A Proposal to Make Lex Domicilii the Required Choice of Law Under Article 28 of the Warsaw Convention

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A PROPOSAL TO MAKE LEX DOMICILII THE REQUIRED CHOICE OF LAW UNDER ARTICLE 28 OF THE WARSAW CONVENTION

INTRODUCTION

Since international air travel began some forty years ago, the United States has sought through treaty negotiations to ensure that Americans injured, or the survivors of Americans killed in international air travel are able to receive adequate compensation in damages. But amounts considered adequate by Americans have to others seemed exorbitant. As a result, the United States has been unsuccessful in achieving a substantial increase in the limit of liability imposed by existing treaties.

In May, 1966, under the threat of withdrawal from the Warsaw Convention,1 the United States was able to extract an "interim agreement" from the principal international carriers under which they agreed to a voluntary waiver of liability up to $75,000. But a new formal treaty must yet be negotiated.

Recent developments in United States case law may provide the basis for a United States initiative in the future treaty negotiations. This Note will examine these recent developments, and on the basis of the underlying considerations discerned therein, will propose that, to meet the objections of those who oppose an increase in the existing limit on liability, domicile be adopted as the required uniform choice of law in awarding damages in air accident litigation. Adoption of this proposal would make possible the achievement of the United States' objective of a higher limit on liability and would also serve to establish true international uniformity in compensation.

HISTORICAL BACKGROUND2

In October, 1929, thirty nations,3 realizing that "what engineers are doing for machines, we must do for the law,"4 met in Warsaw, Poland, 

1. See note 6 infra.
2. For a comprehensive discussion, see Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497 (1967).
3. Germany, Austria, Belgium, Brazil, Bulgaria, China, Czechoslovakia, Denmark, Egypt, Germany, Spain, Estonia, Finland, France, Great Britain, Australia, South Africa, Greece, Hungary, Italy, Japan, Latvia, Luxemburg, Mexico, Norway, The Netherlands, Poland, Rumania, Russia, Sweden, Switzerland, Venezuela, and Yugoslavia. The United States did not participate, but was represented by observers.
4. Minutes, II CONFÉRENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, 4-12 OCTOBRE 1929, VARSOVIE 17 (1930).
to formulate uniform rules for regulating international air transportation. That conference produced the Warsaw Convention, one of the most widely accepted treaties extant on private international law. The Treaty was the result of four years of study and drafting by the interim Comité Internationale Technique d'Experts Juridique Aériens (CITEJA), created at an earlier International Conference on Private Air Law in Paris in 1925.

When CITEJA began its preparation for the Treaty in 1926, international air travel was just getting off the ground. Risks—both physical and financial—were enormous at that uncertain stage of development. The accident rate was high, and a major accident could have been financially catastrophic to the fledgling enterprise. One of the foremost objectives of the Treaty’s planners, therefore, was to protect the international air transportation industry financially by limiting the potential liability of a carrier in case of an accident. Articles 17 and 20 of the Convention established the presumptive liability of the carrier for damage sustained by a passenger in the course of flight or while embarking or disembarking, but Article 22 limited that liability to 125,000 francs—approximately 8,300 current U. S. dollars.

5. Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw, October 12, 1929, 137 L.N.T.S. 11 (1929). The United States did not participate in the Warsaw Conference and it was not until June, 1934, that the President submitted the Treaty to the Senate. The Senate gave its advice and consent on June 15, 1934. The United States deposited its instrument of adherence on July 31, 1934, and the President proclaimed the Treaty on October 29, 1934. 49 Stat. 3000, T.S. No. 876 (1934).

6. As of January 1st 1968, the Convention was adhered to by 95 states. Members not adhering to the Convention are two Eastern European states (Albania and Mongolia), eight States of Asia and the Middle East (Afghanistan, Iran, Iraq, Saudi Arabia, South Korea, Thailand, Turkey, and Yemen), and eleven Latin American States (Bolivia, Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Nicaragua, Panama, Paraguay, Peru, and Uruguay). Dep't of State, Treaties in Force (1968).

7. See Minutes, supra note 4, at 135, and at 159.

8. Article 17 of the Convention reads:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

9. Article 22 of the Convention reads:

(1) In the transportation of passengers the liability shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments...
Those who argued that the limit had not been set high enough pointed out that recoveries for personal injury and death in the more developed countries were usually higher than the limit imposed for international travel by the Warsaw Convention. Furthermore, with the improvement of air safety, and the growth of the insurance industry, it has become apparent that the special protection given the international airline industry in 1929 is no longer necessary. A diplomatic conference to amend the Warsaw Convention was convened at the Hague in September 1955. At that conference, the United States sought an increase in the limit of liability to $25,000. During the course of the conference, the United States delegation was forced to compromise down to a limit of $16,000—twice that of Warsaw. The Chairman of the United States delegation was later to conclude that even this amount "was regarded by almost everyone familiar with the matter as a clearcut victory for the United States."
The Hague Protocol, as the product of the Hague Conference came to be called, was never ratified and probably never will be ratified by the United States. The Protocol was not submitted to the Senate by the Eisenhower Administration until the summer of 1959, and was not considered by the Senate Foreign Relations Committee until the summer of 1961—six years after the Hague conference.

In 1961, the Kennedy Administration decided to take a fresh look at the question of ratifying the Protocol, and at the question of the limit under the Warsaw Convention in general. In July, 1961, the Interagency Group on International Aviation (IGIA) undertook extensive new consultations and discussions with industry and public representatives. As a result of this renewed investigation, the IGIA recommended in 1964 that the Hague Protocol be ratified, but that ratification be accompanied by an automatic compulsory insurance scheme in the amount of $50,000 for death or very serious personal injury. If the ratification could not be accompanied by the insurance legislation, IGIA recommended that the United States should then denounce the Convention.

In the summer of 1965 it became obvious to the Administration that the proposed insurance scheme stood no chance of enactment and that, without the legislation, Senate ratification of the Protocol was unlikely. Not wishing to experience defeat on a major treaty, and recognizing the general dissatisfaction in the United States with the limits under both the Warsaw Convention and the Hague Protocol, the Administration decided to denounce the Treaty.

16. The Interagency Group on International Aviation (IGIA) was created by Presidential Memorandum of August 11, 1960, 25 Fed. Reg. 7710 (1960). The Group is composed primarily of the Departments of State, Commerce, Defense, the F.A.A., the C.A.B., and more recently, the Department of Transportation.
19. During July and August several Senators spoke against both the Warsaw Convention and the Hague Protocol on the floor of the Senate. 111 CONG. REc. 15,596 (remarks of Senator Yarborough); id. at 16,716 (remarks of Senator Ervin); id. at 17,881-84 (remarks of Senators Gore, Hartke, and Gruening); id. at 20,164 (remarks of Senator Robert Kennedy). See Editorial, N.Y. Times, June 16, 1965, at 26, col. 1.
Under Article 39 of the Convention, a six-month waiting period is required for a denunciation to become effective. To be free of the Warsaw limits before the 1966 tourist season, the United States deposited its formal notice of denunciation of November 15, 1965. The denunciation would then become effective on May 15, 1966.

The door was left open, however, for further negotiation. The Department of State indicated in a press release issued simultaneously with the notice of denunciation:

The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of one hundred thousand dollars per passenger or on uniform rules but without any limit of liability and if, pending the effectiveness of such international agreement, there is a provisional agreement among the principal international airlines waiving the limits of liability up to seventy-five thousand dollars per passenger.

In the meantime, the Council of the International Civil Aviation Organization (ICAO) had resolved on October 28, to convene a special ICAO meeting in February of 1966, in Montreal. It was hoped either that the Conference could arrive at a solution or, at the least, that an agreement between the U.S. and the international carriers, for an interim arrangement voluntarily waiving the limit on liability by the carriers, could be concluded pending a call for a formal diplomatic conference to revise the Warsaw Convention. The Conference closed after two weeks of hard negotiation with no result and with only little hope for any resolution.

20. Article 39 of the Convention reads:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.


22. Id. at 924.

In a last-ditch effort to prevent United States denunciation from becoming effective, the International Air Travel Association (IATA), in cooperation with the United States Government, made a concerted effort to secure agreement by the principal international carriers to a voluntary waiver of liability up to $75,000 under terms of absolute liability. Under intense pressure, IATA received the acceptance of principal carriers operating into or out of the U.S., and their respective governments' approval, by the afternoon of May 12, 1966.

The IGIA met on Friday, May 13, to discuss whether the IATA agreement should be accepted. At 5 p.m. on the afternoon of the last day for withdrawal, the State Department announced that the IATA proposed agreement had been accepted, and that the U.S. denunciation would be withdrawn.

The IATA Interim Agreement, in brief, provides absolute liability up to $75,000 per passenger traveling on any participating carrier and on a journey to, from, or with a stopping place in the United States.

24. See Lowenfeld and Mendelsohn, supra note 2, at 586-96.

The Agreement applies only to airlines operating to, from, or with a stopping place in the United States, and who have filed agreement with the CAB. An American traveler therefore may still be subject to the $8,300 Warsaw limit if he is injured while flying on a Warsaw Convention flight aboard an airline that has not signed the Agreement. According to information made available from the files of the Department of State, the following 25 airlines, which either operate to the United States or carry substantial numbers of American passengers, were still not parties to the interim arrangement, at least as of November 27, 1967:

<table>
<thead>
<tr>
<th>Airline</th>
<th>Country</th>
</tr>
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<tbody>
<tr>
<td>Aerocondor</td>
<td>Colombia*</td>
</tr>
<tr>
<td>Aerolineas El Salvador</td>
<td>El Salvador</td>
</tr>
<tr>
<td>Aerolineas Venezolanas (AVENSA)</td>
<td>Venezuela</td>
</tr>
<tr>
<td>Aerovias Quisqueyana</td>
<td>Dominican Republic*</td>
</tr>
<tr>
<td>All Nippon Airways</td>
<td>Japan</td>
</tr>
<tr>
<td>Area</td>
<td>Ecuador*</td>
</tr>
<tr>
<td>Aviateca</td>
<td>Guatemala*</td>
</tr>
<tr>
<td>Caledonian Airways</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Compania Dominicana de Aviacion</td>
<td>Dominican Republic*</td>
</tr>
<tr>
<td>Compania Ecuatoriana</td>
<td>Ecuador</td>
</tr>
<tr>
<td>Lamca Airlines</td>
<td>Nicaragua*</td>
</tr>
<tr>
<td>Linea Aeropostal Venezolana (LAV)</td>
<td>Venezuela</td>
</tr>
<tr>
<td>Polynesian Airlines</td>
<td>New Zealand (Western Samoa)</td>
</tr>
<tr>
<td>Sahsa Honduras Airlines</td>
<td>Honduras*</td>
</tr>
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</table>

* Not party to Warsaw Convention.
Although the agreement is characterized as interim, it has no terminal date, and will likely continue for several years until a new treaty can be negotiated.27

**Obstacles to an Increase in the Limit on Liability under the Convention**

Before proceeding to a discussion of the proposal as a possible solution to the liability limit controversy, it will be useful to define the problem in terms of objectives—those of the United States, and of those who oppose any substantial increase in the limit.

*The United States Objective*

The primary United States objective has been clear from the beginning—to ensure adequate recoveries for American accident victims. A higher limit than Warsaw, Hague, or even the Interim Agreement is essential for the accomplishment of that objective.

At the first session of the Hague Conference the United States delegation urged an increase in the limit to $25,000.28 In a paper presented

<table>
<thead>
<tr>
<th>Airline</th>
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<tbody>
<tr>
<td>TAN Airlines</td>
<td>Honduras*</td>
</tr>
<tr>
<td>Trans Globe Airways</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Union de Transports Aeriens</td>
<td>France</td>
</tr>
<tr>
<td>Ariana Afghan Airlines</td>
<td>Afghanistan*</td>
</tr>
<tr>
<td>British Eagle International Airlines</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Civil Air Transport</td>
<td>Republic of China*</td>
</tr>
<tr>
<td>Garuda</td>
<td>Indonesia</td>
</tr>
<tr>
<td>Iran Air</td>
<td>Iran*</td>
</tr>
<tr>
<td>J.A.T.</td>
<td>Yugoslavia</td>
</tr>
<tr>
<td>Lloyd Aero Boliviano</td>
<td>Bolivia*</td>
</tr>
<tr>
<td>Thai International Airlines</td>
<td>Thailand*</td>
</tr>
</tbody>
</table>

*Not party to Warsaw Convention.

It should be noted, of course, that there are other airlines, for example Air Afrique, that are not parties but that are not included on this list, presumably because they either do not operate to the United States or do not carry substantial numbers of American travelers.

27. Furthermore, the Agreement is probably vulnerable to criticism that it is in effect an amendment to an international treaty without the advice and consent of the Senate. See Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 A.B.A.J. 1122 (1966).

to the American Society of International Law at its annual meeting in 1962, the Chairman of the United States Hague Delegation outlined the position taken by the United States at that Conference:

Our line of argument was that the general rule required complete restitution for personal injury and death, or failing that, compensation in damages for any injury done to persons or property. *The normal and proper rule is that liability should be unlimited.*

The United States objective was also clearly expressed in the November 15, 1965, letter to the Polish Government transmitting notice of the United States denunciation of Warsaw Convention.

The United States wishes to state that it gives this notification solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention, even as those limits would be increased by the protocol to amend the Convention done at The Hague on September 28, 1965.

At the Montreal Conference the United States delegation in its opening statement presented the United States objective of a $100,000 limit, and pointed out that Congressional and public concern in the United States would not permit another summer to go by with American citizens traveling under the Warsaw limit.

30. 53 DEP'T STATE BULL. 924 (1965) (Emphasis Added).
31. II DOCUMENTS ICAO SPECIAL ICAO MEETING ON LIMITS FOR PASSENGERS UNDER THE WARSAW CONVENTION AND THE HAGUE PROTOCOL 174-78 (1966); 54 DEP'T STATE BULL. 580 (1966).
32. Public awareness and criticism of the low limit under Warsaw began to crystallize in the late 1940's when entertainer Jane Froman was seriously injured in a crash near Lisbon in 1943. In spite of large medical bills and disabling injury which curtailed a promising career she was limited to a recovery of only $8,300 from Pan American because of the Warsaw limit. Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955). In January 1960, the son and daughter-in-law of Senator Homer Capehart were killed in an Avianca crash on landing at Montego Bay, Jamaica. Capehart v. Aerovias Nacionales de Colombia, S.A., Civil No. 10,315, E.D. Fla. (1963). Although recovery in the Capehart case was able to exceed the Warsaw limit ($300,000) because of a willful misconduct finding, Senator Capehart became very strongly opposed to the Warsaw and Hague limits. See remarks by George Buschman, Counsel and Administrative Assistant to Senator Homer Capehart, *Proceedings American Soc'y Int'l Law* 128 (1962). For other congressional criticism see note 19 *supra*. For examples of other major accidents causing public outcry against
Recoveries in the United States in excess of the IATA Agreement level of $75,000 are not unusual. The United States objective of a limit in excess of $100,000 is therefore not unrealistic by American standards.

Objectives of Those Who Oppose any Substantial Increase in the Limit

The objectives of the low level proponents are not so clearly articulated. The Chairman of the Hague delegation has stated:

It is difficult to put one's finger directly on the true reason. Undoubtedly the standards of living and the per capita gross national product of the various countries concerned, in comparison to our own, form part of the explanation. Possibly a more doctrinaire approach to legal matters on the part of the European lawyer is responsible. In any event one thing is certain, the foreign lawyers felt distrust, dismay, and disdain for the death claim compensation system in force in the United States. I have never been able to determine just how tangible this legal bogey man was—whether it was grounded in a real fear of the economic consequences of insurance costs which greatly increased verdicts might entail, or whether it was a dislocation of the system they were used to, or perhaps a philosophical insistence that human life could not be measured in money. . . .

Some have intimated that it is indeed the doctrinaire approach of certain European lawyers who represent their airlines privately, and their governments in the ICAO Legal Committee, that presents a major obstacle to the adoption of a high limit. Whether this potential conflict of interests has had or will continue to have an effect is an interesting


33. E.g., in Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967), a trial court without a jury, awarded $329,956 to a surviving wife and two minor children; in United States v. Becker, 378 F.2d 319 (9th Cir. 1967), a jury awarded $322,995, which was affirmed on appeal. There is no doubt that awards and settlements are also on the increase elsewhere in the world, particularly in Western Europe. Statistics along these lines are probably available in documents that were submitted by states to the ICAO Panel of Experts. Unfortunately, the ICAO Council has classified these documents and the statistics are therefore not available.

34. Calkins, supra note 13, at 121.

but probably unanswerable question. But apart from conflict of interests, there is the additional factor that several of the senior, and most influential, state representatives to the ICAO Legal Committee are individuals who developed their conceptual approaches to air law at a time when international aviation was still in its early stage of development. As a consequence, their approach to the regulation of the aviation industry is one based far more on protecting the airline than protecting the passenger. In this respect, it might well be said that the influence of the representatives of France and Spain—two of the most senior and articulate representatives to the ICAO Legal Committee—may have had, and may still have, an inordinate influence in obstructing the path to higher limits.

Certainly, no one can realistically argue today that a low limit is needed to protect airline development.\textsuperscript{36} While the cost argument was once significant—if only because no figures were available, the argument should have been scuttled by the figures and statistics prepared by the United States Government and presented to the Montreal Conference.\textsuperscript{37} As the United States delegation to that Conference states, the estimated

\begin{footnotesize}
\begin{itemize}
\item[36.] In discussing this argument Mr. H. Drion states:
\begin{quote}
The idea that aviation would be impossible without limitation of liability is flatly contradicted by the facts. Though USA law has no limitation of liability of air carrier or aircraft operator . . . there is no country in the world where civil aviation has developed to a comparative level. And not only does American law not know of special limitations of liability for the protection of aviation, but the claims awarded there against carriers and operators are avowedly higher than anywhere else.\end{quote}


\item[37.] The following estimated insurance costs were prepared by the CAB, on the basis of estimates provided by one of the principal groups of underwriters of aviation insurance in the United States, for presentation to the ICAO Montreal Conference:

\begin{table}[h]
\begin{tabular}{|c|c|c|c|}
\hline
Limit of Liability & Estimated Percentage Increase & Total Cost per Revenue Passenger Mile & \\
\hline
$8,300 & . & $0.64 & \\
16,600 & 5\% & 0.68 & \\
25,000 & 9\% & 0.71 & \\
50,000 & 25\% & 0.81 & \\
75,000 & 38\% & 0.90 & \\
100,000 & 48\% & 0.96 & \\
200,000 & 72\% & 1.12 & \\
\hline
\end{tabular}
\end{table}

\end{footnotesize}
increase in insurance premium costs as a proportion of operating expenses resulting from an increase from a $75,000 limit to a $100,000 limit would be "somewhere between the cost of the olive and the cost of the gin in the martini, and nowhere near the cost of an inflight movie."\textsuperscript{38} And though there is still idle speculation that the increased costs will be exorbitant, no country has yet been able, despite the passage of almost two years since the May, 1966, interim arrangement, to disprove that statement.\textsuperscript{39}

This is not to suggest however that there are no realistic or well based objections to a high limit. It has been argued, with some justification, that if a limit acceptable to the United States is achieved, the very height of that limit will stimulate a world-wide trend toward verdict and settlement figures much higher than has been customary, and much higher than would be appropriate in any country other than the United States.\textsuperscript{40} It has also been argued, again with some justification, that if a high limit is achieved, foreign nationals will be motivated to bring their suits, assuming venue, in the United States, where they can win verdicts and settlements much higher than would be possible if they were suing in their own countries. While foreign governments would probably not be concerned about their nationals collecting high awards from United States airlines in the New York courts, their concern becomes serious when their airlines are sued in New York by their own nationals—not to mention the nationals of third countries. A high limit, it is argued, would not only stimulate forum shopping, but would necessarily tend to increase the size of verdicts and settlements that foreign nationals might otherwise receive.

The primary justification for this type of argument must lie in the fact that foreign states have their own laws and practices for calculating damages, and that the United States system should not be allowed to interfere with or even influence the application of these laws and practices. This is not an unreasonable objective. In some nations the law and practice for calculating damages requires that a decedent's insurance

\textsuperscript{38} Lowenfeld and Mendelsohn, \textit{supra} note 3, at 567.
or death benefits and government pension proceeds be taken into consideration to reduce the amount of the award of damages.\(^4\) In some nations law and practice require that the widow's remarriageability be similarly considered.\(^4\) Furthermore, consider the broader question of some particular emerging nation whose courts have never awarded a verdict in excess of the Hague limits and whose Administration believes that the Hague limits are entirely adequate for the survivors of decedents of that nation. Why, it is asked, should the individualistic United States desire for a high limit be satisfied if, to do so, means affecting adversely the laws, practices, and attitudes of so many foreign courts and administrations?

In summary, then, and apart from the intangible factors and insubstantial arguments, the objectives of those opposing a substantial increase in the limits of liability must be both to avoid needless worldwide increases in verdicts and settlements, and to preclude forum shopping by foreign nationals in United States, and particularly New York, courts. Admitting the reasonableness of these objectives, it may be said that before the United States can hope to achieve a higher international limit on liability appropriate by American standards, a sound regime to satisfy these objectives of the low level proponents, and to protect the law, practice, and customs of their countries must first be found.

### Recent Developments In United States Case Law Suggest A Possible Solution

Judge Jessup has written that “Every generation imagines it is confronted with stupendous unprecedented novelties.”\(^4\) The spectacular growth of international air travel seems to have confronted this generation with such a novelty in the question of the proper choice of law to be applied in tort litigation resulting from air accidents. “The ice began to form on the wings over Pennsylvania; the wrong handle was pulled in the air over Maryland so that the de-icer broke down over West Vir-


ginia, and the plane fell in Virginia." 44 Where did the tort occur? The age of the long-range, high-speed commercial jet makes the question still more difficult to answer.

The classical choice of law rule has been that damages are governed by the law applicable at the place where the accident occurred.45 For airlines and other multi-state or multi-national operating enterprises, the lex loci rule was by far the simplest and the most certain of application. It took no account of the person. If the accident happened in X state or nation, that law applied irrespective of what may have been the individual circumstances or exigencies of the person.

But as legal institutions progressed and as individual rights slowly came to be recognized as far more important than they were looked upon in the days of the industrial revolution and "rugged individualism," the law made its own effort to keep apace. It is perhaps ironic that though lex loci had long been questioned by academicians and legal writers,46 it was first challenged in court by the airline industry—the most recent arrival on the scene of great multi-national operating enterprises. In 1961, lex loci was abandoned by the New York Court of Appeals in air accident cases.47 Once the door was opened, the progression of cases developed the now well-recognized doctrine of "predominant contacts."

The Contacts Doctrine in Air Accident Litigation

United States courts had not challenged the classical lex loci delicti doctrine as the choice of law rule in tort claims until the now famous case of Kilberg v. Northeast Airlines, Inc. was decided by the New York Court of Appeals in 1961.48 In that case the New York court required the plaintiff to sue on the Wrongful Death Statute of Massachusetts, the state in which the crash occurred, but refused on public policy grounds to enforce the Massachusetts statute’s provision limiting damages,49 saying:

44. Knauth, Renvoi and other Conflicts Problems in Transportation Law, 49 Colum. L. Rev. 1, 19 (1949).
45. RESTATEMENT OF CONFLICT OF LAWS § 378 (1934). "The law of the place of the wrong determines whether a person has sustained a legal injury."
46. E.g., Ehrenzweig, Conflict of Laws § 222(3) (1962).
48. Id.
49. At the time of the accident recoverable damages were limited by the Massachusetts Wrongful Death Statute to $15,000. Mass. Gen. Laws Ann. ch. 299, § 2 (1955). The limit has been raised and is currently $50,000. MASS. GEN. LAWS ANN. ch. 299, § 2 (Supp. 1965).
Modern conditions make it unjust and anomalous to subject the traveling citizen of this state to the varying laws of other states through and over which they move. . . . An air traveler from New York may in a flight of a few hours’ duration pass through several [states]. . . . His plane may meet with disaster in a state he never intended to cross but which the plane has flown because of bad weather or other unexpected developments, or an airplane’s catastrophic descent may begin in one state and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own state’s people against unfair and anachronistic treatment of the lawsuits which result from these disasters.

There is available, we find, a way of accomplishing this conformably to our State’s public policy and without doing violence to the accepted pattern of conflict of law rules.50

Thus began the development of a significant body of law which rejects the venerable lex loci delicti doctrine, and holds that the choice of law in awarding damages is no longer controlled by the wholly fortuitous fact of the place of the accident.51 This departure from an established rule evoked an abundance of critical legal writing,52 but the way was opened for the development of the more flexible and now well recognized doctrine of predominant contacts enunciated in Babcock v. Jackson in 1963.53

50. 9 N.Y.2d at 39, 172 N.E.2d at 527 (Emphasis Added).

51. In Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962) (rehearing en banc), cert. denied, 372 U.S. 912 (1963), a case arising from the same accident, Kilberg was attacked on constitutional grounds as a failure of the New York court to recognize the full faith and credit clause. On a hearing by a panel of the court, the panel held that “The Full Faith and Credit Clause of the United States Constitution barred New York courts, and a federal court . . . from awarding unlimited recovery in a lawsuit ‘based’ upon the Massachusetts statute.” Id. at 555. Upon rehearing en banc, however, the court held that “. . . the ruling of the New York Court of Appeals in Kilberg was a proper exercise of the state’s power to develop conflict of laws doctrine. . . .” Id. at 556. The court characterized the panel’s rationale as the “. . . first decision to ‘freeze’ into constitutional mandate a choice-of-law rule derived from what may be described as the Ice Age of conflict of laws jurisprudence— at a time when that jurisprudence is in an advanced stage of thaw.” Id. at 557.

52. E.g., Currie, Conflict, Crisis and Confusion in New York, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 690 (1963); Comment, Selection of Law Governing Measure of Damages for Wrongful Death, 61 COLUM. L. REV. 1497 (1961) (". . . it may be treated as a minor aberration . . . a precedent to be discarded. . . ."); Comment, Lex Loci Delicti or Lex Fori, 28 U. CHI. L. REV. 733 (1961).

53. 12 N.Y.2d 473, 191 N.E.2d 279 (1963). A New York resident riding as a guest of another New York resident on a weekend trip to Canada was seriously injured when
The Supreme Court of Pennsylvania adopted the contacts doctrine in *Griffith v. United Airlines, Inc.*,\(^{54}\) in October 1964, in a case arising from the death of a Pennsylvania domiciliary while a passenger aboard defendant's airline when the aircraft crashed on landing at Denver, Colorado. The Pennsylvania court held:

Thus, after careful review and consideration of the leading authorities and cases, we are of the opinion that the strict *lex loci delicti* rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.\(^{55}\)

It seems, therefore, to have been well settled by 1964, that, especially in air accident litigation, the law of the place of the accident would no longer be the choice of law, but rather the law of the State having the predominant contacts.\(^{56}\) Although recent air accident cases can be found

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...the host lost control of the car. Ontario's guest statute would have barred suit in Ontario, and the action was brought in New York where no such bar is recognized under New York law. The New York court, although not completely adopting the public policy rationale of *Kilberg*, again rejected the traditional choice of law rule. The court instead chose to weigh the most significant contacts with the occurrence and the parties to arrive at its decision.

The court found that New York, the place where the relationship arose, where the trip began and was to end, was the jurisdiction with the dominant contacts, and not Ontario, where the accident was merely fortuitous. The court accordingly held that New York had the superior claim for application of its law.


55. Id. at 22, 203 A.2d at 805.
56. The proposed Introductory Note to the 1964 tentative draft of The Restatement (Second) of Conflict of Laws states:

The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the place of wrong. "... The principal changes are (a) that torts are now said to be governed by the local law of the State which has the most significant relationship with the occurrence and with the parties, and (b) that separate rules are stated for different kinds of torts. The identity of the state of most significant relationship in a given case will depend upon the kind of tort involved and upon a number of other factors."

RESTATATION (SECOND) OF CONFLICT OF LAWS Chap. 9, Introductory Note at 1-2 (Tent. Draft No. 9, 1964). But see Wolens, *A Thaw in the Reign of Lex Loci Delicti*, 32 J. AIR L. & COM. 408 (1966) (Analyzes jurisdictions as Trend Jurisdictions, Waivering Jurisdictions, and Traditional Jurisdictions, and concludes that there is no clear answer as to what the new rule is.)
which still adhere to the *lex loci* rule, the majority seem clearly to have adopted the more flexible contacts rule in cases of this type.

In 1965, the New York court had the opportunity to apply the contacts doctrine from the viewpoint of a "disinterested third state." In *Long v. Pan American World Airways Inc.*, plaintiff's decedent, a

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One important recent airline case in which the U. S. District Court for the Southern District of New York did not follow the *Kilberg and Babcock* doctrine was *Ciprari v. Servicos Aeros Cruzeiro* 245 F. Supp. 819 (S.D.N.Y. 1965), aff'd 359 F.2d 855 (2d Cir. 1966). Mr. Ciprari, a New York domiciliary, had flown to Rio de Janeiro, Brazil, on Pan-American. But upon arrival he was directed by his employer to continue on to Sao Paulo. Had Mr. Ciprari continued his original New York-Rio flight he would have come within the definition of international transportation under the Warsaw Convention, and would have been entitled to at least an $8,300 recovery. He chose instead to purchase—or his employer gave him—a new ticket on Cruzeiro for the flight to Sao Paulo. As a consequence of this wholly fortuitous transaction, he was on a purely domestic journey in Brazil. The Cruzeiro flight crashed on landing in Sao Paulo, and Mr. Ciprari sustained severe injuries. Brazilian law limited liability to 100,000 cruzeiros worth at the time of trial, about 70 U.S. dollars. The U.S. District Court held that Brazil, as the place where that segment of the trip commenced and ended (rather than New York where the passenger resided, and from which he had originated his travel) had the greater contacts, and Brazilian law should therefore be applied as to the issue of the measure of damages. The federal court recognized *Kilberg* and *Babcock*, but refused to apply New York law as the choice of law because of a New York Court of Appeals holding, just three months earlier which appeared to deviate from *Babcock*. In *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792 (1965), the New York court, declaring that it was applying the *Babcock* Doctrine, nonetheless refused to permit a New York resident to sue another New York resident for injuries arising from an automobile accident which occurred in Colorado. Although professedly following *Babcock*, the court found factual distinction in that the residents involved in the accident in *Dym* formed their host-guest relationship in Colorado. The accident in *Dym"arose out of Colorado based activity," and the place of accident was thus held not to be fortuitous.

In light of this *Dym* decision, the federal court in *Ciprari* said:

... it seems reasonably clear ... that at least a majority of the New York Court of Appeals, and probably all of the judges of that court, would apply the law of Brazil, including that part of Brazilian law limiting damages against an air carrier, to the case at bar.

245 F. Supp. at 824.

This seeming inconsistency in the New York holdings was resolved the following year in October, 1966. In *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380 (1966), the court reversed a lower court decision that *Dym*, not *Babcock*, controlled, and held that New York, as the place where both resided, had the dominant contacts. Considering the weight the federal court had given to the apparent inconsistency in New York, it can reasonably be concluded that *Ciprari* would have been decided differently had it been tried a year later.

resident of Pennsylvania, was aboard a Pan American flight from San Juan to Philadelphia which disintegrated in flight, the wreckage falling to earth near Elkton, Maryland. The plaintiffs, brothers and sisters of decedent, were also residents of Pennsylvania. The action was brought in New York where defendant has its principal place of business.

The New York Court of Appeals was faced with the question of whether to apply Pennsylvania law, or Maryland law—the place of the accident. Both states permit recoveries for wrongful death, but Maryland law creates a cause of action only for the surviving spouse, parent or child of the deceased. The court, applying the principle laid down in Babcock, selected Pennsylvania law rather than that of Maryland. Pennsylvania, the court held, had the most significant contacts, while “Maryland's sole relationship with the occurrence is the purely adventitious circumstance that the aircraft wreckage fell on Maryland following an explosion while aloft.”

With Long it became certain that New York would not only apply the contacts doctrine for its own citizens, but would also open its courts as a disinterested third state, to domiciliaries of other states. It appears that every international carrier operating in this country is therefore now subject to suit in New York.

In the light of the case development since 1961, it appears that courts in the United States, faced with a choice of law issue arising from an international air accident, will almost surely apply the law of the jurisdiction having the most significant contacts with the victim and his situation—especially if the survivors would otherwise be limited to a low recovery. Thus, if a victim bought his ticket and began his journey from the state in which he resides, his contacts with that state, under the contacts doctrine, would be sufficient for the law of that state to be applied, even if the accident should occur on Air India while landing in Paris.

Does Contacts Really Mean Domicile?

There is one very important aspect of the preceding case law development which seems not to have been widely discussed. In all of the airline cases which have followed the contacts doctrine, even though the courts have spoken in terms of public policy or predominant contacts, the choice of law has always been resolved in favor of the victim's domicile or residence.

60. 16 N.Y.2d at 342, 213 N.E.2d at 798.
In Kilberg the New York court extended the effect of a New York constitutional public policy requirement for the benefit of the descendants of a New York resident who had been killed in Massachusetts.\(^61\) In Pearson v. Northeast Airlines, arising from the same Massachusetts crash,\(^62\) a federal court applied New York law as the choice of law for a New York "citizen and domiciliary."\(^63\)

The Pennsylvania court in Griffith chose to apply Pennsylvania law for the benefit of the brothers and sisters of "a Pennsylvania domiciliary" killed in Colorado. Although recognizing the existence of another contact, i.e., that the contractual relationship between decedent and the airline was consummated in Pennsylvania, the court said:

> Our Commonwealth, the domicile of decedent and his family, is vitally concerned with the administration of decedent's estate and the well-being of the surviving dependents to the extent of granting full recovery, including expected earnings.\(^64\)

In Long,\(^65\) the New York court, while noting the contact that the passengers had purchased their ticket in Philadelphia, said:

> Both of the passengers had resided in Pennsylvania. ... They are survived by brothers and sisters who are residents of Pennsylvania, as are the plaintiffs, who were appointed executors and administrators pursuant to the laws of the state.\(^66\)

In Gore v. Northeast Airlines, Inc.,\(^67\) another case arising from the same Massachusetts accident as in Kilberg, the surviving widow gave up her New York residence one month after the crash, and went to live with her mother in Maryland. The court nonetheless held:

> New York was the domicile of the decedent and that of his principal beneficiaries at the time of his death. New York has an interest in applying its law ... to see that the decedent's surviving dependents domiciled there at the time of the occurrence are adequately cared for during the period when the decedent would

\(^{61}\) See p. 1130 supra.

\(^{62}\) See note 51 supra.

\(^{63}\) 309 F.2d at 556.

\(^{64}\) 416 Pa. at 23, 203 A.2d at 807.

\(^{65}\) See p. 1133 supra.

\(^{66}\) 16 N.Y. 2d at 339, 213 N.E.2d at 796.

\(^{67}\) 373 F.2d 717 (2d Cir. 1967).
have continued to support them, to preserve its jurisdiction over the devolution of its domiciliary's estate and to protect creditors of the decedent who would present claims against that estate. ... 68

In each of these cases, although there were other contacts considered, it is significant that the courts always resolved the final choice of law for damages in favor of the victim's domicile or place of residence. The decisions have always been in favor of the law providing the most just economic result for surviving families. Although the courts have used the well known rubrics of domicile, residence, or home, the selection of law has always been the one which would most benefit surviving dependents in the economic environment in which they are most likely to continue to live.

This conclusion may have been what the Kilberg court had in mind when it spoke of public policy. Public policy, however, could not conveniently have been applied by a neutral state, such as New York in Long, so the predominance of contacts doctrine proved to be much more flexible.

But whether the doctrine applied, be public policy, or contacts, the proper and desirable result is the one which will provide for the survivors a standard of living similar to that which they would have enjoyed had the family breadwinner continued to live. This is determinable by the economic standards of the place in which the victim and his family were living, and the place in which the surviving family will most likely continue to live.

It is submitted therefore, that this tendency of the courts to resolve the choice of law issue in favor of the victim's domicile or residence be recognized, and that domicile, or residence, be made the required choice of law in these cases.

Contacts, other than Domicile, can be as Fortuitous as the Place of Accident

The criticism of the lex loci doctrine, and one of the primary reasons for abandoning it in favor of the contacts doctrine, was the completely fortuitous relationship the victim may have with the place of accident. In the words of the court in Long, the only relationship the law of the place of accident has with the occurrence "is the purely adventitious circumstance that the aircraft wreckage fell [there]." 69 But even under

68. Id. at 724.
69. 16 N.Y.2d at 342, 213 N.E.2d at 798.
the contacts doctrine, each of the contacts other than residence or domicile, may be as adventitious as the place of accident. 70

Consider for example the businessman with offices in New York City who is domiciled in Greenwich, Conn., but who, on a business trip, takes a flight departing from Newark Airport. Or, for example, the New Jersey resident who works in New York City, booked his ticket there, and began his journey from John F. Kennedy Airport in New York. In both of these examples, the place of contract as well as the airport of departure are entirely fortuitous; each could have been different, depending on personal convenience, airline operating schedules, etc. The only stable contact, and the only contact that is not fortuitous is the passenger's residence. Why then, should not this law be the most appropriate choice of law in the event of a later accident.

The examples are even more poignant in an international context. Consider the successful New York businessman, domiciled in New York, who is on a vacation trip to Europe. He is called to return to corporate headquarters in New York for an important meeting, after which he will return to Europe to continue his vacation. For the trip to New York he buys a Madrid-New York-Madrid ticket in Madrid aboard Iberian Airlines. If the accident occurs on take-off at Madrid, all the contacts, except domicile, would point to Spanish law. Yet, would not a New York Court, on public policy grounds, though obviously not on contacts, be justified in applying New York rather than Spanish law?

To apply the law of the jurisdiction with the predominance of contacts in these situations would be to apply a doctrine which would yield as unsatisfactory a result as would the doctrine of lex loci delicti. In the determination of damages, it would seem that the most important consideration should be not the fortuity of a combination of contacts, but rather the single definitive factor of where the victim was domiciled.

The jurisdiction of “the domicile of the decedent and his family is vitally concerned with the administration of the decedent’s estate and the well-being of surviving dependents.” 71 The State of domicile of the decedent has an interest in applying its law “... to see that the decedent’s surviving dependents domiciled there at the time of the occurrence are ade-

70. Contra, Hopkins v. Lockheed Aircraft Corporation, 201 So.2d 743 (Sup. Ct. Fla. 1967). “A domiciliary or other forum in which a transitory action is brought may in these times be equally fortuitous.”

A Proposal to Make Domicile the Required Choice of Law
Under Article 28 of the Warsaw Convention

It is proposed, therefore, that domicile be made the mandatory uniform choice of law under the Warsaw Convention. Incorporating a uniform rule for awarding damages, with required multilateral application, would meet the objectives of the law liability proponents, and would thereby make possible an increase in the limit or, indeed, a removal of the limit altogether.

The Proposal

The mandatory application requirement could be accomplished by amending Article 28\(^{73}\) paragraph (2), and adding a new paragraph (3) as follows:

(2) Questions of procedure, and determination of domicile for the purposes of paragraphs (1) and (3) of this Article, shall be governed by the law of the court to which the case is submitted.

(3) Irrespective of the court in which the action is brought in accordance with paragraph (1), damages awarded under this Article for death or personal injury shall be calculated and awarded in accordance with the local law and practice of the domicile of the passenger suffering death or personal injury.

With this type of amendment, it would only be necessary to delete Article 22(1)\(^{74}\) in order to eliminate the limit altogether.\(^{75}\)

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73. Article 28 of the Convention presently 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 of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.
   (2) Questions of procedure shall be governed by the law of the court to which the case is submitted.
74. For the present wording of Article 22 of the Convention see note 9 supra.
75. It should be noted that a proposal along somewhat similar lines has recently been elsewhere advanced by Mr. Alan Mendelsohn of the Department of State. See Mendelsohn, A Conflicts of Laws Approach to the Warsaw Convention, — J. Air L. & Com. — (1968). However, that proposal suffered from several defects. First, for what
Advantages of the Proposal

The foremost advantage of the proposal is that it provides a regime which should satisfy the objectives of the low limit proponents. Requiring all courts to award damages in accordance with the law and practice of the passenger's domicile removes the motivation to forum-shop in United States courts. Moreover, it enables developing countries to set their own presumably lower limits applicable to their own domiciliaries. By setting this lower limit, they should be able effectively to avoid what they fear will become a needless increase in settlements and verdicts world-wide. Finally, it will enable domiciliaries of the United States and other developed countries to recover more adequate awards in those cases where, by reason of the forum limitations in Article 28(1), they are now forced to sue in the courts of emerging countries. In short, no matter where the suit is brought, damages would be awarded as though the plaintiff were suing in the courts of his own country.

It can, of course, be argued that this looks like a return to the days of British imperialism where the object was to clothe every British subject, no matter where he happened to be, with the protection of British law and the Union Jack. But whatever may have been the objections to that approach, the difference between that approach and the proposal under consideration is that under the latter, every domiciliary, not just British, will carry his law with him wherever he goes. The system is thus totally devoid of discrimination and both fair and just in application.

Irrespective of the court in which survivors bring suit, equity and fairness require that damages be awarded in accordance with the law and practice of the decedent's domicile. Only by this means can a recovery be effected that would reflect the prevailing economic conditions in which the survivors will continue to live.

Furthermore, if the law and practice in the jurisdiction of the pas-
senger's domicile requires that decedent's insurance or death benefits or government pension proceeds be taken into consideration to reduce the amount of damages awarded,80 the persons suing on his behalf should not be able to avoid this diminution simply by suing in a foreign court. Nor should an airline be forced to pay a higher verdict only because of the plaintiff's wise selection of forum. If the Administration of a country, in its legislative judgment, limits the amount domiciliaries may recover, such a limitation should not be avoidable simply by bringing suit outside that country. If \textit{lex domicilii} is adopted as proposed, these national laws and practices will always be respected irrespective of where suit is brought.

\textbf{Conclusion}

There appears to be very little precedent in international law for this proposal. A recent study of current developments in private international law by Professor deNova of the University of Pavia, Italy, discusses the trend toward legislating conflicts of law rules in European and South American countries.81 The law of the domicile is drafted into this legislation as applicable for certain purposes, e.g., stateless persons, contract, interspousal relationships. The application of \textit{lex domicilii} is similarly accepted for certain purposes in the United States. But as the choice of law for tort, \textit{lex loci delicti} is the required choice in almost all countries—as it was in the United States before \textit{Kilberg}.

A notable exception appears in the Benelux Convention on Private International Law82 concluded by representatives of the three Benelux States in 1951. Article 18 of that Convention reads:

\begin{enumerate}
\item The law of the country where an act has taken place shall determine if that act is unlawful and also any obligations arising therefrom.
\item However, if the effects of an unlawful act are produced within the legal system of some country other than the country where the act has taken place, the obligations arising therefrom shall be determined by the law of that other country.83
\end{enumerate}

80. See note 41 \textit{supra}.
83. Id. at 430.
Under paragraph (1), obligations arising from a tort are governed by the *lex loci delicti*. However, under paragraph (2), when the circumstances are such that the effects of a tort take place in another country, the legal consequences are determined by the law of that other country. The report of the standing committee discussed as an example the case of a collision between two motorcars operated and owned by persons both living in the neighboring country. Significantly, the Report concluded that “the legal consequences of such an accident are always settled according to the law of the domicile of the parties.”

Professor Eek of the University of Stockholm, in an article entitled “Babcock in Sweden”, has addressed the question: “Is the *lex loci delicti* invariably applicable to all types of torts and to all phases of a tort case?” The question, he states, is of equally great importance in countries other than the United States, particularly in relation to traffic accidents with circumstances similar to those in *Babcock v. Jackson*. In an effort to determine what advice a Swedish lawyer would give to a Swedish citizen injured in an accident in Italy, Professor Eek concludes that the cautious lawyer would have to conclude that *lex loci delicti* would be applied by a Swedish court. But that lawyer must make this cautious conclusion, Eek adds, because the Swedish courts have not dealt with this question since 1935. Although assuming that the court would apply *lex loci delicti*, Eek concludes that:

The circumstances in some accident cases show, however, that the application of the *lex loci* may lead to what are looked upon by both the informed public and the courts themselves as undesirable or meaningless results.

Eek submits that this question will probably not find solution in the courts in Sweden, though the idea will be used in support of legislative reform.

Eek’s views, taken together with Article 18 of the Benelux Convention, may well reflect recognition of some of the consequences of the growing trend toward mobility in Western Europe—a trend that started...
in the United States after World War II and that today is no longer a trend but an established way of life. Moreover, it goes without saying, that as the standard of living continues to rise throughout the world—as it has in Western Europe only since the late 1950's—the individual citizen will become increasingly more mobile, on business trips, weekend visits, and longer vacations. *Lex loci delicti* will be in no better position to survive this trend in Europe and elsewhere than it was in the United States at the moment of *Kilberg* in 1961. The benefits of the "contacts doctrine" or, more properly speaking, *lex domicilii*, cannot help but be adopted by all courts on behalf of their traveling nationals. The extent and rapidity of judicial or legislative adoption will vary almost in direct proportion to the extent and rapidity of the rise in the standard of living within the particular country.

Mandatory application of *lex domicilii* as the choice of law for awarding damages in aviation accident litigation will provide uniform application of law throughout the world. This is consistent with our objective of keeping the law apace with modern times. To paraphrase our predecessors quoted earlier—what the engineers and the lawyers did for the bi-plane and the Warsaw Convention in the 1920's, we must do for law in the jumbo-jet airbus age of the 1970's.

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90. See p. 1118 *supra.*