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Comments

FROM WARSAW TO TENERIFE: A CHRONOLOGICAL ANALYSIS OF THE LIABILITY LIMITATIONS IMPOSED PURSUANT TO THE WARSAW CONVENTION

DAVID I. SHEINFELD*

INTRODUCTION

ON MARCH 27, 1977, the worst air disaster in aviation history took place.¹ Intended as an alternate refueling point, the tiny island of Tenerife in the Canary Islands was the site where two jumbo Boeing 747's² collided, killing over 580 passengers.³ Before the ruins of the two jumbo jets were removed from the runway, lawsuits praying for enormous amounts of damages were in the preparatory stages.⁴ Speculation as to the amount to be received by the victims varied depending upon the jurisdiction in which the lawsuit was brought.⁵ Questions immediately arose involving the role the Warsaw Convention⁶ would play

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¹ Los Angeles Times, Mar. 29, 1977, at 1, col. 5. For a chronological study of the Tenerife disaster, see Spanish Government Report, *Colision Aeronaves Boeing 747 PH-BUF de K.L.M. y Boeing 747 N 737PA de PAN AM* (March 27, 1977) (on file with CAL. W. INT'L L.J.).

² The two jumbo jets involved in the Tenerife disaster were operated by Pan American World Airways and the Royal Dutch Airlines, known as KLM.

³ TIME, Oct. 30, 1978, at 58.

⁴ Los Angeles Times, *supra* note 1, at 2, col. 5.

⁵ *Id.* In California, compensation for the loss of a young mother with children generally ranges from \$200,000 upwards. Jury verdicts for the loss of a father depend primarily upon the age and income level of the passenger. *Id.*

⁶ The Warsaw Convention, officially known as the Convention For the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) [hereinafter cited as Warsaw Convention], was proclaimed for the United States by President Franklin D. Roosevelt on October 29, 1934. The Warsaw Convention was the result of international conferences held in 1925 and 1929 which dealt with the problems confronting the world's growing commercial aviation industry.

in settling the claims of the 644 passenger claimants.⁷ Pursuant to the terms of the Warsaw Convention and its subsequent amendments, liability was admitted by both air carriers involved,⁸ but Pan Am and KLM waived the defense of the Warsaw Convention as to the limitations on each passenger's recovery.⁹

⁷ Los Angeles Times, *supra* note 1, at 1, col. 5. At the time of the accident the two carriers reported that there were 248 people on the KLM plane and 396 people on the Pan Am plane. *Id.*

⁸ As can be shown by the standard air passenger ticket provisions, any accident not caused by the passenger effectively binds the carrier to the extent of liability within the Warsaw Convention. If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable, and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U. S. \$75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. The limit of liability of U. S. \$75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U. S. \$58,000 exclusive of legal fees and costs. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U. S. \$10,000 or U. S. \$20,000.

The names of carriers, parties to such special contracts, are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

⁹ *In re Air Crash Disaster at Tenerife, Canary Islands*, on March 27, 1977, MDL Docket No. 306 (S.D.N.Y. 1978). It was stated in the stipulation: "The Warsaw Convention/Montreal Agreement limitations on recoverable compensatory damages shall not be asserted as a defense herein by KLM or Pan Ameri-

Like most international air travelers, the Tenerife passengers probably had only a limited awareness of the international rules governing limitations on recoveries. Few passengers realize what the alternatives are for recovery should an accident occur. As a result, the passenger relies upon the current state of international aviation law to provide adequate compensation. The moment the passenger is tendered the ticket and given a reasonable time to read its provisions, the traveler is legally put on notice of the carrier's limited liability.¹⁰ Under the conditions of Article 3(1)(e) and (2)¹¹ of the Warsaw Convention, passengers are entitled to be informed of the recoveries a carrier must provide. The ticket acts as notification that this mode of transportation is subject to the rules of liability established by the Warsaw Convention. Each passenger is then afforded the opportunity to take additional steps to protect against this limited liability. The passenger may pur-

can. All other defenses, except the defense of no liability for compensatory damages, are reserved by KLM and Pan American."

¹⁰ See *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (9th Cir. 1965), in which the court held that, under Article 3, note 3 of the Warsaw Convention, "if the carrier 'accepts a passenger without a passenger ticket having been delivered,' it shall not be entitled to the limitation of liability afforded by Article 22(i)." See also *Reed v. Wiser*, 414 F. Supp. 863 (S.D.N.Y. 1976), *rev'd*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), *noted* 44 J. AIR L. & COM. 175 (1978); *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455, *rehearing denied*, 391 U.S. 929 (1968).

¹¹ Article 3 of the Warsaw Convention states:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

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

Warsaw Convention, *supra* note 6, art. 3.

chase additional flight insurance or separately contract with the carrier for recovery limits contrary to those under the Warsaw Convention.¹²

The Warsaw Convention was originally enacted to place uniform liability limits on all suits by international air passengers, but changes in the laws of many countries significantly affected the amount a potential claimant could recover. As the Warsaw Convention grew older the inequities in its recovery limitations grew, and subsequent amendments attempting to rectify the problem quickly became outdated. Although attempts have been made to modernize the liability limitations, the effectiveness of such attempts cannot be ascertained when the original Warsaw Convention is identified as the starting point.

This uncertainty about the Warsaw Convention's liability limitations continues to create havoc in the courts. The issue to be resolved in future international air claims, therefore, is whether the liability limits set under the Warsaw agreement are subject to broad interpretation by the courts.

In an effort to examine the inequities of passenger recovery within the stipulations of the present Warsaw Convention, this comment will chronologically analyze the following major events: the original Warsaw Convention of 1929; the Hague Conference of 1955; the Montreal Agreement of 1966; and the more recent, but not yet ratified, international proposals. In discussing the development of the recovery limitations of the Warsaw Convention, it is necessary to identify the interplay between the interests involved. Politics, economics, and the growth of the aviation industry have been major factors in the effort to reach the most workable solution for all concerned.¹³ Not only has this international process

¹² See *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir. 1965), in which a flight chartered by the United States government was involved in transporting military personnel and cargo outside the continental limits of the United States. An accident occurred in Japan, killing the plaintiff's son. The decedent's ticket had been handed to him, *after* he had boarded the plane; thus he had no opportunity to purchase additional flight insurance. The Second Circuit found that "the delivery of the ticket was not adequate and that the limitation on damages of the Convention is inapplicable." *Id.* at 856. Essentially, the decedent was not afforded a reasonable opportunity to take any additional measures against the stipulated liability limitation.

¹³ See generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967). The authors of this article set forth

of negotiation been tedious and long,¹⁴ its results can be frustrating to those passengers, air carriers, and attorneys who must deal with its provisions on a regular basis. Even though the Warsaw Convention is applicable each time a passenger sets out on an international air journey, the adjudicative interpretation of the liability limits is not fully understood by the many who must utilize and apply it.¹⁵

I. THE ROAD TO LIABILITY LIMITS

A. *The Original Warsaw Convention*

With the commercial air transportation industry blossoming in the 1920's, governments and industry alike began to inquire into the ramifications of an aviation accident. Taking notice of this concern, the French government in 1925 convened the First International Conference of Private Air Law¹⁶ primarily to consider the creation of a uniform system of aviation law. Subsequently,

an excellent overview of the events leading up to the implementation of the Warsaw Convention.

¹⁴The Warsaw Convention was the product of an international conference in Paris in 1925, the 1929 Warsaw Conference, and preliminary work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA). Lowenfeld & Mendelsohn, *supra* note 13, at 498.

¹⁵Legal writers in the field of international aviation law have acknowledged the uncertain state of international liability limits. See Franck, *International Law in Canadian Practice: The State of the Art and the Art of the State*, 31 INT'L J. 180, 197 (1976).

Other writers have discussed the problems inherent in the combining of complex legal guidelines with complex factual patterns, a combination which occurs in nearly every aviation case. In an effort to thoroughly examine each issue, the standards used to interpret the law must be flexible, but this inevitably leads to the application of law that is neither uniform nor consistent with previous cases or appropriate statutory (treaty) provisions. See Campbell, *Airlines' Responsibilities to Passengers: Recent Theories and Extensions*, 43 J. AIR L. & COM. 289, 322 (1977). See also text accompanying notes 134-138 *infra*. Progressing through the development of the Warsaw Convention, it becomes readily apparent that this international aviation treaty is providing much more than is being utilized by the judicial system. Modernization has led the original Warsaw draft to different interpretation although many of the interpreters appear uncomfortable with this modernization. For example, in *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), the court upheld the liability limitation of the Montreal Agreement which was over ten years old. The court, however, discussed the newly approved international liability limitation under the Guatemala Protocol, stating that it would not utilize the new limitation because any limit must be beneficial to the passenger. See note 99 *infra*.

¹⁶See Lowenfeld & Mendelsohn, *supra* note 13, at 498.

in 1929, the full conference was called to Warsaw to adopt what is now known as the Warsaw Convention.¹⁷

The conference in Warsaw focused on two areas. First, it was clear to the many member nations that commercial aviation travel was expanding into many countries having different customs, languages, social identities, and legal systems.¹⁸ These differences necessitated the formation of a uniform international system to deal with claims arising from international air accidents, without regard to the destination of the flight.¹⁹ The second goal at Warsaw was to limit the potential liability the carrier would sustain should an accident occur.²⁰ The delegates debated extensively in attempting to arrive at a limit which was fair both to the victims and the carrier. It was finally agreed that the carrier's liability for personal injury or property damage suffered by passengers on a flight or while disembarking or embarking would be limited to 125,000 "Poincare francs," approximately 8,300 United States dollars.²¹

Beyond the two stated objectives for the Warsaw Convention, the delegates present had one overriding goal in mind: uniformity for all aspects of international commercial aviation.²² In time, with extensive application and interpretation of the Convention, it became apparent that the delegates had failed to accomplish this primary purpose. As is the case with many treaties that must be applied in ever-changing conditions, problems resulted from many

¹⁷ See note 10 *supra*, for an explanation of the Warsaw Convention as interpreted by the courts.

¹⁸ Lowenfeld & Mendelsohn, *supra* note 13, at 498; see generally C. SHAW-CROSS & K. BEAUMONT, *AIR LAW* (2d ed. 1951).

¹⁹ Lowenfeld & Mendelsohn, *supra* note 13, at 498.

²⁰ Warsaw Convention, *supra* note 6, arts. 17, 22. Extensive discussion was centered on the limit of liability a carrier would incur. The initial limit appears to have been the result of a compromise considering the presumption of liability every carrier was to withstand under Article 17. Lowenfeld & Mendelsohn, *supra* note 13, at 499.

²¹ Lowenfeld & Mendelsohn, *supra* note 13, at 499. Throughout this comment, direct reference to liability amounts will be made in terms of the United States dollar. Liability amounts were expressed in "Poincare francs," probably because the original Warsaw Convention was formulated in France.

²² International commercial aviation means the carriage by aircraft of persons or property as a common carrier for compensation or hire between a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. Federal Aviation Act of 1958, 49 U.S.C.A. § 1301(23)(c) (Supp. 1979).

different and contradictory interpretations by the courts.²³ In addition, many developed and industrial countries began to question the reasonableness of the liability limit.²⁴ They raised three main objections: (1) liability insurance could be obtained by the carrier at a lower cost per passenger mile than originally had been thought, because of the increased ability of the carriers to provide safer transportation; (2) liability insurance costs were now shown to be a minimal part of the carriers' operating costs, and; (3) the initial protection afforded to the industry was now too extensive due to the experience and knowledge of the carriers and their vastly improved safety record.²⁵

Countries whose personal injury damage awards were not high countered the developing countries' position by pointing out that the limit of liability is dependent upon the value of an ounce of gold in relation to the value of the Poincare franc at a particular time.²⁶ Thus, many countries viewed the limitation of liability under Article 17 as no limitation at all, since the recovery limitation would rise should a worldwide gold devaluation occur.²⁷

B. *The Hague Conference*

Dissatisfaction with the Convention remained until 1955 when the Hague Conference²⁸ was convened by the legal committee of the International Civil Aviation Organization (ICAO).²⁹ Prior to the Conference numerous preliminary conferences had met to discuss what was to result at the Hague in an increase in liability limits. On the first day of the Hague Conference the United States proposed an increase in the limit of liability to approximately

²³ See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *rehearing denied*, 429 U.S. 1124 (1977). *C.f.* *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967).

²⁴ The contents of these arguments are set out in ICAO LEGAL COMMITTEE, REPORT ON THE REVISION OF THE WARSAW CONVENTION, ICAO INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, The Hague, Sept. 1955, vol. 2, at 93-100, ICAO Doc. 7686-LC/140 (1956).

²⁵ *Id.* at 96-97.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on October 12, 1929, The Hague, ICAO Doc. 7632 (1955) [hereinafter cited as Hague Protocol].

²⁹ Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. AIR L. & COM. 253, 256-57 (1956).

25,000 United States dollars. In response to this figure, many of the delegations introduced the Rio draft³⁰ proposing that the limit of liability be set at approximately 13,300 United States dollars.³¹

After much deliberation on the matter, a limit of approximately 16,600 United States dollars was adopted as the new ceiling of recovery.³² Even with the new limit, however, the real increase was greatly affected by the changed economic circumstances from 1929 to 1955. Since attorneys' fees, inflation, and the increased cost of living would absorb a significant part of this added amount, it was argued that the sum actually received by the passenger would be much less than the authorized \$16,600 recovery.³³ The conflict between member nations over liability limitations ended with a new effective recovery practically identical to the original limit.

With the completion and signing of the Hague Protocol amendment to the Warsaw Convention, problems developed in applying the amendment to an already existing treaty. Numerous countries, primarily those opposed to the Protocol, began to question the validity of setting liability limitations. Does the amended treaty still maintain its original purpose? Will it meet the needs of both the victims and carriers should an international air accident occur? Here again arose Warsaw's previous liability disputes.

By the time the Hague Conference was meeting, the international commercial aviation community had taken a giant leap toward economic stability.³⁴ No longer was there a need to protect

³⁰ See ICAO LEGAL COMMITTEE, REPORT ON THE REVISION OF THE WARSAW CONVENTION, ICAO INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, The Hague, Sept. 1955, vol. 2, at 76, ICAO Doc. 7686-LC/140 (1956).

³¹ *Id.* at 79.

³² On September 28, 1955, the Hague Protocol was adopted by a vote of 22 to 14. It is interesting to note the voting patterns of the governments of five major international air carrier nations. While the United States and most of the other major aviation nations voted in favor of the Hague Protocol, Great Britain and Italy abstained, and Spain and Japan viewed the need for the addition to the Warsaw Convention as unsubstantiated. The differences centered on allowing each court the discretion to award court costs and expenses incurred by the plaintiff only if the damages exceeded that amount for which the carrier had offered to settle the matter. *Id.* at 509.

³³ ICAO LEGAL COMMITTEE, REPORT ON THE REVISION OF THE WARSAW CONVENTION, ICAO INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, The Hague, Sept. 1955, vol. 2, at 93, ICAO Doc. 7686-LC/140 (1956).

³⁴ The tremendous growth experienced by the aviation industry was only then coming into the public awareness. During testimony before the Senate Foreign

the carriers' financial position. International air transport had blossomed into a multi-billion dollar industry.³⁵

The proposed liability limitation in the Hague Protocol received a cool reception in the United States.³⁶ The Americans and other opponents of the Protocol limit began to question the legality of imposing any liability limitation on an industry that had compiled such an impressive safety sheet. As a majority of all international aviation carriers and passengers were from the United States, American support was necessary if any new amendment to the Warsaw Convention was to be effective. With talk of United States denunciation³⁷ filtering the halls of the Conference, the fear of a nonexistent Warsaw Convention, especially in the United States, became a real possibility.³⁸ Nevertheless, the American dele-

Relations Committee, it was determined that international carriers, such as Pan American World Airways and Trans World Airlines, had experienced enormous growth from 1929 through 1964. This point, as well as others dealing with the assertion of economic stability in the aviation industry, was cited in *Hearings on the Hague Protocol to the Warsaw Convention Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 68 (1965) [hereinafter cited as *1965 Senate Hearings*].

³⁵ *Id.*

³⁶ Many of the arguments, both in favor of the Hague Protocol and in opposition, were brought forth in hearings before the Air Coordinating Committee (ACC) which was charged under an executive order to review all pertinent information and to submit its recommendation to the executive and legislative branches for or against ratification of the Hague Protocol. See *1965 Senate Hearings*, *supra* note 34, at 14-38.

³⁷ The "denunciation" procedure is explained by the State Department in Press Release No. 268, Nov. 15, 1965, 53 DEP'T STATE BULL. 923, 924 (1965). Under Article 39 of the Warsaw Convention, each member country may denounce the Convention upon six months notice. This press release announced that the United States gave notice of denunciation of the Convention on November 15, to become effective May 15, 1966, unless prior to the effective date there was a reasonable prospect of an international agreement to protect international air passengers.

³⁸ Setting the stage for what was to come, Rep. Lester Wolff strongly denounced the limit proposed by the Hague Protocol. Analogizing the proposed limit to fraud, he elaborated on the inequities of the liability limits:

The Warsaw Convention and Hague Protocol are so unpalatable that the State Department, which is pushing for ratification of Hague, has decided to give us a bit of honey. . . . The treaty provides for uniformity. That is ridiculous. Uniformity can and is secured by other means. First of all a majority of the countries of the world belong to IATA, in fact, IATA is employed to set the rates for all the airlines. If need be, we can keep the Warsaw Convention and just exclude the liability limits. . . . For this reason, I am asking the House of Representatives to set a precedent, a resolution to express the sense of Congress that the United States

gation to the convention recommended that the United States sign the Protocol.

Prior to approval of the Protocol in the United States Senate, the agency charged with reviewing such matters, the Air Coordinating Committee (ACC), held hearings and submitted its findings.³⁹ Even though it recommended submitting the Protocol to the Senate for its advice and consent, the ACC report questioned several points. First, the Committee noted that the Hague Protocol limit of recovery, although twice the amount allowed under the original Warsaw Agreement, closely complied with the average recovery obtained in non-Warsaw cases.⁴⁰ Secondly, the report addressed itself to the inadequacy of notice on the air carrier ticket.⁴¹ Under the provisions of Article 3(1)(c) of the Hague Protocol it was clear that each country could regulate its own notice requirement.⁴² The third question involved whether the

should not ratify a treaty, specifically the Hague Protocol. I also ask that we be released from the Warsaw Convention with respect to its liability limits.

89 CONG. REC. 20375-76 (1965) (remarks of Rep. Wolff).

³⁹ These reports appear in the Report of the Air Coordinating Committee transmitted by the President to the Senate for ratification. SENATE FOREIGN RELATIONS COMM., MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CERTIFIED COPY OF THE PROTOCOL, S. EXEC. DOC. NO. H, 86th Cong., 1st Sess. 15, 18 [hereinafter cited as ACC REPORT]. See also Lowenfeld & Mendelsohn, *supra* note 13, at 510.

⁴⁰ What the ACC failed to consider was the difference between the average recovery in non-Warsaw settlements as compared to a set limit. In 1959, the average recovery for a Warsaw fatality was \$7,654 while under the non-Warsaw classification the average recovery per fatality was \$79,857. Lowenfeld & Mendelsohn, *supra* note 13, at 554.

⁴¹ See ACC REPORT, *supra* note 39, at 24. See also *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y. 1966) (ticket provision ruling).

⁴² Article 3(1)(c) of the Hague Protocol, *supra* note 28, reads as follows:

1. In respect of the carriage of passengers a ticket shall be delivered containing:

- (a) an indication of the places of departure and destination;
- (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
- (c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

See also ACC REPORT, *supra* note 39, at 25.

Protocol would be applicable within the United States.⁴³ The ACC report did not say that United States ratification should be conditional upon the Protocol being applicable within the United States.⁴⁴ Originally intended as a uniform international system of rules and regulations, the Hague Protocol appeared to be heading in the opposite direction.

While considering the Hague Protocol for ratification, the Senate Foreign Relations Committee was exposed to two divergent views. Witnesses representing the United States government favored the acceptance of the Hague Protocol combined with insurance legislation which would require United States certified carriers to procure up to \$50,000 accident insurance.⁴⁵ The Air Transport Association (ATA), however, representing the air carriers, proposed the acceptance of the Protocol without the insurance legislation.⁴⁶ Although a compromise was reached between the administration and the carriers eliminating the insurance requirement while compelling each carrier to waive liability limits up to \$50,000 per passenger, it was evident that the United States Senate was moving toward disapproval of the Protocol as drafted.⁴⁷

The Hague Protocol, which arose primarily from the public indignation surrounding two landmark cases,⁴⁸ was distinctly outdated in terms of a fair liability limitation by the time it reached the United States Senate for consideration. The talk throughout the legislative halls was directed toward either a \$100,000 lia-

⁴³ ACC REPORT, *supra* note 39, at 25.

⁴⁴ *Id.*

⁴⁵ See 1965 Senate Hearings, *supra* note 34, at 88-89, 99.

⁴⁶ *Id.* at 53.

⁴⁷ As of August 9, 1978, there were approximately 90 governments participating in the Hague Protocol. Although the United States was one of the signatories of the agreement in principle, continued conflicts stalled the Hague package in the Senate Foreign Relations Committee. Address by Hon. James R. Atwood, Deputy Assistant Secretary of State, Remarks to the Air Transportation Subcommittee, International Law Section, American Bar Association Annual Meeting (Aug. 9, 1978) (unpublished).

⁴⁸ *Ross v. Pan Am. Airways, Inc.*, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955). This action was originally commenced by Ellen Jane Ross, known by her professional name of Jane Froman, for damages as a result of injuries sustained when the plane crash-landed near Lisbon, Portugal. Although the amount of damages recoverable was limited, the court went to great lengths to apply that limit to the plaintiff's notice on the ticket. 88 N.E.2d at 882-86.

bility limit⁴⁹ or denunciation. Faced with mounting pressure from Congress and constant disagreement between State Department officials and the ATA, each political party developed its respective position.⁵⁰ By the summer of 1965, it appeared that Congress would not be able to act on the insurance legislation.⁵¹ Thereafter, the administration concluded that the Hague Protocol alone "would not afford adequate protection to the American traveling public. If no supplementary protection could be made available, then withdrawal from the Convention and reliance on the common law would afford the best measure of protection."⁵² Within a week, the five major United States international air carriers returned with a decision rejecting the \$100,000 liability limit, while concurrently showing signs of possible cooperation at the \$50,000 level.⁵³ With Congress preparing to adjourn amidst disagreement between federal regulatory agencies, time became a very important factor.⁵⁴ Cognizant of the discontent surrounding the Warsaw Convention and the Hague Protocol, the United States government gave notice of denunciation of the Convention on November 15, 1965, to become effective May 15, 1966.⁵⁵ It was emphasized that such action was solely the result of the Convention's low limits of liability for personal injury or death to passengers.⁵⁶

The United States was prepared to withdraw its notice of denunciation should all the international carriers agree to an interim

⁴⁹ See FLIGHT INT'L, Sept. 1965, at 538.

⁵⁰ *Id.*

⁵¹ Having conditioned Senate ratification of the Hague Protocol upon the agreement on a system of automatic compulsory trip insurance valued at \$50,000, the outlook for passage of the insurance legislation was not good. The State Department was told by the chairman of the Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce that if an alternate program to the insurance was not submitted, the Hague Protocol would stand no chance of ratification. Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 300 (1965).

⁵² Dep't of State, *United States Government Action Concerning The Warsaw Convention*, May 5, 1966, reprinted in 32 J. AIR L. & COM. 243, 244 (1966); See also Lowenfeld & Mendelsohn, *supra* note 13, at 546-47.

⁵³ Lowenfeld & Mendelsohn, *supra* note 13, at 547.

⁵⁴ *Id.*

⁵⁵ See note 37 *supra*. For a full explanation of the denunciation and the reasons surrounding it, see CAB Agreement 18900 approved by CAB Order No. E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966).

⁵⁶ 31 Fed. Reg. 7302 (1966).

arrangement to waive liability limits up to \$75,000 per passenger.⁵⁷ As the consistent trend of disagreement over the Warsaw Convention continued into the ICAO interim conference in Montreal on October 26, 1965, it became apparent that preliminary steps toward denunciation by the United States were destined to become finalized.⁵⁸

C. *The Montreal Agreement*

As the 1965 Christmas tourist season approached, no interim agreement had been reached and the United States began to prepare for the ICAO conference to be held in Montreal⁵⁹ in February, 1966. The clear purpose of the Montreal Conference was to determine a liability limit that would lead to cooperation within the international aviation community.⁶⁰ At this conference the United States delegation was fully equipped with economic statistics and solutions to support its views on liability limitations.⁶¹ Argument and discussion continued over the course of several weeks on the limit of liability that carriers should be required to waive. In developing its position on recovery limits, the United States government considered the doctrine of absolute liability to the carrier to offset any increased costs a passenger would incur in attempting to prove liability. The United States was previously opposed to absolute liability⁶² "since the theory is unjust to the aircraft operator in requiring it to respond to damages regardless of fault."⁶³ Nevertheless, in developing a position that would be acceptable to the fifty-nine nations assembled, the legal arm of the Inter-agency Group on International Aviation (IGIA) began to seri-

⁵⁷ 53 DEP'T STATE BULL., *supra* note 37, at 923.

⁵⁸ *Id.*

⁵⁹ All reports, minutes, and documents of the ICAO Montreal conference are reprinted in the SPECIAL ICAO MEETING ON LIMITS FOR PASSENGERS UNDER THE WARSAW CONVENTION AND THE HAGUE PROTOCOL, MONTREAL ICAO Doc. 8584-LC/154-1, 154-2 (1966). For a general overview of the conference other than liability limits, see Lowenfeld & Mendelsohn, *supra* note 13, at 552-96.

⁶⁰ ICAO Doc. 8584-LC/154-1, 154-2, *supra* note 59.

⁶¹ Cooperating with the Department of State and the Federal Aviation Administration, the Civil Aeronautics Board compiled statistics from 1958 through 1964 listing all aircraft accidents and the amount of recovery, whether by judgment or settlement. ACC REPORT, *supra* note 39; see also Lowenfeld & Mendelsohn, *supra* note 13, at 553.

⁶² See Lowenfeld & Mendelsohn, *supra* note 13, at 558.

⁶³ *Id.*

ously contemplate the implementation of absolute liability. While reaffirming the goal of attaining maximum recovery for passenger victims, the IGIA outlined two reasons for advocating absolute liability:

(1) By 1965, it was assumed that commercial aviation was no longer an ultrahazardous enterprise. The aviation industry was adapting itself to serve all facets of society,⁶⁴ and; (2) Between all the parties involved in an accident, the airline is the party who is in the best position to allocate the risk, either by insurance or by loss distribution, so as to involve the least hardship.⁶⁵

The presence of these modern conditions was looked upon as altering the meanings of original Warsaw Articles 17⁶⁶ and 21,⁶⁷ and as compelling the contracting parties to waive the Article 20⁶⁸ defense. The purpose of Article 20 was to enable an aviation carrier to exonerate its actions from liability by showing that it had taken "all necessary measures to avoid the damage or that it was

⁶⁴ See Note, *Liability For Aircraft Damage to Ground Occupiers—A Study of Current Trends in Tort Law*, 31 IND. L.J. 63 (1955). It was found that due to the technological advancements made in the industry and to the commendable safety records compiled since World War II, the aviation industry can no longer be classified as ultrahazardous. This being the case, a basis for the liability conditioned upon the safeness of the carrier is no longer needed. *Id.* at 64.

⁶⁵ *Id.* at 69-71.

⁶⁶ Under the original provisions of Article 17 of the Warsaw Convention, it was stipulated that, "The carrier *shall be* liable for damage sustained . . ." (emphasis added), whereas under the Hague Protocol revision, Article 17 reads as follows:

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

Hague Protocol, *supra* note 28, art. 17 (emphasis added).

⁶⁷ Article 21 of the Warsaw Convention reads as follows: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." Warsaw Convention, *supra* note 6, art. 21. See Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 33 J. AIR L. & COM. 147, 151 (1967).

⁶⁸ Article 20(1) of the Warsaw Convention, as amended by the Hague Protocol reads as follows: "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Warsaw Convention, *supra* note 6, art. 20(1).

impossible for him or them to take such measures."⁶⁹ In addition to showing that it took all necessary measures, the carrier must show that it was logically impossible that an accident would occur after taking *all* necessary measures to avoid the damage.⁷⁰

Ultimately, the real issue was a permanent determination of liability limits. Realizing that the Montreal Conference was only temporary, the representatives assumed that an international conference would be convened immediately following adoption of the interim agreement in order to consider permanent revisions to the Warsaw Convention.⁷¹ Conflicts arose among the representatives to the conference with respect to four separate proposals on liability limits.⁷² When no proposal received a decisive vote, the conference closed without reaching an interim agreement. Soon thereafter, the president of the ICAO council began to discuss with the delegates the \$75,000 interim recovery limit proposed by the United States and its co-signers.⁷³ The concept of absolute liability was proposed along with a three-point plan. First, the United States proposal called for notification of an interim arrange-

⁶⁹ *Id.*

⁷⁰ The revisions to Articles 17, 21, and 20 raise questions regarding language which fundamentally overlaps. Although a carrier is presumed to be liable under Article 17 and its ability to raise defenses under Article 20 is essentially waived, there is no provision explaining to what degree, if any, willful misconduct by the passenger would apply. For case law dealing with the burden of proof an air carrier must carry, see *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), and *Rhoades, Inc. v. United Air Lines, Inc.*, 340 F.2d 481, 484 (3d Cir. 1965).

⁷¹ See Sincoff, *supra* note 67, at 153.

⁷² The four principal proposals on liability limitations introduced at the Montreal conference and the final votes on each were as follows:

Czech Proposal	22 for, 11 against, 11 abstentions
(\$33,200 under Warsaw-Hague)	
French Proposal	32 for, 7 against, 7 abstentions
(\$50,000 under Warsaw-Hague)	
Irish Proposal	25 for, 8 against, 12 abstentions
(\$50,000/66,000)	
LIM-32 (Sweden, Germany, New Zealand, and Jamaica)	20 for, 16 against, 9 abstentions
(\$58,000/75,000, without absolute liability)	

See Lowenfeld & Mendelsohn, *supra* note 13, at 574.

⁷³ The International Civil Aviation Organization (ICAO) and the International Air Transportation Association (IATA) were expected to thoroughly examine the United States interim plan as it was their duty and obligation to the other international aviation members to do so.

ment, involving the \$75,000 limit and absolute liability, to be made to all United States carriers traveling internationally. If acceptable to the carriers, the second point called for consultations and meetings with members of Congress. After a successful completion of these first two steps, the proposal would then be tested through various international agencies.⁷⁴

Again, as in the past, conflicts arose regarding the issue of absolute liability. The ATA answered the proposed interim arrangement by approving the \$75,000 limit, but conditioning such support on a commitment by the United States to push for ratification of the Hague Protocol.⁷⁵

Racing against a deadline set by the United States for acceptance of the proposed recovery limit,⁷⁶ the IATA reported that twenty-five of its member carriers were prepared to accept the arrangement as detailed in the three-point plan. Subsequently, on May 16, 1966, an agreement was reached between the various air carriers, both foreign and domestic, increasing the liability limit to \$75,000 for all "international transportation."⁷⁷ The interim agreement did not delete or supersede Article 25 of the Warsaw Convention; therefore, unlimited damages were still permitted to a plaintiff who could prove willful misconduct.⁷⁸

⁷⁴ Lowenfeld & Mendelsohn, *supra* note 13, at 588.

⁷⁵ *Id.* at 588 n.298.

⁷⁶ Recognizing the benefits accorded by an interim agreement which included the \$75,000 limit with absolute liability, the United States government extended the period of initiation by the IATA to May 1, 1966. Although either denunciation of the agreement or acceptance of the \$75,000 limit was acceptable to the United States, numerous international airlines began to fear the possibility of unlimited recoveries should denunciation of the Warsaw Convention occur. Lowenfeld & Mendelsohn, *supra* note 13, at 590.

⁷⁷ See ticket provisions, *supra* note 8, and accompanying text.

⁷⁸ Article 25 of the Warsaw Convention reads as follows:

Carrier's willful misconduct or defaults

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

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

Warsaw Convention, *supra* note 6, art. 25.

It is essential to determine upon what legal foundation, if any, this new interim agreement stands. Article 22(1) of the Warsaw Convention states: "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." At first glance it would appear that a contract supersedes an international treaty. The Montreal Agreement, unlike the original Warsaw Convention and the Hague Protocol, is a "special contract" in accordance with Article 22(1).⁷⁹ Proper tendering of a ticket combined with reasonable notice of its contents will bind a passenger to its stipulated terms.⁸⁰ This Agreement includes three essential provisions: (i) recovery for death or bodily injury shall not exceed \$75,000 including all legal fees and costs; (ii) the carrier must furnish a ticket detailing notice of the liability limitation of the Warsaw Convention, the Hague Protocol, and the Montreal Conference; and (iii) the defense under Article 20(1) of the Warsaw Convention will no longer be available to the carrier.⁸¹ Here, a question arises as to the legality of a contract when there has been no formal severance of the coverage under the original Warsaw Convention. Lowenfeld and Mendelsohn, two of the leading scholars in aviation law, conclude:

Since the agreement is expressly stated to be a special contract under Article 22(1) of the Warsaw Convention, it incorporates all the other provisions of the Convention. . . . Article 23 of the Convention must be understood as if it read, 'Any provision (statutory or contractual) tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the agreement among carriers shall be null and void.'⁸²

Despite such views, the controversies which surrounded the Warsaw Convention from its inception continued to impede the implementation of the Montreal Agreement. Its standing as an

⁷⁹ Article 22(1) reads as follows: "In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." Hague Protocol, *supra* note 28, at 7-8. The last count of international carriers that are parties to the Montreal interim Agreement showed over 140 signatories. 54 DEP'T STATE BULL. 455-57 (1966). See also CAB AERONAUTICAL STATUTES AND RELATED MATERIALS 426-27 (rev. ed. 1970).

⁸⁰ See ticket provisions, *supra* note 8, and accompanying text.

⁸¹ *Id.*

⁸² See Lowenfeld & Mendelsohn, *supra* note 13, at 597.

interim agreement left it open for attack from those parties who thought that a set limit was not a true reflection of the recoveries obtained in other accidents. Two distinct arguments were made for the liability limit under the 1966 Montreal Agreement. Lowenfeld and Mendelsohn expressed the view that the Montreal Agreement furthers the best interests of the public and reinforces a position the United States plans to take in preparation of a permanent amendment:

Essentially, then, the success of the arrangement will depend on the accuracy of the prediction that cases will be settled quickly and economically. It may well be that in the case of principal wage earners in the United States, claims will be handled like health or life insurance claims—with forms and perhaps interviews with the plaintiff and with the decedent's employer, but without litigation. Where lawyers do participate, either to establish the proper claimant or to participate in the determination of the amount of damages, their task will be far simpler than at common law. They will not be required to have expertise either in conflict of laws or in the causes of air accidents, and with the issue of fault laid aside, there will be no risk of nonrecovery. It would seem fair to assume that in these circumstances the cost of lawyers' services will be drastically reduced.⁸³

Other individuals knowledgeable in the field of international aviation law took different views. A majority of those who oppose the Montreal Agreement recognized it as a restraint upon the power of the judiciary and the traveling public to determine justifiable recoveries in relation to each accident.⁸⁴ Others opposed any liability limitation that would benefit an industry able to bear the burden of compensation:⁸⁵

Compensation, by definition, should compensate. If a man is badly injured, and his damages are great, the damages should be tailor-made to compensate for those great injuries. If a man has a minor injury, the compensation should be small. Compensation which gives too little, in my way of thinking, is not right, and compensation which gives too much is not right.⁸⁶

The concept of appropriate compensation in my judgment is very

⁸³ *Id.* at 600-01.

⁸⁴ See Kreindler, *Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528 (1967) (covering the pros and cons of the Montreal interim Agreement).

⁸⁵ *Id.* at 531.

⁸⁶ *Id.* at 529.

close to the concept of the dignity of the individual. If you deprive a man of his means to earn a livelihood, you should compensate him for that. And so, when anyone or anything, be it an international organization, or an outdated treaty, attempts to impose an arbitrary or artificial limitation of any kind on this concept, there is going to be a clash of ideology. And I do not think in this day and age you will see any further ratification of limitations.⁸⁷

Conflict among these well-respected experts ultimately led to increased studies on the matter of aviation liability.⁸⁸ The world economy was changing much too rapidly for established limits to be broadly applicable, and a difficult enforcement question was to confront both the carriers and their respective licensors in the courts: Was the Montreal Agreement to be interpreted as an amended provision to the original Warsaw Convention or as a separate agreement enforceable under basic contract principles?⁸⁹ During the 1977 Senate hearings to consider further amendment to the Warsaw Convention,⁹⁰ it was found that, while the Warsaw Convention with its subsequent amendments is the most widely accepted private international law treaty in the transportation field, it is also the most widely criticized. The existence of this agreement in today's aviation community continues to allow an international *carte blanche* on liability limitation.

II. RECENT TRENDS

The deficiencies of the Montreal interim Agreement, coupled with a rapidly changing world economic order brought about further attempts to amend the Warsaw Convention. Even as the Montreal interim Agreement was announced, the United States Department of State was advancing its position on a new amendment to the Warsaw Convention.⁹¹ While a basic framework for

⁸⁷ *Id.* at 531.

⁸⁸ CAB, RECOVERIES FOR DEATH AND PERSONAL INJURY RESULTING FROM AIR TRANSPORT ACCIDENTS INVOLVING UNITED STATES CARRIERS 1950-1964, reprinted in Stephen, *The Montreal Conference and International Aviation Liability Limitations*, 33 J. AIR L. & COM. 554, 590 (1967) [hereinafter cited as *CAB Studies 1950-1964*].

⁸⁹ See notes 134-138 and accompanying text.

⁹⁰ *Hearings on Aviation Protocols Before the Comm. on Foreign Relations, United States Senate*, 95th Cong., 1st Sess. 52 (1977) [hereinafter cited as *1977 Senate Hearings on Aviation Protocols*].

⁹¹ See 50 DEP'T STATE BULL. 923, 924 (1965).

uniform air carrier liability was developed at Montreal, further conflict was inevitable.⁹² The interests in favor of protecting the international aviation industry could not deter proponents who argued in favor of just compensation for a just cause of action.⁹³ Numerous studies, together with compilations of statistics focusing on the levels of recoveries involving United States carriers, heavily reinforced the \$100,000 (1,500,000 Poincare francs) limit proposed by the United States.⁹⁴ With these statistics and numerous policy arguments,⁹⁵ it was apparent that the next major ICAO conference, to be held in Guatemala City in 1971, would again focus on the issue of amending the Warsaw Convention to increase the recovery level to one acceptable to both the carriers and potential beneficiaries. Following two unsuccessful attempts to impose a \$100,000 liability limit as a reasonable compensation,⁹⁶ it seemed that any proposal incorporating a limit of less than \$100,000 would stand little chance of United States Senate approval.⁹⁷

⁹² As the ICAO Guatemala Conference proceeded, the issue of a set recovery limit began to overshadow all other issues, including passenger tickets, baggage claims, and liability for delay in the carriage of passengers. Much of the time allocation for discussion of the issues can be found in the records of the ICAO INTERNATIONAL CONFERENCE ON AIR LAW, GUATEMALA CITY, ICAO DOC. 9040-LC/167-1, 167-2 (1971) [hereinafter cited as GUATEMALA PROCEEDINGS].

⁹³ *Id.*

⁹⁴ See *CAB Studies 1950-1964*, *supra* note 88, at 590.

⁹⁵ The United States supported its position with both statistics from the CAB studies and the proposed establishment of an additional system to supplement the results of the revised Convention. The increased American standard of living led the United States delegation in Guatemala City to remark, "The magnitude and rate of increase of the change (in passenger recovery levels) has led us to believe that recoveries within the limit of liability specified in the proposed revisions would not alone afford sufficient protection of United States citizens and therefore would not provide the basis for an enduring agreement." GUATEMALA PROCEEDINGS, *supra* note 92, at 43.

⁹⁶ See ICAO MEETING ON LIMITS FOR PASSENGERS UNDER THE WARSAW CONVENTION AND HAGUE PROTOCOL, ICAO DOC. 8584-LC/154-1, at 112 (1966).

With the United States facing a possible second defeat with the \$100,000 liability limit, the ICAO Legal Committee recommended in 1967 that a subcommittee be formed primarily concerned with the revision of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955. Nonetheless, the United States was again unsuccessful in attaining an agreement that \$100,000 was a reasonable compensation limit. For a full explanation of the events leading up to this decision, see ICAO SUBCOMMITTEE OF THE LEGAL COMMITTEE ON THE QUESTION OF REVISION OF THE WARSAW CONVENTION AS AMENDED BY THE HAGUE PROTOCOL, MONTREAL, ICAO DOC. 8839-LC/158-1 (1969) [hereinafter cited as REVISION COMMITTEE].

⁹⁷ See REVISION COMMITTEE, note 96 *supra*.

Civil Aeronautics Board (CAB) studies for the period from 1966 to 1970 showed that the average settlement for a passenger death in an accident not covered by the Warsaw Convention exceeded the \$200,000 level.⁹⁸ Therefore, the previously proposed \$100,000 limitation was already outdated. The United States, recognizing that the statistics and research supporting the \$100,000 limitation were already obsolete, was forced to reevaluate and reweigh its position regarding the proposed \$100,000 recovery level. In an effort to revise its position, while at the same time to afford the passenger the maximum possible recovery, the United States proposed to the Guatemala delegates a Supplemental Compensation Plan (SCP) to be established by each nation over and above the initial \$100,000⁹⁹ recovery permitted. The conditions of Article 35 A of the Guatemala Protocol, which implemented the Supplemental Compensation Plan, can be interpreted as broadening the scope of liability. In other words, the establishment of a limit of supplemental compensation would allow "any person suffering damage as a consequence of death or personal injury" of a passenger contributing to a SCP to recover under the system.¹⁰⁰

⁹⁸ In an effort to verify its previous studies, (*see CAB Studies 1950-1964, supra* note 88) the CAB presented a questionnaire to the United States air carriers seeking information on approximately 180 accidents between 1966 and 1970. The questionnaire requested that the carriers state the claims and the date of settlement, whether through judgment or settlement. The results of this questionnaire were recorded in CAB, LEVEL OF RECOVERIES ON ACCOUNT OF PASSENGER DEATHS AND SERIOUS INJURIES IN AIRPLANE ACCIDENTS (1970) (unpublished report to the Committee on Foreign Relations, U.S. Senate, July 26, 1977) [hereinafter cited as CAB STUDY 1970].

⁹⁹ Based on the price of an ounce of gold in today's market, the initial recovery limit of \$100,000 set under the Guatemala conference would now be worth well over \$500,000.

¹⁰⁰ Article 35 A states:

No provision contained in this convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect to death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

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

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

c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available

The United States delegation was prepared to labor diligently to secure these revisions, intending to extract major concessions from its aviation allies.¹⁰¹ While there were many arguments against the SCP idea, the supplemental plan included an increase in passenger recovery substantially higher than would be the case with no such plan.¹⁰² A tentative agreement was not reached, however, until the seventeenth session of the ICAO Legal Committee. The delegation from New Zealand presented a proposal incorporating the minimum limits set by the United States as well as absolute air carrier liability.¹⁰³ In adopting this set liability of \$100,000, the Guatemala Conference also adopted the doctrine of absolute liability and stipulated that the limit be made "unbreakable in all circumstances."¹⁰⁴ The delegates could probably foresee that this \$100,000 limit would soon need revision. Years of compiling statistics on air crash recoveries might be inadequate to supply an accurate report on amounts of damages. For this reason, the New

to said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

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

GUATEMALA PROCEEDINGS, *supra* note 92, at 191. In essence, the scope of liability has expanded under Article 35 A as compared to Article 17(1) through its use of the words, "any person suffering damage as a consequence of death or personal injury of such [a] passenger." Article 17(1) limits liability to "damage[s] sustained."

¹⁰¹ Address by Hon. James R. Atwood, *supra* note 47.

¹⁰² See 1977 Senate Hearings on Aviation Protocols, *supra* note 90, at 43.

¹⁰³ The original text of the New Zealand proposal was recorded by the ICAO LEGAL COMMITTEE, 17TH SESS., MONTREAL, ICAO Doc. 8878-LC/162, at 364 (1970). Essentially, the proposal included five main positions:

1) There would be absolute liability in the case of death or personal injury to the passenger. Contributory negligence was the only defense a carrier could invoke;

2) There would be an increase in liability for death or personal injury to the passenger to \$100,000;

3) There would be a provision adopted for the limit to be unbreakable in all circumstances;

4) There would be an increase of approximately \$2,500 per year for twelve years while a diplomatic conference would convene during the fifth and tenth years of the Protocol to decide whether to amend this provision or continue it; and

5) A settlement inducement clause which would permit the allocation of court costs and attorneys' fees to the plaintiff in addition to the compensation awarded by the courts.

¹⁰⁴ *Id.*

Zealand Plan, as adopted, provided for conferences to reconsider the liability limit to be convened during the fifth and tenth years of the treaty with a maximum increase of approximately \$12,500 per conference.¹⁰⁵

While this compromise plan was a major step forward, the ultimate effectiveness of the Guatemala Protocol was to rest on two final provisions. The first provision, introduced as Article D and subsequently implemented into Article VIII,¹⁰⁶ called for thirty nations to ratify the Protocol. To assure adequate compliance with the Protocol, it was further required that five of the thirty nations account for at least forty percent of the total travel of ICAO member nations.¹⁰⁷ Because the United States carriers comprised approximately forty percent of the ICAO scheduled traffic,¹⁰⁸ the Protocol's success was dependent upon United States acceptance and ratification.¹⁰⁹

In an effort to invoke the uniformity so needed by the aviation community, the second of the final clauses, known as Article H, proposed a limitation on the reservations a nation may declare

¹⁰⁵ Article 42(3) states:

(3) Subject to paragraph 2 of this Article, unless before the thirty-first of December of the fifth and tenth year after the date of entry into force of the Protocol referred to in paragraph 1 of this Article the aforesaid Conferences decide otherwise by a two-thirds majority vote of the Parties present and voting, the limit of liability in Article 22, paragraph 1 (a) in force at the respective dates of these Conferences shall on those dates be increased by 12,500 Special Drawing Rights.

GUATEMALA PROCEEDINGS, *supra* note 92, at 142.

¹⁰⁶ Article XX states that as soon as thirty signatory states have deposited their instruments of ratification of the Protocol, it shall come into force between them on the ninetieth day after the deposit of the thirtieth instrument of ratification. It shall come into force for each state ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification. See final version in GUATEMALA PROCEEDINGS, *supra* note 92, vol. II, at 192.

¹⁰⁷ See Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519, 541 (1972).

¹⁰⁸ 1977 Senate Hearings on Aviation Protocols, *supra* note 90, at 3.

¹⁰⁹ A differentiation of the words "acceptance" and "ratification" is in order. Although the Senate's express authority under the Constitution entitles that legislative body to exercise its advice and consent power as a step towards treaty ratification, the ratification is often misapprehended as an inherent right of the United States Senate. The Constitution of the United States provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2, cl. 2.

during the ratification procedure.¹¹⁰ At first glance, Article H appears not to supersede the requirements proposed in the "New Zealand Package"; however, an alternate interpretation may be appropriate. Since the primary goal of the Guatemala Protocol was to modify the Warsaw Convention articles dealing directly or indirectly with the liability limitation,¹¹¹ ratification of this Protocol would have no enforceable effect without a nation's compliance with the original Warsaw Convention or the Hague Convention.¹¹² Essentially, the ratification of the Guatemala Protocol by a member nation of the ICAO, coupled with the interpretation of Article 27 that the Warsaw Convention, amended by the Hague

¹¹⁰ Article H to the Protocol was incorporated as Article XI. It states:

(1) Only the following reservations may be made to this Protocol:

a) any State whose courts are not authorized under its law to award the costs of the action including lawyers' fees may at any time by notification addressed to the Government of the Polish People's Republic declare that Article 22, paragraph 3(a) shall not apply to its courts;

b) any State may at any time declare by a notification addressed to the Government of the Polish People's Republic that the Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975, shall not apply to the carriage of persons, baggage, and cargo for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities; and

c) any State may declare at the time of ratification or of accession to the Montreal Protocol No. 4 of 1975, or at any time thereafter, that it is not bound by the provisions of the Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975, in so far as they relate to the carriage of cargo, mail and postal packages. Such declaration shall have effect ninety days after the date of receipt by the Government of the Polish People's Republic of the declaration.

(2) Any State having made a reservation in accordance with the preceding paragraph may at any time withdraw such reservation by notification to the Government of the Polish People's Republic.

GUATEMALA PROCEEDINGS, *supra* note 92, at 192.

¹¹¹ See note 92 *supra*, and accompanying text.

¹¹² Ratification of the Guatemala Protocol under Article XIX provided:

[R]atification of this Protocol by any state which is not a party to the Warsaw Convention or of any state which is not a party to that Convention as amended at the Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended at the Hague, 1955, and at Guatemala, 1971.

See Mankiewicz, *supra* note 107, at 542.

Protocol of 1955, as a single agreement,¹¹³ would eliminate any possibility that a member nation could approve only a specific part of the amended treaty. Because of this interpretation and the continued United States opposition to the concepts embodied in the Hague Protocol, the United States Senate to this day has yet to approve the Guatemala Protocol.¹¹⁴ Since the Guatemala Protocol was essentially a United States initiative,¹¹⁵ many governments are following the standard practice of treaty approval and are awaiting United States ratification before making the same international commitment.¹¹⁶

Subsequent to the agreement reached in Guatemala City in 1971, the innovative minds that directed this liability package through the diplomatic gauntlet would be further frustrated as they sought the resolution of another issue. World economic events affecting currency value led to much speculation on the standardized unit of payment: gold. With the role of gold in the international monetary system greatly fluctuating,¹¹⁷ there was a need to

¹¹³ *Id.* It should be pointed out that although Article XIX interprets the three agreements as one, their origination and application are separate.

¹¹⁴ The Diplomatic Conference held in Guatemala City under the auspices of the International Civil Aviation Organization for the purpose of amending the Warsaw Convention adopted the Protocol by a vote of 36 to 6. The Protocol was signed on behalf of the following 22 states: Belgium, Brazil, Canada, Rep. of China, Columbia, Costa Rica, Denmark, Ecuador, El Salvador, France, Fed. Rep. of China, Guatemala, Israel, Italy, Jamaica, Nicaragua, Switzerland, Trinidad, Tobago, United Kingdom, United States, and Venezuela. INTERNATIONAL CIVIL AVIATION ORGANIZATION, PROTOCOL REVISING WARSAW CONVENTION RULES ON AIR CARRIER LIABILITY TO PASSENGERS, reprinted in 64 DEP'T STATE BULL. 661 (1971).

¹¹⁵ See 50 DEP'T STATE BULL. 923, 924 (1965); Address by James R. Atwood, *supra* note 47, at 8.

¹¹⁶ Address by James R. Atwood, *supra* note 47, at 8.

¹¹⁷ The system of Special Drawing Rights (SDR) was ushered into the International Monetary Fund after it was discovered that the diminishing value of gold had caused a weakness in the foreign exchange market. Unlike any general account, which is calculated through a quota derived from the value of gold and the members' own currency, the SDR does not hold gold and currencies which must be maintained in gold values. Accordingly, the delegation to the second major Montreal Conference in 1975 urged the adoption of the SDR as the standard to determine a uniform recovery limit. For a full text of the SDR system, see Effros, *Maintenance of Value in the General Account and Valuation of the SDR in the Special Drawing Account of the IFM*, 6 GA. J. INT'L & COMP. L. 493, 504 (1976). It is ironic to note that upon originally introducing the SDR system to the delegations, the CAB emphatically rejected this IATA adoption; however, during that same month at the Montreal Conference, the CAB was

implement an alternative system for financial transactions within the set liability limits.¹¹⁸ As a reform aimed at providing a less erratic monetary standard, the 1975 ICAO conference meeting in Montreal adopted the Standard Drawing Right¹¹⁹ (SDR) as the basic monetary unit of the Warsaw Convention and its subsequent agreements.¹²⁰

Although the 1975 Montreal Conference altered the monetary system involving the limitation on recovery, the agreement was essentially the same document adopted in 1971 at Guatemala City. The new agreement, known as Montreal Protocol No. 3,¹²¹ provides for absolute liability, a settlement inducement clause, an unbreakable limit of \$100,000 SDR's (approximately 117,000 United States dollars), and the express right of each party to the treaty to establish a Supplemental Compensation Plan within its territories.¹²²

The international aviation community has not as yet benefited from the optional SCP clause to the Montreal Protocol No. 3. Under the conditions outlined in the Montreal Protocol of 1975, ratification may occur only when a supplemental system is endorsed providing sufficient liability coverage to the United States citizen. Thus, the international aviation community has had to forestall ratification pending the approval of a sufficient SCP as

strongly urging adoption of the SDR system. *AV. WEEK & SPACE TECH.*, Sept. 8, 1975, at 24.

¹¹⁸ Effros, *supra* note 117, at 504.

¹¹⁹ *Id.*

¹²⁰ *Id.* Introduction of the SDR system to the limit set in Guatemala, *see* GUATEMALA PROCEEDINGS, *supra* note 92, amended the \$100,000 limit to approximately \$117,000.

¹²¹ While the 1975 Montreal Conference was convened primarily for the purpose of addressing the problems of air mail and cargo, numerous developments during the early 1970's called for an immediate reevaluation of the recovery limit set under the Guatemala Protocol. Detailed records explaining the proceedings and all pertinent documents can be found in ICAO INTERNATIONAL CONFERENCE ON AIR LAW, ICAO Doc. 9154-LC/174-1, 174-2 (1975) [hereinafter cited as 1975 MONTREAL PROCEEDINGS]. Further, two events occurred in 1971 which appeared to shake the international monetary system, primarily in regards to converting to the U.S. dollar. The first event occurred when the U.S. reneged on its obligation to freely buy and sell official gold at \$35 per ounce and suspended the U.S. dollar convertibility into gold. The second event involved the devaluation of the dollar by approximately 8% in relation to gold to \$38 per ounce. *See* Mendelsohn, *The Value of the Poincare Gold Franc in Limitation of Liability Conventions*, 5 J. MAR. L. & COM. 125, 126 (1973).

¹²² *See* 1977 Senate Hearings on Aviation Protocols, *supra* note 90, at 7.

stipulated in Article 35 A of the Guatemala Protocol.¹²³

The United States government has been determined to abide by its longstanding policy that any loss resulting from an international aviation disaster must be sufficiently recoverable,¹²⁴ but faced with the dilemma of passenger compensation versus industry stability, the government has been forced to set a limit which clearly could be adhered to by all parties to the agreement. An insurance underwriter capable of managing and carrying the supplemental compensation fund was needed. Numerous insurance underwriters were examined, with the Prudential Insurance Company of America faring the best.¹²⁵ It is hoped that the Supplemental Compensation Plan, when formally approved, will establish a system under which the insurer will cover the passenger up to \$200,000 over the maximum liability standard of \$117,000 (100,000 SDR's). With each passenger paying a surcharge or tariff of \$2.50 per ticket, Prudential will set up a pool into which the carrier will make monthly contributions collected from passengers flying the international route. The applicability of this plan is contingent upon three essential requirements: (1) the transportation is subject to the Warsaw Convention; (2) the person has his or her domicile or permanent residence in the territory of the United States; and (3) the Plan surcharge was or should have been collected.¹²⁶ Upon examination, two points must be noted regarding these requirements. First, under the language of the third requirement, the additional \$200,000 under the SCP would be tendered to the injured passenger or his immediate family for wrongful death not only if he paid the \$2.50 surcharge, but also if he should have paid it and the carrier failed to collect it.¹²⁷ Secondly, careful

¹²³ See Address by James R. Atwood, *supra* note 47, at 8.

¹²⁴ See 1977 Senate Hearings on Aviation Protocols, *supra* note 90, at 8 (statement of Herbert Hansell).

¹²⁵ Their plan called for using 93% of the charges for payments to claimants, direct claim expenses and additions to the fund. The balance would be used to pay taxes, the administrative costs, and the risk charges. In addition, Prudential is willing to share its underwriting with other companies so that the level of charges may be kept to a minimum.

¹²⁶ 1977 Senate Hearings on Aviation Protocols, *supra* note 90, at 59-61 (statement of Alan N. Ferrguson).

¹²⁷ It should be noted that a situation similar to the one mentioned would inevitably open the door for continued litigation on the issue of whether the

examination of Article 35 A shows a dramatic conflict between its intended use and subsequent application. Article 35 A states, "No provision contained in this convention shall prevent a state from establishing and operating within its territory a system to supplement the compensation. . . ." ¹²⁸ This appears to focus on the sufficiency of recovery; ¹²⁹ only the specific amount necessary to compensate the victim will be sufficient. ¹³⁰ The determination of a sufficient recovery will depend upon the acceptance and verification of government statistics showing that recovery under the Warsaw liability limitation is nearly equal to non-Warsaw recoveries. ¹³¹ Previous statistics used to compile a standard recovery limit for the Montreal interim Agreement were shown to be outdated the day they were submitted. ¹³² Should the international air passenger have to assume that the statistics used in arriving at this SCP figure are accurate and truly reflect the amount of recovery due the passenger? The United States Senate must make the final decision whether these drawbacks inherent in the SCP are outweighed by the overall benefits to the United States air traveler and carrier.

After many years of dealing with the primary issue of liability,

underwriter or the carrier bears the loss. Thus, the courts would continuously have to address the question of intent.

¹²⁸ For text of Article 35 A, see note 100 *supra*.

¹²⁹ During testimony before the Senate Foreign Relations Committee, 1977 *Senate Hearings on Aviation Protocols*, *supra* note 90, at 88, Mr. Sodd stated that "if we are to use domestic recoveries as a yardstick to measure the sufficiency of recovery under the treaty, then there is no sufficient limit that we can establish now that will not be exceeded in the next decade."

¹³⁰ Responding in the area of adequate compensation, Mr. Lee S. Kreindler's testimony revealed the story of a young lawyer who was killed in a helicopter accident on top of the Pan American building. This young man, the father of four children, earned approximately \$160,000 annually at his death. The impact of a possible \$317,000 recovery limitation on his family would be, according to Kreindler, "devastating." 1977 *Senate Hearings on Aviation Protocols*, *supra* note 90, at 94.

¹³¹ By comparison, the sufficiency of recovery in non-Warsaw claims, which can be classified as domestic, should not be used in the same context as sufficiency of recovery would be labeled under the Warsaw Convention. Applying sufficiency used in the domestic sense, it is used to describe the full recovery of proven damages by the claimant, whereas, under the Warsaw Convention, sufficiency means that the number of individuals receiving insufficient recoveries is within the established operational level set by the government. See Comment, *Revised Warsaw Convention and Other Aviation Disasters*, 8 CUM. L. REV. 764, 855 (1978).

¹³² See notes 88-89 *supra*, and accompanying text.

the United States determined that the standard articulated through the SCP would be adequate to satisfy most of the claims arising from aviation accidents. President Ford, therefore, transmitted Montreal Protocol Nos. 3 and 4 on January 14, 1977, to the United States Senate for its advice and consent. Thereafter, on July 20, 1977, the Civil Aeronautics Board approved an agreement among the carriers serving the boundaries of the United States establishing the SCP under the Prudential Insurance Company.¹³³ Unfortunately for the international aviation community, however, ratification of the Montreal Protocol appears to remain at a standstill in the Senate Foreign Relations Committee.

CONCLUSION

Tracing the stages from the original inception of the Warsaw Convention in 1929 through the Montreal interim Agreement signed in 1966, this comment has analyzed the progress made in revising international air carriers' liability limits under the Warsaw Convention and the Hague Protocol. It is a basic premise of tort law that it is in the government's best interest to protect each and every citizen from any unreasonable loss. For a period of almost fourteen years, international air travelers have been affected by court decisions that adhere to the outdated liability measures of the Warsaw Convention and, at the same time, try to adequately protect the traveling public.¹³⁴ Nowhere in today's modern decisions do the courts attempt to address the proposed extension of liability limitations. These decisions are a maze of outdated reasoning preventing the passenger from being sufficiently compensated. Although the Convention recovery limitations have been steadfastly upheld,¹³⁵ the weakness of the Warsaw Convention is that it does not provide a uniform, clear, and manageable system within which all nations can work fairly and economically. Whether the courts will move beyond their traditional parameters and allow a jury unlimited discretion to decide on a just compensation has not been seen. Two of the most recent and most devastating air

¹³³ CAB, APPLICATION OF CERTAIN CERTIFIED U.S. AND FOREIGN AIR CARRIERS AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA TO ESTABLISH A SUPPLEMENTAL COMPENSATION PLAN, CAB Order No. 77-7-85 (July 20, 1977).

¹³⁴ See *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977).

¹³⁵ *Id.*

disasters¹³⁶ have, to this date, failed to test the substantive contents of liability under today's treaties and agreements.¹³⁷ The member nations have initiated new ideas to adequately compensate the passenger for injuries or death sustained while traveling internationally. Nevertheless, as the Montreal interim Agreement has proven to be outdated, it is equally fair to say that the pending Montreal Protocol No. 3 could also quickly become outdated. As a result, actual protection in terms of compensation will again be eminently unsatisfactory.

The inequities of these subsequent liability limitation revisions are evident. It is difficult to comprehend sufficiency of compensation to the passenger on the one hand and, a limitation on that sufficiency on the other. Sufficiency of compensation must be measured on a subjective basis by inviting the courts to determine a reasonable recovery limit based upon the facts of each case, whether the SCP system or any other is implemented. In essence, the limit on liability is still alive, but now the courts will determine its applicability and free the international community to focus more on setting a coextensive and uniform policy.

The main objectives and purpose of the Warsaw Convention and its subsequent amendments are to set uniform standards amenable to all the international carriers included. It is evident that for such a goal to be attained, every interest cannot be fully satisfied. Even so, the member nations can come to a basic agreement, and still permit each country to supplement the set limit separately and distinctly from the treaty obligation. In the meantime, international travelers continue to be bound by the \$75,000 limit set in Montreal in 1965 even though the member nations have agreed in principle to a base liability limit \$42,000 above the Montreal level.

Although some government officials involved in the treaty re-

¹³⁶ One of the disasters referred to involved a Turkish Airlines DC-10 which crashed shortly after takeoff on March 3, 1974, in Paris, causing the death of all 333 passengers on board. Three years later, on March 27, a Pan American Airways 747 and a KLM 747 collided on the runway at Tenerife in the Canary Islands killing almost 600 passengers and crew. See notes 1-4 *supra*.

¹³⁷ Although the context of the Warsaw Convention was not in issue, the first Tenerife damage trial was held in the Southern District of New York with the jury returning a verdict of \$375,000. *Johnson v. Pan Am. World Airways*, No. 78-CV-0086 (S.D.N.Y., filed 1977).

visions consider these changes to be the best obtainable to achieve international cooperation and uniformity, one official recently concluded:

Continued failure on our part to ratify the protocols could lead to a costly and complicated liability scheme for civil aviation, *disrupt the international aviation community*, and seriously damage the credibility of the United States negotiators who labored long and hard to obtain these forward-looking changes in the Warsaw Convention. (emphasis added)¹³⁸

A constructive step has been taken towards uniformly setting policy in international aviation liability law. The basic premise of full compensation for loss, however, has and will continue to disrupt any limitation on liability.

¹³⁸ Address by James R. Atwood, *supra* note 47, at 12. On December 3, 1979, suit was commenced in the United States District Court in the Central District of California to recover for personal injuries and loss of corporate profits. *Rideout v. Pan Am and KLM*, No. 78-CV-1130 RJW, MDL Docket No. 306. This was one of the very few cases to be tried as a result of the Tenerife disaster on March 27, 1977. The court denied the defendants' motion for summary judgment four times on the issue of lost profits to a corporation from an injury to its key employee by finding that there was a triable issue of fact that should be decided by the jury. The decision by the district court to allow the corporate claim to come before the jury should be read in light of the fact that aviation litigation is becoming more complex and expanding to wider degrees of liability. In addition to the court allowing for lost earnings and personal property, it is now recognized in California that a corporation can recover lost profits resulting from the injury of its key employee. With California law permitting recovery by the corporation and more and more businessmen traveling the airways each day, the aviation industry should be aware that businesses whose key employees are injured, causing the business to suffer economic harm, will be able to sustain an action for the amount of their loss of business.

