# The New Montreal Liability Convention, Major Changes in International Air Law: An End to the Warsaw Convention

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*The 1929 International Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention, Warsaw Treaty, or Warsaw System), long the multinational treaty governing all liability for losses incurred during an international commercial air flight, and that also provides consistency in such claims, has been replaced by the new Montreal Liability Convention.*

*However, this new Convention in fact operates as a revocation of the Warsaw Convention by removing all set liability limits and provides for a different amount of damages to be recovered by every passenger traveling in the Warsaw system. Furthermore, the new Convention totally eliminates the principle underlying article 25(1) of the Warsaw Treaty, which prohibited unlimited damages unless the airline was proven guilty of willful misconduct.*

*This Article contrasts and compares the two treaties in light of the expectations of the parties and shows how the new treaty, in eliminating the bases for liability limits previously established under the Warsaw Treaty, has created a system that is in effect the U.S. liability system applied internationally.*



## I. INTRODUCTION

The 1929 International Convention for the Unification of Certain Rules Relating to International Carriage by Air and its subsequent modifications, additions, protocols, and private agreements (collectively known as the "Warsaw Convention," "Warsaw Treaty," or "Warsaw System"), has long been the multinational treaty governing all liability for losses incurred during an international air flight.[1] The treaty also

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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, Oct. 12, 1929, 49

controls losses on aircraft serving as a leg of any other international flight. Having been in effect for more than seventy years, the Warsaw Treaty was enacted to protect the new aviation industry from potentially disastrous results of large judgments arising from the frequent air accidents at the time. The Treaty also has the purpose of providing international consistency in the claims arising from such accidents.[2] The Warsaw Treaty is one of the world's oldest general commercial international treaties.[3]

The Treaty also provides uniformity between countries as to the content of tickets,[4] baggage claim checks,[5] and airbills.[6] The Treaty requires information found on standard airline tickets for international travelers.[7] It is in effect from the moment a passenger with a ticket for an international flight begins to board an airplane until that passenger disembarks and leaves the terminal gate at his or her final destination.[8]

The original Warsaw Treaty was the result of two international conferences designed to draft a law to aid the development of the fledgling airline industry.[9] The idea came from a French proposal called

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Stat. 3000, 137 L.N.T.S. 11 [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, Sept. 28, 1955, ICAO Doc. 7632; 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, Sept. 18, 1961, ICAO Doc.8181; 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, Mar. 8, 1971, 10 I.L.M. 613; 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, Sept. 25, 1975, ICAO Doc. 9145; 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, Sept. 25, 1975, ICAO Doc. 9146; 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, Sept. 25, 1975, ICAO Doc. 9147; 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, Sept. 25, 1975, ICAO Doc. 9148.

2. Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-501 (1967).

3. *Id.* at 498-501.

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

5. *Id.* art. 4.

6. *Id.* arts. 5-8.

7. *See* Lowenfeld & Mendelsohn, *supra* note 2, at 498.

8. *See* Larry Moore, *Taking the Fall and Other Mishaps: An American Perspective on Airport Injuries Under International Legal Agreements*, 24 ANNALS AIR & SPACE L. 187, 190 (1999).

9. Lowenfeld & Mendelsohn, *supra* note 2, at 499.

the *Avant-Projet*,[10] which proposed to establish a single liability system and to provide for uniformity in the regulation of international aviation.[11] This proposal was submitted by France at the 1925 Paris Conference on Private International Air Law.[12] From this meeting came the first draft of the Warsaw Treaty.[13] A commission, known as the *Comité International Technique d'Experts Juridiques Aériens*,[14] was formed and a panel of experts appointed to study the problems of aviation and to present proposed solutions at a second international convention specifically called to ratify these proposals.[15] The Comité worked on this problem for four years and submitted its final draft to the second conference held in Warsaw in 1929.[16] Member nations ratified the proposals in October 1929,[17] going into effect on February 13, 1933, as a treaty (or more specifically as a convention).[18] The United States became a formal signatory to the Treaty in 1934.[19]

In the eyes of the United States, the Treaty set relatively low liability limits in cases of personal injury or death.[20] Under article 22(1) of the Warsaw Convention, the total damages allowed was 125,000 Poincare francs, or the equivalent of U.S. $8300.[21] The United States further eliminated the opportunity for inflation adjustments when it first froze the value of gold, and then abandoned the gold standard altogether, even though gold was the treaty standard for determining the value of the franc and, through the currency exchange rate, the dollar.[22] As a result of this abandonment of the gold standard, the damage limits have been frozen at the last official U.S. gold-to-dollar exchange rate set by the Civil Aeronautics Board in 1958.[23] Because of the low amount of

10. GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 12 (1977).
11. *Id.* at 7.
12. *Id.* at 12.
13. *Id.* at 12-13.
14. G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217, 218 n.7 (1959).
15. *Id.*; *see also* SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, Oct. 4-12, 1929, at 18 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter MINUTES.]
16. Calkins, *supra* note 14, at 227.
17. *Id.*
18. Lowenfeld & Mendelsohn, *supra* note 2, at 501-02.
19. *Id.* at 502.
20. *See id.* at 504.
21. Warsaw Convention, *supra* note 1, art. 22. See text accompanying *infra* note 40 for the text of article 22. *See also* Lowenfeld & Mendelsohn, *supra* note 2, at 499.
22. *See* Lowenfeld & Mendelsohn, *supra* note 2, at 504.
23. Rene H. Mankiewicz, *The Judicial Diversification of Uniform Private Law Conventions*, 21 INT'L & COMP. L.Q. 718, 719 (1972).

recovery with no adjustments for inflation,[24] legal and judicial gymnastics were developed to avoid the liability limits by the courts of United States.[25]

The Treaty has been subjected to partial amendments over the years at several different conferences and meetings.[26] Almost all of the changes were made in an effort to address the U.S.'s objections to the low liability limits.[27] Until recent developments, which have resulted in the Montreal Liability Convention, the United States had accepted only one of these modifications as adequate.[28] That modification, however, was not an official governmental treaty modification, but rather the result of a private agreement reached in Montreal by the major commercial airlines. The companies agreed to strict liability and an increase in liability limits to $75,000 in international accident cases.[29] While this agreement has served to keep the United States in the Montreal system for the last thirty-four years, it probably was illegal.[30]

However, all the years of U.S. displeasure with the current system may be at an end. On October 30, 1995, the fifty year old International Air Transportation Association (IATA), in conjunction with the International Civil Aviation Organization (ICAO), adopted the IAIA

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24. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 104 S. Ct. 1776 (1984). This set the liability limit under the Treaty at about US$8700 based on the gold exchange rate at the time, which was up from the amount of US$8200 set at the time the Treaty was enacted.

25. Warsaw Convention, *supra* note 1, art. 22. Under article 22(1) of the Warsaw Convention, the total damage allowed was 125,000 Poincare francs or US$8300.

26. 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). In *Chan*, the Supreme Court eliminated the American Rule in its interpretation of the Warsaw Convention. This rule set aside the limits of the treaty if the required warning on the ticket was set in a print size that was smaller than ten point type. Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

27. Moore, *supra* note 26, at 229.

28. Larry Moore & Stephen P. Ferris, *Air Disasters and Their Financial Effects on the International Aviation Industry: Justification for the Warsaw Convention?*, 4 J. LEGAL STUD. BUS. 107, 107-11 (1995).

29. *Id.*

30. Warsaw Convention, *supra* note 1, art. 32. This section in effect bars the members of the Treaty from changing the law to be applied in advanced by contract, which would have included the law governing damages. The Montreal Agreement does exactly that. The text of article 32 provides:

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

*Id.* art. 32.

Intercarrier Agreement.[31] This became the basis for a new international treaty. After several years of discussion and negotiations regarding the final terms of this new treaty, it was ratified and formally took effect as the Convention for the Unification of Certain Rules For International Carriage by Air (Montreal Liability Convention) on May 28, 1999.[32] When ratified by a member nation, the Montreal Liability Convention will serve as a new set of rules that replaces Canada's version of the Warsaw Treaty. The most controversial changes would replace the Warsaw Treaty's damage recovery and choice of law rules.[33] The UN's civil aviation agency has already adopted this agreement as the replacement treaty for the Warsaw Convention;[34] however, the Treaty has yet to go before the U.S. Senate.

## II. A COMPARISON OF MAJOR CHANGES IN THE MONTREAL TREATY

### *A. Liability Limits*

The most striking aspect of this Treaty is that it completely changes the basis for damage claims and the liability rules to be employed. The Montreal Liability Convention establishes a two-tiered recovery system for death or injuries arising from an international air accident. The first tier of recovery raises the limit from its Warsaw System/Montreal Agreement limits of $75,000 for developed nations who signed the Montreal Agreement, and approximately $8700 for many of the other nations, to approximately $135,000 (or 100,000 Special Drawing Rights or SDRs) for all member states.[35] The air carrier is subject to strict liability for this first tiered amount.[36] The second tier of recovery is activated if the damages sought are above the initial amount of 100,000

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31. *See* Ludwig Weber & Arie Jakob, *Current Developments Concerning the Reform of the Warsaw System*, 21 ANNALS AIR & SPACE L. 301, 304 (1996). For the text of the IAIA Intercarrier Agreement, see 21 ANNALS AIR & SPACE L. 292 (1996). The United States is a party to this Agreement, pursuant to Department of Transportation Order 97-1-2 (Jan. 8, 1997), *available at* http://dms.dot.gov/general/orders/19971qtr/970102.pdf.

32. *Montreal Liability Convention*, 28 May 1999, 24 ANNALS AIR & SPACE L. 25 (1999). *See* Sung Hwan Shin, *Warsaw System—Liability as the Common Interest*, 22 ANNALS AIR & SPACE L. 261, 263 (1996); *see also* 22 ANNALS AIR & SPACE L. 295 (1996) (giving the text of this antecedent agreement to the Montreal Liability Convention). After much consultation, the United States became an official party to this new agreement in 1997. *See* Dep't of Transp. Order, *supra* note 31.

33. *See* Robert F. Hedrick, *The New Intercarrier Agreement on Passenger Liability: Is It a Wrong Step in the Right Direction?*, 21 ANNALS AIR & SPACE L. 135, 150-52 (1996).

34. *See* Christopher Chipello & Anna Wilde Matthews, *Accord Is Reached to Increase Liability, Remove Low Caps for Plane Accidents*, WALL ST. J., June 1, 1999, at B8.

35. *See id.*

36. *See id.*; *see also* Ludwig Weber, *ICAO's Initiative to Reform the Legal Framework for Air Carrier Liability*, 22 ANNALS AIR & SPACE L. 59, 62 (1997).

SDRs.[37] If a plaintiff alleges that the air carrier was negligent, higher amounts may be awarded unless the carrier can prove it was not negligent.[38] This effectively means that there will be no limit to damage recovery for actual damages.[39]

With regard to personal injury, article 22 of the Warsaw Treaty provides:

> (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, 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.[40]

The new liability terms of article 21, dealing with compensation in case of death or injury of passengers, of Montreal Liability Agreement provides:

> 1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
> 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:
> (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
> (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.[41]

In essence, when article 21, sections 1 and 2 above are taken together, the result is that there is no liability limit at all if the injury is a result of negligence.[42] Section 2 shifts the burden of proof onto the airline to show that it was not negligent.[43] Additionally, the section seems to imply that negligence will be presumed and that higher damage awards would follow automatically. That is, an unrefuted negligence claim under the Montreal Convention would yield the same resulting damages as would a successful ordinary negligence claim anywhere else.

In effect, the Montreal Liability Convention operates as a revocation of the governing principle behind the Warsaw Convention,

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37. *See* Chipello & Matthews, *supra* note 34, at B8.
38. *See id.*
39. *See id.*
40. Warsaw Convention, *supra* note 1, art. 22.
41. *Montreal Liability Convention*, *supra* note 32, art. 21.
42. *See id.* art. 21(a)(2).
43. *See id.* art. 21(2).

which was to set a definite amount for damages so that any passenger traveling in the Warsaw system would know what they would generally be entitled to before an accident occurs.[44] Furthermore, the new Convention totally eliminates the principle underlying article 25(1) of the Warsaw Treaty,[45] which only allowed unlimited damages if the airline was proven guilty of willful misconduct.[46] This was the only basis for eliminating liability limits under the Warsaw Treaty.[47] What we now have is the U.S. system applied internationally.

### *B. Monetary Standards*

The Montreal Liability Convention does address one long-standing problem which plagued the Warsaw Convention: inflation.[48] After setting the initial liability levels, the Warsaw Convention provided no instrument for dealing with inflation.[49] Decade after decade, plaintiffs saw their damage awards become worth less and less.[50] The Montreal Liability Convention addresses this problem in two ways. First, it defines "Special Drawing Right" as valued by the International Monetary Fund (IMF) in the nation's currency on the date of the judgment.[51] Second, in lieu of the SDR standard, the new Convention also provides a gold standard for nations not a member of the IMF.[52] Both measures will serve as hedges against inflation.

### *C. Jurisdiction and Venue*

The most radical and detested change in the new Convention is the method of determining which court has jurisdiction for trying accident

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44. *See id.* art. 21.

45. Warsaw Convention, *supra* note 1, art. 25. The text of article 25 provides:

> (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 misconduct or by such default on his part as, in accordance with the law of the Court seised of the case is considered to be equivalent to wilful misconduct.
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> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

*Id.*

46. *See also* Juan Acosta, *Willful Misconduct Under the Warsaw Convention: Recent Trends and Developments*, 19 U. MIAMI L. REV. 575 (1965).

47. *See* Larry Moore, *Terrorist Airline Bombings and the Article 20(1) Defense Under the Warsaw Convention: The Lockerbie Air Disaster Reconsidered*, 25 DENVER J. INT'L L. & POL'Y 25, 30 (1996).

48. *See* Moore, *supra* note 26, at 239.

49. *Id.*

50. *Id.*

51. *Montreal Liability Convention*, *supra* note 32, art. 23(1).

52. *Id.* art. 23(2).

cases. Article 28 of the Warsaw Convention dealt only with the question of venue.[53] Under it, there were only three choices: the domicile of the air carrier, the location of the ticket purchase, or the destination of the flight.[54] Thus the possible locations were limited and definite.[55]

Under the new Montreal Liability Convention the substantive issue of ultimate recovery in each case will be determined by the claimant's domicile or permanent residence.[56] That is, given that the liability limits of the Treaty are not really limits, but in reality represent at most an additional trial stage before unlimited liability is permitted, this Treaty makes the local damage procedures and customs of the domicile nation of each individual passenger the true basis for establishing the recovery limits in air accident cases.[57] Thus, an award given in the Central African Republic could be strikingly different from one given in the United States for the same injury.[58] What had been a law of unification which provided the world with a relatively consistent pattern of damage recovery for injury has been fractured to the point that, in reality, separate laws may be applied to each victim of the same international air accident in setting the value of the claim.[59] In the United States, this could well put an end to the practice of consolidating airline cases for trial because if there are one hundred different plaintiffs involved, all from different nations, the court could now be required to use one hundred different national laws to determine all procedural issues of recovery.[60]

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

54. *Id.*

55. *Id.* The Warsaw Convention, article 28, reads as follows:

> (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 having jurisdiction where carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

56. *Id.*

57. Moore, *supra* note 26, at 113.

58. *Id.*

59. Andreas Kadletz, *Passenger Domicile as a Relevant Point of Contact: An Obituary of Uniform Private Air Law?*, 22 ANNALS AIR & SPACE L. 217, 220-21 (1996).

60. The Montreal Liability Convention article 33 states:

> Jurisdiction:
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> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
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> 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another

## III. SUMMARY

Not only did the new Montreal Liability Agreement reverse all prior standards of international commercial aviation, but, according to Sven Brise, it also staged a revolution that, in effect, replaces all previous case law.[61] In many ways, he is correct in this statement. Under the Warsaw Treaty, there had been a consistent effort to achieve and maintain the goal of providing a uniform and unified air law. The new Convention, however, could easily lead to a complete disunification as a result of litigation. Brise also argues that this fragments the Treaty solely for the benefit of the United States and for the benefit of U.S. citizens.[62] Regardless of where an accident occurs, as long as it was in one of the many nations party to the new Treaty, a U.S. citizen could always sue in a U.S. court.[63]

In the international community, the Warsaw Treaty was generally approved of and respected.[64] Ludwig Weber, another critic of the new agreement, claimed that the only real criticism of the old Treaty was that the recovery amounts were too low.[65] All that needed to be done was to raise the liability rates, not to scrap the old treaty altogether.[66] To most

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carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the Purposes of Paragraph 2

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of Procedure Shall Be Governed by the Law of the Court Seised of the Case

The following Part merely reinstates part of the original Warsaw Convention bases for determining jurisdiction of an air accident case.

The Montreal Liability Convention in article 46 states:

Additional Jurisdiction:
Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

61. *See* Sven Brise, *Economic Implications of Changing Passenger Limits in the Warsaw Liability System*, 22 ANNALS AIR & SPACE L. 121, 129 (1992).

62. *See id.* at 125.

63. *See* Chipello & Matthews, *supra* note 34, at 88.

64. Ludwig Weber, *ICAO's Initiative to Reform the Legal Framework for Air Carrier Liability*, 22 ANNALS AIR & SPACE L. 59, 60 (1997).

65. *Id.*

66. *See id.*

Americans dealing with large international companies, big law suits and large damages awards are a way of life. The greatest change may be to small, state-owned carriers.[67] A large U.S.-style judgment could bankrupt a country. For now, however, under the Montreal Liability Convention, when talking about their liability law, U.S. citizens can say, "We never leave home without it."

67. *See* Brise, *supra* note 61, at 128.