of whether the IATA Agreements run afoul of Article 32 of the Convention. The IATA scheme is only contractual between airlines, and Article 32 bans any infringement of the rules provided for by the Convention, particularly those protecting passengers' rights. At issue are the waiver of liability, whether damages may be determined by the law of the passenger's domicile, and the fifth forum provisions of IATA.¹⁰⁰

Other problems with the IATA scheme concern Article 30(2) of Warsaw. This provision provides that "the passenger or his representative can take action only against the carrier who performed the transportation during which the accident occurred." As such, if a successive carrier is the carrier on which the accident happened, it may choose not to waive the limits if it is not a signatory to the Agreement.

Problematic as well is the fact that IATA does not

100. The waiver of liability does not appear to conflict with Article 32's prohibition because it protects passengers' rights, and the Convention clearly entitles the carrier and the passenger to agree to higher liability limits. As to the passenger's domicile for determining damages provision, there would appear to be no conflict, as the Convention does not contain a provision that specifies how damages are to be determined, is not an attempt to circumvent the liability regime of the Convention, and is otherwise not mandatory. Finally,

as to the fifth forum provision, there also does not appear to be a direct infringement of the Convention as the Convention does not preclude the addition of a jurisdictional forum and such an addition does not lessen passengers' rights. However, it has been noted that a fifth forum provision would run afoul of Article 32 where the resulting forum is a party not a signatory to Warsaw and lessens the carrier's liability.

include a fifth forum for jurisdiction — the court of the passenger's domicile. The lack of such a provision in the Convention has long resulted in criticism, as it is deemed unfair and unjust in that air accident victims should receive compensation according to the standard of their home country. Due to fear of non-U.S. airlines of U.S. jury awards, the additional forum was never agreed to or incorporated into IATA even on an optional basis. Accordingly, controversy remains as advocates of a fifth forum provision contend that the absence of such a provision is fundamentally unfair, especially if airlines do not adopt the law of the passenger's domicile as the law applicable to the determination of damages.

The more fundamental problem with the IATA scheme is that it is contractual and that it effectively establishes a no-fault system. As a contract, questions arise whether it can co-exist with the Warsaw Convention, especially the IATA provisions for arbitration and the additional jurisdictional forum. The contractual status shortcoming is further exemplified by the issue of whether a carrier will have a meaningful right of recourse against the manufacturer or airport. For instance, if a carrier pays a passenger damages under its terms and then seeks recourse from a third party like a manufacturer, the manufacturer may well take the position that such a payment was voluntary or a collateral source and not required by law, defeating any claim for contribution or indemnification. Even more fundamental is the fact that nothing prevents a carrier from suddenly opting out of the undertaking. A carrier's being bound by a private agreement is simply not the same as its being held to a legal obligation of a global international treaty.

The IATA scheme likewise establishes an essentially no-fault system. While it allows a carrier to escape liability for damages over the 100,000 SDR limit based on proof that it took all reasonable measures to prevent the accident or that it was impossible to take such measures, this "defense" has been gutted by judicial interpretation if not by its very terms. As mentioned, it has been held that while "all necessary measures" equates to "all reasonable measures," the carrier must show that it took all reasonable measures, not some.¹⁰¹ Indeed, some states have held that this defense is *ex contractu* not *tort*, and that a common carrier by contract "guarantees the safety of the passenger." This "defense" has, in fact, been rarely successful in defeating a passenger's claims. Given its illusory status, carriers have no real substantive defense to unlimited liability outside of the passenger's contributory

negligence. A no-fault system does not appear to be in the public's best interest insofar as it provides no incentive to provide high standards of safety and security, and also encourages claimants to seek damage trials, as they really have nothing to lose.

The European Community Regulation

Complicating the patch quilt of reform efforts is the European Community Regulation dating back to 1993 and recently amended in 1997. European community countries as well as Norway and Sweden were concerned about Warsaw's liability limits and whether the increased limits would have an adverse affect on aviation industry insurance premiums.¹⁰² Further, the European community was concerned about the success of the IATA scheme, given that it was a purely voluntary agreement, and desired that all air travel within the community be regulated by one standard, whether or not the flights were international. The IATA scheme only applied to international flights and left various options for the individual airline to choose.

After various conferences, proposals and amendments, the EC Regulation,¹⁰³ which is an intercarrier agreement, was adopted and contains the following provisions:

- eliminates liability limits altogether and imposes strict liability for damages up to 120,000 ECUs;
- requires carriers to pay to injured passenger or his surviving family a nonrefundable advance payment in an amount "as may be required to meet immediate economic needs on a basis proportional to the hardship suffered" and in the event of death, no less than 15,000 SDRs; and
- provides that any advance payment may be offset by any subsequent settlement.

Similar to the IATA agreements, the EC Regulation creates the unlimited and absolute (up to a certain amount) scheme, as did the Japanese Initiative and the IATA schemes. It eliminates the "all necessary measures defense" up to 100,000 SDRs but otherwise retains the ability of the carrier to be "exonerated" wholly or partly due to the negligence of the injured or deceased passenger. The EC Regulation further provides that non-EC carriers must inform passengers via their ticket that they are not covered by the EC Regulation. Further, the United Kingdom went so far as to render a carrier *criminally* liable if it fails to include the EC Regulation in its condition of carriage.¹⁰⁴ Also noteworthy is the fact that, unlike IATA, the EC Reg-

101. *See generally*, *Manufacturers Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964, 967 (S.D.N.Y.), *aff'd*, 573 F.2d 1292 (2d Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

102. Ortino & Jurgens, *supra* note 87, at 406-16.

103. IATA, *Aviation Documents*, *supra* note 61, at 73.

104. *Id.* at 76.

ulation does not contain a passenger's domicile provision or establish the applicable law governing damages, which could lead to forum shopping between the EC and IATA regimes. It also confirms the fundamental shortcoming of regulating carrier liability through private or regional legislation.

The EC Regulation became effective on October 17, 1998. However, the Regulation was challenged before the High Court of Justice in the United Kingdom as constituting an impermissible change to Warsaw without the consent of the signatory states. The court held that the Regulation "is in conflict with the Warsaw Convention and impedes the performance by member states of their obligations owed under the Convention to non-member states who are parties to it" and was thus held in suspense.¹⁰⁵

The Montreal Convention of 1999

On May 28, 1999, the Montreal Convention was opened for signature.¹⁰⁶ The Convention is the result of the efforts of the International Civil Aviation Organization¹⁰⁷ to reform the Warsaw Convention through amendment rather than intercarrier agreement. The primary focuses were increasing the existing limits of liability under Warsaw and having the changes or updates have the force and effect of an international treaty, as opposed to the more limited EC Regulation or contractual agreements like the IATA Agreements. By maintaining the main regime under Warsaw, the new Convention preserves the 60 years of established judicial precedents. The goals of the Convention are set forth in its text. They include "the need to modernize and consolidate the Warsaw Convention and related instruments" and recognition "that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests."¹⁰⁸ The Montreal Agreement is essentially the composition of the original Warsaw Convention and the subsequent protocols, namely, the Hague Protocol, the Montreal Protocol Nos. 3 and 4, the Guatemala City Protocol, and the Guadalajara Supplementary Convention of 1961.

Under the existing Warsaw regime, the liability limits are either \$8,300.00 or \$16,600.00, depending upon which instrument governs (i.e., the original Warsaw Convention or as modified by the Hague Protocol).

Under the special contracts of the Montreal Agreement of 1966 or the IATA Agreements, the liability limits are either \$75,000.00 or 100,000 SDRs, with liability being absolute up to those amounts.

The Montreal Convention of 1999 establishes a two-tiered liability regime similar to the IATA scheme. Specifically, the carrier is strictly liable, up to 100,000 SDRs, for death or injury of a passenger resulting from an "accident." The injured passenger bears the burden of establishing provable damages, and the carrier may only escape or reduce its liability based on the contributory negligence of the passenger. For provable damages over 100,000 SDRs, the carrier is liable based on fault—that is, it is not obligated to pay any damages in excess of 100,000 SDRs where the carrier establishes that the damage was not the result of its negligence or "wrongful act or omission," or was the result of the "sole" negligence or wrongful act or omission of a third party. The SDR limit is subject to review and revision every five years. This updating clause allows the signatory parties to implement adjustments in accordance with any economic changes.

Importantly, the Montreal Convention expressly adopts the fifth jurisdiction, in that in addition to the domicile of the carrier, the principal place of business of the carrier, the point of departure or point of destination, a plaintiff passenger has the option of filing and pursuing suit where he or she has his or her principal and permanent residence. However, this jurisdictional forum can only be invoked if the carrier provides services pursuant to a commercial agreement at such location and conducts such business from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.¹⁰⁹

Notably, the Convention incorporates the EC Regulation's advance payment component. Carriers must make advance payments to passengers in the event of death or injury to meet the passengers' "immediate economical need."¹¹⁰ The amount of the payment will be subject to national law and will be deductible from any future settlement or award.

The Montreal Convention also incorporates Montreal Protocol No. 4, which contained language rendering the Convention the exclusive remedy and precluding resort to state remedies.¹¹¹ This same provision also expressly excludes all non-compensatory damages, including punitives.¹¹²

The Convention did little to clarify whether "men-

105. *The Queen v. The Secretary of State For the Environment, Transport and the Regions* (Apr. 1999).

106. *IATA, Aviation Documents, supra* note 61, at 17.

107. ICAO is a specialized agency of the United Nations, first created in 1944 and headquartered in Montreal, Canada. For more information see their website at <http://www.icao.org/icao/>.

108. *IATA, Aviation Documents, supra* note 61, at 17.

109. *Id.*

110. *Id.*

111. *Id.* at 22, art. 29.

112. *Id.*

tal injury” is recoverable as a separate stand-alone damage. Instead, the conference recorded a common understanding as to the conditions and circumstances pursuant to which compensation of mental injury could be awarded, acknowledging that jurisprudence is still developing.¹¹³

Additional provisions pertaining to personal injury and death claims include:

- a two-year statute of limitations;
- inflationary adjustment based on the Consumer Price Indices of the SDR States;
- carriers may stipulate to higher limits or to no limits at all;
- carriers have right of recourse against third parties;
- carriers must submit proof of insurance; and
- all carriers, including successive and contracting, carriers are covered by the Convention.

The Convention requires ratification by 30 countries to come into force. A total of 50 signed the Convention at the conclusion of the conference. As of today, 65 states have signed the Convention, with two states — Belize and the former Yugoslav Republic of Macedonia — already ratifying the Convention. The proponents of the Convention hope for swift ratification and that the Convention will enter into force as early as 2001. In order to facilitate the swift ratification, the ICAO has provided all states with an administrative package, including model instruments of ratification.

Baggage, Cargo and Delay

While the primary focus of this article is the liability rule for personal injuries during international flight, it is important to recognize that the Convention sets forth two additional liability rules: one for damage to baggage or cargo, and the other for damages resulting from delay.

A. Baggage/Cargo Damage

As to baggage and cargo, the liability rule is again presumed liability:

The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of dam-

age to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.¹¹⁴

Transportation by air, in turn, is defined as the period during which the baggage or cargo are “in charge of the carrier.”¹¹⁵ The carrier can escape liability if it establishes that the damage or loss was caused by an error in piloting, handling of the aircraft including navigation and that, “in all other respects,” the carrier and its agents took “all necessary measures to avoid the damage.”¹¹⁶ The Convention further requires that an aggrieved passenger make a written complaint to the carrier within three days of receipt of the baggage, or seven days in the case of goods.¹¹⁷ These time limit provisions for written notice may be enlarged by the particular carrier’s tariffs. However, failure to comply with the notice provisions bars the claim absent a showing of fraud on the part of the carrier.

The original limits were 250 francs per kilogram (\$20.00 per kilogram, or \$9.07 per pound) for checked baggage and 5,000 francs (\$400.00) for carry-on, unless the passenger had made a “special declaration of the value [of the baggage] at delivery and ha[d] paid a supplementary sum if the case so require[d].” Notably, the limits could be overcome in two ways: (a) by demonstrating “willful misconduct” by the carrier; or (b) with regard to checked baggage, by demonstrating that the carrier fails to comply with Article 4.

Article 4 requires the carrier to ensure the baggage check contains, among other things, the number of the passenger’s ticket, the number and weight of the packages, and a statement that the transportation is subject to the rules relating to liability established by the Convention. Under the text of the Convention, the failure to comply prevents the carriers from utilizing any defense or limitation.¹¹⁸ Some courts have refused to strip the carrier of its limitation where the baggage check does not contain the weight of the baggage as required by Article 4. These cases hold that the weight may be based on the maximum allowable weight set forth in the carrier’s tariff,¹¹⁹ the rationale being that the omission of the weight of the baggage is a “technical” and “insubstantial” omission and that the purpose of the weight requirement is to enable passengers to calculate the amount recoverable from the carrier.¹²⁰ Other courts have held that where the passenger is a

113. Dr. Ludwig Weber (ICAO) presentation of Embry-Riddle Aeronautical College, Daytona Beach, Florida (Jan. 2000).

114. *Warsaw Convention*, *supra* note 1, at art. 18(1).

115. *Id.*

116. *Id.* at 20(2).

117. *Id.* at art. 26(2); *see Moses v. Air Afrique*, 2000 WL 306853 (E.D.N.Y. 2000) (actual notice may not substitute for formal notice).

118. *See, e.g., Sibens v. American Airlines, Inc.*, 913 F. Supp. 271, 277 (S.D.N.Y. 1996).

119. *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 160 (S.D.N.Y. 1996), *rev’d in part*, 122 F.3d 99 (2d Cir. 1997), *rev’d on other grounds*, 525 U.S. 155 (1999).

120. *Republic Nat’l. Bank of N.Y. v. Eastern Airlines*, 815 F.2d 232, 237 (2d Cir. 1987); *Spanner v. United Airlines, Inc.*, 1998 WL 196466, *4 (N.D. Cal. 1998), *rev’d* 177 F.3d 1173 (9th Cir. 1999).

“sophisticated” or a “commercial” traveler or shipper, the omission of weight in the baggage check would not defeat the carrier’s limitation under the Convention.¹²¹

The defenses and limits applicable to cargo and baggage claims have undergone certain modifications. As of March, 1999, for international carriers servicing the United States, the carrier’s presumed liability rule for damaged cargo and/or baggage remains. A carrier, however, can escape liability for cargo damage if it can establish contributory negligence, or that the loss or damage was caused by:

- (a) “an inherent defect, quality or vice” of the cargo;
- (b) defective packing of the cargo unrelated to the carrier;
- (c) act of war or armed conflict;
- (d) “an act of a public authority carrier in connection with the entry, exit or transit of the cargo;” or
- (e) the “negligence or other wrongful act or omission of the person claiming compensation.”¹²²

As to baggage, the defenses of contributory negligence and all reasonable measures remain.

The liability limits are currently 17 SDRs (\$22.10) per kilogram for cargo and 332 SDRs (\$431.60) per kilogram per passenger for carry-on luggage.¹²³ Again, an individual airline may provide for higher limits.

Under the proposed Montreal Convention of 1999, the carrier is liable for all loss of, or damage to, checked baggage if it was in the care of the carrier at the time and if the loss was not the result of an “inherent defect, quality, or vice” of the baggage.¹²⁴ As to unchecked baggage, the carrier is liable “if the damage resulted from its fault or that of its servants or agents.”¹²⁵ The Montreal Convention of 1999 leaves unchanged the liability rules and defenses as to cargo. The liability limits, in turn, are 1,000 SDRs (\$1,300.00) for loss or damage to baggage (absent special declaration) and 175 SDRs (\$227.50) per kilogram for cargo, subject to an airline’s providing higher limits if so desired.

B. Damages For Delay

The third and final liability rule under the Warsaw scheme governs claims based on delay. Article 19 provides:

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

The defenses remain the same as with passenger liability and baggage claims, i.e., “all necessary measures” and contributory negligence. Article 24(1) of the original Convention provides that in all delay cases “any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.” Accordingly, the same limits for baggage and personal injury apply to delay claims.

The Montreal Convention of 1999 left intact the liability rule and defenses for claims of delay, but did establish new limits: 1,000 SDRs (\$1,300.00) for baggage, 175 SDRs (\$227.50) per kilogram for cargo, and 4,150 SDRs (\$5,395.00) per passenger for passenger claims. Again, these limits can be overcome upon a showing that the damage resulted from an intentional or reckless act or omission of the carrier.

Delay claims have been found to be actionable only when they relate to the performance of the international transportation. For instance, “bumping” at the airport prior to embarkation is not actionable, as it results in total non-performance of the contract of carriage rather than mere delay.¹²⁶ The scope of recoverable damages under Article 19 remains uncertain. It has been held that incidental damages arising out of the delay itself (i.e., rental, hotel accommodation, taxis, etc.) are recoverable as is any physical injury, economic loss, and even inconvenience. Some courts have also allowed recovery for associated mental anguish accompanied by physical manifestations such as nausea and diarrhea so long as they were caused by the delay itself.¹²⁷

Many courts apply the general contract rule that recoverable damages include all “contemplated and foreseeable damages for the failure to timely transport the passenger.”¹²⁸ One recent decision applied this rule and denied a claim for a lost business deal resulting from a delay by finding that at the time the airline issued the ticket it had no knowledge of the reasons for the claimant’s travel and no reason to foresee that a dispute regarding the proposed business deal would occur.¹²⁹

121. *Republic Nat’l. Bank of N.Y.*, 815 F.2d at 237; *Sibey v. American Airlines*, 913 F. Supp. 271 (S.D. N.Y. 1996).

122. Warsaw Convention as Amended by Protocol No. 4, art. 18(3), reprinted in *IATA Aviation Documents*, supra note 61, at 6.

123. As of May 17, 2000, 1 SDR equated to approximately \$1.30. All conversions of the SDR in this article are based on the \$1.30 conversion rate.

124. Montreal Convention, 1999, art. 17(2), reprinted in *IATA Aviation Documents*, supra note 61, at 20.

125. *Id.*

126. *See Wolgel v. Mexicana Airlines*, 821 F.2d 442, 444-45 (7th Cir.), cert. denied, 484 U.S. 927 (1987).

127. *Daniel v. Virgin Atlantic Airways Ltd.*, 59 F. Supp. 2d 986, 992-94 (N.D. Cal. 1998).

128. *Id.* at 993 (citing *Pakistan Arts & Entertainment Corp. v. Pakistan Int’l Airlines Corp.*, 660 N.Y.S. 2d 741, 744 (N.Y. App. Div. 1997)).

129. *Peralta v. Continental Airlines, Inc.*, 1999 WL 193393 *2 (N.D. Cal. 1999).

The New Regime

Given the multiple instruments presently comprising the Warsaw system, the practitioner must initially determine which instrument or instruments govern. This determination depends upon the particular carrier, the country of the carrier's domicile or place of business, and the date of the incident. For instance, for claims arising aboard flights to or from the United States, there are presently three primary sets of instruments governing potential claims: (1) the original Convention as amended by the Montreal Interim Agreement of 1966; (2) the original Convention as amended by the Montreal Interim Agreement of 1966 and Montreal Protocol No. 4; and (3) the IATA Agreements.

The original Convention as amended by the Montreal Interim Agreement of 1966 would govern covered claims which arise prior to March, 1999, where the particular carrier or carriers at issue have not signed onto the IATA Agreements. For those covered incidents and claims arising after March, 1999, and where the carrier has not signed onto the IATA Agreements, the original Convention as amended by both the Montreal Interim Agreement and Montreal Protocol No. 4 would apply. If the carrier at issue is a signatory to the IATA Agreements, then the IATA scheme would be applicable. Indeed, by signing onto the IATA Agreements, international carriers servicing the United States are no longer bound by the Montreal Interim Agreement of 1966.

In those cases not including international flight to or from the United States, the practitioner needs to identify what particular Warsaw instrument the carrier's country has adopted and/or whether the carrier is a signatory to the IATA Agreements. Further, the original Convention allows carriers to accept higher limits of liability by special contract, and many carriers have done so. For instance, Australia has adopted a 350,000 SDRs limit and British Airways 130,000 SDRs. Once the particular governing instrument or instruments as well as applicable limits are identified, an application of the facts to the governing liability rule, defenses and jurisdiction and related rules can take place. Obviously, the practitioner needs to confirm that the flight at issue was "international."

Remaining Issues

Importantly, efforts of both the IATA and Montreal Convention of 1999 have been exalted as major accomplishments in the modernization of the 70-year-old Warsaw scheme. Without question, they both establish fairer compensation limits, close the gap between available damage recovery of domestic and foreign

travel, and move closer to establishing a more unified system of compensation and of coping with the complexities of modern international aviation. Both schemes incorporate the SDR as the appropriate monetary value and eliminate the need to establish "willful misconduct" to break the monetary cap which has, up to now, proven to be both costly and time consuming to litigate and resolve.

The Montreal Convention of 1999 is particularly noteworthy, as it incorporates the various and prior protocols and conventions into one instrument, thus unifying and streamlining the existing patchwork of instruments governing international passenger liability. It will have the force of international law as opposed to mere contract, obviating many of the issues under the IATA format, including a carrier's right of recourse against negligent or responsible third parties and foreclosing any challenge to the legality of the fifth jurisdictional forum. Further, the Montreal Convention of 1999 has replaced the "all necessary measures" language with the concept of negligence. As such, a clear fault-based system is at least in place for damage claims in excess of 100,000 SDRs, thus leaving an incentive for carriers to maintain standards of safety and security.

Despite the improvements brought by the IATA scheme and the Montreal Convention of 1999, significant issues remain. For instance, until the Montreal Convention of 1999 is adopted, IATA's no-fault system controls, giving little incentive for claimants to settle and providing no incentive for carriers to maintain high levels of safety standards. Further, absent a global-wide system, the goal of uniformity for international air travel is impossible to obtain. Although IATA eliminates liability limits, answers to questions about applicable law, jurisdiction, mandatory insurance, notice, defenses, up-front payments and indemnification rights will differ depending upon the governing regime and such factors as the nationality of the carrier or the destination of the flight.

Further, both the IATA and Montreal Convention of 1999 schemes fail to address the various outstanding issues that have emerged in judicial interpretation of the basic Warsaw standard of liability set forth in Article 17. Indeed, the language of Article 17 remains untouched from its original version, and it appears little attention was paid to the issues that have arisen and remain in applying it to particular disputes. As set forth above, courts have long debated over the meaning and scope of the term "accident" and the type and measure of recoverable damages. For instance, there is substantial dispute as to whether an Article 17 accident requires that there be some connection to an

abnormal operation of the aircraft,¹³⁰ whether it includes actions or torts of fellow passengers; whether it encompasses medical emergencies involving a passenger's preexisting medical condition;¹³¹ and whether it includes injuries related to security measures such as searches.¹³² Courts have also been inconsistent in determining the scope of embarking and disembarking set forth in Article 17.¹³³

In its purest form, the debate centers upon whether courts are to take a restrictive or expansive view of Article 17. Notwithstanding the Supreme Court's direction in *Saks* to "flexibly" assess all the circumstances of an alleged accident, the courts, including the First Circuit, have traditionally adopted and espoused a restrictive interpretation of Article 17, due to underlying policy considerations accompanying an essentially no-fault regime, and the underlying purpose of the Warsaw system to control and limit carrier liability.¹³⁴ This traditional restrictive view may well be subject to some loosening. Specifically, Montreal Protocol No. 4, the Montreal Convention of 1999 and the Supreme Court in its decision in *Tseng* all make clear that the Warsaw scheme precludes passengers from bringing actions under local law when they cannot establish air carriers' liability under the scheme. Accordingly, if the passenger fails to establish that an accident occurred, causation or bodily injury, the passenger has no recourse to state law. Courts may now be more inclined to liberally construe "accident" and injury under Article 17, given that an injured claimant will otherwise have no available remedy.

Another issue that remains unresolved is damages. Courts remain conflicted over what constitutes a "physical manifestation" compensable under Warsaw and whether a claimant who has suffered a physical injury or physical manifestation of injury can recover for emotional distress resulting from the shock and trauma of the accident or only for the emotional distress resulting from the physical injury or physical manifestation of injury. Further, the types of damages recoverable under the Convention are not identified in the text, leaving it to the courts to determine on a case-by-case basis. In the United States, the Supreme Court has held that in determining what damages are recoverable, resort must be made to local law, including choice of law rules.¹³⁵

Conclusion

To truly modernize Warsaw, these issues need to be put to rest. Even more fundamentally, while the IATA and the Montreal Convention of 1999 schemes mark a substantial change to the Warsaw system more in keeping with modern international air travel than at any point in the past, one can legitimately question whether, in modern times, there should be any difference between the claims and defenses available for international aviation injury and those suffered on domestic flights or in other areas of modern life and travel. Further, it remains to be seen what effect a largely no-fault system will have on claims, ticket prices, insurance rates and safety standards.

130. See, e.g., *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823, 827 (D. Haw. 1995); *Tsevas v. Delta Air Lines, Inc.*, 1997 WL 767278, *2-3 (N.D. Ill. 1997); *Wallace v. Korean Air*, 1999 WL 187213, *4-5 (S.D.N.Y. 1999); *Gezzi*, 991 F.2d at 605. The issue as to whether an Article 17 accident requires there to be some relation to the abnormal operation of the aircraft is currently before the Second Circuit in the Wallace case. The issue was recently and partially addressed by the First Circuit in *Langadinos v. American Airlines, Inc.*, 199 F.3d 68 (2000). There, the First Circuit reversed the allowance of the airline defendant's motion to dismiss a passenger's claim under the Convention. The male plaintiff claimed he was inappropriately touched by another passenger. The plaintiff alleged that the offending passenger may have been over-served alcohol. The Court held the

allegation sufficient to get by a motion to dismiss but that the airline could only be liable if it played a "causal role" in the commission of the tort. Id. at 71.

131. See *Krys*, 119 F.3d at 1522 (11th Cir. 1997); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996).

132. See *Tseng*, 525 U.S. at 166.

133. *McCarthy*, 56 F.3d at 317-18; *Martinez Hernandez*, 545 F.2d at 281-82.

134. See, e.g., *Gotz*, 12 F. Supp. 2d at 201-02; *McCarthy*, 56 F.3d at 316; *Martinez Hernandez*, 545 F.2d at 283-84.

135. *Zicherman*, 516 U.S. at 228-29.