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A 73-Year Odyssey: The Time Has Come For a New International Air Liability System

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For the last seventy-three years representatives from most of the world's governments and airlines have wandered near and far to attend meetings and sign documents intended first to establish and then to maintain a uniform liability system applicable to international air transportation of people, baggage, and goods. The resulting treaty[1] and side agreements have controlled the outcome of thousands of claims and lawsuits. In too many of these cases restrictive rules and low damages limitations have been enforced to the disadvantage of the customers of the world's airlines. The damage limits have occasionally been defeated, but usually only after extended delays and costly litigation.

The reasons for limiting an airline's legal responsibility for the consequences of its wrongful actions or neglect have steadily eroded in the years that have passed since the Warsaw Convention took effect. As this happened, resistance to the limitations grew. In retrospect, most of the attempts to change or do away with the Warsaw Convention[2] resulted in little improvement. Then, in 1997 a temporary solution to the biggest problem came in the form of agreements signed by many but by no means all of the world's

airlines to waive in most instances the liability limits that the law would otherwise enforce. In addition to presenting the Warsaw history, in this paper we will report for the first time on the effect that these new side agreements have had on the resolution of covered injury and death cases. Not surprisingly, the result has been speedier resolutions involving greater compensation for the victims.

At the International Conference on Air Law in May of 1999 a new treaty meant to replace the Warsaw Convention was opened for signature and ratification, the Montreal Convention.[3] If the Montreal Convention takes effect, among other important improvements, it will eliminate the arbitrary caps on personal injury and wrongful death damages, and hold airlines legally responsible for wrongful conduct that injures their passengers. The changes put forth in the Montreal Convention are long overdue. Twenty-two countries have already ratified this treaty. Only eight more are needed for it to take effect. With widespread ratification of Montreal, the Warsaw Convention can be laid to rest and never again cause grieving families further insult. It is with achievement of that goal in mind that our review of the Warsaw Convention odyssey begins.

1929—The Warsaw Convention

Following approximately four years of deliberations that began in Paris, representatives from thirty-two League of Nations countries agreed to *The Convention For The Unification of Certain Rules Relating To The International Carriage By Air Signed on 12 October 1929*, a Treaty that is commonly referred to as the Warsaw Convention. While the United States had observers attend the discussions, it had chosen not to join the League of Nations[4] in 1920 and did not initially sign the Convention.

Before Warsaw could take effect it had to be ratified by a minimum of five of the original signatory countries.[5] It came into force on February 13, 1933, initially binding only Brazil, France, Latvia, Poland, Romania, Spain and Yugoslavia.[6] With the further development of international air travel, at President Roosevelt's request the United States Senate decided to give its advice and consent to join the Convention and it came into force for the United States on October 29, 1934.[7] Warsaw was the first Treaty to address international passengers' rights and air carriers' responsibilities.[8] It introduced the concept of liability for most covered accidents,[9] subject to significant limitations on damages. For example, the air carriers' liability for personal injury or death was capped at 125,000 Poincare Goldfrancs (approximately $8,300) per ticketed passen-

ger[10] unless the passenger could prove "wilful misconduct" by the responsible airline, in which case the limit on damages would not apply[11] and full damages could be recovered under local law.[12] This meant that airlines were immune from liability (over the damages limit) for their negligent conduct. Claims could be filed against an airline in four jurisdictions only, and this did not necessarily even include the victim's permanent residence.[13]

The Supreme Court of the United States has explained the rationale for the limitation on damages:

> Two years after Charles Lindbergh captured the world's imagination by piloting the Spirit of St. Louis from New York to Paris, delegates from two dozen nations met in Warsaw and drafted an international agreement to encourage the establishment of a secure international civil aviation industry. . . .
>
> Air transportation was then viewed as dangerous. The liability limitation was deemed necessary in order to enable air carriers "to attract capital that might otherwise be scared away by the fear of a single catastrophic accident."[14]

Soon after the Warsaw Convention took effect in America, on May 3, 1937, the largest aircraft to ever fly, took off from Frankfurt, Germany bound for Lakehurst, New Jersey with 36 passengers and a crew of 61 on board. "During the landing operation, the airship Hindenburg burst into flames at an altitude of about 200 feet and was burned to destruction by hydrogen fire originating at or near the stern."[15] Under the Warsaw Convention the passenger claims for injury or death were limited to a maximum of $8,300 each, providing an early example of the Treaty at work. The fears that gave rise to the Warsaw Convention "were epitomized by the crash of the Hindenburg in 1937, though the Warsaw Convention's liability limitation could not save the dirigible—then a significant mode of international air transportation—from rapid extinction."[16]

Proof of Wilful Misconduct—A Formidable Burden—The *Cali* Case

Over the years courts have frequently been called upon to resolve disputes over the presence or absence of wilful misconduct within the meaning of the Warsaw Convention. The airlines have usually prevailed, making the limit an effective shield, too often protecting airlines and their insurers against meaningful liability for the horrific and devastating human damage that they have sometimes caused.[17]

What evidence have courts in the United States required for a passenger to prove a claim against an air carrier for wilful misconduct? The answers by the courts have not always been consistent on this point, as the next case will illustrate.

On December 20, 1995, American Airlines Flight 965 crashed into a mountain near Cali, Columbia on a flight from Miami, killing all of the 151 passengers on board. Over 160 passenger lawsuits were consolidated for multi-district pre-trial proceedings. In the litigation[18] American Airlines sought to enforce the damage limitation contained in the Warsaw Convention.[19] The plaintiffs argued that there was wilful misconduct so that the limitation should not apply. On September 11, 1997, United States District Judge Stanley Marcus entered an order granting the plaintiffs' motions for partial summary judgment, finding that there were no genuine issues of material fact and that American Airlines, through its flight crew, was guilty of wilful misconduct as a matter of law.[20] In reaching this conclusion the trial court applied an objective "reasonable person" analysis to determine whether there had been a reckless disregard of the consequences by the flight crew.[21] The court ruled, in the alternative, that he would have reached the same result if the law required a subjective test.[22]

American Airlines appealed and on June 15, 1999, the United States Court of Appeals for the Eleventh Circuit reversed.[23] The court concluded that the Warsaw Convention "requires a plaintiff to establish that the carrier knows that its conduct likely will result in damage—in other words, that the carrier has shown an indifference that a risk of harm exists . . . a subjective test."[24] The Court of Appeals did not agree with Judge Marcus that, using a subjective test, American Airlines was guilty of wilful misconduct as a matter of law. The case was remanded for a trial by jury on the issue.

By the time the *Cali* crash case was decided, the thorny and contentious wilful misconduct issue had been actively litigated in Warsaw Convention cases for over sixty years. The disturbing legacy the *Cali* court found and described was "a body of law that frequently is inconsistent and that provides a vague and nebulous definition of wilful misconduct, rendering it difficult to apply."[25]

1955—The Hague Protocol

After World War II and with the development of larger, wider ranging aircraft allowing the extension to global international mass air transportation—some of the Warsaw countries decided to adjust the Warsaw Treaty to then prevailing economic conditions, raising the liability limit to 250,000 francs (about $16,600) and modernizing the airfreight documentation system. What resulted was The

Hague Protocol,[26] which was signed on September 28, 1955. It took eight years before the thirtieth country had ratified The Hague Protocol and it did not come into force (and then for only thirty-one signatories) until August 1, 1963.[27] The United States did not sign or ratify The Hague Protocol, because the damage limit for personal injury and death was still unacceptable. On July 31, 2002, however, and as a direct result of the decision in *Chubb & Son v. Asiana Airlines*[28], President Bush sent a message to the Senate requesting that it now give its advice and consent to ratify The Hague Protocol, explaining to the Senate that:

> . . . A recent court decision held that since the United States had ratified the Warsaw Convention but had not ratified The Hague Protocol, and the Republic of Korea had ratified The Hague Protocol but had not ratified the Warsaw Convention, there were no relevant treaty relations between the United States and Korea. This decision has created uncertainty within the air transportation industry regarding the scope of treaty relations between the United States and the 78 countries that are parties only to the Warsaw Convention and The Hague Protocol. Thus, U.S. carriers may not be able to rely on the provisions in the Protocol with respect to claims arising from the transportation of air cargo between the United States and those 78 countries. In addition to quickly affording U.S. carriers the protections of those provisions, ratification of the Protocol would establish relations with Korea and the five additional countries (El Salvador, Grenada, Lithuania, Monaco, and Swaziland) that are parties only to The Hague Protocol and to no other treaty on the subject.
>
> A new Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999 (the "Montreal Convention") is pending on the Senate's Executive calendar (Treaty Doc. 106-45). I urge the Senate to give its advice and consent to that Convention, which will ultimately establish modern, uniform liability rules applicable to international air transport of passengers, cargo, and mail among its parties. But the incremental pace of achieving widespread adoption of the Montreal Convention should not be allowed to delay the benefits that ratification of The Hague Protocol would afford U.S. carriers of cargo to and from the 84 countries with which it would promptly enter into force.

> I recommend that the Senate give early and favorable consideration to The Hague Protocol and that the Senate give its advice and consent to ratification.[29]

The Montreal Intercarrier Agreement of 1966

Dissatisfied that a suitable compromise could not be found to address the rights of American citizens, on November 15, 1965, the United States gave notice[30] that it intended to denounce the Warsaw Convention effective May 15, 1966.[31] However, under the auspices of the International Air Transport Association (IATA), an interairline agreement, known as the Montreal Intercarrier Agreement of 1966 was reached, increasing the liability limits for covered accidents to $75,000[32] per passenger. The Montreal Intercarrier Agreement of 1966 was permissible under the Warsaw Convention because "by special contract the carrier and passenger may agree to a higher limit of liability."[33]

The goal of the United States was to remove the limitation on injury and death damages or at least raise the limit to $100,000. In approving the Montreal Intercarrier Agreement of 1966 the United States Civil Aeronautics Board (CAB) explained:

> [T]he decision of the U.S. government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger. Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from and within the United States. The agreement will result in a salutary increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or protocol. The U.S. government has concluded that such arrangements warrant withdrawal of the notice of denunciation of the Warsaw Convention.

> Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States.[34]

A consequence of The Hague Protocol and the IATA Montreal Intercarrier Agreement of 1966 was the dissolution of the unified liability system. Depending on whether a country had ratified either Warsaw, Warsaw/Hague, or just the Hague, and whether the IATA Montreal Intercarrier Agreement applied to a given case, the presumptive liability limit could have been $8,300, $16,600 or $75,000.[35] Furthermore, as the recent *Chubb*[36] case makes clear, some courts have decided that no air transportation liability treaties exist at all between certain countries, a matter that obviously concerns the airline industry and provides independent justification for widespread prompt ratification of the Montreal Convention.

Guadalajara Convention, Guatemala City Protocol and Montreal Aviation Protocols No. 1-4

Of less historical importance were the Guadalajara Convention of 1961[37] and the Guatemala City Protocol of 1971.[38] Guadalajara dealt with the responsibilities of companies other than the contracting carrier but did not have wide spread acceptance and was not signed or ratified by the United States. The Guatemala City Protocol had a provision that would have raised the damages limitation to 1.5 million francs (approximately $100,000) and altered the triggering event in Article 17 from an accident to an "event," but the United States has not signed this agreement either.

In 1975 there was another unsuccessful attempt to modernize the Warsaw system. On September 25, 1975 four different proposed amendments to the Warsaw Convention were signed, Montreal Aviation Protocol Nos. 1 through 4.[39] Montreal Aviation Protocol Nos. 1, 2, and 3 each had different presumptive damage limitations for personal injury and death cases, ranging from a low of 8,300 Special Drawing Rights[40] (SDRs) (Protocol No. 1) (approximately $11,000) to a high of 100,000 SDRs (Protocol No. 3) (approximately $132,000).[41] Like the Guadalajara Convention and the Guatemala City Protocol, Montreal Aviation Protocol Nos. 1, 2 and 3 never took effect in the United States. Montreal Aviation Protocol No. 4 recently took effect in the United States, but it does not deal directly with personal injury and wrongful death limitations, instead it deals with issues tied to liability for baggage and cargo losses and documentation.

1983-2000: KAL 007—Dante's Inferno

On September 1, 1983, Korean Air Lines Flight 007 strayed into the air space of the former Soviet Union. A Soviet fighter plane terminated the flight over Sakhalin Island and it crashed into Soviet territorial waters, shattered and sank, killing all of the 269 individuals on board[42]. Within approximately two months, forty-two lawsuits had been filed arising out of the crash in eight different federal courts.[43]

Over the next seventeen years the KAL007 issues would be dealt with not only in the district court system, but also repeatedly in the Circuit Court of Appeals and, unique for an occurrence with non-constitutional problems, three issues were found worthy for examination and decision by the United States Supreme Court.[44] The issues in contention would cover the gamut of the *Warsaw* pallet—size of the font type for the liability limitation warning on tickets, jurisdiction under article 28,[45] and, after "wilful misconduct" litigation—"Death On The High Seas Act" limitations, to name just a few of the issues resolved.[46]

On November 6, 1983, the Judicial Panel on Multi-District Litigation transferred all of the KAL007 cases to the United States District Court for the District of Columbia and assigned them to Chief Judge Aubry E. Robinson, Jr. for coordinated or consolidated pre-trial proceedings pursuant to 28 U.S.C. § 1407.[47] Claims were brought, *inter alia*, against Korean Air Lines.[48]

Early in the litigation Korean Air Lines sought the protection of the limitation on damages set forth in Article 22 of the Warsaw Convention. Trying to defeat this argument without an expensive and time-consuming trial on the wilful misconduct issue, the Plaintiffs' Steering Committee ("PSC") filed a motion for partial summary judgment, arguing that the limitation provision of the Warsaw Convention was not enforceable because the notice to the passengers on some of their tickets was printed on non conforming stock in type size that was too small.[49] In this partial summary judgment motion the PSC also sought immediate payment[50] of $75,000 per decedent pursuant to the IATA Montreal Agreement of 1966, without prejudice to their clients' rights to pursue further damages.

On July 25, 1985, Judge Robinson denied the PSC's motion for partial summary judgment and ruled that KAL "was entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement" and that "Plaintiffs may not receive immediate payment of $75,000, there being material issues of fact with respect to the amount of unliquidated damages [in each case]."[51] The same day Judge Robin-

son also dismissed three of the actions for lack of jurisdiction, holding that the United States court was not a proper jurisdiction for these three cases under Article 28 of the Warsaw Convention.[52]

The plaintiffs appealed the order rejecting their motion for partial summary judgment. On September 25, 1987, in an opinion authored by then-Circuit Judge Ruth Bader Ginsburg, the plaintiffs lost their first appeal concerning the notice/type size issue. In what may in retrospect be one of the judicial understatements of the century, Judge Bader Ginsburg began her analysis by pointing out that this case "arises out of an air disaster and raises turbulent federal questions."[53] On April 4, 1988, the Supreme Court of the United States granted plaintiffs' petition for writ of certiorari, and later affirmed.[54]

After five years of frustrating litigation, the plaintiffs obtained a small victory on November 7, 1988 when Judge Robinson found that the plaintiffs had sufficient evidence to proceed to a trial by jury on whether the flight crew on KAL 007 was guilty of wilful misconduct that caused the crash.[55] The judge rejected KAL's argument that since the Death on the High Seas Act ("DOHSA")[56] applied, there was no right to a trial by jury.

In 1989, the plaintiffs reached their apex of success when a jury determined that the crash was caused by wilful misconduct by KAL. $50 million in punitive damages were awarded. On October 11, 1989, Judge Robinson denied KAL's motions for judgment notwithstanding the verdict and mistrial, instead entering judgment on the verdict.[57] KAL appealed and on May 7, 1991, the Court of Appeals affirmed the finding of wilful misconduct, vacated the punitive damages award and remanded 137 passenger cases for damages trials free of the Warsaw Convention damages limit.[58] On December 2, 1991, the United States Supreme Court denied KAL's petition for writ of certiorari.[59] Sadly, it took the plaintiffs over eight years of active and aggressive litigation[60] to resolve the wilful misconduct issue and defeat the draconian damages limitations, but even then it wasn't completely finished. Russia finally later released the cockpit voice recorder (CVR) and digital flight data recorder (DFDR) and, remarkably, KAL sought a new trial on the wilful misconduct issue, a request, ultimately unsuccessful, that caused additional delay. Damages trials did not proceed until the mid and late 1990s.

KAL007 presents an example of cumbersome litigation lasting seventeen years and the type of injustice to surviving families that has been the result of the Warsaw Convention. And it must be remembered that KAL was a partial success for the plaintiffs, after all, they did prove that wilful misconduct by KAL caused the crash,

only later to be defeated to some extent by DOSHA interpretations. Although the KAL007 families triggered and spearheaded the modernization of DOHSA, which now finally allows recovery of intangible damages for loss of "care, comfort and companionship,"[61] they were deprived of the benefits of this amendment to the law because the retroactivity was limited to the crash of TWA 800 in 1996.[62]

1995- 1997: Kuala Lumpur IATA Intercarrier Agreement

After unsuccessful attempts to ratify Montreal Aviation Protocol #3 and with some countries unwilling to proceed without the United States, IATA was again persuaded to attempt to modernize the Warsaw system by agreement, which resulted in a major advance in 1995 with the development of the Kuala Lumpur IATA Intercarrier Agreement of October 31, 1995 and its associated Agreement on Measures to Implement the IATA Intercarrier Agreement.[63] The air carriers in the United States, through the Air Transport Association, decided to file a different implementation agreement—the IPA. For ease of reference these three agreements will collectively referred to herein as the "IIA."

In covered accidents, the IIA imposes strict liability upon carriers for per person damages of up to 100,000 SDRs (worth just under $132,000 under conversion rates in effect at the time of publication) and presumptive liability beyond the strict liability limit for full damages unless the carrier proves affirmatively that it has "taken all necessary measures to avoid the damage" or that it was "impossible for [the carrier and its agents] . . . to take such measures . . ."[64]

Under the IIA "the wilful misconduct exception of Article 25 is rendered irrelevant because the carrier has contractually agreed to pay all of a passenger's damages including amounts over 100,000 SDRs, unless the carrier can prove the all necessary measures affirmative defense to avoid liability beyond the SDR threshold."[65] The burden of proof has shifted.

The United States Department of Transportation ("DOT") initially approved the IIA with conditions that were unacceptable to IATA on November 12, 1996.[66] IATA then filed a petition for reconsideration which resulted in a modification of the conditions by the DOT[67] which IATA agreed to. On February 14, 1997, the IATA Director General declared that the IIA "was in effect for those carriers that had signed and, where appropriate, had received the requisite governmental approvals."[68] One hundred twenty-three carriers worldwide representing more than 90 percent of the world's civil air transportation industry have signed the IIA[69] and ninety-

one carriers have signed the Agreement on Measures to Implement the IATA Intercarrier Agreement.[70]

The IIA has Proven to be an Excellent Temporary Solution to Many of the Most Serious Problems with the Warsaw System

For the thirty years preceding the IIA, the 1929 Warsaw Convention supplemented by the Montreal Intercarrier Agreement of 1966 governed most of the international air disaster cases litigated in the United States. In the last five years a number of cases have now been litigated under the new IIA regime. As the KAL007 case reveals, before the IIA injustice in international air disaster litigation was too frequent, unreasonable delay too common, and unfair expenses too prevalent. When one obstacle was overcome another was raised. This is the backdrop on which the IIA was built. Now that the IIA has been in effect for approximately five years, it is reasonable to retrospectively analyze cases resolved under the IIA to determine if the gains are real or illusory.

Swissair Flight 111

The first air disaster case litigated in the United States after the IIA took effect was a result of the crash of Swissair Flight 111 on September 2, 1998 near Peggy's Cove, Nova Scotia in the territorial waters of Canada. An early issue involved whether, as a result of the IIA, the family of each deceased passenger was automatically and immediately entitled to payments of 100,000 SDRs (then approximately $133,000) after the crash without prejudice to the resolution of their full damages claim later. Legal issues associated with this contention were not resolved because Swissair senior management eventually decided that these payments should be voluntarily made on behalf of each decedent. Before this, $20,000 per decedent immediate payments were made very soon after the crash in most cases.

In *Swissair*, at the first hearing in the consolidated federal litigation that followed, Swissair and Boeing announced that they had reached an agreement which resulted in their ability not to contest liability. From that point forward, Swissair made no attempt to raise the Warsaw Convention/Montreal Agreement limitations as a defense. According to the presiding judge:

> Once in this court, Boeing and Swissair, pursuant to a joint agreement, conceded liability for purposes of the claims brought on behalf of the passengers and agreed to pay full compensatory damages available under whatever law is applicable to a particular decedent in a particular

> case, provided that there was no remaining claim for punitive damages.[71]

Boeing and Swissair did file contentious motions seeking to dismiss the cases involving deaths of individuals that did not reside in the United States on the basis of *forum non conveniens*, although these motions were never decided and most, if not all such cases have now been settled in the United States, along with many of the wrongful death cases filed on behalf of U.S. resident passengers. Since then, the United States Court of Appeals for the Ninth Circuit has ruled "that Article 28(1) of the Warsaw Convention precludes a federal court from dismissing an action on the ground of forum non conveniens."[72] The court reached this conclusion because:

> Although the text of the Warsaw Convention is ambiguous, the purposes and drafting history of the treaty, as well as evidence of the parties' post-ratification understanding and treatment of the issue in other treaties and by other courts, persuade us that the contracting parties did not intend to permit the plaintiff's choice of national forum to be negated by the doctrine of forum non conveniens.[73]

In *Swissair*, most of the legal issues other than the amount of compensatory damages due families that have not settled have now been resolved.[74] For example, Chief Judge Giles ruled that DOHSA governed the case and dismissed all claims for punitive damages, finding such damages were not allowed by DOHSA or the Warsaw Convention. The remaining families should be allowed to try their damages cases in the near future.

American Airlines Flight 1420

American Airlines Flight 1420 crashed at Little Rock, Arkansas on June 1, 1999. While this was a flight from Dallas, Texas to Little Rock, Arkansas, approximately one-third of the 132 passengers were returning from trips to Europe, flying on international tickets through American's hub at Dallas-Ft. Worth. Nine of the ten passengers that were killed were traveling on international tickets. The claims of the passengers traveling on international tickets, and of their families, were governed by the Warsaw Convention and the IIA.[75] American Airlines made immediate payments of $25,000 to most of the passengers in the immediate aftermath of the crash.

In the first months following the crash passengers filed five federal actions for damages in two districts. On December 14, 1999, the Judicial Panel on Multi-District Litigation assigned the case to

the Eastern District of Arkansas for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.[76] The late Judge Henry Woods wasted no time in setting an initial hearing, which took place on January 31, 2000.[77] At this hearing the Judge promptly questioned American Airlines to determine if they would pursue the "all necessary measures" defense and informed the plaintiffs that he was ruling out punitive damages as a matter of law. Under some pressure from the court American Airlines waived the all necessary measures defense and Judge Woods promptly set damages trials in all of the Warsaw/IIA cases and announced that resolution of these cases would be a top priority.

The first case was set for trial on June 17, 2000, less than six months after the first hearing and just over one year after the crash. The other Warsaw Convention cases were all set to be tried in the following weeks. On August 11, 2000 Judge Woods reported that "[t]he international cases which have not settled are now set for trial in the next sixty days for the sole determination of compensatory damages."[78]

American Airlines sought leave of court to file a third-party complaint for contribution under Arkansas law, arguing that negligence by the air traffic controllers contributed to cause the crash. In the international cases, Judge Woods refused to allow American to proceed with this claim, explaining that:

> American, as a signatory to the IATA, has assumed liability to international passengers solely on the basis of its contractual agreement to be absolutely liable to international passengers. Its liability is not based on negligence, tort or fault. None of these concepts are involved in any way with American's liability towards its international passengers. In sum, American is liable to its international passengers in contract, not in tort. Because of this, there can be no claim against the United States for contribution under Arkansas law. While under the IATA, discussed above, American reserved its rights to contribution and indemnity, there simply is no right of contribution under Arkansas law in this circumstance.[79]

The great majority of the Warsaw Convention cases were settled in the *Little Rock* litigation by the end of 2000, less than eighteen months after the crash. For those that preferred trial, the procedure was still expeditious. For example, on October 27, 2000, Judge Woods entered judgment on a jury verdict in favor of Anna Lloyd in a Warsaw Convention case. Around the same time another passenger with severe injuries whose rights were governed by the

Warsaw Convention and the IIA proceeded to trial and obtained an $11 million jury verdict that was promptly paid.[80] Unhappy with the result in *Lloyd*, American Airlines appealed and the appeal was resolved on May 29, 2002, offering the plaintiff a remittitur of $1.5 million of her $6.5 million verdict.[81]

EgyptAir Flight 990

Another major air disaster governed by the IIA and DOHSA occurred on October 31, 1999, when EgyptAir Flight 990 crashed into the ocean sixty-one miles off the coast of Nantucket Island after take-off from New York bound for Cairo, Egypt. The cases arising out of the crash were transferred for consolidated and coordinated pretrial management to Judge Block in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1407 on June 7, 2000.[82] EgyptAir has agreed not to contest its liability for payment of full compensatory damages without arbitrary limitations. It has not since raised the "all necessary measures" defense.

While EgyptAir initially refused to make automatic SDR payments to the families, they did offer settlements early on and, while few of those were accepted by American[83] families, they also offered to pay one-half of the proposed settlement amounts with no strings attached, as automatic payments without prejudice to the right of each victim to proceed with their claims for more generous compensatory damages. This resulted in many American families receiving early payments without prejudice to their right to proceed with their disputed damages claims.

Many of the U.S. filed cases arising out of this crash have now been resolved by settlement. There are some plaintiffs who have not yet settled. For any that choose a trial on the amount of damages owed, it is likely that these trials will be set soon, and unlikely that any case against EgyptAir that was properly filed in the United States will remain pending and unresolved for long.

Alaska Air Flight 261

On January 31, 2000, Alaska Air Flight 261, en route from Puerto Vallarta, Mexico to San Francisco and Seattle, crashed into the Pacific Ocean near Point Mugu, California, killing all of the eighty-eight people on board. Litigation was filed and ultimately consolidated for coordinated pre-trial management before Judge Legge in the Northern District of California. Judge Legge promptly recognized that the case was governed by the Warsaw Convention as modified by Montreal Protocol No. 4 and the IIA.[84] Relying on a number of recent cases, he concluded that "the Convention is limited to compensatory damages and does not include punitive

damages."[85] Therefore, on May 1, 2001, Judge Legge granted Alaska Air's motion for judgment on the pleadings, dismissing all claims for punitive damages against the air carrier (but not other defendants).[86] Immediate payments have been made and 100,000 SDRs per decedent paid.

Alaska Air is not contesting its liability for compensatory damages under applicable law. Therefore, arbitrary damages limitations will not be a problem for the Alaska Air victims. Warsaw Convention limits will not slow this litigation down. A full liability work up is under way by those families who choose to proceed with litigation to determine the liability of other defendants including Boeing and McDonnell Douglas for compensatory and punitive damages. Because the crash occurred within twelve nautical miles of California, it is not governed by DOHSA.

Singapore Airlines Flight SQ006

Another major international air disaster that is being litigated in the United States involves the crash of Singapore Airlines Flight SQ006 on October 31, 2000. While taking off from Taipei bound for Los Angeles in a typhoon-like condition and on a closed runway the plane crashed into construction equipment killing eighty-one individuals. On April 28, 2001 the Judicial Panel on Multidistrict Litigation transferred all U.S. filed cases to United States District Court Judge Gary Feess of the Central District of California for consolidated and coordinated pretrial proceedings.[87] Since that time three published opinions have been issued in the case, all dealing with contentious discovery issues.[88] Singapore Airlines has made $20,000 voluntary payments and, so far, is raising the all necessary measures defense.

"All necessary measures" has been described as a "rare" defense by IATA.[89] It is hard to imagine a clearer case for rejection of the defense than one involving an unnecessary take off in inclement weather on a closed runway that crashes into construction equipment. Counsel, airlines, and insurers would be well advised to carefully consider the potential ramifications of Rule 11 of the Federal Rules of Civil Procedure on their choice to raise the all necessary measures defense.

Air France Flight 4590—The Concorde

Outside of the United States, the IIA has also had a favorable effect. On July 25, 2000, Air France Flight 4590 crashed near Paris, France, killing 113 people. Within nine months after the crash, legal advisers for the victims' families reached an out of court settlement agreement with all defendants and their insurers which it is believed would not have been possible without the IIA. AF4590

presented unusual circumstances. By the first anniversary of the Concorde crash most families had received their damages awards.[90]

AF4590 was a charter group flight organized by a German travel agency/ship operator connected with a maritime cruise. The tragedy involved the group organizer, the air carrier, the airport, the plane manufacturer, a tire manufacturer, an American airline, and several governments. Many had an interest in the expeditious resolution of the tragedy's aftermath.

Almost immediately after the disaster some of the parties began informal exchanges on how to address the resolution of the victims' families' needs. Family advocates had worked with Air France two years prior to the AF4590 tragedy to help develop their crisis management program. At the suggestion of these advocates two plaintiff's attorneys traveled to the United States to meet with various United States government agencies as well as with aviation plaintiffs counsel in the United States to discuss how to address jurisdictional and damages issues and at the same time to assess the public safety, security and operational records of the Concorde operations in the United States.[91] From then on discussions with representatives of all parties continued—ultimately resulting in developing a "midatlantic" formula for uniform damages per seat/traveler to be distributed over six hundred claimants according to the laws of their respective countries. This process proceeded without any active judicial action or intervention. The claims of some families of the plane's crew were not included in the settlement that resulted.

In contrast, the *Birgenair* crash off the coast of the Dominican Republic in 1996, which also involved a charter flight (this time to Europe), proceeded under the original Warsaw/Hague system without the benefit of the Montreal Intercarrier Agreement of 1966. The victims' families, without any meaningful legal remedies, were limited to the Warsaw/Hague cap of approximately $16,000 per decedent whereas the recoveries in the Concorde case were approximately $1.6 million dollars on average per decedent under the "midatlantic" Warsaw /IIA solution.

Verdesca v. American Airlines

The IIA has not only improved commercial air disaster litigation; it has also had a favorable effect on other types of Warsaw Convention cases. For example, on May 10, 1998, while disembarking on an American Airlines flight from Dallas to Paris, Sondra Verdesca fell down the stairs landing on the tarmac and later died of massive head injuries. Her husband filed a wrongful death lawsuit against American Airlines in the state court in Texas which

was later removed to the federal court. American Airlines was a signatory to the IIA. The plaintiff moved for partial summary judgment, contending that the defendant did not take "all necessary measures" to prevent the accident because there were no airline employees at all assisting the passengers as they left the plane. The court ruled, following *El Al v. Tseng*,[92] that the Warsaw Convention provided the plaintiff's exclusive remedy.[93] Viewing the evidence in the light most favorable to the defendants, as the court was required to do on plaintiff's summary judgment motion, the court concluded that there was a triable issue of fact over whether the defendant took all necessary measures to avoid the accident. That issue of fact will never be resolved, because shortly after the ruling the parties negotiated a settlement that ended the case.

Going Forward—The Montreal Convention of 1999

From the beginning the IIA was meant to be a temporary bridge between the Warsaw/Hague/Montreal(1966) patchwork and an ultimately comprehensive and modern international air transportation treaty suitable for this century. With all of its advances the IIA has its flaws. For example, the airlines have agreed to absolute liability and have failed to ensure their right to obtain contribution or indemnity from other companies or governments whose negligence contributes to cause an air crash, as Judge Woods made clear in the *Little Rock* litigation. American courts have held airlines in domestic cases legally responsible for their wrongful conduct, but have not required the airlines to be absolute insurers, yet this is the practical effect of the IIA under current interpretation. Another problem is that nothing would stop some of the member airlines from withdrawing from the IIA on relatively short notice, returning to the pre IIA justice travesty. What was needed when IIA was signed is still needed today, a new binding treaty for all of the 189 countries that are members of ICAO, so that the benefits of the IIA can grow beyond a private agreement into a lasting international treaty and so that the flaws of the IIA can be rectified.

On October 28, 1999, at the conclusion of an International Conference on Air Law at the International Civil Aviation Organization (ICAO), The Montreal Convention[94] ("Montreal 99") was adopted by acclamation—initially signed by 52 countries, this time including the United States.[95] Since then 22 countries have ratified Montreal 99, a long way towards the 30 countries needed to put the new treaty into effect.[96] On September 6, 2000 President Clinton submitted Montreal 99 to the United States Senate for its advice and consent toward ratification.[97] President Bush reiterated this

request on July 31, 2002, stating: "I urge the Senate to give its advice and consent to that Convention, which will ultimately establish modern, uniform liability rules applicable to international air transport of passengers, cargo, and mail among its parties."[98]

The centerpiece of the Montreal 99 is Article 21:

> Article 21—Compensation in Case of Death or Injury of Passengers
>
> 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 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.

Under this provision, the airlines are strictly liable for the first 100,000 Special Drawing Rights in compensable damages in personal injury and death cases, but only liable beyond the limited amount in the event that the airline was negligent. The degree of negligence, however, is not relevant. No matter how gross the neglect, Montreal 99 does not allow punitive damages.[99] On the other hand, whether the degree of the air carrier's causal negligence was 1 percent or 100 percent, the air carrier is liable for the full amount of the personal injury and wrongful death damages allowed under local law. The result reached by Judge Woods in the Little Rock case on the issue of American Airlines' right to contribution against the United States would probably be decided differently under the Montreal Convention, because "nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person."[100]

Resolution No. 2 associated with the Montreal Convention "urges air carriers to make advance payments without delay based on the immediate economic needs of families of victims, or survivors of accidents" and encourages governments to "take appropriate measures under national law to promote such action by carriers."

This is consistent with one of the declarations made in the Convention, that of "recognizing the importance of insuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution."[101] The Montreal Convention deals clearly with these issues:

> Article 28—Advance Payments.
>
> In the case of aircraft accidents resulting in death or injury to passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payment shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the carrier.

The Montreal Convention also deals clearly with code sharing arrangements between airlines, successive carriage and carriage that is only partially performed by air.[102] In addition, Montreal 99 requires air carriers to operate with insurance.[103] Concerning the four jurisdictions that a plaintiff was allowed under the Warsaw Convention to bring a claim, a "fifth jurisdiction" has been added by the Montreal Convention:

> In respective damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article [the old Article 28 repeated verbatim] or in the territory of a State Party in which at the time of the accident the passenger has his or her principal or permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.[104]

The United States Supreme Court has identified the primary reasons for the severe limitation on damages laid down in 1929. These dealt with the dangerous nature of flying at the time and the perceived need to provide special support to the young airlines so that they could attract investors. In 1929 scheduled international air travel hardly existed, civil liability systems as we know them

today were unheard of and there were no unified rules or regulations for airfreight documentation. Today and for at least the last thirty-five years, these reasons no longer can justify an international airline exception to otherwise applicable liability principles.

In the early days, aviation crashes may have been viewed as unavoidable and the choice to fly tantamount to an assumption of the risk. Today, flying on a commercial airliner is viewed as a reasonably safe activity and the statistics bear that out in spite of September 11. Fatality rates published by ICAO reasonably measure aviation safety. The aviation fatality rate dropped nearly a hundred fold from 1925 (45 people per 100 million passenger miles) to 1965 (.55 per 100 million passenger miles).[105] There has been even further improvement since then, with the latest available statistics covering 2001 and demonstrating .02 fatalities per 100 million passenger kilometers.[106]

While airline passenger losses have dramatically decreased in percentage to total air traffic, the actual number of incidents with fatalities is increasing, and will continue to do so commensurate with the development of air transportation worldwide. Furthermore, fatalities on the ground caused by air tragedies have dramatically increased. This development makes it urgent to revisit the 1952 Treaty of Rome and its 1978 Protocol of Amendment,[107] a procedure outside of the Montreal Convention of 1999, as are the considerations of adequate, affordable war risk and terrorist insurance.

The IIA concept of presumptive liability for full compensatory damages without pre-conceived arbitrary limitations has contributed substantially to speedier damage resolutions. The concept of reversing the burden of proof has worked. For example, it is now just over three years after the *Little Rock* crash and long ago all of the Warsaw/IIA cases that arose from it were resolved and paid, including those that proceeded to trial. In contrast, by the time the KAL litigation was three years old, the plaintiffs were involved with interlocutory appeals and still years away from their wilful misconduct trial, after which they would wait years again before overcoming defendants' challenges and other major obstacles to recovery, ultimately to face contentious litigation that did not go well, over the available damages under DOHSA. After losing loved ones under the most tragic of circumstances, such convoluted legal proceedings cannot be justified and no longer need to be accepted.

After World War II the United States became the leader in civil air transportation and in airplane development as well as manufacturing. The League of Nations, with headquarters in Geneva, Switzerland on the bucolic Lake of Geneva was reborn in San

Francisco as The United Nations and then relocated to New York, a dynamic financial and economic center. Romantic philosophical reflections were replaced by everyday post-World War II realities. The international community has looked to America for worldwide leadership in many areas, including in international aviation safety, security, rules, regulations and treaties. Yet, when it came to the Warsaw Convention the world has been excruciatingly slow to adapt this worthwhile endeavor for unification to modern requirements.

Montreal 99 is not only an improvement compared to our presently so fractured system, it also will simplify, clarify and expedite the fair resolution of fundamental and recurrent liability questions in international air transportation cases. The IIA has accomplished much, but it is a mere contract, a welcome way station on a long and painful odyssey. That journey can and should end with widespread ratification of the Montreal Convention, this time with the United States fully participating. It is time to return to a unified international air liability system, one based on principles of enduring fairness.

David E. Rapoport is a veteran trial attorney with substantial experience representing air disaster victims. Currently, he is a member of the court appointed plaintiffs' steering committees in federal litigation arising out of three recent international air disaster cases that were each governed by the IATA Intercarrier Agreement of 1997. In recent years, he successfully represented more than fifty victims of more than a dozen major air crash cases and served as the lead trial attorney in the last air carrier case to be tried on liability issues in the U.S. Mr. Rapoport is admitted to practice law before the Supreme Court of the United States and many lower courts. He is the Illinois State Coordinator for the National Board of Trial Advocacy and serves as the Vice-Chair of the Chicago Bar Association's Aviation Litigation Section.

Hans Ephraimson-Abt became involved in the Warsaw Convention when Korean Airlines Flight 007 was terminated by a Soviet fighter plane over Sakhalin Island in 1983. His oldest daughter was one of the 269 passengers who were never recovered. The legal proceedings in KAL007 lasted for 17 years, with three issues accepted by the U.S. Supreme Court. He is the Chairman of "The American Association for Families of KAL007 Victims" and spokesman for "The Air Crash Victims Families Group." In 1989 he was invited to testify before the Senate Foreign Relations Committee in favor of "The Montreal Protocols Nos. 3 & 4". In 1994 he was a member of a workgroup at the "National Economic

Council" which led, in 1995, to an IATA aviation conference resulting in the "IATA Intercarrier Agreement" (IIA). He represented victims' families associations in an informal coalition of the air transportation industry, government agencies, and others which contributed to the Montreal Convention of 1999. He also was the spokesman of a de facto observer delegation to the 33rd Assembly of the International Civil Aviation Organization (ICAO). He is a businessman, now retired.

[The next page is 22,175.]

Endnotes

[1] The Convention For The Unification of Certain Rules Relating To The International Carriage By Air, Signed at Warsaw on 10 October 1929, 49 Stat. 3000, 3020-21, T.S. No. 876 (1934), note following 49 U.S.C. §40105. The official United States translation of the Convention will be used in this article and is found at 49 Stat. 3014-23.

[2] *Id.*

[3] The Convention For The Unification of Certain Rules Relating To The International Carriage By Air, Signed at Montreal on 28 May 1999, DCA Doc. No 57.

[4] *See http//www.history.acusd.edu/gen/WW2Timeline/1919 Legue2.html*

[5] According to Article 37(2) of the Warsaw Convention: —"(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the nineteenth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

[6] *http://www.icao.int/cgi/goto_leb/treaty.htm*

[7] *http://www.icao.int/cgi/goto_leb/treaty.htm.*

[8] The Warsaw Convention does not cover legal actions that an airlines' customers may have against parties other than the airline, such as airframe manufacturers and air traffic controllers.

[9] According to Article 17 of the Warsaw Convention: "the carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Article 20 of the Warsaw Convention, subparagraph 1, the treaty states: "the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." In addition, Article 21 of the Convention makes clear that: "if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provision of its own law, exonerate the carrier wholly or partly from his liability."

[10] Article 22 of the Warsaw Convention.

[11] According to Article 25 of the Warsaw Convention: "(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 wilful 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 to be equivalent to wilful misconduct. (2) Similarly, the carrier shall not be entitled to avail himself of said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

[12] The United States Supreme Court has determined that Articles 17 and 24(2) of the Warsaw Convention provide "nothing more than a pass-through, authorizing us to apply the law that would govern in absence of the Warsaw Convention." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 229 (1996) (applying Death on the High Seas Act to calculate wrongful death damages in a wrongful death case arising out of the crash of Korean Air Lines Flight 007). *See also Maddox v. American Airlines, Inc.*, 298 F.3d 694, 697 (8th Cir. 2002) ("thus, Article 17 is a 'pass-through' provision which, absent special federal legislation applicable to Warsaw Convention cases, provides nothing more than an authorization to apply whatever law would govern in the absence of the Warsaw Convention.").

[13] Article 28 of the Warsaw Convention in subparagraph 1 states: "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination."

[14] *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 264-265 (1984) (citing Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 499 (1967)).

[15] *http://www.nlhs.com/tragedy.htm.*

[16] *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 265 n. 1 (1984).

[17] *Compare, Grey v. American Airlines*, 227 F.2d 282 (2d Cir. 1955) (no wilful misconduct); *Goepp v. American Overseas Airlines*, 305 NY 830, 114 N.E.2d 37 (1953) (no wilful misconduct); *Ross v. Pan American Airways*, 299 NY 88, 85 N.E.2d 880 (1949) (no wilful misconduct); *Wyman v. Pan Am Airways*, 293 NY 878, 59 N.E.2d 785 (1944) (no wilful misconduct); *with American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949) (ample evidence to support jury finding of wilful misconduct in case involving crash into the side of a mountain when flight crew knowingly violated a civil air regulation which required flying at least 1,000 feet above the highest obstacle within five miles).

[18] *In re Air Crash Near Cali, Columbia on December 20, 1995*, 985 F. Supp. 1106 (S.D. Fla. 1997).

[19] The limit was $75,000 as a result of the Montreal Intercarrier Agreement of 1966 (to be discussed *infra*).

[20] *In re Air Crash Near Cali, Columbia on December 20, 1995*, 985 F. Supp. 1106 (S.D. Fla. 1997).

[21] An objective test, measuring whether an airline was guilty of wilful misconduct by comparing the conduct in the case at hand with what a reasonable person under similar circumstances would have done is clearly a much easier burden of proof for plaintiffs. A subjective test, on the other hand, would be a much more difficult proposition to prove in air disaster litigation. Few pilots would knowingly choose to endanger their own lives, their airplane and all of their passengers.

[22] *Id.* at 1127-29, 1138.

[23] *Cortes v. American Airlines*, 177 F.3d 1272 (11th Cir. 1999), *reh. den. en banc*, 193 F.3d 525, (11th Cir. 1999); *cert. den.*, 528 U.S. 1136 (2000).

[24] *Id.* at 1291.

[25] *Id.* at 1287.

[26] *Protocol to Amend The Convention For The Unification of Certain Rules Relating To The International Carriage By Air*, signed at The Hague on September 28, 1955.

[27] *See http//www.tc.gc.ca/Actsregs/cba-ita/cba2.html#SCHEDULE%201.*

[28] 214 F.3d 301 (2d Cir 2000), *cert. den.* 533 U.S. 928 (2001).

[29] *http://www.whitehouse.gov/news/releases/2002/07/20020731—4.html.*

[30] Article 39 of the Warsaw Convention states that "[a]ny one of the High Contracting Parties may denounce this convention. . ." and that the "[d]enunciation shall take effect six months after the notification of denunciation and shall operate only as regards the party which shall have proceeded to denunciation."

[31] "[S]uch action was solely because of the Convention's low limits of liability for personal injury or death to passengers." *Order of Civil Aeronautics Board* dated May 13, 1966, reprinted in note following 49 U.S.C. § 40105.

[32] "By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which results in death, wounding, or other bodily injury of a passenger. The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. . . ." 49 Stat. 3000, 3020-21, T.S. No. 876 (1934), note following 49 U.S.C. § 40105 (comments following text of the Warsaw Convention).

[33] Article 22 of the Warsaw Convention.

[34] CAB Order dated May 13, 1966 approving CAB 18900. In 1983, the CAB adopted regulations mandating participation in the Montreal Intercarrier Agreement. 14 C.F.R. 203.1 *et seq.*

[35] This was in direct conflict with the cardinal purpose of the Warsaw Convention, which was to "achieve uniformity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991). *See also, El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169-72 (1999); *Hosaka, et al. v. United Airlines, Inc., et al.*, 2002 U.S. App. LEXIS 19176, *13 (9th Cir. 2002).

[36] *Chubb & Son v. Asiana Airlines*, 214 F.3d 301 (2d Cir 2000), *cert. den.* 533 U.S. 928 (2001).

[37] Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed in Guadalajara, on 18 September 1961.

[38] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955, signed at Guatemala City, on 8 March 1971.

[39] Additional Protocol No. 1 to Amend Convention For The Unification of Certain Rules Relating To The International Carriage By Air, signed at Warsaw on 12 October 1929, signed at Montreal, on 25 September 1975; Additional Protocol No. 2 to Amend Convention For The Unification of Certain Rules Relating To The International Carriage By Air, signed at Warsaw on 12 October 1929, Signed at Montreal, on 25 September 1975; Additional Protocol No. 3 to Amend Convention For The Unification of Certain Rules Relating To The International Carriage By Air, Signed at Warsaw on 12 October 1929, Signed at Montreal, on 25 September 1975; and Additional Protocol No. 4 to Amend Convention For The Unification of Certain Rules Relating To The International Carriage By Air, Signed at Warsaw on 12 October 1929, Signed at Montreal, on 25 September 1975.

[40] Special Drawing Rights ("SDRs") were created by the International Monetary Fund (IMF) in 1969 as an international reserve asset. "The SDR is valued on the basis of a basket of key national currencies and serves as the unit of account of the IMF. Special Drawing Rights, A Fact Sheet by the IMF, *http://www.imf.org/external/np/exr/facts/sdr.htm.* Based on conversion rates on October 7, 2002 one U.S. dollar will buy.759501 SDRs and one SDR will buy $1.31665.

[41] Based on conversion rates on October 7, 2002 one U.S. dollar will buy.759501 SDRs and one SDR will buy $1.31665. *http://www.imf.org/external/np/tre/sdr/drates/0701.htm.*

[42] Mystery still surrounds the KAL 007 crash.

[43] *In re Korean Air Lines Disaster of September 1, 1983*, 575 F. Supp. 342, 343 (J.P.M.L. 1983).

[44] *Chan v. Korean Air Lines*, 490 U.S. 122, 127 (1988) (The "Warsaw Convention does not eliminate the limitations on damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation"); *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996) (Death on the High Seas Act, 46 U.S.C. App. §761 *et seq.* does not allow loss of society damages); *Dooley v. Korean Air Lines*, 525 U.S. 116 (1998) (Death on the High Seas Act does not allow conscious pain and suffering damages or any other category of non-pecuniary losses). Distinguished judges like Antonin Scalia, Sandra Day O'Connor, Abner Mikva, Pierre Leval and others would either sit on appeals court panels or write opinions for the court. Clarence Thomas and Ruth Bader Ginsberg would be involved in KAL 007 issues both on the District of Columbia Circuit Court of Appeals where the latter wrote an opinion of the court, and again after they were elevated to the Supreme Court.

[45] *E.g., Wyler v. Korean Air Lines*, 928 F.2d 1167, 1174-75 (D.C. Cir 1991) (affirming dismissal of 10 cases pursuant to Article 28 of the Warsaw Convention, finding that "domicile" of the carrier means the corporation's headquarters, not anywhere it does substantial business). In three cases the jurisdiction got so convoluted that in one instance the decedent's family, residing in midtown Manhattan, had to bring their cases in the Philippines, in another the family, residing within minutes of the competent Eastern District of New York Satellite Court had to bring their case in Canada; in stark contrast the families of two Taiwanese ship engineers who were ordered to return to Taiwan from Panama had their cases tried and resolved in the United States District Court for the Southern District of New York solely because their tickets were purchased and paid for by a shipping agent in New York.

[46] *E.g. Zicherman v. Korean Air Lines, supra*; *Dooley v. Korean Airlines, supra.*

[47] *In re Korean Air Lines Disaster of September 1, 1983*, 575 F. Supp. 342, 343 (J.P.M.L. 1983).

[48] Our comments focus on those claims only because they were the only claims governed by the Warsaw Convention. Non Warsaw claims against other defendants were all eventually dismissed.

[49] The Montreal Agreement required this notice to be printed in 10-point type size whereas the defendant printed the notice in 8.0 type size. *In re Korean Air Lines Disaster*, 664 F. Supp. 1463, 1464 (D.D.C. 1985).

[50] The topic of "immediate payments" could support a paper on its own and will not be discussed in detail here. There has been a growing trend toward immediate payments after major air disasters in recent years to enable families with losses to deal with the immediate aftermath of the disaster without financial stress. This area is a major priority for involved family organizations but will only be peripherally discussed in this paper.

[51] 664 F. Supp. at 1478.

[52] Since the carrier was domiciled and had its principal place of business in Korea, only those passengers who either purchased their tickets in the United States or had purchased round-trip tickets with an ultimate destination in the United States were allowed to proceed with litigation against Korean Air Lines in the United States. The court strictly enforced Article 28 and dismissed all cases where the plaintiff could not prove that treaty jurisdiction was proper under the Warsaw Convention. *E.g., In re Korean Air Lines Disaster*, 664 F. Supp. 1478, 1479-1481 (D.D.C. 1986).

[53] *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1172 (D.C. Cir. 1987), *aff'd Chan v. Korean Air Lines*, 485 U.S. 986 (1989).

[54] *Chan v. Korean Air Lines*, 485 U.S. 986 (1988).

[55] *In re Korean Air Lines Disaster of September 1, 1983*, 704 F. Supp. 1135 (D.D.C. 1988).

[56] 46 U.S.C. App. § 761 *et seq.*

[57] *In re Korean Air Lines Disaster of September 1, 1983*, 1989 U.S. Dist. LEXIS 11954 (D.D.C. 1989).

[58] *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991).

[59] *Dooley, et al. v. Korean Air Lines*, 502 U.S. 994 (1991).

[60] Discovery difficulties and the inability to obtain evidence further hampered the KAL007 litigation. The Soviet/Russian governments denied for nine years the recovery of the Cockpit Voice Recorder and of the Digital Flight Data Recorder. These "black" boxes and Soviet/Russian documents were only released after ten years of diplomatic extra legal negotiations initiated by the KAL007 victims' families, who assisted their legal advisors in obtaining the release of other classified documents. Plaintiffs attorneys were limited and stymied in their discovery efforts because the documents and evidence they needed was either controlled or in the possession of foreign governments, witnesses resided in foreign countries, or documentation was classified. Nevertheless the PSC succeeded to obtain the jury's "wilful misconduct" finding and an award of punitive damages by means of compelling circumstantial evidence. Although the Warsaw limit was breached in 1989 it took another seven years of appeals before actions began again in the trial court, this time litigating what turned out to be extremely contentious damages issues that led to many more years of delay before these claims were finally resolved.

[61] 46 U.S.C. App. Sec. 761 *et. seq.* (2001) (as amended April 5, 2000, P.L. 106-181, Title IV, Sec. 404(a), 114 Stat. 131).

[62] According to Title IV, Sec. 404(a), 114 Stat. 131, the DOHSA amendments adding non-economic losses "shall apply to any death occurring after July 16, 1996." The date was selected to make the new law retroactive to the TWA 800 case but not earlier cases, even though the statute does not cover the TWA 800 case, because the crash occurred within twelve nautical miles of the New York coast and the Act "does not apply" to cases involving deaths "occurring on the high seas 12 nautical miles or closer to the shore of any State. . ." 46 U.S.C. App.

Sec. 761 (2001). Lack of DOHSA coverage was not a bad thing for the TWA 800 victims, because the statute makes clear that "this Act shall not apply and the rules applicable under Federal, State, and other appropriate law shall apply. *Id. See Yamaha Motor Corp. v Calhoun*, 516 U.S. 199 (1996).

[63] *http://www.iata.org/legal/_files/iia.pdf* and *www.iata.org/legal/_files/mia.pdf. See also Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1282, n.5 (11th Cir. 1999). The "Air Transport Association", representing the major US carriers developed a different implementation agreement which included a law of the domicile provision.

[64] The *Agreement on Measures to Implement the IATA Intercarrier Agreement* states as relevant:

"I. Pursuant to the IATA Intercarrier Agreement of 31 October 1995, the undersigned carriers agree to implement said Agreement by incorporating in their conditions of carriage and tariffs, where necessary, the following:

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

[CARRIER] shall not avail itself of any defence 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]."

The partially waived Article 20(1) defense states: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

[65] *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1282, n.5 (11th Cir. 1999).

[66] *See* D.O.T. Order 96-11-6 (Nov. 12, 1996).

[67] D.O.T. Order 97-1-2 (Jan. 10, 1997).

[68] Clark, European Council Regulation (EC) No. 2027/97: Will the Warsaw Convention Bite Back?, Vol. XXVI, No. 3 (2001) p. 4.

[69] *http://www.iata.org/legal/_files/iiasign.doc.*

[70] *http://www.iata.org/legal/_files/miasign.doc.*

[71] *In re Air Crash Disaster Near Peggy's Cove, Nova, Scotia on September 2, 1998*, 2002 U.S. Dist LEXIS 3308 *4-5.

[72] *Hosaka v. United Airlines*, 2002 U.S. App. LEXIS 19176, *35-35 (9th Cir. September 18, 2002). *See also Milor v. British Airways PLC*, Q.B. 702, 706 (C.A. 1996) (British Court of Appeals concluded that *forum non conveniens* doctrine may not be used to dismiss a claim otherwise properly filed pursuant to Article 28 of the Warsaw Convention). *But see In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147, 1161 (5th Cir. 1987) (en banc)) (holding that the Warsaw Convention permits application of *forum non conveniens* but refusing to apply the doctrine to the case at bar); *In re Air Crash off Long Island, New York on July 17, 1996*, 65 F. Supp. 2d 207, 214 (S.D.N.Y. 1999) (holding that the Warsaw Convention permits application of forum non conveniens, although the court later decided not to dismiss cases filed by foreign nationals under the doctrine).

[73] 2002 U.S. App. LEXIS at *35-36.

[74] Early on Swissair and Boeing sought to dismiss cases filed in the United States by families of passengers that lived overseas at the time of their death on the grounds of *forum non conveniens*. This attempt even included a few claims relating to the death of American citizens that were living abroad at the time of their deaths as well as an American citizen living and working in New York whose Swiss company provided him with tickets: Geneva—New York—Geneva—. The judge withheld his decision on these motions and the cases were all successfully settled in the United States.

[75] *In re Air Crash at Little Rock, Arkansas, on June 1, 1999*, 109 F.2d 1022, 1024 (E.D. Ark. 2000).

[76] *In re Air Crash at Little Rock, Arkansas, on June 1, 1999*, 1999 U.S. Dist. LEXIS 19202 (JPML 1999).

[77] *In re Air Crash at Little Rock, Arkansas, on June 1, 1999*, 109 F. Supp. 2d 1022, 2000 U.S. Dist. LEXIS 12271, **4.

[78] *Id.* at **4.

[79] *In re Air Crash at Little Rock, Arkansas, on June 1, 1999*, 109 F. Supp. 2d 1022, 1025 (E.D. Ark. 2000).

[80] There was an appeal in this case that went to the Eighth Circuit concerning ruling with regard to pre-judgment and post-judgment interest rates, and these issues were resolved long after this plaintiff was paid in full on August 1, 2002. *Maddox v. American Airlines*, 298 F.3d 694 (8th Cir. 2002).

[81] *In re: Air Crash at Little Rock, Arkansas on June 1, 1999* (Claim of Anna Floyd). 291 F.3d 503 (8th Cir. 2002).

[82] *In re Air Crash near Nantucket Island, Massachusetts, on October 31, 1999*, MDL-1344 (EDNY 2000).

[83] Not all of the victims of this crash have Article 28 jurisdiction over EgyptAir in the United States. It is believed that many of these victims have been offered and have accepted settlements of 100,000 SDRs but are pursuing product liability claims in the United States against Boeing and others. Boeing has filed third party actions in these cases against EgyptAir, who is trying to transfer many of these cases to Egypt pursuant to the doctrine of *forum non conveniens* but over the objections of the plaintiffs and Boeing.

[84] *In re Air Crash off Point Mugu, California, on January 30, 2000*, 145 F. Supp. 2d 1156, 1161 (N.D. Cal. 2001).

[85] *Id.*

[86] *Id.* at 1162.

[87] *In re Air Crash at Taipei, Taiwan, on October 31, 2000*, 2001 U.S. Dist. LEXIS 5232 (J.P.M.L. 2001).

[88] *In re Air Crash at Taipei, Taiwan, on October 31, 2000*, 2001 U.S. Dist. LEXIS 19981 (N. Dist. Cal. 2001) (defendant's motion for protective order concerning pilot and other depositions denied by Magistrate Judge Chapman); *In re Air Crash at Taipei, Taiwan, on October 31, 2000*, 2002 U.S. Dist. LEXIS 466 (N. Dist. Cal. 2002) (ruling that pilot in command (but not co-pilot) was a managing

agent); *In re Air Crash at Taipei, Taiwan, on October 31, 2000*, 2002 U.S. Dist. LEXIS 11051 (N.D. Cal. 2002) (plaintiffs' motion to compel granted in part and denied in part).

[89] Application of the International Air Transport Association for Approval of Agreement, Antitrust Immunity and Related Exemption Relief, Docket OST-95-232 filed before the Department of Transportation, Washington D.C. on July 31, 1996.

[90] Thibault de Mallman, (General Counsel La Reunion Aerienne) Settling Claims from the Concorde Accident, IATA Airline Insurance Rendezvous 2002, London, March 2002.

[91] Rudolf von Jeinsen, *http//www.luftundrecht.de.*

[92] *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999).

[93] *Verdesca v. American Airlines*, 2000 U.S. Dist. LEXIS 15476, *9-12 (N.D. Tex. 2000).

[94] The Convention For The Unification of Certain Rules Relating To The International Carriage By Air, Signed at Montreal on 28 May 1999, DCA Doc. No 57.

[95] Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal from 10 to 28 May, 1999. DCW Doc. No. 58, 28/5/99.

[96] *http://www.icao.int/icao/en/leb/mt/99.html.*

[97] Treaty Doc. 106-45 September 6, 2000, Message from the President.

[98] *http://www.whitehouse.gov/news/releases/2002/07/20020731—4.html.*

[99] Article 29 of the Montreal Convention.

[100] Article 37 of the Montreal Convention.

[101] Preamble to the Montreal Convention.

[102] Articles 3, 36, and 39 through 48 of the Montreal Convention.

[103] "States parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the state party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention." Article 50 of the Montreal Convention.

[104] Article 33 of the Montreal Convention.

[105] *In re: Air Crash in Bali*, 684 F.2d 1301, 1310 (9th Cir. 1982), *app. after remand* 871 F.2d 812 (9th Cir. 1989), *cert. den.*, 493 U.S. 917 (1989) (referring to ICAO statistics).

[106] *http://www.icao.int/icao/en/nr/pio200205.htm.*

[107] 31st Session of the Legal Committee of the International Civil Aviation Organization, held from 28 August to 8 September 2000, Item No. 4.

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