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## Casenotes and Statute Notes

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**TORTS—LIABILITY LIMITATIONS UNDER THE WARSAW CONVENTION**—Failure to provide adequate notice will not exclude an air carrier from the damages cap under the Warsaw Convention for passenger injury or death. The Supreme Court rejects the purpose-oriented approach to the Warsaw Convention in favor of effectuating its plain meaning. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

On September 1, 1983, a Soviet military aircraft shot down Korean Air Lines (KAL) Flight 007 over the Sea of Japan when the Boeing 747 strayed into Soviet airspace. All 269 persons on board were killed. The plane, en route from Kennedy Airport in New York to Seoul, South Korea, with a refueling stop in Anchorage, Alaska, constituted an international flight for purposes of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention or Treaty).<sup>1</sup>

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<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted following* 49 U.S.C. app. § 1502 (1982) [hereinafter *Warsaw Convention*]. The pertinent parts of article 1 of the Warsaw Convention read:

(1) This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purpose of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or

Family members of the victims filed wrongful death claims against KAL in several federal district courts. Pursuant to 28 U.S.C. Section 1407, all such claims were transferred for pretrial proceedings to the District Court of the District of Columbia. Plaintiffs then filed a summary judgment motion seeking a declaration that KAL's failure to print Warsaw Convention liability rules<sup>2</sup> in ten point type<sup>3</sup> prevented KAL from invoking the damages limitation.<sup>4</sup> The district court denied the motion, finding that neither the Warsaw Convention nor the Montreal Agreement provide such a sanction in the event of defective notice.<sup>5</sup> In so doing, the district court specifically rejected contrary precedent.<sup>6</sup> Under 28 U.S.C. Section 1292(b), the district court certified for interlocutory appeal the issue whether KAL could avail itself of the Warsaw Convention liability protections despite the delivery of defective tickets to the passengers.

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authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

<sup>2</sup> Warsaw Convention, *supra* note 1, art. 22. The Convention limited air carrier liability to 125,000 francs (\$8,300) for each passenger. *Id.* The Montreal Agreement raised this limit to \$75,000. Agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. 18,900, I.A.T.A. Agreement Re: Liability Limitations, 44 C.A.B. 819, *reprinted in* 31 Fed. Reg. 7302 (1966) [hereinafter Montreal Agreement].

<sup>3</sup> Montreal Agreement, *supra* note 2, art. 2. Article 2 provides that a notice of the liability limitation shall be printed in type no smaller than ten point in ink contrasting with the stock. The notice shall be printed either on each ticket, a piece of paper placed in the ticket envelope with the ticket or attached to the ticket, or on the ticket envelope. The Agreement, however, does not specify a sanction for noncompliance with the notice requirement.

<sup>4</sup> KAL printed the notice of the limitation in eight point type.

<sup>5</sup> *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987).

<sup>6</sup> *In re Air Disaster Near New Orleans, Louisiana*, on July 9, 1982, 789 F.2d 1092, 1098 (5th Cir. 1986), *reinstated*, 821 F.2d 1147 (5th Cir. 1987), *vacated sub nom.* *Pan American World Airways v. Lopez*, 104 S. Ct. 1928 (1989) (vacating opinion to be consistent with *Chan v. Korean Air Lines, Ltd.*, 109 S. Ct. 1676 (1989); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied sub nom.* *Polskie Linie Lotnicze v. Robles*, 464 U.S. 845 (1983); *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1967) (4-4 decision); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 287 N.Y.S.2d 14, 234 N.E. 2d 199, (1967), *cert. denied*, 390 U.S. 1039 (1968).

The Supreme Court granted certiorari. *Held, affirmed*: Absent the failure to deliver any document whatsoever or the delivery of a document whose shortcomings are so severe that it cannot reasonably constitute a "ticket," an air carrier will not be deprived of the Warsaw Convention liability limitations unless the negligence of the air carrier amounts to wilful misconduct.

## I. LEGAL BACKGROUND

### A. *History of the Warsaw Convention*

The Warsaw Convention<sup>7</sup> of 1929 comprised the work of two international conferences, one in Paris in 1925 and the other in Warsaw in 1929.<sup>8</sup> It addressed the two fundamental concerns behind the conferences: first, the need for uniformity in the rights and liabilities of international air carriers and passengers;<sup>9</sup> and second, the need for limited liability to protect the fledgling international aviation industry from large tort recoveries that not only would discourage investment but potentially could destroy the air carriers.<sup>10</sup>

The Warsaw Convention became effective in 1932 but was not embraced by the United States until 1934.<sup>11</sup> The hesitancy reflected American dissatisfaction with the liability limitation which the United States and other industrialized countries felt were too low.<sup>12</sup> In 1955, as a result of American insistence, the Hague Conference convened to amend the Warsaw Convention, doubling the damages

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<sup>7</sup> See generally, Kim, *Some Consideration of the Draft for the Convention on an Integrated System of International Aviation Liability*, 53 J. AIR L. & COM. 765 (1988); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Note, *Torts—International Liability Limitation Agreements*, 53 J. AIR L. & COM. 839 (1988) [hereinafter Note, *Torts*]; Note, *Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the Warsaw Convention*, 54 CHIKENT L. REV. 851 (1978).

<sup>8</sup> Lowenfeld and Mendelsohn, *supra* note 7, at 498.

<sup>9</sup> *Id.* There was also a need for uniform documentation. *Id.*

<sup>10</sup> *Id.* at 499.

<sup>11</sup> *Id.* at 501-02. The United States Senate approved the Treaty by voice vote, without debate, committee hearing, or report. *Id.* at 502.

<sup>12</sup> *Id.* at 504.

cap to \$16,600 in the Hague Protocol.<sup>13</sup> The United States, however, never ratified the Hague Protocol.<sup>14</sup> Instead, the United States eventually denounced the Warsaw Convention on the basis of its inadequate liability limitations for passenger injury and death.<sup>15</sup>

The United States indicated it would retract its denunciation if all international air carriers increased the damages cap to \$75,000.<sup>16</sup> The aviation industry responded with The Montreal Agreement in 1966.<sup>17</sup> In addition to the new liability limitation of \$75,000, the Montreal Agreement imposed strict liability on the airlines by requiring air carriers to waive the defense of article 20 of the Warsaw Convention.<sup>18</sup> After the major airlines signed the Montreal Agreement, the United States retracted its denunciation.<sup>19</sup>

The Montreal Agreement was intended to operate only until the member nations of the Warsaw Convention should convene and formally amend the Treaty.<sup>20</sup> In 1971, they did so. The passage of the Guatemala Protocol increased the liability cap to \$100,000 and preserved the strict liability provision of the Montreal Agreement.<sup>21</sup> The United States, however, neglected to ratify the Guatemala Protocol.<sup>22</sup> Nor did the United States adopt several amendments, labeled the Montreal Protocols of 1975, which created an international monetary unit to measure liability.<sup>23</sup> Thus, only the Warsaw Convention and the

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<sup>13</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371.

<sup>14</sup> Note, *Torts*, *supra* note 7, at 847-48, 848 n.59.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 849.

<sup>18</sup> *Id.* Article 20 exempts the air carrier if the air carrier can prove it did everything possible to avoid the accident, *See supra* note 1, at art. 20.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 850.

<sup>23</sup> *Id.*

Montreal Agreement are in effect in the United States.<sup>24</sup>

B. *Judicial Interpretation of the Warsaw Convention*

American air passengers aboard international flights are subject to the Warsaw Convention and the \$75,000 liability limitation produced by the Montreal Agreement. In the past, three events could trigger the removal of the Treaty limitations: 1) the air carrier's wilful misconduct; 2) the failure to deliver a passenger ticket to a passenger; and, 3) the failure to provide adequate notice of the limitations cap under the Treaty.<sup>25</sup> The first two events expressly subject the air carrier to unlimited liability. The last event, the requirement of adequate notice to preserve Treaty protections, had been implied by the judiciary. After *Chan*, however, the requirement of adequate notice is effectively dead.

1. *The "Purpose-Oriented" Approach to the Warsaw Convention*

Under the Warsaw Convention, an air carrier must provide each passenger with a ticket meeting certain requirements.<sup>26</sup> If the air carrier transports a passenger without delivering a ticket, it is excluded from the limited liability provisions of the Treaty.<sup>27</sup> In *Ross v. Pan Am Airways*,<sup>28</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> See Warsaw Convention, *supra* note 1, at art. 25, art. 3(2). The requirement of adequate notice arose by judicial implication. See *infra* notes 26-65 and accompanying text.

<sup>26</sup> Warsaw Convention, art. 3(1) provides:

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

- (a) the place and date of issue;
- (b) the place of departure and of destination;
- (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character.
- (d) the name and address of the carrier or carriers;
- (e) a statement that the carriage is subject to the rules relating to liability established by this Convention.

<sup>27</sup> Warsaw Convention, *supra* note 1 at art. 3(2). This section provides:

however, the court permitted the airline to assert Treaty protections despite the fact that the plaintiff, a theatrical-performer en route to entertain American soldiers in Europe, never received her ticket.<sup>29</sup>

In *Ross*, the plaintiff sought damages of \$1,000,000 following an airplane crash that left her a paraplegic. She claimed that the Warsaw Convention damages cap did not apply because Pan Am did not deliver a ticket personally to her. Nevertheless, the court limited her recovery to the then existing liability cap of \$8,300, finding that an implied agency relationship existed between the plaintiff and a USO officer who had received her ticket.<sup>30</sup> The agency relationship arose because she had permitted the officer to take care of all embarkation arrangements, including the responsibility of obtaining her passenger ticket.<sup>31</sup> Yet, the Treaty expressly prohibits an air carrier from asserting Warsaw liability limitations when a passenger has not been delivered a passenger ticket.<sup>32</sup> The court explained that the Warsaw Convention "must be construed reasonably and [sic] so as to accomplish its obvious purposes."<sup>33</sup>

*Ross* rejected a literal application of the treaty in favor of a reasonable, policy-oriented approach, an approach continued in *Grey v. American Airlines*.<sup>34</sup> In that case, the parents of the plaintiffs died when the American Airlines DC-6, on an international flight from New York to Mexico

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The absence, irregularity, or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, 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 be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.

<sup>28</sup> 299 N.Y. 88, 85 N.E.2d 880 (1949). See also *With a Song in My Heart* (20th Century Fox 1952) (starring Susan Hayward).

<sup>29</sup> *Id.* at 88, 85 N.E.2d at 882. The plaintiff suffered disabling injuries when the plane crashed near Lisbon, Portugal, effectively ending her career. *Id.* at 88, 85 N.E.2d at 881.

<sup>30</sup> *Id.* at 88, 85 N.E.2d at 884.

<sup>31</sup> *Id.*

<sup>32</sup> See *supra* note 27 for text of article 3(2).

<sup>33</sup> *Ross*, 229 N.Y. at 93, 85 N.E. 2d at 885.

<sup>34</sup> 227 F.2d 282 (2d Cir. 1955), *cert.denied*, 350 U.S. 989 (1956).

City, crashed at Love Field Airport in Dallas, Texas. The court allowed the Warsaw liability provisions to apply even though the ticket did not indicate intermediate "agreed stopping places" as required by article 3(1)(c) of the Treaty.<sup>35</sup> The reason is because this "technical and wholly unsubstantial" omission could not preclude the Convention protections.<sup>36</sup>

By refusing to employ a literal interpretation of the Treaty, *Ross* and *Grey* launched a judicial trend toward emphasizing the Treaty's purpose rather than its plain meaning.<sup>37</sup> Following this lead, later courts focused on whether the non-compliance in question was sufficiently egregious to disqualify the air carrier from the liability protection, given the purpose of the requirement with which the air carrier had failed to abide.

For example, the purpose of the notice requirement under article 3<sup>38</sup> is to allow the passenger an opportunity to purchase additional insurance should the passenger decide that the damages cap provides insufficient coverage. If the air carrier delivers the ticket after the passenger has boarded the plane, the passenger is deprived of this opportunity. Indeed, in *Mertens v. Flying Tiger Line, Inc.*,<sup>39</sup> the Second Circuit held that the Warsaw Convention requires ticket delivery to the passenger in a manner affording the passenger reasonable chance to take self-protective measures.<sup>40</sup> In *Mertens*, the parents of the decedent com-

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<sup>35</sup> *Id.* at 284; *Grey v. American Airlines*, 95 F. Supp. 756, 757 (S.D.N.Y. 1950). The ticket did not list Love Field as a stopping place. *Id.*

<sup>36</sup> *Id.* The district court allowed the liability protection because article 3(2) authorizes the sanction of exclusion only in the event of nondelivery of a ticket. *Grey*, 95 F. Supp. at 758. The court concluded that there must be some reason why articles 4 and 9 forbade the airline to avail itself of limitations for failing to comply with certain notice requirements while article 3 did not. *Id.* In this respect, the opinion is similar to *Chan*.

<sup>37</sup> *Ross*, 299 N.Y. at 93, 85 N.E.2d at 885. The court noted that the twin aims of the Warsaw Convention, uniformity of laws and limited liability, would be poorly served by an overly burdensome application of the Treaty. *Id.* See also *Grey*, 227 F.2d at 285.

<sup>38</sup> See Warsaw Convention, *supra* note 1, at art. 3.

<sup>39</sup> 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

<sup>40</sup> *Id.* at 857.

menced an action when their son perished aboard a Flying Tiger Line plane that crashed in Japan. According to the court, the air carrier's failure to deliver the ticket sufficiently in advance of boarding constituted "nondelivery" under the Treaty, an event that expressly invokes the sanction of unlimited liability.<sup>41</sup> The court explained that the delivery requirement would "make little sense if it could be satisfied when the aircraft was several thousand feet in the air."<sup>42</sup>

Likewise, in *Warren v. Flying Tiger Line*<sup>43</sup> the court barred the Warsaw Convention damages cap because the air carrier delivered passenger tickets at the foot of the ramp leading to the plane just before take off. Specifically, delivery at the ramp did not allow reasonable time for the passengers to purchase additional insurance.<sup>44</sup> Therefore, the court allowed the plaintiffs, the personal representatives of the military passengers killed aboard the defendant's plane en route from Travis Air Force Base to Vietnam, to assert a cause of action under article 3 of the Warsaw Convention.

As in *Mertens*, the court found that delivery of passenger tickets in this case was too late to constitute "delivery" within the meaning of article 3(2).<sup>45</sup> Since none of the passengers were given a reasonable chance to purchase coverage above the Treaty limitation, the air carrier denied them "a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability."<sup>46</sup> The court considered the purpose of the limitations cap to both the air carrier and the passenger and prevented application of the Treaty aegis even though,

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 352 F.2d 494 (9th Cir. 1965).

<sup>44</sup> *Id.* at 496. The court also noted that the warning of the liability limitation was in such fine print that it would be difficult to read it without a magnifying glass. *Id.* at 497.

<sup>45</sup> *Id.* at 498.

<sup>46</sup> *Id.*

technically, the air carrier had fully complied with article 3.<sup>47</sup>

In *Lisi v. Alitalia-Linee Aeree Italiane*,<sup>48</sup> the court expanded upon the purpose of adequate delivery to include the requirement of adequate notice of limited liability. In *Lisi*, the defendant failed to give the passengers adequate notice by printing the limitations in such small print, unemphasized by bold face type or contrasting color, as to effectively camouflage its presence.<sup>49</sup> The court understood the *Mertens* and *Warren* cases to apply Warsaw Convention articles only if "the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures."<sup>50</sup> Significantly, however, those cases turned upon the timing of physical delivery, not the adequacy of the print on the ticket.<sup>51</sup>

Nevertheless, the *Lisi* court found inadequate print analogous to dilatory delivery so as to bar invocation of the damages cap. Both deficiencies prevent the passenger from purchasing additional insurance.<sup>52</sup> To allow limited liability removes the quid pro quo, for the arbitrary liability limitations under the Treaty are especially unfair if

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<sup>47</sup> *Id.* at 497. *Mertens* and *Warren* do not contradict *Ross*. Admittedly, the results in the cases are different but all three courts reject a literal interpretation of the Convention. See *id.* at 494; *Mertens*, 341 F.2d at 851; *Ross*, 299 N.Y. at 88, 85 N.E.2d at 880. In fact, had the three cases been litigated after the Supreme Court's decision in *Chan*, the air carrier could have successfully enacted the liability provisions in each case. See *Chan*, 490 U.S. at 122.

<sup>48</sup> 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1967) (4-4 decision).

<sup>49</sup> *Id.* at 514. See *Warren v. Flying Tiger Line*, 253 F. Supp. 237, 240-242 (S.D.N.Y. 1966) (photocopy of the ticket and notice provision therein). The plane, en route from Rome to New York, crashed in Ireland. Five suits were consolidated in the district court for wrongful death, personal injury and property damages, allegedly sustained by the thirteen passengers aboard the flight. *Id.* at 510.

<sup>50</sup> *Lisi*, 370 F.2d at 512.

<sup>51</sup> See *Boryk v. Argentinas*, 332 F. Supp. 405 (S.D.N.Y. 1971) (verbal delivery of liability statement sufficient to constitute physical delivery within the meaning of article 3(2)).

<sup>52</sup> The court also relied upon *Mertens*. See *supra* notes 39-43 and accompanying text; *Lisi*, 370 F.2d at 514-516.

they apply when the air carrier has not allowed its passengers to further insure their lives.<sup>53</sup>

The *Lisi* opinion focused on implied notice requirements of article 3. Even if an air carrier delivers the ticket, the notice must be conspicuous and interpretable.<sup>54</sup> As such,<sup>55</sup> *Lisi* represents the first case to require adequate notice in addition to adequate delivery.<sup>56</sup>

The Second Circuit adhered to the implied requirement of adequate notice in *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*.<sup>57</sup> In that case, the court stripped the airlines of the Convention liability limitations when the defendant printed notice in 8.5 point type rather than

<sup>53</sup> *Lisi*, 370 F.2d at 513. Alitalia relied on *Grey* to argue that a technical and unsubstantial defect should not preclude Convention provisions. *Id.* at 513 n.8. The circuit court disagreed, stating that the issue in *Grey* was whether the failure to include agreed stopping places on the ticket deprived the passengers of a reasonable opportunity to take self-protective measures. *Id.* Since the stops had no effect on the international character of the flight, it did not deprive the passengers of such an opportunity. Thus, "delivery" of the ticket had taken place. *Id.*

<sup>54</sup> *Id.* at 514 n.10. The court found it highly questionable whether a passenger could understand if his flight constituted "international carriage" when the air carrier did not define the term. *Id.* Moreover, the carrier's liability was expressed in French gold Francs, thereby making it difficult for the passenger to determine the dollar amount for which his life had been insured. *Id.*

<sup>55</sup> The dissent accused the majority of judicial treaty-making. *Id.* at 515. Previous cases were based on facts tantamount to no effective preflight delivery. *Id.* This is scarcely relevant to the case in question, in which the tickets were delivered from three to thirty-three days in advance. *Id.* The dissent further stated that actual notice is not required; should such a requirement be needed, it is up to the legislative and executive branches of the government to implement any changes. *Id.*

<sup>56</sup> See *Egan*, 21 N.Y.2d at 160, 234 N.E.2d at 199, 287 N.Y.S.2d at 14. The facts of *Egan* are quite similar to *Lisi*. The air carrier delivered a notice in 4.5 point type. The court held that this notice was inadequate to provide the passenger the opportunity to take self-protective measures despite the fact it complied with article 3 of the Warsaw Convention. *Id.* at 203. Hence, both *Egan* and *Lisi* rejected a literal interpretation of the treaty when to do so would conflict with the treaty's purpose.

<sup>57</sup> 705 F.2d 85 (2d Cir.), cert. denied sub nom. *Polskie Linie Lotnicze v. Robles*, 464 U.S. 845 (1983). An Ilyushin 62-M aircraft owned and operated by the defendant air carrier crashed while on its landing approach in Warsaw, Poland. Eight of the nine decedents were members of the United States Amateur Athletic Union Boxing Team traveling to Warsaw for a tournament. The ninth decedent was the wife of the team physician. The plaintiffs who filed suit were the survivors of these passengers. *Id.* at 86.

ten point type as required by the Montreal Agreement.<sup>58</sup> The defendant admitted it had not complied with the Agreement, but argued it had provided adequate notice nonetheless.<sup>59</sup> The court, however, suggested that ten point type represents the floor boundary of adequate notice by holding the air carrier disqualified from the liability limitations of the Convention for the failure to comply with the Montreal Agreement's notice requirement.<sup>60</sup>

Initially, it may seem the Second Circuit employed a literal interpretative approach to the Treaty rather than the purpose-oriented interpretation of earlier decisions.<sup>61</sup> The court's approach, however, was hardly literal. For example, the court neglected to consider whether 8.5 point type qualified as a defective ticket within the meaning of article 3(2) of the Warsaw Convention.<sup>62</sup> Also, the court failed to explain how the Montreal Agreement provides a sanction for non-compliance. In fact, the Agreement is completely silent on the matter.<sup>63</sup> A literal interpretation, therefore, would have allowed the liability limitations since no provision in either the Warsaw Con-

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<sup>58</sup> See Montreal Agreement, *supra* note 2. The cases discussed above were decided before the United States signed the Montreal Agreement. The Agreement is a "special contract" under article 22(1) of the Convention (allowing the air carrier to agree to a higher liability limit) that effectively modifies the Convention insofar as those flights have the United States as a place of departure, stopping, or termination point. *In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, 705 F.2d at 88. The Agreement imposes strict liability in exchange for the limitations cap. Montreal Agreement, art. 20(1).

<sup>59</sup> *In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, 705 F.2d at 89 (citing *Mertens*, 341 F.2d at 856; *Warren*, 353 F.2d at 498).

<sup>60</sup> *Id.*; See also *In re Air Disaster Near New Orleans, Louisiana* on July 9, 1982, 789 F.2d at 1098 (reading the 10 point requirement in the Montreal Agreement to provide the floor level of compliance for purposes of adequate notice); *In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, 748 F.2d 94 (2d Cir. 1984) (air carrier's failure to deliver a ticket with adequate notice barred Convention protection even though another carrier had delivered a proper ticket for another portion of the flight). *Contra* *Stratis v. Eastern Airlines*, 682 F.2d 406 (2d Cir. 1982) (carrier could invoke the damages cap because the passenger had been delivered a domestic ticket with the proper notice).

<sup>61</sup> See *supra* notes 27-51 and accompanying text.

<sup>62</sup> Warsaw Convention, *supra* note 1, at art. 3. This article allows the air carrier to avail itself of the damages cap in such cases.

<sup>63</sup> Montreal Agreement, *supra* note 2, at art. 22.

vention or Montreal Agreement expressly bar it.<sup>64</sup>

This approach to the Treaty betrays the court's frustration with the limited liability provision insofar as it prevents complete redress for an injured plaintiff by those most responsible for the harm.

## 2. *In re Korean Air Lines Disaster of September 1, 1983*<sup>65</sup>

Against this back drop of the purpose-oriented interpretive approach to the Warsaw Convention, the District Court for the District of Columbia reexamined the implied nexus between adequate notice and limited liability.<sup>66</sup> The court held that the damages limitation established by the Treaty was enforceable even though Korean Air Lines printed the liability statement in eight point type, reasoning that the plain meaning of the Treaty did not authorize unlimited liability in the event of inadequate notice.<sup>67</sup> Further, the court found no evidence from the drafting history or the signatory nations that the liabil-

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<sup>64</sup> This casenote does not discuss the judicial approach to either article 4 (baggage checks) or articles 8 and 9 (air waybills) of the Convention. As with article 3, courts have disagreed as to whether a literal or practical approach is proper. *E.g.* Republic Nat'l Bank of New York v. Eastern Airlines, 815 F.2d 232 (2d Cir. 1987). In *Eastern Airlines*, the defendant's failure to comply with the literal terms of article 4 was not fatal to its right to invoke the liability limitations because, though the ticket did not contain the weight of the baggage as required by article 4(3)(f), (article 4(4) disallows liability limitations if this defect exists), the defect did not prejudice Republic from obtaining additional insurance since it was on notice of the Convention's applicability, knew the approximate weight of the baggage, and was aware of the high value of the bag's contents. *Id.* at 236-37. Likewise, the court found that the failure to record the ticket number in accordance with article 4(d) was not prejudicial. *Id.* See also *Martin v. Pan Am. World Airways*, 563 F. Supp. 135, 139 (D.D.C. 1983) ("[T]he court must follow the fundamental principle that a treaty, whether construed strictly or liberally, must be interpreted to effectuate its evident purpose."). *Contra* *Gill v. Lufthansa German Airlines*, 620 F. Supp. 1453 (E.D.N.Y. 1985) (language of article 4 should be given its plain meaning and improper notice, like the failure to issue a ticket number and the failure to record the number and weight of the bags, forecloses invocation of the liability protection); *Maghsoudi v. Pan Am. World Airways*, 470 F. Supp. 1275 (D. Haw. 1979) (strict construction of article 4 precludes liability protection for failure to record the weight of passenger baggage). For a discussion of the judicial approach to articles 3, 4, 8 and 9 see Note, *Torts* at 949.

<sup>65</sup> 664 F. Supp. 1463 (D.D.C. 1985), *aff'd* 829 F.2d 1171 (D.C. Cir. 1987).

<sup>66</sup> *Id.* at 1472-1474.

<sup>67</sup> *Id.* at 1476.

ity limitation depended upon proper notice.<sup>68</sup>

To the contrary, the literal interpretation of article 3 of the Warsaw Convention subjects the air carrier to unlimited liability only in the event of nondelivery.<sup>69</sup> That is, the liability limitation is not dependent upon a notice statement.<sup>70</sup> The district court admitted its holding seemed inequitable but noted that a literal application of the Treaty accorded the meaning evident from the negotiation of its drafters.<sup>71</sup> Besides, according to the court, it is not the business of the judiciary to engage in treaty-making.<sup>72</sup> This judicial activism reveals the role in which previous courts employing the purpose-oriented approach have engaged<sup>73</sup> and reflects the judiciary's irritation with the notion that courts are prevented from fully compensating plaintiffs under the Warsaw Convention.<sup>74</sup> The district court concluded that the unfairness can only be eradicated through the political process.

## II. *CHAN V. KOREAN AIR LINES*

The United States Supreme Court granted certiorari to resolve the dispute between the lower courts on the issue of whether there is an implied requirement of adequate notice that precludes the air carrier from asserting limited liability under the Treaty. Though the holding was unanimously affirmed, the majority and the concurrence emphatically disagreed as to the proper interpretive approach to the Warsaw Convention. Justice Scalia, writ-

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<sup>68</sup> *Id.* at 1474.

<sup>69</sup> *Id.* The Supreme Court of Canada agrees. See *Ludecke v. Canadian Pacific Air Lines, Ltd.*, 12 *Avi. Cas. (CCH)* 17,191 (Que. Super. Ct. 1971). In that case, the Canadian Supreme Court allowed the air carrier to avail itself of the damages cap when it printed the liability statement in 4.5 point type. *Id.* The Court rejected the interpretive approach of the American courts, stating that article 3 was clear: improper notice amounts to a defective ticket, the issuance of which explicitly preserves the Treaty protections. *Id.* at 17,192.

<sup>70</sup> *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. at 1474.

<sup>71</sup> *Id.* at 1477.

<sup>72</sup> *Id.* at 1475.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

ing for the majority,<sup>75</sup> held that the literal words must govern, that judges must effectuate the plain meaning of the Treaty. Justice Brennan's concurrence responded that misguided adherence to literalism prevents a judge from enforcing the intention of the drafters.<sup>76</sup> In his view, courts should go beyond the literal words when to do so would reflect the policies and goals set forth in the Treaty.

The structure of the opinion focused first on the proper interpretation of article 3 and second on the relevance of structural differences in article 4 (baggage checks) and article 9 (air waybills).

#### A. *The Meaning of Article 3*

The Court noted that the plaintiffs, family members of the decedents, had admitted that the Montreal Agreement does not itself impose a sanction for the failure to comply with the ten point type requirement.<sup>77</sup> Rather, the petitioners contended the sanction arose through a reading of the Montreal Agreement in conjunction with the Warsaw Convention. The plaintiffs asserted that first, article 3 of the Warsaw Convention precludes the liability limitations if a carrier neglects to provide adequate notice of the Warsaw Convention's liability cap on its passenger ticket, and that second, the Montreal Agreement's ten point type requirement presents the minimum standard of adequate notice under article 3.<sup>78</sup>

The majority rejected the first point and thus never discussed the second. The concurrence agreed on the first point but disagreed with the second, that the Montreal Agreement provided the minimum level of compliance. The importance of the holding, however, is that, absent wilful misconduct, air carriers are now subject to unlim-

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<sup>75</sup> *Chan v. Korean Airlines*, 490 U.S. 122, 123 (1989). Chief Justice Rehnquist and Associate Justices White, O'Connor and Kennedy joined in the majority. *Id.*

<sup>76</sup> *Id.* at 136, (Brennan, J., concurring). Associate Justices Marshall, Blackmun and Stevens joined the concurrence. *Id.*

<sup>77</sup> *Id.* at 125.

<sup>78</sup> *Id.* at 126.

ited liability for passenger injury only if they accept a passenger without delivering a passenger ticket.<sup>79</sup>

This result proceeds from the majority's construction of article 3 in which the Court held that article 3(2)<sup>80</sup> did not contemplate a sanction for issuing a passenger ticket failing to comply with the requirements of the Warsaw Convention.<sup>81</sup> Rather, article 3(2) specifies that an "irregularity"<sup>82</sup> of the passenger ticket will not impair the validity of the transportation contract.<sup>83</sup> Thus, an irregularity such as inadequate notice does not remove a document from its status as a passenger ticket or from the contractual damages limitation of the Convention.<sup>84</sup> According to the majority, the second sentence of article 3(2)<sup>85</sup> subjects the air carrier to unlimited liability only if the carrier fails to deliver any document whatsoever or delivers a document with shortcomings so severe that it cannot reasonably be labeled a "ticket."<sup>86</sup> Consequently, the validity of article 3 is not conditioned by an implied requirement of adequate notice.<sup>87</sup>

In contrast, the concurrence construed article 3 to impose unlimited liability upon the air carrier in the event of inadequate notice. The concurrence disagreed with the Court's deconstruction of article 3, suggesting that the

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<sup>79</sup> *Id.* at 128-29.

<sup>80</sup> *See supra* note 27 for a discussion of article 3(2).

<sup>81</sup> *Chan*, 490 U.S. at 128-29.

<sup>82</sup> *Id.* Scalia found the meaning of irregularity in Webster's Second International Dictionary (1950): the "[q]uality or state of not conforming to rule or law." *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 128. The majority interpreted the first sentence of article 3(2) to make clear that defective notice will not cause forfeiture of limited liability. *Id.*

<sup>86</sup> *Id.* at 129. Scalia gives as an example a blank form with no data filled in. *Id.* The question remains as to whether his example is the universe of defective tickets that would trigger the article 3(2) penalty. While Scalia felt the use of eight point type instead of the requisite ten point type was not a shortcoming of such magnitude, (as the concurrence did), he leaves open whether a ticket with no warning at all would give rise to unlimited liability. *Id.* Ostensibly, if notice is not a requirement, the air carrier no longer has to print any warning whatsoever of the Warsaw Convention limitation.

<sup>87</sup> *Id.*

term "passenger ticket" used in article 3(2) is an abbreviation of the longer phrase used to describe a ticket in article 3(1).<sup>88</sup> Logically, then, if a ticket does not contain all the requisite elements under article 3(1), it is not a passenger ticket.<sup>89</sup> Hence, article 3(2) subjects the air carrier to unlimited liability for accepting a passenger without a "regular passenger ticket".<sup>90</sup> More importantly for the concurrence, if "passenger ticket" means "regular passenger ticket," then under article 3(2), the failure to deliver a "regular passenger ticket" will not impair the validity of the Treaty.<sup>91</sup> The reason is because the second sentence of article 3(2) still applies.<sup>92</sup> According to the concurrence then, if the air carrier fails to deliver a "regular passenger ticket," the Warsaw Convention provisions nevertheless apply,<sup>93</sup> and one provision, namely article 3(2), prohibits the air carrier from invoking limited liability in certain circumstances.<sup>94</sup>

The majority responded that this strict interpretation produces absurd and nonsensical results.<sup>95</sup> The majority reasoned that a prudent draftsman intending to provide a

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<sup>88</sup> *Id.* at 137 (Brennan, J., concurring). That section requires the air carrier to deliver "a passenger ticket which shall contain the following particulars . . . a statement that the carriage is subject to the rules relating to liability established by this Convention." *Id.*

<sup>89</sup> See *supra* note 26. For the concurrence, article 3(2) holds the carrier to all the obligations of the Convention but denies the benefit of the liability limit. Therefore, according to the concurrence, the article subjects the air carrier to limited liability.

<sup>90</sup> *Chan*, 490 U.S. at 137-38. For a discussion of why inadequate notice in particular subjects the air carrier to unlimited liability see *infra* notes 117-140 and accompanying text.

<sup>91</sup> *Id.* at 137. Regardless of the meaning of "passenger ticket," article 3(2) "provides that the 'absence, irregularity or loss' of a ticket shall not effect the validity of the contract, 'which shall none the less be subject to the rules of this convention.'" *Id.*

<sup>92</sup> *Id.* The concurrence argues that the rule of the second sentence of article 3(2) subjects the carrier to unlimited liability in case of the nondelivery of a "regular passenger ticket."

<sup>93</sup> *Id.* at 138.

<sup>94</sup> See *supra* note 27 for the text of article 3(2). The concurrence concludes that the intent of article 3(2) is to hold the carrier to Convention obligations and to deny Convention benefits if it fails to comply with certain requirements. *Chan*, 490 U.S. at 138 (Brennan, J., concurring).

<sup>95</sup> *Id.* at 129 n.3.

short hand for the elements of a passenger ticket listed in article 3(1) would do so by using the language "such a passenger ticket."<sup>96</sup> Further, the majority argued that if "passenger ticket" in article 3(2) is to mean "regular passenger ticket," then the first sentence of article 3(2) no longer makes any sense — "the . . . irregularity . . . of a regular passenger ticket shall not affect the existence or the validity of the contract of transportation."<sup>97</sup> The only way to avoid this construction is to define an "irregularity" as meaning something other than the failure to comply with all the requirements of article 3(1).<sup>98</sup> But, as the majority pointed out, there is no plausible "something other."<sup>99</sup>

Moreover, the majority suggested that there is no textual limitation to confine the "defective-ticket-is-no-ticket" theory to the requirement of adequate notice.<sup>100</sup> The opinion further stated that the concurrence would subject the air carrier to unlimited exposure for failing to comply with the particular requirement that the address of the carrier be listed, an absurd result indeed.<sup>101</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 130.

<sup>101</sup> *Id.* The concurrence counters that the drafters debated the proper means to enforce compliance with certain "obligatory" or essential particulars of the transportation documents, considering the imposition of civil and criminal penalties for noncompliance but ultimately deciding that the loss of Convention protection would effectively compel compliance. *Id.* at 141-42.

Essential particulars are those relating to the international character of the transportation. *Id.* at 141. While the requirement of name and address of the carrier is seemingly unnecessary to demonstrate the international character of the transportation, the drafters nonetheless expressly deemed such particulars as essential or obligatory. *Id.* It is possible this information was thought essential to establish the air carrier's domicile for jurisdictional purposes under article 28 of the Treaty. *Id.* at 141-42. Hence, the concurrence responded that what the majority considers an absurd result, subjecting the air carrier to unlimited liability for failing to list its address and name, was a result precisely intended by the drafters at one time. *Id.* at 141. See also *infra* notes 122-140 and accompanying text (explaining why, according to the concurrence, the requirement of adequate notice conditions the air carriers' right to invoke the Warsaw Convention liability protections).

The majority next dismisses the concurrence's interpretation of the first sentence of article 3(2).<sup>102</sup> Under the concurrence's construction, if a "regular passenger ticket" is not delivered, the limited liability rule shall not apply.<sup>103</sup> The majority replies that if "passenger ticket" is not defined by the particulars under article 3(1), then article 3(2) is given its most logical meaning: a carrier failing to deliver any passenger ticket whatsoever is subject to unlimited liability, but a carrier delivering an irregular passenger ticket may invoke the Treaty limitations cap.<sup>104</sup> Thus, the majority read the two sentences under article 3(2) to be exclusive, finding the concurrence to be incorrect insofar as the concurrence understands the first sentence of article 3(2) to incorporate the second. Why else, the majority asks, does the second sentence begin with the word "[N]evertheless"?<sup>105</sup>

The majority interpreted "nevertheless" to indicate an exception to the operation of the first sentence, "not a specification of something already included within it."<sup>106</sup> Should the concurrence's construction be correct, the second sentence of article 3(2), according to the majority, would have been written as a new clause beginning with "including the rule that."<sup>107</sup> Thus, the plain meaning of the second sentence states that when the "absence" of a "passenger ticket" is due to ticket nondelivery, the air carrier shall *nevertheless* be unable to avail himself of the limited liability rules.<sup>108</sup>

The concurrence answers that the majority's failure to accept its interpretation results from the misplaced literalism and disregard of context in its approach to the

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<sup>102</sup> That is, the concurrence's reading that the language, "irregular ticket shall nonetheless be subject to the rules of this convention" includes among those rules, the rule of the second sentence of article 3(2). See *supra* notes 92-95 and accompanying text.

<sup>103</sup> *Chan*, 490 U.S. 129-30 n.3.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

Treaty.<sup>109</sup> Noting that an analysis of the drafting history of the Warsaw Convention reveals that there is no support for the Court's understanding of article 3,<sup>110</sup> the concurrence points out that the draft of article 3 presented to the Warsaw Conference placed the first and second sentences of Article 3(2) in completely separate paragraphs.<sup>111</sup> Thus, there is no indication that the drafters intended a substantive change by combining the two paragraphs.<sup>112</sup> The concurrence thinks it more likely that when the drafters reduced the two paragraphs to the two sentences of article 3(2), the word "nevertheless" ("*toutefois*") was placed between the sentences as a transition.<sup>113</sup>

The majority responds to this final assault upon its interpretation of article 3 by pointing out that at the very least the concurrence ought to have the strength of its convictions.<sup>114</sup> That is, the concurrence rejects its own reading of article 3 by stating the omission of any single

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<sup>109</sup> *Id.* at 138 n.5.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The draft version reads as follows:

In the carriage of travelers the carrier shall be required to deliver a passenger ticket which shall contain the following particulars:

- (a) the place and date of issue;
- (b) the points of departure and destination;
- (c) summary indication of the route to be followed (via) as well as the contemplated stopping places;
- (d) the name and address of the carrier or carriers;

The passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.

The presence, irregularity, or loss of this document of carriage shall not prejudice either the existence or the validity of the contract of carriage.

If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, or if the ticket does not contain the particulars indicated hereabove, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants. *Id.* at 1688 n.8.

<sup>112</sup> *Id.* at 138 n.5.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

particular listed in article 3(1) does not necessarily impose the sanction of the second sentence of article 3(2).<sup>115</sup>

## B. *The Relevance of Articles 4 and 8*

After developing and defending the Court's interpretation of article 3, the majority next turns to articles 4, 8 and 9 to further conclude that inadequate notice will not eliminate the liability limitation.<sup>116</sup> In identical terms, articles

<sup>115</sup> *Id.* at 134-35 n.5.

<sup>116</sup> *Id.* at 130. The relevant provisions of articles 4, 8 and 9 read:

### *Article 4*

(3) The baggage check shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The name and address of the carrier or carriers;
- (d) The number of the passenger ticket;
- (e) A statement that delivery of the baggage will be made to the bearer of the baggage check;
- (f) The number and weight of the packages;
- (g) The amount of the value declared in accordance with article 22(2);
- (h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f) and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit the liability.

### *Article 8*

The air waybill shall contain the following particulars:

- (a) The place and date of its execution;
- (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 consignor;
- (e) The name and address of the first carrier;
- (f) The name and address of the consignee if the case so requires;
- (g) The nature of the goods;
- (h) The number of packages, the method of packing, and the particular marks or numbers upon them;
- (i) The weight, the quantity, the volume, or dimensions of the goods;
- (j) The apparent condition of the goods and of the packing;

3(1), 4(3)(h), and 8(q) require a statement of the liability limitation under the Warsaw Convention. The three articles also subject the air carrier to unlimited liability if the relevant document, ticket, baggage check or air waybill, has not been delivered to the passenger prior to departure.<sup>117</sup> Unlike article 4 and article 9, however, article 3 does not authorize the same sanction for the failure to provide notice.<sup>118</sup>

For this reason, articles 4 and 9 confirm what the text of article 3(2) already makes clear: the delivery of a document failing to provide notice of the liability limitations is different from the failure to deliver a document.<sup>119</sup> The majority states that it would be a flouting of the text to

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(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with article 22(2);

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

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

*Article 9*

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

*Id.* at 131-32 n.4.

<sup>117</sup> *Id.* at 131.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 131-32. The majority disagrees with the petitioners that it would be absurd for defective notice to preclude liability limits on baggage checks and air freight yet not for passenger injury or death. The \$8,300 limit ratified in 1929 might have been considered adequate so that a passenger who did not purchase additional coverage because of defective notice would be sufficiently insured in any event. *Id.* at 133. The survivors of the decedent receive equitable treatment. *Id.* In contrast, limited liability for baggage and freight does not suggest so much a concern for value as it does for a fair level of liability commensurate with profit. *Id.* Thus, the shipper of baggage and freight, having been deprived of adequate

imply in article 3 a "sanction not only withheld there but explicitly granted elsewhere."<sup>120</sup>

In a response that exhaustively examines the history of the Warsaw Convention drafts, the concurrence implies that, while no one can be certain as to the proper literal meaning of article 3, the majority has flouted the intention of the drafters. The drafters of the Warsaw Convention, the Comité International Technique D'Experts Juridiques Aériens (CITEJA), excluded the benefit of liability limitation if a passenger ticket did not contain certain listed particulars, including the failure to provide notice of the damages cap.<sup>121</sup> The drafting notes make clear that CITEJA intended to apply a uniform regime of sanctions for the failure to comply with the provision listed in articles 3, 4 and 8.<sup>122</sup> At the third session of CITEJA, the draft of article 3 contained provisions similar to those foreseen for the air waybill (article 8), including the statement that if no notice is provided, the Warsaw Convention is still in effect except for the provisions shielding the air carrier from total or partial liability.<sup>123</sup> Hence, CITEJA reports indicate an intended parallelism of approach to the three types of transportation docu-

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notice, would not receive equitable treatment since the shipper never had the opportunity to insure the carriage. *Id.*

The majority suggests other possible reasons why the sanctions exist for inadequate notice under articles 4 and 8 but not under article 3. *Id.* First, the liability limitations for baggage and freight are much more substantial. *Id.* Second, perhaps the drafters believed passengers were more likely to insure their carriage than their lives. *Id.* Freight is lost more frequently than passengers. Moreover, the Convention provides a means to protect carriage at the airport for the baggage and freight on condition the passenger specially declares the value upon delivery. *Id.*

The majority's point is that the interpretation of article 3 is by no means absurd. Since the text of article 3 does not produce an absurd result, it cannot be dismissed as an obvious drafting error. The plain meaning must therefore govern with no reference to the complicated drafting history. *Id.* at 1683-84. For the majority, where the text is clear, the drafting history should not be inspected, particularly when the structure of the document, namely articles 4, 8 and 9, confirm rather than subvert the text. *Id.*

<sup>120</sup> *Id.* at 133.

<sup>121</sup> *Id.* at 139 (Brennan, J., concurring).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 140.

ments: "[t]he sanction for transporting passengers without regular tickets is the same as that for the transportation of baggage and goods."<sup>124</sup>

The concurrence next examines why article 3 lost its uniformity with the provisions for air waybills and baggage checks. To begin with, there is some ambiguity as to whether the notice clause was actually among those particulars required to preserve the Warsaw Convention liability protections.<sup>125</sup> The article 3 notice requirement in

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<sup>124</sup> *Id.* Furthermore, a report prepared on behalf of CITEJA accompanying its final draft stated "[T]he sanction provided . . . for carriage of passengers without a ticket or with a ticket not conforming to the Convention is identical to that provided . . . for carriage of baggage and goods. *Id.* at 140-41 (quoting Second International Conference on Private Aeronautical Law Minutes 247 (R. Horner & D. Kegrez trans. 1975) (emphasis added)).

<sup>125</sup> See *supra* note 112 (draft version of article 3). The CITEJA draft of article 4 reads:

In the carriage of baggage, other than small personal objects of which the passenger himself retains custody, the carrier shall deliver a baggage check.

It shall contain the following particulars:

- (a) the place and date of issue;
- (b) the points of departure and of destinations;
- (c) summary indication of the route to be followed (via) as well as the contemplated stopping places;
- (d) the name and address of the carrier or carriers;
- (e) the number of the passenger ticket;
- (f) indication that the check is made out in duplicate;
- (g) indication that the delivery of the baggage to the traveler shall be validly made to the bearer of the check.

The baggage check shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the Convention.

The absence, irregularity, or loss of this baggage check shall not prejudice either the existence or the validity of the contract of carriage.

If, for the international carriage, the carrier accepts baggage without having made out a ticket, or if the ticket does not contain the particulars indicated herabove up to and including (d), the contract of the carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servant. *Id.* at 143 n.9.

The draft form of article 8 specified fifteen particulars the waybill was to contain of which (a) through (g) were deemed compulsory. *Id.* at 143-44 n.10.

A separate article 9 required that the air waybill contain a statement of limited liability governed by the Warsaw Convention. Article 17 excluded an air carrier from invoking the liability protection if the carrier failed to comply with all the elements of article 8(a) through (g) inclusive or with the notice requirement of article 9. *Id.*

the final draft was not listed under a letter of the alphabet but rather as a separate paragraph. Likewise, the drafters listed the article 4 notice requirement in a separate paragraph yet failed to state whether noncompliance would give rise to unlimited liability. On the other hand, article 8, the air waybill provision clearly required the notice of limited liability to benefit from the damages cap.<sup>126</sup>

To remedy this uncertainty, the Japanese delegation to the Warsaw Convention proposed an amendment to articles 3 and 4, the passage of which placed the identical liability clauses of both articles as a lettered particular. This made clear that the liability clause was to be treated as an essential particular.<sup>127</sup> The purpose of the amendment, however, remains unclear, for there was no floor discussion debating its passage.<sup>128</sup> In any case, had only this amendment addressed the notice requirements, it would be clear that the failure to provide the liability statement precludes invocation of the damages limitation.<sup>129</sup>

Unfortunately, a second amendment proposed by the Greek delegation revived the ambiguity. The Greek delegation had repeatedly criticized the sanctions clause as too harsh. The delegation, therefore, proposed an amendment to remedy the perceived unfairness to the air carrier. This amendment deleted from article 3(2) the language, "or if the ticket does not contain the particulars above," while rewriting the parallel article 4 particular as a listed particular in order to conform in structure with article 9.<sup>130</sup> Thus, a difference exists between the final structure of article 3 and that of articles 4 and 9.<sup>131</sup>

At this point in its extensive study of the drafting history of the Warsaw Convention, the concurrence concedes that the majority may be correct in holding the drafters intended the substantive differences between the

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 144.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 145.

<sup>131</sup> *Id.*

articles insofar as sanctions are concerned. Ultimately, however, the concurrence rejects the majority's construction. The concurrence points out that the Solicitor General of the United States felt the difference reveals a drafting error caused by the difficulty in coordinating the Japanese and Greek amendments.<sup>132</sup> Moreover, it is puzzling for the concurrence that such a significant departure from efforts to provide a uniform scheme between all three articles would not be reflected anywhere in the drafting history.<sup>133</sup>

With this in mind, the concurrence returns for a closer examination of the Greek amendment, finding that the amendment did not intend to provide different treatment for passenger tickets.<sup>134</sup> Rather, the Greek amendment reflected the concern that a simple omission<sup>135</sup> caused by employee negligence would lead to an overly severe punishment. Because the amendment addressed clerical errors in the filling of ticket forms,<sup>136</sup> an effort to remove such minor errors from the list of particulars that subject the air carrier to unlimited liability would not be inconsistent with the intent to preserve the sanction for the failure to provide a liability statement.<sup>137</sup> Conceivably then, since the liability statement in article 3 consisted of a separate paragraph rather than a listed particular at the time the Greek amendment was debated, the removal of the language "or if the ticket does not contain the particulars indicated above" did not address the liability statement at all.<sup>138</sup> It follows that the amendment never intended to render the liability statement any less essential than it is in articles 4 and 9.<sup>139</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 146.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 147.

<sup>139</sup> *Id.*

### C. *The Holding*

The differences in the interpretive approach notwithstanding, the Court allowed Korean Air Lines the limitations cap.<sup>140</sup> The majority did so because, absent wilful misconduct, an air carrier may avail itself of the Treaty aegis unless it has failed to deliver a passenger ticket. The petitioners misread article 3 to imply a requirement of "adequate notice" before an air carrier can enjoy limited liability.

The concurrence agreed with the result, but not the rationale. Restated, the concurrence agreed with the petitioners that article 3 requires "adequate notice" to invoke the protection but disagreed that the Montreal Agreement, in requiring the statement be printed in ten point type, sets the minimum level of compliance.

While the majority rejected a purpose-oriented approach to the Warsaw Convention, the concurrence aligns itself with those courts focusing on whether the passenger received adequate notice. The concurrence, however, overturned the brightline approach of some of these courts in which the ten point requirement of the Montreal Agreement defined the floor boundary of "adequate notice." It found that the eight point type in the case at bar constituted adequate notice under any "conventional" interpretation of that term.<sup>141</sup>

The two opinions are diametrically opposed as to the proper interpretive theory. Generally, a judge is not to consult legislative histories when the language of a statute

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<sup>140</sup> For an explanation of *Chan* and its Constitutional implications insofar as the Warsaw Convention is concerned, see Note, *Chan v. Korean Air Lines: The United States Supreme Court 'Shoots Down' Notice Requirements under the Warsaw Convention*, 3 TRANSNAT'L LAW. 363, 386-88 (1990) (authored by Richard Manuel Clark).

<sup>141</sup> *Id.* at 151. Ultimately, the applicable standard under the concurrence is whether the notice is minimally legible. Otherwise, it is no notice at all. And, as a matter of interpretation of the Warsaw Convention, this failure removes the air carrier's liability protection under the Treaty. The carrier's obligation under the Montreal Agreement, however, is of no relevance to a determination of the extent of liability. Violations of the Montreal Agreement are subject only to FAA sanctions, if applicable. *Id.*

or treaty is clear and unambiguous.<sup>142</sup> Article 3 may very well contain such clear language. In this respect, the concurrence's position that article 3 is susceptible to at least two readings is somewhat forced. Justice Brennan demonstrates that one could torture any statute to strip it of its "unambiguous" status and so consult drafting histories ultimately to arrive at a position contrary to the "plain meaning."

Even so, one is hard-pressed to say the majority carries the day. The drafting histories of the Treaty present compelling evidence that a uniform regime of sanctions was intended for articles 3, 4 and 8. A strict, literal approach to the Treaty may have prevented the Court from effectuating the intentions of the drafters. And yet, a policy oriented approach lends itself to the danger of judicial abrogation of the Warsaw Convention.<sup>143</sup>

### III. CONCLUSION

The practical effect of *Chan* confines the litigation strategy of counsel seeking to avoid the damages cap on pas-

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<sup>142</sup> *Id.* at 134.

<sup>143</sup> The interpretive styles of the majority and the concurrence are categorized as the new textualist approach and the traditionalist approach respectively. Es-  
kridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990). The New Textualist  
rejects legislative histories on the grounds that courts only have jurisdiction to  
adjudicate laws passed, not thoughts undergone. *Id.* at 649. Reliance on legisla-  
tive history to reject the plain meaning of the statute violates bicameralism be-  
cause the views of a legislative subgroup supersede the voice of Congress as a  
whole. *Id.* Additionally, this reliance misrepresents the President's view by read-  
ing into the statute a meaning the President may not have considered when he  
signed it. *Id.* at 649-50 (discussing presentment).

Traditionalism, on the other hand, embraces legislative histories because it en-  
ables courts to carry out an essential function: implementing the original intent of  
the enacting Congress. *Id.* at 626. An inspection of Committee Reports, sponsor  
statements, rejected proposals, floor and hearing colloquy, views of non-legislator  
drafters, legislative inaction, and subsequent legislative history allows the courts  
to faithfully effectuate the intent and purpose of the supreme lawmaking body. *Id.*  
at 636. Rejection of such legislative records in deference to the plain-meaning  
results, on occasion, in judicial interpretations that contravene Congressional in-  
tentions. *Id.* at 627. See also Note, *Justice Scalia's Use of Sources in Statutory and Consti-  
tutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (authored by  
Arthur Stock).

sengers to basically one argument: wilful misconduct.<sup>144</sup> Because it is extremely difficult to prove wilful misconduct, international air carriers are likely to enjoy a \$75,000 liability limit for each passenger as long as the United States continues its adherence to the Warsaw Convention. Congressional attention to dissatisfaction with the Warsaw Convention is therefore likely to increase. The aviation industry long ago outgrew the need for special protection.<sup>145</sup> More importantly, limited liability on tort recovery is anathema to the American ideal of full compensation to injured victims by those responsible for the harm. Events like the recent tragedy of the Pan Am Flight 103 bombing in Lockerbie, Scotland and the Soviet attack upon Korean Air Lines Flight 007 focus attention on the shortcomings of the Treaty. Should the air carrier's liability remain limited to \$75,000 per passenger, an uproar before Congress is likely to follow.

The United States has in the past expressed its dislike of the Warsaw Convention. With tragedies like those mentioned above, it is likely to do so again. Dissatisfaction with the Treaty, however, has not yet led to the kind of legislative action that will meaningfully protect passengers. Instead, protection came from the courts which confined the Treaty to its purpose as best they could, hoping to avoid the unfairness.

*Chan* removes the judicial response. Thus, passengers now have two means to protect themselves. They can purchase insurance, or they can lobby for legislative abrogation of the Treaty. By foreclosing the judicial response, the Supreme Court may very well have cleared the way for the latter action. Without a more flexible judicial approach to the Warsaw Convention, litigants are likely to turn to the majoritarian branches of the government. The

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<sup>144</sup> Warsaw Convention, *supra* note 1, at art. 25. Article 3(2) does authorize unlimited liability in the event of ticket non-delivery, but this situation is highly unlikely to occur. See *supra* note 27.

<sup>145</sup> W. Turley, AVIATION LITIGATION, § 5.06 (1986).

political response to *Chan* should finally lead to the kind of Congressional action that is long overdue.

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