

THE INTERNATIONAL AIR TRANSPORTATION ASSOCIATION'S ATTEMPT TO MODIFY INTERNATIONAL AIR DISASTER LIABILITY: AN ADMIRABLE EFFORT WITH AN IMPOSSIBLE GOAL

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INTRODUCTION

On September 2, 1998, Swissair Flight 111 crashed into the Atlantic Ocean off the coast of Nova Scotia.¹ As numerous newspapers, magazines, and television reports publicized, many famous and important people were aboard the flight.² Second only to the Clinton controversy, this plane crash dominated media attention worldwide and caused close scrutiny of the airline industry during the fall of 1998. While the media predominately covered issues such as who was killed and why the crash occurred, the International Air Transportation Association (IATA) focused on a somewhat different issue. Specifically, the IATA was anxious to see what effect the Swissair disaster would have on the international airline liability scheme because the Swissair crash was the first international air disaster to occur since the IATA implemented a major overhaul of the liability scheme in 1995.³

What does this mean to the families of those who had loved ones aboard Flight 111? Unfortunately, the answer is not clear and may actually depend on the individual nation in which each specific passenger was domiciled when the accident occurred. If Swissair's liability for each death is uncertain, then the resulting non-uniformity would certainly be unfair. For example, the family of a passenger whose domicile was the United States could receive over one hundred times the compensation received by the family of the passenger whose domicile was India.

Since 1929, the international air community has been seeking to avoid this very result.⁴ Nearly seventy years ago, delegates from around the world met

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¹ See Dave Lenkus, *Swissair Crash Unlikely to Turn Aviation Market*, BUS. INS., Sept. 14, 1998, at 1.

² See *id.*

³ See Tu Thanh Ha, *The Swissair Disaster*, GLOBE & MAIL (Toronto), Sept. 9, 1998, at A4.

⁴ See Katherine A. Staton, *The Warsaw Convention's Facelift: Will it Meet the Needs of 21st Century Air Travel*, 62 J. AIR L. & COM. 1083, 1085 (1997).

in Warsaw, Poland at what is now commonly referred to as the Warsaw Convention.⁵ Their goal was simple: to develop a plan of international air liability that would later be adopted by every nation participating in international air travel.⁶ Each human life would be worth a set amount that could be recovered upon a wrongful death action brought against the airline.⁷ The liability of the aircraft carrier would be predetermined, regardless of the country in which the passenger resided.⁸ Thus, the family of the passenger from India and the family of the passenger from the United States would be compensated equally. This agreement remained in full force until 1997, with the amount allowed for each victim of an international air disaster set at \$75,000.⁹

Many individuals, especially citizens of more economically sound nations, began to complain about the Warsaw limits on grounds that the system was entirely unjust. For example, if one's child was killed on a flight from Atlanta to Chicago, the recovery could potentially be over \$1 million.¹⁰ Yet, another family's recovery for the death of their child on a flight from Atlanta to London would be limited to \$75,000.¹¹ In an effort to address these complaints, the IATA proposed several changes to the Warsaw System.¹² More significantly, the IATA proposed returning to the "old system" of liability, where each victim's wrongful death recovery would be contractually based on the laws of his or her domiciled nation.¹³ This result would require two essential acts: (1) the consent of the individual airline carriers within a nation to ignore the \$75,000 liability ceiling and (2) the development by each airline of a recovery system for those killed in international airline disasters.¹⁴ Although the IATA put forth an admirable effort, the adopted changes are probably too difficult to implement in a short period of time.

⁵ See *id.*

⁶ See *id.*

⁷ See James N. Fincher, Comment, *Watching Liability Limits Under the Warsaw Convention Fly Away, and the IATA Initiative*, 10 TRANSNAT'L LAW. 309, 310 (1997).

⁸ See *id.*

⁹ See *id.*

¹⁰ See, e.g., Eric S. Roth, Note, *Confronting Solicitation of Mass Disaster Victims*, 2 GEO. J. LEGAL ETHICS 976, 976 n.46 (suggesting that victims of a Northwest Airlines crash in Denver in 1987 were expecting \$1 million in recovery).

¹¹ See Fincher, *supra* note 7, at 310.

¹² See *id.*

¹³ See Lee S. Kreindler, *Warsaw Convention Waivers: Goodbye to Liability Limitations*, 1997 ANDREWS AVIATION LITIG. REP. 24668, available in WL, 1997 ANAVIALR 24668.

¹⁴ See *id.*

This paper will examine the background of the IATA Amendments, discuss and summarize the content of amendments concerning wrongful death limitations, and then examine the IATA's success or failure in various nations across the world. A particular focus will be given to the fundamental political structures of the nations and how these structures have affected their respective approaches to implementation. The paper will also consider whether the post-IATA Warsaw Agreement is destined to be unsuccessful. Finally, the paper will suggest an alternative way for coping with the international air disaster liability dilemma.

I. THE IATA AMENDMENTS AND THEIR EFFECT ON THE WARSAW AGREEMENT

A. Background: The History Behind the 1995 Amendments

In the late 1920s, the airline industry began to flourish. Commercial airlines had expanded so that flights were available to and from cities across the world. Where Orville and Wilbur Wright were barely able to cross the town of Kitty Hawk, North Carolina, airplanes were now crossing the Atlantic Ocean and transporting passengers across continents. The development of the airline industry signaled progress for the international community. However, specific industry-related issues developed alongside the rise of the international passenger flight.

The issue of tort liability raised the greatest number of concerns. In the event of an air disaster, which passengers would be able to recover and under whose rules? Although no one desired such dire situations, most individuals associated with the airline industry realized potential problems were on the horizon if such a disaster were to happen. Dr. Francis Lyall of the University of Aberdeen, Scotland, United Kingdom, noted four such problems: (1) businessmen who traveled to multiple destinations were uncertain which nations' laws applied to them if such a disaster occurred; (2) any such air disaster that might happen could entirely obliterate the finances of the airline because the industry was still relatively new and did not have the vast financial resources that it has today; (3) any air disaster would create the likelihood of forum shopping because different nations would have different systems of recovery; and (4) great problems of proof would exist in determining whether to hold the airline at fault for the accident.¹⁵

¹⁵ See Francis Lyall, *The Warsaw Convention—Cutting the Gordian Knot and the 1995 Inter-carrier Agreement*, 22 SYRACUSE J. INT'L L. & COM. 67, 68-69 (1996).

As a result of these concerns, representatives from twenty-three nations attended a conference in Warsaw, Poland in October of 1929.¹⁶ Although the United States was not a participating nation, the remaining members of the industrial international community were able to reach an agreement that stood for almost sixty years.¹⁷ Commonly referred to as the Warsaw Convention, the 1929 agreement addressed many of the potential problems listed above in addition to many problems yet unanticipated.¹⁸

The critical provision of the Warsaw Convention can be found in article 22 of the agreement, which established a standardized recovery amount for personal injuries incurred on international flights.¹⁹ Although article 20 allowed an airline to escape this liability if it could establish that it took all "necessary measures" to avoid the disaster, article 22 of the original convention took great strides in addressing many of the pre-convention concerns.²⁰ In one short paragraph, article 22 removed the inequitable possibilities of having different legal systems apply varying legal standards, hence removing the possibility of forum shopping and the concerns of businessmen (because recoveries would be identical in all nations). Further, article 22 helped to soothe those air carriers who feared massive, unlimited tort litigation upon the occurrence of an air disaster, and instead allowed these carriers to budget for such disasters so that any one incident would not create automatic insolvency.

Thus, each of the problems discussed by Dr. Lyall was addressed by the convention except one: the problem of proof. As mentioned above, article 20 allowed the airline to escape liability for the disaster if it could demonstrate that all "necessary measures" were taken to prevent the disaster.²¹ Admittedly, the article 20 provision hampered chances of recovery – the airline would always have superior access to information pertaining to a crash of one of its fleet. Perhaps to offset this tip of the scales towards the airline industry, the convention included one important exception to the article 22 limitation amount, which is found in article 25: If the carrier is guilty of "willful

¹⁶ See Andrea L. Buff, Note, *Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Inter-carrier Agreement Eliminate the Need to Amend the Convention?*, 20 FORDHAM INT'L L.J. 1768, 1773 (1997).

¹⁷ See Harold Caplan, *The Future of the Warsaw Convention: A Personal Tribute to the United States*, 7-SPG AIR & SPACE LAW. 13, 13-14 (1993).

¹⁸ See Staton, *supra* note 4, at 1084-85.

¹⁹ In 1929, this amount translated into approximately \$8,300 United States dollars. See Staton, *supra* note 4, at 1085.

²⁰ See Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

²¹ See *id.* art. 20.

misconduct," then the liability limitations are removed entirely.²² This provision has since developed special applications within the United States that will be discussed in later portions of this article.

The United States jumped on the Warsaw bandwagon within five years (1934) and the convention's provisions are currently codified at 49 U.S.C. 40105 (1994).²³ Unfortunately, beginning in the mid-1950s, certain problems began to arise with the convention that ultimately led to a conference at the Hague in 1955. The focus of this conference was the article 22 limitation: many countries argued that its ceiling of 125,000 French gold Francs (SDR) was too little compensation for injuries in the mid-twentieth century.²⁴ Consequently, in what is known as the Hague Protocol, the article 22 limitation on recovery was doubled to 250,000 SDRs.²⁵ While on its surface the protocol solved the immediate problem, the Hague protocol created an even larger, more fundamental problem: the option of adopting the protocol was left to each individual nation.²⁶ Due to its lack of binding authority, many of the problems that existed prior to the original Warsaw Convention once again surfaced. The flights governed by the laws of countries that adopted the protocol were forced to pay a greater recovery than those who did not adopt it.²⁷ Thus, both uncertainty and forum shopping once again became legitimate concerns for the international airline community.

For reasons beyond the scope of this note, the United States was one of the countries who opted out of the 1955 Hague Protocol.²⁸ Because American limitations on liability remained at the 1929 original levels, great discontentment began to arise towards the Warsaw agreement, culminating on November

²² See *id.* art. 25.

²³ See Caplan, *supra* note 17, at 16.

²⁴ See Naneen K. Baden, Comment, *The Japanese Initiative on the Warsaw Convention*, 61 J. AIR L. & COM. 437, 441-42 (1995/1996).

²⁵ See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 373 [hereinafter Hague Protocol]. Note that the Hague Protocol also reduced the article 25 standard from "willful misconduct" to one of "recklessness." See *id.*

²⁶ See *id.*

²⁷ See Trevor Atherton, *Unlimited Liability for Air Passengers: The Position of Travel Agents and Tour Operators Under the IATA Passenger Liability Agreement Scheme*, 63 J. AIR L. & COM. 405, 410 (1997).

²⁸ Many authors on the subject suggest that the United States generally felt that the Hague Protocol did not go far enough in raising the article 22 limitations. See Lyall, *supra* note 15, at 72; Staton, *supra* note 4, at 1085. However, I would suggest that the protocol's rejection reflected the United States' more general dissatisfaction with the entire Warsaw Doctrine, including the lack of strict liability and the return of uncertainty and forum shopping. The United States may have very well believed that the Warsaw Agreement was beyond repair.

15, 1965, when the United States revoked the Warsaw Convention altogether.²⁹ Naturally, the United States revocation created a crisis: the United States was a major player in the international air field, and if its air carriers and air passengers were not bound by the provisions of the Warsaw Convention, then a significant number of international air passengers would be removed from the convention's reach. The IATA asked representatives from the United States to attend an emergency conference in Montreal with hopes that the United States would reaffirm the Warsaw document.³⁰ Within days, the IATA met its goal with the formation of the Montreal Agreement. This agreement, however, contained some drastic alterations from the original 1929 document.³¹

Most notable among the changes was an increase in the article 22 limitation amount to \$75,000.³² This was in direct response to United States criticism that the Hague Protocol did not go far enough.³³ Ironically, this change was not the most significant to arise from the Montreal Agreement. The United States and the IATA also agreed to waive article 20 entirely, so that the article 22 recovery was allowed and the airlines were subject to strict liability.³⁴ For the first time, problems of proof that exist with airline disasters were addressed by the IATA. Finally, the Montreal Agreement enacted two other changes: a written warning to passengers and an option of unlimited damages if there is willful misconduct on the part of the airline.³⁵

The Montreal Agreement made some important and necessary modifications to the Warsaw Agreement. Further, the Montreal Agreement probably saved the Warsaw Agreement itself.³⁶ After all, if the United States had removed itself, many nations probably would have followed. The critical problem with the Montreal Agreement, however, was that it only applied to United States passengers, carriers, and flights.³⁷ After the Montreal Agreement, and until the 1995 IATA conference, one could legitimately argue that,

²⁹ See Lyall, *supra* note 15, at 71, 73.

³⁰ See *id.*

³¹ See *id.*

³² See Agreement Relating to Liability Limitations of Warsaw and Hague Protocol, May 13, 1966, Agreement C.A.B. 18990 (approved by order E-23680), reprinted in LAWRENCE B. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED 317 (1988) [hereinafter Montreal Agreement].

³³ See Lyall, *supra* note 15, at 73.

³⁴ See Montreal Agreement, *supra* note 32, at 317.

³⁵ See *id.* at 317-18. Recall that the United States did not adopt the Hague Protocol, which lowered the willful misconduct standard to one of recklessness.

³⁶ See Buff, *supra* note 16, at 1784.

³⁷ See *id.*

by focusing on Dr. Lyall's pre-Warsaw problems, the international air community was no better off than it was in 1929.

For instance, the businessman's uncertainty was probably worse than it was in 1929. If one were killed and associated with the United States, one could automatically recover \$75,000 through strict liability or an unlimited amount upon a showing of willful misconduct.³⁸ In contrast, one injured in a Hague Protocol nation would have recovery capped at 250,000 SDRs (approximately \$16,000)³⁹ unless one demonstrated recklessness on the part of the airline, which then allowed for unlimited recovery.⁴⁰ If one were injured and associated with a non-protocol country, the original 1929 article 22 limitations still remained, unless one could demonstrate willful misconduct.⁴¹ Finally, in both the Hague Protocol and original Warsaw Convention nations, the airline could still escape from liability under article 20.⁴²

B. An Outline of the IATA Amendments: Changes on the Recovery Limitations Imposed by the Warsaw Agreement

Members of the international airline community, now united as an organization under the IATA, met in Kuala Lumpur in 1995 to address the problems facing the industry under the current provisions of the Warsaw Convention.⁴³ The main goal of the IATA conference (hereinafter the 1995 Conference) was to address the issue of liability limitations and to develop, under one common agreement, a system that represented the interests of all nations (large and small) and all airlines (large and small).⁴⁴ Indeed, in the introduction to the final Inter-carrier Agreement itself, the participants stated their belief that "the [Warsaw] Convention's limits of liability, which have not been amended since 1966, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers."⁴⁵

Certainly, this was an ambitious goal on the part of the IATA. While many larger airlines had no problems agreeing to increase the limitations on liability,

³⁸ See Fincher, *supra* note 7, at 310.

³⁹ See Hague Protocol, *supra* note 25, art. XI, at 381.

⁴⁰ See *id.* art. XIII, at 383.

⁴¹ See Warsaw Convention, *supra* note 20, art. XXII, at 3019.

⁴² See *id.* art. XX, at 3019.

⁴³ See Staton, *supra* note 4, at 1104.

⁴⁴ See *id.*

⁴⁵ Inter-carrier Agreement on Passenger Liability, *reprinted in* Lyall, *supra* note 15, at 79 [hereinafter IATA Agreement].

smaller airlines were concerned that any increase above the 300,000 SDR to 500,000 SDR range might result in prohibitively expensive insurance costs.⁴⁶ Nevertheless, the one definite result of the 1995 Conference was an agreement to "take action" to remove the liability limits under article 22 of the Warsaw Convention.⁴⁷ Indeed, "for small and medium sized carriers, remote from the United States, it will be a gigantic leap from the existing limits to no limits."⁴⁸

What "action" is to be taken by the parties to the 1995 Conference? This depends on the implementation agreement to which each carrier agrees. The first, entitled *The Measures to Implement the IATA Inter-carrier Agreement (MIA)*, requires the agreeing carriers to neither invoke the convention's original article 22 limitation nor invoke any article 20 defenses for claims of 100,000 SDRs or less.⁴⁹ Additionally, at the option of the carrier, recoverable compensatory damages will be determined with reference to the law of the domicile or permanent residence of the passenger.⁵⁰

The second implementation measure, which was adopted primarily for United States carriers, was formed by the Air Transport Association (ATA).⁵¹ These measures, commonly referred to as the IPA agreement, instruct United States air carriers as to the implementation of the MIA agreement with certain additions.⁵² These additions are significantly more stringent than those of the MIA itself and provide the underlying support for those who argue that the revamped Warsaw-IATA system is destined for failure.

Among the additional requirements of the IPA, paragraph 4 stands out as being the most significant.⁵³ The wording of this paragraph varies only slightly from the MIA. The IPA reads:

The carrier agrees that the recoverable compensatory damages may be determined by reference to the law of the

⁴⁶ See James F. Brashear, *IATA Airline Liability Conference Carriers Prepare to Modernize the Warsaw System*, 10 FALL AIR & SPACE LAW. 1, 22 (1995). Note that the reason that such a change would be cost prohibitive for the smaller airlines would be because of the sharp increase in insurance premiums. See *id.*

⁴⁷ See Lyall, *supra* note 15, at 79.

⁴⁸ Caplan, *supra* note 17, at 4.

⁴⁹ Agreement on Measures to Implement the IATA Inter-carrier Agreement, May 1996 [hereinafter MIA], reprinted in Staton, *supra* note 4, at 1106.

⁵⁰ See *id.* at 1106.

⁵¹ See Kreindler, *supra* note 13.

⁵² See Staton, *supra* note 4, at 1108.

⁵³ Provisions Implementing the IATA Inter-carrier Agreement to be Included in Conditions of Carriage and Tariffs, May 16, 1996, I(4) [hereinafter IPA], reprinted in Staton, *supra* note 4, at 1107; see also Staton, *supra* note 4, at 1108; Kreindler, *supra* note 13.

domicile or permanent residence of the passenger, subject to the applicable law of recoverable compensatory damages.⁵⁴

Nevertheless, the variation is critical to the recovery of compensatory damages by injured passengers and their families. Under the MIA, the *carriers* have the *option* of looking to the law of the injured passenger's domicile or permanent residence in determining compensatory damages.⁵⁵ This option at minimum opens the door to forum-shopping by defendant airlines. Though some airlines (probably the larger ones with larger insurance carriers) would be likely to follow this "option" and invoke the passenger's domiciliary law (in order to maintain goodwill with the public, demonstrate responsibility, and quickly resolve the dispute), there is little doubt that some airlines, on limited budgets and paying costly insurance premiums, would shy away from the MIA's "option." The option makes little economic sense, as a small airline would not choose to apply the domiciliary law of an injured passenger when such domiciliary law would cost them more money. Though goodwill, responsibility, and quick resolution are all important, if the cost of obtaining these benefits will put an airline out of business, each of these factors quickly becomes irrelevant.

The IPA eliminates this problem by making the carrier agree that the domiciliary law may be applied to accident situations regardless of its choice of law.⁵⁶ Although some authors have suggested that this provision of the IPA makes domiciliary law "mandatory" in the determination of compensatory damages, this may be taking paragraph 4 a bit too far.⁵⁷ One cannot overlook the word "may" in this paragraph. While certainly the airline carriers do not have the option under the IPA to refuse to apply domiciliary law, the presence of the word "may" suggests that domiciliary law application is not "mandatory." Thus, under the IPA, if a plaintiff stands to benefit from the compensatory system of his domicile, then this option is available to him notwithstanding any objection by the airline. However, if the plaintiff would benefit by applying another country's compensation laws (such as the country the accident occurred in, the country the flight originated in, etc.), then there is nothing in the IPA language that would prohibit the plaintiff from applying

⁵⁴ IPA, *supra* note 53, at I(4).

⁵⁵ See Staton, *supra* note 4, at 1106.

⁵⁶ See *id.* at 1107.

⁵⁷ See *id.* at 1109.

this foreign law. Regardless of the interpretation, paragraph 4 of the IPA certainly differs from its counterpart, the MIA.

The IPA has two other significant additions to the MIA: notice requirements and tariff payments.⁵⁸ Under section II of the IPA, the airline is required to give notice of the liability limitations before the flight begins.⁵⁹ Again, this demonstrates the plaintiff-friendly nature of the IPA.⁶⁰ In addition, the IPA agreement states that any and all participation in the 1966 Montreal Agreement is revoked.⁶¹ This provision most likely exists to establish the permanency of the IPA (recall that the Montreal Agreement was a temporary, last-minute measure).⁶² The IPA airlines provide plaintiff passengers with some stability that might not have existed without the addition of this clause.⁶³

In summary, the IATA Agreement of 1995 was critical to saving the Warsaw Convention Agreement of 1929. Under the IATA Agreement, all participating airlines agreed to "take action" to save the dying Warsaw doctrine.⁶⁴ Two separate implementation agreements surfaced to put the IATA Agreement into action: the MIA and the IPA. The MIA waives the \$75,000 cap on damages, provides strict liability for damages up to \$100,000, and introduces the idea of applying domiciliary law in determining compensatory damages.⁶⁵ The IPA takes the MIA further, by requiring tariff payments, mandatory notice provisions, and a domiciliary law option for plaintiffs.⁶⁶ While the MIA is signed by airlines from across the world, only United States airlines have agreed to the IPA.

⁵⁸ See *id.* at 1107.

⁵⁹ See IPA, *supra* note 53, at II.

⁶⁰ Note that the fact that the IPA is more plaintiff-friendly is probably a reflection on the airlines that signed the IPA in addition to the MIA agreement. The IPA airlines are all American airlines with significantly larger budgets and with smaller insurance premiums. This is in contrast to the MIA airlines, who have varying economic conditions and different insurance situations. As stated earlier, it is much easier for an airline to be plaintiff-friendly when such actions are not cost prohibitive!

⁶¹ See IPA, *supra* note 53, at II.

⁶² See *id.* at III.

⁶³ Note, however, that this type of provision would not have been necessary for the MIA airlines because the Montreal Agreements involved solely the United States airlines, all of which are a part of the IPA. Further, the MIA airlines were a part of the Hague Protocol, which was not deemed to be a temporary measure when it was created.

⁶⁴ See IATA Agreement, *supra* note 45, at I.

⁶⁵ See MIA, *supra* note 49, at 1106.

⁶⁶ See IPA, *supra* note 53, at 1106-07.

II. THE IATA AGREEMENT'S RECEPTION ON THE INTERNATIONAL SCENE

A. *The United States*

Without question, the United States has been the most critical nation of the Warsaw Convention Agreement throughout the years. Indeed, recall that the United States was the only major nation to reject the Hague Protocol and nearly threatened to reject the entire Warsaw Agreement ten years later.⁶⁷ If not for the special Montreal Agreement of 1966, the Warsaw Convention would most likely have become obsolete. With this history in mind, it is not surprising that the United States is presenting major obstacles to the 1995 "take action" order from the IATA.

1. *A Problem of Partial Satisfaction*

As mentioned above, all United States air carriers have signed on to both the IPA and the MIA Agreements.⁶⁸ This fact by itself demonstrates the problem of implementation in the United States. The IPA does not facially contradict any part of the MIA Agreement; if it did, carriers would find it impossible to agree to both. The IPA, however, does take the MIA much further: where the MIA provides an option, the IPA does not; where the MIA requires no notice, the IPA does not make notice mandatory.⁶⁹ The logical inference from the fact that United States carriers have signed on to both agreements (as compared to most other international carriers, who have only signed onto the MIA) is that the United States clearly does not feel that the MIA goes far enough. Because the United States does not believe that the MIA provides sufficient protection for injured passengers and their families, it still is going to remain partially unsatisfied with the Warsaw Agreement itself, even with the 1995 IATA "take action" order.⁷⁰

Mr. Allan I. Mendelsohn, a specialist in international air liability issues, gave a speech in Montreal, Canada in late 1996, where he agreed with this proposition, though in a somewhat concealed fashion.⁷¹ Mr. Mendelsohn

⁶⁷ See *supra* text accompanying notes 28-29.

⁶⁸ See Kreindler, *supra* note 13.

⁶⁹ See *supra* text accompanying note 66.

⁷⁰ See Allan I. Mendelsohn, *The Warsaw Convention and Where We Are Today*, 62 J. AIR L. & COM. 1071, 1077 (1997).

⁷¹ See *id.* at 1071. Mr. Mendelsohn is a Washington, D.C. attorney who is active in the international air liability field, having attended the Montreal Convention in 1966. See *id.* at 1071 n.a.

outlined four elements that the United States targeted in improving the Warsaw Convention Agreement prior to the 1995 "take action" order: unlimited liability, absolute liability, *lex loci domicilii*, and the implementation of a fifth forum.⁷² According to Mendelsohn, the United States is satisfied that all but the last of these elements have been met by the IATA/MIA/IPA agreements.⁷³

Certainly, the IATA/MIA/IPA have attempted to resolve the first element of the United States' concern about the limited liability that the Warsaw Convention adopted.⁷⁴ Both the MIA and the IPA carriers have agreed to drop the article 22 liability limitations so that the \$75,000 maximum recovery amount is now obsolete.⁷⁵ In his speech, Mendelsohn recognizes that this is "something that the United States has been seeking for a very long time."⁷⁶ Although there are still airlines that have failed to sign onto either the MIA or the IPA, these airlines are limited in number and other provisions of the MIA/IPA (see below) attempt to address these concerns.

Mendelsohn's second element, absolute liability, also seems to be addressed by both the MIA and IPA Agreements. Although both agreements limit this absolute liability to \$150,000 and the United States could have tried to set this amount higher, the United States seems to be satisfied with the \$150,000 ceiling on absolute liability.⁷⁷ Why is this? Apparently, one of three scenarios must be true: (1) the United States is satisfied that the \$150,000 ceiling is sufficiently high to fully reward injured plaintiffs; (2) the absolute liability element really was not as essential to the United States as Mendelsohn would suggest; or (3) other avenues exist to avoid the \$150,000 limit imposed by the IPA and the MIA.

The first of these scenarios must be quickly rejected. While \$150,000 is double the amount of the previous ceiling established under the Warsaw Convention as amended by the Montreal Agreement, one must remember that the Montreal Agreement was established over thirty years ago.⁷⁸ Indeed, Harold Caplan notes that the recovery amount would need to be six times greater in order to remain consistent with the 100,000 SDR amount established

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.* at 1075.

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ See Montreal Agreement, *supra* note 32, at 317.

in 1971.⁷⁹ In other words, the \$150,000 ceiling on absolute liability is too low an amount to truly establish an absolute liability system for recovery in international air disasters. While admittedly any absolute liability is a step in the right direction in the eyes of the United States, it would be quite unlikely that a system with this low of a ceiling would greatly alter the workings of the Warsaw System.

The second scenario seems much more likely on its face. Perhaps Mendelsohn is simply wrong and the establishment of an absolute liability system was not that important to the United States after all. One must admit that the main objection of the United States throughout the history of the Warsaw Convention has been the recovery ceiling imposed by article 22.⁸⁰ One could legitimately suggest that this and only this was the main priority of the United States in forming the IPA Agreement for implementation of the IATA Amendments. While absolute liability certainly was a positive result of the IPA and MIA, it was not the critical issue that Mendelsohn suggested. This argument is furthered by examining the lack of differences on this subject between the IPA and the MIA. If absolute liability were really that important to the United States, why not increase the \$150,000 ceiling on absolute liability or eliminate it altogether? This would appear to be a very simple undertaking, especially considering that United States air carriers have already developed a separate implementation agreement in the IPA. In light of the passenger-friendly nature of the IPA and the United States approach, why not take the IPA farther than the MIA in yet another area?

Certainly this could have been done. The \$150,000 ceiling could have been left out of the IPA and there would have been little doubt that absolute liability was a priority for the United States. We should not be so quick to dismiss Mendelsohn's second element. There is a much more likely explanation as to why the United States willingly conceded to the \$150,000 absolute liability system originally established in the MIA agreement. Recently, at least one authority has argued that the \$150,000 absolute liability cap is really no cap at all.⁸¹ He reaches this conclusion by examining the workings of the MIA/IPA agreements and how they correspond to the original Warsaw Document.

⁷⁹ See Caplan, *supra* note 17, at 19. Note that most of the Montreal Agreement was adopted by other nations in the Guatemala City Protocol of 1971 (which raised the recovery cap to 100,000 SDRs).

⁸⁰ See generally Caplan, *supra* note 17, at 14 (quoting Secretary of State Cordell Hull in 1934 arguing for the limits as beneficial to passengers and carriers).

⁸¹ See Kreindler, *supra* note 13.

The \$150,000 absolute liability cap is tied into article 20 of the Warsaw Convention.⁸² While the original Warsaw Convention allowed an airline to escape liability if they took "all necessary measures" in avoiding an accident,⁸³ the MIA/IPA implementations remove this escape hatch up to approximately \$145,000.⁸⁴ Kreindler's argument is as follows:

The only situation that we know of where an airline can possibly show that "it took all necessary measures to prevent the damage" is the missile possibility that has surfaced in the TWA 800 accident – that a missile was fired by a non-airline source. In only one case has the airline sustained an Article 20(1) defense . . . If one puts aside the missile possibility . . . the carrier is liable, and the fact that Article 20(1) is in there above [\$150,000] has no practical significance. That is certainly absolute liability in real terms. And so, for the first time, on a major scale in a major place, we will truly be living with a no-fault absolute liability system.⁸⁵

Although Kreindler later continues to argue that this is an unfavorable result for the entire airline industry (including aviation attorneys and insurance carriers), he does not attempt to suggest that this result would be disfavored by the United States government or by the injured passengers themselves.⁸⁶ Indeed, if we are to believe Mendelsohn, the United States very much favors this result.⁸⁷ Consequently, the United States is satisfied by the IPA/MIA Agreements.⁸⁸

Mendelsohn's third element, *lex loci domicilii*, is also addressed in both the IPA and the MIA, but in contrast to the first two elements, it is addressed somewhat differently by each agreement.⁸⁹ The MIA allows the airline the

⁸² See Warsaw Convention, *supra* note 20, art. XX, at 3019.

⁸³ See *id.*

⁸⁴ See Fincher, *supra* note 7, at 323.

⁸⁵ Kreindler, *supra* note 13.

⁸⁶ See *id.* Note that Kreindler suggests later in his article that the airline industry would prefer to maintain the \$150,000 ceiling on absolute liability, but add a "simple negligence" standard in place of the "all necessary measures" standard. See *id.* This two-tiered system will be discussed later in this article.

⁸⁷ See generally Mendelsohn, *supra* note 70, at 75 (noting that the United States accepted the IATA position calling for a \$150,000 limit on the second tier under absolute liability).

⁸⁸ See *id.* at 1075.

⁸⁹ See *id.*

option of choosing whether or not to apply the law of the passenger's domicile in adjudicating the issue of compensatory damages.⁹⁰ In contrast, the IPA removes this option from the aircraft carriers and gives them no choice as to the application of domiciliary law.⁹¹ Thus, only the IPA contains the concept of *lex loci domicilii* in its "pure form."⁹² Conversely, the MIA has *lex loci domicilii* in its "optional" form, which raises the question whether it really is a *lex* ("law") under the MIA at all.⁹³

If this is true, and if *lex loci domicilii* is the essential element to the United States that Mendelsohn suggests that it is, then he may have been too quick to presume that the United States is satisfied this element has been met.⁹⁴ Indeed, the American airlines have all agreed via the IPA to abide by a rule of *lex loci domicilii*.⁹⁵ American officials must see this as a step in the right direction. However, if the United States was dissatisfied with the Warsaw Convention, as amended by the Montreal Agreement of 1966 because of concern for United States passengers seeking access to United States courts, then the United States must remain dissatisfied with the Warsaw Doctrine to this day, even after IPA/MIA implementation.⁹⁶ Under today's regime, if an American passenger is injured on an American international flight, then his family can recover compensatory damages under the laws of the United States, regardless of where the crash occurs.⁹⁷ However, if that same American passenger is on an airline governed solely by the MIA, then his family cannot be certain that United States law would apply.⁹⁸ As long as *lex loci domicilii* is a critical element for the United States, this result cannot be acceptable.

Mendelsohn finally argues that the fourth United States element, which he refers to as the "fifth forum," is "the single and only remaining element that

⁹⁰ See MIA, *supra* note 49, at II(1).

⁹¹ See Staton, *supra* note 4, at 1109. Under the IPA, compensatory damages will only be determined by the law of the passenger's domicile. See *id.*

⁹² See *id.*

⁹³ See *id.* at 1108-09.

⁹⁴ Mendelsohn is most likely correct in asserting that *lex loci domicilii* is an essential element for United States satisfaction. This point is furthered by its presence in the IPA (implementation measures for United States airlines) and the DOT requirements. See Brashear, *supra* note 46, at 21.

⁹⁵ See Staton, *supra* note 4, at 1106.

⁹⁶ See Robert P. Warren, *The Future and Effect of the IATA Inter-carrier Agreements on Passenger Liability: A U.S. Perspective*, 11-SUM AIR & SPACE LAW. 3, 4 (1996) (arguing that the United States wants to assure its citizens access to its courts).

⁹⁷ See Mendelsohn, *supra* note 70, at 1080.

⁹⁸ See Staton, *supra* note 4, at 1106 and text accompanying note 55.

separates the United States from the rest of the world."⁹⁹ This assertion by Mendelsohn may be partially incorrect in that this is not the only element that separates the United States from the rest of the world, as long as we acknowledge *lex loci domicilii* as an essential United States element. Mendelsohn is, however, right on target when he identifies the "fifth forum" issue as a sticking point between the United States and the rest of the world.

To begin, one must understand exactly what the United States is asking when it says that it is seeking a "fifth forum." A fifth forum is exactly that: a potential fifth forum in which an injured airline passenger may bring suit.¹⁰⁰ Note the four forums that currently exist: the air carrier's principle place of business, the place of business where the passenger made a contract with the air carrier, the location of the passenger's destination, and the air carrier's domicile.¹⁰¹ A fifth forum is added allowing an injured passenger to bring suit in the country where he or she is domiciled. It is important to note the difference between *lex loci domicilii* and the fifth forum. *Lex loci domicilii* seeks to apply the law of the country where the injured passenger is domiciled, while the fifth forum seeks to force the courts of the injured's domicile to hear the case.¹⁰² This distinction is critical in understanding the debate currently in progress between the United States and the rest of the world.

Mendelsohn describes the American argument for a fifth forum as an attempt to protect passengers worldwide, not just Americans (contrary to what the IATA has suggested).¹⁰³ Indeed:

There are wandering Germans, wandering Swiss, wandering British, and wanderers of every nationality. There are no greater number of Americans who live in Hong Kong and fly Hong Kong-Moscow-Hong Kong than there are Germans or Frenchmen or British. These same foreigners probably also fly Hong Kong-United States as often as Americans. If they fly on a third country airline, are we going to say that none of these foreigners will be able to sue in their home countries? Are the governments of Germany and France really going to say that they do not want their citizens to be able to sue at home? Are they

⁹⁹ See Mendelsohn, *supra* note 70, at 1075.

¹⁰⁰ See Buff, *supra* note 16, at 1833.

¹⁰¹ See *id.* at 1802.

¹⁰² See BLACK'S LAW DICTIONARY 911 (6th ed. 1990).

¹⁰³ See Mendelsohn, *supra* note 70, at 1078.

going to say that their citizens should be able to sue only in one of the often very fortuitous and faraway Article 28 forums? I believe they will not and it would be a great mistake if they did.¹⁰⁴

Unfortunately, as Mendelsohn suggests, not all countries feel that this "fifth forum" is a great idea.¹⁰⁵

The main complaint of the IATA is that the concept of a fifth forum violates the Warsaw Convention Agreement itself.¹⁰⁶ This argument is based in article 32 of the original agreement, which reads:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.¹⁰⁷

At least one author suggests that "it appears that a carrier or its insurers could avoid this clause in the [implementation agreements] even if it was agreed to and included in their conditions of carriage."¹⁰⁸ The American response to this criticism is that the fifth forum argument does not "infringe the rules" laid down by the original Warsaw Convention. The opposition has yet to accept this argument.¹⁰⁹

The other argument against the adoption of a fifth forum in international air disasters is a financial one. Many smaller airlines are concerned that the fifth forum possibility would increase recovery amounts for injured passengers since more suits could be brought in the United States.¹¹⁰ The increase in recoveries would consequently increase the already costly insurance premiums that the individual airline is forced to pay.¹¹¹ Although Mendelsohn attempts to argue that this is not a problem because the American courts would invoke

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 1077.

¹⁰⁶ *See id.* at 1075.

¹⁰⁷ Warsaw Convention, *supra* note 20, art. 32, at 3021.

¹⁰⁸ Atherton, *supra* note 27, at 416.

¹⁰⁹ *See* Mendelsohn, *supra* note 70, at 1076.

¹¹⁰ *See* Bruno Bertucci, *A European Perspective on Air Carrier Liability*, 9-SUM AIR & SPACE LAW. 1, 17 (1994).

¹¹¹ *See id.*

forum non conveniens as a result of the *lex loci domicilii* application, this argument seems questionable at best.¹¹²

Forum non conveniens is used sparingly in the American courts and is nothing more than a judicially-created doctrine. The United States Supreme Court itself has said recently that the *forum non conveniens* doctrine "make[s] uniformity and predictability of outcome almost impossible" due to the discretionary nature of the doctrine.¹¹³ Although it might be accurate to predict insurance premiums will fall if United States courts invoke the *forum non conveniens* doctrine whenever possible (thereby actually forcing more suits to be heard outside of the United States), insurance companies cannot rely on an automatic assumption that the *forum non conveniens* doctrine will apply.¹¹⁴ Instead, premiums would most likely rise sharply at the first invocation of the fifth forum, though the effect on airline ticket prices should be negligible.¹¹⁵ Nevertheless, this premium rise would instantly force many of these smaller airlines out of business.¹¹⁶ Consequently, the United States has a long way to go before it will convince the IATA that a fifth forum provision should be allowed as an amendment to the original Warsaw Agreement.

2. *The United States Department of Transportation vs. The World*

The United States is only partially satisfied with the IATA Amendments to the Warsaw Convention, notwithstanding the more stringent guidelines that are incorporated within the IPA implementation measure.¹¹⁷ After the American airlines unanimously signed the IPA, the United States Department of Transportation (the DOT) conditioned its approval of the IATA Amendments on four significant addendums.¹¹⁸

First, the DOT proposed that the *lex loci domicilii* provision become mandatory for all flights that enter or leave the United States.¹¹⁹ This request is consistent with the prediction that Mendelsohn was correct in arguing that *lex loci domicilii* was indeed an important objective for the United States in

¹¹² See Mendelsohn, *supra* note 70, at 1080.

¹¹³ American Dredging Co. v. Miller, 510 U.S. 443, 455 (1994).

¹¹⁴ See *id.*

¹¹⁵ See Matthew R. Pickelman, Comment, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time?*, 64 J. AIR LAW & COM. 273, 304 (1998).

¹¹⁶ See Brashear, *supra* note 46, at 22.

¹¹⁷ See *supra* text accompanying note 70.

¹¹⁸ See Buff, *supra* note 16, at 1820.

¹¹⁹ See *id.* at 1822.

reforming the Warsaw document.¹²⁰ The DOT's request also supports the conclusion that the current IPA/MIA implementation measures fall short of meeting this important goal.¹²¹ Indeed, as the DOT proposal indicates, the MIA implementation measures have no binding effect on airlines choosing not to sign on to that specific agreement.¹²² Thus, any American passenger flying on an airline other than an MIA airline is not able to take advantage of the *lex loci domicilii* application.¹²³ The DOT's request seeks to remedy this problem.¹²⁴

The other extremely controversial addendum the DOT sought to add was a requirement that all air carriers submit to the court of the passenger's domicile: the dreaded fifth forum issue.¹²⁵ This is a bold attempt by the DOT to persuade the international community to adopt a venue-choosing system that only the United States fully supports.¹²⁶ One might tangentially note at this point that the DOT qualified its *lex loci domicilii* request by stating that it only wanted to require *lex loci domicilii* to apply to flights entering and leaving the United States, while on the fifth forum addendum, the DOT allowed for no such limitation.¹²⁷ Perhaps this confirms the suggestion that *lex loci domicilii* was less important to the United States than Mendelsohn and others believed.¹²⁸ Regardless, the DOT surely knew that the IATA would object to this addendum.

Two additional addendums were sought by the DOT.¹²⁹ First, the DOT requested that all airlines entering or leaving the United States either be party to the IATA Amendments or else assume liability for the entire flight in the case of a disaster.¹³⁰ Second, the DOT "proposed establishing a requirement that air carriers make previously existing liability provisions, which were more

¹²⁰ See *supra* text accompanying note 96.

¹²¹ See *supra* text accompanying note 98.

¹²² See Buff, *supra* note 16, at 1821.

¹²³ See generally *id.* (discussing DOT requests with respect to *lex loci domicilii*).

¹²⁴ See *id.*

¹²⁵ See *id.* at 1820-21.

¹²⁶ See Mendelsohn, *supra* note 70, at 1076.

¹²⁷ See DOT Order No. 96-10-7 (Oct. 7, 1996), available in 1996 WL 563872 [hereinafter "show cause order"].

¹²⁸ See *supra* text accompanying notes 90-99.

¹²⁹ See Buff, *supra* note 16, at 1822.

¹³⁰ See *id.* Interestingly enough, the United States only requested that the airlines entering the country be party to the IATA General Agreement and not the IPA implementation measures. See *id.* One possible explanation for this is that the United States was satisfied that MIA airlines would sufficiently protect United States passengers as long as the first addendum was also added to the IATA Agreement.

generous than those required by the IATA Inter-carrier Agreements, available to passengers traveling to or from the United States."¹³¹

According to at least one author, this "IATA derailment by the United States was a significant concern industry-wide."¹³² Why were the DOT's addendums considered a "derailment" of the IATA proposals? The DOT's opposition repeated many of the arguments presented above, objecting to *lex loci domicilii* and the fifth forum provisions; they claimed that article 28 of the Warsaw Convention prevented any creation of a "fifth forum" by the DOT, IATA, or any other organization and that the *lex loci domicilii* requirement could be cost prohibitive to regional airlines.¹³³ In addition, the IATA argued that it had no power under the Warsaw Convention agreement to force all airlines entering or leaving the United States to be party to the IATA amendments or assume all liability.¹³⁴ Specifically, the IATA argued that article 30 prevented such a request and only after an amendment to the Warsaw Agreement itself could such a request be legal.¹³⁵ Ironically, even the IPA signatories complained about the suggested DOT addendums because they believed that "approval of its implementation agreement without conditions would permit signatory air carriers to offer immediate benefits to passengers."¹³⁶ Clearly, the battle lines had been drawn.

The DOT suddenly found itself looking like the bad guy of the international air community, a position it somewhat tried to remedy when it agreed to delay discussion on all of its requested addendums with the exception of one: *lex loci domicilii* for all aircraft entering or leaving the United States.¹³⁷ The DOT was speaking loud and clear as it considered *lex loci domicilii* an important issue. The issue was so important that the DOT was willing to temporarily forget about its other objections and ratify the IATA/IPA Amendments if the *lex loci domicilii* addendum was agreed to by the international community.¹³⁸

Much to the IATA's credit, it did not budge from its position. It reasserted the argument that the *lex loci domicilii* provision would be cost prohibitive and added that the IATA would run the risk of losing signatory airlines generally (including MIA and non-implementation signing airlines) if the *lex loci*

¹³¹ *Id.*

¹³² Staton, *supra* note 4, at 1111.

¹³³ See Buff, *supra* note 16, at 1823.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ *Id.*

¹³⁷ See *id.* at 1825.

¹³⁸ See *id.*

domicilii provision was accepted.¹³⁹ Finally, on January 8, 1997, the DOT conceded to delay its request for the *lex loci domicilii* addendum.¹⁴⁰ The DOT approval, however, was only temporary, and the IATA Amendments were to be reviewed no later than June 30, 1998.¹⁴¹ On August 24, 1998, the DOT issued an order extending this deadline for review to September 30, 1999, and noted that "much work remains to be done if voluntary adherence to the IATA Agreements is to constitute the means of preserving the Warsaw System."¹⁴² The DOT has a long way to go in a short period of time if the Warsaw Doctrine is to survive into the 21st century.

B. The European Community

The European Community (EC) provides an entirely different set of challenges to successful IATA implementation.¹⁴³ These different challenges can be greatly attributed to Europe's diversity. While the United States consists of fifty tightly-woven states that are accustomed to dealing with the international community as one consolidated unit, many European countries, including those belonging to the EC, have established their own unique systems for dealing with the inadequacies of the sixty year-old Warsaw Agreement.¹⁴⁴

1. The Warsaw Agreement in Europe Before the IATA Amendments

As early as 1985, the members of the EC realized that the Warsaw Convention (as amended by the Hague Protocol) was destined for failure if changes were not soon implemented.¹⁴⁵ Italy shocked the international air community on May 2 of that year when it withdrew from the agreement.¹⁴⁶ Specifically, the Italian courts declared that liability limits for personal injury or death as laid down by the Warsaw Convention and amended by the Hague

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 1825-26.

¹⁴¹ See Staton, *supra* note 4, at 1112.

¹⁴² Order Extending Discussion Authority, Order 98-8-28, Dep't Transp., Aug. 28, 1998, at 1, available in 1998 WL 527097.

¹⁴³ See generally Bertucci, *supra* note 110, at 19 (outlining the various decision-making groups analyzing the liability limits).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 12.

¹⁴⁶ *Id.* at 12 n.2.

Protocol were unconstitutional.¹⁴⁷ Further, the Italian legislature decided to oblige "all carriers whose routes have a departure or a landing within Italian territory to cover their liability for at least 100,000 SDR . . . per passenger in order to benefit from the limitations laid down by the Warsaw Convention."¹⁴⁸ In essence, the Italians implemented in 1985 what the IATA and the United States could not implement until ten years later.¹⁴⁹

Approximately eight years after Italy's drastic action, the remaining European countries seemed to awaken to the problems that the Warsaw Agreement posed for them.¹⁵⁰ The timing of Europe's awakening was neither the result of random decision making nor the result of great, painstaking research. Instead, it was the Japanese Initiative of 1992¹⁵¹ (to be discussed later) that prompted the EC to seek modification of the Warsaw Agreement.¹⁵²

The EC's modification efforts began on January 18, 1993, when all EC heads of state, with the addition of Norway and Sweden, met in Brussels to discuss the current problems with the Warsaw Agreement.¹⁵³ Two issues quickly surfaced at the Brussels convention. First, all nations present agreed that the current mandatory liability limits were too low.¹⁵⁴ A great diversity existed between the amounts that an EC citizen could recover in a domestic air accident and what the same citizen could recover in an international accident.¹⁵⁵ Much like the United States, the EC felt that the Warsaw Agreement was disadvantaging its own citizens for the benefit of foreign air carriers.¹⁵⁶ Without question, the EC felt that it needed to put its citizens first.¹⁵⁷

In addition, the EC realized the need to have a consistent, common liability system for all European countries.¹⁵⁸ Indeed, the EC felt that if it did not act

¹⁴⁷ See *id.*

¹⁴⁸ *Id.* at 1.

¹⁴⁹ Compare *id.* at 12 n.2 with the MIA, *supra* note 49, at 1106 (declaring that the limited liability rules under the Warsaw Convention would not be invoked).

¹⁵⁰ See *id.* at 12.

¹⁵¹ See generally Baden, *supra* note 24, at 448-65 (providing an indepth analysis of the initiative).

¹⁵² See Bertucci, *supra* note 110, at 12.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 14.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

soon, many other European nations might follow the trend of Italy, Japan, and the United States and set out on an independent course of their own.¹⁵⁹

Why would the independent course approach be a bad idea? Two possible explanations exist: (1) the EC believed that allowing each European country to establish its own rules and guidelines in such an important area would be harmful to its political goal of unification or (2) the EC realized that the Warsaw "ideal," the concept that the entire international community benefits from unified, consistent, and neutral liability laws, was at risk, and the EC feared that a patchwork, individualized approach to solving the Warsaw Agreement's problems would ultimately result in its destruction.¹⁶⁰ Most likely, both of these explanations are correct.

Certainly, the central purpose of the 1993 Maastricht Treaty, fostering "increased cooperation and harmonization on the European level," would not have been furthered by allowing each European country to develop its own liability system.¹⁶¹ In 1993, even more so than today, both Japan and the United States, the EC's largest economic rivals, had serious doubts as to whether the Europeans would be able to take Europe's vast diversity and combine it into one unified political force.¹⁶² With such lofty political goals and extensive international doubt, there should be little wonder why "the European Commission emphasized the importance of regulation for all EC members."¹⁶³

Additionally, the Europeans, probably to a greater extent than the Americans, realized the importance of maintaining the Warsaw "ideal."¹⁶⁴ If the Warsaw Agreement was to be abandoned, then many European airlines could be forced to endure multiple litigation, much of which could be in the United States.¹⁶⁵ Further, based on the stated goals for IATA implementation, there was some indication that several nations (namely Japan and the United States) would adopt a combination of unlimited liability and strict liability,

¹⁵⁹ See *id.*

¹⁶⁰ See Bertucci, *supra* note 110, at 16 (discussing unification); see also Warren L. Dean, Jr., *Airline Liability in International Air Transportation: Time for a Change*, 4 WTR AIR & SPACE LAW. 1, 9 (1989) (stating the wide international support for preserving the Warsaw System).

¹⁶¹ Dieter Kugelman, *The Maastricht Treaty and the Design of a European Federal State*, 8 TEMP. INT'L & COMP. L.J. 335, 354 (1994).

¹⁶² See generally Matthew J. Eshelman, Comment, *The Maastricht Train: Slowing Down for Sharp Curves*, 11 DICK. J. INT'L L. 605, 624 (1993) (discussing the integration of the EC).

¹⁶³ Bertucci, *supra* note 110, at 12.

¹⁶⁴ See *supra* text accompanying notes 158-60.

¹⁶⁵ See Mendelsohn, *supra* note 70, at 1079.

whether it be within or outside the Warsaw framework.¹⁶⁶ If such a system were to be adopted, many feared that insurance premiums would skyrocket and force the smaller airlines either out of the air in the countries that adopted such systems or out of the airline business entirely.¹⁶⁷ Once again, the EC needed to demonstrate to the world that it would protect its industry.

At the same time that EC leaders meeting in Brussels, the European Civil Aviation Conference (ECAC) convened to discuss an identical issue: the soon-to-be-failure of the Warsaw Agreement.¹⁶⁸ At the conclusion of the ECAC conference, the task force agreed that the liability limits needed to be increased (the suggested increase was from 100,000 SDRs to 250,000 SDRs).¹⁶⁹ Further, the task force suggested a unique proposal whereby there would be a "prompt payment of a nonrefundable sum to an injured passenger or his nearest relative in the event of his death."¹⁷⁰ This proposal would soon become the distinguishing feature of the EC's proposal to the world.

2. *The IATA Amendments? What IATA Amendments?*

In 1995, after two years of negotiation, debate, and advisement, the EC submitted its Warsaw Agreement revisions to the world.¹⁷¹ Among the suggested modifications to the Warsaw Agreement was the implementation of a partial strict liability system, as well as the partial advance payment idea advocated several years earlier by the ECAC.¹⁷² Meanwhile, the IATA was also addressing the inadequacies of the Warsaw Convention and developing its own amendments.¹⁷³ Because the IATA Amendments covered many of the same concerns that the EC's initial proposal covered, the EC nations soon found themselves at a crossroads: Do we help develop the ECAC proposal and develop a unified liability system for European nations, or do we focus on developing the IATA Amendments and attempt to incorporate the ECAC

¹⁶⁶ See *id.* at 1075; Baden, *supra* note 24, at 455.

¹⁶⁷ See Buff, *supra* note 16, at 1825. Buff admits that many people originally thought that insurance premiums would skyrocket with a strict liability system, but now many people in the insurance industry question whether this is true.

¹⁶⁸ See *id.* at 1827.

¹⁶⁹ See *id.*

¹⁷⁰ *Id.*

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *supra* text accompanying notes 43-45.

proposal in the implementation process (much as the United States DOT did)?¹⁷⁴ Ultimately, the EC chose to take the former route.

As of the most recent report, the European Parliament is considering passing a resolution that would provide for the elimination of liability limits altogether, strict liability for damages up to 120,000 European Currency Units, the payment of a nonrefundable advance payment within ten days of an airline disaster in an amount sufficient to satisfy immediate economic need to a victim or his or her family (to be offset at final settlement), and most interestingly, the allowance of a fifth forum, the passenger's domicile.¹⁷⁵ Perhaps the most troublesome feature of the European proposal is that it would apply solely to EC member state air carriers, and it could not protect passengers on non-EC chartered flights.¹⁷⁶

The IATA was less than enthusiastic about the Europeans' competing agreement. Claiming that the "EC proposal risked complicating and counteracting already existing reform efforts" and citing the concern over problems of proof that the advance payment system might create, the IATA seems to be irritated that the EC was not patient enough to let it reform the Warsaw Agreement.¹⁷⁷ Notwithstanding the IATA's objections, the EC continues to pursue the above-described plan of action.¹⁷⁸ It is important to note, however, that most of the major European airlines have signed on to the IATA Amendments as well, via use of the MIA implementation agreement.¹⁷⁹

3. *Europe: Why A Different Course Is Needed*

Even the most optimistic supporter of the IATA Amendments would describe the status of the Warsaw Agreement in Europe as shaky at best. The Europeans seem to be developing an alternative, strictly European system of liability for international air travel. This system, if adopted, would force the amended Warsaw Doctrine off the European continent.¹⁸⁰ While it is true that the EC believes the "Warsaw ideal" is essential to the well-being of the international air community,¹⁸¹ the EC has decided that this ideal can be better

¹⁷⁴ See Buff, *supra* note 16, at 1826.

¹⁷⁵ See *id.* at 1829.

¹⁷⁶ See *id.*

¹⁷⁷ *Id.* at 1830.

¹⁷⁸ See *id.* at 1828.

¹⁷⁹ See generally Staton, *supra* note 4, at 1105 (noting that by sometime in 1997, twenty-four international carriers had signed the MIA).

¹⁸⁰ See *supra* text accompanying notes 175-179.

¹⁸¹ See *supra* text accompanying note 164.

accomplished by unifying and modernizing the international liability laws in Europe only (in contrast to world-wide modernization).¹⁸² The Europeans believe that the "Warsaw ideal" of uniformity and consistency can best be met by focusing on Europe alone. This is because Europeans are coping with several issues unique to the EC.¹⁸³

The first critical issue revolves around the problem of escalating insurance premiums.¹⁸⁴ As mentioned earlier, Europe is home to many smaller-market, smaller scale airline industries.¹⁸⁵ These airlines naturally run on a much smaller budget.¹⁸⁶ This is in sharp contrast to the United States, where most airlines are large in fleet size and financial backing.¹⁸⁷ Consequently, while the American airlines (and the United States DOT specifically) are pushing for unlimited liability for international air disasters, this could be a destructive blow to many of the smaller European airlines.¹⁸⁸ As Bruno Bertucci, head of one of Italy's largest airline insurers notes:

Any increase in liability limits would produce an increase in insurance costs, which would be substantial in the case of unlimited liability. However, it is almost impossible for an insurer to predict an increase in costs on a hypothetical basis. The cost depends on the airline considered and its scope of operation.¹⁸⁹

This point is furthered by the Chairman of the Aviation Insurance Offices' Association, who said that "it [was] impossible to quantify the exact increase the insurance industry could face in passenger liability claims, but estimates the increase at \$300 million annually."¹⁹⁰

Fortunately, the recent Swissair Flight 111 crash has suggested otherwise. Even though up to sixty-four percent of the insurance underwriters' estimated written premiums for 1998 will be consumed in compensation of Swissair

¹⁸² See *supra* text accompanying note 176.

¹⁸³ See Bertucci, *supra* note 110, at 16-18.

¹⁸⁴ See *id.* at 17.

¹⁸⁵ See G. Porter Elliot, *Antitrust at 35,000 Feet: The Extraterritorial Application of United States and European Community Law in the Air Transport Sector*, 31 GEO. WASH. J. INT'L L. & ECON. 185, 230 (1998).

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See Bertucci, *supra* note 110, at 17.

¹⁸⁹ *Id.*

¹⁹⁰ Fincher, *supra* note 7, at 310.

victims' families, market executives predict that the accounts renewing during the fall of 1998 will have little problem in reducing their premiums by up to thirty percent.¹⁹¹ Thus, if these predictions prove correct and if the insurance premiums do not escalate in the aftermath of the first crash after the IATA amended the Warsaw Doctrine, then experience may help to alleviate this concern for the Europeans.

Notwithstanding this possibility, Bertucci recommends an alternate solution: "the best choice for the EC countries would definitely be to find an approximate level of limitation and a reasonable way to revise the limits periodically."¹⁹² Unfortunately, Bertucci may also be mistaken on this point.¹⁹³ The IATA Amendments (as influenced by the United States DOT, American air carriers, and the success of the Japanese Initiative) have as their cornerstone unlimited liability.¹⁹⁴ Further, all indications from the United States continue to suggest that the unlimited liability ideal is essential to that country's continued participation in the Warsaw agreement.¹⁹⁵ Finally, even if the United States did not stand in the way of Europe imposing its regional ideals on the IATA Amendments, the last two years of negotiations and amendments show that the proposed European goal may be impossible within the Warsaw framework.¹⁹⁶

There is no possible way that the Warsaw Doctrine can adopt a system where there is a "reasonable way to revise the [liability] limit periodically."¹⁹⁷ Indeed, the Warsaw Agreement has nearly been destroyed during each of the last four decades because the doctrine is so inflexible.¹⁹⁸ The reasons for this inflexibility can be debated: each nation's compensation system may be too inconsistent with every other nation's interest;¹⁹⁹ the doctrine's age might

¹⁹¹ See Lenkus, *supra* note 1, at 2.

¹⁹² Bertucci, *supra* note 110, at 17.

¹⁹³ The idea that Bertucci somehow reached the wrong conclusion about the adaptability of the Warsaw Doctrine is of no surprise and is of little significance when evaluating the European concerns which he submits. One must remember that Bertucci wrote this article in 1994, which was more than one year before the actual IATA Amendments surfaced. In addition, it was written approximately two years before the DOT strongly supported unlimited liability. Thus, what might have seemed possible within the confines of the Warsaw Doctrine in 1994 might not seem possible today.

¹⁹⁴ See Mendelsohn, *supra* note 70, at 1075; see also Baden, *supra* note 24, at 455 (explaining that cultural reasons and a serious airline crash in 1985 both contributed to the need for unlimited liability).

¹⁹⁵ See Mendelsohn, *supra* note 70, at 1075.

¹⁹⁶ See Buff, *supra* note 16, at 1830.

¹⁹⁷ Bertucci, *supra* note 110, at 17.

¹⁹⁸ See Atherton, *supra* note 27, at 408.

¹⁹⁹ See Bertucci, *supra* note 110, at 18 (discussing social security systems).

finally be rearing its head regarding damage limitations,²⁰⁰ the original doctrine's language pertaining to liability limits may have been mistranslated.²⁰¹ Regardless, the Warsaw Doctrine has proven nearly impossible to alter.

When the doctrine has been altered, as in 1995, some nations were offended and threatened to withdraw if their interests went unaddressed.²⁰² How could the Warsaw Agreement encompass a system that asks for a limit to be reasonably revised periodically?²⁰³ The answer is that it probably could not. Thus, unless the Swissair disaster proves the EC's fears about escalating insurance premiums to be wrong, the EC will most likely continue to look outside the Warsaw system and develop a pact with selected countries whose interests are identical to its own. Only under this approach can Europeans hope to avoid costly unlimited liability (because all nations in the European "pact" are concerned about the smaller airlines) and hope to develop a system where the liability cap could easily be adjusted to adopt to the current economic situation.

The second European concern that an international airline liability system must account for is the role of the state social security systems.²⁰⁴ As Bertucci points out, these schemes play a very important role in the settlement of liability claims, so much that "[q]uite often social security programs are entitled to claim reimbursement in respect of the benefits or the payments made to victims or their next of kin up to total indemnity that should be paid by carriers and insurers."²⁰⁵ Although the nature and procedure for reimbursement varies from country to country, this uniquely European issue poses some interesting considerations that must be accounted for in establishing a system of liability for international air disasters.²⁰⁶ Of primary importance is the

²⁰⁰ See Staton, *supra* note 4, at 1086.

²⁰¹ See Caplan, *supra* note 17, at 13.

²⁰² For example, the United States threatened to withdraw from the doctrine in the 1960s. See *supra* text accompanying note 29.

²⁰³ See *supra* note 193.

²⁰⁴ See Bertucci, *supra* note 110, at 17.

²⁰⁵ *Id.* at 18.

²⁰⁶ According to Bertucci, the following countries take the following approaches:

(1) France: Social security must be reimbursed up to the total amount which the air carrier is liable for, with the exception of any damages paid by the carrier for moral damage or physical impairment.

(2) Germany: Social security is entitled to reimbursement for all damages which is later paid by the airline.

(3) Italy: Social security reimbursement sums are deducted from

discouraging effect that the state social security system will have on the settlement of claims. If the air carrier (or the carrier's insurer) is only required by law to pay for the amount not covered by social security, why would a carrier ever want to pay a claimant in advance of a trial determining the social security payment amount?²⁰⁷

This very problem could suggest the logic behind the non-refundable sum component in the EC proposal. If air carriers are required to pay an amount to the victims before any determination of social security payment has been reached, then carriers cannot totally avoid liability simply by waiting for the actual trial to occur.²⁰⁸ Although admittedly the non-refundable sum approach only pays the victims and their families a marginal amount, this might be seen as a step towards avoiding the social security dilemma that most European nations face.²⁰⁹ Moreover, because the United States has no comparable social security system to reimburse the families of injured victims, it is not forced to deal with the problems of carriers and insurers stalling litigation for this reason. This analysis highlights the EC's need to have an agreement that is separate from the Warsaw Pact. Interestingly, the non-refundable sum could actually slow the resolution process and harm the policy goals of the United States.²¹⁰ The "social security difference" may be too distinct to encompass the EC and the rest of the world in one cohesive and workable agreement.²¹¹

the final settlement between the airline and the victim's family, not exceeding the total amount of the settlement itself. Physical impairment and moral damages are excluded.

(4) Netherlands: All social security payments must be taken into account when assessing how much to pay the claimant.

(5) Portugal: All amounts paid by social security are deducted from the amount paid to the claimant.

See id. at 18.

²⁰⁷ For example, the Netherlands has such a structure currently in place. *See id.*

²⁰⁸ Bertucci states that currently in a system that does not require advance payments, "carriers and insurers may refrain from settling any claim" because they wait until the state social security pays. *Id.*

²⁰⁹ The social security system is entitled to reimbursement from the carrier in cases of willful and wanton misconduct. *See id.* However, it is hard to prove willful and wanton misconduct of an airline. *See supra* text accompanying notes 15-22.

²¹⁰ The non-refundable sum could potentially allow airlines (as well as the American court system) to justify delays in settlement actions by claiming that the families of the victims have already been paid an amount sufficient to sustain daily living, thus removing some of the urgency from the dispute resolution process.

²¹¹ Clearly, some within the EC believe that its concerns are better addressed by a separate agreement. *See supra* text accompanying note 176.

The final European concern is the threat posed by a strict liability regime.²¹²

In the United States, it is quite common for passengers and next of kin to pursue their claims against the carrier and the manufacturer simultaneously to achieve full compensation. On the other hand, in Europe the airline usually is the consumers' target . . . If carriers had to facilitate settlements under a strict liability regime, their rights to subrogate against other possible liable or responsible parties would have to be preserved. This issue may well lead to serious problems.²¹³

The "serious problem" is the United States' contractual waiver laws.²¹⁴ Unlike the EC, which has a law stating that the producer of an airplane cannot contractually limit or exclude itself from potential liability, the United States has no such law.²¹⁵ Thus, if a strict liability system is adopted and a European air carrier is the only party sued by the passenger, that carrier will be forced to fully compensate the victim and then seek contribution from the producer of the airline.²¹⁶ There is no problem if the suit is brought in Europe or if the producer of the airplane is European because contribution will be allowed.²¹⁷ Unfortunately, a great majority of the aircraft flying today are produced in America.²¹⁸ If the European carrier wanted to seek contribution, then it would have to sue the American producer, most likely in the United States.²¹⁹ The United States, however, allows producers to limit or exclude themselves from liability, thereby causing the European carrier to get stuck with the bill for all liability incurred in the accident. While this is not of great concern for the United States (because both the carrier and the manufacturer are usually sued at the same time), this poses economic disaster for European airlines that are often the only defendant sued.

One might attempt to counter this European concern by recalling that the IATA Amendments (via the implementation agreements) seek to limit strict

²¹² See Bertucci, *supra* note 110, at 18.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ See *id.* at 18.

liability at \$150,000.²²⁰ Also recall, however, that there are serious questions as to whether this strict liability cap is really a cap at all. The article 20 limitations seem to create a nearly impossible standard of proof for the airline.²²¹ Thus, the IATA Amendments' position on strict liability could knock many smaller-market European airlines out of business.²²² The EC cannot, and will not, allow this to happen.

C. Japan

Several years ago, a much greater portion of this Note would have been dedicated to discussing the "Japanese Initiative," which was a voluntary movement in 1992 by ten Japanese airlines to waive all liability limits for international air disasters.²²³ For the first time in the history of the Warsaw Doctrine, article 22 of the agreement was invoked. Article 22 gives airlines the freedom to opt out of the liability limits imposed by the Warsaw Convention if they choose to privately offer higher liability limits.²²⁴ A great majority of literature has been dedicated to the effects of the Japanese Initiative on the Warsaw Convention Doctrine, but many of these questions have now been resolved due to the recent IATA Amendments, the United States DOT's proposal, and the EC proposal.²²⁵ This Note will therefore not discuss the effects that the Japanese Initiative had on the entire airline industry as they are readily apparent.

1. Why the Japanese Initiative Came About

The Japanese wanted to alter the existing liability limits imposed by the Warsaw Convention. They were equally dissatisfied, if not more so, than the United States and Europe in feeling that injured passengers in international air travel were being greatly undercompensated for injury.²²⁶ The Japanese, however, acted radically in 1992, over three years before any other nation took action, to remedy the major fault of the Warsaw Doctrine.

²²⁰ See *supra* text accompanying note 77.

²²¹ See Kreindler, *supra* note 13.

²²² See Brashear, *supra* note 46, at 21.

²²³ See Baden, *supra* note 24, at 453.

²²⁴ See *id.* at 454.

²²⁵ See generally *id.* at 456-59 (summarizing the effect of the Japanese initiative).

²²⁶ See *id.* at 454.

Two reasons underlie the Japanese decision to act. First, the Japanese had recently endured a devastating domestic air disaster.²²⁷ The disaster prompted discussion concerning the great inequity of compensation that existed between disasters occurring domestically and those on international flights.²²⁸ The Japanese could neither explain nor justify why citizen A's life was worth \$1.5 million on a flight from Tokyo to Osaka, but on a flight from Tokyo to New York, citizen A was only worth \$75,000.²²⁹ The very thought that families of the victims of the 1985 crash could only receive \$75,000 per victim from the airline carrier scared the Japanese into acting.²³⁰

The second and more prominent reason the Japanese acted three years prior to any other nation is best described by Naneen Baden:

In Japan, the tradition is to deal with conflicts through social arrangements. Civil disputes are taken to court only as a last resort. The Japanese prefer a less adversarial process than litigation, valuing "harmony and compromise" to reach agreements that collectively benefit Japanese society. Because of the availability of mediation, and the far-reaching interdependent relationships characteristic of Japanese society, fewer benefits are achieved by litigation. . . . Taking someone to court in Japan constitutes a "breach of the community harmony" as a lawsuit evidences a "miscarriage of the social process." . . . Settlements [for the 1985 crash] averaged \$800,000 U.S. per passenger. This settlement figure established a legal precedent for compensation under Japanese law. After this precedent was set, it would have been dishonorable for Japanese airlines to continue operating under the liability limits set by the Warsaw Convention.²³¹

Therefore, between the 1985 crash and the community standards underlying the Japanese legal process, it is clear why the Japanese acted as they did in 1992.

²²⁷ In 1985, a Japan Air Lines Boeing 747 crashed, killing 529 passengers. *See id.* at 453.

²²⁸ *See id.*

²²⁹ *See* Panel Discussion, *The Japanese Initiative: Absolute Unlimited Liability in International Air Travel*, 60 J. AIR L. & COM. 819, 851 (1995).

²³⁰ *See id.*

²³¹ Baden, *supra* note 24, at 453-54 (footnotes omitted).

2. *The Japanese Initiative: Good for Japan Alone?*

In a speech before the New York County Law Association in 1995, George Tompkins had this to say about the Japanese Initiative:

The Japanese Initiative is a great step forward but we have to find some better way. The better way is to denounce the Warsaw Convention. We don't need the Warsaw Convention. We don't need it for choice of law We get along without it in handling domestic cases. It serves no purpose whatsoever . . . We should denounce [the Warsaw Convention].²³²

Tompkins, a well-respected American expert in the field, speaks harshly about the proposal. His main concern is the very reason why the Japanese are so thrilled with the initiative: it encourages settlement and decreases lawsuits.²³³ As Tompkins accurately observes, a great amount of the litigation surrounding an air disaster pertains to the air carrier's liability.²³⁴ Thus, if the liability amount were collectively agreed upon (as has been the case in Japan), there would be little need for public investigation.²³⁵ This is a horrible possibility according to Tompkins, because when an international air disaster lawsuit takes place, "[w]e ha[ve] a chance to examine what went wrong, we ha[ve] a chance to focus on fault, and we ha[ve] a chance to focus on causation in a way that has made, and will continue to make, aviation safer."²³⁶

What makes Tompkins so sure that the Japanese Initiative encourages massive settlements? The answer lies in an unwritten, but commonly agreed upon, code within the Japanese Initiative: each airline will compensate an individual's family for loss of life in an amount entirely consistent with every other airline that is part of the initiative.²³⁷ Without this presumption, how could Tompkins be upset? Surely he does not think that removing the liability cap in and of itself automatically transforms the world into one where all injured parties settle and live happily ever after. Quite the opposite. Tompkins possibly recognizes the social and political culture of the Japanese

²³² Panel Discussion, *supra* note 229, at 831.

²³³ See Baden, *supra* note 24, at 453.

²³⁴ See Panel Discussion, *supra* note 229, at 837.

²³⁵ See *id.* at 830.

²³⁶ *Id.*

²³⁷ See generally Baden, *supra* note 24, at 454 (noting the Japanese tradition of operating in social harmony and favoring settlement over litigation).

and realizes that, if this culture were not in place, the Japanese Initiative would have been considerably more strict and definite in determining the exact amount of liability per human life lost in an international air disaster.²³⁸ With such an implication in place (all airlines will compensate equally), there is no way that the Japanese Initiative could ever become a part of the Warsaw Doctrine.²³⁹ Unfortunately, because the Japanese have been satisfied with the workings of their system since its inception in 1992, there is no reason to suspect that the Japanese will consider solving the Warsaw "problem" as urgently as other nations throughout the world.²⁴⁰

CONCLUSION

The recent Swissair Flight 111 crash provides hope to the future success of the IATA Amendments that did not exist before that deadly morning in September 1998. If the insurance industry is able to fully compensate flight victims while reducing premiums for all airlines in 1999, perhaps more nations will be inclined to implement the IPA as amended by the United States DOT. As long as the DOT, the EC, and the Japanese continue to express doubt about the remains of the 1929 Warsaw Agreement, the survival of this seventy year old doctrine is questionable. The implementation agreements (IPA/MIA)²⁴¹ remain highly contested, and the United States' participation in such agreements is tentative at best. Thus, the international air passenger cannot be certain when he purchases an international airline ticket six months from now whether his family will face a \$75,000 liability limit or no limit at all, or whether they may bring suit in his domiciled nation or have to bring suit thousands of miles from home. This is the uncertainty that the Warsaw Agreement was trying to avoid.

Due to the diversity of political interests, states may not be able to permanently unite under one agreement. International air travel is more complex than it was in 1929, as proved by the discontent among all IATA nations.²⁴² Accepting this premise, what is the alternative to the Warsaw/IATA

²³⁸ *See id.*

²³⁹ Under current United States anti-trust laws, agreements to limit liability amounts under private carriers would be illegal.

²⁴⁰ *See generally* Panel Discussion, *supra* note 229, at 825 (noting that Japan has seemingly solved the liability limitation problem, the area with which all other countries are most dissatisfied).

²⁴¹ *See supra* notes 49 and 53.

²⁴² *See* Lyall, *supra* note 15, at 67.

system? What if, notwithstanding the successful resolution of the Swissair Flight 111 disaster, the IATA Amendments fail due to lack of implementation?

The IATA must consider allowing each country to continue on its current path. As George Tompkins noted, each country seems to be handling its own domestic cases just fine.²⁴³ If inequality of liability is a concern, much of it will be alleviated by the DOT, EC, and Japanese regulations pertaining to all international flights entering, leaving, or associated with those countries. Indeed, the United States, Europe, and Japan account for a great number of international air travel in the world today. Further, when nations realize they have the liberty to pursue a liability system that can reflect their own political cultures, more nations will be likely to jump on the bandwagon. Finally, as for the countries (and airlines individually, because they are always free to opt out via article 20) who refuse to implement international air disaster agreements, market forces should push these countries and airlines out of the international air travel industry. In the end, this individualized approach will benefit the international community as a whole, and more importantly, will end nearly forty years of debate over the Warsaw Doctrine.

²⁴³ See *supra* text accompanying note 232.

