

2006

Does the Montreal Convention of 1999 Require That a Notice Be Given to Passengers - What Is the Validity of Notice of a Choice of Forum Clause under Montreal 1999

Senai W. Andemariam

Recommended Citation

Senai W. Andemariam, *Does the Montreal Convention of 1999 Require That a Notice Be Given to Passengers - What Is the Validity of Notice of a Choice of Forum Clause under Montreal 1999*, 71 J. AIR L. & COM. 251 (2006)
<https://scholar.smu.edu/jalc/vol71/iss2/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**DOES THE MONTREAL CONVENTION OF 1999 REQUIRE
THAT A NOTICE BE GIVEN TO PASSENGERS?
WHAT IS THE VALIDITY OF NOTICE OF A CHOICE
OF FORUM CLAUSE UNDER MONTREAL 1999?**

SENAI W. ANDEMARIAM*

I. INTRODUCTION

ONE OF THE MOST important areas of concern in transport by air or sea is the choice of law and forum applicable to the transport when a dispute arises. The fact that:

- passengers¹ and carriers are often nationals or domiciliaries of different countries or regions of a country;
- the economic strength of the carriers and the passengers are almost always of a stark difference;
- different courts use different procedures of litigation;
- the public policy preferences adhered to by different courts – whether protecting the carriers or the passengers – are oftentimes different,

makes choice of law and forum one of, if not, the most important areas of concern in international transportation law.

Before proceeding to the subject matter of the discussion, there are some basic points that must be noted.

First, there is a difference in the party autonomy that the parties have in choosing the law and forum applicable to the *type of transport* before a dispute arises. The parties have a greater autonomy in domestic transportation than they have in international transport. In international transportation, the relevant

* Professor of Aviation Law, University of Asmara, Eritrea. Special thanks to professors Allan Mendelsohn and Warren Dean of Georgetown University Law Center (“GULC”) for their advice and comments on the progress of an aviation law seminar paper from which this article was developed. The author owes gratitude to his GULC classmate and friend Anthony Davidowitz for carefully going through the paper and correcting grammatical and related mistakes.

¹ This article is limited to the transport of passengers by air or sea. It does not address the transport of cargo or luggage.

conventions list the different countries where the suit can be filed.² Thus, the parties do not have wide discretion to select the applicable law and forum by a pre-dispute agreement.³

Second, the conventions on international transportation by air and sea also differ from each other on the *choice of forum* provisions. It has been indicated that the Convention for the Unification of Certain Rules Relating to International Transportation by Air of 1929 ("Warsaw Convention" or "Warsaw") has strict provisions on the applicability of the Warsaw Convention for international transportation by air and the availability of a choice of forum.⁴ On the contrary, the International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea of 1961 ("Brussels 1961," also known as "Little Warsaw" for being modeled mainly after the Warsaw Convention), while stating when Little Warsaw applies as a governing law,⁵ does not have any list of forums where suit can be brought. The only provision related to the choice of forum is Article 9,

² See, e.g., Warsaw Convention, *infra* note 3.

³ *On the Applicable Law.* Article 1 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air of 1929 states that the convention is the applicable law in an international transportation whose places of departure and destination are in the High Contracting Parties. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, art. 1 [hereinafter Warsaw Convention]. It is very difficult, if not impossible, to see how the carrier and the passenger can agree that the Warsaw Convention does not apply in such international transportation. *On Selection of Forum.* Article 28 of the Warsaw Convention reads: "An Action for damages *must* be brought *at the option of the plaintiff*. . . ." *Id.* at art. 28 (emphasis added). Four forums were selected in the Warsaw Convention, and a fifth forum was added in the Guatemala City Protocol of 1971 (Article XII), 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, ICOA Doc. 8932, art. 12, and the Montreal Convention of 1999 (Article 33 (2)). Convention for International Carriage by Air Done at Montreal, May 28, 1999, 1999 WL 33292734, art. 33(2) [hereinafter Montreal 1999]. The Convention provides no discretion for the parties to select a forum (whether one of the five contained in the Convention or a different one) by a pre-dispute agreement.

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

⁵ Article 2 of the International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea of 1961 reads: "The Convention *shall* apply to any international carriage if either the ship flies the flag of a Contracting State or if, according to the contract of carriage, either the place of departure or the place of destination is in a Contracting State (emphasis added)." International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers of Sea of 1961 art.2, Apr. 29, 1961 [hereinafter Little Warsaw].

which nullifies, among other things, a pre-dispute choice of jurisdiction or arbitration.⁶

Both in domestic and international transport, the carriers usually have a contract of carriage that is prepared for the passengers. The passengers are given the contract that contains all the basic provisions for the contract of carriage ("Contracts of Adhesion"). Usually, such contracts contain provisions on the applicable law and forum for any disputes that may arise out of the transportation, defining the limitation of carrier liability and other issues. Different courts have tended to accept Contracts of Adhesion as a reasonable solution to the application problems of different laws and forums for all the passengers that might ensue in the absence of such a previously identified law and forum.⁷ Others, however, tended to refuse enforcing such clauses, considering them to supercede the power of the courts to handle cases.⁸

An important concept in international transportation law related to the choice of law and forum is the proper communication (also called "reasonable communicativeness") given by the carrier to the passenger. This communication is to inform the passenger which relevant convention applies to solve the disputes that arise out of the carriage. A number of conventions provide that the carrier has a duty to inform the passenger in a reasonable manner lest the carrier lose some of the benefits that the conventions give to the carrier. The courts reasoned that the passengers, being so notified of the applicability of the conventions, would be able to take other precautionary measures (for example, insurance) to cover the losses that the conventions cannot remedy.⁹ Different courts have maintained different standards of what could be called an "adequate communication" of such a "notice" to the passenger.¹⁰

A. SCOPE OF THE ARTICLE

The scope of this article is limited to:

⁶ For a detailed discussion of the 1961 Brussels Convention, see Axel Gehringer, *After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions*, 66 J. AIR L. & COM. 633, 671-73 (2001).

⁷ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991).

⁸ Gehringer, *supra* note 6, at 651.

⁹ See, e.g., *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 498 (9th Cir. 1965).

¹⁰ See, e.g., *Warren*, 352 F.2d at 495-98.

- Addressing the issue of adequate communication (notice) of the applicability of the international convention on the transportation of passengers by air (Warsaw et. al). Issues related to international transportation of cargo or luggage by air and issues related to national or international transportation of passengers, cargo or luggage are not discussed.
- Addressing the choice of forum issue in international transportation of passengers.

Issues related to choice of law or to the concept of *forum non conveniens* are not the subjects of this article.

II. THE CONCEPT OF ADEQUATE COMMUNICATION (NOTICE) OF THE CONTRACT OF CARRIAGE IN INTERNATIONAL TRANSPORTATION OF PASSENGERS BY AIR

A. INTRODUCTION

In the jurisprudence of international transportation by air, one of the most important principles is the limitation of the carrier's liability in the event of death or personal (bodily) injury suffered by the passengers.¹¹ To be precise, scholars identified

¹¹ ANDREAS F. LOWENFELD, AVIATION LAW: CASES AND MATERIALS 7/98-144 (2d ed. 1981). The History of International Aviation Law indicates that the limitation on a carrier's liability has been the nuclear principle upon which Warsaw and the amendments to Warsaw were established. *Id.* at 7-27. Limitation of liability has also been the main reason why the United States moved the Warsaw members to amend Warsaw. In fact, this is the main reason why the United States decided to withdraw from Warsaw, had it not been for the signing of the 1966 IATA Inter-Carrier Agreement, which raised the limit to \$75,000, with absolute liability for international air transport originating from, destined to, or having an agreed stop in the United States. When a higher limit was made part of the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 signed at Montreal ("Montreal 1999"), President William J. Clinton, in his letter to the U.S. Senate for Advice and Consent sent on September 6, 2000, stated:

Upon entry into force for the United States, the Convention, where applicable, would supersede the Warsaw Convention, as amended by the Protocol to Amend the Warsaw Convention, done at Montreal September 25, 1975 ("Montreal Protocol No. 4"), which entered into force for the United States on March 4, 1999. *The Convention represents a vast improvement over the liability regime established under the Warsaw Convention and its related instruments, relative to passenger rights in the event of an accident. Among other benefits, the Convention eliminates the cap on carrier liability to accident victims; holds carriers strictly liable for proven damages up to 100,000 Special Drawing Rights (approximately \$135,000) . . .*

two principal goals of the Warsaw Convention, one of which is the limitation of the carriers' liability:

The Convention had two primary goals: first, to establish uniformity in the aviation industry with regard to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims, as well as with regard to documentation such as tickets and waybills; *second - clearly the overriding purpose- to limit air carriers' potential liability in the event of accidents.*¹²

The Warsaw Convention and its first two amendments (Hague Protocol of 1955 and Guatemala City Protocol of 1971) state that the liability of the carrier for injuries suffered by passengers is limited to a certain amount of money.¹³

However, there were two possibilities by which the passenger could break the limits provided by the Warsaw Convention. The first of these is expressly provided for in the Convention, while the second is the product of judicial interpretation.¹⁴ Only the second possibility is a subject of this article.

B. FIRST POSSIBILITY (WILLFUL MISCONDUCT)

Article 25 of Warsaw Convention provides that:

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 willful misconduct or by such default on his

Letter of President William J. Clinton Approving The Montreal Convention, at www.cargolaw.com/presentations_montreal_cli.html#clinton_letter#clinton_letter (last visited on February 18, 2004) (emphasis added).

¹² Allan I. Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Forum Non Conveniens and The Foreign Plaintiff*, 68 J. AIR L. & COM. 75, 77 (2003) (quoting *In re Disaster at Lockerbie, Scotland* on December 21, 1988, 928 F.2d 1267, 1270 (2d Cir. 1991)) (emphasis added).

¹³ Warsaw limited the liability to 8,300 Special Drawing Rights ("SDR"), Hague Protocol of 1955 to 16,600 SDR, the 1966 IATA Inter-Carrier Agreement to \$75,000 with absolute liability, Guatemala City Protocol to unbreakable limit of 100,000 SDR. Montreal 1999 set the limit to 100,000 SDR with an absolute liability on the part of the carrier of more than 100,000 SDR if negligence is proven [Article 21]. Montreal 1999, *supra* note 3, at art. 21. This may be the reason why the requirement for the delivery of a passenger ticket to the passenger in Montreal 1999 is not attached to the loss of the carrier's limitation of liability. The same may be the reason for the deletion of the passenger's requirement of proof of willful misconduct to break the limit, as required by the previous conventions and protocols.

¹⁴ *In re Korean Air Lines Disaster* of September 1, 1983, 664 F. Supp. 1463, 1471-72 (D.D.C. 1985).

part, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.¹⁵

The Hague and Guatemala City Protocols amended Warsaw Article 25 to require a higher burden of proof of willful misconduct, principally because of the increase in the carrier's limitation of liability.¹⁶

Thus, if a passenger could prove the injury suffered was caused by the willful misconduct (called "*dol*" in the French text of Warsaw) of the carrier or the carrier's agents, the passenger could exceed the limit provided by the convention, and the passenger could recover a higher amount of damages from the carrier in the court of the country where the suit is brought.¹⁷ It is the passenger's onus to prove the presence of willful misconduct, not the carrier's to prove the absence thereof.¹⁸

C. SECOND POSSIBILITY (INADEQUATE NOTICE)

1. Introduction

The second possibility for breaking the limit for liability, established by judicial interpretation, was based on the ticket and notice requirements of Article 3 of the Warsaw Convention.

Article 3 of the Warsaw Convention reads:

1. For the transportation of the passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:
 - a) the place and date of issue
 - b) the place of departure and of destination
 - c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character
 - d) the name and address of the carrier or carriers
 - e) a statement that the transportation is subject to rules relating to liability established by this convention.
2. The absence, irregularity, or loss of the passenger ticket shall not affect the existence or validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not

¹⁵ Warsaw Convention, *supra* note 3, art. 25.

¹⁶ LOWENFELD, *supra* note 11, at 100-01.

¹⁷ *Id.*

¹⁸ Grey v. Am. Airlines, Inc., 227 F.2d 282 (2d Cir. 1955).

be entitled to avail himself of those provisions of this convention which exclude or limit his liability.¹⁹

In 1955, the Warsaw Convention was amended, to some extent, by the so-called Hague Protocol. Article 3 was one of those articles that was amended. Sub-Article 2 reads:

The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity, or loss of the passenger ticket does not affect the existence or validity of the contract of carriage which shall, none the less, be subject to the rules of this convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 (c) of this Article, *the carrier shall not be entitled to avail himself of the provisions of Article 22 [emphasis added]*.²⁰

Article 3(2) of Warsaw had, for a long time, been explained by aviation scholars and courts to mean that if the carrier accepts a passenger:

- i. without a ticket;
- ii. with a ticket that does not contain the list provided in Article 3(1); or
- iii. with a ticket that was not “adequately delivered” to the passenger (i.e.,) ticket that was not delivered in due time;²¹

¹⁹ It can be inferred from this provision that the purpose of the delivery of a ticket to the passenger is the limitation or exclusion of liability, which is one of the foundations of the Warsaw convention. *See supra* notes 3, 4.

²⁰ Notice that the Hague Protocol provides that the failure of the carrier to deliver a ticket to the passenger results only in the loss of the benefits of Article 22, i.e., limitation of liability; whereas Warsaw Article 3(2) refers to the provisions that limit and exclude liability. 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, 478 U.N.T.S. 372, art. 3(b)(2). Thus, while a *Warsaw carrier* that did not deliver a ticket *cannot limit or exclude its liability*, a *Hague carrier* that did not deliver a ticket *can nevertheless exclude its liability*. Warsaw Convention, *supra* note 3, at art. 3(2).

²¹ *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). In this case, the court held that delivery of a ticket on board the airline several miles after takeoff was not considered to be delivered on time because it prevented the passenger from duly seeking other means of protecting any damage that may be caused during the flight, for instance purchasing insurance. *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965). The “virtually unnoticeable and unreadable” print size of the ticket was another reason for the holding. *Id.*

In *Warren*, the United States government contracted with the Flying Tiger Line to transport ninety-two troops to Vietnam in March 1962. *Id.* at 495. Upon arrival at the airport, each soldier received a boarding ticket. *Id.* at 496. A soldier

ticket that was not delivered to the proper person;²² or particularly "without notice" of the application of the convention),²³

the carrier could not avail himself of the provisions of the convention limiting or excluding liability.

The fact in element (i) is relatively easy to apply as it is derived from a literal reading of the Convention's text. Elements (ii) and (iii) are, however, derivatives of judicial interpretation.²⁴ Courts have long read Article 3(2) of Warsaw to incorporate a concept that the carrier should not only deliver a ticket with a notice of the convention's applicability (in order to exclude or limit liability) but also should deliver the ticket in due

had to show this ticket before he was allowed to board. *Id.* The ticket did not conform to the Warsaw Convention, since the Warsaw limitation was printed on the back in fine print that was difficult to read without a magnifying glass. *Id.* at 497. The plane made intermediate stops in Hawaii, Wake Island, and Guam. *Id.* It disappeared after leaving Guam on route to the Philippines and was never heard from again. *Id.* Although the Ninth Circuit noted that the tickets contained a warning that was in fine print, the court chose not to consider this in their final decision. *Id.* (However, since this was a pre-Montreal Agreement case, the ten-point type size requirement was not yet established.) Instead, the Ninth Circuit focused its analysis on the question of delivery: After delivery of the ticket, was there enough time for the soldiers to obtain other insurance coverage beyond the Warsaw limits? *Id.* at 497-98. The Ninth Circuit ignored the fact that the plane made several stops where the soldiers could have bought additional insurance and ruled that the tickets were not delivered in such a manner as to allow the troops an opportunity to obtain additional insurance. *Id.* at 498. The Ninth Circuit apparently believed the delivery question alone was enough to resolve the matter.

In *Warren and Mertens*, the courts moved away from the technical meaning of delivery of a ticket, which served as the basis for the decision in *Ross*, and considered whether the ticket was delivered in such a fashion as to allow the passengers an opportunity to obtain extra insurance after receiving the ticket. If delivery did not afford such an opportunity, then there was no delivery of a ticket pursuant to the Warsaw Convention. The rulings from *Warren and Mertens* were expanded by the United States Court of Appeals for the Second Circuit in *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966). See Moore, *infra* note 42, at 235-36.

²² In *Ross v. Pan Am. Airways, Inc.*, 85 N.E.2d 880 (N.Y. 1949), *cert. denied*, 349 U.S. 947 (1955), the court held that delivery of a ticket to an agent who exercised the duty of purchasing the tickets and delivering them to a group of performers, often on board the airplane, was proper enough to be considered as a delivery to the plaintiff who claimed that the ticket was not delivered to her according to Article 3 of Warsaw Convention. *Ross*, decided by the New York Court of Appeals, was the gate opener for the so called American Rule, *infra* note 40, of interpreting Warsaw Convention. See Moore, *infra* note 42, at 234-35.

²³ LOWENFELD, *supra* note 11, at 55, 81-98.

²⁴ *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1471 (D.D.C. 1985).

time,²⁵ to the proper person,²⁶ and in such a manner that the passenger could inform himself of the ticket's contents.²⁷

Element iii(c) is the issue that this article will address in depth. The celebrated *Lisi v. Alitalia-Linee Aeree Italiane S.P.A.* case is a good illustration.²⁸

2. *The Lisi Case*

Five suits were consolidated in the Southern District of New York Court for wrongful death, personal injuries, and property damage suffered by thirteen passengers of Alitalia's airplane that crashed on February 26, 1960, shortly after takeoff from Shannon, Ireland, on a Rome-New York trip.²⁹

During the trial, Alitalia moved the court to order limitation of its liability by raising all the Warsaw defenses that limit or exclude a carrier's liability.³⁰ The plaintiffs replied that the carrier's liability should not be limited because proper notice of the applicability of Warsaw was not duly given to them by Alitalia as required by Article 3(2) of the Convention.³¹ The dispute revolved around the size of the ticket's text given to the passengers – a 4-point size print text. The plaintiffs argued that the size of the print of the text of the ticket was so small as not to be reasonably noticeable by a passenger. Thus, the ticket did not meet the Warsaw Article 3(2) notice requirement.³²

²⁵ *Mertens*, 341 F.2d at 856.

²⁶ *Ross*, 85 N.E.2d at 884.

²⁷ Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 513-514 (1967). In the Hague Conference of September 1955, the United States cautioned the delegates about the size of the text of the ticket that notifies the passenger of the limitation of liability matters. The United States proposed that the Standard Warsaw ticket (displayed on LOWENFELD, *supra* note 11, at 93) be amended in such a way that the "warning be more specific and in letters at least one-half centimeter high," but these efforts had failed to persuade the delegates. The relevance of the size of the letters in the notice ticket was not an issue until the *Lisi* case made the same an issue. More than a decade later, in the Montreal Inter-Carrier Agreement of 1966 (an agreement that prevented the withdrawal of the United States from Warsaw), the United States' proposal was accepted and carriers engaged in international air transports to, from, or stopping by the United States agreed to give a notice typed in not less than 10 point text size with contrasting colors.

²⁸ *Lisi v. Alitalia-Linee Aeree Italiane S.P.A.*, 253 F. Supp. 237 (S.D.N.Y. 1966).

²⁹ *Id.* at 238.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The trial court (Judge MacMahon) stated that the Warsaw Convention limitation on liability was advantageous to the carrier and that the ordinary way for the carrier to get the benefit of the limitations and exclusions of liability was to give a notice to the passenger that the transport would be bound by the convention's liability rules.³³ The court referred to the holdings in *Mertens* and *Warren*,³⁴ in which delivery of a ticket on board after several miles in the air and delivery of a ticket at the ramp foot of the airplane respectively, were held to be inadequate notices of the applicability of the limitations of liability under Warsaw. The court reasoned that a properly communicated ticket notice would enable a passenger to guard himself against the very low amount of Warsaw damages payable in accident cases by additionally purchasing flight insurance.³⁵ Hence, in effect, the standard the court took for checking the adequateness of the notice was whether the notice of limitation was properly communicated to the passenger so that the passenger might have a reasonable opportunity to take self-protective measures.³⁶

Moving to the details of the case, the trial court stated that the statements of "notice" in the ticket given to the passengers on their ticket and baggage check were "virtually invisible . . . ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they [were] so artfully camouflaged that their presence [was] concealed."³⁷ In so concluding, the trial court also criticized the rather vague way in which the notice was drafted.³⁸ The court of appeals rejected (with a strong dissent by Circuit Judge Moore,³⁹ a dissent that would later be used as the founda-

³³ *Id.* at 239.

³⁴ *Id.* at 243; *see text supra*, note 21.

³⁵ *Id.* at 239.

³⁶ This being the interpretation of the court, Professor Lowenfeld states that the Warsaw preparatory meetings state that the purpose of Article 3(2) of Warsaw was "to provide an incentive (by threat of sanction) to bring all airlines to adopt the same form of ticket." LOWENFELD, *supra* note 11, at 96. However, the writer agrees with the sensible and pragmatic interpretation adopted by the court. Moreover, since one of the basic objectives of Warsaw 1929 was to limit air carriers' potential liability in the event of accidents, the court's interpretation is in line with the reasoning that the passengers should reasonably be informed of the low amount of damage recoverable under Warsaw 1929, so that the passengers can get other protective measures.

³⁷ *Lisi v. Alitalia-Linee Aeree Italiane S.P.A.*, 253 F. Supp. 237, 243 (S.D.N.Y. 1966).

³⁸ *Id.*

³⁹ Judge Moore stated that:

tion for reversing the *Lisi-Mertens-Warren* line of interpretation in another case) Alitalia's defense that the passengers were given an Article 3 notice. The appellate court affirmed.⁴⁰

The ruling in *Lisi* brought considerable opposition from some Warsaw signatories and IATA, which, together with Alitalia, petitioned the United States Supreme Court for certiorari. An equally divided Supreme Court affirmed.⁴¹ With *Lisi* and similar court decisions as a background, the United States led IATA and a number of carriers to agree to the 1966 Montreal Inter-Carrier Agreement ("1966 Agreement"), among the provisions of which was the size of the print of the notice to be given to the passengers.

The majority in their opinion indulge in judicial treaty-making . . . the majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. . . [w]ere actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both understood and agreed to the limitation.

See *In re Korean Air Lines disaster* of Sept. 1, 1983, 664 F. Supp. 1463, 1472 (D.D.C. 1985).

⁴⁰ The Appellate Court quoted, as an example, a Department of Transportation (formerly the Civil Aeronautics Board) Economic Regulation, 14 C.F.R. § 211.175 (1963), circulated to all United States air carriers and foreign air carriers which wanted to avail themselves of the exclusions and liabilities of Warsaw to include the following statement in *at least as large as ten point modern type and in ink contrasting with the stock on each ticket*:

Advice to International Passengers on Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention *may* be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately \$8,290 and limits liability for loss or damage to baggage.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative

14 C.F.R. § 211.175 (1963) (emphasis added).

⁴¹ *Alitalia-Linee Aeree Italiane S.P.A. v. Lisi*, 390 U.S. 455 (1968).

3. *Korean Air Lines*

The interpretation of Warsaw Article 3(2) followed the above mentioned analysis until the *Korean Air Lines* case of 1989 brought a reversal to the *Lisi-Mertens-Warren* line of holdings.

The courts had hitherto held that there was a concept of "adequate notice" in Article 3(2) whereby the air carrier ought to deliver a ticket:

- that contains all the elements contained in Article 3(1);
- in due time;
- to the proper person; and
- that contains a notice of the applicability of the convention in such a readable size and manner as to inform an average passenger.

Apart from this, the carrier would lose the benefit of the provisions of the convention on exclusion or limitation of liability. This ruling was called the *American Rule*.⁴²

The issue concerning the status in Warsaw Article 3(2) of the size of the notice was not only a debate in the United States but also in the countries of other Warsaw members. In Canada, the Canadian Supreme Court made a final ruling on this issue in *Ludecke v. Canadian Pacific Airlines, Ltd.* that was decided ten years before the United States Supreme Court reversed the *Lisi* holding in the *Korean Air Lines* case.⁴³

In *Ludecke*, the Canadian Supreme Court decided that the delivery of a ticket with a small size of the notice text was not considered a non-delivery under Article 3(2) of the Warsaw Convention.⁴⁴ In that case, the airline gave the plaintiff passenger a 4½ size notice in the ticket.⁴⁵ After an injury was suffered by the plaintiff, the issue arose as to whether the small size of the notice text was tantamount to non-delivery of a ticket, thus denying the defendant the benefit of limited liability.⁴⁶ The Canadian Supreme Court, referring to the American cases which, in similar circumstances, held that this was a case of non-delivery, stated that the American Courts strayed from the literal reading of Warsaw Article 3(2), which denied the carrier the benefits of

⁴² Larry Moore, *Chan v. Korean Air Lines, Ltd.: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention*, 13 HASTINGS INT'L & COMP. L. REV. 229, 229-30 (1990).

⁴³ *Ludecke v. Can. Pac. Airlines, Ltd.* [1979] 98 D.L.R. 3d 52 (Can.).

⁴⁴ *Id.*

⁴⁵ *Id.* at 55.

⁴⁶ *Id.* at 56.

limitation of liability *only* when a ticket was not delivered at all.⁴⁷ The Canadian Supreme Court reasoned that the American Courts, in holding against the carriers in such cases, were responding to the view in the United States that the liability limits in the conventions on international transportation by air were too low.⁴⁸ By so holding, the United States courts were improperly subjecting the carriers to unlimited liability.⁴⁹ Admitting that the Warsaw limitation of liability was extremely low, the Canadian Supreme Court nevertheless held that the airline gave an adequate notice to the passengers, and it saw no reason why it should hold that a ticket was “not delivered.” The plaintiff’s claim was denied.⁵⁰

Back to the United States.

On September 1, 1983, a Boeing airplane owned by Korean Air Line (KAL), on a New York-Seoul route (KAL 007), accidentally strayed into the Soviet Union air zone, was shot down by Soviet Union military aircraft, and crashed into the Sea of Japan, killing all the 269 passengers and crew on board.⁵¹

The tickets delivered to the passengers contained a notice that the Warsaw Convention applied to that international transportation.⁵² The notice, however, appeared in 8-point type instead of a 10-point type required by the 1966 Agreement.⁵³

The passengers sued in a number of courts, and the suits were consolidated to a pre-trial hearing before the District Court for the District of Columbia (Judge Aubrey E. Robinson, Jr.). Since the flight was from the United States to South Korea (both being members to the Warsaw Convention, although South Korea joined Warsaw by assenting to the Montreal Protocol of 1975), the fact that the flight was an international transport according to Article 1 of Warsaw was not an issue.⁵⁴

The main issue was “*whether the failure to print notice to passengers of the applicability of the Warsaw Convention in 10-point modern type*

⁴⁷ *Id.* at 57–58.

⁴⁸ *Id.* at 56.

⁴⁹ *Id.*

⁵⁰ *Id.* at 57–58.

⁵¹ *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 123 (1989).

⁵² *Id.* at 124.

⁵³ *Id.*

⁵⁴ *Id.* at 122.

size, as required by the Montreal Agreement, strips the carrier of the Convention's liability limitation."⁵⁵

After the *Lisi-Mertens-Warren* cases, decisions that preceded the 1966 Agreement, United States courts had been strictly following the *American Rule*.⁵⁶ The district court in this case, however, reversed the *American Rule* and decided that a failure to give a 10-point size notice was not a cause that would deny the carrier the benefit of the limitations and exclusions of liability under Warsaw.⁵⁷ The Court of Appeals for the District of Columbia noted that the size of the type did not comport with the 1966 Agreement, but upheld the district court's denial of the plaintiff's motion to remove the Warsaw Convention's protection.⁵⁸

As later framed by the Supreme Court, the resolution of the issue depended on an answer given to the question of whether the *failure to give a notice* fell under the first or second sentence of Warsaw Article 3(2). This reads:

The absence, irregularity, or loss of the passenger ticket shall not affect the existence or validity of the contract of transportation, which shall none the less be subject to the rules of this convention [*First Sentence*].⁵⁹

Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability [*Second Sentence*].⁶⁰

The Supreme Court correctly stated that any fact matter that fell under the first sentence did not have an effect on the applicability of the convention's rules limiting or excluding liability because the ticket remained valid.⁶¹ If, however, the fact matter

⁵⁵ *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. at 1463, 1464 (D.D.C. 1985) (emphasis added).

⁵⁶ *Chan*, 490 U.S. at 124, 127-128 (citing *Egan v. Kollsman Instrument Corp.*, 234 N.E.2d 199 (1967), *cert. denied*, 390 U.S. 1039 (1968) (where 4 1/2 point text was enough ground to revoke the Warsaw limit despite the fact that the passenger had bought two insurance policies of \$75,000 value)); *Deutsche Lufthansa Aktiengesellschaft v. Cival Aeronautics Bd.*, 479 F.2d 912, 917-18 (1973); *In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, 705 F.2d 85, *cert. denied sub nom*; *Polskie Linie Lotnicze v. Robles*, 464 U.S. 845 (1983) (where the size of the text was 8 1/2 points) [arranged chronologically by the writer]. See also *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 789 F.2d 1092 (5th Cir. 1986) (where the size of the text was 9 points).

⁵⁷ *In re Korean Air Lines*, 664 F. Supp. at 1466-67.

⁵⁸ Moore, *supra* note 42, at 237-38.

⁵⁹ Warsaw Convention, *supra* note 3, art. 3(2).

⁶⁰ *Id.*

⁶¹ *Chan*, 490 U.S. at 1680-82.

is one that fell under the second sentence, then the carrier would lose the benefit of the exclusion or limitation of liability.⁶²

The refined issue before the Supreme Court, therefore, was whether the delivery of an 8-point notice on a passenger ticket would be considered an irregularity (that would be of no effect on the validity of the ticket: *First Sentence*) or a non-delivery of a ticket (that would deny the carrier the benefits of the exclusion or limitation of liability: *Second Sentence*).⁶³

Although the Supreme Court decided to discuss this at the end, a subsidiary issue was whether the 1966 Agreement could be considered part of the Warsaw Convention. This is because the passengers' claim was based on a requirement found in the 1966 Agreement.⁶⁴ The Court held that the 1966 Agreement was not an amendment to Warsaw and Warsaw contained no

⁶² *Id.*

⁶³ *Id.*

⁶⁴ The relevant provision of the 1966 Agreement reads:

Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention . . . the following notice, which shall be printed in type at least as large as 10 point and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER
ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name the carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US \$75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US \$8,290 or US \$16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

provision on the size of the text of the notice. The Court stated, in relevant part:

Petitioners here similarly contend that the Montreal Agreement established a bright line which should be taken to define what notice is adequate. I cannot accept this argument. [*The Montreal Agreement is a private agreement among airline companies, which cannot and does not purport to amend the Warsaw Convention.*] To be sure, the Agreement was concluded under pressure from the United States Government, which would otherwise have withdrawn from the Warsaw Convention (emphasis added).⁶⁵

If the court had addressed this issue at the beginning, there would have been no need to further discuss Warsaw Article 3(2). Thus, the court elected to discuss the 1966 Agreement together with the Warsaw Convention.

The Court stated that the only way a carrier could lose the benefit of the exclusion or limitation of liability was when a ticket had not been delivered or when the carrier delivered a ticket "whose shortcomings are so extensive that it cannot reasonably be described as a 'ticket' (for example, a mistakenly delivered blank form, with no data filled in)."⁶⁶ The Court rejected the *American Rule* which held that failure to give an ade-

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative. Either alternative may be used.

⁶⁵ *Chan*, 490 U.S. at 150 (quoting Lowenfeld & Mendelsohn, *supra* note 27) (emphasis added). The Supreme Court seems to have tacitly reversed the notion in *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983), where the defendant Polskie Linie Lotnicze (LOT Polish Airlines) lost the protection of the Warsaw limitation and exclusion because it gave the passengers an 8 1/2 point type. There the "court found that the Montreal Agreement qualified as a 'special contract' under article 22(1) of the Warsaw Convention and, as such, it effectively modified the Convention" and found for the passengers because the airline did not give a 10 point type size notice as required by the Agreement. *Id.* at 88.

The same conclusion was reached in the next similar case, *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 789 F.2d 1092 (5th Cir. 1986), *vacated by*, 490 U.S. 1032 (1982). In this case, the notice given was a 9 point size text. Regardless, however, of the fact that there was a 1 point size difference with the Montreal's 10 point requirement, the court denied the carrier a Warsaw limitation benefit. *Id.* at 1095. In the *Chan* case, the Supreme Court gave the final word on the status of the 1966 Agreement, reversing the trend of such holdings. *Chan*, 490 U.S. at 125-26.

⁶⁶ *Chan*, 490 U.S. at 129. The Court reversed the trend in which "[s]everal courts have equated nondelivery of a ticket, for purposes of this provision, with the

quate notice was tantamount to a ticket's non-delivery. The Court expressed its clear intent to reverse the *American Rule* by stating that "a delivered document does not fail to qualify as a 'passenger ticket,' and does not cause forfeiture of the damages limitation, merely because it contains a defective notice."⁶⁷ In other words, the Court was stating that a ticket's delivery with a defective notice is a mere irregularity (under the *First Sentence*) and not a non-delivery (under the *Second Sentence*). In so holding, the Court put an end to forty-one years of controversy on the interpretation of Article 3(2) of Warsaw Convention.⁶⁸

Moreover, the Court mentioned that the 1966 Agreement did not make the 10-point size notice a condition for the carrier's protection by the exclusion and limitation provisions of Warsaw.⁶⁹

Although the concurring opinion discussed this in detail, Justice Scalia, writing for the Court's majority, made an analogical reference to the Warsaw's similar provisions that deal with baggage checks and air waybills for cargo (Articles 4 and 8/9 respectively).⁷⁰ These provisions state that the carrier shall not avail itself of the provisions of Warsaw excluding or limiting carrier liability if the respective document does not contain a notice that Warsaw applies (Article 4(4) and Article 9 respectively).⁷¹ The Court read these similar provisions and concluded that if the drafters wanted to make notice a condition precedent for the carrier's benefit, as they expressly did for baggage checks and air waybills for cargo, they could have done so for passenger tickets.⁷²

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, however, indicated a willingness to retain the *American Rule* in a modified version. If notice is indeed required, the concurring Justices stated, it must surely meet some minimal standards of "adequacy."⁷³ All would agree that notice that could be read only with a magnifying glass would be no notice at all. For the concurring Justices, there would be a substantial difference

delivery of a ticket in a form that fails to provide adequate notice of the Warsaw limitation." *Id.* at 127 (emphasis added).

⁶⁷ *Id.* at 128.

⁶⁸ Moore, *supra* note 42, at 238.

⁶⁹ *Chan*, 490 U.S. at 150-51.

⁷⁰ *Id.* at 133.

⁷¹ *Id.* at 132-33.

⁷² *Id.* at 130-33.

⁷³ *Id.* at 149-50.

between 4-point and 8-point type, particularly where, as in that case, the notice reasonably met the requirement of the "advice" prescribed by the 1966 Agreement and occupied a separate page in the ticket book.⁷⁴ For the concurring Justices, it could not be concluded that the notice given here was "camouflaged in Lilliputian print in a ticket of [other conditions]" as was so held in *Lisi*.⁷⁵

The concurring opinion also indicated that the Justices would be willing to keep the question open as to what constitutes proper notice in order to retain the right to prohibit inadequate notice.⁷⁶ The Supreme Court majority, however, left no doubt that lower courts must adhere to the Warsaw Convention strictly and may not exploit minor technicalities to circumvent the convention's limitation provisions. The *American Rule* was officially dead as Justice Brennan wrote, "If I may paraphrase Justice Harlan: I agree that the interpretation of the Warsaw Convention advanced by petitioners should be rejected, *but I consider it entitled to a more respectful burial than has been accorded.*"⁷⁷

4. *The Requirement of Notice under Montreal Convention of 1999*

a. Background on Montreal Convention of 1999

In 1999, the Convention for the Unification of Certain Rules for International Carriage by Air Signed at Montreal on May 28, 1999 ("Montreal 1999") was agreed upon. Originally, fifty-eight countries, including eighteen African countries, signed it and it entered into effect on November 6, 2003, with thirty-five countries ratifying it thus far.

As narrated at the beginning of this article, the history of the Warsaw Convention and the subsequent amendments to it, as well as other inter-carrier agreements: (1) Hague Protocol of 1955; (2) the Guadalajara Convention of 1961; (3) the Montreal Inter-Carrier Agreement of 1966 (based on Article 22 of Warsaw); (4) the Guatemala City Protocol of 1971; (5) the Montreal Additional Protocols of 1975; and (6) the IATA Inter-carrier Agreement of 1996 ("IATA 1996"), all revolved around the concept of the limitation of liability applicable to the carriers. Obviously one of the foundational concepts of Montreal 1999 was also the limitation of the carrier's liability.

⁷⁴ Moore, *supra* note 42, at 238-39.

⁷⁵ *Chan*, 490 U.S. at 149.

⁷⁶ *Id.* at 151-52.

⁷⁷ *Chan*, 490 U.S. at 136 (emphasis added).

Following the 1966 Agreement that applied to international transportation by air to, from, or with an agreed stopping place in the United States, the IATA responded with IATA 1996 to the international demand for the increase of the low Warsaw limit and for a limit on the various defenses for the carriers available in Warsaw. IATA 1996, signed by a number of carriers provided, in relevant part:

1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
2. {CARRIER} shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDR [unless option II(2) is used].
3. Except as otherwise provided in paragraphs 1 and 2 hereof, {CARRIER} reserves all defenses available under the Convention to any such claim. With respect to third parties, the carrier also reserves all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.

II. At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

1. {CARRIER} agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger. (*lex loci domicilii*).
2. {CARRIER} (shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs), except that such waiver is limited to the amounts shown below for the routes indicated, as may be authorized by governments concerned with the transportation involved.⁷⁸

The crux of IATA 1996 was that the carriers would not, up to a maximum passenger damage claim of 100,000 SDR (equivalent to \$135,000), argue that:

- (1) the Warsaw Convention limit of 8,300 SDR applies to them; or
- (2) under Warsaw Article 22(1), they, or their agents, took all the necessary measures to avoid damage or that it was impossible for the carrier or its agents to take such measures.

⁷⁸ IATA Agreement on Measures to Implement the IATA Inter-carrier Agreement, Oct. 31, 1995, <http://www.iata.org/NR/contentconnector/CS2000/siteinterface/sites/legal/file/mia.pdf>.

Thus, up to a maximum of 100,000 SDR, the passengers would get compensation without proof of any kind, except extent of damage, against the carrier.

In May 1999, over 500 participants from 121 contracting states, as well as one non-contracting state and eleven international organizations took part in the three week conference which witnessed the birth of Montreal 1999. The convention was signed by fifty-two states, including eighteen African countries. The broad representation reflected the importance the international aviation community had placed on adoption of an updated regime for air carrier liability. During the three week conference, there were divergent views among the participating states.⁷⁹ This was, however, resolved by a consensus package developed by a working group known as "The Friends of the Chairman." Montreal 1999 has fifty-seven Articles. Its main features can be summarized as:

- the incorporation of the provisions of the Guadalajara Convention and Montreal Protocol No 4 on cargo;
- the incorporation of the liability provisions of IATA 1996 on passenger injury and death (i.e., a 100,000 SDR damage on absolute liability basis and for unlimited damage beyond 100,000 SDR on the carrier's failure to prove absence of negligence) (Article 21);
- the provisions requiring states to maintain adequate insurance covering their liability under the convention (Article 50), thus assuring adequate insurance availability in cases of automatic payments or litigation;
- though not mandated by the convention, carriers are obliged to make advance payments in the case of accidents causing passenger injury or death and speedy settlements (upfront payments to prevent hardship);
- it relaxes prior requirements as to content of passenger documentation and simplification or modernization of documentation related to passengers, baggage, and the cargo;
- it establishes the fifth jurisdiction (Article 33), an attempt to increase the available forums for litigation from the four provided in Warsaw cases to five. Legal action for damage

⁷⁹ *Id.* The United States, supported by a number of Latin American countries, primarily focused on the widest possible fifth jurisdiction. The European Union had its focus on securing the most strategic unlimited liability, whereas the African States, supported by Middle East and some developing nations, were keen to preserve a balance of interest with a view to protecting their carriers.

may be filed in the country where at the time of accident the passenger has his or her principle and permanent residence (the fifth jurisdiction is the homeland of the passenger subject to other conditions);

- there is no clear provision for recovery of damages for mental injury of passengers;
- it replaces six different legal instruments, collectively known as the Warsaw System;
- under article 24, there is a provision for review of liability limits every five years.⁸⁰

Of relevance to this article are the provisions of Montreal 1999 that deal with the limitation of carrier liability and damage, as well as those related to the requirement of notice to passengers. As discussed in the sections above, the history of Warsaw and interpretation of its Article 3(2) dealt with the relationship between the limitation of the carrier's liability and the notice given to the passengers regarding the applicability of the Convention to the air carriage. It was also discussed that the Canadian and the United States Supreme Courts interpreted Warsaw Article 3(2) literally and held that the carrier loses the benefit of Warsaw liability limitations only when it did not deliver a ticket to the passenger.⁸¹ The concept of willful misconduct was also discussed at the beginning of this article, and it was mentioned there that the carrier could also be subjected to unlimited liability when it, or its agents, were engaged in an act of willful misconduct.

The principal reason for providing the two grounds for escaping the Warsaw liability limitation (i.e., non-delivery of a ticket with a notice and willful misconduct) was to ease opposition to the very low limit of damages available under Warsaw. In an incident of injury where one passenger was a Warsaw passenger and the other was not, the non-Warsaw passenger could recover greater damages than the Warsaw passenger if the forum country's national law provides for a higher amount.⁸² Thus, Warsaw

⁸⁰ *Id.* at 2-3.

⁸¹ The concurring opinion in the *Chan* case, it is worth remembering, stated, nevertheless, that in cases of flagrantly inadequate notices (for example a notice of such a text size that could only be read with the assistance of a magnifier), they would assimilate such notices with non-delivery. *Chan*, 490 U.S. at 150. In fact, unlike the Canadian Supreme Court case quoted above, the concurring opinion stated that there would be a difference on its holding if it was presented with a 4-point text size than an 8-point size text as in *Chan*. See Moore, *supra* note 42.

⁸² *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 158 (1999).

passengers were given these two grounds to escape the Warsaw principles of low damage and proof of fault for recovery.

It is easy to conclude, then, that if the amount of damages recoverable in an international transport by air were increased, there would be no need for passengers to seek out grounds to escape the Warsaw limits.⁸³ This is what was achieved in Montreal 1999; the Warsaw limit of 8,300 SDR was raised by a factor of about twelve to 100,000 SDR.⁸⁴ The major difference between Warsaw (as amended) and Montreal 1999, however, is the adoption in Montreal 1999 of unlimited liability above 100,000 SDR if the carrier fails to prove absence of negligence on its part or if the carrier proves negligence of a third party as the sole cause of the damage.⁸⁵

When the ICAO authorized its Legal Bureau to “modernize” the Warsaw system, the principal issue for all members and carriers was the limitation of liability.⁸⁶ It was agreed by all participants in the conference and during the meetings that led to Montreal 1999 that the Warsaw system of presumed fault, breakable only upon proof by the passenger of willful misconduct or gross negligence, was a pro-carrier doctrine.⁸⁷ The participants in the drafting history of Montreal 1999 agreed that Warsaw was designed to assist the infant air carrier industry of the early Warsaw days.⁸⁸ With the astronomical growth of the airline industry in all dimensions, however, the Warsaw doctrine of low liability, breakable only upon proof of fault, was untenable given the realities of the late twentieth century air transport industry.⁸⁹ Thus, from the inception of the Warsaw modernization movement, all participants agreed:

- to increase the amount of damages recoverable; and
- to shift the orientation of international air transport law from a pro-carrier to a pro-consumer stance, which could easily be achieved by altering the law governing liability.

⁸³ See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 505 (1967) (at the Hague Conference, raising the liability limit was inextricably linked with revising Article 25 dealing with the carrier’s willful misconduct).

⁸⁴ Montreal 1999, *supra* note 3, at art. 21.

⁸⁵ *Id.*

⁸⁶ Int’l Civil Aviation Org. [ICAO], *International Conference on Air Law*, vol. 1 at 1 & vol. 2 at 71, ICAO Doc. 9775-DC/2 (1999) [hereinafter *Convention Minutes*].

⁸⁷ Lowenfeld, *supra* note 11, at 499-500.

⁸⁸ ICAO, *Status of Warsaw Convention System*, at 2, ICAO Doc. C-WP/10381 (1996).

⁸⁹ *Id.* at 2.

Referring to and emboldened by the 1966 and 1996 Inter-carrier Agreements, the drafters established a new doctrine of liability. The Convention's first draft,⁹⁰ prepared by the Legal Bureau, was presented to the Secretariat of the ICAO on June 10-12, 1996. Similar to the present Montreal 1999, the main features of the draft included:

- (1) making the convention a consolidated instrument replacing all the previous Warsaw-series Conventions and Protocols;
- (2) implementing a new regime of liability similar to that contained in the IATA 1996, (specifically an absolute liability for the first 100,000 SDR and unlimited liability if the carrier failed to prove that it or its agents were not at fault or negligent and that it took necessary measures to avoid damages);
- (3) changing documentation requirements;
- (4) adding a fifth jurisdiction to the four Warsaw fora mentioned in Warsaw Article 28(1); and
- (5) retaining of the notice requirement along the lines of the Hague Protocol.⁹¹

Of particular concern to this article are the second and fifth points of the above-mentioned features of the draft.

The drafters made it clear that they were eliminating the willful misconduct element of Warsaw while retaining the notice requirement.⁹² The reason for eliminating willful misconduct can be inferred from the elimination of limits of liability.

As for the delivery of ticket and notice requirements, the participants noticed that with the progress of technology, "ticketless travel" was a possibility. Burdening carriers with a Warsaw Article 3(2) second sentence-like requirement was not going to be practical.⁹³ On the other hand, the drafters were cautious of the fact that some concrete documentary evidence was needed as

⁹⁰ ICAO, *Draft of New Warsaw Instrument*, ICAO Doc. C-WP/10470 (1996) [hereinafter *Instrument to Modernize*].

⁹¹ *Id.* at A/2-3.

⁹² ICAO, *Report on Modernization of the Warsaw System*, at 3, ICAO Doc. C-WP/10381 (1996) ("Under this proposed mechanism, full recovery of damages sustained is no longer predicated upon proof of willful misconduct on the part of the air carrier since it is sufficient to establish the required element of negligence in order to be compensated.").

⁹³ *Convention Minutes*, *supra* note 86, vol. 1 at 56 (The United Kingdom noted that "[t]he existence and validity of the contract of carriage existed independently of [Article 3].").

proof of the air carriage.⁹⁴ Thus, to stand on the middle ground, they resolved to make the requirements of delivery of a document of carriage and notice of the applicability of the convention requirements compulsory upon the carrier without depriving the carrier of the benefit of limitation of liability provided in the new convention if there was no delivery.⁹⁵

This was a wonderful balance of interests. It was discussed earlier that Warsaw had two grounds for denying the carrier the benefit of limiting or excluding liability: willful misconduct and non-delivery of a ticket.⁹⁶ By eliminating proof of willful misconduct and raising the strict liability limit to 100,000 SDR, the drafters tightened the grip on the carrier. By removing the non-delivery of a ticket as a second ground for benefiting unlimited liability, however, the drafters left the passengers with a single ground to escape the 100,000 SDR limit (i.e., if the carrier fails to prove absence of negligence on its part).

With this compromise as a background, the succeeding drafts and Montreal Conferences were left with one issue: drafting the new liability regime in a way that places the burden on the carrier.⁹⁷ Removing the non-delivery of a ticket as a ground for breaking the limit was not made an issue from the first draft in 1996 until the signing of Montreal 1999.

b. Montreal 1999 on Delivery of Ticket

Article 3 of Montreal, as we read it today, was copied, with a small but significant change, from the Hague Protocol Article III that modified Article 3 of Warsaw.⁹⁸ Article III of the Hague Protocol reads:

In respect of the carriage of passengers a ticket *shall* be delivered containing:

...

c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and

⁹⁴ *Id.* vol. 1 at 57 (Canada requested that the passenger be given written notice prior to departure).

⁹⁵ *Id.* (France supported the position of Lebanon "in that there must be a balance between the rights of the carrier to promote the use of modern technology in the issuance of tickets, and protection of the rights of the passenger.").

⁹⁶ See *supra* notes 11-22 and accompanying text.

⁹⁷ *Convention Minutes*, *supra* note 86, vol. 1 at 84-96 (discussing the liability limits in Article 20).

⁹⁸ Compare Montreal 1999, *supra* note 3, art. 3, with Hague, *supra* note 3, art. 3.

that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity, or loss of the passenger ticket does not affect the existence or validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, *with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.*⁹⁹

Article 3 of Montreal reads:

1. In respect of carriage of passengers, an individual or collective document of carriage *shall* be delivered containing
2. Any other means which preserves the information contained in paragraph 1 may be substituted for the delivery of the document
3. *The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and . . . for delay.*
4. Non-compliance with the provisions of the *foregoing paragraphs* shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention *including those relating to limitation of liability.*

Unlike in the Hague Protocol, where non-delivery of a ticket or with no (or inadequate) notice deprived the carrier of the advantage of Article 22,¹⁰⁰ in Montreal 1999, non-delivery of a document (or delivery of a document without a notice) does not deprive the carrier of the benefits of the limitation provided in Article 21(1) of Montreal 1999.¹⁰¹ Thus, the only ground whereby the carrier can be subjected to unlimited liability is when the carrier cannot prove absence of negligence on its part or that the negligence of a third party is the sole cause of the damage (Article 21(2) of Montreal 1999).¹⁰²

⁹⁹ Hague, *supra* note 3, at art. 3 (emphasis added).

¹⁰⁰ *Id.*

¹⁰¹ Montreal 1999, *supra* note 3, art. 3.

¹⁰² *Id.* art. 21.

- c. What is the Effect of Montreal 1999 on the *Lisi-Warren-Mertens-Chan* line of cases?

It was discussed earlier that the United States and Canadian Supreme Courts finally held, on Warsaw Article 3(2), that it was only when the carrier did not deliver a ticket that the passenger could claim damages above the limit provided.¹⁰³ Montreal 1999, however, shut that door by stating clearly that non-delivery of a travel document does not affect the provisions of the convention relating to liability.¹⁰⁴ By providing this principle, Montreal 1999 took the *Lisi-Warren-Mertens* line of interpretation a step further than that provided in the *Chan* interpretation. In *Chan*, the United States Supreme Court interpreted Article 3(2) of Warsaw as stating that only non-delivery of a ticket could deny the carrier the benefit of limitation or exclusion of liability;¹⁰⁵ Montreal 1999 dropped even that possibility.¹⁰⁶ It *seems* that the drafters included the phrase "including those relating to limitation of liability"¹⁰⁷ to clarify that the Warsaw effect of non-delivery of a ticket was eliminated by Montreal 1999.¹⁰⁸

The reader must note that in Montreal 1999 Article 3(5), particular reference is made to the provisions of the convention *relating to the limitation of liability* but *not to those relating to exoneration from liability*.¹⁰⁹ An issue that may be raised with the wording of Article 3(5) of Montreal 1999 is whether the omission of a reference to the provisions of the convention relating to exclusion (exoneration) of liability has any effect on the passenger or carrier. In other words, would it make a difference if

¹⁰³ See *supra* notes 22-30 and accompanying text.

¹⁰⁴ Montreal 1999, *supra* note 3, art. 3.

¹⁰⁵ *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 128-29 (1989).

¹⁰⁶ Montreal 1999, *supra* note 3, art. 3.

¹⁰⁷ *Id.*

¹⁰⁸ The preparatory documents and the notes on the drafting history of Article 3(5) of Montreal 1999 do not tell why the drafters added the phrase "including those relating to limitation of liability" at the end of the paragraph. Moreover, the reader must be aware of the use of the phrase "limitation of liability" in Montreal 1999—a convention that provided for unlimited liability. By "limitation of liability," the drafters mean the 100,000 SDR strict liability provided for in Article 21(1). Therefore, in cases where the carrier does not deliver a travel document or delivers a travel document with no notice of the applicability of the convention, and the carrier makes a successful Article 21(2) defense, the carrier will be liable only to the strict liability of 100,000 SDR. This is the meaning of "limitation of liability" in Article 3(5) of Montreal 1999; thus, the phrase should not be used to infer limited liability under Montreal 1999.

¹⁰⁹ Montreal 1999, *supra* note 3, art. 3.

the phrase read “including those relating to limitation or exclusion of liability”?¹¹⁰

It seems clear that the answer is no. If the drafters clearly indicated that the rules of the convention, *including* the limitation of liability, apply even where a ticket is not delivered, then it also means that non-delivery of a ticket has no effect on the applicability of the rule on the exclusion of liability which is found in Article 20 of Montreal 1999.

It may be argued, on the other hand, that if the drafters used the language “the contract of carriage . . . shall, nonetheless, be subject to the rules of this Convention” and then added the phrase “including those relating to limitation of liability,” they did not mean that they were referring to the whole convention when they used the phrase “the rules of this Convention.” If they were referring to the whole Convention, there would be no need to insert the phrase “including those relating to limitation of liability;” it would be superfluous. Therefore, by “the rules of this Convention,” the drafters meant the rules of the convention related to the effect of delivery or non-delivery of a travel document, the most obvious being the limitation or exclusion of liability.¹¹¹ It has been discussed in the sections above that exclusion and limitation of liability are inseparable concepts; hence, a reference only to limitation of liability was intended to exclude the exclusion of liability. An obvious conclusion is that the carriers may not exclude their liability under Article 20 if they have not delivered a travel document.¹¹²

¹¹⁰ Please note that the second sentence of Warsaw Article 3(2) deprived the carrier of the benefits of the provisions of the Convention that limit or exclude liability. Warsaw Convention, *supra* note 3, art. 3. Hague Protocol, to which Montreal 1999 is closer, however, deprived the carrier only of the benefit of Article 22 (limitation of liability) from which one can infer that in all circumstances (i.e., whether a ticket was delivered or not) the carrier had the benefit of arguing on the provisions excluding liability except, of course, when the carrier is not liable for willful misconduct under Hague. Hague, *supra* note 3, art. 3.

¹¹¹ See, for example, that Article 17(1), a liability Article, uses the clause: “the carrier shall not be able to *exclude or limit* its liability. . . .” Montreal 1999, *supra* note 3, art. 21 (emphasis added).

¹¹² An *opposite* conclusion was made by the writer in the analogous Article in the Hague Protocol that refers only to the limitation of liability. See discussion *supra* note 110. This is because the failure to deliver a ticket has an opposite consequence in Hague and Montreal 1999: in Hague, the carrier would lose the benefit of limitation of liability but in Montreal 1999, it cannot. Similarly, if *in Hague*, the carrier would not lose the benefit of exclusion of liability if a ticket was not delivered (a loss of the benefit of limitation being certain), but *in Montreal 1999*, in accordance with the second interpretation of the phrase “including those relating to limita-

It is submitted, however, that the second interpretation deviates from the spirit of Montreal 1999, a convention which tried to benefit the carriers against the increase in liability and the shift in the burden of proof of liability.

Nevertheless, Montreal 1999 requires that notice of the applicability of the Convention should be given to the passengers.¹¹³ The non-compliance with this mandatory requirement will not have any effect on the applicability of the provisions on limitation of liability.¹¹⁴ The writer is not aware of any significant effect that such non-compliance may have on the carrier because non-compliance always has had the effect of depriving the carrier of the benefits of limitation or exclusion of liability, such an effect being eliminated by Montreal 1999. The effect of non-compliance with the mandatory requirements of Article 3 (1)-(4) of Montreal 1999 remains to be seen. But since the notice is a mandatory requirement, the writer believes that the wording of the notice will be similar to that of Warsaw and may read:

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions, including those related to limitation of liability, of a treaty known as the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Montreal on May 28, 1999, may be applicable to the entire journey, including any portion entirely within the country of origin or destination.¹¹⁵

d. Montreal 1999 on Willful Misconduct

Article 21 of Montreal 1999 states:

1. For damages arising under paragraph 1 of Article 17¹¹⁶ not exceeding 100,000 Special Drawing Rights for each passenger, *the carrier shall not be able to exclude or limit its liability.*

tion of liability" in Article 3(5), the carrier will lose the benefit of exclusion of liability (the benefit of limitation of liability being preserved).

¹¹³ Montreal 1999, *supra* note 3, art. 3.

¹¹⁴ See *supra* note 110 on the meaning of the phrase "limitation of liability" under Article 3(5) of Montreal 1999.

¹¹⁵ ANDREA F. LOWENFELD, AVIATION LAW: CASES AND MATERIALS 7-93 (2d ed. 1981).

¹¹⁶ "The carrier is liable for damage sustained in case of death or bodily injury of a passenger *upon condition only* that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Montreal 1999, *supra* note 3, art. 17 (emphasis added).

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 (emphasis added).¹¹⁷

The crux of the line of analysis of this part of the article is in paragraph 1 of Article 21. In that paragraph, the drafters used language similar to that used in Warsaw Article 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 willful misconduct or by such default on his part
2. *Similarly the carrier shall not be entitled to avail himself of the said provisions* if the damage is caused under the same circumstances by any agent¹¹⁸

Article 21(1) of Montreal 1999 states that under no circumstances can the carrier exclude or limit his liability for a sum not exceeding 100,000 SDR.¹¹⁹

By introducing a new standard of liability in Article 21(1) of Montreal 1999, carrier liability above 100,000 SDR where the carrier fails to prove the absence of negligence on its part or that the negligence of a third party was the sole cause of the damage, the drafters correctly removed the Warsaw requirement of proof of willful misconduct by the passenger.

III. THE CONCEPT OF A PRE-DISPUTE-SELECTED FORUM IN INTERNATIONAL TRANSPORTATION OF PASSENGERS BY AIR

The term “notice” has been used in ways other than that of Warsaw Article 3(2); for example, in the sphere of choice of law and forum.¹²⁰ It is not an exaggeration to say that the choice of law and forum provisions are indispensable parts of most contracts that occur for every day transactions. The concept has a unique relevance in contracts for the transport of passengers by

¹¹⁷ *Id.* art. 21 (emphasis added).

¹¹⁸ Warsaw Convention, *supra* note 3, art. 25 (emphasis added).

¹¹⁹ Montreal 1999, *supra* note 3, art. 21.

¹²⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 25 (1971).

sea or air, domestic or international.¹²¹ This article will analyze the realm of choice of forum in international transportation by air based on a United States Supreme Court decision on the applicability of a choice of forum clause.¹²²

This article will address two issues: *first*, how the concept of choice of forum is related to the discussion presented above on Article 3(2) of Warsaw; *second*, and more naturally, why must a reference be made to a national law to see its applicability on the international sphere?

On the first question. It has been concluded that Montreal 1999 removed one of the Warsaw benefits of delivering a ticket to the passengers: its use for limiting or excluding liability.¹²³ This does not, however, mean that there is no use or requirement of providing a ticket to the passengers. Although the delivery or non-delivery of a ticket (including the communication of a notice) is no longer grounds for arguing the applicability of the limitation of liability, the carrier can still insert provisions in the ticket that ultimately affect the amount of damages a passenger may recover in cases of negligence.¹²⁴ One way the carrier could do this is by choosing a local forum that, in its opinion, would be more convenient for defending the alleged negligence or that might award a lower amount of damages if the carrier fails to make a successful Article 21(2) defense.¹²⁵

On the second question. For the purposes of this discussion, consideration will be given to the 1991 United States Supreme Court case that decided whether a choice of forum clause, inserted in a non-refundable ticket representing a contract of carriage between two United States points, was valid.¹²⁶ As will be

¹²¹ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972).

¹²² Choice of law seems to be a settled concept in international transportation by air because all the relevant conventions—from Warsaw through to Montreal 1999—grant an exclusive applicability to the conventions for transportation between the Contracting Parties. See Montreal 1999, *supra* note 3, art. 49; Warsaw Convention, *supra* note 3, art. 32. It is beyond the scope of this article to consider whether the carrier and the passenger, in international transportation by air, can choose a law other than the convention.

¹²³ See *supra* notes 49-53 and accompanying text.

¹²⁴ Montreal 1999, *supra* note 3, arts. 47 & 49.

¹²⁵ Under Article 21(1), a carrier can benefit from choosing a forum which awards lesser damages within the 100,000 SDR limit. Similarly, under Article 21(2), a carrier can benefit from choosing a forum in which there is less likelihood of finding negligence on its part or a forum which awards lesser damages within the beyond-100,000 SDR limit.

¹²⁶ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) [hereinafter *Carnival I*].

shown later, Montreal 1999¹²⁷ deals with the countries that would be the forums in cases of disputes. The Convention does not deal with the designation of the particular local forum that may entertain the disputes arising from the Convention. Thus, the national laws and rulings of the courts in the country that is a Montreal forum will continue to determine the court that may finally decide the international air transportation dispute. In the realm of the applicable forum, Montreal 1999 accompanies an international air transportation dispute up to the boundaries of the forum country.¹²⁸ Thereafter, Montreal 1999 seems to indicate, it is up to the domestic laws and principles of the country to select the appropriate local forum that entertains the litigation.¹²⁹ In this line of analysis, the next logical question is: what is the validity of a choice of local forum in an international air transportation dispute? For example, will the choice of a New York Court as a forum for damages claims, arising from a United Airlines contract of carriage for a New York–Paris flight, be valid?¹³⁰

Therefore, regarding the choice of forum, the adequate delivery of a ticket or other travel documents will continue to be one of the potential causes of dispute under the new Montreal 1999.

With the above background, a discussion of the *Carnival Cruise*¹³¹ case and its possible implications on international transportation by air is needed.

A. THE CARNIVAL CRUISE CASE

The Shutes, a Washington State couple, bought passenger tickets from Carnival Cruise Lines for a seven day passage on a ship owned by the petitioner.¹³² Carnival sent the Shutes non-refundable tickets containing the provisions of the contract of carriage from its travel agent in Arlington, Washington.¹³³ In

¹²⁷ A reference is made to Montreal 1999 because it is the most comprehensive convention now applicable and because it was built upon the jurisdictional rules of Warsaw.

¹²⁸ See Montreal 1999, *supra* note 3, art. 33 (designating countries where a case may be brought, but remaining silent on where within those countries a case may be brought).

¹²⁹ See *id.*

¹³⁰ The United States, as the domicile of United Airlines, is, according to Article 33(1) of Montreal 1999, one of the five fora in cases of damage disputes. The hypothetical case was developed upon that premise.

¹³¹ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

¹³² *Id.* at 587.

¹³³ *Id.* at 597 (Stevens, J., dissenting).

the lower left-hand corner of each ticket was a statement that read, "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT ON PAGES 1, 2, 3."¹³⁴ Some of the provisions in the twenty-five paragraph contract read as follows:

Paragraph 3 of the Terms and Conditions of Passage Contract Ticket stated:

(a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all the terms and conditions of this Passage Contract Ticket.¹³⁵

Paragraph 8 of the twenty-five paragraph contract read:

It is agreed by and between the passenger and the Carrier that *all disputes and matters* whatsoever arising under, in connection with or incident to this Contract *shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of any other state or country.*¹³⁶

Paragraph 16(a) stated, "the Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger."¹³⁷

After receiving the tickets, the Shutes boarded the *Tropicale*, Carnival's ship, in Los Angeles.¹³⁸ In the international waters off the coast of Mexico, Mrs. Shute slipped on a deck mat and suffered injuries whereof she sued for damages.¹³⁹ The Shutes sued in the District Court for the Western District of Washington, which granted Carnival's summary judgment, upholding the argument that the contract provided that Florida was the proper forum and finding that the tickets' delivery in Washington State was insufficient to create a contact with Washington State.¹⁴⁰

The Court of Appeals referred to the earlier Supreme Court case, *M/S Bremen v. Zapata Off-Shore Co.*,¹⁴¹ where it was held that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . .

¹³⁴ *Id.* at 587.

¹³⁵ *Id.*

¹³⁶ *Id.* at 587-88 (emphasis added).

¹³⁷ *Id.* at 597 (Stevens, J., dissenting).

¹³⁸ *Id.* at 588.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 588.

¹⁴¹ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

should be given effect.”¹⁴² Based on the *Bremen* statement, the Court of Appeals stated that the essence of *Bremen*’s pro-forum selection clause holding was the free negotiation of the parties involved.¹⁴³ In the case at hand, however, the contract was a contract of adhesion, and the respondents did not have the opportunity to freely negotiate the forum selection clause.¹⁴⁴ Stating also that the respondents were physically and financially unable to pursue the litigation in Florida, the Court of Appeals reversed the District Court.¹⁴⁵ In reversing the Court of Appeals, the Supreme Court distinguished the *Carnival Cruise* facts from *Bremen*.¹⁴⁶

In *Bremen*, the parties were the American corporation Zapata and the German corporation Unterweser, and they had agreed for the towage of Zapata’s oceangoing rig “from Louisiana to a point in the Adriatic Sea.”¹⁴⁷ The parties agreed that any dispute under the contract was to be resolved in the London Court of Justice.¹⁴⁸ A storm in the Gulf of Mexico seriously damaged the rig and Zapata instructed Unterweser’s ship to tow the rig to the nearest port of refuge, Tampa, Florida.¹⁴⁹ Zapata sued Unterweser in federal court in Tampa. Unterweser argued that, according to the contract, the appropriate court was the London Court of Justice. The District Court and the Court of Appeals for the Fifth Circuit found in favor of Zapata.¹⁵⁰ The Supreme Court vacated and remanded.¹⁵¹

The Supreme Court, in upholding the choice of forum clause, reasoned that Zapata and Unterweser, being corporations of different nations involved in a complex and costly transaction, were naturally expected to have thoroughly discussed the choice of forum clause.¹⁵² Reversing the previous trend in American courts of disfavoring choice of forum clauses, particu-

¹⁴² *Carnival I*, 499 U.S. at 591.

¹⁴³ *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 388 (9th Cir. 1990) [hereinafter *Carnival II*].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 389.

¹⁴⁶ *Carnival I*, 499 U.S. at 591.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 592.

larly in adhesionary contracts,¹⁵³ the Supreme Court stated that “[a] freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given effect.”¹⁵⁴ This is the statement that the Court of Appeals used in *Carnival Cruise* to quash the choice of forum clause.¹⁵⁵

The Supreme Court, in reversing the Court of Appeals in *Carnival Cruise*, cautioned that “[w]e do not adopt the Court of Appeal’s determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.”¹⁵⁶ To buttress its finding, the Supreme Court added, first, that a cruise line has the upper hand in selecting a forum for litigation because it is involved with passengers who come from many different locales.¹⁵⁷ A predetermined forum, therefore, will avoid litigation against a single cruise line by different passengers in numerous forums in similar causes of action.¹⁵⁸ Second, the Shutes admitted that they had notice of the forum selection clause, and thus, they carry the heavy burden introduced in *Bremen* to prove misconduct or ill intent by the carrier.¹⁵⁹ Third, the Court stated that the place where the accident occurred was nearer to Florida, where the petitioner had its principal place of business, than Washington State.¹⁶⁰

The Court also replied to the Shutes’ argument, based on the Limitation of Vessel Owner’s Liability Act of 1936,¹⁶¹ that any provision contract that purports to lessen, weaken, or avoid the right of any claimant to a trial by a court of competent jurisdiction is null and void.¹⁶² The Court stated that there was no reason why it should hold that choosing a Florida court in such circumstances weakened the Shutes’ right to claim damages.¹⁶³ The Court, referring to the draft documents for the statute,

¹⁵³ Axel Gehringer, *After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions*, 66 J. AIR L. & COM. 633, 646 (2001).

¹⁵⁴ *Carnival I*, 499 U.S. at 591.

¹⁵⁵ *Shute v. Carnival Cruise Lines*, 899 F.2d 377, 388 (9th Cir. 1990).

¹⁵⁶ *Carnival I*, 499 U.S. at 593.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 590.

¹⁶⁰ *Id.* at 594.

¹⁶¹ 46 U.S.C. app. §§ 183 et. seq. (2006).

¹⁶² *Carnival I*, 499 U.S. at 596.

¹⁶³ *Id.*

mentioned that nothing in the history of the statute indicated Congress' intent for the statute to apply in circumstances where the claimants had agreed to litigate their case in a distant court.¹⁶⁴

In his dissenting opinion, Justice Stevens stressed that the ticket was a non-refundable Contract of Adhesion.¹⁶⁵ Even if the Shutes had had adequate notice of the forum selection clause, there was nothing in reality that they could have done to negotiate its terms. The two options they had were to cancel their trip without a refund or to proceed with their trip, thereby agreeing to all the terms contained in the ticket.¹⁶⁶ He also noted that only the most meticulous of passengers could read a forum selection clause written in the midst of the twenty-five paragraphs of fine print on the back of the ticket, especially since there was nothing the passengers could have done to alter its terms.¹⁶⁷

After *Carnival Cruise*, American courts have strictly adhered to the *Carnival Cruise* ruling and applied it even in situations where an American bought a ticket in the United States and the selected forum was outside the United States.¹⁶⁸

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 597 (Stevens, J., dissenting).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Gehringer, *supra* note 153, at 651-52.

In *Effron v. Sun Line Cruise, Inc.*, for example, the Court upheld a forum selection clause in a form passenger contract designating Athens, Greece as the exclusive forum. The case involved the purchase of a South American vacation package from Sun Line Cruises, a New York firm, through a Florida-based travel agent by Mrs. Effron, a resident of Florida. The transportation of passengers and baggage was provided solely by Sun Line Greece Special Shipping Co., Inc, a Greek company. The purchased ticket informed passengers that the carrier with whom they were contracting was Sun Line Greece, and the company's Greek address and phone number were listed on the face of the ticket. The ticket contained a forum selection clause—the existence of which was reasonably communicated to Mrs. Effron—designating Athens, Greece as the exclusive forum. During the cruise, Mrs. Effron was injured as a result of a shipboard fall. She brought suit against Sun Line Cruises and Sun Line Greece in New York, where she maintained a second residence and where Sun Line Cruise did business. The U.S. District Court for the Southern District of New York refused to enforce the forum selection clause holding that Mrs. Effron had met her burden to show that filing suit in Greece would be a grave inconvenience. The district court stressed the fact that neither plaintiff, nor the occurrence sued on, had any connection with

The Supreme Court, as it did in *Carnival Cruise*, has also held that forum selection clauses are valid in the sphere of maritime law, where they are inserted in bills of lading.¹⁶⁹

B. THE SKY REEFER CASE

In one case, the Supreme Court was confronted with the question of whether the insertion of a choice of forum clause in bills of lading allowed the carrier to relieve itself from, or lessen its liability to, the provisions of § 1303(8) of the Carriage of Goods by Sea Act ("COGSA").¹⁷⁰

Section 1303(8) reads:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.¹⁷¹

The Supreme Court, finding in the negative, stated that an increase in transportation and other costs that the passengers

Greece. The United States Court of Appeals for the Second Circuit, however, reversed.

The Court of Appeals held that "a forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel." Relying on *Vimar Seguros v. Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the court ruled that the costs and difficulties entailed in suing in Greece, "being but the obvious concomitants of litigation abroad, do not satisfy The *Bremen* inconvenience standard." The court suggested that the problem of transporting witnesses to Greece might be resolved by a commission rogatoire, whereby Greek courts may request American courts to take testimony. The court's reliance on *Sky Reefer* is questionable because *Sky Reefer* did not involve a form passenger contract but a form bill of lading. In any event, *Effron v. Sun Line Cruise* made clear that *Carnival Cruise* cannot be distinguished by arguing that a foreign forum is less convenient than a forum within the United States. A distinction between foreign and domestic fora in determining inconvenience is thus seemingly eliminated. *Effron* is another example of the recent tendency among United States courts to enforce all types of forum selection agreements, no matter where the forum is located, and no matter whether such an agreement was concluded between sophisticated businessmen or between sophisticated businessmen and unsophisticated passenger-consumers.

Id. (internal footnotes omitted and emphasis added).

¹⁶⁹ *Sky Reefer*, 515 U.S. at 541.

¹⁷⁰ *Id.* at 530.

¹⁷¹ 46 U.S.C. app. § 1303(8) (2006).

may incur by litigating in the selected forum was not equivalent to the “relieving from” or “lessening such liability” standard set in COGSA.¹⁷² Moreover, the Supreme Court added that the courts of all the countries which were members to the 1924 Hague Convention were similarly interpreting Article 3(8) of Hague from which § 1303(8) of COGSA was adopted.¹⁷³

C. WHAT IS THE EFFECT OF MONTREAL 1999 ON THE
CARNIVAL CRUISE–SKY REEFER LINE OF CASES?

We will now move to the impact that Montreal 1999 will have on the *Carnival Cruise–Sky Reefer* line of interpretation.

The core question in assessing the impact of the *Carnival Cruise–Sky Reefer* cases is whether Montreal 1999 allows parties the contractual freedom to choose a forum for resolving disputes arising under international transport. In other words, the question is: would a paragraph like paragraph 8 of the *Carnival Cruise* contract of adhesion be valid under Montreal 1999?

Article 33 of Montreal Convention states:

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the State 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.
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 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. Questions of procedure shall be governed by the law of the court seised of the case.¹⁷⁴

This is the only article that deals with the forums before which the disputes of Montreal 1999 must be brought. A literal reading of paragraph 1 of Article 33 would conclude that there are

¹⁷² *Sky Reefer*, 515 U.S. at 534-35.

¹⁷³ *Id.* at 536.

¹⁷⁴ Montreal 1999, *supra* note 3, art. 33.

only five places where a case under Montreal 1999 can be brought, and that selection is left to the option of the plaintiff.¹⁷⁵

Article 33 raises a number of questions not discussed in this article. In the sphere of *forum non conveniens*, courts have held that the phrase "at the option of the plaintiff" is not as absolute as it may appear.¹⁷⁶

In interpreting the phrase in Article 28(1) of Warsaw, the predecessor to Article 33 of Montreal 1999, the Fifth Circuit of the United States held that, in light of the doctrine of *forum non conveniens*, Article 28 of Warsaw did not give the plaintiff carte blanche and that if the court chosen by the plaintiff is found to be inconvenient, the case could be heard at another court.¹⁷⁷ The court held that Warsaw Article 28(2), which leaves questions of procedure to the forum, also incorporates the doctrine of *forum non conveniens*, long held to be part of the procedural common law.¹⁷⁸

In 2002, however, *Hosaka v. United Airlines*,¹⁷⁹ which relied on a previous British case *Milor S.R.L. v. British Airways, Plc.*,¹⁸⁰ held contrary to the *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982* ("New Orleans") and *In re Air Crash off Long Island New York on July 17, 1996* cases.¹⁸¹ The Ninth Circuit held that the wording of Article 28(1) gave the plaintiff an absolute choice among the forums enumerated therein.¹⁸² It may be hard, *Hosaka* being the latest case dealing with the issue of the absolute right of a plaintiff to choose the forum,¹⁸³ to hold that the plaintiff's right may be limited contractually.

Although there was a long debate on the issue of *forum non conveniens* in the drafting process of Montreal 1999,¹⁸⁴ there is

¹⁷⁵ *In re Air Crash Disaster Near New Orleans, La. on Jul. 9, 1982*, 821 F.2d 1147, 1161 (5th Cir. 1987) [hereinafter *New Orleans*].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1162; *In re Air Crash off Long Island, N.Y., on July 17, 1996*, 65 F. Supp. 2d 207, 214 (S.D.N.Y. 1999) [hereinafter *Long Island*].

¹⁷⁸ *New Orleans*, 821 F.2d at 1162; *Long Island*, 65 F. Supp. 2d at 214.

¹⁷⁹ *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002).

¹⁸⁰ *Milor S.R.L. v. British Airways, Plc.* [1996] Q.B. 702.

¹⁸¹ *Hosaka*, 305 F.3d at 999.

¹⁸² *Id.* at 1003-04.

¹⁸³ It remains to be seen what the Supreme Court will decide on this issue because it denied *Hosaka* certiorari. See *United Airlines, Inc. v. Hosaka*, 537 U.S. 1227 (2003) (denying certiorari). For more on *Hosaka* and related *forum non conveniens* issues, see Allan I. Mendelsohn, *Recent Developments in the Forum Non Conveniens Doctrine*, FED. LAW., Feb. 2005.

¹⁸⁴ See *Convention Minutes*, *supra* note 86, vol. 1 at 104-84.

no mention of the drafters' discussion on the doctrine of choice of forum, and the topic was never made a specific part of the agenda. The possibility of parties selecting a forum was not addressed in the meetings. Most of the discussions on the issue of jurisdiction focused on the inclusion of the "fifth" forum proposed by the United States and also found in the presentation by the International Air Transport Association ("IATA") during the drafting process of Montreal 1999.¹⁸⁵ Thus the question on the issue of choice of forum remains open under Montreal 1999. A reference to related conventions might give some insight.¹⁸⁶

Some conventions clearly indicate that the parties can, from a given pool of forums, choose an applicable forum prior to the incident. Article 13(1) of the International Convention for the Unification of Certain Rules Relating to Carriage of Passenger Luggage by Sea of May 27th 1967 states that "prior to the occurrence of the incident which causes the loss or damage, the parties to the contract of carriage may agree that the claimant shall have to maintain an action for damages according to his preference, only before"¹⁸⁷

This provision indicates that there is a possibility for the parties to agree on the forum in their contract of carriage, provided that the forum is one listed in that paragraph.¹⁸⁸

Other conventions, on the other hand, indicate that there is no possibility of selecting a forum and that, in fact, such a clause is null and void. Articles 17 and 18 of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea of 1974 ("Athens 1974") state:

Art. 17. COMPETENT JURISDICTION 1. An action arising under this Convention *shall, at the option of the claimant*, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention: . . . [options similar to those found in Montreal 1999]

¹⁸⁵ ICAO Document, DCW-Min. FCG/3. France and fifty-three African countries, which had their own articles drafted, opposed the introduction of the fifth forum.

¹⁸⁶ The writer chose to disregard whether the referred conventions came into effect or not; they are referred to for comparative study purposes only.

¹⁸⁷ International Convention for the Unification of Certain Rules Relating to Carriage of Passenger Luggage at Sea art. 13, May 27, 1967, 1967 I.M.C.O., <http://bar.austlii.edu.au/au/other/dfat/seldoc/1967/1204.html>.

¹⁸⁸ *Id.*

2. *After the occurrence* of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration.

Art. 18. INVALIDITY OF CONTRACTUAL PROVISIONS Any contractual provision *concluded before the occurrence* of the incident which caused the death of or personal injury to a passenger . . . or *having the effect of restricting the option specified in paragraph 1 of Article 17, shall be null and void . . .*¹⁸⁹

We can understand from these two conventions that often the drafters clearly indicate whether they want the parties to have the right to choose the forum by an agreement concluded before the incident creating the dispute.

A third group of conventions are unclear on the issue of jurisdiction. The International Convention Relating to the Limitations of the Liability of Owners of Sea-going Vessels of October 10, 1957¹⁹⁰ and The International Convention of Limitation of Liability for Maritime Claims of November 19, 1976¹⁹¹ are good examples.

Montreal 1999 stands between the second and third group of conventions. Silent on the possibility of choice of forum, Article 33 is drafted similarly to Article 17 of Athens 1974, but excludes any provision similar to Article 18 of Athens 1974. It is not, therefore, clear whether Montreal 1999 allows or prohibits the choice of forum by the parties before an incident occurs. There are two possible interpretations.

One interpretation is that *Hosaka* and the literal wording of Article 33 of Montreal 1999 provide that selection of forum is subject to no restriction except the choice of the plaintiff. Paragraph 1 reads, "Action for damages *must* be brought, *at the option of the plaintiff, in the territory of one of the States Parties . . .*"¹⁹² This indicates that:

1. the choice of the plaintiff cannot be subject to the choice of forum by *Carnival Cruise*-type tickets; and
2. even if a choice of forum is somehow accepted, it cannot be brought to any court but a court "in the territory of one

¹⁸⁹ Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea arts. 17-18, Dec. 13, 1974, 1463 U.N.T.S. 20 (emphasis added).

¹⁹⁰ International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, Dec. 21, 1979, 1412 U.N.T.S. 81.

¹⁹¹ Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 222.

¹⁹² Montreal 1999, *supra* note 3, art. 33 (emphasis added).

of the State Parties,”¹⁹³ as indicated in paragraph 1 of Article 33.

A second possible interpretation, considering the literal silence of Montreal 1999 on choices of forum, is that there may be a possibility for choice of forum. Ordinarily, choice of forum provisions are found in articles that allow room for party autonomy and contractual freedom. In Montreal 1999, Article 27, entitled Freedom to Contract, states, “Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defenses available under the convention, or *from laying down conditions which do not conflict with the provisions of this Convention.*”¹⁹⁴

Article 27 is an article that provides a choice *to the carrier*. It allows the carrier a choice to refuse to enter into a contract, to waive defenses, and to lay down conditions not contrary to Montreal 1999. The question, then, is whether inserting a choice of forum clause in a contract of carriage is contrary to Montreal 1999. On the issue of choice of forum, Montreal 1999 seems to be literally silent, allowing the implication that providing a choice of forum would not conflict with Montreal 1999. A possible limit on the provision of choice of forum would be the introductory sentence of Article 33 Montreal: “Action for damages *must be brought*, at the option of the plaintiff, *in the territory of one of the States’ Parties.*”¹⁹⁵ Remember also that the phrase “at the option of the plaintiff” has been interpreted to grant the plaintiff an absolute advantage over *forum non conveniens* defenses.¹⁹⁶

If, however, there is a possibility of a choice of forum as discussed above, the *Carnival Cruise* holding may be applied in international air transport disputes. *Carnival Cruise* was decided under United States law.¹⁹⁷ Thus, the logical question is: would the United States courts apply the *Carnival Cruise* interpretation in a Montreal 1999 case? To return to the example introduced

¹⁹³ Within the territories of the enumerated countries, however, the parties would continue to have the freedom of choosing the court to which the case would be brought, provided that such court does not decline jurisdiction for reasons including absence of subject matter jurisdiction and forum non conveniens. For example, the choice of forum could state: If a suit is brought in the United States, it must be brought in the federal district court in the Southern District of Florida.

¹⁹⁴ Montreal 1999, *supra* note 3, art. 27 (emphasis added).

¹⁹⁵ *Id.* art. 33 (emphasis added).

¹⁹⁶ See *supra* notes 176-178 and accompanying text.

¹⁹⁷ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

at the beginning of this section, assume United Airlines, in the tickets delivered to the passengers, indicated that all disputes against United Airlines covered by Montreal 1999 shall be filed in a New York District Court. On a particular New York–Paris flight, an accident injures a British passenger who bought the ticket from a United Airlines agent in the United Airlines office in London. The passenger, who presumably had notice of the forum selection clause, approaches a New York District Court to decline hearing the case because he wants to file suit in London, where he bought the ticket. United Airlines argues that the forum selection clause should be enforced and asks the court to extend *Carnival Cruise* to this case. Should, or could, the court do so?

Forum non conveniens issues set aside, there is a possibility of extending the *Carnival Cruise* interpretation to such international disputes. It has been indicated earlier that Montreal 1999 does not deal with the particular local court where the case must be brought.¹⁹⁸ Article 28(1), predecessor to Montreal 1999 Article 33, reads, in relevant part:

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.¹⁹⁹

In interpreting this text, the Second Circuit stated that the list of courts indicated in Article 28(1) was meant to identify the countries where the case must be heard, but the designation of the particular court was left to the internal laws of the forum country.²⁰⁰ Therefore, *Carnival Cruise*, which governs designa-

¹⁹⁸ See *supra* notes 127-30 and accompanying text.

¹⁹⁹ Warsaw Convention, *supra* note 3, at art. 28.

²⁰⁰ *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 855 (2d Cir. 1965). In *Mertens*, an airplane accident occurred in Japan and the plaintiffs brought a suit in New York, where the office of the Delaware Corporation, Flying Tiger Line, was located. *Id.* at 853. The defendant argued that Article 28(1) established four “places” within the territory of a High Contracting Party and that a court located in another place in that High Contracting Party cannot assume jurisdiction—thus the New York Court [the Southern District of New York] was not a proper forum. *Id.* at 854. The United States Court of Appeals, in rejecting the defendant’s argument, stated:

However, we read Article 28(1) quite differently. The “places” specified refer to the High Contracting Parties, not to areas within a particular High Contracting Party. An action may be brought, at

tion of the local court within which the case must be heard, would confirm the New York District Court as the court in which this fictitious case would be heard.

The possibility of a choice of forum under Montreal 1999 will be one of the questions that would need a uniform answer from the new international air transportation law.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

- Since the inception of Warsaw 1929, interested parties have attempted to strike a balance between the low amount of recoverable damages and the possibility for the passengers to break the limit. As the damage cap was raised with every Warsaw amendment, the difficulty for the passengers to break the limit also rose.
- In the second half of the twentieth century, as carriers became more efficient and financially stronger, the orientation of Warsaw became sympathetic to the passengers.²⁰¹ In the 1996 IATA Inter-carrier Agreement, for example, the carriers agreed to abandon invoking the Warsaw provisions that would limit their liability.
- Montreal 1999 raised the amount of recoverable damage, developed a two-tier liability statute, and dropped the two Warsaw grounds for breaking the damage cap (non-delivery of a travel document and willful misconduct).
- The effect, under Montreal 1999, of non-compliance with the mandatory requirement of giving a travel document and notice to the passengers (Article 3(1)-(4)) remains to be seen. This is because historically these two requirements were linked with depriving the carrier of the benefits of limitation and exclusion of liability, and such deprivation has

the option of the plaintiff, in the territory of a High Contracting Party, if the domicile of the carrier, the place of business at which the contract was made, or the place of destination is within that country. Plaintiff's choice of forum within that country is governed by the internal law, with all its intricacies and complexities, not by the Warsaw Convention.

Id. at 855. Note that the phrase "at the option of the plaintiff" was used in another sense in this case, not in response to the possibility of choice of forum by an agreement.

²⁰¹ See Vijay Poonoosamy, *Report of the Rapporteur on the Modernization and Consolidation of the Warsaw System*, at A1-A2, ICAO Doc. C-WP/10576 (1997) (recounting the increases in air carrier liability limits).

been eliminated by Montreal 1999. Nevertheless, we will continue to have a notice that is similar to the Warsaw notice.

- The proper delivery of a travel document will continue to be important in another sphere of dispute: choice of forum.

B. RECOMMENDATIONS

- The phrase “including those relating to limitation of liability” should be interpreted to include the exclusion provisions so that it is in line with the underlying Montreal 1999 principle that the carrier should be liable without limitation for injury caused by negligence.
- The possibility of a choice of forum clause should be read into Montreal 1999; however, to be in line with Article 33 (giving the passenger the right to choose the forum) the carrier must bear the burden of proving that the passenger had notice of the choice of forum clause.