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THE IATA AGREEMENTS AND THE EUROPEAN REGULATION: THE LATEST ATTEMPTS IN THE PURSUIT OF A FAIR AND UNIFORM LIABILITY REGIME FOR INTERNATIONAL AIR TRANSPORTATION†

Federico Ortino*
Gideon R.E. Jurgens**

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IATA AGREEMENTS/EUROPEAN REGULATION

I. INTRODUCTION

As it nears its seventieth birthday, the Warsaw Convention has once more proven that it does not wish to exit the stage yet.

On October 30, 1995, at its Annual General Meeting in Kuala Lumpur, the representatives of the six regions of the International Air Transport Association (IATA) unanimously adopted an Intercarrier Agreement (IIA), which has been broadly regarded as the long-awaited change in the legal regime that relates to one of the major problems of international air transport: how to deal with damage claims brought for death or injury to passengers on international flights. A majority of IATA’s members have since agreed to include in their conditions of carriage, a provision that would waive the liability limits set by the Warsaw Convention and its progeny.

In December 1995, just after the IIA was adopted, the Commission of the European Union drafted a proposal for a Council Regulation on carrier liability that, with the principal intent of achieving a uniform and fair system of airline liability (at least within the European Union), also waived the Warsaw Convention’s liability limits.

Notwithstanding the several improvements accomplished by the IATA and European initiatives, the two principal goals to be pursued in any attempt to reform the Warsaw Convention (i.e., uniform rules and fair damage compensation) have not been fully achieved. Although the liability limits will largely disappear from the conditions of carriage of most of the world’s air carriers, questions like applicable law, jurisdiction, mandatory insurance, liability defenses, adequate notice, up-front payments, mutual liabilities, and indemnification rights have not been adequately resolved. The answers to these questions will differ depending both on the regime governing the particular contract of carriage and on several other factors like the nationality of the carrier or the destination of the flight.

Accordingly, it seems more evident today than ever that the only way an adequate and uniform regime for international air transport can be achieved is through intergovernmental action modifying the Warsaw Convention. In May 1997, the Legal Committee of the International Civil Aviation Organization opened for signature Oct. 12, 1929, 49 Stat. 3000, 876 U.N.T.S. 11 (1934) [hereinafter Warsaw Convention].
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(ICAO) took the first step toward such a system by adopting a draft Convention for the Unification of Certain Rules for International Carriage by Air.

This Article will offer a brief survey of the Warsaw Convention and its progeny. It will analyze, in detail, the IATA initiative, including its content and implementation. It will also comment on the content and evolution of the European regulation. Finally, the article will review the accomplishments of the latest initiatives and the issues that still need to be resolved, along with a brief analysis of the recent draft Convention approved by the ICAO Legal Committee.

II. HISTORICAL BACKGROUND: THE WARSAW CONVENTION AND ITS AFTERMATH

Before analyzing the content and implementation of the two IATA Intercarrier agreements and the European Regulation, it is important to give a brief survey of what was accomplished in the field of international air transportation law up to the moment the IATA agreements were signed and the Commission Proposal was drafted. The reader will be introduced to the world's most widely adopted (and perhaps its most widely maligned) private international law treaty, the 1929 Warsaw Convention, and to the many changes this so-called "Warsaw System" has undergone through the years.

A. THE WARSAW SYSTEM: A BRIEF INTRODUCTION

Air carrier liability for accidents in international carriage by air is basically governed by the 1929 Warsaw Convention as supplemented by certain other instruments. Notwithstanding its age, the Warsaw Convention still represents the principal piece of legislation on international aviation law. Designed at a time when the commercial air transportation industry was first emerging and the Convention's principal goal was to limit and define the potential liability of carriers in claims for death or personal injury caused by accidents in international air travel. Such a limitation was intended to "attract capital that might

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2 The other instruments include the Hague Protocol of 1955, the Guadalajara Convention of 1961 and the 1966 Montreal Agreement. See infra notes 15, 19, and 22.
otherwise be scared away by the fear of a single catastrophic accident."

The Convention provided that carriers are liable for damage sustained by a passenger in the course of a flight or while embarking or disembarking (Article 17), but limited this liability to 125,000 Poincaré francs (roughly the equivalent of U.S. $8300) at that time. In exchange for such a limit, which was considered low even in 1929, the Convention, first, rendered null and void any provision tending to relieve the carrier of liability or to fix a limit lower than 125,000 Poincaré francs, and secondly, shifted the burden of proof so that the carrier was presumed liable unless it could prove that either it had taken all necessary measures to avoid damages or that it was impossible for the carrier to take such measures. Additionally, where the passenger could show willful misconduct or equivalent conduct, on the part of the carrier, the limits of liability set out in Article 17 would not apply.

The other main goal of the Convention was to develop uniform rules governing air travel, particularly in the international setting. It was clear even then, that commercial aviation travel was "expanding into many countries having different customs, languages, social identities, and legal systems." The Convention addresses the issue of uniformity almost completely in regard to documentation, like passenger tickets, baggage checks, and air waybills, and only to a certain degree as to the procedures for dealing with claims arising out of an international flight and the substantive law applicable to such claims. Besides providing for a two-year period of limitation and a rule by which the passenger (or his or her descendants) is limited by being able only to bring suit against the carrier that was performing the part of the transportation involved in the accident, the Convention designated only four fora in which

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5 Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 499 (1967).
6 See id., art. 20(1).
7 See id., art. 25.
9 LOWENFELD, supra note 4, at 7-27.
10 See Warsaw Convention, supra note 1, art. 29.
11 See id., art. 30(2).
actions could be brought: the domicile of the carrier, the principal place of business of the carrier, the place of business of the carrier through which the contract was made, and the place of destination.\textsuperscript{12}

Since 1929 there have been several attempts, most of them unsuccessful, to somehow improve the Convention’s liability regime. In fact, it did not take a long time for the limitation provided in Article 22 to become inadequate and unreasonable. Several objections were raised by those arguing for higher limits. In developed countries like the United States, for example, awards in personal injury and death actions were far higher than the limits permitted by the Warsaw Convention. Secondly, liability insurance could be obtained by the carrier at a lower cost per passenger mile than originally had been possible, not only because of the increased ability of the carrier, aided by technological progress, to provide safe transportation but also because of the burgeoning international insurance marketplace following World War II.\textsuperscript{13} By 1965 liability insurance costs were a minimal part of the operating costs of the carrier.\textsuperscript{14}

Industry-wide dissatisfaction and the consequent need for modification of the liability limit led to the Hague Protocol\textsuperscript{15} and the Warsaw Convention in 1955, which only managed to double the previous limit from 125,000 to 250,000 Poincarré francs (about U.S. $16,600), and amended Article 25 by introducing an intentional or reckless misconduct standard to replace the willful misconduct standard.\textsuperscript{16} The United States actively participated in and voted for the Protocol, but while a

\textsuperscript{12} See id., art. 28. In actual practice, a carrier’s domicile and its principal place of business are usually the same. Article 28, therefore, allows only three fora where suit can be brought.

\textsuperscript{13} See LOWENFELD, supra note 4, at 7-99.

\textsuperscript{14} See Sheinfeld, supra note 8, at 659.


\textsuperscript{16} “Willful misconduct” (or the equivalent thereof according to the court to which the case is submitted) was replaced by “the damage resulted from an act or omission of the carriers, his servants or agents, done with intent to cause damage or recklessly and with knowledge that the damage would probably result.” See Hague Protocol, supra note 15. This was intended to make it more difficult to “break” the limit.
relatively large number of countries ratified the Hague Protocol, the United States never did.\textsuperscript{17}

After the United States announced its withdrawal from the Warsaw Convention in 1965,\textsuperscript{18} international carriers, with the help of IATA, signed the so-called Montreal Interim Agreement, which raised the liability limit to U.S. $75,000. At the same time, the agreement required airlines to waive the Article 20(1) defense for damage claims up to that limit.\textsuperscript{19} The Montreal Agreement,\textsuperscript{20} which was neither an international treaty nor a formal amendment of the Warsaw Convention, had its legal foundation in Article 22(1) of the Warsaw Convention which, after setting the limit of liability, states that "by special contract, the carrier and the passenger may agree to a higher limit of liability."\textsuperscript{21} The agreement was intended to apply, however, only to flights with a point of origin, destination, or an agreed stopping point in the United States; and only those airlines that signed the agreement were bound by its terms, although almost every airline serving the United States ultimately signed. Additionally, in accordance with Article 25 of the Warsaw Convention, the new limit set by the Montreal Agreement could be broken if the passenger could establish that the damage was caused by the reckless or willful conduct of the carrier. In May 1966, once the Montreal Agreement became generally accepted, the United States withdrew its notice of denunciation and remained a party to the Warsaw Convention.

In 1971, in a further attempt to reach a satisfactory international system, representatives at ICAO’s international conference on air law at Guatemala City, agreed to amend the Warsaw Convention. Under the Guatemala Protocol,\textsuperscript{22} carrier limits would be increased to U.S. $100,000, exclusive of legal fees and

\textsuperscript{17} One hundred and eleven countries are currently parties to the Hague Protocol.
\textsuperscript{18} For the history of these events, see Lowenfeld & Mendelsohn, supra note 3, at 503.
\textsuperscript{20} See id.
\textsuperscript{21} See id.
\textsuperscript{22} Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on September 1955, Mar. 8, 1971, 64 Dep't St. BuiL 55 [hereinafter Guatemala Protocol].
costs, the liability of the carrier would be absolute (there would not be an Article 20(1) defense), but the damage limitation could not be exceeded in any way (i.e., the limit of liability would be unbreakable) due to the fact that the reckless or willful misconduct standard of Article 25 would be deleted). In addition, states would be permitted to establish supplemental compensation plans within their territories over and above the initial U.S. $100,000 recovery, which would be financed by contributions made by the passengers (i.e., a surcharge or a higher ticket price). Further, Article 28 of the Convention would be amended to permit a passenger to sue in the courts of his or her domicile if the carrier had a place of business in that state and the state was a party to the Convention. To preserve a certain degree of uniformity it was decided that, for the protocol to take effect, thirty countries would have to ratify the agreement, five of which would have to comprise forty percent of air travel of ICAO member nations. Twenty-two nations ratified the Guatemala Protocol, but for various reasons, the United States refused to do so. Since the United States comprised such a large portion of international air travel, without United States ratification, the Guatemala Protocol has become ineffective.

In 1975, at the next ICAO meeting in Montreal, yet another amendment to the Warsaw Convention, known as Montreal Protocol No. 3 (MAP3), was adopted. MAP3 altered Warsaw’s monetary unit for calculating the limitation on recovery. Because of economic events affecting the stability of world gold prices, the 1975 Conference replaced the Poincaré franc with the International Monetary Fund’s Special Drawing Rights (SDR) as the new basic monetary unit of the Warsaw Convention. Other than this, MAP3 was essentially the same docu-

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24 See id.
25 So far as the authors are aware, the United States never explained why it ultimately did not adopt a supplemental compensation plan, e.g., one with no limits (that would then have made possible United States notification of the Guatemala Protocol).
26 Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage by Air): Montreal Protocols 3 Providing Higher Liability Limits, Sept. 25, 1975, ICAO Doc. 9147 [hereinafter Montreal Protocol No. 3 or MAP3]. MAP 1, 2, and 4 did not affect the liability regime for passengers and, hence, will not be addressed in this article.
27 SDR's were first issued in January 1970 at a value of 0.888671 grams of fine gold, precisely equal to the U.S. dollar. The IMF decided to fix the value of the SDR in terms of a “basket” of 16 currencies. As the dollar changed value, the SDR
ment adopted in 1971 at Guatemala City. It provided for absolute liability, a settlement inducement clause, an unbreakable limit of SDR 100,000 (approximately U.S. $117,000), and the express right of each party to the Convention to establish a Supplemental Compensation Plan within its territory. Because of various problems, including disagreement on the appropriate limit for a supplemental compensation plan, the United States did not ratify MAP3.28

B. Unilateral Steps Taken by Single Countries, Airlines, or Groups of Airlines

It is fair to say that the American government was not alone in seeking to modernize the liability limitation provided in the Warsaw-Hague system. As early as 1967, British airlines fell under public pressure because of the low liability limits under the Hague Protocol (and because of the limited geographical application of the Montreal Agreement), and they began to enter into special contracts, with higher limits on liability, as a matter of routine.29 By 1974, formal support for the Montreal initiative and its limits of liability was expressed in a press statement issued on behalf of thirteen European countries:30

It is considered that the limits of liability under the Warsaw-Hague system are unacceptably low and that the application of the Montreal Agreement gives rise to inequalities. Accordingly most Western European countries have been considering steps to ensure that in the case of death or personal injury to passengers their airlines will accept a limit of liability approximately equal to U.S. $58,000, expressed in national currencies. For airlines of some of these countries that limit is already applicable and in others governmental action is taking place. This action affects only the airlines of those countries. It is hoped that most Western European airlines will introduce similar arrangements in the near future. Some countries are contemplating December 1, 1974, as the effective date.31

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28 See Lowenfeld, supra note 4, at 7-171. See also infra notes 43-44.
31 Original signatories to the Agreement were: Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Spain, Switzerland, and the United Kingdom.
In 1975 British authorities required British airline license holders to provide a minimum of 25,000 Pound Sterling as a liability limit to each passenger (approximately U.S. $60,000 on April 1, 1975). This limit was increased in 1981 to the Sterling equivalent of SDR 100,000 (then roughly the equivalent of U.S. $120,000). Following the British lead, other airlines decided to voluntarily raise their liability limitation to the Montreal level likewise relying on Warsaw's Article 22(1). In June 1975, the U.S. Attorney-General's Department approved a proposal by Quantas to increase its liability for passenger injury or death pursuant to the Montreal Agreement in respect of all its international routes. At the time, the department held the responsibility for the administration of the Australian Civil Aviation (Carriers' Liability) Act of 1959. In Italy, the state-owned airline, Alitalia, voluntarily adopted a liability limit of U.S. $90,000, except for flights to and from the United States, where the lower limits of the Montreal Agreement still applied. Japanese and other airlines followed thereafter.

By 1981, other agreements created increased liability limits in excess of the Warsaw limitations for transportation not involving the United States (i.e., non-Montreal Agreement flights). Throughout the 1980's, other increases followed with still

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33 See id. The new limit became effective April 1, 1981. SHAWCROSS & BEAUMONT, supra note 29, at § VII/159.
36 The Italian authorities authorized these limits, which were adopted by the end of the 1970's by all other smaller Italian airlines. See BALLARINO & BUSTI, supra note 34, at 648.

The governments of France (for domestic flights), Ireland, Norway, Sweden, and Switzerland require a liability limit of at least U.S. $58,000; Air Afrique, Austrian Airlines, Sabena, Burma Airways, SAS, TACA, Finnair, Air France, Air Inter, UTA, Lufthansa, Condor, El Al, Alitalia, Japan Airlines, Alia, Middle East Airlines, Luxair, MAS, KLM, Martinair, Transavia, Air New Zealand, Air Panama, Singapore Airlines, South African Airways, Iberia, Thai, and Tunis Air offer liability limits of at least U.S. $58,000.

Id.
higher liability limits. Unlike the Montreal Agreement carriers, however, most non-U.S. carriers did not waive the benefit of the defense provided by Article 20.

By 1995, the limits of liability ranged from U.S. $75,000 in the United States, to U.S. $150,000 in most of Europe and U.S. $350,000 in Australia.

C. Problems with the Warsaw System

The general criticism toward the Warsaw system from both the airline industry and the passenger perspectives is understandable for the following reasons.

1. Non-Uniformity

Uniformity in the liability system sought by the proponents of the Warsaw Convention, if it ever existed, started to disintegrate a long time ago. Even without taking into account the several unilateral steps taken by single countries, airlines, or groups of airlines in the past two decades, at least three different sets of rules relating to airlines' liability for passengers' death or injury

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38 The Italian Parliament increased to 100,000 SDR's in 1988. See BALLARINO & BUSTI, supra note 34, at 311. In the United Kingdom, although the UK license condition still imposes a 100,000 SDR limit on UK-registered carriers, "British Airways' Conditions of Carriage expressly provide that a limit of 130,000 SDRs applies on British Airways service which would otherwise be subject to the Montreal Agreement limit, i.e., [sic.] the higher of the two limits apply." SHAWCROSS & BEAUMONT, supra note 29, at § VII/158 citing BRITISH AIRWAYS CONDITIONS OF CARRIAGE, art. 16, ¶ 2(a). "By 1990, "all Japanese airlines were . . . voluntarily applying a limit of 100,000 SDR's . . . by 'special contract' to passengers whose carriage was subject to the Convention." Id. Anthony G. Mercer, The Montreal Protocols and the Japanese Initiative: Can the Warsaw System Survive?, 19 AIR & SPACE L. 301 (1994).

39 See SHAWCROSS & BEAUMONT, supra note 29, at § VII/159. However, Warsaw Article 20 defenses were waived by some United Kingdom airlines as part of their special contracts. These defenses were also waived by Qantas Airways from and to Australia, Gibraltar Airways from and to Gibraltar, Middle East Airlines from and to Lebanon and Thai International Airlines from and to Thailand. See COHEN, supra note 32, at 164 n.230.

40 For a detailed list of the liability limits in EC countries, see Commission Proposal for a Council Regulation (EC) on Air Carrier Liability in Case of Accidents, 1996 O.J. (C 104) 18 [hereinafter EC Proposal].

41 It is interesting that for almost 30 years the United States saw limits rising around the world but did nothing to increase the U.S. $75,000 limit in the Montreal Agreement. This may be partly explained by the fact that in highly publicized disasters, like Lockerbie and KAL 007, U.S. Courts found willful misconduct under Article 25 and held that the limits did not apply. See infra note 48 and accompanying text.
on an international flight exist: (1) the Warsaw Convention of 1929 with its presumed liability and limitation of U.S. $8300; (2) the Warsaw Convention as modified by the 1955 Hague Protocol with its limitation of U.S. $16,600; and (3) the 1966 Montreal Agreement with its absolute liability up to U.S. $75,000.

Considering every Article 20(1) special contract that raised the liability limit of Warsaw-Hague in the past two decades, whether voluntary or mandated by national regulation, the liability regime of carriers changes depending on both the contracting airline and the route of the particular flight. "There is a plethora of mandated limits and Montreal Agreement type voluntary limits... [such that it] is becoming difficult to find more than a few major States where an unmodified Warsaw Convention or Hague Protocol limitation is still in effect."42

2. Low Liability Limits

In spite of all the measures taken by governments and airlines to increase the Warsaw-Hague limits, the coverage afforded to passengers on international flights in case of injury or death remained inexcusably low.43 Inflation44 and the introduction of the "two-tier" gold standard45 rendered even the new voluntary limits just as inadequate as the earlier limits of Warsaw-Hague. Hence, claimants have tried different ways to get around such limitations and secure full compensation. Among them, the

42 Cohen, supra note 32, at 167.

43 The Rand Corporation's Institute for Civil Justice published a study in November 1988 examining the outcomes of claims involving 2228 deaths in the 25 worst crashes involving U.S. airlines in the period 1979 to 1984. It found that surviving relatives received on average U.S. $363,000, but estimated the true economic loss at U.S. $749,000 per case. These figures are much higher than the U.S. $75,000 limit under the Montreal Agreement and the 100,000 SDR limit in many special contracts (equivalent in 1988 to approximately U.S. $136,000). Shawcross & Beaumont, supra note 29, at § VII-159-10.

44 A 1989 IFAPA study reported a 150% inflation record in OECD countries since 1971. By the end of 1990, 100,000 SDRs were worth approximately U.S. $144,000. If movements in the relevant consumer price indices since 1971 are taken into account, the real value to a U.S. claimant would be U.S. $53,300 in 1971 terms. See id.

45 In the 1970's the central banks of most of the western countries adopted the "two-tier" standard and the price of gold in private transactions began to fluctuate, while the official value was kept stable by governments. Since several courts used the official value as the standard for calculating the Warsaw-Hague limit, the "value" of the damages recovered by Warsaw plaintiffs dropped even further. See Ballarino & Busti, supra note 34, at 642.
most frequently used are forum shopping,\textsuperscript{46} claims against multiple defendants,\textsuperscript{47} and the willful misconduct and notice exceptions of the Warsaw Convention.\textsuperscript{48} Even though courts are often willing to go along with plaintiffs and "break" the limitation, such a practice not only causes greater uncertainty and non-uniformity in the interpretation and application of the Warsaw Convention worldwide, but it also produces prodigious delays in resolving disputes and distributing damage awards to the victims and the families.

3. Lack of a General Provision on Applicable Law

The Warsaw Convention does not contain a general choice of law provision to determine the size and scope of damage awards (i.e., the laws of the country that are used to determine damages). The Convention contains specific choices of law clauses that point to the \textit{lex fori}: (1) Article 21 on contributory negligence; (2) Article 24(2) on standing; and (3) Article 29(2) on calculation of time limits. Additionally, the criteria for determining damages are left to the conflict of law rules of the court in which the suit is brought. Because every country's law of damages is different and the application of the proper set of rules in a particular case may result in a more favorable decision for either the plaintiff or the defendant, the judicial battle over the law applicable to the determination of recoverable damages is always fought very intensely in a Warsaw case. The battle inevitably carries with it, among other consequences, prolonged and

\textsuperscript{46} United States courts are favored by non-U.S. claimants because of the greater tendency of United States courts to "break" the liability limits, the higher awards rendered by U.S. juries in favor of accident victims, and the possibility of receiving punitive damages. \textit{See id.}

\textsuperscript{47} Claims against the manufacturer or the air traffic control facility have often been joined in lawsuits in order to obtain jurisdiction in the United States and to broaden the pool of defendants. This increases the chance of avoiding the limits and receiving unlimited compensation. \textit{See id.}

\textsuperscript{48} The Warsaw-Hague liability limitation can be overcome either by showing willful misconduct on the part of the carrier or by demonstrating that the passenger has not been given proper notice pursuant to Article 3 of the Convention. \textit{See Lisi v. Alitalia-Linee Aeree Italiane S.P.A., 370 F.2d 508, 514 (2d Cir. 1966) (holding that a ticket in lilliputian print does not satisfy the Article 3 notice requirement and, therefore, unlimited liability was appropriate). But see Chan v. Korean Air Lines Ltd., 490 U.S. 122, 129 (1989) (appearing to overrule Lisi by holding that the limit may be broken only if a carrier failed to deliver any document, or the quality of the document is so poor that it cannot reasonably be described as a 'ticket', such as a blank form).}
expensive litigation, forum shopping, and non-uniform and unfair results.

4. *Fori Domicilii* Not Available to Plaintiff

Selection of the proper forum can make a very substantial difference in a Warsaw case. Professor Andreas F. Lowenfeld has stated that “determination of the applicable law is only a small part of the task of fixing compensation for international transport accidents. In fact, once special provisions designed to implement Warsaw are cast aside, the law of accident compensation is pretty much the same in all countries.” Although Lowenfeld may underestimate the relevance of the applicable law, he is certainly on point when he asserts that “the most significant differences in accident compensation come in the conditions of litigation, actual or potential.” Some of the litigation factors that play a major role in the determination of damage awards are: (1) the availability of contingency fee arrangements; (2) whether the damage award is made by a judge, a group of judges, or a jury; (3) the competence of the court; (4) the level of litigiousness of the particular country; and (5) the community’s view on the value of a person’s life. These are practically more important than the law according to which the damages are determined.

Although Article 28 of the Warsaw Convention lists four different places where the plaintiff may file suit, it does not provide for the court of the passenger’s domicile (the so-called fifth forum). Denying the plaintiff his *fori domicilii* often results in damage awards that differ from the amount usually awarded by the courts of the plaintiff’s domicile. This is especially true from the perspective of the “wandering American” (i.e., the U.S. citizen who travels or works abroad), who could be barred from suing in a U.S. court if the permissible four *fori* of Article 28 do

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Focusing on application of a given law can tell us whether collateral benefits, . . . are or are not to be deducted from an award of damages; . . . whether such elements of damages as loss of consortium, grief, or pain and suffering before death are or are not to be taken into account; and under what circumstances (if at all) punitive damages may be awarded.

*Id.*

50 Id.

not include a U.S. court. Several commentors view such a result as unfair and unjust, believing that air accident victims should receive compensation according to the standards of the country of their domicile. But it is not only the "wandering American" that raises the problem. What about the German or French citizen who purchases a ticket in Beijing for a Beijing-to-Los Angeles-to-Beijing flight on a Chinese airline. Should they be limited to suing only in Beijing, which is currently the only permissible forum under Article 28? Or should they be allowed to sue in a court in Germany or France where the Chinese carrier does business?

D. The Japanese Initiative of 1992

The adoption by Japanese airlines of new conditions of carriage in November 1992 represented the most significant development in the liability levels of international airlines since the Montreal Agreement of 1966. It was a decisive turning-point in the history of the Warsaw system. In 1992, airlines were faced with public and scholarly pressure asking for a new special contract under Article 22(1) of the convention with higher limits of liability. Japan Airlines, All Nippon Airways and Japan Air Systems responded by voluntarily waiving the limits of liability entirely and the Article 20(1) defense up to SDR 100,000 (approximately U.S. $140,000) for passengers whose carriage on the services of those airlines is subject to the Warsaw-Hague regime. This resulted in a two-tier system: absolute liability up to SDR 100,000 and unlimited liability under a presumption of negligence.

At the end of 1993, with no other airlines willing to follow the Japanese lead, IATA filed with the U.S. Department of Transportation (DOT) an application for approval of, and anti-trust immunity for, discussion authority to update the Warsaw/Hague-Montreal System. The intercarrier discussions for which authority and immunity were sought concerned the limits and condi-

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53 The first author who proposed the adoption of lex domicilii as the choice of law criteria for the determination of damages under Warsaw was Professor Allan I. Mendelsohn. See generally, Mendelsohn, supra note 51, at 624.

54 See SHAWCROSS & BEAUMONT, supra note 29, at § VII/159 D-E.
tions of passenger liability established by the Warsaw Convention, specifically Articles 20(1) and 22(1).

III. THE IATA AGREEMENTS

A. THE 1995 KUALA LUMPUR AGREEMENT

On October 30, 1995, at the Annual General Meeting of IATA in Kuala Lumpur, the representatives unanimously adopted an Intercarrier Agreement (IIA), which represented the latest effort by the airline industry to modernize the Warsaw system. Like the 1966 Montreal Agreement, the IIA is an inter-airline agreement that finds its legal basis in Article 22(1) of the Warsaw Convention and which does not necessarily require governmental approval for its enforcement.

1. Its Content: A Statement of Purpose

The IIA was, without doubt, only a statement of purpose. The interesting thing about this statement of purpose, however, was that the purpose itself was not entirely clear. The reason for this is simple: IATA is an international association which represents more than 230 airlines in six different continents, and a consensus within the association on the future of the liability regime for international air transportation was at that time far away. In fact, only a minority of the IATA members favored a two-tier system similar to the one introduced by the Japanese airlines in 1992. The majority was staunchly opposed to the elimination of the liability limitation, and preferred, instead, only an increase in the level of that limitation. In a questionnaire sent out by the ICAO in February 1995, only three of the seventy-two member States replying to the questionnaire were in favor of unlimited liability (the United States was, of course, one of them).

55 See id.
58 More than 180 countries have signed the ICAO-Convention.

Most responding States (and carriers) from Africa/Caribbean and Middle East favoured the adoption of a limit of SDR 100,000. On
In order to reach an agreement that could be accepted by a large number of the IATA members, a compromise had to be found (or imposed). That compromise is found in the first two paragraphs of the Kuala Lumpur Agreement:

The undersigned carriers agree
1. To take action to waive the limitation of liability on recoverable compensatory damages in Articles 22, paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defenses pursuant to the provision of the Convention; nevertheless, any carrier may waive any defense, including the waiver of any defense up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.

The compromise was apparently reached because, by signing this Agreement, an airline was not necessarily agreeing to the Japanese two-tier system of “unlimited” and “absolute up-to-a-certain-amount-liability.” It was merely given the option to apply such a two-tier system. Thus, the Agreement does not mandate absolute liability, but affords each carrier the option of waiving the Article 20(1) defense up to a particular monetary amount.

Furthermore, and most importantly, the first paragraph of the Agreement does not mandate that signatory airlines adopt unlimited liability. The parties only agreed “to waive the limitation so that recoverable compensatory damages may be determined by reference to the law of the domicile of the passenger.” At

the other hand most of the responding States from Asia/Pacific, Europe and North America favoured raising the limit to some SDR 250,000 or more, with three States: Japan, Switzerland, and the United States, suggesting that there should be no limits.


60 IIA, supra note 56, § 1.

61 Id.

62 Under the Warsaw system, even though the carrier is presumed liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger under Article 17, Article 20(1) of the Convention permits air carriers to avoid such liability by proving that the airline and its agents have taken “all necessary measures to avoid the damage or that it was impossible for . . . them to take such measures.” Warsaw Convention, supra note 1, at 11.

63 IIA, supra note 56, § 1.
the time the IATA representatives agreed to that text, there was no consensus on how to interpret or implement the text. That sentence was just a statement of purpose, and, as is evidenced by the Explanatory Note to the Agreement, the question of its implementation was intentionally left open for resolution at a later time. Although there were several options for interpreting and implementing the language of the IIA, only two merit discussion:

(a) The first option was to waive the limits and nothing else in other words, an unconditional waiver. By waiving the limitation set by the Convention, the statement of intent of paragraph 1 was automatically set so that "recoverable compensatory damages may be determined by reference to the law of the domicile of the passenger."66

(b) The second option, on the contrary, involved attributing real meaning to the reference to the law of the passenger's domicile and, accordingly, limiting the scope of the "waiver," so that even those airlines that did not favor a two-tier liability system would be inclined to sign the IIA.67 By following this option, a

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64 After stating that the "Intercarrier Agreement is an 'umbrella accord"' according to which the signatory carriers "undertake to waive the limitations of liability as are set out in the Warsaw Convention (1929), The Hague Protocol (1955), the Montreal Agreement of 1966, and/or limits they may have previously agreed to implement or were required by Governments to implement," the Explanatory Note goes on to say that "such waiver by a carrier may be made conditional on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages under the Intercarrier Agreement." EC Proposal, Explanatory Memo, supra note 40. The Note then specifies that "this is an option" and that "should a carrier wish to waive the limits of liability but not insist on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages, or not be so required by a governmental authority, it may rely on the law of the court to which the case is submitted." Id. The Note thus leaves the signatory airlines with more than one option, apparently without giving preference to any option in particular.

65 Because of the several options left open to the signatory airlines, the 1995 IATA Agreement has often been referred to as an "umbrella agreement."

66 IIA, supra note 56. Under this option, use of the term "may" leaves it to the court that decides the case whether to use the law of the domicile of the passenger. The reference to the law of the domicile of the passenger was thus just a statement of explanation of what could happen if an airline waived limits.

67 See id. It has been said that the reason underlying such an approach was to avoid any infringement of the social policies of the law of the domicile of the passenger, which might have occurred if the waiver of the liability limitation was required to be made unconditional (i.e., a citizen of a third world country could in that case sue under U.S. law and would be able to get a much higher reward because the law of his or her own country will certainly be less favorable). See Bert Rein, Address at the Conference The International Airline Passenger Liabil-
signatory airline would not only waive the liability limitation, but also specify the law of the passenger’s domicile as the applicable law for determining the amount of damages to be awarded to the passenger. Under this scenario, the limitation would disappear and the damages would be determined (contractually) according to the law of the passenger’s domicile.

2. The Two Options at Work

The practical difference between the two options or interpretations lies in the scope of the waiver itself and, consequently, in the amount of damages that the passenger may recover. Since the distinction between the two options may still be relevant today, as will be discussed later in this article, it seems important to illustrate such a distinction with a practical example: A bright Italian law student with a promising future, temporarily living in the United States, flies home for the Christmas holidays from Washington, D.C. to Rome on a U.S. carrier that has signed the IIA. Under Italian law, the life of this twenty-six-year-old student is worth approximately U.S. $200,000, while under U.S. law, that same life may be worth as much as U.S. $2,000,000. If the U.S. carrier has adopted the first option (i.e., unconditional waiver), the amount of compensatory damages recoverable by the family of the Italian student will be either U.S. $200,000 or $2,000,000 depending on the law applied by the court where suit is brought. If suit is brought in the United States under Article 28 of the Convention, and the U.S. court applies U.S. law, then the award can reach U.S. $2,000,000. If the court applies Italian law, however, the amount of damages recovered by the family of the Italian student can reach only U.S. $200,000.

Conversely, if the U.S. carrier has adopted the second option (i.e., waiver plus the law of the passenger’s domicile), the amount of damages recoverable by the family of the Italian student will always be U.S. $200,000 no matter where the suit is brought. Since the right to invoke the limitation has been waived, and the law applicable to determine the recoverable damages is the law of the passenger’s domicile, the amount recovered will always be more or less the same, around U.S.

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68 In the example, Article 28 does not allow the family of the Italian student to bring suit in Italy, because the place of destination was Washington, the ticket was purchased in the United States, and the carrier is from the United States.
$200,000 depending on the competency of the court applying Italian law.

The practical difference between the two options is obvious. By not specifying the law of the passenger's domicile as the law applicable for determining the damages, the "unconditional waiver" would not in any way be limited, and medium and small-size airlines could expect a significant increase in compensation awards if plaintiffs—increasingly file suit in high-damage-award countries like the United States. This is contrary to the purpose of the "waiver plus the law of the passenger's domicile" rule, which was designed to protect carriers from suits brought in high-award jurisdictions with little or no connection to the controversy. No matter where the suit is brought, the recoverable damages should always be approximately the same. Additionally, this second option serves the purpose of guaranteeing each passenger a level of damage compensation corresponding to the economic standards and the law of his or her domicile.

When the time came to implement the IIA and find the appropriate provisions to be inserted in the conditions of carriage of the signatories, IATA decided to take a road that would run somewhere in between the first and the second option.

B. The 1996 Miami Agreement

Since the IIA was only a statement of purpose, IATA formulated a second agreement in 1996, the Agreement on Measures to Implement the IATA Intercarrier Agreement, often referred to as the Miami Intercarrier Agreement (MIA), as it was drafted in Miami.

Although airlines still maintain some discretion with their implementation of the MIA, the MIA adopted more definitive solutions and closed some of the options that the IIA had left open. This is evidenced, for example, by the inclusion in the MIA of two mandatory provisions that the signatory carriers agreed to incorporate in their conditions of carriage and tariffs, and three optional provisions which, at the option of each carrier, may also be included in its conditions of carriage and tariffs. The following discussion examines the MIA by using such a distinction.

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I. Mandatory Provisions

In Section I of the MIA, the undersigned carriers agree to implement the IIA by incorporating in their conditions of carriage and tariffs, where necessary, the following:

1. (CARRIER) shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
2. (CARRIER) shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs [unless option II(2) is used].
3. Except as otherwise provided in paragraphs 1 and 2 hereof, (CARRIER) reserves all defenses available under the Convention to any such claim. With respect to third parties, the carrier also reserves all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.

Paragraph 1 represents the entire waiver of the limitation of liability of Article 22(1) of the Warsaw Convention as amended by the 1955 Hague Protocol. Contrary to the IIA, the MIA mandates that airlines waive the limit in all circumstances (i.e., unconditional waiver). However, as discussed below, the MIA also allows, but does not require, the airline to agree to the application of the law of the passenger's domicile. Accordingly, and only to the extent a carrier does so, the carrier adopts the above-mentioned waiver plus the law of the passenger's domicile option.

The waiver was also limited since it refers only to claims for "compensatory damages," and, accordingly, does not apply to claims for punitive and non-physical damages. As a consequence of this waiver, the signatories also rendered meaningless the Article 25 willful misconduct exception, which represented the most popular instrument for victims to avoid the limitation on liability and thus became the principal reason for prolonged and expensive litigation.

In paragraph 2, the MIA also mandates the waiver of the Article 20(1) defense with respect to the portion of the claim which does not exceed SDR 100,000. By waiving this defense, signatory airlines that have properly revised their conditions of car-

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70 Id. § 1.

71 As discussed above, the IIA, on the other hand, did not specify a particular amount and left to the discretion of the signatory airlines the waiver of any defense provided by Warsaw.
riage and tariffs will be liable notwithstanding the absence of fault (i.e., absolute liability) at least up to SDR 100,000 (approximately U.S. $150,000). The Article 20(1) defense will, however, apply for claims above SDR 100,000.72

Because of this new two-tier system based on absolute liability up to SDR 100,000 and presumed fault with no limit, if it were established, for example, that the TWA 800 disaster was caused by a missile for which no one could claim TWA’s negligence, it would ensure that the families of victims would receive at least some monetary recovery.73

Paragraph 3 reserves all other defenses available under the Convention, and in particular reserves to the carrier all rights of recourse against others, like rights of contribution and indemnity. Although some doubts have been raised,74 this provision was included to make certain that an airline that had to pay compensation to a passenger did not waive its right to receive contribution or indemnification from third parties, i.e., the manufacturers or the air traffic control authorities.

2. Optional Provisions

Section II of the MIA states:

At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

72 It is only fair to mention that airlines have so far almost never been able to use the Article 20(1) defense by proving that they had taken “all necessary measures.” This may change, however, when recoveries are unlimited and airlines, therefore, have a much more pressing incentive to prove non-negligence.
73 See Mendelsohn, supra note 52, at 1074.

If the plaintiff can just get his or her money from the airline, it is then open, according to the proponents of the IATA Agreements, for the airlines or their insurers to try to get contribution or indemnification from the manufacturers. This seems questionable, however. The Intercarrier Agreement under which the airline will pay unlimited amounts does not constitute law, or a legal judgment. It is primarily a contract among the airlines . . ., although it is partly law . . . If the manufacturer wants to contest its liability for contribution or indemnification, it will claim that the airline that paid the plaintiff was a volunteer, and, as such, has no effective recourse against the manufacturer. The plaintiff can make a similar claim if he or she separately sues the manufacturer, claiming that the manufacturer is not entitled to a set off for what the airline paid.

Id.
1. (CARRIER) agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2. (CARRIER) shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs, except that such waiver is limited to the amounts shown below for the routes indicated, as may be authorized by governments concerned with the transportation involved.

3. Neither the waiver of limits nor the waiver of defenses shall be applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shall be subject to the limit in Article 22(1) and to the defenses under Article 20(1) of the Convention. The carrier will compensate the passenger or his dependents for recoverable compensatory damages in excess of payments received from any public social insurance or similar body.\footnote{MIA, \textit{supra} note 69, at § II.}

The provision in paragraph 1 is certainly the most important of the three provisions contained in section II. Even though on a voluntary basis, the MIA provides that recoverable compensatory damages may be determined by reference to the law of the domicile of the passenger. As a consequence, and depending on whether an airline includes such a provision in its conditions of carriage, the two main options of the IIA appear still to be found in the MIA: (a) "unconditional waiver," and (b) "waiver plus the law of the passenger's domicile."\footnote{Id.}

It is important to stress that if "waiver b" is included in the conditions of carriage and tariffs of a carrier, the application of the law of the passenger's domicile would not be mandatory. The use of the expression "may be determined" clearly emphasizes the non-mandatory connotation of the provision. This would leave open the question whether the decision to apply the law of the domicile rests with the passenger, the carrier, or the court. Although such choice in the first instance should be up to the passenger claimant, it will ultimately be up to the court to decide which law to apply.\footnote{See \textit{Order to Show Cause}, issued by the Department of Transportation on Oct. 31, 1996, at 5 n.7. The DOT's interpretation would also accord with the problem said to be caused by Article 32 and the presumed infringement of the rules of the Convention. \textit{See infra} notes 85-88 and accompanying text.}
3. The "Fifth-Forum" Provision

Following an effort by the United States to change the jurisdictional provisions of the Convention in order to protect the so-called "wandering American" from the unfairness of being forced to seek compensation in a foreign court, it was suggested that the airlines could, by special agreement, include the domicile of the passenger as a fifth basis of jurisdiction in their conditions of carriage, which would be added to the four (or three) fora already included in Article 28 of the Convention.

It was argued, for example, that airlines could add the domicile of the passenger as the fifth forum simply by inserting a provision in their conditions of carriage that would deem the contract to have been made through a place of business in the passenger's country of domicile. Another solution was proposed by the Air Transport Association (ATA) at the IATA meeting in Montreal in April 1996, when IATA was trying to reach an agreement to implement the IIA. The ATA proposed the inclusion of a provision in the IIA's implementation-agreement by which carriers would have agreed to permit cases to be brought in the passenger's domicile. Nevertheless, because of the fear of non-U.S. airlines of U.S. jury awards, none of these efforts has been successful to date, and the "wandering American," like the wondering German, British, and Italian, is still wandering even under the new IIA-MIA system.

78 See supra note 13.
80 See Warren Dean, Remarks at the International Air Transport Association Legal Symposium 97 (Feb. 3, 1997) (unpublished manuscript at 4, on file with the authors).
81 The ATA proposal was not agreed to at the Montreal meeting, even for inclusion in the MIA on an optional basis, and it was therefore withdrawn from the text that became the IPA, as filed with the Department of Transportation. See id. at 4.
82 Those who argued against the fifth forum did so because it would only benefit the "wandering American." However, this ignores the fact that there are many other people (or survivors) of all nationalities who might not be able to sue at home under Article 28, but who could do so if the fifth forum was adopted. See Mendelsohn, supra note 52, at 1077-78.
4. Compatibility of the IATA Agreements With the Warsaw Convention

Since the IIA and MIA are only "contracts between airlines," an important question that arises regarding both the mandatory and optional provisions of the MIA is their compatibility with the Warsaw Convention particularly with Article 32, which provides that:

any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void.83

The object of Article 32 is to ban any infringement of the rules provided for by the Convention, especially those designed to protect the passenger's rights. Accordingly, Article 32 would nullify both any contractual clause which directly violates (i.e., "infringes" upon, a specific rule of the Convention ("direct infringement")), and also any contractual clause by which the carrier might attempt to circumvent the provisions of the liability system set out in the Convention, or, in other words, lessen its liability (indirect infringement).

We will analyze the question of the MIA's compatibility with Article 32 of each of the following MIA provisions: (a) the waiver of the liability limit (mandatory); (b) the law applicable to the determination of the damages (optional); and (c) the fifth forum provision (excluded).

(a) The provisions of section I of the MIA do not conflict with any of the provisions of the Warsaw Convention as amended by the Hague Protocol. In particular, the carrier and the passenger are entitled to agree to a higher liability limit both by an express provision in Article 22(1)84 and implicitly by Article 23.85 The ban provided for in Article 32 regarding "any clause by which the parties purport to infringe the rules laid down by this convention" does not apply since there is clearly no infringement.86

83 Warsaw Convention, supra note 1, at art. 32.
84 Article 22, paragraph 1, states that, "by special contract, the carrier and the passenger may agree to a higher limit of liability." Id. at art. 22, ¶ 1.
85 Article 23 provides that "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void . . . ." Id. at art. 23.
86 The scope of Article 32, as discussed later, seems limited to choice of law and choice of forum clauses. See infra note 88-97 and accompanying text for discussion.
Additionally, the waiver of the liability limit would certainly accord with the Warsaw Convention's purpose of protecting passenger's rights.

(b) The question of the compatibility with Article 32 of the applicable law clause relating to the determination of damages is more complicated. Since the Convention does not have either a general conflict of laws rule relating to the applicable law or a provision that specifies how damages are to be determined, a *lex domicilii* clause does not seem to "directly" violate any provision of the Convention.

On the other hand, a *lex domicilii* clause, like the one found in the MIA, could "indirectly" infringe the rules laid down by the Convention by lessening the rights of the passenger as guaranteed by the Convention. An argument could be made that a contractual clause providing for the law of the passenger's domicile as the applicable law for damages may lessen the rights of the passenger, and thus "indirectly" infringe the rules of the Convention. This could happen if the damages law of the passenger's domicile is less favorable than the law of damages in the state where suit is brought or the accident occurred. For example, where *lex domicilii* provides for only actual damages and not (or to a lesser extent) for damages for pain and suffering in case of death, then by mandating the application of *lex domicilii*, where a more favorable *lex fori* or *lex loci delicti* is available, a carrier is indeed lessening its liability and thus infringing the Convention.

Although this argument has some basis, especially where the *lex domicilii* clause would apply mandatorily, we doubt that such a clause would be an infringement of the rules of the Convention. In fact, the clause in the MIA that provides for the law of the domicile does not constitute an attempt at circumventing the liability regime of the Warsaw Convention or lessening the rights of the passenger. The law of the domicile is used only to determine the amount of damages to be awarded, and nothing in the Convention specifically precludes the adoption of *lex domicilii*.

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87 Article 32, in fact, also has to be interpreted as a "protective mechanism." Under this perspective, its purpose is to make sure that the rights of the passengers are not lessened below the level guaranteed by the Convention.

Moreover, application of a law of damages less favorable to the plaintiff could and may well occur even without a *lex domicilii* clause. After all, many courts have concluded, even without a *lex domicilii* clause, that the law of the victim's domicile is the most appropriate law to apply when determining a victim's damages.\(^8\)

Further, even if a "law of the domicile choice of law clause" is included in the conditions of carriage and tariffs of the relevant carrier, the application of the law of the passenger's domicile would not be mandatory.\(^9\) Accordingly, the clause by itself would not lessen the carrier's liability and thus would not constitute an infringement of the Convention's rules. For the above mentioned reasons, it seems that Article 32 does not bar the inclusion in the carriage conditions of a provision from which damages may be determined by reference to the law of the passenger's domicile.

(c) One of the reasons why the signatories refused to consent to the contractual fifth basis of jurisdiction was that such a provision would arguably violate the Convention's Article 32. As has been distinctly concluded by two experts in the field of international aviation law, however, the contractual fifth forum does not violate Article 32.\(^9\) Although it is true that the rules as to jurisdiction are altered by adopting a fifth forum or *fori domicilii* by special agreement, it is also true that "when we do so, we are not infringing the rules laid down by the convention."\(^9\)

The inclusion of the fifth basis of jurisdiction does not appear to be a "direct infringement" of the rules of the Convention, since the *fori domicilii* would only be added to the other four fora of Article 28.\(^9\) Such an "addition" obviously cannot be considered as an "infringement" for purposes of Article 32. This can be concluded from a careful reading of the original text of the Convention. Instead of the English word "infringe," the French text employs the word "derogeraient," which means "derogue from," thus presumptively allowing a mere addition.\(^9\)

\(^8\) See id.

\(^9\) The use of the phrase "may be determined" clearly emphasizes the non-mandatory connotation of the provision. See id.

\(^9\) See Mendelsohn, supra note 52, at 1075-76; see also Warren Dean, Restructuring the Warsaw Right to Recover, 1089 AVIATION L. REP. 19,151, 19,155-56 (1996).

\(^9\) Mendelsohn, supra note 52 at 1076.

\(^9\) See id.

\(^9\) Id.
Moreover, the fori domicilii clause does not appear to be an “indirect infringement,” either. Once again, the addition of the fifth forum would generally not constitute a lessening of the carrier’s liability or the passenger’s rights. As Professor Mendelsohn states, “[a]dopting a fifth forum would not violate Article 32 because there is no infringement; there is no derogation. You are adding something that is a real benefit to passengers. You are enhancing the rights and the benefits that passengers enjoy under the Convention.”

Nevertheless, a domicile fifth forum would be barred by Article 32 if it leads to a forum that (a) is not a party to Warsaw and (b) lessens the carrier’s liability. Such an interpretation accords with the purpose of Article 32. As stated above, Article 32 is a defensive mechanism for the protection of passenger rights. Its purpose is to nullify any attempt by carriers to circumvent the provisions of the liability system set out in the Convention. For example, by attributing jurisdiction to the courts of a particular country (the passenger’s domicile) that does not adhere to the Warsaw Convention, and whose laws provide for a U.S. $5000 liability limitation, a carrier would lessen its liability and, thus, infringe the rules laid down by the Convention. To be sure, it is the passenger (or the survivors) who opt for the forum; and it is unlikely that they would opt for a forum where Warsaw and the advantages of the MIA might not be applicable.

What if the fori domicilii were to be adopted under the MIA as the sole and exclusive forum available for plaintiffs? The adoption of an exclusive forum selection clause would give sole jurisdiction to the courts of the passenger’s domicile. This would result in excluding the other fora provided for in Article 28 and would be void per se under Article 32 as a “direct infringement” of the rules of the Convention. An alteration of the rules regarding jurisdiction would not ipso facto constitute an infringement. However, an exclusive forum selection clause would be an infringement because it would derogate from Article 28.

In summary, the inclusion of a clause providing for fori domicilii as the fifth basis of jurisdiction would not be barred by Article 32 of Warsaw if it is added as an additional and nonexclusive forum.\textsuperscript{96} It would be void, however, if it were included as

\textsuperscript{95} Id.

\textsuperscript{96} See Ballarino & Busti, supra note 34, at 686. The authors argue that both the governments and the parties may not either add to or derogate from the four jurisdictions of Article 28.
the exclusive forum or if it has the effect of infringing the rules laid down by the Warsaw Convention as a protection of the rights of the passengers (i.e., by lessening the carrier's liability).

C. The Actual Implementation

As of 16th February, 1999, 120 carriers had signed the IIA. Of those, eighty-eight had also signed the MIA. Questions have arisen since the agreements were drafted. These include: Are the agreements binding on the signatory airlines; Must there be some form of actual implementation, if so, what form of implementation is required?

It seems that airlines are not legally bound by simply signing both the IATA Agreements. In order to render the IATA Agreements effective, an airline would have to modify its conditions of carriage according to the provisions set out in the MIA. This is what the Japanese airlines did following their 1992 decision to adopt the two-tier system. This is also what some European airlines did after a declaration in November 1996 that they would not apply the Warsaw Convention limitation on liability.

All major U.S. international airlines have modified their conditions of carriage to the MIA. They have, in fact, drafted and signed a third agreement, called "Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs" (IPA), and also filed appropriate tariffs with the U.S. DOT. As a consequence, the two-tier system is already in effect on all international flights of the large U.S. airlines. Under the DOT's order, the U.S. airlines have adopted the "waiver plus the law of the passenger's domicile" option under the MIA.

As of April 1998, forty-nine carriers, including thirteen U.S. airlines, are reported to have effectively waived the liability limits

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97 This would happen if, as a consequence of enforcing a fifth-forum clause, the level of protection provided by the Warsaw Convention (presumed liability limited to the equivalent of U.S. $8300 or $16,600) is not afforded to the passenger. See id.


99 It is true, however, that the new text does not have to appear on the passenger's ticket to be binding. See MIA, supra note 69.

100 For a discussion of the IPA, see Dean, supra note 80.

101 The liability limitation will disappear and the damages will be determined by reference to the law of the domicile or permanent residence of the passenger.
provided for by the Warsaw Convention (i.e., modifying their conditions of carriage). Among them, however, only Air Canada, Canadian International, Air France, Avianca, British Airways, Cathay Pacific, Lufthansa, Korean Airlines, Malaysian Airlines System, Swissair, Belair and Crossair, Scandinavian, Singapore Airlines, Japan Air Lines, New Zealand Airlines have also filed tariffs with the U.S. DOT.

A number of foreign carriers have declared that they have adopted the MIA, but they have not filed tariffs with the U.S. DOT nor shown evidence that they have modified their conditions of carriage. This situation is confusing, particularly for passengers who might take several airlines on an international journey. Moreover, there are certain areas of the world (i.e., South America, the Carribean, Africa, and the Middle East), where few, if any, carriers have adopted the MIA or filed tariffs with the U.S. DOT.

IV. THE REGULATION OF THE EUROPEAN UNION

In December 1995, just after the IIA was agreed upon in Kuala Lumpur, the Commission of the European Union, pursuant to the EU legislative "cooperation" procedure, drafted a proposal for a Council Regulation on air carrier liability. The proposal, like the IATA initiative, purports to waive all monetary limits of liability set by the Warsaw Convention. After almost two years of intense labor, the Council adopted the proposal on October 9, 1997. The regulation was published in the Official Journal of the European Communities on October 17, 1997, and pursuant

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102 The list also includes five Japanese air carriers which have not signed the MIA, and other small airlines which have not signed either the IIA or the MIA (British Midland, British Regional Airlines, Loganair, Manx Airlines, Tower Air). Unofficial list given to the authors by the IATA Legal Department. This list does not take into account the effect of the EC Regulation 2027/97. See infra note 108 and accompanying text.

103 The U.S. DOT reportedly requires the filing of a tariff in order to constitute evidence that the two-tier system is effectively in place. Five of the carriers among the 49 are Japanese and presumably filed tariffs when they originally adopted the two-tier system in 1992.

104 Among those are Asiana, Austrian, British Midland, British Regional, Finnair, GB Airways, Icelandic, KLM, Lauda Air, Loganair, Martinair, Manx Airlines, Maersk Air, Quantas, Royal Air Maroc, SAS, Singapore, and Transavia. See id.

105 See id.

106 See EC Proposal, supra note 40.
to Article 8 of the Regulation, came into force on October 17, 1998.  

As is evidenced in the Explanatory Memorandum included in the proposal, the principal intent of the Commission was to achieve, at least within the European Community, a uniform and fair system of liability. After introducing the subject of air carrier liability, the Commission states the following:

It is against this background of low limits and a risk not only to the unity of the Community aviation market, but also to the protection of air transport users that the Commission is of the opinion that Community action should be undertaken in order to establish an acceptable situation for the air transport sector by ensuring common rules for liability in the terms and conditions of carriage irrespective of the nature of the operation and by guaranteeing a fair situation for air transport users.

In the following paragraphs, we will analyze the content of the Regulation, keeping in mind the similarities and differences with the IATA initiative. We will also comment on the legislative evolution of the proposal, which has lasted almost two years.

A. THE CONTENT OF THE EU REGULATION

The Regulation resembles, but also differs from, the IATA Agreements in several respects. The most important similar features of the regulation are the following:

(a) the introduction of a two-tier system;
(b) the removal of any limit of liability (Article 3(1)(a));
(c) absolute liability up to the equivalent in ECU of SDR 100,000 (Article 3(2));
(d) presumed liability above the equivalent in ECU of SDR 100,000 (i.e., the airline can invoke its defenses under Article 20(1) of the Convention, i.e., that it took all possible measures to prevent the damage from occurring);
(e) airlines retain the right to seek contribution or indemnity from any other party (Article 4).

This is the same two-tier system of unlimited and absolute (up to a certain level) liability that was introduced for the first time

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108 See id.
109 Id.
110 Common Position (EC) No. 197, art. 3-4 (adopted by the Council on Feb. 24, 1997) available in Interinstitutional File No. 95/0359 (SYN) [hereinafter Common Position].
in international air transport by the Japanese airlines in 1992. This was then followed by IATA in its two Intercarrier Agreements in 1995 and 1996.

On the other hand, there are several important features of the Regulation that differ from, or were not included in, the IATA Agreements:

(a) mandatory applicability to all EU airlines instead of the voluntary applicability of the MIA;
(b) applicability of the Regulation to all national and international flights of all EU airlines, whereas the MIA is only applicable to international flights (Article 1);
(c) applicability of the Regulation only to community air carriers (Articles 1-2);[11]
(d) mandatory up-front payment of the equivalent in ECU of SDR 15,000 to the family of a victim in case of death (Article 5);[12]
(e) information obligations imposed on all air carriers, operating in the European Union (Article 6).[13]

The above provisions, which were not included in the IATA Agreements, are designed to improve the uniformity and fairness of the liability regime. The provisions relating to mandatory applicability and the applicability to both domestic and international flights evidence the pursuit of a uniform regime, at least within the European Union. The Articles relating to the advance-payment and the notice requirement are intended to provide additional protections for victims and their families.

It is important to mention that, unlike the IATA initiative, the applicability of the lex domicilii to determine damages was never even considered by the Commission, the Parliament, or the Council. As will be discussed below, the lack of a lex domicilii provision will not only constitute a problematic difference between the EU and the IATA regimes, but will also represent an incentive for forum shopping.

[11] The U.S. Department of Transportation, for example, made certain that all carriers operating to, from, or with an agreed stopping place in the United States, adhered to the 1966 Montreal Agreement. See Lowenfeld, supra note 4, at 7-102.


B. Why a Separate EU Proposal When the Kuala Lumpur Agreement Was Already Adopted?

There are at least two sound explanations why the Commission presented its own proposal even after the IIA was signed. First, the Commission's interest in the modernization of the air carrier liability regime provided for by the Warsaw Convention did not result exclusively because of the IIA. In fact, the Commission's intent to improve the Warsaw system can be traced back to 1989, when it commissioned a study in order to have a full account of the state of ratification, legislation, and practices in the field of air carrier liability in the Member States as well as in other countries. The results of that analysis led in March 1991 to a preliminary study on the "Possibilities of Community action to harmonize limits of passenger liability and increase the amounts of compensation for international accident victims in air transport." 114 A Consultation Paper was then issued in 1992 by the Commission entitled "Passenger liability in aircraft accidents-Warsaw Convention and Internal Market Requirements," which was followed by a "round table" with Member States and interested parties in March 1993, and another study on the cost implications of different limits in February 1994. 115

A second reason explaining the drafting of the proposal after the IIA was signed was that the Commission was reportedly skeptical of the success of the IATA initiative, mainly due to the fact that the initiative was based on a voluntary agreement. Why would European carriers sign the IIA/MIA while the Warsaw System still covers their international routes? Why would they waive their defenses up to U.S. $150,000? Why should they accept unlimited liability? The Commission did not wish to wait for answers to these questions or to see whether the MIA would be successful among European carriers. When the Commission issued its proposal, only Austrian Airlines, KLM, SAS and Swissair had signed the IIA. 116 Hence, the Commission states in its Explanatory Memorandum to the initial proposal of December, 1995:

The intercarrier agreement is a minimum common denominator. If carriers acting on a voluntary basis, or obliged by their governments, would like to offer more, they would be able to do

114 Study delivered on 15 September 1991 by Sven Brise, consultant. EC Proposal, supra note 40, § 10.
115 See id. § 11.
116 See id. § 12.
so. The signing carriers will have to implement the provisions of the agreement no later than 1 November 1996. . . . [T]he effectiveness of the agreement will depend on the degree of participation by airlines. At the moment, as indicated earlier, only certain Community carriers have signed. Without the agreement of all Community air carriers, the risks of differing standards and thus fragmentation of the internal aviation market will not only subsist, but may increase. Thus the situation for the air user would become more confusing.¹¹⁷

For the above mentioned reasons, the Commission decided that a Council regulation would be the best way to quickly achieve the desired results: adequate protection of Community air passengers in case of accidents and simplification of an overly complex system for Community air carriers.

Nevertheless, during the legislative process in Brussels, both the IIA and the MIA appeared to be reasonably successful (although only a few airlines effectively implemented the MIA in their conditions of carriage).¹¹⁸ While the Commission’s decision to pursue the proposal may seem strange, it is understandable. It could have taken an extended period of time before all community air carriers implemented the MIA in their conditions of carriage. Additionally, the Commission wanted to assure that all air travel within the Community was regulated by one standard, regardless of the preferences of the airline or whether or not the flights were international. Such a result was not guaranteed under the IIA/MIA regime, since both Agreements only applied to international flights and left several options open for the individual airline to decide.

Moreover, as evidenced in both the Explanatory Memorandum of the Commission and the Opinion of the Economic and Social Committee, the proposed Regulation was seen by the EU community as an opportunity to influence the future drafting of a possible new multilateral Convention that would replace or amend the Warsaw Convention.¹¹⁹ In the words of the Economic and Social Committee, the questions relating to the modification of the airline’s liability system “need to be addressed with a view that the final regulation will act as a catalyst for a

¹¹⁷ Id. at §§ 13-14.
¹¹⁹ See E.C Proposal, supra note 40.
new, more appropriate world-wide system for the benefit of the traveling public."\textsuperscript{120}

C. THE EVOLUTION OF THE EU REGULATION

1. History of the Legislative "Cooperation" Procedure of the Regulation

The proposal followed the European Union legislative "cooperation" procedure pursuant to Article 189c (d) of the EC Treaty.\textsuperscript{121} It was drafted by the Commission in December 1995, and subsequently transmitted to the Council of (Transport) Ministers (the Council) in February 1996.\textsuperscript{122} The Council submitted the proposal to the Economic and Social Committee and the European Parliament, which gave their opinions on the proposal and the amendments in May and September 1996, respectively.\textsuperscript{123} An amended proposal, which took into consideration several of the suggestions and amendments proposed by the Economic and Social Committee and the European Parliament, was submitted to the Council in December, 1996.\textsuperscript{124} On February 24, 1997, the Council adopted a so-called Common Position on the proposal.\textsuperscript{125} The proposal was then sent to the Parliament for a "second reading." The European Parliament, during its plenary session on May 29, 1997, approved the Common Position and adopted several textual amendments to the text.\textsuperscript{126} The Commission accepted the amendments and, in July 1997,

\textsuperscript{120} Opinion of the Economic and Social Committee on the "Proposal for a Council Regulation (EC) on Air Carrier Liability in Case of Air Accidents," 1996 O.J. (C 212) ¶ 3.2 [hereinafter Opinion]. Similarly, the Commission stated in its Explanatory Memorandum that the Community action must be seen as a measure that will help to trigger existing international Conventions. By adopting the Regulation, the Community will act as a catalyst together with similar moves in Japan and the USA. In any event, the Community and the Member States should in cooperation with ECAC use all its efforts in order to urge the appropriate international forum—ICAO—to update the current international instruments into force. EC Proposal, Explanatory Memo, supra note 40, § 15.

\textsuperscript{121} See EC Regulation, supra note 107.

\textsuperscript{122} See id.


\textsuperscript{125} See Common Position, supra note 110, at 87.

forwarded a revised proposal to the Council for final adoption. The Council adopted the proposal on October 9, 1997.

2. Evolution of Several Provisions of the Regulation

Apart from changing some numbers in the proposal, the contents of the Regulation relating to the two-tier system are much the same today as when the Commission first issued it in December 1995. There are, however, several provisions relating to an airline’s liability that were modified or amended during the two-year legislative process that are worth mentioning.

a. Advance Payment.

Article 4 of the original 1995 proposal related to the “advance payment provision.” It provided that the carrier, not later than ten days after an accident, pay to “the person entitled to compensation a lump sum of up to ECU 50,000 and in any event a sum of ECU 50,000 in case of death.” Following criticism from both the European Parliament and the Economic and Social Committee regarding the “unworkability” of the lump sum scheme, the Commission amended Article 4. Introducing more flexibility into the advance payment provisions, the Commission provided that the carrier, “not later than ten days after the identity of the person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs.” Subsequently, in the Council’s common position, the ten days were raised to fifteen days “since ten days was not considered enough time to gather all the necessary elements to make the payments.” A minimum amount of compensation in case of death (SDR 15,000—roughly the equivalent of ECU 15,000) was also added “in order to provide a higher level of protection for those entitled to re-

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127 See id. EU regulations are similar in form to administrative regulations commonly found in North America; see generally RALPH H. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL 38 (2d ed. 1995).
128 The level of strict liability, for example, was increased from ECU 100,000 to ECU 120,000. See Amended EC Proposal, supra note 124, at 9.
129 EC Proposal, supra note 40, at 19.
130 Id.
131 “[T]he Committee is concerned that the proposal will be unworkable unless it is clear as to how certain difficulties will be met. For example, it can take time to identify victims and trace relatives. There may be difficulties in establishing who is entitled to payments.” Opinion, supra note 120, at 39.
132 Amended EC Proposal, supra note 124, at 10.
133 Common Position, supra note 110.
Moreover, the requirement that the payment be non-refundable, first introduced in the Commission's original proposal, was modified in order to take into account cases where, for example, the negligence of the injured or deceased passenger, the negligence of the person who received the advance payment, or a mistake in the identification of the person entitled to compensation, were proven. The European Parliament fully accepted the changes in its "second reading."

b. Adequate Information

Article 5 of the original proposal included obligations to provide information to passengers for both Community and non-Community air carriers. Paragraph 1 provided that requirements relating to the waiver of liability limits and advance payment had to be included in the conditions of carriage of all Community air carriers. Paragraphs 2 and 3, respectively, specified under somewhat different terms that Community and non-Community carriers provide on request "adequate information" to passengers. Paragraph 3 noted that "the fact that the limit is indicated on the ticket document does not constitute sufficient information." Although the Economic and Social Committee voiced criticism about the difficulties of enforcing this requirement on non-Community carriers, the European Parliament accepted the provision without any significant changes, as did the Council in its Common Position. However, in order to provide necessary consumer protection, the Council imposed an additional burden on third-country air carriers by creating an obligation to provide the passenger with a form setting out their conditions. The provision was not well accepted by either non-Community airlines or legal commentators, who, like the Economic and Social Committee, thought that such requirements could cause confusion and disuniformity and could be difficult to enforce.

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135 See id.
136 See EC Proposal, supra note 40, at 19, 20.
137 See id.
138 Id.
139 Id.
140 See Opinion, supra note 120, at 40.
141 See Common Position, supra note 110, at 91.
142 See Opinion, supra note 120, at 20.
At the "second reading," the European Parliament took the comments into account and amended Article 6. First, the European Parliament eliminated the difference between Community and non-Community airlines. This abolished the need for several different notices attached to the ticket, a system burdensome on the airlines and confusing to passengers. Second, the "duty of information" could be satisfied by simply indicating the airlines' liability schedule on the passenger's ticket. Accordingly, paragraphs 2 and 3 stated that "the liability regime applied by an air carrier shall be clearly set out in its conditions of carriage and shall be made available to passengers at the air carrier's agencies, travel agencies, check-in counters and points of sale," and "the ticket document or an equivalent shall refer to the liability regime and make clear where the detailed conditions of carriage can be obtained." Notwithstanding the Commission acceptance, the Council has not taken into account the changes suggested by the Parliament and adopted the previous version of Article 6.

c. Fifth-Forum

The original proposal also contained a critically important provision that allowed victims or their descendants to commence proceedings in the Member State where they are domiciled. The Explanatory Memorandum stated the following about this critical provision:

Passengers should have the choice of the jurisdiction before which to bring an action. It should include an option to bring an action before the court of the Member State where the passenger has his domicile. This might circumvent the possibilities of confusion that might arise when referring to the law of the domicile.

The Economic and Social Committee welcomed the addition of the fori domicilii to the four specified by Article 28 of the War-
saw Convention. Commentators in the United States also received the addition with enthusiasm. Unfortunately, the “fifth forum” provision was then deleted by the Council from its Common Position of February, 1997. The Council explained its deletion by stating that Article 7 was “deemed to raise very complex legal and factual issues which would have to be resolved before settling the claim” and “the other four jurisdictions provided pursuant to the Warsaw Convention were sufficient.” There is no readily available proof to substantiate the official explanation for deleting the fifth forum. The deletion was probably not so much a result of superior intellect at the Council level as the result of successful lobbying in Brussels by the Community carriers that were apprehensive about the possibility of excessive litigation in different member states after an accident. Unfortunately, the Commission and the European Parliament backed down and did not try to restore what was once a “welcomed” and “appropriate” provision. Both appeared to supinely accept the Council’s amendment in its entirety.

d. Applicability to Non-EU Carriers

While the Commission decided against applying the regulation to third-country airlines, the concern about uniformity of the liability system in case of an accident became an issue in the regulation’s legislative process of the Regulation. Following an amendment that the European Parliament adopted at its “first reading,” the Commission inserted into the proposal a recital and an article providing for the introduction in future civil aviation negotiations with third-countries of a commitment to apply the Regulation. In the Common Position adopted by the Council, however, both the recital and article were deleted because they referred to matters “outside the scope of the regula-

149 See Opinion, supra note 120, at 18.
150 See Mendelsohn, supra note 52, at 1077.
151 See Common Position, supra note 110, at 94.
152 Id.
153 Id. at 95.
154 Applicability to all carriers operating to or from the European Union would actually have been a logical step towards uniformity of the legal consequences of an accident in the European Union. However, the Council’s “proposal [aimed] at improving the level of protection of passengers involved in air accidents on board a Community air carrier.” Common Position, supra note 110, at 92. The Council did not seem to care about Community passengers who suffered injury or death on board non-Community air carriers, but did not state its reasons.
155 See Amended EC Proposal, supra note 124, at 12, 15.
However, showing a tenacity that many would like to have seen for the "fifth forum" provision, the European Parliament reintroduced those provisions at a "second reading" in a new Article 7a, and they were accepted by the Commission. The final version adopted by the Council, however, had taken them out again.

V. THE LATEST INITIATIVES AND THE FUTURE OF INTERNATIONAL AIR LAW

A. The Accomplishments of the IATA and European Initiatives

The results accomplished by the two latest initiatives are revolutionary and monumental. In 1995 when IATA filed a petition before the U.S. Department of Transportation seeking "discussion authority and antitrust immunity" to consider special contracts that would affect the liability regime of its members, and the European Commission presented a draft proposal for a Council Regulation time, there were two main flaws to the liability regime established by Warsaw and its progeny: (a) Warsaw had not achieved its original goal of providing industry-wide uniform rules of liability for death or personal injury caused by airline accidents; and (b) victims were not fairly and adequately compensated. While liability rules are still far from uniform, under both the IIA/MIA and European regimes, the levels of passenger compensation have been radically improved. In the past three years alone, the two principles of "unlimited" and "absolute" (up to a certain amount) liability have been slowly but steadily accepted by a number of airlines. Even if the IATA and European initiatives prove to be unsuccessful, it is probably true that "there will almost surely never again be an agreement on internationally sanctioned limits of liability in air law." That, by itself, is a remarkable accomplishment, from both a theoretical and practical point of view.

From a theoretical point of view, the latest initiatives and the adoption of the principle of "unlimited liability" represent the end of the 1929 regime, with its underlying principles and ratio-

156 Common Position, supra note 110, at 93, 95.
157 See Decision, supra note 126.
158 See EC Regulation, supra note 107.
159 See Baden, supra note 28, at 465.
nances, and the first step into a new era of air carrier liability. Today, everyone involved in international air transportation law is aware of the fact that the original rationales underlying liability limitations have been surpassed. On one hand, the airline industry does not need to be protected by artificial limits on liability, as was the case when the Warsaw Convention was first drafted. Because of rampant technological change and airlines’ vastly improved safety records, coupled with the maturation of the international insurance market, air carriers today are able to adequately insure every passenger—even to meet the uniquely high standards of the United States. The cost of waiving the limits on liability only adds a negligible increase to the ticket price.161

On the other hand, it is clear today that liability limitations contribute to neither uniformity nor fairness. Uniform limits on liability strive for identical results, which—because of the fundamental differences in legal systems, standards of living, social and cultural perceptions, etc.—have proven to be an unachievable goal. Liability limits are also the principal cause of unfairness. They have consistently been set too low, causing plaintiffs to try to “break” them through costly and time-consuming litigation.162

With the adoption of unlimited liability, countries and airlines are seeking a uniform rule that will make it possible to reach fair and reasonable, although not identical, results that can be accepted by all parties involved in air carrier liability controversies.

From a practical point of view, both initiatives have already accomplished a relevant goal—to modernize the liability regimes for all major international U.S. airlines and all the Euro-

161 According to John Westcott, director of underwriting at London-based Hill Aerospace Syndicate, the waiver of the liability limitation on a London-to-Miami flight “would cost air travelers an additional 50 cents a ticket to cover the increased premiums airlines would need to pay.” International Effort to Update 68-Year Old Treaty on Passenger Liability Picks Up Momentum, AIRLINE FIN. NEWS, May 19, 1997, available in LEXIS, Market Library IACNWS File [hereinafter International Effort].

162 The litigation that followed the downing of Korean Air Lines Flight 007 in 1983 by a Soviet fighter pilot is just one example of the unfairness of the Warsaw Convention. In March 1997, after a 14-year legal marathon, Hans Ephraimson-Abt was awarded U.S. $2,135,000 (of which U.S. $2,000,000 was punitive damages) for his daughter’s death, a 23-year-old graduate student in Asian studies from Saddle River, New Jersey. About 16 families still have not been compensated, although KAL’s willful misconduct was established years ago. See Jan Hoffman, In His Daughter’s Memory: Grieving Father’s 14-Year Crusade Helps Air Crash Victims, N.Y. TIMES, Mar. 31, 1997.
pean community ones. All United States, as well as some Canadian and European, airlines involved in international transportation have signed the IIA and the MIA, modified their Conditions of Carriage, and filed appropriate tariffs with the U.S. Department of Transportation. Presently, the two-tier system of unlimited and absolute liability up to SDR 100,000 is in effect on a great number of international flights to and from the United States.\textsuperscript{163} Moreover, after the entry into force of the European regulation in October 1998, any passengers flying on an European air carrier is enjoying the new two-tier system.

B. PROBLEMS WITH THE LATEST INITIATIVES

Keeping in mind the two principal goals of reforming the Warsaw regime (uniform rules and fair compensation), we now turn to some of the most relevant problems that the latest initiatives have raised or were not able to resolve following the IATA Agreements and the EU Regulation.

\begin{quote}
163 The families of the victims in the recent tragic crash of Swissair flight 111, New York–Geneva, on September 3, 1998, will most likely be the first ones to benefit from the new two-tier system designed by IATA. At the time of the crash, Swissair had signed both the IIA and the MIA, and filed a tariff with DOT. Accordingly, families will be able to recover all compensatory damages without having to go through lengthy and expensive litigation. In a statement released by Swissair only a few hours after the crash, the Swiss airline announced that it “will compensate relatives of passengers on flight SR 111 for compensatory damages under the applicable law. Claims of the passengers’ families are subject to the Warsaw Convention and to the General Conditions of Carriage of Swissair.” \textit{Swissair Offers Immediate Compensation to Families of Passengers on SR 111}, Swissair Press Release, Zurich, Sept. 3, 1998 (visited on Mar. 9, 1999) \texttt{<http://www.swissair.com/press_releases/pressrel_030998_2030-en.htm>}. The reference to the General Conditions of Carriage should reinforce our prediction.

It is also interesting to note the effect of the EU regulation on the Swissair case. Although Swissair, as a Swiss airline, was not bound by the EU regulation, it offered immediate compensation to families of passengers on flight 111, as it is provided in Article 5 of the EU regulation. The above mentioned press release stated:

In order to help meet the immediate financial need that may be experienced by relatives of the passengers on board flight SR 111, Swissair will, as soon as possible, make payments of CHF 30,000 or USD 20,000 in respect of each passenger, should they wish this. Letters are being sent to relatives of all the passengers inviting them, or their representative, to contact the company if they wish to take advantage of this.

\textit{Id.}
1. The IATA Agreements

a. The Private Nature of the Agreements

IATA’s latest initiative is based entirely on the last sentence of Article 22(1) of the Warsaw Convention. Like the 1966 Montreal Agreement, both the IIA and the MIA find their legal basis in this provision. They are, in essence, “special contracts.” But this is all they are—contracts between airlines relating to the liability limitations set in the Warsaw Convention. Because of their private nature, such provisions have to conform with both the provisions of the Warsaw Convention and national laws. For example, the refusal of IATA to insert a clause into the IIA/MIA regime that would provide for domicilii as the fifth basis of jurisdiction finds its official—even if questionable—explanation in an arguable prohibition contained in Article 32 of the Warsaw Convention. Similarly, the IATA Agreements do not seem to enjoy any per se real legal effect until their signatory airlines include the appropriate implementing provisions in their conditions of carriage or the competent authorities approve them.

b. Variable Regimes

The IATA initiative consists of two agreements that differ substantially from each other. Since a third of the airlines that have signed the IIA have not signed the MIA, it is very difficult to predict what the liability regime will be on many of the IIA’s signatory airlines. Questions arise such as: Will they eventually adopt the MIA and, if not, which of the two options will prevail, “unconditional waiver” or “waiver plus the law of the passenger’s domicile;” will they waive the Article 20(1) defense and, if so, to what amount; will they provide for the law of the passenger’s domicile as the governing law for purposes of damage determination? Even assuming that every airline adheres to both the IIA and MIA uncertainties will still remain. For instance, the MIA (which is supposed to supply the provisions implementing the IIA) has mandatory and optional provisions that leave carriers the option of waiving the liability limitation without adopting the law of the passenger’s domicile as the applicable law to determine the damages (i.e., the “unconditional waiver” option).

164 See Warsaw Convention, supra note 1, art. 22(1).
Another issue that has not been resolved is the law applicable to the determination of damages. Without addressing the question of whether it is preferable to apply the law of the passenger’s domicile or a different law, the MIA, by not adopting one law is failing to assure uniform rules applicable in all circumstances. In order to know the liability regime to which a particular airline may be subject, it seems necessary to consult its conditions of carriage to see how that airline has actually implemented the IATA Agreements. The consequences of this situation are very clear. Non-uniform rules or unclear provisions are in fact the primary obstacle to the quick settlement of disputes and the main cause for prolonged litigation and unfair results. As mentioned previously, the last twenty years of air accidents have clearly demonstrated this fact.

Moreover, because of the low limits of liability, the importance of the applicable law that determines the compensatory damages has, until now, very seldom been a serious issue in international air law. Today, with the waiver of the limitation, the question of the applicable law becomes significant because it can make an award of U.S. $20,000 under Bangladeshi law become one of U.S. $2,000,000 under California law.

Even if one accepts the supposition that the tort system is designed exclusively to compensate victims, why should a U.S. air carrier only be liable to pay damages to the family of a Bangladeshi student according to Bangladeshi law when the ticket was bought in the U.S. by the student at the same price that was paid by his fellow student from Columbus, Ohio? Should not the benefit of lower compensation standards be somehow distributed between the airlines and the victims in a more fair way? A possible compromise could be to provide for mandatory application of either one of two: (a) the law of the passenger’s domicile or (b) the law of the place of issuance of the ticket. The choice could be left up to the plaintiff—who most surely will decide according to his or her own convenience, i.e., the law which provides the highest award—or the court—which will choose in order to secure a fair result. If in most cases the two criteria will point to the same result (i.e., application of the same law), the above mentioned choice may guarantee a more fair outcome in certain circumstances (as for example in the case of a Bangladeshi student or businessman buying a ticket in the U.S., and paying U.S. dollars), because it would also take into account the market where the ticket was sold. For a discussion on conflict of laws in the field of international air transportation, see generally Andreas F. Lowenfeld, Mass Torts and the Conflict of Laws: The Airline Disaster, 1989 U. Ill. L. Rev. 157 (1989); Yves Van Couter, Barkanic: The New York Choice-of-Law Method and Recovery for Air Crashes Abroad, 60 J. Air L. & Com. 759 (1995); Russell J. Weintraub, Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation, 1989 U. Ill. L. Rev. 129 (1989); and Mendelsohn, supra note 52.

See Mendelsohn, supra note 88, at 185.
Difficulties may arise with regard to the definitions of both "domicile" and "permanent residence" of the passenger, which are used as the criteria for determining the law applicable to the calculation of damages.\textsuperscript{167} Which rules would a court apply in determining the "domicile" or "permanent residence" of the passenger: its own rules, the rules of the country of domicile, the Warsaw Convention, or some other law?\textsuperscript{168}

d. Fifth-Forum

Another source of unfairness is the lack of the fifth basis of jurisdiction. There has always been a strong effort to add the domicile of the passenger as the fifth forum in order to protect each passenger (the "wandering American" as well as the "wandering European" or "Japanese")\textsuperscript{169} from the unfairness of being forced to seek compensation in foreign courts and under foreign rules.\textsuperscript{170} U.S. carriers and the ATA were willing to insert such a provision in the implementation agreement, but only if all airlines agreed. As mentioned above, because of strong opposition from the majority of non-U.S. airlines, due to the fear of high damages awards of U.S. juries, the fifth forum is not even inserted in the MIA as an optional provision.

As is the case with the applicable law provision, once carriers have waived the liability limitation, the issue of where a passenger is able to bring suit will be even more important than before. As Professor Lowenfeld has put it "with or without Warsaw, the place of suit remains critically important, once substantial damages are available but not guaranteed."\textsuperscript{171} Accordingly, the failure to include the domicile of the passenger as the fifth forum in the IIA-MIA regime will again be the cause of considerable unfairness and eventually, we suspect, of an increasing level of controversy, especially if airlines do not adopt the law of the

\textsuperscript{167} See id.

\textsuperscript{168} See Lowenfeld, supra note 49, at 188. But see Mendelsohn, supra note 88 at 141.

\textsuperscript{169} The argument could well be made by European as well as Japanese passengers, and accordingly is not just an American problem. See Mendelsohn, supra note 52, at 1077-78.

\textsuperscript{170} The "fifth forum" was adopted in 1971 in Article XII of the Guatemala Protocol. See supra note 22 and accompanying text. In the face of this precedent, it is difficult to understand why non-U.S. carriers were reluctant to adopt it in these IATA agreements.

\textsuperscript{171} Lowenfeld, supra note 49, at 188.
passenger’s domicile as the law applicable to the determination of damages.\textsuperscript{172}

e. Other Questions

There are a host of other questions that have not even been considered by any of the recent initiatives. For example, what are the implications of code-sharing and commercial agreements between different airlines if the liability regimes of both the contractual and operating carriers are not the same? Should the obligations and rights of third parties, like manufacturing companies and air traffic control authorities, be determined by, and be included in, the uniform regime that prescribes the liability rules for carriers? What is the proper definition of domicile and/or permanent residence to be used as the criteria for choice of law and forum selection clauses in today’s global economy? These are some of the issues that will become increasingly important in the system that follows the elimination of limits.

2. The European Regulation

Although the European initiative strengthens the belief that liability limits are a thing of the past and that the concept of absolute liability, at least up to a certain level, seems to have finally been accepted by most of the western world, several issues remain unresolved or controversial. Since the Council regulation resembles the IATA initiative in many aspects, some of these issues have already been mentioned.

First, the Regulation, based on the special contract provision of Article 22(1), like the IATA Agreements, must conform to the provisions of the Convention. Otherwise it would presumably violate international law. However, unlike the IATA Agreements, the Regulation will supersede any non-conforming national law and will be binding in its entirety and directly applicable in all EU Member States.

More importantly, after the elimination of the fifth forum, the proposed regulation is silent on two matters that will become key issues in any air accident after the liability limits are removed: (1) the applicable law according to which damages are to be determined; and (2) the forum where the victims or their

\textsuperscript{172} Passengers forced to sue in foreign courts (other than these in the U.S.) under foreign law will often receive much lower compensation than they could receive according to the standards of the law of their domicile.
survivors will be able to bring suit. The consequences of such choices have been already discussed above.

It is interesting to note that the EU's choices have not escaped notice or criticism. In Washington, D.C., on an internet chat box for aviation enthusiasts (known colloquially as "Mifnet," after its founder KLM legal counsel, Paul Mifsud), the question recently arose as to which carriers had filed tariffs with the DOT and were therefore implementing the IIA and the MIA. A recent article by Mendelsohn was cited suggesting that "except for about a dozen U.S. carriers and a handful of foreign carriers" there was no certainty about any other carriers implementing the IIA and MIA. Almost immediately, Mr. Frederick Sorensen-V, the EU's aviation guru, logged in with the comment that: "the EU has done away with the Warsaw limits and any Member State limits for all Community Air Carriers with effect from 17 October this year. Mendelsohn is therefore not right in referring to only a handful of foreign carriers."

On March 15, 1998, Mendelsohn responded with the following comments:

Unfortunately, at least on the basis of my last inquiry a month or so ago, most of the EU carriers (except for BA, LH, and AF) have not yet filed tariffs with the DOT, and no one knows why they are reluctant to do so [Swissair, Belair, and Crossair have since done so] . . . Until they file those tariffs . . . I believe there's serious doubt under US law whether their [IIA and MIA] agreements are fully effective. While you're at it, ask Fred for the real story about what happened when the EU Council last February (1997) abandoned the EU's apparent enthusiasm for the fifth forum. Don't they want Germans and Frenchmen (etc., etc.) to be able to sue in Germany or France, or is it a fact . . . that they really like forum shopping and want all of their citizens to hire U.S. lawyers and sue in the U.S. Nor at this point can there really be any acceptable argument that the fifth forum might violate Article 32. I think even IATA agrees with that. And how about lex domicilii? Are the U.S. carriers going to be the only ones on the line for that too?

There has been no reply to date from Mr. Sorensen.


174 This exchange is not published, but is on file with the authors.

175 This exchange is not published, but is on file with the authors.
Another question relates to the up-front payment provision of the Regulation, which provides for an advance-payment in case of death in order to meet immediate economic needs. Although the concept of an advance payment may be an interesting innovation, such a provision may prove unnecessary, especially if it is imposed as a matter of law. It is unnecessary because, by eliminating any liability limit, the disincentive to write the up-front check by underwriters has been eliminated. Underwriters can be expected to provide advance payments, simply in order to try to limit the final award for full compensatory damages, which would surely also include those damages suffered because of the lack of immediate financial support. The advance-payment provision may also prove counter productive because of the usual penchant for transforming a minimum limit into the maximum limit.176

The relationship between the EU Regulation and the IATA Agreements is controversial. The different approach toward the applicable law for the determination of damages, for example, constitutes undoubtedly an initial conflict between what could be the regimes applicable in the United States and the European Union. No provision regarding the law applicable to the determination of damages has been included in the Regulation. The European Union thus seems to prefer the unconditional waiver approach that was abandoned by the U.S. airlines in the drafting of the IPA. When the Regulation entered into effect on October 17, 1998, two different regimes became applicable in the United States and the European Union: (1) “unconditional waiver” in the European Union; and (2) “waiver plus the law of the passenger’s domicile” in the United States. Such a result does not contribute to uniformity in airline liability rules. It does, however, confirm the fundamental flaw of regulating carrier liability through private or regional (i.e., Japan, Europe, the United States) rules.

In short, the pursuit of the goal of uniform and fair rules for international air transport may, at least in the next few years, suffer a setback. Even though the liability limits will disappear from the conditions of carriage of most of the world’s major airlines (that will mean higher, more adequate compensation awards for many, though not all, passenger victims), questions like applicable law, jurisdiction, mandatory insurance, liability defenses, adequate notice, up-front payments, and indemnifica-

176 See supra note 112. The Swissair case seems to confirm both suppositions.
tion rights will differ depending on the regime governing the particular contract of carriage and on several factors like the nationality of the carrier or the destination of the flight. As discussed above, the absence of uniformity and certain fundamental provisions (i.e., *lex domicilii* and *fori domicilii*) will only bring increased costs for both the aviation and the insurance industries, less proper information for the consumer, prolonged litigation, forum shopping, and ultimately, less than fair results for victims and their families.

C. The ICAO Legal Committee's Draft Convention

After the Japanese, IATA, and European initiatives, the latest action taken by the ICAO will hopefully prove to be the final chapter in the pursuit of a uniform and fair liability regime for international air transportation.

The 30th session of the ICAO Legal Committee was held in Montreal from April 28 to May 9, 1997, under the agenda item "[t]he modernization of the Warsaw System and review of the question of the ratification of international air law instruments." The Legal Committee reviewed and revised a draft instrument designed to modernize and consolidate the "Warsaw System" by means of a single self-standing Convention. At the end of its session, the Legal Committee approved the text of a draft instrument that, at the end of June 1997, was circulated by State letter so as to afford States and international organizations an opportunity to submit comments.

Since the text approved by the Legal Committee is in fact little more than a first draft, we will only briefly examine those provisions most relevant to our topic.

The first change from the Warsaw System is found in Article 16, which provides that the carrier is liable for damage sustained in case of death or "bodily or mental injury" of a passenger, thus expanding the types of injury that may fall within an airline's scope of liability. It has been said that this condition would "open a whole new door."\(^{177}\) For instance, a passenger could try to recover damages for stress (but no physical injury) suffered while his flight experienced severe turbulence.\(^{178}\)

Article 23 specifies the "basis of claims" by stating that, in the carriage of passengers any action for damages, however

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177 *International Effort*, *supra* note 161.

founded, whether under this Convention or in contract or in
tort or otherwise, can only be brought subject to the conditions
and such limits of liability as are set out in this Convention. The
provision seems to close the door on those claims not covered
by the Convention, which lately have attracted some atten-
tion.\textsuperscript{179} It is interesting to note that Article 23 also clarifies that
the term “damage” does not include any punitive, exemplary, or
other non-compensatory damages.

Regarding the liability regime, the Legal Committee has ex-
pressed its support for the two-tier system in case of accidental
death or injuries to passengers, according to which, in the first
tier, for claims up to SDR 100,000, the liability of the carrier
would be based on the principle of absolute liability, and for
claims exceeding this amount (second tier), the liability of the
carrier would be based on fault but perhaps without benefit of a
presumption. It is stated in the Explanatory Memorandum,
“concerning the second tier of liability, however, no clear con-
sensus could be reached as to who shall bear the burden of
proof.”\textsuperscript{180} While some delegations preferred that the burden
should be on the plaintiff to prove fault of the carrier, the ma-
jority of those delegations favored an approach similar to the
Warsaw system and the latest IATA initiatives that fault is pre-
sumed unless the airline can prove that it had taken all reason-
able measures to avoid the damage or that it was impossible for
it to do so. A compromise was found by inserting three alterna-
tives in Article 20. In the words of the Legal Committee, this is
how Article 20 is structured:

\begin{quote}
In Alternative 1, each State party shall, upon ratification, notify
which regime shall be applicable to its carriers. Under Alterna-
tive 2, each State party would have the possibility of “opting-out”
of the liability regime, which provides for the air carrier’s pre-
sumed fault, in favor of the regime which places the burden of
proof on the claimant. Alternative 3 establishes a three-tier re-
gime, with strict liability in the first tier, with a second tier on the
\end{quote}

\textsuperscript{179} In July 1997, a federal appeals court in Manhattan ruled that all claims by
U.S. citizens against airlines that are not covered by the Warsaw Convention
can be pursued in U.S. state courts. The case had been brought against El Al Airlines
by Tsui Yuan Teng, who argued that she suffered psychological distress and per-
sonal injuries when searched prior to an international flight. The appeals court
held that, although the incident was not an “accident” under Warsaw Article 17,
12 F.3d 99 (2d Cir. 1997), the plaintiff could pursue her claim against El Al in the
New York state courts. The case is now pending on appeal before the Supreme
Court.

\textsuperscript{180} ICAO State Leuter, \emph{supra} note 178, Attachment B.
basis of presumed fault of the carrier, and with the burden of proof on the claimant in the third tier.\textsuperscript{181}

Although each of the three proposals constitutes an attempt at finding a compromise within the Legal Committee, it is evident how the alternative solutions, if adopted, would seriously endanger uniformity under the new liability regime. Different rules would be applicable according to the choices of individual states. The Legal Committee prudently decided to refer the three alternatives for final consideration to the Diplomatic Conference, thus leaving the issue open for later discussions and resolution.

A compromise also was required with regard to the inclusion in the draft Convention of the so-called “fifth jurisdiction” provision. After providing for the Warsaw original four jurisdictions, Article 27, in paragraph 2, states that

in respect of damage resulting from the death or injury of a passenger, the action may be brought 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.\textsuperscript{182}

Paragraph 3 specifies that “‘establishment’ means 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.”\textsuperscript{183} It is clear how the fifth jurisdiction is limited by the specific conditions of both paragraph 2 and 3 of Article 27. A plaintiff could sue in his or her country of domicile or residence only if the airline maintains a virtually full operational presence in that country.\textsuperscript{184} In light of the recent actions taken by IATA and the European Union, the presence of at least a “limited” fifth basis of jurisdiction is to be considered a positive first step of the draft Convention. But like the liability regime, the Legal Committee decided to refer Article 27, paragraphs 2 and 3, as a whole for final consideration by the Diplomatic Conference.

\textsuperscript{181} Id.

\textsuperscript{182} Id. Attachment A.

\textsuperscript{183} Id. art. 27, \S 3.

\textsuperscript{184} It is difficult to understand how the legal committee could have proposed anything less comprehensive than was adopted in Article XII of the Guatemala Protocol in 1971. \textit{See supra} note 170.
There are also provisions addressing for the first time issues such as the possibility of stipulating arbitration agreement between the parties to the contract of carriage for both passenger and cargo, the respective liabilities in case the carriage by air is performed by a person (i.e., an actual carrier) other than the contracting carrier, and the freedom of the carrier to make advance payments based on the immediate economic needs of families of victims or survivors of accidents.

Unfortunately, like in the EU Regulation, there is no provision regarding the law applicable for the determination of damages. There is no persuasive explanation why the Legal Committee did not include some provision, even if alternatives, for choice of damage law. With four or five fora from which to choose, plaintiffs will certainly have the chance to forum shop, which, in the interests of uniformity and fairness, should be avoided.

The complex process of modernizing the Warsaw system is at its earliest stage. It is even questionable whether the Legal Committee's draft is sufficiently refined as to warrant referral at this stage to a Diplomatic Conference. A more prudent approach might be to refer the draft back to the Legal Committee for an additional year of study in the light of comments received from member states. After so many years of hesitation and experimentation, which still continue today, it may be unseemly now to rush to a Diplomatic Conference without the kind of active intellectual thought that should be given to a document of this importance. Sooner or later, however, there must be a final

185 See id., art. 28.
186 See id., art. 33-42.
187 See id., art. 44.
188 In a decision of the ICAO Council in November 1997, a Special Group on the modernization and Consolidation of the "Warsaw System" was established to review the draft of the legal committee. The Special Group held its meeting from April 14-18, 1998, in Montreal and approved an amended draft text that was submitted to the ICAO Council for consideration during its 154th session. On June 3, 1998, the Council decided to convene a Diplomatic Conference for the adoption of said draft Convention to be held from May 10-29, 1999, in Montreal unless an invitation is received from a Contracting State to hold the conference. Therefore, the arrangements as to the location of the conference are to be further reviewed later this year. The following are a few of the changes worth mentioning in the amended draft: (a) regarding the carrier's liability, Article 16 has deleted the reference to "mental damages," and Article 20 has chosen alternative 1, i.e., the two-tier system of absolute—up to 100,000 S.D.R.—and presumed unlimited liability; and (b) relating to the jurisdictional provision, the amended Article 27 provides for a still "limited" fifth-forum right, although one of the two
draft. As it is stated in one of the recitals of the current draft, everyone today is "convinced that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests."\(^\text{189}\)

VI. CONCLUSION

By exploiting the special contract provision of Article 22(1) of the Convention, several members of IATA and the European Union have attempted to modernize the airline liability regime, in particular by waiving all limits on liability.

In light of the private and regional nature of such initiatives, the different regimes that the IATA Agreements and the EU Regulation will establish, and several issues which have not yet been resolved, the two principal goals of any attempt at reforming the Warsaw Convention—i.e., uniform rules and fair damage compensation—have not yet been achieved.

While under both the IIA/MIA regime and the European initiative the levels of passenger's compensation have been radically improved, the goal of more certain and more uniform liability rules continues to be elusive. Moreover, and as mentioned earlier, non-uniformity will bring increased costs for both the aviation and the insurance industries, general consumer disinformation, prolonged litigation, forum shopping, and ultimately unfair results.

While the results that both IATA and the European Union have accomplished in the past few years are extraordinary, there is no doubt that a fair and uniform liability system in this field of international air transportation law can only be achieved through inter-governmental action and a new Convention.

\(^{189}\) ICAO State Letter, supra note 178, Attachment A. At its 32nd session in October 1998, the Assembly of the International Civil Aviation Organization (ICAO) endorsed the convening of a Diplomatic Conference in May 1999. It also requested the Council and the ICAO secretariat to take appropriate action, such as regional seminars, in order that states may better prepare their positions in anticipation of the Diplomatic Conference. See ICAO press release on 5 October 1998 (visited on Mar. 9, 1999) <http://www.icao.org/icao/en/nr/pio9812.htm>.
Such an effort, which should not be undertaken lightly nor rushed, will do away with all of the different “special contracts” and provide for a system that “people can understand and rely upon, . . . a system that works to bridge the awkwardness and difficulty of the international air transportation system that people encounter in attempting to get compensation for their losses.” The demand for government-level action is also mandated by the need to take into account and resolve a host of issues that were either not considered or not finally resolved by any of the recent initiatives nor by the ICAO Legal Committee in its work to date. However long it may still take, the road toward a fair and uniform liability regime in international air transportation is no longer merely a fantasy.

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