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THE WARSAW CONVENTION: JUDICIAL TOLLING OF THE DEATH KNEll?*

EDWARD CHARLES DEVIvO**

INTRODUCTION

On March 8, 1983, the United States Senate voted against the ratification of Montreal Protocols 3 and 4.1 The Montreal Protocols were an attempt to counterbalance the effects of the Warsaw Convention, an antiquated treaty imposed upon virtually all passengers who travel by air in international transportation.2 Although they may reach the Senate floor by way of a vote for reconsideration,3 the Montreal Protocols are in a moribund state, as matters now stand.

Originally, the Warsaw Convention's limitation on the amount of damages recoverable for wrongful death, personal injury or loss of goods or personal effects was intended to protect the fledgling aviation industry.4 After discussion of the concept of limited liability at two Conferences, held in Paris

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* This article is dedicated to the memory of Walter E. Rutherford.

1 129 CONG. REC. S2279 (daily ed. March 8, 1983).
3 Immediately after the vote against ratification was announced, Senate Majority Leader Howard H. Baker, Jr. (R-Tennessee) who had originally voted in favor of ratification changed his vote to “nay, in order to acquire status to enter a motion to reconsider the vote by which the resolution of ratification was defeated.” 129 CONG. REC. S2279-80 (daily ed. March 8, 1983).
in 1925 and in Warsaw in 1929,\(^5\) an international treaty was drafted and signed by 23 nations\(^6\) to provide uniformity to the terms and conditions of international transportation by air. Entitled the "Convention for the Unification of Certain Rules Relating to International Transportation by Air,"\(^7\) the treaty became commonly known as the Warsaw Convention and attained its sovereign status as a formally adopted international treaty on February 13, 1933.\(^8\) Its central underpinning is article 22 which places a maximum ceiling on the damages recoverable from an air carrier when a passenger has been injured or killed in international transportation\(^9\) or when baggage, cargo or personal effects have been damaged, lost, delayed or destroyed.\(^10\)

Although designed to provide much needed uniformity for

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\(^5\) Lowenfeld and Mendelsohn, \textit{supra} note 4, at 498.

\(^6\) The United States attended the Paris and Warsaw Conferences merely as an observer. It was not one of the original signatory nations when the Warsaw Convention was adopted on October 12, 1929, as more fully discussed in Part I, \textit{infra} notes 8, 24-28 and accompanying text.


\(^8\) Pursuant to article 37 of the Warsaw Convention, the treaty was to become effective: ninety days after ratification by five of the High Contracting Parties at the Warsaw Convention (Article 37). France, Poland, and Latvia all deposited their ratifications on November 15, 1932, joining Spain, Brazil, Yugoslavia, and Rumania, which had previously done so; and on February 13, 1933, the Convention entered into force. Great Britain and Italy deposited their ratifications on the following day, and by the end of 1933 twelve countries, including most of the European nations, were members.


\(^9\) Warsaw Convention, \textit{supra} note 7, art. 22. Article 22 provides:

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

\textit{Id.}

The methodology for converting the liability limitation into U.S. dollars is explained at length in Part IV, \textit{infra} notes 196-209 and accompanying text.

\(^10\) Warsaw Convention, \textit{supra} note 7, art. 22(2), (3), (4). These subsections provide:
an infant industry, the Warsaw Convention has become an unjust mechanism that imposes artificial boundaries on an air crash victim's recovery of just compensation. To soften and at times blunt the Convention's impact, courts in the United States have repeatedly attempted to circumvent its liability limitations by innovatively interpreting the Warsaw Convention and the Montreal Agreement. The result has been total disarray in United States case law regarding the scope of recovery in international aviation disasters. More significantly, these diverse judicial excursions have not been met with any meaningful legislative reaction by Congress.

As promulgated, the Montreal Protocols would have raised the Convention's monetary limitation from $75,000 to an unbreakable boundary near $109,000. Prior to the proposed amendment by the Montreal Protocols, the liability limitation was "breakable" because proof of wilful misconduct, or the failure to give notice to passengers of the liability

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Id.

See infra notes 13, 51-53, 92-103 and accompanying text.

See supra notes 1-3 and accompanying text; see also infra notes 13, 339-340 and accompanying text.

The Intercarrier Agreement increased the original ceiling of $8,300 under the Warsaw Convention to $75,000. The Intercarrier Agreement, as discussed at length in Part II, infra notes 55-105 and accompanying text, came into effect in May of 1966 and is commonly known as the Montreal Agreement. The increased limit, as a special contract under article 22, is subject to the relevant provisions of the Warsaw Convention. Lowenfeld & Mendelsohn, supra note 4, at 597.

129 Cong. Rec. S2238-39 (daily ed. March 7, 1983). The actual limit is expressed as 100,000 special drawing rights which converts roughly to this dollar amount as of March 8, 1983. For a full explanation of the special drawing rights, see infra notes 202-218 and accompanying text.
limitation, subjected the carrier to liability for provable damages without limitation.\footnote{15} The Montreal Protocols would have eliminated these exceptions and imposed absolute liability with a new unbreakable ceiling on recoverable damages.\footnote{16}

Having languished in the Committee on Foreign Relations for over seven years, the Montreal Protocols 3 and 4 reached the Senate for a final vote on March 8, 1983, upon the formal request for advice and consent to ratification which had been submitted by President Gerald R. Ford shortly before the end of his term.\footnote{17} Following eight hours of debate on the Senate floor,\footnote{18} the arguments against ratification made in the closing minutes of the debate seemed to best express the impracticality of ratifying legislation which sustains and prolongs antiquation. Focusing upon air safety concerns, which could be compromised seriously by the Montreal Protocols' elimination of the "wilful misconduct" exception, one senator criticized the effort to revitalize the scope and intent of the original Warsaw system of liability as susceptible to further debilitation by adoption of the quasi-modern legislation.\footnote{19}
The legislative and executive input to modernize the Warsaw Convention has been limited strictly to the proposal for ratification of the Montreal Protocols. There have been no efforts toward legislation which would maintain uniformity and allow for flexibility as well. The need to break from the present system of uniformity under the Warsaw Convention most obviously resides in the limitation of liability provision. Any effective revision of the Warsaw Convention must provide for the abandonment of this limitation because it works to the detriment of passengers of the United States vis-a-vis those of other signatory nations. In the course of the debate over the Montreal Protocols, one United States Senator expressed concern that the low liability limitation would injure the American traveling public.\(^2\)\(^{20}\)

The Warsaw Convention has lost its vitality. Its development has run the gamut from the paternalism of its drafters to those who now propose to sustain it by artificial means, such as the ineffective higher monetary ceiling contained in the Montreal Protocols. What is needed, as the history and the United States' case law of the Convention clearly demonstrate, is a new system which abandons all liability limitations and realizes that new monetary ceilings belabor the antiquity of an outdated system. As long as the door to Capitol Hill remains closed to proposals for changing the Convention, the courts in the United States will continue to find new ways to avoid application of the liability limitation and, thereby, slowly toll the death knell of the Warsaw Convention.

\(^{20}\) 129 CONG. REC. S2250 (daily ed. March 8, 1983) (remarks of Senator Hollings stating "proponents [of the Protocols] acclaim the treaties for their importance in maintaining our national prestige as the international leader in aviation. We will become the international leader in a ripoff of the American traveling public").
In an effort to mesh two goals, namely to provide some uniformity to the liability rules applicable to claims arising out of international transportation by air and to limit the potential liability of air carriers in the event of accidents, the Warsaw Convention originally provided that an airline would be liable for damages sustained by a passenger in the course of a flight or while embarking or disembarking up to a monetary limit of approximately $8,300. As a counterbalance to this monetary limitation of liability, the Warsaw Convention shifted the burden of proof such that the carrier was presumed liable for the damages alleged to have occurred on board the aircraft or in the course of embarking or disembarking. The carrier, however, would be given the opportunity to avoid liability by proving that it had taken all necessary measures to avoid the damages or that it was impossible to do so.

The United States was merely an observer to the original

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21 Warsaw Convention, supra note 7, art. 17. Article 17 of the Convention reads as follows:

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


22 Warsaw Proceedings, supra note 4, at 224-25.

23 Warsaw Convention, supra note 7, art. 20. Article 20 provides:

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Id.
conferences leading up to the creation of the Warsaw Convention in 1929 and its consummation in 1933. Although the United States was not one of the creators of the treaty, article 38 of the Convention permitted subsequent adoption of the Warsaw Convention. In November, 1933, the Commerce Department and the State Department, recognizing the utility of the United States' participation in the Convention, recommended to President Roosevelt that the treaty be adopted by the United States. President Roosevelt accepted the recommendation and submitted the treaty to the Senate where, on June 15, 1934, the Warsaw Convention received the necessary "Advice and Consent" by voice vote. Hence, while the United States had no input in formulation of the Warsaw Convention, the United States adopted the treaty shortly after it went into effect.

Both historical and economic considerations caused the Convention's monetary limitation to be reconsidered periodically. In September, 1955, a diplomatic conference was convened at the Hague to consider the status of the Warsaw Convention. The Hague Conference was the culmination of several years of extensive research devoted to revising the Convention. Immediately after World War II the issue of revision was referred to the Comite International Technique d'Experts Juridiques Aeriens (CITEJA) by the Provisional

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24 Lowenfeld and Mendelsohn, supra note 4, at 502.
25 Warsaw Convention, supra note 7, art. 38. Article 38 of the Warsaw Convention provides as follows:

1. This convention shall, after it has come into force, remain open for adherence by any state.
2. The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.
3. The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Id.
26 Lowenfeld and Mendelsohn, supra note 4, at 502.
27 78 Cong. Rec. 11,582 (1934).
28 Lowenfeld and Mendelsohn, supra note 4, at 501-03.
29 2 ICAO INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW (1955) (Doc. No. 7686-LC/140) [hereinafter cited as HAGUE PROCEEDINGS].
30 Id.
International Civil Aviation Organization. Because the CITEJA was dissolved in 1947, the Legal Committee of the International Civil Aviation Organization (ICAO) continued this study. As a result of discussions in the Legal Committee, several draft conventions were formulated during the years 1948 through 1951. In January, 1952, a special subcommittee appointed by the ICAO Legal Committee drafted at Paris a completely new convention to replace the Warsaw Convention in its entirety.

Prior to convening at the Hague, the ICAO Legal Committee gave serious consideration to utilizing the Paris draft as the new starting ground for rewriting and replacing the original Convention. After extensive debate in the committee, however, it was determined that the more practical and expedient manner in which to proceed was to conform the existing Warsaw Convention to the contemplated revisions rather than to work from the 1952 Paris draft.

Having decided to work from the Warsaw Convention itself rather than the draft prepared in Paris in 1952, two major considerations became the focal point of the Hague Conference: 1) an increase in the monetary value of the liability limitation, and 2) a modification of article 25 relating to the "wilful misconduct" exception. The proposal which emerged from the Hague Conference was to raise the liability

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31 Id.
32 Id.
33 Id.
34 Id.
35 Id. The Hague Proceedings noted: Therefore while recognizing the unquestionable value of the draft formulated at Paris by its [ICAO Legal Committee's] sub-committee and of the preparatory and exploratory work undertaken by its rapporteur, Major K.M. Beaumont, particularly inasmuch as that draft represented a systematic rearrangement, including drafting improvements, of the contents of the Warsaw Convention and included also fresh treatment of certain subjects, the Committee decided that the object of effecting only limited necessary amendments would be better achieved by taking as the bases of its discussions the Warsaw Convention itself rather than the Paris draft.

limitation from $8,300 to $13,300.\textsuperscript{37} The United States had attempted to raise the limit to $25,000.\textsuperscript{38} By compromise, it was agreed to double the originally established $8,300 ceiling and establish a new limitation of liability in the amount of $16,600.\textsuperscript{39}

Although the United States signed the Hague Protocol, ten years elapsed without the President of the United States or the Senate Foreign Relations Committee taking a firm stand on ratification.\textsuperscript{40} Opponents of the Warsaw Convention were not mollified by the doubling of the $8,300 ceiling established by the original Warsaw Convention.\textsuperscript{41} In June, 1961, the Chairman of the Senate Foreign Relations Committee wrote to the new Secretary of State regarding the hiatus over Hague ratification:

[The Hague] Protocol was referred to the Committee on Foreign Relations on July 24, 1959, and as of this date, the Executive Branch has shown little interest in it. I should like to learn, therefore, whether the Department of State would want the Committee on Foreign Relations to act on the Protocol during this session of the Congress. If not, I would be interested in learning the reasons why the Department of State does not desire Committee action on the Protocol at this time.\textsuperscript{42}

The receipt of the letter by the Department of State prompted a new look at the Hague Protocol. Consequently,

\textsuperscript{37} Id. at 76-81, 93-100.


\textsuperscript{39} Id. at 270.

\textsuperscript{40} Lowenfeld and Mendelsohn, supra note 4, at 515-16. The United States was grappling with the concept of limited liability when death or injury occurred even after it had agreed to the accord reached at the Hague in 1955. The United States did not sign the Hague Protocol at the Conference, demonstrating its equivocation despite its acknowledgement of the Protocol's increase of the monetary ceiling on recoverable damages. It is unknown to what extent the tragedy over Medicine Bow Peak, Wyoming in October, 1955, killing members of the Mormon Tabernacle Choir, captured the minds and hearts of those who originally favored the United States' adherence to the Hague Protocol. Id.

\textsuperscript{41} Id. at 510.

\textsuperscript{42} Letter from Senator J.W. Fulbright to Secretary of State Rusk (June 12, 1961), referred to in Lowenfeld and Mendelsohn, supra note 4, at 516 n.73.
the Kennedy administration introduced domestic legislation, under which air carriers would be compelled to insure passengers at a higher monetary level. The Senate Foreign Relations Committee thereafter left no doubt as to where it stood, stating that the Warsaw Convention liability limitation was an "extremely inadequate amount of compensation" and further that "even the $16,600 limitation . . . is highly inadequate by U.S. standards." It called for complementary insurance legislation for protection of up to $76,000.

After lengthy debate in Congress concerning the insurance legislation, it became evident that there was little chance of its enactment. Automatic recovery through compulsory insurance projected serious concern over the potential for aircraft sabotage and became the gravamen of the controversy over the Hague Protocol in 1964 at hearings before a special committee composed of representatives of the State Department, the Justice Department, the CAB and the FAA:

The argument was that an automatic recovery of 50,000 dollars was 'an invitation to sabotage,' not only in less developed countries where this could be a 'king's ransom,' but even in the United States. Unlike trip insurance or large amounts of life insurance purchased shortly before a flight, there could be no record that could lead to identification of a saboteur.

In fact, the issue had gained such momentum that neither the Senate nor the House of Representatives would call for a hearing on the Hague Protocol. As the opposition mounted, so did the United States' unhappiness with the unrealistic monetary limitation. Hence, in an atmosphere of increasing dissatisfaction, the executive branch of the United States government denounced the Warsaw Convention on

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43 See Lowenfeld and Mendelsohn, supra note 4, at 533-41.
46 Lowenfeld & Mendelsohn, supra note 4, at 538-39, 539 n.157.
47 Id. at 544-45.
48 Id. at 546-52.
November 15, 1965, to become effective six months from that date, on May 15, 1966. 49

A chasm thus emerged between the United States and the rest of the world over the limitation on liability in international air transportation accidents. On the same date that the formal notice of denunciation was deposited by the United States, the Department of State issued a press release indicating that the United States would continue its adherence to the Warsaw Convention provided that an international agreement limiting liability to approximately $100,000 could be reached. The Department of State further stipulated that pending the adoption of such an international agreement, there be a provisional arrangement among the principal international airlines waiving the limits of liability up to $75,000 per passenger. 50

Under the impetus of the United States' denunciation of the Warsaw Convention, the ICAO held a conference in Montreal in February, 1966 in an effort to fulfill the United States Department of State's proviso. 51 While the Montreal conference proved inconclusive and the May 15, 1966 denunciation date for the United States was drawing closer, domestic and international air carriers reconsidered interim measures which they had, on previous occasions, found to be unacceptable. As a result, the carriers agreed to a monetary liability limitation in the amount of $75,000 without regard to fault on the part of the carrier (the Montreal Agreement). 52 The United States government, as a result of this interim resolution, withdrew its denunciation of the Warsaw Convention on May 13, and gave its approval to the Montreal Agreement of 1966, 53 which became effective on May 15, 1966. 54

50 Id.
51 Lowenfeld and Mendelsohn, supra note 4, at 552. The Department of State released the proviso on November 15, 1965.
B. **Concluding Remarks.**

The new Montreal Agreement posed a problem for the courts of the United States as they attempted to relate its interim contractual status to the terms of the Warsaw Convention. Judicial examination of the Montreal Agreement involved serious consideration of whether the inter-carrier agreement modified, supplemented, amended or paralleled the Warsaw Convention. The conclusions reached by the courts often evidence a growing concern with the unfairness of the liability limitation to United States passengers. The chasm between the United States and the rest of the world which emerged when the United States threatened to withdraw from the Warsaw Convention in 1965 was widened by the introduction of the Montreal Agreement and the judicial reception it encountered.

**PART II**

**THE TRANSITION FROM THE TREATY PROVISIONS TO THE JUDICIAL EXPANSION OF THEIR MEANING**

A. **Judicial Interpretation.**

According to the terms of the Warsaw Convention, there are two ways to avoid the application of the liability limitations of article 22. First, a plaintiff may attempt to prove that the "delivery" of a ticket pursuant to the requirements of article 3 has not been accomplished. Second, the plaintiff can prove "wilful misconduct" on the part of the carrier pursuit.

The term "delivery" is not specifically defined in the Warsaw Convention. Courts have derived its definition(s) by interpreting article 3 of the treaty. See infra notes 63-77 and accompanying text. See also Manion v. Pan Am. World Airways, 55 N.Y.2d 398 (1982) and cases discussed therein. In Manion, New York State's highest court held that the carrier could not avail itself of the liability limitation because no ticket was delivered to the passenger at the outset of her international journey in New York. Plaintiff was injured on the second portion of the journey in Rome where the ticket had been delivered to her.

The wilful misconduct exception to the liability limitation under article 25 of the Warsaw Convention has been a cause of concern and extensive debate throughout the history of the Convention. As originally written in the French draft of the treaty, the carrier could not invoke the provisions of the Convention which exclude or limit its liability if the damage was caused by "dol" or by such default on his part as, in accord-
In both instances, the sanction is the same; there is no ceiling on the amount of damages which the plaintiff can be awarded, and the carrier is deprived of all Convention defenses to liability. The reason for these two exceptions to the liability limitation is to serve as a stop-gap measure against placing passengers at an inherent disadvantage. In practical terms, the two exceptions are invoked first to provide adequate notice to the passenger of the limitation on the carrier's liability (article 3) and secondly, to distinguish between the conduct to which the monetary ceiling applies and that conduct which may warrant the imposition of punitive or exemplary damages against an airline (article 25).

These are the only two vehicles to escape the liability limitation explicitly provided by the Convention. The latter vehicle, proof of wilful misconduct, has generated few pro-plaintiff judicial decisions. This is due to the plaintiff's difficult burden of proving the elements which constitute wilful misconduct.

Consequently, the lion's share of judicial circ-

__Note__

56 See supra note 54 and accompanying text.

57 See supra note 55; infra note 59 and accompanying text.


In In re Pago Pago Aircrash of January 30, 1974, a Boeing 707 aircraft crashed on American Samoa, killing ninety-seven persons including all members of the flight crew. The record reflected evidence that the aircraft descended too quickly, was flying too low and too fast and that the crew failed to use proper callout and instrument checking procedures during the runway landing approach. The district court held that the question of wilful misconduct was a question for the jury and accordingly allowed into
cumvention of article 22 has emerged through a varied anal-

evidence facts pertaining to the flight crew's conduct. 419 F. Supp. 1158, 1160 (C.D. Cal. 1976). The Ninth Circuit held that the jury could properly find from the evidence that the flight crew's conduct not only constituted negligence but that taken cumula-
tively, the crew's errors could be found to have constituted willful misconduct. No. 78-
3591, slip op. (9th Cir. 1982).

In LeRoy v. Sabena Belgian World Airlines, a jury finding of willful misconduct rested upon deductions from indirect evidence concerning the flight crew's missed approach and crash into a mountain northeast of the city of Rome. Since the inferences required to be drawn in order to find Sabena guilty of willful misconduct were reasonable, the court of appeals held that the jury's finding must not be overturned. 344 F.2d at 268-
75.

In Berner v. British Commonwealth Pacific Airlines, the district court granted the plain-
tiffs' motion for a directed verdict, thereby finding that the pilot's failure to follow instructions to maintain a certain altitude over a radio signal station constituted willful misconduct. The court reasoned that even though the pilot did not intend the fatal crash near Half Moon Bay, California, his conduct constituted recklessness and this was sufficient to invoke the "willful misconduct" exception to the treaty liability limita-
tions. 219 F. Supp. at 324-26. On appeal, the Second Circuit reversed the directed verdict for plaintiffs and held that there was evidence from which the jury properly could have inferred that the pilot thought he was bringing the aircraft down at the proper location. 346 F.2d at 537-38. The appellate court stated that once the case went to the jury, its verdict should not have been upset if reasonable men could find in defendant's favor, as they could have done in Berner. Id. at 538.

In Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller, Circuit Judge Burger affirmed the district court's decision that there was sufficient evidence to find KLM and its ground agent guilty of willful misconduct. The aircraft crashed in the tidewaters of the Shannon River approximately one minute after its takeoff from the airport in Shannon, Ireland. KLM's failure to properly instruct pas-
sengers of the location of life vests and their use, failure to broadcast an emergency message, failure to provide for the safety of the plaintiff after his peril was known, and the failure of KLM's ground agent to monitor radio messages and initiate rescue proce-
dures precluded the invocation of the Warsaw liability limitation. 292 F.2d at 779-82.

In Grey v. American Airlines, recovery was sought exclusive of the Warsaw limitation when an American Airlines flight crashed near Dallas, Texas on November 29, 1949. At trial, evidence showed that one of the engines backfired and forced the aircraft to seek clearance to land in Dallas. The jury found that miscommunication in the cock-
pit occurred between the time the aircraft crossed the boundary of the airport at an altitude of 200 feet and the time it crashed on top of the hangar of the Dallas Aviation School. The jury further found that the disaster was due to wilful misconduct. 95 F. Supp. at 456. The trial court granted American Airlines' motions to set aside the verdict and directed judgment in favor of the plaintiffs pursuant to the Warsaw limita-
tion. The Second Circuit Court of Appeals affirmed the directed verdict. Id.

In Pekelis v. Transcontinental & Western Air, Circuit Judge Augustus Hand reversed the Southern District of New York's ruling which upheld the $8,300 maximum recoverable damages for the death of a passenger who was killed enroute to Shannon, Ire-
land on December 28, 1946. The underlying basis for the Second Circuit's reversal was the exclusion of the findings of various inquiry boards. These findings documented a faulty altimeter on the aircraft, thereby properly giving rise to jury instructions that
ysis of what constitutes adequate "delivery" of a passenger ticket under article 3.

Article 3(1) of the Warsaw Convention requires that the passenger ticket contain certain information. Article 3(2) one of TWA's mechanics intentionally omitted to perform a necessary safety check.

In American Airlines v. Ulen, the Circuit Court of Appeals for the District of Columbia affirmed the district court's ruling that the carrier's charter operation of a flight from Washington, D.C. to Mexico City flew at improper altitude and crashed into Glade Mountain in Southwest Virginia. The evidence established wilful misconduct on the part of the flight crew where the plan called for flight at an altitude of 4,000 feet within one and one half miles of a mountain which was 4,080 feet high. The Warsaw Convention limitation was deemed inapplicable.

Finally, there are two federal court decisions in which wilful misconduct was found against the carrier; however, neither of the incidents involved operational acts or omissions concerning the flight itself. These do not typify article 25 cases. First, in Hill v. United Airlines, the plaintiffs had reservations on United to travel from Kansas City to Denver to Seattle, where they planned to depart for the Orient on Northwest Airlines. Once airborne on the Kansas City-Denver leg, United announced that inclement weather in Seattle led to cancellation of the Denver-Seattle flight. Rerouting from Denver to Seattle through Portland, on the advice of a United ticket agent, plaintiffs discovered in flight that the Seattle airport had been opened. When they ultimately arrived in Seattle, plaintiffs learned that they not only missed their Northwest flight to Tokyo but also that United did not have the proper equipment in Denver to meet its scheduled Denver-Seattle flight. 530 F. Supp. at 1050. In a rather twisted interpretation of the Warsaw Convention, the district court first held that its terms applied to the facts before the court and then assimilated the plaintiffs' assertion of intentional misrepresentation to "wilful misconduct" under Warsaw. The language of article 25, the court said, is broad enough to encompass intentional misrepresentation when it arises in international transportation. Id. at 1055. The court, therefore, denied the defendant's motion for a determination of the applicable law and for judgment thereon. Id. at 1056.

The second "Warsaw" case not based on operational conduct is Tarar v. Pakistan International Airlines. In Tarar, the family of Feroze Tarar sued the airline for failing to properly transport the human remains of the decedent to his homeland in accordance with the family's Islamic religious beliefs. Among the various plaintiffs' family members, only decedent's son entered into the contract for carriage of the casket from Houston, Texas to Lahore, Pakistan. Thus, only his claim for damages invoked the provisions of the Warsaw Convention, while all other plaintiffs' recoverable damages were governed by Texas law. 554 F. Supp. at 478-79. With respect to the son's claim for damages under the Warsaw Convention, the court held that the carrier intentionally refused to load the human remains of the decedent aboard the agreed upon flight to Pakistan. Wilful misconduct was therefore established. Id. The court's characterization of the case as a "Warsaw" case stemmed from its interpretation of article one of the Convention. Under article one, the treaty applies to "all international transportation of persons, baggage, or goods." Warsaw Convention, supra note 7, art. 1. Despite its admission that human remains are neither "person, baggage, or goods," the court found the case to fall within the ambit of the Convention. 554 F. Supp. at 478-79.

" Warsaw Convention, supra note 7, art. 3(1). Article 3(1) provides:
provides for the imposition of absolute and unlimited liability if the airline accepts a passenger without delivering such a ticket to a passenger. \(^1\) Read literally, article 3(2) provides that the Warsaw Convention limitations of liability apply even if the ticket does not contain a statement that the transportation is governed by the Convention. Under the literal language of article 3 the liability limitation is inapplicable only when no ticket has been delivered. The only requirement within the context of the Warsaw Convention is to provide "notice" of the liability limitation such that the passenger ticket contains a statement that the transportation is subject to the Convention's rules relating to liability. \(^2\) United States courts have not, however, read the provisions of article 3 literally in the context of a "delivery" issue. Hence, what has emerged is the judiciary's autonomous creation of notice and delivery requirements which are not contained anywhere in the language of the Warsaw Convention itself.

This protracted interpretation of article 3 is exemplified by three federal court decisions which emerged in the mid-1960's. In Mertens v. Flying Tiger Line, \(^3\) the Second Circuit

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For the transportation 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 transportation of its international character;
- (d) The name and address of the carrier or carriers;
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

\(^{1}\) Warsaw Convention, supra note 7, art. 3(2). Article 3(2) provides:

The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless 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.

\(^{2}\) See Warsaw Convention, supra note 7, art. 3(1)(e).

\(^{3}\) 341 F.2d 851 (2d Cir.), cert. denied, 382 U.S. 816 (1965).
held that "delivery" of the ticket while the passenger was on board the aircraft was not timely within the meaning of article 3(2) of the Warsaw Convention. Article 3(2) was read to require reasonable delivery "in such a manner as to afford him [the passenger] a reasonable opportunity to take measures to protect himself against the limitation of liability." Such a reasonable opportunity, for example, would provide the passenger with sufficient time prior to boarding the aircraft to procure additional insurance.

In Warren v. Flying Tiger Line, the Ninth Circuit agreed with the Mertens decision, emphasizing the quasi-treaty requirements for delivery of a passenger ticket. The Ninth Circuit found an implied requirement under article 3(2) that delivery of the passenger ticket be made sufficiently in advance of the flight so that a passenger may, if he desires, obtain additional insurance protection. The passengers were deprived thereby of a right which was intended to be concomitant with the carrier's "right" to limit its liability.

While neither Mertens nor Warren dealt with the adequacy of a ticket's type size, a third case, Lisi v. Alitalia-Linee Aeree Italiane, S.P.A., looked beyond the physical delivery requirements under article 3, and held that the ticket must also contain sufficient notice of the limitation of liability in a size of print that is readable, regardless of whether the ticket was delivered six months in advance of the flight. Despite the literal reading of article 3(2) requiring only "delivery" of a ticket, the Second Circuit in Lisi interpreted the Warsaw Convention to transcend the "timeliness" criterion and further require adequate notice on the ticket of the applicability

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64 341 F.2d at 856-57.
65 Id. at 856.
66 Id. at 856-57.
67 352 F.2d 494 (9th Cir. 1965).
68 Id. at 497.
69 Id. at 498.
70 Id.
72 Id.
of the Convention's liability limitation.\textsuperscript{73}

The key to understanding the \textit{Lisi} decision is found in a footnote to the district court's opinion.\textsuperscript{74} The issue was no longer adequate "delivery" of the ticket but whether that ticket gave legible notice of the liability limitations. The appellate court quoted from the district court's reasoning: "'Lilliputian typography' which must be read through 'a magnifying glass' is at war with the intent of the Convention."\textsuperscript{75} Concededly, timely delivery of the ticket under article 3(1) had been satisfied in \textit{Lisi}, and the carrier therefore had the right to avail itself of the treaty's exculpatory defenses. Nevertheless, the district court equated timely delivery of a ticket containing unreadable notice with non-delivery under article 3(2) and thereby reasoned that the article 3(2) sanction of absolute liability was justifiably imposed upon the air carrier.\textsuperscript{76} The trial court's language implicitly acknowledged that "delivery" had, in fact, occurred and that the sanction of unlimited liability could not be based upon the absence of delivery under article 3(2).\textsuperscript{77}

Oddly enough, the Civil Aeronautics Board (CAB) had already promulgated a regulation in 1963 by the time the lower court had decided \textit{Lisi}, which specified that notice of the liability limitation had to be printed in a specified type size.\textsuperscript{78} The CAB promulgated \textit{sua sponte} this regulation, which only came to light three years later when the inter-carrier agreement was reached in Montreal.\textsuperscript{79} Because article 3 did \textit{not} provide what these cases attributed to it, the CAB added its

\begin{footnotes}
\item[\textsuperscript{73}] 370 F.2d at 513-14.
\item[\textsuperscript{74}] 253 F. Supp. at 243, 243 n.7.
\item[\textsuperscript{75}] \textit{Id.} at 243. The Second Circuit Court of Appeals affirmed the district court's granting of plaintiffs' motion but did not specify what size print would be required to render the "delivery" of the ticket in compliance with the "notice" concept. The court merely stated that the notice must be "adequate". 370 F.2d at 513.
\item[\textsuperscript{76}] 253 F. Supp. at 239-40.
\item[\textsuperscript{77}] \textit{Id.} The trial court stated, "We are of the opinion that a jury could not reasonably find that the passenger tickets and baggage checks \textit{delivered here} notified the passengers . . . and accordingly hold as a matter of law that defendant cannot exclude or limit its liability under the [Warsaw] Convention." \textit{Id.} (emphasis added).
\item[\textsuperscript{78}] 28 Fed. Reg. 11,775, 11,777 (1963).
\item[\textsuperscript{79}] The CAB regulation proposed on April 1, 1963 contained a type size specification for purposes which the CAB clearly enunciated:
\end{footnotes}
new type size provision to require that simultaneous with delivery of the ticket the passenger be furnished a written statement entitled “Advice to International Passengers on Limitation of Liability.”

The newly adopted section 221.175 of the CAB Economic Regulations specified, in part, that “[t]he statement [i.e., Advice of the Article 22 limitation under Warsaw] prescribed herein shall be printed in type at least as large as ten point

The Warsaw Convention requires that the passenger be given a ticket containing a statement that the transportation is subject to the rules relating to liability established by the Convention. The carriers comply with this requirement by a notice in small print on the face of the ticket reading as follows: ‘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 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.

It appears to the Board that this notice may be inadequate in two major respects: First, the ticket is by no means the most effective instrument for advising a passenger of a limitation of liability. There can be no assurance that a passenger will read his ticket at all or if he does, that he will read it under such circumstances as will enable him to realize the significance of the notice provision and take such protective action as his circumstances require. The type in which the notice is currently printed on the ticket is too small to alert the passengers to the importance of the matter. Second, the fact of greatest significance to the passenger, namely, the amount of the limitation on liability for death or injury does not appear in the notice.

28 Fed. Reg. 3281, 3282 (1963). In the same regulatory proposal, the CAB commented that the selected 10 point modern type for the draft regulation (28 Fed. Reg. 3283) was “substantially larger than the notice presently appearing on the tickets.” Id. The Board obviously was responding to the type size condemned by the Second Circuit in Lisi. See supra notes 71-77.

The “Advice to International Passengers on Limitation of Liability” states:

Passengers embarking upon a journey involving an ultimate destination or a 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 personal liability to approximately $8,290 and limits liability for loss of damage to baggage.

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

Theoretically, the CAB was supplementing the requirement of article 3 "delivery" under the Warsaw Convention. Although the Montreal Agreement was not yet conceived in 1963, the CAB economic regulation was clearly the genesis of the 10 point modern type specification subsequently adopted as part of the Montreal Agreement in May, 1966. In fact, from the comments of the CAB it can be argued that the CAB had predicted the emergence of the Montreal Agreement type of special contract permitted by article 22(4) of the Warsaw Convention.

Ironically, the final version of the inter-carrier pact which became the Montreal Agreement never defined the meaning of "10 point modern type," nor did it describe a specific type face in lieu of type size which would be measured by lines per inch. Rather the type size requirement is merely alluded to in the history of the Montreal Agreement once. The Agreement states that "on May 4 details of the arrangement (including a notice to each passenger in quite large type) were worked out in an all day negotiating and drafting session in Montreal." Moreover, there is no definition or technical requirement for that specification in the CAB regulations or the CAB Order approving the Montreal Agreement. Hence, combined with the judicial "re-write" of article 3 of the Warsaw Convention, the CAB’s failure to define the type size which was adopted as part of the Montreal Agreement

Furthermore, Article 22(4) of the Warsaw Convention provides:

Carriers may if they are so disposed, enter a special contract providing for a higher liability than the limit provided in the [Warsaw] Convention. Such a contract could be effectuated by an appropriate tariff provision making it part of the transportation contract . . . . Specifically, it is proposed to require inclusion in all tariffs of a brief statement as to the applicability and effect of the Warsaw Convention including the amount of the limit in dollars.


served as the precursor to further judicial excursions away from the literal application of the terms of the treaty. Article 3 of the Warsaw Convention would subsequently become a revolving door through which the courts could continually usher out the liability limitation.

With the 10 point type specification promulgated and approved, but nowhere explained, the post-Montreal Agreement cases raise an important question as to the real significance to be attached to the undefined type size. In *Milliken Trust Co. v. Iberia Lineas Aereas De Espana S.A.*, the Supreme Court of New York County held that 8 point type was acceptable because it was "easily readable" and because the CAB in its regulation "did not profess to be codifying or in any way determining what size type may be required by the Warsaw Convention." In *Ludecke v. Canadian Pacific Airlines*, the Supreme Court of Canada held that 4.5 point size was such type and arrangement "as to be legible by the ordinary person using ordinary diligence."

Thus, after judicial scrutiny of the Montreal Agreement, the central underpinning of the inter-carrier agreement did not emerge as the type size of the notice of limitation on the passenger ticket. The United States' real concern with the Agreement was, instead, the limitation of recoverable damages as expressed under article 22 of the Warsaw Convention. The legislative history behind the Montreal Agreement evidences the United States' grave concern about the Warsaw Convention and its liability limitation.

Concurrent with its notice of denunciation of the Warsaw Convention in 1965, the United States set forth the conditions under which it was prepared to withdraw the notice of denunciation, which included both a "reasonable prospect" of an international agreement limiting liability to approxi-
mately $100,000 per passenger and a provisional international liability limit of $75,000 per passenger. Accordingly, the Montreal Conference convened on February 1, 1966, to consider the conditions proposed by the United States. After two weeks of debate, however, neither the conditions proposed by the State Department nor a compromise solution based on those conditions appeared to be forthcoming. Shortly thereafter, the President of the Council of the ICAO wrote to the United States Government and suggested that perhaps the conditions proposed by the United States could be met, at least in part. This action was motivated by the fact that many of the signatory countries began to realize more fully the implications of the United States' denunciation.

However, the attempt by the ICAO Council President to revive U.S. interest proved difficult, just as the reaction of the United States to the prospect of limited liability had been unfavorably displayed at the Hague in 1955. By focusing upon the United States' indication in 1965 that an increase of liability limitation to $75,000 would be acceptable, the Council President, Dr. Walter Binaghi, gained the United States' assurance that it would return to the negotiating table. Certain factions within the United States, primarily the CAB and the Department of Labor, opposed the $75,000 ceiling because it did not appear to be "interim" to any higher monetary ceiling. The desired $100,000 ceiling appeared to

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92 50 DEP'T ST. BULL. 923, 924 (1965). The United States' conditions were stated: If prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to $75,000 per passenger.

Id.

93 Lowenfeld and Mendelsohn, supra note 4, at 563-75.

94 Letter from Dr. Walter Binaghi, President of the ICAO Council, to Nelson B. David, the United States Representative to the ICAO Council (February 25, 1966), cited in Lowenfeld and Mendelsohn, supra note 4, at 587 n.296.

95 See supra note 92 and accompanying text.

96 Lowenfeld and Mendelsohn, supra note 4, at 552, 586-88.
be unattainable in the foreseeable future. However, with the potential for final accord appearing imminent, the factions which advocated Dr. Binaghi's proposal realized that the unsuccessful Montreal Conference left little hope of ever attaining a $100,000 limit. At this juncture, the issue of absolute liability re-emerged which consequently averted a stalemate among the various factions in the United States government. With the imposition of absolute liability, theoretically litigation would be reduced, settlements would be reached more expeditiously and the value of plaintiffs' recoveries would be substantially greater than under the existing Warsaw System. More importantly, the inclusion of an absolute liability provision would make the $75,000 limitation more palatable, a quid pro quo for retreat from the strenuous advocacy of the $100,000 limitation of liability.

The revised proposal included a $75,000 limitation of liability and the airlines' consent to waive "all necessary [defense] measures" available under article 20(1) of the Warsaw Convention. On May 13, 1966, the proposal was agreed to and adopted as the Montreal Agreement. However, the compromise solution did not satisfy the United States government, which adopted the $75,000 limitation with the understanding that it was merely an interim solution toward establishing a framework for further negotiation of a higher limitation.

Accordingly, the United States expressed concern over the

97 Id.
96 It was further argued that the ninefold increase from the original $8,300 limitation represented a substantial accomplishment. Moreover, the United States' acceptance of this proposal would be looked upon favorably by the ICAO as well as the international aviation community in general. Id.
95 Id. at 587
94 Id.
93 Article 20(1) of the Warsaw Convention states, "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Warsaw Convention, supra note 7, art. 20(1).
92 54 DEP'T ST. BULL. 955-57 (1966).
90 Lowenfeld and Mendelsohn, supra note 4, at 552, 586-88.
attempt to limit recovery for passengers in international transportation. While the Convention's liability limitation originally purported to provide support for a fledgling industry, there was no longer any justification for singling out the airline industry for special protection against tort liability. The rapid growth of the aviation industry substantially lessened the need for uniformity which the Warsaw Convention provided, unless courts could pragmatically apply the Convention in individual cases.105

B. Concluding Remarks.

Any form of proposed legislation concerning the Warsaw Convention would have encountered the United States' long-standing distrust of artificial limits imposed upon the right to recover damages for death or personal injury. The United States Delegation's conduct at the Hague in 1955 evidenced this reluctance on the part of the United States. The ten year epilogue which ensued became a chasm for the legislature to fill with a viable remedy. However, no such remedy emerged.

What developed instead were the contemporaneous evolutions of the CAB's undefined passenger ticket specifications and the judicial expansion of article 3 of the Warsaw Convention. These developments evidenced the fact that the judiciary was re-drafting the treaty. Without an appropriate response from the legislature, the courts have continued to search for innovative methods of circumventing the liability limitations, particularly as seen in the Mertens-Warren-Lisi trilogy of cases. Not only did the developments through the late 1950's and the 1960's open the door to further "judicial legislation" affecting the treaty but, more gravely, they forever clouded the real historical development of the United States' dissatisfaction with the Warsaw Convention. The significance of the trilogy and the CAB's ill-defined proposal for passenger ticket specifications merely diverted attention away

from the real concern in the United States over the article 22 limitation of air carrier liability.

PART III
THE TICKET ISSUE TODAY: THE EXTENSION OF MERTENS, WARREN, and LISI

A. Judicial Interpretation.

If the Montreal Agreement merely supplemented the treaty provisions of the Warsaw Convention, then by logical extension, a violation of the Agreement should not give rise to treaty sanctions against the carrier. Treaty sanctions should be imposed only when the treaty itself has been violated. This would become the reformation of the Lisi issue as affected by air carriers' adherence to the Montreal Agreement.

On March 14, 1980, an Ilyshin-62 aircraft enroute from John F. Kennedy International Airport operated by Polski Linie Lotnicze ("LOT") crashed on approach to Warsaw, Poland. As a result, several wrongful death suits were brought against LOT on behalf of members of the United States Amateur Athletic Union Boxing Team. These suits were consolidated before Judge Charles P. Sifton for pre-trial proceedings in the United States District Court for the Eastern District of New York. Judge Sifton held that the use of an 8.5 point rather than a 10 point print size in advising international passengers of the applicable liability limitations constituted a breach of the Montreal Agreement and therefore did not limit the carrier's liability to $75,000 per passenger.

None of the parties disputed the fact that the flight constituted "international transportation" within the meaning of article 1(2) of the Warsaw Convention. Consequently, the

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109 Articles 1(1), and (2) of the Warsaw Convention state:
parties did not dispute that the provisions of the Warsaw Convention controlled these actions.\(^{110}\) Moreover, LOT actually entered into the 1966 Intercarrier Agreement known as the Montreal Agreement.\(^{111}\)

During the course of discovery proceedings, certain of the plaintiffs filed motions for partial summary judgment urging the dismissal of LOT’s limitation of liability defense, based upon the provisions of the Montreal Agreement.\(^{112}\) In their motion, the plaintiffs argued that LOT was not entitled to any limitation of liability because the LOT passenger tickets did not conform to the requirements of the Montreal Agreement. The plaintiffs contended that the print type must be 10 point modern type size rather than 8.5 point type.\(^{113}\)

Furthermore, the plaintiffs argued that while the Montreal

\(^{110}\) The Peoples’ Republic of Poland and the United States are both High Contracting Parties to the Warsaw Convention. 535 F. Supp. at 833, 835.

\(^{111}\) Id.

\(^{112}\) Id. at 834.

\(^{113}\) Id. at 835.

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

Warsaw Convention, supra note 7, art. 1(1), (2).

The courts in recent years have had a number of occasions to consider the background, history and overall effect of the combined provisions of the Warsaw Convention and the Montreal Agreement on the rights of the parties to litigation arising out of “international transportation.” See, e.g., Stratis v. Eastern Air Lines, 682 F.2d 406 (2d Cir. 1982); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979); Reed v. Wiser, 555 F.2d 1079 (2d Cir.), cert. denied, 434 U.S. 922 (1977); Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976); Husserl v. Swiss Air Transport Co., 485 F.2d 1240 (2d Cir. 1973); Molitch v. Irish Int'l Airlines, 436 F.2d 42 (2d Cir. 1970).
Agreement's liability limitation should not apply to their claims, LOT nevertheless should remain bound by waiver of its defense under article 20(1) of the Warsaw Convention. Thus, the plaintiffs contended that the failure of LOT to comply with one provision of the Montreal Agreement, the type size in which the Montreal Advice was printed, should result only in the unenforceability of the liability limitation provision of the Montreal Agreement, leaving all other provisions of the Agreement in effect, including LOT's waiver of the Warsaw Convention's article 20(1) "all necessary measures" defense. LOT argued that the noncomformity to the 10 point modern type size was a technical deviation from the Montreal Agreement that did not warrant waiver of its article 20(1) defense. Moreover, LOT argued under the guise of contract principles that its failure to deliver passenger tickets bearing 10 point modern type was excused by the doctrine of substantial performance of LOT's special contract (Montreal Agreement) with the passengers.

After briefs were filed and oral argument was heard, the district court granted plaintiffs' motions for partial summary judgment and dismissed LOT's affirmative defense of the limitation of liability. The district court precluded LOT from limiting its liability because the Montreal Advice was printed in 8.5 point type rather than the specified 10 point modern type size. Judge Sifton premised his ruling on the rationale that the Montreal Agreement was clearly intended to operate within the framework of the Warsaw Convention.

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114 Warsaw Convention, supra note 7, art. 20(1). Article 20(1) provides, "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Id. See Grey v. American Airlines, 227 F.2d 282, 285 (2d Cir. 1955) (discussing how article 20(1) is implemented), cert. denied, 350 U.S. 989 (1956).
115 See supra note 80 and accompanying text.
117 Id. at 836.
118 Id. at 837-38.
119 Id. at 838-39.
120 Id. at 836. Judge Sifton characterized the use of 8.5 type size as a breach of the passenger contract. However, the print size specification is not part of the passenger's contract with the carrier because it is not included in the carrier's tariff. LOT Counterpart to Agreement CAB 18900 (New York, January, 1973).
and, therefore, incorporated all of the relevant provisions of the Convention.121 Thus, LOT’s breach of the provisions of the Montreal Agreement “ha[d] the same effect as non-delivery of a conforming ticket as set forth in Article 3(2) of the Convention.”122 Based on the proposition that the effect of a Montreal violation constituted a Warsaw violation, Judge Sifton justified the dismissal of LOT’s two pronged argument without difficulty.123

With respect to LOT’s argument that 8.5 type was a “purely technical” deviation from the Montreal Agreement specification, Judge Sifton acknowledged that there were several cases which held that ticket notices printed in 8 point type or less satisfied the requirements of article 3 of the Warsaw Convention, even as interpreted in Lisi.124 These cases did not, however, contemplate adherence to the language of the Montreal Agreement but instead were scrutinized under the ticketing requirements of article 3 of the Warsaw Convention.125 The LOT case, according to Judge Sifton, was distinguishable because the air carriers’ agreements to adhere to the terms of the Montreal Agreement constituted a trade-off for the United States’ decision not to withdraw from the Warsaw Convention in 1966.126

Having established the thread that connects the Montreal Agreement to the Warsaw Convention, Judge Sifton then dismissed the second prong of LOT’s argument, which sought relief under the contractual principle of substantial performance.127 While this doctrine is applied to contracts of transportation, the district court reasoned that the contract under analysis was the Montreal Agreement, not the contract for carriage itself.128 The court rationalized this distinction,

121 535 F. Supp. at 839.
122 Id.
123 The court stated, “The Montreal Agreement was clearly intended . . . to incorporate all the relevant provisions of the [Warsaw] Convention.” 535 F. Supp. at 839.
124 Id. at 837. See supra notes 88-91 and accompanying text.
125 Id. at 837.
126 Id.
127 Id. at 838.
128 Id.
stating:

The importance of the distinction becomes meaningful in the context of Corbin's analysis of the substantial performance doctrine in terms of the purposes of the particular contract said to have been substantially performed . . . . Here, the character of the performance promised, notice in a specified type size, itself suggests that strict compliance was intended by the parties to the Montreal Agreement.\(^{129}\)

Because the purpose of the Montreal Agreement, like that of the Warsaw Convention, was to regulate by uniform terms the conditions under which the United States would continue to adhere to the treaty, the court cast doubt on whether a doctrine such as substantial performance had a valid role to play in light of the Montreal Agreement's "quasi-legislative purpose."\(^{130}\)

The district court concluded that the 8.5 point type deviation from the Montreal Agreement specification precluded any limitation of liability.\(^{131}\) The court further accepted the plaintiffs' argument which bound LOT by its waiver of the "all necessary measures" defense against any liability provided by article 20(1) of the Warsaw convention.\(^{132}\) According to the court, the Montreal Agreement provides an intricate and inevitable nexus to the provisions of the treaty.

On appeal, LOT expanded its argument and diverged from the contractual principles it had relied upon in the district court.\(^{133}\) LOT argued that the thrust of the 10 point modern type size specification under the Montreal Agreement was to assure that passengers in international transportation are given adequate notice of the applicability of the carrier's limited liability.\(^{134}\) LOT further argued that the legislative history of the Montreal Agreement did not attach any

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id. at 835, 839.

\(^{132}\) Id.

\(^{133}\) 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 (LOT Polish Airlines) v. Robles, 104 S. Ct. 147 (1983).

\(^{134}\) Id. at 88-89.
particular significance to 10 point modern type size. LOT also contended that its passenger tickets complied with the intent and purpose of the Warsaw Convention and the Montreal Agreement in that the 8.5 point type provided adequate notice to passengers. Moreover, LOT argued that a particular print size specification was not a part of the passengers’ contract with the airline because it is not included in LOT’s tariffs filed with the CAB, and therefore, LOT had not committed any tariff violations which would justify invocation of the treaty sanction of absolute and unlimited liability. Furthermore, LOT contended that it had not violated the Warsaw Convention and thus the treaty sanction of absolute and unlimited liability could not be imposed. LOT reasoned that if it could not avail itself of the limitation of liability defense, then the Montreal Agreement should be rendered inapplicable in its entirety to the litigation.

The Plaintiffs-Appellees’ argument mirrored the points raised by LOT. The plaintiffs took the position that the duty of strict compliance with the terms and conditions of the Montreal Agreement was breached by LOT, thereby depriving the carrier of all treaty defenses. LOT’s breach of the 10 point modern type size specification had the same effect as non-delivery of a conforming ticket under article 3(2) of the Warsaw Convention.

Oral argument was heard by the Second Circuit on January 18, 1983. The strength of LOT’s argument on appeal seemingly rested on one central point, namely that stripping the carrier of its limited liability defense is a treaty sanction only to be invoked by a treaty violation. The Montreal Agreement is neither a statute, a law, nor a treaty. Relying

135 Id.
136 Id.
137 Id. at 89-90.
138 Id. at 90.
139 Id. at 91.
140 Brief For Plaintiffs-Appellees Smiegel, Pimental, Bland, Wesson, Chavis, Radison and Lindsay (No. 82-7616 MDL 441) (2d Cir. 1982) at 5, 8-10.
141 Id. at 13.
142 In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 705 F.2d at 90.
on the legislative history of the Warsaw Convention, the Second Circuit affirmed Judge Sifton's holding against LOT.\textsuperscript{143} According to the Second Circuit, to argue as LOT had done, that a violation of the 10 point modern type size specification of the Montreal Agreement could not invoke a treaty sanction, ignores the historical and functional relationship of the Montreal Agreement to the Warsaw Convention.\textsuperscript{144} The Second Circuit stated, "The Agreement supplements the Convention in particular respects, but Article 3(2) still imposes on carriers the duty to inform passengers of liability limitations. Failure to do so, as measured either by the terms of Article 3 or the Montreal Agreement, results in forfeiture of the limitation."\textsuperscript{145}

Within the parameters of "adequate notice," the court's treatment of LOT's argument concerning when a treaty sanction is warranted overlooked the import of the distinction LOT attempted to draw. Regardless of whether the use of 8.5 point type by LOT was a mere technical deficiency, the 10 point modern type size specification is not a treaty requirement. Unlimited liability is the fate of a carrier who accepts a passenger without delivering a passenger ticket pursuant to article 3(2) of the Convention. "Delivery" as interpreted by the courts in \textit{Mertens}, \textit{Warren} and \textit{Lisi}\textsuperscript{146} requires reasonable notice such that the passenger has an opportunity to take measures against the carrier's liability limitation.\textsuperscript{147} But LOT did effect such a delivery.\textsuperscript{148}

Strictly applying the intent of article 3(2)'s "delivery" requirement, 8.5 type cannot be placed in the same category as the "Lilliputian" 4 point type found inadequate in \textit{Lisi}. Arguably, but for the specification in the Montreal Agreement

\textsuperscript{143} Id. at 85.
\textsuperscript{144} Id. at 90.
\textsuperscript{145} Id.
\textsuperscript{146} See supra notes 63-77 and accompanying text.
\textsuperscript{147} In re Air Crash Disaster at Warsaw Poland on March 14, 1980, 705 F.2d at 89.
\textsuperscript{148} The appellant pointed out that "[t]he difference in size between 10 point modern type size and 8.5 point type is 15/720ths of one inch calculated upon the basis of there being 72 type points to one inch." Brief of Defendant-Appellant Polskie Linie Lotnicze (LOT Polish Airlines) at 7 n.9 (2d Cir. 1982) (No. 82-7616 MDL 441).
and the tie-in of that specification to article 3(2) "delivery," LOT did not violate the treaty requirements under article 3(2). The Second Circuit seems to have had this in mind when it stated, "Whatever merit LOT's argument might have were we considering the adequacy of notice solely under the Warsaw Convention, the fact remains that we are not."\footnote{149}

Because the LOT appeal was decided not only under the Warsaw Convention but also under the Montreal Agreement, one would expect the distinction between article 3(2) of the Convention and the 10 point modern type size specification contained in the Agreement to emerge more clearly. The Second Circuit acknowledged that it is a violation of article 3(2), which LOT did not commit, that gives rise to the treaty sanction.\footnote{150} The court stated, "The [Montreal] Agreement supplements the Convention in particular respects, but Article 3(2) still imposes on carriers the duty to inform passengers of liability limitations."\footnote{151} Simply stated, the treaty has its own ticketing requirements, and accordingly, its own sanctions for not adhering to those requirements.

In support of its rationale that either article 3(2) of the Warsaw Convention or the 10 point modern type size specification of the Montreal Agreement may preclude the carrier from availing itself of the liability limitation, the court emphasized how the adequacy of the notice of limitation was a decisive factor in the United States' ultimate withdrawal of its notice of denunciation of the Warsaw Convention. Withdrawal of the denunciation, according to the Second Circuit, indicated a judgment by at least the executive branch that 10 point type was necessary.\footnote{152}

It is dubious whether the Second Circuit appreciated the genuine import of the history behind the treaty's development. The executive branch was concerned about the adequacy of notice, not a specified print size.\footnote{153} The United

\footnote{149 In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 705 F.2d at 89.}
\footnote{150 Id. at 90.}
\footnote{151 Id. (emphasis added).}
\footnote{152 Id. at 91.}
\footnote{153 See supra notes 40-53, 92-105 and accompanying text.
States' primary concern with the interim proposal which became the Montreal Agreement was to increase the Warsaw Convention's liability limitation and to apprise passengers adequately of the limitations which potentially applied to them.\textsuperscript{154} It was not, as the Second Circuit seems to indicate, the actual size of the ticket print which ultimately determined the United States' position with respect to the treaty, but rather the increased liability limit and the prospects for further increases.\textsuperscript{155}

The ticket requirements which emerged from the Hague and Montreal Conferences momentarily pacified the United States because they increased the recovery ceiling substantially and insured that the passenger was adequately notified of that ceiling.\textsuperscript{156} The selection of 10 point type, as opposed to 8 point or 12 point, was arbitrary, as the Second Circuit admits,\textsuperscript{157} and served only as a vehicle to implement the real intention of the Warsaw Convention and the Montreal Agreement. The 10 point modern type size specification does not even have a strong nexus to article 3(2) of the Warsaw Convention as article 3(2) has its own "adequate notice" requirement, established as a result of \textit{Lisi} and acknowledged by the Second Circuit in \textit{LOT}. As long as that requirement is met, the Warsaw Convention has not been violated.

If, as the Second Circuit warned, the historical and functional relationship between the Warsaw Convention and the Montreal Agreement must not be ignored,\textsuperscript{158} then fulfillment of both article 3(2)'s requirements and the Montreal Agreement's intention to offer "adequate notice" was achieved by \textit{LOT}. \textit{LOT}'s use of 8.5 point type did provide adequate notice of the liability limitation to passengers. Article 3(2)'s notice requirement certainly was not meant to be interpreted by such a narrow, technical standard.\textsuperscript{159}

The historical relationship between the Warsaw Conven-

\textsuperscript{154} Id.

\textsuperscript{155} Lowenfeld and Mendelsohn, supra note 4, at 586-96.

\textsuperscript{156} See supra text at note 153; supra notes 40-53, 92-105 and accompanying text.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} See supra note 148.
tion and its progeny nevertheless led the court in LOT to equate specification of type size with the article 3(2) requirement for delivery. Failure to inform passengers of liability limitations, whether measured by article 3(2) or the Montreal Agreement, results in forfeiture of the limitation. Thus, in the eyes of the Second Circuit the effect of a violation of the Montreal Agreement is no different from a violation of the Warsaw Convention. Despite the significance of the fact that an international treaty is the supreme law of the land while the Montreal Agreement "is not clothed in such a sovereign robe," the judiciary utilized the provisions of the Montreal Agreement to circumvent the liability limitation provisions of the Warsaw Convention.

The Second Circuit left open the issue of adequate delivery as it affected passengers who traveled with tickets in appropriate form prior to boarding LOT. If those passengers had already received adequate notice of the carrier’s liability limitation on the domestic leg of their international journey (before making the New York to Warsaw connection), the 8.5 point print size may strip the carrier of the liability limitation. If it does, then the real purpose of the Warsaw Convention and the Montreal Agreement is thwarted because the passenger has had the opportunity to counteract the limitation by purchasing insurance, regardless of print size issues.

One year before the LOT appeal was presented to the court, the Second Circuit addressed this issue in Stratis v. Eastern Air Lines. While the issue in Stratis was delivery under article 3 of the Warsaw Convention and did not involve the Montreal Agreement, the case illustrates how the Second Circuit departed from the very history of the Warsaw/Montreal relationship which it had charged LOT with having ig-

160 In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 705 F.2d at 90.
161 Id.
163 LOT’s petition for a writ of certiorari was denied on October 3, 1983. Polskie Linie Lotnicze (LOT Polish Airlines) v. Robles, 104 S. Ct. 147 (1983).
164 In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 705 F.2d at 86 n.2.
165 682 F.2d 406 (2d Cir. 1982).
On June 23, 1975, Stratis, a Greek seaman, was discharged from his ship, the S.S. Paros, at Baton Rouge, Louisiana, due to an illness. Under Greek law and the United States immigration laws, he was required to be repatriated at the expense of the vessel’s owner. Accordingly, the vessel owner’s agents arranged for Stratis and three other Greek seamen to travel on Delta Air Lines Flight 412 from Baton Rouge to New Orleans and on Eastern Air Lines Flight 66 from New Orleans to New York. The four seamen were then to connect from New York to Athens on Olympic Airways Flight 418, all to take place on June 24th.

Stratis received a ticket in Baton Rouge covering only the domestic portion of his travel with Delta and Eastern. Olympic’s New York City office prepared a prepaid ticket advice containing notice of the Warsaw Convention’s applicability for the international segment of this trip on Olympic. Olympic then transmitted the information on the ticket notice by telephone to the American Airlines desk at John F. Kennedy International Airport, where American maintained the Olympic counter pursuant to a ground handling agreement with Olympic. At Kennedy, a ticket was issued for Stratis’ international travel but it did not bear the date of its issuance or a validation stamp nor was it ever “delivered” to Stratis.

On approach to Kennedy Airport from New Orleans, Eastern Flight 66 crashed, killing 113 of the 124 persons on board. Stratis survived and sued Eastern Air Lines and the United

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166 In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 705 F.2d at 90.
167 The relevant provisions of the U.S. Immigration Law require that, in such cases, the individual must make “definite arrangements” to depart from the U.S. before he is permitted entry into the country from his ship. 8 U.S.C. § 1282(a); 8 C.F.R. § 252.1(c), (d).
169 Id.
172 Id.
173 Id.
States to recover damages for his injuries. On the eve of trial, the United States consented to the entry of a liability judgment against it in all of the cases consolidated on the issue of liability in the United States District Court for the Eastern District of New York. Eastern Air Lines proceeded to trial and was found negligent by the jury.

In the lower court, Stratis moved for partial summary judgment to strike Eastern’s affirmative defense of limitation of liability under the Warsaw Convention. The district court granted the motion, stating that the fundamental inquiry under the provisions of the Warsaw Convention is whether the passenger is involved in "international travel" as evidenced by the passenger's ticket. Because the only ticket held by Stratis at the time of the crash authorized purely do-

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174 The claim against the United States was for negligent air traffic control operation of Kennedy Airport by the Federal Aviation Administration. 682 F.2d at 408 n.1.
175 Id. at 408.
176 In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 635 F.2d 67 (2d Cir. 1980).
177 512 F. Supp. at 331 n.5. The Convention defines “international transportation” as:
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 the 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 authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

Warsaw Convention, supra note 7, art. 1(2). Such transportation however need not take place on only one airline under article 1(3):
[T]ransportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or a series of contracts and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

Id. art. 1(3).

mestic transportation, the district court concluded that Stratis was not, in fact, proceeding in “international travel” when Eastern Flight 66 crashed.\textsuperscript{179} Furthermore, a ticket for his international travel had not been delivered to him pursuant to article 3 of the Convention.\textsuperscript{180}

On appeal to the Second Circuit, Eastern Air Lines succeeded in invoking its Warsaw Convention limitation of liability defense, thereby obtaining a reversal of the district court decision.\textsuperscript{181} Acknowledging that “the rub in the case is, of course, that the only ticket delivered to Stratis was the ticket covering the domestic flights,”\textsuperscript{182} the Second Circuit nevertheless agreed with Eastern’s counter-argument that a passenger ticket containing the required notice had been delivered to Stratis and that the overall contract was one for “international transportation” within the meaning of article 1(3) of the Warsaw Convention.\textsuperscript{183} While Eastern satisfied the court that Stratis did actually have a contract for international travel,\textsuperscript{184} the real inquiry turned on whether the absence of delivery of the ticket for his international segment was an irregularity affecting the validity of the overall contract of transportation.\textsuperscript{185} The Second Circuit characterized the inquiry as follows:


\textsuperscript{180} Eastern attempted to argue in the district court that the Warsaw limitation of liability provision was included in Stratis’ ticket for domestic travel on the Delta and Eastern flights, and that this inclusion was sufficient to meet the notice requirement of Meriens v. Flying Tiger Line, 341 F.2d 851 (2d Cir. 1965), discussed supra, note 63 and accompanying text. The court rejected Eastern’s contention, noting that there was serious doubt “whether Mr. Stratis or anyone else for that matter, can be said to truly understand what this notice provision states.” The court added, “While the airlines’ notice provision may certainly appear to be Greek to even the well-seasoned traveler, it certainly was not Greek to Mr. Stratis, a Greek seaman, whose deposition was conducted through a Greek interpreter.” Transcript of District Court Proceedings, 75 Civ. 1151 (HB) (August 3, 1979) as cited in Georgakis v. Eastern Air Lines, 512 F. Supp. 330, 333 n.11 (S.D.N.Y. 1981).

\textsuperscript{181} Stratis v. Eastern Air Lines, 682 F.2d at 413.

\textsuperscript{182} \textit{Id.} at 409.

\textsuperscript{183} \textit{Id.} at 412.

\textsuperscript{184} \textit{Id.} at 410 n.4.

\textsuperscript{185} \textit{Id.} at 412.
Absent delivery of a ticket for the international leg of the journey, the question is not whether Stratis knew his domestic flight could be subject to the Convention as a leg of an international flight under Article 1(3) . . . but whether he had reason to know his overall flight was international. If not, he lacked a reasonable opportunity to buy insurance or take other precautions against the limitation of liability; if so, the treaty requires his domestic flight to be subject to the limitation.\textsuperscript{186}

At the threshold, the Second Circuit sorted out the precedent on both sides and concluded that "[t]he relevant case law does not answer the argument."\textsuperscript{187}

The thrust of the court's inquiry was properly concerned with the underlying intention of the treaty writers.\textsuperscript{188} The Second Circuit, however, did not arrive at a conclusion consistent with its own analysis. Concluding that it did not know what the treaty writers intended, the court reasoned that to answer the inquiry in favor of either Eastern or Stratis would be equally arbitrary. Ultimately, according to the court, a passenger such as Stratis must be presumed to know that his flight is international in nature and that the Convention limitations apply.\textsuperscript{189}

The majority properly recognized that the intent of article 3 was to provide the passenger with notice of the limitation of liability, so as to afford him the opportunity to take any measures necessary in the face of the carrier's liability limitation. But, there was nothing on the facts in \textit{Stratis} to suggest that Stratis was ever given that opportunity. The majority seems to have concluded by implication that where the ticket delivery requirement of the Convention applies to the domestic leg of a journey, and where notice is printed in a language that is foreign to a passenger, non-delivery of the ticket to such passenger for travel to the foreign destination is excused.

The majority's pursuit of the unwritten intention behind

\textsuperscript{186} \textit{id.}
\textsuperscript{187} \textit{Id.} at 410.
\textsuperscript{188} \textit{Id.} at 412.
\textsuperscript{189} \textit{Id.} at 413-14.
article 3 resulted in limiting Eastern’s liability. The court isolated for analytical purposes the United States’ historical dissatisfaction over the liability limitation. But the court progressed from this sound analysis to an inapposite conclusion, which demonstrates the judicial outcry for new legislation affecting the Warsaw Convention. The dissent illuminates how the majority’s argument went awry.

From the standpoint of Eastern’s involvement in the transportation of Stratis, the majority’s holding puts the cart before the horse and permits Eastern a limitation of liability strictly because it was ignorant of Stratis’ further travel on an international segment. Eastern had no idea that Stratis was on the domestic leg of an international journey because a ticket for transportation to his destination in Athens never had been delivered to Stratis. In the absence of such knowledge, Eastern had no occasion to adjust its liability insurance in light of the Convention’s limitation. As Judge Newman points out in his dissent, the failure to comply with the practical intent of the Warsaw Convention results in a reward for the carrier:

I fully agree with the majority that, under our prior decisions, the possible unfairness of the Convention is no reason to construe it narrowly. But surely its unfairness is not a reason to construe it broadly. If there ever was a case where an entity seeking a windfall from the terms of a provision should be held to a literal application of those terms, it is a common carrier seeking refuge in a limitation of liability.190

The suggestion by the dissent that Eastern sought this refuge for the purpose of unjust enrichment is an unfair overstatement that digresses from the issue in the case. Nevertheless, Judge Newman addressed the central inquiry which the majority posed without answering. The dissent reasoned:

The majority asks “If the ‘absence’ of a ticket does not affect the existence of the contract [pursuant to article 3(2)] but the carrier ‘must deliver’ a ticket [pursuant to article 3(1)], what

190 Id. at 419 (Newman, J., dissenting).
did the treaty writers intend?" . . . . I think the answer is obvious. They intended, just as they said, that a ticket must be delivered to the passenger . . . . By removing the limitation of liability for a carrier who accepts a passenger to whom a ticket has not been delivered, the Article [3 of the Convention] plainly implies that the "absence" of a ticket mentioned in the first sentence [of article 3(2)] pertains to a passenger to whom a ticket has previously been delivered. 191

Any "absence, loss, or irregularity" of the passenger ticket under article 3(2) contemplates that a ticket was delivered in the first place. To hold as the majority had done, both in Stratis and in LOT would be to interpret the "absence" of the ticket under article 3(2) as synonymous with non-delivery. The effect of doing so is to impose treaty sanctions where the actual terms of the Warsaw Convention do not so provide. This, the dissent properly concludes, contravenes a consistent interpretation of the treaty as a whole. 192

B. Concluding Remarks.

What has emerged from the Second Circuit's rulings in LOT and Stratis is a judicial failure to differentiate the implications of violating the inter-carrier (Montreal) Agreement from the implications of violating article 3 of the Warsaw Convention. Only the latter embraces the concept of limitless liability borne by the carrier's failure to "deliver" a passenger ticket. If the treaty drafters had intended to create gradations of ticket "delivery," the history behind article 3 of the Warsaw Convention would indicate this. It does not. 193

In any event, it is doubtful that the treaty drafters intended or anticipated that the unequivocal term "delivery" as used in article 3 of the Warsaw Convention would be dissected by the judiciary and given ever-changing dimensions according to judicial desires to circumvent the liability limitation.

Underlying the entanglement of ticketing issues is the need

191 Id. at 418-19 (Newman, J., dissenting).
192 Id.
193 II Conference International de Droit Prive Aerien, 4-12 Oct. 1929, 1929 Varsovie 17, at 18-22, 150, 258-59 [hereinafter Warsaw Minutes].
to determine the nature and extent of the interface between a treaty and a contract. The common denominator to both the Warsaw Convention and the Montreal Agreement is the concept of limited liability, but just how it is to be administered seems to defy principles of judicial logic. Arguably, the simple reason for this is that there is no longer any justification for limiting a carrier's liability to United States passengers, and the judiciary remains bound by a recognized principle of international law, "pacta sunt servando," meaning that treaty obligations must be observed.\(^{194}\)

This entanglement was demonstrated in \textit{LOT}, when the Second Circuit equated the use of 8.5 point type under the Montreal Agreement with non-delivery under article 3(1) of the Warsaw Convention.\(^{195}\) The Second Circuit further exhibited the problem in \textit{Stratis} by equating the "absence, irregularity, or loss" of the ticket under article 3(2) with non-delivery under article 3(1). Both conclusions run afoul of the import of the treaty and the Montreal Agreement.

Literally, Stratis' ticket was issued and validated, so the mechanics of article 3 of the treaty technically were met. Pragmatically, however, Stratis never received the ticket for his international segment and thereby never had an opportunity to read the ticket advice in Greek and act upon it accordingly. Similarly, in \textit{LOT}, 8.5 point type is not 10 point modern type size, and the technical specification had not been met. In reality, the ticket advice was given; the contract for transportation was intact; and the Warsaw Convention was not violated.

The United States' portrayal as the "hold out" throughout the historical struggle to attain international accord on the liability limitation is the most definitive pronouncement of why article 22 of the Warsaw Convention is no longer vital. If the judiciary were to treat the history accordingly, inflexible analyses would yield to purposeful interpretation of the treaty provisions. Because it is not for the courts to re-write


\(^{195}\) \textit{See supra} notes 121-122 and accompanying text.
or abrogate the Warsaw Convention, the propriety of the liability limitation is equally beyond the purview of the judicial system. The courts do have the power to utilize the historical looking glass which has been welded by the recurrent reservations expressed by the United States over article 22. Through the looking glass, one of two conclusions will emerge; either (i) international transportation by air no longer deserves the unique status of having a ceiling for the amount of recoverable damages; or (ii) if this status is still warranted and the judiciary must work within the legislative parameters, then the Warsaw Convention and its progeny must be interpreted, not in terms of "broadness" or "narrowness" as the Second Circuit attempted, but merely with a flexibility which embraces the pragmatic resolution of issues. This second, pragmatic approach would have dictated opposite conclusions to those reached by the Second Circuit in LOT and Stratis.

As matters stand in the 1980's, with the most recent attempt at legislation having failed, it seems that the latter of the two choices is at least the short term answer to halting ad hoc judicial amendments to the text of the Warsaw Convention. However, the judicial progression is moving now from a sequence of carved exceptions to broad, sweeping decisions which jeopardize the continued existence of the treaty in its entirety.

PART IV
THE "GOLD" ISSUE

A. The Emergence of the Gold Standard.

When the Warsaw Convention originally established the $8,300 liability limitation, it was specified in terms of Poincare francs of a certain gold content.\(^{196}\) Gold was chosen as the unit of conversion because it served official monetary

\(^{196}\) The Warsaw Convention internationally established the rule that carriers are liable for damage sustained by a passenger in the course of international transportation up to an amount not exceeding 125,000 Poincare francs. Article 22(4) of the Warsaw Convention defines the franc as a gold coin consisting of 65.5 milligrams of gold. Warsaw Convention, supra note 7, art. 22(4). See Warsaw Proceedings, supra note 4, at 221-25. This dollar equivalent has been in effect in the United States since 1933.
functions internationally and its price was set by law in most countries, including the United States.\textsuperscript{197} For the first twenty years the gold standard provided the desired uniformity; however, changes in the value of currency were inevitable.\textsuperscript{198} The rates of currency exchange began to fluctuate rapidly and the liability limits began to appear hopelessly inadequate.\textsuperscript{199} Moreover, there were considerable differences developing in the level of damages among the various signatory nations to the Warsaw Convention.\textsuperscript{200} Because gold was assuming a more flexible, less stable role in the world economy, it became less significant as a benchmark for the performance of international monetary functions, and as such, no longer could serve adequately as the standard of conversion for determining article 22's liability limitation.\textsuperscript{201}

In 1934, the value of gold was set at $35.00 per troy ounce pursuant to the United States Gold Reserve Act of 1934.\textsuperscript{202} When the United States became a party to the International Monetary Fund (IMF) in 1945 under the Bretton Woods Agreement Act,\textsuperscript{203} it became obligated as a signatory to maintain the value of the United States dollar in terms of gold.\textsuperscript{204} When the Bretton Woods Agreement was signed by the United States, the U.S. dollar was more valuable than gold. Hence, the United States' commitment to redeem all dollars in gold could be made without actually having to fulfill the promise.\textsuperscript{205} Beginning in 1955, however, the United States faced a balance of payments deficit, giving rise to a dollar glut.\textsuperscript{206} In order to compensate for this, central banks abroad began trading their dollars for gold and speculators

\textsuperscript{197} \textit{In re} Air Crash at Kimpo Int'l Airport, Korea on November 18, 1980, 558 F. Supp. 72, 73 (C.D. Cal. 1983).
\textsuperscript{198} J. C. Shawcross & M. Beaumont, \textit{Air Law}, supra note 4, ¶ 332.
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.} ¶ 335, 453.
\textsuperscript{201} \textit{Id.} ¶¶ 335, 453.
\textsuperscript{202} Pub. L. No. 73-87, 48 Stat. 337 (1934).
\textsuperscript{204} \textit{Id.} § 7.
\textsuperscript{205} P. Samuelson, \textit{Economics} 678-88 (8th Ed. 1970).
\textsuperscript{206} \textit{Id.} at 690-91.
began hoarding it. The U.S. gold reserves thus plummeted and the gold standard's demise was imminent.207

Confronted with the depletion of gold reserves in the United States, the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States agreed to stop supplying gold to private markets. This gave rise to the creation of a "two-tier" system for the implementation of gold pricing: a market price which was set and the official price which had been derived under Bretton Woods.208 However, a stronger measure was needed to turn the depletion around, so in 1971 the United States suspended its commitment under Bretton Woods to convert dollars into gold.209

A two year proposal was developed in 1976 by the IMF to devalue the official price of gold.210 The plan, known as the Jamaica Accords, was adopted in April, 1978. The IMF substituted special drawing rights (SDR's), as the reserve asset and unit of account, based upon sixteen major world currencies.211 Accordingly, most references to gold in the IMF's Articles of Agreement were deleted and the official function of gold was replaced with the SDR's.212 The new unit of conversion, SDR, was to be calculated in accordance with the

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207 Id. at 691.
209 P. Samuelson, supra note 205, at 641.
210 In replacing the official function of gold, however, Congress specified that it would be utilized for the limited purpose of determining the value of gold held in the form of gold certificates. 31 U.S.C. § 405(b) (1976); S. REP. NO. 1293, 94th Cong., 2d Sess. 18 (1976).
212 Articles of Agreement of the International Monetary Fund (Second Amendment), approved April 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937.


What the Par Value Modification Act had done was to devalue the dollar by raising the official price of gold, first to $38.00 per ounce in 1972 (Pub. L. No. 92-268, § 2, 86
method of valuation applied by the IMF.\textsuperscript{213} However, if a high contracting party was not a member of the IMF, the value of a national currency in terms of the SDR would be calculated in a manner determined by that party.\textsuperscript{214}

B. Judicial Interpretation.

These radical alterations in the international monetary system threw the Warsaw Convention limitations into a cauldron of historic and economic problems. Gold's new identity as a free market priced commodity undermined the Convention's unit of conversion in its entirety. Anticipating the discord which the gold crisis would create, the Warsaw Conferees met in 1975, before the IMF plan was proposed, and substituted SDR's as the Warsaw Convention's unit of conversion.\textsuperscript{215} At the time of the proposal, the SDR was calculated in terms of gold.\textsuperscript{216} The difficulty is that some countries have adopted the SDR for purposes of interpreting the standard of conversion under article 22 of the Warsaw Convention and other countries have not done so.\textsuperscript{217} Hence, despite its relative stability, the SDR did not foster the kind of uniform adoption and application which was necessary.\textsuperscript{218}

The gold controversy is well presented in decisions from two district courts sitting respectively in the Fifth and Second Circuits. They are \textit{Boehringer Mannheim Diagnostics, Inc. v. Pan Stat.} 116 (1972)) and then to $42.22 per ounce in 1973 (Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973)).

\textsuperscript{213} I C. SHAWCROSS & M. BEAUMONT, \textit{supra} note 4, ¶ 335.

\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} Id., supra note 208, at 345.


\textsuperscript{218} I C. SHAWCROSS & M. BEAUMONT, \textit{supra} note 4, ¶¶ 335-36.
American World Airways, and Franklin Mint Corp. v. Trans World Airlines. The district courts in Texas and New York had held that the proper standards for conversion of the Warsaw limitation into U.S. dollars were, respectively, the free market price of gold in Boehringer and the last official price of gold in the United States in Franklin Mint. The Boehringer decision is presently on appeal to the United States Court of Appeals for the Fifth Circuit. A decision probably will not be handed down by that court until the United States Supreme Court has had an opportunity to resolve the issues before it in Franklin Mint which may well determine the future of the Warsaw Convention in its entirety.

In March of 1979, Franklin Mint Corporation delivered to TWA four packages weighing approximately 715 pounds. The cargo was to be shipped from Philadelphia, Pennsylvania to London's Heathrow Airport. While the packages were said to contain a large quantity of valuable coins, Franklin Mint made no special declaration of value on them at the time they were delivered to TWA. The packages never arrived at their destination in the United Kingdom, and Franklin Mint brought suit for the alleged loss valued at $250,000.

TWA invoked article 22 of the Warsaw Convention which provides that unless a special value is declared, the carriers' liability for checked cargo is the equivalent of 250 francs per kilogram. Article 22 also provides that "[this limitation] shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths [the so-called Poincare franc]. These

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221 In LOT, the gold standard issue was presented with the ticket issue. The district court decision aligned itself with Franklin Mint, holding that the proper standard was the last official price of gold in the United States. In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833, 839 (E.D.N.Y. 1982).
222 Franklin Mint, 525 F. Supp. at 1288.
223 Id.
224 Id. at 1289.
225 Id.
sums may be converted into any national currency in round figures."  

TWA presented three possible bases for the method of converting the article 22 limitation into U.S. dollars. First, the SDR which was being used by some members of the IMF was raised. Second, the last official price of gold in the United States was proposed as a proper unit of account. Third, the exchange value of the current French franc was placed before the court for its consideration. Franklin Mint proposed to the court that the free market price of gold be considered as a viable fourth alternative.

The district court upheld the liability limitation and computed the monetary award in terms of the last official price of gold in the United States. This basis, according to the court, at least bears the implicit approval of the legislature since it is the standard of conversion espoused by the CAB, the government agency most intimately concerned with the transaction at hand. A judgment was entered for Franklin Mint in the amount of $6,479.98.

Franklin Mint appealed to the Second Circuit. With the four alternative conversion standards before it, three proposed by TWA and one by Franklin Mint, the court refused to adopt any one of them and thereby rendered the Warsaw Convention's limitations prospectively unenforceable in United States courts. The court dismissed each conversion standard individually while holding fast to an overall sentiment that the Convention is outmoded. Designed to pr-
tect "the fledgling aviation industry," the Convention's establishment of a uniform, stabilized conversion standard in gold no longer met its objective of insulating recoveries from the vicissitudes of currency devaluation.

Like SDR's, each of the other three conversion standards proposed had a "devastating argument against it." With respect to the last official price of gold, the case for its continued use found support in neither law nor logic. This standard already had been explicitly rejected by Congress in 1978 and was out of touch with both economic and monetary reality. The Second Circuit further noted that neither the free market price of gold nor the current French franc was ever accepted as a conversion standard by the Convention's framers. The adoption of either would represent a "gross departure" from the Convention's thrust toward stable, uniform recoveries. The court stated that use of the free market price of gold would simply mean adoption of a daily fluctuating price, affected by the volatile nature of supply and demand. Similarly, adoption of the exchange value of the French franc would deliberately flout the avowed desire of the treaty drafters to avoid the use of a single national currency subject to unilateral action.

As it did in *Stratis*, the Second Circuit took cognizance of the central underpinnings of the Warsaw Convention. However, the court deferred to "the province of the execu-

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236 Id. at 306.
237 Id.
238 Id. at 309.
239 Id. at 306, 308.
240 Id. at 310.
241 Id.
242 Id.
243 Id. at 311.
244 See supra note 165, at 406.
245 690 F.2d at 311. The court stated:
For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula . . . . What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.
246 Id.
tive” to propose a new treaty and have the judiciary witness its ratification without intervention. Until such time as political resolution of the gold issue is achieved, the court held that the Convention’s limitations on liability for losses of cargo were unenforceable in U.S. courts. Franklin Mint’s holding was made prospectively applicable to events creating liability 60 days from the issuance of the mandate of unenforceability.

TWA filed a petition for a Writ of Certiorari on the grounds that the Second Circuit had abrogated the Warsaw Convention by nullifying the liability limitation provisions. By so holding, TWA argued further, the Second Circuit acted beyond its constitutional powers and impermissibly infringed upon the powers reserved to coordinate branches of the fed-

246 Id.

247 Id. Recently, in Maschinenfabrik Kern, A.G. v. Northwest Airlines, 562 F. Supp. 232 (N.D. Ill. 1983), the same four alternative gold standards were suggested to the district court. Id. at 238. The district court reviewed the Franklin Mint decision but refused to hold, even prospectively, that the article 22 liability limits were unenforceable. The district court criticized the Second Circuit’s approach stating,

To conclude as the Second Circuit did in Franklin Mint that the action of Congress in eliminating an official price of gold should operate to eliminate all limitations of liability found in the Warsaw Convention reads too much into an unrelated act of Congress. That act [the repeal of the official price of gold, discussed supra note 212] was intended to deal with various monetary matters and only incidentally affected the provisions of the Warsaw treaty. There is no reason to believe that Congress intended to declare Article 22 obsolete.

Id. at 239. Instead, the district court utilized the last official price of gold as incorporated into the last, unrevised CAB limiting tariffs. Id.; see id. at 238 for a discussion of the CAB’s role in determining the tariffs for limiting liability under article 22.

248 690 F.2d at 312. In cases already pending and events giving rise to liability which occur before the 60 days would run, the court held that the last official price of gold would be used to calculate the limits of liability. The issuance of the Second Circuit’s ruling which rendered the liability limitations unenforceable was to apply 60 days from the issuance of the mandate. The ruling was prospective in application because of the compelling fact that “this is the first case in which a court has declined to enforce the Convention’s limits on liability.” 690 F.2d at 311-12.


250 Id.
eral government.  

Franklin Mint did not respond to TWA’s petition but, instead, filed its own petition for a Writ of Certiorari on March 1, 1983. Franklin Mint offered two reasons why certiorari should be granted. First, the case concerns an important question of federal law, namely the judicial power to abrogate the provisions of an international treaty. Second, the federal courts are in conflict over the interpretation of article 22 of the Warsaw Convention.

251 Id. TWA took the position that both its and Franklin Mint’s petitions should be granted. TWA Petition, supra note 249, at 5. The judicial disarray which the Supreme Court must resolve is raised in both petitions and each petition on its own “entails consideration of the issues raised by TWA.” United States Brief, infra note 254, at 17. However, when the most significant issue for Supreme Court review emerges, namely whether “the Second Circuit exceeded its power by nullifying a treaty to which the United States is a party” (TWA Brief, supra note 249, at 5), then TWA should be treated as the petitioner because it argues for reversal of the Second Circuit’s prospective decision. Id.


On March 7, 1983 Franklin Mint was requested by the United States Supreme Court to file a response to TWA’s original Petition for a Writ of Certiorari. The response of Franklin Mint was filed on April 5, 1983.

254 Id. at 3, 7. In addition to the petitions filed by the two parties to the litigation, four non-parties filed amicus curiae briefs. On January 20, 1983, the International Air Transport Association (IATA) and forty-three of its member airlines filed an amicus curiae brief in support of TWA’s Petition. In the alternative, IATA petitioned for leave to intervene. Petition of International Air Transport Association (IATA) for Leave to Intervene in Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288 (S.D.N.Y. 1981), aff’d, 690 F.2d 303 (2d Cir.), cert. granted, 77 L. Ed. 2d 1347 (1983) (No. 82-1186, Jan. 20, 1983); Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit or, in the Alternative, Brief of Amicus Curiae in Support of Petition for Writ of Certiorari of Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288 (S.D.N.Y. 1981), aff’d, 690 F.2d 303 (2d Cir. 1982), cert. granted, 77 L. Ed. 2d 1347 (1983) [hereinafter IATA Petition].

IATA’s Amicus Brief asserts, inter alia, that the Second Circuit has violated the constitutional separation of powers doctrine by its jurisdictional intervention into the conduct of foreign relations. The IATA Petition acknowledged forthrightly that a request to intervene before the United States Supreme Court is unusual. IATA Petition, supra, at 11. To justify its intervention, IATA utilized a broad-based argument that encompasses Franklin Mint’s effect on all of its 123 international members. Id. at 12. Because these members conduct their daily operations in reliance upon the Warsaw Convention, the Second Circuit’s decision (if permitted to stand) would disrupt the entire international framework thereby hampering international commerce. Id. at 12-
The broad-based argument advanced in TWA's position never attacked the judgment of the Second Circuit. Instead, TWA only attacked the prospective aspect of the ruling. Because a money judgment was issued to Franklin Mint, the holding by the Second Circuit which actually bound the parties to that litigation was an affirmation of the district court's judgment limiting TWA's liability to an

13. While the issue raised by IATA is an integral part of any in-depth analysis of the Convention's liability limitations, its petition was denied by the Supreme Court.


On April 7, 1983, the United States filed an amicus curiae brief in both TWA's and Franklin Mint's petitions urging the Court to grant both parties' petitions. Brief of the United States as Amicus Curiae on Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288 (S.D.N.Y. 1981), aff'd, 690 F.2d 303 (2d Cir.), cert. granted, 77 L. Ed. 2d 1347 (1983) (Nos. 82-1186 and 82-1465 April 7, 1983) [hereinafter United States Brief]. The United States takes the position that the repeal of the Par Value Modification Act in 1978, discussed supra note 212 and accompanying text, did not abrogate the liability limitation established by article 22 of the Convention. Hence, the Second Circuit was wrong in concluding that with the repeal, Congress had specifically rejected use of the $42.22 per troy ounce of gold standard to implement article 22. Conversion at this rate, argued the United States, would effectuate the manifest purpose of the contracting nations. United States Brief, supra, at 11-13.

Finally, on October 12, 1983, two plaintiffs whose decedents were killed as a result of a crash of a Korean Air Lines (KAL) Boeing 747 aircraft at Kimpo International Airport at the end of a Trans-Pacific flight on November 18, 1980 filed an amicus curiae brief. Brief of Amicus Curiae Mark Hammerschlag and Ellen Van Fleet in Support of Franklin Mint Corp., Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288 (S.D.N.Y. 1981), aff'd, 690 F.2d 303 (2d Cir.), cert. granted, 77 L. Ed. 2d 1347 (1983) (Nos. 82-1186 and 82-1465 October 12, 1983) [hereinafter Kimpo Plaintiffs' Brief].

The wrongful death litigation arising out of that crash is pending in the United States District Court for the Central District of California. Hammerschlag v. Korean Air Lines, 558 F. Supp. 72 (C.D. Cal. 1983), sub nom. In re Aircrash at Kimpo International Airport on November 18, 1980, 558 F. Supp. 72 (C.D. Cal. 1983). The Kimpo plaintiffs argued that as strong as the Franklin Mint decision is in holding article 22 unenforceable in a cargo loss, it is even stronger when examined in the context of death and personal injury claims. Kimpo Plaintiffs' Brief, supra, at 5. See infra note 269 and accompanying text for further discussion of the Kimpo litigation and its relation to the Second Circuit's decision in Franklin Mint.

255 TWA Petition, supra note 249.

256 Id.
amount calculated at the rate of $42.22 per ounce of gold.\textsuperscript{257} This had been one of the standards of conversion advocated by TWA itself.\textsuperscript{258} In effect, TWA only sought review of the legal rule which the Second Circuit announced for application to future cases.\textsuperscript{259}

The \textit{amicus curiae} brief filed by the United States Solicitor General pointed out the importance of appealing the Second Circuit decision as it related to the parties to the instant litigation. Arguably, TWA presented no actual controversy to the Supreme Court.\textsuperscript{260} Nevertheless, the issues which emerged out of the district court’s holding were raised in Franklin Mint’s petition and, as the Solicitor General argued, resolution of those issues entails consideration of the issues raised by TWA.\textsuperscript{261} While this flaw in TWA’s petition is not likely to be dispositive of the Supreme Court’s decision, it seemingly would prevent TWA from claiming aggrieved party status.\textsuperscript{262}

On June 13, 1983, certiorari was granted to both TWA and Franklin Mint.\textsuperscript{263} While the effect of the \textit{Franklin Mint} decision presently is stayed pending Supreme Court review, certain potential ramifications become imminently clear through the treaty’s looking glass. First, and most obvious, \textit{Franklin Mint} exposes air carriers to unlimited liability in international transportation to the extent that events giving rise to liability are litigated in United States courts. Because the Warsaw Convention and its progeny apply only to carriers and not to manufacturers or other potential target defendants in mass aviation disasters, the spill-over effect of this rule is that a system is created whereby all claims will be channelled to the carrier. There will be no motivation to sue the

\textsuperscript{258} Id. See supra notes 227-229 and accompanying text.
\textsuperscript{259} 690 F.2d at 311-12.
\textsuperscript{260} United States Brief, supra note 254, at 16.
\textsuperscript{261} Id. at 17.
\textsuperscript{262} Id. at 16-17.
\textsuperscript{263} 77 L. Ed. 2d 1347 (1983) (No. 82-1186, Trans World Airlines, Petitioner; No. 82-1465, Franklin Mint Corp., Petitioner).
aircraft manufacturer or other parties, such as the United States government because of the actions of the Federal Aviation Administration (FAA) or the State Department. It will be incumbent upon the carrier to then pursue other potential defendants for contribution or indemnification, which will inevitably give rise to more extensive litigation among insurers than if a plaintiff were to sue these other parties directly.

Second, there is nothing in the opinion to suggest that the holding is limited to cargo cases. If it is not, then the limitation of liability for the international carriage of passengers is equally unenforceable. The Second Circuit demonstrated no inclination toward limiting its holding to cargo cases. If anything, it would seem that the motivation to render the monetary limitations unenforceable would have been greater if the court were facing a tragic loss of life rather than the loss of cargo. As expected, the issue emerged shortly after Franklin Mint was decided by the Second Circuit. The District Court for the Central District of California held the Warsaw Convention limitations unenforceable in personal injury and wrongful death cases in In re Aircrash at Kimpo International Airport, Korea, on November 18, 1980.264

Third, given Stratis,265 one also wonders if the result in Franklin Mint might have been different if Circuit Judge Newman, the dissenter in Stratis, had participated in resolving the issue of article 22’s enforceability. It seems that Judge Newman would have taken the position that despite possible unfairness and confusion among the courts, a practical application of the Convention must be pursued as long as the treaty remains in existence. Certainly, whether the issue is ticket delivery or the conversion standard, the practical application does not contemplate the type of treaty abrogation announced by the Second Circuit. As Judge Newman realized, as long as the Warsaw Convention remains legislatively intact, the judiciary must continue to work within its parameters.

The fourth ramification of Franklin Mint is the implicit

264 558 F. Supp. 72 (C.D. Cal. 1983). See supra note 254; see also infra note 269.
265 See supra notes 165–193 and accompanying text.
unenforceability of the Montreal Agreement. As Judge Sifton noted in In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, "[t]he Montreal Agreement was clearly intended to operate within the framework and incorporate all the relevant provisions of the Convention." Thus, by virtue of article 23 of the Warsaw Convention the provisions of the Montreal Agreement setting forth the $75,000 limitation of liability may be declared null and void in those cases where damages exceed that sum. If the Warsaw Convention's limits are unenforceable, the Montreal Agreement flies in the face of Franklin Mint because, if still enforceable by its own terms, the Montreal Agreement sets a limit which contravenes the unlimited liability established by the Second Circuit.

Fifth, the "wilful misconduct" exception to the liability limitation remains, in a technical sense, unaffected and therefore intact after the Franklin Mint decision. In a footnote to Franklin Mint, the Second Circuit stated that its holding was limited to the enforceability of the liability limitations under the Warsaw Convention and that it was expressing "no view as to the severability of those limits from the rest of the Convention." Nevertheless, while Franklin Mint does not expressly void the "wilful misconduct" exception, the unenforceability of the limitation renders the need to establish "wilful misconduct" unnecessary. The Second Circuit achieved, by implication, what the Montreal Protocols would have accomplished in specific legislative terms.

As the Warsaw Convention now stands, aside from Franklin Mint, the mere threat of a "wilful misconduct" finding by the jury is sufficient motivation for the carrier to negotiate toward high settlement value of cases above the $75,000 limit.

535 F. Supp. at 839 (emphasis added).

Warsaw Convention, supra note 7, art. 23(1). Article 23(1) of the Warsaw Convention provides that:

[Al]ny contractual provision which fixes a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Id.

690 F.2d at 311 n.27.
The elimination of the threat of a wilful misconduct finding would also eliminate the examination of the airlines' operation and performance. The carrier, as the targeted defendant, will be faced with unlimited liability and will be dismissed from scrutiny at the same time.269

Sixth, if the Second Circuit's methodology is valid, then the judiciary may have taken the power to abrogate international laws under the guise of "treaty interpretation". It is at least arguable that the Second Circuit properly exercised its constitutional responsibility to interpret the Warsaw Convention.270 In implementing this responsibility, it determined that the Warsaw Convention conflicted with a subsequent act of Congress, the 1976 Bretton Woods Agreement Act271 which repealed the Par Value Modification Act.272 If the Par Value Modification Act's repeal did abolish the official price

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269 558 F. Supp. 72 (C.D. Cal. 1983). The first judicial realization of this came from the United States District Court for the Central District of California on February 15, 1983. The case involved consolidated wrongful death actions which arose out of the 1980 Korean Air Lines crash near Seoul, Korea. The plaintiffs sought to strike Korean Air Lines' limitation of liability defense on the basis of insufficient notice of the limitation to the particular flight; alternatively, plaintiffs argued that, if the treaty applied, then the measure of recovery would be computed based upon the free market price of gold. Offering virtually no remarks on the merits of the plaintiffs' first contention, the district court went directly to the gold issue and decided it broadly as in Franklin Mint, stating, "The well-reasoned, comprehensive Franklin Mint opinion has persuaded this Court that, indeed, the limitation on damages that is imposed by the [Warsaw] Convention is unenforceable." 558 F. Supp. at 74-75.

With respect to Franklin Mint's effect on the Montreal Agreement, the Court agreed that the very concern of the Montreal meeting in 1975 represented the Warsaw Convention Signatories' recognition that the Convention's unit had been eliminated. The court stated:

It is clearly established that the airlines knew that "a rational limit on liability cannot exist" without an internationally agreed upon unit . . . . Therefore, airlines, including Korean, presumptively knew that this 'international disarray' would prevent the Convention from shielding them in any rational manner, and they would be expected to protect themselves and obtain additional insurance.


270 Kimpo Plaintiffs' Brief, supra note 254, at 5-6.

271 See supra notes 203-206 and accompanying text.

272 See supra notes 209-212 and accompanying text.
of gold, as the Second Circuit held, then the effective date
of the repeal placed the Warsaw Convention liability limi-
tation in direct conflict with the Bretton Woods Agreement.

The other side of the coin to this argument in support of
the Second Circuit’s ruling is that the 1976 Repeal Act and
its legislative history make no reference to the Warsaw Con-
vention. The treaty will not be deemed to be abrogated by
a later statute unless such a Congressional purpose has been
clearly expressed. The latter argument, grounded in fun-
damental principles established by the Founding Fathers,
should prove to be the sounder of the two when the Supreme
Court renders its decision in the case. If the Court is to rule
that article 22 has properly been abrogated, the vehicle it will
utilize to reach such a conclusion would hardly derive from
the argument that an act of Congress has overridden the
Warsaw Convention.

C. Concluding Remarks.

The Second Circuit’s decision will cause reverberations in
courts across the country and subject various disciplines to
new policy considerations. The aviation and insurance in-
dustries, intertwined as they inevitably must be when faced
with an air crash disaster arising out of international trans-
portation, must re-assess the respective roles of “insured” and
“insurer.” With a channelling of all claims to the air carrier
who is now faced with unlimited liability, the cost to the car-
rier’s insurer may increase to cover the greater risk involved.

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273 690 F.2d at 308.
274 Kimpo Plaintiffs’ Brief, supra note 254, at 10-11.
275 Brief of Trans World Airlines, on Writs of Certiorari to the United States Court
of Appeals for the Second Circuit at 15-20, Franklin Mint Corp. v. Trans World Air-
lines, 525 F. Supp. 1288, (S.D.N.Y. 1981), aff’d, 690 F.2d 303 (2d Cir.), cert. granted, 77
L. Ed. 2d 1347 (1983) (Nos. 82-1186 and 82-1465, August 29, 1983) [hereinafter TWA
Brief].
276 Id. at 16.
277 It must surely be assumed that Congress was aware of the requirement, under
article 39(2) of the Convention, that a signatory desiring to withdraw from the Con-
vention must provide its treaty partners with six months’ notice of its intended with-
drawal and that Congress would not knowingly ignore this express treaty obligation of
the United States. See J. Jay, THE FEDERALIST No. 64 at 424 (B. Wright ed. 1961)
cited in TWA Brief, supra note 275, at 18-19.
If this, in turn, puts the insurer at greater exposure than it would have with the survival of the limited liability provision under Warsaw, then the conflict for counsel hired by the insurer to protect the interests of the insured is also severely affected. Members of the defense bar must evaluate whose interests are really at issue, those from whom they have received their instructions, the insurer, or the commercial entity they are supposed to defend in the litigation. These respective interests are often neither parallel nor symmetrical.

From the aircraft manufacturer’s standpoint in litigation after Franklin Mint, the channelling of all liability claims to the carrier will provoke more insurance battles between the insurers of the carrier and the manufacturer, primarily over the issue of apportioning the liability among them. Sensible discussions would be preferable to litigating these issues. However, it cannot be denied that idealism yields to the reality of the inherent conflicts which separate the carrier and the manufacturer when settlement funds must be put on the table.

As the insurers enter the picture when apportionment emerges as the primary issue, the conflict of insuring risks becomes of grave concern. Because most of the liability risks are underwritten not by one insurer but by many over whom that risk is safely spread, it is not unusual for an insurer who has a “piece” of the carrier’s risk to also have underwritten a portion of the manufacturer’s risk. If Franklin Mint foreshadows a proliferation of apportionment-type litigation among various defendants, the conflict of the insurer’s interests envisions the same money put up at both ends of the negotiating table. The scenario is such that the insurer’s negotiating forum becomes a roundtable where all the money which is put up comes from the same pockets. Whether this will open the door to a more pragmatic resolution of how to allocate each defendant’s risk or will create an even more litigious posture than already exists in the United States courts remains to be seen, pending the final outcome of Franklin Mint and its effect on the Warsaw Convention.
V. THE CONSTITUTIONAL ISSUES OVER WARSAW

A. The *Bali* Decision.

In *Franklin Mint*, the Second Circuit arguably left intact all the provisions of the Warsaw Convention other than the article 22 liability limitation. Recently, in *In re Air Crash in Bali, Indonesia on April 22, 1974,* the Ninth Circuit Court of Appeals examined whether the existence of the treaty is possible, in practical terms, without the implementation of article 22. Whereas the judicial progression from the *Mertens-Warren-Lisi* trilogy through *Franklin Mint* circumvented the liability limitation through specific provisions of the Warsaw Convention, in *Bali* the Ninth Circuit intimated in dicta that a constitutional criterion may make the entire Warsaw Convention unenforceable.

In *Bali*, wrongful death litigation arose out of the crash of a Pam Am Boeing 707 which flew into a mountain near Bali, Indonesia. When the aircraft began its descent to Bali under a dark sky, the crew lost sight of their approach markers. Instead of ascending to their former, higher altitude the crew remained at a very low altitude and crashed into the mountain. Numerous lawsuits were filed in several federal district courts throughout the United States. After they were filed, all the suits were consolidated in the United States District Court for the Central District of California pursuant to an order of the Judicial Panel on Multidistrict Litigation.

Wrongful death suits on behalf of three passengers were

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278 The court noted that the Warsaw Convention established limited liability. The holding in *Franklin Mint* was limited solely to the unenforceability of the limits and expressed no view as to the severability of those limits from the rest of the Convention. *Franklin Mint*, 690 F.2d at 311 n.27.

279 684 F.2d 1301 (9th Cir. 1982) (also referred to as Causey v. Pan Am. World Airways).

280 See supra text of Parts II, III and IV, at notes 55-345.


282 Id.

283 Id.

284 Id.

285 Id.
tried to a jury. The verdict returned was that Pan Am was guilty of negligence but not wilful misconduct in the operation of the aircraft. Therefore, the jury’s determination did not preclude the carrier from invoking the limitation of liability defense.

The trial was bifurcated so that all issues relating to the carrier’s limitation of liability and other defenses under the Warsaw Convention were deferred until after the jury returned its verdict. Based upon its finding of negligence against Pan Am, the jury awarded each plaintiff a sum of money in disregard of and in excess of the $75,000 limitation set by the Montreal Agreement. Because of the bifurcation, the jury’s determination that Pan Am was not guilty of wilful misconduct left open the issue whether the damages awarded would be limited by the terms of the Warsaw Convention and the Montreal Agreement.

Unlike Lot, Stratis, and Franklin Mint, there was no issue before the California District Court that related to a specific provision of either the Warsaw Convention or the Montreal Agreement. There were no factual issues presented concerning the size of ticket print, the proper delivery of a ticket for international transportation, or the proper unit of account to convert gold into United States dollars. Yet, after the jury returned its verdict, the district court transcended that judicial progression which fostered piecemeal circumvention of the article 22 liability limitation and ruled that under California law a decedent could not contractually compromise his survivor’s right to wrongful death recovery. Accordingly, the trial court held that the contractual limitations imposed by the Warsaw Convention could not be invoked against a

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266 Id.
267 684 F.2d at 1306.
268 See supra note 15 and accompanying text.
269 462 F. Supp. at 1116.
270 Id.
271 Id. at 1116-17.
272 Id. at 1117.
273 Id.
passenger's next of kin. 294

As a result of its threshold characterization of the treaty as a contract which limited the rights of those not in privity to it, the district court never reached the plaintiffs' challenge to the constitutionality of the Convention. 295 On appeal, the Ninth Circuit, however, held that the Warsaw Convention preempted California law to the extent that California law would prevent the application of the treaty's limitation of liability. 296 It was this preemption of state law which exposed the Warsaw Convention to constitutional scrutiny. 297 The Ninth Circuit, however, did not pass on the Convention's constitutionality because it found an alternative remedy in the Court of Claims jurisdiction to determine whether the Convention's liability limitation constituted a taking of property without just compensation. 298

The constitutional challenge advanced by the plaintiffs consisted of three points. First, they argued that the Warsaw Convention was "so arbitrary and unreasonable" as to deprive them of substantive due process. 299 Second, they submitted that the treaty deprived them of equal protection of the laws. 300 Third, they contended that it impermissibly restricted their constitutional right to travel. 301

The court dismissed the first two prongs of the plaintiffs' attack by analogizing the Warsaw Convention to domestic legislation which limits liability for injury resulting from nuclear power plant accidents. 302 The Ninth Circuit stated that like the Price-Anderson Act, 303 the Warsaw Convention is an economic regulation under the commerce clause that is not
unconstitutional unless it is arbitrary or unreasonable.\textsuperscript{304} Citing a decision which upheld the constitutionality of the Price-Anderson Act,\textsuperscript{305} the court inferred that the Warsaw Convention would be constitutional unless arbitrary or unreasonable.\textsuperscript{306} In drawing this inference, however, the Ninth Circuit never determined whether the Warsaw Convention was arbitrary or unreasonable,\textsuperscript{307} because of the alternate remedy in the Court of Claims.\textsuperscript{308}

Turning its attention to the plaintiffs' third point of attack, the Ninth Circuit explained the plaintiffs' constitutional argument that the Warsaw Convention's low liability limits restricted their decedents' right to travel.\textsuperscript{309} First, the court reiterated case law holding that any restriction imposed upon the right to travel must be carefully tailored to serve a substantial and legitimate government interest\textsuperscript{310} and must not constitute a penalty on the exercise of that right; otherwise such limitations would be a direct restriction.\textsuperscript{311} The court reiterated the plaintiffs' arguments that the Convention's low liability limits so burdened the right to travel as to be a penalty on the exercise of the right.\textsuperscript{312} Although the court de-

\textsuperscript{304} 684 F.2d at 1309.
\textsuperscript{306} 684 F.2d at 1309.
\textsuperscript{307} Id.
\textsuperscript{308} See infra notes 315-329 and accompanying text.
\textsuperscript{309} 684 F.2d at 1309-10. The court found international travel was a fundamental right, like interstate travel. Id. (citing Zemel v. Rusk, 381 U.S. 1, 13-14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1968); Kent v. Dulles, 375 U.S. 116, 126 (1958)).
\textsuperscript{310} 684 F.2d at 1309 (citing Aptheker v. Secretary of State, 378 U.S. 500, 507-08 (1964)).
\textsuperscript{311} 684 F.2d at 1309-10 (citing Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969)). The Ninth Circuit was not troubled by the plaintiffs' need to assert third party constitutional rights, their decedents' right to travel, which was burdened by the Convention's liability limits. The court stated in passing that "this may be one of the cases in which constitutional rights can be successfully protected only if interested third parties are permitted to raise them." 684 F.2d at 1310 (citing Griswold v. Connecticut, 381 U.S. 479, 481 (1965)). The Ninth Circuit considered these plaintiffs, the survivors of the crash victims, to be adequate third parties to raise their decedents' constitutional rights. The court stated, "Surely penalties that would be unconstitutional if imposed on the traveler himself cannot be validly imposed on his survivors, simply because they were not the ones who sought to exercise the right." 684 F.2d at 1310.
\textsuperscript{312} 684 F.2d at 1310. The plaintiffs argued that the support for the rationale behind the Warsaw Convention's liability limits had changed drastically between 1934 and
scribed the plaintiffs' arguments as "persuasive" and "substantial," the Ninth Circuit abstained from reaching the constitutionality of the Warsaw Convention because of an alternate remedy available to the plaintiffs.

Having abstained from deciding the plaintiffs' three constitutional attacks on the Warsaw Convention, the Ninth Circuit proceeded to chart the course which the plaintiffs could take to launch their alternate remedy, a "takings" claim. The court reasoned that once the plaintiffs had obtained a money judgment against the defendant airline, the plaintiffs had a property interest that could not be taken for public use without just compensation given to the owner of that property right. If the trial court lowered the plaintiffs' money judgment to the Warsaw Convention's liability limits, a "taking" under the fifth amendment may have occurred. Because "takings" cases turn on the degree of governmental impairment of a private property right, the plaintiffs must seek a determination in the Court of Claims whether their loss of the amount of the judgment exceeding the Convention's limit is justly compensable under the provisions of the Tucker Act.

the present, and the treaty presently does not protect a government interest or benefit United States citizens who travel internationally. Id.

Id.

Id.

Id.

684 F.2d at 1312. See Ware v. Hylton, 3 U.S. (3 Dall.) 199, 245 (1796).

684 F.2d at 1312.

Id. (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)).

28 U.S.C. § 1491. The Tucker Act provides:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchanges . . . or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of
In reaching its conclusion that the Warsaw limit may be a "taking" under the fifth amendment, the Ninth Circuit did not mention the requirement that the governmental regulation causing the "taking" be for a public use, but the court did examine the jurisdiction of the Court of Claims. The court noted that rights created by or dependent on treaties were excepted from the Court of Claims' jurisdiction, under the "treaty exception". To circumvent the treaty exception, the court relied on Dames & Moore v. Regan, in which the Supreme Court deferred to the Court of Claims "takings" claims which resulted from the United States' Executive Agreement with Iran to secure the release of American hostages. Just as did the Ninth Circuit in Bali, the Supreme Court in Dames & Moore did not hold that a "taking" had

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the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

Id. For a detailed discussion of the Tucker Act, see 1 Moore's Federal Practice ¶ 0.65 [2-3] (2d ed. 1981).

319 684 F.2d at 1311.


322 Id. at 660-68. In response to the seizure of American personnel as hostages at the American Embassy in Tehran, Iran, President Carter, pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (1976 & Supp. III 1979), declared a national emergency on November 14, 1979, and froze the removal or transfer of all property and interests in property held by the Government of Iran which were subject to the jurisdiction of the United States. The Treasury Department then issued implementing regulations providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed an interest of Iran" and that any licenses or authorizations granted could be "amended, modified, or revoked at any time." The President then granted a general license that authorized certain judicial proceedings, including pre-judgment attachments, against Iran but did not allow the entry of any judgment or decree. On December 19, 1979, petitioner Dames & Moore filed suit in federal district court against the Government of Iran the Atomic Energy Organization of Iran and a number of Iranian banks, alleging that it was owed a certain amount of money for services performed under a contract with the Atomic Energy Organization. Id. at 662-64.
been effected nor could it properly make such a determination.\textsuperscript{323} Both courts reasoned that it was inappropriate to address the contention of a "taking" and properly deferred the issue to the jurisdiction of the United States Court of Claims.\textsuperscript{324}

The Ninth Circuit further reasoned that the narrow\textsuperscript{325} treaty exception did not apply because the wrongful death causes of action in \textit{Bali} arose under California law, not the Warsaw Convention.\textsuperscript{326} Arguably, the Warsaw Convention creates a cause of action,\textsuperscript{327} and the rights asserted are dependent upon the treaty itself which would prevent the Court of Claims from taking jurisdiction. Several circuit courts have recently held that the Convention creates a cause of action, the Ninth Circuit among them. The Ninth Circuit in \textit{Bali}, however, distinguished between the treaty as the source of a cause of action and the treaty as limiting plaintiffs to a cause of action created by the treaty itself.\textsuperscript{328} Under the former view, a plaintiff could choose to sue under the Convention or under another cause of action. The better view is that the Convention limits the amount of recovery rather than creates the right to assert the claim brought in \textit{Bali}.\textsuperscript{329}

\textsuperscript{323} \textit{Id.} at 688-89. The Supreme Court's thirty page opinion contains less than one full page devoted to the subject of a "taking". \textit{Id.}

\textsuperscript{324} 453 U.S. at 688; 684 F.2d at 1311-13.

\textsuperscript{325} The court noted that the Court of Claims itself narrowly construed the treaty exception. 684 F.2d at 1311 (citing Hughes Aircraft Co. v. United States, 534 F.2d 889, 902-06 (Ct. Cl. 1976)).

\textsuperscript{326} 684 F.2d at 1311. The Ninth Circuit reversed the district court's holding that the Convention did not preempt California law. The district court had reasoned that the plaintiffs, as survivors of the decedent crash victims, were not in privity with the airline. As such, the district court determined that, under California law, the contractual limits on recovery in the Warsaw Convention could not limit recovery on a tort claim to those not in privity with the contracting parties. 684 F.2d at 1306. The Ninth Circuit reversed, holding that Congress intended, by the overall scheme of the Warsaw Convention, to preempt state law allowing unlimited liability. \textit{Id.} at 1307-08. Implicitly, the court of appeals concluded that state wrongful death laws were part of the state legislation which Congress intended not to preempt. \textit{See id.} at 1307 and 1311 n.8.


\textsuperscript{328} 684 F.2d at 1311 n.8.

\textsuperscript{329} \textit{See Maugnie v. Compagnie Nationale Air France}, 549 F.2d 1256, 1258 n.2 (9th
B. Concluding Remarks.

In *Bali*, the Ninth Circuit lent its credibility to four constitutional arguments regarding the Warsaw Convention. Although the court carefully explained each argument, it did so only in dicta. The specific holding of *Bali* is only that the Court of Claims has jurisdiction to adjudicate the “takings” claims which plaintiffs could bring. The Ninth Circuit did not hold that a “taking” had occurred, that the plaintiffs’ decedent’s right to travel was restricted by the Convention’s low liability limits, or that the liability limits are arbitrary or unreasonable so as to violate substantive due process or the equal protection clause.

The Ninth Circuit’s map for a “takings” claim places several burdens on plaintiffs. According to the court, plaintiffs must prosecute to judgment their cause of action against an international air carrier and obtain a judgment in excess of the Warsaw Convention’s limits. The plaintiff must experience the trial court’s imposition of the Convention’s limits on the judgment, lowering the amount of the judgment. Only then, and after the expiration of any appeals, when the judgment becomes final, does the plaintiff have a claim for a “taking” without just compensation. According to the Ninth Circuit, the statute of limitation begins to run from the time the judgment becomes final and the plaintiff must prosecute a second action in the Court of Claims. In this second action, the plaintiff must defeat a “treaty exception” objection to the Court of Claims’ jurisdiction. Additionally,
the plaintiff bears the heavy burden of proving a "taking." The plaintiff may obtain the full amount of the original verdict after additional years, procedural difficulties and great expense.

Clearly, the issue of "taking" would have been ripe for adjudication before the Court of Claims in *Dames & Moore* because the property right of the petitioners was infringed upon to the direct benefit and public use of the United States. Bali and other Warsaw tort claims, however, are dissimilar to the circumstances which raised the "taking" issue in *Dames & Moore*. It is difficult to see how the Convention's liability limitation serves a public use or benefits the United States when, as the Ninth Circuit noted in Bali, "[t]he United States itself doesn't assert a national interest in limiting liability per se. In fact, continuing efforts are being made by the United States to raise or dispense with the limitations altogether." As such, the attempt to scrutinize the Warsaw liability limitation in light of the Tucker Act disregards the intent and meaning of the concept of "taking". The Ninth Circuit's introduction of the Tucker Act into cases involving Warsaw Convention limitations is incongruous with the import of the constitutional protection which it attempts to challenge. Needless to say, there will be further judicial interpretation of the Ninth Circuit decision in Bali.

**PART VI**
**THE FUTURE**

The Warsaw Convention has outgrown the paternalistic guise of the aviation industry. We have witnessed a recurring struggle by United States courts to reconcile historical progress with a treaty which places artificial monetary values on the loss of life. This is the real crisis with which the judiciary is left to grapple, from the technical intricacies of what constitutes proper ticket "delivery", through the gold mesh, to the

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342 684 F.2d at 1310.
newest vehicle toward circumvention of the treaty's limitations - constitutional attack under the guise of a "taking".

The varied conclusions reached by United States courts in recent Warsaw/Montreal cases collectively have taken on the appearance of a serpentine judicial progression, wrought with confusion and inconsistency. Hopefully, when the United States Supreme Court takes hold of the issues concerning ticket delivery, the unenforceability of all standards of gold conversion and the potentially unconstitutional "taking" created by the Warsaw Convention limitations, a more definite, unequivocal statement will emerge with respect to the viability of the Warsaw Convention. Resolution of these issues by the Supreme Court is necessary for at least the time being, so as to diminish; if not destroy, the judicial disarray hanging over this area of the law.

Supreme Court review notwithstanding, we must look beyond the final resolution of the serious issues currently existent as a result of cases such as LOT, Franklin Mint, and Bali. To look no further than the final disposition of these cases would be a myopic view. The time is long overdue for a re-interpretation of the goal of the treaty drafters in the light of current affairs. Serious re-interpretation may well bring us to the realization that the liability limitation under article 22 is no longer justified.

The one message which the judiciary clearly has enunciated in its bouts with the Warsaw Convention and its progeny is that the time for a shift in theme is at the legislature's doorstep. With the recent rejection of Montreal Protocols 3 & 4 by the Senate, the legislative input now needed is not a further attempt toward ratification of the protocols but a re-orientation toward practical uniformity to the extent it is desired in the United States. Ratification of the Montreal

\[343\] In the aftermath of the downing of Korean Air Lines (KAL) Flight 007 over the Sea of Japan on September 1, 1983, it is likely that all the issues which have been generated by the Warsaw Convention over the past two decades will reemerge.  

\[344\] In September, 1982, the International Law Association was presented with a Draft Convention on an Integrated System of International Aviation Liability, the purpose of which is to maintain but simplify the provisions of the present Warsaw System. Among other changes, the Draft Convention does away with the limitation of
Protocols does not fulfill this goal because it will always be met with the resentment and opposition of those who have carried the United States' long-standing dissatisfaction over the liability limitation through history. The protocols present the same ineffectual solution as occurred at the Hague in 1955, and, as such, their ratification would only serve to widen the chasm between the United States and the rest of the world.

A serious issue posed now to the international aviation community is whether or not the Warsaw Convention regime of liability limitations is still an effective system for governing international air transportation in the United States. Primarily because any individual limitation on liability for tortious conduct is strongly disfavored by our judiciary, the courts in the United States have demonstrated little reluctance to avoid the Warsaw Convention liability limitation in those cases where the damages sustained exceed the limitation. The "ticket delivery" cases epitomize the courts’ readiness to circumvent the monetary ceiling; the "gold controversy" is a direct outgrowth of the disfavor over the limitations; and the emerging constitutional attack is the forebearer of further devices constructed by the courts in the

a carrier's liability for death and personal injury; only limitations with respect to carriage of baggage and cargo are retained. The latter limitations are stated in terms of SDR's at the day of judgment.

The concept of absolute liability is retained and further characterized as "secured" liability by providing that the carrier shall maintain adequate insurance coverage to the satisfaction of the nation into which the carrier operates. Other than this "secured" liability concept, the Draft Convention does not expound upon how each national system would integrate on an international level. Wide discretion is given to each nation to determine the scope of financial security to be procured by the carrier, with the nation itself bearing the ultimate responsibility to make certain that the security is sufficient to cover losses of life and personal injuries.

Insofar as the "wilful misconduct" exception of article 25 is concerned, the Draft Convention makes the plaintiff's burden to overcome the liability limitation much more difficult by requiring that he prove that the damage resulted from a wrongful act or omission, done with the carrier's intent to cause damage.

The Draft Convention was prepared by Professor Bin Cheng, Chairman of the International Law Association's Air Law Committee, together with Professor Jacqueline Dutheil de la Rochere. No further action upon the Draft is known by this commentator to have taken place since originally presented in September, 1982. See LLOYD'S AV. L., April 15, 1983, at 3-5.
United States to side-step the undesirable effect of the Warsaw System.

If the Warsaw Convention’s liability limitations are no longer viable in the 1980’s, then why should not the United States be the forebearer of a new trend, indeed perhaps a new treaty. This would allay the fears of Montreal Protocol proponents who express concern over the United States’ loss of prestige by not adopting Montreal Protocols 3 & 4. Senator Hollings aptly addressed this “fear” during the March 7, 1983 Senate debate on ratification of the Protocols, declaring, “What national prestige? I do not think there is anything prestigious about this nonsense . . . . If the protocols are ratified, [w]e will become the international leader in a ripoff of the American traveling public . . . .” Would there not be more genuine prestige to be gained by shifting our thought processes in the United States away from the “artificial respirator” syndrome which would impose the Montreal Protocols upon an already wavering foundation, and toward construction of an entirely new piece of legislation that not only generates uniformity for international air transportation but that allows for the lack of it where needed as well. If our legislative branch of government is able and willing to get out of the starting block in the direction of a refined treaty, then its first step must be to stop the judicial stranglehold that is mutilating the Warsaw Convention and its progeny. It must acknowledge forthrightly that the uniformity of damages can no longer be the Convention’s cornerstone if it is serving to foist arbitrary values on human life which cannot be justified. With such an admission, at least a new course could be established, and if the Warsaw Convention has been destined by the death knell, it can at least be succeeded by the undertaking of new treaty drafters rather than fade out in a whimper through piecemeal judicial destruction.

Comments, Casenotes and Statute Notes