

Spring 1982

A Proposed Revision of the Warsaw Convention

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Recommended Citation

Lewin, Susan Schneider (1982) "A Proposed Revision of the Warsaw Convention," *Indiana Law Journal*: Vol. 57 : Iss. 2 , Article 4.
Available at: <http://www.repository.law.indiana.edu/ilj/vol57/iss2/4>

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NOTES

A Proposed Revision of the Warsaw Convention

The Warsaw Convention¹ is a treaty which permits an international airline to limit its liability for the death or injury of a passenger.² Ratified by Congress in 1929, the Convention's main purpose was to protect the fledgling airline industry from the devastating effects³ of unlimited liability for air disasters.⁴ Today, more than fifty years following its adoption, the treaty remains in effect, despite both the financial stability of the airlines and evidence that air travel is the safest mode of transportation available.⁵ The existence of a stable and safe airline industry suggests that the treaty's main purpose has been achieved, and that continued enforcement of the liability limitation is unwarranted.

In response to the questionable fairness of the liability limitation, a

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (United States ratification effective as of October 29, 1934) [hereinafter cited as Warsaw Convention].

² In its original form, the treaty limited a plaintiff's recovery to 125,000 Poincare francs, which is \$8,300 in United States currency. Warsaw Convention, *supra* note 1, art. 22(1). Depending on which amendment (or amendments) are adhered to by the country in which the court hearing the suit is situated, this recovery limit may either remain at \$8,300 or be raised to \$16,600 (as a result of the Hague Protocol, *opened for signature* August 1, 1963, 478 U.N.T.S. 371 (United States not a signatory)), \$75,000 (the result of the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Docket 17325, 31 Fed. Reg. 7302 (1966) [hereinafter referred to as the Montreal Agreement]) or \$100,000 (due to the Guatemala Protocol, ICAO Doc. No. 8878-L.C. 161-162) (1970) (United States not a signatory at time of this writing).

³ For instance, the fatality rate in 1929 was 45 persons for every 100 million passenger miles flown. 1965 ANNUAL REPORT OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO) COUNCIL TO THE ICAO ASSEMBLY 13 [hereinafter cited as 1965 ICAO REP.]; *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1125 (C.D. Cal. 1978); 2 J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES, Ch. 7, at 5 (1968); Lowenfeld & Mendelsohn, *The U.S. and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967).

⁴ *Benjamins v. British European Airways*, 572 F.2d 913, 917 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed v. Wisner*, 555 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967); *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1118-19 (C.D. Cal. 1978); Lowenfeld & Mendelsohn, *supra* note 3, at 499; Note, *The Interpretation of the Warsaw Convention in Wrongful Death Actions*, 3 FORDHAM INT'L L.F. 71, 74-75 (1979). There was a second purpose for the implementation of the Warsaw Convention: The signatories to the treaty were desirous of developing uniform systems for litigation and travel arrangements. *Id.*

⁵ See note 26 *infra*.

number of courts⁶ have accepted legal theories which permit a plaintiff to circumvent the Convention and recover an amount in excess of the current \$75,000 limit.⁷ The executive branch of the government, upon which the Constitution places the responsibility for the negotiation of and adherence to treaties,⁸ has neither condemned the courts for their actions nor reaffirmed a desire to remain signatory to the treaty.⁹ This note contends, however, that despite the desirability of adequate compensation

⁶ See *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965); *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir. 1965); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Pekelis v. Transcontinental & W. Air, Inc.*, 187 F.2d 122 (2d Cir. 1951); *American Airlines, Inc. v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949); *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); *Grey v. American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

⁷ For the source of the limit, see note 2 *supra*. Some of the methods of avoidance include: finding the treaty unconstitutional, *e.g.*, *Burdell v. Canadian Pac. Airlines*, 10 Av. Cas. 18, 151 (Ill. Cir. Ct. 1968), *amended*, 11 Av. Cas. 17, 351 (Ill. Cir. Ct. 1969) (changing ground for finding nonimposition from unconstitutionality to lack of "international transportation" which would make the treaty applicable); finding an airline employee committed an act which, although if committed by the carrier itself would have insulated the carrier from liability, allowed the plaintiff to recover complete damages from the employee personally, *e.g.*, *Pierre v. Eastern Airlines, Inc.*, 152 F. Supp. 486, 489 (D.N.J. 1957); *but see Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977); *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611 (S.D.N.Y. 1955); (this controversy was later clarified by the Hague Protocol, *supra* note 2, which provides for insulation from liability for carriers as well as their agents, *Reed v. Wiser*, 555 F.2d at 1086.); finding that the carrier or its agents committed an act of willful misconduct, *e.g.*, *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir. 1965); *Koninklijke Luchtvaart Maatschappij N. V. KLM Royal Dutch Airlines v. Tuller*, 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961); *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949); finding that a ticket was not delivered on time, *e.g.*, *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); finding that the ticket, although delivered, contained an inadequate warning about the liability limitation, *e.g.*, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); or finding that the passenger's survivors were not in privity with the airline and therefore not bound by the limitation contained in the contract, *e.g.*, *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978).

⁸ U.S. CONST. art. II, § 2, cl. 2 states that it is the power of the executive branch of the government to make treaties.

⁹ In fact, in 1965 the United States government displayed its dissatisfaction with the low liability limitation of the Warsaw Convention and its progeny by filing notice that it intended to denounce the treaty. *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1118-19 (C.D. Cal. 1978); 2 J. KENNELLY, *supra* note 3, at 33-34; 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11:19 (1978); Hickey, *Breaking the Limit—Liability for Willful Misconduct Under the Guatemala Protocol*, 42 J. AIR. L. & COM. 603, 612 (1976); Lowenfeld & Mendelsohn, *supra* note 3, at 497; Note, *supra* note 4, at 78. The denunciation prompted negotiation of what is now termed the Montreal Agreement, *supra* note 2. *In re Air Crash in Bali, Indonesia*, 462 F. Supp. at 1118-19; 2 J. KENNELLY, *supra* note 3, at 10-14, 33-34; 1 L. KREINDLER, AVIATION ACCIDENT LAW (rev'd. 1977); 1 S. SPEISER & C. KRAUSE, *supra*, at § 11:19; Boyle, *The Guatemala Protocol*, 6 AKRON L. REV. 123, 125 (1973); Lowenfeld &

which can result from avoidance of the Convention's restrictions, the judicial activism practiced by the courts might be overly zealous and could lead to unintended results.¹⁰

After an analysis of the basic problems with the treaty and the most popular theories of avoidance, this note concludes that although the recovery system is outdated and must be changed, its alteration is not the prerogative of the judiciary. Two original proposals are then presented. The first suggests that the appropriate conduct for the judiciary is to await executive action on the issue of the liability limitation. The second proposes an amendment of the treaty's recovery system whereby the level of an airline's liability becomes commensurate with its financial status.

TREATY PROBLEMS AND POPULAR MODES OF AVOIDANCE

Treaty Problems

The inequitable aspects of the Warsaw Convention's recovery system are attributable to three basic problems: first, because a contract for air travel is between two parties of grossly disparate bargaining powers, most of the advantages in the contract accrue to the airline; second, due to the vast changes which have occurred in the safety of air travel, the treaty is no longer as essential for the protection of the interest of either the airlines or their passengers; third, the current operation of the liability limitation results in an unfair financial burden upon certain defendants in air crash cases.

The first problem, inequality of bargaining power, violates the basic principle of contract law that parties should be able to contract freely.¹¹ The assumption underlying that principle is that the parties to a contract are of equal bargaining power and are able to achieve the results they desire at a price that is both fair and equitable.¹² The purchase of an airline ticket, however, is inconsistent with this assumption, because

Mendelsohn, *supra* note 3, at 497; Note, *supra* note 4, at 78. The Montreal Agreement increases the liability for all flights of signatory airlines which originate, stop over, or terminate in the United States. Montreal Agreement, *supra* note 1. The uniqueness of the Montreal Agreement lies in the fact that it is not a treaty among nations. Rather, it is a contractual agreement between the United States government and the airlines that maintain flights which terminate, originate, or stop over in the United States. Flights which have any one of these characteristics are subject to the \$75,000 liability limitation. *In re Air Crash in Bali, Indonesia*, 462 F. Supp. at 1118-19; 2 J. KENNELLY, *supra* note 3, at 10-16; 1 L. KREINDLER, *supra*, at § 12A.02; 1 S. SPEISER & C. KRAUSE, *supra*, at § 11:19. For a more extensive discussion of the events surrounding the negotiation for the Montreal Agreement, see Lowenfeld & Mendelsohn, *supra* note 3, at 497-502.

¹⁰ See note 73 & accompanying text *infra*.

¹¹ J. MURRAY, MURRAY ON CONTRACTS, §§ 350-351 (2d rev. ed. 1974).

¹² *Id.*

all terms of passage are predetermined.¹³ The passenger is unable to bargain with the airline for the terms of transportation. Even if the opportunity to bargain were available, it would be highly improbable that a private individual could induce an airline to forgo the benefit of the liability limitation.¹⁴

Since the bargaining power of the two contracting parties is grossly disparate, the ticket results, for the most part, in certain inequitable terms of passage.¹⁵ While a few elements of the contract provide an equitable distribution of benefits and detriments between the passenger and the airline,¹⁶ those terms are not explicitly addressed within the body of the Convention.¹⁷ When the airline's benefit is weighed against its detriment, the former far exceeds the latter.¹⁸

The second problem stems from the changes which have occurred in the airline industry. Originally, the drafters intended a quid pro quo exchange of benefits and detriments between the airline and the passengers.¹⁹

¹³ The terms of passage contained in the ticket include the place and date of issue, the place of departure and of destination, the agreed stopping places, the name and address of the carrier or carriers, and a statement concerning the liability limitation. Warsaw Convention, *supra* note 1, art. 3(1).

¹⁴ A private individual simply does not have the power to force the airline to increase its liability. Article 22(1) of the Convention, which gives a passenger the right to bargain with the carrier for a higher recovery, is at best an empty promise. Warsaw Convention, *supra* note 1, art. 29(1). An example of the potential powerlessness of a single individual against an airline is the Montreal Agreement, *supra* note 2. There, the threat of the United States government to withdraw from the Warsaw Convention was required before the airlines would agree to increase their liability. For a more complete discussion of the events surrounding the Montreal Agreement, see Lowenfeld & Mendelsohn, *supra* note 3. See also 2 J. KENNELLY, *supra* note 3. There may be counterarguments for prohibiting an individual from bargaining for his terms of passage, such as lack of uniformity (which was one of the major purposes of the Warsaw Convention), *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), and confusion which would result from airline ticket agents needing to bargain or explain each element of the contract, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting).

¹⁵ The inequitable terms of passage are all those contained in the ticket in which there is not an equal distribution of benefits and detriments between the airline and the passenger. The contract, when weighed as a whole, is inequitable to the passenger. The terms of passage are only a part of the inequity; the recovery terms also are inequitable. See notes 18-32 & accompanying text *infra*.

¹⁶ The one quid pro quo exchange of benefits and detriments is that the passenger pays a fee and is transported by the carrier to the destination he desires. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967).

¹⁷ Transportation *per se* is only mentioned in article 1, Warsaw Convention, *supra* note 1, art. 1, where it is defined, and in article 2, *id.*, art. 2, which states that the Convention applies to transportation performed by the state.

¹⁸ The benefit mentioned in the treaty which favors the airline is the liability limitation of article 22(1), *id.* art. 22(1). The airline's corresponding detriment, the presumption of liability, is contained in article 17, *id.* art. 17.

¹⁹ *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, (S.D.N.Y.), *aff'd*, 370 F.2d 508, 512-13 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); cf. Note, *Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the*

An examination of ticket prices²⁰ and aviation accident litigation²¹ demonstrates that, currently, the exchange is not equal.²² The airlines argue that reasonable and stable travel costs and favorable proof presumptions which insure swift and certain recoveries are great benefits to the traveler.²³ They contend that these advantages are sufficient to justify limited recovery,²⁴ and argue that without the benefit of the liability limitation, insurance costs become unreasonable.²⁵ The carriers conclude by explaining that the rise in insurance rates attributable to unlimited liability would greatly increase air fares²⁶ and eliminate potential passengers whose

Warsaw Convention, 54 *Chi.-Kent L. Rev.* 851, 852 (1978) [hereinafter cited as Note, *Aviation Law*] (explaining that presumption of liability was created to justify low liability limitation); Note, *supra* note 4, at 76. The passenger benefits by being able to arrange his flight for a fairly reasonable sum, Note, *Aviation Law, supra*, at 863, and by the guarantee of a swift and certain recovery in the event of an accident, Boyle, *supra* note 9, at 123; Hickey, *supra* note 9, at 608; Note, *Aviation Law, supra*, at 863. The corresponding detriment to the passenger is the limited liability enjoyed by the airline. Boyle, *supra* note 9, at 123; Hickey, *supra* note 9, at 608. To its detriment, the airline agrees to either a presumption of liability for the accident, *Warsaw Convention, supra* note 1, art. 17, if the situation is covered by the *Warsaw Convention*, or absolute liability under the *Montreal Agreement, supra* note 2. The airline benefits from its limited liability.

²⁰ The airlines argue that the liability limitation helps keep ticket prices stable, Note, *Aviation Law, supra* note 19, at 863, because insurance costs, which are a part of the ticket price, are much easier to calculate if the rate of recovery is fixed. Hickey, *supra* note 9, at 612; Note, *Aviation Law, supra* note 19, at 863; Note, *supra* note 4, at 75. See note 28 & accompanying text *infra*.

²¹ In a suit governed by the *Warsaw Convention*, the airline is presumed liable, *Warsaw Convention, supra* note 1, art. 17. This shifts the burden of proof to the airline to show that it was not negligent. Lowenfeld & Mendelsohn, *supra* note 3, at 500. In suits governed by the *Hague Protocol, supra* note 2, or the *Montreal Agreement, supra* note 2, the airline is held strictly liable. *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1119 (C.D. Cal. 1978); 2 J. KENNELLY, *supra* note 3, ch. 7, at 10; Boyle, *supra* note 9, at 125; Note, *Aviation Law, supra* note 19, at 853.

²² *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 512-13 (2d Cir. 1966), *aff'd* by an equally divided court, 390 U.S. 455 (1968). See Lowenfeld & Mendelsohn, *supra* note 3, at 500.

²³ See notes 20-21 *supra*.

²⁴ Note, *Aviation Law, supra* note 19, at 851-52.

²⁵ Hickey, *supra* note 9, at 610.

²⁶ Note, *Aviation Law, supra* note 19, at 864. The contentions that insurance rates and ticket prices would become unreasonable if liability became unlimited are unfounded when examined in light of current data concerning overall airline costs and factors which determine insurance premiums. In 1966, the *Montreal Agreement, supra* note 2, increased the liability limitation of nearly every international airline with United States flights to \$75,000. *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1119 (C.D. Cal. 1978); 2 J. KENNELLY, *supra* note 3, ch. 7, at 10; Boyle, *supra* note 9, at 125; Note, *Aviation Law, supra* note 19, at 853. Following that increase, insurance costs of those carriers rose approximately \$.06 per passenger, Hickey, *supra* note 9, at 611, which in total remained only one percent or less of their total operating expense. *Id.* As two international legal scholars observed, "[t]he incremental insurance costs . . . were clearly somewhere between the cost of the olive and the cost of the gin in the martini, and nowhere near the cost of an inflight movie." Lowenfeld & Mendelsohn, *supra* note 3, at 567.

At the February 1978 Symposium on Aviation Litigation held in Monaco, it was reported that, in 1977, United States airlines paid roughly \$.40 per passenger per round trip for liability insurance of up to \$400 million per occurrence. 1 L. KREINDLER, *supra* 9, § 12B.01.

ability to travel by air is predicated on cost.²⁷

The advantages named by the airlines and intended by the drafters—stable air fares and favorable proof presumptions—today either do not exist or do not need the treaty to assure their enforcement. Airline ticket prices for international travel have not remained stable,²⁸ so the traveler

Since 90% of these flights were domestic, *id.* § 12B.02[4], and therefore, subject to unlimited liability, *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 513 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); Kreindler, *The Guatemala Protocol*, 6 AKRON L. REV. 131, 135 (1973), it cannot be assumed that the insurance costs of international carriers, because they enjoy limited liability, are equivalent to that of their domestic counterparts. Rather, due to the liability limitation, it can be expected that the cost per passenger per round trip is less than the \$.40 figure given for the domestic airlines.

Knowledge of the price paid for insurance by the United States airlines is helpful in two ways. First, it provides the international airlines with an estimate of the cost of insurance for unlimited liability. Second, it demonstrates that, if unlimited liability were to be imposed on the international carriers, insurance would be available to protect them from financial catastrophe. It may therefore be assumed that an elimination of the liability limitation would not impose upon international airlines a burden of unmanageable insurance costs.

In addition, there are other reasons which justify the assumption that unlimited liability will not produce exorbitant insurance premiums. The strongest reason for the belief is found in the domestic airlines. They are charged with unlimited liability, yet remain some of the most viable industries in the world. Kreindler, *supra* at 132, 135. Their continued success may be due to the fact that insurance premiums are based on the estimated risk of accident combined with an estimated average recovery to be paid to victims. Hickey, *supra* note 9, at 612. The risk is calculated on past air safety records, taking into account the climate and technical standards of equipment and facilities used by the airline. *Id.* Because air travel is statistically proven to be the safest form of transportation now in existence, risk of accident is very low (airline travel is now considered the safest method of transport, A.O.P.A. HANDBOOK FOR PILOTS (1977)). For example, in 1929 the fatality rate for every 100 million passenger miles flown was 45, and by 1965, that had been reduced to 0.55 for the same distance. 1965 ICAO REP., *supra* note 3, at 13. In 1976 that figure had been further reduced to 0.21 deaths per 100 million passenger miles. INTERNATIONAL AIR TRANSPORT ASSN, WORLD AIR TRANSPORT STATISTICS 14 (21st ed. 1976). This compares with 3.31 deaths per 100 million passenger miles driven in the United States alone in 1976. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1977 ed.). Also, due to technical advancements, airline safety is expected to continue its improvement. Hickey, *supra* note 9, at 612.

The estimated average recovery is the factor which causes concern in determining the premium rate. In 1970 the average recovery for a non-Warsaw-limited airline death was \$200,000, and statistics demonstrate that it is continually rising. 1 L. KREINDLER, *supra*, note 9, § 12B.02[b]. For airlines, the continued increase may not, however, be a cause for alarm. In 1977 those airlines which were incurring \$200,000 liabilities for air disaster deaths still only paid \$.40 per passenger for liability insurance. *Id.* § 12B.01. If it is proposed that unlimited liability exist solely for American victims and survivors, the cause for concern is further reduced. Between 1963 and 1973, the average number of United States citizens who died every year in plane crashes was 186. Kreindler, *supra*, at 132. That includes deaths in domestic and international flights. Therefore, if the airlines were to incur unlimited liability for American citizens, they would be facing such a burden for an average of fewer than 186 persons per year. The increase seems even less when it is realized that the American market represents a large percentage of all international air travel, 1 L. KREINDLER, *supra* note 9, § 12B.02[4], which suggests that the airlines receive most of their profits from United States citizens.

²⁷ See notes 20 & 26 *supra* for reasons why the airlines say the cost would increase and a refutation of that argument.

²⁸ See DELTA AIRLINES 1980 ANNUAL REPORT: 52 MOODY'S INVESTORS SERVICE, INC., MOODY'S TRANSPORTATION NEWS REPORTS, 2329 (1981); *Hearings Before the Subcomm. on Aviation of the*

has not benefited from static costs. Due to the high safety ratings accorded air travel,²⁹ as well as to the applicable treaties, a question of fault is rarely litigated in a present-day air accident suit.³⁰ Because the courts almost uniformly eliminate the question of fault,³¹ it seems that judges, rather than the treaty, impose the advantages of either a presumption of fault or absolute liability.³² This demonstrates that it is no longer necessary for the treaty to be in existence for the plaintiff to obtain a favorable proof presumption.

The third problem with the Warsaw Convention is the unfair burden it places on aircraft manufacturers if one of the causes of the crash is mechanical failure. Since the manufacturer is outside the scope of the treaty,³³ it is subject to unlimited liability. The result of limited airline liability when manufacturers of the airplane or its component parts are partially responsible for the accident is that nonairline defendants bear the brunt of the compensation burden without regard to their degree of fault.³⁴ One argument is that this is an acceptable consequence, since it results in adequate compensation for plaintiffs and enables the courts to grant unlimited liability against certain defendants and still allow the United States to continue to adhere to the Warsaw Convention. Since tort law looks favorably on imposing liability on parties who are in a good position to absorb the cost and then pass it on to many customers,³⁵ the airline manufacturers could be considered proper defendants from which to extract unlimited compensation.³⁶

Comm. on Public Works and Transportation on H.R. 5481, 96th Cong., 1st Sess. 102 (1979) (statement of the Civil Aeronautics Board). A large part of the price increase is a reflection of the rising costs of fuel. The airlines, however, use the price stability argument as a primary reason for maintaining the limitation, saying the costs would increase to even greater amounts without it. Note, *Aviation Law*, *supra* note 19, at 863. The increase attributable to greater insurance costs, however, would be approximately \$.40. See note 26 *supra*.

The airline might argue that if the passenger desires greater financial protection, the passenger should purchase insurance. Note, *Aviation Law*, *supra* note 19, at 864. That is allegedly the purpose of the notice requirement contained in the treaty. Warsaw Convention, *supra* note 1, art. 3(1)(e). See also notes 74-84 & accompanying text *infra*. The cost per passenger for extra insurance, however, is greater when purchased individually, because the airline can buy in bulk and thereby obtain a cheaper rate. 1 L. KREINDLER, *supra* note 9, § 11.01[5]. It is more efficient to require the airlines to purchase additional insurance because they can spread the extra cost among all the passengers.

²⁹ See note 26 *supra*.

³⁰ Note, *Aviation Law*, *supra* note 19, at 865. See also note 21, *supra*.

³¹ Lowenfeld & Mendelsohn, *supra* note 3, at 521-22; Note, *Aviation Law*, *supra* note 19, at 865.

³² See Lowenfeld & Mendelsohn, *supra* note 3, at 521-22; Note, *Aviation Law*, *supra* note 19, at 865.

³³ *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 747 (C.D. Cal. 1975); 2 J. KENNELLY, *supra* note 3, ch. 7, at 2.

³⁴ J. KENNELLY, *supra* note 3, ch. 7, at 20; Hickey, *supra* note 9, at 604.

³⁵ 1 L. KREINDLER, *supra* note 9, § 11.01[5]; Hickey, *supra* note 9, at 606-07; Lowenfeld & Mendelsohn, *supra* note 3, at 559.

³⁶ The contention that plaintiffs should receive their compensation in unlimited amounts

The assumption that unlimited liability and therefore adequate compensation results from impleading a manufacturer where legally appropriate is not always true, however. Due to certain legal difficulties, it is harder to succeed against the manufacturer in litigation.³⁷ When a plaintiff sues an airline, he is guaranteed either a presumption of liability³⁸ or strict liability³⁹ against the carrier. Since the manufacturer is not bound by any of the agreements which guarantee these favorable proof presumptions,⁴⁰ the plaintiff is never assured that the court will employ them.⁴¹ Another legal barrier to suing the manufacturer instead of the airline is that each state has its own products liability legislation,⁴² and the application of any or all of the presumptions in the particular state court is often dependent on the theory upon which the plaintiff proceeds.⁴³ Plaintiff compensation, although limited, is therefore practically insured by the Warsaw Convention, whereas recovery from a manufacturer, albeit unlimited, is not so certain.

While data demonstrate that, financially⁴⁴ and numerically,⁴⁵ the aircraft manufacturers are the best risk spreaders, the airlines are also

from the aircraft manufacturers is based on the belief that the manufacturers are the best risk spreaders. See text accompanying note 35 *supra*. The reasoning is that manufacturers can charge higher prices for their planes, which would pass the cost of unlimited liability on to the airlines. The airlines, in turn, could raise their ticket prices to represent the increased cost of the aircraft. The system's positive aspect is that it would distribute the price of some air transportation defendant's unlimited liability among the entire air traveling industry and public. The system's negative result, however, is that it does not deter the defendant airline, in whose hands lies the power to reduce air crashes and thus decrease the volume of unlimited liability claims.

³⁷ 1 L. KREINDLER, *supra* note 9, § 7.01.

³⁸ See note 21 *supra*.

³⁹ See *id.*

⁴⁰ See text accompanying note 33 *supra*.

⁴¹ See generally 2 S. SPEISER & C. KRAUSE, *supra* note 9, §§ 19:5-19:12.

⁴² *Id.* § 19:12, at 519-20.

⁴³ *Id.* For instance, strict liability is almost uniformly applied when a plaintiff is claiming that a design was defective, *id.* § 19:5, at 492. But even when strict liability is applied, a plaintiff may lose. See generally *Collins v. B.F. Goodrich Co.*, 558 F.2d 908 (8th Cir. 1977); *Rigby v. Beech Aircraft Co.*, 548 F.2d 288 (10th Cir. 1977); *Wangeman v. General Dynamics Corp.*, 53 A.D.2d 520, 384 N.Y.S.2d 174 (1976). Some other theories which plaintiffs employ against the manufacturers are breach of implied warranty, *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), or express warranty, *Alaska Airlines, Inc. v. Lockheed Aircraft Corp.*, 430 F. Supp. 134 (D. Alaska 1977); *Motorola Aviation Elec. Inc. v. Louisiana Aircraft, Inc.*, 172 So. 2d 118 (La. Ct. App.), *cert. denied*, 247 La. 717, 174 So. 2d 131 (1965), and failure to warn the operator adequately of certain features or safety measures for the plane, *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975).

⁴⁴ The profits of McDonnell-Douglas Corp. in 1979 alone were \$199.1 million. MCDONNELL DOUGLAS CORP., 1979 ANNUAL REPORT; From 1975-1979, four of the major United States airlines—Delta, Eastern, TWA, and American—each earned an average of \$48 million in annual profits. See DELTA AIRLINES, 1979 ANNUAL REPORT; EASTERN AIRLINES, 1979 ANNUAL REPORT; AMERICAN AIRLINES, 1979 ANNUAL REPORT; TWA, 1979 ANNUAL REPORT.

⁴⁵ There are over one hundred international airlines in existence today. See INTERNATIONAL AIR TRANSPORT ASS'N, *supra* note 26, at 2, 14. The major aircraft manufacturers, who

eminently capable of bearing the risk of unlimited liability. The court in *Husserl v. Swiss Air Transport Co.*⁴⁶ determined that the amendments to the treaty demonstrate that the drafters thought the airlines could absorb the cost of unlimited liability and then pass the cost on to their passengers.⁴⁷ The airlines are particularly appropriate objects of tort liability in light of the goal of deterring conduct that causes accidents.⁴⁸ Manufacturer liability for air accidents does not spur the airlines to require more thorough flight preparation by pilots. Since pilot error is the most frequent cause of air accidents,⁴⁹ the airlines have the greatest opportunity to try to prevent even those few accidents which do occur.⁵⁰ The tort law objective of deterrence is therefore best served by imposing unlimited liability on the airlines as well as on manufacturers.

Modes of Avoidance

The judiciary's dislike for the liability limitation of the Warsaw Convention, due to both its unfairness and its obsolescence, has resulted in three theories which enable judges to permit plaintiffs to recover unrestricted amounts from defendant airlines. One theory finds its basis in contract law.⁵¹ The two other theories are based on the treaty itself, which allows unlimited recovery in cases of willful misconduct by an airline or failure to give notice of the limitation to the passenger.⁵² This section discusses the reasoning of each of the theories and the positive and negative results of their application.

Contract Analysis

The reasoning behind the contract cases⁵³ begins with the basic princi-

sell the planes to these airlines, are Boeing, Lockheed and McDonnell-Douglas. The three manufacturers therefore have over one hundred airlines among which the risk of unlimited liability may be spread. The airlines can also pass the cost of liability on to the passengers. Liability of the manufacturers thereby creates a longer chain of risk spreading and numerically allows more people to shoulder the burden of unlimited liability.

⁴⁶ 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

⁴⁷ *Id.* at 707.

⁴⁸ W. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 1, at 4-6 (4th ed. 1971).

⁴⁹ NATIONAL TRANSPORTATION SAFETY BOARD, [1968] ANNUAL REVIEW OF AIRCRAFT ACCIDENT DATA 12 (1980).

⁵⁰ See 351 F. Supp. at 707.

⁵¹ The contract theory rests on the principle of privity, that principle being that parties not in privity of contract are not bound by the contract's terms. J. MURRAY, *supra* note 11, § 285, at 581-84.

⁵² The willful misconduct theory is based on article 25 of the treaty. Warsaw Convention, *supra* note 1, art. 25. The ticket delivery mode of avoidance is based on articles 3(1) and (2) of the treaty. Warsaw Convention, *supra* note 1, art. 3(1), (2).

⁵³ The main contract case is *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978). Other cases which stated that the ticket represented a contract between the

ple that the ticket represents the contract between the passenger and the airline.⁵⁴ In *In re Air Crash in Bali, Indonesia*,⁵⁵ the district court used the above premise in combination with the California wrongful death statute⁵⁶ to demonstrate in a unique way that plaintiffs were not in a position to be bound by the Convention's restriction.⁵⁷ The court reasoned that since the decedents contracted with the airline for transportation, they accepted the liability limitation imposed by the Warsaw Convention⁵⁸ and thereby contracted away their right to recover any amount in excess of the limitation. The court held that plaintiffs, as survivors of the deceased passengers, were not parties to the contract and were not bound by the Convention's restrictions.⁵⁹ The California wrongful death statute created for the decedent's survivors an original cause of action that, according to the court, did not depend on any rights the decedent might have had.⁶⁰ Thus plaintiffs were not bound by any waiver of rights by the decedent and were permitted to recover damages in excess of the Warsaw Convention limitation.⁶¹

The positive aspect of the *Bali*-type contract analysis is that, as with all the other modes of avoidance, plaintiffs have the opportunity for adequate compensation. Since many states have wrongful death statutes similar to that of California,⁶² judges who can find no act of willful

airline and the passenger include *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967) and *Glenn v. Compania Cubana de Aviacion, S.A.*, 102 F. Supp. 631 (S.D. Fla. 1952). After 1967 the contract mode of avoidance was abandoned until the *Bali* decision for those theories which were more directly based on the treaty, *see note 7 supra*.

⁵⁴ *Benjamins v. British European Airways*, 572 F.2d 913, 915 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967); *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1119-21 (C.D. Cal. 1978); 1 L. KREINDLER, *supra* note 9, § 11.05[1].

⁵⁵ 462 F. Supp. 1114 (C.D. Cal. 1978).

⁵⁶ CAL. CIV. PROC. CODE § 377 (West Supp. 1982).

⁵⁷ The *Bali* court's method of avoidance was unique in that it combined the previous contract theory, *see note 53 supra*, with the California wrongful death statute. 462 F. Supp. at 1117.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1122, 1124.

⁶⁰ *Id.* at 1117, 1122, 1124.

⁶¹ The damages awarded one plaintiff were \$300,000. Another received \$651,500. *Id.* at 1116, 1126.

⁶² Twenty-six states in addition to California create an original cause of action in their wrongful death statutes. *See* ALASKA STAT. § 09.55.580 (1962); ARIZ. REV. STAT. ANN. § 12-611 (1982); ARK. STAT. ANN. § 27-906 (1979); COLO. REV. STAT. § 13-21-202 (1973); HAWAII REV. STAT. § 663-3 (1976); IDAHO CODE § 5-311 (1979); ILL. ANN. STAT. ch. 70, § 1 (Smith-Hurd 1959); IND. CODE § 34-1-1-2 (1976); LA. CIV. CODE ANN. art. 2315 (West 1972); MD. CTS & JUD. PROC. CODE ANN. § 3-904 (1980); MASS. ANN. LAWS ch. 229, § 2 (1974); MISS. CODE ANN. § 11-71-13 (Supp. 1981); MO. ANN. STAT. § 537-080 (Vernon Supp. 1982); NEV. REV. STAT. § 41.085 (1979); N.J. STAT. ANN. § 2A:31-1 (West 1952); N.C. GEN. STAT. § 28A-18-2 (Supp. 1981); OHIO REV. CODE ANN. § 2125.01 (Page Supp. 1981); OKLA. STAT. ANN. tit. 12, § 1053 (West Supp. 1981); OR. REV. STAT. § 30.020 (1981); PA. CONS. STAT. ANN. tit. 42, § 8301 (Purdon 1982); S.C. CODE § 15-51-10 (1976); S.D. COMP. LAWS ANN. § 21-5-1 (1979); UTAH CODE ANN. § 78-11-12 (1953); VA. CODE § 8.01-50 (Supp. 1981); WASH. REV. CODE ANN. § 4.20.010 (1962); W. VA. CODE § 55-7-5 (1981).

misconduct,⁶³ no inadequate ticket delivery,⁶⁴ and no faulty notice⁶⁵ could still allow plaintiffs unlimited recovery through the contract and wrongful death statute theory.⁶⁶

There are also negative aspects to the *Bali* approach to the limitation. Widespread forum shopping could result,⁶⁷ contravening the purpose of uniformity.⁶⁸ With the opportunity for greater application of this avoidance theory,⁶⁹ diplomatic objections from other member nations might be forthcoming.⁷⁰ Finally, the *Bali* court, in its zeal, seems to have committed an error which, given the overall tone of the opinion, it probably did not intend.⁷¹ The privity interpretation protects survivors of passengers from the liability limitation, yet it holds the passengers to the contract. If a passenger was therefore able to survive the crash, the *Bali* interpretation would be of no aid in avoiding the limitation.⁷² This demonstrates the dangers inherent in judicial activism, and justifies the constitutional ban on such activities.⁷³

⁶³ See notes 90-94 & accompanying text *infra*.

⁶⁴ See notes 74-80 & 84-88 & accompanying text *infra*.

⁶⁵ See notes 74-78 & 81-88 & accompanying text *infra*.

⁶⁶ Note, *supra* note 4, at 72-73.

⁶⁷ One writer has argued that continuous judicial reinterpretation of the treaty's terms promotes forum shopping. Mankiewicz, *The Judicial Diversification of Uniform Private Law Conventions* 21 INTL & COMP. L.Q. 718, 745 (1972). Plaintiffs could have a choice of forums in which to sue, those with California-type wrongful death statutes and those with statutes which do not create an original cause of action. See note 62 *supra*. There is also the possibility that different judges will have different attitudes toward the importance of adherence to the liability limitation. If forum shopping were permitted without jurisdictional limitations, a plaintiff could always be allowed to sue in a court which had the appropriate type of wrongful death statute and a judge who frowned upon imposition of the liability limitation. Litigation, however, does have jurisdictional requirements, and there is a possibility that a plaintiff could be procedurally restricted to a court whose statute lacked the original cause of action provision or to a judge who believed in adhering to the limitation.

⁶⁸ See note 4 & accompanying text *supra*.

⁶⁹ The contract theory employed by the *Bali* court presents greater opportunities for application because of the number of states with wrongful death statutes similar to that of California. See note 62 & accompanying text *supra*. See also Note, *supra* note 4, at 72-73.

⁷⁰ Note, *supra* note 4, at 77. The problem of foreign relations difficulties, however, was also a problem in 1965 when the United States first contemplated denouncing the treaty, Lowenfeld & Mendelsohn, *supra* note 3, at 510, yet the fear did not deter the government from threatening denunciation in order to force an increase in the recovery allowed to victims and survivors of air accidents. See generally Lowenfeld & Mendelsohn, *supra* note 3.

⁷¹ The court, in a number of places, indicated its overall dislike for the liability limitation, and intimated that its usefulness had long since passed. For instance, the court argued that, because of technological and safety developments, "[t]here is now a strong factual basis for the argument that a legal limitation on the amount a plaintiff may recover in the event of an air tragedy is unwarranted." 462 F. Supp. at 1125. Judge Williams also contended that legislation such as the Airline Deregulation Act of 1978 demonstrated the federal government's intent that the airline industry "stand on [its] own feet" and take "responsibility for damages caused by its own negligence." *Id.* The antilimitation sentiment displayed by the court suggests that it would not approve of limited liability for an air crash victim.

⁷² See text accompanying note 64 *supra*.

⁷³ The Constitution provides that the President has the power to make treaties. U.S. CONST. art. II, § 2, cl. 2. Also, in article VI the Constitution states that "all treaties made,

Lack of Notice and Failure of Delivery

Article 3(1)⁷⁴ requires that the airline deliver to the passenger a ticket

or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby . . ." U.S. CONST. art. VI, cl. 2. The *Bali* court, by not adhering to the treaty, which was allegedly made under the authority of the United States (for a discussion contending the Warsaw Convention was not so negotiated, see Note, *Aviation Law, supra* note 19, at 855 & n.36), could be said to have violated both articles II and VI. The article VI violation would be nonadherence, and the article II violation would be rewriting the treaty to include a privity requirement.

The judicial treaty-making problem can also be looked upon as a question of proper judicial conduct in light of statute obsolescence. The Warsaw Convention, as a federal treaty, has the force of federal law. *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971); U.S. CONST. art. VI, cl. 2. Federal law, as enacted by the Congress, is binding on "the judges in every State . . ." U.S. CONST. art. VI, cl. 2. There is a problem, however, when statutes become obsolete. Unlike the common law, courts cannot change outdated statutes by judicial decision. Davies, *A Response to Statutory Obsolescence: The Non-Primacy of Statutes Act*, 4 VT. L. REV. 203, 213 (1979). Only the legislature has the power to alter and update statutes. *Id.* This is enough of a difficulty on the state or federal level, but an even greater problem is posed for alteration of an international treaty. Much more time is needed for the negotiation of international rules. The increased time results in harm to a greater number of people because the obsolete treaty is enforced for a longer period of time.

The problem with obsolete statutes which remain in force is that judges, in despair over the inordinate amount of time required for reformation, become more and more creative in their interpretation of the statute. Courts look at the conditions which prompted enactment of the legislation in the first place, and compare those conditions with the present situation. *Reed v. Wisner*, 555 F.2d 1079, 1088 (2d Cir. 1977). Often judges will look to more recent legislation in the area which represents the modern prevailing legislative opinion on the topic, see, e.g., *In re Air Crash in Bali, Indonesia*, 462 F. Supp. at 1125-26, and attempt to decide the case in accordance with that opinion.

In the United States, judges have pointed to both federal legislation, e.g., *id.* at 1125-26 (relying on The Airline Deregulation Act of 1978, Pub. L. No. 95-448, 92 Stat. 1073), and other judicial decisions, e.g., 462 F. Supp. at 1122 (relying on *Grey v. American Airlines*, 95 F. Supp. 756 (S.D.N.Y. 1950); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); and *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965), among other cases), to explain their liberal construction of the treaty. Their unorthodox interpretation, however, could easily lead to unfavorable repercussions, such as embarrassment of the United States government, given the fact that not many other signatories to the treaty have adopted the more liberal construction the American judiciary has given to the treaty. See note 85 & accompanying text *infra*. See also Note, *supra* note 4, at 77. Given the need both to protect the integrity of the United States in treaty negotiations and to uphold the supremacy of federal statutes, the judicial conduct proposal described in the text accompanying notes 97-98 *infra* should be seriously considered as an alternative method of judicial activity. The role of the judiciary should be to enforce federal laws, despite obsolescence, not to rewrite them in accordance with their own views. *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).

⁷⁴ This article provides:

- (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
 - a) The place and date of issue;
 - b) The place of departure and of destination;
 - c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises

which is to contain, among other things,⁷⁵ a warning that the transportation is subject to "the rules relating to liability."⁷⁶ Article 3(2) warns that the carrier cannot avail itself of the liability limitation if it accepts a passenger without the passenger ticket being delivered.⁷⁷ Courts in the United States have found that the purpose of these two provisions, taken together, is to enable the passenger to take his own precautions⁷⁸ to prevent the serious consequences which flow from imposition of the limitation.⁷⁹ When this purpose is frustrated, the courts refuse to enforce the limitation. The "late delivery" cases⁸⁰ reason that receipt of a ticket containing the warning after a certain point in the embarkation process does not afford the passenger an adequate opportunity to take precautions.⁸¹ Some cases focus on the warning contained in the ticket,⁸² contending that the warning itself is printed in such a manner so as to be "virtually" invisible,⁸³ resulting in a similar denial of an opportunity

that right, the alteration shall not have the effect of depriving the transportation of its international character;

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

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

Warsaw Convention, *supra* note 1, art. 3(1).

⁷⁵ The "other items" the ticket is to contain include the place and date of issue, the place of departure and destination, agreed stopping places, and the name and addresses of the carrier or carriers. *See id.*

⁷⁶ *Id.* art. 3(1)(e).

⁷⁷ *Id.* art. 3(2).

⁷⁸ The precautions a passenger could take to avoid the harsh consequences of the liability limitation include acquiring additional insurance, *Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851, 856-57 (2d Cir. 1965); *Warren v. The Flying Tiger Line, Inc.*, 352 F.2d 494, 497-98 (9th Cir. 1965); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 239 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); Note, *Aviation Law*, *supra* note 19, at 864; bargaining with the airline for increased liability (a right granted to the passenger by article 22(1) of the treaty, Warsaw Convention, *supra* note 1, art. 22(1)); or deciding not to take the flight, *Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851, 856-57 (2d Cir. 1965); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 239 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).

⁷⁹ *Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851, 856-57 (2d Cir. 1965); *Warren v. The Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (9th Cir. 1965); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 239 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).

⁸⁰ *Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965); *Warren v. The Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).

⁸¹ The Second Circuit stated that "[t]he delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air." *Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir. 1965).

⁸² *DeMarines v. KLM Royal Dutch Airlines*, 433 F. Supp. 1047 (E.D. Pa. 1977); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).

⁸³ One court contended that references to the limitations were "camouflaged in Lilliputian print" and that they were therefore "unnoticeable and unreadable." *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F. Supp. 237, 243 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).

for self-protection.⁸⁴ The positive result of these interpretations is, once again, the opportunity for plaintiffs to recover damages which reflect their losses.

There are also many negative results. First, no other member nation, except Canada, interprets articles 3(1) and 3(2) to disallow the liability limitation in cases of late delivery or inconspicuous warnings.⁸⁵ The goal of uniformity is therefore not obtained.⁸⁶ Second, in the ticket delivery cases, it is very difficult to determine how soon is soon enough to enable the traveler to take precautionary measures.⁸⁷ Third, in the case of the printed warning, until the tickets are altered, it is possible that no passenger will be subjected to the liability limitation in United States courts.⁸⁸ Finally, that the United States and Canada are the only countries which interpret article 3(2) in this manner demonstrates that judicial activism is again at work.⁸⁹

Willful Misconduct

The willful misconduct mode of avoidance is based on article 25 of the treaty,⁹⁰ which prevents an airline from availing itself of the liability limitation if either the carrier or its agent commits an act of "willful misconduct."⁹¹ Judges are often able to permit a plaintiff to recover unrestricted amounts through a liberal interpretation of what constitutes

⁸⁴ *Id.* at 239.

⁸⁵ The Canadians, in *Montreal Trust Co. v. Canadian Pac. Airlines*, 12 *Av. Cas.* 17,197 (Montreal Sup. Ct. 1971), *rev'd*, 13 *Av. Cas.* 17,456 (Que. Ct. App. 1974), *rev'd*, 14 *Av. Cas.* 17,510 (Can. Sup. Ct. 1976), decided the case along the lines of the *Lisi* court. Mankiewicz, *supra* note 67, at 730.

⁸⁶ The goal of uniformity is disrupted when countries interpret clauses differently. Mankiewicz, *supra* note 67, at 726-36.

⁸⁷ The only guidelines given by the court are that it cannot be done when the aircraft is already airborne, *see* note 81 *supra*, and that delivery must occur so as to "afford the passenger a reasonable opportunity to take . . . self-protective measures." *Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir. 1965).

⁸⁸ After the *Lisi* case, the Montreal Agreement contained a requirement that the warning of the liability limitation be in 10-point type. Montreal Agreement, *supra* note 2. But due to estimates of the low number of people who are aware of the limitation (less than one-half, as reported in Lowenfeld & Mendelsohn, *supra* note 3, at 535) this note contemplates the possibility of future lack-of-notice litigation.

⁸⁹ *See* note 73 & accompanying text *supra*.

⁹⁰ Article 25 provides:

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

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

Warsaw Convention, *supra* note 1, art. 25.

⁹¹ *Id.*

willful misconduct. The advantage to this approach is that plaintiffs have the potential to be more adequately compensated for their injuries than if the liability limitation were strictly enforced. There are, however, a number of negative results. First, judges in the United States use a lighter standard for willful misconduct than judges of other member nations,⁹² and this promotes nonuniform litigation and defeats one of the treaty's main purposes.⁹³ Second, a liberal interpretation of willful misconduct confuses the standard of care for other, non-Warsaw-limited tort cases.⁹⁴ Finally, by employing a standard which falls short of willful misconduct, the judges are again engaging in judicial activism, the right to which is questionable.⁹⁵

JUDICIAL CONDUCT PROPOSAL

The three modes of avoidance discussed above are an example of overzealous judicial activism. Although the results achieved by the circumvention of the liability limitation are attractive, the employment of the three theories also creates the problems discussed in the previous section.⁹⁶ This

⁹² Mankiewicz, *supra* note 67, at 723, 725-26.

⁹³ See note 4 & accompanying text *supra*.

⁹⁴ Cases which involved circumstances which were of questionable willful misconduct include *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir.) (plane crashed en route to Rome; plaintiff successfully claimed Sabena's pilot deliberately misled the Rome controller as to their position), *cert. denied*, 382 U.S. 878 (1965); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller*, 292 F.2d 775 (D.C. Cir.) (failure of crew to tell passengers where life jackets were and failure to communicate with carrier to attempt rescue), *cert. denied*, 368 U.S. 921 (1961); *American Airlines, Inc. v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949) (violation of safety regulation requiring plane to be flown to 1,000 feet above highest obstacle in area). *But see* *Wing Hang Bank, Ltd. v. Japan Air Lines*, 357 F. Supp. 94 (S.D.N.Y. 1973) (item stolen from valuable cargo area; no willful misconduct found on behalf of airline because value of item not known or made visible); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965) (no willful misconduct when pilot became confused and began to land from point he believed to be proper); *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628 (3d Cir. 1963) (no willful misconduct found when claimed pilot tried to make "sneak-in" landing and had deliberately flown below legal minimums); *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955) (no willful misconduct found in acts taken by pilot when plane in danger); *Goepp v. American Overseas Airlines, Inc.*, 281 A.D. 105, 117 N.Y.S.2d 276 (1952) (no willful misconduct when pilot failed to make two qualifications flights), *aff'd mem.*, 305 N.Y. 830, 114 N.E.2d 37, *cert. denied*, 346 U.S. 874 (1953).

The willful misconduct cases cause difficulties because an act of willful misconduct is more than gross negligence. The actor must, in addition to doing the act in question, have intended the result that came about. *Froman v. Pan Am. Airways*, 284 A.D. 935, 135 N.Y.S.2d 619 (1954). Because of the low survival rate in aircraft disasters, it is illogical to contend that the pilot intends to crash the plane. In a plane crash, 75% of the passengers will die and 25% will be injured. 1 L. KREINDLER, *supra* note 9, § 12B.02[4].

⁹⁵ See note 73 & accompanying text *supra*.

⁹⁶ See notes 68, 70, 72, 86, & 92-94 & accompanying text *supra*. See also *Benjamins v. British European Airways*, 572 F.2d 913, 920 (2d Cir. 1978) (VanGraafeilan, J., dissenting), *cert. denied*, 439 U.S. 1114 (1979); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting), *aff'd by an equally divided court*, 390 U.S. 455

section, in order to avoid those problems, will therefore suggest a more appropriate mode of conduct.

The proposed conduct for the judiciary is uniform adherence to the treaty's liability limitation. Although this will cause the distasteful result of inadequate recoveries, it will halt the equally impermissible excesses of the judicial branch and restore some certainty to the litigation of recovery questions. This conduct is suggested because it is the job of the executive, not the judiciary, to make treaties,⁹⁷ and the judges are compelled by the Constitution to uphold those treaties.⁹⁸ If there is to be an amendment of the Warsaw Convention's recovery system (which this note supports), its creation should be and is the province of the executive branch.

A PROPOSED REVISION OF THE RECOVERY SYSTEM

In order for a renegotiation of Warsaw Convention liability to be successful, the United States should adopt two nonnegotiable premises. The first premise is that every United States citizen who flies abroad, regardless of the flight's point of origin, stopover, or termination,⁹⁹ should be financially protected with an assurance of adequate compensation where the United States has jurisdiction to require such a result. The second premise is that the newer, nongovernmentally owned airlines¹⁰⁰ should be afforded the same opportunity for development which was enjoyed by their larger competitors in the early decades of this century. This final section will discuss the justifications for, problems with, and implemen-

(1968); Swan, *The Constitutional Power to Terminate Treaties: Who, When and Why*, 6 YALE STUD. WORLD PUBL. ORD. 159 (1979).

⁹⁷ See note 73 *supra*.

⁹⁸ *Id.*

⁹⁹ The point of origin, stopover, or termination of the flight determines liability under the Montreal Agreement. Montreal Agreement, *supra* note 2.

¹⁰⁰ The reasons for the nongovernment distinction is that most foreign carriers engaged in international transport are owned by the government of the country under whose flag they fly. Note, *Aviation Law*, *supra* note 19, at 865. This means that any payment for damages is derived from the public funds. There is no justification to limit liability when a foreign government is the defendant who is ultimately protected. *Id.* Another justification for protecting only non-government-owned international carriers is that fewer airlines will be able to avail themselves of a liability limitation, thereby making the proposed revision of the recovery system more efficient to administer.

There are, of course, objections to this type of system. The smaller, less developed nations, contend that a system with even some type of limited liability would impose great insurance costs upon them, Hickey, *supra* note 9, at 611, thus making economic growth impossible, *id.* The question asked at the conference which resulted in the Montreal Agreement was why should the peasant be required to pay for the comfort of a king? See Lowenfeld & Mendelsohn, *supra* note 3, at 565. The smaller countries contend that only passengers from richer countries expect higher recoveries, and that they should not be made to suffer the additional expense just to allow more wealthy travelers to take advantage of increased limits. Hickey, *supra* note 9, at 611. As suggested by note 26 *supra*, however, this increase would be minimal.

tation of a system which both financially protects American travelers and fosters the development of the non-government-owned airlines.

Justifications for Financial Protection and Development

The desire to protect American citizens financially through an assurance of adequate compensation is not foreign to Warsaw Convention negotiations.¹⁰¹ When the *Guatemala Protocol*¹⁰² was drafted, the goal of the United States delegation was to protect financially at least eighty percent of American travelers.¹⁰³ In addition to this historical expression of American policy, another justification for financially protecting United States citizens is that Americans comprise more than one-half of the total number of international air travelers.¹⁰⁴ International airlines should accommodate the interests of this profit source by accepting greater liability.¹⁰⁵

Making provisions to aid the development of newly organized, non-government-owned airlines is also justifiable. Whereas many of the foreign flag airlines are government owned¹⁰⁶ and therefore have access to the public coffers for payment of large claims,¹⁰⁷ newly organized airlines that lack government backing are in a position analogous to that of the entire airline industry in 1929.¹⁰⁸ If it is determined that creation and develop-

¹⁰¹ See note 103 & accompanying text *infra*. Desiring to protect American citizens is also not an unusual contention for scholars who write on Warsaw Convention issues. See 1 L. KREINDLER, *supra* note 9; 2 J. KENNELLY, *supra* note 3, ch. 7, at 5; Lowenfeld & Mendelsohn, *supra* note 3, at 565.

¹⁰² ICAO Doc. No. 8878-L.C. 161-162 (1970) (United States not a signatory at time of this writing). For a discussion on the Guatemala Protocol, see 1 S. SPEISER & C. KRAUSE, *supra* note 9, § 11:20; 1 L. KREINDLER, *supra* note 9, § 12; Boyle, *supra* note 9; Kreindler, *supra* note 26.

¹⁰³ The negotiations fell far short of that figure. The liability limitation of \$100,000 leaves over 60% of the United States travelers without an opportunity to recover an amount which actually reflects their pecuniary loss. 1 L. KREINDLER, *supra* note 9, § 12B.02[b].

¹⁰⁴ See Lowenfeld & Mendelsohn, *supra* note 3, at 514.

¹⁰⁵ For additional arguments why the airlines should be willing to accept greater liability, see note 26 *supra*.

¹⁰⁶ See note 100 *supra*.

¹⁰⁷ *Id.*

¹⁰⁸ The similarity of today's non-government-owned airlines with the entire industry in 1929 is based both on financial status and safety records. Because new airlines are more likely to purchase used equipment, A. Altman, *The Domestic Airline Industry* (March 1978) (unpublished senior thesis in Union College Library, Schenectady, N.Y.), and a smaller aircraft, INTERNATIONAL AIR TRANSPORT ASS'N, *supra* note 26, at 20-53, both of which are less safe, NATIONAL TRANSPORTATION SAFETY BOARD, ANNUAL REVIEW OF AIRCRAFT ACCIDENT DATA 48 (1978), their insurance costs are likely to be much higher, 3 S. SPEISER & C. KRAUSE, *supra* note 9, § 22:4, at 14-15. Without the public treasury to pay claims, unlimited liability could bankrupt a privately owned infant airline. This was the worry of the drafters when the original treaty was negotiated. See notes 3-4 & accompanying text *supra*. Privately owned new airlines, therefore, have the financial difficulties of their predecessors. The new airlines, unless they are owned by a large corporation which can afford to purchase new, large aircraft, also have the safety problems encountered by the industry in 1929. See A. Altman, *supra*.

ment of new, non-government-supported airlines is desirable,¹⁰⁹ then, given the tremendous costs of establishing a new airline,¹¹⁰ some type of financial incentive should be available for those attempting to enter the industry.¹¹¹

There are, however, arguments which might justify the imposition of unlimited liability upon even the new, fledgling, airlines. If they are able to obtain insurance coverage for unlimited liability in the event of a crash, it might be best for all airlines to be subjected to unlimited recoveries. Further, if potential passengers are informed of the new airline's limited liability, they might be discouraged from traveling on that airline, thereby threatening the airline's potential for success. Since it is unknown whether the difference in insurance premiums for a new airline with limited liability would be enough to charge a significantly lower rate than the airlines with unlimited liability and thus to combat this negative effect, the possibility of unlimited liability for all airlines is not rejected. Nevertheless, liability is not recommended for the newly established non-government airlines, due to the potential financial difficulties presented by such a system.¹¹² Some system must therefore be developed whereby the new, non-government-owned airlines are allowed to mature financially before being asked to shoulder the burden of increased or unlimited liability.

The Problems of Financial Protection

There are two sets of problems which arise from the two premises. The first set includes whether liability should be limited or unlimited¹¹³ and whether citizens other than Americans will be entitled to avail themselves of the new recovery system.¹¹⁴ The second set of problems is less vexing and is procedurally oriented. These problems concern questions such as the method for calculating damages;¹¹⁵ whether, if the limit

¹⁰⁹ This note contends that development of new airlines is desirable because it grants passengers greater freedom in deciding with which carrier to fly and at what time to travel.

¹¹⁰ Entrance into what is termed the "long-haul market" (as opposed to local or regional markets) is expensive, involving outlays for equipment, personnel training, and promotion. A. Altman, *supra* note 108. For example, in 1978, Braniff Airlines, in an attempt to compete effectively with the other carriers in its class, purchased 90 Boeing 727's at a cost of \$12.5 million each. BRANIFF AIRLINES 1978 ANNUAL REPORT. Entry into the long-haul markets is usually reserved for the extremely well-to-do firms. A. Altman, *supra* note 108. Nevertheless, some airlines could start out financially capable of sustaining unlimited liability. If this is so, then they should be subject to the unlimited liability suggested by note 157 *infra*.

¹¹¹ See note 108 *supra*.

¹¹² For a discussion of the financial difficulties presented by unlimited liability for privately owned, newly established airlines, see note 108 *supra*.

¹¹³ See notes 118-31 & accompanying text *infra*.

¹¹⁴ See notes 132-35 & accompanying text *infra*.

¹¹⁵ See text accompanying notes 136-37 *infra*.

were simply increased, the new limit would be breakable;¹¹⁶ and what to do about nonuniform recovery in Warsaw Convention suits.¹¹⁷ In this section, each of these difficulties is discussed and some solutions are offered.

In order to implement a more modern system of recovery, the primary determination must be whether to increase the liability limitation substantially or to abandon the concept of limited recovery completely. This note argues that, at least for United States citizens, unlimited liability is the preferable system. The idea of unlimited liability is in accord with traditional notions of American tort law.¹¹⁸ The only limitation is the degree of fault of the actor.¹¹⁹ Since courts throughout the world are accustomed to dealing with the concepts of negligence and fault,¹²⁰ those principles would not be unfamiliar to them if employed to determine damages in Warsaw Convention suits. Unlimited liability also guarantees each American passenger on an international flight the availability of just compensation for an air accident.¹²¹

Airlines argue that unlimited liability presents grave problems. There is an increased difficulty in calculation of insurance premiums¹²² and an almost certain fare increase.¹²³ Potential investors may shy away from the airlines for fear of the increased liability.¹²⁴ These difficulties, however, are not of the magnitude which the airlines suggest.¹²⁵ Insurance premiums may be established for unlimited liability just as for limited liability.¹²⁶ The fare increase, if it were to reflect solely the insurance cost of unlimited liability, would be less than one dollar for the established airlines.¹²⁷ It is also unlikely that a change in potential liability would drive away investors.¹²⁸ The problems which allegedly arise from unlimited liability are minimal.

¹¹⁶ See text accompanying notes 138-42 *infra*.

¹¹⁷ See Hickey, *supra* note 9, at 604.

¹¹⁸ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 5, at 22-23 (4th ed. 1971).

¹¹⁹ *Id.*

¹²⁰ A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 590-780 (2d ed. 1977); *cf.* Mankiewicz, *supra* note 67, at 737-46 (explaining difference between common law and civil law countries).

¹²¹ The guarantee of just compensation would have to be limited to an amount not in excess of the airline's assets. That is not a terrible limit, however, since the four major domestic carriers have each had assets averaging \$7 billion over the past five years. See note 157 *infra*.

¹²² See note 20 *supra*.

¹²³ See note 26 *supra*.

¹²⁴ The potential hesitancy of investors was one of the reasons which led to the imposition of the liability limitation in 1929. Lowenfeld & Mendelsohn, *supra* note 3, at 499.

¹²⁵ See note 26 *supra*; notes 126-27 & accompanying text *infra*.

¹²⁶ Insurance premiums are in effect for the domestic airlines, see generally 1 L. KREINDLER, *supra* note 9, § 12B.01, which are subject to unlimited liability. See note 26 *supra*. This note therefore assumes that the international carriers could also receive insurance for unlimited liability.

¹²⁷ See note 26 *supra*.

¹²⁸ The domestic airlines have investors while shouldering unlimited liability. It is therefore assumed that unlimited liability would not discourage investors from investing in the international airlines.

The advantages of a greatly increased liability limit accrue mostly to the airline industry. Their liability would not be based on fault.¹²⁹ The certainty in the purchase of insurance and uniformity of recovery would be restored.¹³⁰ The benefit to the passenger would be a greater opportunity for just compensation. The increased opportunity for adequate recoveries is the sole advantage to be gained by passengers. Problems arise, however, from limiting liability. Some plaintiffs will still be unable to recover an amount which represents their actual loss. Also, courts might still try to circumvent the liability limitation. Finally, the major airlines would still be receiving a benefit of artificially low liability. An alternative method of recovery for United States citizens when the United States has jurisdiction¹³¹ should be considered.

The Warsaw Convention's liability limitation should therefore be abolished. While not every country should be required to guarantee unlimited liability for its citizens, United States citizens, who comprise more than one-half of the international air traveling public,¹³² should be guaranteed unlimited liability.¹³³ If other countries feel their citizens need this type of financial protection and their carriers can afford unlimited liability,¹³⁴ then the proposed United States system can either be adopted completely or modified to suit their particular needs. For countries that still believe in a system of limited liability, the limit should be raised to reflect the current world economic situation.¹³⁵

There are solutions to the procedural problem of damage calculation and to the controversy over a breakable or nonbreakable limit. The pecuniary loss standard encompassed in most wrongful death statutes can be employed to determine damages.¹³⁶ The loss can be measured with

¹²⁹ There is no reason why, if a limitation is still in effect, the present system which disregards fault and citizenship should not continue. It has basically worked, except for a number of ruptures caused by the United States. See generally notes 51-97 & accompanying text *supra*.

¹³⁰ See note 20 *supra*.

¹³¹ When there is no United States jurisdiction, an American citizen will be forced to sue in a foreign court, and therefore will be subject to foreign laws. Lack of United States jurisdiction, however, is infrequent in an air accident, since there are few carriers which are not present for jurisdictional purposes in some state. Lowenfeld & Mendelsohn, *supra* note 3, at 524.

¹³² *Id.* at 514.

¹³³ Americans should receive unlimited liability because they have the economic power to demand compensation commensurate with their injuries. See notes 104-05 & accompanying text *supra*. Moreover, if higher recoveries were available only for American citizens, those airlines which carried mainly non-Americans would be unaffected by the increased recoveries. Lowenfeld & Mendelsohn, *supra* note 3, at 565.

¹³⁴ The choice of limited or unlimited liability is not necessarily made on the government's belief that its citizens have a right to unlimited liability. Rather, because most of the airlines outside the United States are government-owned, see note 100 *supra*, the liability decision reflects the government's desire to avoid imposing unlimited liability upon itself.

¹³⁵ See notes 164-74 & accompanying text *infra*.

¹³⁶ 2 J. KENNELLY, *supra* note 3, ch. 7, at 5.

actuarial tables.¹³⁷ Whether the new limitation on liability to non-United States citizens can be exceeded has been debated since the conferences on the Hague Protocol.¹³⁸ The controversy centers around whether an airline should be permitted to avail itself of the liability limitation despite an act of willful misconduct,¹³⁹ the failure to deliver a ticket,¹⁴⁰ or lack of notice concerning the limitation.¹⁴¹ There has been little United States support for an unbreakable limit,¹⁴² but because American citizens will seldom be affected by a decision for a breakable or unbreakable limit, the determination should be left to the governments of the world.¹⁴³

Implementation of a System for Financial Protection and Development

To satisfy modern demands for increased airline liability, this note suggests a system of recovery from air accidents based on nationality. It consists of three separate modes of recovery: unlimited compensation for United States citizens from major¹⁴⁴ and government-owned smaller airlines,¹⁴⁵ greatly increased liability limitations for other citizens,¹⁴⁶ and limited recoveries from privately owned, newly developing airlines regardless of citizenship.¹⁴⁷ Because a tripartite compensation scheme has never before been proposed¹⁴⁸ or employed, the following discussion examines methods of operations¹⁴⁹ and means for insuring compliance.¹⁵⁰

Implementation of a system for the unlimited protection of all United States citizens who fly abroad involves a slight rise in the insurance expense incurred by airlines.¹⁵¹ This will be reflected in an equally impercep-

¹³⁷ *Id.* at 25.

¹³⁸ Hickey, *supra* note 9, at 605.

¹³⁹ See notes 90-95 & accompanying text *supra*.

¹⁴⁰ See notes 74-77 & 85-89 & accompanying text *supra*.

¹⁴¹ See notes 80-84 & accompanying text *supra*.

¹⁴² Hickey, *supra* note 9, at 604.

¹⁴³ No solution is offered here for the "problem" of nonuniform recovery because it actually should not be considered a problem. Recovery has never been uniform in Warsaw Convention suits in that complaining parties do not receive similar compensation for similar claims. 1 L. KREINDLER, *supra* note 9, § 11.02[2]. Because the treaty provides for the use of local laws in a number of situations, Warsaw Convention, *supra* note 1, arts. 22(1), 25(1), 28(2), it seems that the drafters themselves never intended uniformity in recovery. Finally, nonuniform recovery is not a terribly distasteful offense.

¹⁴⁴ For a definition of a major airline which would be subject to unlimited liability, see note 157 *infra*.

¹⁴⁵ See note 100 *supra*; notes 151-72 & accompanying text *infra*.

¹⁴⁶ See notes 173-80 & accompanying text *infra*.

¹⁴⁷ See notes 175-76 & accompanying text *infra*.

¹⁴⁸ Methods of recovery have, however, been suggested which allow for higher recoveries by United States citizens, see, e.g., Lowenfeld & Mendelsohn, *supra* note 3, at 565, and which have suggested elimination of the willful misconduct clause, thus allowing each nation to determine the just compensation for its citizens, Tompkins, *Limitation of Liability by Treaty and Statute*, 36 J. AIR L. & COM. 421, 434 (1970).

¹⁴⁹ See notes 151-56, 158-62, & 164-75 & accompanying text *infra*.

¹⁵⁰ See notes 157, 168-74, & 176 & accompanying text *infra*.

¹⁵¹ See note 26 *supra*.

tible increase in the price of plane tickets bought by Americans for foreign air travel.¹⁵² The revenues received from the fare increase can be pooled in a common insurance fund¹⁵³ for all airlines that carry United States citizens. When an air accident occurs, full and just compensation can be derived from the fund.¹⁵⁴ Unlimited liability for international carriers, which have a greater number of companies among whom the insurance costs can be shared,¹⁵⁵ would not cause financial ruin; the domestic airlines, despite their exposure to unlimited liability, are among the most successful industries in the world.¹⁵⁶ This suggested compensation system should not be optional for the international carriers; rather, to insure protection of every American who travels abroad by air, compliance with its terms should be made a prerequisite to carrying United States citizens. It should be enforced by congressional legislation which would denote those airlines subject to its terms and contain a penalty for noncompliance which would allow for revocation of the airline's license to do business within the United States.¹⁵⁷

¹⁵² See generally *id.* The domestic airlines are used as a comparison for insurance costs because the United States is the country whose citizens make the greatest use of air transportation. Lowenfeld & Mendelsohn, *supra* note 3, at 514. Other countries employ primarily rail transport. The domestic airlines therefore form the system most similar to the international air transport network.

¹⁵³ For a similar system, see Boyle, *supra* note 9, at 127-28. This proposed system of insurance is unique in that normally each airline has its own insurance company for every item it must insure (the aircraft itself, injury to the crew, and injury to the passengers), 3 S. SPEISER & C. KRAUSE, *supra* note 9, § 22:4. The airlines are not, therefore, normally self-insurers. This self-insurance system is proposed for efficiency and certainty. If the airlines lose a claim, compensation will be provided from this fund without the necessity of dealing with an intermediary insurance company. Because this fund will be used only for international air accidents, each airline will always be aware of the amount available for compensation in the event of an air accident. A low level of funds, due to a greater number of recoveries than anticipated, will warn the airlines of the need to charge more for each international passenger so as to assure adequate compensation.

¹⁵⁴ As mentioned in note 26 *supra*, recoveries should average fewer than 186 persons per year, a figure that probably will decrease as airline safety continues to improve. Special ICAO Meeting on Limits For Passengers Under the Warsaw Convention and Hague Protocol, ICAO Doc. No. 8584-L.C./154-1, at 142 (1966). Since the average recovery for non-Warsaw Convention suits is now in excess of \$200,000, 1 L. KREINDLER, *supra* note 9, § 12B.02[b], the total yearly expenditure from the fund, assuming 186 recoveries of \$300,000 each, would be \$5,800,000.

¹⁵⁵ See note 45 *supra*.

¹⁵⁶ Kreindler, *supra* note 26, at 135. See also note 157 *infra*.

¹⁵⁷ The statute could require that any air carrier, foreign or domestic, which has flown an average of 10 billion passenger miles per year over the past five years, or has carried an average of 50 United States citizens per year over the past five years, or has earned an average of \$20 million worth of profits per year over the past five years, or has conducted business which has averaged \$1 billion per year over the past five years, or has possessed assets which have averaged \$1 billion per year over the past five years would be subject to unlimited liability in the event of an air accident causing the death or injury of a United States citizen.

The above-mentioned figures are suggested solely for purposes of discussion. The quantities are based on two items. The first consists of the annual reports for the years 1976 through 1979 of four of the major domestic airlines—Delta, Eastern, American, and TWA. The second item is MOODY'S TRANSPORTATION MANUAL for the years 1975 through 1979.

Moody's provided information on six major international carriers—KLM Royal Dutch Airlines, Deutsche Lufthansa Airlines, Air Canada, Japan Airlines, Swiss Air, and SAS (Scandinavian Airlines Systems). A survey of their total business revenues, passenger miles flown, and assets revealed that, given the above-mentioned figures, each airline would be subject to the statute. See MOODY'S INVESTORS SERVICE, INC., 1976 MOODY'S TRANSPORTATION MANUAL 1207-08, 1344, 1367-71 [hereinafter cited as MOODY'S]; *id.* 1977 MOODY'S, at 909-10, 1051-52, 1056-57, 1069, 1072; *id.* 1978 MOODY'S, at 909-10, 1053-54, 1058-59, 1070, 1073-74; *id.* 1979 MOODY'S, at 909-10, 1061, 1064-66, 1076-78; *id.* 1980 MOODY'S, at 1209-10, 1438, 1442-44, 1454-56.

The domestic airlines were used for comparison because they are subjected to unlimited liability. See note 26 *supra*. The five-year figure was employed because that is the amount of time over which Delaware corporation law values a business. *Universal City Studios, Inc. v. Francis I. duPont & Co.*, 334 A.2d 216, 218 (Del. 1975); *Piemonte v. New Boston Garden Corp.*, 377 Mass. 719, 387 N.E.2d 1145 (1979).

This statute might not be necessary. Because this note proposes to alter only the recovery system of the Warsaw Convention, and no other aspects, the broad jurisdictional grants of the treaty are maintained. The section that permits the airline to claim limited liability will be replaced by a section that dictates which airlines can claim limited liability and when. The treaty grants jurisdiction where the carrier is domiciled, where the carrier has its principle place of business, where the carrier has a place of business through which the arrangements were made for passage, and at the destination contained in the ticket. Warsaw Convention, *supra* note 1, art. 28. As it now stands, therefore, it is not difficult to be able to sue a carrier in the United States. 1 L. KREINDLER, *supra* note 9, § 12B.04[1]; Lowenfeld & Mendelsohn, *supra* note 3, at 524. The statute is suggested, however, for two reasons. First, it would permit unlimited recovery from those airlines to which it applies. Second, it demonstrates to the airlines the importance to the United States government of adequate compensation for American passengers injured or killed in air accidents.

There might also be a question of what to do in case an alien sues in a United States court under the treaty with the proposed revisions. Would he be bound by the liability limitation of his native land, or allowed to sue for unlimited liability under the new law in the United States? A similar situation, where a lower limit of liability might be in force depending on the law applied by the court, was present in *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975). There, the court decided not to apply foreign law if it resulted in a recovery which would be different from the recovery as a result of the application of American law. *Id.* at 743. This note suggests following the *Paris* court in applying United States law. Some people may argue that this decision might increase litigation in the United States courts by encouraging aliens to bring suits in the United States. This will not happen, however, because this note suggests only revision of the recovery system, not of other elements of the treaty. The jurisdictional elements of the treaty, Warsaw Convention, *supra* note 1, art. 28, should be retained. The jurisdiction of the United States courts, therefore, will not be increased, nor will persons who were not previously permitted by the treaty to sue in United States courts be allowed to sue in the United States courts with the proposed law.

Some hypothetical situations are presented below to demonstrate how the new recovery system will operate. Three factors should be kept in mind. First, there will be a new section in the treaty which states that, absent supplemental recovery statutes (like the one proposed for the United States *supra*) there will be a new, higher recovery limitation. For discussion purposes, assume the new liability limitation is \$50,000. Second, the original jurisdictional allowances of the Warsaw Convention remain in force. Third, privately owned fledgling airlines will also have a liability limitation. For discussion purposes, assume the liability limitation is \$8,300.

One group of situations involves an American citizen flying after the United States passes the proposed statute:

1. A, an American citizen, flies on Air France from New York to Paris. Air France has offices in New York and has earned an average of \$30 million worth of profits a year over the past five years and therefore is subject to the statute. If his plane crashes, A will be able to sue in the United States and Air France will have unlimited liability.

2. A, an American citizen, flies Air Sudan from Paris to London. Air Sudan is government-

There remains, however, the problem of liability for airlines that carry American passengers but do no business that would subject them to the jurisdiction of United States courts.¹⁵⁸ Because it is likely that few, if any, of those carriers would choose a system of unlimited liability and that the United States would be unable to require them to adopt it,¹⁵⁹ the passengers transported by those carriers should be notified of the limited liability.¹⁶⁰ The task may be performed by any public interest group, airport, or airline.¹⁶¹ Information on limited liability should be made conspic-

owned, but has no United States connections which would subject it to the statute. If *A*'s plane crashes, Air Sudan will not have unlimited liability unless Air Sudan agrees to such a system. Rather, since Air Sudan is government-owned, the new treaty limits *A*'s recovery to \$50,000.

3. *A*, an American citizen, flies Privately-Owned airline from Cairo to Jerusalem. Privately-Owned is a nongovernment airline which has just recently bought its first plane. If *A*'s plane crashes, *A* will be limited to \$8,300 because the airline is a privately owned fledgling airline.

A second group of situations involves a foreign citizen whose country decides not to enact an unlimited liability statute, but instead adheres to the \$50,000 liability limitation:

1. *F*, a French citizen, flies Air France from Paris to London. If *F*'s plane crashes, since France has not enacted an unlimited liability statute, *F*'s recovery will be limited to \$50,000.

2. *F*, a French citizen, flies Privately-Owned airline from Cairo to Jerusalem. Since the airline is privately owned and in its infancy, *F*'s recovery is limited to \$8,300.

3. *F*, a French citizen, flies Pan Am from Paris to New York. Pan Am is domiciled in the United States, therefore *F*, if his plane crashes, has the right to sue in a United States court. Because of the case of *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975), *F* will not be subjected to French law because it would result in a recovery which would be different from the recovery as a result of the application of American law (*i.e.*, the recovery under French law would be limited to \$50,000, but the recovery under United States would be unlimited). *F*'s recovery would be unlimited.

¹⁵⁸ Carriers that would not be subject to the jurisdiction of the United States through the events mentioned in note 157 *supra* would not be forced, through the economic need to survive, to accept unlimited liability.

¹⁵⁹ The United States would have no jurisdictional power over airlines which do no business within the United States. The United States therefore lacks official sanctions to force compliance with an unlimited liability statute.

¹⁶⁰ Notification is important because the passenger should, if possible, be able to choose to travel with an airline whose liability is unlimited. It is also essential because fewer than one-half of one percent of all international travelers are aware of the limit. *See* Lowenfeld & Mendelsohn, *supra* note 3, at 535 (quoting Senator Homer Capehart). That ignorance is due in large part to the fact that most United States passengers are accustomed to traveling on domestic airlines, which have no liability limitation, and they fail to recognize the difference between domestic and international flights. *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 513 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968). The airlines provide no extra help in this area, since they use the same ticket for both national and international passage. 1 L. KREINDLER, *supra* note 9, § 11.05[2].

¹⁶¹ The suggestion of a public interest group to provide information about the liability limitation is justified by the low rate of awareness. *See* note 160 *supra*. Airlines subject to unlimited liability would be interested in providing information because they might be able to attract customers from the limited liability airlines. Airports might want to provide information on which airlines have unlimited liability to avoid liability themselves. This is because, with the present system of limited airline liability, if the air traffic controller is negligent, then the government, whose liability is unlimited, pays a large majority of the judgment that exceeds the liability limitation. 2 J. KENNELLY, *supra* note 3, ch. 7, at 18; Kreindler, *supra* note 26, at 133-34. This is similar to the manufacturer's liability problem discussed in notes 33-36 & accompanying text *supra*.

uously available where those airlines arrange flight reservations. The notice of restricted recovery should be accompanied by a list of airlines that are subject to unlimited liability. Notification of liability limits appears to be the only way to protect American citizens when United States courts have no jurisdiction over the international carrier to enforce unlimited liability.¹⁶²

An increase in the limitation on liability would eliminate the obsolete element of the Warsaw Convention.¹⁶³ The countries that choose an increase in the limitation would first have to decide on an agreeable figure for the new recovery restriction. Before the agreement could be arranged, an agency familiar with the international air transportation system¹⁶⁴ would have to collect and study data on recoveries for air accidents¹⁶⁵ and ascertain the amount which would insure adequate compensation.¹⁶⁶ That figure would be the new liability limitation.¹⁶⁷ The new limit, however, should not remain static.¹⁶⁸ Provisions should be made for a periodic mandatory increase¹⁶⁹ to reflect alterations in the world economic situation.¹⁷⁰ Those increases should be tied to an acknowledged world economic indicator,¹⁷¹ thus insuring that no single country could force an increase not desired

¹⁶² A problem could arise if a passenger is forced to procure transportation with an airline whose liability is limited yet which possesses the sole rights to the particular route of travel the traveler desires. But, in all likelihood, the airline with the sole rights to a particular route would be too small to be subject to unlimited liability. A. Altman, *supra* note 108. If it is not too small, the proposed financial standards, *see* note 157 *supra*, could subject it to greatly increased liability.

¹⁶³ The limitation, imposed when the airline industry was in its infancy and vulnerable to excessive claims, *see* notes 3-4 & accompanying text *supra*, is no longer justified due to the present financial status of the airline industry.

¹⁶⁴ The agency in charge of accumulating the financial information could be the International Air Transport Association (IATA), which routinely collects data on financial situations of airlines and recoveries in the handbook cited in note 26 *supra*. Another organization which could gather the data required is the International Civil Aviation Organization (ICAO), which collected the financial data for the Montreal Convention, 1 L. KREINDLER, *supra* note 9, § 12B.02[4].

¹⁶⁵ The collection of data on recoveries for air accidents was used in the Montreal Agreement negotiations. Lowenfeld & Mendelsohn, *supra* note 3, at 552-53.

¹⁶⁶ The new amount could be an average of recoveries or a more intricate combination of the general economic situation and average recoveries.

¹⁶⁷ Although the idea of a liability limitation has not received much support in this country, other nations (mostly third world countries) do support such a system of recovery. Hickey, *supra* note 9, at 610. Therefore, if allowing limited liability is necessary for a new treaty, it must be available for those nations that desire it for their citizens.

¹⁶⁸ If the new limit remained static, there would remain the problem that sometime in the future, the new limit would also become outdated and need revisions.

¹⁶⁹ A similar provision for a periodic mandatory increase is contained in the Guatemala Protocol, *supra* note 2. For a more extensive discussion of this proposal, *see* Boyle, *supra* note 9, at 126-28.

¹⁷⁰ The Guatemala Protocol, *supra* note 2, contains a provision for a yearly update of the liability limitation of \$2,500. 1 L. KREINDLER, *supra* note 9, § 12B.03[4].

¹⁷¹ The price of gold could be used as the world economic indicator. Gold is suggested because that is the standard upon which the original liability limitation was based. 2 J. KENNELLY, *supra* note 3, ch. 7, at 4.

by the others.¹⁷² Because no statutory system of enforcement is available,¹⁷³ enforcement of this new liability increase should be accomplished through the courts of the countries that become signatories to the new treaty, which is the compliance method employed by the Warsaw Convention.¹⁷⁴ To establish this system, the participating countries should hold a conference to decide how often and by how much the liability limitation should be increased.

The implementation of a system to insure continued development of fledgling, privately owned airlines should include limitation of liability regardless of citizenship. A system should be developed for fledgling airlines similar to the one that fostered the growth of the now-established airlines. There should not be the option in this situation for the individual countries to require unlimited liability from the fledgling airlines because, if a country were permitted to demand unlimited liability from infant airlines, either no new airlines would come into existence or, if they did manage to begin, one accident could be ruinous. The International Air Transport Association should decide on a level of financial stability below which an airline might avail itself of limited liability.¹⁷⁵ Enforcement by

¹⁷² The advantages of a system which increases the limitation on liability are that victims or their survivors are more justly compensated for air accidents, while the airlines are permitted to maintain their limited liability. The smaller airlines can also participate in this system. They will remain subject to very limited liability until they reach a certain level of growth. Then, depending on the passenger's nationality, either their liability will be increased to the new limit and become subject to the periodic revisions, or their limitation will be eliminated. *See also* note 175 *infra*.

¹⁷³ There is no international law enforcement system. The International Court of Justice, established by the United Nations, has no enforcement powers in the form of sanctions. Statute of the International Court of Justice, art. 36, reprinted in *INTERNATIONAL LAW IN A CHANGING WORLD* 57 (E. Collins ed. 1970).

¹⁷⁴ The governments of the world ratified the treaty, yet its enforcement was left to the local courts. Mankiewicz, *supra* note 67, at 721. Because United States treaties are the supreme law of the land, U.S. CONST. art. VI, cl. 2, the United States courts were to apply the Convention's principles. Note, *supra* note 4, at 73-74.

¹⁷⁵ The small airlines would be further divided into categories which represent their industrial growth. A measure of that growth could be a combination of the factors suggested as elements of the statute proposed in note 157 *supra*. Airlines in primary stages of development can be allowed the lowest liability limitation. Carriers that exhibit more extensive growth can be subjected to increased, yet restricted liability. The amount of compensation that may be attained from those airlines could be a figure the ICAO thinks that the carrier can adequately manage given both its monetary position and its potential for future growth. As an airline matures, it can be subjected to greater liability commensurate with its development. For elements which might be considered growth indicators, see note 157 *supra*. Ideally, each airline could eventually achieve a level of financial stability that would enable it to bear unlimited liability for its injured American passengers.

While an airline is at an underdeveloped stage and is permitted to employ the recovery restrictions, it should be the task of a public interest group, airport, or airline to inform United States citizens of the limited liability of these airlines, so the decision to contract the transportation with them can be made with the knowledge that, in case of injury or death in an air accident, the airline's liability will be limited to a certain amount. For an explanation why those three parties are suggested to provide the information on limited liability, see note 161 *supra*.

the International Air Transport Association of the provisions applying to the newly developing non-government-owned airlines should be handled by the local courts.¹⁷⁶ Unlike the present, easily avoided liability limitation, this new restriction should be strictly enforced in the absence of a showing of truly willful misconduct, failure to deliver a ticket, or lack of notice concerning the limitation. Strict enforcement is necessary if the desired goal of eventually subjecting these new carriers to unlimited liability is to be achieved.

Although the results of this tripartite system of recovery may be nonuniform compensation and administrative difficulty,¹⁷⁷ the newer system attains more desirable results than the present method of compensation in Warsaw Convention suits. The proposed system meets the demand for adequate compensation for injuries or death. Revisions of the amount are automatic,¹⁷⁸ thus eliminating the need for noncompliance as a method for forcing an increase.¹⁷⁹ Finally, since the proposed system reflects the present financial status of the international airline industry, it brings the Warsaw Convention up to date with the industry it controls.

CONCLUSION

The Warsaw Convention successfully fostered the development of the airline industry through accident liability limitations.¹⁸⁰ Despite substantial achievement of its purposes, however, the liability limitation remains in force. For the past twenty years, the American judiciary has demonstrated an increasingly hostile attitude toward the liability limitation and has discovered ingenious methods for circumventing its imposition.

Two of the most popular modes of avoidance are based upon the treaty. The first treaty-based method is willful misconduct. The court relieves the plaintiff of the liability limitation by finding an act of willful misconduct when the deed does not display all the elements of willful misconduct. The second method for circumventing the limitation which comes from the treaty is a finding either that a ticket was not delivered soon

¹⁷⁶ For reasons why enforcement is left to the local courts, see notes 173-74 & accompanying text *supra*.

¹⁷⁷ The administrative difficulties would be in the following areas: First, when a plane crashes, the citizenship of each passenger must be determined. Second, before an airline carries United States citizens (or the citizens of any other country which elects to enforce unlimited liability) it must have its economic status determined so its passengers may become aware of its level of liability. Third, citizenship will become important in determining both recovery levels and ticket prices. Fourth, due to the rapid changes inherent in the world economy, the status of airlines as to recoveries could be constantly changing.

¹⁷⁸ See notes 169-70 & accompanying text *supra*.

¹⁷⁹ The United States threatened noncompliance, and in fact practiced it, to force negotiation of the Montreal Agreement, *supra* note 2. 2 J. KENNELLY, *supra* note 3, ch. 7, at 33-34.

¹⁸⁰ *Reed v. Wisner*, 414 F. Supp. 863 (S.D.N.Y. 1976), *rev'd on other grounds*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); 2 J. KENNELLY, *supra* note 3, ch. 7, at 5; 1 S. SPEISER & C. KRAUSE, *supra* note 9, § 11:4.

enough or that the ticket contained an inadequate warning of the liability limitation. A third mode of avoidance is based on contract principles and state wrongful death law. This theory allows the plaintiff unlimited compensation by reasoning that only the passenger and the airline contract to limit the carrier's liability, and therefore that the passenger's survivors are not in privity with the airline and are not bound by the contract's terms. Although these theories achieve desirable results, their methodology is excessive judicial activism and they create more problems than they solve. Consequently, this note suggests a mode of judicial conduct whereby the judiciary strictly enforces the liability limitation. This will return the judiciary to its proper role as the enforcer of treaties made by the executive branch.

The growing activity of the American courts is a signal to the executive branch of the United States government that a new method of recovery for international air accidents must be negotiated. Although the three modes of avoidance achieve desirable results, excessive judicial activism cannot be condoned. A new system under which recovery is based on the nationality of the victim and the economic status of the airline can be devised. The United States should pass a statute requiring certain carriers which possess a certain level of financial stability to be subject to unlimited liability for any death or injury suffered by any United States citizen coming within the jurisdiction of the United States courts. Any foreign citizen coming within the jurisdiction of the American courts would also be afforded unlimited liability. Other countries also could pass a similar statute granting the possibility of unlimited recoveries. If other countries still desire a limitation, however, it should be increased beyond the current figures set by the various treaties. The new limit should also correspond to the stage of economic development of the particular airline. Privately owned, newly established carriers should have a lower liability limitation than those which are either government operated or financially well established. This new system, based on the airline's level of economic development, is equitable for victims, airlines, and governments and reflects the high level of air transportation development.

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