THE GUATEMALA PROTOCOL TO THE WARSAW CONVENTION

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Since 1934, the United States has been party to the Convention for the Unification of Certain Rules relating to International Transportation by Air, usually referred to as the Warsaw Convention.[1] The Convention was opened for signature at a Diplomatic Conference held in Warsaw, Poland, in 1929, and came into effect in 1933. Its major purpose was to establish a regime of law which would give needed stability and uniformity to what was in 1929, an infant international air transport industry. To this end, the Convention established uniform rules on such things as documentation (passenger tickets and airway bills of lading), procedural rules governing the time and place for filing damage claims, and the basis for and limits of liability. Of the principal provisions of the Warsaw Convention, those governing the basis for and limits of the liability of the air carrier to the passenger have proven to be the most controversial.

This article is not intended to deal with the chequered history of thirty years of efforts to find a solution to this problem, but only to examine the latest such attempt—The Guatemala Protocol.[2] Earlier commentators and scholars[3] have learnedly and exhaus-

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done at Warsaw* Oct. 12, 1929, 49 Stat. 3000 (1929) [hereinafter cited as Warsaw Convention].

2. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, *done at Guatemala City* March 8, 1971 [reproduced in 10 INT'L LEGAL MATERIALS 613 (1971)] [hereinafter cited as Guatemala Protocol].

3. For a complete review and analysis of the events leading up to the begin-

tively covered the tortuous path that led to the Guatemala Protocol, and no further commentary beyond that necessary to set the stage would be appropriate.

I. THE HISTORICAL BACKGROUND

The United States historically has been the prime mover in seeking revision of those parts of the Warsaw Convention that deal with the limit of liability of the air carrier.[4] In fact, active work on this aspect of revision of the Warsaw Convention within the International Civil Aviation Organization (ICAO) began as long as thirty years ago, soon after the end of World War II.[5] The United States' preoccupation with the amount of the liability limit over this span of time is not an indication that it considered nothing else to be wrong with the Warsaw Convention. It is simply a reflection of the fact that in terms of recoveries by victims of aviation accidents in domestic air transportation within the United States where no limit existed, recoveries by U.S. citizens in international accidents where limited by the Warsaw Convention were considered to be far too low. Thus, the limit was the most dramatic of the defects in the Warsaw Convention and, as such, received the most attention. However, the limit could not be divorced from the related elements of the treaty; it was, in fact, a part of an integrated system. For example, under the Convention, the air carrier could escape liability if it could establish that it had "taken all necessary measures to avoid the damage or that it was impossible . . . to take such measures."[6] On the other hand, the air carrier could not avail itself of this limit of liability "if the damage is caused by his wilful 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 wilful misconduct."[7]

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ning of work on the Guatemala Protocol including a collection of all major writings on the subject, see Lowenfeld and Mendelson, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967) [hereinafter cited as Lowenfeld].

4. Testimony of Leonard Meeker, Legal Adviser, Department of State, on ratification of the Hague Protocol to the Warsaw Convention before the Committee on Foreign Relations, S. EXEC. H., 86th Cong., 1st Sess. 9 (1959) [hereinafter cited as Meeker].

5. ICAO Doc. 7686-LC/140 (1947) at XV.

6. Warsaw Convention, *supra* note 1, art. 20.

7. *Id.*, art. 25. This is the "official" translation of the French in which the Warsaw Convention was written. 49 Stat. 3000, 3020 (1934). The phrase "wilful misconduct" is a translation of the French word "dol"; *see* the French text

Thus, on the one hand, the claimant under the Warsaw Convention has the advantage of a presumption of fault by the air carrier which the carrier must rebut if it is to escape liability, but on the other, the carrier has the advantage of a limit on its liability unless the claimant, by affirmative proof, establishes "wilful misconduct." For the past thirty years, the interrelation of these factors has been the focal point of negotiations seeking some resolution of the Warsaw Convention problem.

The limit of liability of the original Convention was expressed in article 22 as 125,000 francs, defined as a "French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths." This converted in round figures to 8,300 U.S. dollars so long as the official price for gold in the United States was $35 per ounce. Although there have been recent changes in the official price for gold in the United States with major consequences to be discussed later, the $8,300 figure was the basic amount around which negotiations centered.[8]

A. The Hague Protocol

The first effort to modify the Warsaw Convention by increasing the limit and making some attempts at modernization to take account of the rapidly evolving air transport industry's new methods of operation was the Hague Protocol of 1955.[9] This Protocol was the end result of more than ten years of negotiations in the Legal Committee of ICAO, and it provided for a doubling of the limit of liability to $16,600. In addition to such limit, it also authorized, but did not require, courts to award all costs of litigation including attorneys fees, absent a timely and adequate offer of settlement.[10]

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at 49 Stat. 3006 (1934). Just what type of conduct could be considered "wilful misconduct" or "dol" has been a subject on which there has been little agreement, particularly in U.S. courts; *compare* Gray v. American Airlines, 227 F.2d 282 (2d Cir. 1955), *with* Goepp v. American Overseas Airlines, [1951] U.S. Av. 527 (Sup. Ct., N.Y. Co., N.Y.). *See generally* Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Law*, 27 J. AIR L. 86 (1960) [hereinafter cited as Hjalsted].

8. By Order dated January 3, 1974, in Docket 26274, the Civil Aeronautics Board required certain air carriers to revise liability limitations arising under the Warsaw Convention to $10,000 reflecting the change in the U.S. official price of gold to $42.22 per ounce. 39 Fed. Reg. 1526 (1974).

9. Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *done at the Hague* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter cited as Hague Protocol].

10. *Id.*, art. XI.

Further, in an effort to end disparate treatment of "wilful misconduct" in courts within the United States and abroad, article 25 of the Warsaw Convention was amended to provide that the limit would not apply if the damage resulted from an act or omission "done with intent to cause damage or recklessly and with knowledge that damage would probably result. . . ."[11] Possibly there was for some countries an element of trade-off in this latter change. The more difficult it was to "break" the liability limit, the higher it was possible to set that limit, and some countries accepted the higher limit because in their view the new standard would be more difficult to break. However, it is doubtful that this trade-off was the principal motivation for the majority since not all courts had been persuaded to "expansive interpretations of wilful misconduct," even though apparently most did have some problems of interpretation and even-handed application.[12] In any event, the new limit and the new standard by which it could be broken, together with the other improvements, persuaded the United States to recommend ratification of the Hague Protocol.[13]

For a variety of reasons the United States delayed action on ratifying the Hague Protocol.[14] It was not until July, 1959, that the Hague Protocol was transmitted to the Senate for ratification, and it was not until May of 1965 that hearings on the question of ratification began.[15] Thus, the hearings on ratification occurred ten years after the Diplomatic Conference which opened the document for signature by States. The net result of this ten year delay was that the new limit of liability of $16,600, plus costs of litigation in some cases contained in the Hague Protocol were no longer enough to provide adequate recovery for U.S. victims of international air accidents.[16]

In renewing its request for ratification, the executive branch proposed the adoption of legislation which would provide an additional $50,000 of insurance for all international passengers subject to the Warsaw Convention whose journey originated or terminated

11. *Id.*, art. XIII; *see also* Meeker, *supra* note 4, at 4.

12. *See* Hjalsted, *supra* note 7, at 122.

13. Meeker, note 4, *supra.*

14. For discussion of these reasons, see Lowenfeld, note 3, *supra.*

15. Meeker, note 4, *supra.*

16. Statements of Leonard Meeker and Najeeb Halaby, in Hearings before the Committee on Foreign Relations, U.S. Senate, S. EXEC. H, 86th Cong., 1st Sess. 1-26 (1959).

in the United States.[17] If adopted, the legislatively provided insurance, coupled with the Hague limit, would produce a total potential recovery of $66,600 which compared favorably with the data available at that time on the average recoveries in domestic aviation accident cases where the Warsaw Convention would not operate to limit recoveries.[18] After extensive hearings, the Committee on Foreign Relations of the U.S. Senate agreed with the position taken by the executive branch and gave its advice and consent to ratification of the Hague Protocol, but only on condition that the accompanying insurance legislation be adopted prior to the adjournment of the 89th Congress.[19]

The legislation proved extremely unpopular. In fact, no hearings were ever held on the proposal. Although it is difficult to point to a single reason for this, it is fair to say that the most signficant opposition came from the U.S. airlines, and certainly such opposition was a major factor in the demise of the legislative insurance supplement.[20] Whatever the reason, the failure of the legislation ended what small hope there had been to secure ratification of the Hague Protocol, with the result that the United States was left with the unamended Warsaw Convention and its now hopelessly outdated limit of liability.

B. Efforts to Avoid United States Denunciation of the Warsaw Convention

As it became clear that the supplemental legislation and the Hague Protocol were lost causes in the Congress, unsuccessful efforts were made to seek other solutions to the low limits of the unamended Warsaw Convention, primarily through a voluntary agreement by international airlines to a higher limit of liability.[21] Having exhausted every feasible alternative, the executive branch finally concluded that it could no longer subject the American air traveller to a limit of $8,300, and on November 15, 1965, filed notice of denunciation of the Warsaw Convention, which under the terms of the Convention would be effective in six months.[22] This notice was

17. *Id.*

18. *Id.; see* tables at 28-37.

19. Report from the Committee on Foreign Relations, U.S. Senate, S. EXEC. H., 86th Cong., 1st Sess. 7 (1959).

20. *Id.* at 53.

21. For a discussion of this area, see Lowenfeld, *supra* note 3.

22. 50 DEP'T STATE BULL. 923 (1965).

coupled with a statement that the denunciation would be withdrawn if there was "reasonable prospect" of international agreement to a limit "in the area of $100,000." A further condition was that until such agreement could become effective, there would have to be enacted a "provisional arrangement among the principal international airlines" waiving the limit up to $75,000.[23] This statement was issued because ICAO, seeing the failure of the United States attempt to find a way to remain in the Warsaw Convention system, had belatedly issued a call for a special meeting to begin on February 1, 1966 to seek a solution.[24]

This special meeting was literally a last minute effort by the international aviation community to stave off U.S. denunciation of the Warsaw Convention. It was convened in a confused and somewhat hostile atmosphere due largely to a feeling that the United States was in effect coercing the international aviation community by its denunciation.[25] The meeting consisted of negotiations between the United States and the rest of the nations present on the issue of what should be the limit of liability in the Warsaw system. The United States opened with the proposal that this be set at $100,000, and later elaborated on this to specify that this limit would be inclusive of legal fees.[26] This in turn was met by a number of comments and counter proposals from other governments. After a great deal of discussion, these several counter proposals were finally reduced to four upon which debate and voting focused.[27] However, despite efforts of the delegates attending, no consensus on a proposal acceptable to the United States could be achieved, and the meeting ended without recommendation on the central question concerning an increase to the limit of liability under the Warsaw Convention.[28]

There has been some controversy as to whose fault it was that this special meeting failed. Some lay blame at the door of the United States.[29] Others attribute it, at least in part, to a procedural problem that unfortunately prevented a vote on a possible compro-

23. *Id.* at 924.

24. ICAO Doc. 8584-LC/154-1 (1966).

25. *Id.* See particularly the statement of the French Delegate at 10, the statement of the Zambian Delegate at 33, and the report of the Secretariat at IX.

26. *Id.*, Statement of U.S. at 5-7 and 30-31.

27. *Id.*, Report of Secretariat, paras. 20 and 21, at XI.

28. *Id.*, Statement of U.S., pages 140-42.

29. *Id.* See particularly the statements of the representatives of the Congo (Brazzaville) at 148, France, at 150, and Jamaica, at 151.

mise solution.[30] Whatever may be the real reason (and it probably lies somewhere between these two views) the Conference ended in failure and with little prospect that the U.S. denunciation of Warsaw would be withdrawn before it came into effect.[31]

At this point the international airlines undertook to seek a solution that might delay the taking effect of the U.S. withdrawal from the Warsaw system. The Director General of the International Air Transport Association (IATA) queried whether the United States would cancel its notice of denunciation if the major international airlines serving the United States would agree to contract for a limit of liability at $75,000, and waive their defenses under article 20 (1) of the Warsaw Convention.[32] He was advised that if such agreement included all carriers operating to and from the United States, including the major U.S. airlines, there was a possibility of such withdrawal.[33] At this point, there began a frantic effort to round up the international carriers and secure their agreement to a voluntary special contract for such higher limit of liability pursuant to article 22 of the Warsaw Convention. The effort was ultimately successful and the so-called Montreal Agreement came into effect.[34]

C. *The Montreal Agreement*

The Montreal Agreement did two things. First, as already noted, the air carriers agreed to a liability limit of $75,000, and waived any defense pursuant to article 20 (1) of the Warsaw Convention.[35] Secondly, the carriers agreed to furnish a specific type of notice to the passenger that the Warsaw Convention may limit the liability of the air carrier.[36] Thus, a start had been made

30. *See* Lowenfeld, *supra* note 3, at 574-75.

31. Statement of U.S. Representative, ICAO Doc. 8584-LC/154-1 (1966) at 141.

32. *See* remarks of Sir William Hildred, *Symposium on the Warsaw Convention*, 33 J. AIR L. 519, 525 (1967) [hereinafter cited as *Warsaw Symposium*].

33. *Id.*

34. Agreement, C.A.B. 18900, approved C.A.B. Order No. E23680, Docket 17325, May 13, 1966, 44 CAB REP. 819 (1966) [hereinafter cited as Montreal Agreement]. For details of this effort, see *Warsaw Symposium, supra* note 32.

35. Montreal Agreement, note 34, *supra.*

36. This provision was designed to assure that the new limit of $75,000 would not be broken by a court holding that the notice given the passenger was inadequate, thus invoking the provisions of article 3 of the Warsaw Convention under which the airline cannot invoke the limit of liability if he fails to deliver a ticket containing the required notice. *See, e.g., Lisi v. Alitalia Airlines*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968).

toward two goals which were developing as basic premises of the U.S. view of what the Warsaw Convention should be in the future. The first goal was to establish a limit of liability which provided a more adequate recovery for the U.S. victims of international aviation accidents. The second was to establish a legal regime under which most claimants could recover without resort to time-consuming and expensive litigation.

The first of these objectives was clearly and unequivocably stated by the United States in its position papers filed with ICAO at the beginning of the special meeting of February, 1966.[37] The second objective was not fully articulated during the meeting, although it is foreshadowed by the U.S. agreement to accept a solution which incorporated the principle of absolute liability.[38] However, the U.S. Delegation was somewhat ambiguous on this point, and possibly due to this fact the Conference failed to recommend a system based on the theory of absolute liability.[39] In any event, important issues arising from adoption of the concept of absolute liability, such as the nature of defenses left to the carrier, were left unresolved, and in fact, almost completely undiscussed. These issues remain unresolved in the Montreal Agreement even today. However, this omission is probably not as significant as it would have been in an amendment of the treaty, because in reality all a carrier has done under the Montreal Agreement is waive the defense of proving that it has taken all necessary measures to avoid the damage. Existing defenses under other provisions of the Warsaw Convention are not waived. In fact, there is interesting litigation on the use of such defenses which points up the fact that in 1966, when the United States was seeking a revision of the Warsaw Convention, the problem of the defenses to be allowed a carrier under a regime of absolute liability had not been fully examined.[40]

The Montreal Agreement ended the crisis created by the U.S. denunciation of the Warsaw Convention, but it did not solve the underlying problem. The Warsaw Convention remained a treaty drawn up in 1929 to provide a legal framework for the international operations of an infant air transportation industry. In fact, either the original Warsaw Convention or that Convention as amended by

37. ICAO Doc. 8584-LC/154-2 (1966) at 174-78.

38. ICAO Doc. 8584-LC/154-1 (1966) at 89, 90.

39. *Id.* at 95, 196.

40. Kriendler, *Recent Developments in Aerial Hijacking: The Issue of Liability*, 6 AKRON L. REV. 157 (1973).

the Hague Protocol governed substantially all international air transportation that did not operate to, from or through the United States.[41] Thus, U.S. citizens who for one reason or the other were passengers traveling on tickets not going to, from or through the United States were still possibly subject to the limits of liability set forth in the original or amended Warsaw Convention, $8,300 and $16,600 respectively.

True, there were those who contended that the rule of *lex loci delicti* was dead, at least in the United States, and it was superseded by the rule that "[t]he local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort."[42] Still this was almost inevitably a subject of controversy and could be a source of expensive litigation reducing the amount of any eventual recovery which found its way into the pocket of the claimant. Further, it could be argued that since the United States had withdrawn its notice of denunciation and thus reaffirmed its adherence to the Warsaw Convention, it had in effect, agreed to accept the limits of the Convention except in cases covered by the Montreal Agreement. Additionally, in most cases of U.S. citizens engaged in international air travel other than to, from, or through the United States, tickets will have been purchased outside the United States and thus there may be no "treaty of jurisdiction" in a U.S. court under article 28 of the Warsaw Convention.[43] Consequently, there were compelling reasons for the United States to press on with its efforts in ICAO to secure a revision of the basic Warsaw Convention that would meet the needs of the American traveler.

D. Further Efforts to Modify the Warsaw Convention

The first actions of the United States were hesitant and some-

41. *Cf.* Kennelly, *Aviation Law: International Air Travel—A Brief Diagnosis and Prognosis*, 6 CALIF. W. INT'L L.J. 86 (1975).

42. RESTATEMENT (SECOND) OF CONFLICTS § 379(1) (1971).

43. Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971). *See also* McCarthy v. East African Airways Corp., 13 AV. L. REP. ¶ 18,385 (S.D.N.Y. 1974); Biggo v. Alitolia-Linee Aeree Itoliano, S. P. A., 10 AV. L. REP. ¶ 18,354 (E.D.N.Y. 1969). The Warsaw Convention in paragraph 1 of article 28 provides:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principle place of business through which the contract has been made or before the court at the place of destination.

Warsaw Convention, *supra* note 1, at 3020.

what indecisive. It participated on the Panel of Experts created by ICAO to study the problem of how best to amend the Warsaw Convention.[44] Also, the United States was a member of the subcommittee which the Legal Committee of ICAO established in September of 1967 to study the "Possible Revision of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955."[45] However, it was not until after the first meeting of the subcommittee in late 1968 that the U.S. government undertook its first in-depth consideration of what it wanted in an updated and modernized Warsaw Convention.[46] This study was undertaken by a special *ad hoc* committee of the Interagency Group on International Aviation (IGIA)[47] appointed by the Secretary of Transportation and chaired by his Deputy General Counsel.[48]

During the preliminary meetings, it became obvious that a simple solution of the Warsaw problem by raising the limits to the $75,000 figure of the Montreal Agreement or higher was not going to meet the needs of the U.S. air traveler. A much more sophisticated approach was required to take into account not only the inadequate limit problem but also a number of other matters that had become increasingly troublesome. The broad general target on which the committee agreed was that a revised Convention should assure claimants three benefits: certainty of recovery, speed of recovery and sufficiency of recovery. The special committee began reviewing those elements of the existing Convention which it felt needed change to achieve these objectives. These elements are discussed below.

1. *The limit upon liability.* It is a truism to say that the limit of liability cannot be separated from the conditions of liability. But this is really only partly so. For example, it is said that the easier it is to "break" the limit, the lower that limit can be set. But, no

44. ICAO Doc. 8839-LC/158-2 (1969) at 73-74.

45. *Id.* at 81.

46. The primary reason for the rather inconclusive efforts of the first meeting of the ICAO Legal Subcommittee was the absence of economic data pertaining to the impact of higher limits on insurance costs that the member nations of ICAO had been requested to provide. ICAO Doc. 8839-LC/158-1 (1969) at 72.

47. The Interagency Group on International Aviation was created by memorandum of the President, August 11, 1960, to develop U.S. international aviation policy. 25 Fed. Reg. 7710 (1960).

48. The author was a member of this special *ad hoc* committee from its inception and attended all the ICAO conferences for which the committee did the preparatory work, including the Guatemala Conference. Much of what is set forth herein is based upon this personal experience.

matter how easily the limit may be broken, there will always be some exceptional cases where the limit will be effective, and thus the amount of the limit has to bear some reasonable relationship to the damages likely to be incurred in an ordinary case. In fact, the basic U.S. concept for some time had been to establish a limit within which most victims of air accidents would have full recovery.[49]

In solving the problem of the limit, the Ad Hoc Committee had the benefit of a special study undertaken by the C.A.B. in 1968 of passenger recoveries (including both judgments and settlements) in Warsaw and non-Warsaw Convention cases.[50] This study had been undertaken in response to an inquiry from ICAO for economic data which would permit its Air Transport Committee to make recommendations to the Legal Committee concerning the liability limit for an amended Warsaw Convention.[51] In general, it showed that in the United States, between 19% and 20% of death settlements and judgments in non-Warsaw Convention cases (where no artificial limit to liability existed) exceeded $100,000 which figure necessarily included legal costs. While it is difficult to break down in exact amounts the distribution of those recoveries exceeding $100,000, it appeared to the IGIA Committee that if the United States wanted to cover in excess of 90% of all recoveries within the limits, something on the order of $150,000 would be required. However, considering the dismal results of the U.S. proposal for $100,000 as a limit at the Special ICAO Meeting in 1966, $150,000 appeared to have little chance of success.[52] Consequently, the lower figure of $125,000 was adopted by the Committee as its initial negotiating position.[53] However, to meet its self-adopted criteria of "sufficiency of recovery" the Committee considered that more was necessary.

49. Report of the Air Coordinating Committee, June 20, 1957 on U.S. Ratification of the Hague Protocol. S. EXEC. H., 86th Cong., 1st Sess. 23 (1959).

50. Civil Aeronautics Board, Data on Insurance Costs and Accident Settle ments and Judgments of United States Certificated Air Carriers, 1958-1967 [on file with CAB, FAA and ICAO]. For analysis of this report, see ICAO Doc. 8839-LC/158-1 (1969) at 54-57.

51. Report of the Air Transport Committee, ICAO Doc. 8839-LC/158-1 (1969) at 35-60.

52. ICAO Doc. 8584-LC/154-1 (1966) at 87. At this 1966 meeting only five votes were cast for the $100,000 figure, while 36 were cast in opposition to it.

53. Statement of the United States on Revision of the Warsaw Convention ICAO Doc. 8839-LC/158-1 (1969) at 293-94.

2. *Settlement inducement.* One way to provide a more adequate recovery without increasing the limit was to assure that more of the ultimate recovery went into the pocket of the claimant. This desire coincided with the fact that the United States had not been happy with the provision dealing with the award of legal fees separate from the limit that existed in the Hague Protocol. Originally, the United States had been satisfied with that feature of the Hague Protocol believing it would operate to increase the recovery of American claimants.[54] However, on mature reflection it appeared that the provision accepted at The Hague did not really accomplish the hoped-for objective of providing, in certain cases, the award of costs of litigation including attorneys' fees in addition to the limit. Its main shortcoming was that such award was to be made by the court "in accordance with its own law" so, in fact, if the existing law of the forum did not authorize such awards, which appears to be the case in most jurisdictions of the United States, the provision did not accomplish the objective of increasing the claimant's potential recovery.[55] Thus, this provision needed revision in any event, and if properly written could serve also as a vehicle to augment the recovery of the claimant.

The IGIA Committee eventually recommended a text which preserved the original Hague Protocol concept that only in cases where the air carrier made no offer of settlement (or made an inadequate one) within six months of the accident should court costs including attorneys' fees be awarded over and above the limit. However, the new text provided that in such event that "the court *shall* award" litigation expenses over and above the limit.[56]

3. *Periodic adjustment.* The Committee was not quite through with the problem of "sufficiency of recovery." The history of the Warsaw Convention clearly demonstrated that a major problem was that it was very difficult to adjust the liability limit to the changing realities of economics. The United States had tried for ten years to get a revision of the limit before obtaining some increase in the Hague Protocol in 1955. Even if the United States had ratified the Hague Protocol when originally submitted for the advice and consent of the Senate in 1959, the limit would have been overtaken

54. *See* Report of the Air Coordinating Committee, *supra* note 49, at 18, 25.

55. For a discussion of this problem, see Lowenfeld *supra* note 3, at 509, 561-63.

56. Statement of U.S. Position on Revision of Warsaw Convention, ICAO Doc. 8839-LC/158-1 (1969) at 294.

by changing economic conditions in less than ten years.[57] Consequently, some means to automatically adjust the amount of the limit to reflect the constant upward thrust of settlements and recoveries in aviation accident cases had to be found. Otherwise the limit would rapidly have become "insufficient" as inflation or a steadily increasing standard of living ate into it. The special IGIA Committee made no specific proposal on how this could best be accomplished, but a number of alternatives were suggested which were put forward at future meetings of ICAO.[58] At that time, the primary thrust of the U.S. view was that the increase should coincide with the worldwide rate of inflation.

4. *Basis of liability.* As earlier noted, the United States had indicated at the 1966 special ICAO meeting a willingness to consider a regime of absolute liability in lieu of the existing Warsaw Convention system with its shifted burden of proof[59] and its opportunities for breaking the limit.[60] Further, absolute liability was a basic part of the United States' willingness to accept the Montreal Agreement. This had not gone unnoticed, and at the first meeting in November, 1968, of the ICAO Legal Subcommittee studying the Warsaw problem, the International Air Transport Association presented a paper on behalf of its member air carriers which stated that they were willing "to accept, in respect of liability to passengers, the absolute and definite liability system. . . ."[61] This would be "coupled with a limit to protect against catastrophic losses only."[62] As a *quid pro quo* for aceptance of such a system, IATA indicated that the limit-breaking provisions for failure to comply with documentation requirements[63] and for "willful misconduct"[64] should be eliminated from the Convention.

The IGIA Committee in reviewing the Montreal Agreement and the IATA statement concluded that the theory of absolute liability had become generally acceptable, was proving workable in

57. *See* position of U.S. at Special ICAO Meeting, ICAO Docs. 8584-LC/154-1, 154-2 (1966).

58. *See* U.S. Position, ICAO Doc. 8839-LC/158-1 (1969) at 307.

59. Warsaw Convention, *supra* note 1, art. 20.

60. *Id.*, arts. 3, 15.

61. Statement by IATA to the ICAO Subcommittee of the Legal Committee on the Question of Revision of the Warsaw Convention as amended by The Hague Protocol, ICAO Doc. 8839-LC/158-1 (1969) at 91-93.

62. *Id.*

63. Warsaw Convention, *supra* note 1, art. 3.

64. *Id.*, art. 25.

practice and should be retained in any new Convention. However, the extent of "absoluteness" had yet to be determined. As earlier noted, the Montreal Agreement made no mention of defenses, and there were as yet a number of unresolved questions, such as whether the airline would be liable if the event causing the damage was the independent, possibly criminal, act of a third party. Ultimately, it was concluded that since the air carrier was in the best position to minimize the incidence of avoidable accidents and also to distribute the costs of unavoidable accidents, no defenses should be allowed the air carriers for accidents caused by the independent acts of third parties. Specifically, no defense was to be permitted for cases of hijacking, sabotage or war. However, the IGIA Committee felt that the existing defense of contributory negligence should be retained and broadened to include the deliberate wilful act of the claimant, in order to prevent a saboteur from profiting in any way from his own act.[65] Obviously, the Committee expected such a regime to contribute to its objectives of "certainty of recovery" and "speed of recovery." Certainly, the need for litigation should be substantially reduced since the only issue open for controversy or litigation under such a regime would be the amount of the damage.

The Committee then considered that portion of the IATA paper which reflected the air carriers' desire to eliminate the possibilities of breaking the liability limit under a regime of absolute liability. It concluded that the United States should reflect a willingness to accept such conditions but should not intitiate or urge them. In fact, in the case of notice to the passenger of the possibility that the air carrier's liability might be limited,[66] the IGIA Committee proposed that the requirement for notice be retained but that failure to give such notice be the subject only of an increase in the limit, not its total elimination. However, on this latter point the United States was prepared to accept deletion of the requirement of notice in the treaty so long as it was clear that each government remained free to require such notice in tickets which were sold subject to its legal jurisdiction.[67]

5. *Additional forum.* One of the provisions of the Warsaw Convention which had become increasingly troublesome was the fact that under certain circumstances, an action could not be maintained against the air carrier at the domicle or permanent residence of the

65. U.S. Position, ICAO Doc. 8839-LC/158-1 (1969) at 293.

66. *See* Warsaw Convention, *supra* note 1, art. 3.

67. *See* Revised Proposal of U.S., ICAO Doc. 8839-LC/158-1 (1969) at 32.

claimant, even though the air carrier was otherwise amenable to suit in that jurisdiction.[68] This arose out of the provisions of article 28 of the Warsaw Convention limiting actions to courts in contracting states which were: (1) the court of the domicile of the carrier or its principal place of business; (2) the place where the contract was made; or, (3) the place of destination. In effect, the Warsaw Convention operated to deny U.S. citizens access to their own courts to which, absent the Convention, they were entitled under existing law. The Committee felt this needed correction, and as part of their recommended U.S. position urged that the court of the claimant's residence or domicile should be open to him if the carrier was otherwise subject to its jurisdiction.[69]

These five principal provisions were the basis of the U.S. negotiation position in the next series of ICAO meetings. Actually, taken together, they called for a wholly new system of compensation for death or personal injury occurring in international air transportation. The position recognized the benefits of a uniform legal system so that all concerned—passenger, air carrier and shipper—had identical legal rights without regard to where the event causing damage might occur. However, the position made it clear that this uniformity, desirable as it might be, was not worth the price of low limits of liability, and that any limit would have to be one that provided full compensation for a substantial majority of claimants within a system guaranteeing recovery in almost all cases. The key to the new system—absolute liability of the carrier with virtually no defenses—recognized the fact that in aviation accident cases in which multiple deaths often arise from a single incident, where proof of fault can be difficult and expensive and where the carrier is in the best position through insurance to distribute the costs of compensation, departure from the old rules of tort compensation is warranted. This represented the culmination of several years of developmental thinking within the concerned agencies of the United States government, and it became the basis for subsequent negotiation in ICAO on the Warsaw Convention.[70]

The story of the U.S. negotiation of its position in ICAO and in the Diplomatic Conference in Guatemala has been set forth

68. For an interesting comment on this problem, see Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. 624 (1967).

69. ICAO Doc. 8839-LC/158-1 (1969) at 295.

70. The IGIA Committee consisted of: The Departments of State, Commerce, Defense and Transportation, and the Civil Aeronautics Board. *See* note 47, *supra.*

elsewhere and will not be repeated here.[71] The essential element of this negotiation which began with the first presentation of this U.S. proposal in 1969 and continued through the Diplomatic Conference in 1971 was that it represented a "package." Each element was interdependent, and the United States could not bargain below the limits set forth in its "final" position at the first meeting at which it was presented.[72] Even a major development which forced a substantial change in one aspect of the United States position, the continued impact of the rising standard of living and inflation upon recoveries in the United States for death or injury in aviation accidents, did not change the view of the United States that what it sought to do in a revised Warsaw Convention was to create a new system of tort compensation. For that reason, it was considered essential that all elements of its "package" remain intact.[73]

In achieving this new system of tort compensation in the Guatemala Protocol what major changes are made in the text of the Warsaw Convention, and what considerations are involved in these specific language changes? The remainder of this article is devoted to analysis of each of the articles which cover essential details, indicating the extent to which they reflect the U.S. views set out above.

II. THE ARTICLES OF THE GUATEMALA PROTOCOL

A. Article I

This article provides that the amendments of the Guatemala Protocol are amendments to the text of the Warsaw Convention as amended by the Hague Protocol of 1955. As indicated earlier, the United States has never ratified the Hague Protocol, and should it ratify the Guatemala Protocol, the United States, is in effect, accepting the provisions of the Hague Protocol except as the Guatemala Protocol modifies that document. As earlier indicated, the major reason why the United States did not ratify the Hague

71. Boyle, *The Warsaw Convention*, THE FORUM (1972) [hereinafter cited as FORUM]; Boyle, Kriendler and McPherson, *The Guatemala Protocol: Three Views*, 6 AKRON L. REV. 119 (1973) [hereinafter cited as *Three Views*].

72. ICAO Doc. 8839-LC/158-1 (1969) at 27.

73. Report of the Working Group on National Systems for Supplementary Compensation, International Conference on Air Law, Guatemala, 1971, ICAO Doc. 9040-LC/167-1 (1972) at 244. *See also* FORUM, *supra*, note 71. For a discussion of the Supplementary Compensation problem see text associated with notes 158-171, *infra*, pertaining to article XIV, and article 35A of the revised Warsaw Convention.

Protocol was its low limit of liability.[74] Since the Guatemala Protocol cures this defect and since the other provisions of the Hague Protocol were considered satisfactory by both the executive branch and the Committee on Foreign Relations of the U.S. Senate,[75] acceptance of the amendments to the Warsaw Convention made by the Hague Protocol should not be an obstacle.

B. Article II

Article II revises article 3 of the Warsaw Convention dealing with notice to the passenger that the liability of the carrier to him might be limited. It eliminates the former language which required such notice on the ticket and delivery of the ticket to the passenger before embarkation. Under article II failure by the carrier to do either no longer results in loss of the protection of the liability limit. The article also removes language which required certain information to be on the ticket, and now permits such information to be communicated through other means.

The minutes of the meetings of the Legal Committee of ICAO and the Diplomatic Conference reflect at least two principal reasons for these changes. The first, initially articulated by IATA,[76] was to eliminate failure to give proper notice as a potential basis for "breaking" the limits as occurred in the case of *Lisi v. Alitalia Airlines*.[77] The other, and possibly more persuasive argument, in view of the new and higher limit which should restrain efforts to "break," thus providing more return to claimants, was to permit the air carriers greater flexibility in ticketing. For example, on-board ticketing, now common on air shuttles is forbidden by the original Warsaw Convention; so also are computerized systems currently under development, including automatic credit card ticketing.

The United States supported elimination of specific ticketing requirements, but, as earlier indicated would have retained the obligation to give notice of the limitation of liability, but only at the risk of an increase in the limit of liability, not the complete removal of the limit. However, the United States accepted the complete elimination of the notice requirement, but did so on the express

74. S. EXEC. REP. No. 3, 89th Cong., 1st Sess. 7 (1969).

75. *Id.* at 6.

76. *See* note 61, *supra.*

77. 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968). *See* note 36, *supra.*

understanding set forth in the record that the absence of the requirement in the treaty did not prevent a Contracting State from requiring such notice under its own laws in the case of any air carrier selling tickets within its territory for international air transportation.[78]

C. *Article III*

This article is consequential upon the changes made by the prior article. Its effect is to conform article 4 of the Warsaw Convention dealing with the passenger baggage check to reflect the changes made with respect to the passenger ticket.

D. *Article IV*

Article IV amends in a number of ways article 17 of the Warsaw Convention as amended by the Hague Protocol. Since these changes are among the most important modifications made by the Guatemala Protocol they will be separately discussed.

1. *"Personal injury" for "bodily injury"*. The French text of the original Warsaw Convention which at that time was the only official text, provides in article 17:

> Le transporteur est responsable du dommage survenu in cas de mort, de blessure, ou de toute autre lésion corporelle subie par un voyageur. . . .[79]

The translation of this text used by the U.S. Government is:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger. . . .[80]

No change in this provision was made by the Hague Protocol.[81] However, in the Guatemala Protocol changes in the English text were made. So far as is pertinent to this point, no change was made in the French text. It remained "survenu en cas de mort, de blessure, ou de toute autre lésion corporelle subie par . . . ."[82] However, in the English text the phrase "personal injury" was

78. ICAO Doc. 8878-LC/162 (1970) at 48.

79. Warsaw Convention, *supra* note 1, at 3005.

80. *Id.* at 3018.

81. S. EXEC. H., 86th Cong., 1st Sess. 5 (1959).

82. ICAO Doc. 8932 (1971) at 1. The new French text used the word "passenger" instead of the word "voyageur" but that appears to have no bearing on this matter. It also introduced the phrase "du prejudice" in the first line for reasons to be discussed later.

substituted for the phrase "bodily injury." The new English text, now an official one, reads in pertinent part:

> The carrier is liable for damage sustained in case of death or personal injury of a passenger. . . .[83]

There is little or no "legislative history" which is helpful in determining what, if any, reasons lie behind this change. It was originally made by the Drafting Committee of the Legal Committee of ICAO at its 17th Session, meeting in Montreal in February 1970. The change was noted in the report of the Chairman of the Drafting Committee in his introduction of the new text, but no substantive discussion of the reason for the change appears to have occurred.[84]

At the Diplomatic Conference at Guatemala, the draft articles which contained the change noted above as prepared by the Legal Committee were adopted as the basis for the work of the Conference and discussed article by article.[85] Again, there seems to have been no substantive discussion of the change. One explanation for this lack of discussion is that it was not considered to be a change at all. As noted above, there was no change in the French text, and thus it can be argued that this was merely a change in the English translation of the French phrase "*lesion corporelle*" from "bodily injury" to "personal injury" without intending any substantive change.

This view is supported by two additional facts. First, the Spanish translations of the original Warsaw text used the phrase "lesion corporal"[86] and no change was made in that language in the Guatemala Protocol where the official Spanish language text uses this phrase.[87] Second, according to the final clause of the Guatemala Protocol, the French language shall prevail in the case of any inconsistency.[88] Since there was no change in the pertinent provisions of the French language, it may be argued that no change was made by the new English text.

These arguments, of course, do not necessarily settle the question. The most they can do is to reach the conclusion that whatever was included under the original Warsaw Convention, to

83. *Id.* at 7.
84. ICAO Doc. 8878-LC/162 (1970) at 187.
85. ICAO Doc. 9040-LC/167-1 (1972) at 29; 9040-LC/167-2 (1972) at 18.
86. ICAO Doc. 9040-LC/167-2 (1972) at 187.
87. ICAO Doc. 8932 (1971) at 13.
88. *Id.* at 11.

which the United States was and still is a party, will be included under the Guatemala Protocol. In fact, it is possible that no change would have been made in the English text if certain cases currently in litigation had been underway in 1971. For example, in *Rosman* and *Herman v. Trans World Airlines Inc.*[89] the precise issue of what the phrase "bodily injury" contemplates was raised. As stated by the New York Court of Appeals, the issue there was whether the:

> [P]laintiffs should be allowed to prove damages for palpable, objective bodily injuries suffered, whether caused by psychic trauma or by the physical conditions on the aircraft, irrespective of impact, but not for psychic trauma alone.[90]

The contention of the plaintiffs, of course, was that psychic trauma alone was fully compensable under the Warsaw Convention. After first rejecting the contention that the treaty requires the application of French law and French legal usage in determining the meaning of "bodily injury" in this context, the court concluded that it should determine the legal significance of the term in light of "the purposes of the Convention and the ordinary meaning of its terms . . . ."[91] and then stated:

> [I]n seeking to apply the treaty's terms to the facts before us, we ask whether the treaty's use of the word "bodily", in its ordinary meaning, can fairly be said to include "mental". We deal with the term as used in an international agreement written almost [fifty] years ago, a term which even today would have little significance in the treaty as an adjective modifying "injury" except to impart a distinction from "mental". In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily", as distinguished from "behavioral", manifestations.[92]

Certainly it is conceivable the analysis used by the New York Court of Appeals in the *Rosman* and *Herman* cases would have given some pause to the revision of the English text if it had occurred before the fact. However, this was not the case and there is now an interesting question—does the change in the English text enlarge the scope of the Convention? Possibly some legislative

89. 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

90. Rosman v. Trans World Airlines, Inc., 314 N.E.2d 848, 850 (1974).

91. *Id.* at 854.

92. *Id.* at 855 (footnote omitted). *See also* Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D.N.M. 1973).

history occurring during the treaty ratification process will be able to reduce or eliminate what may otherwise be a problem of interpretation.

2. *Absolute liability.* As earlier noted, the Warsaw Convention, both in its original form and as amended by the Hague Protocol, provides the air carriers with defenses to claims for damage, the fate of which are discussed below. However, in article 17 the first change is made to implement the absolute liability theory of the Convention. Under the new language, the carrier is liable "upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."[93]

This language makes several changes of some significance. First, the phrase "upon condition only" was introduced in the text to reflect the new principal of absolute liability. In fact, the original text in English submitted by the Legal Committee of ICAO read "upon proof only . . . ."[94] However, this latter phrase was objected to because some thought it introduced the concept of burden of proof which was inconsistent with the adoption of the theory of absolute liability.[95] Thus, apparently in a move to further clarify this point, the Conference adopted the phrase "upon condition only." This action was designed to further minimize any small burden of proof that might have been laid upon the claimant by the original language of the Legal Committee, and to reinforce the principle of absolute liability.

Another change incorporated in the new article 17 is the substitution of the word "event" for the word "accident." In general it appears to have been the intention of the Conference to broaden the scope of the Convention to include an occurrence which might not be classed as an accident but which nevertheless caused death or injury. Among these "events" was the deliberate act of a third person including a hijacker or saboteur.[96] Other "events" probably encompassed in the new term but probably not considered "accidents" are air turbulence, unusual or violent changes in the attitude or direction of the aircraft, trips and falls

93. ICAO Doc. 8932 (1971) at 7.

94. ICAO Doc. 9040-LC/167-2 (1972) at 14.

95. ICAO Doc. 9040-LC/167-1 (1972) at 33, 34; for contrary views, *see id.* at 38.

96. Chairman of Legal Committee Drafting Group, ICAO Doc. 8878-LC/162 (1970) at 187.

and spills, particularly of hot foods and beverages. In fact, the substantial enlargement of the scope of coverage of the Convention by the use of this new term led directly to another change in article 17.

3. *"State of health of the passenger."* The Diplomatic Conference seems to have been agreed that the air carrier should not be responsible for death or injury occurring on board the aircraft or in the course of embarkation or disembarkation if the death or injury was a consequence of some physical defect of the passenger. The use of the word "event" instead of "accident" intensified this concern because, as just noted, an encounter with clear air turbulence might be fatal to a passenger with a heart condition while harmless to healthy passengers, and because such an occurrence was now clearly an "event" but not necessarily an "accident."[97] Suggestions that the carrier be relieved of its liability in this type of situation to the extent it could prove that the passenger's health contributed to the damage were defeated, primarily because such a standard would give rise to substantial litigation, and therefore prejudice the theory of absolute liability.[98] The ultimate solution gives the carrier a potential defense only if the death or injury (presumably on proof by the carrier) "resulted solely from the state of health of the passenger."

4. *Baggage.* The revised article 17 contains two new paragraphs which deal with the liability of the carrier for the baggage of the passenger. These provisions were in article 18 of the original Warsaw Convention along with provisions dealing with the carriage of cargo. The Diplomatic Conference decided not to deal with the subject of cargo at the Guatemala meeting, and thus continued for cargo the regime of liability under the original Warsaw Convention.[99] However, it was decided to make the baggage of passengers subject to the rule of absolute liability, and thus, the Conference added paragraphs 2 and 5 to article 17.

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97. ICAO Doc. 9040-LC/167-1 (1972) at 118.

98. *Id.* at 49, 50.

99. This decision appears never to have been explicitly taken. The Legal Committee considered the possibility of drafting amendments to revise the cargo rules but did not attempt such action. *See* Annexes C, D & E to Report of the Legal Committee, ICAO Doc. 8878-LC/162 (1970) at 28-38. The Diplomatic Conference in choosing the form of a protocol rather than a complete new text of the entire Convention to make its changes necessarily opted for the exclusion of changes in the cargo text except as consequential upon changes made with respect to passengers. *See* Minutes, The Form of the New Instrument, ICAO Doc. 9040-LC/167-12 (1972) at 219-28.

Paragraph 2 establishes essentially the same liability regime for baggage as for passengers, allowing only the defense of "inherent defect, quality or vice" of the baggage. The time within which the carrier is responsible for the baggage remains virtually the same as it was under the original Warsaw Convention, not only while the baggage is actually on board the aircraft but also "during any period within which the baggage was in charge of the carrier."[100]

Paragraph 3 of the revised text does away with an outmoded distinction between "checked" and "unchecked" baggage and makes it clear that the responsibility of the carrier for damage extends to "both checked baggage and objects carried by the passenger."[101]

E. Article V

As just noted, article 18 of the unamended Warsaw Convention contained the rules of liability of the carrier for the carriage of cargo. Its revision by the Diplomatic Conference at Guatemala was consequential upon the decision to subject baggage to the rule of absolute liability but not to deal at this meeting with the rules on cargo. Thus, the revision made to article 18 is intended to apply the rules of the Warsaw Convention, as amended by the Hague Protocol, to the carriage of cargo without substantive change.

F. Article VI

Two essential changes in the provisions of article 20 of the Warsaw Convention are made by this provision of the Guatemala Protocol.[102] The first change is to strike the paragraph which, in the case of the death or personal injury of a passenger, gave the carrier the defense of proving "that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."[103] However, it was concluded that such defense should continue to be available to the carrier for the case of "delay" to passengers and baggage, and for

100. Guatemala Protocol, *supra* note 2, at 613.

101. *Id.*

102. The Hague Protocol made only a minor amendment to the original Warsaw Convention by deleting paragraph 2 of article 20 which permitted, in the case of cargo and baggage, the additional defense of "an error in piloting, in the handling of the aircraft, or in navigation." ICAO Doc. 7632 (1955) at 7.

103. Warsaw Convention, *supra* note 1, at 3019.

that reason, the new article 20 in paragraph 1 retains the former defense for this limited class of damage.

As earlier indicated, the Diplomatic Conference made no changes in the rules governing the carriage of cargo, and thus it was necessary to provide in paragraph 2 of new article 20 for the retention of the "all reasonable measures" defense for the case of "damage resulting from destruction, loss, damage or delay . . ."[104] arising out of the carriage of cargo.

G. Article VII

Two changes are made by the Guatemala Protocol to the provisions of article 21 of the Warsaw Convention. The first of these relates to the defense of contributory negligence. Under the original provisions of article 21, the court seized of the case could "in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."[105] The result was a rather uneven treatment of the problem of contributory negligence because of the differing treatment of the defense of contributory negligence among the nations party to the Warsaw Convention which uneven treatment the Diplomatic Conference intended to end.[106] The new article now provides a uniform rule:

> [T]he carrier shall be wholly or partly exonerated from his liability to such person to the extent that such negligence or wrongful act or omission caused or contributed to the damage.[107]

One interesting development since the Guatemala meeting has been a discussion of whether the just-quoted sentence is intended to reduce the *limit of liability* of the carrier or whether it is intended to reduce the *amount of the damages* the claimant has established. As an example, and using as a rough equivalent of the new limit in article 22 the sum of $120,000, take the case of a claimant with provable damages of $240,000 who, the court finds, contributed 50% to the damage. Should the claimant's damages be reduced 50% to $120,000 (the carrier's maximum liability under article 22), or should that maximum liability be reduced by 50% to $60,-

104. Guatemala Protocol, *supra* note 3, at 614.

105. Warsaw Convention, supra note 1, at 3019.

106. *See* Minutes, ICAO Doc. 9040-LC/167-1 (1972) at 95-98. For a discussion of the U.S. rule on contributory negligence, see *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

107. Guatemala Protocol, *supra* note 3, at 614.

000? In the one case, the claimant recovers $120,000, in the other $60,000. It is the opinion of this writer that the correct view is that the amount of the damage, not the limit of liability, is reduced. This is based on the fact that in the normal case, the rule of comparative negligence operates to reduce the amount which a claimant can recover; it only indirectly operates to reduce the obligation of the defendant to compensate. In this sense, in a normal situation the doctrine has been referred to as one of "apportionment of damages."[108] However, in a case under the Guatemala Protocol where negligence of the defendant carrier is clearly not at issue because he is absolutely liable regardless of fault, no apportionment between the claimant's and defendant's negligence can occur, thus leaving only the possibility of reducing the claimant's recovery to the extent it can be shown that the damage was the result of his negligence. Certainly, in a case involving major damage to a claimant, for example, $300,000, it would be unfair and inequitable to not only reduce his claim from $300,000 to $150,000 (assuming his negligence to be 50%) but also reduce the carrier's limit of liability 50% to $60,000 under the assumption previously made earlier as to the liability limit.

The view that the intended reduction is only in the amount of the damages and not the amount of the limit is further supported by the fact that the minutes and documents of the Conference show some delegates referring to this article as reducing "damages;" no delegate is quoted as referring to it as reducing the amount of the limit of liability.[109]

H. Article VIII

This article makes a complete revision of article 22 of the Warsaw Convention as amended by the Hague Protocol which contains the major provisions dealing with the amount of the limit of liability. Since these revisions are of major significance they will be taken up paragraph by paragraph.

1. *Paragraph 1.* Paragraph 1(a) is revised to state the limit of liability of the air carrier as 1,500,000 francs, up from 250,000 under the Warsaw Convention as amended by the Hague Protocol. Expressed in terms of U.S. dollars, according to the "official rate"

108. *See* Annot., 32 A.L.R.3d 467 (1970); 57 AM. JUR. 2d *Negligence* § 426 (1971).

109. *See* Proposal of Ireland, ICAO Doc. 9040-LC/167-2 (1972) at 38; delegates' discussion of problem, ICAO Doc. 9040-LC/167-1 (1972) at 95-97.

now existing, this amounts to $120,000.[110] However, according to the U.S. "official rate" existing at the time of opening the Guatemala Protocol for signature, March 8, 1971, that limit in U.S. dollars was $100,000. The ramifications of this change and other related problems will be taken up in connection with paragraph 4 below.

Another change introduced into this paragraph by the conference at Guatemala was the concluding phrase of its first sentence "for the aggregate of the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger."[111] Presumably, this phrase was introduced to assure absolute "unbreakability" of the liability limit, but due to the way the Diplomatic Conference approached its work, an amendment to article 24 which appeared to accomplish the same purpose, had already been adopted. The introduction of this phrase in article 22 ostensibly for the same purpose stirred a significant debate.[112]

It was explained as necessary despite the existence of the provision of article 24 on the theory that article 24 dealt only with the problem of liability of the air carrier for the death or personal injury of each passenger and did not deal with the case of the liability of the air carrier to others—manufacturers, suppliers, air traffic control agencies and so forth. This class may have been sued by passengers and may have paid damages for death and personal injury beyond the limit and be seeking compensation for such damages from the carrier through recourse actions. It is a little difficult to see how this clause operates to prevent that type of recovery against the air carrier any better than does the language in article 24, but after substantial debate it was inserted here, presumably to prevent indirect breaking of the liability limit of the carrier.

Paragraph (1) also deletes from article 22 the sentence expressly providing for contracts for higher limits of liability:

> Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.[113]

The recommendation to delete this sentence had come from the draft prepared by the ICAO Legal Committee and reflected an interesting debate by that Committee. The proposal to delete the

110. Pub. L. No. 93-110 (Sept. 21, 1973).
111. Guatemala Protocol, *supra* note 2, at 614.
112. ICAO Doc. 9040-LC/167-1 (1972) at 264.
113. Hague Protocol, *supra* note 9, at 381.

sentence had stemmed from the same consideration as the amendment just discussed—to remove any possibility that a new and higher limit of liability might be broken.[114] During the debate, a further elaboration had occurred with a proposal that not only should the sentence recognizing contracts for a higher limit of liability be deleted, but that one should be added specifically forbidding such a contract.[115]

After extensive debate, the proposal to delete the sentence was agreed to, but the proposal to add a sentence expressly forbidding contracts for a higher limit of liability was defeated.[116] During the debate, the United States and others made it clear that, in their view, the mere deletion of the sentence would not preclude entering into such contracts which would continue to be legally proper between the parties.[117] During the consideration of article 22 at the Diplomatic Conference, no specific discussion of this problem is found other than the fact that the Conference took the text as prepared by the Legal Committee of ICAO as its basis of discussion. Since there was no discussion of the recommendation of the Legal Committee, and since it is apparent that the recommendation to delete was adopted, it is the assumption of the writer that the views expressed by the Legal Committee control the interpretation to be given to the removal of the sentence. On this basis it is concluded that contracts for a higher limit of liability between the carrier and the passenger are proper unless forbidden by the law otherwise applicable to such contracts.

Paragraph (1) of new article 22 contains two subparagraphs (b) and (c) which find no exact counterpart in the Warsaw Convention as amended by the Hague Protocol. The first of these specifies that the limit of liability of the carrier for "delay" of a passenger shall be 62,500 francs, or roughly, at current "official rates," 4,800 U.S. dollars. The second of these specifies a limit of 15,000 francs (about 1,200 U.S. dollars) for "destruction, loss, damage or delay" of baggage.

The limit on delay of passengers was added because no separate limit in the case of delay existed under the original or

114. ICAO Doc. 8878-LC/162 (1970) at 201.

115. *Id.* at 203.

116. *Id.* at 205.

117. *Id. See* remarks of delegates of United States, at 202, 207; France at 203; Sweden at 203; Spain at 204; Trinidad and Tobago at 204.

amended Warsaw Convention, the applicable limit in such case being the overall limit of the carrier.

In effect, there is a reduction in the limit of liability for delay from $20,000[118] to $4,800. However, for this limited situation the new limit seems adequate. In the case of passenger baggage, the old limit was divided into two parts: 5,000 francs ($400) for baggage the passenger had in his own charge and 250 francs per kilogram (about $7.50 per pound) in the case of checked baggage. While the new standard is markedly different from the old, the total limit of $1,200 for "destruction, loss, damage or delay" of baggage seems adequate to protect the traveling public.

2. *Paragraph 2.* Paragraph 2(a) and (b) of new article 22 deal separately with the limit of liability of the carrier in the carriage of cargo. Other than the changes consequential upon removing references to the carriage of baggage, this paragraph is identical to the provisions of the Warsaw Convention as amended by the Hague Protocol. In passing, it might be noted that these paragraphs retain the provision relating to "a special declaration of interest in delivery at destination . . ."[119] whereby a higher limit of liability may be agreed upon, despite the earlier action of the Conference in striking the provision relating to a higher limit of liability for the carriage of passengers. However, since the carriage of cargo was not put under a regime of absolute liability and in fact was left aside for later consideration at another conference,[120] this difference can be explained on that basis.

3. *Paragraph 3.* This paragraph of article 22 is a substantial revision of those provisions of the Warsaw Convention as amended at the Hague which dealt with costs of litigation which, under certain circumstances may be awarded independently of the limit. In essence, these provisions reflect the views advocated by the United States in the Legal Committee of ICAO and at the Guatemala meeting.[121] Under the new wording, courts of Contracting States which do not, under their own law, have the power to award costs of litigation in whole or in part "shall, in actions to which this Convention applies, have the power to award, in their discretion, to the claimant the whole or part of the costs of the action, including

118. *See* Hague Protocol, *supra* note 9, at 381.
119. *Id.*
120. This conference was held in Montreal during September, 1975.
121. *See* note 56, *supra.*

lawyers' fees which the court considers reasonable."[122] This amount is not to be taken into account in applying the liability limits. The new language also retains the principle of the Hague Protocol that these awards can be made only when the claimant has given the carrier notice of the amount claimed and the basis thereof, and the carrier has failed, within six months thereafter, to make an offer of settlement which, subject to the limit, is equal to the compensation ultimately awarded.

4. *Paragraph 4.* Paragraph 4 of article 22 contains a provision which at the time of this writing is of major importance. In fact, its impact on the other provisions of article VIII may well decide whether the Guatemala Protocol will ever come into force. On the surface, the paragraph is simple enough. It repeats the definition of a "franc" which was adopted in the Hague Protocol. In essence, this definition does not call the "franc" a "French franc" which the original Warsaw Convention did, but instead defines it as a "currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred."[123] It then provides that the sums in "francs" may be converted "into national currencies" and if these currencies are other than gold, such conversion "shall, in case of judicial proceedings, be made according to the value of such currencies at the date of the judgment."[124]

The problem is whether the conversion should be at the world market price or at the "official" price for gold in the country in which the judgment is rendered. There is a major difference between the two. At world market prices of gold in the neighborhood of $180 an ounce which have occurred on some markets, 1,500,000 francs can convert to in excess of $500,000 instead of $120,000, which the U.S. "official" price of $42.22 per ounce would bring. This being the case, the international airlines questioned whether they could accept the absolute liability of the Convention, when in effect, the *quid pro quo* of an effective and unbreakable limit was gone.[125]

This is no longer an academic discussion. The highest court of The Netherlands in a recent case[126] held that the conversion rate of

122. Guatemala Protocol, *supra* note 2, at 614.

123. *Id.*

124. *Id.*

125. *See* IATA statement, note 61, *supra.*

126. SS Hornland v. SS President Angot, 7 European Transport Law 933 (1972).

the gold franc under the International Convention on the Limitation of the Liability of Owners of Sea-Going Ships[127] should be at the Netherlands official rate. But the Athens Court of Appeal in applying the Hague Protocol to a case of lost baggage on Olympic Airways held that the market value of gold on the Athens Stock Exchange determined the conversion rate.[128] Added to this, of course, is the recent action of the President of the United States, authorizing private ownership of gold by U.S. citizens,[129] which some view as an indication that the United States may be moving toward a repeal of the U.S. "official rate" for gold.

So long as the U.S. "official rate" for gold continues to exist, a strong case can be made that the Athens court was wrong and that The Netherlands court was right. The existing text of paragraph 4, article 22 of the Guatemala Protocol comes via the Hague Protocol from another air law convention,[130] the Rome Convention on Surface Damage by Aircraft.[131] The basic concept of doing away with the "French franc" and using a defined "currency unit" was formulated at the Rome Conference. An examination of the minutes of that Diplomatic Conference leaves little doubt that it was intended to "leave it up to the national legislations of the countries to define the method of conversion and not to attempt to impose a method for defining the relationship between their currency in circulation and the Poincare franc."[132]

Further, the entire record of the negotiations before and during the Guatemala Conference show conclusively that the basic figure for discussion was $100,000 U.S. dollars. All during that period, roughly 1969 to 1971, the official rate for gold in the United States was $35 per ounce which converts into approximately 1,500,000 francs using the formula now in paragraph 4 of article 22. Thus, it seems clear that conversion at the "official rate" was intended rather than at the world market price which was approximately $39 per ounce during February and March of 1971

127. International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, *signed at Brussels* Aug. 25, 1924, 120 L.N.T.S. 123.

128. Case No. 256 (1974).

129. *See* Pub. L. No. 93-110 (Sept. 21, 1973).

130. ICAO Doc. 7379-LC/34 (1953) at 249-69.

131. Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, *done at Rome* Oct. 7, 1952, 310 U.N.T.S. 181.

132. ICAO Doc. 7379-LC/34 (1953) at 346-47.

when final debates on the limit was occurring.[133]

Because of the uncertainty just discussed, the international air carriers have recommended against any steps to ratify the Guatemala Protocol until the issue of gold convertibility and its effect on the liability limit is resolved. These carriers, through their official industry organizations, IATA, and the Air Transport Association of America, have advised the United States that so long as the uncertainty as to gold continues they "are not able to continue to support ratification of the Protocol or to commit themselves to a Supplemental Plan."[134]

The international air carriers suggested that resolution of this problem might result from revision of paragraph 4 of article VIII of the Guatemala Protocol. This would have the effect of using the "official" price of gold on March 8, 1971, to freeze the value of the limits in paragraph 1 of article VIII in terms of the currencies of the ratifying countries, while allowing subsequent changes in the values of such currencies in relation to the March 8, 1971, figure.[135] Thus, in the case of U.S. dollars, the 1,500,000 francs in paragraph 1 would be $100,000 on March 8, 1971, but today because of subsequent changes in the value of the dollar relative to the March 8, 1971 figure, the 1,500,000 franc limit

133. However, no matter how good a case can be made for using the "official rate" rather than the world market price, it will not serve to answer the problem if the United States and other countries abandon any "official" price for gold. This seems very likely to occur. In January of 1975, at meetings of the finance ministers of countries represented in the International Monetary Fund, preliminary steps looking toward the eventual abolition of the "official price" for gold were taken. Business Week, Jan. 20, 1975, at 20; N.Y. Times, Jan. 17, 1975, § 1, at 1, col. 6. In fact, final action by the IMF may occur in the near future; see the action taken by the IMF at its Jamaica meeting on Jan. 9, 1976. N.Y. Times, Jan. 9, 1976, § 1, at 1, col. 4. Thereafter, individual country actions will be taken. Since the United States generally has been following a policy of eventually reducing gold to the status of a commodity and removing it from any monetary status, it is likely that the United States would be among those nations following such a recommendation of the IMF.

134. Statements of IATA and ATA in letters of April 7, 1975 and April 10, 1975 to Deputy Assistant Secretary for Transportation and Telecommunications, Department of State.

135. *Id.* The text of both letters on this point states:

> This might be achieved by an amendment to clarify the intention of the Guatemala Protocol which would state that the limits of liability expressed therein are to be converted into national currencies at the official gold value of those currencies as of the date the Protocol was opened for signature (March 8, 1971), adjusted to take account of officially declared devaluations or revaluations of the currency of the State where action for recovery under the Protocol is instituted.

would now be $120,000.[136] Of course, future fluctuations in currencies would also affect those values.

There are other possible solutions to be considered if amendment of the Protocol is the route chosen to resolve the problem. One possible solution is to express the limit in terms of U.S. dollars or some other currency rather than a defined currency unit. However, this gives the country whose currency is used somewhat of an advantage arising out of current practices of governments in controlling currency values in relation to other currencies for purposes of improving their trading posture. For this reason it might not be an acceptable solution.

Another possibility is to express the limit in terms of the Special Drawing Rights used by the International Monetary Fund which, since it is based upon a "basket" or "cocktail" of currencies, does not have the disadvantage just mentioned. However, since not all countries participate in the International Monetary Fund and since only some of the participants' currencies are in the "basket," this also may not be fully acceptable. However, it may be more easily agreed upon than other solutions having graver political and economic problems.

Whatever the ultimate solution, it is the opinion of this writer that it needs to be found quickly. The Guatemala Protocol has been in existence for four years without coming into effect. The effect of this delay is amplified because none of the other participants intend to ratify unless the United States does.

No matter what the reason, however, continuing delay weakens the chance of U.S. accession. For one thing, inflation and a rising standard of living is again eating into the adequacy of the limits. For another, there are those critics of the proposed system who point to it as an unnecessary subsidy of international air transportation at the expense of the air traveler. Further delay serves only to add support to their view that the proposal is, in essence, not only unfair but also unworkable.[137] Partial resolution of this problem was reached at the Diplomatic Conference called by ICAO and held in September, 1975, and a formula was agreed upon at this meeting which may give ratification of the Guatemala Protocol a chance.[138]

136. Pub. L. No. 93-110 (Sept. 21, 1973).

137. *Three Views*, note 71, *supra*.

138. The Montreal Diplomatic Conference sponsored by ICAO in September of 1975 to revise the cargo provisions of the Warsaw Convention took up the

I. Article IX

This article introduces a whole new text into article 24 of the Warsaw Convention. Paragraph 1 of the new article continues for the carriage of cargo the existing rules of the original Warsaw Convention with virtually no change in the language. However, paragraph 2 dealing with the carriage of passengers is substantially different from the old Warsaw Convention language. Most of the changes are ones that arise out of the concern of the Conference that the new limits should be limits that were absolutely unbreaka-

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problem of a new international monetary unit to express the various limits of liability set out in the Warsaw Convention. The solution adopted was to use as the new monetary unit the Special Drawing Right (SDR) as defined by the International Monetary Fund. The value of a particular national currency on the date of judgment is to be calculated in accordance with the method of valuation applied by the IMF in effect for its operations and transactions on that date. If a particular State is not a member of the IMF, the calculation is to be determined by that State. Further, if a State is not a member of IMF and it cannot under its own law use the Special Drawing Right as a monetary unit, it will still be permitted to use the monetary unit set out in the basic Guatemala Protocol in the amount also set out in that Protocol. This unit remains a monetary unit corresponding to 65½ milligrammes of gold of millesimal fineness nine hundred. *See generally* Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, *done at Montreal* September 25, 1975, ICAO Doc. 9147 (1975) [hereinafter cited as Additional Protocol No. 3] [copy on file at CALIF. W. INT'L L.J.].

The basic limits of liability set out in article 22 of the Warsaw Convention as amended by the Guatemala Protocol, and as further amended by the Protocol adopted in Montreal in September of 1975 as expressed in Special Drawing Rights are as follows:

article 22, paragraph 1(a)—100,000 SDR's
article 22, paragraph 1(b)— 4,150 SDR's
article 22, paragraph 1(c)— 1,000 SDR's

Further, the amounts expressed in article 42 of the Warsaw Convention as adopted in the Guatemala Protocol are now expressed as 12,500 SDR's. *Id.* art. II.

As the IMF currently calculates the SDR, it has minor fluctuations in value. However, these are not severe, and the limits expressed in terms of SDR's should remain reasonably stable. For example, the U.S. dollar's value in terms of SDR's has remained near a one-to-one ratio for some time, although recent quotations show its value a little less than one-to-one (1 SDR = $1.15 to $1.20). As a consequence, the basic limit of liability for death or injury of a passenger under article 22, paragraph 1(a) of the Warsaw Convention, as amended, expressed in U.S. dollars dependent on the day of judgment would be somewhere in the range of $115,000 to $120,000.

The solution is less than perfect, particularly since for some countries a continuing reference to a monetary unit based upon gold is still possible, but, since it is believed to be acceptable to the airlines of the world, it offers an opportunity to get widespread application of a modernized system of tort compensation in aviation cases. Therefore, it should be adopted.

ble.[139] However, in achieving this objective other changes have occurred. In an effort to assure that the limits of the Convention applied to all actions for damages, the Conference added new language.

Under the old language (still applicable to the case of carriage of cargo) "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention."[140] Under the new text, this is substantially enlarged:

> Any action for damages, however founded, whether under this Convention, or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention . . . .[141]

This language appears to have been intended to assure the air carrier the benefit of the limits in all possible situations, including the case of recourse actions discussed earlier. In addition, it probably cures a defect that existed in the U.S. law.

In *Noel v. Linea Aeropostal Venzolana*,[142] the court held, in a case involving death in an international air transportation accident to which the Warsaw Convention otherwise applied, that the Warsaw Convention did not create a cause of action. While this decision has been criticized as being based on a faulty interpretation of the Warsaw Convention,[143] it has generally been regarded as expressing current U.S. law. Now, however, the specific reference to actions "under this Convention" contained in the new language may well change the rule of the *Noel* case. Certainly, the concern that runs throughout the debates in the ICAO Legal Committee and the Guatemala Conference that, particularly in the United States, it was necessary to assure absolute unbreakability of the limits, would support the view that the change was made to assure that actions could be brought "under the Convention" contrary to the *Noel* decision.

Another significant change from the original Warsaw provisions is introduced by the last sentence of new article 24, paragraph 2:

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139. Changes were also made in article 25 of the Warsaw Convention as amended by the Hague Protocol to achieve this goal, and they will be discussed below. *See also* ICAO Doc. 9040-LC/167-1 (1972) at 135-45.

140. Warsaw Convention, *supra* note 1, at 3020.

141. Guatemala Protocol, *supra* note 2, at 614.

142. 247 F.2d 677 (2d Cir. 1955), *cert. denied*, 355 U.S. 907 (1957).

143. Caulkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217 (1959).

> Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.[144]

As indicated, the Diplomatic Conference had decided to eliminate proof of gross negligence as a circumstance permitting the limits to be exceeded. To some delegates the fact of deletion of the exception without more, would have been sufficient to assure unbreakability.[145] However, to others mere deletion was not enough.[146] The problem centered around the possibility that unless it was explicitly forbidden, it was feared that a court in an exceptionally outrageous case of negligence might, for public policy reasons, declare the limit to be inapplicable. Thus, the new language quoted above was introduced to assure that even in cases involving the most serious of negligent acts the limits would be applied.

J. Article X

This article amends article 25 of the Warsaw Convention as amended by the Hague Protocol to eliminate the provision that, in the case of the carriage of passengers, permits the limits to be broken upon proof "that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result . . . ."[147] This provision is continued, however, to apply to the carriage of cargo since no substantive change was made in that legal regime.

K. Article XI

This article makes only consequential changes to article 25A which was added to the Warsaw Convention by the Hague Protocol. The article gives to servants and agents of the carrier the protection of the limits of liability when acting within the scope of their employment. Again, it is an effort to avoid any possibility of breaking the liability limit by indirect actions against, for example, a pilot. Such an action otherwise might not be subject to the limit, and the carrier might ultimately have to pay by virtue of an indemnification clause in a union contract. The change removes, in

144. Guatemala Protocol, *supra* note 2, at 614.

145. Remarks of Delegates of Spain and The Netherlands, ICAO Doc. 9040-LC/167-1 (1972) at 137, 141.

146. Remarks of Delegates of Italy, France and Jamaica, *id.* at 135, 136, 141.

147. Hague Protocol, *supra* note 9, at 383.

the case of carriage of passengers, the old provision voiding the limit in the case of gross negligence by such a servant or agent. However, in the case of the carriage of cargo, that provision is retained.

L. Article XII

The amendment made here is to add to article 28 of the Warsaw Convention as a jurisdiction in which actions may be brought, the jurisdiction in which the passenger has his domicile or permanent residence, and in which the carrier "has an establishment." As earlier stated, this was one of the amendments the United States sought, and reflects its efforts to assure availability of U.S. courts for U.S. citizens in almost all actions. However, in accomplishing this objective, one possible problem was created because the meaning of the word "establishment" is not entirely clear.

There was a long and not very conclusive debate on the issue at the Conference.[148] The United States noted that in its own "official" translation of the French version of the original Warsaw Convention, it had always used the phrase "place of business," and its willingness in this new clause to use the word "establishment" arose from its understanding that the two phrases meant the same thing.[149] This view was based upon the fact that in the unamended portion of article 28(1) where "place of business" is still the "official" U.S. translation, the French text is "un établissement"[150] which is also the French text of the new clause.[151] Consequently, it must be assumed that the same sort of "presence" is contemplated in both cases, and thus that the U.S. Delegation's remarks that no new concept was intended are probably right. In any event, discussion of this point during the ratification process might be useful in giving U.S. courts some insight as to the intention of the government.

M. Article XIII

This text introduces into the Warsaw Convention as article 30A, an express provision that the Convention shall not "prejudice the question whether a person liable for damage in accordance with

148. ICAO Doc. 9040-LC/167-1 (1972) at 110-31.
149. *Id.* at 114, 119, 120.
150. 49 Stat. 3007 (1929).
151. ICAO Doc. 8932 (1971) at 3.

its provisions has a right of recourse against any other person."[152] The basic reasons for the introduction of this new text are somewhat obscure. The proposal originated with the Subcommittee of the Legal Committee of ICAO and is recommended in its second report.[153] Since there are no minutes of Subcommittee meetings, no direct source of rationale exists, and the report of the Subcommittee accompanying the text offers no reasons for its inclusion.[154] At the meeting of the ICAO Legal Committee, the Committee accepted the recommendation of the Subcommittee without vote and with little substantive discussion.[155] However, in its report, the Committee indicated it considered such a provision necessary because under a regime of absolute liability, a carrier might be liable for the negligent acts of third parties, and thus, the Convention should contain an express statement that any right of recourse which might exist would remain unaffected.[156] Why it was thought that the Convention might otherwise extinguish such a right is not disclosed.

At the Diplomatic Conference in Guatemala there is an equally brief discussion of the new article, ending again with little further clarification in adoption of the text coming from the Legal Committe.[157] Thus, there is little rationale to explain this new article, and since it is probably only a declaration of what the law would be otherwise, none may be needed.

N. Article XIV

This article brings into the Warsaw Convention article 35A, which is probably the most controversial of the provisions that the United States proposed and ultimately succeeded in having adopted. This new article explicitly recognizes the right of any Contracting State to establish and operate within its territory a system to supplement the compensation payable to claimants under the Convention. As earlier indicated, the United States entered into the negotiation of a revised Warsaw Convention with the object of securing "sufficiency of recovery" as one of its primary goals. At that time, based on data then available, $100,000 was considered

152. Guatemala Protocol, *supra* note 2, at 615.
153. ICAO Doc. 8839-LC/158-1 (1969) at 12.
154. *Id.* at 4.
155. ICAO Doc. 8878-LC/162 (1970) at 227-28.
156. *Id.* at 26.
157. ICAO Doc. 9040-LC/167-1 (1972) at 197-98.

the basic minimum which could be accepted.[158] In fact, this continued to be the basis of the United States position throughout the discussions of the matter in the ICAO Legal Committee. However, after the end of those meetings in early 1970, the United States undertook a new survey of recoveries in U.S. domestic aviation accident cases to determine if the goal of "sufficiency of recovery" could still be achieved at $100,000.

This new survey disclosed major increases in the amounts of recoveries. These increases were unanticipated, not only by the United States but also by the other countries whose air carriers served the United States. For example, the new figures indicated that in the first half of 1970, over 58% of the recoveries within the United States in non-Warsaw aviation accidents were in excess of $150,000 as contrasted to the earlier figures where, in 1966, only 18.3% were at or over $150,000. In fact, to assure full recovery for 80% of the cases in the first half of 1970, limits on the order of $300,000 to $350,000 would be required. The average level of recovery in a domestic accident case in the United States had more than doubled, jumping from less than $90,000 before 1968 to nearly $200,000 by the first half of 1970.

These figures made it plain that $100,000 was no longer adequate for U.S. citizens. The United States informed ICAO of this fact, stating that it was examining ways to make adequate provision for its citizens but did not have specific proposals to make at that time. The figures on which the concern of the United States was based were submitted with this statement and are part of the record of the Guatemala Conference.[159]

The same IGIA Committee that had worked on the position of the U.S. government for the ICAO Legal Committee meeting took up this new problem. Its solution was to propose a supplementary compensation system which any Contracting State could establish for the benefit of its citizens. No specific proposal was made in advance documentation on the realization that such a proposal, coming just before the convening of the Diplomatic Conference and after most ICAO countries believed the United States had accepted the $100,000 limit of the Legal Committee text, would give rise to serious problems of negotiation. Nevertheless, some basic principles of such a system were agreed upon and

158. *See* authorities cited in notes 50-53, *supra.*
159. ICAO Doc. 9040-LC/167-2 (1972) at 43-57.

most found their expression in a working paper filed by the United States at the Guatemala Conference.[160]

Basically, these principles were that any such supplement should be paid for by those who would benefit; that it would apply to all citizens and residents equally; that no competitive advantage or disadvantage would be created for any carrier; that rights to recover from the supplementary system would be the same as the right to recover from the carrier; and that funding would be from passenger collections made within the country creating the system. It expressed the strongly held view of the United States that the treaty itself while recognizing such systems should not try to spell out the details or the amounts.[161] As indicated in its initial statement on the matter, the United States had not decided how to establish such a supplementary system and did not want the treaty to foreclose its options.

As could be expected, the introduction of this proposal produced a host of unfavorable comments.[162] However, in the end two separate working groups produced article 35A which was accepted.[163] With one or two exceptions, the U.S. views as to the provisions which should be in the treaty on this point prevailed. The essential points now in article 35A are:

1. The Convention recognizes the right of a State to establish and operate "within its territory a system to supplement the compensation payable to claimants under the Convention. . . ."
2. The system is not to "impose upon the carrier, his servants or agents, any liability in addition to that provided under [the] Convention."
3. It is not to "impose upon the carrier any financial or administrative burdens other than collecting in that State contributions from passengers if required to do so."
4. "It shall not give rise to any discrimination between carriers . . . and the benefits available to the said passengers . . . shall be extended to them regardless of the carrier whose services they have used;" and
5. Any passenger, or any person claiming through him, who

160. ICAO Doc. 9040-LC/167-2 (1972) at 76.
161. *Id.*
162. Minutes, ICAO Doc. 9040-LC/167-1 (1972) at 65-90.
163. For a history of these negotiations, see FORUM, note 71, *supra.*

"has contributed to the system . . . shall be entitled to the benefits of the system."[164]

There are one or two points about the foregoing that deserve comment. First, the United States at all times was very careful to insist upon language which gave great flexibility in the manner in which the system would be set up, specifically rejecting one version which would have required that the system be operated only by the government pursuant to specific legislation.[165] Secondly, and in consonance with its efforts to keep the system flexible, the United States was careful to leave open the option of voluntary agreement by the carriers to do more than could be "imposed" on them by legislation.

The government has opted for a plan patterned on the lines of the Montreal Agreement calling for an agreement between the air carriers serving the United States and a contractor who will administer funds collected on international tickets sold within the United States and from which supplemental benefits up to $200,000 per passenger will be paid, thus effecting a maximum potential recovery of $320,000.[166] Any such plan, of course, is subject to the approval of the Civil Aeronautics Board[167] and is also subject through that agency to continuing review by the government.

Such a system has been successfully developed. After extensive consideration of a number of proposals from a wide variety of organizations and individuals, an agreement between the airlines and the Prudential Insurance Company as contractor has been reached.[168]

This plan meets essential criteria set out by the government by providing $200,000 supplemental coverage, initially for $2.00 per international ticket, and provides that 90% of receipts are available for payment and administration of claims. It also assures recovery from the fund for provable damages in excess of the liability of the carrier on the same basis as the basic liability of the carrier.

Regrettably, the problems attendant upon the expression of the limit of liability of the carrier in terms of gold brought this

164. Guatemala Protocol, *supra* note 2, at 615.

165. Remarks of United States Delegate, ICAO Doc. 9040-LC/167-1 (1972) at 148.

166. *See* FORUM; *Three Views*, note 71, *supra.*

167. *See* 49 U.S.C. § 1382 (1970).

168. *See* Agreement to Establish Supplemental Compensation Plan Pursuant to Article 35 A of the Warsaw Convention [copy on file at CALIF. W. INT'L L. J.].

progress to a virtual halt for several months. So long as the gold problem discussed above remained unresolved, the carriers were unwilling to sign the agreement for a supplemental compensation system, and in fact, as noted, may not support ratification of the Guatemala Protocol.[169] However, with the successful conclusion of the 1975 Conference in Montreal,[170] the carriers signed and filed with the Civil Aeronautics Board on December 31, 1975 an agreement with the Prudential Insurance Company providing for supplemental compensation under article 35A of the Warsaw Convention as amended by the Guatemala Protocol.[171] Should the gold problem be completely resolved, quick action on the agreement will be possible.

O. Article XV

This article introduces into the Warsaw Convention the last of the new provisions which the United States considered necessary to construct a new and viable treaty. New article 42 provides that on the fifth and tenth years after the Guatemala Protocol comes into force there will be "Conferences of the Parties" to review the limit in paragraph 1(a) of article 22. Unless these Conferences decide otherwise by a two-thirds majority vote, the limit in paragraph 1(a) of article 22 shall be increased by 187,500 francs, roughly $12,000 at the current "official" U.S. rate for gold of $42.22 an ounce.

Hopefully, the effect of this will be to prevent obsolescence of the Guatemla Protocol through inflationary erosion of the real value of the liability limit and accommodation of rising world-wide standards of living. Admittedly, at a rate of increase of only a little over 2% per annum, this seems doubtful. More hope for achieving its intended objective would be possible if article 42 did not contain paragraph 2 which was inserted in an excess of caution by delegates opposing higher limits.

Under paragraph 2 the Conferences are not to increase the limit by more than the 187,500 francs. In the opinion of the author, this, while probably politically effective, is legally ineffective. All of article 42 is made subject to article 41 of original Warsaw Convention which provides a mechanism for Diplomatic Conference "to consider any improvements which may be made in

169. Statement of Air Transport Association of America; Statement of International Air Transport Association note 128, *supra.*

170. *See* note 138, *supra.*

171. *See* note 168, *supra.*

this convention,"[172] and this is subject to no restriction on changes which may be made. Thus, if a five-year increase of 187,500 francs is obviously too small to prevent obsolescence of the Convention, a Conference can be called under article 41 instead of article 42 to remedy the situation.

P. Article XVI

At least initially, it is expected that there will be some divergence between those countries signing the Guatemala Protocol and those countries who are party to the original Warsaw Convention as amended by the Hague Protocol. Additionally, there may be countries party to the original Warsaw, unamended by the Hague Protcol, who are not party to the Gatemala Protocol. For that reason it is necessary to separately provide for the application by States of the Warsaw Convention as amended by the Guatemala Protocol, to particular types of international journeys. This article does not amend any existing article of Warsaw because it relates only to application of the Guatemala Protocol, but uses, as between signatory States, the identical standard as that of article 1 of the original Warsaw Convention in determining to what "international carriage" this Protocol will apply.

Q. Articles XVII Through XXVI

These are the so-called "final clauses" of the Guatemala Protocol, none of which are amendments to the Warsaw Convention. All of them relate solely to the Guatemala Protocol and deal with such matters as who may sign, effect of ratification, entry into force, method of accession, method of denunication and nature of reservations. Of these, the one of principal importance at this time is article XX governing entry into force.

As earlier mentioned, most States present at the Diplomatic Conference made it very clear that the increase in the amounts of the limit contained in the Protocol was higher than they would agree to were it not for the insistence of the United States. For that reason, they wished to make sure that the Protocol could not come into effect unless the United States was a Party. This article achieved this objective by two provisions. First, the Protocol would come into effect ninety days after thirty states had ratified, but second, only if, of those states, the airlines of five carry "at least

172. Warsaw Convention, *supra* note 1, at 3023.

40% of the total internationally scheduled air traffic of the airlines of the member States of the International Civil Aviation Organization . . ."[173] for the year 1970. However, Additional Protocol No. 3[174] to the Warsaw Convention adopted at the Diplomatic Conference in Montreal in September, 1975, modified this provision so that the Guatemala Protocol as amended by Additional Protocol No. 3 will come into effect as soon as thirty signatory states have deposited their instruments of ratification.[175]

III. CONCLUSIONS

The Warsaw Convention is an interesting anomaly. It is a complex and somewhat anachronistic document. It has been patched up and preserved despite its obvious defects by the efforts of governments and airlines. It has been severely criticized by courts,[176] practitioners,[177] and writers.[178] Nevertheless, it has, so far, survived both the rather cumbersome repairs and the comments of its critics. In fact, strong efforts are underway for its further rehabilitation through the Guatemala Protocol. It is not easy to say why.

Obviously, international air transportation is today a major industry. Over 10,000,000 people leave this country annually for a foreign destination. While the United States is the largest single contributor to the world's international air passenger total, the air traffic of other countries brings the world total of international airline passengers, for 1973, to 96,000,000.[179] Passenger traffic of this magnitude requires some form of international legal stability so that the respective rights and obligations of passengers and air carriers are reasonably definite and certain at all times and not subject to changing local laws applied in various degrees by the widely varying views of the courts of the world. Thus, it can be argued that the Warsaw Convention has survived because circumstances require its existence. However, contrary to what one might

173. Guatemala Protocol, *supra* note 2, at 616.

174. *See* note 138, *supra.*

175. Additional Protocol No. 3., *supra* note 138, art. VIII.

176. *See, e.g.*, Burdell v. Canadian Pacific Airways, Ltd., 10 AV. L. REP. ¶ 18,151 (Cir. Ct. Cook Co., Ill. 1968); 11 AV. L. REP. ¶ 17,351 (Cir. Ct. Cook Co., Ill. 1969).

177. *See, e.g., Three Views, supra* note 71, at 131.

178. *See, e.g.*, Lowenfeld, note 3, *supra.*

179. 2 ICAO Digest of Statistics No. 189-B, (Airline Traffic) 1969-1973, (1974) at A-2.

expect considering the large amount of international passenger traffic, the number of litigated cases, and the volume of law review articles and comments, the fact is that the number of cases of deaths and injuries to U.S. air passengers to which the Convention might conceivably apply, is not large.[180]

Why then is there substantial expenditure of time and effort by governments, airlines, international organizations and others on a treaty that has a fairly low incidence of application? One reason, already cited, is the need for uniformity of law in an industry that by its very nature is exposed to diversity of law. Another is the obvious interest of the air carriers in protecting themselves from major losses through unlimited verdicts. A third, and not minimal reason, is that this treaty is widely adhered to and is referred to as a prime example of international cooperation which should be preserved.[181] Probably the first and last reasons, coupled with a strong desire to try for a fresh approach to the problem of compensation to victims of international aviation accidents, are the fundamental reasons why

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180. In preparation for its work in developing supplemental compensation system under article 35A, the IGIA Ad Hoc Working Group on Warsaw/Guatemala obtained information from the Department of State on the number of deaths of U.S. citizens occurring outside the United States resulting from aviation accidents. This data was compiled from reports required of each U.S. consulate involving deaths of U.S. citizens occurring within its jurisdiction. Admittedly, these figures may not be absolutely accurate due to errors in reporting or in locating the reports. Nevertheless, they are revealing as to the approximate numbers of U.S. citizens that may be involved in future applications of the revised Warsaw Convention.

By year, U.S. citizen fatalities in aviation accidents outside the United States, according to this source were:

Year	Number	Year	Number	
1966	155	1970	145	
1967	27	1971	12	
1968	27	1972	72	
1969	67	1973	100	Total fatalities: 565

The foregoing are gross figures and there is no way to determine how many were the result of accidents involving a journey to which the Warsaw Convention might apply. In fact, some were fatalities occurring in non-commercial flights by small aircraft, not covered by the Convention; some fatalities listed were crew members, not covered in any case by Warsaw; and some were on purely domestic flights within a foreign country to which it is unlikely that Warsaw rules applied. Thus, even of the relatively small total of 565, a substantial number were non-Warsaw cases and should be excluded. For comparison, the total number of claims within the United States, both Warsaw and non-Warsaw, arising out of aviation accidents for the period 1960 to 1969 was 2,469, of which 2,356 were death claims. ICAO Doc. 9040-LC/167-2 (1972) at 56.

181. *See* Hearings on the Hague Protocol, S. EXEC. H., 86th Cong., 1st Sess. (1959).

the U.S. government has spent so much time and effort on this treaty.

Certainly, the Guatemala Protocol is a new approach to tort compensation. It gives the potential claimant not only absolute liability but also deprives the carrier of all defenses except contributory negligence. With today's distressing high incidence of violence, the extension of absolute liability to include hijacking, sabotage and acts of war is of major importance to the traveling public. The Protocol also does much to minimize litigation; absolute liability removes proof of fault as an issue. The revised clause authorizing awards of attorneys' fees and other litigation expenses, over and above the limit, encourages settlements. In fact, the only issue left for controversy is the amount of damages, and this issue, unlike proof of fault in an aviation accident, does not necessarily require an aviation law expert. Hopefully, the result is that more of the proceeds recovered go to the claimant and get there quicker than is the case under the common law tort compensation system. If this occurs, then recoveries, even ones reduced by the operation of the liability limit ($120,000 plus $200,000), will provide the sufficiency of recovery that the United States set out to achieve in the years 1968 to 1969.[182]

At any rate, it is the view of this writer that the legal system which the Guatemala Protocol will create is worth the time and the effort it has cost. Aviation litigation has a reputation of being difficult, time consuming and expensive. Possibly this new system will be a start toward a better way of handling an increasingly serious problem of providing adequate recovery for the victim, without undue burdens on the carrier. This, plus the need for uniformity of law and continued international cooperation to that end warrant the continuing efforts to preserve the Warsaw Convention.

182. *Three Views, supra* note 71, at 141-44.