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Jennifer McKay

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**THE REFINEMENT OF THE WARSAW SYSTEM: WHY THE 1999
MONTREAL CONVENTION REPRESENTS THE BEST HOPE FOR
UNIFORMITY**

*Jennifer McKay**

INTRODUCTION

The airline liability regime known as the “Warsaw System” has governed international air travel since the early days of the industry. The Warsaw System includes the original Warsaw Convention of 1929, along with several other protocols and agreements amending it. Over 135 countries currently adhere to the Warsaw Convention or one of its revised forms.¹ One of the primary goals of the Warsaw Convention is to create uniformity in the rules governing international carriage by air.² However, mounting evidence demonstrates that the scheme set out by the Warsaw Convention has been largely unsuccessful in meeting this goal. It remains unclear whether true uniformity is actually realistic with so many countries involved. Resolving the inconsistencies between the many agreements in the Warsaw System will create a greater degree of uniformity in the application of the rules governing international air transport. This Note argues that signatories to the Convention should adopt the 1999 Montreal Convention, the most recent attempt at unifying all previous Warsaw treaties and agreements.

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¹ Multilateral Convention for International Carriage by Air, May 28, 1999, S. TREATY DOC. NO. 106-45, at 15-16 (hereinafter “Montreal Convention”)(letter of submittal by Sen. Strobe Talbott).

² See LAWRENCE B. GOLDHIRSCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 5 (1988); see also Bernard Wood, *Yet Another Look at the Warsaw Convention*, in *AIR AND SPACE LAW* 149 (Tanja L. Masson-Zwaan et al. eds., 1992), Naneen K. Baden, Comment, *The Japanese Initiative on the Warsaw Convention*, 61 *J. AIR. L. & COM.* 437, 438 (1996). But cf. Ian D. Midgley, Note, *You’ll Love the Way We Fly – But If You Don’t, Too Bad: Does Zicherman v. Korean Air Lines Offer Hope of Subjecting Reckless International Airlines to Punitive Damages?* 48 *CASE W. RES.* 73, 106-20 (1997) (Midgley argues that, contrary to the beliefs of most court and commentators, the drafters of the original Warsaw Convention did not actually intend to create substantive uniformity, thereby promoting the notion that punitive damages can and should be allowed under the Warsaw Convention.).

Section II of this Note reviews the history of the Warsaw System, pointing out how liability rules evolved through amended versions of the Warsaw Convention. Section III presents several inconsistencies within the Warsaw System, and the reasons for the lack of uniformity in the application of key provisions. Section IV identifies the consequences of disuniformity within the Convention. Finally, Section V evaluates the potential impact of the proposed revisions to the Convention and argues that the 1999 Montreal Convention, the newest set of rules, will ultimately foster the goal of uniformity.

I. HISTORY OF THE WARSAW SYSTEM

The Warsaw System is a “patchwork of liability regimes.”³ People commonly refer to “the Warsaw Convention” without realizing there are actually several amendments and agreements that make up this complex system of rules. Since the introduction of the original Convention in 1929, member countries and private airlines have made repeated attempts to revise various provisions, particularly with respect to liability. The result is a tangled network of at least ten different agreements and protocols. Some of these documents’ provisions overlap, while other provisions conflict with each other. Several countries belong to vastly different regimes within the system, causing unpredictability and many contradictions. Before exploring these inconsistencies, it is first necessary to become familiar with the key provisions of the main documents that comprise the Warsaw System.

A. *Formation and Contents of the Warsaw Convention of 1929*

The Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter “Warsaw Convention” or “Convention”) applies to all international air travel, as well as international transportation of goods.⁴ This multilateral treaty was introduced in October 1929 at an international aviation conference in Warsaw, Poland,⁵ and entered into force in 1933.⁶ The reason for the conference was the need to “foster the growth of the fledgling commercial aviation industry.”⁷

³ Montreal Convention, *supra* note 1, at 16.

⁴ 49 Stat. 3000, found at 49 U.S.C.S. § 40105 (United States Translation) [hereinafter “Warsaw Convention”]. See also GOLDHIRSH, *supra* note 2, at 199.

⁵ See GOLDHIRSCH, *supra* note 2, at 3. See also Randi Lynne Rubin, *The Warsaw Convention: Capping the Value of Life?*, 12 TEMP. INT’L & COMP. L.J. 189, 190 (1998).

⁶ See Midgley, *supra* note 2, at 78.

⁷ Baden, *supra* note 2, at 438 (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991)).

The delegates to the Warsaw Conference decided to protect the new international industry in two ways. First, the delegates created uniformity in the rules governing such issues as ticketing, transport of baggage and cargo, and some of the procedures surrounding passenger claims resulting from international flights.⁸ Second, the drafters capped the amount of air carriers' liability in accidents, while also limiting the defenses available to the airlines.⁹ The United States did not participate in either the negotiation or the drafting of the Convention but ratified the treaty in 1934.¹⁰

The Warsaw Convention contains 41 Articles. Certain Articles have figured more prominently than others in cases brought under the Convention. The Articles that have generated the most controversy and discussion deserve special focus.

1. Article 1: International Transportation

Article 1 defines "international transportation" to mean any flight in which both the point of departure and the destination are either within two High Contracting Parties to the Convention, or within one High Contracting Party if there is an "agreed stopping place" within another country (whether or not a Party to the Convention).¹¹ Air travel between a High Contracting Party and a country that is not a High Contracting Party is not "international" for purposes of the Convention. In addition, a flight from a High Contracting Party to one of its territories or possessions is not considered international, even when the route takes the airplane over another country or the high seas. For example, a flight from New York to

⁸ See Federico Ortino and Gideon R.E. Jurgens, *The IATA Agreements and the European Regulation: The Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air Transportation*, 64 J. AIR L. & COM. 377, 381 (1999). See also GOLDHIRSCH, *supra* note 2, at 5 ("The Convention seeks to . . . unify laws in treaty countries and establish uniformity of documents. . .").

⁹ Rubin, *supra* note 5, at 193. See also GOLDHIRSCH, *supra* note 2, at 5 ("The Convention seeks to limit international air carriers' potential liability in case of accidents [and] facilitate recovery by passengers . . . by creating a presumption of liability for accidents and limit[ing] passengers' recovery for injuries caused by such accidents during transportation covered by the Convention.").

¹⁰ Howard Sokol, Comment, *Final Boarding Call – The Warsaw Convention's Exclusivity and Preemption of State Law Claims in International Air Travel: El Al Israel Airlines, Ltd. v. Tseng*, 74 ST. JOHN'S L. REV. 227, 228 (Winter 2000). The U.S. declined to participate in the conference leading to the Warsaw Convention for three reasons: 1) It was a conflict of U.S. public policy to limit liability in cases of negligence; 2) The U.S. did not directly subsidize its airlines; and 3) Pan Am was the only U.S. air carrier which flew internationally, so the goals of the Convention were not as immediately necessary. Rubin, *supra* note 5, at 194-95.

¹¹ Warsaw Convention, *supra* note 4. "A High Contracting Party is a country that has ratified the Convention and not merely signed it . . ." GOLDHIRSH, *supra* note 2, at 10.

Puerto Rico, or from Paris to Guadeloupe would not be "international" and the Convention would not apply.¹²

Article 1 also provides that "carriage to be performed by several successive air carriers is deemed, for the purposes of [the] Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation . . ." ¹³ A flight will still be considered "international" if portions of the flight are solely within the same country.¹⁴ For example, if "Frank" flies from Country A to Country B (both High Contracting Parties), the Warsaw Convention covers his flight to Country B and his successive flight within that country. Therefore, if he flies from Country A into an airport at one city in Country B, and then boards another flight to continue on to his final destination at a different city in Country B, both flights are considered "international" for purposes of the Convention.

This distinction becomes particularly important with regard to the latter flight. If "Joe" boards the flight between two cities within Country B, a purely "intra-national" journey, he would be considered a domestic passenger. This means that if Joe is on the same flight within Country B as Frank, the flight would be "international" for Frank, while simultaneously "domestic" for Joe. The terms of the Warsaw Convention would govern a claim for damages by Frank for injuries sustained on that flight. Joe, on the other hand, would not be covered by the Convention for injuries arising out of the same flight. Instead, Joe would resort to local law. The possibility exists that Joe, as a domestic passenger unhindered by the liability caps in the Convention, could recover a great deal more in damages than Frank, the international passenger.

A domestic passenger also may have a greater variety of claims to pursue. The Warsaw Convention has often been interpreted as a bar to recovery of punitive damages¹⁵ and recovery for purely mental injuries.¹⁶ It is important to note that the United States Supreme Court, as well as courts of other nations, has held that the Warsaw Convention provides the exclusive remedy for injuries sustained on international flights, and that the

¹² See GOLDHIRSH, *supra* note 2, at 14-15.

¹³ Warsaw Convention, *supra* note 4.

¹⁴ See *id.*

¹⁵ See generally Midgley, *supra* note 2. See also *In re Air Crash at Little Rock, Ark.*, 118 F.Supp.2d 916, 921 (E.O. Ark. 2000). *In re Korean Air Lines Disaster of Sept. 1, 1984*, 932 F.2d 1475 (D.C. Cir. 1991).

¹⁶ See generally Max Chester, Comment, *The Aftermath of the Airplane Accident: Recovery of Damages for Psychological Injuries Accompanied by Physical Injuries Under the Warsaw Convention*, 84 MARQ. L. REV. 227 (Fall 2000). See also *In re Air Crash at Little Rock, Ark.*, 118 F.Supp.2d 916, 921 (E.O. Ark. 2000). *South Pacific Air Motive Pty. Ltd. v. Magnus*, 157 ALR 443 (Fed. Ct. Austl., 1998).

Convention pre-empts all other causes of action.¹⁷ If, in the above example, Country B's law allows claims for punitive damages and mental injuries, Joe (the domestic passenger) could receive far more than the \$8300 in compensatory damages to which Frank, as an international passenger, would be limited under the Convention.¹⁸

2. Articles 17, 18 and 19: Carrier's Liability

These three Articles are key in two respects: They define the liability of the carrier for both injury and delay.¹⁹ Article 17 states that the air carrier shall be liable for damage sustained in the event of death or bodily injury of a passenger, if the accident takes place on the airplane, or while boarding or disembarking.²⁰ Article 18 provides that the carrier is liable for checked baggage and goods that are damaged or lost while in the care of the airline.²¹ Article 19 holds the carrier liable for damages caused by the delay of passengers, baggage or cargo.²²

Although these provisions seem straightforward, many courts have struggled to interpret their meaning. The word "accident" in Article 17, for example, draws a lot of attention. The definition is crucial because "[i]f an incident occurs in international air transportation, it is not compensable unless it is an 'accident.'"²³ The United States Supreme Court defines "accident" as "an unexpected or unusual event or happening that is external to the passenger."²⁴ American courts have determined that the aggravation of a pre-existing medical condition does not fall under the definition of an

¹⁷ *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999) ("The treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty."). *Roberts v. Guyana Airways Corp.*, 41 O.R.3d 653 (Gen'l Div. Ontario Ct., 1998). *Sidhu v. British Airways PLC*, 1 All E.R. 193 (U.K. House of Lords, 1997), *Seagate Technology Int'l v. Chang Int'l Airport Services Pty. Ltd.*, [1997] 3 SLR 1 (Singapore Ct. of App. May 27, 1997).

¹⁸ *See, e.g., In re Air Crash at Little Rock*, 118 F.Supp.2d at 921 ("[T]here were both domestic and international passengers injured when flight 1420 crashed. Passengers covered by the Warsaw Convention are precluded from seeking punitive damages. Domestic passengers are free to assert such a claim. This is true even though the domestic and international passengers were all affected by the disaster." *Id.*). *See discussion supra* Section II(A)(4) and accompanying notes regarding liability limits.

¹⁹ Air carrier liability has been called "the heart of the Convention." I.H. PH. DIEDERIKS-VERSCHOOR, *AN INTRODUCTION TO AIR LAW* 66 (5th ed. 1993).

²⁰ Warsaw Convention, *supra* note 4.

²¹ *Id.*

²² *Id.*

²³ GOLDHIRSCH, *supra* note 2, at 60.

²⁴ *Air France v. Saks*, 470 U.S. 392, 405 (1985).

“accident” for purposes of claims under the Warsaw Convention.²⁵ One court held that a plane’s hard landing was not an “accident” because the landing was not an unexpected or unusual event, despite the fact that the landing resulted in injury to the plaintiff’s back.²⁶ Courts in the United States and France consider a terrorist attack an “accident,”²⁷ but one court in England concluded that a terrorist attack does not fall under this definition.²⁸

The accident must cause physical injury to be compensable; recovery for mental distress unaccompanied by a bodily injury caused by the accident is barred.²⁹ Punitive damages are also not permitted under the Warsaw Convention.³⁰ This is due to courts’ interpretation of the expression “damage sustained” (“*dommage survenu*” in the French text) in Article 17. This term is commonly held to cover compensatory damages only.³¹

3. Articles 20 and 21: Carrier’s Defenses

Articles 20 and 21 provide the carrier with defenses to liability claims. Article 20 allows a carrier to completely avoid liability if it proves it took “all necessary measures” to avoid the accident, or it was impossible to do so.³² “All necessary measures” is generally interpreted to mean measures “reasonably available to the carrier, and reasonably calculated to prevent the loss.”³³ Article 21 enables the carrier to reduce its liability based on the contributory negligence of the injured passenger.³⁴ The carrier has the burden of proof for both of these defenses.³⁵

²⁵ *Baden*, *supra* note 2, at 449-50 (citing *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3rd Cir. 1984), and *Walker v. Eastern Air Lines*, 785 F. Supp. 1168 (SDNY 1992)).

²⁶ *See* GOLDHIRSH, *supra* note 2, at 60 (citing *Salce v. Aerlingus*, 19 Avi. 17377 (Dist. Ct. N.Y. 1985)).

²⁷ *See* *Air France v. Saks*, 470 U.S. at 405, *Ayache v. Air France*, 38 Rev. franc. dr. aerien 450, 451 (T.G.I. Paris, 1st ch. 1984).

²⁸ *See* *Sidhu v. British Airways*, 1 All E.R. 193 (British House of Lords 1997).

²⁹ *See* *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991).

³⁰ *See supra* note 15.

³¹ *See, e.g., South Pacific Air Motive Pty. Ltd. v. Magnus*, 157 ALR 443, 447-449 (Fed. Ct. Austl., 1998).

³² Warsaw Convention, *supra* note 4.

³³ GOLDHIRSCH, *supra* note 2, at 87.

³⁴ Warsaw Convention, *supra* note 4.

³⁵ *See* GOLDHIRSH, *supra* note 2, at 89-92.

4. Article 22: Liability Limit

Article 22 is one of the most important and controversial in the Warsaw Convention. This section caps the air carrier's liability for passenger injury or death at 125,000 francs (approximately \$8300)³⁶ in actions falling under the Convention.³⁷ Many countries find this figure unacceptably low, particularly when domestic plaintiffs may recover millions of dollars in compensatory and punitive damages from the same accident in which an international passenger is limited to no more than \$8300.³⁸ One early example of the inequity caused by this limit is found in *Ross v. Pan American Airways*.³⁹ An American who was seriously injured in a 1943 crash in Portugal was limited to a recovery of only \$8300, despite enormous medical bills and grave injuries, because of the liability limits of the Warsaw Convention.⁴⁰

A clause in paragraph One of the Article provides a method by which carriers may agree to a higher limit, however.⁴¹ This provision is the basis for several later private agreements among carriers requiring higher liability limits, and even waiving them altogether in some cases. A carrier may not, however, contract for limits *lower* than those set out in Article 22.⁴²

5. Article 25: Willful Misconduct

Article 25 strips the carrier of the Warsaw Convention's defenses if the damage was caused by the carrier's "willful misconduct."⁴³ More importantly, a carrier shown to have caused an injury through willful misconduct is not entitled to the liability limits that would otherwise govern.⁴⁴ This provision is difficult for plaintiffs to use successfully, particularly in jurisdictions that define willful misconduct as an act done to intentionally cause harm, since, as one commentator points out, "[i]t could

³⁶ See Ortino and Jurgens, *supra* note 8, at 381.

³⁷ Warsaw Convention, *supra* note 4.

³⁸ See discussion *supra* pages 23-24 and accompanying notes regarding Japan, Italy and Fiji.

³⁹ 85 N.E.2d 880 (N.Y. 1949) (*cited in* Baden, *supra* note 2, at 452).

⁴⁰ See *id.*

⁴¹ "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." Warsaw Convention, *supra* note 4 (emphasis added).

⁴² Article 32 provides in part: "Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention . . . shall be null and void." *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

prove extremely difficult to convince a jury that a pilot would intentionally cause a crash since the pilot's own life would be at risk."⁴⁵

6. Article 28: Fora Available to Plaintiff

Article 28 lists the four fora in which a plaintiff may bring an action for damages: 1) the domicile of the carrier; 2) the principal place of the carrier's business; 3) the country where the contract of travel was made, so long as the carrier has a place of business there; or 4) the place of destination.⁴⁶ In addition, the Article makes clear that the chosen forum must be within the territory of a High Contracting Party.⁴⁷ The lack of an option for the plaintiff to bring suit in the country of his own domicile can lead to an effective bar to recovery, particularly in situations where the only fora permitted are in countries thousands of miles away.

A New York court, for example, dismissed a case in which a New York resident paid for tickets at a New York travel agency and picked them up in Delhi, India, for travel from Delhi to New York on a Romanian airline.⁴⁸ The tickets were for a round-trip from India to the U.S. in order to save money on a future trip to India, according to the plaintiffs.⁴⁹ The plaintiffs were detained for six days by the carrier's employees at a stop-over in Bucharest and allegedly deprived of adequate food and facilities.⁵⁰ Because the carrier's domicile and place of business were in Romania, the face of the tickets showed the ultimate destination as India, and the tickets were physically retrieved in India (becoming, in the court's view, the place of business where the contract was made), the court ruled the U.S. was not one of the four fora available under Article 28 of the Warsaw Convention. Therefore, the plaintiffs could not sue in U.S. court.⁵¹ In addition, since the Warsaw Convention pre-empts all other causes of action, the plaintiff's claim for damages for false imprisonment was dismissed as well.

A similar ruling was issued by the U.S. District Court in Houston, Texas, in which the court dismissed a claim for damages arising out of the death of a passenger in a crash.⁵² The passenger had purchased the ticket through an agent in the U.S. for a flight on Continental Airlines from Texas to Colombia, with a connection to the defendant air carrier for a flight to Panama. The court held that, despite the fact that the ticket was purchased

⁴⁵ Baden, *supra* note 2, at 452. See discussion *supra* page 25 of varying interpretations of "willful misconduct."

⁴⁶ Warsaw Convention, *supra* note 4.

⁴⁷ *Id.*

⁴⁸ Singh v. Tarom Romanian Air Transport, 88 F.Supp.2d 62, 62-63 (E.D.N.Y. 2000).

⁴⁹ *Id.* at 63.

⁵⁰ *Id.*

⁵¹ See *id.* at 64-67.

⁵² Luna v. Compania Panamena De Aviacion, S.A., 851 F. Supp. 826 (S.D. Tex. 1994).

for successive carriage through an agent in the U.S. (arguably a place of business through which the contract was made),⁵³ the defendant's contacts with Texas were so minimal the court did not have jurisdiction.⁵⁴

7. Article 29: Statute of Limitations

Article 29 sets forth a period of two years in which a plaintiff may bring an action under the Convention. After this period, all rights to a claim for damages are extinguished. There is some debate, however, as to how exactly to calculate this period. Some courts have held the period is subject to tolling in certain circumstances, while others have held the period is strictly for two years, with no tolling allowed.⁵⁵

B. *The Hague Protocol of 1955*

In response to international pressure to raise the liability limit contained in the Warsaw Convention, an international conference assembled at The Hague in 1955.⁵⁶ The resulting treaty, the Hague Protocol,⁵⁷ contains various revisions of the Warsaw Convention, the most notable being a doubling of the liability limit to 250,000 francs (approximately \$16,600).⁵⁸ In addition, the "willful misconduct" provision of Article 25⁵⁹ was changed to a standard requiring intentional or reckless acts or omissions on the part of the carrier before a plaintiff can claim unlimited liability.⁶⁰

Those countries that ratified the Hague Protocol automatically adopted the original Warsaw Convention as well.⁶¹ The United States signed the Hague Protocol, but the treaty was never ratified by the Senate because of continuing dissatisfaction with the low liability limits.⁶² The United States

⁵³ Cf. *American Airlines v. Court of Appeals [Philippines]*, G.R. No. 116044-45 (3d Div. 2000) (holding that defendant airline was acting as an agent of another airline whose ticket plaintiff exchanged in Switzerland for a different ticket on a flight with defendant, and that since the original ticket was purchased in the Philippines, the court had jurisdiction as the country of the place of business where the contract was made).

⁵⁴ Luna, 851 F.Supp. at 833-34.

⁵⁵ See discussion *supra* Section III(E) and accompanying notes.

⁵⁶ Rubin, *supra* note 5, at 199.

⁵⁷ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air [hereinafter "Hague Protocol"], reprinted in GOLDHIRSH, *supra* note 2, at 265.

⁵⁸ See Montreal Convention, *supra* note 1, at 4.

⁵⁹ See *supra* note 53 and accompanying text.

⁶⁰ See *supra* note 57.

⁶¹ GOLDHIRSH, *supra* note 2, at 6.

⁶² Rubin, *supra* note 5, at 201.

continued to abide by the original, unamended Convention, while other countries (including many that flew to and from the U.S.) adhered to the Hague Protocol. This was a major step away from the uniformity sought by the Convention. International flights are governed by the most recent version of the Convention that *both* countries have ratified.⁶³ In the case of a flight between the U.S. and a signatory of the Hague Protocol, this means the flight would fall under the terms of the original Convention, since that would be the most recent one the U.S. ratified. Therefore, a passenger injured on a flight from a Hague Protocol country to the U.S. would still be limited to a recovery of \$8300.

C. *The Montreal Agreement of 1966*

The United States, concerned about the low value placed on the lives of Americans flying overseas (in contrast to the higher awards plaintiffs receive in domestic air cases), continually pushed for higher liability limits in the Warsaw Convention. By 1966, the U.S. finally grew tired of the low liability limits and filed a denunciation, which would have allowed the United States to withdraw completely from the Convention.⁶⁴

The international community feared that if such a powerful country abandoned the Convention, most other member countries would quickly follow suit. In response, the International Air Transport Association ("IATA")⁶⁵ held a meeting in Montreal to persuade the U.S. to withdraw its denunciation of the Convention.⁶⁶ As a result of this meeting, the delegates reached a new agreement that added certain new provisions designed to placate the U.S.⁶⁷ Under the 1966 Montreal Agreement, carriers agreed to

⁶³ See GOLDHIRSCH, *supra* note 2, at 12. *But see* Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 310-14 (2d Cir. 2000) (holding that the Warsaw Convention does not apply to a dispute between an American plaintiff and a South Korean airline, since the U.S. ratified the original Convention but not the Hague Protocol, whereas South Korea ratified the Hague version of the Convention, rather than the original). This illustrates just one of the many interpretive differences caused by the multiple liability regimes currently in existence. As one commentator stated, "[I]t is not at all unusual for transport to take place between two states, one of which has adhered to the Hague Protocol, whereas the other has only ratified the Warsaw Convention: the application of the two Conventions may then cause complications." DIEDERIKS-VERSCHOOR, *supra* note 19, at 100.

⁶⁴ GOLDHIRSH, *supra* note 2, at 7. Article 39 of the Warsaw Convention provides in part: "Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland . . ." Warsaw Convention, *supra* note 4.

⁶⁵ For a description of the history and mission of the IATA, see generally JACQUES NAVEAU, INTERNATIONAL AIR TRANSPORT IN A CHANGING WORLD 59 (1989).

⁶⁶ GOLDHIRSH, *supra* note 2, at 7.

⁶⁷ See Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990 [hereinafter "Montreal Agreement"], reprinted in GOLDHIRSH, *supra* note 2, at 317.

raise their liability limits to \$75,000⁶⁸ where passengers had tickets with the United States as the point of departure, destination or as a planned stopping place. These carriers also agreed to waive completely the Article 20 defense of having taken “all necessary measures” to avoid the accident.⁶⁹

The Montreal Agreement only covers flights into and out of the United States, so carriers could potentially be bound by three different liability regimes, depending on the destination.⁷⁰ A carrier adhering to the Hague Protocol (\$16,600 limit) is bound by that protocol when flying to another Hague Protocol country. The same carrier, if also a signatory to the Montreal Agreement (\$75,000 limit), is bound by that agreement when flying to and from the United States. In addition, that very same carrier, when flying to a country that signed only the original Warsaw Convention (\$8300 limit), is bound on that particular flight only by the provisions of the Convention. This inconsistency makes it increasingly difficult for passengers to predict the air carrier’s liability on any given flight. The Warsaw System becomes more complicated with each new evolution.

D. *The Montreal Protocols of 1975*

In 1975, delegates from around the world again met in Montreal, resulting in four new protocols amending the Warsaw Convention. The most notable change was to replace the gold standard used in calculating damage amounts with a new unit of currency: Special Drawing Rights (“SDR”)⁷¹ The SDR was developed by the International Monetary Fund, based on the currencies of France, Britain, Japan, Germany, and the United States.⁷² Although the Montreal Protocols were signed immediately by many countries, the United States did not sign the protocols until 1999. Once again, with every country under a different liability regime, predictability and uniformity became even more unattainable.

E. *The Japanese Initiative of 1992*

In response to domestic concerns about the low liability limits in the Warsaw Convention, ten Japanese airlines decided to use the “special contract” opt-out clause contained in Article 22(1) of the Convention.⁷³ The airlines agreed to unlimited liability in any claim of injury on international flights under the Convention. In addition, the airlines voluntarily restricted their access to any of the Convention’s defenses in

⁶⁸ See *id.*

⁶⁹ See *id.* See also note 32 *supra*.

⁷⁰ See Rubin, *supra* note 5, at 204.

⁷¹ See Additional Protocols No. 1-4 [hereinafter “Montreal Protocols”], reprinted in GOLDHIRSH, *supra* note 2, at 331.

⁷² GOLDHIRSH, *supra* note 2, at 97.

⁷³ See *supra* note 41 and accompanying text.

claims up to 100,000 SDRs (approximately \$135,000).⁷⁴ This Initiative applied only to Japanese air carriers. The international community regarded this newest development cautiously, but some of its provisions were later incorporated into private agreements among other airlines.

F. *The IATA Intercarrier Agreements of 1996*

Frustrated with the increasing complexity of the Warsaw System and the continued low limits of liability, the International Air Transport Association ("IATA")⁷⁵ drew up two private air carrier agreements in 1996. Taking advantage of Article 22's opt-out clause, the IATA Intercarrier Agreement on Passenger Liability ("IIA") required signatories to waive all limits of liability, in favor of determining damages according to the law of the injured passenger's domicile.⁷⁶ The Agreement on Measures to Implement the IATA Intercarrier Agreement ("MIA") implemented the provisions of the IIA.⁷⁷ In addition, the MIA allowed carriers to waive all defenses on claims up to 100,000 SDR (approximately \$135,000) regardless of negligence.⁷⁸ Several carriers, including most major ones, signed on to one or both of these agreements. As of June 30, 1999, 122 carriers are signatories to the IIA, while as of October 20, 1999, 90 are signatories to the MIA.⁷⁹

G. *The Montreal Convention of 1999*

The 1999 Montreal Convention represents the latest attempt to consolidate the various treaties and private agreements that make up the Warsaw System.⁸⁰ The Montreal Convention was completed in Montreal, Canada, in May 1999, during an international air law conference. The new Convention was immediately signed by over fifty countries, but will not enter into force until it is ratified by thirty.⁸¹ Years of dissatisfaction with the Warsaw Convention led the United States to take an active role in the negotiation of the new agreement. The United States considers the Montreal Convention a "success with respect to all key U.S. policy

⁷⁴ Baden, *supra* note 2, at 455.

⁷⁵ See *supra* note 65.

⁷⁶ Intercarrier Agreement on Passenger Liability [hereinafter "IIA"], available at <http://www.iata.org>.

⁷⁷ Agreement on Measures to Implement the IATA Intercarrier Agreement [hereinafter "MIA"], available at <http://www.iata.org>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Montreal Convention, *supra* note 1.

⁸¹ See *id.* The Convention was transmitted to the U.S. Senate for its advice and consent on September 6, 2000. *Id.*

objectives.”⁸² To fully appreciate the impact the new agreement will have on international air travel, it is important to examine the relevant provisions of the Montreal Convention and their effect.

1. Article 17: Baggage

Article 17(4) specifies that the term “baggage” means both checked and unchecked (i.e., carry-on) baggage, and the Montreal Convention applies equally to both.⁸³ This provision would have changed the outcome of one German case. The claimant sued the airline for his lost watch and glasses after the flight crew took them and placed them in bags in the toilet in preparation for an emergency landing.⁸⁴ The court ruled the items were not “checked baggage” since no baggage ticket was issued. The carrier was found liable for the loss, but at much lower liability limits than were in place for checked baggage.⁸⁵ In the U.S., on the other hand, a carrier was held liable for all damages when it took a passenger’s carry-on items without issuing a receipt.⁸⁶

2. Articles 19 and 20: Carrier Defenses

Article 19 replaces the “all necessary measures” defense⁸⁷ with “took all measures that could reasonably be required to avoid the damage”⁸⁸ Article 20 allows a carrier to avoid liability “to the extent that” the airline proves the damage was caused by the passenger’s contributory negligence.⁸⁹ This is a slight modification of the Warsaw Convention’s Article 21 contributory negligence defense.

3. Article 21: Two-Tiered Liability

Article 21 of the Montreal Convention calls for strict carrier liability up to 100,000 SDR (approximately \$135,000), with the only available defense being contributory negligence.⁹⁰ In claims for more than 100,000 SDR, the carrier may use the defense that the damage was not caused by its negligence or wrongful act, or the accident occurred because of events out

⁸² *Id.*

⁸³ *See id.* at 89.

⁸⁴ GOLDHIRSH, *supra* note 2, at 94-95 (citing 1979 ZLW 137 (Bundesgerichtshof, 28 Nov. 1978)).

⁸⁵ *Id.*

⁸⁶ *See* Schedlemayer v. Trans Int’l Airlines, 416 N.Y.S.2d 461 (N.Y. Civ. Ct. 1979).

⁸⁷ *See supra* note 32 and accompanying text.

⁸⁸ Montreal Convention, *supra* note 1, at 91.

⁸⁹ *See id.* at 91.

⁹⁰ *See id.* at 91-92.

of the carrier's control.⁹¹ This Article represents a drastic change in the damages a plaintiff can receive, and increases the likelihood that passengers will be adequately compensated for severe injuries or death from accidents.

Unless the carrier can show the plaintiff contributed to or caused the accident, there is basically a guaranteed recovery of up to \$135,000. After that threshold, a plaintiff can theoretically recover an unlimited amount by showing the accident was caused by the carrier's negligence. This is an easier standard than having to show the carrier actually intended to cause the accident. The result is that plaintiffs will finally be able to receive more equitable and just compensation for their damages.

4. Article 23: Currency

Article 23 adopts the SDR valuation formula used in the Montreal Protocols, basing the valuation on the date of judgment.⁹²

5. Article 25: Opt-Out Provision

Article 25 allows a carrier to raise or eliminate the Convention's liability limits.⁹³ This is a restatement of the "special contract" clause in Article 17 of the original Warsaw Convention, allowing the carrier to completely do away with the liability limits. However, Article 26 acts as a "check" on that power by providing that any contract that relieves a carrier of liability or attempts to lower the Convention's liability limits is null and void.⁹⁴

6. Article 30: Servant and Agent Liability

Article 30 explicitly extends the limitations and conditions of the Montreal Convention to servants or agents of the carrier.⁹⁵ The provisions of the original Warsaw Convention were somewhat unclear as to whether or not servants and agents were included. Under the prior regime, this ambiguity led to inconsistent interpretations by domestic courts. For example, France did not allow servants or agents to take advantage of the carrier's liability limits, reasoning that agents could not be liable since they were not contracting parties.⁹⁶ In addition, the Singapore Court of Appeal declined to apply the liability provisions of the Warsaw Convention to servants or agents of a carrier, on the basis of a "plain and literal" reading

⁹¹ *See id.* at 92.

⁹² *See id.* at 95.

⁹³ *See id.* at 99.

⁹⁴ *See id.* at 99.

⁹⁵ *See id.* at 101.

⁹⁶ GOLDHIRSH, *supra* note 2, at 95.

of the Convention.⁹⁷ Japan and the U.S., on the other hand, extended the limitations to the carrier's employees, as well as "whoever performs the tasks the carrier was required to do. . . ."⁹⁸

7. Article 33: Plaintiff's Available Fora

Article 33 adds a fifth forum to the list of those in which a plaintiff may bring suit. Under the Montreal Convention, a claim for damages may be brought in the country of the "principal and permanent residence" of the passenger as long as the carrier also flies to and from that country and owns or leases premises in that country.⁹⁹ This Article is another that will potentially lead to more equitable results for plaintiffs. It resolves the difficulties many had in bringing suit in their home country, due to a flight on a foreign carrier in a distant country. It will now be much easier for passengers to file claims in their home countries, with friendlier courts and more familiar procedures.

H. Article 55: Relationship With Other Warsaw Convention Documents

Article 55 provides that the 1999 Montreal Convention prevails over the Warsaw Convention, the Hague Protocol, and other subsequent revisions.¹⁰⁰ However, it is important to note the Montreal Convention's supremacy over previous agreements applies only to those countries that actually ratify the new Convention. If a country declines to ratify the new agreement, and continues to adhere to one of the older treaties, the Montreal Convention will not apply to travel to and from that country. Thus, some commentators argue that the result of the Montreal Convention will be greater disunity and inconsistency among the liability regimes.¹⁰¹

For example, if the United States ratifies the Montreal Convention, while Country X continues to adhere to the Hague Protocol,¹⁰² travel between the two countries will continue to be governed by the original Warsaw Convention. This is because a State that ratifies one of the later versions of the Warsaw Convention automatically adheres to the original Convention.¹⁰³ In addition, international flights under the Warsaw System are governed by the most recent treaty ratified by both countries involved.

⁹⁷ See *Yusen Air & Sea Service v. Changi International Airport Services*, 1999-4 SLR 135, at 45 (Singapore Ct. of App., 1999).

⁹⁸ GOLDHIRSH, *supra* note 2, at 95.

⁹⁹ See Montreal Convention, *supra* note 1, at 102-03.

¹⁰⁰ See *id.* at 114-15.

¹⁰¹ See DIEDERIKS-VERSCHOOR, *supra* note 19, at 99-100.

¹⁰² Assuming the country is not a party to the 1966 Montreal Agreement (covering travel to the U.S.) or the 1996 IATA Agreement.

¹⁰³ GOLDHIRSH, *supra* note 2, at 12.

The United States never ratified the Hague Protocol. Therefore, even though the United States is now a signatory to the Montreal Convention, flight between the U.S. and Country X must fall under the most recent version that both countries signed. Since Country X automatically adheres to the original Warsaw Convention by signing the Hague Protocol, and the U.S. did not sign the Hague Protocol, the most recent Convention to which both countries are parties is the Warsaw Convention. Therefore, despite the higher liability limits available through the 1999 Montreal Convention, a passenger on the flight in the above example would still be limited to \$8300 recovery. The potential for confusing results such as these is precisely why some fear that introducing this new document may only serve to complicate the system even further.

II. REASONS FOR LACK OF UNIFORMITY

A. *Adherence to Different Conventions and Agreements*

One of the primary reasons for the lack of uniformity in the rules governing international air travel is the many protocols and amendments mentioned previously. Member countries and private airlines adhere to different provisions, depending on whether they have ratified the original Warsaw Convention, the Hague Protocol, the Montreal Agreement, or one of the numerous other protocols or private airline agreements.¹⁰⁴ The U.S. Second Circuit Court noted, “[a] single State might be bound to one version of the Warsaw Convention with one State, another version of the Warsaw Convention with another State, a separate bilateral treaty with another State, and a separate contract with a private party.”¹⁰⁵ Because of the many different agreements in effect, passengers on the same flight are often subject to vastly different liability schemes, depending on each individual’s destination, departure point, the home State’s ratification of various treaties, and the nation where suit is brought.¹⁰⁶

For example, if a passenger flies from the U.S. (a Warsaw country) to France (a Hague Protocol country that also adheres to the 1966 Montreal Agreement governing flights to and from the U.S.), the courts of both France and the U.S. would apply the Montreal Agreement’s \$75,000 limit.¹⁰⁷ If a passenger instead flies from Belgium (a Hague Protocol country) to France (also a Hague country), the Belgian and French courts would both be bound by the \$16,600 limit on carrier liability specified in

¹⁰⁴ See Rubin, *supra* note 5, at 210.

¹⁰⁵ *Chubb & Son*, 214 F.3d at 306.

¹⁰⁶ See DIEDERIKS-VERSCHOOR, *supra* note 19, at 100. Baden, *supra* note 2, at 439; See Rubin, *supra* note 5, at 212.

¹⁰⁷ Rubin, *supra* note 5, at 213.

the Hague Protocol.¹⁰⁸ This means that if “Mary” flies from the U.S. to France via Belgium (all Montreal Agreement countries¹⁰⁹), while “Sally” flies only the Belgium-France leg of the same flight, Mary could receive up to \$75,000 under the Montreal Agreement from a crash on the Belgium-France portion of the trip, whereas Sally would only be allowed to recover \$16,600, as mandated by the Hague Protocol.

Similarly disparate recovery amounts could result from a plane crash in which some passengers, by nature of their contract (i.e., ticket)¹¹⁰ with the airline, are considered international (and therefore limited by some variation of the Warsaw Convention), while other passengers are considered domestic, and therefore subject only to the local liability rules instead of the Warsaw limitations.¹¹¹ For example, on a round trip flight from New York City to Nice via Paris (i.e., New York - Paris - Nice - Paris - New York)¹¹², a passenger making the entire trip would be considered international (and therefore subject to the Warsaw Convention and Montreal Agreement), while a passenger flying only from Paris to Nice on the same airplane would be considered domestic (and therefore not covered by the Convention), no matter what the passenger’s nationality.¹¹³ Depending on local law, the domestic passenger could potentially receive much more than the international passenger for an accident on the same aircraft, occurring at the same time, resulting in the same injuries.

In addition, punitive damages and claims for mental anguish are barred for plaintiffs suing under the Convention, while such claims are available to domestic plaintiffs. A domestic plaintiff who suffers from major depression or other mental trauma as a result of the plane crash would be able to recover for the anguish and associated costs, such as psychiatrist bills. An international passenger, on the other hand, would be limited to compensatory damages for physical injury caused by the accident only. All expenses incurred as a result of an emotional or mental injury fall outside the scope of the Convention, and the international plaintiff would not recover anything for them. Results such as these have led the United States to call for greater unification among the provisions of the Warsaw System.

¹⁰⁸ *Id.*

¹⁰⁹ See discussion *supra* Section II(C) and accompanying notes.

¹¹⁰ GOLDHIRSH, *supra* note 2, at 10-11 (“The ticket is what usually determines if the transport is international or not . . .”). *Id.* at 14. (“The rule that the destination is determined by the intent of the parties as evidenced by the ticket has been adopted almost universally . . . The actual intent is usually immaterial.”).

¹¹¹ See *id.* at 15.

¹¹² See *id.* at 13.

¹¹³ See DIEDERIKS-VERSCHOOR, *supra* note 19, at 100.

B. *Differing Linguistic Interpretations of Treaty Language*

Many of the inconsistent rulings are the result of courts' interpretation of various French words and legal terms in the original, official Warsaw text. Article 1(1), for example, states the Convention "applies to all international carriage of persons, luggage or goods. . . ." ¹¹⁴ There appears to be a difference in the definition of "goods" among various States. France, in keeping with the official French text of the Convention, uses the word "*marchandises*" rather than "goods."¹¹⁵ "Under French law, '*marchandises*' means anything able to be the object of a commercial transaction, whereas 'goods' refers to any inanimate object and excludes live animals."¹¹⁶ The U.S. and Canada use the word "goods," yet have extended the definition to include live animals.¹¹⁷ One French court determined that cadavers did not come under the scope of the Convention, while courts in the U.S. have found otherwise.¹¹⁸

The interpretation of the term "bodily injury" ("*lésion corporelle*") in Article 17 of the Warsaw Convention has led to much discussion as to how far to apply the concept. The United States and the United Kingdom are among the countries whose courts have held that bodily injury cannot be construed as covering purely mental injuries.¹¹⁹ The Supreme Court of Israel, on the other hand, held that the Convention should be interpreted in the context of modern society, in which damages for mental distress are often awarded.¹²⁰ The Federal Court of Australia has taken a slightly different approach. The Warsaw Convention and Hague Protocol are codified into Australia's domestic law. The court decided psychological harm is not compensable on international flights under the Warsaw Convention, but such injuries are compensable under the domestic version of the Convention on flights within Australia.¹²¹

The interpretation of "willful misconduct" also differs among various countries. The original French text of the Convention uses the word "*dol*," which implies an act that intentionally causes injury.¹²² Common law countries do not have that particular concept, so "willful misconduct" was

¹¹⁴ Warsaw Convention, *supra* note 4.

¹¹⁵ See GOLDHIRSCH, *supra* note 2, at 8.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.* (citing *Djedraoui c. Tamisier*, 1953 RFDA 494 (Trib. Paix Paris, 31 March 1952)).

¹¹⁹ *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991), *Hammond v. Bristow Helicopters Ltd.*, ScotCS 80 (Scottish Ct. of Session, 13 Nov. 1998).

¹²⁰ *See Daddon v. Air France* (1985) 39 R.F.D.A. 232 (1 S&B Av.R., vii/141).

¹²¹ *South Pacific Air Motive Pty. Ltd. v. Magnus*, 157 ALR 443 (Fed. Ct. Austl., 1998).

¹²² GOLDHIRSH, *supra* note 2, at 121.

chosen for the English translation.¹²³ Because willful misconduct need not be intentional, but instead may be a reckless act with knowledge that harm will result, this translation effectively lowers the burden of proof in common law countries.¹²⁴ Civil law countries tend to treat “gross negligence” as the equivalent of “*dol*” (which, since 1957, has been interpreted as “inexcusable fault” in France).¹²⁵ Japanese courts interpret “willful misconduct” as “gross negligence.”¹²⁶ “In common law countries the courts have emphasized the specific character of ‘wilful [*sic*] misconduct,’ which is entirely different from negligence and goes far beyond it, however gross or culpable the negligence may have been.”¹²⁷

This conflict in interpreting the terms of Article 25 of the Warsaw Convention has led to the development of two different tests to determine whether a carrier’s behavior fits within the scope of the provision. The objective test does not look at the actor’s intent, but instead uses a “reasonable person” standard.¹²⁸ This standard was used by the High Court of Fiji in determining that a pilot who flew 100 feet above the ocean in severe weather conditions, and later crashed, was not guilty of willful misconduct, since it would be “perverse” for a person in that situation to purposely act in that manner.¹²⁹ France, Germany, Greece and Korea have also used the objective test when deciding cases involving willful misconduct.¹³⁰

The subjective test, on the other hand, looks to the actor’s state of mind at the time of the accident.¹³¹ A Hong Kong court declared that its case law shows the subjective test should be used.¹³² The Ninth Circuit Court of Appeals in the U.S. has also followed a subjective standard.¹³³ This difference in standards can make it more difficult for plaintiffs in subjective test jurisdictions to prove an air carrier’s willful misconduct and lift the Warsaw Convention’s liability cap, since proving the pilot’s actual

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ DIEDERIKS-VERSCHOOR, *supra* note 19, at 85.

¹²⁶ *See* Wood, *supra* note 2, at 152.

¹²⁷ DIEDERIKS-VERSCHOOR, *supra* note 19, at 85.

¹²⁸ GOLDHIRSH, *supra* note 2, at 121.

¹²⁹ *Thomas v. Turtle Airways, Ltd.*, Civ. Action Nos. HBC 1024 & HBC 1025 of 1983 (High Ct. of Fiji at Suva, 1997), available at www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/volume_S-T/Thomas_v_Turtle_Airways.html.

¹³⁰ GOLDHIRSH, *supra* note 2, at 121.

¹³¹ *Id.*

¹³² *See* *Hang Seng Bank Ltd. v. Cathay Pacific Airways Ltd.*, 1997 HKC Lexis 2018 (High Ct. of Hong Kong 1997).

¹³³ *See* *Koirala v. Thai Airways Int’l Ltd.*, 126 F.3d 1205, 1210 (9th Cir. 1997) (citing *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir. 1987)).

intent is more burdensome than simply demonstrating what a "reasonable person" would have done in the same situation.¹³⁴

In determining under Article 28 the forum in which suit may be brought,¹³⁵ the French courts define "place of business" ("*établissement*") as being "the center of operations of a corporation (geographically distinct of its headquarters), but excluding its filials (subsidiaries or branches) and agencies."¹³⁶ The U.S., Germany, and Switzerland, on the other hand, define "place of business" much more broadly to include the carrier's offices, as well as agents who merely sell tickets for the carrier.¹³⁷ However, a Canadian court found that an agent who only sells tickets in return for a commission is not included under the definition of "*établissement*" for the purposes of jurisdiction under Article 28.¹³⁸

In addition to the problems inherent in working from a foreign language text, many courts struggle with the consequences of the sometimes vague intended meanings of the Convention's terms. The difficulty of the Convention's construction was recognized as early as 1949. One commentator wrote that "almost every Article of the existing Convention includes defects or obscurities, and some of them contain several. These are not merely theoretical or technical defects . . . they cause almost daily practical difficulties and problems . . ."¹³⁹

One issue that arises is whether the available fora listed under Article 28 refer to countries generally, or rather to specific places within a particular country. The U.S., Switzerland, and England have decided the fora listed under Article 28 refer to the entire territory of a nation, not to particular "political subdivisions" (such as states) within the territory.¹⁴⁰ France and Nigeria, however, see the Article 28 jurisdictions as referring to particular areas within a nation, rather than the entire nation itself.¹⁴¹ This variation could affect a claimant's choice of court.¹⁴²

Differing interpretations of "embarking" have also been found in various countries. France defines "embarking" as "the time the passenger is

¹³⁴ See Baden, *supra* note 2, at 452.

¹³⁵ Four fora are available: 1) the carrier's domicile, 2) the destination, 3) the carrier's principal place of business, or 4) the place where the travel contract was made, if the carrier also has a place of business there. See discussion *supra* Section II(A)(6).

¹³⁶ GOLDHIRSCH, *supra* note 2, at 145.

¹³⁷ See *id.* at 146.

¹³⁸ *Id.* at 147 (citing Quershi v. KLM, 102 Dom. L. Rep. 3rd 205 (Nova Scotia Sup. Ct. 12 June 1979)).

¹³⁹ K.M. Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. AIR LAW & COM 395, 411-12 (1949).

¹⁴⁰ See GOLDHIRSCH, *supra* note 2, at 140-41.

¹⁴¹ See *id.* at 141.

¹⁴² See *id.*

placed in a zone of air transportation risks,"¹⁴³ while Germany holds the carrier responsible once it has directed the passenger to go from the terminal to the plane.¹⁴⁴ In the U.S., a carrier's responsibility begins once it has "assumed some control over the passengers."¹⁴⁵

C. *Differing Domestic Interpretations of Treaty Provisions*

Much of the lack of uniformity in the application of the rules in the Warsaw System stems from the fact that a court's interpretation of the scope of the provisions is usually based on local law, rather than any one international standard. Several provisions of the Convention have received disparate interpretations by domestic courts. Many countries, including France, England and Australia, have adopted the Convention to cover domestic as well as international air travel, ostensibly to increase uniformity in the application of the rules.¹⁴⁶ However, since several Articles of the Convention direct the courts to use local law for determining such factors as who may bring suit and what damages are recoverable for injury or delay, there is a lot of disparity in how various countries' courts apply the Convention.¹⁴⁷ It is well known that the outcome of a claim can depend greatly on the court where it is filed. One commentator remarked that "[i]t is possible for a claimant to influence legal procedure by his choice of a forum."¹⁴⁸

A court considering an Article 21 defense of contributory negligence,¹⁴⁹ for example, must apply its own law to determine contributory negligence and the amount by which it may reduce a carrier's liability.¹⁵⁰ This has led to the application of different rules, sometimes even within the same country. In the U.S., for example, some states will not usually allow a claimant to recover unless he has proved there was no contributory negligence at all, while other U.S. states will allow a claimant to recover an amount that has been reduced by the extent to which he contributed to the damage.¹⁵¹

¹⁴³ *Id.* at 63.

¹⁴⁴ *See id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 5.

¹⁴⁷ *See, e.g.,* Article 21 (contributory negligence), Article 22 (amount of liability), and Article 29 (period of limitations), Warsaw Convention, *supra* note 4.

¹⁴⁸ DIEDERIKS-VERSCHOOR, *supra* note 19, at 83.

¹⁴⁹ *See supra* note 34 and accompanying text.

¹⁵⁰ *See* GOLDHIRSH, *supra* note 2, at 91.

¹⁵¹ *See id.* It should be noted, however, that a court hearing a Warsaw case may not apply its own law if that law is contrary to the rules of the Convention. *See id.* at 91. "To do so would run contrary to the spirit of Article 23 which prohibits courts from reducing the liability of the carrier under the Convention." *Id.*

Another example of disparate local interpretations is found in situations involving the delay of baggage by an airline. Article 19 of the Warsaw Convention does not specify what damages are recoverable in case of delay, leaving it up to each court to determine according to local law. The recovery allowed for inconvenience or expenses associated with delayed baggage varies widely. France will not allow a vacationer to recover damages caused by delayed luggage.¹⁵² In the United States, however, a New York court allowed a plaintiff to recover damages for the inconvenience and humiliation that resulted from baggage being delayed for the entire duration of the vacation.¹⁵³ One German court allowed a plaintiff to recover compensation for his replacement purchases but not lost vacation time caused by the baggage delay.¹⁵⁴

The addition of local choice of law rules into the equation means claimants of different nationalities may also receive disparate results in the same forum. In France, for example, one court allowed a lawsuit for damages on the death of a mistress,¹⁵⁵ whereas in many other countries, only members of the decedent's immediate family or those persons supported by him may file suit.¹⁵⁶ Because choice of law rules are up to the local court to determine, it is entirely possible a U.S. court would apply French law to a French citizen's action for damages under the Warsaw Convention, thereby allowing recovery for the death of a mistress. In an action by a U.S. citizen for damages arising out of the same accident, however, it is highly unlikely that the same court would allow the American to recover for the death of a mistress.

Finally, domestic interpretation of the jurisdictions available under the Convention often leads to inconsistent results. One U.S. court held it had no jurisdiction under the Warsaw Convention to hear a case involving the crash of a Panamanian airplane, for which the decedent purchased a ticket from Continental Airlines in Texas, in accordance with an interline agreement between the two airlines (both of which are IATA members).¹⁵⁷ Another United States court declared that "whether tickets were paid for at an agency in one location but issued by a different agency in another

¹⁵² *Id.* at 81 (citing *Air France c. Malbois* 1984 RFDA 287 (Cass., 27 March 1984)).

¹⁵³ *Kupferman v. Pak. Int'l Airlines*, 438 N.Y.S.2d 189 (N.Y. Civ. Ct. 1981).

¹⁵⁴ *GOLDHIRSH, supra* note 2, at 81 (citing 1986 ZLW 86 Amtsgericht Düsseldorf, 15 Oct. 1984)).

¹⁵⁵ *See id.* at 177 (citing *Mutelle d'Assurances Aeriennes c. Veuve Thierache*, 1967 RFDA 443 (Cass. 18 July 1967)).

¹⁵⁶ *Id. See, e.g., Koirala v. Thai Airways Int'l*, 126 F.3d 1205 (9th Cir. 1997) (affirming District Court's finding that a woman whose adult son was killed was not entitled to wrongful death damages because she was not financially dependent on the decedent).

¹⁵⁷ *Luna v. Compania Panamena de Aviacion, S.A.*, 851 F.Supp. 826 (S.D. Tex. 1994).

location, the agency that actually issues the tickets will be deemed the place through which the contract was made”¹⁵⁸

Meanwhile, a Philippine court found it had jurisdiction under the Warsaw Convention to hear a case in which the claimant, in Geneva, exchanged a Singapore Airlines ticket to Copenhagen for a one-way ticket to New York from American Airlines.¹⁵⁹ The court held that, due to the fact both airlines are members of the IATA, the defendant airline was acting as an agent of Singapore Airlines. Since the original ticket (the one that was exchanged) was purchased in the Philippines, the court deemed the replacement ticket to be part of a successive carriage, and therefore Philippine courts had jurisdiction under Article 28(1) of the Convention (e.g., the place of business where the contract was made).¹⁶⁰

D. *Conversion of Liability Amounts into Local Currency*

The methods countries use to convert the Warsaw Convention’s liability amounts into local currency can lead to different values. Under the combination of regimes that currently exists, “[t]he local court can use 1) the ‘official’ price of gold, 2) the free market price of gold, 3) SDRs, as envisaged under the Guatemala and Montreal Protocols, or 4) the current value of the French franc, or 5) some other currency.”¹⁶¹ Some courts in India, Austria, Greece, Australia, Argentina, Brazil, Canada, and Italy base their conversions on the market price of gold.¹⁶² The U.S. approach is to base conversion values on the last official dollar value in gold (a “status quo” solution used in Spain and Germany as well).¹⁶³ Many countries have legislation that converts the Convention’s amounts into their local currencies (e.g., U.S., Denmark, Finland, Germany, Israel, New Zealand, Norway, England, Netherlands, Canada, Italy, South Africa, Sweden).¹⁶⁴ Some of these statutes, however, base the conversion to domestic currency on an “outmoded” gold standard, causing low liability limits as a result of inflation.¹⁶⁵

Another difference in countries’ conversion to local currency comes from the date used for the conversion. Several methods are used by signatories to the Convention: 1) the date of the contract, 2) the date of the accident, 3) the date of the judgment, and 4) the date of the payment.¹⁶⁶

¹⁵⁸ *Singh v. Tarom Romanian Air Transport*, 88 F. Supp. 2d 62, 66 (E.D.N.Y. 2000).

¹⁵⁹ *See American Airlines v. Mendoza*, G.R. No. 116044-45 (3d Div., Philippines 2000).

¹⁶⁰ *See id.*

¹⁶¹ GOLDHIRSH, *supra* note 2, at 97.

¹⁶² *See id.* at 99.

¹⁶³ *See Wood, supra* note 2, at 152.

¹⁶⁴ GOLDHIRSH, *supra* note 2, at 97-98.

¹⁶⁵ *See id.* at 98.

¹⁶⁶ *See id.* at 106.

The original Convention allows all of the above methods, while the Hague Protocol provides for the conversion to be made on the day of the judgment. Meanwhile, French law dictates the conversion to take effect on the date of the accident.¹⁶⁷ Therefore, depending on which agreement a country adheres to, and what the local laws direct, the amount of damages awarded could vary widely.

E. *Differing Calculations of Statute of Limitations*

The statute of limitations is another way in which the application of the Warsaw System's rules may differ among countries. The two-year period for bringing suit under the Convention (specified in Article 29)¹⁶⁸ is viewed as a condition precedent to a suit (and therefore not subject to tolling) in Israel, Switzerland, Belgium, and Spain.¹⁶⁹ France and Austria, on the other hand, consider the two-year period a statute of limitations that is subject to tolling.¹⁷⁰ One U.S. court ruled the limitations period is not subject to tolling, even when the defendant airline is under bankruptcy protection.¹⁷¹ This difference can affect the resolution of questions of when an action is brought, and whether the time period can be suspended or interrupted.¹⁷²

III. CONSEQUENCES OF THE LACK OF UNIFORMITY

The uncertainty of the outcome of a lawsuit stemming from a plane crash, particularly when some passengers are considered domestic while others are considered international, has led to growing dissatisfaction over the inconsistent liability limits placed on claimants who must bring suit under the Convention.¹⁷³ Because the liability limits in the Warsaw Convention are so low compared with the amounts generally awarded in

¹⁶⁷ See *id.* at 107.

¹⁶⁸ Article 29 provides:

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Warsaw Convention, *supra* note 4.

¹⁶⁹ See GOLDHIRSCH, *supra* note 2, at 154-56.

¹⁷⁰ See *id.*

¹⁷¹ See *Husmann v. Trans World Airlines, Inc.*, 1999 U.S. App. LEXIS 388, 10 (8th Cir. 1999).

¹⁷² See GOLDHIRSCH, *supra* note 2, at 154-55.

¹⁷³ See Wood, *supra* note 2, at 151.

domestic air cases in the U.S., some U.S. courts have interpreted the Convention in ways that produce outcomes less offensive to the American tort system.¹⁷⁴ Japan is another example of a country where the wide disparity between the Warsaw Convention's limits and domestic tort awards prompted drastic change to the liability regime. Distressed and embarrassed by the discrepancy, Japan did away with the Convention's liability limits altogether through the Japanese Initiative.¹⁷⁵ In yet another example, the Italian Constitutional Court ruled in 1985 that the low liability limits in the Convention violated the right to compensation for personal injury or death, and that the limits were therefore unconstitutional.¹⁷⁶

Judges frequently express their disdain for the low amounts they are forced to award. The High Court of Fiji was faced with a claim by two passengers who were seriously injured when their plane crashed in the ocean (a third passenger died). The plaintiffs were unable to show the pilot's actions were reckless, however, so their recovery was limited by the Warsaw Convention. In the decision, the court stated:

Given the most harrowing experience they had and the injuries they described in evidence and the medical reports on those injuries, if these actions fell to be decided on the ordinary principles of common law negligence I would have no hesitation in awarding them damages for their injuries and the loss of enjoyment of life these have entailed of a much higher order than that suggested by counsel for the Defendant . . .¹⁷⁷

The court also expressed regret that, under the Convention, it could not award the plaintiffs interest on damages in the 14-year old accident.¹⁷⁸ Similarly, an American court stated it was "troubled by the seeming inequities in the law resulting from the application of different standards for recovery," but added that there was very little the court could do to resolve the issue.¹⁷⁹

Ironically, the drive to achieve the uniformity sought by the Warsaw Convention actually contributes to the lack of uniformity in the application of its rules. Several courts have expressed the desire to use more discretion

¹⁷⁴ See *id.*

¹⁷⁵ See DIEDERIKS-VERSHOOR, *supra* note 19, at 98. See discussion *infra* at Section II(E) and accompanying notes.

¹⁷⁶ See Wood, *supra* note 2, at 151. This was later rectified by 1988 legislation which raised the limits to 100,000 SDRs and required carriers to keep liability insurance. See *id.*

¹⁷⁷ Thomas v. Turtle Airways, Ltd., Civ. Action Nos. HBC 1024 & HBC 1025 of 1983 (High Ct. of Fiji at Suva, 1997), available at www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/volume_S-T/Thomas_v_Turtle_Airways.html.

¹⁷⁸ See *id.*

¹⁷⁹ In re Air Crash at Little Rock, 118 F.Supp.2d at 920. Both domestic and international passengers were on the flight. Domestic passengers were free to pursue punitive damages against the airline, an option denied to the international passengers because of the Warsaw Convention. *Id.* at 921.

in Warsaw cases.¹⁸⁰ However, the fear of contravening the Convention's goals leads courts to judge cases based on their interpretation of the *original* 1929 treaty. Courts also look to each other for guidance in their judgments. Although this appears to be a logical formula for reaching uniformity among nations, this is not always the result. Frequently, a court's attempt to interpret a Warsaw provision in the context of the original Convention, and a court's desire to interpret the provision in the context of modern local law, are incompatible. While proclaiming that a decision was made in accordance with the original Convention and other countries' judgments, all in the name of uniformity, some of a court's natural inclination toward its own law and sense of equity between domestic and international passengers creeps into the opinion. Although this is hardly surprising, it serves to create small but discernible differences between countries' application of the Convention. These variations are significant enough that the uniformity so cherished becomes merely an illusion.

This cycle causes some tension between courts. For example, the Israel Supreme Court proposed that the goals of the Convention be reevaluated to keep up with the realities of modern life, specifically in the area of compensation for emotional distress, which is widely recognized as a valid claim under domestic law.¹⁸¹ The Scottish Court of Sessions considered this approach, but ultimately declined to follow it, in favor of the United States' view that the Convention does not allow compensation for purely mental injury.¹⁸² The court did so somewhat reluctantly, however, stating that "because of the need to achieve uniformity, it [is] not permissible to construe the Convention in the light of the changes in civil aviation transport since 1929"¹⁸³

The fact that courts apply the Convention differently, despite the quest for uniformity, is not lost on plaintiffs. In one case, the plaintiffs brought suit against an airline in both France and England simultaneously, as a way of "hedging their bets" as to which court would grant them jurisdiction.¹⁸⁴ The British court noted the plaintiffs knew they could receive a higher award in France, while the defendant airline hoped to take advantage of England's stricter interpretation of the Warsaw Convention.¹⁸⁵ The court

¹⁸⁰ See, e.g., *In re Air Crash at Little Rock*, 118 F.Supp.2d at 920-21. See also Wood, *supra* note 2, at 151.

¹⁸¹ See *Daddon v. Air France*, (1985) 39 RFDA 232 (1 S&B Av.R, vii/141).

¹⁸² See *Hammond v. Bristow Helicopters, Ltd.*, ScotCS 80 (Scottish Ct. of Sessions, 13 Nov. 1998) (*citing* *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991)).

¹⁸³ *Id.* (*citing* *Kotsambasis v. Singapore Airlines Ltd.*, 42 NSWLR 110 (S. Ct. New South Wales, 1997)).

¹⁸⁴ See *Deville v. Aeroflot Russian Int'l Airlines*, 2 Llyod's Rep. 69 (Q.B. 1997).

¹⁸⁵ See *id.*

also stated that “[i]t is common ground that the French Courts interpret art. 25 [*sic*] more favourably to claimants than do the English Courts”¹⁸⁶

The lack of uniformity in the application of the various liability regimes within the Warsaw System leads to all of the problems mentioned above. Passengers and airlines are left with great uncertainty as to which treaty will govern any given accident. The multiple overlapping liability schemes can lead to victims of the same accident recovering vastly different amounts for the same injuries. Courts currently have little guidance in their interpretation of treaty provisions, leading to even more unpredictability as to how a case may be decided. All of these inconsistencies and uncertainties leave claimants bewildered and confused, forcing them to search desperately for a country in which they may have hope of receiving an adequate and appropriate judgment.

IV. POTENTIAL IMPACT OF THE REVISED CONVENTION

The 1999 Montreal Convention provides both passengers and carriers with a much higher degree of predictability than exists under the current Warsaw System. The new Convention clarifies many terms and provisions which were previously left to individual courts to decipher. For example, the new Convention specifies that both checked and unchecked articles fall under the definition of “baggage,” thereby enabling passengers to recover for damage to carry-on items.¹⁸⁷ The wording of the original Warsaw Convention is frequently ambiguous, which has led some courts to conclude that a passenger cannot recover for damage to belongings kept in his possession while on board the plane. The new Convention enables parties to have a better idea of how courts are likely to interpret certain provisions.

The Montreal Convention also resolves the issue of whether a carrier’s servants and agents are covered by the liability limitations and other provisions extended to the carrier. The new Convention states explicitly that the rules are intended to include servants and agents of the carrier.¹⁸⁸ Prior to this determination, countries were divided as to whether a servant or agent could take advantage of the Convention’s liability limits and defenses. By resolving these types of conflicts, the Montreal Convention makes it easier for both passengers and carriers to know their rights and obligations.

The “two-tiered” liability regime set forth in the Montreal Convention will have a major impact on future litigation. The new agreement requires carriers to assume strict liability for all claims up to 100,000 SDR

¹⁸⁶ *Id.* at 70.

¹⁸⁷ *See* Montreal Convention, *supra* note 1, at Article 17.

¹⁸⁸ *See id.* at Article 30.

(\$135,000).¹⁸⁹ The only defense a carrier has against these claims is to show contributory negligence on the part of the passenger. Plaintiffs will no longer be denied compensation due to the carrier's showing that it took "all necessary measures" to avoid the accident. The strict liability scheme gives plaintiffs more certainty they will be fairly and adequately compensated for their injuries.

The second tier of the Montreal Convention's liability scheme states that, for claims over 100,000 SDR, a carrier can only avoid liability if it shows the damage was not due to the negligence or wrongful act of the airline.¹⁹⁰ Plaintiffs need not show that the carrier actually intended to cause an accident, as required under the original Warsaw Convention. Airlines are still protected against frivolous million-dollar judgments, since the carrier can escape liability over 100,000 SDR if the accident was not due to negligence. This liability structure will lead to greater uniformity in judgments among signatories to the Montreal Convention because passengers are guaranteed compensation, while carriers are guaranteed some protection. Again, both sides will be better able to determine the damages which any given court will award.

It is important to point out, however, that this uniformity can only happen when all countries involved in the various liability regimes are members of the Montreal Convention. Otherwise, as noted previously, the lower limits of the most recent agreement signed by both parties apply, and the passengers and carriers are once again left wondering which rules govern their claims.

The U.S. has not yet ratified the revised Convention. Some scholars argue that a consolidated system will make matters even more confusing, since countries are not required to agree to the newest revision.¹⁹¹ As long as countries have the option of adhering to one of the earlier Warsaw agreements, the newest version will quickly become merely the latest to complicate the system. However, if all signatories agree to not only ratify the new treaty but denounce all of the other agreements, much of the current tension within the Warsaw System will dissipate. If all countries either belong to one unified treaty or none at all, both passengers and airlines will have a greater chance of knowing what rules govern their international flights, and how much they may recover in the event of an accident.

The United States is involved in a large number of all international flights. Accordingly, the U.S. has the clout necessary to persuade other countries to follow its lead in this matter. In his introduction of the 1999 Montreal Convention to Congress, U.S. Senator Strobe Talbott stated that

¹⁸⁹ See *id.* at Article 21.

¹⁹⁰ See *id.*

¹⁹¹ See DIEDERIKS-VERSCHOOR, *supra* note 19, at 100-01. ("It would only confuse matters further by adding another legal instrument to the existing series." *Id.* at 100.).

“U.S. ratification of this Convention will encourage ratification by a number of other States and will lead to a much-needed and long sought after modernized unification of the liability regime applicable to international air carriers.”¹⁹² The world’s reaction to the U.S. denunciation of the original Warsaw Convention in 1966, when the international community drew up a special agreement designed specifically to placate the U.S. and keep the country in the Warsaw System, is evidence of the United States’ position as a leader in the international aviation arena. The United States should denounce all previous aviation treaties and private agreements, and ratify the 1999 Montreal Convention. Most other countries would likely follow suit. By agreeing to consolidate the entire Warsaw System into a single document, the international community would take a huge step toward finally achieving the Warsaw Convention’s goals.

V. CONCLUSION

The majority of commentators and courts agree that one of the main goals of the original Warsaw Convention was to create uniformity in the application of rules relating to international air travel, particularly in the area of liability. Courts around the world strive for comity among States when deciding Warsaw cases. Judges frequently consult foreign cases for guidance in ensuring uniformity of application of the Warsaw provisions. But despite these efforts, uniformity remains elusive. There are currently too many documents being interpreted by too many different legal systems for absolute uniformity to be achieved.

It is possible, however, that countries can reach a higher degree of predictability than now exists in the application of rules governing international aviation. For this to happen, all of the current signatories to the various documents in the Warsaw System must sign the newest unifying treaty, the 1999 Montreal Convention. In addition, the countries must denounce all of the previous agreements, both public and private. This may seem like a massive undertaking. But as long as countries still have the option of adhering to any of the previous Warsaw documents, the newest version will soon be just the latest in a long line of conflicting treaties in a confusing regime. Only after the international community has consolidated the Warsaw System into one official document, to the exclusion of all others, will the original goal of uniformity become a reality.

¹⁹² Montreal Convention, *supra* note 1 (letter of submittal).

