

IMPAIRMENT OF THE OPERATION OF THE WARSAW CONVENTION BY RECENT LEGISLATIVE AND JUDICIAL ACTION

I. INTRODUCTION

The Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly known as the Warsaw Convention,¹ is one of the most widely accepted and, at the same time, most heavily criticized of all private international agreements.² The principal effect of the Warsaw Convention is that, when applicable,³ it limits the liability of air carriers for damages

¹ The Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1929) [hereinafter cited as Warsaw Convention]. The Warsaw Convention was the result of conferences held at Paris in 1925 and Warsaw in 1929. The United States was not an official party to the conferences; however, it acceded to the Warsaw Convention in 1934 following the advice and consent of the Senate. For an excellent discussion of the history of the Warsaw Convention and the events which led to the various documents which have modified the original agreement, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

² The Warsaw Convention has been ratified by 117 countries. Only the United Nations Charter has been accepted by more nations. The parties to the Convention are listed in COMMONWEALTH OF AUSTRALIA GAZETTE G18, May 8, 1979, at 16.

Although many aspects of the Warsaw Convention have been subject to controversy over the years, the bulk of the criticism has been directed at those provisions which permit air carriers to limit their liability for damages arising out of international air travel. See generally Hollings, *Defeat of the Montreal Protocols: Victory for Airline Passengers*, 19 TRIAL 21 (May 1983); Moller, *The Warsaw Convention: Can it Survive?*, reprinted in 129 CONG. REC. §2272 (daily ed. March 8, 1983); Podgers, *Aviation Law: Changes in the Wind?*, 11 BRIEF 26, 26-31 (1982); Hollings, *Montreal Protocols: A Threat to the American System of Jurisprudence*, 18 TRIAL 69, 69-70 (1982); Kean, *Checking the Bags: Collins v. British Airways Board*, J. BUS. L. 144 (Mar. 1982); Gerry, *Aviation Consumer Ripoff (President's Page)*, 18 TRIAL 6 (Feb. 1982); Note, *A Proposed Revision of the Warsaw Convention*, 57 INDIANA L. REV. 297 (1982); Bockstiegel, *Some Recent Efforts for a Fundamental Reconsideration of the International Aviation Liability System*, 5 ANNALS AIR & SPACE L. 17 (1980); Mateesco-Matte, *Should the Warsaw System be Denounced or "Integrated"?*, 5 ANNALS AIR & SPACE L. 201 (1980); Note, *Extension of the Warsaw Convention's Protection: Julius Young Jewelry Mfg. Co. v. Delta Airlines* (414 N.Y.S.2d 528), 5 N.C.J. INT'L L. & COM. REG. 497 (1980); Loggans, *Personal Injury Damages in International Aviation Litigation: The Plaintiff's Perspective*, 13 J. MAR. L. REV. 541 (1980); Comment, *Revised Warsaw Convention and Other Aviation Disasters*, 8 CUM. L. REV. 763 (1978); Landry, *Swift, Sure and Equitable Recovery—A Developing Concept in International Aviation Litigation*, 47 N.Y.S.B.J. 372 (1975); Note, *The Warsaw Treaty: The Quid Pro Quo*, 29 U. PITT. L. REV. 253 (1967).

³ The Convention applies "to all international carriage of persons, luggage, or goods performed by aircraft for reward." Warsaw Convention, *supra* note 1, art. 1(1).

arising out of accidents involving international flights.⁴ Most of the criticism to which the Warsaw Convention has been subjected has focused upon dissatisfaction with the limitation of liability provisions.⁵ However, many commentators have failed to note that even if the liability limits were deemed sufficient, there is a technical problem in applying the terms of the Warsaw Convention.

The technical problem is straightforward. To enforce liability limits under the Warsaw Convention, courts must have a method for converting the limit provided for in the Warsaw Convention into an equivalent amount in domestic currency. In *Franklin Mint v. Trans World Airlines, Inc.*,⁶ the United States Court of Appeals for the Second Circuit held that there was no legally valid standard of conversion under the Convention, and, consequently, the court declared the liability limits for damage to cargo unenforceable.⁷ The facts of *Franklin Mint* involved only cargo. Therefore, the court did not address whether the liability limits relating to personal injury also would be considered unenforceable.⁸ Without an officially sanctioned standard of conversion, the technical weakness identified in *Franklin Mint* could endanger the Warsaw Convention's limitation of liability for personal injury as well as the liability limits for loss of cargo.

This issue took on a new importance on March 8, 1983 when the United States Senate rejected the Montreal Protocols⁹ which

International transportation, for purposes of the Convention, means "any carriage in which, according to the contract made by the Parties, the place of departure and the place of destination, whether or not there be a break in the carriage . . . are situated . . . within the territories of two High Contracting Parties." Warsaw Convention, *supra* note 1, art. 1(2).

⁴ For an explanation of the Warsaw Convention liability limits, see *infra* notes 15-23 and accompanying text.

⁵ See *supra* note 2.

⁶ 690 F.2d 303 (2d Cir. 1982).

⁷ *Id.* at 311.

⁸ At least one district court has relied upon the reasoning in *Franklin Mint* to declare the Warsaw Convention limitation of liability for personal injury unenforceable. See *infra* note 82 and accompanying text.

⁹ Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12th October 1929 as Amended by the Protocols Done at The Hague on 28th September 1955 and at Guatemala City on 8th March 1971, done at Montreal on September 25, 1975 (ICAO Doc. No. 9417) [hereinafter cited as Montreal Protocol No. 3]; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12th October 1929 as Amended by the Protocol Done at The Hague on 8th September 1955, done at Montreal on September 25, 1975 (ICAO Doc. No. 9148) [hereinafter cited as Montreal Protocol No. 4], reprinted in C. SHAWCROSS & M. BEAUMONT, AIR LAW A242-256 (4th ed. 1982) (status as of April 1982). The Senate considered the Montreal

would have amended the Warsaw Convention. The protocols would have provided for a new standard of conversion,¹⁰ thereby resolving the issue raised by *Franklin Mint*. The technical problem presented in *Franklin Mint* is beyond the power of the Second Circuit to remedy.¹¹

If it were within the power of the court to select a new conversion standard, it is unclear whether the court would do so or whether it would allow the Warsaw Convention system of limited liability to falter because of judicial dissatisfaction with the low level of the liability limits. The widespread belief that the liability limits have become insufficient over time¹² has resulted in courts' being torn between conflicting policy goals in considering Warsaw Convention cases. They want to provide an adequate recovery for those killed or injured in aircraft accidents; however, they also understand the needs to maintain an internationally uniform treatment of claims and to shield airlines from the potentially catastrophic financial effects of liability for a major air crash. This conflict is manifested in judicial interpretation of the Warsaw Convention provisions determining whether the liability limits apply. In *Stratis v. Eastern Air Lines, Inc.*,¹³ the Second Circuit applied an unusually liberal interpretation of the ticketing provisions of the Convention to hold that the Warsaw Convention limitation of liability provisions could be applied to a passenger who was contemplating an international flight, but who held a ticket solely for domestic travel.¹⁴ The court's opinion in *Stratis* indicates support for the underlying principles of the Warsaw Convention liability limits and raises some doubts as to whether the court truly would desire to invalidate the Convention altogether.

The first section of this Note will discuss the problem presented by *Franklin Mint*. In order to discuss the technical problem raised by that case, it is useful to review the history of the use of gold as a standard of conversion in transportation conventions and to survey

Protocols on March 8, 1983. The vote was 50 in favor of ratification and 42 against. Two-thirds of the Senators present must vote affirmatively in order to ratify a treaty; therefore, the Senate's advice and consent was withheld. For the Senate's debate on the Montreal Protocols, see 129 CONG. REC. S2235-62 (daily ed. March 7, 1983) and 129 CONG. REC. S2270-79 (daily ed. March 8, 1983).

¹⁰ The Montreal Protocols would replace the use of the *franc Poincaré* with a monetary unit known as the Standard Drawing Right (SDR). See *infra* note 57.

¹¹ See *infra* note 61 and accompanying text.

¹² See *supra* note 2.

¹³ 682 F.2d 406 (2d Cir. 1982).

¹⁴ *Id.* at 412-14.

the various approaches taken by foreign courts in defining a conversion standard under the Warsaw Convention. The second section will examine the *Stratis* decision and the implications of that decision on the policy issues associated with the Warsaw Convention. Finally, this Note will analyze the prospects for a lasting solution to the confusion and debate which have surrounded the Warsaw Convention for more than fifty years.

II. THE LIMITATION OF LIABILITY PROVISIONS OF THE WARSAW CONVENTION

The original limitation of liability for personal injuries under article 22(1) of the Warsaw Convention was 125,000 francs, or approximately \$4,898. A doubling of the limit, to 250,000 francs, was agreed upon at a special diplomatic conference convened in 1955 at The Hague.¹⁵ Although the Senate Foreign Relations Committee eventually recommended ratification of the protocol which resulted from that meeting,¹⁶ it was never put to a vote before the full Senate because of objections to an accompanying proposal for mandatory insurance.¹⁷

A second increase in the limitation of liability for death and personal injury occurred in 1966 following the threatened denunciation¹⁸ of the Warsaw Convention by the Johnson administration. The United States gave notice of denunciation on November 15, 1965, to become effective on May 15, 1966. The State Department press release announcing the denunciation stated that the United States was prepared to withdraw its denunciation if, before the effective date, there was "a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of \$100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to \$75,000

¹⁵ See Lowenfeld & Mendelsohn, *supra* note 1, at 504-09.

¹⁶ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12th October 1929, The Hague, ICAO Doc. No. 7632, (1955) [hereinafter cited as Hague Protocol].

¹⁷ Senate Comm. on Foreign Relations, *Montreal Aviation Protocols Nos. 3 and 4*, S. EXEC. REP. No. 45, 97th Cong., 1st Sess. 2 (1981) [hereinafter cited as S. EXEC. REP. No. 45]. For a detailed account of the United States consideration of the Hague Protocol, see Lowenfeld & Mendelsohn, *supra* note 1, at 509.

¹⁸ As applied to treaties, the term "denounce" indicates "the act of one nation in giving notice to another nation of its intention to terminate an existing treaty between the two nations." BLACK'S LAW DICTIONARY 392 (rev. 5th ed. 1979).

per passenger."¹⁹

A special meeting of the International Civil Aviation Organization (ICAO) was convened at Montreal in February 1966 to address the problem. At that meeting, which ended in a deadlock, only one country supported the United States proposal for a limit of \$100,000, and forty countries voted against it.²⁰ Nevertheless, the United States withdrew its denunciation the day before it was to have become effective because the principal United States and foreign airlines reached a special inter-carrier agreement, popularly known as the Montreal Agreement, in which the carriers agreed to accept a liability limit of \$75,000.²¹

The liability limit for property loss has remained at 250 francs as article 22(2) of the Warsaw Convention provides. The dollar value of the limit, however, was adjusted in 1974 to reflect the devaluation of the dollar relative to gold.²²

Currently, then, the liability limits are \$75,000 per passenger for death or personal injury and \$9.07 per pound for damage or loss of property. The Montreal Protocols, which recently were rejected by the United States Senate,²³ would have raised the limitation of liability for personal injury to approximately \$117,000, with an additional \$200,000 recovery possible through a supplemental insurance plan. The liability limit for property loss would have been approximately \$17.00 per kilogram under the Protocols.

III. *Franklin Mint v. Trans World Airlines*: THE TECHNICAL PROBLEM

The limitation of liability provisions of the Warsaw Convention use the "official" price of gold as a standard of conversion to achieve uniform values for liability limits in a variety of different currencies. Although gold proved to be a satisfactory conversion standard for many years, the United States, like a number of other nations, abandoned the official price of gold in 1978. This action prompted the Second Circuit in *Franklin Mint* to declare the War-

¹⁹ 50 DEP'T ST. BULL. 923 (1965).

²⁰ S. EXEC. REP. NO. 45, *supra* note 17, at 2.

²¹ Agreement Relating to Liability Limits of the Warsaw Convention and the Hague Protocol, Civil Aeronautics Board (CAB) Agreement 18900, approved by order F-23680, May 13, 1966 [hereinafter cited as the Montreal Agreement]. For a detailed discussion of the events which led to the formation of the Montreal Agreement, see Lowenfeld & Mendelsohn, *supra* note 1, at 546-601.

²² See *infra* note 68.

²³ See *supra* note 9.

saw Convention liability limit unenforceable because of a lack of a legally enforceable standard of conversion.

A. *Historical Development of Gold as a Standard of Conversion in Limitation of Liability Clauses*

Limitation of liability clauses tied to the value of gold were used first in two conventions signed at Brussels on August 22, 1924 (1924 Conventions).²⁴ Five years later, a similar, although more specific, gold clause was included in the Warsaw Convention.²⁵ The liability limits of the 1924 Conventions were tied to the gold pound sterling,²⁶ while the Warsaw Convention limits used the French *franc Poincaré*.²⁷ Other international transport agreements have used the *franc de germinal*.²⁸

Serious problems arose under these early gold clauses as a result of provisions which permitted some countries to convert the gold liability limits into sums expressed in terms of their own currencies.²⁹ The failure of the 1924 Conventions to specify when the conversion must be made was taken by many member states to mean that it could be made at any time and that states were not required to change the amount of their currency set by domestic law, even if the value of their currency in relation to the gold stan-

²⁴ The International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels, signed at Brussels Aug. 25, 1924, and the International Convention for the Unification of Certain Rules Relating to Bills of Lading, opened for signature Aug. 25, 1924, 51 Stat. 233, T.S. No. 931 (1925) [hereinafter referred to as the Hague Rules Conventions.]

²⁵ The Hague Rules Conventions, *id.*, set a limitation of liability based on the gold value of the British pound sterling. However, they fail to specify the weight and fineness of gold which the pound sterling represents. This deficiency was corrected in article 22 of the Warsaw Convention which provides that "[t]he sums mentioned above shall be deemed to refer to the French franc consisting of 65 ½ milligrammes of gold millesimal fineness 900." Warsaw Convention, *supra* note 1, art. 22(4). Millesimal fineness 900 means 90% pure gold.

²⁶ *Id.*

²⁷ The French *franc Poincaré* was named after the prime minister in office at the time the value of the franc was set at 65.5 milligrammes of gold at a millesimal fineness 900. Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COM. 645 (1974).

It was Prime Minister Poincaré who originally requested that the First International Conference of Private Air Law, held at Paris in 1925, discuss the need to provide a limitation of liability for international air carriers. *Id.*; see also *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. 27, 30 (1932).

²⁸ The *franc de germinal* is another gold franc which derives its name from the French statute of 7 germinal in the year XI (March 28, 1803) which fixed the gold parity of the franc at 10/31 of a gram of gold millesimal fineness 900. Asser, *supra* note 27, at 646.

²⁹ *Id.* at 648.

dard of the 1924 Conventions subsequently changed.³⁰ Having adopted this position, most member nations stated in their legislation ratifying the 1924 Conventions a sum equal to the value of their currency in relation to the gold standard at the time the adopting legislation was passed.³¹ Thereafter, as the rates of exchange among the member states' currencies fluctuated, the various values expressed in local currencies lost their equality and the liability limits varied accordingly from nation to nation. The result was to provide an international environment conducive to forum-shopping.³² In an attempt to rectify this problem, provisions specifying the date of conversion were included in the Hague Protocol of 1955³³ and the Protocol to Amend the Hague Rules Convention, signed at Brussels on February 23, 1968.³⁴

Once the initial problems related to the date of conversion were settled, the gold standard proved to be a satisfactory conversion device. By the mid-1960's, however, rapid fluctuations in the price of gold on the world's free markets began to put a strain on the gold reserves of many countries.³⁵ In early 1968, a severe depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom, and the United States to agree to dis-

³⁰ *Id.*

³¹ *Id.*

³² The following is an example of the potential for forum-shopping. The Hague Rules Conventions, *supra* note 24, set a liability limit of 100 pounds sterling. The United States, in writing that limit into the Carriage of Goods by Sea Act of 1936, 49 Stat. 1207 (1936), 46 U.S.C. §§1300-1315 (1976) [hereinafter cited as COGSA], converted the 100 pounds sterling into \$500. Subsequently, the dollar parity of the pound sterling dropped from approximately \$5.00 per pound in 1936 to \$2.80 per pound by 1949. This meant that the maximum possible recovery in a British court was equal to only \$280 at a time when it was possible to obtain a \$500 judgment in a United States court. As a result, it became advantageous for owners of lost or damaged cargo carried by British vessels under bills of lading governed by both British and United States COGSAs to bring suit whenever possible in United States courts. See Asser, *supra* note 27, at 646.

³³ The Hague Protocol provides for the following sentence to be added to article 22: "Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment." Hague Protocol, *supra* note 16.

³⁴ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading Signed at Brussels on 25 August 1924, signed Feb. 23, 1968, reprinted in INTERNATIONAL CONVENTIONS OF MERCHANT SHIPPING 1388 (1973) [hereinafter cited as Protocol to Amend The Hague Rules Convention].

This protocol amends the gold clause of article IV, paragraph 5, to provide that "[t]he date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case." *Id.* art. IV, para. 5.

³⁵ Asser, *supra* note 27, at 650.

continue supplying gold to private markets.³⁶ This move by the major international banks resulted in the creation of a "two-tier" system of gold pricing—an official price set under the Bretton Woods Agreement³⁷ and a fluctuating price set on the world's free markets.³⁸

The United States abandoned the official price of gold on April 1, 1978, by repealing the Par Value Modification Act of 1973.³⁹ A

³⁶ In 1961, these banks had joined together in a multilateral agreement known as the "gold pool." The purpose of the gold pool was to stabilize the price of gold on the London market close to the price of U.S. \$35 per ounce. As the price of gold on the private market rose above that level, plus an allowed margin, these countries offered gold from their own reserves for sale on the London market, a move designed to relieve the pressure from buyers. This agreement served two purposes: it stabilized the price of gold in private trading and it provided a mechanism for supplies of newly-minted gold to enter the marketplace. The gold pool proved effective until the surge of speculative buying of gold which followed the sterling devaluation of 1967, an event which cost the members of the gold pool some U.S. \$1,500 million in gold to counteract. A renewed surge of speculative buying occurred in March 1968. This time, however, the speculation was accompanied by a widespread belief that the "official" price of gold would be raised above U.S. \$35 per ounce. The gold pool attempted to meet this new wave of buying as they had met the 1967 increase. When their effort failed to stabilize the price of gold, the seven members of the gold pool decided that they would cease selling gold from their reserves to support the private market. See Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. MAR. L. & COM. 73, 81-82 (1974); Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. INT'L L. & ECON. 323, 340 (1981); SAMUELSON, *ECONOMICS* 686-88 (8th ed. 1970).

³⁷ See Bretton Woods Agreement Act, ch. 339, §2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (current version at 22 U.S.C. §286 (1976)). By this Act, the United States accepted the Articles of Agreement of the International Monetary Fund, effective Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 266 (1947), amended by Act of July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 39 (1970), and Act of Apr. 1, 1978, 29 U.S.T. 2203, T.I.A.S. No. 8937 (1978) [hereinafter cited as the Bretton Woods Agreement]. The official price of gold at the time of the Bretton Woods Agreement was U.S. \$35 per troy ounce. This price was revised twice. See *infra* note 48.

³⁸ The gold pool agreement to halt the sale of domestic gold reserves, see generally *supra* note 36, provided, *inter alia*, that transactions among the countries' monetary authorities would be conducted at the official price of gold (then U.S. \$35 per ounce), plus or minus the prescribed margin, and that all other transactions would be carried out at free market prices. Thus, a "two-tier" system of gold pricing was established, and an issue was raised as to which was the appropriate standard of conversion under the Warsaw Convention, the official price of gold or the price on the world's free markets. See Heller, *supra* note 36, at 82; see also Kelly, *Two-Tier Gold: Who is Right?* THE BANKER 600 (1968); Gold, *supra* note 36, at 340-41.

³⁹ The last official price of gold was set at U.S. \$42.22 per troy ounce by the Par Value Modification Act, amendments, Pub. L. No. 93-110, §1, 87 Stat. 352 (1973) (codified at 31 U.S.C. §449 (1976)). In 1976, the International Monetary Fund (IMF) presented a proposal to delete gold as a monetary unit and to substitute a new unit of account known as the Standard Drawing Right (SDR). See *infra* note 57. The plan, known as the Jamaica Accords, was passed by the members of the IMF to become effective on April 1, 1978. In response, the United States passed implementing legislation which, *inter alia*, repealed the Par Value Modification Act of 1973. See Pub. L. No. 94-564, §§6, 9, 90 Stat. 2661 (1976).

number of nations joined the United States and discontinued all use of the official price of gold.⁴⁰ Following this action, which was engendered by a feeling that the official price of gold "was totally out of touch with economic and monetary reality,"⁴¹ courts around the world expressed a variety of opinions concerning the proper construction of the gold clauses contained in article 22 of the Warsaw Convention.

B. *Foreign Courts Adopt Different Conversion Standards*

Because United States courts have considered the actions of foreign courts in addressing the issue of the correct standard of conversion, a review of the various approaches which foreign courts have taken is helpful.

In India, Greece, and Argentina, courts have ruled that the free-market price of gold is to be used in determining liability limits under the Warsaw Convention. In *Kuwait Airways Corporation v. Sanghi*,⁴² the court reasoned that the wording of article 22(5), which states that "conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment," must be read to refer to the free-market price of gold because the government of India never has adopted the official price of gold as established by the Articles of Agreement of the International Monetary Fund (IMF).⁴³ *Sanghi*, however, ignores an important fact about the Warsaw Convention: the IMF formulation for the official price of gold was not conceived until 1945.⁴⁴ At the time the Warsaw Convention was drafted, its framers clearly intended the language to mean the official price of gold on the date of judgment. The court states that the Convention grants it no authority to adopt the IMF official price of gold when the government of

⁴⁰ In theory, the Second Amendment to the Articles of Agreement of the International Monetary Fund, effective Apr. 1, 1978, 29 U.S.T. 2203, T.I.A.S. No. 8937 (1978), abandoned the official price of gold for all 141 members of the IMF. In practice, however, a number of states still use gold as a reserve asset. For a detailed description of the present uses of gold as a monetary standard, see Gold, *supra* note 36, at 351-70.

⁴¹ See, e.g., *Franklin Mint v. Trans World Airlines, Inc.*, 690 F.2d at 303-09.

⁴² Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, Aug. 11, 1978) (available at the library of the University of Georgia School of Law).

⁴³ *Id.* at 3-4. The language quoted does not appear in the 1929 Convention; it was added by the Hague Protocol in 1955. Although India has adopted the Hague Protocol, the United States has not. Thus, this language is non-binding in the United States.

⁴⁴ See *supra* note 37.

India has not.⁴⁵ It failed to note, however, that the Warsaw Convention gives the court no authority to adopt the free-market price of gold as a standard of conversion.

Zakoupolos v. Olympic Airways Corporation,⁴⁶ a Greek case decided in 1972, held that the free-market price of gold must have been intended by the drafters of the Warsaw Convention because, if the official price were used, the requirement of a calculation on the date of judgment would serve no purpose since the price of gold would be steady and unchanged.⁴⁷ In so reasoning, the court failed to recall that the official price of gold was periodically subject to revision. Indeed, the official value of gold in the United States was increased twice between 1929, when the Warsaw Convention was drafted, and 1978, when the official price of gold was abandoned.⁴⁸ A more plausible explanation for the language of article 22, given the history of the application of the Warsaw Convention,⁴⁹ is that the liability limits are to be converted into local currencies based on the official price of gold at the date of judgment.

In Argentina, the court deciding the 1976 case of *Florenzia, Cia de Seguros v. Varig S.A.*⁵⁰ justified the application of the free-market price of gold by claiming that the Convention's drafters desired that the standard of conversion be tied to a currency which is defined by its metallic content only and which therefore retains its value because of its intrinsic character.⁵¹ In fact, however, the drafters of the Warsaw Convention selected gold as a standard of conversion because at the time the Convention was written the price of gold was governed and relatively stable.⁵² In light of this

⁴⁵ See *supra* note 42.

⁴⁶ (1975) RFDA 138 (No. 256 of 1974 Court of Appeals; 3d Dep't, Athens, Greece (Feb. 15, 1974)) (All-Language Services, Inc. trans. 1983) (available at the library of the University of Georgia School of Law).

⁴⁷ *Id.* at 2-3.

⁴⁸ The first increase occurred in December 1971 when the United States devalued the dollar by 7.9 percent. This resulted in a new "official" price of U.S. \$38 per troy ounce of gold. A second increase—to U.S. \$42.22 per ounce—took place in 1973. See Heller, *supra* note 36, at 83-85; see also *supra* notes 37 and 39.

⁴⁹ The early cases and literature concerning the Warsaw Convention make it clear that the official price of gold was regarded as the standard of conversion intended by the drafters. See, e.g., Clare, *Evaluation of Proposals to Increase the "Warsaw Convention" Limit of Passenger Liability*, 16 J. AIR L. & COMM. 53, 57 (1949).

⁵⁰ [1977] LaLey 135. (All-Language Services, Inc. trans. 1983) (available at the library of the University of Georgia School of Law).

⁵¹ *Id.* at 3.

⁵² Ward, *The Price of Gold and the Warsaw Convention*, 4 AIR L. 70, 71 (1979).

concern with stability, the court's choice of the free-market price of gold is questionable since, within the last decade, that price has experienced wide fluctuation.⁵³

These foreign decisions can be interpreted as judicial attempts to soften the harsh results of the low limitation of liability reached under the Warsaw Convention when the official price of gold is applied as a standard of conversion. However, the Convention itself provides no authority to adopt the free-market price of gold, and to do so is contrary to the Convention's goal of creating a stable limitation of liability on which international air carriers can rely in assessing their operations.

Adopting a different approach to the problem, Sweden,⁵⁴ the United Kingdom,⁵⁵ the Netherlands,⁵⁶ and Italy have utilized the Special Drawing Right (SDR), a unit of account established by the IMF using a pool of five currencies.⁵⁷ The Italian case of *Linee Aeree Italiane v. Riccioli*⁵⁸ illustrates the line of reasoning adopted in these countries. *Riccioli* held that the SDR was the appropriate standard of conversion as it most closely reflects the underlying intention of the Warsaw Convention that a stable standard which is easily converted into any national currency be used for determining liability limits.⁵⁹ This view is supported by the selection of the SDR for use in the Montreal Protocols.⁶⁰ Decisions such as *Riccioli* are, however, of limited value in the United States because absent formal acceptance of the SDR through ratification of the

⁵³ See STATISTICAL ABSTRACT OF THE UNITED STATES 734 (103d ed. 1982-83).

⁵⁴ Carriage by Air Act (1957), amendment to Chapter 9, §22, effective April 27, 1978, cited in *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d at 308 n.14.

⁵⁵ In the Carriage By Air (Sterling Equivalents) Order 1980, STAT. INST. 1980, Part 1, §1, at 840-41, the Parliament announced that the SDR would be used to calculate liability limits under the Warsaw Convention.

⁵⁶ *State of the Netherlands v. Giant Shipping Corp.*, 1st May, 1981, RvdW 1981, 321 (Supreme Court of the Netherlands) (All-Language Services, Inc. trans. 1983) (available at the library of the University of Georgia School of Law).

⁵⁷ Prior to 1981, the value of the SDR was related to a fixed amount of 16 currencies. On January 1, 1981, the structure of the SDR was revised so that it was made up of only five currencies—the currencies of the IMF members with the five largest exports of goods and services for the period 1975-79. In determining the value of one SDR, the five currencies are given the following relative weights: the U.S. dollar 42%, the Deutsche mark 19%, and 13% each to the French franc, the Japanese yen, and the British pound sterling. See Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. MAR. L. & COM. 1 (1981).

⁵⁸ Rome Civil Court Judgment 609/1979 (Nov. 14, 1978) (All-Language Services, Inc. trans. 1983) (available at the library of the University of Georgia School of Law).

⁵⁹ *Id.* at 11.

⁶⁰ Montreal Protocol No. 3, *supra* note 9.

Montreal Protocols, such decisions amount to judicial amendment of the Convention and therefore would violate a long-established principal of law.⁶¹

In France, an appeals court has ruled that the current value of the French franc must be used in calculating the Warsaw limits. In *Chamie v. Egyptair*,⁶² it was recognized that the official price of gold could not be utilized because it no longer had any international monetary significance.⁶³ Likewise, the court stated that the free-market price of gold was extremely volatile and therefore contrary to the purpose of article 22.⁶⁴ Egyptair included a clause on its tickets which attempted to limit the carrier's liability to U.S. \$20.00 per kilogram for international passengers and argued that its liability should be limited to this amount. The Court of Appeals of Paris responded to this argument by holding that it was illegal for Egyptair to substitute a liability limit determined by reference to a foreign currency not convertible into gold for the system of calculation provided by article 22.⁶⁵ The *Chamie* court then proceeded to apply the current French franc as a standard of conversion, even though the French franc has no legal reference to gold. No explanation was provided as to why it was acceptable for a judicial body to apply an arbitrary standard while it was not permissible for the carrier to do so contractually.

C. *United States Case Law Development*

The confusion over the conversion standard issue is not limited to foreign courts. In the United States, federal district courts have

⁶¹ The power to make a treaty is granted exclusively to the President, with the advice and consent of two-thirds of the Senate. U.S. CONST. art. II, section 2. See generally 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1 (1970). The Constitution further states that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby. . . ." U.S. CONST. art. VI, cl. 2. A statute, once enacted by the legislature, is rigid and may only be changed by subsequent action of the legislature. Holtzoff, *The Vitality of the Common Law in Our Time*, 16 CATH. U.L. REV. 23, 25 (1966). Even an obsolete statute may not be reformed by the judiciary. Davies, *A Response to Statutory Obsolescence: The Non-Primacy of Statutes Act*, 4 VT. L. REV. 203, 213 (1979) A treaty is equivalent to a statute under the United States Constitution. An obsolete treaty such as the Warsaw Convention is, therefore, equivalent to an obsolete statute and should be governed by the same prohibition on judicial reform.

⁶² Cours d'appel Paris (Jan. 31, 1981) (All-Language Services, Inc. trans. 1983) (available at the library of the University of Georgia School of Law).

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 4-5.

⁶⁵ *Id.* at 13.

been equally divided on the issue of the correct standard for determining the amount of the Warsaw Convention limitation of liability. In *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*,⁶⁶ the United States District Court for the Southern District of Texas held that the free-market price of gold is to be applied in calculating the Warsaw limits. The Eastern District of New York, however, maintained in *In Re Air Crash Disaster at Warsaw Poland on March 14, 1980*⁶⁷ that the last official price of gold was the appropriate conversion factor under article 22.

In 1974, a Civil Aeronautics Board (CAB) order instructed airlines to continue basing liability limits on the 1973 official gold standard of \$42.22 per troy ounce.⁶⁸ In light of that order, the district court which first considered *Franklin Mint*⁶⁹ held that Trans World Airlines' \$9.07 per pound limitation of liability, calculated pursuant to the CAB's instructions, was applicable.⁷⁰ The court noted that the CAB order came "as close as anything to constituting a governmental interpretation of the article 22 limitation," and, apparently under the theory that treaty-making is predominantly the domain of the executive and legislative branches, it refused to impose a contrary judicial interpretation.⁷¹ The Second Circuit, in considering the appeal of *Franklin Mint*, criticized the CAB, labeling its position as inconsistent.⁷² The CAB rejects the use of SDRs because the Senate has not approved the Montreal Protocols, said the court, while at the same time, the CAB adopts the last official price of gold—a price which has been explicitly rejected by the Congress.⁷³ The only foundation supporting the CAB's position "appears to be the law of inertia."⁷⁴ The court thus concluded that the case for continuing to use the last official price of gold "finds no support in law or logic."⁷⁵

The parties in *Franklin Mint* argued three other alternative standards for use in interpreting article 22(2): (i) the free-market

⁶⁶ 531 F. Supp. 344 (S.D. Tex. 1981).

⁶⁷ 535 F. Supp. 833 (E.D.N.Y. 1982).

⁶⁸ Civil Aeronautics Board, Order 74-1-16, Dkt. 26274, adopted Jan. 3, 1974, 39 Fed. Reg. 1526 (1974).

⁶⁹ 525 F. Supp. 1288 (1981).

⁷⁰ *Id.*

⁷¹ *Id.* at 1289.

⁷² 690 F.2d at 310.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 309.

price of gold, (ii) the exchange value of the current French franc, and (iii) the SDR.⁷⁶ The court disposed of the free-market price of gold and the current franc as possible standards with little discussion, noting only that these were never agreed to by the Warsaw Convention framers and are "gross departures" from the purposes of the Convention.⁷⁷ In rejecting the application of SDRs as a standard, the court said that since the Congress had not adopted SDRs through ratification of the Montreal Protocols, the court was without authority to do so.⁷⁸ "Substitution of a new term is a political question, unfit for judicial resolution."⁷⁹

The problem presented in *Franklin Mint* is straightforward. The Warsaw Convention contains a conversion standard based on the "official" price of gold. That price has been explicitly repealed by the Congress and a substitute standard has not been properly authorized. When a term has not been provided by the executive branch or the Senate, the court may not create a term. The Second Circuit was merely following well-established rules of law in refusing to engage in judicial treaty-making.⁸⁰

D. *Reaction to the Franklin Mint Decision*

Although the importance of *Franklin Mint* was instantly apparent to the international aviation community,⁸¹ the impact of the decision was broader in scope and came more quickly than anticipated. In less than five months, a California district court relied on the reasoning in *Franklin Mint* to declare the Warsaw Convention limitation of liability for *personal injury* unenforceable. In *In Re Aircrash at Kimpo International Airport, Korea on November 18, 1980*,⁸² the court noted that the Warsaw Convention liability limit for personal injury, like the limit for loss of cargo, was based on the official price of gold and, therefore, could not be enforced in United States courts.⁸³ The *Kimpo* decision discusses neither the existence of the Montreal Agreement nor that the limit set in that document is not tied to a gold standard.

⁷⁶ See *id.* at 310.

⁷⁷ *Id.*

⁷⁸ *Id.* at 311.

⁷⁹ *Id.*

⁸⁰ See *supra* note 61.

⁸¹ See, e.g., Hemingway, Eddy & Lev, *Liability Treaty Given Push by Court Rulings*, AIRCARGO MAG. 20 (Dec. 1982) (statements of various air transport industry officials).

⁸² 558 F. Supp. 72 (D.C. Ca. 1983).

⁸³ *Id.* at 75.

IV. *Stratis v. Eastern Air Lines*: THE PHILOSOPHICAL PROBLEM

The *Franklin Mint* decision came as a surprise; it was preceded by little serious debate in either the courts or the air transport industry.⁸⁴ The same cannot be said of *Stratis v. Eastern Air Lines*. Many of the policy considerations which influenced the *Stratis* decision have been the subject of debate for more than fifty years.⁸⁵

Before examining the *Stratis* decision, it is necessary to look more closely at the policy issues governing the outcome of Warsaw Convention cases. It is easy for a court to be dispassionate in dealing with the liability limits of article 22(2) relating to cargo. Most transportation of international cargo by air is done in a commercial context. The limitation of liability provisions merely serve to shift the burden of insurance from the carrier to the shipper, just as any commercial exculpatory clause is used to shift the burden of insurance from one party to another. In contrast, nearly all claims under article 22(1) of the Convention are brought by ordinary individuals—individuals who cannot be held to the same standards of knowledge and sophistication as a commercial enterprise. Furthermore, without the liability limits provided by the Warsaw Convention, the average level of recovery in death and personal injury cases would be exponentially higher than the average award for loss of cargo. Courts, then, are torn between conflicting policy goals in considering Warsaw Convention cases. Although they want to provide adequate recovery for those killed and injured in aircraft disasters, they also want to shield airlines from the catastrophic financial effects of a major air crash and to maintain a uniform treatment of claims in an international setting. The result has been a series of decisions which contorts the provisions of the Warsaw Convention to reach a variety of results.⁸⁶

⁸⁴ The court took judicial notice of this fact and made its ruling prospective, taking effect 60 days after the decision was handed down. *Franklin Mint v. Trans World Airlines, Inc.*, 690 F.2d at 311-12.

⁸⁵ In fact, dissatisfaction with the amount of the liability limits—one of the chief policy discussions concerning the Warsaw Convention—began as early as 1935, the year after the United States became a party to the Convention. See Calkins, *Grand Canyon, Warsaw and the Hague Protocol*, 23 J. AIR L. & COM. 253 (1956). See also Lowenfeld & Mendelsohn, *supra* note 1, at 502.

⁸⁶ A number of courts have allowed plaintiffs to recover amounts greater than the Warsaw Convention limits by adopting a number of legal theories to avoid the application of the Convention. These cases include: *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (2d Cir. 1965), *cert denied*, 382 U.S. 816 (1965), and *Warren v. Flying Tiger Line, Inc.*, 234 F.Supp. 223 (S.D. Cal. 1964), *rev'd*, 352 F.2d 494 (9th Cir. 1965) (finding that a ticket had

A. *Stratis v. Eastern Airlines and Article 3 of the Warsaw Convention*

Efstratios Stratis was a seaman on a Greek ship, the S.S. Paros. Suffering from phimosis, he requested a discharge from ship's duty, which was granted on June 23, 1975 at Baton Rouge, Louisiana.⁸⁷ His Seaman's Articles, Greek law, and the immigration laws of the United States required that Stratis be repatriated at the expense of the vessel's owner.⁸⁸ Furthermore, federal law required that Stratis make "definite arrangements" to depart from the United States before he would be allowed to enter the country from his ship.⁸⁹ Arrangements were made for Stratis to fly from Baton Rouge to New Orleans on Delta Airlines and from New Orleans to New York on the same day via Eastern Airlines. He then was to connect at New York's John F. Kennedy International Airport (JFK) with an Olympic Airways flight to Athens. Stratis was given a ticket covering only the domestic Delta and Eastern flights, although a ticket for the Olympic flight was prepared (but not validated) at the American Airlines desk at JFK. Stratis was instructed to pick it up upon arrival in New York. Unfortunately, Eastern flight 66 crashed while attempting to land at JFK, and Stratis sustained burns and a cervical fracture. As a result of the air crash and later negligent medical treatment at a nearby hospital, Stratis was rendered quadraplegic.⁹⁰

In the subsequent suit for damages, Eastern asserted the affirmative defense of limitation of liability under the Warsaw Convention and the Montreal Agreement.⁹¹ Stratis successfully moved for

not been delivered on time); *Lisi v. Alitalia-Linee Aeree Italiane, S.P.A.*, 253 F.Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968) (finding that a ticket, though delivered, contained an inadequate warning concerning the liability limits); *In Re Air Crash at Bali, Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978) (finding that the passenger's survivors were not in privity with the airline and, therefore, were not bound by the limitation in the contract); *Leroy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir. 1965) (finding that the carrier committed an act of willfull misconduct).

⁸⁷ *Stratis v. Eastern Airlines*, 682 F.2d at 409.

⁸⁸ *Id.*

⁸⁹ 8 U.S.C. §1282(a); 8 C.F.R. §252.1(c) and (d) (1952).

⁹⁰ *Stratis v. Eastern Airlines*, 682 F.2d. at 408.

⁹¹ Eastern argued that it had delivered a passenger ticket for the flight during which the accident occurred containing the required notice of liability limits and that the overall contract was one within the meaning of article 1(3) of the Warsaw Convention, which states:

(3) Transportation to be performed by successive air carriers is deemed, for purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form

partial summary judgment, striking the affirmative defense, on the ground that the Warsaw Convention was inapplicable because he was travelling on a ticket for domestic travel only.⁹² The United States Court of Appeals for the Second Circuit reversed on the issue of Eastern's Warsaw Convention defense, holding that where a prepaid ticket for an international flight has been issued though not validated or delivered, a contract for international transportation has been made and the passenger could not cancel the international portion of the journey without running afoul of his commitments to the immigration authorities, and where the passenger has been delivered a ticket from a domestic carrier that contained an adequate notice of the Warsaw system liability limitations, the passenger is assumed to know that the flight was international and that the Warsaw Convention, and thus the liability limit, is applicable.⁹³ In so deciding, the Second Circuit deviated from a recent trend by United States courts to construe article 22(1) of the Warsaw Convention so as to avoid the harsh results of its liability limits in personal injury cases.⁹⁴

The *Stratis* court's discussion of the Warsaw Convention defense focused upon the apparently contradictory language of article 3. Under article 3(1), the carrier "must deliver a passenger ticket" containing specific information before it can claim the protection of the liability limitation provided by article 22.⁹⁵ In

of a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

See *Stratis v. Eastern Airlines*, 682 F.2d at 410.

⁹² *Stratis* maintained, *inter alia*, that the ticket which had been issued to him did not meet the requirements of article 3(1)(b) because it did not list an international destination. See *infra* note 95 and accompanying text.

⁹³ *Stratis v. Eastern Airlines*, 682 F.2d at 412-13.

⁹⁴ See generally *Recent Developments in Aviation Case Law*, 47 J. AIR L. 651, 672 (1982) (citing *Manion v. Pan American World Airways, Inc.*, 80 A.D.2d 303, 439 N.Y.S.2d 6 (1981) as "one of the rare recent decisions holding the Warsaw Convention applicable." *Manion* was later reversed. 449 N.Y.S.2d 693 (Ct. App. 1982)). See also *Maximizing Passenger Recovery Under the Warsaw Convention*, 34 WASH. & LEE L. REV. 141 (1977); Comment, *supra* note 2.

⁹⁵ Article 3(1) of the Warsaw Convention, *supra* note 1, provides as follows:

For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its inter-

contrast, article 3(2) mandates that "the absence, irregularity or loss of the passenger ticket shall not effect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention."⁹⁶ The question in this case was whether the failure of Stratis' ticket to list his ultimate destination as required by article 3(1)(b)⁹⁷ of the Warsaw Convention resulted in a failure to deliver an international ticket or whether it was merely a technical irregularity which, under article 3(2), would not preclude the application of liability limits.⁹⁸ The court decided the latter, saying that the language of article 3 clearly was contradictory and could be interpreted either way.⁹⁹

The dissent found the majority's reasoning somewhat strained. Judge Newman pointed out that article 3(2) can be read so as to avoid any contradiction with article 3(1).¹⁰⁰ Article 3(1) requires that the carrier "deliver" a passenger ticket. Article 3(2) clearly can be construed to mean that once a ticket has been delivered, its subsequent "absence, irregularity or loss" does not impair the contract of transportation or remove the liability limits. Judge Newman explained that "[w]ith delivery, there is limited liability even if the ticket is later absent; without delivery there is no limitation of liability."¹⁰¹ Under this interpretation of the language of article 3, the majority's reliance on article 3(2) is misplaced. Viewed from this perspective, article 3(2) serves not as a loosening of the delivery requirement, but as a reinforcement of article 3(1).¹⁰² For the

national character;

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

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

⁹⁶ Article 3(2) of the Warsaw Convention, *supra* note 1, continues: "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." Eastern argued, and the court apparently agreed, that it had delivered "a passenger ticket" for the accident flight and that the omission of the final destination is merely an irregularity not affecting the validity of the contract of transportation (*emphasis added*). This is a curious argument in light of the statement in Judge Newman's dissent that "Eastern had no idea that Stratis was on the domestic leg of an international journey and thus had no occasion to adjust its liability insurance in light of such a circumstance." *Stratis v. Eastern Airlines*, 682 F.2d at 419 n.7.

⁹⁷ Warsaw Convention, *supra* note 1, art. 3(1)(b). For the text of the article, see *supra* note 95.

⁹⁸ *Stratis v. Eastern Airlines*, 682 F.2d at 409.

⁹⁹ *Id.* at 412.

¹⁰⁰ *Id.* at 417.

¹⁰¹ *Id.* at 419.

¹⁰² Indeed, under the generally recognized principles of treaty interpretation, article 3

ticket to be "absent" or "lost," it must first have been delivered.

The purpose of the delivery requirement of article 3 is to ensure that international passengers have notice that their flights are subject to the Warsaw Convention limitation of liability and that they have a reasonable opportunity to take precautions against that limit.¹⁰³ The *Stratis* court recognizes this purpose generally,¹⁰⁴ but gives a very limited interpretation of notice. According to the majority, the question is not whether Stratis knew that his domestic flight could be subject to the Warsaw Convention as a leg of an international flight under article 3(1), but whether he had reason to know his overall flight was international. The court then found that if Stratis did not know that his overall flight was international, he lacked a reasonable opportunity to buy insurance or take other precautions against the limitation of liability, but that if he were aware that his overall flight was international, the Warsaw Convention requires that his domestic flight be subject to the limitation.¹⁰⁵

Implicit in the holding of *Stratis* is the idea that the average airline passenger, holding a ticket for a domestic flight only, would understand that the Warsaw Convention liability limits apply to that ticket so long as the passenger had an ultimate destination in another country. While it is true that the notice of the limitation of liability which was printed on Stratis' domestic ticket did refer to any journey "involving an ultimate destination or a stop in a country other than the country of origin,"¹⁰⁶ it is unlikely that the

should be read in precisely this manner. Whenever possible, treaty provisions should be construed so as to support and explain, rather than contradict, each other. See *In re Air Crash in Bali, Indonesia*, 462 F.Supp. 1114, 1120 (C.D. Cal. 1978), citing *Bernier v. Bernier*, 147 U.S. 242 (1893); See also 14 M. WHITEMAN, *supra* note 61, at 353-58.

¹⁰³ See *Lisi v. Alitalia—Linee Aeree Italiane, S.P.A.*, 370 F.2d 508, 512 (2d Cir. 1966).

¹⁰⁴ *Stratis v. Eastern Airlines*, 682 F.2d at 411.

¹⁰⁵ See *id.* at 412.

¹⁰⁶ The Eastern ticket issued to Stratis contained two notices. The first notice read in part as follows:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. \$75,000 per passenger, and that this

average passenger would realize that the liability limit would apply to a flight which was not on his international ticket.¹⁰⁷ Indeed, it is not unreasonable to suppose that many passengers holding a ticket for a purely domestic flight might fail to read a notice entitled "Advice to International Passengers on Limitation of Liability."¹⁰⁸

The *Stratis* case is the most recent example of judicially interpreting the language of the Warsaw Convention to reach a desired outcome. In *Stratis*, the Second Circuit held that the Warsaw Convention limitation of liability for personal injury could be applied to a passenger who was contemplating an international flight, but

liability up to such limit shall not depend on negligence on the part of the carrier. The limit of liability of U.S. \$75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. \$58,000 exclusive of legal fees and costs. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. \$10,000 or U.S. \$20,000. The names of carriers, parties to such special contracts, are available at all ticket offices of such carriers and may be examined on request. Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your air line or insurance company representative.

The second notice read as follows:

NOTICE

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. See also notice headed "Advice to International Passengers on Limitation of Liability."

Stratis v. Eastern Airlines, 682 F.2d at 413.

¹⁰⁷ Consider the Second Circuit's remarks in *Lisi v. Alitalia—Linee Aeree Italiane, S.P.A.*, 370 F.2d 508 (2d Cir. 1966), on the difficulty of providing adequate notice of the applicability of the Convention to international flights:

[N]otice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights. . . . It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may recover in the event of an accident is drastically reduced.

Id. at 513. If it is "too much to expect" that passengers holding international tickets will understand the general terms of the Warsaw Convention without explicit notice, surely it is unreasonable to expect passengers holding domestic tickets to comprehend the finer technical points of the agreement. In fact, this might be one reason why the drafters of the Convention chose to require the delivery of an international ticket.

¹⁰⁸ Judge Newman suggests this argument in his dissent. *Stratis v. Eastern Airlines*, 682 F.2d at 418.

who held a ticket solely for domestic travel.¹⁰⁹ The language of the ticketing provisions is not precise and is open to interpretation by the courts. However, the purpose behind article 3 is clear: it is designed to assure that passengers have adequate notice that their flight is subject to the terms of the Convention and a reasonable opportunity to take precautions against the limitation of the carrier's liability.¹¹⁰ The interpretation of article 3 in *Stratis* is contrary to that purpose and, therefore, oversteps the bounds of acceptable treaty construction.¹¹¹

V. PROSPECTS FOR A RESOLUTION OF THE LIMITATION OF LIABILITY PROBLEM

The *Stratis* decision is merely the latest round in a debate which has existed for more than fifty years over the limitations of an air carrier's liability for personal injury.¹¹² There are almost as many opinions concerning the Warsaw system as there are observers of the international air transportation scene.¹¹³ Virtually all commentators on the regulation of international air travel, however, agree on two points: some uniform treatment of claims arising from international air transportation is needed¹¹⁴ and the liability limit set by the Warsaw system is woefully inadequate.¹¹⁵

The treatment of the Warsaw Convention by United States courts has demonstrated considerable confusion and disagreement over how the Convention is to be interpreted.¹¹⁶ This "havoc in the

¹⁰⁹ *Stratis v. Eastern Airlines*, 682 F.2d at 412-14.

¹¹⁰ See *Lisi v. Alitalia—Linee Aeree Italiane, S.P.A.*, 370 F.2d 508, 512 (2d Cir. 1966); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (2d Cir. 1965).

¹¹¹ 14 M. WHITEMAN, *supra* note 61, at 634.

¹¹² See *supra* notes 85 and 86.

¹¹³ See, e.g., *Mateesco-Matte*, *supra* note 2; Sozer, *Consolidation of the Warsaw/Hague System*, 25 MCGILL L.J. 217 (1979); Hollings, *Montreal Protocols: A Threat to the American System of Jurisprudence*, 18 TRIAL 69 (1982). Note, *The Warsaw Treaty: The Quid Pro Quo*, 29 U. PITT. L. REV. 253 (1967).

¹¹⁴ See Bockstiegel, *supra* note 2.

¹¹⁵ Dissatisfaction with the liability limits of the Warsaw Convention began to emerge as early as 1935, the year after the United States ratified the treaty. See *supra* note 85. For an excellent discussion of how inflation has dramatically enlarged the insufficiency of recovery under the Warsaw system (even under the proposed modification of Convention by the Montreal Protocols), see Comment, *supra* note 2, at 838-58.

¹¹⁶ For example, United States courts appear to have applied at least three tests to determine whether a passenger is in the process of "embarking" under article 17(1). In *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1955), a case resulting from a terrorist attack on passengers boarding an aircraft, the court adopted a tripartite test based on what the plaintiffs were doing, under whose control, and at what location. However, in another case arising from that same terrorist attack, the court in

courts"¹¹⁷ has resulted primarily from judicial reaction to the inequities of the low liability limits set by the Convention.¹¹⁸ Courts around the country have examined the purposes of the Warsaw Convention, and opinions regarding its applicability run the spectrum between two extremes. Some federal district courts seem to have adopted the position that while the limitation of liability provided by article 22 may have furthered the original purpose of providing a cost-allocation mechanism to protect a growing airline industry from the catastrophic effects of liability for a major aircraft accident,¹¹⁹ that purpose is obsolete in today's world of modern, safe jet travel.¹²⁰ The Second Circuit, however, sees this purpose of the Convention as very much intact. In reviewing Warsaw Convention cases, the Second Circuit generally has sought to allow recovery outside of the Warsaw limits, but has refused to contradict the clear language of the Convention in doing so. In *Reed v. Wiser*,¹²¹ it was acknowledged that an increase in the liability limit is needed. Nevertheless, the decision stated that "at no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters."¹²²

The difficulty, of course, is establishing precisely how large the

Evangelinos v. Trans World Airlines, Inc., 369 F.Supp. 95 (W.D. Pa. 1975), *rev'd* 550 F.2d 152 (3d Cir. 1977), applied a broad test based solely on a geographic area surrounding the aircraft to achieve an opposite result. Although the Third Circuit reversed the *Evangelinos* decision and adopted the reasoning of the Second Circuit in *Day*, the court's opinion contained a sharply worded dissent. The dissenting judges would apply a two-tiered geographical test which on its face appears more restrictive than the *Day* test. See Comment, *supra* note 2, at 831-32.

¹¹⁷ Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653, 656 (1980).

¹¹⁸ Even the *Stratis* court acknowledged the inequity of the limitation of liability; however, it maintained that "the possible unfairness of the Convention is no reason to construe it narrowly." *Stratis v. Eastern Airlines*, 682 F.2d at 412 (citing *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977)).

¹¹⁹ See Lowenfeld & Mendelsohn, *supra* note 1, at 499-500.

¹²⁰ At the time the Warsaw Convention was adopted, the Lockheed Vega, which carried six passengers with a cruising speed of approximately 120 mph and a range of only 550 miles, was the most advanced aircraft in airline service. In the years 1929 to 1936, there was approximately one fatality per 1.05 million passenger miles of air travel. By 1965, that figure had been reduced to about .55 fatality per million passenger miles, making air travel nearly twice as safe. See Comment, *supra* note 2, at 767 n.14; See also C. GIBBS-SMITH, *THE AEROPLANE: AN HISTORICAL SURVEY* 97-100 (1960).

¹²¹ 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

¹²² *Id.* at 1089.

liability limit should be. In an international setting involving nations whose standards of living range from wealthy to desperately poor,¹²³ the task is still more complicated. What might constitute a sufficient recovery for a citizen of one country could be wholly insufficient for the citizen of another. The *Stratis* case provides one illustration of the problem. In the district court's holding against the United States government, it found that the plaintiff's future expenses for attendant care in Greece over his life expectancy of 38.5 years would be \$335,230.¹²⁴ However, in Eastern's trial the jury was allowed to determine the question of costs for attendant care if Stratis remained in the United States, and the plaintiff's evidence showed that more than \$2 million would be required to provide attendant care in this country.¹²⁵ Thus, it seems clear that a sufficient recovery—one large enough to provide for a victim's future needs¹²⁶—can be more than six times as large in the United States as it is in Greece.

Finding a workable system of liability limits which adequately addresses the needs of the more than 100 signatories to the Convention has proved to be a vexing task. The Montreal Protocol No. 3 provides what is perhaps the best solution offered to date. It approaches the problem of insufficient recovery by expressly permitting nations to adopt a supplemental compensation plan (SCP), so long as the plan does not impose any additional liability on air carriers.¹²⁷ The SCP provision, contained in article 35A of the Re-

¹²³ Compare, for example, per capita income in the United States (\$8,612 for 1978) with per capita income in El Salvador (\$639 for 1978). Both nations are parties to the Warsaw Convention. (Statistics from *THE WORLD ALMANAC AND BOOK OF FACTS* 1983.)

¹²⁴ *Stratis v. Eastern Airlines*, 682 F.2d at 408.

¹²⁵ *Id.*

¹²⁶ See Comment, *supra* note 2. The authors suggest that the United States government does not approach the Warsaw Convention with this definition of a sufficient recovery. Rather, they submit that the government views sufficiency of recovery in terms of providing an adequate recovery to a large enough percentage of accident victims. *Id.* at 838-839 (citing *Hearings on Aviation Protocols before the Senate Committee on Foreign Relations*, 95th Cong., 1st Sess. 11 (July 26, 1977) (statement of Linda H. Kamm)).

¹²⁷ Article 35A of the Warsaw Convention, as revised by the Montreal Protocols, states: No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;

vised Warsaw Convention, is of fundamental importance to the United States. In fact, the Senate Foreign Relations Committee's approval of Montreal Protocols 3 and 4 is conditional upon the establishment and continued functioning of a satisfactory SCP.¹²⁸

The CAB approved the United States SCP without conducting hearings on the final draft of the plan.¹²⁹ The plan selected was put forth by the Prudential Insurance Company of America; it would cover international passengers for proven damages up to \$200,000 over the carrier's maximum liability of 100,000 SDRs (approximately \$117,000) under Montreal Protocol No. 3.¹³⁰ Thus, the total amount of damages recoverable under the Revised Warsaw System is \$317,000. To finance the SCP, each international passenger would pay a ticket surcharge of \$2.00. Funds collected from the surcharge would be used to establish a pool from which claims would be paid.¹³¹

The United States SCP has been the subject of harsh criticism and was met with staunch opposition in the Senate.¹³² The thrust of the criticism is three-fold. First, a total recovery of only \$317,000 would leave a large number of United States nationals

c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.

See Comment, *supra* note 2, at 879-80.

¹²⁸ The Protocols were transmitted to the Senate for its advice and consent in January 1977, at the end of President Ford's administration. Although hearings on the revised Warsaw Convention were held on July 26, 1977, it was not until 1981 that the Senate Committee on Foreign Relations recommended ratification of the Montreal Protocols. The Committee's support of the Protocols, however, was conditional on the "establishment and continued functioning of a satisfactory Supplemental Compensation Plan, as envisaged under Article 35A of the revised convention, to increase substantially the recoveries available to U.S. citizens." S. EXEC. REP. No. 45, *supra* note 17, at 1.

¹²⁹ Agreement to Establish Supplemental Compensation Plan Pursuant to Article 35A of the Warsaw Convention, as Amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional (Montreal) Protocol No. 3 of Montreal, 1975, CAB Agreement No. 25632, adopted July 20, 1977, Civil Aeronautics Board, Order No. 77-7-85 (July 20, 1977) [hereinafter cited as Supplemental Compensation Plan]. For the historical development of the Supplemental Compensation Plan, see Comment, *supra* note 2, at 782-84.

¹³⁰ Comments in Support of Supplemental Compensation Agreement, Before the Civil Aeronautics Board, Docket No. 28713, at 7-10 (Dec. 31, 1975) (statement of Paul R. Ignatius, Pres., Air Transp. Ass'n of America).

¹³¹ Supplemental Compensation Plan, *supra* note 129.

¹³² See, e.g., Hollings, *supra* note 2.

unable to recover the total amount of their actual damages.¹³³ Second, critics claim that unlimited insurance is available to the carriers for a per-passenger cost which is far below the \$2.00 surcharge proposed by the SCP.¹³⁴ Finally, it is noted that the SCP is not insurance, and therefore the international passenger would pay more for the privilege of recovering *proven* damages up to \$200,000 than it would cost to procure insurance for unlimited recovery.¹³⁵ The evidence supporting the claim that the surcharge is greater than the cost of insurance is contradictory and inconclusive, according to the report of the Senate Foreign Relations Committee recommending ratification of the Montreal Protocols.¹³⁶ Even if the claim were to be substantiated, however, it would call only for a re-evaluation of the SCP and not, as some have suggested, for an abandonment of the entire limitation of liability system established by the Revised Warsaw System. In any event, the issue would appear to be moot since the Senate's rejection of the Montreal Protocols makes it unlikely that the Prudential plan will ever be implemented.

VI. CONCLUSION

The *Franklin Mint* decision declares the Warsaw Convention liability limits for loss of cargo unenforceable for want of a legally valid standard of conversion. While that decision is binding only in the Second Circuit, early reaction to the opinion indicates that the Convention soon may be invalidated in other jurisdictions. Indeed, it would appear that some courts will be willing to extend the reasoning of *Franklin Mint* to find the liability limits for personal injury unenforceable as well. Selection of a conversion standard is not within the purview of the courts; it is a function of the legislative and executive branches. Therefore, should the reasoning of *Franklin Mint* be adopted widely, the rejection of the Montreal Protocols by the United States Senate will ensure that the Convention dies a swift death.

There is some evidence that the courts approve of the fundamental principles of limited liability which the Warsaw Convention

¹³³ See *Hearings on Aviation Protocols before the Senate Committee on Foreign Relations*, 97th Cong., 1st Sess., 21 (Sept. 29, 1981) (prepared statement of Alan J. Konigsberg) [hereinafter cited as *Senate Hearings*].

¹³⁴ See Hollings, *supra* note 2, at 70.

¹³⁵ See *Senate Hearings*, *supra* note 133, at 14.

¹³⁶ S. EXEC. REP. No. 45, *supra* note 17, at 7.

embodies, even though it is clear that they generally consider the amount of the limits to be too low. Just three months before it handed down its decision in *Franklin Mint*, the Second Circuit ruled in the case of *Stratis v. Eastern Airlines* that the Warsaw Convention limitation of liability for personal injury could be applied to a passenger who was contemplating an international flight but who held a ticket solely for domestic travel. The *Stratis* case represents the most liberal interpretation of the Convention's ticketing provisions ever applied to allow limitation of a recovery. In extending the amount of protection afforded the air carrier at the expense of the passenger, the court reaffirmed its approval of the concept of limited liability. As noted above, however, the courts have no power to correct a technical deficiency such as the one which has arisen over the invalidity of the Convention's gold clause. The survival of the Warsaw system of limited liability therefore rests in the hands of the legislative and executive branches. Unless negotiations are begun on a new agreement in the near future, the Warsaw system cannot survive.

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