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THE ROLE OF CHOICE OF LAW IN DETERMINING DAMAGES FOR INTERNATIONAL AVIATION ACCIDENTS

KIMBERLEE S. CAGLE

INTERNATIONAL AIR TRAVEL has drawn the borders of nations closer, making it easier for passengers to cross time zones, countries, and continents.¹ The increase in international air travel, however, has not prompted uniformity among the laws governing damage awards to passengers injured in international flight. International air travel has traditionally been governed by the Warsaw system,² but despite the framers’ intent to create uniformity among liability limits, four distinct dam-

¹ Lipton & Cooper, International Air Travel: An Air Carrier’s Liability for Personal Injury, 5 ADVOCATE’S Q. 403, 405 (1984-85).
age limits currently exist. Furthermore, in those cases where the Warsaw system does not apply, nations’ domestic damages laws provide a plethora of liability limits. If nations’ domestic laws conflict, then courts must look to choice of law rules to determine which liability limit to apply. Thus, the choice of law analysis used by a court will ultimately determine how much damages an injured passenger will receive.

To illustrate the effect of the Warsaw system and choice of law rules on damage awards, consider the following case. Passenger A from the United States travels on a Dallas - New York flight which ultimately crashes. If she brings suit in a United States court, the court will apply its choice of law rules in determining which jurisdiction’s substantive law on damages will govern. Choices may include the domicile of the carrier, the domicile of the passenger, or the situs of the crash. Passenger B, a German citizen, holds a Dallas - New York ticket. If he sues in Germany, the German court will use its choice of law rules to determine the applicable damage laws. The choice of law analysis used by the German and American courts may differ and result in different applicable damage limits. The problem is further complicated by Passenger C, a United States citizen holding a Dallas - New York - London ticket, a Warsaw system flight. In this case, a court must look to the public international law and the applicable agreements in the Warsaw system to determine the appropriate damage limit. Thus, although the passengers suffered the same injury, the amount of compensation available directly depends upon which of the many liability limits is chosen to govern.

This comment will illustrate the important effect of choice of law rules in determining the damages awarded to those injured in an international aviation accident. Such an illustration will begin with an analysis of the liability limits available under the Warsaw system and the

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3 McCoy, Yes or No to the Guatemala Protocol - Con, 10 Forum 739, 762 (1975).

4 See infra notes 77-124 and accompanying text.
manner in which they are applied. In those cases not governed by the Warsaw Convention, this comment will discuss the liability law of many nations as well as the choice of law analysis used by various countries. Finally, various alternatives to both the Warsaw system and choice of law rules will be considered.

I. THE WARSAW SYSTEM

A. History

In October of 1929 representatives of twenty-three nations signed the Warsaw Convention ("Convention"). The Convention was the product of two international conferences, one in Paris in 1925 and the other in Warsaw in 1929. Two primary objectives guided the conferences: the establishment of uniform rules relating to air transportation documents and the limitation of air carrier liability in aviation accidents.

The signatories desired to establish uniform liability rules governing international aviation which would supersede the various domestic laws, leaving the latter applicable only to domestic flights. The signatories agreed that without such uniformity offered by the treaty, courts might face a "chaos of conflicting laws." Proponents of limited liability hoped that the limitation would provide a

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5 Block v. Compagnie Nationale Air France, 386 F.2d 323, 325 n.1 (5th Cir. 1967) (Warsaw Convention applies to charter flights), cert. denied, 392 U.S. 905 (1968). The United States did not officially attend the Warsaw Conference, but American observers were present. 386 F.2d at 326.

6 Reed v. Wiser, 555 F.2d 1079, 1090 (2d Cir. 1977) (air carrier's employees may assert Warsaw Convention as modified by the Montreal Agreement to limit damages), cert. denied, 434 U.S. 922 (1977).

favorable environment for the growth of the then infant international air transportation industry.\textsuperscript{10} The liability for death or personal injury was limited to 125,000 Poincaré gold francs or approximately US $8,300.\textsuperscript{11} In return for limiting the damages recoverable by injured passengers, the Warsaw Convention aided passengers by shifting the burden of proof to the carrier.\textsuperscript{12} Thus, the carrier was presumed liable unless it could show it had taken all possible steps to avoid the damage or that such measures were impossible to perform.\textsuperscript{13} The signatory nations generally considered the Warsaw Convention satisfactory for the first twenty-five years of its existence.\textsuperscript{14} Most European nations ratified or adhered to

\textsuperscript{10} See Husserl v. Swiss Air Transport Co., Ltd., 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975) (Warsaw Convention arts. XVII - XIX comprehended mental injuries); Lowenfeld & Mendelsohn, \textit{supra} note 9, at 499. Secretary of State Hull expressed the effect of limiting liability as follows:

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

\textit{Block}, 386 F.2d at 327 (quoting Secretary of State Cordell Hull in transmitting the Warsaw Convention to the Senate).

\textsuperscript{11} 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11:36 & n.19 (1978) [hereinafter cited as SPEISER & KRAUSE]. The American translation of the official French text states:

\begin{quote}
In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and passenger may agree to a higher limit of liability.
\end{quote}

Warsaw Convention, \textit{supra} note 2, art. XXII(1).

\textsuperscript{12} \textit{Block}, 386 F.2d at 327.

\textsuperscript{13} Article XX(I) of the Warsaw Convention, \textit{supra} note 2, states, "the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

the treaty, as did the United States.\textsuperscript{15} During this period, however, international aviation was still in its infant stages, and courts rendered few judicial decisions under the Convention.\textsuperscript{16}

Despite the initial satisfaction with the Warsaw Convention as a whole, some groups, especially the American legal community, began expressing strong dissatisfaction with the low liability limit of $8,300.\textsuperscript{17} This resulted in two conferences, one in Rio de Janeiro in 1953 and the other at the Hague in 1955.\textsuperscript{18} The delegates sought to modify the Warsaw Convention in order to solve some practical difficulties in its application and to adapt it to the political and economic realities of the 1950's.\textsuperscript{19}

These conferences resulted in the Hague Protocol of 1955, which changed the Warsaw liability limits from 125,000 Poincaré francs to 250,000 francs (approximately US $16,600).\textsuperscript{20} The United States wanted a limit of $25,000, but most of the nations thought this too high.\textsuperscript{21}

The Hague Protocol officially entered into force in Au-

\textsuperscript{15} Lowenfeld & Mendelsohn, supra note 9, at 502. The United States Senate recommended adherence on June 15, 1934, and on October 29, 1934, President Roosevelt proclaimed adherence. Block, 386 F.2d at 325 n.1. The United States adhered to the Convention with the reservation that the Convention would not apply to international transportation performed by the United States. Speiser & Krause, supra note 11, § 11:8. Today over 100 nations have ratified or adhered to the Convention. Id. § 11:4.

\textsuperscript{16} Martin, supra note 14, at 234. Only fifty-three judicial decisions were rendered between 1929 and 1955. These were decided in Belgium, France, Germany, Hungary, Italy, the United Kingdom, and the United States of America. Id.

\textsuperscript{17} Id. The average recovery per passenger death paid by American carriers in non-Warsaw Convention cases was $38,499 from 1950 to 1964. The average recovery in Convention cases was $6,489. Lowenfeld & Mendelsohn, supra note 9, at 554.

\textsuperscript{18} Speiser & Krause, supra note 11, § 11:18.

\textsuperscript{19} Martin, supra note 14, at 234.

\textsuperscript{20} Speiser & Krause, supra note 11, § 11:18. See Martin, supra note 14, at 234. The Hague Protocol, supra note 2, art. XI, states, "[i]n the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs." Other matters covered by the Hague Protocol include the scope of the Warsaw Convention, the definition of "High Contracting Parties," traffic documents, air waybills, carriage of special cargo, wilful misconduct, liability of the carrier's agents, and negligent navigation. Martin, supra note 14, at 234.

\textsuperscript{21} Lowenfeld & Mendelsohn, supra note 9, at 506-07. The majority of delegates favored a $13,300 limit. Reed, 555 F.2d at 1086.
gust of 1963.\textsuperscript{22} Today, forty-seven states have ratified or adhered to the Hague Protocol.\textsuperscript{23} The United States, however, refused to ratify the Hague Protocol because of its dissatisfaction with the low liability limits.\textsuperscript{24}

United States dissatisfaction with the Warsaw Convention, especially its low liability limits, continued to grow.\textsuperscript{25} On November 15, 1965, the United States gave formal notice of its denunciation of the Convention, to become effective six months later.\textsuperscript{26} The United States stated, however, that it would withdraw its denunciation if the international carriers provisionally agreed to raise the liability limit to $75,000 and if a reasonable chance existed that an international agreement would be created to raise the liability limit to $100,000.\textsuperscript{27}

Following the United States proposal, delegates from fifty-nine nations met in Montreal and developed an interim solution known as the Montreal Agreement.\textsuperscript{28} The Montreal Agreement is an agreement between air carriers establishing the conditions of the airline contract between prospective passengers and the carrier.\textsuperscript{29} The agreement provided that the airlines would file tariffs with the Civil Aeronautics Board (CAB) and the CAB would raise the

\begin{itemize}
\item 3 Av. L. REP. (CCH) 24,060, 24,062-5.
\item Reed, 555 F.2d at 1086. The United States signed the Hague Protocol, but ten years passed without the Senate or a President taking any position on ratification. Later, another President recommended ratification combined with a mandatory insurance plan for the American airlines. The insurance scheme was opposed by many groups, thus, the Protocol was not ratified. \textit{Id}.
\item \textsc{Speiser & Krause, supra} note 11, §11:19.
\item Over 2 million Americans travel annually on international flights. Assuring that they and their families are adequately protected in case of accident is, consequently, a matter of widespread importance. . . . No one questions the fact that the protection now afforded international travelers is woefully inadequate.
\item 111 CONG. REC. 20,164 (1965) (statement of Sen. Robert Kennedy).
\item \textsc{Speiser & Krause, supra} note 11, §11:18.
\item \textit{Id.} §11:19 n.21.
\item \textit{Id.} §11:19.
\item \textsc{F. Videla Escalada, Aeronautical Law} 548 (1979). Videla Escalada comments that the Montreal Agreement impairs the unification achieved by the Warsaw Convention, since private parties backed by a single government have made an agreement which affects liability limits. See \textit{id.} at 549.
\end{itemize}
liability limit to $75,000. The Montreal Agreement raised the liability limit to $58,000 for those nations not awarding attorney's fees on a contingency basis. In addition, by signing the agreement the airlines waived the liability defenses available under the Warsaw Convention. The Montreal Agreement is unique in that it is not an agreement between sovereign states and therefore is not on equal standing with the Warsaw Convention or the Hague Protocol. The agreement only applies where the place of departure, the place of destination, or an agreed stopping place is in the United States.

B. Application of the Liability Limits

The Warsaw Convention applies to all international transportation performed by aircraft for hire. International transportation is defined by the Convention as:

[ANY transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or...]

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30 SPEISER & KRAUSE, supra note 11, § 11:19. The Warsaw Convention, supra note 2, art. XXII(l), expressly allows the carrier and passenger to agree to higher liability limits. For the text of art. XXII(l), see supra note 11.
31 See Lowenfeld & Mendelsohn, supra note 9, at 568, 574-75.
32 SPEISER & KRAUSE, supra note 11, § 11:19. The defenses available under the Warsaw Convention are found in Warsaw Convention, supra note 2, art. XX(l). For the text of art. XX(l), see supra note 13. By waiving these defenses, the airlines assume absolute liability. 3 AV. L. REP. (CCH) 24,065-2.
33 F. VIDELA ESCALADA, supra note 29, at 548.
34 SPEISER & KRAUSE, supra note 11, § 11:19. Fifty-eight United States carriers and ninety-one foreign carriers have signed the agreement. 3 AV. L. REP. (CCH) 24,065-3 to -5.
35 Warsaw Convention, supra note 2, art. I(l). The Convention also applies to gratuitous transportation performed by an air transportation enterprise. Id.
36 The place of departure is "the place at which the contractual carriage begins;" and the place of destination is "the place at which the contractual carriage ends." Grein v. Imperial Airways, Ltd., [1937] 1 K.B. 50, 1 AV. Cas. (CCH) 622, 635 (Ct. App. Eng. 1936) (Warsaw Convention applies where London was place of departure and destination and Antwerp was stopping place although separate tickets were issued for each part of the journey).
37 A High Contracting Party is a nation that has actually ratified the treaty, not merely signed it. See SPEISER & KRAUSE, supra note 11, § 11:13. The Hague Proto-
within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

In interpreting whether a carriage is international, the terms of the contract prevail.

Similar to the Warsaw Convention, the Hague Protocol also applies to international transportation. The Hague Protocol applies when the departure and destination points are located within the territory of two parties to the Hague Protocol or within the territory of a single Hague Protocol party with an agreed stopping place in another nation. When a state ratifies the Hague Protocol, it is in effect adopting the Warsaw Convention, even though the state had not done so previously.

The Montreal Agreement applies to carriage governed by the Warsaw Convention or the Convention as amended by the Hague Protocol. The place of departure, the place of destination, or an agreed stopping place

col explains that “High Contracting Party” means a state who has adhered to the Convention and who has not denounced the Convention. Hague Protocol, supra note 2, art. XVII.

An agreed stopping place according to the contract is where the plane stops in the course of the contractual transportation regardless of the purpose of the descent. Grein, 1 Av. Cas. at 635.

Warsaw Convention, supra note 2, art. I(2). The Convention makes three exceptions to article I(2). First, article II(2) excludes carriage performed under the terms of any international postal convention. Second, article XXXIV excludes transportation performed as an experimental trial with a view to establishing a regular navigation route. Third, article XXXIV excludes transportation “performed in extraordinary circumstances outside the normal scope of an air carrier’s business.”

G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 18 (1977). Miller notes that courts in the United States, England, France, and Canada have adopted this position. Id. at 18 & n.62.

Hague Protocol, supra note 2, art. I. The definition of “international carriage” in the Hague Protocol is similar to that given in the Warsaw Convention. Compare Hague Protocol, supra note 2, art. I(a) (defining international carriage), with supra text accompanying notes 36-39 (defining international transportation).

Hague Protocol, supra note 2, art. I(a).

Id. art. XXI(2).

G. MILLER, supra note 40, at 38.
must be located within the United States. Furthermore, the carrier must be a party to the agreement.

As discussed, the Warsaw Convention, Hague Protocol, and Montreal Agreement differ in the scope of their application. Consequently, different liability limits may apply depending upon the circumstances of the international flight. An analysis of the possible scenarios which can arise under the Warsaw system demonstrates further the effect of these different agreements on the limits of damage awards.

Passenger A departs from the United States which has ratified the Warsaw Convention. He arrives in a nation which has done likewise, Austria. The Warsaw Convention governs the flight because the carriage begins and ends in two nations which are High Contracting Parties. Customary international law adopts the principle *pacta sunt servanda*, meaning agreements of the parties must be observed. The Vienna Convention, which codifies some of the rules of international law, prescribes a similar result. The Vienna Convention is a "treaty on treaties" and, as such, generally codifies the present customary international law on treaties and other international agreements. Accordingly, the Vienna Convention incorporates the principle of *pacta sunt servanda* in stating that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

Thus, both the Vienna Convention and customary international

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45 Id.
46 Id. For a list of the signatories to the Montreal Agreement, see 3 Av. L. Rep. (CCH) 24,065-3 to -5.
47 Black's Law Dictionary 999 (5th ed. 1979). Some scholars believe that *pacta sunt servanda* means that international agreements must be performed in good faith, while others think the Latin term means that the agreements are to be performed with utmost fidelity. J. Sweeney, C. Oliver & N. Leech, The International Legal System 953 (2d ed. 1981) [hereinafter cited as Sweeney].
49 Sweeney, supra note 47, at 951.
50 Vienna Convention, supra note 48, art. XXVI. The Vienna Convention adopts the view of those scholars who believe *pacta sunt servanda* means interna-
law would require nations which are parties to the Warsaw Convention, such as the United States and Austria, to apply the $8,300 limit. Furthermore, if the action were brought in the United States, both federal and state courts would have to apply the Convention because the Warsaw Convention, being a treaty, is the supreme law of the land and as such overrides any contrary state law.51

Passenger B has a round-trip ticket for a flight departing from a Warsaw nation with a scheduled stopping place in a non-Warsaw nation. Will the Warsaw Convention govern this flight? Such a question arose in Glenn v. Compania Cubana de Aviacion, S.A.52 in which the decedents held a round-trip ticket from Miami, Florida to Havana, Cuba, a non-Warsaw nation.53 The United States Court for the Southern District of Florida held that the Warsaw Convention should apply even though the defendant airline was a national of Cuba, a non-Warsaw nation.54 If the plaintiff had sued in Cuba, however, the Cuban tribunal would not have been bound to apply the Warsaw Convention limit of $8,300 because Cuba was not a party to the Convention. Under general principles of public international law, states which are not parties to a treaty are not bound by the treaty.55 This principle is also codified in the Vienna Convention.56 Since the Warsaw Convention

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53 Id. at 633.
54 Id. at 633-34. The court did not apply the Convention, however, because the defendants did not allege that the carrier had delivered tickets to the deceased passengers. The court noted the defendants' failure and gave them leave to amend. Id. at 634.


56 See Vienna Convention, supra note 48, art. XXXIV. "A treaty does not create either obligations or rights for a third state without its consent." Id. An exception
would not apply, the Cuban tribunal would have to choose between United States and Cuban domestic laws.

Similarly, the courts must choose between the nations' domestic laws in the case of Passenger C who, unlike B's round-trip ticket, has a one-way ticket from a nation which is not a party to the Warsaw Convention to a nation which is a party. The plaintiff in Tolson v. Pan American World Airways, Inc.,\textsuperscript{57} for example, departed on a flight from Argentina, a non-contracting state at the time, and arrived in Mexico City.\textsuperscript{58} The court found the Warsaw Convention inapplicable because neither party presented evidence of plaintiff's ticket to prove that the plaintiff's departure and destination points were within the meaning of "international transportation" in the Convention.\textsuperscript{59} More specifically, the plaintiff's flight was neither between two High Contracting Parties, nor was it a round-trip from a High Contracting Party with an agreed stopping place outside that nation.\textsuperscript{60}

Passenger D has a round-trip ticket from a non-Warsaw nation with an agreed stopping place in a Warsaw nation. This flight is not international carriage under the Warsaw Convention. The departure and destination sites are not within two High Contracting Parties' territories nor are the sites within a single High Contracting Party's territory.\textsuperscript{61} Thus, courts must choose among the domestic laws of the interested nations to determine the damages.

Thus far in the analysis, a variety of outcomes is possible. Some of these passengers could easily be on the

\textsuperscript{57} 399 F. Supp. 335 (S.D. Tex. 1975).
\textsuperscript{58} Id. at 338. Mexico is a High Contracting Party to the Warsaw Convention. 3 Av. L. REP. (CCH) 24,059-2. This source also lists Argentina as a current High Contracting Party. Id.
\textsuperscript{59} 399 F. Supp. at 338. See supra text accompanying notes 36-39. The court then applied the Texas rules of conflict of laws to determine which law governed. The court concluded that Texas law applied. 399 F. Supp. at 338-39.
\textsuperscript{60} 399 F. Supp. at 338. See supra notes 36-39 and accompanying text.
\textsuperscript{61} See supra notes 36-39 and accompanying text.
same flight, but different liability limits could apply in each case. Yet the analysis has focused only upon the problems of traveling between nations that have or have not ratified the Warsaw Convention. When the Hague Protocol becomes applicable, the choices among damage award limits increase.

Passenger E leaves Mexico, a nation adhering to the Hague Protocol, and arrives in Belgium, a nation that also adheres. The Protocol applies because the departure and destination points are within the territory of two nations which are parties to the Protocol. Thus, the courts in either nation should apply the $16,600 limit. A nation not a party to the Warsaw Convention or the Hague Protocol, however, would not be bound to follow the liability limits, but instead would perform a choice of law analysis.

Passenger F has a one-way ticket from the United States, a nation adhering only to the Warsaw Convention, to Belgium, a nation which is party to the Hague Protocol. Passenger G has a round trip flight from a Warsaw nation, the United States, with an agreed stopping place in a Hague Protocol nation. The United States District Court for the Eastern District of New York in Kelley v. Societe Anonyme Belge D'Exploitation stated that in such circumstances the Warsaw limit of $8,300 must apply. The terms of the Hague Protocol mandate such a result because the departure and arrival points are not within the territory of two parties to the Hague Protocol.

62 For example, if the flight were from Istanbul, Turkey to New York, Passengers B, C, and D could be on board. Passenger B is flying the second leg of her round trip New York - Istanbul - New York. Passenger C is flying from Istanbul to New York. Passenger D is flying the first leg of his round trip Istanbul - New York - Istanbul. (Turkey is not a party to the Warsaw Convention. 3 Av. L. Rep. (CCH) 24,059-2).

63 See supra note 42 and accompanying text.

64 This assumes, of course, that the non-party nation has jurisdiction.


66 Id. at 146. The court stated, "[t]hus whether the instant contracts of carriage be considered as running from the United States to Belgium, or from the United States to the United States with stopping places in Belgium . . . it is the Convention's limitations which must be applied herein." Id.

67 See supra note 42 and accompanying text.
Passenger H has a round trip ticket from a nation adhering to the Hague Protocol with an agreed stopping place in a nation which adheres only to the Warsaw Convention. For example, the passenger in *Montreal Trust Co. v. Canadian Pacific Airlines Ltd.* held a ticket for a voyage from Montreal to Vancouver to Hong Kong to Tokyo and return to Montreal. At the time, Canada was a High Contracting Party to the Hague Protocol, whereas the United Kingdom and Japan were not. The Canadian Supreme Court stated that the Hague Protocol was the governing document.

Notably, two more liability limits, $75,000 or $58,000, are available under the Montreal Agreement provided the destination, departure, or stopping place is in the United States. For example, in *Reed v. Wiser,* passengers were flying from Tel Aviv to New York via Athens and Rome on Trans World Airlines, an airline adhering to the Montreal Agreement. The Second Circuit Court of Appeals stated that the Warsaw Convention as modified by the Montreal Agreement applied to limit liability to $75,000. If the legal fees were to be awarded separately, the liability amount would have been $58,000.

These scenarios illustrate the variety of liability limits which courts may apply depending upon the departure point, the destination point, the agreed stopping place, and the nation in which the suit is filed. Although these passengers may be seated on the same flight and suffer identical injuries, the limits on their damage awards could

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69 Id. at 796.
70 Id. The court did not allow the defendants to limit their liability under the Hague Protocol, however, because the tickets lacked the requisite notice calculated to attract the attention of the passenger to the liability limits. Id. at 803.
71 See supra notes 30-31, 34 and accompanying text.
72 555 F.2d 1079 (2d Cir. 1977).
73 Id. at 1081; 3 Av. L. Rep. (CCH) 24,065-3.
74 555 F.2d at 1081. More specifically, the court held that airline employees were entitled to assert the defense of the liability limits of the Warsaw Convention as modified by the Montreal Agreement. Id.
75 See supra note 31 and accompanying text.
differ greatly. As the hypotheticals discussed illustrate, the Warsaw system is not fully attaining one of its primary goals of a uniform system of liability rules to govern international aviation. Choices between various liability limits destroy any semblance of uniformity. In cases where the Warsaw system is held not applicable—for example, in the cases of Passengers C, D, and perhaps B—the disparity among possible damage limits becomes more obvious. In these cases, the choice of law analysis by the courts plays a crucial role in determining the amount of damages an injured passenger may recover.

II. FLIGHTS NOT COVERED BY THE WARSAW SYSTEM

A. The Foreign Laws Limiting Liability

In the preceding discussion, certain passengers did not fall within the Warsaw system and its four limits on damages awards. Other passengers, even though they came within the system, would not have one of the four limits applied in their cases because they chose to sue in a nation which was not a party to the Warsaw Convention or the Hague Protocol. In these cases, the courts must choose among the domestic laws of the nations having a relationship to the flight involved. The limits on damage awards available in an action against the air carriers vary tremendously. As a result, the choice of law determination made by the court may determine whether the injured passenger receives full compensation for his injuries, perhaps millions of dollars, or minimal compensation, perhaps only a few hundred dollars.

1. Latin American Nations

Mexico has a three tiered liability system for damages sustained by passengers who are in privity of contract with

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76 See S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 16:1-66 (2d ed. 1975) [hereinafter cited as SPEISER] (discussing foreign law damages for wrongful death in both aviation and non-aviation cases).
the air carrier. Article 343 of the Ley de Vías Generales de Comunicación establishes that a carrier is liable, regardless of fault, for up to 50,000 pesos (US $107.55) for death or total, permanent disability; 20,000 pesos (US $43.02) for injuries which cause partial, permanent disability; and 10,000 pesos (US $21.51) for injuries that cause partial, temporary disability.

The carrier's liability increases if it is at fault. The statute imposes an additional limit (which can be added to the previously stated limits) of 75,000 pesos (US $161.32) in cases of death or total, permanent disability. A limit of 25,000 pesos (US $53.77) exists for other less serious injuries. The carrier will not be liable for these two higher limits if it proves it has taken reasonable steps to avoid the harm or that such steps were impossible to take. Finally, no limit on liability exists if there were doler, meaning "wilful misconduct," on the part of the carrier.

In Costa Rica, under Article 251 of the Ley General de Aviación Civil, in case of death or injuries which cause to-
tal or permanent disability of a passenger, the carrier is liable for 100,000 colones (US $1,862.19). This limit may be exceeded, however, if the plaintiff can prove that the damages are greater than this amount. A carrier may not agree to reduce its liability below these amounts.

Under El Salvador’s laws, the carrier is absolutely liable to its passengers for the following amounts: 40,000 colones (US $16,000) for death; 30,000 colones (US $12,000) for injuries causing total, permanent disability of the entire body; up to 15,000 colones (US $6,000) for injuries causing partial, permanent disability of a major limb; and up to 5,000 colones (US $2,000) for injuries causing partial, temporary disability and inability to perform one’s habitual or specialized work. As under Mexico’s laws, when the accident is due to the fault, dolo, of the carrier, the liability is unlimited. If the carriage is performed gratis, then the carrier is liable only if fault or dolo exists on its part. If so, the parties may agree upon an amount or the judge may set the award.

In Guatemala the carrier is liable to a limit of 5,000 quetzales (US $1,818.18) for bodily injuries or death of a passenger. The carrier and passenger may agree upon a higher amount, but not a lower amount. In order to recover, the plaintiff has the burden of proving the negli-

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84 Ley General de Aviación Civil, art. 251 (1973) [hereinafter cited as Costa Rican Law]. See J. Pino Muñoz, supra note 77, at 130.
85 J. Pino Muñoz, supra note 77, at 130. No express limit exists in cases of partial disability. Id.
86 Costa Rican Law, supra note 84, art. 257; J. Pino Muñoz, supra note 77, at 191.
87 Decreto No. 2011 of Dec. 22, 1955, art. 256 [hereinafter cited as Decree 2011]. A table of compensation may be applied in determining the appropriate amount for the two latter types of injuries. Id. art. 256; J. Pino Muñoz, supra note 77, at 158.
88 Decree 2011, supra note 87, art. 256; J. Pino Muñoz, supra note 77, at 158.
89 Decree 2011, supra note 87, art. 255; J. Pino Muñoz, supra note 77, at 159.
90 Ley de Aviación Civil, Decreto No. 563 of Oct. 28, 1949, art. 101 [hereinafter cited as Decree 563]; J. Pino Muñoz, supra note 77, chart following 192. Non-physical injuries are not included. J. Pino Muñoz, supra note 77, at 182.
91 Decree 563, supra note 90, art. 104; J. Pino Muñoz, supra note 77, at 182-83.
gence of the carrier.\textsuperscript{92} If the plaintiff proves \textit{dolo}, no liability limit exists.\textsuperscript{93}

Similar to the Mexican law, the Honduran Civil Aeronautical Law establishes a three tiered system of air carrier liability. If the carrier is without fault, it will be liable to the passengers as follows: 20,000 lempiras (US $10,000) for death; 25,000 lempiras (US $12,500) for injuries causing total, permanent disability; up to 15,000 lempiras (US $7,500) for injuries causing partial, permanent disability; up to 8,000 lempiras (US $4,000) for injuries causing temporary disability; and up to 5,000 lempiras (US $2,500) for other injuries.\textsuperscript{94} If the carrier is at fault, then these amounts increase by fifty percent.\textsuperscript{95} Finally, if the carrier acts with \textit{dolo}, then the liability is unlimited.\textsuperscript{96} In cases of \textit{dolo}, the tribunal may not award damages lower than those prescribed under the second tier.\textsuperscript{97}

Nicaragua, in its civil aviation code, also establishes a tiered system of liability. An air carrier is liable for damages incurred by passengers on charter flights or "non-regular" public flights as follows: 5,000 dólares (US $500) for death; 6,000 dólares (US $600) for injuries that cause total, permanent disability; up to 4,000 dólares (US $400) for injuries causing partial, permanent disability; up to 2,000 dólares (US $200) for injuries causing temporary disability; and up to 1,000 dólares (US $100) for other injuries.\textsuperscript{98} For regular, public flights these amounts

\textsuperscript{92} Decree 563, \textit{supra} note 90, art. 97; J. Pino Muñoz, \textit{supra} note 77, chart following 192.

\textsuperscript{93} Decree 563, \textit{supra} note 90, art. 97; J. Pino Muñoz, \textit{supra} note 77, chart following 192.

\textsuperscript{94} Ley de Aeronautica Civil, Decree No. 121 of Mar. 17, 1950, art. 221 [hereinafter cited as Decree 121]; J. Pino Muñoz, \textit{supra} note 77, at 205.

\textsuperscript{95} Decree 121, \textit{supra} note 94, art. 22; J. Pino Muñoz, \textit{supra} note 77, at 205.

\textsuperscript{96} Decree 121, \textit{supra} note 94, art. 224; J. Pino Muñoz, \textit{supra} note 77, chart following 230.

\textsuperscript{97} Decree 121, \textit{supra} note 94, art. 224; J. Pino Muñoz, \textit{supra} note 77, chart following 230.

\textsuperscript{98} Código de Aviación Civil, Decree No. 176 of Nov. 22, 1956, art. 214, Gaceta No. 266 [hereinafter cited as Decree 176]; J. Pino Muñoz, \textit{supra} note 77, at 245-46.
double.\textsuperscript{99} If the plaintiff proves fault, then the carrier is liable for an additional fifty percent.\textsuperscript{100}

In Argentina, the carrier has a limited liability equal to 1,000 Argentine gold pesos for each passenger’s death.\textsuperscript{101} If the carrier acts with \textit{dolo}, his liability is unlimited.\textsuperscript{102} Brazilian law requires that a carrier be liable for 200 times the minimum salary in case of a passenger’s death or injury.\textsuperscript{103} The carrier and passenger, however, may agree upon a higher liability.\textsuperscript{104} Paraguayan law limits the damages for death to the amounts applicable under the Hague Protocol.\textsuperscript{105}

2. Eastern European Nations

The Soviet Union limits liability for death on domestic flights to those amounts available under the Hague Protocol.\textsuperscript{106} These limits do not apply, however, in cases of intentional or severe negligence.\textsuperscript{107} Turkey places no limit

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{99}] Decree 176, \textit{supra} note 98, art. 214; J. \textsc{Pino Muñoz}, \textit{supra} note 77, at 245-46.
  \item[\textsuperscript{100}] Decree 176, \textit{supra} note 98, art. 216; J. \textsc{Pino Muñoz}, \textit{supra} note 77, at 246. For example, if a passenger on a regular, public flight died, the carrier would be liable for 6,000 dólares (US $600) increased by 100\%, or 12,000 dólares (US $1,200). If the plaintiff proved fault, the amount of liability would be increased by 50\% of 12,000 to 18,000 dólares (US $1,800). J. \textsc{Pino Muñoz}, \textit{supra} note 77, at 246.
  \item[\textsuperscript{101}] Código Aeronautico, Ley 17,285, art. 144 (1967) Anales de Legislación Argentino 326, 359 [hereinafter cited as Ley 17,285]; \textsc{Speiser}, \textit{supra} note 76, \S\ 16:29. The Spanish text of article 144 is reprinted in \textsc{Speiser}, \textit{supra} note 76, \S\ 16:29 n.43. The award is made in the national currency of Argentina, the austral. The actual amount is based on the price of gold at the time when the action giving rise to the liability occurs. Ley 17,285, \textit{supra} this note, art. 144.
  \item[\textsuperscript{102}] I. \textsc{Quintana Carlo}, \textit{La Responsabilidad del Transportista Aéreo por Daños a Los Pasajeros} 70 (1977).
  \item[\textsuperscript{103}] \textsc{Speiser}, \textit{supra} note 76, \S\ 16:31. \textit{See} Brazilian Air Code, Decree Law No. 32 of Nov. 18, 1966, 30 \textsc{Lex} (Braz.) 1603, \textit{amended by} Decree Law No. 234 of Feb. 28, 1967, 31 \textsc{Lex} (Braz.) 550.
  \item[\textsuperscript{104}] \textsc{Speiser}, \textit{supra} note 76, \S\ 16:31.
  \item[\textsuperscript{105}] \textsc{Speiser}, \textit{supra} note 76, \S\ 16:43. Speiser notes that this limit does not apply to international flights since Paraguay is not a signatory of the Hague Protocol. \textit{Id.}
  \item[\textsuperscript{106}] \textsc{Speiser}, \textit{supra} note 76, \S\ 16:47. \textit{See} U.S.S.R. Air Code, arts. 130, 131 (1962); D. \textsc{Cooper}, \textit{The Air Code of the U.S.S.R., Translated and Annotated} 139 (1966).
  \item[\textsuperscript{107}] \textsc{Speiser}, \textit{supra} note 76, \S\ 16:47. \textit{See} U.S.S.R. Air Code, art. 133; D. \textsc{Cooper}, \textit{supra} note 106, at 141.
\end{itemize}
\end{footnotesize}
on the amount of damages recoverable in domestic flights.\textsuperscript{108} Hungary, also, places no limit on damages arising out of aviation or non-aviation activities.\textsuperscript{109}

3. Western European Nations

In the Federal Republic of Germany, the carriers’ liability for domestic flights is limited to the equivalent of US $100,000.\textsuperscript{110} The Republic of Ireland,\textsuperscript{111} France,\textsuperscript{112} Belgium,\textsuperscript{113} and Switzerland\textsuperscript{114} impose the liability limits provided under the Hague Protocol for death on domestic flights by air carriers. Italian law limits the liability of an air carrier to 5,200,000 lire (US $3,255.20) per passenger.\textsuperscript{115} Spain limits the liability of an air carrier as follows: 200,000 pesetas (US $1,351.80) for death or total, permanent disability; 100,000 pesetas (US $675.90) for partial, permanent disability; and 50,000 pesetas (US $337.95) for partial, temporary disability.\textsuperscript{116} The Netherlands limits liability for death in domestic air travel to 125,000

\textsuperscript{108} Speiser, supra note 76, § 16:23. The judge determines the damage award, taking into consideration the severity of the wrongdoing and the degree of causation between the wrongdoing and the injury. Id. § 16:23 n.1.

\textsuperscript{109} See Civil Code of the Hungarian People’s Republic, ch. XXXI, §§ 355, 356, reprinted in 2 S. Speiser, Recovery for Wrongful Death 223-24 (2d ed. Supp. 1985). Hungarian law provides, “the person responsible for the loss shall restore the former situation.” Id. at 223. If this is not possible, the person shall compensate for the loss covered. Id.


\textsuperscript{111} Speiser, supra note 76, § 16:4.

\textsuperscript{112} Speiser, supra note 76, § 16:13.

\textsuperscript{113} Speiser, supra note 76, § 16:15.

\textsuperscript{114} Speiser, supra note 76, § 16:22. See Swiss Air Transportation Act, art. 8.

\textsuperscript{115} Speiser, supra note 76, § 16:18. See Navigation Code, art. 943.

\textsuperscript{116} I. Quintana Carlo, supra note 102, at 214. These limits are found in article 117 of the Ley de Navegación Aérea of July 21, 1960. In case of dolo or serious fault by the carrier, the limits do not apply. I. Quintana Carlo, supra note 102, at 214.
French gold francs.¹¹⁷

4. Other Nations

New Zealand provides a liability limitation of NZ $42,000 (US $22,365) in wrongful death actions due to aviation accidents.¹¹⁸ This limit does not include legal costs, and the carrier and passenger may agree to raise the limit.¹¹⁹ Australia limits the amount recoverable to $30,000 Australian dollars (US $20,739), but the air carriage contract may provide a higher amount.¹²⁰ Canada imposes no limits on the amount recoverable.¹²¹ India limits the liability of carriers in domestic flights to Rs 100,000 (US $8,030) for passengers over twelve years old and Rs 50,000 (US $4,015) for younger passengers.¹²² Morocco limits the liability in domestic flights to the limits found in the Hague Protocol.¹²³ Thai law does not place a limit on liability for death or injuries caused by a wrongful act.¹²⁴

This brief survey of limitations on liability adopted by other nations demonstrates the prevalence of this type of legislation. These restrictions may appear to be arbitrary and unfair to the injured passenger, especially to those

¹¹⁷ Speiser, supra note 76, § 16:25.
¹¹⁸ Speiser, supra note 76, § 16:5. These limits are embodied in The Carriage by Air Act of 1967, N.Z. Stat. § 28(1).
¹¹⁹ Speiser, supra note 76, § 16:5.
¹²¹ Speiser, supra note 76, § 16:3.
¹²² Id. § 16:10.
¹²³ Id. § 16:64.
¹²⁴ See Civil and Commercial Code, Book II, Title V, Chapter 11, Compensation for Wrongful Acts §§ 443-446. The Thai code does not specifically address air carriage accidents. Rather, those sections of the code prescribe the compensable damages resulting from a wrongful act. In cases of death, the compensation includes funeral expenses, medical expenses, loss of wages, and loss of support by decedent's dependents. Id. § 443. In cases of physical injury, the compensable damages include expenses incurred, loss of both present and future wages, and non-pecuniary losses. Id. §§ 444, 446. For a complete text of the Thai code in English, see CIVIL & COMMERCIAL CODE BOOK I-VI (compiled by P. Suttawarasit & K. Sandhikshetrin 1971).
American passengers who are accustomed to the large damages awarded by American courts. As a result, the choice of law analysis used to determine the applicable laws governing damages becomes a crucial factor in deciding whether to sue and where to sue.

B. Choice of Law Analysis

1. American Approaches

One American judge has commented that the determination of the applicable law is an "entry into the wilderness."^{125} Another has remarked that choice of law is a "veritable jungle," subject to a "reign of chaos."^{126} Despite the confusion in this area of law, four basic approaches exist to help a court determine the appropriate law in a tort action: lex loci delicti, most significant contacts or relationship, governmental interests analysis, and choice-influencing considerations.

The first approach is the classical rule, lex loci delicti, which literally means "the law of the place of the wrong determines whether a person has sustained a legal injury."^{127} The rule applies to all the substantive rights of the parties,^{128} including the limitations on damages.^{129} This principle could subject passengers to lower liability limits under the law of the accident site than under the limits available via the Warsaw system.^{130}

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^{125} Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 609 (9th Cir. 1975). "The determination of applicable law is entry into the wilderness in which courts sometimes find themselves when searching for solutions to problems arising under the judicial nightmare known as Conflict of Laws." Id.

^{126} In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal 1975). Judge Hall states:

The law as "choice of law" in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a "rule of action" but a reign of chaos dominated in each case by the judge's "informed guess" as to what some other state than the one in which he sits would hold its law to be.

Id.

^{127} RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).


^{129} Lowenfeld & Mendelsohn, supra note 9, at 527.

^{130} Id. at 526. In reality, in 1965, only two non-Warsaw nations and six Warsaw
Under the lex loci rule, "the place of the wrong" is the place where the last event needed to make the actor liable for the tort takes place.\(^\text{131}\) Since all torts must have an injury, the rule, in effect, requires application of the law of the place of injury.\(^\text{132}\) In theory, the rule is consistent with the vested rights doctrine, which requires application of the law of the place where the last event occurred which created a right to recover.\(^\text{133}\)

The advantages of the lex loci rule are its ease of application, its predictability of outcome, and its symmetry of application to the parties.\(^\text{134}\) The rule, however, has many disadvantages. First, the place of the injury is not always easy to ascertain.\(^\text{135}\) Second, the vested rights theory, on

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\(^{131}\) **Restatement of Conflict of Laws** § 377 (1934).


\(^{133}\) *Id.* Another explanation of the doctrine is that "a right to recover for a foreign tort owes its creation and depends for its existence and extent solely on the law of the jurisdiction where the injury occurred." 16 *Am. Jur. 2d Conflict of Laws* § 99 (1979).

\(^{134}\) 16 *Am. Jur. 2d Conflict of Laws* § 99 (1979). A Texas case, Pratt v. Royder, 517 S.W.2d 922 (Tex. Civ. App.—Waco 1974, writ ref’d n.r.e.), demonstrates this ease of application and predictability of outcome. Decedent, a Maine resident, died in a plane crash in Mexico. Plaintiffs resided in Maine while the defendant resided in Texas. The court decided the issue of whose damage law applied (Texas, Maine, or Mexico) in two sentences. "Texas follows the doctrine of lex loci delictus, the law of the place of the wrong. Thus a wrongful death action based on the law of Mexico must apply the measure of damages of the law of Mexico, and not the Texas or Maine measure of damages." *Id.* at 924. Texas later rejected the lex loci rule in Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) (common law doctrine of lex loci delecti overruled; the most significant relationship test of the Restatement applies to all future conflict cases sounding in tort).

\(^{135}\) Reese, *supra* note 132, at 3. The place of injury is especially difficult to ascertain in cases of unfair competition, misrepresentation, or loss of reputation where damages consist of out-of-pocket losses. *Id.*
which the rule is based, ignores the interests that other jurisdictions have in the outcome.\footnote{Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746 (Ct. App. 1963) (New York law rather than Ontario statute (lex loci) applies where New York had dominant contacts).} Third, the result is often unfair to the plaintiff, who may have had little, if any, contact with the forum, since the place of injury was entirely fortuitous.\footnote{Foss, \textit{Choice of Law in General Aviation Tort Litigation: Liability and Damages}, in \textit{AIRCRAFT CRASH LITIGATION} 159 (1983).}

The notion of fortuity is particularly relevant in aviation accident cases. During a flight a traveler may pass through several states, or a plane may crash in a state the passenger never intended to cross. Indeed, an airplane's descent may begin in one state, and eventually the crash may occur in another state.\footnote{Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133, 135 (1961). In this case, the court departed from the lex loci rule in refusing to apply the damage limitations of the crash site, Massachusetts. The court gave two reasons for this decision: the measure of damages was a procedural issue and the Massachusetts's limit was contrary to New York public policy. 9 N.Y.2d at 40, 41-42, 172 N.E.2d at 528, 529, 211 N.Y.S.2d at 136, 137.} In order to avoid these disadvantages, courts have used various techniques to circumvent the lex loci rule. Such devices include characterization, public policy, failure to prove foreign law, and renvoi.\footnote{See Reese, \textit{supra} note 132, at 4; I. Agbede, \textit{Conflict of Tort Laws: New Bases for Solution}, 11 \textit{NIGERIAN L.J.} 75, 81 (1977-80). For an example of the use of public policy to avoid the rule, see supra note 138. For an example of failure to prove foreign law, see Tolson v. Pan American World Airways, Inc., 399 F. Supp. 335 (S.D. Tex. 1975). Plaintiff suffered injuries in Panama where her flight from Argentina to Mexico had stopped. Since Argentina was not a party to the Warsaw Convention, the court held that the Warsaw liability limits did not apply. The federal court sitting in Texas attempted to apply the then existing Texas rule of lex loci delecti. The court noted that the law of a foreign country is a fact to be proven. The plaintiff offered no proof of Panamanian law, however, so the court simply applied Texas law, the law of the forum. \textit{Id.} at 338. As a tactical matter, a plaintiff may not want to prove foreign law, especially if this law limits the damage award. See Reese, \textit{supra} note 132, at 4.} For example, the court would classify an issue which was normally considered substantive as procedural and then apply the forum law rather than the lex loci rule.\footnote{See Reese, \textit{supra} note 132, at 4.} The New York Court of Appeals first avoided the lex loci rule without resorting to these devices...
in Babcock v. Jackson.\textsuperscript{141} Other American courts openly departed from the rule in the mid-1960's.\textsuperscript{142}

In Babcock the court applied the second choice of law approach, the most significant contacts test, also called the center of gravity test, in an auto accident case. Under this approach, the court identifies all of the relevant contacts regarding the particular issue in dispute and applies the law of the state having the most significant contacts.\textsuperscript{143} Consequently, in Babcock, where the plaintiff-passenger and the defendant-driver were from New York and the accident occurred in Ontario, the court applied New York law rather than the Canadian automobile guest statute.\textsuperscript{144}

Although the most significant contacts approach was an innovation in choice of law analysis, the approach became unpopular as judges merely added up the contacts and applied the law of the forum with the largest number of contacts.\textsuperscript{145} A modification of the most significant contacts test is the "most significant relationship" test found in the Restatement (Second) of Conflict of Laws.\textsuperscript{146} The test provides that for each issue in a tort case, the court should apply the law of the forum which has the most significant relationship to the occurrence and the parties.\textsuperscript{147} In making this determination, the court should consider: the needs of various legal systems; the policies of the forum; the interests of other states in the issue; the policies of these states; the parties' expectations; the policies of the particular area of law; the certainty, predictability, and uniformity of the outcome; and the ease in determining and applying the law.\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{141} See 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Reese, supra note 132, at 4.
  \item \textsuperscript{142} See Foss, supra note 137, at 160.
  \item \textsuperscript{143} Id. at 160.
  \item \textsuperscript{144} Babcock, 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751.
  \item \textsuperscript{145} Foss, supra note 137, at 160 (citing Douglas, Air Disaster Litigation Without Diversity, 45 J. Air L. & Com. 411, 427 (1980)).
  \item \textsuperscript{146} Foss, supra note 137, at 160. Restatement (Second) of Conflict of Laws § 145 (1971) embodies this approach.
  \item \textsuperscript{147} Restatement (Second) of Conflict of Laws § 145 (1971).
  \item \textsuperscript{148} Id. § 6(2). In applying these principles, the court should consider the fol-
Many courts have followed the most significant relationship approach. For example, the court in *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense* used this approach in an action for wrongful death arising out of an airplane collision in Brazil. The issue was whether to apply the Brazilian law limiting damages to 100,000 cruzeiros or the District of Columbia's unlimited recovery law. In analyzing the interests of each jurisdiction, the court noted that Brazil was the scene of the accident, the parties' relationship existed in Brazil, the defendant carrier was a Brazilian corporation owned by the Brazilian government, and Brazil had a strong interest in protecting its local infant airline industry by limiting the carrier's liability. Therefore, the court applied the Brazilian limitation on damages. The plaintiff received only US $170, while if the District of Columbia's law had been applied, she probably would have received much more.

Following contacts: the place of the injury; the place of the conduct causing injury; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and the place where the parties' relationship is centered. *Id.* § 145(2).


Economic inflation and depreciation of the cruzeiro had occurred since enactment of the statute fixing the 100,000 limit. Even though the cruzeiro was worth less, this did not make obsolete Brazil's interest in protecting her airline industry. *Id.* at 472.

The court, sua sponte, also considered whether Maryland law should apply, since the plaintiff and the decedent resided in Maryland. The circuit court considered a Maryland court precedent that held if the accident and death occur in another state, the law of that state determines the defendant's liability. Since damages in tort are a matter of substantive law, the District of Columbia Court of Appeals concluded that a Maryland court would, under Maryland law, apply the Brazilian damages law. Since a Maryland court would not ignore Brazilian law for the benefit of its own citizens, then a District of Columbia court should not ignore it either. *Id.* at 474-75.

The plaintiff claimed damages of US $250,000. *Id.* At that time, article 102 of the Brazilian Code limited liability for injury or death in airplane
The third choice of law approach is the governmental interests analysis. Under this approach, the court analyzes the interests of the parties and the nations to determine the most appropriate law on the issues presented. Generally, the court will apply the law of the forum unless another state's interests in advancing its own policy is greater.

The California Supreme Court applied the governmental interests analysis in Hurtado v. Superior Court. The plaintiffs and plaintiffs' decedent resided in Mexico, the defendant resided in California, and the accident occurred in California. The court concluded that California damage laws applied, rather than the Mexican law limiting damages, because Mexico had no interests in applying its damage limitations. Mexico had no resident defendants to protect and no reason to deny full recovery to its residents where non-Mexican defendants caused the injury. Furthermore, California had a interest in applying its full compensation laws in order to deter dangerous tortious conduct.

More recently, California courts have utilized a refinement of the governmental interests analysis called the comparative impairment approach. Under this ap-

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155 Professor Brainard Currie was the proponent of this analysis. See Currie, The Constitution and Choice of Law: Governmental Interests and Judicial Function, 26 U. Chi. L. Rev. 9 (1958). Many consider Babcock the forerunner of this approach. Foss, supra note 137, at 161. The Babcock court stated that the law of the state having "the greatest concern with the specific issue raised in the litigation" should be applied. Babcock, 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. For a fuller critique of Babcock, see Reese, supra note 132, at 4-8.

157 Foss, supra note 137, at 161.
159 Hurtado, 11 Cal. 3d at 578, 522 P.2d at 668, 114 Cal. Rptr. at 108.
160 Id. at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110.
161 Id.
162 Id. "It is manifest that one of the primary purposes of a state in creating a cause of action in the heirs for the wrongful death of the decedent is to deter the kind of conduct within its borders which wrongfully takes life." Id.
163 Foss, supra note 137, at 161.
A court determines which state's interest would be more greatly impaired if its policy were subordinated to another state's policy. Usually, the court will apply the forum's law unless a party invokes a foreign law. If so, the invoking party has the burden of proving the foreign state's law will further the interest of the foreign state and is an appropriate rule.

In *Hernandez v. Aeronaves de Mexico, S.A.*, a federal district court sitting in California applied the comparative impairment analysis in a wrongful death action arising out of a plane crash in Mexico. The court was faced with whether to apply Mexican law limiting liability to 125,000 pesos or California law providing unlimited liability. The decedents resided in California where they had purchased their tickets. The defendant carrier was a Mexican corporation which conducted a large amount of business in California. These contacts gave California, the forum state, an interest in having its law applied. Thus, the Mexican law would apply only if a more compelling reason existed. Mexico had an interest in protect-

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165 *Hernandez*, 583 F. Supp. at 333.
166 *Id.*
167 *Id.* at 331.
168 *Id.* at 332-33.
169 *Id.* at 332. Two actions arising out of the same accident were consolidated for this opinion. In the other action, the court faced the issue of whether the plaintiff's flight was an international flight so that the Warsaw system limit of $75,000 applied. The plaintiff flew from San Jose to San Diego, crossed to Tijuana, Mexico, and flew to Monterey. This was not one continuous trip. The court found that the flight was domestic because both parties must regard the transportation as a single operation in order to apply the Warsaw Convention. Since this was a domestic flight, the court followed the choice of law analysis discussed previously and applied the California damages law. *Id.* at 333.
170 *Id.*
171 *Id.* More specifically, the carrier operated regular flights to and from Los Angeles, maintained ticket offices in California, advertised in California, and sold tickets through California travel agents. *Id.*
172 *Id.*
173 *Id.*
ing its airlines by limiting liability.\textsuperscript{174} The court reasoned, however, that application of California law would not endanger the Mexican economy.\textsuperscript{175} In addition, Mexico had an interest in regulating conduct within its territory.\textsuperscript{176} The court said that the issue in this case involved rules limiting damages rather than rules limiting conduct, and the court stated that rules limiting damages were generally given less deference than rules regulating conduct.\textsuperscript{177} In the final balance, the court found that California's interest in providing just compensation to its residents outweighed Mexico's interest in limiting liability, and the court applied California law.\textsuperscript{178}

The fourth approach to choice of law analysis is the choice-influencing considerations approach. Under this approach the court should consider five factors in its choice of law decision: predictability of results; maintenance of international and interstate order; simplification of the judicial duty; advancement of the forum state's interests; and application of the better rule of law.\textsuperscript{179} A few jurisdictions have followed this approach.\textsuperscript{180} Most of the cases applying this approach have based their decisions

\textsuperscript{174} Id. The court noted that large liability awards could affect Mexico's economic strength. \textit{Id.}

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Id. The court cited Cable v. Sahara Tahoe Corp., 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (1979).

\textsuperscript{178} \textit{Hernandez}, 583 F. Supp. at 333. "In this action, Mexico's interest in limiting damages must be balanced against California's interest in securing proper and just compensation for the death of its residents, and in encouraging its residents' safety." \textit{Id.}


on the two latter considerations of advancing the forum's interests and applying the better rule of law.\textsuperscript{181}

2. \textit{Foreign Approaches to Choice of Law Analysis}

American approaches to choice of law analysis have influenced the choice of law rules in other nations, both in case law and statutory law.\textsuperscript{182} The law in the European nations reflects these various methods.\textsuperscript{183} Similarly, recent codifications in Latin American law incorporate parts of the American approaches.\textsuperscript{184}

\textit{Chaplin v. Boys}\textsuperscript{185} illustrates the use of the American approaches in English choice of law analysis. The plaintiff in \textit{Chaplin} suffered injuries resulting from a car accident in Malta.\textsuperscript{186} Both the plaintiff and defendant were British citizens living temporarily in Malta.\textsuperscript{187} Under English law, a tort action may only be brought if the wrong committed abroad was actionable under both English law and the law of the nation where the wrong occurred.\textsuperscript{188} Although Maltese law allowed recovery only for direct financial loss, the House of Lords affirmed the application of English law allowing recovery for pain and suffering.\textsuperscript{189} The House of Lords' opinion does not adopt any particular choice of law approach, but one judge referred to the most significant relationship approach of the Restate-

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\textsuperscript{181} Hanotiau, \textit{The American Conflicts Revolution and European Tort Choice-of-Law Thinking}, 30 \textit{Am. J. Comp. L.} 73, 82 (1982).

\textsuperscript{182} \textit{Id.} at 82, 88. The works of legal scholars and the provisions of recent international conventions also reveal the influence of the different choice of law analyses. See \textit{id.} at 88-89.

\textsuperscript{183} \textit{Id.} at 88. See \textit{infra} notes 185-232 and accompanying text.

\textsuperscript{184} \textit{See infra} notes 233-239 and accompanying text.

\textsuperscript{185} 1971 A.C. 356 (H.L. 1969). The issue presented to the court was, "where an action is brought in England in respect of a tort committed abroad what law is to be applied in determining the heads or measure of damages to be awarded to the plaintiff?" \textit{Id.} at 359.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} See Phillips v. Eyre, 6 L.R.-Q.B. 1 (1870).

\textsuperscript{189} \textit{Chaplin}, 1971 A.C. at 356, 373, 392. Under Maltese law the plaintiff would recover £53 in damages. \textit{Id.} at 373.
\end{flushleft}
ment. Another judge followed the interest analysis approach and concluded Malta had no interest in applying its rule.

The Court of Appeal of the Hague in Holland did not follow the traditional lex loci rule in *de Beer v. de Hondt*. The plaintiff suffered injuries from an auto accident in France. Both the plaintiff and defendant were Dutch citizens. The court applied Dutch law noting an exception to the lex loci rule where the consequences of the tortious act belonged to another nation's legal sphere. In this case, both parties were Dutch nationals living in the Netherlands, and thus the consequences of the accident belonged to Holland.

A Swiss court also refused to apply the lex loci rule where the parties were Swiss citizens and the accident occurred in France. The court reasoned that the parties' expectations justified application of Swiss law over the lex loci rule when the situs of the accident was fortuitous. Even if the situs were not fortuitous, Swiss law would apply because the tort involved a group of persons who were all domiciliaries of Switzerland.

In addition to case law, foreign statutes also reflect the trend toward rejection of the lex loci rule. The influence of the newer choice of law approaches may be seen in the foreign rules. One recent trend is the codification of the

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190 *Id.* at 380; Hanotiau, *supra* note 181, at 93.
191 *Chaplin*, 1971 A.C. at 391-92. Malta had no interest in limiting damages because neither party was a Maltese citizen. *Id.* at 392. See also Hanotiau, *supra* note 181, at 93 (discussing the influence of the American approaches in *Chaplin*); Nygh, *Some Thoughts on the Proper Law of a Tort*, 26 INT'L & COMP. L.Q. 932, 936 (1977) (discussing the interest analysis approach in *Chaplin*).
193 Hanotiau, *supra* note 181, at 93.
194 *Id.*
195 *Id.*
196 See *id.*
197 Hanotiau, *supra* note 181, at 94-95. The case is Judgment of May 2, 1973, Tribunal fédéral, première cour civile, Switzerland.
198 Hanotiau, *id.*, at 95.
199 *Id.*
conflict of laws principles, also called private international law, into a single statute.\textsuperscript{200}

The Polish private international law, enacted in 1965, is one of the earliest codifications of private international law.\textsuperscript{201} The Polish statute instructs courts to apply the law of the state where the event giving rise to the liability occurred.\textsuperscript{202} If the parties are both citizens and domiciliaries of the same state, that state’s law applies.\textsuperscript{203}

The Hungarian Decree on Private International Law became effective in 1979.\textsuperscript{204} The code contains a comprehensive treatment of the choice of law rules in tort actions.\textsuperscript{205} Generally the controlling law at the time and place of the tortious conduct will apply.\textsuperscript{206} Lex loci delicti will apply, however, if its application is advantageous to the injured party.\textsuperscript{207} If the defendant and plaintiff are from the same nation, then the law of their common domicile controls.\textsuperscript{208} The Hungarian statute also incorporates public policy considerations. For example, the court will not determine liability if the conduct is not unlawful in Hungary.\textsuperscript{209} Likewise, the court will not assess the award for tortious damages if such damages are unknown under Hungarian law.\textsuperscript{210} Furthermore, the court will disregard

\begin{footnotes}
\item[202] Hanotiau, \textit{supra} note 181, at 89 (quoting Law of 12.11.1965, art. 31).
\item[203] \textit{Id}.
\item[205] \textit{Id} at 81. See Law Decree No. 13 of 1979 of the Presidential Council of the Hungarian People’s Republic; The International Private Law, 33 Maggar Kozlong 495-514 (1979), reprinted and translated in Gabor, \textit{supra} note 204, at 88-113 [hereinafter cited as Hungarian Decree].
\item[206] Hungarian Decree, \textit{supra} note 205, art. 32(1).
\item[207] \textit{Id} art. 32(2).
\item[208] \textit{Id} art. 32(3).
\item[209] \textit{Id} art. 34(1).
\item[210] \textit{Id} art. 34(2) which states, “[t]he Hungarian Court shall not determine the legal consequences for infliction of tortious damages, which are not known under Hungarian law.”
\end{footnotes}
foreign law in general if it violates Hungarian public policy.\textsuperscript{211}

Yugoslavia has also incorporated public policy into its private international law act.\textsuperscript{212} The foreign law will not be applied if its application is contrary to the basic public policy of Yugoslavia.\textsuperscript{213} The foreign law is a question of law whose content the court has a duty to determine.\textsuperscript{214} This rule is in direct contrast with the American principle that foreign law is a fact which must be proven.\textsuperscript{215} In determining the foreign law, the court may consult with other federal agencies and with any explanatory documents submitted by the parties.\textsuperscript{216}

The draft of the Federal Republic of Germany's conflict of laws statute, like the Hungarian and Yugoslav statutes, contains references to public policy concerns.\textsuperscript{217} Courts will not apply the foreign law "when the application of the foreign law is obviously inconsistent with the basic essen-

\textsuperscript{211} Id. art. 7(1). Socio-economic differences between the foreign state and Hungary may not constitute the sole ground for disregarding foreign law. \textit{Id.} art. 7(2).


\textsuperscript{213} Yugoslav PIL Act, \textit{supra} note 212, art. 4; Sarcevic, \textit{supra} note 212, at 285. Article 4 of the Yugoslav PIL Act states that "[t]he law of a foreign state shall not be applied if the application thereof would be contrary to the basic principles of social organization laid down by the constitution of the SFRY." The term "principles of social organization" should be interpreted the same as "public policy." Sarcevic, \textit{supra} note 212, at 286.

\textsuperscript{214} Yugoslav PIL Act, \textit{supra} note 212, art. 13(I); Sarcevic, \textit{supra} note 212, at 288.

\textsuperscript{215} \textit{See supra} note 139.

\textsuperscript{216} Yugoslav PIL Act, \textit{supra} note 212, arts. 13(I)-(III); Sarcevic, \textit{supra} note 212, at 288.

\textsuperscript{217} Dickson, \textit{The Reform of Private International Law in the Federal Republic of Germany}, 34 Int'l \\& Comp. L.Q. 231, 241-242 (1985). Dickson notes that West Germany's German speaking neighbors have made much progress in codifying private international law and that Germany is on the point of enacting the draft statute since Germany is dissatisfied with its present law. \textit{Id.} at 231. Dickson gives three reasons for the dissatisfaction with the present law. First, the law is in an "extremely untidy state" because the rules of private international law are not brought together in the Civil Code. \textit{Id.} Second, the present law is incompatible with the Federal Republic's Constitution. \textit{Id.} at 232. Third, the increasing importance of private international law in a nation attracting more foreigners to its soil provides the impetus for a change. \textit{Id.} at 234.
tial principles of German law."^{218} German public policy includes, at the minimum, the basic principles set forth in the German Constitution.^{219} Regarding choice of law analysis in tort, the draft simply repeats the current German principle that "claims arising out of a tort committed abroad cannot be brought against a German national to a greater extent than is allowed for by the German law."^{220}

The German Democratic Republic conflict of law statute requires that in tort cases the law of the place of the injury governs the issues of liability and damages.^{221} If the plaintiff and defendant are nationals or residents of the same state, then the law of that state applies.^{222} Thus, the traditional lex loci delicti rule need not be applied.

The Austrian Code of 1978 incorporates a "strongest connection" approach into its conflict of laws analysis.^{223} In tort actions the Austrian code provides that if the parties have a stronger connection to the law of a foreign state, then that law should be applied rather than the lex loci.^{224} The stronger connection may be common nationality or residency.^{225} This approach is similar to the "most significant relationship" test.^{226}

Switzerland also has a draft on a private international law.^{227} The Swiss draft, like the Austrian code, is similar

\(^{218}\) Id. at 241-42 (quoting article 6 of the draft law).

\(^{219}\) Id. at 242.

\(^{220}\) Id. at 236 n.27 (translation of article 38 of the draft law and article 12 of the current law, the Introductory Law to the Civil Code, Bürgerliches Gesetzbuch [BGB] art. 12 (1896)).


\(^{222}\) Hanotiau, supra note 181, at 90.

\(^{223}\) McDougal, supra note 201, at 119.


\(^{226}\) See supra notes 146-154 and accompanying text.

\(^{227}\) Sarcevic, supra note 212, at 283. The Swiss draft is published in Botschaft zum Bundesgetz über das internationale Privatrecht Vol. 10, Nov. 1982, Bundesblatt [BBL], 82.072. Sarcevic, supra note 212, at 283 n.4.
to the Restatement's approach. The draft's policy is to have the law of the state of the "social environment" of the parties govern the tortious act. Generally the law of the parties' common residence applies. If the parties do not have the same residence, then the lex loci delecti rule applies. Furthermore, the parties may choose post factum the law governing the liability issue.

European nations are not alone in reforming and codifying their conflict of laws rules into a single statute. Latin American nations have also begun to do so. Argentina has written a draft, although not yet effective, which aids the foreign attorney by organizing and following the current law that is otherwise difficult to find. The draft code does not use the interest analysis approach, but reaches a similar result by using a public policy approach. Specifically, the Argentine court will not apply foreign law if a foreign judge applying that law would resolve the case in violation of Argentine law principles.

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228 Hanotiau, supra note 181, at 91. For a further discussion of the Swiss draft, see McCaffrey, The Swiss Draft Conflicts Law, 28 AM. J. COMP. L. 235 (1980).
230 Id. Hanotiau, supra note 181, at 91.
250 Id.
231 Id. The locus delectus is the state where the tortfeasor acted or the state where plaintiff's harm was caused. If the plaintiff's residence is in the former, courts will apply that law. The law of the state where the defendant has acted will not be applied, however, if the tortfeasor proves that he could not foresee that harm would be caused in the state of injury. Id.
232 Id.
233 Dahl, Argentina: Draft Code of Private International Law, Introductory Note & Translation, 24 I.L.M. 269, 270 (1985) [hereinafter cited as Argentine Draft]. This article also contains an English translation of the draft code. Id. at 272-91.
234 Id. at 272.
235 Art. 6 of Argentine Draft, supra note 233, at 273, states:

Foreign law which is declared applicable shall not be applied if a judge of that country would probably treat the case in violation of principles governing its resolution under Argentine law; however, a difference in the structural elaboration of identical principles of foreign and in Argentine law does not preclude application of foreign law.

If, in a case where foreign legal principles are incompatible with those of Argentina, the foreign law declared applicable offers an alternative solution based on acceptable principles, that solution shall be applied. Absent such alternative solution, the judge shall apply Argentine law.
Peru, another Latin American nation, has a civil code, effective in 1984, that includes conflict of laws rules. In tort actions the law of the state where "the main activity which gave rise to the damages took place" applies. The statute indicates that public policy exceptions to this rule are to be construed narrowly. In fact, foreign law should be rejected only when it would produce outcomes incompatible with international public policy and good customs (*buenas costumbres*).

The preceding survey of choice of law approaches illustrates the diverse analyses available for a court's use. The chosen approach may greatly affect the amount of damages the plaintiff can recover. This effect can be demonstrated best by considering the following example. Passenger A, a Hungarian citizen, B, an American citizen, and C, an American citizen from California, sustain total, permanent disability caused by an airplane accident in Honduras. The place of departure and arrival are located within Guatemala, so the Warsaw system does not apply. The defendant carrier is a Hungarian corporation which conducts a substantial amount of business in the United States.

Passenger A brings her tort claim in Hungary. The Hungarian court uses the choice of law analysis prescribed in the Hungarian Decree on Private International Law. Thus, the law of the plaintiff's and defendant's common domicile, Hungary, controls the amount of damages to be awarded. Passenger B sues in a state which uses the *lex loci delecti* rule. Honduras is the situs of the accident, and the law of Honduras limiting recovery to 25,000

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237 Art. 2097, Peruvian Code, supra note 236, at 1011.

238 Art. 2097, Peruvian Code, supra note 236, at 1000.

239 Art. 2049, Peruvian Code, supra note 236, at 1002.

240 See supra note 208 and accompanying text.
lempiras (US $12,500) applies.241 Passenger C brings suit in California which follows the comparative impairment approach. The court will consider the contacts of both the defendant and the plaintiff. As in Hernandez,242 California has an interest in providing full compensation to its resident, Passenger C.243 Similarly, Hungary may have an interest in protecting its airlines from high liability limits, and Guatemala and Honduras may have an interest in regulating conduct within their borders.244 In the final balance, however, the court following Hernandez would most likely conclude that California law with its unlimited recovery should apply.245 Thus, three passengers on the same flight sustaining equal injuries could receive three different damage awards. This result depended almost solely upon the forum chosen and that forum's choice of law analysis.246

241 See supra note 94 and accompanying text.
242 See supra notes 167-178 and accompanying text.
243 See supra note 178 and accompanying text.
244 See supra notes 174 & 176 and accompanying text.
245 See supra notes 177-178 and accompanying text.
246 This hypothetical assumed that the courts had no difficulties in determining and applying the foreign law. This assumption is not always valid. First, a judge usually does not know foreign law as well as he knows the law of his jurisdiction. Zajtay, Problemas Fundamentales Derivados de la Aplicación del Derecho Extranjero, Boletín Mexicano de Derecho Comparado 371, 375 (1978). A judge who feels less secure with issues relating to foreign law may tend to avoid applying foreign law, applying instead the law of his jurisdiction each time the opportunity arises. Id.

A second problem concerns what the court should do if, despite the efforts of the parties and the court, the foreign law cannot be determined. Id. at 377. One solution is to apply another foreign law considered to be very similar to the law which should have been applied. This approach, however, risks reaching an arbitrary result. Id. Another solution is for the judge to investigate the historical, cultural, social, and economic facts of the nation in question in order to form an "approximate opinion of the applicable foreign norm." Id. at 378.

A third problem may be termed the "inequality" of the applicable law. See Graveson, The Inequality of the Applicable Law, 51 Brit. Y.B. Int'l L. 231 (1980). Legal systems may be at different stages of development. Id. at 242. Even within a single nation, different levels of development may exist. For example, western Nigeria has a sophisticated European legal system, while northern Nigeria has a much less developed system based on Islamic law. Id. at 241.
III. ALTERNATIVES FOR THE FUTURE AND CONCLUSION

As discussed, choice of law analysis can lead to widely divergent damage awards. Even among similarly situated passengers, the damage awards can be strikingly disparate. The Warsaw system has tried to create some degree of uniformity, yet, as illustrated, uniformity is frequently not obtained. Legal commentators have suggested various alternatives to be used both in the Warsaw system and in general choice of law analysis in aviation cases.

Delegates of fifty-five nations met in 1971 in Guatemala City to amend the Warsaw Convention and the Hague Protocol. They created one of the first alternatives, the Guatemala Protocol ("Protocol"). The Protocol's most significant change was to raise the liability limit to 1,500,000 francs for passengers (approximately US $100,000). This limit is unbreakable, even though the carrier has acted with dol, meaning "wilful misconduct." In addition, the Guatemala Protocol establishes absolute liability for the carrier, making litigation much easier for the plaintiff-passenger and leaving only the defense of contributory negligence. The Protocol drafters also included a settlement inducement provision. According to the Protocol, the plaintiff receives court costs and attorneys fees if the plaintiff gives written notice.
to the carrier of the amount claimed, and the carrier does not make a settlement offer equal to the actual amount awarded within six months.\textsuperscript{251} By ratifying or acceding to the Guatemala Protocol a state becomes a party to both the Warsaw Convention and the Hague Protocol if it has not already done so.\textsuperscript{252}

The Guatemala Protocol has not entered into force because it has not obtained the required number of ratifications.\textsuperscript{253} If it were to become effective, the Protocol would add yet another liability limit, complicating further the goal of attaining uniform liability. Unless all of the nations who have signed any of the agreements under the Warsaw system also sign the Guatemala Protocol, the different liability limits will still exist. Some nations might be parties to the Warsaw Convention with its $8,300 limit, while others may be parties to the Warsaw Convention as amended by the Hague Protocol with its $16,600 limit. Still others may be parties to the Warsaw Convention as amended by the Hague Protocol as amended by the Guatemala Protocol with its $100,000 limit. By creating another liability limit, the goal of uniformity would become more illusory.

After the conference in Guatemala, delegates met in Montreal in 1975 and adopted four agreements known as the Montreal Protocols.\textsuperscript{254} Protocol No. 1\textsuperscript{255} replaced the

\textsuperscript{251} Guatemala Protocol, supra note 247, art. VIII(3); Landry, supra note 250, at 732.
\textsuperscript{252} Guatemala Protocol, supra note 247, arts. XIX, XXI.
\textsuperscript{253} Article XX of the Guatemala Protocol, supra note 247, provides:

\textsuperscript{254} K.A.L. Incident, supra note 248, at 100.
\textsuperscript{255} Additional Protocol No. 1 to Amend the Convention for the Unification of
Poincaré gold franc in the Warsaw Convention with the Special Drawing Right ("SDR")\textsuperscript{256} of the International Monetary Fund ("IMF").\textsuperscript{257} Protocol No. 2\textsuperscript{258} amended the Hague Protocol to include the SDR.\textsuperscript{259} Similarly, Protocol No. 3\textsuperscript{260} included the SDR in the Guatemala Protocol.\textsuperscript{261} Protocol No. 3 also changed provisions of the Guatemala Protocol so that ratification was not dependent upon United States acceptance.\textsuperscript{262} Finally, Protocol No. 4\textsuperscript{263} dealt with the cargo provisions under the Warsaw system.\textsuperscript{264}

The Protocols would also destroy uniformity of liability limits among passengers in the Warsaw system if less than all nations in the Warsaw system adopted the Protocols or if some nations were not members of the IMF. For instance, if a nation is not a member of the IMF, the value of its national currency based on SDR's is calculated in a manner which the nation chooses.\textsuperscript{265} Thus, variations of calculations could exist.\textsuperscript{266} If a nation were not a member of the IMF and the nation's law did not permit using SDR's, then the nation may declare the liability limit at a

\textsuperscript{256} FitzGerald, supra note 253, at 72. Special Drawing Right is defined as "the average value of a defined basket of IMF member currencies." Trans World Airlines, Inc. v. Franklin Mint Corp., 104 S. Ct. 1776, 1781 (1984).

\textsuperscript{257} FitzGerald, supra note 253, at 72.


\textsuperscript{259} FitzGerald, supra note 253, at 72.


\textsuperscript{261} FitzGerald, supra note 253, at 72.

\textsuperscript{262} Id. at 72. See supra note 253.


\textsuperscript{264} FitzGerald, supra note 253, at 73.

\textsuperscript{265} G. MILLER, supra note 40, at 182.

\textsuperscript{266} Id. at 183.
certain quantity of "monetary units." Thus, the actual value of the limit could change as the conversion rate of monetary units to national currency fluctuated.

One writer has suggested another alternative: abandon the liability limitations and article 25 of the Warsaw Convention dealing with wilful misconduct, retain only the administrative framework of the Convention, and impose strict liability upon the carriers. Many nations impose strict liability without limitation upon carriers when the carriers are liable to third parties other than passengers. So, it is argued, no reason exists not to impose strict liability when carriers are liable to passengers. By removing the liability limits of airlines, passengers are no longer encouraged to sue the manufacturers and others in order to receive full compensation. Furthermore, today's carriers should be able to purchase insurance covering unlimited liability without having to pay uneconomic premiums.

This alternative could help avoid choice of law problems because courts would no longer need to choose among various liability limits. By abolishing liability limits, the lack of uniformity among the current limits would also be abolished. Thus, ideally, passengers would be fully compensated regardless of whether the airline had signed the Montreal Agreement or whether a nation had signed the Hague Protocol. In reality, however, such a solution would cause the widespread participation in the

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267 Id. The monetary units are defined in the same way as the Poincaré francs—65.5 milligrams of gold of millesimal fineness nine hundred. Id.
268 See id. Incidentally, the United States Senate considered Montreal Protocols Nos. 3 and 4 in March, 1983. KAL Incident, supra note 248, at 101. The Protocols did not rally the required two-thirds majority; therefore, the Senate rejected the Protocols. Id. at 117.
269 Martin, supra note 14, at 248-50.
270 Id. at 248. Martin asks, "Why should a passenger, therefore, be in a worse position than a person or owners of property on the ground?" Id. One may respond that by boarding the airplane the passenger assumed the risk of flying.
271 See id. at 249.
272 Id. at 247. Martin notes that United States carriers can buy all the insurance coverage needed. Id. at 247-48.
273 Id. at 248.
Warsaw system to dissolve and raise questions as to the Convention's continued viability. The argument given in the late 1920's in favor of the Warsaw Convention was that the infant airline industry needed the protection of limited liability. This agreement may still be valid in developing nations, although it no longer applies to developed countries like the United States, England, etc. Thus, many developing nations probably would not agree to unlimited liability.\textsuperscript{274}

Another alternative is to require each state to compensate the damage to passengers caused by its own national carriers. The state would become unlimitedly and absolutely liable for damage caused by public airline operators.\textsuperscript{275} Obviously, this alternative seems inconsistent with Western notions of private enterprise.\textsuperscript{276} In spite of this, the practical consequences of such an alternative should be considered. For example, if the value of international air transportation is greater than the possible damages caused by such activity, as is the case in scheduled international transportation, then such activity should be promoted and protected to the fullest extent.\textsuperscript{277} Also, a carrier would more willingly disclose facts regarding an accident, and by doing so positively affect air safety, if the carrier is not compensating the victims.\textsuperscript{278} In order to discourage wilful misconduct by the carriers, the state could impose criminal sanctions.\textsuperscript{279}

\textsuperscript{274} See supra notes 152 & 174 and accompanying text. Even in European nations, maintaining full compensation may be less important than providing special treatment of airlines. Many nations treat airlines as instruments of national policy for which protectionism is the rule, not the exception. Note, Aviation: Liability Limitations for Wrongful Death or Personal Injury — A Contemporary Analysis of the Warsaw System, 10 Brooklyn J. Int'l L. 381, 398 n.125 (1984).

\textsuperscript{275} Wassenbergh, Reality and Value in Air and Space Law, 3 Annals Air & Space L. 323, 327 (1978).

\textsuperscript{276} Id.

\textsuperscript{277} Id. at 328.

\textsuperscript{278} See id. Wassenbergh comments that under the present system, operators are hesitant to disclose the facts in accident cases out of fear of being held liable. Id.

\textsuperscript{279} Id. Wassenbergh's basic thesis may be summarized as follows: "Nobody should be obliged to pay for his fallibility. Nobody can be deterred from his falli-
This alternative clearly provides uniformity among damage awards in international transportation. All passengers would be fully compensated by the carrier's government. New Zealand has developed a somewhat similar system. In New Zealand injured workers and victims of automobile accidents have the right to receive no-fault compensation for their personal injuries or death. Similar to the other alternatives discussed, the chances of the Warsaw system adopting such a system appears slim. The notion of the government paying compensation for the torts of its citizens contradicts the principles of private enterprise and laissez-faire capitalism. In addition, the government would have the burden of raising funds to compensate the victims.

Another alternative is to change the choice of law analysis used by the courts. Professor Willis L. M. Reese, reporter of the Restatement (Second) of Conflict of Laws, has suggested a new choice of law formula to be used in commercial aviation cases. In developing this formula, Reese considered six principles. First, the formula should contain choice of law rules which would be easy to apply. Second, the choice of law formula should prefer the plaintiff over the defendant. This principle is consistent with the basic policy behind most tort law, that is, compensate the plaintiff and spread the risk of loss.

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280 For a fuller discussion and critique of the New Zealand system, see Henderson, The New Zealand Accident Compensation Reform, in Perspectives on Tort Law 316 (R. Rabin 2d ed. 1983).
281 Id.
283 Id. at 1304. Reese comments that the vague criteria currently used, such as most significant relationship, comparative impairment, or governmental interests are difficult to apply and afford little predictability of result. In fact, Reese notes, "it seems almost certain that by and large, the judges first decided upon the result they wished to reach and only then thought of a rationale that would more or less support their conclusions." Id.
284 Id. at 1305.
through liability insurance. Third, the passenger's domicile should play no role in the choice of law analysis in determining the passenger's rights. If domicile were a factor, different treatment would be given to similarly situated persons. Fourth, the place where the passenger acquired his ticket should have no weight in choosing the applicable law. If the place of acquisition were a factor, different treatment of similar passengers could result simply because passengers bought their tickets in different places. Fifth, the choice of applicable law should depend on the particular issue in question. Sixth, the plaintiff should have limited power in choosing the applicable law. In this way, the court no longer has the burden of deciding which law is more favorable to the plaintiff.

Reese created various formulas from which the applicable law is to be chosen in cases of commercial flight accidents which occur any place in the world. For example, when the passenger sues the carrier on the issue of damages, the choice of law formulations can comprise two categories. First, when injury results from failure to repair or inspect the plane, the passenger can choose the law of (1) the place of the carrier's maintenance, repair, or inspection; (2) the place of the carrier's principal place of business; (3) the place of the passenger's actual departure; or (4) the place of the passenger's intended arri-

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285 Id.
286 Id. at 1306.
287 Id. Reese thinks it "unseemly" for a passenger to recover more or less than others on the same plane because of the law of his domicile. Id. at 1306-07.
288 Id. at 1308.
289 Id.
290 Id.
291 Id. at 1308-09. This is consistent with the principle of favoring the plaintiff. Id. at 1309.
292 Id. at 1309. One result of this principle is uniformity among passengers' choices since usually one law will be most favorable to all passengers on the particular issue. Id.
293 See id. at 1310-22.
294 See id. at 1316-17.
Second, when injury results from navigational error, the plaintiff should have the choice of (1) the law of the place of the carrier's principal place of business; (2) the place of the passenger's departure; (3) the place of the passenger's intended arrival; or (4) the place where the error occurred.

Reese's choice of law formulation should greatly advance the goal of uniformity in aviation cases. Consider two similarly situated passengers, Passenger X from Mexico and Passenger Y from the Soviet Union, both departing from the United States and both sustaining similar injuries in a crash in Indonesia. Both bring suit in the United States. Although Mexican law and Soviet law provide different liability limits, the courts would not consider the law of the domicile. Even if passengers X and Y sue in different courts, assuming that both courts use Reese's formula, the damages awarded should be approximately the same. If the law of the place of departure provided the highest damage award, then naturally both passengers X and Y would choose this law.

Reese's formula would provide uniformity of decision only if all countries adopt his analysis. In view of the wide variety of current choice of law analysis and proposals for reform, it seems unlikely that all nations of the world would adopt the same analysis. Another alternative,

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295 Id.
296 Id. Reese draws a distinction between the elements of damages and the calculation of damages. Id. The first category includes such questions as whether pain and suffering or loss of consortium can be recovered. This category also includes the items for which damages can be recovered by the beneficiaries in an action for injuries resulting in death and the extent to which recovery will be reduced by other collateral source payments. The second category, calculation of damages, includes questions of whether the judge or the jury calculates the amounts and the extent of the judge's power to overturn the jury's decision. Id. at 1313. Issues in the first category are determined by the choice of law analysis formula discussed in the text. The law of the forum controls issues in the second category. Id. at 1317.
297 See supra notes 77-83 & 106 and accompanying text.
298 Among the states of the United States, however, this could be achieved. All states once followed the traditional lex loci rule. Such conformity in analysis could be achieved in the future.
however, provides a solution to this problem.

The most idealistic alternative is to create a World Court with jurisdiction to resolve claims arising out of international aviation disasters. In this court the procedural and substantive laws must be uniform and just. The creation of other international courts demonstrates that such a court is possible. This World Court could hear any claim growing out of both international air crash accidents and transnational accidents in which plaintiffs and defendants are from different nations. This alternative would eliminate the lack of uniformity of decisions under the Warsaw system by replacing the Warsaw system. In addition, national courts would no longer have to apply their own choice of law analyses in choosing the applicable liability limits for cases that do not fall under the Warsaw system. Thus, creation of a World Court would eliminate disparity of damage awards among similarly situated passengers in non-Warsaw system cases.

The framers of such a World Court would have to hurdle jurisdiction obstacles. One solution would be to extend the jurisdiction of the International Court of Justice at The Hague to include international aircrash litiga-

299 See Kennelly, Litigation of Foreign Aircraft Accidents — Advantages (Pro and Con) From Suits in Foreign Countries, 16 FORUM 488, 518 (1981).

300 Id. at 519.

301 The International Court of Justice was created by the United Nations Charter in 1945. SWEENEY, supra note 47, at 57. The court handles disputes between nations. For a list of the seventy cases filed with the court as of July, 1984, see 1983-84 I.C.J.Y.B. 3-6 (1984). Other international courts include the Court of Justice of the European Community, before which states and private parties can come, the European Court of Human Rights, and the Inter-American Court of Human Rights. SWEENEY, supra note 47, at 70-71.

302 Kennelly, supra note 299, at 518.

303 The Warsaw system need not be destroyed, however. Professor Matte of McGill University suggests creating an International Court of Appeal or extending jurisdiction to the International Court of Justice at The Hague to decide Warsaw Convention cases. The differences in damage awards could be harmonized by creating "a system of automatic and global compensation." For example, by compiling an international index of the cost of living, an annual table of automatic compensations for certain categories of claims could be formulated. Matte, International Air Transport, 12 INT'L ENCYCLOPEDIA COMP. L., ch. 6, 76-77 (1982).
In order for the Court to have jurisdiction, however, the nations must consent to such jurisdiction, because the jurisdiction of the International Court of Justice is based upon the consent of the various nations. Nations may consent to the court's jurisdiction in three ways: special agreement, provisions in treaties and conventions, and acceptance of compulsory jurisdiction in international legal disputes. Even if the nations gave their consent to jurisdiction, individual citizens did not, so further steps would have to be taken to insure that individuals brought their claims to the International Court of Justice rather than to the domestic courts.

Creation of an International Court of Appeal to handle international aircraft cases provides another solution to the jurisdiction problem. By allowing individuals to bring appeals from the domestic courts, the International Court of Appeal could formulate uniform rules of private air law. Nevertheless, the framers of such a judicial system would have to take certain measures to ensure that the International Court of Appeal would have exclusive and mandatory jurisdiction to hear such cases.

In conclusion, under the present law, similarly situated passengers suffering identical injuries on the same flight can recover vastly different damage amounts. Depending upon the tickets in their pockets and the skill of their attorney in arguing the applicability or non-applicability of the Warsaw Convention, some passengers may come within the Warsaw system. Among those passengers covered by the Warsaw system, no uniformity of recovery exists. Some passengers may recover only $8,300 under the Warsaw Convention while others may pocket $75,000 under the Montreal Agreement. This result clearly con-

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304 Id. at 76.
306 Id. at 45-46.
307 Matte, supra note 303, at 76.
308 Id.
transcends the Warsaw Convention’s goal of uniform liability rules governing international aviation.

For those passengers on the same flight who do not fall within the Warsaw system, the amounts recoverable vary even more. One passenger may receive full compensation in the millions of dollars under United States law while another may receive only 200,000 pesetas (approximately US $1,351.80)\footnote{This calculation is based on a market exchange rate of 147.95 pesetas to one United States dollar. See Dallas Morning News, Feb. 14, 1986, at 5D, col. 2.} under Spanish law.\footnote{See supra text accompanying note 116.} Choice of law analysis and the attorney’s skill in presenting the choice of law analysis favorable to his client play a crucial role in determining whether the law of the nation with unlimited liability or the law of the nation with the 200,000 peseta limit will be applied. Currently, choice of law analysis provides no uniformity among damage awards to similarly situated passengers. The creation of a World Court could provide the uniformity of decision currently lacking in claims arising out of commercial aviation accidents. Until a World Court is established to handle such claims and to provide some measure of uniformity, attorneys acting in their client’s best interest should closely scrutinize the court’s choice of law rules.
APPENDIX A
WARSAW CONVENTION PARTIES

Afghanistan  
Algeria  
Argentina  
Australia, including    
Norfolk Island  
Austria  
Bahamas, The  
Barbados  
Belgium  
Benin  
Botswana  
Brazil  
Bulgaria  
Burma  
Cameroon  
Canada  
China, People’s Republic  
Colombia  
Congo (Brazzaville)  
Cuba  
Cyprus  
Czechoslovakia  
Denmark, not including    
Greenland  
Dominican Republic  
Ecuador  
Egypt  
Ethiopia  
Fiji  
Finland  
France, including French    
colonies  
Gabon  
Gambia, The  
German Democratic    
Republic  
German Federal Republic  
Ghana  
Greece  
Grenada  
Guinea  
Guyana  
Hungary  
Iceland  
India  
Indonesia  
Iran  
Iraq  
Ireland  
Israel  
Italy  
Ivory Coast  
Jamaica  
Japan  
Kenya  
Korea People’s Democratic Republic  
Laos  
Latvia  
Lebanon  
Lesotho  
Liberia  
Libya  
Liechtenstein  
Luxembourg  
Madagascar  
Malaysia  
Mali  
Malta  
Mauritania  
Mauritius  
Mexico
Mongolia
Morocco
Nauru
Nepal
Netherlands, including Curacao
New Zealand
Niger
Nigeria
Norway
Pakistan
Papua New Guinea
Paraguay
Philippines
Poland, including Free City of Danzig
Portugal
Romania
Rwanda
Saudi Arabia
Senegal
Sierra Leone
Singapore
Somalia
South Africa, including Southwest Africa
Spain, including colonies
Sri Lanka
Sudan
Surinam
Swaziland
Sweden
Switzerland
Syrian Arab Republic
Tanzania
Tonga
Trinidad and Tobago
Tunisia
Uganda
Union of Soviet Socialist Republics
United Kingdom
United States
Upper Volta
Venezuela
Viet-Nam
Western Samoa
Yemen (Aden)
Yugoslavia
Zaire
Zambia

Taken from 3 Av. L. Rep. (CCH) 24-059-2 to -3
APPENDIX B
HAGUE PROTOCOL PARTIES

SIGNATORIES:

Algeria  Portugal
Australia  Rumania
Barbados  Sweden
Belgium  Switzerland
Brazil  Syran Arab Republic
Byelorussian Soviet Socialist Republic  Ukrainian Soviet Socialist Republics
Canada  Union of Soviet Socialist Republics
Czechoslovakia  United Arab Republic
Denmark  United Kingdom
El Salvador  United States
Finland  France
France  Venezuela
German Democratic Republic  Western Samoa
German Federal Republic  Yugoslavia
Greece  Adherences:
Hungary  Afghanistan
Iceland  Argentina
Ireland  Austria
Israel  Bahamas
Italy  Bangladesh
Japan  Bulgaria
Laos  Cameroon
Liechtenstein  Chile
Luxembourg  Congo (Brazzaville)
Mali  People's Republic
Mexico  Cuba
Morocco  Cyprus
Netherlands  Dahomey (now Benin)
New Zealand  Dominican Republic
Norway  Ecuador
Pakistan  Egypt
Philippines  Fiji
Poland  Gabon
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Taken from 3 Av. L. Rep. 24,065-2.
APPENDIX C
MONTREAL AGREEMENT PARTIES

UNITED STATES CARRIERS:

Air East
Air North, Inc.
Air South, Inc.
Air West, Inc.
Airlift International, Inc.
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Airlift International, Inc.
American Flyers Airline Corp.
Braniff Airways, Inc.
Cape & Islands Flight Service, Inc.
Capitol International Airways, Inc.
Caribbean-Atlantic Airlines, Inc. (Caribair)
Commuter Airlines, Inc. (Binghamton, N.Y.)
Continental Air Lines, Inc.
Crown Airways, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Executive Airlines, Inc.
Fischer Bros. Aviation, Inc.
Flying Tiger Line, Inc.
Frontier Airlines, Inc.
Georgia Air, Inc.
Hawaiian Airlines, Inc.
Henson Aviation, Inc.
Interstate Airmotive, Inc.
Mackey International, Inc.
Modern Air Transport, Inc.
Mohawk Airlines, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northeast Airlines, Inc.
Northwest Airlines, Inc.
Overseas National Airways, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Pennsylvania Commuter Airlines
Piedmont Aviation, Inc.
Pocono Airlines, Inc.
Purdue Aeronautics Corp.
Reading Aviation Service, Inc.
Saturn Airways, Inc.
Seaboard World Airlines, Inc.
Shawnee Airlines, Inc.
Southern Airways, Inc.
Standard Airways, Inc.
Texas International Airlines, Inc.
Trans Caribbean Airways, Inc.
Trans International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Universal Airlines, Inc.
Vercoa Air Service, Inc.
Western Air Lines, Inc.
Wien Consolidated Airlines, British United Airways Inc.
World Airways, Inc.

FOREIGN CARRIERS:

Aer Lingus Teoranta (Irish International Airlines)
Aerlinte Eireann Teoranta (Irish International Airlines)
Aerolineas Argentinas
Aerolineas Peruanas, S.A.
Aeronaves de Mexico, S.A.
Aerovia Nacionales de Colombia (AVIANCA)
Air Afrique
Air Canada
Air France
Air India
Air Jamaica (1968) Ltd.
Air New Zealand Ltd.
Air Panama Internacional, S.A.
ALIA - The Royal Jordanian Airlines
Alitalia-Linee Aeree Italiane - S.p.A.
All Nippon Airways Company, Ltd.
ALM Dutch Antillean Airlines
Area Ecuador Airlines
Austrian Airlines
Bahamas Airways Ltd.
British European Airways Corp.
British Overseas Airways Corp. (BOAC)
British West Indian Airways Ltd. (BWIA)
Canadian Pacific Air Lines, Ltd.
Cathay Pacific Airways, Ltd.
China Airlines
Compania Mexicana de Aviacion, S.A.
Cyprus Airways Ltd.
Czechoslovak Airlines
El Al Israel Airlines, Ltd. (El Al)
Empresa Guatemalteca de Aviacion
Ethiopian Air Lines, Inc.
Finnair (Aero O/Y)
Flightexec Ltd.
Flugfelag Islands, H. F. (Icelandair)
Fowler Aircraft Rentals Ltd.
Great Lakes Airlines Ltd.
Great Northern Airways Ltd.
Harrison Airways, Ltd.
Iberia Air Lines of Spain
Icelandic Airlines, Inc. (Loftleidir)
Iraqi Airways
Japan Air Lines
Jugoslovenski Aerotransport (JAT)
KAR-AIR o y
KLM Royal Dutch Airlines
Korean Air Lines, Inc.
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<td>Lebanese International Airways</td>
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<td>Seagreen Air Transport</td>
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<td>Luftverkehrsunternehmen ATLANTIS AG</td>
<td>Sudflug, Suddeutsche Fluggesellschaft mbH</td>
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<td>Olympic Airways, S.A.</td>
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<td>Pacific Western Airlines, Ltd.</td>
<td>Varg Airlines (S.A. Empresa de Viaacao Aerea Rio Grandense)</td>
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<td>Pakistan International Airlines (PIA)</td>
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<td>Philippine Air Lines</td>
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<td>Polynesian Airlines, Ltd.</td>
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<td>Qantas Airways Ltd.</td>
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Taken from 3 Av. L. Rep. 24,065-3-5.