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Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time

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DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR: THE WARSAW CONVENTION REVISITED FOR THE LAST TIME?

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I. INTRODUCING THE PROBLEM: THE "WARSAW SYSTEM"

One of the most controversial and publicly debated issues among the international aviation community is that of air carrier liability arising from international, private aviation disasters. Air carrier liability in such incidents is governed by a number of international legal instruments collectively known as the "Warsaw System."¹ Given that its basic component, the Warsaw Convention of 1929,² was enacted almost seven decades ago, certain concepts are now seen as unfair to air travelers and unresponsive to the needs of both the disaster victims and the aviation industry alike due to the unrealistic, antiquated systems of compensation.

The Warsaw System, as a uniform liability regime, severely limits the ability of a passenger, or the surviving family, to recover damages resulting from injury or death aboard an international flight.³ It does so by requiring the establishment of willful mis-

¹ "Warsaw System" refers to the Warsaw Convention of 1929 and related international legal instruments, including, *inter alia*, the Hague Protocol of 1955 and the Montreal Interim Agreement of 1966. See Bin Cheng, *A New-Look Warsaw Convention on the Eve of the Twenty-First Century*, 22 ANNALS AIR & SPACE L. 45 (1997).

² See Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1988) [hereinafter Warsaw Convention]. Having been ratified by 127 countries, it could be said that the Warsaw Convention is the world's most successful international treaty. See H. Caplan, *Modernizing the Warsaw System: A Protocol on New Convention*, AVIATION Q., Oct. 1996, at 138.

³ The disparity between damage awards for international and domestic crashes is a good indication of the effects of the limitations. See Henry J. Reske, *Putting a Price on Life*, 83 A.B.A. J. 23 (1997). One study concluded that wrongful death claimants in international aviation disasters recovered on average U.S. \$200,000 in cases settled before trial and U.S. \$330,000 in cases that went to trial. In contrast, average recoveries for domestic claimants arising from flights that both depart from and arrive in the United States, where no liability limitation is

conduct on the part of the airline in order to escape certain caps placed on air carrier liability.⁴

The Warsaw Convention of 1929 originally set a cap on air carrier liability for passenger injury or death at approximately U.S. \$8300.⁵ In 1955 dissatisfaction with this liability limit and the absence of a mechanism in the Convention to increase the limits relative to inflation led several nations to ratify the Hague Protocol,⁶ an amendment to the Warsaw Convention that doubled the damage cap in incidents governed by such to approximately U.S. \$16,600.⁷ Depending on which legal instrument governs the accident, the original liability cap or the liability cap as modified by the Hague Protocol still applies unless the applicable carrier is subject to the Montreal Interim Agreement of 1966; a contractual agreement between the United States and airlines serving the United States raising the limit to U.S. \$75,000.⁸

While claimants would like to see the elimination of the extremely low damage limits, both airlines and claimants would very much like to see the elimination of the time and cost associated with litigating international aviation disaster claims as well.⁹ Because claimants invariably seek to escape the liability limitations by attempting to prove that an air carrier's "willful miscon-

applicable, were U.S. \$480,000 and U.S. \$730,000 respectively. See *id.* at 23 (Paul Stephen Dempsey, director of the Transportation Law Program at the University of Denver College of Law, citing a 1990 U.S. General Accounting Office study).

⁴ See Warsaw Convention, *supra* note 2, art. 25(1).

⁵ Warsaw Convention, *supra* note 2, art. 22(1).

⁶ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol] *reprinted in* LAWRENCE B. GOLDBIRSH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 265 (1988).

⁷ See *Committee Approves Draft Convention for Modernization of Warsaw System*, ICAO J., May 1997, at 27 [hereinafter *Committee Approves Draft Convention*].

⁸ Agreement Relating to Liability Limitations of Warsaw Convention and Hague Protocol, May 13, 1966, 14 C.F.R. § 203 (1996) [hereinafter Montreal Interim Agreement], *reprinted in* LAWRENCE B. GOLDBIRSH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 317 (1988).

⁹ For example, the lengthy litigation arising from the 1988 bombing and subsequent crash of Pan Am flight 103 in Lockerbie, Scotland, shows how difficult it is to overcome the antiquated liability ceiling and how much time and cost is associated with asserting and defending such a claim. See Reske, *supra* note 3, at 23. "In the Lockerbie case, some 225 passenger claims were consolidated The case produced 22,000 pages of depositions, 10,000 pages of exhibits, and an 8000-page trial record. After a three-month jury trial, willful misconduct was found." *Id.* (quoting Paul Stephen Dempsey, director of the Transportation Law Program at the University of Denver College of Law).

duct" caused the injury or death, lengthy and therefore costly litigation inevitably results, but it fails to yield compensation commensurate with amounts necessary to sufficiently make either an injured passenger or her surviving family whole.¹⁰

As a result of continued dissatisfaction with the Warsaw System, domestic and international carriers took independent action in 1996 to adopt the International Air Transport Association (IATA) Intercarrier Agreement.¹¹ The Intercarrier Agreement requires carriers to "voluntarily" waive the Warsaw Convention's liability cap and the application of strict liability principles to claims as high as approximately U.S. \$135,000.¹² In addition, the initiative could conceivably allow recovery of damages above the threshold without proof of air carrier willful misconduct if the air carrier fails to prove it was free of fault.¹³ The Intercarrier Agreement is a laudable attempt to rectify the problems of the Warsaw System, especially in light of the fact that most of the major airlines of the world have effectively waived the limitations of liability available to them under the Warsaw Convention. However, the manner in which the IATA Intercarrier Agreement came about leaves the legal consequences of the agreement far from clear. Because it is, by its nature, a contract and not legislation, it must be viewed, at most, as an interim solution.¹⁴

Despite the tremendous and often horrific significance that the Warsaw System, as amended, modified, and supplemented, has on private air carrier liability, it is safe to say that the majority of the public around the world are oblivious to its impact until a disaster hits close to home.¹⁵ Yet, tragedies such as the

¹⁰ See Susan Carey & Leslie Scism, *Airlines: Old Liability Limits May Not Apply in TWA Crash*, WALL ST. J., July 24, 1996, at B1 (reporting on increased cost and delay resulting from claimants attempting to prove willful misconduct in order to avoid the liability limitations under the Warsaw System).

¹¹ International Air Transport Association, Intercarrier Agreement on Passenger Liability, *opened for signature* Oct. 31, 1995 (on file with author).

¹² "IATA Intercarrier Agreement" is actually the collective name of three agreements. See discussion of the International Air Transport Association Intercarrier Agreement, *infra* Part IV.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ This truth remains notwithstanding the fact that air carriers are required under the Warsaw Convention to give notice to travelers by inserting the Convention's liability provisions in their tickets. See Warsaw Convention, *supra* note 2, art. 3(1).

shooting down of Korean Airlines Flight KAL 007 in 1983,¹⁶ the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, the 1995 American Airlines crash in Cali, Columbia, and the 1996 explosion of TWA Flight 800 off Long Island, New York, to name a few, have increased awareness of international air carrier liability under the outdated Warsaw System, and specifically the resulting paltry damage awards.¹⁷ As a result of the heightened awareness and notwithstanding the most recent self-regulatory efforts of air carriers, the governments, air travelers, and air carriers of the world are demanding, more than ever, an urgent overhaul of the system. Historically, previous attempts have resulted in a loose bundle of international treaties and contractual agreements endangering the viability of the uniform global legal framework initially sought by the drafters of the Warsaw Convention. The "uniform" Warsaw System now varies by country and by carrier, because countries have adopted different legal instruments and the Warsaw Convention in its original form has left carriers free to accept higher limits of liability by special contract.

Thus, to finally fulfill the initial goal of uniformity and to modernize international air carrier liability, the International Civil Aviation Organization (ICAO)¹⁸ Legal Committee has drafted a new international treaty to completely replace the antiquated Warsaw Convention. Once adopted and ratified, the Draft Convention will likely serve as a permanent answer to a

¹⁶ The cases arising from KAL 007 are a good illustration of the unacceptable length of time associated with litigating claims stemming from aviation tragedies, attributed, for the most part, to the shortcomings of the present liability regime under the Warsaw System. See Ludwig Weber & Arie Jakob, *Draft Convention Seeks to Consolidate and Modernize the Elements of the Warsaw System*, ICAO J., Oct. 1997, at 5 [hereinafter Weber & Jakob, *Draft Convention*]. For instance, several of the cases involving victim's families' suits against Korean Airlines are still pending in 1998, almost 15 years after the tragedy, with the most recent resolution of one of the cases being decided in September 1997. See *id.*; *Oldham v. Korean Air Lines Co.*, 127 F.3d 43 (D.C. Cir. 1997).

¹⁷ See Carey & Scism, *supra* note 10, at B1.

¹⁸ The ICAO, created in 1944 to promote the safe and orderly development of civil aviation worldwide, is the specialized United Nations agency for civil aviation that administers the Warsaw Convention and related treaties. See 1 STUART M. SPEISER & CHARLES F. KRAUSE, *AVIATION TORT L.* § 11:4, at 631-33 (1978 & Supp. 1997) [hereinafter 1 SPEISER & KRAUSE]. Headquartered in Montreal, ICAO develops international air transport standards and regulations and serves as the medium of cooperation in all fields of civil aviation among its 185 Contracting States. See *Promoting the Development of International Civil Aviation*, ICAO J., Oct. 1997, at 30.

seventy-year old problem.¹⁹ The Draft Convention essentially provides for a two-tiered liability system based upon strict liability up to approximately U.S. \$135,000 and unlimited fault-based liability beyond that limit.²⁰ Although similar in effect to the IATA Inter-carrier Agreement, the Draft Convention would be law, not merely a contract. In addition, certain provisions of the Draft Convention, such as an "Updating Clause," which provides for periodic adjustments of the liability limitations, go far beyond that endeavored by the IATA.

The purpose of this Comment is to introduce the ICAO's draft of this landmark treaty and to discuss how it proposes to modernize and consolidate the Warsaw System.²¹ The primary focus will be on the attempt to eliminate the artificially low limits placed on private air carrier liability in cases of international aviation disasters that result in personal injury or death to passengers. However, in order to fully consider the Draft Convention in context, it is necessary to discuss the evolution of air carrier liability under the Warsaw System. Thus, this Comment will first introduce the Warsaw System and trace certain of the more significant international community efforts to expand the liability provisions of the Warsaw Convention, both successful and unsuccessful, including the IATA Inter-carrier Agreement of 1996.

II. THE WARSAW CONVENTION OF 1929

A. UNIFORM PROCEDURES AND LIABILITY

The Warsaw Convention, ratified by the United States in 1934, is a multilateral treaty that governs private air carrier liability

¹⁹ See discussion of the ICAO Draft Convention for the Unification of Certain Rules for International Carriage by Air of 1997, *infra* Part V.

²⁰ See Ludwig Weber & Arie Jakob, *Current Developments Concerning the Reform of the Warsaw Convention*, 21 ANNALS AIR & SPACE L. 303, 312 (1996) [hereinafter Weber & Jakob, *Current Developments*].

²¹ The Draft Convention, before afforded an opportunity to be ratified individually by any country, must first be presented to, and formally adopted by, the 185 ICAO contracting or signatory nations at a Diplomatic Conference called by the Council of the ICAO. See ICAO, News Releases, *Draft Convention for the Modernization of the Warsaw System of Air Carrier Liability Approved* (visited May 14, 1997) <<http://www.cam.org/~icao/>>. Because the thirty-second session of the ICAO Assembly will be held in the autumn of 1998, the Diplomatic Conference on the Draft Convention will not take place in 1998. The Council of the ICAO, though, will consider the subject of such a Diplomatic Conference in its session in June 1998 where it will decide on its timing, likely to be in 1999.

stemming from international air transportation²² and that commits its signatories to mutual obligations under each signatory's respective legal system.²³ The conference at Warsaw in 1929 had two primary goals. First, it attempted to establish a certain degree of uniformity in documentation, such as tickets and air waybills, and in procedures governing liability arising out of international, private aviation transportation.²⁴ Second, and more important at the time, the conference sought to establish a uniform system of strict but limited liability for air carriers in the event of international accidents²⁵ involving passenger²⁶ in-

²² The Warsaw Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, *supra* note 2, art. 1(1). "International transportation" is defined by the Convention as

any 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. art. 1(2). In the United States, a High Contracting Party is a signatory nation which has ratified the Warsaw Convention. See 1 SPEISER & KRAUSE, *supra* note 18, § 11:13, at 661.

²³ See GOLDBIRSCH, *supra* note 8, at 3-4. For a list of the countries that are parties or signatories to the Warsaw Convention, see 1 LEE S. KREINDLER, AVIATION ACCIDENT L. § 11.01[3], at 11-7 (1988) [hereinafter 1 KREINDLER]. For a list of the 185 Contracting States of the ICAO, see any recent publication of the ICAO Journal. See, e.g., *Promoting the Development of International Civil Aviation*, ICAO J., Oct. 1997, at 30.

²⁴ See 1 SPEISER & KRAUSE, *supra* note 18, § 11:4, at 635-36; Frances K. Davis & Ann Thornton Field, *Can the Legal Eagles Use the Ageless Preemption Doctrine to American Aviators Soaring Above the Clouds and into the Twenty-First Century?*, 62 J. AIR L. & COM. 315, 368 (1996). The Warsaw Convention also determines the rules on which courts have jurisdiction. See Warsaw Convention, *supra* note 2, art. 28(1).

²⁵ In order for the limitations under the Warsaw Convention to be triggered, an "accident" must have been the cause of the passenger's death or injury while on board or "embarking or disembarking," otherwise the claimant can escape the limitations by proving negligence. See Warsaw Convention, *supra* note 2, art. 17. An "accident" occurs only when external, unexpected events kill or injure the passenger. See *Air France v. Saks*, 470 U.S. 392 (1985) (holding deafness of passenger caused by normal aircraft pressurization not an accident). In order to determine if a passenger is "embarking or disembarking," one court has employed a three-part test that considers, at the time of the accident, the passenger's activities, the distance between the aircraft and the passenger, and the extent of control over which the air carrier had on the passenger. See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33-34 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

jury or death.²⁷ The damage limitations, however, were set only as a *quid pro quo* for a placement of limitations on the air carrier's defenses, as well as the presumption of fault on the air carrier.²⁸ The Convention did not purport to afford complete coverage for casualty losses, yet mainly intended to extend necessary protection to a still-developing, infant aviation industry.²⁹

B. AIR CARRIER LIABILITY

Nonetheless, the Warsaw Convention establishes a presumption that air carriers are liable for damages sustained by its pas-

²⁶ Status as a passenger is a prerequisite to recover damages under the Warsaw Convention. A passenger is one who has either paid for his transportation on the aircraft or is transported gratuitously. See Warsaw Convention, *supra* note 2, arts. 1(1), 17. Passengers under the Warsaw Convention do not include those traveling in the course of employment on their employer's aircraft. See, e.g., *Sulewski v. Federal Express Corp.*, 933 F.2d 180 (2d Cir. 1991) (aircraft mechanic who was traveling at time of his death in plane crash was not traveling as "passenger" for purposes of liability under Warsaw Convention, so worker's compensation was exclusive remedy available for mechanic's death); *In re Mexico City Air crash of Oct. 31, 1979*, 708 F.2d 400 (9th Cir. 1983) (two flight attendants working aboard airplane that crashed were not "passengers" within meaning of Warsaw Convention and therefore representatives precluded from bringing wrongful death action under Convention).

²⁷ The Warsaw Convention procedures and limitations on liability also were intended and are applicable for any claims arising out of damaged cargo and baggage, yet for our purposes discussion will be dedicated to claims of personal injury and death. See Warsaw Convention, *supra* note 2, art. 1.

²⁸ See 1 SPEISER & KRAUSE, *supra* note 18, § 11:4, at 636; Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

²⁹ See 1 KREINDLER, *supra* note 23, § 11.01[6], at 11-13. At that time the air carrier industry was weak financially, and it was thought necessary to protect air carriers from going bankrupt as a result of a single disaster. See *id.* Moreover, without limits, it was thought insurance would be too expensive for carriers to obtain, or in the alternative that tickets would be too expensive for passengers to purchase because the cost of such would inevitably be inflated commensurate with any rise in an air carrier's insurance costs. See *id.* In other words, the drafters sought to enable the aviation industry to obtain the necessary capital for future growth by providing a definite basis for insurance rates and reducing operating expenses with subsequent savings to the airline industry and its passengers. See 1 SPEISER & KRAUSE, *supra* note 18, § 11:4, at 332. In addition, systematic procedures for handling international aviation claims were also sought to help simplify the complications associated with the use of different languages and customs. See Lowenfeld & Mendelsohn, *supra* note 28, at 498-99. Although the goals and considerations of the original drafters of the Warsaw Convention were then necessary, it surely could be said that the original policy of the Convention has lost a great deal of its persuasive force given that international air travel is no longer an infant industry.

sengers,³⁰ yet allow the carrier to escape liability upon the carrier's establishment of a "due care defense," if it can prove that all necessary measures were taken to avoid the damage or that it was impossible for the carrier to take such measures to prevent the damage as defined under the Warsaw Convention.³¹ Similarly, if an air carrier establishes that a passenger's own actions contributed to his injury or death, the forum court's law on contributory or comparative negligence will apply to reduce the extent which the air carrier is liable.³²

However, the most significant and subsequently controversial provision of the Convention is found in Article 22(1), which strictly limits liability or potential damages to 125,000 francs, the equivalent of U.S. \$8300,³³ absent the plaintiff being able to successfully prove that the carrier was guilty of "willful misconduct," a question for the fact-finder.³⁴ Thus, under the original War-

³⁰ This, of course, is a reversal of the traditional burden of proof. See Warsaw Convention, *supra* note 2, art. 17. Article 17 expressly provides that

[t]he carrier shall be liable for damage sustained in the event of 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.

³¹ Warsaw Convention, *supra* note 2, art. 20(1). Article 20 expressly provides that "[t]he 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." *Id.*

³² See Warsaw Convention, *supra* note 2, art. 21. Article 21 expressly provides 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.*

³³ Warsaw Convention, *supra* note 2, art. 22(1). Article 22(1) expressly provides that

[i]n 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 passenger may agree to a higher limit of liability.

Id. It should be noted that at the time the United States ratified the Warsaw Convention in 1934 that amount was approximately U.S. \$10,000. See Desmond T. Barry, Jr. & Thomas J. Whalen, *Unlimited Liability: The New Ball Game in International Transportation by Air*, 64 DEF. COUNS. J. 381 (1997).

³⁴ See Warsaw Convention, *supra* note 2, art. 25(1). Article 25(1) expressly 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

saw System, assuming that the air carrier could not establish a "due care defense," a passenger injured or killed on an international flight would be entitled, upon proof of damages, to only a minimal recovery leaving either the injured or his surviving family inadequately compensated for the value of loss sustained in most cases.³⁵

Notwithstanding the damage recovery limit, air carriers can contract with passengers to pay a higher amount of damages.³⁶ However, an air carrier is prohibited from contracting to reduce the amount of damages to be paid in the event of injury or death resulting from an international flight.³⁷

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. The air carrier also loses the benefit of the liability limitation if one of its agents, while acting in the scope of his employment, engages in willful misconduct. *See id.* art. 25(2). However, the Warsaw Convention itself does not define willful misconduct. *See id.* Because of the failure of Article 25 to specify what constitutes willful misconduct, the findings in willful misconduct cases vary according to the law of the court in which a passenger files a complaint against an air carrier and in turn have resulted in a disparity of findings. *See* Eloise Cotugno, *No Rescue in Sight for Warsaw Plaintiffs from Either Courts or Legislature—Montreal Protocol 3 Drowns in Committee*, 58 J. AIR L. & COM. 745, 773 (1993).

In defining "willful misconduct," U.S. courts do not typically require intent to do harm as an element to be proven in air crash cases, they do typically require "knowledge that one's actions likely will result in death or a conscious or reckless disregard for that probability." John Gibeau, *An Airline Limitation Device Used in the Unlikely Event of 'Water Landings,' Laws Cap Recovery*, 82 A.B.A. J. 34 (1996); *see* 1 KREINDLER, *supra* note 23, § 10:05[4], at 10-80 (intent to do harm not an element of willful misconduct); *In re Air Disaster at Lockerbie*, Scot. of Dec. 21, 1988, 37 F.3d 804, 812 (2d Cir. 1995) (stating "[w]illful misconduct means that a carrier must have acted either with knowledge that its actions would probably result in injury or death, or in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions"). In comparison, the U.S. Department of Transportation has defined "willful misconduct" in this context as an "extreme form of gross negligence." *See* Reske, *supra* note 3, at 23.

³⁵ *See* Warsaw Convention, *supra* note 2, arts. 20, 22.

³⁶ *See* Warsaw Convention, *supra* note 2, art. 22(1). Article 22 expressly provides that by "special contract, the carrier and passenger may agree to a higher limit of liability." *Id.*

³⁷ *See* Warsaw Convention, *supra* note 2, art. 23. Article 23 expressly provides that

[a]ny 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.

C. JURISDICTION

The Warsaw Convention not only curtails the amount and kind of damages recoverable, but also the jurisdictional fora for filing claims against air carriers. The jurisdictional fora are limited to the country of the air carrier's domicile, the country of the air carrier's principal place of business, the country in which the contract for air travel was made, or the country of the passenger's destination or final stop, regardless of whether the passenger traveled on more than one airline.³⁸ Unlike the liability provisions, the provisions governing jurisdiction cannot be altered by "special contract" between the air carrier and the passenger.³⁹

III. EARLY MODIFICATIONS OF THE WARSAW CONVENTION

The Warsaw Convention represented a major achievement in the unification of international private aviation law in 1929. Absent the introduction of the uniform rules on liability, the development of the private aviation industry would have been severely hampered given the unpredictability common with complex conflicts of law likely to have arisen, which would have in turn precluded airlines from being insured against the risks that would have resulted. However, almost immediately after it went into effect, the Warsaw Convention provoked sharp debate and criticism in the United States and throughout the world.⁴⁰ Because the Warsaw Convention does not contain any mechanisms to increase the limits of liability relative to inflation and

³⁸ See Warsaw Convention, *supra* note 2, art. 28(1). Article 28(1) expressly provides that

[a]n 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.

Id.

³⁹ See Warsaw Convention, *supra* note 2, art. 32. Article 32 expressly provides that

[a]ny 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.

Id.

⁴⁰ See Lowenfeld & Mendelsohn, *supra* note 28, at 502.

other factors, the passage of time invariably has necessitated adjustments to the liability regime in order to be responsive to changing demands for compensation associated with increases in real income and the rising cost of living.

A. HAGUE PROTOCOL OF 1955

It was not until 1955 and the Hague Protocol that the first substantial effort was made to modify the original legal framework of the Warsaw System.⁴¹ In principal effect the Hague Protocol doubled the Warsaw Convention's limit of recovery for passengers, or their surviving families, to approximately U.S. \$16,600 in cases of personal injury or death.⁴² However, some nations, the United States in particular, did not ratify or adhere to the protocol⁴³ and continued to express dissatisfaction with the limit of liability even as modified at the Hague.⁴⁴

B. MONTREAL INTERIM AGREEMENT OF 1966

Notwithstanding its dissatisfaction with the Warsaw System, the United States did ultimately agree to participate in the Montreal Agreement of 1966.⁴⁵ At Montreal, international air carriers that travel to, from, or throughout the United States voluntarily agreed to: (1) raise the limit of absolute liability to U.S. \$75,000; (2) waive the "due care defense" or carrier proof

⁴¹ Hague Protocol, *supra* note 6.

⁴² Hague Protocol, *supra* note 6, art. XI. In addition, the Hague Protocol allowed courts to award passengers litigation expenses according to the law of the applicable forum. *See id.*

⁴³ Notably, in 1965 the United States was on the verge, ten years after Hague, of denouncing the Warsaw System altogether because of the still extremely low liability cap. *See* GOLDBIRSH, *supra* note 8, at 7. Thus, the original liability limit of U.S. \$8300 remained applicable in the United States. *See id.*

⁴⁴ *See id.* Opponents of the Hague Protocol argued that the international aviation industry was well established and no longer financially weak so as to require the protection of special liability limitations. *See* David I. Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR. L. & COM. 653, 660 (1980). Over time, over 100 countries became parties to the Hague Protocol. *See* 1 KREINDLER, *supra* note 23, § 11:03[04], at 11-11.

⁴⁵ Montreal Interim Agreement, *supra* note 8. The agreement in Montreal was intended to be an "interim solution" to the Warsaw System, hence the name Montreal Interim Agreement. However, it is interesting to note that it lasted over thirty years. For a detailed discussion of the Montreal Interim Agreement and the events leading up to it, see Lowenfeld & Mendelsohn, *supra* note 28 (article authors represented the United States State Department at Montreal).

of non-negligence⁴⁶ regarding the U.S. \$75,000 limit; (3) provide passengers with a warning regarding the applicability of the Warsaw system, as modified by the Montreal Interim Agreement; and (4) allow passengers to retain the option of establishing "willful misconduct" on the part of the carrier in order to get unlimited damages.⁴⁷

Unlike the Warsaw Convention, or Hague Protocol, the Montreal Interim Agreement is not a treaty or amendment thereto, but rather is a "special contract," allowed by Article 22 of the Warsaw Convention, between international carriers who signed the agreement and passengers with tickets having points of departure, destination, or agreed stopping places in the United States.⁴⁸ Due to its contractual nature, the Montreal Interim Agreement imposed a quasi-legal and experimental system of liability and does not amend the provisions of the Warsaw Convention or the Hague Protocol.⁴⁹

After the Montreal Interim Agreement and before the IATA Inter-carrier Agreement of 1996,⁵⁰ thirty years passed before there was an attempt to modify the Warsaw Convention's damage limitations. Thus, with respect to international transportation to, from, or through the United States, such limitations have not been altered since.⁵¹ Consequently, a passenger on a

⁴⁶ See Warsaw Convention, *supra* note 2, art. 20(1). The waiver thereby allows the plaintiff the presumptive right to compensation for damages up to U.S. \$75,000 upon simple proof of damages. See *id.*

⁴⁷ Pursuant to 14 C.F.R. § 203 (1996), all carriers operating to and from the United States are deemed to be parties to the Montreal Interim Agreement; thus, the applicable limit to and from the United States is currently U.S. \$75,000. See 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, at 2 n.2 (Jan. 8, 1997), available in WESTLAW Firan-dot Database [hereinafter DOT Reconsideration Order].

⁴⁸ See GOLDBIRCH, *supra* note 8, at 7. The Montreal Interim Agreement, just as the IATA Inter-carrier Agreement, can be deemed a mechanism of "special contract" of which Article 22(1) of the Warsaw Convention expressly allows to effect a higher limit of liability. See *infra* notes 60-63 and accompanying text.

⁴⁹ See 1 KREINDLER, *supra* note 23, § 12:03[04], at 12-7.

⁵⁰ See discussion of the IATA Inter-carrier Agreement, *infra* Part IV.

⁵¹ Not to say that there has not been attempts in the interim. For instance, because the United States viewed the Montreal Interim Agreement as a temporary, non-governmental solution, it, along with twenty other countries signed and adopted the Guatemala Protocol of 1971. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on Oct. 12, 1929, as Amended by the Protocol Done at the Hague on Sept. 28, 1955, done Mar. 8, 1971, ICAO Doc. No. 8932 (1971) [hereinafter Gua-

flight that has a place of departure, agreed destination, or agreed stopping place in the United States has two options: (1) prove actual damages up to U.S. \$75,000 without establishing a liability case against the carrier, or (2) attempt to prove that the carrier engaged in "willful misconduct"⁵² in hopes of gaining

temala Protocol], reprinted in GOLDHIRSCH, *supra* note 8, at 319; see also 1 SPEISER & KRAUSE, *supra* note 18, § 11:20, at 680. Some of the main provisions of the Guatemala Protocol of 1971 included: (1) increasing the Warsaw Convention's liability limits for passenger death or injury to the approximate equivalent of U.S. \$100,000 exclusive of legal fees and costs; (2) periodic adjustment of the liability limit; (3) application of strict liability, i.e., absolute or not dependent on fault, in the case of personal injury or death, but with the quid pro quo that the damage limitation could not be transgressed in cases of willful misconduct; (4) supplemental national insurance plans or compensation systems to further protect passengers; and (5) a settlement inducement clause where legal fees could be awarded passengers if an air carrier refused to settle within a six-month period after being notified in writing of a settlement amount. See Guatemala Protocol, *supra*, arts. II, III, VI, VII, VIII, X, XIV, XV. Nevertheless, the Guatemala Protocol is not in force anywhere in the world because of an insufficient number of ratifying countries. See Ludwig J. Weber & Arie Jakob, *ICAO Taking Initiative to Reform the Legal Framework for Air Carrier Liability*, ICAO J., Apr. 1996, at 22 [hereinafter Weber & Jakob, *ICAO Taking Initiative*]. The United States never even submitted the Guatemala Protocol to the Senate for ratification because its provisions linked liability limits to the fluctuating price of gold. See Nicolas M. Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 ANNALS OF AIR & SPACE L. 151, 158 (1983).

Of similar consequence are the four Additional Montreal Protocols of 1975. See Additional Protocols 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 Oct. 12, 1929, Sept. 25, 1975 [hereinafter Montreal Protocols], reprinted in GOLDHIRSCH, *supra* note 8, at 331-62. The main purpose of Montreal Protocols Nos. 1-3, collectively, were to replace the denomination of the liability limits expressed in gold francs in the different Warsaw instruments with SDR, the IMF unit of account. See Weber & Jakob, *ICAO Taking Initiative*, *supra*, at 22. Yet, Montreal Protocol No. 3 also sought to fully incorporate the Guatemala Protocol of 1971 into a new instrument that would apply independently of the original. See *id.* Montreal Protocol No. 4, not particularly relevant to our discussion, further sought to align air carrier liability for the carriage of cargo with that established for the carriage of passengers and baggage by introducing the concept of strict liability. See *id.* At any rate, the Montreal Protocols have thus far suffered the same fate as the Guatemala Protocol because none have been ratified by a sufficient number of countries. See *id.*

⁵² Although the burden typically is too great to overcome, U.S. courts have found willful misconduct in some cases. See *In re Air Disaster at Lockerbie*, Scot. of Dec. 21, 1988, 37 F.3d 804, 819 (2d Cir. 1995) (finding carrier guilty of willful misconduct when risk of a bomb, hidden inside a radio packed in baggage, was well known to the aviation industry at the time, and personnel repeatedly ignored warnings indicating security measures were deficient); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1479-84 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (holding air carrier, which was shot down after flying into Soviet airspace, guilty of willful misconduct in light of evidence of previous errors in program-

unlimited damages. Outside the United States, the liability provisions of the Warsaw Convention, or the Convention as amended by the Hague Protocol if applicable, remain in effect. Because injured passengers or their surviving families often believe that even the Montreal Interim Agreement's U.S. \$75,000 is not enough to adequately compensate them for losses sustained⁵³ and therefore inevitably attempt to establish "willful misconduct," the issues of liability and damages under the Warsaw System have been and still are extensively litigated.⁵⁴ Moreover, the dissatisfaction with the low liability limits of the Warsaw System has led to various judicial attempts to circumvent the limits over the years.⁵⁵

IV. INTERNATIONAL AIR TRANSPORTATION ASSOCIATION INTERCARRIER AGREEMENT OF 1996

A. AIR CARRIER SELF-REGULATION

All facets of the industry remained critical of the Warsaw System, since the Montreal Interim Agreement of 1966, regarding its inability to provide fair and swift compensation to passengers killed or injured on international flights. Air carriers, arguably the most frustrated critics,⁵⁶ decided to take the initiative and

ming flight paths and flight crew's decision deciding not to return to flight's last refueling stop to avoid risk of disciplinary action).

⁵³ In today's dollars, one needs about U.S. \$330,000 to equal the buying power of U.S. \$75,000—the limit set in 1966. See Reske, *supra* note 3, at 23.

⁵⁴ See GOLDBIRCH, *supra* note 8, at 97.

⁵⁵ See *id.* For good discussions of judicial treatment of the provisions of, and past and present damage recovery under, the Warsaw Convention, see Andrea L. Buff, Note, *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, 1791-1813 (1997) (discussing U.S. courts' treatment of the Warsaw Convention's liability limits, the varying definitions of willful misconduct, the availability of punitive and emotional distress damages, as well as various methods used by the courts to skirt the limits, such as interpreting the Convention to require an exclusive cause of action, refusing to find an "accident," a "passenger," or the requisite "embarking or disembarking" occurred, which are all necessary to trigger the application of the Convention) and Katherine A. Staton, *The Warsaw Convention's Facelift: Will it Meet the Needs of 21st Century Air Travel?*, 62 J. AIR L. & COM. 1083, 1086-1103 (1997) (tracing damage recovery under the Warsaw Convention through *Zicherman v. Korean Air Lines, Co.*, 116 S. Ct. 629 (1996) and its progeny).

⁵⁶ Air carriers especially desired to eliminate the lengthy, and therefore costly, litigation arising from major international air disasters. See Barry & Whalen, *supra* note 33, at 382. Under the limited liability regime of the Warsaw System, if

avoid the long delay associated with a government-led effort.⁵⁷ On October 31, 1995, foreign and domestic airlines met under the auspices of the International Air Transport Association (IATA)⁵⁸ and subsequently adopted a resolution entitled the "Intercarrier Agreement on Passenger Liability" that supersedes the Warsaw Convention's personal injury damage limitations.⁵⁹ As a result, most of the important airlines in the world effectively waived the limitations of liability available to them under the Warsaw Convention, yet the legal consequences of the agreement are far from clear because the resolution amounts to a contract, not a treaty or law.⁶⁰

B. WARSAW CONVENTION "SPECIAL CONTRACT"

Airlines cannot legally alter the Warsaw Convention; the Convention is a treaty and can be amended only by its signatories, in accordance with the procedures provided by the Convention itself.⁶¹ Even the express terms of the Convention provide that air carriers cannot try to change or "infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction. . . ."⁶² However, the Convention also provides, "[N]evertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."⁶³ Thus, the carriers at the IATA meeting, similar to the parties to the Montreal Interim Agreement, sought to effect the change in the limits of liability by incorporating certain provisions into contracts with passengers for carriage—tickets—

a passenger is severely injured or killed, he or his family will inevitably seek to prove "willful misconduct" to overcome the liability limit, therefore dictating a lengthy process of determining liability and subsequently determining proper awards. *See id.* Besides avoiding lengthy and costly litigation, the airlines and other critics also recognized the value of the losses attributed to air disasters.

⁵⁷ *See International Effort to Update 68-year [sic] Old Treaty on Passenger Liability Picks Up Momentum*, AIRLINE FIN. NEWS, May 19, 1997, at 20 [hereinafter *International Effort*].

⁵⁸ The IATA is a private organization whose membership is comprised of international air carriers and is also instrumental in determining the form of flight tickets and waybills. *See* GOLDBIRSCHE, *supra* note 8, at 4. IATA's purpose is to "promote safe, regular, and economic air transport." *Id.*

⁵⁹ *See* Patrick Grady & John S. Hoff, *Bye, Bye 'Warsaw'*, LAW PILOTS B. ASS'N J., Winter 1996, at 23-24.

⁶⁰ *See* Lee S. Kreindler, *Goodbye to Liability Limitations*, N.Y.L.J., Feb. 20, 1997, at 3.

⁶¹ *See* Barry & Whalen, *supra* note 33, at 381.

⁶² Warsaw Convention, *supra* note 2, art. 32.

⁶³ *Id.* art. 22(1).

under the theory that this method is just such a mechanism of "special contract" or agreement as permitted in Article 22(1).⁶⁴

C. THE AGREEMENTS COLLECTIVELY KNOWN AS IATA INTERCARRIER AGREEMENT

Now a reality,⁶⁵ the IATA Inter-carrier Agreement actually is the formal name for three separate agreements: the IATA Inter-carrier Agreement on Passenger Liability (IIA),⁶⁶ the IATA Agreement on Measures to Implement the IATA Inter-carrier Agreement (MIA),⁶⁷ and the Air Transport Association's⁶⁸ Provisions Implementing the IATA Inter-carrier Agreement to be Included in Conditions of Carriage and Tariffs (IPA).⁶⁹ Intended to operate in connection with each other, the agreements effectively waive the Warsaw Convention's limit of liability for the claim of death, wounding, or other bodily injury to passengers while allowing a claimant to recover full compensation for provable damages without shouldering the burden of proving willful misconduct on the part of the carrier.⁷⁰

⁶⁴ See Barry & Whalen, *supra* note 33, at 381. The mechanism of an inter-carrier agreement to raise the Warsaw Convention's liability limits had been invoked successfully in the previous Montreal Interim Agreement. See discussion on the Montreal Interim Agreement, *infra* Part III.B.

⁶⁵ At least in the United States. All American flag carriers have signed all three agreements collectively known as the IATA Inter-carrier Agreement and, on November 12, 1996, the U.S. Department of Transportation (DOT) approved it, *pendente lite*, subject to certain conditions. See 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 of the Warsaw Convention, Order No. 96-11-6 (Nov. 12, 1996), available in WESTLAW, Ftran-dot Database [hereinafter DOT Order Approving Agreements], as modified by DOT Reconsideration Order, *supra* note 47.

⁶⁶ IATA Inter-carrier Agreement on Passenger Liability, Oct. 31, 1995 [hereinafter IIA] reprinted in 1 KREINDLER, *supra* note 23, § 10.11, at 10-142.

⁶⁷ Agreement on Measures to Implement the IATA Inter-carrier Agreement, May 1996 [hereinafter MIA] reprinted in 1 KREINDLER, *supra* note 23, § 10.11, at 10-144.

⁶⁸ The Air Transport Association of America (ATA) is a private organization of air carriers that generally represents the interests of U.S. airlines. See Staton, *supra* note 55, at 1104 n.148 (citing Air Transport Association of America on DOT Order 96-10-7, at 1 n.1 (Oct. 3 1996)).

⁶⁹ ATA Provisions Implementing the IATA Inter-carrier Agreement to be Included in Conditions of Carriage and Tariffs, *opened for signature* May 16, 1996 [hereinafter IPA] (on file with the author).

⁷⁰ See Robert P. Warren, *The Future and Effect of the IATA Inter-carrier Agreements on Passenger Liability: A U.S. Perspective*, 11 AIR & SPACE LAW. 3 (1996); Barry & Whalen, *supra* note 33, at 382.

Each agreement has a separate purpose in operating in connection with the others. The IIA provides a general framework to guide each carrier in incorporating general principles into the carrier's conditions of carriage and tariff filings.⁷¹ The IPA pertains to U.S. carriers implementing the IIA and MIA provisions,⁷² while the MIA further defines the IIA and provides mandatory and optional provisions for carriers to include in their conditions of carriage and tariff filings.⁷³ Although the IIA provides the overall framework of the Inter-carrier Agreement, it is only an "umbrella" agreement, requiring air carriers to develop appropriate provisions to implement it through their conditions of carriage and tariffs filed with governments, either unilaterally or by further agreement.⁷⁴ The MIA addresses the language a carrier needs to incorporate the IIA into its conditions of carriage and tariff filings.⁷⁵ In contrast, the IPA is the special contract by which U.S. carriers will implement the IIA and MIA into their conditions of carriage and tariff filings, and thereby terminate each carrier's participation in the Montreal Interim Agreement of 1966.⁷⁶ All major U.S. carriers are signatories to the IPA.⁷⁷

D. EFFECT OF IATA INTERCARRIER AGREEMENT

As a result of the IATA Inter-carrier Agreement, and with respect to travel to and from the United States, a strict liability standard would be applied to any claim not exceeding 100,000 Special Drawing Rights (SDR),⁷⁸ inclusive of legal fees and costs, with the presumption of liability contained in Article 17 of the Warsaw Convention remaining applicable.⁷⁹ In principal effect,

⁷¹ See IIA, *supra* note 66.

⁷² See IPA, *supra* note 69.

⁷³ See MIA, *supra* note 67.

⁷⁴ See Staton, *supra* note 55, at 1108.

⁷⁵ See MIA, *supra* note 67.

⁷⁶ See IPA, *supra* note 69.

⁷⁷ See *id.* at E.

⁷⁸ Special Drawing Rights (SDR) is an international monetary unit created and defined by the International Monetary Fund (IMF) and is an international reserve asset, although it is only an accounting entry, not actual coin or paper and not backed by precious metal. See Barry & Whalen, *supra* note 33, at 382. The 100,000 SDR equals approximately U.S. \$135,000. See IMF, *Exchange Rates in Terms of SDRs* (visited May 10, 1998) <<http://www.imf.org/>> [hereinafter *SDR Exchange Rates*]. The Draft Convention developed by the ICAO also authorizes and requires the use of SDR. See Draft Convention, *infra* note 91, art. 21; Weber & Jakob, *ICAO Taking Initiative*, *supra* note 51, at 22.

⁷⁹ See MIA, *supra* note 67, at 1(2).

the IATA Intercarrier Agreement provides that the claimant is entitled to unlimited provable damages. The air carrier is strictly liable up to 100,000 SDR if the claimant can prove that the damage was caused by an accident. In addition, in order to avoid further liability for amounts over 100,000 SDR, the carrier has the burden to prove that it or its agents took all necessary measures to avoid the damage or that it was impossible for the carrier to take such measures, as provided in Article 20 of the Warsaw Convention.⁸⁰

International travelers who are ticketed to, from, or through the United States now have full compensation available on a strict liability basis under the provisions of the IATA Intercarrier Agreements, and in particular under the MIA. The agreements provide for no per passenger limits and for damages consistent with U.S. tort law.⁸¹ The carriers are not subject to punitive damages,⁸² and they retain their non-negligent defense for claims exceeding 100,000 SDR. Plaintiffs will still bear the burden of proving compensatory damages.⁸³

E. INTERCARRIER AGREEMENT NOT A PERMANENT ANSWER TO THE PROBLEM

While the joint, self-regulatory effort of the IATA and the ATA has had the support of many domestic and international air carriers,⁸⁴ the International Chamber of Commerce,⁸⁵ and the Association of Trial Lawyers of America,⁸⁶ there is a tremendous amount of uncertainty relating to the success of the agreements, thus leading to the conclusion that the agreements do not offer a permanent answer. First of all, the attachment of additional conditions by the DOT to its approval order⁸⁷ has, to some ex-

⁸⁰ See *id.* at 1(3); Warsaw Convention, *supra* note 2, art. 20.

⁸¹ See Staton, *supra* note 55, at 1107.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See 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. By May 1997, 85 carriers had signed the original 1995 agreements and 53 had signed a subsequent implementation agreement, but only the major U.S. airlines and 17 non-U.S. airlines had implemented the agreements. See *International Effort*, *supra* note 57, at 20.

⁸⁵ See *ICC Urges DOT Approval of Higher Airline Liability Limits*, AVIATION DAILY, Aug. 22, 1996, at 306.

⁸⁶ See *Trial Lawyers Back Passenger Liability Limit Increases*, AVIATION DAILY, Aug. 26, 1996, at 320.

⁸⁷ See DOT Order Approving Agreements, *supra* note 65; DOT Reconsideration Order, *supra* note 47. DOT approved the IATA Intercarrier Agreement conditioned on agreement that the carriers cannot invoke Article 22(1) of the

ment, diluted the impact that the IATA Inter-carrier Agreement will have on international aviation liability.⁸⁸ Second, with the elimination of the air carrier's "no-negligence" defense and with claimants no longer having to prove willful misconduct, the IATA Inter-carrier Agreement essentially eliminates the fault system, which is necessary to maintain acceptable standards of safety and security in aviation. Can the standards of air carriers be the same with knowledge that a premium is no longer placed on being able to prove "all necessary measures" were taken to avoid an accident? I think not. Finally, and most detrimental to the success of the IATA Inter-carrier Agreement, is the fact it is essentially a contract that does not carry the status of law that a treaty carries.

Because the IATA Inter-carrier Agreement is based on contract and not law, the need to formally amend the Warsaw Convention's liability provisions remains because contractual agreements cannot achieve the dual goals of uniform liability limits and systematic legal procedures set out by the drafters of the Warsaw Convention. An air carrier bound by a private contract is just not the same as being held to the letter of the law or a globally-adopted treaty.

Besides air carriers being far less reluctant to opt out of an inter-carrier contract in contrast to an international treaty, other collateral concerns must—and likely will—be addressed, but only in the courts where the answer will not be very clear. For example, a problem arises when an air carrier, pursuant to the Inter-carrier Agreement, pays out for injury or death to a passenger and then seeks contribution or indemnification from a manufacturer. To contest its liability, the manufacturer would likely assert that the airline paid out voluntarily, rather than by virtue of the law and, thus, the airline has no recourse against the manufacturer for any amounts above the Warsaw Convention limita-

Warsaw Convention's limitation of liability or the Warsaw Convention's "all necessary measures defense" set forth in Article 20(1) of the Convention to that part of the claim that does not exceed 100,000 SDR. See *id.* For an analysis of the conditions that the DOT attached to its approval order, see A.J. Harakas, *The Status of the Warsaw Convention Limits on Liability—The IATA and ATA of America File Applications with the U.S. DOT for Approval of the Inter-carrier Agreement and Implementing Agreement of Passenger Liability*, AVIATION Q., Oct. 1996, at 115-23.

⁸⁸ See *DOT Faces Wide Opposition to its Liability Limit Conditions*, AVIATION DAILY, Oct. 28, 1996, at 154; *DOT Conditions Could "Derail" World Liability Agreement*, AIR SAFETY WK., Oct. 14, 1996.

tion.⁸⁹ Similarly, the claimant, after being compensated by the airline under the IATA Inter-carrier Agreement could then sue the manufacturer separately and assert that she was a third-party beneficiary to the inter-carrier contract and that the payment made by the airline was not payment of a legal judgment but was one paid by a collateral source and, thus, being no different from payments made under a life insurance policy, could not be used by the tortfeasor manufacturer to set off its liability.⁹⁰

V. INTRODUCING THE ANSWER: ICAO DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

While the IATA Inter-carrier Agreements were near the end of development in 1996, the Legal Bureau of the ICAO, assisted by an ICAO Secretariat Study Group, also began the process of developing a draft of a new international convention⁹¹ to modernize and consolidate the Warsaw System's provisions on air carrier liability.⁹² After its inception, the ICAO Council noted

⁸⁹ The doctrines of indemnity and contribution generally preclude one from recovering any "voluntary payments" made to third parties. To recover against a joint tortfeasor or the manufacturer, the airline would have to prove that the amounts it paid to the passenger were "legally irresistible." Since the airline voluntarily waived the Warsaw Convention limitations, it could be argued the waiver is inconsistent with the airline asserting it could not legally resist paying the amount it did. See Barry & Whalen, *supra* note 33, at 385.

⁹⁰ See Kreindler, *supra* note 60, at 3.

⁹¹ Draft Convention for the Unification of Certain Rules for International Carriage by Air, May 9, 1997 [hereinafter Draft Convention] (on file with the author). Because the majority present at the meeting sought consolidation of the entire Warsaw System with all its complexities, a single convention was created as opposed to the creation of another amending protocol, thus avoiding the perpetuation of the tangled web of legal instruments and agreements now existing. See Weber & Jakob, *Draft Convention*, *supra* note 16, at 5. In addition, if the new instrument took the form of an amending protocol, it would be unclear what it should amend. See *id.* at 6. Amending the original Warsaw Convention would cover only those signatory nations that have ratified it, but not the Hague Protocol. Revising the Warsaw Convention as amended by the Hague Protocol would cover only those nations that ratified the Hague Protocol, thereby excluding those, such as the United States, that only ratified the original Warsaw Convention. See *id.* It should be noted, however, that the IATA felt modernization could be achieved simply through inserting limited amendments—the amendments, of course, being restricted to the terms of the IATA Inter-carrier Agreement. See *id.* at 5.

⁹² See 1996 *Annual Report of the Council*, at 51, ICAO Doc. 9685 (1997) [hereinafter *Annual Report*]. The ICAO first conducted a socio-economic study analyzing air carrier liability limits throughout the world. The results indicated that dissat-

the Draft Convention and forwarded it to the ICAO Legal Committee which approved the text of the draft treaty in its thirtieth session on May 9, 1997.⁹³

A. DRAFT CONVENTION RETAINS THE STRUCTURE OF THE WARSAW CONVENTION

The Draft Convention preserves the structure of the Warsaw Convention while consolidating provisions of existing legal instruments such as the Hague Protocol of 1955 and Montreal Protocols of 1975 for incorporation into the Draft Convention.⁹⁴ By maintaining the main format of the Warsaw Convention, the Draft Convention proposes to sustain sixty years of established judicial precedents in interpreting the Warsaw Convention and allow the aviation industry to continue to benefit from them.⁹⁵ Nevertheless, despite retention of the structure of the Warsaw Convention, certain rules relating to the liability regime and liability limits have been modernized under the Draft Convention in order to conform to the needs of the international aviation environment of the twenty-first century.⁹⁶

As a comprehensive overhaul of the entire Warsaw System,⁹⁷ the Draft Convention has the same scope of application as the original Warsaw System of 1929.⁹⁸ Although the Draft Convention serves as a complete revision, the most significant provi-

isfaction with the Warsaw System was not confined to isolated geographic areas. See Weber & Jakob, *Draft Convention*, *supra* note 16, at 5.

⁹³ See *id.*

⁹⁴ See Weber & Jakob, *Current Developments*, *supra* note 20, at 312. Even certain provisions of Montreal Protocol No. 4 have been incorporated into the Draft Convention. See *id.*

⁹⁵ See Weber & Jakob, *Draft Convention*, *supra* note 16, at 5. In fact, a comparison of the language found in the Draft Convention to the language of the original Warsaw Convention reveals, to a large extent, the same wording.

⁹⁶ See *id.*

⁹⁷ The language in the preamble of the Draft Convention is indicative of its purpose, recognizing "the need to modernize and consolidate the Warsaw Convention and related instruments . . ." and "the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution . . ." Draft Convention, *supra* note 91. In comparison to previous attempts of other entities, the goal of the Draft Convention is to maintain the Warsaw Convention's basic structure as an instrument of international law while responding to concerns about modernizing passenger liability limits. See Weber & Jakob, *Current Developments*, *supra* note 20, at 313.

⁹⁸ The Draft Convention "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward . . . [and] [i]t applies equally to gratuitous carriage by aircraft performed by an air transport undertaking." Draft

sions of the text approved by the ICAO Legal Committee are, of course, those that address air carrier liability in international aviation disasters and, in effect, remove the antiquated restraints in cases involving personal injuries or accidental death of passengers on international flights.⁹⁹

B. TWO-TIERED LIABILITY SYSTEM UNDER THE DRAFT CONVENTION

The Warsaw Convention currently limits the liability of carriers. Typically the limit is either U.S. \$8300 or U.S. \$16,600, depending on which legal instrument governs the disaster (either the original Warsaw Convention or the Convention as modified by the Hague Protocol of 1955). But a "special contract" (such as the Montreal Interim Agreement of 1966 or the IATA Inter-

Convention, *supra* note 91, art. 1(2). Furthermore, for the purposes of the Draft Convention,

the expression *international carriage* means any carriage which, according to the contract between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment [sic], are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

Id. This is consistent with the definition of international carriage in Article 1(1) of the Warsaw Convention. See Warsaw Convention *supra* note 2. Also consistent with the Warsaw Convention,

[c]arriage to be performed by several successive carriers is deemed, for purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as single operation, whether it had been agreed upon under the form of a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same state.

Draft Convention, *supra* note 91, art. 1(3).

⁹⁹ See *Draft Treaty in Progress*, AIRLINE FIN. NEWS, May 19, 1997, at 20.

carrier Agreement of 1996)¹⁰⁰ may allow higher limits where the plaintiff can prove willful misconduct of a carrier.¹⁰¹

In contrast, the Draft Convention creates, for the most part, a two-tiered liability system in cases of accidental death or passenger injury. For claims of up to approximately U.S. \$135,000¹⁰²—the first tier—the liability of the air carrier is based on the principle of strict liability.¹⁰³ For claims exceeding this amount—the second tier—liability of the air carrier is based on fault, without numerical limitations on liability.¹⁰⁴ Unlike the first tier, second tier liability is dependent upon (1) a passenger proving that the air carrier was negligent; or (2) the air carrier proving that it was either free of fault, that it carried out all possible steps to thwart the air disaster, or that preventative measures were impossible.¹⁰⁵

The provisions effecting a new liability regime are found in Chapter III of the Draft Convention entitled "Liability of the Carrier and Extent of Compensation for Damage."¹⁰⁶ Article 16 initially sets out liability for carriers in the case of passenger death or injury:

The carrier is liable for damage sustained in case of death or bodily or mental injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.¹⁰⁷

¹⁰⁰ See *supra* notes 54-57 and accompanying text. As "special contracts" allowed by Article 22 of the Warsaw Convention, the Montreal Interim Agreement (of which any international flights to, from, or through the United States are subject to) and the IATA Inter-carrier Agreement cannot carry the legal weight of a treaty, but are, in effect, contracts between the signatory airlines and its passengers. See discussion of the Montreal Interim Agreement, *supra* Part IIIB; discussion of the International Air Transport Association Inter-carrier Agreement, *supra* Part IV; Warsaw Convention, *supra* note 2, art. 22(1).

¹⁰¹ See *Committee Approves Draft Convention*, *supra* note 7, at 27.

¹⁰² The approximate equivalent of 100,000 SDR. See *SDR Exchange Rates*, *supra* note 78.

¹⁰³ In other words, the passenger or the person entitled to claim on the passenger's behalf will be able to obtain full economic restitution with respect to proven damages sustained in an accident regardless of fault on the part of the air carrier. See Weber & Jakob, *Draft Convention*, *supra* note 16, at 6.

¹⁰⁴ See *id.*

¹⁰⁵ See *Draft Treaty in Progress*, *supra* note 99, at 20.

¹⁰⁶ See Draft Convention, *supra* note 91, arts. 16-31.

¹⁰⁷ *Id.* at art. 16.

Article 20, the most important provision for air carrier liability in the Draft Convention, contains the framework for the liability regime itself, introducing the so-called two-tier liability system and effectively eliminating the caps on damage recovery contained in the Warsaw Convention.¹⁰⁸ Article 20 presently contains three alternatives to the two-tiered system subject to the adoption of the ICAO Contracting States at the Diplomatic Conference.¹⁰⁹

¹⁰⁸ See Draft Convention, *supra* note 91, art. 20; *Draft Treaty in Progress*, *supra* note 99, at 20.

¹⁰⁹ See Draft Convention, *supra* note 91, art. 20. In Article 20, the ICAO Legal Committee provided the following alternatives to govern compensation in the case of death or injury of passengers:

ALTERNATIVE 1

[1. Subject to paragraph 2, the carrier shall not be liable for damages arising under Article 16, paragraph 1 which exceed 100,000 Special Drawing Rights:

(a) if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage, or that it was impossible for it or them to take such measures; or

(b) unless the damage so sustained was due to the fault or neglect of the carrier or of its servants or agents acting within their scope of employment or agency.

2. At the time of ratification, adherence or accession, each State Party shall declare which of either subparagraph (a) or subparagraph (b) of the preceding paragraph shall be applicable to it and its carriers. A State Party which has declared that subparagraph (b) shall be applicable to it, may later make such declaration in respect of subparagraph (a) instead. All declarations made under this paragraph shall be binding on all other States Parties and the Depositary shall notify all States Parties of such declarations.]

ALTERNATIVE 2

[1. The liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100,000 Special Drawing Rights if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. Notwithstanding paragraph 1 of this Article, any State Party may by notification to the Depositary at the time of ratification or acceptance, or thereafter, declare, that in any action brought before a court within its territory, the liability of the carrier for damages arising under Article 16, paragraph 1 shall be limited to 100,000 Special Drawing Rights, unless the damage so sustained was due to the fault or neglect of carrier or of its servants or agents acting within their scope of employment. The Depositary shall inform all other States Parties accordingly and shall keep current a list of States Parties having made such declaration.]

ALTERNATIVE 3

1. *Proposed Alternatives of a Two-Tiered System*

Each of the alternatives from which the ICAO Contracting States have to choose with regard to first-tier liability covers claims up to 100,000 Special Drawing Rights (SDR),¹¹⁰ exclusive of awarded court costs and attorney's fees,¹¹¹ and eliminates the need for plaintiffs to prove airline fault for an accident.¹¹² In effect, claims for damages up to approximately U.S. \$135,000 (100,000 SDR) would be governed by strict liability principles; plaintiffs would merely have to provide proof of damage suffered as a result of the accident in order to be compensated.¹¹³ This would simplify and considerably shorten compensation procedures for most aviation disaster victims.¹¹⁴

With regard to second tier liability, the delegates could not reach a consensus on the burden of proof issue—namely, whether, in order for recovery to exceed 100,000 SR, the claim-

[1. Subject to paragraph 2 of this Article, the liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100,000 Special Drawing Rights if the carrier proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. The liability of the carrier above an amount of [the Legal Committee left the amount to be set by the Diplomatic Conference in case it would decide in favor of Alternative 3] Special Drawing Rights shall be subject to proof that the damage sustained by the passenger was due to the fault or neglect of the carrier or its servants or agents acting within their scope or employment.]

Id. (alterations in original).

¹¹⁰ The Draft Convention authorizes and requires the use of Special Drawing Rights (SDR), the international monetary unit defined by the International Monetary Fund (IMF). See Draft Convention, *supra* note 91, art. 21; Weber & Jakob, *ICAO Taking Initiative*, *supra* note 51, at 22. The 100,000 SDR amount equals approximately U.S. \$135,000, a substantial increase from the Warsaw Convention, yet the United States has indicated that it will try to have the cap raised to 250,000 SDR, the equivalent of approximately U.S. \$340,000. See *Draft Treaty in Progress*, *supra* note 99, at 20 (U.S. dollar figures adjusted to current SDR rate). Although it seems unlikely that the cap will be raised to that which the United States prefers, the ICAO Legal Committee did leave the actual damage threshold amount in the first tier to be determined by the upcoming Diplomatic Conference. See Draft Convention, *supra* note 91, Explanatory Memorandum in Attachment B, ¶ 1 n.1.

¹¹¹ See Draft Convention, *supra* note 91, art. 21(3) (“[t]he limits prescribed in Article 20 . . . shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and . . . expenses of the litigation incurred by the plaintiff, including interest.”).

¹¹² See Draft Convention, *supra* note 91, art. 20.

¹¹³ See *id.*; see also *Committee Approves Draft Convention*, *supra* note 7, at 27.

¹¹⁴ See *Committee Approves Draft Convention*, *supra* note 7, at 27.

ant must prove airline negligence or conversely the airline must prove either it was not at fault, it took all possible measures to prevent the accident, or preventative measures were unavailable.¹¹⁵ Therefore, in Alternative 1, each State party, upon ratification, must determine and notify which regime provided for in paragraph 1 of Alternative 1 will be applicable to its carriers: either the carrier has the burden or the claimant has the burden.¹¹⁶ Under Alternative 2, each State party would have the possibility of "opting out" of the liability regime provided in paragraph 1 of Alternative 2, which requires a presumption of the air carrier's fault, in favor of a regime that places the burden of proof on the claimant.¹¹⁷ While both Alternatives 1 and 2 retain the so-called two-tiered liability system, it appears that Alternative 3 establishes a three-tiered liability regime: (1) strict liability in the first tier up to 100,000 SDR, (2) presumed fault of the carrier in the second tier to go above 100,000 SDR, and (3) placement of the burden of proof on the claimant in the third tier in order for the claimant to recover beyond an SDR amount to be set by the Diplomatic Conference, which in turn limits second tier liability.¹¹⁸

2. Draft Convention "Updating Clause"

Another significant aspect of the Draft Convention is the incorporation of an "updating clause". This procedure is designed to ensure that the remaining limits of liability retain their value against inflation.¹¹⁹ The updating clause would require that the limits of liability be reviewed at five year intervals

¹¹⁵ See Draft Convention, *supra* note 91, art. 20. While some delegations preferred the burden to rest with the plaintiff to prove the fault of the air carrier, the majority of the delegations preferred the air carrier be required to prove it had taken all reasonable measures to avoid the damage or that it was impossible to do so. See *id.*, Explanatory Memorandum in Attachment B, ¶ 1. The inability of the delegates to reach a clear consensus concerning second tier liability, or responsibility for the burden of proof, prompted the development of the three alternatives presently in Article 20 of the Draft Convention. See *id.*

¹¹⁶ See Draft Convention, *supra* note 109; see also Draft Convention, *supra* note 91, Explanatory Memorandum in Attachment B, ¶ 1.

¹¹⁷ See *id.*

¹¹⁸ See Draft Convention, *supra* note 109; see also Draft Convention, *supra* note 91, Explanatory Memorandum in Attachment B, ¶ 1. The ICAO Legal Committee left the amount over which would require the burden of proof on the claimant to be set by the Diplomatic Conference in case it did decide in favor of Alternative 3 in article 20. See Draft Convention, *supra* note 91, art. 20, Alternative 3, Secretariat Note.

¹¹⁹ See Draft Convention, *supra* note 91, art. 21(5)(a).

and thereby allowing the parties to the ultimate Convention, along with the ICAO Council, to initiate and implement an adjustment in accordance with changing economic conditions.¹²⁰ An adjustment is necessitated at the close of the five year period if the average accumulated rate of inflation based on the "weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right," exceeds ten percent since the previous revision or "the date of entry into force of the Convention."¹²¹ A two-thirds vote of the ICAO Council is required for the adoption of the revision and becomes effective six months after its submission to the nations that are parties to the ultimate Convention, unless within three months a majority of such nations register their disapproval with the Council.¹²²

C. OTHER SIGNIFICANT PROVISIONS

Not only would the Draft Convention substantially revise the air carrier liability regime, it may also resolve a long-standing debate by providing for an additional forum or "fifth jurisdiction"¹²³ for the filing and adjudication of claims made under the Draft Convention against an air carrier:¹²⁴ the passenger's domicile. But the text and effect of the provision allowing the additional forum have been left as a whole for final consideration by the Diplomatic Conference because, although a consensus had been reached that a link should be required as between the pas-

¹²⁰ See *id.* The first review to take place at the conclusion of the fifth year following the date the Convention goes into force. See *id.*

¹²¹ *Id.* The exact wording of this clause was left for final decision by the Diplomatic Conference. See *id.* art. 21(5)(a), Secretariat Note.

¹²² See *id.* art. 21(5)(b).

¹²³ See Weber & Jakob, *Draft Convention*, *supra* note 16, at 7. The argument in favor of providing for the passenger's domicile as an additional forum is that it would be available in the absence of the Warsaw Convention under general principles of private international law. See *id.* On the other hand, many carriers and governments are concerned about defending claims in a jurisdiction that will favor its citizens and allow for unreasonable damage awards. See *id.*

¹²⁴ See Draft Convention, *supra* note 91, art. 27. Under the Warsaw Convention, the plaintiff has the option of where to bring the lawsuit but is limited to the country of the air carrier's domicile, the country of the air carrier's principal place of business, the country in which the contract for air travel was made, or the country of the passenger's final destination regardless of whether the passenger traveled on more than one airline. See *supra* note 38. It should be noted that the "fifth jurisdiction" would only be allowed with "respect [to] damage resulting from the death or injury of a passenger." Draft Convention, *supra* note 91, art. 27(2). For other actions for damages the fora available to the plaintiff would be the same as under the Warsaw Convention. See *id.* art. 27(1).

senger's domicile or permanent residence and the "operational presence of the air carrier," no compromise could be reached with regard to what type of link was necessary.¹²⁵ Final decisions of the Diplomatic Conference must also be made as to whether arbitration would be an alternative means for settlement¹²⁶ and as to whether to include in the new legal instrument a compulsory insurance requirement.¹²⁷

Although the system of liability in the Draft Convention substantially enhances the legal position of the claimant, the liability regime does exclude, in both tiers, the possibility of punitive or exemplary damages, only allowing recovery for compensatory damages, or damage actually suffered, the extent of which, of course, must be proven by the claimant.¹²⁸ This seems to be consistent with the trend of the courts disallowing punitive dam-

¹²⁵ See *id.* Explanatory Memorandum in Attachment B, ¶ 2. Article 27(2) expressly provides that

[i]n respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article [which provides for the original fora designated under the Warsaw Convention] or in the territory of a State Party in which the passenger has his or her domicile or permanent residence and to and from which the carrier operates services for the carriage by air [and] [or] in which the carrier has an establishment.

Id. art. 27(2). The issue among the delegations was whether to employ the word "and" or "or" in the provision to establish the necessary link between the carrier and the passenger's domicile or residence, the latter allowing for a broader range of additional fora. Although the meaning of the word "establishment" for purposes of Article 27(2) was also left to the Diplomatic Conference to clarify, Article 27(2) preliminarily defines it as "premises leased or owned by the carrier concerned from which, [through its own managerial and administrative employees,] it conducts its business of carriage by air." *Id.* art. 27(3) (alteration in original). Again the bracketed portion represents that which is to be clarified by the Diplomatic Conference. See *id.* Explanatory Memorandum in Attachment B, ¶ 2.

¹²⁶ See *id.* art. 28.

¹²⁷ See *id.* art. 45.

¹²⁸ See *id.* art. 23; Weber & Jakob, *Draft Convention*, *supra* note 16, at 6. Article 23 of the Draft, entitled "Basis of Claims" provides:

1. In the carriage of passengers . . . any action for *damages*, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits on liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

2. For the purposes of this Convention the term "damages" does not include *punitive*, exemplary or other non-compensatory damages.

Id. (emphasis added).

ages under the Warsaw system.¹²⁹ In fact, the few courts which have most recently addressed the issue have held that punitive damages are not recoverable as a matter of law against the air carrier in a case governed by the Warsaw Convention.¹³⁰

In addition, the Draft Convention further takes the interests of the air carrier into account by retaining the Warsaw Convention provision for the air carrier defense of contributory negligence in both tiers of liability.¹³¹ Moreover, under the Draft Convention, the right of the air carrier to take recourse against a liable third party, irrespective of the air carrier's being strictly liable to the passenger in the first tier, is also maintained.¹³²

Other than the noteworthy modifications and consistencies aforementioned, the Draft Convention provisions, as well as its probable effects, predominantly parallel the language and provisions of the original Warsaw Convention. For instance, the mechanism of "special contract" is still available to effect higher limits of liability than those provided for in the Draft Convention,¹³³ yet such a mechanism still cannot relieve the carrier of liability or fix a lower limit.¹³⁴

VI. OUTSTANDING ISSUES

The Draft Convention has been received by all ICAO Contracting States and non-Contracting States and could be adopted as early as 1999,¹³⁵ but may take several years more to

¹²⁹ See Barry & Whalen, *supra* note 33, at 384-85; Kelly Compton Grems, *Punitive Damages Under the Warsaw Convention: Revisiting the Drafters' Intent*, 41 AM. U. L. REV. 141, 157-158 (1991). Due to the lack of specificity as to the nature of damages collectible in international aviation disasters, courts have struggled with this issue. See Barbara J. Buono, *The Recoverability of Punitive Damages Under the Warsaw Convention in Cases of Willful Misconduct: Is the Sky the Limit?*, 13 FORDHAM INT'L L.J. 570, 582 (1990).

¹³⁰ See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991); *In re Air Disaster at Lockerbie, Scot. of Dec. 21, 1988*, 928 F.2d 1267 (2d Cir. 1991).

¹³¹ See Draft Convention, *supra* note 91, art. 19.

¹³² See *id.* art. 31.

¹³³ See *id.* art. 21(6).

¹³⁴ See *id.* art. 22.

¹³⁵ See *Annual Report*, *supra* note 92, at 51. Prior to ratification, a new treaty first must be formally adopted by the 185 Contracting States of the ICAO at a Diplomatic Conference called by the ICAO Council expected to be held in 1998. After formal adoption, the treaty must then be ratified by thirty of the nations in order to be in force. See *International Effort*, *supra* note 57, at 20.

be adopted by much of the world.¹³⁶ While most governments and airlines would like to update the antiquated Warsaw System, there are, nevertheless, outstanding issues that need to be settled before the final text of the treaty can be hammered out.¹³⁷

First, an issue which is yet to be resolved is the question of who will have the burden of proving the negligent conduct of the air carrier which is necessary for the air carrier's liability to exceed the 100,000 SDR amount. The Draft Convention's provisions may make it even more difficult for families to collect damages in comparison to the IATA Inter-carrier Agreement. For instance, the language in the Draft Convention requiring a passenger to prove negligence on the airline's part would be a step backwards from the IATA Inter-carrier Agreement, which provides for the application of strict liability to all claims,¹³⁸ while strict liability is only applicable under the Draft Convention to the extent the claims for damage do not exceed the 100,000 SDR threshold.¹³⁹ However, requiring proof of air carrier negligence for second tier liability is necessary. Without a fault system consistent with current tort law, the aviation industry and passengers will have watered down levels of safety and security or at least a lack of future safety and security improvements. At any rate, the three alternatives in Article 20 of the Draft Convention specifically developed by the ICAO Legal Committee to resolve

¹³⁶ While the consensus of many aviation officials is that it will take up to five years for a treaty to be ratified after it is adopted by the ICAO contracting nations, the process could be completed much sooner. *See id.* For instance, approval of a new treaty by North America, Europe, and the major aviation nations of Asia would provide 38 countries; only 30 nations are needed to ratify the treaty for it to be in force. *See id.*

¹³⁷ *See id.* The United States is not expected to block treaty ratification, and the DOT likely would recommend the treaty for required U.S. Senate ratification if certain unsettled provisions are resolved at the Diplomatic Conference in a manner acceptable to the DOT. One contentious issue is the DOT's interest in allowing plaintiffs to sue in the country of a passenger's domicile, referred to as fifth jurisdiction rights. This provision would help assure that lawsuits of relatives of U.S. passengers are heard under U.S. law, regardless of the country in which the ticket is bought. Under existing law, American citizens can have their case heard in a U.S. court only if the ticket was purchased in the United States. *See id.* This issue was left for resolution by the Diplomatic Conference.

¹³⁸ *See* Draft Convention, *supra* note 91, art. 20. For example, paragraph 1 and subparagraph (b) in Alternative 1 of Article 20 of the Draft provide, in part, "the carrier shall not be liable for damages arising under Article 16, paragraph 1 which exceed 100,000 Special Drawing Rights . . . unless the damage so sustained was due to the fault or neglect of the carrier or of its servants or agents acting within their scope of employment or agency." *Id.*

¹³⁹ *See id.*

this issue will likely produce compromise at the Diplomatic Conference.

Furthermore, removing the artificial passenger compensation limits should help put an end to lengthy litigation, saving airlines legal costs and allowing families to recover their provable damages sooner. Currently, to receive more than U.S. \$75,000 limitation as set by the Montreal Interim Agreement in 1966,¹⁴⁰ family members of an air crash victim must overcome the difficult burden of proving the airline is guilty of "willful misconduct," a form of gross negligence in some jurisdictions. Unlike the current rules, full compensation is no longer predicated upon the requirement of "willful misconduct" under either of the Alternatives under Article 20 of the Draft Convention.¹⁴¹ However, the issue left to be resolved is not what amounts an injured passenger can receive above the threshold set by the Draft Convention, but what amount should constitute that threshold. The 100,000 SDR amount, of approximately U.S. \$135,000, is a significant increase, especially when the passenger is not required to prove willful misconduct to obtain higher amounts and the "updating" mechanism provides for adjusting the threshold amount for inflation and other factors in the future. But the threshold, as it stands in the Draft, is already out of date. Hopefully, the Diplomatic Conference will recognize this and increase it even more, perhaps to 200,000 SDR as suggested by the United States.

Another question is, who is going to bear the burden of increased airlines payments for international air disasters. Obviously, relaxing the limits on air carrier liability will annually increase the cost of claims paid out by airlines. Given the expected increase in premiums, insurers must pass on the cost of increased claims to airlines, who will inevitably pass on such costs to air travelers. Industry-wide liability payments can be expected to increase, on average, by U.S. \$300 million annually for airlines with international service, in effect doubling the industry's annual passenger liability payments.¹⁴² However, in 1996 U.S. \$300 million would have represented only .02 percent of the operating expenses for scheduled international operations

¹⁴⁰ See Montreal Interim Agreement, *supra* note 8.

¹⁴¹ See Weber & Jakob, *Draft Convention*, *supra* note 16, at 6.

¹⁴² See *International Effort*, *supra* note 57, at 20. Experts estimate annual liability payments have averaged U.S. \$400 million in the 1990s, excluding unsettled claims. See *id.*

of IATA members.¹⁴³ Thus, although a substantial rise in ticket prices would seem to follow, insurance underwriters believe that the liability provisions of the Draft Convention would create only negligible increases in ticket prices to cover air carriers' additional insurance requirements.¹⁴⁴

Furthermore, the provision contained in the Draft Convention which creates air carrier liability for mental injury does not seem viable.¹⁴⁵ This condition opens a whole new door and allows passengers to sue without suffering any bodily injury.¹⁴⁶ For instance, a passenger could try to recover damages for any stress suffered while his flight experienced turbulence.¹⁴⁷ It seems very unlikely that this provision will remain in the final version of the treaty.¹⁴⁸

VII. CONCLUSION

In conclusion, the Warsaw System prevents air crash victims' families from obtaining adequate compensation and resolving their claims in a timely fashion.¹⁴⁹ The Draft Convention is the

¹⁴³ See *id.*

¹⁴⁴ See *id.* For example, on a London to Miami flight, the proposal would cost air travelers an additional fifty cents a ticket and fifteen cents on the price of a London to Paris ticket to cover the increased insurance premiums that airlines would pay to abolish the liability limits established under the Warsaw System. See Weber & Jakob, *Current Developments*, *supra* note 20, at 307 (reporting that the Draft Convention's raising of the Warsaw Convention's liability limits would only require increasing liability insurance costs for air carriers by nominal amounts averaging below U.S. two dollars per round-trip ticket based on a socio-economic study conducted by the ICAO analyzing air carrier liability limits throughout the world).

¹⁴⁵ See Draft Convention, *supra* note 91, art. 16. Article 16 of the Draft Convention provides, in part, "[t]he carrier is liable for damage sustained in case of death or bodily or mental injury of a passenger . . ." *Id.* (emphasis added).

¹⁴⁶ The Warsaw Convention sets forth conditions under which international air carriers can be held liable for injuries to passengers, and does not allow recovery for purely mental injuries. See Warsaw Convention, *supra* note 2, art. 17; *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (holding that the French phrase in Article 17 of the Warsaw Convention "lesion corporelle" should be translated to mean only "bodily injury" and not encompass purely mental injuries therefore precluding recovery for such injury); see also Lisa M. Fromm, *Eastern Airlines v. Floyd: Airline Passengers Denied Recovery for Emotional Distress Under the Warsaw Convention*, 25 AKRON L. REV. 425 (1991).

¹⁴⁷ However, under the Draft Convention, the passenger would not be able to recover from such injury if it "resulted solely from the state of health of the passenger." Draft Convention, *supra* note 91, art. 16.

¹⁴⁸ See *International Effort*, *supra* note 57, at 20.

¹⁴⁹ As was previously alluded to, the U.S. \$75,000 Warsaw System threshold, as per the Montreal Interim Agreement, was shown to be woefully inadequate when

latest attempt to rectify the antiquated scheme. While the IATA Inter-carrier Agreement of 1996 has been implemented by some of the airlines¹⁵⁰ and does afford significant benefits, the contractual nature of the instrument cannot fully attain the Warsaw Convention's drafters' dual goals of uniform liability limits and systematic legal procedures, nor can it serve as a permanent answer to the problem. An international convention, adopted by a majority of the world's governments, would be the best means for achieving that which the original Warsaw Convention drafters sought: uniformity and safety. The Draft Convention, as a new, comprehensive convention and not as a "special contract" or modification perpetuating the fragmentation that exists as the Warsaw System, will enjoy the force of international law behind it and will likely be the permanent answer to the seventy-year-old problem of coping with the inherent complexities of international, private aviation.

the families of U.S. victims of the 1988 downing of Pan Am Flight 103 in Lockerbie, Scotland, were barred from recovering more damages. Lawsuits designed to prove "willful misconduct" on the part of the airline and surmount the compensation limit inevitably resulted in protracted litigation. See, e.g., *In re Air Disaster at Lockerbie*, Scot. on Dec. 21, 1988, 928 F.2d 1267, 1279 (2d Cir. 1991); *In re Air Disaster at Lockerbie*, Scot. on Dec. 21, 1988, 37 F.3d 804, 828 (2d Cir. 1994).

¹⁵⁰ As of June 1997, 85 air carriers had signed the original 1995 IATA Inter-carrier Agreements and 53 had signed a subsequent implementation agreement, yet only the major U.S. airlines and seventeen non-U.S. airlines have voluntarily implemented the agreement.