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Memorandum of Opinion

Nicholas J. Bua

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This action seeks damages for the death of FRANK BURDELL resulting from the crash of defendant Canadian Pacific's Flight 402 while enroute from Hong Kong to Tokyo, Japan, on March 4, 1966. Canadian Pacific has filed its motion to dismiss the suit upon the grounds that the court lacks jurisdiction over the subject matter and alternatively because of improper venue in this court.

Defendant, Canadian Pacific Airlines, contends that the flight in question was an international flight governed by the provisions of the Warsaw Convention to which that defendant is a Contracting Party.

At the time of his death, the decedent was the District Representative for the Far East for the Hyster Company of Peoria, Illinois. He had held that position since 1961, and Mr. Burdell and his family had lived in Singapore during this employment. The address of the decedent at the time of death was 3 Chatsworth Avenue, Singapore. However, Mr. Burdell and his family were citizens of the United States, and citizens of the State of Illinois.

The ticket, which constitutes the contract of carriage, discloses that Mr. Burdell had made arrangements to fly from Singapore to Bangkok, Thailand on Cathay Pacific Airways on February 28, 1966; on March 1, he flew from Bangkok to Hong Kong on Cathay Pacific; on March 4, 1966, he flew from Hong Kong to Tokyo on Canadian Pacific Airlines; and he left open the date for a flight on Cathay Pacific Airways from Tokyo to Hong Kong and thence back to Singapore.

It is undisputed that Canadian Pacific Airlines does business in the State of Illinois, and would be subject, *in personam,* to the jurisdiction of this court, except that this defendant airline has raised Article 28 of the Warsaw Treaty.

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*The International Lawyer is pleased to reproduce the full text of the decisions of Judge Nicholas J. Bua of the Circuit Court of Cook County, Illinois rendered on November 7, 1968 holding certain provisions of the Warsaw Convention unconstitutional.

Canadian Pacific contends in its brief that the Warsaw Convention (The Convention for the Unification of Certain Rules Relating to International Transportation by Air) is a treaty of the United States and as such, it is the supreme law of the land and must be adhered to by the courts of the State of Illinois.

Furthermore, Canadian Pacific asserts in its brief that the Warsaw Convention establishes four forums in which an action based thereon may be brought, namely, (1) the domicile of the carrier, (2) the principal place of business of the carrier, (3) the carrier's place of business through which the contract of carriage was made, or (4) the place of destination. As applied to this litigation, Canadian Pacific contends neither the State of Illinois nor the United States constitutes a proper forum under the Warsaw Convention, and therefore, the courts of the State of Illinois lack jurisdiction and constitute an improper venue for this litigation.

Canadian Pacific refers to Article VI of the United States Constitution, which states;

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

Although Canadian Pacific in its reply brief states that it has not pleaded the limitation of liability under Article 22 of the Warsaw Convention Treaty, and that this motion does not concern the limitation, its original brief referred to these provisions, and stated, in substance, that the limitation provisions must be followed, even though the limitation is substantially less than the wrongful death damages which would otherwise be awarded. Canadian Pacific concludes that "this court is bound to follow the provisions of the Warsaw Convention, if it is applicable to this litigation, even though this convention is shown to be contrary to the constitution, statutes, or court decisions of the State of Illinois.

It is apparent and the court is not blind to the fact that underlying this litigation is the defense that the damage limitations of the Warsaw Convention apply to this case and limit the widow and children of the decedent to $8,291.

The Court has considered the extensive, learned and very thorough briefs submitted by the parties. The Court has drawn from these briefs in this opinion.

I

The Court finds that the ticket involved in this case contains the same "Lilliputian" printing as the ticket involved in Lisi v. Alitalia Airlines, 253 F.Supp. 237, aff'd. 370 F. 2d 508. This decision was affirmed without opinion by the United States Supreme Court, 390 U.S. 455; rehearing denied 391 U.S. 929.

The Court finds that the venue provisions of the Warsaw Treaty which restrict the place of suit, in fact and realistically exclude or limit a carrier's liability. The Court finds, under the authority of Lisi v. Alitalia Airlines, 253 F.Supp. 237, aff'd. 370 F. 2d 508, and cases cited therein, that restricting these American and Illinois citizens to the institution of suits in Singapore, Hong Kong or Canada would exclude or limit the air carrier's liability. Canadian Pacific failed to comply with the Warsaw Convention requirements with respect to the ticket. This Court refers to the language of United States District Judge Lloyd MacMahon of the New York Federal Court, who, in his opinion, in *Lisi,* 253 F.Supp. 237, stated:

> We hold, therefore, that compliance with the Convention requires not merely physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable. Cf. Mertens v. Flying Tiger Line, Inc. 341 F.2d 851 (2d Cir.), cert. denied, 382 U.S. 816 (1965); Warren v. Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965); Block v. Compagnie Nationale Air France, 229 F.Supp.801, 808 (N.D.Ga. 1964); Sand, Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com.260, 262-63 (1962). Thus, if the tickets and checks issued here did not so notify the passenger, the challenged affirmative defenses are unavailable and must be dismissed.

Judge MacMahon was affirmed through the United States Court of Appeals and through the United States Supreme Court. In his opinion, Judge MacMahon stated further:

> We are of the opinion that a jury could not reasonably find that the passenger tickets and baggage checks delivered here notified the passengers that the exclusion or limitation provisions of the Convention were applicable, and, accordingly, hold as a matter of law that defendant cannot exclude or limit its libility under the Convention in the case at bar. We think one look at the tickets and checks, which were combined in the form of small printed booklets, compels this conclusion.

> The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of Conditions of Contract crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.
>
> Lilliputian typography, Eck. v. United Arab Airlines, Inc., 20 App.Div. 2d 454, 457 n.2, 247 N.Y.S. 2d 820, 824, rev'd on other grounds, 15 N.Y.2d 53, 255 N.Y.S. 249, 203 N.E.2d 640 (1964), aff'd, 352 F.2d 494 (9th Cir. 1965), is at war with the intent of the Convention. This was recognized by our Court of Appeals in Mertens where one of the reasons for precluding the carrier from limiting its liability under the Convention was that the required statement was printed in such a manner as to virtually be unnoticeable and unreadable. . . . Mertens v. Flying Tiger Line, Inc., supra at 857.
>
> We hold, therefore, that defendant failed to comply with Articles 3(1)(e) and 4(3)(h) of the Warsaw Convention and that the challenged affirmative defenses are unavailable to defendant in these actions.

The United States Court of Appeals affirmed Judge MacMahon's decision, stating:

> It is clear, however, that under other Articles of the Convention, these limitations on liability are not applicable if the carrier fails to deliver to the passenger a ticket or a check for baggage. These Articles, moreover, provide that the ticket and check shall contain certain specified information, including a statement that the transportation is subject to the rules relating to liability established by this convention. Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.

The Court finds that the venue provisions of the Warsaw Convention are inapplicable to this case.

II

The Court finds that the origin of the decedent's air traffic ticket was Singapore, and that his destination likewise was Singapore. The Court also finds that Singapore was not a High Contracting Party at the time the ticket was purchased or at the time of the accident.

International transportation is defined 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 transshipment, are situated within the territories of two High Contracting Parties, or

within the territory of a single High Contacting 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." Warsaw Convention, Article 1.

In Hjalsted, The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law, 27 Journal of Air Law and Commerce, p.1, 4, the author states:

> International carriage is, for the purposes of the Convention, any carriage in which, according to the agreement between the parties, the places of departure and destination are situated within the territory of two Contracting States, or within the territory of one Contracting State if there is an agreed stopping place within the territory of another State, be it or not a Contracting State. A carriage to be performed by several successive air carriers is deemed to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts.

The Court concludes, from an analysis of case law on the subject, that the destination is determined not by the flight which comprises part of the trip, but by the entire contract of carriage.

Canadian Pacific in its brief has stated:

> The flight plan lists the point of departure and the point of arrival both as Singapore. However, this defendant respectfully submits that such a procedure was followed merely for the convenience of the customer, and does not truly represent what actually occurred. Mr. Burdell eventually would return to Singapore, since that was where he resided and where he centered his business. However, the flight plan, when considered in the light of the purpose therefor, was a series of independent flights which were arranged for his convenience at one time by a carrier in Singapore with whom he did a good deal of business. As a consequence of these factual considerations, the 'contract made by the parties,' referred to in Article 1(2), is the contract of carriage between Canadian Pacific Airlines and Mr. Burdell from Hong Kong to Tokyo, and not the total flight plan so arranged for Mr. Burdell by Cathay Pacific.

However, the Court notes that in one of the Affidavits filed by defendant airline, it pleaded that "the origin of Mr. Burdell's air traffic ticket was Singapore"; and that "the destination of Mr. Burdell's air traffic ticket was Singapore."

Furthermore, defendant airline pleaded herein initially that:

(a) This defendant is incorporated under the laws of Canada;

(b) The defendant's principal place of business is in the City of Montreal, Province of Quebec, Canada;

(c) The contract of carriage in this case was made in Singapore;
(d) The place of destination of said flight was Singapore.

It is clear, therefore, from the express statement on the ticket, the pleadings in this case, and the applicable case law, that Singapore was the destination as well as the place of origin within the meaning of the Warsaw Convention.

Article 38 of the Warsaw Convention Treaty provides:

> 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.
>
> The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

In its brief, Canadian Pacific attached a letter from the United States Department of State, wherein the Deputy Legal Adviser stated that he considers Singapore to be an adherent to the Warsaw Convention. However, an official publication compiled by the Treaty Affairs Staff, Office of the Legal Adviser, Department of State, lists treaties on record in the Department of State on January 1, 1967. States which are parties to the Warsaw Convention are listed on pages 235 and 236. Singapore is not among the 93 nations listed although Singapore is listed as a party to other treaties in this publication.

But of even more significance is a letter filed in this proceeding from the Government of Poland, signed by Dr. J. Osiecki, Vice-Director of Legal and Treaty Department, which is dated February 19, 1968, and reads as follows:

> Dear Sir:
>
> In reply to your letter of November 27, 1967 directed to the Polish Government and concerning the participation of Singapore in Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, I would like to inform you that the Polish Government has not received the notification of adherence from Government of Singapore since it became an independent State to the above mentioned Convention.
>
> At the same time I can only inform you that on 6 November 1967 the Government of Singapore deposited with the Government of Poland the instrument of adherence bySingapore to the Protocol amending the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at the Hague on 28 September 1955. In accordance with paragraph 3 of Article XXIII of the Hague Protocol it entered into force for Singapore on 4 February 1968.

In Aviation Law Reports, No. 408, of March 6, 1967, dated two years after Singapore became an independent sovereign state, the Convention parties are listed, but Singapore is not listed.

In conclusion, this Court finds that Singapore became an independent Republic of Southeast Asia, a member of the Commonwealth of nations, and an independent sovereign state in 1965, and that Singapore, as of the time of the purchase of the tickets and the time of the occurrence, had not adhered to or ratified the Warsaw Convention.

The Court refers to authorities cited in plaintiffs' brief, including D. P. O'Connell, "Independence and Succession of Treaties," 38 Brit. Year Book of Intl. Law 84, at page 143:

> No international authority has decided that the Warsaw Convention is automatically applicable in territories which belong to a contracting State before independence, or with respect to international carriage by air after independence.

Article 40 of the Convention states that "any High Contracting Party may bind a colony or protectorate territory." However, Singapore became a completely independent sovereign state in 1965, prior to the occurrence, and it is clear that it did not deposit an instrument of adherence with the Government of Poland until November 6, 1967. The Court refers to Jones, "State Succession in the Matter of Treaties," 24 Brit. Year Book of Intl. Law 360, at page 366:

> DISMEMBERMENT AND SECESSION.
>
> A new state is formed by secession from the mother-country.
>
> The obvious historical example is that of the United States. It was never contended that the treaties made by Great Britain, even so far as they related specifically to the American Colonies, applied to the United States. Keith, Theory of State Succession (1907), page 19.
>
> When a new State comes into existence, which formerly formed part of an older State, its acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by expressed declaration or by conduct (in the case of each individual treaty) as considerations of policies may require. Irish Free States Debates, 11 July, 1933.

Plaintiffs assert that the Federation of Malaya never complied with the requirements for adherence. Prior to achieving a complete independent sovereignty in 1965, the state or territory of Singapore was a part of the Federation of Malaya. The Court finds that it is unnecessary to determine whether or not the Federation of Malaya adhered to or ratified the Warsaw Convention, because it is clear that the Government of Singapore did not, and Singapore became an independent sovereign state prior to the occurrence.

Therefore, for this further reason, the Warsaw Convention is not applicable to this case.

III

Even though the Court has found that the provisions of the Warsaw Convention Treaty, in respect to venue or jurisdiction, are not applicable for the reasons previously stated, the Court deems it necessary to pass upon the validity of certain provisions of the Warsaw Convention. This point was stressed particularly by the plaintiffs as an alternative objection to the Motion to Dismiss, and the Court feels it would be remiss if it did not pass upon these alternative arguments which may now have relevance and most certainly will have relevance in the future in this litigation.

At the outset the Court realizes the importance and significance of this decision. Everyone is aware that international air travel is rapidly increasing to the point where millions of United States citizens are or will be flying in international air travel. In "Aerospace Facts and Figures, 1968," published by Aero Publishers, Inc. in respect to international air travel, this publication shows the following, at page 105. (see facing page)

The Court takes notice of the fact that large jet transports which may contain as high as 400 or more passengers are now being flight-tested and will soon be operational in international air travel.

Canadian Pacific takes the position that any treaty is not subject to constitutional restrictions. This Court does not agree.

In Treaties and Constitutional Law: Property Interferences and Due Process of Law, by Willard B. Cowles, the author states that treaties are subject to constitutional attack and in deciding constitutionality, the Courts should consider changed conditions.

Plaintiffs point out that "deprivations" or "takings" of property (the essence of the terms used in the Fifth Amendment of Constitution) are species of interferences therewith. When the due process or just compensation clauses are raised in litigation it assumes an "interference" with property, the litigated question being whether the interference operated to "deprive" persons of property without due process of law or to "take" property without assuring just compensation. (Omina Commercial Co. v. U. S., 261 U.S. 502, 510 (1923); Eaton v. B. C. & M. R.R.Co., 51 N.H. 504, 511 (1872); O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908); Fairmount Creamery Co. v. Minn., 274 U.S. 1, 8 (1927); Bird et al. v. U. S. 24, F. 2d 933, 934

International Airline Passenger Service
Selected Calendar Years, 1926 to Date

Year Ending Dec. 31	Passengers Carried (Thousands)	Revenue Passenger-Miles Flown (Millions)
1926	Not Available	Not Available
1930	33	7.8
1935	111	46.7
1940	163	99.8
1945	511	450.1
1950	1,752	2,214.0
1951	2,140	2,613.8
1952	2,391	3,065.0
1953	2,745	3,450.8
1954	2,919	3,810.4
1955	3,488	3,398.9
1956	4,068	5,226.2
1957	4,259	5,882.0
1958	4,428	6,123.9
1959	4,999	7,064.2
1960	5,499	8,306.2
1961	5,699	8,768.5
1962	6,598	10,138.0
1963	7,513	11,905.4
1964	8,775	14,352.4
1965	10,195	16,789.0
1966	11,646	19,298.4
1967	13,424	23,259.3

(C.C.A., 9th 1928); New York v. Eckerson, 133 A.D. 220, 223 (1909); State v. Miksicek, 225 Mo. 561, 569 (1910)).

In Cochrane v. United States, 92 F.2d 623 (C.C.A. 7th, 1937), cert.den. 303 U.S. 636 (1938), the court considered the constitutional validity of a treaty concerning duck hunting. Although the court did not declare the treaty unconstitutional, it again confirmed that validity or invalidity of a treaty is essentially a question of "degree"—that is, does the treaty infringe upon the rights of citizens "unreasonably and arbitrarily?"

The Court finds, as stated by the author Cowles, in "Treaties and Constitutional Law," that the United States Constitution "is the real supreme law of the land, and its prohibitions are binding in cases of irreconcilable conflict with treaty stipulations, where the question is properly raised . . . . Treaty stipulations and treaty implementing instruments must be, or be construed to be, consistent with the due process and just compensation clauses of the Fifth Amendment of the Constitution or be held inoperative."

The Court has noted that various decisions have eroded the force of the restrictive provisions of the Warsaw Convention, while not squarely passing upon the validity of its restrictive provisions (Lisi v. Alitalia Airlines, 370 F. 2d 508; Mertens v. Flying Tiger Line, 341 F. 2d 851).

The Court finds that the Warsaw Convention Treaty, and any treaty, is subject to the Constitution of the United States, and any provision of a treaty which purports to take away a right of a citizen, provided for by the Constitution, is invalid as to that citizen.

The Court refers to American Law Institute *Restatement,* Foreign Relations Law (1965), Comment under Section 117(d), in which it is stated: "The United States has the power under the Constitution to make an international agreement if . . . (b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States."

Furthermore, this *Restatement* states: "No power granted to the United States by the Constitution is unlimited–including the treaty power. Notwithstanding the existence of an affirmative constitutional power in the Federal Government to deal with a matter by international agreement, the Constitutional limitations upon action by the Government may nevertheless prohibit the making of an agreement. Such limitations as those contained in the Bill of Rights apply to action taken under the grant of the power to make international agreements just as to action taken under other grants of governmental power."

In 52 Am.Jur., Treaties, p. 809:

> It is uniformly conceded that a treaty cannot be considered as the law of the land within the meaning of the Federal Constitution, and as such binding on the courts, if in making it the limits of the treaty-making power have been exceeded. While there is no such limitation as to subject matter on the treaty-making power as exists in the case of the legislative power, nevertheless, the Federal power does not extend to the making of treaties which change the Constitution or which are inconsistent with our form of government, with the relations of the states and the United States, or with the Federal Constitution.

Story states in his *Commentaries on the Constitution of the United States* (Vol. 2, p. 1508):

> It (a treaty) is not to be construed as to destroy the fundamental laws of the United States. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument.
>
> It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions.

In Cooley, *Principles of Constitutional Law,* p.117:

> The United States Constitution imposes no restriction upon the power of the President to make treaties with the concurrence of two-thirds of the Senate, but the treaty making power is subject to the restriction that nothing can be done under it which changes the Constitution.

The United States Supreme Court said in Cherokee v. United States, 78 U.S. 616, 20 L.ed 227, 229:

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the natural and fundamental principles of our government.

In Dowling and Edwards, *American Constitutional Law,* at page 298, it is stated:

> In the Supremacy Clause treaties made under the authority of the United States are declared to be the supreme law of the land. The Constitution contains no express limitation upon this power. The Supreme Court has never held a treaty unconstitutional, despite repeated and vigorous contentions to that effect in a variety of factural matters. Does this indicate that the treaty power is without constitutional bounds? Or are there constitutional restraints; if so, how may they be determined and defined?
>
> At the outset a significant but often disregarded fact should be noted; namely, that from its earliest decisions, the Court has consistently expressed its power of judicial review of treaties rather than regarding them as so political in character as to be beyond Court inquiry. The Court has said that the provisions of a treaty may not be annulled or disregarded by the Courts 'unless they violate the Constitution of the United States.' (Doe ex dem. Clark v. Braden, 16 How. 635, 657, 14 L.Ed. 1090 (1853)), and 'that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument.' (The Cherokee Tobacco, 11 Wall.616, 620, 20 L.Ed. 227 (1870)).

In Wheare, *Federal Government* (1947), at page 182, it is stated that the treaty-making power cannot be contended to "extend so far as to authorize what the Constitution forbids . . . . This surely means that

the treaty-making power is subordinate to, among other principles, such rules as that of the 'Due Process Clause.'"

The Court refers to an article by Roger Lea MacBride entitled "Treaties versus the Constitution," 26 Int'l. Law Pamphlets 17. In the article, MacBride stated:

> Another treaty which may contravene the United States Constitution is the Warsaw Convention, ratified in 1934. That multipartite international treaty undertakes to regulate and limit rights of recovery against international air carriers. In the debate in the Senate last January (1955), Senator Butler posed this hypothetical case: Two men take off from San Francisco, one bound for New York and the other for London. The plane crashes on take-off. The man holding the ticket for New York may recover damages to the extent that a jury finds he is entitled to them; the man whose destination was London is limited by the Warsaw Convention to a maximum of $8,300. Senator Kefauver, having admitted that this was a correct interpretation of the treaty, Senator Butler continued, 'In my opinion, it shows conclusively that we have already, by treaty, cut across the right of the American people to a full jury trial in the event of accident or death in a case such as that stated.' Congressional Record, January 29, 1955 (Vol. 100, No.17), p. 971, unbound edition. See also Report of Standing Committee on Peace and Law Through United Nations, ABA, Feb. 1, 1952, p. 16.

The then President of the American Bar Association, Frank E. Holman, stated in reference to MacBride's article, "I have no hesitation in saying that it is one of the best exposés of the danger of treaty law to American rights and the American form of government that has yet been written."

Preliminary to any decision, it is important to trace the history of the Warsaw Convention Treaty, because the Court believes that it is its duty to analyze the origin and creation of the restrictive venue and monetary provisions. If these provisions of the Treaty are violative of the United States Constitution, then this Court and any Court, must declare such restrictive provisions of the Warsaw Convention Treaty unconstitutional and invalid.

There does not appear to be any serious dispute but that the Warsaw Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comite International Technique d'Experts Juridique Aeriens (CITEJA) created by the Paris Conference. Civil aviation at that time was still in its infancy. The total airline operations in the five-year period 1925 to 1929—in domestic as well as foreign travel—was only 400 million passenger miles. The fatality rate was 45 per 100 million

passenger miles. Plaintiffs point out that this compares with the rate of 0.55 fatalities per 100 million passenger miles in 1965 (1965 Annual Report of the ICAO Council to the ICAO Assembly 13).

In that early period, it is obvious that airlines, especially in international travel, constituted a fledgling industry to which the Senate of the United States apparently desired to grant preferential protection. Airlines carried a few passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. This is in marked contrast to the present day jet travel, in which over 13 million passengers were carried in international travel in 1967, according to "Aerospace Facts and Figures,1968."

The Court has read an article in 80 Harvard Law Review 497, entitled "The United States and the Warsaw Convention." In that article it is stated:

> The United States, which had not participated in the work of CITEJA and had sent only an observer to the Warsaw Conference, moved quickly thereafter. In November of 1933, the Commerce Department wrote to the Secretary of State (Letter from E. Y. Mitchell, Assistant Secretary of Commerce, to the Secretary of State, Nov. 28, 1933—this letter and all the others referred to in this article, can be found in the files of the General Counsel, Federal Aviation Agency, Washington, D.C.):
>
> > The Aeronautics Branch has made a study of the Treaty drafted and approved at Warsaw and has contacted a number of air transportation operators on the subject. All United States operators conducting international air transport services strongly favor adherence to the Convention by the United States. . . . The Aeronautical Chamber of Commerce of America, the Trade Association Organization representing ninety percent of all United States transport operators and one hundred percent of those operating internationally, strongly favors participation in the Convention. No airline operating at the present time has indicated opposition to adherence to the Convention by the United States.
>
> The State Department thereupon transmitted its approval to the President, the President submitted the Treaty to the Senate, and on June 15, 1934, without debate, committee hearing, or report, the Senate gave its advice and consent by voice vote. (78 Cong.Rec.11,582 (1934)). The United States deposited its instrument of adherence on July 31, 1934, and the President proclaimed the Treaty ninety days later (T.S. No. 876, 49 Stat. 3000 (1934)). Thus, although the United States had nothing to do with formulation of the convention and had adhered rather than ratified, it was almost a charter member.

Plaintiffs point out that in 1933-34 economic conditions throughout the world were relatively severe and that at that time there was virtually no international air transportation, except for a few short trips between Paris and London, and similar flights not over 500 miles. The Court has noted that in May of 1966, certain airline carriers entered into an agreement providing for an increase of their liability to $75,000. However, this increased liability would not apply to this case, even if this occurrence took place after May of 1966, because this so-called Montreal Interim Agreement applies only to international air travel which has a contact with the United States.

The project of the Conference (II Conference International de Droit Prive Aerien, 4-12 Octobre 1929, Varsovie 17 (1930) was twofold. First, since aviation was obviously going to link many lands with different languages, customs and legal systems, it was desirable to establish at the outset a certain degree of uniformity. The Convention achieved this almost completely as to documentation—tickets, waybills, and the like (International Air Traffic Association (IATA) had prepared standard documents which had been in use since 1921, but their legal effect was not certain: C. Shawcross & K. Beaumont, Air Law, § § 40 n.(e), 71 (2d ed.1951))—and to a degree as to the procedure for dealing with claims arising out of international transportation and substantive law applicable to such claims. Briefly, there was to be a two-year period of limitation (Article 29), and only the carrier actually performing the transportation was to be liable for damages caused in the course of the transportation (Article 30 (2)). (Warsaw Proceedings 226-27). This was the rule in respect to claims for damage to passengers. Jurisdiction over a carrier was to be available where the carrier was "domiciled" or had its principal place of business, where the carrier had a place of business through which the contract was made, or at the place of destination of the flight (Article 28).

Furthermore, the Warsaw Convention limited the liability of air carriers to 125,000 "Poincare francs." This now amounts to $8,291. At the time of the Warsaw Conference in 1929, the value of 125,000 Poincare francs was $4,898.

With this historical analysis in mind, the Court must determine the validity of these restrictions of the Warsaw Convention, as applied to this case, which involves the death of an executive, an American citizen, engaged in travel in the Far East, who was killed due to the alleged negligence of the defendant, Canadian Pacific Airlines.

In this case it appears to be undisputed that the decedent, Frank W. Burdell, was 40 years of age at the time of his death and was earning

approximately $15,000 per year; that he left surviving his widow, Lois Arlene Burdell, age 32, and his children, Nickola Leigh Burdell Sexton, age 18, James F. Burdell, age 9, and Paul D. Burdell, age 7, and that Mr. Burdell was employed by The Hyster Company in Singapore, as a Far Eastern Representative. It is obvious that the damages which resulted to his family from his death are most substantial.

It also appears to be undisputed that Mr. Burdell was a passenger in a jet airplane operated by defendant, Canadian Pacific Airlines. Plaintiffs have alleged that upon arrival in the Tokyo area it circled Tokyo for approximately one hour, due to the extremely thick fog and obviously very hazardous conditions. The pilot told the control tower at Tokyo airport that he would head for Taiwan. Nonetheless, he attempted to land in the thick fog, and quickly turned into an approach pattern over Tokyo Bay and headed down toward the runway. At the end of the runway the plane rammed a seawall, somersaulted and exploded into flames, killing its crew of ten and all but eight of its 62 passengers.

If defendant airline were correct, and if 125,000 Poincare francs were now worth less than $1.00, then the courts would still be powerless to declare such provisions unconstitutional. Furthermore, if the venue provisions of the Warsaw Convention required the institution and prosecution of all actions in Warsaw, Poland, for example, defendant would likewise contend that this Court could not act.

The Court has considered the perceptive article in '68 Harvard Law Review by Lowenfeld and Mendelsohn, referred to by plaintiffs in their brief and refers to the statistics therein: (see following page)

These authors state that:

> Allowing for a reasonable margin of error in what were conceded to be only estimates, the incremental insurance costs at various limits, taken as a proportion of operating cost, were clearly somewhere between the cost of the olive and the cost of the gin in the martini, and nowhere near the cost of an inflight movie.

Furthermore, plaintiffs point out that the International Union of Aviation Insurers in Montreal have stated that:

> The truth is we just do not know what the premiums involved would be, bearing in mind the individual nature of the insurance contracts between the airlines and their insurers. . . . In conclusion we feel that the passenger legal liability coverage is a relatively small proportion of the overall operating costs of an airline against its revenue and that by and large far too much emphasis has been put upon the aspect of insurance costs.

Applicable Year	Number of Settlements	Total Settlements	Average per Passenger Fatality
		WARSAW	
1950	25	$ 201,529	$ 8,061
1951	26	82,015	8,154
1952	43	276,634	6,433
1953	3	28,088	8,696
1954*	—	——	——
1955	1	10,576	10,576
1956	2	11,656	5,828
1957	23	108,700	4,726
1958	1	4,812	4,812
1959	53	405,710	7,654
1960	10	74,700	7,470
1961	8	37,227	4,653
1962	2	12,000	6,000
1963	2	16,600	8,300
1964	14	114,000	8,142
Totals	213	$ 1,382,247	$ 6,489
		NON-WARSAW	
1950	112	$ 1,327,385	$11,350
1951	105	1,506,764	14,350
1952	107	2,493,165	23,301
1953	62	2,362,910	38,111
1954*	—	——	——
1955	122	2,433,345	19,945
1956	85	2,467,980	29,035
1957	43	1,295,064	30,118
1958	112	6,451,351	57,601
1959	161	12,856,984	79,857
1960	184	8,901,610	48,378
1961	105	1,562,397	14,880
1962	117	7,421,849	63,434
1963	114	3,057,079	26,816
1964	23	1,763,000	76,652
Totals	1,452	$55,900,883	$38,499

* No judgments or settlements were reported for accidents occurring in 1954.

The relevance of this statistical and other information is that the preferential treatment accorded airlines has no economic, moral or legal justification at the present time. Any reasons which ever existed for such preferential treatment accorded airlines has not only disappeared, but the contrary is now the fact.

Plaintiffs point out that in the American Bar Journal, Vol. 43, page 412, (May 1957) Clifford W. Gardner, formerly President of the Minnesota Bar Association, prescribed legal advice to lawyers and judges in an article entitled, "So You're Going to Fly to London." This article points out the alleged limitations imposed by the Warsaw Convention. The author states: "From an airline's or an insurer of an airline's point of view, I think this Treaty is the greatest writing since the advent of paper money."

This Court believes that very few members of the public have been aware of the severe monetary damage limitations of the Warsaw Convention which would restrict the family of a father, husband and wage-earner to $8,291, regardless of the degree of the true, uncontested, pecuniary losses.

The Court has considered the authorities cited by defendant airline in its brief. No Court of appellate jurisdiction, state or federal, has passed upon the constitutionality of the Warsaw Convention. The first case cited by defendant airline, Block v. Compagnie Nationale Air France, 229 F. Supp. 801 (N.D. Ga. 1964), has, subsequent to the filing of the airline's brief, been decided by the United States Court of Appeals (386 F.2d 323). Certiorari was denied by the United States Supreme Court. This case is not in point because it did not decide the unconstitutionality of the Warsaw Convention Treaty.

The second case cited by defendant airline, Pierre v. Eastern Air Lines, 152 F.Supp. 486 (D.N.J. 1957), was a decision of a United States District Judge. Apparently this case was not reviewed by a Higher Court. This decision, in 1944, did not involve the points raised in this case, and in the decision, the judge recognized the legal principle that a treaty may be declared unconstitutional by a Court. The Court agrees with the plaintiffs that this case, involving an accident more than two decades later, involves different considerations than were presented to the Court in 1944. The plaintiffs in this case raise contentions not made in *Pierre* to the effect that the restrictive provisions of the Warsaw Convention Treaty in respect to venue and damages violate the Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

The third case cited by defendant airline is Garcia v. Pan American Airways, Inc. 269 App.Div. 287, 55 N.Y.S. 2d 317 (1945), aff'd., 295

N.Y. 852, 67 N.E.2d 257, cert.den. 329 U.S. 741. This case is also a lower court opinion in which the points urged by the plaintiffs apparently were not presented to that Court. That case, also decided in 1944, cited no authority.

The Court finds that the venue provisions and damage limitation provisions of the Warsaw Convention Treaty are unconstitutional, as applied to this case; that such provisions deny to the plaintiffs due process and equal protection of law guaranteed to them by their Constitution.

The Court finds that the Warsaw Convention Treaty provisions which would restrict the right of the plaintiffs to bring this action against defendant airline in a duly constituted court of the United States which would otherwise have jurisdiction, are unconstitutional and therefore, unenforceable.

The Court further finds that the provisions of the Warsaw Convention Treaty which would restrict damages in this case to approximately $8,300 are unconstitutional and therefore not enforceable because they violate the due process and equal protection clauses of the United States Constitution. The Court finds that such provisions are arbitrary, irresponsible, capricious and indefensible as applied to this case, in that such provisions would attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved in this case. Such unjustifiable, preferential treatment of airlines is unconstitutional. The Court finds that such preferential discrimination to airlines does not apply to manufacturers or even to the United States Government. As pointed out by the plaintiffs, this could result in an absurd situation in which, in this case, Douglas Aircraft Company, if liable under either the strict liability rule or because of common law negligence, might be required to pay damages of $591,700, if a verdict of a jury were $600,000. Canadian Pacific Airlines, which might be considered much more negligent and at fault than this defendant manufacturer, would be permitted to escape with the nominal payment of approximately $8,300. The Government enjoys no immunity or restriction of liability. Thus, in a similar situation involving the Government as an additional defendant, the United States Government would be required to pay damages similar, comparatively, to that of the manufacturer. The Court considers that

there is no basis for this unequal and discriminatory treatment of common carrier airlines, engaged in international travel, and that there is no legal or rational basis for this discriminatory treatment.

Accordingly, defendant airline's motion to dismiss is denied. Said defendant is ordered to answer the complaint within twenty-eight days.

Enter: NICHOLAS J. BUA, *Judge*
NOVEMBER 7, 1968
CIRCUIT COURT