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Samuel W. Bettwy

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THE INTERNATIONAL-DOMESTIC DICHOTOMY OF THE UNITED STATES AVIATION LAW AND THE PROPOSED AIR TRAVEL COMPENSATION ACT

Samuel W. Bettwy*

“[I]magination at all events struggles to idealize and to unify.”¹

INTRODUCTION

The rapid development of commercial aviation technology has resulted in a number of complex and novel legal issues. The underlying character of all law is that it provides a civilization with the power to create order² in a manner that is fair to all related interests.³ Two factors unique to the commercial aviation industry have put this power of law to a difficult test.

First, commercial jets routinely transport substantial numbers of passengers of varying nationalities to remote places at increasingly faster speeds.⁴ In route, the planes often travel through the airspace of numerous sovereignties. As a result, United States aviation laws, unlike other United States laws, have not developed in a purely domestic environment.⁵ As business flourished, aviation demanded the development of laws designed to resolve not only “domestic” but also “inter-

* Attorney, State Bars of Arizona, California, and the District of Columbia; B.A. Economics, Pomona College, 1976; J.D., California Western School of Law, 1980; LL.M., Georgetown University Law Center, 1985.

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1. S. COLDERIGE, *BIOGRAPHIE LITERATURIA* 202 (1817 & photo reprint 1939).
2. “[M]an is constrained . . . to believe that order and not chaos is the governing principle of the world in which he has to live.” J.B. BRIERLY, *THE LAW OF NATIONS* 57 (5th ed. 1955).
3. This is especially true if one subscribes to the thinking of legal realists. Llewellyn, for example, asserted: “One starts with the interest. That is a social fact or factor of some kind, existing independent of the law. And it has value independent of the law. Indeed, its protection is the purpose of substantive legal rights, of legal rules, of precepts of substantive law.” Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431 (1930). See also F. SETARO, *WRITINGS OF ROSCOE POUND* (1942).
4. Between 1925 and 1929, the larger airliners could travel at cruising speeds of about 100 miles per hour and over stages of about 500 miles. Today the SST and the Concorde supersonic jets can travel non-stop between New York and Paris in about three hours. See A.F. LOWENFELD, *AVIATION LAW—CASES AND MATERIALS* Ch. 7, § 2.1 (2d ed. 1981). Concurrently, air traffic and the number of passengers carried has increased steadily. For example, for the past ten years (1974-1983), the number of passengers in international air traffic on scheduled flights has risen on the average of seven percent every year except from 1981 to 1982. 39 *ICAO BULL.* July 1984 at 14.
5. When the Warsaw Convention convened in 1929, civil aviation was only on the threshold of existence. The planners of the convention were anticipating that civil aviation would necessarily mean international transportation. The capability of the airplane to overcome geographical barriers far surpassed the capabilities of the automobile, railroad engines and steamships. See LOWENFELD, *supra* note 4 at Ch. 7, § 2.1. United States law related to civil aviation therefore did not have much time to develop before the entry into the Warsaw Convention. By comparison, Germany adopted an Air Traffic Law in 1922 only seven years before the Warsaw Convention was concluded. See note 142 *infra*. The law was finally amended to achieve conformity with the Convention in 1943. Law of January 26, 1943, [1943] 1 *Reichsgesetzblatt* 69.

national" issues.⁶ The impact of foreign interests upon the law's development made a comprehensive and uniformly fair system difficult to achieve.

Second, the fundamental relationships between those entities whose interests are governed by aviation law have changed dramatically and rapidly.⁷ As a result, laws designed to provide order and fairness to these entities quickly become obsolete and ineffective. The problem of rapid obsolescence is exacerbated by the unavoidably slow and tedious process of changing existing laws. When aviation laws change, the alteration has purposely increased the protection afforded to one group at the expense of another group. In this regard, the groups whose interests have most often been balanced against each other are those of commercial air carriers and the traveling public.

The United States lawmakers' first response to the competing interests in the aviation field was to establish an international-domestic dichotomy. The Warsaw Convention created that dichotomy 1929.⁸ Since the dichotomy's inception, however, Congress has disowned the original concept of the Warsaw Convention,⁹ and the courts in turn have limited its application.¹⁰ In light of this renunciation, one views with some consternation recent attempts at legislation to supplant the Warsaw Convention.

The proposed Air Travel Compensation Act (ATCA) is the most recent comprehensive legislation designed to establish order and fairness in aviation law.¹¹ Unfortunately, ATCA pays homage to the continued existence of an international-domestic dichotomy, despite the dichotomy's all but official demise. This article reviews ATCA and its problems in a four-step method. First, the article traces the evolution of the international-domestic dichotomy in aviation law from its inception in the Warsaw Convention to its reappearance in ATCA. Second, the article examines the proposed scope and function of ATCA. Third, the article considers some of the potential conflicts within aviation law which ATCA's enactment would create. Fourth, the article recommends improvements to ATCA.

6. See, e.g., *Northwest Air et. al., North Atlantic Routes*, 6 C.A.B. 319 (international and domestic concerns influenced the award of international air routes to United States carriers).

7. The interests are those of the travelling public, air carriers, aircraft manufacturers, air traffic controllers, and to some extent, the airports. In the infancy of the aviation industry, air travel posed a considerable risk to the travelling public, so the decision was practically (though not legally) an "assumption of the risk." One alleged social interest was to protect the industry from lawsuits which were likely to ensue and the costs of which burgeoning companies would be unable to absorb. As the industry grew and air travel became safer, the ability to absorb lawsuits became much greater, and the travelling public did not perceive air travel as such a risk. Therefore the social interest in protecting the air carriers diminished.

8. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (codified at 49 U.S.C. § 1502 (1982), [hereinafter cited as the *Warsaw Convention*]. See *infra* notes 40-45 and accompanying text.

9. See *infra* notes 40 and 43 and accompanying text.

10. See *infra* notes 47-61 and accompanying text.

11. H.R. 4479, 98th Cong., 1st Sess., 129 CONG. REC. H10, 578-79 (daily ed. Nov. 18, 1983) [hereinafter cited as *ATCA*]. The bill was introduced by Representative Anderson, (D.-Cal.) and previously known as the Air Travel Protection Act in a draft submitted, though not introduced, in the 97th Congress. See 48 J. AIR L. & Co. M. 263, 275-82 (1982). The Act provided no-fault compensation for injuries or death arising out of domestic aircraft accidents in accident victims who were residents of the United States. Damages were limited to economic losses. Pain or suffering would not have been compensated. The total amount recoverable by all claimants could have been limited to the amount of insurance carried by the airline as directed by regulations established by the Secretary of Transportation. *Id.*

THE "INTERNATIONAL" ELEMENT OF THE DICHOTOMY: ITS RISE AND FALL

The Warsaw Convention

In the early 1900's, the aviation industry was embryonic worldwide.¹² During this period, the incubative assistance of protective legislation maintained the industry's viability.¹³ The technical state of aviation was such that fatal accidents were frequent, especially by today's standards.¹⁴ This caused many to believe that the industry could not afford to insure itself against unlimited liability.¹⁵ In a cooperative effort to protect the aviation industry, a substantial portion of the international community entered the Warsaw Convention.¹⁶

The Convention resulted from work done at conferences convened in Paris in 1925 and in Warsaw in 1929, and from work done in the interim by the Comité International Technique d'Experts Juridiques Aériens.¹⁷ Delegates to the conferences established as their primary objective an agreement to insulate air carriers from unlimited liability for personal injury and property damage caused by accidents during international transportation. Many countries, including the United States, and several states within the United States, had already recognized contractual limitations on damages or liability through their respective domestic laws.¹⁸ The convention delegates, however, considered this piecemeal protection to be inadequate. They sought to protect "national industries"¹⁹ against suits brought in other countries,²⁰ or states of the United States,²¹ without liability limits.

The United States' delegates agreed to the proposed limitations on the international travel liability of air carriers within the scope of the Warsaw Convention.²² The liability limitation was set at about \$4,898,²³ and it applied under circumstances defined in Article 1(2) as follows:

[A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a

12. See *supra* note 5.

13. See, e.g., note 29 *infra* and accompanying text. See also LOWENFELD, *supra* note 4, at Ch. 7, § 2.1. "[I]t was expected that such a limit, applied uniformly on international flights—and, it was hoped, internally as well through corresponding legislation in the member countries—would enable airlines to attract capital that might otherwise be scared away by the fear of a single catastrophic accident." *Id.*

14. Between 1925 and 1929, there were 45 fatal accidents for every 100 million miles flown. 26 ICAO BULL. (May 1971) at 43. In 1950, fatalities per 100 million miles flown were 3.02. 26 ICAO BULL. (May 1971) at 4. In 1960, airplane fatalities dropped to 1.76 per 100 million miles, *Id.*, and to 0.64 per 100 million miles in 1970. 34 ICAO BULL. (June 1979) at 54. In 1983, the number of fatal accidents per 100 million miles flown was 0.35. 39 ICAO BULL. (July 1984) at 44.

15. See *supra* note 13 and *infra* note 29 and accompanying text.

16. See *infra* note 26.

17. This committee was created at the Paris conference. The Warsaw Conference records were originally in French; for an English translation, see R. Horner & D. Legrez, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW (1975).

18. For a discussion on limitations of liability under federal law for interstate common carriers, see Comment, *Limitations on Liability: Passenger Injuries and Baggage Losses on Land, Sea and Air*, 34 TUL. L. REV. 354 (1960). For examples of state law and its development, see Donovan, *The Origins and Development of Shipowner's Liability*, 53 TUL. L. REV. 999, 1000 (1979). See also *infra* Notes 101-102.

19. This term includes both nationally operated air carriers and the privately operated air carriers of a particular nation.

20. See *supra* note 13 and note 29.

21. See *supra* note 18.

22. The Convention was opened for signature on October 12, 1929; entered into force on February 13, 1933; ratified by the United States on June 15, 1934; and entered into force for the United States on October 29, 1934. See *supra* note 8.

23. *Warsaw Convention*, *supra* note 8, art. 22; "[Liability will be] . . . limited to the sum of 125,000 francs . . . deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths." Today the amount converts to about \$13,750.

break in the transportation. . . are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or other power, even though that power is not a party to this convention.²⁴

Thus the international-domestic dichotomy was conceived.²⁵

The United States Senate ratified the Warsaw Convention in 1934,²⁶ at a time when the aviation industry's need for protection was still apparent.²⁷ Indeed, the fatality rate in 1929 was 45 per 100 million passenger miles.²⁸ Secretary of State Cordell Hull wrote at the time that "the principle of limitation of liability would be an aid in the development of international air transportation."²⁹ Although the Senate agreed to limit liability arising out of international travel, it did not extend the same principle to domestic air transportation under federal law. Thus the international-domestic dichotomy came to fruition in the United States.

The Dichotomy's Demise

Soon after ratification, it became apparent that the Warsaw Convention suffered from several fundamental defects. Some of the problems resulted from ambiguous drafting. Interpretation of article 1(2),³⁰ for example, produced inconsistent results which led to concern over whether the convention was achieving its intended purpose. Moreover, even textually clear provisions resulted in confusion. It was unclear, for example, why foreign carriers whose governments had not ratified the convention should be protected by it in American courts,³¹ or why form should supersede substance in the contract of carriage.³²

More fundamentally, however, the convention suffered as a result of technological and legal developments which challenged its underlying premises. By the

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24. *Id.* art. 1(2). For an example of how the same definition can be improved by clarity of expression, see article 1(f) of the International Convention For The Unification of Certain Rules Relating to the Carriage of Passengers by Sea, *done* Apr. 29, 1961, reprinted in M. EVANS & M. STANFORD, IV TRANSPORT LAWS OF THE WORLD at I/E/10 (1983): "[I]nternational carriage means any carriage in which according to the contract of carriage the place of departure and the place of destination are situated in a single State if there is an immediate port of call in another State, or in two different States."
 25. See *infra* notes 62-68 and accompanying text. This dichotomy pertained not only to limitations of liability but also to other issues such as jurisdiction, liability, burden of proof, notice, statute of limitations, and choice of law. Other issues not covered by the Warsaw Convention were to be settled under domestic law. These domestic law issues included allowable types of damages, measure of damages, contributory negligence, venue, settlement inducement, apportionment of liability between or among defendants, attorney fees, court costs and certain other choice of law issues.
 26. 49 U.S.C. § 1502 (1982). See *supra* note 8. The United States is a party to the Multilateral Convention for the Unification of Certain Rules Relating to International Transportation by Air, which concluded at Warsaw on October 12, 1929, and entered into force for the United States on October 29, 1934. Forty-three countries joined the pact which committed itself to the greatest degree of competition that is compatible with a well functioning international air transport system. The United States amended the 1934 legislation with the International Air Transport Competition Act of 1979. Pub. L. No. 96-192, 94 Stat. 42 (1980).
 27. See *supra* note 14 and accompanying text.
 28. See *supra* note 14.
 29. S. EXEC. DOC. NO. C., 73d Cong., 2d Sess. 3-4 (1934).
 30. See *supra* note 24 and accompanying text.
 31. See *Glenn v. Compania Cubana de Aviacion, S.A.*, 102 F. Supp. 631 (S.D. Fla. 1952) (a Cuban corporation which was not a contracting party to the Warsaw Convention received the benefit of the Convention's limited liability provisions).
 32. See *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955) (American Airlines' failure to refer to an intermediate stop on its airline tickets was held not to constitute "willful misconduct" sufficient to trigger the unlimited liability provision); *Berner v. United Airlines, Inc.*, 219 F. Supp. 289 (S.D.N.Y. 1963) (pilot's failure to follow instruction to maintain altitude was held to constitute willful misconduct). See also *Georgakis v. Eastern Airlines, Inc.*, 512 F. Supp. 330 (E.D.N.Y. 1981).

time of the Convention's ratification, its underlying purpose, limiting air-carrier liability under Federal law, had become suspect for two reasons. First, increased safety in air travel meant that the industry required less protection from liability.³³ The second, and equally important development, was that the states of the United States had begun to invalidate limited liability provisions as a matter of state law.³⁴ Even as the Warsaw Convention was in the process of being ratified by the United States in 1934, a trend had begun among the states to invalidate contractual provisions that would limit a common carrier's liability for negligent injury to its passengers.³⁵ As a result such contractual provisions were valid only where they were not invalidated by state statute, case law, or constitutional provision. By the mid-1960's, all states of the United States had made such invalidating law in one form or another.³⁶

Practically overnight what had been considered a fair system of law had come to be seen as unfair.³⁷ In the United States, it was this perceived unfairness that led to the decline in adherence to the principles of the Warsaw Convention.³⁸ Each branch of the Federal Government played a role in contributing to this decline.

Executive and Legislative Responses.

The executive branch, operating primarily through the State Department, sought to maintain adherence to the Convention while, at the same time, limiting its negative effects. The Department attempted to implement this policy in a series of international conferences. It sought to negotiate the highest possible limits on awards while still remaining within a limited liability framework. At the Hague Conference in 1955, the limit was doubled;³⁹ at the Montreal conference in 1966, agreement was reached among the air carriers to raise the limit to \$75,000;⁴⁰ and at the Guatemala City conference in 1971, the limit was raised to \$100,000.⁴¹ Although the State Department was instrumental in achieving these higher limits, the Senate has never ratified the amendments.

The reason for this conflict between the Senate and the State Department is quite simple. It has become obvious that the Senate is not willing to participate in the adoption of any treaties containing liability limitation provisions. On the

33. See *supra* note 14 and accompanying text.

34. See *supra* note 18.

35. *Id.*

36. *Id.*

37. See LOWENFELD, *supra* note 4, Ch. 7, § 4.11. "Debates concerning revision of the Warsaw Convention began almost as soon as the Convention came into effect. . . . [T]hose arguing for higher limits pointed out that . . . as a result of improvement in air safety, liability insurance could be obtained by the carriers at much lower cost per passenger mile than when the Convention was negotiated." *Id.*

38. See *infra* text accompanying notes 39-61 on the response of the executive, legislative and judicial branches of the United States Government.

39. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929, done Sept. 28, 1955, reprinted in M. EVANS & M. STANFORD, *supra* note 24, at I/C/4.

40. Agreement relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, May 13, 1966, CAB Agreement No. 18990 Docket No. 17325: Order No. E-23680 [hereinafter cited as *Montreal Agreement*]. For an account of the events leading up to the conclusion of the agreement, including the text of the denunciation of the Warsaw Convention by the United States and subsequent withdrawal of that denunciation, see Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965).

41. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as Amended by the Protocols done at the Hague on September 28, 1955. For the full text See 64 MATERIALS DEP'T ST. BULL. 555 (1971) and *Int'l Legal Materials*. 613 (1971). For a discussion of the amendments, see Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 AM. J. COMP. L. 335 (1972).

other hand, the State Department apparently perceives a need to maintain cooperative international relations even if it means preserving the outdated principle of limited liability. One might explain this difference by the theory that elected representatives would be more sensitive to a nationwide abandonment of the principle of limitation of liability by state legislatures and courts.

Caught between the United States Senate and the international community, the State Department finally produced its own solution. In 1965, the Department threatened to denounce the Warsaw Convention if higher limitations of liability could not be achieved.⁴² While this declaration failed to motivate Senate action, it did cause worldwide concern among air carriers.⁴³ The threat of denunciation by the State Department of the Warsaw Convention raised for air carriers the specter of total loss of protection against American-style jury awards.⁴⁴ Thus, the threat provided a lever, through which the State Department could exert pressure on air carriers to implement the desired modifications to the Convention. This means of implementation bypassed the Senate ratification requirement by remaining within the framework of the Warsaw Convention.

The solution was keyed to article 22(1) of the agreement which provides in pertinent part: "[B]y special contract, the carrier and the passenger may agree to a higher limit of liability."⁴⁵ By putting this clause into effect, the air carriers became parties to the Montreal Agreement under which the limit of liability was raised to \$75,000 in 1966.⁴⁶

Response of the Judiciary.

During the same period, the judiciary also participated in safeguarding the interests of those injured by air carriers. By the early 1950's, judges began ruling that the limitations of the Warsaw Convention did not apply. In the "wilful misconduct,"⁴⁷ "delivery,"⁴⁸ and "notice,"⁴⁹ cases, the courts found in favor of plain-

42. "The United States of America wishes to state that it gives this notification solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention. . . ." Notice of Denunciation as printed in 31 J. AIR L. & COM. 291, 303 (1965). See also Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 546-52 (1967); Kreindler, *supra* note 40.

43. Lowenfeld & Mendelsohn, *supra* note 42, at 539, 547-48.

44. *Id.* at 534.

45. *Warsaw Convention*, *supra* note 8, art. 22(1).

46. *Montreal Agreement*, *supra* note 40. The so-called agreement is, of course, not really between "the carrier and the passenger," and it does more than set "a higher limit of liability." In addition, art. 1(2) imposes a standard of absolute liability on the air carrier. See *id.* at art. 1(2). The Montreal Agreement is more accurately described as the air carriers' concession to the State Department in exchange for its withdrawal of its denunciation of the Warsaw Convention. Whether or not a concession is valid within the context of the Warsaw Convention without legislative enactment, the Montreal Agreement has been recognized by the United States courts as a valid exercise of power effectively granted by the Warsaw Convention. In fact, no American court has raised the issue of the Agreement's validity although enforced by the courts many times. The result of this agreement between the air carriers and the State Department has been to preserve the international-domestic dichotomy in aviation law for the present. See, e.g., *Manion v. Pan American World Airways, Inc.*, 55 N.Y.2d 398, 434 N.E.2d 1060, 449 N.Y.S.2d 693 (1982). (In *Manion*, a suit was brought to recover against the airline for injury sustained by a passenger when terrorists attacked the plane. The New York Court held that if a passenger's roundtrip ticket was contracted for as a whole, and if the airline failed to deliver to a passenger a ticket containing notice of Warsaw Convention's liability limitations at the outset of her trip, the airline could not invoke the liability limitations of the Convention. The case was remanded for determination of whether a ticket was delivered to the passenger at the outset of her trip within the terms of the Convention.)

47. See, e.g., *Pekelis v. Transcontinental and Western Air, Inc.*, 187 F.2d 122 (2d Cir. 1951), *cert. denied* 341 U.S. 951 (1951). In *Pekelis* the plaintiff brought an action for the death of her husband. The Court of Appeals held that where the defendant took the position that the accident was caused by pilot negligence not amounting to "wilful misconduct," the report of boards organized by the defendant was admissible as an adoptive admissions. See also *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir.

tiffs seeking to avoid Convention limitations. The decisions held that a plaintiff who could prove either that the air carrier had committed wilful misconduct resulting in the plaintiff's injury or had failed to deliver adequate notice of the Convention's existence and possible application to the plaintiff could avoid enforcement of the limitation of liability provision.⁵⁰

Particular provisions of the Montreal Agreement of 1966 were formulated in reaction to this line of judicial decisions. Notice requirements were specifically outlined in the Agreement,⁵¹ to encourage carrier compliance. In addition, courts tended to be less inclined to find wilful misconduct on the part of air carrier defendants under the higher limits of the Warsaw-Montreal scheme.⁵²

The Montreal agreement notwithstanding, plaintiffs and the courts soon discovered ways to avoid the new limitations⁵³ and the agreement's \$75,000 limit only temporarily dampened concern over the perceived "unfairness" of limitations on liability. With the development of products liability law in the United States,⁵⁴ plaintiffs found that they could successfully sue not only the air carrier, but also aircraft manufacturers and air traffic controllers, neither of which are afforded protection under the Warsaw Convention.⁵⁵

In addition, with the demonetization of gold in the United States, attempts were made to call the enforceability of Article 22 of the Convention into question.⁵⁶ Article 22 states that "the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . ." with the franc "consisting of 65 1/2 milligrams of gold. . ." ⁵⁷ In *Franklin Mint v. TWA Inc.*⁵⁸ the limitation of lia-

1955); *KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961); *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

48. *See, e.g.*, *Mertens v. The Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965). The court held that virtually unreadable liability limitation printed on ticket was not binding on the passenger to whom it was not delivered until after he had boarded the airplane.

49. *See e.g.*, *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966). The court held that the passengers' ticket and baggage checks which were combined in the form of small printed booklets containing footnotes printed in type so as to render them unnoticeable, unreadable, and virtually invisible, were insufficient to notify passengers that exclusion or limitation provisions of the Warsaw Convention were applicable, and the airline could not exclude or limit its liability under the Convention.

50. *See Warsaw Convention, supra* note 8, arts. 3 and 25.

51. *Montreal Agreement, supra* note 40, at art. 2.

52. The courts, for example, strictly applied the notice provisions of the Montreal Agreement. *See e.g.*, *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983). The court held that an airline's violation of notice provisions of the Montreal Agreement deprived it of the Agreement's liability limitations and prevented it from raising defenses under the Warsaw Convention.

53. The courts, for example, strictly applied the notice provisions of the Montreal Agreement. *See e.g.*, *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983) (The court held that an airline's violation of notice provisions of the Montreal Agreement deprived it of liability limitations of the agreement and prevented it from raising defenses under the Warsaw Convention.)

54. *See W. PROSSER & W. KEETON, THE LAW OF TORTS* § 95 (5th ed. 1984).

55. *See In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (D. Cal. 1975). The court held that on the face of their texts neither the Warsaw Convention, the Hague Protocol, nor the Montreal Agreement were applicable to the United States, the manufacturer, or the dealer-broker who sold the plane which was the subject of the suits. This decision has been followed in other federal courts. *See e.g.*, *Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978); *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979). *See also Lowenfeld, supra* note 4, Ch. 7, § 2.1 ("[a]fter the DC-10 case, no one would ever against think of compensation in an aviation disaster without looking at the manufacturer as a potentially responsible party").

56. *See e.g.*, *Franklin Mint Corp. v. TWA Inc.*, 690 F.2d 303, 305 (2d Cir. 1982). Article 22 of the Warsaw Convention limits the carriers' liability for injuries. The various limits are stated in terms of a specified number of French francs. The dollar value of that limit is calculated by simply converting the gold value of the specified limit into United States dollars. The difficulty arises from the official monetary functions, and the fact that its price was set originally by law. By international agreement and United States domestic regulation, gold has now lost its monetary functions and no longer has an official price. *Warsaw Convention supra* note 8, art. 22.

57. *See supra* note 23 and accompanying text.

58. 690 F.2d 303 (2d Cir. 1982).

bility provision of the Warsaw Convention was held unenforceable because the limitation is defined in terms of gold, which had been demonetized by the United States. The court stated:

[I]nternational disarray as to the proper unit of conversion under the Convention. . . must be selected either through treaty approval by the Senate or by legislation passing both Houses of Congress. . . [but is] unfit for judicial resolution. . . [T]herefore the Convention's limits on liability. . . are unenforceable in the United States courts.⁵⁹

The Supreme Court, however, recently reversed the Second Circuit in *TWA, Inc. v. Franklin Mint Corp.*⁶⁰ The Court stated: "The political branches, which hold the authority to repudiate the Warsaw Convention, have given no indication that they wish to do so. Accordingly, the Convention's cargo liability limitation remains enforceable in the United States."⁶¹

This section of the article has traced the development of the international-domestic dichotomy in United States aviation law from its birth to its present state. With respect to limitations of liability, the *raison d'être* of the Warsaw Convention, the dichotomy has been virtually eradicated by state statutes and judicial decisions. With respect to issues of jurisdiction,⁶² burden of proof,⁶³ liability,⁶⁴ notice,⁶⁵ statute of limitations,⁶⁶ and certain choice of law issues,⁶⁷ the dichotomy lives on since the "domestic" side of aviation treats those issues in different ways.⁶⁸

The inconsistent approaches which the judiciary, executive and legislative branches have taken in dealing with this dichotomy have created considerable confusion regarding the proper disposition of these cases. One response to this

59. *Id.* at 311.

60. *TWA, Inc. v. Franklin Mint Corp.*, — U.S. —, 104 S. Ct. 1776 (1984).

61. *Id.* at 1787.

62. Article 1 of the Warsaw Convention determines the first step in a "two-step" process of deciding the issue of jurisdiction. The places listed in the article are the countries in which the case may be brought. See *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965). In *Mertens* the court held that under the Warsaw Convention, Article 28(1), the United States qualified as a forum when an action was brought against a carrier for the death of an airline passenger on a flight from a California Air Force base to a base in Japan. The carrier was domiciled and had its principle place of business in the United States, in which the contract for carriage was also made. *But see Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532 (1965), *cert. denied*, 382 U.S. 983 (1966). The second step of the process is the application of domestic law to determine which court within the country has power to hear the case. In the second step, the Warsaw Convention empowers the federal courts with subject matter jurisdiction. See *Benjamin v. British European Airways*, 572 F.2d 919 (2d Cir. 1978) (court held that the Warsaw Convention creates a cause of action, not only for the loss of or damage to baggage, but also for the wrongful death of an airline passenger), *rev'd Noel v. Lines Aeropostal Venezdana*, 247 F.2d 677 (2d Cir. 1957), *cert. denied* 355 U.S. 907 (1957).

63. Article 20(1) of the Convention states that an air carrier "shall not be liable if he proves that he and his agents have taken all necessary measures to avoid . . . damage[s], or that it was impossible . . . to take such measures." *Montreal Agreement*, *supra* note 40, at art. 1(2). Therefore, under the convention, the air carrier is subject to absolute liability. See W. PROSSER AND W. KEETON, *supra* note 53 at 257-58.

64. The Warsaw Convention provides that its limitation on damages provision will not apply if injury to the plaintiff results from the "wilful misconduct" of the air carrier. *Warsaw Convention*, *supra* note 8, art. 25.

65. The notice provisions of the Warsaw Convention as clarified in the Montreal Agreement are not required with respect to transportation which is not international or not performed by a party to the agreement. *Warsaw Convention*, *supra* note 8, art. 2.

66. An action governed by the Warsaw Convention is barred after two years. *Id.* at art. 29(1). The period of limitations for wrongful death and personal injury varies from state to state. See W. PROSSER AND KEETON, *supra* note 54, at 957.

67. The Warsaw Convention provides that issues of contributory negligence and the calculation of the limitations period shall be governed by the law of the forum. *Warsaw Convention*, *supra* note 8, arts. 21, 29(2).

68. See *supra* note 55 and accompanying text.

confusion is H.R. 4479, the proposed Air Travel Compensation Act (ATCA).⁶⁹ Many features of the bill make it attractive to the public as well as the aviation and insurance industries.⁷⁰ The bill provides for speedy and organized settlements while protecting the financial stability of the aviation industry and without placing quantitative limits on damages.⁷¹ The bill also provides the Federal courts with rules specially designed for handling aviation claims.

Unfortunately, ATCA provides this new system of aviation law only for *domestic* air commerce. As a result of the bill's limited applicability, ATCA regrettably fails to establish what could otherwise be a fair and orderly system which provides "uniformity" to domestic and international aspects of United States aviation law.

THE PROPOSED AIR TRAVEL COMPENSATION ACT:

On March 8, 1983, the Senate rejected a proposal⁷² intended to update the Warsaw Convention. The package consisted of Montreal Protocol Numbers 3 and 4, as adopted at the Montreal Convention⁷³ and a supplemental insurance program that would have raised the liability limits above the ceilings recommended by the Montreal Protocols. In addition, the package would have eliminated the "wilful misconduct" escape clause of the Warsaw Convention.⁷⁴

ATCA was introduced in the House of Representatives on November 18, 1983.⁷⁵ The bill borrowed its main feature, a supplemental compensation plan,⁷⁶ from the Montreal package. ATCA also proposes, in Section 1702(a), a federal private right of action, though that right is limited to claims arising from domestic flights. The bill provides in pertinent part: "There is hereby created a . . . right of action to recover . . . for injury or death to persons . . . other than persons . . . being carried in international air commerce, sustained as a consequence of an aircraft incident."⁷⁷ The scope of ATCA, therefore, reinstates the international-domestic dichotomy of aviation law by carving out a "domestic" element to which it will apply exclusively.⁷⁸

69. See ATCA, *supra* note 11.

70. The bill would establish a limitation of liability that would be set for air carriers, air frame manufacturers and air traffic controllers. In addition, it would establish a Claims Payment Facility through which the travelling public would pay for liabilities that went beyond the limitation. See text accompanying notes 81-87 *infra*.

71. ATCA does, however, limit the types of damages that may be awarded. See *infra* notes 90-96 and accompanying text.

72. By a vote of 50-42 the Senate failed to pass the "Montreal Package." Passage required approval by a two-thirds majority. 129 CONG. REC. § 2279 (1983). See S. EXEC. NO. B., 95th Cong., 1st Sess. (1976), reprinted in M. EVANS & M. STANFORD, *supra* note 24, at I/C/8. The related debates are located at 129 CONG. REC. § 2270-79 (1983).

73. See S. EXEC. NO. B., 95th Cong., 2nd Sess. (1976), reprinted in M. EVANS & M. STANFORD, *supra* note 24, at I/C/8. The protocols are cited as Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as Amended by the Protocols done at The Hague on September 28, 1955, and at Guatemala City, March 8, 1971 and Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as Amended by the Protocol done at The Hague on September 8, 1955.

74. *Id.* See also 129 CONG. REC. § 2278 (1983) (remarks of Sen. Joseph Biden (D-Del.): "It is hard for me to believe that passengers would prefer a system where airlines know their liability is absolutely limited, even if airlines engage in willful misconduct").

75. 129 CONG. REC. H10578-79 (1983).

76. ATCA, *supra* note 11 § 1703.

77. *Id.* § 1702(a).

78. The scope of ATCA is even further limited by other definitions. "Aircraft incident" means "any occurrence involving . . . a domestic carrier during . . . domestic air commerce which results . . . in (i) the hospitalization for more than forty-eight hours or the death of five or more persons, or (ii) damage to property, other than damage to aircraft engaged in flight . . . in excess of \$10,000,000."

The dual purposes of ATCA parallel Warsaw Convention's purposes, though ATCA is intended to have more comprehensive effect. ATCA is designed to provide "financial protection" in the aviation industry, and to establish a "fair, orderly, and expeditious federal system of assured compensation" ⁷⁹ In keeping with the bill's intent to provide comprehensive coverage, ATCA protects air carriers, air frame manufacturers, aircraft engine manufacturers, and air traffic controllers. ⁸⁰ The bill would require each of these groups to maintain aggregate insurance coverage at levels set by the Secretary of Transportation. ⁸¹

Despite providing broad protection to the aviation industry, ATCA offers injured parties almost unqualified access to the recovery of damages. Recovery is achieved through a two-stage process. First, plaintiffs are not obligated to prove fault; they need only file a "Public Liability Action" which gives Federal courts subject matter jurisdiction. ⁸² In response to the filing of an action, liable parties are required to pool their insurance proceeds for the purpose of immediately compensating injured passengers or their survivors. ⁸³ The aggregate of the pooled insurance proceeds represents the total liability of the "aviation industry" to the injured victims. ⁸⁴ In this stage of the recovery process, plaintiffs may seek any damages in excess of such aggregate from a terrorist attack from "The Claims Payment Facility." ⁸⁵

The Claims Payment Facility is to be funded, in the event liability arises, by the collection of a surcharge on passenger tickets and freight waybills. ⁸⁶ The amount of the surcharge would be proposed by the defendants, approved by the Secretary of Transportation, and collected by all domestic air carriers. ⁸⁷ The defendants, who through subrogation would be the insurance companies, may apportion liability among themselves through a proceeding to determine relative fault. ⁸⁸ To take advantage of this provision, a defendant must file an "Apportionment Action." ⁸⁹

On the surface, ATCA appears to protect members of the aviation industry and their insurance companies by quantitatively limiting the aggregate liability which may be imposed on the industry. At the same time, it appears to assure full

ATCA, *supra* note 11, § 1701(1)(A). "Domestic air commerce" is restricted to "the carriage, by an aircraft having a maximum passenger seating capacity exceeding sixty seats or a maximum payload capacity exceeding eighteen thousand pounds" *Id.* § 1701(19). Despite the attempt to create uniform rules governing recovery, ATCA would not apply to most minor accidents, to those involving small aircraft, or hijackings. Also, note that § 1702(c)(3)(A) excludes "claims arising out of or resulting from an aircraft incident if military hostilities among governments or directed at any government were a substantial factor in producing such incident."

79. ATCA, *supra* note 11, §§ 2(b)(1),(3).

80. *Id.* § 2(b)(2).

81. *Id.* § 1710(b). This might create insurance requirements that are too burdensome, especially for smaller and newer air carriers and manufacturers.

82. ATCA, *supra* note 11, § 1702(b).

83. *Id.* § 1710(b). An "interim assistance plan" is described in § 17 of the bill. It is not clear, however, that passengers or their survivors would receive immediate assistance in case of injuries sustained in a terrorist attack. In such cases, the insurance companies are exempted from liability. Thus, any recovery to which an injured party might be entitled must be obtained through the Claims Payment Facility by use of the "surcharge" procedure. Injured parties may be able to avoid the cumbersome "surcharge" procedure by invocation of a "catch-all" provision which states: "The plan for the establishment of the Claims Payment Facility shall . . . provide any other terms and conditions necessary or appropriate . . . to ensure . . . expeditious payment" *Id.* § 1712(b)(11).

84. *Id.* § 1711.

85. *Id.*

86. *Id.* § 1713.

87. *Id.* § 1710.

88. *Id.* § 1714.

89. *Id.* § 1714.

recovery to passengers and their survivors for their injuries by spreading any costs in excess of industry liability over the whole of the domestic traveling public.

Other unique features of ATCA, however, affect both the measure of damages and the apportionment of costs between the aviation industry and the traveling public. Section 1703 of ATCA places restrictions on recovery for pain and suffering⁹⁰ or emotional distress.⁹¹ Likewise, recovery is generally barred for exemplary or punitive damages.⁹² Thus damages are generally limited to loss of earnings, although an exception apparently exists for death of a survivor's spouse, child or parent when there is no economic detriment beyond death-related expenses.⁹³ In such circumstances, "the court shall make an award to such survivor that is just and reasonable, taking account of similar awards made in other cases"⁹⁴ The bill further limits recoveries awarded to nonresident aliens for economic detriment that would be awarded in the jurisdiction in which the individual was a resident at the time of the aircraft incident.⁹⁵ Finally, no provision is made for personal injury or property damage on the ground.⁹⁶

Obviously, ATCA's compensation scheme is designed primarily to protect the aviation industry and its insurance companies. Other provisions of ATCA are intended to provide a uniform legal system, under federal auspices, to resolve claims orderly and expeditiously.⁹⁷ In addition, the Act provides a formula for measuring economic detriment⁹⁸ and rules regarding jurisdiction,⁹⁹ venue,¹⁰⁰ attorney fees,¹⁰¹ court costs,¹⁰² contributory negligence,¹⁰³ settlement inducement,¹⁰⁴ statute of limitations,¹⁰⁵ apportionment of liability¹⁰⁶ and jury

90. Damages for pain and suffering will be awarded if the "claimant has sustained serious and permanent of disfigurement (sic) . . . or more than ninety days of total disability . . ." *Id.* at § 1703(a)(2)(B).

91. *Id.* § 1703(a)(2)(A).

92. *Id.* § 1703(a)(3).

93. *Id.* § 1703(a)(5). "Economic detriment includes (a) "allowable expenses," such as medical treatment and related procedures, (b) "loss of income" from injury, (c) "replacement services loss"—services which had to be procured because the person killed in the airline disaster was thus unable to provide them for his family, (d) "survivor loss"—lost income to the family due to the decedent's death, less (e) "Government payments" received by the survivors and (f) "income tax saving" to the extent that recovery under the act is not taxable income.

94. *Id.*

95. *Id.* § 1703(b).

96. Examination of the bill fails to reveal any mechanism to trigger such recovery. *See id.* §§ 1702(a), 1702(c)(3), 1703(a). In general, under the ATCA, a victim is protected by determining whether the related flight was "domestic air commerce." Since this depends upon the contract of carriage and since persons on the ground would have no contracts of carriage, there is no way to bring them within ATCA without a specific provision for doing so.

97. Section 1702(a) creates a "sole and exclusive right of action" to recover compensation for an injury or death to persons or damage to property being carried in international air commerce, sustained as a consequence of an aircraft incident. Section 1702(c)(2) further provides that the "right of action provided in subsection (a) shall . . . be governed by the provisions of this title to the exclusion of any State law, any inconsistent provision of any Federal law, and the law of any place outside the United States."

98. *Id.* § 1703(a)(1).

99. *Id.* §§ 1707(a), 1714(b), 1718(c).

100. *Id.* §§ 1707(b), 1714(c). When the claimant is a resident of the United States, venue is in the District Court where the plaintiff resides. When the plaintiff is a nonresident, venue is the district where the accident occurred if the accident occurred within the United States, or the district where the decedent deplaned or was bound to, if the accident occurred outside the United States.

101. *Id.* §§ 1709(a) & 1717(b). Reasonable fees for attorneys and expert witnesses are recoverable by a person who prevails in a public liability action. The District Court may also grant reasonable fees in an apportionment action.

102. *Id.*

103. *Id.* The amount of compensation recoverable in a public liability action shall be reduced to the extent of the failure of the plaintiff or plaintiff's decedent to take reasonable steps following an incident to mitigate damages. *Id.* § 1702(b)(2).

104. *Id.* §§ 1705 & 1712. Parties adjudged to have contributed to the incident are required to send settlement offers to next of kin and also publish the offers in a newspaper of general circulation in the

instructions.¹⁰⁷

If enacted, ATCA would change aviation law as it pertains to "domestic air commerce."¹⁰⁸ It would provide uniformity in decisions involving domestic commerce where inconsistencies previously existed. ATCA, however, does nothing to resolve the inconsistencies that have arisen in the past from the dichotomy in aviation law. Because ATCA perpetuates this dichotomy, it will necessarily fail to be fully effective in producing uniformity even in purely domestic controversies.

THE INCOHERENCE OF AVIATION LAW UNDER ATCA

In a single air crash case, courts will resolve certain issues differently depending upon whether the plaintiff was engaged in "international transportation" as defined in the Warsaw Convention. Under the Warsaw Convention, the distinction lies in each passenger's carriage contract or ticket.¹⁰⁹ Under ATCA, courts will continue to distinguish among passengers in light of whether they were engaged in "domestic air commerce" or in "international air commerce."

If, under ATCA, "international air commerce" were synonymous with "international air travel," the effect of the bill would simply be to supplant current rules regarding the domestic side of the dichotomy in aviation law. The two, however, are not synonymous.¹¹⁰ This distinction would create new inconsistencies in aviation law. These would arise under ATCA in at least three contexts: issues covered by ATCA but not by the Warsaw Convention; protection of aircraft manufacturers and air traffic controllers; and cases not covered by the Warsaw Convention or ATCA.

The table below summarizes the relevant provisions of the Convention and ATCA. It will serve as a useful reference for discussion of the new inconsistencies

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- country where the incident occurred. If the incident is a terrorist aircraft incident, the contributing parties must set up a Claims Payment Facility. See also §§ 1701(14), 1712.
105. *Id.* §§ 1707(c), 1714(d). All suits must commence within two years of the date of the incident on which the suit is based. Apportionment actions cannot be brought until after 30 days, but must be brought within three years. Both limitation requirements can be excused by a party's written waiver.
106. *Id.* §§ 1714, 1716. Liability is to be comparatively apportioned.
107. *Id.* § 1708. Section 1708 provides:
- (a) In any public liability action which is tried to a jury—
 - (1) the court shall instruct the jury—
 - (A) as to the provisions of section 1709;
 - (B) as to the treatment under Federal and applicable state or local income tax laws of awards of compensation in a public liability action and of earnings on such awards; and
 - (C) in cases where the court proposes to enter a judgment pursuant to subsection (c), to disregard the effect of changes in the purchasing power of the dollar; and
 - (2) the court shall require a special verdict itemizing—
 - (A) each element of economic detriment provided for in subparagraphs (A) through (D) of section 1703(a)(1);
 - (B) each of the offsets provided for in subparagraphs (E) and (F) of sections 1703(a)(1);
 - (C) any allowance for pain and suffering provided for in section 1703(a)(2); and
 - (D) in cases where the court proposes to enter a judgment pursuant to subsection (c), a breakdown between (i) the amount of compensation to which plaintiff is entitled on account of damages sustained prior to the entry of judgment, and (ii) the amounts of compensation to which plaintiff will be entitled on account of damages anticipated to be sustained subsequent to such entry; such latter amounts shall be determined period by period and without adjustments for changes in the purchasing power of the dollar.
108. *Id.* § 1701(19).
109. For example, if the flight was from Chicago to Montreal with a stop in New York, passengers booked through to Montreal would be subject to the Warsaw Convention while those who were booked only to New York would not be subject to the Convention.
110. See *supra* note 77.

which would arise under ATCA. Under these conditions, the inconsistencies which presently exist as a result of the international-domestic dichotomy would remain essentially intact.

Section	Issue	Warsaw Convention	ATCA
I	Measure of Damages	domestic law	§ 1703
	Types of Damages	domestic law	§ 1702(c)(3) & 1703(a)
	Contributory Negligence	article 21	§ 1702(b)(2)
	Venue	domestic law	§ 1707(b) & 1714(c)
	Settlement Inducement	domestic law	§§ 1705 & 1712
	Apportionment of Liability	domestic law	§§ 1714 & 1716
	Attorney Fees and Costs	domestic law	§ 1709(a)
II	Choice of Law	domestic law	§ 1703(b)
	Limits of Liability	article 22 & Montreal Agreement, ¶ 1(1)	§ 1711
III	Jurisdiction	article 28	§§ 1702(a), 1707(a), 1714(b) & 1718(c)
	Liability/Burden of Proof	article 28	§§ 1702(b)(1) §§ 1702(b) & 1716(c)
	Notice	article 3 & Montreal Agreement ¶ 2	N/A
	Statute of Limitations	article 29(1)	§ 1707(c) & 1714(d)
	Choice of Law	article 21	none, but see § 1702(b)(2)
	Wilful Misconduct	article 25	§ 1703(a)(3)

As discussed earlier,¹¹¹ the issues listed in Section I of the table are presently covered by the common or statutory law of the forum regardless of whether the case is related to international transportation. Thus, a forum would resolve these issues according to the same law for all passengers of a single air crash. ATCA, however, would preempt state law with respect to these issues in cases related to domestic air commerce.¹¹² Thus, under ATCA, some of those passengers would be subject to ATCA and others to the forum law if some of them were engaged in “domestic air commerce” while others were engaged in “international air commerce.” Thus, ATCA would unnecessarily create a dichotomy in aviation law where none presently exists.

The ATCA, as drafted, introduces a new inconsistency to the protection of aircraft manufacturers and air traffic controllers (ATCs) who are presently unaffected by an international-domestic dichotomy. The Warsaw Convention, as noted above,¹¹³ only protects air carriers. Manufacturers and ATCs are unprotected in both domestic and international cases. ATCA proposes to protect the entire aviation industry,¹¹⁴ but only with respect to domestic air commerce. As a result, manufacturers and ATCs would remain unprotected in cases involving international air commerce. In this area, enactment of ATCA would create a dichotomy of treatment between international and domestic commerce where none had previously existed and where none is warranted.¹¹⁵

ATCA states that only domestic air carriers are subject to its protection.¹¹⁶

111. See *supra* notes 68-69 and accompanying text.

112. See *supra* note 97.

113. See *supra* note 55 and accompanying text.

114. See *supra* note 80 and accompanying text. At least one caveat must be mentioned in the context of this discussion of the general rule. It is conceivable that airport authorities, including municipalities, could also be subject to suit for failure to take adequate precautions to prevent a hijacking or terrorist attack. Airport authorities, however, are not protected by ATCA.

115. One should reconsider, at this point, the limitations on the scope of ATCA mentioned in note 78, *supra*. Although not directly related to the issue of an international-domestic dichotomy, one must wonder why Congress would not apply uniformity uniformly.

116. ATCA, *supra* note 5, § 1710(a).

Domestic air carriers are persons who engage in intrastate or interstate commerce within the United States.¹¹⁷ ATCA does not indicate, however, how its compensation scheme would operate if a domestic air carrier and a foreign air carrier collided and all surviving passengers brought their actions in the same Federal court. If a court determined that the legislative aim in drafting the protective provisions of ATCA had been nationalistic, the court might rule that the foreign air carrier was not protected. Under such circumstances, disposition of the inevitable collateral claims could prove to be insurmountably confusing for the court. If, however, the foreign air carrier, in these circumstances, is protected by ATCA, then one must ask on what rational foundation Congress has relied in drawing a distinction between domestic and nondomestic air carriers or, for that matter, between domestic and nondomestic air commerce.

ATCA refers throughout to "domestic" air carriers but never distinguishes between domestic and nondomestic manufacturers or ATCs. According to ATCA, an aircraft manufacturer is "any person who has manufactured an airplane in use by a domestic air carrier in domestic air commerce,"¹¹⁸ an aircraft engine manufacturer is "any person who has manufactured engines powering aircraft in use by a domestic air carrier in domestic air commerce,"¹¹⁹ and an air traffic controller is "any person who has supplied a system for en route or terminal surveillance of aircraft involved in domestic air commerce."¹²⁰ Since there are foreign manufacturers and ATCs that fit these descriptions,¹²¹ it is possible for a foreign manufacturer or ATC to be protected by ATCA. Clearly the bill would act to protect some foreign entities while excluding others from the same protection. This situation results in a dichotomy which protects foreign manufacturers and ATCs, but denies protection to the air carriers who fly the manufacturers' aircraft under the ATCs' guidance.

In addition to those problems which result from creating new dichotomies, another problem exists with the scope of ATCA. Currently there are entire lawsuits which fall into the "domestic" side of the international-domestic dichotomy under the Warsaw Convention, but which would not fall within the *scope* of ATCA. The possibility of such occurrences is evident based solely on comparison of the definitions of "scope" in both ATCA and the Warsaw Convention.

ATCA excludes "international air commerce," which is air travel for which the contract of carriage designates "a place of departure, place of destination or an agreed stopping point outside the United States, whether or not there be a break in the carriage. . . ."¹²² The Warsaw Convention pertains to international air transportation,¹²³ which differs from the "international air commerce" in one major respect. Under the Convention, transportation departing from the United States qualifies as "international" when either the destination or a stopping place

117. *Id.* §§ 1701(18), (19). See *supra* note 77.

118. *Id.* § 1701(4)(1).

119. *Id.* § 1701(5).

120. *Id.* § 1701(6).

121. An example of a foreign manufacturer would be Airbus Industrie, the European consortium of French, British, West German and Spanish aircraft manufacturers. It supplies Airbus A310s and Airbus A320s to Pan Am for its domestic flights.

Canadian ATCs in Toronto and Montreal are examples of foreign ATCs that monitor "en route" domestic air commerce. ATCA, *supra* note 11, § 1701(6). It is not possible however, for any foreign ATC to fit the category of "any person who has supplied a system for . . . terminal surveillance of aircraft . . . in domestic air commerce" (*Id.* (emphasis added)), because ATCA defines domestic air commerce as "movement of persons or property solely interstate or intrastate within the United States." *Id.* § 1701(19).

122. *Supra* note 11, §§ 1701(22), 1702(a).

123. *Supra* note 2, art. 2(1)(a).

along the way is in a country which is a party to the Convention.¹²⁴ Similarly, the Convention applies when either the departure point or a stopping point along the way is in a country which is a party to the Convention if the destination is within the United States.¹²⁵ Therefore, if the contract of carriage were one-way from the United States to a country which is not a party to the Warsaw Convention, let us say Ruritania,¹²⁶ then the flight would not be "international air transportation" according to the convention. Yet the flight would be "international air commerce" according to ATCA, because the destination is "outside the United States." Therefore, the transportation would be outside the scope of both the Warsaw Convention, and ATCA. If ATCA is enacted as introduced, the entire aviation industry would remain unprotected by United States law in these situations.

HYPOTHETICAL CASE STUDY

A more detailed analysis of the anomalies which may arise under the the proposed combination of ATCA and the Warsaw Convention may benefit from the use of a hypothetical case study. Assume the existence of six passengers flying Americana Airlines, a fictional United States corporation which is party to the Montreal Agreement. In the case of each passenger, a ticket was sold by an agent of Americana Airlines. Ruritania is a fictional country which is not a party to the Warsaw Convention. Passengers A, B and C, are Ruritanian citizens and residents, while passengers D, E and F are citizens and residents of the United States. As the following analysis indicates, in the event of an airline crash each passenger's ticket will determine his or her right to recover and whether the extent of that recovery will be governed by the Warsaw Convention, the ATCA or neither. Passenger Ticket Governing Law

<u>Passenger</u>	<u>Ticket</u>	<u>Governing Law</u>
A	Chicago-New York	ATCA
B	Chicago-New York-Ruritania- New York-Chicago	Warsaw Convention
C	Ruritania-Chicago-New York	Neither ATCA nor the Warsaw Convention
D	Chicago-New York	ATCA
E	Chicago-New York-Ruritania- Chicago	Warsaw Convention
F	Chicago-New York-Ruritania	Neither ATCA nor the Warsaw Convention

Assume also that all six passengers are aboard an American flight pursuant to their respective tickets, bound for their next stop, which is New York, but are destined to crash during the approach. There are no survivors of the crash. The cause of the accident is determined to be due to the combined errors of another air carrier, the aircraft manufacturers, and the air traffic controllers.¹²⁷ Suits are brought by all six passengers' estates in the same federal district court.

124. See *supra* note 24 and accompanying text.

125. *Warsaw Convention*, *supra* note 8, art. 2(1)(a).

126. Ruritania is a fictional country which will be used further in the discussion below. Two countries with aviation industries that are not party to the Warsaw Convention are China (Taiwan) and Holland. KREINDLER, AVIATION ACCIDENT LAW § 11.01[3] (1984).

127. See *supra* note 114.

The analysis of this hypothetical situation will concentrate on what damages are likely to be awarded to the six passengers' estates. As an initial matter, a court assessing damages would be required to distinguish between the American and the Ruritanian citizens in cases where liability is governed by ATCA. Specifically, section 1703(b) of the bill states that damages shall be computed "in accordance with applicable rules . . . in the jurisdiction in which the individual was a resident at the time of the aircraft incident" ¹²⁸ In the chart below it has been assumed that Ruritanian courts use a formula that results in about one-half the award amount that a United States court would grant.

The chart below indicates how different types of injuries would be treated under respective schemes. ATCA, for example, precludes recovery of punitive damages, or damages for the emotional distress or pain and suffering of non-surviving passengers. ¹²⁹ Under the Warsaw Convention, a court will apparently award punitive damages only in rare circumstances, ¹³⁰ but all other damages would be awarded according to applicable domestic law. ¹³¹ In the chart below it has been assumed that this court finds no grounds to avoid the \$75,000 limitation on liability imposed by the Montreal Agreement. For the purpose of comparison, the following values represent the liability which might be assessed for each injury indicated in a case where neither ATCA nor the Warsaw Convention apply.

Type of Injury/Damages	Amount
Loss of Support	\$200,000.00
Pain and Suffering	20,000.00
Punitive	500,000.00
Emotional Distress	20,000.00
TOTAL	740,000.00

On the basis of the hypothetical awards that the trial court would grant under the forum's law and according to its finding of fact, it is a simple matter of applying the respective limitation of liability provisions of the Warsaw Convention and ATCA to arrive at the court's awards for each of the hypothetical passenger's estate. The table below should be self-explanatory.

128. *ATCA*, *supra* note 11, § 1703(b).

129. *Id.* § 1703(a).

130. Punitive damages, however, could conceivably be awarded. *See e.g.*, *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981). Although the court decided not to award punitive damages in this case, the court's discussion of how it resolved the conflict of laws questions clearly shows that, had the facts been different, punitive damages could and would have been imposed.

131. *See* Warsaw convention, *supra* note 8, arts. 17-30 on the "Liability of the Carrier."

Passenger	Contract	Law	Support	Pain & Suffering	Punitive	Emotional Distress	TOTAL
A	Chicago-N.Y.	ATCA	10,000	0	0	0	\$100,000
B	Chicago-N.Y.-Ruritania-N.Y.-Chicago	Warsaw	75,000		Limit Reached		\$ 75,000
C	Ruritania-Chicago-N.Y.	Neither	200,000	20,000	500,000	20,000	\$740,000
D	Chicago-N.Y.	ATCA	200,000	0	0	0	\$200,000
E	Chicago-N.Y.-Ruritania-Chicago	Warsaw	75,000		Limit Reached		\$ 75,000
F	Chicago-N.Y.-Ruritania	Neither	200,000	20,000	500,000	20,000	\$740,000

CONCLUSION

In *Executive Jet Aviation, Inc. v. Cleveland*,¹³² the Supreme Court stated: "If federal uniformity is the desired goal with respect to claims arising from aviation accidents Congress is free under the Commerce Clause to enact legislation applicable to all such accidents . . ." ¹³³ Federal judges who are experts in the field of aviation law¹³⁴ have encouraged Congress "to make a statute as comprehensive, detailed, and specific as possible, for commercial aviation accidents particularly with respect to damages issues."¹³⁵ Proponents of ATCA explain that the "principle problems created by numerous and differing state laws . . . is the *difficulty and delay* involved in resolving conflicts of laws questions and the inequities that result when plaintiffs similarly situated get dramatically different recoveries because of differing state laws."¹³⁶

Congress has failed to respond to these unequivocal recommendations for uniformity in aviation law. While ATCA proponents have proposed legislation intended to impose some uniformity on aviation cases, even they have chosen to ignore the ailments of United States aviation law on the international side.

In addition, Congress has resisted numerous attempts by the State Department to reform the international side of United States aviation law.¹³⁷ As a result, some American courts have simply refused to enforce the Warsaw Convention's limitation of liability provision.¹³⁸ In *Franklin Mint*, the opinions of both the circuit court and the Supreme Court suggest that Congress should accept the responsibility to reform the inequities and ambiguities of the Warsaw Convention.¹³⁹ By refusing to accept this responsibility, Congress has elected to perpetuate the international-domestic dichotomy. In addition to perpetuating

132. 409 U.S. 249 (1972).

133. *Id.* at 274.

134. Most renowned was Judge Peirson M. Hall of the Central District of California who became an expert in handling multidistrict aircraft litigation. See Speiser, *Dynamics of Airline Crash Litigation: What Makes the Cases Move?*, 43 J. AIR L. & COM. 565 (1977).

135. Report prepared for the House Comm. on Public Works and Transportation, at 25.

136. *Id.* at 10.

137. See *supra* notes 39-46 and accompanying text.

138. The Court of Appeals for the Second Circuit has been particularly adamant in this regard. See, e.g., *supra* notes 32, 47, 49, 53 & 58-61 and accompanying text.

139. See *supra* notes 59-61 and accompanying text.

pre-existing inequities ATCA introduces new dichotomies and ambiguities which are certain to cause even more confusion in the courts and result in even more inconsistent judgments in individual cases than occur now.

In short, not only does ATCA fail to respond to existing problems, it tends to aggravate them. As illustrated above gross inequity exists in the very fact that three persons of the very same background and interests on the same flight could end up with three different awards based solely on their travel plans.

The first step to an "orderly, fair, and expeditious" system of aviation law must be uniformity. ATCA shows that there exist ways to protect the aviation industry without the imposition of quantitative limits on awards of damages. The United States could become a leader in establishing a fair system that carries out the original purpose of the Warsaw Convention—the establishment of a uniform system that protects the aviation industry.

This author proposes, therefore, the establishment of an *ad hoc* commission of experts appointed by Congress and the President. The commission's purpose would be to draft a comprehensive Federal aviation statute which would apply to all aviation cases brought in the United States.¹⁴⁰ The experiences of civil law countries and American jurisdictions following their examples¹⁴¹ have demonstrated that such a process can result in a coherent and workable body of law. There is also a wealth of foreign experience that would aid the commission in developing a code of aviation law.¹⁴² There remains a great deal for American lawmakers to learn from an awareness of how United States aviation law fits into the world picture and how other countries have acted with this awareness. That education should begin without further delay.

140. See Note, *The Case for a Federal Common Law of Aircraft Disaster Litigation*, 51 N.Y.U. L. REV. 232 (1976). Application of the *Erie* doctrine in aircraft disaster litigation has caused wasted time and resources, as well as caused conflict of laws in the Federal courts. Courts have implied a Federal cause of action in the past, and an action should be implied from the Federal Aviation Act to prompt state tort law in the area of aircraft disaster litigation.

141. The German code has served as the model for Switzerland, Poland, Turkey and Japan. See A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM*, ch. 10 (2d ed. 1977). The French code has served as a model for Holland, Spain, Italy, Portugal, Egypt, all of the Latin American countries, and Louisiana. See M. AMOS & F. WALTON, *INTRODUCTION TO FRENCH LAW* (3d ed. 1967).

142. Although there is no unanimity of approach, all tend to shed light on the subject. In particular, see the development of Germany's Air Traffic Law first adopted in 1922. *Luftverkehrsgesetzblatt* of August 1, 1922, [1922] 1 *Recihsgesetzblatt* 681. For a general discussion of the development of French and German law on the subject, see LOWENFELD, *supra* note 4, Ch. 7 § 1.51-1.53.