

DOMICILE AND THE DEATH OF THE WARSAW SYSTEM: THE REVENGE OF KOMLOS

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I. INTRODUCTION

For seventy years, International air travel was governed by the 1929 International Convention for the Unification of Certain Rules Relating to International Carriage by Air; otherwise known as the "Warsaw System."¹ This multinational treaty governed liability within the airline industry, covering losses, damages, or injuries arising out of international flights.² Once considered among the oldest and most successful international treaties governing tort in this area of litigation³, it has recently been replaced by a new convention known as the "Montreal Agreement (also known as: The International Air Transport Association's Intercarrier Agreement on Passenger Liability)."

This recent development is significant because under the new agreement, the Warsaw System's creation of world wide standards for

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¹ The "Warsaw System" collectively refers to the following instruments: *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838 [hereinafter *Warsaw Convention*]; *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, 28 September 1955, ICAO Doc. 7632 [hereinafter *Hague Protocol*]; *Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, 18 September 1961, ICAO Doc. 8181 [hereinafter *Guadalajara Convention 1961*]; *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955*, 8 March 1971, ICAO Doc. 8932 [hereinafter *Guatemala City Protocol 1971*]; *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929*, 25 September 1975, ICAO Doc. 9145 [hereinafter *Montreal Protocol No. 1*]; *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955*, 25 September 1975, ICAO Doc. 9146 [hereinafter *Montreal Protocol No. 2*]; *Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971*, 25 September 1975, ICAO Doc. 9147 [hereinafter *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 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955*, 25 September 1975, ICAO Doc. 9148 [hereinafter *Montreal Protocol No. 4*].

² Andreas Lowenfeld and Allan Mendelsohn, *The U.S. and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-501 (1967).

³ Georgette Miller, *Liability in International Air Transport* (1977).

commercial international aviation has been destroyed. In place of its uniform standards, the Montreal Agreement creates individualized remedies for air victims based on the law of each plaintiff's domicile. This operates contrary to the Warsaw System's goal of encouraging uniformity in international aviation-related tort suits.

Nonetheless, this new agreement is likely to be welcomed by critics of the old "Warsaw System" who disapproved of the convention's incredibly low liability limits.

Following in the wake of *Chan v. Korean Air Lines*,⁴ in 1989, the United States Supreme Court and appellate courts issued a series of rulings which sharply limited remedies to the scope of the Warsaw Convention.⁵ This reduced judicial discretion to consider issues of notice,⁶ jurisdiction, causes of action,⁷ amount of recovery,⁸ and types of damage⁹ in attempts to avoid limitations of the treaty. For a time it appeared that American travelers would have to abide by the Warsaw System because the federal courts routinely rejected all attempts at exceeding its limits.¹⁰ In the United States, virtually all international air accident litigation since 1966 has attempted to get around the Warsaw System's limits.¹¹ In contrast to the old Warsaw System, the new Montreal Agreement makes it possible for courts to award tort damages equivalent to those in the plaintiff's state of domicile. This has created much tension in the area of international tort litigation in recent

⁴ 109 S. Ct. 1676 (1989) [hereinafter *Chan*].

⁵ L. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* (1988).

⁶ Larry Moore, *Chan v. Korean Air Lines: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention*, 13 *Hastings Int'l & Comp. L. Rev.* 229 (1990). The American rule as it is called in other countries is based upon a provision of the Montreal agreement which required that international airline tickets print the liability limits in ten point type. *Infra* note 29. Many American courts held that any deviation from this rule by the use of smaller type would result in these limits being removed and unlimited liability allowed. The Supreme Court found here that the Montreal Agreement, while it set out ticket guidelines, set no penalties for their violation. Hence the Warsaw Convention could be set aside and the lower courts could not provide remedies outside the Convention as they had no power to modify a treaty otherwise constitutional.

⁷ Larry Moore, *Air Disasters: Cause of Actions in International Aviation Under the Warsaw Convention: Burying the Ghost of Komlos*, 2 *J. Legal Stud.* in Bus. 57 (1993).

⁸ Larry Moore, *The Lockerbie Air Disaster: Punitive Damages in International Aviation*, 15 *Hous. J. Int'l L.* 67 (1993). The Second Circuit Court of Appeals held that punitive damages were not allowed under the *Warsaw Convention*.

⁹ Larry Moore, *Mental Injury and Lesion Corporelle In International Aviation under the Warsaw Convention: Eastern Airlines Inc. v. Floyd*, 22 *Acad. Legal Stud. Bus. Nat'l Proc.* 504 (1993). The U.S. Supreme Court rejected mental or psychic injury as an independent ground for recovering damages under the *Warsaw Convention*.

¹⁰ Moore, *supra* notes 6-9.

¹¹ M. Milde, *Warsaw System and Limits for Liability - Yet Another Crossroads?*, 22:1 *Annals Air & Space L.* 269, 272 (1996); Robert Hedrick, *The New Intercarrier Agreement On Passenger Liability: Is It a Wrong Step in the Right Direction?*, 21:2 *Annals Air & Space L.* 135, 137 (1996).

years.¹²

The first signs of change emerged with the U.S. Supreme Court's ruling in *In re Disaster in Lockerbie Scotland*. (hereinafter *Lockerbie I*)¹³ which marked a turning point in international air tort litigation. Cases following *Lockerbie I* subsequently led to the Montreal Agreement which codified the right of U.S. citizens and residents to carry their own liability laws with them anywhere in the world.¹⁴

In the course of discussing differences between the old Warsaw System and the Montreal Agreement, this paper will analyze the development of international air tort litigation and look to how the new agreement affects the current state of international law.

II. THE WARSAW SYSTEM AND RELATED INTERNATIONAL CONFERENCES

The Warsaw Convention grew out of the *Avant-Project*, which sought to provide uniformity in international aviation.¹⁵ It began with a proposal submitted by France at the 1925 Paris Conference on Private International Air Law.¹⁶ The conference created a special commission composed of experts who were appointed and charged with studying the problems of aviation. The commission was then to present a draft solution to these problems at another international convention specifically called to ratify such a proposal.¹⁷ The commission was called the *Comite Internationale Technique d'Experts Juridiques Aeriens* and worked on this problem for four years.¹⁸ Their final report was presented for ratification at a special conference in Warsaw, Poland in 1929.¹⁹ The treaty was ratified by member nations in October, 1929²⁰ and subsequently went into effect on February 13,

¹² Sven Brise, *Economic Implications of Changing Passenger Limits in the Warsaw Liability System*, 22:1 *Annals Air & Space L.* 121, 128 (1996).

¹³ Larry Moore, *Terrorist Airline Bombings & the Article 20(1) Defense Under the Warsaw Convention: The Lockerbie Air Disaster Reconsidered* 25:1 *Den. J. Int'l L. & Pol'y* 25 (1996). The Second Circuit greatly expanded the concept of willful conduct in allowing unlimited liability under the treaty and reversed the prior direction of the court in limiting the use of such technicalities.

¹⁴ Brise, *supra* note 12.

¹⁵ Miller, *supra* note 3, at 13.

¹⁶ *Id.*

¹⁷ Calkins, *The Cause of Action Under The Warsaw Convention*, 26 *J. Air L. & Com.* 217, 218-19 (1959). See also Minutes from the Second International Conference on Private Aeronautical Law (Oct. 4-12, 1929), at 159 (R. Horner and D. Legrez trans.) (1975) [hereinafter *Minutes*].

¹⁸ *Id.* at 281.

¹⁹ *Id.* at 227.

²⁰ *Id.*

1933.²¹

Forty-four nations were invited to attend the conference, out of which thirty-two attended. Additionally, representatives from the League of Nations²² and the International Commission of Air Navigation²³ participated. The United States made an unofficial appearance at the Conference and became a signatory to the treaty in 1934.²⁴

The purpose of the treaty was to protect the new aviation industry from enormous judgments possible in air accident litigation in a time of primitive technology.²⁵ The Warsaw Convention limited recovery for injury, death, and property loss which resulted from international flights.²⁶ Equally important, it standardized procedure for tickets,²⁷ baggage checks,²⁸ waybills²⁹, and claims for lost or damaged luggage shipped in international air commerce.³⁰

In 1947, the International Civil Aviation Organization [ICAO] replaced the Comite Internationale as the major force behind the Warsaw system.³¹ It was the ICAO that guided the treaty through subsequent changes in later conferences and meetings.³² It should be further noted that almost all of these modifications were for the sole purpose of placating the United States, which from the beginning, disapproved of the low liability limits on personal injury and death cases under the treaty.³³ Under Article 22(1) of the Warsaw Convention, the total recovery allowed was 125,000 Poincare francs³⁴ or \$8300.00 American dollars.³⁵ Internationally, the most important modifications were the Hague Protocol,³⁶ the Guatemala Protocol³⁷ and the

²¹ Lowenfeld, *supra* note 3, at 501.

²² *Minutes*, *supra* note 17, at 3.

²³ Barbara J. Buono, *The Recoverability of Punitive Damages Under the Warsaw Convention in Cases of Wilful Misconduct: Is the Sky the Limit?*, 13 *Fordham Int'l L.J.* 570 (1990).

²⁴ Lowenfeld, *supra* note 3, at 504.

²⁵ *Id.*

²⁶ *See id.* Warsaw Convention, *supra* note 1, art. 22. (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

²⁷ *Warsaw Convention*, *supra* note 1, art. 3.

²⁸ *Warsaw Convention*, *supra* note 1, art. 4.

²⁹ *Warsaw Convention*, *supra* note 1, arts. 5-16.

³⁰ *Warsaw Convention*, *supra* note 1, arts. 26 & 30(3).

³¹ Vijay Poonosamy, *The Warsaw Web*, 22:1 *Annals Air & Space L.* 209, 210 (1996).

³² *Eastern Airlines v. Floyd*, 499 U.S. 530, 541-49 (1991).

³³ Lowenfeld, *supra* note 3, at 504.

³⁴ *Warsaw Convention*, *supra* note 1. For text of article 22(1) *see supra* note 29.

³⁵ Lowenfeld, *supra* note 3, at 499.

³⁶ The 1955 Hague Protocol, Hague Proceedings, 478 U.N.T.S.371. This would have raised the treaty limits to 250,000 Poincare francs or \$16,600.00. This agreement was ratified by the other member nations in 1955, but it was so unpopular in the U.S. that it was not submitted to the Senate for

Montreal Agreement.³⁸ However, of all modifications proposed, only the Montreal Agreement³⁹ was accepted by the United States.⁴⁰ The Hague Protocol and the Guatemala City Protocols were rejected by the United States Senate.

Unlike the Hague Protocol and Guatemala City Protocols which were official government amendments, the Montreal Agreement was a private contract drafted by the member nation's airlines companies and agreed upon in 1966 for the sole purpose of keeping the United States in the Warsaw system.⁴¹ Prior to the Montreal Agreement, the United States filed an official Notice of Denunciation; the first step in withdrawing from an international treaty.⁴² This compromise required airlines to voluntarily increase their liability limits for personal injuries and death to \$75,000.00⁴³ in addition to waiving negligence defenses. Furthermore, it required airlines to accept strict liability for claims arising from international air accidents.⁴⁴ This agreement briefly satisfied the United States. However, it never eliminated attempts to evade the Convention in U.S. courts.⁴⁵

III. CAUSE OF ACTION AND DOMICILE IN TREATY AVOIDANCE

Causes of action⁴⁶ and domicile⁴⁷ are ways of evading the Warsaw

confirmation until 1961 and was still the subject of bitter debate in 1966 when the Montreal Agreement was placed into effect. It was never formally ratified in this country.

³⁷ Milde, *supra* note 11, at 272. The *Guatemala City Protocol* drafted at a special conference in 1971, called for the sole purpose of making the U.S. happy. It raised the limits to \$100,000.00. It was signed by the American delegate, but was never ratified by the U.S. Senate.

³⁸ The Conference Agreement Relating to Liability Limitations to the Warsaw Convention and the Hague Protocol, (May 13, 1966), [hereinafter *Montreal Agreement*], CAB Agreement 18900, note following 49 U.S.C.A. Sec. 1502 (approved by CAB Order E-23680), 31 Fed. Reg. 7302.

³⁹ *Infra* note 44.

⁴⁰ Miller, *supra* note 3, at 38 & 258.

⁴¹ *Id.* The United States was fully prepared to denounce the treaty unless the limits of liability were raised to at least \$100,000.00. See also *Notice Of Denunciation*, 53 Dep't St. Bull. 923, 924-25.

⁴² *Id.*

⁴³ *Id.* at 595-96.

⁴⁴ *Montreal Agreement*, *supra* note 38. Note that all further discussion hereinafter of damage limitations under the Warsaw Convention will refer to the \$75,000 limit of the Montreal Agreement; Bin Cheng, *A new Look Warsaw Convention on the Eve of the Twenty-First Century*, 22:1 *Annals Air & Space L.* 45, 46 (1966). Montreal Protocols replaced references to gold francs with a Special Drawing Rights, a currency subsequent that takes the treaty off a gold standard.

⁴⁵ Moore, *supra* note 6.

⁴⁶ Larry Moore, *Air Disasters; Cause of Actions In International Aviation Under the Warsaw Convention: Burying the Ghost of Komlos*, 2:1 *Se. J. Legal Stud. Bus.* 57(1993).

⁴⁷ Allan Mendelsohn, *Domicile and the Warsaw System*, 22:1 *Annals Air & Space L.* 137 (1996). For most of the world, domicile was a minor area of law that has now grown to great importance and dominates the treaty.

Treaty in the United States. Together they compose a two-part legal procedure in trying to circumvent limits of the Treaty. First, however, a plaintiff must show that the defendant was guilty of willful misconduct under the Convention.⁴⁸ This is because the only means to escape the treaty's limits was the willful misconduct exception of article 25(1).⁴⁹ Upon establishing willful misconduct, the plaintiff could then argue that the treaty did not apply and that the only cause of action allowed was governed by state law.⁵⁰ The plaintiff could then seek all damages allowed under the state law of his or her domicile.⁵¹

The Warsaw Convention contains no section or special language creating a cause of action for wrongful death, nor does it provide for punitive damages. As a result, courts initially misinterpreted this to mean that such claims could only be brought under state law.⁵² As a consequence, these early decisions failed to recognize preemption of state remedies by the treaty.⁵³ In early Warsaw Convention case analysis in a common law nation, the courts in a case saw no wrongful death statute in the treaty. Courts therefore assumed that wrongful death causes of action could only be brought under state law.⁵⁴

The Warsaw System became particularly difficult to enforce in the United States for three reasons. First, there was no common law precedent to support the low liability limits set by the Warsaw System. Because the United States is a common law country, its courts had difficulty finding support for the unprecedented low liability limits created by the Warsaw System. There was no equivalent limitation on recovery in American tort law. Therefore, limitations in cases of wrongful death and personal injury cases in particular, were difficult to introduce.

Second, the United States failed to adopt any supporting legislation establishing the sources of causes of action in a Warsaw System case that

⁴⁸ Larry Moore, *Terrorist Airline Bombings & the Article 20(1) Defense Under the Warsaw Convention: The Lockerbie Air Disaster Reconsidered* 25:1 Den. J. Int'l L. & Pol'y 25 (1996).

⁴⁹ *Warsaw Convention*, *supra* note 1, art. 25. (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful(sic) misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful(sic) misconduct.

⁵⁰ Note, the term "state law" when used in international matters, means national law.

⁵¹ *In re Aircrash in Bali, Indonesia* on April 22, 1974, 684 F.2d 1301 (1982).

⁵² Buono, *supra* note 26, at 593-96.

⁵³ *Komlos v. Compagnie Nationale Air France*, 209 F.2d 436 (1953).

⁵⁴ Moore, *supra* note 46, 62-64. The problem was not as severe in other common law nations. Countries such as Canada and Australia each had enacted statutes which decreed that all causes of actions as a result of an injury under the Warsaw Convention will be governed by the Convention. Both of these statutes were based on the United Kingdom's *Carriage by Air Act of 1932*. Oddly enough, this law was repealed in England in 1961. This act in effect reversed the 1932 law and reinstated the *Fatal Accidents Act of 1846* as the basis of liability.

would have supported the treaty. Following the ratification of the Convention, specific carriage by air laws were enacted in other common law nations including England, Canada, and Australia.⁵⁵ By contrast, however, the United States viewed the Warsaw Convention as a self-executing treaty. This meant that the treaty's interpretation would be left to the court rather than spelled out by the legislature in a statute.⁵⁶

Finally, the treaty was drafted in French and included some Continental legal concepts foreign to common law nations which added to the difficulty of its application in the United States.⁵⁷ A translation was prepared and approved by the Department of State. It was then submitted to the Senate along with the original French text for ratification and approval.⁵⁸ The English translation is still unofficial.⁵⁹ However, it is the English text which is used by U.S. courts in interpreting the Convention.⁶⁰

IV. TREATY INTERPRETATION

Pursuant to *Todok v. Union State Bank*⁶¹, treaties are to be interpreted liberally.⁶² However, the *Todok* Court made it clear that the reason behind advocating a liberal interpretation was to achieve the purpose of the treaty.⁶³

⁵⁵ *Id.*

⁵⁶ *Id.* at 28.

⁵⁷ *Warsaw Convention*, *supra* note 1, art. 36. This convention is drawn up in French in a single copy which shall remain deposited in the archives of the ministry of Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

⁵⁸ See also Larry Moore, *Mental Injury and Lesion* Corporelle In International Aviation Under the Warsaw Convention: Eastern Airlines v. Floyd*, 22 Acad. Legal Stud. Bus. Nat'l Refereed Proc. 504 (1993). The problem of determining what a treaty means is a relatively modern one. Historically, most treaties were drafted in Latin until the middle of the 17th century. For the next two centuries until after World War I, French was the language of treaties. It was during this period that the Warsaw Convention was drafted. As a result, there is only one authentic text of the treaty and that is the French. The problem the U.S. courts had in interpreting this statute was whether French law, and not merely the language, be considered as a basis for understanding the statute. Given an authentic translation such as the French used in this case, three schools of thought have developed in determining what the treaty was actually saying. [1] The subjective approach looked to the intention of the parties. [2] The textual approach emphasized the actual words of the treaty. [3] The teleological approach sought to interpret the treaty in light of its objects and purposes. The courts in deciding pre-*Floyd* cases have used all three methods at random and therefore there is no common pattern to the decisions.

⁵⁹ *Id.*

⁶⁰ Dana Stanculescu, *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of the Warsaw Convention: An Interpretation of Leisons Corporelle*, 8 Hastings Int'l & Comp. L.Rev. 339 (1985). See also McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. Air L. & Com. 205, 207 (1963).

⁶¹ 281 U.S. 449 (1930).

⁶² *Id.* at 452.

⁶³ *Id.*

Contrary to this rule, however, courts in the United States frequently found that there was no cause of action under the treaty. This practice was not overruled until *Benjamin v. British European Airways*.⁶⁴ According to a Second Circuit case, *Komlos v. Compagnie Nationale Air France*, the treaty only created a presumption of liability.⁶⁵ Once liability was established, however, the damages would be determined according to local law.⁶⁶

V. TURNING OF THE TIDE

The first case to look at the Warsaw Convention and whether it created a cause of action was the New York case of *Wyman v. Pan American Airways*.⁶⁷ In this case, the court was faced with determining where the plaintiff's cause of action arose in the case of an air crash occurring at sea.⁶⁸ The state's wrongful death statute did not apply at sea, and no local law addressed the issue.⁶⁹ In looking at the Warsaw Convention, the court noted that the treaty covered all areas of the accident, but held that there was no wrongful death statute present in the treaty.⁷⁰ Consequently, it decided the case according to the federal *Death on the High Seas Act*.⁷¹ However, after using this statute to establish a cause of action for the lawsuit, the court rejected efforts to exceed the liability limits of the Convention.⁷² The results reached were precisely those envisioned by the Convention.⁷³ In *Wyman*, the court stated in dictum that the Convention created no new substantive rights.⁷⁴

The next case to tackle the task of interpreting the Warsaw Convention was *Ross v. Pan American Airways*.⁷⁵ This was a personal injury case in which the court properly acknowledged the limits set by the convention. Here, the court recognized that the treaty pre-empted any local

⁶⁴ 572 F.2d 913 (2d Cir. 1978) [hereinafter *Benjamins*]. This case arose out of the crash of a Trident Jet killing 112 people. The court here, after, properly reviewing the history of the Warsaw Convention, decided that the purpose of the treaty was to establish uniformity in international air law in addition to placing limits on liability. The court further found that this could only be achieved if the Warsaw Convention was an exclusive cause of action for claims arising out of international air travel. Based upon this, the court overruled *Komlos*. The other federal circuits soon abandoned *Komlos* and adopted the new rule.

⁶⁵ 111 F.Supp 393 (N.Y.S.D. 1952) [hereinafter *Komlos*]. See also 200 F.2d 436 (2d Cir 1953).

⁶⁶ *Id.*

⁶⁷ 43 N.Y.S.2d. 420 (1943).

⁶⁸ *Id.* at 423.

⁶⁹ *Id.* at 422-23.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 423.

⁷⁵ 85 N.E.2d 880 (1949).

causes of action.⁷⁶

VI. THE KOMLOS PROBLEM

In *Komlos v. Compagnie Nationale Air France*,⁷⁷ the question of who could sue arose where someone was killed in an air crash in Portugal while on business.⁷⁸ Under Portuguese law, the estate would have the right to sue. Therefore, because the crash occurred in Portugal, the principle of *lex loci* would permit the estate to recover. Alternatively, the deceased's workers' compensation insurance carrier might also have a right to sue since they were the ones who paid death benefits to the estate and now sought to recover from the airlines under the right of subrogation.⁷⁹ Here, the issue for the court was whether the right to sue would be governed by state workers' compensation laws, by Portuguese law, or by the Warsaw Convention.⁸⁰

As a target of both suits, the airline argued that the cause of action fell within the treaty.⁸¹ Nonetheless, the court rejected this argument, stating that a wrongful death action could only be brought with explicit statutory authorization which the Warsaw Convention did not contain.⁸² It therefore concluded that state workers' compensation laws gave the right to sue to the insurer and not to the estate.⁸³

Although treaties are a federal matter, the district court here looked to the local New York case law since several cases in New York had already been brought under the Convention. In making its decision, however, the court acknowledged, but rejected the longer, well reasoned New York Court of Appeals opinions in *Ross*, and *Garcia*,⁸⁴ both of which ruled that the treaty was the sole cause of action for international air accidents involving member nations of the treaty.⁸⁵

The *Komlos* trial court also ignored the result in *Wyman*, relying instead on its dictum which stated that the Convention created no cause of action.⁸⁶ Finally, it rejected the treaty's application, concluding that the entire

⁷⁶ *Id.* at 884-85. This rule was also followed in *Garcia v. Pan American Airways*, 55 N.Y.S.2d 317(1945) [hereinafter *Garcia*] and *Salamon v. Koninklijke Luchtvaart Maatschappij*, 107 N.Y.S.2d 768 (1951).

⁷⁷ 111 F. Supp 393 (S.D.N.Y. 1952).

⁷⁸ *Id.* at 396-97.

⁷⁹ *Id.*

⁸⁰ *Id.* at 398-99.

⁸¹ *Id.* at 399.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Supra* note 75.

⁸⁵ *Id.* at 400.

⁸⁶ See *Komlos*, 111 F. Supp. at 399.

matter was one of torts.⁸⁷ In support of this conclusion it cited a letter written by Secretary of State Cordell Hull at the time the treaty was accepted under the Roosevelt Administration.⁸⁸ In this letter, Hull stated that the Convention merely created a presumption of liability.⁸⁹

On appeal, the Second Circuit never addressed the cause of action question.⁹⁰ In fact it neglected to mention the Warsaw Convention anywhere in its opinion which had reversed the lower court.⁹¹ It did, however, adopt the lower court's treaty analysis which substituted the law of Portugal for the law of New York, thereby transferring the right to sue from the insurer to the estate.⁹² Ironically, however, although the appellate decision never mentions the Warsaw Convention, it has continued to be cited as leading authority for the proposition that there is no cause of action under the Warsaw Convention.⁹³ This phantom rule lasted for twenty-one years.⁹⁴

VII. CONTROVERSY OVER ARTICLE 24

Much disagreement over the convention's interpretation arises out of a misunderstanding of article 24.⁹⁵ As drafted, article 24 read alone appears to signify that the Convention is merely a limit on damages for any cause of action used to sue air carriers. Whether the treaty was meant as a source of any right to sue, however, must be determined from the treaty as a whole in the context of its history. Original drafts of articles 26 and 27 provide proper

⁸⁷ *Id.* at 401.

⁸⁸ *Id.* at 402-03. Secretary Hull writes; "The effect of article 17 (ch.III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents..."

⁸⁹ *Id.*

⁹⁰ 209 F.2d 436 (2d Cir. 1953).

⁹¹ *Id.*

⁹² *Id.* at 438-39.

⁹³ The question was considered again in *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957). Here a corporate jet en route from New York to Venezuela crashed over the Atlantic Ocean. The plaintiffs attempted to establish jurisdiction in federal district court under the Warsaw Convention. The trial court dismissed their suit holding that the Convention created no independent cause of action and that the case should have been brought in admiralty. *See also* *Husserl v. Swiss Air Transport*, 388 F.Supp. 1238 (S.D.N.Y. 1975).

⁹⁴ *Id.*

⁹⁵ *Warsaw Convention, supra* note 1, art. 24. (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention. (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

context for evaluating the treaty.⁹⁶ One former draft of article 26 states that "... liability action may not be brought against the carrier except on the basis of this convention..."⁹⁷ However, this clause was eliminated in subsequent versions.⁹⁸ Further reading reveals that the treaty's goal was to standardize international air law.⁹⁹

As previously mentioned, the erroneous reading of the convention, permitting wrongful death claims to proceed under state law was not overruled until *Benjamin v. British European Airways*.¹⁰⁰ This case arose out of the crash of a Trident Jet killing 112 people. After properly reviewing the history of the Warsaw Convention, the *Benjamin* court decided that the purpose of the treaty was to establish uniformity in international air law in addition to placing limits on liability. The court further found that this could only be achieved if the Warsaw Convention itself was recognized as the exclusive cause of action for claims arising out of international air travel.¹⁰¹ Based on this interpretation, the *Benjamin* court overruled *Komlos*.¹⁰² Shortly thereafter, other federal circuits abandoned *Komlos* and adopted the *Benjamin* rule as precedent.¹⁰³ Most cases after *Benjamin* accepted the Warsaw

⁹⁶ Calkins, *supra* note 17, at 222 (translation). Draft submitted to the third session of Citeja, meeting in May of 1928.

Article 26 [Proposed] In case of accident, loss, damage or delay, the liability action may not be brought against the carrier except on the basis of this Convention, unless the damage arises through an intentional unlawful act as to which he bears the liability; in such case, he shall not have the right to avail himself of the provisions of this convention which exclude in whole or in part his direct liability or that derived from the errors or omissions of his servants or agents.

Article 27 [Proposed] In case of death of the person holding the cause of action, every liability action, however founded may be exercised, within the terms and limits provided by this convention, by those persons to whom such action belongs in accordance with the national law of the deceased or, in default of such law, in accordance with the law of place of his last permanent residence.

⁹⁷ *Id.*

⁹⁸ *Id.* at 226. The reporter of the Madrid meeting explains the changes as follows: "...Former Article 26 contained two ideas - first, every liability action must be brought on the basis of the convention; the second idea covered the intentional unlawful acts as to which the carrier had assumed liability. It appeared absolutely necessary to separate these two ideas. There were thus two new paragraphs. In addition, since there had been eliminated from Article 27 the part relating to the person who would be entitled to bring suit on the death of the holder of the right, the article no longer contained more than a declaration that all action must be brought on the basis of the convention. This was a repetition of the same idea contained in Article 26. The drafting subcommittee had therefore combined the two articles in a new Article 24..."

⁹⁹ *Id.* at 221, 227.

¹⁰⁰ 572 F.2d 913 (2d Cir. 1978).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982). In this case a jetliner owned by Pan American World Airways ("Pan Am") crashed in Indonesia, killing 104 passengers. The plaintiffs brought suit in California and successfully argued before the trial court that state law should apply. The jury returned a verdict of \$300,000.00 for one plaintiff and \$651,000.00 for another. On appeal, the court concluded that from the language of the treaty and the subsequent acts of Congress that it was meant to preempt state law in the area of establishing the limits of damage, and reversed the trial

Convention as the dominant cause of action which preempted local law in international air carrier suits.¹⁰⁴

*Floyd v Eastern Airlines*¹⁰⁵ offers a prime example of how the Benjamin rule changed litigation in this area. In *Floyd*, plaintiffs claimed emotional injuries and attempted to sue for punitive damages where three engines shut down on a flight from Naussau to Miami.¹⁰⁶ Plaintiffs argued that article 25(1) of the convention allowed them to claim punitive damages under state law.¹⁰⁷ In *Floyd*, however, no one was killed or injured.¹⁰⁸ Therefore the court held that the Warsaw Convention did not permit punitive damages and preempted any state cause of action.¹⁰⁹ Instead, it explained that article 17 limited claims to actual damages sustained.¹¹⁰

This rule was followed and expanded by a terrorist bombing case: *In Re Air Disaster in Lockerbie Scotland*.¹¹¹ Plaintiffs in *Lockerbie* argued that Article 25 removed liability limits for willful misconduct, thereby permitting punitive damages in their situation.¹¹² However, the court stated that the Convention's text did not contain a cause of action for punitive damages. Thus, it concluded that the removal of liability limitations under Article 25(1) did not permit such a cause of action.¹¹³ The Court held that recovery was only for "damages sustained" and denied the plaintiff's claim.¹¹⁴

In *In Re Hijacking of Pan American World Airways Aircraft at Karachi International Airport*,¹¹⁵ the court re-examined the cause of action

court decision and held the treaty created only a cause of action for the victims of the air crash.

See also *In re Mexico City Air crash* of October 31, 1979, 708 F.2d 400 (9th Cir. 1983) the Ninth Circuit went beyond the rule of *Bali*, which held that the treaty preempted state law in limiting damage awards, to the position that the treaty established an independent cause of action under federal law.

The Fifth Circuit joined this trend in the case of *Boehringer-Mannheim Diagnostics v. Pan Am*, 737 F.2d 456 (5th Cir. 1984). The plaintiffs won on the question of liability, and under Texas law this made the defendant liable for attorney's fees. On appeal, the Court held that the Warsaw Convention created the cause of action and was the exclusive remedy open to the plaintiff. It also denied attorney's fees, holding that they too were preempted by the treaty.

But see *Tokio Marine and Fire Ins. v. McDonnell Douglas*, 617 F.2d 936 (2d Cir. 1980). Judge Van Graafeiland, who dissented in *Benjamins*, wrote the majority opinion. Here the Court ruled that while there was a cause of action under the treaty, it was not exclusive. In fact, this ruling was dictum, as the issues here had little to do with any Warsaw Convention matter. The real issues were in the areas of product liability, contracts, and insurance.

¹⁰⁴ *Id.*

¹⁰⁵ 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 490 U.S. 530 (1991).

¹⁰⁶ *Id.* at 1466.

¹⁰⁷ *Floyd*, 872 F.2d at 1483.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1485.

¹¹⁰ *Id.* at 1484.

¹¹¹ 736 F. Supp. 18 (E.D.N.Y. 1990) [hereinafter *Lockerbie*].

¹¹² *Id.*

¹¹³ *Id.* at 19.

¹¹⁴ *Id.* at 20.

¹¹⁵ 729 F.Supp. 17 (S.D.N.Y. 1990) [hereinafter *Karachi*].

issue. Here, where twenty people were killed, and several were injured,¹¹⁶ the Court held that the Warsaw Convention did create a cause of action for wrongful death and personal injury.¹¹⁷ It additionally allowed plaintiffs to sue for punitive damages under the state law.¹¹⁸ In this case, the court rejected *Floyd* and created a conflict with the decision in *Lockerbie I*.¹¹⁹ This conflict between precedents was later resolved by the *Lockerbie* appeal, which was subsequently referred to as *Lockerbie II*.¹²⁰

In this appeal, the court looked to the purpose of the convention, finding that its intent was to place specific limits on the nature and amount of damages that could be recovered in air accidents except in cases of willful misconduct.¹²¹ The court established that the purpose of the treaty was to provide a single cause of action for injuries and to standardize compensation.¹²² It therefore interpreted the convention to require that state laws violating uniform compensation be preempted.¹²³ The court also found the treaty to be a complete regulatory scheme, intended to serve as an international law.¹²⁴ After a detailed analysis of articles 17, 24(2), & 25,¹²⁵ the court decided that punitive damages could not be recovered under the Warsaw Convention because they conflicted with the treaty's intent.¹²⁶ The decision in *Lockerbie II*, therefore, effectively prohibited plaintiffs from seeking any cause of action outside the scope of the convention.

VIII. CRITIQUE OF THE MONTREAL AGREEMENT

During the *Komlos* regime, U.S. plaintiffs focused on cause of action to set aside rules of the Warsaw Convention. Once the treaty was set aside, courts would then use the law of domicile to determine each plaintiff's recovery. Now, adherence to the law of domicile in international air accident cases world-wide is mandatory.¹²⁷ The result of this may be a decrease in the consolidation of airline cases for trial. This is likely since each plaintiff may

¹¹⁶ *Id.* at 18.

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.* at 19-20.

¹¹⁹ *Lockerbie I*, 736 F. Supp. at 18.

¹²⁰ 928 F.2d 1267 (2nd Cir. 1991) [hereinafter *Lockerbie II*].

¹²¹ *Lockerbie II*, 928 F.2d 1270-71.

¹²² *Id.* at 1273-76.

¹²³ *Id.*

¹²⁴ *Id.* at 1280.

¹²⁵ *Id.* at 1281-87.

¹²⁶ *Id.*

¹²⁷ *Id.* at 244-45. The problem here, however, is that the concept of domicile is different from country to country and in some nations don't recognize the concept at all.

be subject to different liability limits depending on their domicile.

In addition to complaints that the new agreement fragments former unification, others suspect that the agreement was created solely for the benefit of American citizens, since it guarantees that American citizens will never be subject to any laws other than those of the United States.¹²⁸

Finally, many in the international community believe that the Montreal Agreement was unnecessary. The Warsaw Convention which preceded it was highly respected, and its only significant flaws were its incredibly low liability limitations.¹²⁹ All that needed to be done was to raise permissible recovery amounts.¹³⁰ Many believe that the Montreal Agreement has not solved this problem, but instead has replaced a uniform system of international air law with a private piecemeal agreement permitting individualized remedies, inconsistent recovery amounts, and deregulated international air tort litigation.

IX. CONCLUSION

The new Montreal Liability Convention not only reverses this trend, but reinstates principles established in *Komlos*. Additionally, it expands the significance of domicile, making a plaintiff's domicile the basis for liability limits in each international air accident. According to Professor Sven Brise, who represents a growing school of international air transportation experts, the IATA staged a revolution that in effect wiped out all previous case law.¹³¹ Furthermore, the new agreement could operate contrary to goals of the Warsaw Convention by permitting individualized remedies rather than uniformity and standardization in air carrier litigation.¹³²

On October 31, 1995, the IATA and ICAO adopted the *International Agreement Relating to Liability Limitations of the Warsaw Convention*, and for all purposes this date marked the end of the Warsaw System,¹³³ though the formal agreement did not go into effect until 1999,¹³⁴ when it officially replaced the official terms of the Warsaw treaty.¹³⁵

¹²⁸ Brise, *supra* note 130, at 125.

¹²⁹ Ludwig Weber, *ICAO's Initiative to Reform the Legal Framework for Air Carrier Liability*, 22:1 *Annals Air & Space L.* 59, 61 (1996).

¹³⁰ *Id.*

¹³¹ Sven Brise, *Economic Implications of Changing Passenger limits in the Warsaw Liability System* 22:1 *Annals Air & Space L.* 121, 128 (1966).

¹³² *Id.*

¹³³ *Supra* note 5.

¹³⁴ *Id.*

¹³⁵ Robert F. Hedrick, *The New Intercarrier Agreement on passenger Liability: Is it a Wrong Step in the Right Direction*, 21:2 *Annals Air & Space L.* 135, 150-52 (1996).

The Montreal Agreement accomplished two goals. First, it increased the initial liability limit for death and injury from \$75,000.00 to \$145,000.00 or [100,000 Special Drawing Rights or SDR's] for all states.¹³⁶ Under the agreement, air carriers are required to agree to strict liability up to this amount.¹³⁷ Second, the new agreement set up a second tier of recovery, activated if the damages sought are above this initial amount.¹³⁸ The Montreal Agreement permits higher amounts to be awarded upon plaintiff's proof that the accident was fault of the carrier.¹³⁹ In a case of negligence, there is no limit to damage recovery.¹⁴⁰

In the United States, the new agreement will be enforced by the Department of Transportation.¹⁴¹ The agreement has also been adopted by the United Nations and has been recommended as the replacement for the Warsaw Convention.

Most importantly, the new agreement completely changes the basis for determining what liability rules should apply. The following comparison offers an example of the Montreal Agreement's impact. Article 28 of the Warsaw Treaty states:

- (1) An action for damages must be brought, at the option of the plaintiff in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business through which the contract has been made, or before the court at the place of destination.¹⁴²

Section I:4 of the IATA agreement totally changes the above section, as well as the previously discussed case law as follows. By contrast, Section I:4 of the Montreal Liability Convention states:

4. The Carrier agrees that subject to applicable law recoverable claims may be determined by reference to the law of the domicile or permanent residence of

¹³⁶ *Id.*

¹³⁷ *Id.* See also Ludwig Weber, *ICAO's Initiative to Reform the Legal Framework for Air Carrier Liability*, 22:1 *Annals Air & Space L.* 59, 62 (1996).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 21:1 *Annals Air & Space L.* 293 (1996). This agreement was made effective in the U.S. over American airlines by Department of Transportation Order 96-11-06, issued on November 12, 1996.

¹⁴² Calkins, *supra* note 20.

the passenger.¹⁴³

Under article 28 of the Warsaw Convention, domicile was only used in determining venue.¹⁴⁴ However, under the new IATA Agreement, domicile accounts for ultimate liability limits and permissible recovery. Thus, the result in each case is determined by the claimant's domicile or permanent residence. This transformed the unification attempted by the Warsaw Convention into a system of individualized remedies, allowing for different tort laws and recovery amounts to apply in the same international air accident, since liability limits were to be determined by the victim's domicile.¹⁴⁵

¹⁴³ *Supra* note 5.

¹⁴⁴ *Supra* note 146.

¹⁴⁵ Andreas Kadletz, *Passenger Domicile as a Relevant Point of Contact: Or Orbituary of Uniform Private Air Law*, 22:1 *Annals Air & Space L.* 217, 218 (1996).