The Warsaw Convention and Electronic Ticketing

Andres Rueda

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THE WARSAW CONVENTION &
ELECTRONIC TICKETING

ANDRES RUEDA*

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* Cornell, B.A., Georgetown, J.D., LLM. The author would like to thank Professor Allan Mendelsohn for his invaluable substantive comments and editorial advice. This article is dedicated to the author's sisters, Monica and Cristina Rueda, for their love and support.
I. INTRODUCTION

THE WARSAW CONVENTION arose as a result of government efforts in the 1920's to create a uniform legal regime that would protect an infant aviation industry from catastrophic liability in the event of an air disaster, while allowing victims

some measure of relief. The Warsaw Convention was thus designed to achieve two basic objectives: "to foster uniformity in the law of international air travel" and to limit "the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry." Today, the Warsaw Convention has over 130 subscribing nations, making it the most widely adhered to private international law treaty in the world.

Between 1925 and 1929, total airline operations in domestic as well as global travel amounted to only 400 million passenger miles, compared to almost 67 billion passenger miles during 1999 in the U.S. alone. The worldwide fatality rate was about 45 per 100 million passenger miles, compared to a fatality rate of 0.06 per 100 million passenger miles in 1998. The following excerpt from a well-received speech delivered by Mr. Henri de Vos, Reporter of the Warsaw Convention, to the attending delegates, captures the mood prevalent at the time of the Convention's drafting:

Here is the essential outline of the draft of the Convention, which is submitted to you. As I said before, the time to achieve has come. The air carriers expect us to give to them, as well as to the insurers, the legal basis of their operation. Their carriage assumes unexpected proportions everyday; in my country alone, on one single aerodrome in the summer season, there are up to 36 departures of the regular lines by day. Aircraft go faster and faster every day, to the point that the Fokker, the Farman, soon are going to appear as the tools of yesteryear. We still hear the deafening sound of the Super-Marine that just won the Schneider Cup, at a speed of some 600 kilometers an hour, and, we have before us the colossal wing span of the Do-X which, on Lake Constance, has just demonstrated the possibility that tomorrow,

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7 See U.S. Dep't of Transp., supra note 6; Air Flight Much Safer than Road Travel, Statistics Show, AGENCE FRANCE PRESSE, July 26, 2000. The risk of being involved in an aviation accident in which there are multiple fatalities is estimated at around one in 3 million. Id.
in all countries, facilities will be set up for both day and night flights! What the engineers are doing for machines, we, lawyers, must do the same for the law.  

The Warsaw Convention was drafted against the background of then-current industry conditions and common practices. The Convention places a lot of importance on three particular documents: the passenger ticket, the baggage check, and the air waybill of goods. The Convention establishes a quid pro quo between the aviation industry and its customers. Air carriers are required to accept liability without fault for aviation disasters and other mishaps, but only up to a limited amount, provided that they issue and deliver to their customers' documents containing certain specified items, including a notice of the limits on liability imposed under the Convention. Article 3 of the Convention requires that:

1. 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.

2. The absence, irregularity, or loss of the passenger ticket shall not affect the existence or validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a ticket having been delivered he shall not be
entitled to avail himself of those provisions of this convention which exclude or limit his liability.\textsuperscript{13}

In sum, a carrier must have delivered a passenger ticket satisfying certain notice requirements before it may invoke any liability limits under the Convention against a victim of an air disaster. In the 1920’s, the term “passenger ticket” was readily understood as a paper-based ticket containing the required notices in printed or otherwise written form.\textsuperscript{14} As discussed below,

\textsuperscript{13} Warsaw Convention, supra note 1, at art. 3. In the original language, Article 3 provides:

\textit{(1) Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:}
\textit{(a) le lieu et a date de l’émission;}
\textit{(b) les points de départ et de destination;}
\textit{(c) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu’il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;}
\textit{(d) le nom et l’adresse du ou des transporteurs;}
\textit{(e) l’indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.}

\textit{(2) L’absence, l’irrégularité ou la perte du billet n’affecte ni l’existence, ni la validité du contrat de transport, qui n’en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu’il ait été délivré un billet de passage, il n’aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.}


\textsuperscript{14} A 1920’s French-English dictionary translated the operative term “billet” (i.e., ticket) as:

\textit{BILLET, byé-t, [Low Lat.: bulla, or from Eng., bill] sm. 1. Note: short letter, billet, paper folded as a letter. Écrire, recevoir un –, to write, to receive a note. – doux, love letter, billet-doux. 2. bill, handbill: a written or printed paper containing an announcement to the public; 3. circular letter, circular: an announcement addressed to certain individuals. – de naissance, de mariage, d’enterrement, circular announcing a birth, a marriage, a funeral. – de faire part, circular announcing some family event, as a birth, marriage or death; invitation to attend a marriage or funeral. Faire courir le –, to send round circulars. – d’invitation pour un dîner, an invitation to dinner. 4. Ticket. – d’entrée, admission ticket. Prenez vos billets, take your tickets. Montrez vos billets, take your tickets. – d’aller et retour, return ticket. . . 7. voting paper, ballot; 8. Certificate. – de confession, confession. – blanc, blank paper, a blank. . .

A NEW FRENCH-ENGLISH AND ENGLISH-FRENCH DICTIONARY COMPOSED ON A NEW PLAN (Garnier Frères 1st ed., 1922). Webster’s Dictionary in turn defines the English word “ticket” as:
however, today the widespread use of electronic ticketing is dis-
placing traditional paper-based tickets, and may eventually en-
tirely replace them. Nevertheless, the delivery and notice re-
quirements of the Warsaw Convention, as supplemented by
the 1966 MIA and Civil Aeronautic Board (CAB) regulations,

This article discusses how the delivery and notice require-
ments of the Warsaw Convention can be satisfied when airline
tickets are transmitted through electronic media. It addresses
the question of how to take seriously, in the age of the Internet,
the Warsaw Convention’s requirements of delivery and notice
for passenger ticketing, which were originally designed for pa-
per-based media. The article draws heavily from the analysis de-
veloped by the Securities and Exchange Commission (SEC) in
the context of the electronic transmission of securities-related
documents, and applies it to a separate context, air passenger
transportation. It also seeks guidance from the recently enacted
Electronic Signatures in Global and National Commerce Act
(“E-Sign Act”). It concludes by arguing that even in the absence
of an amendment to the Warsaw Convention taking specific ac-
count of electronic ticketing, the Warsaw Convention’s notice
and delivery requirements may be satisfied by documents trans-
mitted electronically.

Part I of the article examines the phenomenon of electronic
ticketing, and its impact on both airlines and passengers. Part II
discusses the requirements of delivery and notice for passenger
ticketing as originally promulgated by the Warsaw Convention,
and as modified by related protocols, private agreements, and
Department of Transportation (DOT) regulations. Part III ex-
amines the interpretation that U.S. courts have given to the

\textit{ticket}... \textit{la obs:} a short note or document in writing \textit{<if your} ~ \textit{had
overtaken me}. \textit{I had certainly returned ~ Richard Baker}> \textit{to:} a
document that serves as a certificate, license, or permit; \textit{specif:} a
master’s, captain’s, mate’s, pilot’s, or airman’s certificate \textit{c:} a writ-
ten, typed, printed, stamped, or engraved notice, memorandum, or
token: as (1): a paper or card on an item giving information (as of
its owner, identity, maker, or price)....

\textsc{Webster’s Third New International Dictionary of the English Language Un-
ticket delivery requirements of Article 3 of the Warsaw Convention. Particular attention will be paid to the Supreme Court’s decision in Chan v. Korean Air Lines, Ltd., which specifically discusses Article 3, and to Carnival Cruise Lines v. Shute, where Justice Stevens in his vigorous dissent discusses the general issue of adequate notice in passenger tickets. In Part IV, the article examines the analysis of Internet technologies developed by the SEC and its potential applicability in the context of air transportation. In Part V, the article turns to the E-Sign Act and assesses the potential impact of that legislation on electronic ticketing. Finally, in Part VI, the article discusses the Montreal Convention of 1999, successor to the Warsaw Convention, which specifically addresses the issue of electronic ticketing but has not yet been ratified by the U.S.

The article concludes by arguing that, even though electronic ticketing is a development that the original drafters of the Warsaw Convention did not foresee, airlines can still comply with the requirements of notice and delivery for passenger tickets when they issue electronic tickets. Specific recommendations are made as to how this can be carried out.

II. THE BRAVE NEW WORLD OF ELECTRONIC TICKETING

Internet use continues to become increasingly common among American households. Although the Internet has only been broadly available since the late 1990’s, it has already achieved a market penetration of 60%, with over 168 million Americans having access to the Internet. The telephone did not reach that level of penetration until thirty years after it was developed. On a typical day during the second half of the year 2000, fifty-eight million people in the U.S. were connecting to the Internet. As of the second half of 2000, 73% of children between the ages of twelve and seventeen, and 45% of all children under the age of eighteen, were logging on.

Indeed, the exploding popularity of the Internet is a global phenomenon. About 55% of the Web traffic, that nearly 300

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16 See Ernest Holsendolph, Internet Growing by Leaps and Bytes; Study Says Americans’ Trek to Cyberspace Is Now a Stampede, ATLANTA J. & CONST., Feb. 19, 2001, at 1A.
17 Id.
18 Id.
19 Id.
20 Id.
million users worldwide generate, occurs abroad.\textsuperscript{21} The Internet already reaches 77\% of Germans, 55\% of Italians, and 52\% of Japanese.\textsuperscript{22} In the Ukraine, 260 thousand people use the Internet regularly, and 140 thousand do so occasionally.\textsuperscript{23} By the end of January 2001, there were already 22.5 million users of the Internet in China.\textsuperscript{24} In Macao, 42\% of residents have access to the Internet.\textsuperscript{25} Moreover, the annual rate of growth of Internet usage worldwide currently stands at 50\%.\textsuperscript{26} In Western Europe, the annual rate of growth is 55\%.\textsuperscript{27}

The Internet promises to revolutionize everyday business and personal financial transactions, introducing unprecedented efficiencies in the carriage of information. In particular, the Internet is expected to have a profound impact on the distribution of airline tickets, leading to higher profits for the airlines and cheaper prices for consumers by eliminating entire layers of distribution. Today, 80\% of airline tickets are still cleared through the Computer Reporting System and the Airline Reporting Corporation, which are used by traditional travel agents.\textsuperscript{28}

Many of the Internet airline ticket sales outlets, such as Price-line, Travelocity, and Orbitz, have been directly funded by the airline industry.\textsuperscript{29} The Internet allows airlines to communicate directly with potential customers, bypassing traditional mortar and brick travel agencies. In 1998, less than 1\% of tickets were purchased online.\textsuperscript{30} However, during the year 2000, the online ticket outlets tallied a record-breaking $13 billion in sales, or 7-


\textsuperscript{22} See World Net Population, supra note 21.

\textsuperscript{23} See id.

\textsuperscript{24} See Adam Creed, China Now Home to Over 22.5m Internet Users – Study, Newssbytes, Feb. 19, 2001.

\textsuperscript{25} See Macao has 130,000 Internet Users, Survey, Emerging Markets Datafile, Xinhuiana, Feb. 26, 2001.

\textsuperscript{26} See Monitoring Media in the Former Soviet Union, Euro-East, Nov. 16, 2000.

\textsuperscript{27} See id.


\textsuperscript{30} See Elaine X. Grant, Gaining Ground in the Air. (Airlines Use of the Internet for Ticket Sales), Travel Agent, July 26, 1999, at 48.
10% of ticket sales. By 2003, one expert estimates that between 25-30% of tickets will be purchased online. As a result of the competitive pressures posed by the Internet, commissions charged by travel agents have eroded from an all-time high of 11.2% in 1995 to a relatively low level of 6.2% today.

Electronic ticketing is particularly well adapted for distributing tickets that have been purchased online. For the airlines, e-tickets have clear advantages. Electronic ticketing improves operational efficiencies and reduces costs. Shipping and handling costs can be eliminated, with a ticket purchased online being automatically forwarded to the gate, where the boarding passenger can easily pick it up. Electronic ticketing also reduces check-in and airport personnel costs by reducing processing costs. The savings can be significant: it costs American Airlines less than 10 cents to create an e-ticket, compared to $12 for a paper one. Other estimates place the cost savings at $4 - $5 per ticket. Ticket distribution costs are consistently the biggest element of total operating costs in any year in which there is no fuel crisis. According to some analysts, by 2005 e-tickets will save the airline industry $1 billion annually in distribution costs.

Electronic ticketing also benefits passengers. Electronic ticketing eliminates passenger concerns over “carrying, forgetting, or losing an airline ticket.” Electronic ticketing has also been

31 See John Croft, supra note 29, at 18. Jon Swartz, Internet’s Future Is Screwed on Tight; It’s No Magic Wand, but It’s Still Quite a Useful, Valuable Tool, USA TODAY, Dec. 28, 2000 at 1B.
32 See Swartz, supra note 31, at 1B.
33 See id.
36 See United Airlines to Offer Industry-Leading ‘E-Ticket-II Interline’ Product, supra note 34.
37 See id.
39 See Betsy Wade, infra note 47.
40 See Jeanniot Sees E-Ticketing Penetrating 50% of Global Market Within Five Years, AIRLINE FIN. NEWS, Apr. 16, 2001.
42 See United Airlines to Offer Industry-Leading ‘E-Ticket-II Interline’ Product, supra note 34.
shown to "significantly reduce transaction times," shortening lines at airport counters and telephone waits, thereby benefiting both passengers and the industry. Moreover, electronic ticketing can now be used for international travel, allowing customers to check-in with only their passports and the credit card used to purchase their ticket in hand. According to recent surveys, electronic ticketing is the preferred form of ticketing for over 90% of passengers who have used it.

Indeed, the move away from paper-based tickets is both widespread and unmistakable. United Airlines first introduced electronic tickets in the fall of 1994 for its West Coast United Shuttle flights. Since then, e-tickets have surged in popularity, currently accounting for 60% of all tickets issued by that carrier, and 57.1% of all tickets issued by U.S.-based carriers as a whole.

The trend away from paper-based tickets is not confined to the U.S. Over 50% of the tickets issued by Air Canada during the year 2000 were in electronic format. British Airways offers discounts for purchases of e-tickets that reflect the lower costs over paper tickets. Japan Airlines has recently expanded e-ticket service to all of Asia and all routes between Japan and North America.

New improvements are also underway. The airline industry is currently working towards establishing centralized electronic ticketing kiosks compatible with the reservation systems of multiple airlines. Previously, passengers traveling in more than one airline were required to have a separate e-ticket for each airline. The new system will reduce duplicative costs at airline ter-

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43 Id.
44 See Larry Bleiberg, Passport Still Gets Stamp of Approval, ARIZ. REPUBLIC, Apr. 2, 2000, at T12.
45 United Airlines to Offer Industry-Leading 'E-Ticket II Interline' Product, supra note 34.
46 Id.
47 See id.; Wade, supra note 39, at 26.
50 See Executive Travel in Asia this Week, PR NEWSWIRE, Aug. 9, 2000.
51 See United Airlines to Offer Industry-Leading 'E-Ticket-II Interline' Product, supra note 34.
52 Id.
minals and further expedite booking for flights involving inter-
airline connections.\footnote{See id.}

The system is also designed to address passenger concerns
with re-accommodation to other airlines in the event of flight
cancellations and other disruptions (e.g., labor strikes).\footnote{See id.} The
old system did not allow for the smooth exchange of e-tickets
another airline with an e-ticket could therefore result in missing
or being blocked from alternate flights, or being placed further
down in wait-lists.\footnote{See Charging for Paper Airline Tickets Puts Airline Needs Before Passengers, AAA Says, supra note 55.} The new system should therefore further en-
hance the popularity of e-tickets by eliminating any residual ad-
vantages of paper tickets over e-tickets from a consumer

standpoint.\footnote{See id.}

III. THE WARSAW CONVENTION AND RELATED
PROTOCOLS, PRIVATE AGREEMENTS, AND DOT
REGULATIONS – THE LONGSTANDING STRUGGLE FOR
A “MORE PERFECT” LIABILITY SYSTEM

A. The Warsaw Convention

Under Article 3(1) of the Warsaw Convention, the carrier
must deliver a “ticket” to the passenger, which must contain,
among others, “[a] statement that the transportation is subject
to the rules relating to liability established by this convention.”\footnote{Warsaw Convention, supra note 1, at art. 3(1).}
Under Article 3(2), the consequence of a “carrier accept[ing] a
passenger without a passenger ticket having been delivered” is
that the carrier will not be “entitled to avail himself of those
provisions of th[e] convention which exclude or limit his
liability.”\footnote{Id. at art. 3(2).}

Following a voice vote, the U.S. Senate ratified the Warsaw
Convention in 1934.\footnote{See 78 Cong. Rec. 11,582 (1934); see generally Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497, 502 (1967).} No congressional hearings, reports, or de-
bates preceded the vote. However, a detailed record was kept of the proceedings leading to the drafting of the Warsaw Convention. According to Mr. Henri De Vos, Article 3 "retain[s] only the indispensable minimum to be able to consider the carriage as international carriage within the meaning of the Convention." Failure to satisfy these minimal requirements will strip a carrier from entitlement to the Convention's liability limits. "The essential thing, in this regard, is the sanction... which consists in depriving the carrier who would carry travelers or goods without documents or with documents not conforming to the Convention, of the benefit of the advantages provided by the Convention."

Under Article 3(2), however, before a carrier may lose the protections available under the Warsaw Convention, the failure to deliver the ticket must be absolute. If a carrier issues a merely defective ticket, or if a passenger loses the ticket, the Warsaw Convention will still apply.

Despite this caveat, in order to avoid the Convention's liability ceilings, plaintiffs' lawyers frequently argue a failure by the carrier to fulfill the requirements under Article 3. One theory often used involves the concept of constructive non-delivery, or the claim that a ticket was delivered in such a manner as to negate the effect of delivery. Another attempt involves arguing that the Convention requires some form of minimally adequate notice in order for the liability ceilings to apply.

Plaintiffs' lawyers generally prefer liability to be assessed under U.S. tort law, which provides for no liability ceilings and has, in the past at least, offered the tantalizing prospects of punitive damages as well. The current trend among circuit level courts in the U.S. has nonetheless been to disallow punitive

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62 See generally Minutes, supra note 8.
63 Id. at 150.
64 Id. at 20.
65 See Warsaw Convention, supra note 1, at art. 3(2).
66 See Sweeney, supra note 11, at 393.
67 See id.
68 See id.; see e.g., Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2d Cir. 1966), aff'd by equally-divided Court, 390 U.S. 455 (1968); and discussion infra; Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965).
damages in cases tried under the Warsaw Convention, even where a showing of willful misconduct has been made.\textsuperscript{70}

Article 22 of the Warsaw Convention caps a carrier’s liability in the event of an aviation disaster at 125,000 Franc Poincaré, or approximately US $8,300, an amount considered low even in 1929.\textsuperscript{71} At the time, the Franc Poincaré was the currency gold standard in France, which the delegates chose in order to avoid devaluation.\textsuperscript{72} Each Franc Poincaré currency unit equaled 64⅛ milligrams of gold of millesimal fineness 900.\textsuperscript{73} Moreover, a French court could easily convert a local currency into Francs Poincaré, because the French franc and the Franc Poincaré had equivalent values in those days.\textsuperscript{74}

In 1937, however, France abandoned the Franc Poincaré as a unit of currency.\textsuperscript{75} In 1944, the Bretton Woods Conference altered the fundamental relationship between national currencies and gold, and created the International Monetary Fund (IMF).\textsuperscript{76} In 1974, the IMF adopted “Special Drawing Rights,” a method of valuation based on a basket of 16 currencies, as its official unit of exchange.\textsuperscript{77} In 1978, the IMF membership, much of which had already abandoned the gold standard, agreed to abolish the official price of gold, thereby letting market forces determine the recovery available under the Warsaw Conven-


\textsuperscript{71} See LOWENFELD, supra note 6, at 7-27.


\textsuperscript{74} See GOLDSHIRCH, supra note 72, at 95-96.

\textsuperscript{75} See GEORGETTE MILLER, \textit{LIABILITY IN INTERNATIONAL AIR TRANSPORT} 177 (1977).


In 1975, the Warsaw Convention was amended to adopt Special Drawing Rights as the treaty’s measure of damages. However, as discussed below, the U.S. has failed to ratify most protocols amending the Warsaw Convention’s liability limits.

Those limits are not mandatory. Article 22 of the Convention allows carriers to contract with individual passengers or among themselves for higher (but not lower) liability limits. Moreover, under Article 25, a carrier will lose the protections of limited liability if a court finds it (or its agent) guilty of willful misconduct. Finally, Article 41 establishes a formalized procedure to call conferences to revise the Warsaw Convention. According to Mr. Henri de Vos, Article 41 would “establish right from today the principle that this first effort we make today is not definitive.” Indeed, before the original Convention had even been signed, the French delegation made a formal request

79 See Miller, supra note 75, at 181.
81 Article 23 of the Warsaw Convention provides as follows:
Any provision tending to relieve the carrier of liability or to fix 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.
Warsaw Convention, supra note 1, at art. 23.
82 Id. at art. 22(1) (“...by special contract, the carrier and the passenger may agree to a higher limit of liability.”).
83 Id. at art. 25. According to article 25:
(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered equivalent to willful misconduct.
(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.
84 Id. at art. 41.
85 Minutes, supra note 8, at 32 (discussing the proposed Article 41).
for future conferences to further "pursue this work of unification."  

B. Treaty Amendments to the Warsaw Convention

1. The Hague Protocol

A number of conferences have been convened to "update" the Warsaw Convention. In 1955, the Hague Protocol doubled to 250,000 Francs Poincaré, or approximately $16,600, the Warsaw Convention's liability limits for death or injury to a passenger. The Hague Protocol includes a provision that allows litigation expenses to be awarded according to local law. Moreover, the Hague Protocol permits plaintiffs to avoid any liability limits by successfully establishing willful misconduct, specifically defined as "an act or omission of the carrier, his servants or

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86 Id. at 182. Specifically, the French delegation made the following request:

The conference,

Considering that the Warsaw Convention provides only for certain difficulties relating to air carriage and that international air navigation raises many other questions that it would be desirable to provide for by international agreements,

Expresses the wish:

That, through the offices of the French Government, which has taken the initiative of the convening of these conferences, that there be convened subsequently, new conferences which will pursue this work of unification.

Id.


88 Id. at art. XI. Article XI, which amends Article 22 of the Warsaw Convention, states:

The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Id. This provision was sponsored in large part by the U.S. delegation, in order to secure a maximum recovery to victims and their families. See Lowenfeld & Mendelsohn, supra note 60, at 507 (discussing liability limits).
agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result . . . “

2. The Guatemala City Protocol

In 1971, the Guatemala City Protocol raised the Warsaw Convention’s liability limit for passenger death or injury to 1,500,000 Francs Poincaré, or approximately $120,000. The Guatemala Protocol also provides for periodic review of the liability limits, strict liability in case of injury or death, the possibility of supplemental national insurance to further protect passengers, and the imposition of legal fees on any carrier who fails to settle a claim within a six-month period. The Guatemala City Proto-

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89 Hague Protocol, supra note 87, at art. XIII (Amending Art. 22 of the Warsaw Convention). In the case of an act by a servant or agent of the carrier, the plaintiff must prove that the agent or servant was acting within the scope of his agency or employment. See id.


91 Id. art. XV, at 615.

92 Id. art. IV, at 613.

93 Id. art. XIV, at 615. The supplemental national insurance plan must meet the following conditions:

(a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;
(b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required to do so;
(c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;
(d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.

Id.

94 Id. art. VIII(3), at 614. Article VIII(3) of the Guatemala Protocol provides, in relevant part:

The costs of the action including lawyers’ fees shall be awarded in accordance with subparagraph a) only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit.

Id.
col is not currently in force anywhere in the world because its ratification clause requires adherence by the U.S. for the protocol to become effective.\textsuperscript{95}

3. The Montreal Protocols

Due to fluctuations in the price of gold, in 1975 a conference was convened in Montreal to substitute the Warsaw Convention’s gold standard with Special Drawing Rights.\textsuperscript{96} The conference resulted in four protocols, only one of which the U.S. has (recently) ratified.\textsuperscript{97} Montreal Protocol No. 1 caps carrier liability for each passenger at 8,300 Special Drawing Rights (approximately $10,250), and 17 Special Drawing Rights for each kg of cargo (about $21 per kg, or $9 per pound), unless a higher value is declared in advance.\textsuperscript{98} Montreal Protocol No. 2 maintains the cargo liability limits of Montreal Protocol No. 1, but provides for a higher liability limit of 16,000 Special Drawing Rights for each passenger (approximately $20,500).\textsuperscript{99}

\textsuperscript{95} Id. art. XX(1), at 615. According to the Guatemala Protocol, thirty states must ratify for the Protocol to become effective. Additionally:

\begin{quote}
[T]he total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines . . . [must equal] at least 40% of the total international scheduled air traffic of the airlines of the member States of the International Civil Aviation Organization in that year.
\end{quote}

\textit{Id.} The effect of this provision is to virtually require adherence by the U.S. for the Guatemala Protocol to come into effect. The purpose of this provision was to prevent the emergence of two parallel systems of liability should only a limited number of countries ratify the Protocol, similar to what happened during the early years of the Hague Protocol of 1955.


\textsuperscript{96} See Batra, \textit{supra} note 76, at 432.

\textsuperscript{97} See \textit{id.}


Montreal Protocol No. 3 raises the liability limits even further, providing for "the sum of 100,000 Special Drawing Rights [approximately US$140,000] for the aggregate of the claims, however founded, in respect of damage suffered, as a result of the death or personal injury of each passenger." Montreal Protocol No. 3 also incorporates by reference all the provisions of both the Hague and Guatemala City Protocols. Montreal Protocol No. 3 languished before the U.S. Senate, but was ultimately not ratified, primarily due to the Senate's preference for unlimited air-carrier liability.

The U.S. has generally been reluctant to adopt any revisions of the Warsaw Convention. However, on September 28, 1998, the U.S. Senate gave its advice and consent to Montreal Protocol No. 4, which incorporates by reference the Hague Protocol of

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100 Additional Protocol No. 3 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, Signed at Montreal, on 25 September 1975, art. II, available at http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.3.1975/doc.html (last visited on Aug. 30, 2002). Montreal Protocol No. 3 also provides for ceilings of 4,150 Special Drawing Rights for liability incurred as a result of delays in the carriage of persons. Additionally, the liability for the loss or destruction of baggage is capped at 1,000 Special Drawing Rights. Id. at art. II.

101 Id. at art. V.

102 See Nicolas Mateesco Matte, The Warsaw System and the Hesitations of the U.S. Senate, 8 ANNALS AIR & SPACE L. 151, 159-60 (1983) (describing Senate opposition to the Protocol's liability limits as the determinative factors in the Senate's failure to ratify). For example, during the Senate debate, Senator Ernest F. Hollings stated that:

In 1980, the Air Law Committee of the International Law Association recommended unlimited liability for personal injuries or death to individual passengers. This Air Law Committee consists of 38 distinguished international scholars, many of whom have been instrumental in the development of the Warsaw Convention and its progeny of treaties. . . When a group such as this puts its support behind the proposition that airlines in international aviation should be subject to unlimited liability, one would be hard-pressed to justify a treaty to the contrary.

129 CONG. REC. 4130 (1983).

103 See Schutty, supra note 5, at 1.

104 Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague on 28 September 1955, Signed at Montreal on 25 September 1975, available at http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.4.1975/doc.html (last visited Aug. 30, 2002) [hereinafter Montreal Protocol No. 4]; see also John F. Schutty, supra note 5, at 1; 144 CONG. REC. § 11,059-2 (daily ed. Sept. 28,
Montreal Protocol No. 4 is an amendment to the Warsaw Convention that modernizes rules applicable to international air cargo. Over 45 countries have adopted Montreal Protocol No. 4. By the time the U.S. finally adopted the Hague Protocol of 1955, over 100 countries, including the majority of European countries, were long-standing signatories.

a. Montreal Protocol No. 4 & Electronic Air Waybills

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a. Montreal Protocol No. 4 & Electronic Air Waybills

No revision to the Warsaw Convention has addressed the issue of electronic ticketing. However, Montreal Protocol No. 4 specifically addresses the issue of electronic air waybills for international air cargo. Montreal Protocol No. 4 allows for the
replacement of paper documentation for international air cargo with electronic documentation, thus reducing processing times for import/export transactions.""" Montreal Protocol No. 4 permits the air carrier and his customer, upon mutual agreement, to issue for all stages of shipment an electronic air waybill instead of the traditional paper document."

Under Article 5 of the original Warsaw Convention, the air carrier has the right to demand that its customer make out and hand over an air waybill. Under Article 8, that air waybill must contain a lengthy list of particular items, including a notice that the liability limits under the Warsaw Convention shall apply. Under Article 9, an air carrier cannot invoke any liability prote-

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11 Montreal Protocol No. 4, supra note 104, art. III.
12 Warsaw Convention, supra note 1, art. 5.
13 Id. at art. 8. The original article 8 required all of the following items to be included in an air waybill:
   (a) the place and date of its execution;
   (b) the place of departure and of destination;
   (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
   (d) the name and address of the consignor;
   (e) the name and address of the first carrier;
   (f) the name and address of the consignee, if the case so requires;
   (g) the nature of the goods;
   (h) the number of the packages, the method of packing and the particular marks or numbers upon them;
   (i) the weight, the quantity and the volume or dimensions of the goods;
   (j) the apparent condition of the goods and of the packing;
   (k) the freight, if it has been agreed upon, the date and the place of payment, and the person who is to pay it;
   (l) if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;
   (m) the amount of the value declared in accordance with Article 22(2);
   (n) the number of parts of the air consignment note;
   (o) the document handed to the carrier to accompany the air consignment note;
   (p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;
tions for lost or damaged cargo unless he has in his possession an air waybill that complies with the requirements of Article 8.\textsuperscript{114}

Montreal Protocol No. 4, however, significantly reduces the information that must be provided under Article 8.\textsuperscript{115} The electronic air waybill must only contain information identifying the cargo, the place of departure and destination, and an express permission by the shipper to its customer granting access to the electronic air waybill.\textsuperscript{116}

Moreover, Montreal Protocol No. 4 entirely omits from the amended version of Article 9 the loss of liability penalty for non-conformity with Article 8.\textsuperscript{117} The effect of this change should be to reduce or altogether eliminate litigation over incomplete air waybills.\textsuperscript{118}

\begin{itemize}
\item[(q)] a statement that the carriage is subject to the rules relating to liability established by this Convention.
\end{itemize}

\textit{Ibid.} The Hague Protocol shortened this 17-item list to only 3 items. Hague Protocol, \textit{supra} note 87, art. VI; Christy, \textit{supra} note 99, at 534-35.\textsuperscript{114}

Article 9 of the original Warsaw Convention provides that:

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

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Warsaw Convention, \textit{supra} note 1, art. 9.\textsuperscript{115}
Unfortunately, Montreal Protocol No. 4 dates back to 1975, when Electronic Data Interchange (EDI) and other electronic information technologies, now routinely used in the import/export business, were in their infancy.\(^\text{119}\) Not surprisingly, Montreal Protocol No. 4 leaves a lot of important issues unsettled.

For example, Montreal Protocol No. 4 requires an air waybill to be divided into three parts.\(^\text{120}\) The consignor must sign the first part, which is marked "for the carrier."\(^\text{121}\) The consignor and the carrier must sign the second part, which is marked "for the consignee."\(^\text{122}\) The carrier must sign the third part and deliver it to the consignor once the cargo has been accepted.\(^\text{123}\) Montreal Protocol No. 4 provides that the signature of the carrier and that of the consignor may be printed or stamped.\(^\text{124}\) However, it makes no provision for signatures that are in electronic format.\(^\text{125}\) This failure is particularly problematic in the context of the recent, rapid emergence of electronic signatures, which use strong encryption technologies to guarantee authenticity, and which, as discussed below, are specifically granted full legal effect (i.e., on par with handwritten signatures) under U.S. federal law.\(^\text{126}\)

In traditional paper-based commerce, formalities pertaining to manually written documents, signatures, or notices give shape


\(^{120}\) Montreal Protocol No. 4, supra note 104, art. III.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Id.

\(^{125}\) See Jones, supra note 119.

to the contours of a commercial contract, providing evidence of its true dimensions before a court of law.\textsuperscript{127} In the absence of such proof, a party's legal remedies may be substantially impaired. It is not clear under Montreal Protocol No. 4 whether an electronic air waybill should be treated in all respects as the legal equivalent of a paper air waybill.\textsuperscript{128}

In particular, Article 11(1) of the original Warsaw Convention states that "[t]he air consignment note is \textit{prima facie} evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage."\textsuperscript{129} Although Montreal Protocol No. 4 amends air waybill delivery requirements under Article 5 of the Warsaw Convention, it does not amend Article 11(1). Moreover, the amended Article 5 does not redefine the term "air waybill" to explicitly include electronic documents.\textsuperscript{130} Instead, it states that "any other means" (i.e., electronic means) will henceforth be deemed as an acceptable substitute for affecting "the delivery of an air waybill."\textsuperscript{131} The impact of the amended Article 5 on Article 11(1) is therefore unclear.

The Montreal Convention of 1999 addresses this ambiguity.\textsuperscript{132} Article 4 of the Montreal Convention of 1999 echoes Article 5 of the Warsaw Convention as amended by the Montreal Protocol No. 4:

Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.\textsuperscript{133}

However, unlike the Montreal Protocol No. 4, the Montreal Convention of 1999 provides for an amended Article 11(1): "The air waybill or the cargo receipt is \textit{prima facie} evidence of the

\textsuperscript{128} See Jones, \textit{supra} note 119.
\textsuperscript{129} Warsaw Convention, \textit{supra} note 1, art. 11(1).
\textsuperscript{130} Montreal Protocol No. 4, \textit{supra} note 104, art. III.
\textsuperscript{131} Id.
\textsuperscript{133} Id. at art. 4.
conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.”

In other words, the Montreal Convention of 1999 expressly recognizes the documentary value of a cargo receipt that provides access to information contained in electronic format, but that itself does not contain such information. On the other hand, absent an “intermediary” cargo receipt, the Montreal Convention of 1999 does not recognize the documentary value of electronic documents.

As further discussed below, the U.S has not yet ratified the Montreal Convention of 1999, which also addresses electronic passenger tickets.

C. PRIVATE AGREEMENTS AND GOVERNMENT REGULATIONS MODIFYING THE WARSAW CONVENTION

1. The Montreal Intercarrier Agreement of 1966

Criticism of the liability limits provided under the Warsaw Convention and related protocols has continued unabated at least since the time of the Hague Conference. By 1955, the airline industry was well-established and financially stable, with significantly improved safety records over earlier periods. Accordingly, it became increasingly felt that the liability limits provided an undeserved benefit to the airlines industry at the expense of passengers.

Dissatisfaction with the liability limits came to a head on November 15, 1965, when the U.S gave notice of its intention to withdraw from the Warsaw Convention unless it was amended to raise them. The U.S. emphasized, however, that the sole reason for the denunciation was that the liability limits were too low. In a press release, the Department of State announced

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134 Id. at art. 11 (emphasis added).
that the U.S. would reconsider withdrawing its denunciation if the Convention’s liability limits were temporarily raised to US$75,000 per passenger, followed by a subsequent increase to US$100,000.\footnote{See Lowenfeld & Mendelsohn, supra note 60, at 551 (discussing the U.S. denunciation of the Warsaw Convention). Under Article 39 of the Warsaw Convention, a notice of denunciation does not become immediately effective. Had the U.S. not withdrawn its denunciation, it would only have become effective on May 15, 1966, or 6 months after November 15, 1965, the date of filing with the Polish government. See Warsaw Convention, supra note 1, at art. 39.}

The effect of a withdrawal by the U.S. from the Warsaw Convention would have been disastrous to the airlines from a liability perspective. A denunciation would have subjected the airlines to uncertainties as to the applicable law, and to recourse by plaintiffs to unlimited liability and even punitive damages.\footnote{See Kelly Compton Grems, Comment, Punitive Damages under the Warsaw Convention: Revisiting the Drafters’ Intent, 41 Am. U. L. Rev. 141, 152 (1991); W. Keeton, Prosser & Keeton On The Law of Torts 257-62 (5th ed. 1984) (explaining the doctrine of res ipsa loquitur, which applies when no direct evidence to show cause of injury exists, but circumstantial evidence makes defendant’s negligence the most plausible explanation). Res ipsa loquitur does not create a presumption of liability, but a permissible inference, which the jury is free to accept or reject. 1 L. Kreindler, Aviation Accident Law §2.09[6] (1991).}

As discussed above, Article 22 of the Warsaw Convention expressly allows carriers to resort to private agreements that increase existing liability limits.\footnote{See also H. L. Silets, Something Special in the Air and on the Ground: The Potential for Unlimited Liability of International Air Carriers for Terrorist Attacks under the Warsaw Convention and its Revisions, 53 J. Air L. & Com. 321, 341 (1987).} Article 22 avoids the logistical difficulties posed by a formal amendment to the Warsaw Convention under Article 41, which in this case would have had to be duly ratified within the six months before the U.S. denunciation came into effect.\footnote{See Jonathan L. Neville, The International Air Transportation Association’s Attempt to Modify International Air Disaster Liability: An Admirable Effort with an Impossible Goal, 3 Ga. J. Int’l & Comp. L. 571, 575 (1999).} Accordingly, in advance of May 15, 1966, intense negotiations were conducted on behalf of the U.S. government, all U.S. air carriers, and most major foreign carriers represented by the International Air Transport Association (IATA).\footnote{See id.; see also 1966 MIA, infra note 144.} One day before the effective date of the U.S. denunciation, these parties signed the 1966 Montreal Intercarrier Agreement (1966 MIA).\footnote{See Order of Civil Aeronautics Board Approving Increases in Liability Limitations of the Warsaw Convention and the Hague Protocol, Order E-23680, 31
Under the 1966 MIA, the carriers agreed to increase the liability limits for passenger injury or death to $75,000 including legal fees (or $58,000 exclusive of legal fees, where awards are so separated).\textsuperscript{145} Moreover, the carriers waive the Warsaw Convention's Article 20(1) due care defense, which reads: "The carrier is not 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."\textsuperscript{146} As a result, the 1966 MIA has the effect of establishing absolute liability for aviation disasters.\textsuperscript{147}

For our purposes, however, the crucial aspect of the 1966 MIA is that it clarified the Warsaw Convention's passenger ticket notice and delivery requirements. Under the 1966 MIA, the air carriers agreed "at the time of the delivery of the ticket" to furnish each passenger engaged in international travel a notice, as described verbatim in the Agreement, advising the passenger that the Warsaw Convention's liability limitations, as modified by the Agreement, will apply.\textsuperscript{148} This notice should be "printed in type

\textsuperscript{145}See \textit{id.}

\textsuperscript{146}Warsaw Convention, \textit{supra} note 1, at art. 20(1). The "due care" defense permitted air carriers to invoke as a defense the proven fact that they took all necessary steps to avoid the accident and the ensuing damages. See M. Veronica Pastor, \textit{Absolute Liability Under Article 17 of the Warsaw Convention; Where Does It Stop?}, 26 G.W. J. INT'L L. & ECON. 575, 577 (1993) (arguing that the 1966 MIA, by abandoning the "due care" defense benefited both air carriers by continuing their liability limitations, and passengers, by relieving them from the burden of overcoming the due care defense and requiring them to only show damages). See also 1966 MIA, \textit{supra} note 115; Loryn B. Zerner, \textit{Tseng v. El Al Israel Airlines and Article 25 of the Warsaw Convention: A Cloud Left Uncharted}, 14 AM. U. INT'L L. REV. 1245, 1256 (1999).

\textsuperscript{147}See O'Rourke v. Eastern Airlines, 553 F. Supp. 226, 229 (E.D.N.Y. 1982). The author uses the term "absolute liability" in contrast to "strict liability" as the latter generally allows for defenses such as war or act of God, while the former allows for no defenses (with the possible exception of the "defense" of contributory negligence).

\textsuperscript{148}Specifically, the 1966 MIA provides in relevant part that:

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

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY
at least as large as 10-point" modern type.\textsuperscript{149}

The U.S. Supreme Court has described the 1966 MIA as a private agreement among carriers, which, by itself, provides for no sanctions for breach.\textsuperscript{150} In particular, in the event of a breach, not even a carrier that has signed the 1966 MIA will lose entitlement to the Warsaw Convention’s liability limits.\textsuperscript{151} For a time, some courts suggested that the 1966 MIA should be read in conjunction with Article 3 of the Warsaw Convention to provide for such a sanction.\textsuperscript{152} However, in \textit{Chan v. Korean Air Lines}, as discussed below, the Supreme Court put any speculation of that sort to rest.\textsuperscript{153} It is certainly arguable nonetheless that the 10-point modern type requirement was a major quid pro quo for

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

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

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

[*] Either alternative may be used.
\end{quote}
the U.S. withdrawal of its notice of denunciation from the Warsaw Convention.

2. The 1966 MIA & the DOT Regulations

Although the U.S. Congress was not required to ratify the 1966 MIA, executive branch regulations incorporate the agreement into U.S. law.\textsuperscript{154} The 1966 MIA was initially enforced by the Civil Aeronautic Board and is now by the DOT.\textsuperscript{155} Air carriers that refuse to abide by the 1966 MIA can lose their license to operate international flights to and from the U.S.\textsuperscript{156}

49 U.S.C. §41504 requires every U.S. and foreign carrier, "in the way prescribed by regulation by the Secretary of Transportation," to file, publish and keep open for public inspection tariffs showing all prices for "foreign air transportation" between points served by that carrier.\textsuperscript{157} Moreover, "[t]he Secretary may reject a tariff or tariff change that is not consistent with this section and regulations prescribed by the Secretary."\textsuperscript{158}

In 14 CFR §221, the Secretary has established the detailed tariff-filing rules and authority for approvals, rejections, and waivers, including provisions for information that must be included in a tariff,\textsuperscript{159} such as "a description of the classifications, rules, and practices related to the foreign air transportation . . . [or] other information . . . ."\textsuperscript{160} As a condition for filing a tariff with the DOT, the Secretary has determined that carriers operating international flights must abide by the provisions of the 1966 MIA.\textsuperscript{161}

\textsuperscript{154} See Exemptions From Passenger Tariff-Filing Requirements in Certain Instances, \textit{supra} note 15, at 40,654, 40,655.

\textsuperscript{155} See 1966 MIA, \textit{supra} note 115.


\textsuperscript{157} 49 U.S.C.S. § 41504(a) (2001).

\textsuperscript{158} Id. § 41504(c).

\textsuperscript{159} 14 C.F.R. Pt. 221 (2001).


\textsuperscript{161} See Exemptions From Passenger Tariff-Filing Requirements in Certain Instances, \textit{supra} note 15, at 40,654, 40,655. Specifically, 14 C.F.R. § 221.105 (2001), entitled, "Special notice of limited liability for death or injury under the Warsaw Convention," provides:

(a) (1) In addition to the other requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure
In particular, the regulations provide that an air carrier must provide passengers with a notice of the limitations of liability under the 1966 MIA.\textsuperscript{162} This notice must be “printed in type at least as large as 10-point modern type and in ink contrasting with the stock” appearing on “[e]ach ticket,” or a “piece of paper either placed in the ticket envelope with the ticket or attached to the ticket,” or “[t]he ticket envelope.”\textsuperscript{163} In other words, the regulations are drafted using restrictive language explicitly applicable to traditional paper-based ticketing.

3. The Japanese Initiative and the European Regulations

On their own initiative and for various reasons, the airlines have increasingly sought to liberalize their rights to limitation under the Warsaw Convention by way of private agreements. As the airlines move towards an unlimited liability framework, the relevance of the issue of adequate notice may seem to fade away. However, the airline industry is yet to voluntarily subject itself to

\begin{quote}
or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on Limitations of Liability

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 the liability of carriers to passengers for death or personal injury to approximately $10,000.

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

(2) Provided, however, that \textit{when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on:

(i) Each ticket;

(ii) A piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or

(iii) The ticket envelope.}

\textsuperscript{162} See id.
\textsuperscript{163} Id.
the full breadth of the U.S. tort system. In particular, as discussed below, no intercarrier agreement provides for punitive damages. Of course, this restriction may not be so significant to residents of states that do not allow for punitive damages.

In November 1992, the Japanese airlines, in the wake of the crash of a Japan Air Lines B747 on a domestic flight, broke ranks with other airlines and wholly abandoned all limits on liability, in what has been labeled “the Japanese initiative.” The families of the 529 passengers who died in that crash received compensation far in excess of that prescribed under the Warsaw Convention. It seemed illogical that passengers on a domestic flight would receive adequate compensation in the event of an air disaster, but not those traveling on a generally more expensive international flight.

For the first 100,000 Special Drawing Rights (approximately $140,000) worth of damages incurred from any aviation disaster, whether during a domestic or international flight, the Japanese airlines therefore agreed to hold themselves absolutely liable. For damages exceeding that amount and up to an unlimited amount, however, the Japanese carriers would retain the “all reasonable measures” defense available under Article 20 of the Warsaw Convention.

In late 1995, the European Union (EU) began to adopt the Japanese initiative’s two-tiered liability approach. EU carriers were to be required to have adequate insurance, and to make advance payments to passengers or their relatives within 15 days of an air disaster. These proposals were formalized in October 9, 1997, with the promulgation of European Council Regulation No. 2027/97, which applies to both intranational and international travel. This regulation is currently being amended to bring it into conformity with the Montreal Convention of 1999, discussed below.

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164 Australia’s Commonwealth Department of Transport and Regional Services, supra note 73.
165 Id.
166 Id.
167 Id.
168 See id.
169 Id.
170 Id.
4. *The IATA Intercarrier Agreements*

Both IATA and the U.S. Air Transport Association (ATA) were moving in the direction of the Japanese initiative. In particular, invoking Article 22(1) of the Warsaw Convention to raise the convention’s liability limits by private agreement, IATA adopted a series of intercarrier agreements that greatly expand carrier liability.\(^7\) On October 30, 1995, the regional delegates at IATA’s Annual Meeting in Kuala Lampur unanimously adopted an Intercarrier Agreement (IA) that, while rejecting the two-tiered liability framework under the Japanese initiative, significantly enhanced passenger rights in the event of an air disaster.\(^4\)

In particular, the carriers agreed:

To take action to waive the limitation of liability on recoverable compensatory damages in Articles 22, paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

To reserve all available defenses pursuant to the provision of the Convention; nevertheless, any carrier may waive any defense, including the waiver of any defense up to a specified monetary amount of recoverable compensatory damages, as circumstances warrant.\(^5\)

Accordingly, each passenger was to be allowed recovery for compensatory damages to the extent allowed by the law of his domicile. Moreover, under the IA each carrier had the option, but was not required, to implement the Japanese two-tier “unlimited” and “absolute-up-to-a-certain-point” liability framework.

In 1996, IATA adopted the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA).\(^6\) This second agreement further expanded passenger rights in the event of an air disaster. Under Article 20(1) of the Warsaw Convention, a


\(^{174}\) See Federico Ortino & Gideon R.E. Jurgens, *infra* note 180, at 379.


carrier may avoid liability if it can show that all necessary measures were taken to prevent the resulting harm. However, the MIA specifies that no carrier shall invoke any defense under Article 20(1) for any claim up to 100,000 Special Drawing Rights (approximately $140,000). At the option of the carrier, that amount may be raised or lowered for some routes if this is consistent with national regulations. Moreover, also at the option of the carrier, recovery may be had under the laws of the domicile of the passenger, but only for "compensatory damages." In other words, punitive or exemplary damages are disallowed.

In 1997 the U.S. ATA, in turn, reached an agreement for the Intercarrier Agreement to be Included in Conditions of Carriage and Tariff (IPA), which directs how the IA and the MIA will be implemented by U.S. carriers, for transportation anywhere in the world. Under the IPA, the carrier is denied the option, otherwise available under the Hague Protocol, to assume absolute liability for amounts of less than 100,000 Special Drawing Rights for specific routes, if consistent with national regulations.

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177 See Warsaw Convention, supra note 1, at art. 20 ("The carrier is not 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.").
178 In Section I of the MIA, the carriers incorporate the following into their tariffs and conditions of carriage:

(CARRIER) shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

(CARRIER) shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs [unless option II(2) is used, which allows carriers to lower this amount for specific routes, if consistent with national regulations].

Except as otherwise provided in paragraphs 1 and 2 hereof, (CARRIER) reserves all defenses available under the Convention to any such claim. With respect to third parties, the carrier also reserves all rights against any other person, including, without limitation, rights of contribution and indemnity.

Id.

179 See id.
182 See id.
On January 8, 1997, the DOT approved the IIA, MIA, and IPA. The approval, however, was conditioned on the carriers’ continuing participation in the 1966 MIA. It is not clear why the MIA 1966 continues to be necessary, given the broadened liability to which air carriers have now volunteered to subject themselves. Nonetheless, the 1966 MIA remains firmly in place in the U.S.

IV. THE VIEWS OF U.S. COURTS ON THE WARSAW CONVENTION’S NOTICE AND DELIVERY REQUIREMENTS

U.S. courts have grappled with the issue of giving substance to the Warsaw Convention’s notice and delivery requirements. As discussed above, Article 3(1) of the Warsaw Convention contains a list of particulars that must be included in the passenger ticket that must be delivered to a passenger as a condition, imposed by Article 3(2), for the liability limits under Article 22 to apply. Article 3(2) also states that irregularities in a passenger ticket will not affect the validity of the contract of transportation, which shall continue to be subject to the rules of the Warsaw Convention. The tension, then, is between a total failure to deliver a passenger ticket, and the delivery of a ticket that is merely “irregular.” U.S. courts have struggled to draw a dividing line between these two extremes.

A. THE “FLYING TIGER LINE” CASES

At one end of the spectrum, for example, are the facts in Warren v. Flying Tiger Line. In that case, on March 1962, a plane carrying military personnel disappeared en route from Travis Air Force Base, California to Vietnam. At the foot of the boarding ramp, the passengers had each been given by a Flying Tiger Line stewardess a document denominated a “boarding ticket,” and required to board immediately.

The boarding tickets did not contain all the information required under Article 3 of the Warsaw Convention. The boarding tickets contained a notice that the transportation was “subject to

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183 See id.
184 See id.
185 See id.
186 See Warsaw Convention, supra note 1, at art. 3.
187 See id.
188 352 F.2d 494 (9th Cir. 1965).
189 Id. at 495.
190 Id. at 496-97.
the rules relating to liability established by the Convention... if such transportation is 'international transportation' as defined by said Convention." However, the notice was printed in such a fine type that the court found that a magnifying glass was literally required to read it. Moreover, the boarding tickets contained neither the name of the passengers to whom they were issued, nor the "agreed" stopping places en route to destination. Finally, the court found that the passengers could have purchased in the airport supplementary insurance had they not been told to board immediately after receiving their tickets.

The Ninth Circuit concluded that the notice and delivery requirements of the Warsaw Convention had not been satisfied. In particular, the Court inferred from Article 3(2) an implied requirement that delivery of a passenger ticket be made sufficiently in advance to permit the passenger to purchase additional insurance should he so desire.

This was the same result previously reached by the Second Circuit, under similar facts, in *Mertens v. Flying Tiger Line, Inc.* That case involved a wrongful death claim arising from an air crash that occurred during a routine journey between San Francisco, California, and Tachikawa Air Force Base, Tokyo, Japan. Lieutenant Mertens, who perished in the flight, had only been delivered a ticket after he boarded the plane, when the plane was already loaded and ready for take-off.

The Second Circuit Court of Appeals held that the ticket had not been delivered to Lieutenant Mertens in such a manner as to allow him to take self-protective measures against the liability limits imposed by the Warsaw Convention. Accordingly, the ticket had not been "delivered" under the terms of Article 3(2) of the Warsaw Convention, and the liability limits therefore did not apply. The Court explained:

The delivery requirement of Article 3(2) would make little sense if delivering the ticket to the passenger when the aircraft was several thousand feet in the air could satisfy it. The specific lan-

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191 *Id.* at 497.
192 *Id.*
193 *Id.*
194 352 F.2d at 498.
195 See *id.*
196 See *id.*
197 341 F.2d 851 (2d Cir. 1965).
198 *Id.* at 853.
199 *Id.* at 857.
guage of Article 3(2), making the limitation of liability unavailable "if the carrier accepts a passenger without a passenger ticket having been delivered" lends support to our position.\footnote{Id. (emphasis added).}

B. \textit{Lisi v. Alitalia-Linee Aeree Italiane}

Aside from the time of delivery of the passenger ticket, U.S. courts have considered the question of the type size used in the notice that must be printed on the ticket pursuant to Article 3(1) of the Warsaw Convention. However, to this day, U.S. courts have not provided a clear dividing line between the type size that violates the Convention, and the type size that does not. At one end of the spectrum is \textit{Chan v. Korean Air Lines}, discussed below, where the Supreme Court found that a notice printed in size 8 type was acceptable. At the other end of the spectrum is \textit{Lisi v. Alitalia-Linee Aeree Italiane},\footnote{370 F.2d 508 (2d Cir. 1966), aff'd by equally divided Court, 390 U.S. 455 (1968).} where the Second Circuit Court of Appeals held that 4-point type did not. And, of course there is still paragraph (a)(2) of the DOT's 14 CFR §221.105, requiring "type at least as large as 10 point."\footnote{Exemptions From Passenger Tariff-Filing Requirements in Certain Instances, supra note 15.}

\textit{Lisi} involved claims arising from an airplane crash in Shannon, Ireland on February 26, 1960 during a flight from Rome to New York.\footnote{Lisi, 370 F.2d at 510.} Alitalia had provided each passenger a ticket and a baggage claim stub that included the notices required by the Warsaw Convention, "but in exceedingly small print."\footnote{Id. at 513.}

The Warsaw Convention does not mention type size. However, the Court rejected a literal reading of the Warsaw Convention.\footnote{See id.} The Court described as arbitrary the Convention's limitations on the carrier's liability, and noted that they had been severely criticized.\footnote{See id. at 512-13.} The Court held that the one-sided advantages that the limitations of liability provide the carrier come at the cost of a quid pro quo.\footnote{Id.} In particular, the carrier must deliver a ticket and a baggage claim stub that clearly state that the Convention severely limits the recovery otherwise availa-
ble to the passenger and his family in the event of an accident.

The Court characterized the Warsaw Convention notice that had been printed on the ticket using 4-point type as "camouflaged in Lilliputian print in a thicket of ‘Conditions of Contract’" and as "virtually invisible. . . ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else." Accordingly, the Court held that the delivery of the passenger ticket had been so inadequate as to be an absolute failure, and that Alitalia therefore could not invoke the Convention’s liability limits.

C. **Chan v. Korean Air Lines**

A problem that plaintiffs’ lawyers frequently confront when invoking theories of constructive non-delivery involves the lack of guidance in Article 3 as to what constitutes effective notice and delivery for Warsaw Convention purposes. The 1966 MIA, by contrast, provides specific instructions for the manner in which notice must be performed. In particular, as discussed above, 10-point modern type in contrasting stock must be used. Moreover, the 1966 MIA also sets forth in verbatim the language that the notice must contain. However, the 1966 MIA does not provide for sanctions in the event of a failure by a carrier to abide by its terms. Although the DOT enforces the 1966 MIA, it has never tried to persuade the courts to waive the liability limits under the Warsaw Convention in the event of a carrier’s breach.

Some courts had speculated that the Warsaw Convention and the 1966 MIA could be read in conjunction. The 1966 MIA would provide the specific instructions as to how notice should be carried out that are absent in the Warsaw Convention, while the Warsaw Convention would provide the sanctions for non-compliance with these instructions that are absent in the 1966 MIA. This approach was followed by the Second Circuit Court of Appeals in *In re Air Crash Disaster at Warsaw, Poland* and the

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208 See id. at 512.
209 Id. at 514.
210 See id.
212 705 F.2d 85 (2d Cir. 1983).
Fifth Circuit Court of Appeals in *In re Air Crash Disaster near New Orleans, Louisiana.*

However, in *Chan v. Korean Air Lines,* the Supreme Court indicated that this approach was incorrect. The 1966 MIA was never merged into the Warsaw Convention. Rather, the two documents coexist side by side, and must be treated as legally independent.

*Chan* arose from wrongful death claims against Korean Air Lines arising from the destruction by a Soviet military aircraft of an off-course Boeing 747 en route from Kennedy Airport in New York to Seoul, South Korea. The passengers had been given tickets that contained the notice required by the Warsaw Convention, but in 8-point type instead of the 10-point type required by the 1966 MIA and specific DOT regulations. Plaintiffs conceded that the Warsaw Convention does not by itself require notice to be provided using 10-point type. However, they claimed that this requirement was created under the 1966 MIA, and that the Warsaw Convention's liability limits should therefore not apply.

1. **Justice Scalia's Restrictive Reading of the Relationship Between Articles 3(1) and 3(2) of the Warsaw Convention**

Justice Scalia, writing for the majority, rejected plaintiffs' contention. The notice that had been printed using the allegedly inappropriate type size is, as discussed above, one of the items required by Article 3(1) of the Warsaw Convention. According to Justice Scalia, nothing in either Article 3(1) or 3(2) states that Article 3(1) provides the standard against which to assess non-delivery under Article 3(2). Only if a court finds that the passenger ticket has not been delivered under the terms of Article 3(2) will a carrier lose the protection of the Warsaw Convention's liability limits. Failure to include in a passenger ticket

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213 789 F.2d 1092 (5th Cir. 1986).
215 See id. at 151 (Brennan, J., concurring).
216 See id.
217 See id. at 123 (Scalia, J., majority opinion).
218 See id. at 124. The author knows of no reason why the DOT took no enforcement action to require carriers, such as Alitalia and KAL, to publish their notices in 10-point type.
219 See id. at 125-126.
220 *Chan,* 490 U.S. at 125-126.
221 See id. at 125.
222 See id. at 128.
any of the items listed in Article 3(1), however, is not necessarily equivalent to non-delivery under Article 3(2).223

Justice Scalia further rejected plaintiffs’ contention that the failure to explicitly link articles 3(1) and 3(2) by way of mutual references had been a drafting error.224 Moreover, the fact that the corresponding provisions in the Warsaw Convention for baggage claim stubs were linked – in that failure to meet the requirements of the first entails a loss of the liability limits according to the second – did not resolve the issue.225 According to Justice Scalia, the result that the text produces as it is written is not necessarily absurd, and estimations of what the drafters may have had in mind are speculation.226 “We must thus be governed by the text – solemnly adopted by the governments of many separate nations – whatever conclusions may be drawn from the intricate drafting history that petitioners and the United States have brought to our attention.”227

As discussed above, the U.S. is now party to the Hague Protocol. The Hague Protocol wholly replaces Article 3(1) of the Warsaw Convention with a new provision that significantly reduces the items that must be listed on a passenger ticket. Specifically, Article 3(1) of the Warsaw Convention, as amended by the Hague Protocol, provides:

1. In respect of the carriage of passengers a ticket shall be delivered containing:
   
   (a) an indication of the places of departure and destination;
   
   (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
   
   (c) a notice to the effect that, if the passenger’s journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.228

223 See id. at 128-29.
224 See id. at 134.
225 See id.
226 Chan, 490 U.S. at 134.
227 Id.
228 Hague Protocol, supra note 87, at Art. III.
The Hague Protocol also redrafts Article 3(2) to make explicit the linkage between the amended Article 3(1) and the loss of liability penalty provision under Article 3(2). The amended Article 3(2) of the Warsaw Convention now reads:

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

In other words, a failure to deliver a notice of the limits of liability under the Warsaw Convention, but not any other instance of nonconformity with Article 3(1), will result in the loss of the liability limits for the carrier. By making the linkage between Article 3(1) and Article 3(2) explicit, the Hague Protocol renders the main thrust of Justice Scalia’s analysis in Chan largely irrelevant.

2. Justice Brennan’s Analysis

Justice Brennan, in his concurring opinion, took issue with the majority’s interpretation of the Warsaw Convention and its “misplaced literalism and disregard of context.” Justice Brennan offered a reading of the text that does not “disregard the wealth of evidence to be found in the Convention’s drafting history on the intent of the governments that drafted the document.”

For Justice Brennan, a reading of the Warsaw Convention that entirely decouples Article 3(1) from Article 3(2) would be incorrect, because it would allow carriers to benefit from having failed to conform to the requirements of Article 3(1). Justice Brennan points out that the penalties set forth in Article 3(2) were intended to protect passengers, not carriers. The drafting history “was absolutely clear” that the carrier was to lose the limit of liability should the passenger ticket not include the particu-
lars listed in Article 3(1). Moreover, “if notice is indeed required, it must surely meet some minimal standard of ‘adequacy.’”

The crucial question, then, was whether the 8-point type in the Korean Air Lines passenger ticket provided adequate notice. Justice Brennan concluded that it did, and distinguished this type size from the four-point size used in the passenger ticket in Lisi. However, Justice Brennan did not develop hard and fast rules against which to measure adequacy of notice under the Warsaw Convention. In particular, he did not address the adequacy of type of intermediate sizes between 4-point and 8-point.

However, unlike the majority opinion, Justice Brennan’s concurrence explicitly addresses the relationship between the Warsaw Convention and the 1966 MIA. Justice Brennan rejected the contention that the 1966 MIA provides the standard against which to measure adequacy of notice under the Warsaw Convention. Because the 1966 MIA, unlike the Warsaw Convention, is not a formal treaty ratified by the U.S. Senate, it can have no impact on a court’s interpretation of the Warsaw Convention or its specific terms. Justice Brennan explained –

The Montreal Agreement is a private agreement among airline companies, which cannot and does not purport to amend the Warsaw Convention. To be sure, the Agreement was concluded under pressure from the United States Government, which would otherwise have withdrawn from the Warsaw Convention. But neither the Montreal Agreement nor the federal regulations purport to provide notice according to the Agreement’s specifications with loss of the Warsaw Convention’s limits on liability. The sanction, rather, can only be whatever penalty is available to the FAA against foreign airlines that fail to abide by the applicable regulations, presumably including suspension or revocation of the airline’s permit to operate in the United States.

D. CARNIVAL CRUISE LINES, INC. V. SHUTE

The Supreme Court had the opportunity to clarify its position on passenger notice in transportation tickets in Carnival Cruise

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233 See id. at 143.
234 Id. at 150.
235 Chan, 490 U.S. at 152.
236 See id. at 149-152.
237 Id. at 151.
Although Justice Blackmun, writing for the majority, passed up that opportunity, the dissent by Justice Marshall and Justice Stevens addressed the issue forthrightly.\textsuperscript{239}


text continues...
conclude that the forum-selection clause should have been deemed null and void.\(^{249}\)

V. THE SEC'S POSITION ON ELECTRONIC NOTICE AND DELIVERY OF DOCUMENTS

A. THE DOT & TICKETLESS TRAVEL

The DOT has recognized that electronic ticketing is a dynamic and evolving element in the marketing of air transportation that entails substantial cost efficiencies.\(^{250}\) Moreover, it has stated that it will not take action against carriers that fail to immediately deliver in printed format with each electronic ticket the notices required by the Department’s regulations:

We have decided as a matter of compliance policy not to pursue remedial or punitive action if air carriers give, or make readily available, to electronically ticketed passengers the written notices required by the existing DOT ticket-notice rules no later than the time that the passengers appear at the airport for the first flight in their itinerary. We believe that this approach strikes the most reasonable balance at this time between ensuring that important information reaches consumers before they travel without inhibiting the development of electronic ticketing and imposing additional costs that might stifle industry innovations and result in higher prices for consumers. It also puts all carriers on the same footing with respect to ticketless notices; as a result of past DOT requests, many airlines currently mail or fax consumer notices to ticketless customers at the time of purchase, but some carriers do not.\(^{251}\)

The Department’s position offers carriers that distribute tickets electronically considerable freedom from regulatory interference. Unfortunately, the DOT has offered scant guidance as to how the notice and delivery requirements may be satisfied for civil liability purposes when tickets are transmitted electronically. Under Supreme Court precedent, offering passengers a notice of liability limits at the airport prior to boarding may not be sufficient to protect carriers in the event of an international air transportation disaster. The format in which the notices should be presented to passengers is also unclear.

\(^{249}\) See id.


\(^{251}\) See id.
Although the DOT offers scant guidance, some government agencies have closely examined the impact of electronic documents in other fields of law. The Securities and Exchange Commission (SEC), for example, has paid considerable attention to the issue.

Indeed, the concepts of notice and delivery are a fundamental aspect of the securities laws. Congress passed the Securities Act of 1933 and the Exchange Act of 1934 to address the widespread fraud and unsavory practices that culminated with the market crash of 1929. The legislation created a regulatory framework to ensure full disclosure to the investing public of all material information for securities offerings, as well as for securities listed for trade on a national security exchange. Under the Securities Act of 1933, a company intending to raise capital through security offerings must, absent an exemption, register with the Securities and Exchange Commission (SEC) by filing a registration statement. The registration statement must contain all relevant information about the company that an investor would need to know to adequately evaluate the securities offering. The Securities Act of 1933 also requires that simultaneously with, or prior to, any public offering, the issuer must deliver a prospectus (which is included in the registration statement filed with the SEC) to potential investors. This requirement is designed to provide investors with all the necessary information to properly evaluate an offering before making an investment decision.

Since the inception of the securities laws, the required disclosures have been performed through prospectuses and other tra-
ditionally paper-based documents. However, in a 1995 no-action letter to Brown & Wood, the SEC staff expanded the definition of a statutory prospectus to include not only documents printed on paper, but those in electronic format as well. As a result, a company for the first time was allowed to offer its prospectus online, thus satisfying the notice and delivery requirements of the securities laws through the Internet. Since then, the Internet has had a profound impact on all aspects of the security business and the SEC has published a number of releases and enforcement actions that provide a refined guidance on the use of electronic media by issuers of all types, including intermediaries. According to the SEC, the use of electronic media to transmit required disclosures should be "at least an equal alternative to the use of paper-based media." Although the SEC explicitly encourages electronic distribution methods, it imposes strict protections that preserve important rights.

1. Verification of Delivery

The SEC approach to electronic document delivery is based on three fundamental principles: notice of delivery, access, and verification of delivery. A document delivered electronically should be delivered in such a manner that its intended recipient

\[\text{\textit{See id.}}\]
\[\text{\textit{See id.}}\]
\[\text{\textit{See Marson, supra note 253, at 281.}}\]
\[\text{\textit{October Interpretative Release, supra note 262, at 6.}}\]
\[\text{\textit{See \textit{id.} at 8 ("An issuer or other party that structures its [electronic] delivery in accordance with the principles and examples set forth below can be assured that it is satisfying its delivery obligations under the federal securities laws.")}.}\]
\[\text{\textit{See generally Marson, supra note 253.}}\]
\[\text{\textit{See October Interpretative Release, supra note 262.}}\]
is aware of its delivery, at least to the same extent as if the docu-
ment had been delivered by postal mail.\textsuperscript{267} Delivery of a document by e-mail would generally satisfy the SEC's notice of delivery requirement.\textsuperscript{268} However, posting the document on a website, without separate notice, would generally not satisfy the requirement.\textsuperscript{269} In the context of electronic ticketing, this would mean, for example, that an online travel agent would not be allowed to satisfy the Warsaw Convention's notice requirement merely by posting a generalized notice on his website for any potential customer to read. At the very least, the online travel agent would have to e-mail, along with the electronic ticket, or embedded in the electronic ticket, a hyperlink\textsuperscript{270} to the generalized notice available at the travel agent's website.

a. Hyperlinks

However, the use of hyperlinks presents its own set of theoretical difficulties. A hyperlink that is used as a text locator within a single document is not problematic from a legal perspective, because it can be analogized to a table of contents.\textsuperscript{271} However, according to the SEC, electronic documents that are hyperlinked to one another may be treated as a single document.\textsuperscript{272} Accordingly, hyperlinks to external documents entail pitfalls for issuers that internal hyperlinks do not. An issuer that provides an external hyperlink (e.g., to a website run by an investment advisor service) may be held accountable for the contents of a website that it does not control.\textsuperscript{273}

From the standpoint of convenience of document presentation, however, the SEC's treatment of hyperlinks has clear advantages.\textsuperscript{274} For example, the securities laws require that sales literature, whether in paper or electronic form, be preceded or

\begin{itemize}
\item \textsuperscript{267} See id. at 8.
\item \textsuperscript{268} See id.
\item \textsuperscript{269} See id.
\item \textsuperscript{270} A hyperlink is an electronic address embedded in a document that links to another place in the same document or to another document altogether. Typically, you click on the hyperlink to activate the electronic address. Hyperlink is the most essential component of hypertext systems (a special type of database system that allows for creative linkage to disparate items) such as the World Wide Web. See http://webopedia.internet.com/TERM/h/hyperlink.html (last visited Aug. 30, 2002).
\item \textsuperscript{271} See April 2000 Release, supra note 262, at 88-89.
\item \textsuperscript{272} October Interpretative Release, supra note 262, at 15.
\item \textsuperscript{273} Id. at 16. See also April 2000 Release, supra note 262, at 32-35.
\item \textsuperscript{274} See Marson, supra note 251, at 293-94.
\end{itemize}
accompanied by a final prospectus. In the case of electronic sales literature that contains a hyperlink to the final prospectus, the SEC will invoke the “envelope theory,” and treat the final prospectus as if it had been delivered in a single package with the sales literature. Likewise, under the “envelope theory,” an electronic ticket would be deemed to contain the notice required by the Warsaw Convention even though the ticket delivered only includes a hyperlink to the relevant material.

2. **Access**

a. The “Digital Divide”

The second fundamental principle of the SEC’s approach to notice and delivery for electronic documents, access, may not be readily satisfied through simple tinkering with the format in which electronic documents are presented. The SEC expects documents delivered electronically to be just as accessible to their intended recipients as if they had been delivered by postal mail. At the same time, it has expressed concern about the differential access to Internet-connected computers across geographical, socioeconomic and ethnic groups, or the so-called “digital divide.”

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275 October Interpretative Release, supra note 262, at 15.

276 See id. See also April 2000 Release, supra note 262, at n. 41. (“When an issuer includes a hyperlink within a document required to be filed or delivered under the federal securities laws, we believe it is appropriate for the issuer to assume responsibility for the hyperlinked information as if it were part of the document. We believe that the inclusion of a hyperlink to an external website or document demonstrates the hyperlinking party’s intent to make the information part of its communication with investors, security holders and the markets. Additionally, because written offers must be made exclusively through a Section 10 prospectus, when an issuer includes a hyperlink to an external web site or document within a Section 10 prospectus, the issuer expresses its concern to have the hyperlinked information treated as part of this exclusive means of offering its securities.”).

277 See id. at 8.

278 See April 2000 Release, supra note 262, at 67. (“We believe that the time for an ‘access-equals-delivery’ model has not arrived yet. Internet access is more prevalent today than it was in 1995, but many people in this country still do not enjoy the benefits of ready access to electronic media.”). The problem of the “digital divide” was repeatedly highlighted during the Clinton administration. See Kevin Sack, Gore Denounces Gap in Access to Computers, N.Y. TIMES, Apr. 4, 2000, at 18. For example, a 1999 Commerce Department study found that households with incomes of $75,000 and higher were 20 times as likely than those at the lowest income to have access to the Internet, and 9 times as likely to own a computer. See id. Among households with earnings between $15,000 and $35,000, more than 32% of white households had computers, compared to 19% of black households.
Accordingly, the SEC has indicated that it does not yet embrace "electronic-only offerings." The SEC has not wholly abandoned the paper-based method of delivery of prospectuses, and in fact requires that that method be retained in all cases.

In other words, issuers that offer electronic documents for distribution must also offer them in an alternative, paper-based format. Moreover, charging additional printing or mailing and handling fees may not restrict access to the paper-based documents in any fashion, such as.

b. The SEC’s “Burdensomeness” Standard

There is another side to the digital divide, however. Some users who do have access to Internet-connected computers may not have access to the specific software and computer hardware necessary to process documents in the format selected by the issuer. Therefore, according to the SEC, “the use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided.”

c. Technological Considerations

The SEC’s “burdensomeness” standard has two aspects. The first aspect relates entirely to technological considerations. Unless specifically informed otherwise, the issuer may not presume that the recipient has access to top-of-the-line Internet computing technologies. For example, an issuer who delivers documents in formats that require specialized computer processing should supply the recipient with all necessary software and technical assistance to process the document, beforehand and at no cost. In certain cases, the recipient may possess the technology necessary to process the electronic document, but the processing itself may be onerous. For example,

See id. For all income levels, 17% of white households had Internet access at home, compared to only 8% of black or Hispanic households. See id.

See April 2000 Release, supra note 262, at 74-75.

See id.

See id.

See id.

See id.

See October Interpretative Release, supra note 262, at 10, n. 29.

Id. at 8.

See id. at 9. See also April 2000 Release, supra note 262, at 21-22.

See id.

See id.

See id.

See id. at 10, n. 29.
downloading the document may be time-consuming.\(^{289}\) In that case, absent prior consent by the recipient, the delivery requirement is not satisfied.\(^{290}\)

ii. Ease of Presentation

The second aspect of the SEC's "bureaucratic burden" standard involves ease of presentation. In other words, disclosures that are legally mandated must be presented in a format that puts them at the recipient's fingertips and does not require any sort of heavy maneuvering on his part. As an example, the SEC suggests that:

[I]f an investor must proceed through a confusing series of ever-changing menus to access a required document so that it is not reasonable to expect that access would generally occur, this procedure would likely be viewed as unduly burdensome. In that case, delivery would be deemed not to have occurred unless delivery otherwise could be shown.\(^{291}\)

Ease of presentation is of particular importance with respect to the proper use of hyperlinks. Hyperlinks to required information should always be prominently displayed, and the information to which they connect should be instantaneously accessible.\(^{292}\) The hyperlinks should therefore not be placed among a clutter of unrelated information, or otherwise obscured. They should be positioned so that the recipient can readily locate them. Moreover, recipients should not be required to "dig" past multiple "inner" web pages to access the relevant hyperlink.

d. Method of Presentation

In the context of electronic ticketing, method of presentation requirement is particularly important. As discussed above, the 1966 MIA sets forth very particularized requirements for the manner in which the Warsaw Convention's limit of liability notice must be presented. The purpose is to prevent presentation methods (i.e., use of small type size) that obscure the notice.

The SEC has specifically sought to preserve for electronic documents form-of-presentation requirements that were originally

\(^{289}\) See id.

\(^{290}\) See October Interpretative Release, supra note 262, at 10, n. 29.

\(^{291}\) Id. at 9, n. 24.

\(^{292}\) See, e.g., id. at 16, ex. 16.
designed for paper-based media. Like the 1966 MIA, the regulations promulgated by the SEC contain in numerous instances detailed instructions as to the appropriate presentation of printed documents. The SEC has sought to retain the substance of those requirements by issuing regulatory amendments that apply to documents delivered by electronic media. For example, 17 CFR §230.420 provides:

Where a prospectus is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents, such as paper size, type size and font, boldface type, italics and red ink, by presenting all required information in a format readily communicated to investors, and where indicated, in a manner reasonably calculated to draw attention to specific information.

In the context of electronic ticketing the critical problem is to identify those electronic-format "bells and whistles" that are equivalent to the 1966 MIA's 10-point size type and "contrasting stock" requirements. The 10-point size type requirement can be quite literally satisfied by using type larger than 10 point throughout the electronic document. Because larger type size will not generally occupy increased computer memory, and because, by way of hyperlinks, available presentation space is virtually unlimited, as a general rule electronic tickets should use throughout type size larger than 10 point. Perhaps the hyperlink connecting to the Warsaw Convention notice should use even larger type, to guarantee that it is not obscured. The "contrasting stock" requirement could also be quite readily satisfied, by using type that contrasts with the website’s background color, or by even using type of a color that contrasts with any other color in the website, including that used elsewhere for type.

3. Verification of Delivery

The third fundamental principle of the SEC's approach to electronic documents involves verification of delivery, which is in large part satisfied through informed consent. To satisfy the informed consent standard, the issuer must apprise the re-

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293 See October Interpretative Release, supra note 262, at 14-30 (containing a number of amendments to existing regulations).
294 See id.
296 See October Interpretative Release, supra note 262, at 10.
recipient of all possible disadvantages of receiving documents in electronic format. According to the SEC:

If consent is used, the consent should be an informed consent. Recipients generally should be apprised: that information provided would be available through a specific electronic medium or source (e.g., via a web site); of the potential that investors may incur costs (e.g., on-line time); and of the period during, and the documents for, which the consent will be effective. For instance, investors should be made aware of whether the consent extends to more than one type of document. If an investor revokes a consent that extends to more than one document, and the provider of the information to ensure effective delivery or transmission is relying upon consent, future documents should be delivered in paper unless the provider of the information has an alternative mechanism for ensuring effective electronic delivery. If not, it would appear likely that continued electronic delivery, after revocation of consent, would not be considered to result in the investor's having access to the information and, therefore, the delivery requirement would not be satisfied.

The SEC allows an issuer to request that recipients provide "global consent," or consent that relates to all documents to be delivered by that particular issuer during a given period. However, as stated by the SEC above, informed consent must generally be technology-specific. The recipient may consent to electronic delivery in certain formats, but not in others. In large part, this reflects concerns by the SEC regarding access and technical compatibility between the issuer's and the recipient's computer systems.

Moreover, the issuer cannot coerce consent from the recipient by requiring that consent be granted as a condition of doing business. In fact, the consent, which must be freely given, may equally be freely revoked. In the case of a revocation, all documents should henceforth be delivered in paper-based format.

297 See id. at 10 n.29.
298 Id.
300 See id. at 19 (stating that an investor should not be "disadvantaged by inadvertently consenting to electronic delivery through a medium that is not compatible with the investor's computer hardware and software").
301 Id. at 17-18.
302 Id. at 19.
303 See October Interpretative Release, supra note 262, at 9 (stating that, "as a matter of policy, where a person has a right to receive a document under the
Moreover, the recipient, whether he has revoked consent or not, should have access in paper-based format to all documents that have ever been delivered electronically.\textsuperscript{304}

At first blush, it would seem that a passenger who purchases an electronic ticket online implicitly consents to the electronic delivery of the Warsaw Convention’s notice of liability limits. However, the SEC has rejected the notion of implied consent.\textsuperscript{305} The recipient must always explicitly provide consent.\textsuperscript{306} Consent cannot be inferred from a recipient’s proven access to the technologies necessary for effective delivery of the electronic documents.\textsuperscript{307}

For example, a passenger who purchases an electronic ticket online cannot be presumed by the carrier to have consented to electronic delivery of the Warsaw Convention’s notice of the liability limits. Instead, a dialog box or other comparable mechanism should be used to specifically request consent for electronic delivery of the notice. Nonetheless, the fact that, upon request, the passenger has provided an e-mail address, may serve as an affirmative expression of consent to the electronic delivery of documents, although the SEC has cautioned that the agency is not yet ready to explicitly say so.\textsuperscript{308}

There are other forms of verifying delivery of electronic documents apart from informed consent.\textsuperscript{309} For example, a website could be programmed to keep a record of every instance that a hyperlink containing required disclosures gets activated.\textsuperscript{310} Delivery would not be deemed complete, and the transaction would not be concluded, until the recipient activates the appropriate hyperlink.\textsuperscript{311} Alternatively, the form that the passenger uses to effectuate payment by entering credit card information could be exclusively made accessible by way of a hyperlink contained in the required liability notice. This would ensure that the passenger has been exposed to the notice before concluding

\textsuperscript{304} Id.
\textsuperscript{305} See April 2000 Release, \textit{supra} note 262, at 71-73.
\textsuperscript{306} See id.
\textsuperscript{307} See id.
\textsuperscript{308} Id. at 73.
\textsuperscript{309} See October Interpretative Release, \textit{supra} note 262, at 11.
\textsuperscript{310} See id. at 11, 15 ex. 15, 19-20 ex. 35.
\textsuperscript{311} See id. at 11.
the transaction. Postal mail or e-mail return receipts could also be used to verify delivery.

The SEC is not oblivious to the advantages of the Internet, and fully acknowledges that the emergence of new technology may well call for a departure from statutory literalism. The Internet allows for the rapid dissemination and publishing of securities prospectuses "in a more cost-efficient, widespread, and equitable manner than traditional paper-based methods." The approach of the SEC has therefore been to encourage the use of the Internet, by unequivocally stating that the notice and delivery requirements under the securities laws may be satisfied electronically, despite statutory silence on the matter. However, protections that preserve important rights must remain firmly in place.

VI. THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

A. APPLICABILITY OF THE NEW LEGISLATION IN THE CONTEXT OF ELECTRONIC TICKETING

The Electronic Signatures in Global and National Commerce Act ("E-Sign Act"), the bulk of which took effect on October 1, 2000, makes electronic signatures and contracts as legally binding as their pen and paper or printed matter counterparts.

The E-Sign Act helps to create "a uniform commercial legal framework that recognizes, facilitates, and enforces electronic transactions worldwide," thereby responding to a public that is "still wary of conducting extensive business over the Internet

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312 See id. at 11, 20 exs. 31 & 33.
313 See id. at 11.
314 See October Interpretative Release, supra note 262, at 2, 7.
315 Id. at 2.
316 See id.
because of the lack of a predictable legal environment governing transactions."\(^{320}\)

In general, the E-Sign Act provides:

Notwithstanding any statute, regulation, or other rule of law..., with respect to any transaction in or affecting interstate or foreign commerce:

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.\(^{321}\)

The consumer protections under the E-Sign Act are comparable to those developed by the SEC in the absence of explicit statutory guidance. In particular, the issue of consumer consent is a keystone of the E-Sign Act.\(^{322}\) Before a commercial transaction may be conducted electronically, the consumer must have affirmatively consented, and must not have withdrawn his consent.\(^{323}\) Moreover, the consumer must be provided with a "clear and conspicuous" statement advising him:

* of any right or option to have the record made available in paper or non-electronic format;
* of the right to withdraw consent to conducting business in electronic form, and of any conditions or consequences of doing so (including any related fees);
* of the scope of the consent, that is, of the specific categories of transactions that will be covered by the consumer’s consent over the course of the parties’ relationship;
* of the procedures necessary to update or correct information on the consumer’s electronic records;
* of the procedures necessary to request particular documents in paper format, and associated fees.\(^{324}\)

Contrary to the SEC’s position, however, under the E-Sign Act doing business or entering into a given commercial transaction may be conditioned upon obtaining the consumer’s consent to

\(^{320}\) Id.


\(^{324}\) Id.
electronic delivery of documents. Moreover, a consumer who withholds his consent or requests paper documents may be penalized through the imposition of fees or higher costs. In other words, American Airlines' practice of charging a $10 differential for shipping and handling to consumers who request paper tickets instead of electronic tickets would be permissible under the E-Sign Act, but would not be appropriate according to SEC practice.

Under the E-Sign Act, a consumer must be "provided with a statement of the hardware requirements for access to and retention of electronic records." Moreover, the consumer must confirm his request electronically, in a manner that confirms that he has access to the electronic documents in the format in which they will be transmitted. As discussed above, this standard is comparable to that required under the SEC's standards for informed consent.

For example, Portfolio Document Format ("PDF") software, developed by Adobe Systems, Inc., allows for the electronic transmission of images that are virtual photocopies of the paper document, and which the consumer can then use to print the electronic document in paper form. Transmission of an electronic ticket in PDF would be particularly desirable, because PDF closely approximates a paper-based document, and could be readily used to satisfy the "10-point modern type" and "contrasting stock" notice requirements of the 1966 MIA and the DOT's implementing regulations.

Under the E-Sign Act, the air carrier would need to confirm beforehand that the consumer has access to Adobe PDF Reader software. As discussed above, according to the SEC only widely accessible electronic formats (such as HTML, the standard Internet computer language) may generally be used in the ab-

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325 See id.
326 See id.
327 See American Charges Fee for Paper Tickets, L.A. TIMES, Apr. 15, 2001, at L4. Other airlines are considering similar charges, which are also imposed by Alaska Airlines. Id.
329 Id.
331 "Hypertext Markup Language, or html, is a system of coding text files for display by World Wide Web browsers. By embedding certain special codes in the document, the browser can be told how to display the text, what graphics to include, and what Internet services should be made available by hypertext links."
sence of the recipient's specific consent. With respect to PDF, however, a solution suggested by the SEC would involve, in the case of electronic ticketing, giving the consumer the option of downloading from the same website used to purchase the electronic ticket the software necessary to process documents in PDF. Despite the absence of the passenger's specific consent, this suggestion would satisfy the E-Sign Act equally well.

B. WHERE THE E-SIGN ACT FALLS SHORT

The E-Sign Act elevates an electronic document used for commercial transactions to the status of the theoretical equivalent of a paper contract. However, it leaves a host of questions unsettled, including whether an electronic document constitutes an original for evidentiary purposes; whether documents that must be retained according to law can be retained in electronic form; and whether electronic documents are admissible into evidence. The E-Sign Act does not address issues of contract formation and sets no standards as to determining the parties' intent or even the authenticity of electronic contracts or signatures.

The E-Sign Act is unspecific in character, and there is no guidance as to whether it should apply to particular statutes or regulations. Although, as discussed above, the DOT has adopted a laissez faire policy with respect to electronic ticketing, the impact of the E-Sign Act on the regulations is not crystal clear. The E-Sign Act will undoubtedly have significant repercussions on the transportation industry as a whole, the regulation of which has traditionally been document intensive. For example, the Federal Maritime Commission has requested comments on the impact of the E-Sign Act on those regulations governing maritime transportation that require the delivery of paper-based documents.


393 See id.

394 See id.

395 See id.

With respect to aviation, courts will have to grapple with issues such as whether an electronic ticket counts as a contract within the meaning of the E-Sign Act, whether the E-Sign Act applies to treaties, and in particular whether it applies to the Warsaw Convention and related protocols. Whether the E-Sign Act applies to the DOT tariff regulations, and especially to the regulations specifically enforcing the 1966 MIA, is also an open question. If a court found that the E-Sign Act applies to both the Warsaw Convention and the DOT regulations, it would also have to address the issue of what constitutes the electronic format equivalent of the 10-point modern type notice required by the 1966 MIA.

Despite the difficulties of interpretation that remain, the E-Sign Act is a clear statement by the U.S. government of its willingness to adapt existing law to emerging technologies.\textsuperscript{337} Any existing ambiguities should therefore be resolved in favor of giving substance to that primary intent.\textsuperscript{338} Accordingly, the fact

\textsuperscript{337} According to one contract law practitioner, "[The E-Signature Act] is not so much a change-the-state-of-the-world law as it is a statement [that the government approves of the paperless way of doing business]. It's a statement that lends confidence to the business community. But there's still a lot that needs to be worked out in real-world application before we'll see the real effect of the E-Signature Act." \textit{Quoted in Mark Ballard, New Signature Act Ushers in Quite Revolution, N.Y.L.J., Sept. 21, 2000, at 5.}

\textsuperscript{338} According to Rep. Anna Eshoo (D-CA), in a hearing on the proposed Electronic Signatures in Global and National Commerce Act, before the Joint Economic Committee of the Senate and the U.S. House of Representatives:

Mr. Chairman, the Internet is changing business – and the way we do business. These companies are busy expanding the Internet and E-commerce at an explosive pace. Last week, a University of Texas study reported the Internet economy generated over $300 billion in U.S. revenue. In just five years since the commercial introduction of the World Wide Web, the Internet sector rivals the automobile and the telecommunications industries in existence for nearly a century.

As legislators we must amend outdated laws that impede this new age of growth, while protecting important principals [sic] of fairness. More importantly, as public policy makers we must be open to new ways of thinking in order to create the conditions in which innovation can flourish.

Everything – from the accounting standards that determine the financial health of these companies, to how we educate our children to participate in this new era of opportunity is subject to review.

Silicon Valley owes its success to the principal [sic] that failure is not bad. These industries have thrived because they know failure can in the end signify progress. One cannot think outside of the box without encountering failure. Now, can you think of a concept any more foreign than that here in risk-adverse Washington?
that the Warsaw Convention and related agreements, protocols, and implementing statutes and regulations do not specifically address the issue of electronic tickets should not dissuade courts from treating them as the legal equivalents to paper tickets. This approach is also consistent with that developed by the SEC in the securities context, despite the absence of a statutory reformulation of the U.S. security laws to explicitly take into account the use of electronic documents.

VII. LOOKING TO THE FUTURE – THE MONTREAL CONVENTION OF 1999

In May 28, 1999, 52 states gathered in Montreal to negotiate and sign a new convention on air carrier liability, to be known as the Montreal Convention of 1999. The Montreal Convention of 1999 replaces the Warsaw Convention’s liability regime with a two-tiered liability framework, the second tier of which provides for unlimited recovery in the event of passenger death or injury, as well as higher liability limits for baggage and cargo. The

Mr. Chairman, that however is the challenge before us. As public policy makers we must think outside of the box.


See Montreal Convention of 1999, supra note 132; see also A New Convention for Air Carrier Liability, at http://www.phillipsfox.com.au/publications/Pnd99001.htm (last visited Aug. 30, 2002). The following countries are the original signatories of the Montreal Convention of 1999: Bahamas, Bangladesh, Belgium, Belize, Benin, Bolivia, Burkina Faso, Cambodia, Chile, China, Cote d’Ivoire, Cuba, Czech Republic, Denmark, Dominican Republic, France, Gabon, Germany, Ghana, Greece, Iceland, Italy, Jamaica, Kenya, Kuwait, Lithuania, Madagascar, Malta, Mauritius, Mexico, Monaco, Mozambique, Namibia, Niger, Nigeria, Pakistan, Panama, Poland, Portugal, Saudi Arabia, Senegal, Slovakia, Slovenia, South Africa, Sudan, Swaziland, Switzerland, Togo, Turkey, UK, USA, Zambia. Id.

See Montreal Convention, supra note 132, at arts. 21, 22. Specifically, Article 21 of the Montreal Convention of 1999, entitled “Compensation in case of death or injury of passengers,” provides:

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each
Montreal Convention in the first tier provides for absolute liability of up to 100,000 Special Drawing Rights, or approximately $140,000, in damages.\textsuperscript{341} To defend against (unlimited) recoveries beyond that amount, the airline must show that it took all necessary measures to avoid damages or that it was impossible to take such measures, a burden which according to a very prominent aviation attorney is "almost impossible to meet in all cases."\textsuperscript{342} Nonetheless, a carrier will be liable, without limit, for all of the plaintiff’s provable damages, should it fail to meet that burden.\textsuperscript{343}

Significantly, however, the Montreal Convention does not allow for punitive damages. The Convention expressly provides that "punitive, exemplary or any other non-compensatory damages shall not be recoverable."\textsuperscript{344} Moreover, the Montreal Convention requires that any cause of action, however founded, can only be brought under the terms, conditions, and limitations that it specifically sets forth.\textsuperscript{345} In other words, if the Montreal Convention applies, U.S. law cannot apply. Accordingly, because punitive damages are an integral part of the U.S. tort system,\textsuperscript{346} and because the Montreal Convention does not allow them, application of the Convention may serve to impair plaintiffs’ rights.

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passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

\textit{Id.} at art. 21.


\textsuperscript{342} Kreindler, \textit{supra} note 341; \textit{see also} Montreal Convention, \textit{supra} note 132, at art. 21(2).

\textsuperscript{343} \textit{See} Montreal Convention, \textit{supra} note 132, at art. 21(2).

\textsuperscript{344} \textit{Id.}

\textsuperscript{345} \textit{See} id.

An advantage of the Montreal Convention is that it significantly simplifies the contents of passenger documentation.\textsuperscript{347} A passenger ticket must be delivered, but this document must only contain a limited number of items, namely the places of departure and destination, as well as one stopping place, if the journey involves one or more stopping places.\textsuperscript{348} However, no penalty attaches for a failure to supply this information.\textsuperscript{349}

The Montreal Convention specifically allows for this limited information to be transmitted by way of non-paper-based ticketing. In other words, carriers may use electronic ticketing and electronic air waybills without being sanctioned for having failed to deliver a paper-based ticket or air waybill.\textsuperscript{350} According to Article 3(2) of the Montreal Convention, “Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.”\textsuperscript{351}

Like the Warsaw Convention, the Montreal Convention requires that passengers be warned about any potential liability limits. Specifically, Article 3(4) provides that “The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.”\textsuperscript{352} Unlike Article 3(2) of the Warsaw Convention and the Hague Protocol, however, Article 3(4) of the Montreal Convention of 1999 does not provide for sanctions in the event of nondelivery of this required notice.

Another interpretative difficulty has to do with form of delivery. It is not clear whether the “written notice” specified by Article 3(4) may be delivered electronically, pursuant to Article 3(2) of the Montreal Convention. Article 3(2) makes specific reference to Article 3(1), but does not mention Article 3(4). That fact, along with the specific use of the term “written notice” in Article 3(4), strongly suggests that the drafters of the Montreal

\textsuperscript{348} See Montreal Convention, supra note 132, at art. 3(1).
\textsuperscript{349} See Thomas J. Whalen, supra note 347.
\textsuperscript{350} See id.
\textsuperscript{351} Montreal Convention, supra note 132, at art. 3(2).
\textsuperscript{352} Id. at art. 3(4).
Convention intended that this notice be delivered in a traditional, paper-based, printed format.

Of course, the efficiencies of electronic ticketing would be severely impaired if, while allowing electronic tickets, a requirement were to be imposed making it necessary for some paper document to be delivered in all instances. However, Article 3(4) of the Montreal Convention, unlike Article 3(2) of the Warsaw Convention, does not require that any document be "delivered" by the carrier. Instead, the operative term used is "given." Perhaps this "written notice" can be "given" at the gate, printed on the back of a boarding pass. As discussed above, courts following the legal reasoning developed in the *Flying Tiger Line* cases (which have not been overruled, despite *Chan*) would find this unacceptable in the context of the Warsaw Convention, particularly in the case of last-minute-arrival passengers. This practice, however, may well be acceptable in the context of the Montreal Convention, especially in view of the relatively expansive liability that it allows.

DOT regulations aside, today there may not even be a need for notice. Formal notice was important when carriers could readily invoke discernible limits on liability. In the eve of the Montreal Convention of 1999, however, there are no limits of liability. Moreover, the first tier of the two-tier liability system, which now prevails for international transportation, seems more generous to passengers than the system, which prevails in U.S. domestic air transportation, because it guarantees recovery up to a certain amount. Because the latter system does not call for notice of any type, it may be that, in the U.S. at least, there is simply no need for notice. Alternatively, the notice may simply state that the Warsaw Convention is applicable and precludes punitive damages, if otherwise available.

The European Council recently endorsed the Montreal Convention of 1999, urging that EU member states ratify the treaty so that it comes into effect simultaneously, on a continent-wide basis, and no later than Dec. 31, 2002. Moreover, the European Commission has proposed regulation to immediately implement key aspects of the Montreal Convention. In the U.S., the Executive Branch transmitted the Convention to the Senate

353 Id.; Warsaw Convention, supra note 1, at art. 3(2).
355 See id.
THE WARSAW CONVENTION
on Sept. 6, 2000, recommending advice and consent.\textsuperscript{356} However, the Senate has not yet acted.

VIII. CONCLUSION

The world of aviation has changed dramatically since the drafting of the Warsaw Convention. Despite the forward-looking mindset of the drafters of the Warsaw Convention, they could not have anticipated the conditions that today prevail in the airline industry. In 1929, “the only international flight was between Key West, Florida, and Havana, Cuba.”\textsuperscript{357} In 1999, 57.3 million passengers traveled internationally, while 583.7 million passengers did so domestically, by aircraft arriving or departing from the 18,345 airports of all sizes and descriptions in the U.S.\textsuperscript{358} Financially, the industry is today very strong, with hundreds of billions of dollars in yearly revenues and tens of billions of dollars in net income.\textsuperscript{359}

Moreover, the industry today has a most impressive safety record. The frequency of fatal accidents in commercial airlines is one per 1.4 billion miles flown, compared to one per 140 million miles flown as recently as 1970.\textsuperscript{360} In fact, it is now much safer to travel by air than by road.\textsuperscript{361} The lifetime odds of dying in an aviation accident for a U.S. resident are one in 3,286, compared with one in 80 for a motor vehicle accident.\textsuperscript{362} The risk of being involved in an aviation accident where there are multiple fatalities is 1 in 3 million.\textsuperscript{363} By contrast, road transportation ac-


\textsuperscript{360} See \textit{Air Flight Much Safer than Road Travel, Statistics Show}, supra note 7. By comparison, the frequency of fatal air accidents was one per 1,000 miles flown in 1907, one per 80,000 miles flown in 1912. See id.

\textsuperscript{361} See id.

\textsuperscript{362} See id.

\textsuperscript{363} See id.
cidents kill about 400,000 people every year worldwide, with a further 12,000,000 injured.\textsuperscript{364}

The Warsaw Convention was drafted with a view towards the conditions confronting the aviation industry at the time. However, the delegates at the original Convention did not intend to adopt a document that would remain frozen in time. Instead, the delegates fully recognized their inability to draft a document that could anticipate and address every single technological development in the field of aviation, rapidly changing even then. According to Mr. Henri de Vos:

I am well aware that there exists no definitive convention – I should say fortunately! ... Therefore, we should consider that in air navigation, it is necessary to begin by laying down the primary general rules of the problem; we make the first effort and we must be happy to do so. If there are improvements to be brought forth, life does not end today, we can do them later on.\textsuperscript{365}

Justice Scalia’s majority opinion in \textit{Chan v. Korean Air Lines} sets forth a restrictive interpretation of the “passenger” guarantees available under Article 3 of the Warsaw Convention. By decoupling Article 3(1) from the punitive Article 3(2), Justice Scalia would lessen the negative impact on a carrier from a failure to abide by the terms of Article 3(1). On the other hand, Justice Scalia’s literal reading of the Warsaw Convention may prove troublesome for air carriers that deliver tickets electronically, because the language of the Convention makes no allowance for such a method of effecting passenger ticket delivery. As discussed above, however, the U.S. ratification of the Hague Protocol, which redrafts Articles 3(1) and 3(2) to explicitly link them, renders largely irrelevant the main thrust of Justice Scalia’s analysis in \textit{Chan}. Justice Scalia’s well-known penchant for literalism in statutory and treaty interpretation, however, remains.\textsuperscript{366}

Like Justice Scalia’s majority opinion, Justice Brennan’s concurring opinion in \textit{Chan v. Korean Air Lines} is a double-edged sword for electronic ticketing. Justice Brennan’s willingness to

\textsuperscript{364} See id.

\textsuperscript{365} Minutes, supra note 8, at 32.

examine the drafting history of the Warsaw Convention bodes well for electronic ticketing. On the other hand, Justice Brennan emphasizes the passenger-protection role of the Warsaw Convention’s notice requirements. Justice Brennan’s concurring opinion relies on legal standards comparable to those developed by the courts in the *Flying Tiger Line* and *Lisi* cases. In particular, Justice Brennan emphasizes that notice must be meaningful, in the sense that it must allow the passenger an opportunity to take remedial action, such as purchasing additional insurance, to protect himself and his family against the Convention’s liability limits in the event of an air disaster.

Regarding type size, the only bright lines available from previous case law is that type size must be larger than 4-point type, but may be as small as 8 points. In the context of electronic tickets, unless the carrier is deliberately attempting to obscure the notice, this particular issue should not be so significant, because, unlike paper-based tickets, electronic tickets are not constrained space-wise (although they may well be constrained memory-wise). Through hyperlinks and other methods of connecting Internet screens, electronic tickets should be able to provide notice in any type size with equivalent convenience to the carrier. If PDF is used to deliver the electronic tickets, type size may well be a significant consideration from the carrier’s point of view. Nonetheless, as a general rule, the carrier should always strive to use type size of 10 points or above in electronic notices of any format.

Before a carrier may satisfy the notice requirements of the Warsaw Convention by way of electronic delivery, it needs to secure the passenger’s consent. This may be done by use of a dialog box that asks the passenger whether he consents to electronic delivery of his ticket, including all associated documentation. Purchase of the electronic ticket may then be confirmed by an e-mail hyper linked to a notice of the Warsaw Convention’s liability limits in the carrier’s website. Alternatively, the notice could be contained in the scroll-down portion of the confirmation document, easily accessible by way of an internal hyperlink. Whatever the case, the hyperlink should be prominently displayed to encourage the passenger to activate it.

With minimal safeguards and common sense, a carrier should be able to satisfy the notice and delivery requirements of the Warsaw Convention in the Electronic Age, even absent a formal amendment to the treaty. This should become an even easier
process when and if the U.S. ratifies the Montreal Convention of 1999 and it enters into force.
Comments