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**LITIGATION WITH A FOREIGN FLAVOR: A
COMPARISON OF THE WARSAW CONVENTION
AND THE HAMBURG RULES**

Chaired by Robert M. Jarvis and Michael S. Straubel

EDITOR'S NOTE: From January 5-9, 1994, the Association of American Law Schools held its Annual Meeting in Orlando, Florida. During the Meeting, the Section on Aviation and Space Law joined the Section on Maritime Law in presenting a program that compared the Warsaw Convention and the Hamburg Rules. Because of the importance of the issues discussed, the Journal of Air Law and Commerce is pleased to publish below an edited version of the program's transcript.

PROFESSOR ROBERT M. JARVIS (Nova Southeastern University): Good morning. As Chair of the Maritime Law Section it is my pleasure to welcome you to this joint program of the Aviation and Space Law and Maritime Law sections. I believe that you will find this morning's program to be both informative and provocative, and I encourage you to take issue with the panelists during the question-and-answer period. It is now my pleasure to turn over the microphone to Professor Michael S. Straubel, the Chair of the Aviation and Space Law Section.

PROFESSOR MICHAEL S. STRAUBEL (Valparaiso University): Thank you, Professor Jarvis. I have the honor today of introducing our three panelists and telling you something about them. Our first speaker this morning is the noted aviation lawyer Lee S. Kreindler. Mr. Kreindler received his A.B. from Dartmouth College in 1945 and his LL.B. from Harvard University in 1949. He is now the senior partner in the New York City law firm of Kreindler

& Kreindler. Mr. Kreindler frequently is called the dean of American aviation lawyers, and with good reason. He is a former chair of the Aviation Law Section of the Association of Trial Lawyers of America, a former chair of the Aviation Litigation Committee of the Litigation Section of the American Bar Association, a past president of the International Academy of Trial Lawyers, and the author of the seminal text *Aviation Accident Law*. Mr. Kreindler and the members of his firm have played a leading role in just about every major airline crash that has occurred in the past forty years, and it was he who organized and led the successful fight against the Montreal Protocols to the Warsaw Convention. Ladies and gentlemen, it gives me great pleasure to present to you Lee S. Kreindler.

MR. KREINDLER: Thank you, Professor Straubel. It is a great pleasure to be here. This is my third opportunity to address a meeting of this august Association and it is always a pleasure and an honor to do so.

My role today is to provide an overview of the Warsaw Convention¹ and to indicate its shortcomings. That is not very hard for me to do. The Warsaw Convention is an abomination. It is an anachronism. It is an evil law. It causes extraordinary distress to many people. It is absolutely incredible that the United States of America in the year 1994 is still a party to the Warsaw Convention and we should get out of it. In my opinion, we should get out of it completely. It should simply be renounced. A number of alternatives and modifications have been suggested to the Warsaw system, at least one of which, the so-called Japanese initiative, has to be considered very seriously. My position, however, is that the Convention is very bad and the United States should renounce it.

Briefly stated, what does the Convention do? The Warsaw Convention applies to all international transportation

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.T.N.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1988) [hereinafter Warsaw Convention].

by aircraft for hire. International transportation is specifically defined to include transportation between countries that are parties to the Warsaw Convention or transportation that starts and ends in the same party country with an agreed stopping place in some other country. For all practical purposes, it applies to most international airline transportation, although from time to time cases do arise involving Turkey or one of the other countries that has not adopted the Convention. It should be noted that at the outset of any case one must look at the passenger ticket to determine what the transportation is and how it is defined because the ticket reflects the contract between the airline and the passenger.

By its own terms, the Convention establishes a system of presumptive liability. The Convention has been effectively modified, however, by the Montreal Agreement of 1966.²

Article 17 of the Convention provides that the carrier is liable in the event of an accident. Article 20 provides that the carrier may exculpate itself by showing that it took all necessary measures to avoid the damage. As a practical matter, this is an impossibility. Article 22 limits the damages that the passenger or his or her family may recover. On the checked baggage and goods side, the limitation on the amount that the passenger may recover is given in terms of French francs *Poincaré*; for passenger injuries and deaths it is 125,000 French francs *Poincaré*, which converts into approximately \$10,000 per passenger. The limitation can be waived by the carrier and also can be lost by the carrier if there is proof of wilful misconduct. Essentially, wilful misconduct means intentional conduct, including reckless conduct with knowledge of the probable consequences.

² Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, May 13, 1966, 31 Fed. Reg. 7302 (1966), reprinted in 2 THE REGULATION OF INTERNATIONAL COMMERCIAL AVIATION: THE INTERNATIONAL REGULATORY STRUCTURE 19-49 to 19-50 (James R. Fox ed. 1992) [hereinafter Montreal Agreement].

In 1966, the United States government, reacting to Warsaw's terrible effect on victims of international accidents, applied a great deal of pressure on the airlines. This resulted in the Montreal Agreement.

As noted a moment ago, Article 22 of the Convention contains a limitation provision and also states that the limit can be increased by special contract between the passenger and the carrier. Using the provisions of Article 22, the Montreal Agreement raised the limit from \$10,000 to \$75,000 and Article 20, the exculpatory clause, was waived by the airlines up to that amount. The effect was to establish absolute liability on the part of the carrier up to \$75,000. As a result, virtually all of the litigation that has occurred since 1966 has centered around attempts by plaintiffs to show wilful misconduct on the part of the carrier in order to defeat the \$75,000 limitation. The *Lockerbie* case, in which a Pan Am airplane was blown up over Scotland in December 1988, exemplifies recent litigation.

In *Lockerbie*, there were 225 passenger claims. They were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of New York and consolidated before Chief Judge Thomas C. Platt, Jr.³ The case subsequently was tried to a jury for three months and resulted in a verdict of wilful misconduct. That verdict was appealed by Pan Am or, more precisely, Pan Am's insurance company, because in the interim Pan Am had entered into bankruptcy. The appeal was argued on May 19, 1993, and we are still waiting for a decision from the Second Circuit.⁴ I, myself, am hopeful of prevailing. It would not surprise me if the decision were by a divided court,⁵ because the argument was the most animated I

³ See *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 709 F. Supp. 231 (J.P.M.L. 1989), *aff'd*, 16 F.3d 513 (2d Cir. 1994).

⁴ *Editor's Note*: On January 31, 1994, the Second Circuit upheld the jury's verdict. See *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 1994 WL 25773 (2d Cir. 1994).

⁵ *Editor's Note*: In fact, the panel was divided. While Judges Cardamone and Altamari agreed that the verdict should be upheld, Judge Van Graafeiland voted to reverse.

have ever witnessed, let alone participated in. When people ask me, "When are we going to know?", which about ten clients ask me every day, I say "February 19th" because that will be nine months from the date of the oral argument and that is the same as having a baby.

I have to tell you that I am ready for the case to be over. It has been incredible, oppressive, exhausting litigation, although intellectually rewarding and at times even fun.

If this case had involved a simple fault system or a simple negligence system, there would probably have been no such litigation. But because one has to prove wilful misconduct, the effort required has become enormous. To give you an idea, I made twenty-five trips to Europe, mostly to Frankfurt, Scotland, and London. There are 22,000 pages of depositions. The trial record is 8,000 pages long. Over 10,000 documents were marked as exhibits. This is all because we had to prove wilful misconduct in a situation where passengers have been killed. Women and children have been waiting for what they are entitled to for more than five years. That is utterly, utterly incredible.

The Warsaw Convention, as presently applied with the Montreal Agreement, is still a fault system—there is not an automatic application of liability. Fault—in the form of wilful misconduct in this case—must be established.

From a societal standpoint, it is my personal feeling that it is very important to maintain the fault system. When you fly to Europe today you will derive the benefit of the *Lockerbie* litigation. The entire airline security apparatus worldwide has been changed and improved, primarily because of the facts uncovered during discovery in the *Lockerbie* case. Incidentally, that gives my clients and me an enormous feeling of pride.

The second aspect that gives us great satisfaction is the fact that the civil litigation gave us the opportunity to prove, in large part, how the bomb got on the airplane. The trial provided the best evidence that the bomb came in from Malta on Air Malta flight KM 180 from Malta to

Frankfurt and was an interline transfer to Pan Am 103 in Frankfurt. The evidence indicates it was an unaccompanied bag. A week before the trial we took the testimony of the detective in Scotland who had investigated the bits and pieces of clothing that were found in the bomb bag impregnated with explosives. The detective had taken the fragments to Malta and gone from factory to factory and proved that these bits and pieces of clothing had been manufactured in Malta. He then traced the pieces to a retail store and discovered that all of the clothing had been sold to one of the two Libyans who has now been indicted. This whole picture was really put together in the civil case by finding the right witness, who had herself produced the computer printout that showed the unaccompanied bag on Air Malta. It did not take me very long to call the Lord Advocate of Scotland, who was the head of the criminal investigation, and tell him who the witness was and what she said. If the Libyans are ever brought to justice they will be tried partly on proof that came out of our civil litigation.

That is something to think about for a minute when we talk about conventions that have automatic rules of liability. This may not pertain to the cargo situation. When, however, you are talking about human life and serious personal injuries or death, as we are in the aviation context, it seems to me that, somehow or other, there has got to be preservation of the fault system. Although the Federal Aviation Administration does a good job, and the National Transportation Safety Board does a good job, and the international authorities do a good job, they simply do not do the whole job. Here it was the civil litigation that helped establish how the bomb got on the airplane.

This takes me back to the Sabena crash of 1961.⁶ One of the two ways to defeat limitation is by finding someone else liable, such as the manufacturer. *Sabena* was a case against Boeing that proved that there were defects in the

⁶ See *Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 242 F. Supp. 129 (E.D.N.Y. 1965).

707; as a result, these defects did not show up in the 747. This is an area that affects me greatly and I do not want to give up this protection, and that brings me to the Japanese initiative.

An interesting modification in the Warsaw system has been made unilaterally by the airlines of Japan. In 1966, the Japanese airlines waived the limit up to \$75,000. Now, however, the Japanese government and the Japanese airlines have waived the limit entirely. The Japanese airlines have unilaterally decided that they will accept the responsibility of absolute liability for any injury or death that occurs in international travel on one of their airlines and that they are not going to take advantage of any limitation. If someone is killed on the way to Tokyo on Japan Air Lines (JAL), a very substantial settlement offer will be made almost immediately because JAL has accepted, under the Japanese initiative, the responsibility for absolute liability with no limitation. On the other hand, if one makes the mistake of flying on United Air Lines or Northwest Airlines and the same thing happens, it is probable that the survivors will have to go through a *Lockerbie*-type litigation experience.

The Japanese initiative is a wonderful thing for the passenger in terms of compensation. I am often asked, "How do you feel about the Japanese initiative?" In response, I always have to make it clear that between what we have now, with the possibility of extended litigation and hardship for the families for a very long time, and absolute unlimited liability, obviously absolute unlimited liability is better. Thus, between the two, I favor the Japanese initiative. Looking at the big picture, however, I am opposed to the Japanese initiative because under it there is no opportunity to address the question of fault. If another *Lockerbie* case comes along and the Japanese initiative is in place, the world will never know about the utterly outrageous conditions relating to airline security, or whatever the next case involves. I think that is too high a price to pay. I think the courts have to do both. They have to

compensate but they also have to keep the airlines safe and functioning properly. It is a hard choice when it comes to the Japanese initiative.

Oddly enough, the other airlines of the world have not climbed onboard. I thought as a competitive matter they would have to do so, but so far they have not. The Japanese say that it does not even cost them more in insurance because the number of accidents in international airline transportation is so low that the insurance cost is the same whether there is or is not a limit. And yet, there seems to be this reluctance to adopt it. I think, in fact, that if the other airlines go along with the Japanese initiative, that will be the end of my academic position and concern and I do think that in that sense it will be a loss to society, which now at least has some opportunity to find out what is going on.

Thank you very much for your attention. It has been a pleasure to start the discussion and I look forward to hearing the other speakers.

PROFESSOR STRAUBEL: Thank you, Mr. Kreindler. Our next speaker is Professor Joseph C. Sweeney. Professor Sweeney received his A.B. from Harvard University in 1954, his J.D. from Boston University in 1957, and his LL.M. from Columbia University in 1963. Since 1966, he has been on the faculty of the law school at Fordham University in New York City. Professor Sweeney will tell us about the relatively new United Nations Convention on the Carriage of Goods by Sea, more commonly known as the Hamburg Rules. Professor Sweeney is particularly well-qualified to discuss this subject as he was the United States Representative to the Diplomatic Conference that drafted the Rules.

PROFESSOR SWEENEY: Thank you, Professor Straubel, and good morning to everyone. I shall be talking about cargo damage and, in particular, whether the cargo owner or the carrier bears the risk of loss. The Warsaw Convention deals with both passengers and cargo, but the

Hamburg Rules⁷ deal only with cargo. Before I go on, allow me to say just a word about the protection of passengers in maritime law.

As some of you may be aware, there exists an international treaty dealing with passengers known as the Athens Passenger Convention of 1974.⁸ It is extremely hostile to United States interests concerning passengers on cruise ships and I do not think that the United States will ever become a party to the Athens Passenger Convention, especially since the Coast Guard is opposed to it. With that much said, I turn now to the subject of cargo damage.

At the present time, there are fifteen conventions or protocols to conventions dealing with the international transport of cargo.⁹ These go as far back as the 1924 Hague Rules and are as current as the 1991 Terminal Op-

⁷ United Nations Convention on the Carriage of Goods by Sea, Official Records, U.N. Doc. No. A/Conf. 89/14 (1981), *reprinted in* 17 I.L.M. 608 (1978) and 6 BENEDICT ON ADMIRALTY Doc. No. 1-3 (Michael F. Sturley ed. rev. 7th ed. 1993) [hereinafter Hamburg Rules]. The United States is a signatory to the Convention but has not yet ratified it. The Convention entered into force on November 1, 1992.

⁸ International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers and their Luggage by Sea, Athens, Dec. 13, 1974, *reprinted in* 14 I.L.M. 945 (1975) and BENEDICT, *supra* note 7, at Doc. No. 2-2. The 1974 Convention replaces the 1961 Carriage of Passengers by Sea and the 1967 Carriage of Passenger Luggage by Sea.

⁹ (a) *The Hague Rules*: International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Aug. 25, 1924, 120 L.N.T.S. 155, T.S. No. 931, 51 Stat. 233. The United States and twenty-five other nations attended the Diplomatic Conference. United States ratification was proclaimed on May 25, 1937, and codified at 49 Stat. 1207 and 51 Stat. 260 (1937). The treaty had entered into force in 1931 with the ratification of Belgium, Hungary, Spain, and the United Kingdom.

(b) *The Warsaw Convention*: Twenty-two nations attended the Diplomatic Conference, *not* including the United States, which merely sent an observer. The treaty entered into force on February 13, 1933 with seven ratifications: Brazil, France, Latvia, Poland, Romania, Spain, and Yugoslavia. The advice and consent of the United States Senate was obtained without debate or recorded vote on June 15, 1934 (78 Cong. Rec. 11,587) and the President proclaimed the ratification effective on June 27, 1934 (49 Stat. 3013). *See supra* note 1.

(c) *C.I.M. or Rail Convention*: International Convention Concerning the Carriage of Goods by Rail, Berne, Oct. 25, 1952, 241 U.N.T.S. 336. This is a revision of an earlier European convention and the United States is not a party.

(d) *Hague Protocol*: Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, The Hague, Sept. 28,

erators Liability Convention. Nine of the fifteen are now in force. The format for many of them actually was worked out by a group of lawyers interested in air law. I am, of course, referring to the Comité International Technique d'Experts Juridiques Aériens (CITEJA), the group

1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]. The United States is not a party.

(e) *C.M.R. or Road Convention*: Convention on the Contract for the International Carriage of Goods by Road, Geneva, May 19, 1956, 339 U.N.T.S. 190. The United States is not a party.

(f) *International Convention Relating to the Liability of Operators of Nuclear Ships*: Brussels, May 25, 1962, *reprinted in* BENEDICT, *supra* note 7, at Doc. No. 5-5. Not in force.

(g) *Visby Protocol*: Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Feb. 23, 1968, 2 U.N. Register of Texts ch. 2, at 180, *reprinted in* BENEDICT, *supra* note 7, at Doc. No. 1-2. These amendments entered into force on June 23, 1977. The United States is not a party.

(h) *Guatemala Protocol*: Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Guatemala City, Mar. 8, 1971, ICAO Doc. 8932. Not yet in force.

(i) *1975 Montreal Protocols*: Additional Protocols 1-4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Montreal, Sept. 25, 1975, ICAO Docs. 9145-9148. Not in force. The United States Senate held hearings on these Protocols in 1977, 1981, and 1983. Although the Senate approved the Protocols on March 19, 1983, by a vote of 50 to 42, the Protocols did not come into effect because the required two-thirds majority was not obtained.

(j) *Hamburg Rules*: United Nations Convention on the Carriage of Goods by Sea, Hamburg, Mar. 31, 1978. *See supra* note 7.

(k) *S.D.R. Protocol*: Further Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Dec. 21, 1979, *reprinted in* BENEDICT, *supra* note 7, at Doc. No. 1-2A. This protocol entered into force on February 14, 1984. The United States is not a party.

(l) *Multimodal Convention*: 1980 United Nations Convention on International Multimodal Transport of Goods, Geneva, May 24, 1980, U.N. Doc. TD/MT/Conf./16, *reprinted in* BENEDICT, *supra* note 7, at Doc. No. 1-4. Not yet in force. The United States is not a party.

(m) *COTIF 1980*: International Convention for the Carriage of Goods by Rail, Berne, May 9, 1980, Cmnd. 8535.

(n) *1989 Inter-American Road Convention*: Organization of American States, 1989 Inter-American Convention on International Carriage of Goods by Road, *reprinted in* 39 AM. J. COMP. L. 121 (1989).

(o) *1991 O.T.T. Convention*: United Nations Convention on the Liability of Terminal Operators in International Trade, Vienna, Apr. 19, 1991, U.N. Doc. A/Conf. 152/13, *reprinted in* 14 FORDHAM INT'L L.J. 1115 (1991) [hereinafter OTT Convention]. Not yet in force. There currently are five signatories: Italy, Mexico, the Philippines, Spain, and the United States.

that did the groundwork for the Warsaw Convention. Its work, which was totally theoretical at the time since there was no international aviation transport industry, has been followed in international transport conventions ever since.

CITEJA laid out ten basic provisions for transport conventions, and as you look through the Warsaw Convention and compare modern conventions to it you can see how well CITEJA did its work.

The first provision deals with definitions of terms. The civil law lawyers generally are not fond of these. They regard these definitions as unnecessary and harmful. From a common law viewpoint, they also are very dangerous because they are the places where you drop in all the little bits of policy that you wish to conceal from the readers of the Convention's general provisions. The other provisions are: 2) the geographic and documentary scope of the convention; 3) the period of carrier responsibility (that is, from when to when); 4) the basis of the carrier's liability (they are all essentially fault-based); 5) the limitation of the carrier's liability in money; 6) the loss of the carrier's right to limit (called breakability); 7) the liability of the shipper who ships dangerous goods; 8) the issue of a document and its contents; 9) the time bar on claims; and, 10) the jurisdiction of the courts.

A general observation about both the Warsaw Convention and the Hamburg Rules is in order here. The Hamburg Rules follow an earlier convention, the Hague Rules of 1924, which was the first international convention dealing with the allocation of risk of loss in cargo damage. That treaty was produced by an ancient worldwide industry with many common practices, and while there were theoretical differences between French law, Scandinavian law, American law, and English law, there were many common practices in what was a well-known industry. When the Warsaw Convention was prepared in 1929, however, there was not an international aviation industry. Warsaw was seen as necessary to protect the in-

fant industry itself, not just the insurers, as was the case with the Hague Rules.

The colonial empires realized the need for rapid communication with their outlying colonies and spurred the development of British Imperial Airways, Air France, KLM, Sabena, and Alitalia in the 1920s to connect their colonial outposts. Many of these operations were not international as such and stopped only at colonial possessions. London to Paris in 1920, and Key West to Havana in 1927, were the first truly international routes by aircraft, and transatlantic service by lighter-than-air craft was begun in 1928 from Germany to New Jersey by the Zeppelin Company. Thus, by the time of the Second World War, there was an international aviation industry to which the Warsaw Convention could be applied.

I have been fortunate to have the opportunity to observe at very close hand the making of a number of these conventions since 1970. Of the fifteen transport conventions that I have spoken of, the United Nations General Assembly and its subsidiary organs, UNCITRAL¹⁰ and UNCTAD,¹¹ have worked on four of them.

There are specialized agencies dealing separately with these transport modes: the ICAO¹² at Montreal for the

¹⁰ The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966. See G.A. Res. 2205 (XXI) of Dec. 17, 1966, 1 UNCITRAL Y.B. 65). Composed of thirty-six nations, its headquarters is in Vienna. In addition to its work on the Hamburg Rules and the OTT Convention, UNCITRAL has produced the United Nations Convention on the International Sale of Goods, 19 I.L.M. 668 (1980); the United Nations Convention on International Bills of Exchange and International Promissory Notes (adopted by the General Assembly, see G.A. Res. 43/165, in 1988 in lieu of a diplomatic conference); and the Voluntary Arbitration Rules of 1976.

¹¹ The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 by G.A. Res. 1995 (XIX), 19 UNGAOR, Supp. No. 15 at 1. All members of the United Nations participate. Conferences are held at four-year intervals at differing locations, while the headquarters is in Geneva. Its transport conventions include the 1974 Code of Conduct for Liner Conferences, 13 I.L.M. 912 (1974) (in force 1980); the 1980 Multimodal Transport Convention, see *supra* note 9(l); and the 1986 United Nations Convention on Conditions for Registration of Ships, 26 I.L.M. 1229 (1987) (not yet in force).

¹² The International Civil Aviation Organization (ICAO) was created by the

aviation industry and the IMO¹³ at London for the maritime industry. But these specialized agencies do not normally deal with the liability and business aspects of international transport. The General Assembly, however, through UNCITRAL and UNCTAD, has been concerned with the allocation of risks of transport.

UNCITRAL is responsible for the preparation of legal texts on trade law issues and the special work of UNCITRAL is putting the science of comparative law into action. I have observed this science in action at UNCITRAL in its work on both the Hamburg Rules and the Terminal Operators Liability Convention. UNCITRAL endeavors, through its comparative law work, to take account of the world's legal systems and also to give some consideration to the differences between Western economies, state socialism, and centrally-planned economies (the United Nations' euphemism for the Soviet Union before it collapsed).

UNCITRAL's Working Group prepared the Hamburg Rules at six sessions that lasted from 1971 to 1976. UNCITRAL then forwarded a draft text to the General Assembly. The General Assembly's Sixth Committee reviewed it and then sent it to a diplomatic conference at Hamburg in March 1978. It was a seven-year effort of study, research, and bargaining.

The Terminal Operators Liability Convention deals not just with maritime transportation but with air and other modes of transportation and the liability of the terminal operator as goods are moved at the terminal from one mode of transport to another. That work began in UNIDROIT¹⁴ but UNCITRAL took it over in 1984. The

1944 Chicago Convention and was established at Montreal in 1946. See 61 Stat. 1180 (1944).

¹³ The International Maritime Organization (IMO), known as the Intergovernmental Maritime Consultative Organization (IMCO) from 1958 until 1982, was established at London in 1958 under its 1948 Constitutive Charter. See 9 U.S.T. 621, T.I.A.S. No. 4044, 298 U.N.T.S. 48.

¹⁴ The International Institute for the Unification of Private Law (UNIDROIT) was chartered under the League of Nations in 1926. It is headquartered in Rome.

Working Group prepared the draft over five years, and in 1989 the UNCITRAL Plenary Commission forwarded the draft to the General Assembly, which called a diplomatic conference at Vienna in April 1991.

Both of these UNCITRAL texts were worked on for seven-year periods. They were not done in haste. There have been no transport projects in the United Nations since the collapse of Soviet Communism, and I do not know what the effect will be in the future drafting of these agreements given that one no longer has to take into account the special needs of centrally-planned economies. At least as far as I can tell, the delegates of the People's Republic of China have not insisted on points of communist ideology.

How did the Warsaw Convention affect the Hamburg Rules? Many of the people drafting the Hamburg Rules were familiar generally with the Warsaw Convention. The Secretariat in 1972 had prepared a report that suggested that carrier liability be framed in language similar to that used in the European Rail Convention.¹⁵ The problem with this idea was that the Rail Convention was unclear as to the burden of proof: who had a positive case and who had to prove the defenses? The Egyptian delegate therefore made the suggestion to reject the Rail Convention analogy and look to the Warsaw Convention, which provides that the carrier is liable for loss or damage to the goods unless the carrier proves that it, or its servants or agents, had taken all necessary measures to avoid the damage and its consequences.¹⁶ This is a reverse burden of proof in tort law and it is what the Hamburg Rules now provide.¹⁷ It is not exactly the same language but it is

¹⁵ See *supra* notes 9(c), (m).

¹⁶ Warsaw Convention, *supra* note 1, art. 20(1) ("The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.").

¹⁷ Hamburg Rules, *supra* note 7, art. 5(1) ("The carrier is liable . . . if the occurrence which caused the loss . . . took place while the goods were in his charge . . . unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.").

very close.

A second instance of Warsaw influence was the question of the denial of the unit limitation, what we call the breakability of the carrier's right to unit limitation because of serious faults. There were proposals to deny unit limitation because of the intentional conduct of the carrier, the intentional conduct of the carrier's servants, the recklessness of the carrier's servants, or, lastly, the wilful misconduct of the carrier's servants.¹⁸ A full debate went on, and after considering the United States case law, the French case law, and the English case law on wilful misconduct, the view prevailed that we could not repeat that mistake in maritime law. As a result, Article 8 of the Hamburg Rules practically eliminates breakability.¹⁹

A third instance of Warsaw influence occurred in the provision for penalizing invalid clauses in bills of lading. Again, the Warsaw experience was not helpful.²⁰ There was a lengthy debate on the sanctions to be imposed for using invalid clauses but, after a discussion of the Warsaw sanctions, we decided to stick with the provision in the Hague Rules that an invalid clause has no effect in litigation.²¹

The Hamburg Rules must be read as a reaction to the 1924 Hague Rules. The United States Carriage of Goods

¹⁸ Warsaw Convention, *supra* note 1, art. 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 wilful misconduct. . .").

¹⁹ Hamburg Rules, *supra* note 7, art. 8(1) ("The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result."). Similar language applies to the servants and agents of the carrier. See art. 8(2).

²⁰ Warsaw Convention, *supra* note 1, art. 32 ("Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. . .").

²¹ Hague Rules, *supra* note 9(a), art. III(8) ("Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods . . . or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . .").

by Sea Act (COGSA)²² is the most heavily litigated statute in transport law in the United States, even after nearly sixty years. It is therefore impossible to argue that all of its problems have been resolved. The Hamburg Rules were written in the context of finding solutions to the most pressing problems, with the hope that the unfairness perceived by developing states would be alleviated. The Hague Rules were successful in dealing with a number of problems in maritime law from the days of sail and from the experience of World War I. The core of the Hague Rules — namely, the amount of limitation of liability per unit — rapidly deteriorated, so that it is impossible today for insurers to predict the exact amount of exposure that they will have as a result of a disaster. The Hague Rules provide a unit of limitation of liability of one hundred pounds sterling in gold per package.²³ The United States translated that into United States dollars in 1936 as \$500 per package for goods that are packageable.²⁴ Congress has left the amount at \$500 per package ever since, despite the effects of inflation.

Another problem with COGSA is its very narrow documentary scope: it only covers paper bills of lading.²⁵ The geographic scope is also very narrow: it only covers the ocean voyage.²⁶ Thus, COGSA does not address the before-voyage and after-voyage problems when the carrier is in actual control of the goods.

Clauses for law selection or forum selection preprinted on the bill of lading also can be hostile to United States cargo interests.²⁷ So, as can be seen, there were problems

²² 46 U.S.C. app. §§ 1300-1315 (1988). COGSA was enacted in 1936 prior to United States ratification of the Hague Rules, and made subject to reservations (or understandings) promulgated in 1937.

²³ Hague Rules, *supra* note 9(a), arts. IV(5) and X.

²⁴ 46 U.S.C. app. § 1304(5) (1988).

²⁵ 46 U.S.C. app. §§ 1300, 1301(b) (1988).

²⁶ 46 U.S.C. app. § 1301(e) (1988) ("The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." This is often referred to as the "tackle to tackle" rule.).

²⁷ See *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967); Hughes

with the Hague Rules that required a major overhaul in 1978. The Hamburg Rules were the product of seven years of comparative law research, hard bargaining, and compromise. The rules preserve a fault system of liability. It is a modern, sophisticated convention dealing in one document with most of the problems of the relationship between the cargo owner and the carrier.

The problem of the unit limitation is always extremely difficult. The International Monetary Fund's Special Drawing Rights (SDR) system has been used to set the unit limitation of liability at 2§ SDR's per kilogram or 835 SDR's per package, whichever is greater.²⁸ The Hamburg Rules also contain a solution to the delayed damage problem. Physical deterioration is governed by the general rule of 2§ SDR's per kilogram or 835 SDR's per package, while economic loss, where provable, is governed by a special limit of 2§ times the freight.²⁹

I am not saying that everything is perfect in the Hamburg Rules. The delegates did try to deal with the problems that had arisen in the decades following the adoption of the Hague Rules, but they were unwilling to deal with the related difficulties of financing and documenting international trade. They did not want to hear about non-traditional documents or electronic data interchange systems.³⁰

The Hamburg Rules also do away with two obsolete

Drilling Fluids v. M/V Luo Fu Shan, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989).

²⁸ Hamburg Rules, *supra* notes 7, art. 6(1), (2).

²⁹ *Id.* art. 6(1)(b).

³⁰ *Id.* arts. 14, 15, and 16. Article 14(3) provides that "[t]he signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued." *Cf.* OTT Convention, *supra* note 9(o), art. 4(3). The OTT Convention states that "[a] document . . . may be issued in any form which preserves a record of the information contained therein. When the customer and the operator have agreed to communicate electronically, a document . . . may be replaced by an equivalent electronic data interchange message." *Id.* Article 4(4) adds that "[t]he signature . . . means a handwritten signature, its facsimile or an equivalent authentication effected by any other means." *Id.*

doctrines: the concept of carrier unseaworthiness³¹ and the defense of negligent navigation.³² The Warsaw Convention used to have a defense of negligent navigation to cargo damage, but the Hague Protocol of 1955 got rid of it as far as signatories to the protocol are concerned.³³ We now have in the Hamburg system a reverse burden of proof: the presumption that the carrier is liable for damage unless the carrier proves that it did all things reasonably possible to prevent the damage and its consequences.³⁴ The Hamburg Rules also have much clearer provisions with respect to the jurisdiction of the courts.³⁵ The Hamburg Rules apply to both import and export transactions. This, of course, is nothing new for the United States because the Harter Act of 1893³⁶ and COGSA³⁷ apply to import and export. For the rest of the world, however, this is a dramatic change because the Hague Rules apply only outward, not inward.

The Hamburg Rules came into force on November 1, 1992, and there are now twenty-two signatories to the Rules.³⁸ The United States is in a stalemate with regard to

³¹ Article III(1) of the Hague Rules states that "[t]he carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to (a) make the ship seaworthy." See 46 U.S.C. app. § 1301(1) (1988). In addition, Article IV(1) provides that "[n]either the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy." See 46 U.S.C. app. § 1304(1) (1988).

³² Article IV(2) of the Hague Rules states that "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from [the] act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." 46 U.S.C. app. § 1304(2) (1988). See also 46 U.S.C. app. § 192 (1988).

³³ "Paragraph 2 of Article 20 of the Convention shall be deleted." Hague Protocol, *supra* note 9(d), art. X.

³⁴ Hamburg Rules, *supra* note 7, art. 5(1).

³⁵ *Id.* art. 21(1).

³⁶ See 46 U.S.C. app. § 192 (1988); *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900).

³⁷ See 46 U.S.C. app. § 1312 (1988).

³⁸ The signatories are: Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tunisia, Uganda, the United Republic of Tanzania, and Zambia.

ratification of the Rules, and the issue has not moved in the United States for years. The State Department will not forward the proposal to the President for presentation to the Senate until the industry is in agreement, yet the industry is light-years away from agreeing on the allocation of risks between shipowners and their insurers on the one hand and cargo owners and their insurers on the other hand. I do not expect United States ratification very soon, but it was an exciting adventure for me to spend more than eight years of my life working on the project, trying to make the law better. I think we did that and, for that reason, I commend the Hamburg Rules to you for your study and support.

PROFESSOR STRAUBEL: Thank you, Professor Sweeney. Our final speaker this morning is Professor Carl E.B. McKenry. Professor McKenry holds an A.B. (1949), a J.D. (1954), and an LL.M. (1962) from the University of Miami and an LL.M. (1965) from New York University. From 1948 to 1957 Professor McKenry worked for Pan American World Airways. He then joined the University of Miami's School of Business Administration. Today, he holds appointments in the University's business, law, and international studies schools. Professor McKenry will compare and contrast the two regimes of which Mr. Kreindler and Professor Sweeney have just spoken.

PROFESSOR MCKENRY: Thank you, Professor Straubel. My assigned task is to compare the Warsaw Convention with the Hamburg Rules from an "academic" standpoint. While the traditional approach might be to emphasize the similarities, here a comparison of the differences is more appropriate. Permit me to open with a short personal note by way of illustration.

As a young lawyer, my senior boss (once removed) in the legal department of Pan American was Henry J. Friendly. He was both Pan Am's Vice President and General Counsel as well as a name partner in what was then the law firm of Cleary, Gottlieb, Friendly, Hamilton & Ball. As you all know, he later served with great distinc-

tion on the United States Court of Appeals for the Second Circuit.

Perhaps because he was a pioneer in the subject's formative years, Judge Friendly argued that the concept of air law as a discrete or generic legal area did not really exist. In fact, he felt so strongly that he devoted his entire review³⁹ of the text *Air Law*, by Professor DeForest Billyou, to the argument that aviation law was really nothing more than a fragmented collection of previously established topics, such as administrative law, constitutional law, contracts, international law, property, and torts. Judge Friendly, however, neither harbored nor articulated such a position in regard to admiralty or maritime law. Thus, my point of beginning in comparing the Warsaw Convention and the Hamburg Rules is to suggest that while certain similarities exist in the English-language versions of these two multilateral treaties, in the application and interpretation of the Hamburg Rules (as well as Hague-Visby) there is the evolution of centuries of highly specialized jurisprudence. The Warsaw Convention, in contrast, is a creature of the twentieth century, as is aviation itself.

Professor Sweeney suggested that whenever we try to compare the two regimes, we have the distinction that in maritime or admiralty law there are centuries of very specific jurisprudence that serve as a reservoir to call upon. In air law, we have no such reservoir, and even in the interpretation of cases with similar facts, we find a substantial difference because of this historical imbalance.

The fundamental distinction is enlarged, in part, I suspect, because of the dual nature of aviation as both a land and sea transport mode. In *Executive Jet Aviation, Inc. v. City of Cleveland*,⁴⁰ the United States Supreme Court, perhaps because it could not accept an earlier court of appeals ruling that an aircraft clearly visible from the runways of Logan Field and resting in the marshes edging Boston harbor was in navigable water and hence admi-

³⁹ See Henry J. Friendly, Book Review, 77 HARV. L. REV. 582 (1964).

⁴⁰ 409 U.S. 249 (1972).

rality jurisdiction,⁴¹ used the case of a land-based aircraft sliding off a Cleveland runway into the waters of Lake Erie to require a maritime flavor or “nexus” in the absence of a federal statute in order to establish admiralty jurisdiction. This created the interesting situation where an aviation-related accident under the Death on the High Seas Act (DOHSA)⁴² would give admiralty jurisdiction by statute, while in the absence of a “maritime nexus” surviving passengers on the same flight would probably be under federal common law and thus be entitled to a jury trial and possibly other advantages.

Aircraft flying from Miami to, say, for example, New York or Boston, often are routed 300 miles out to sea. Because of a footnote in *Executive Jet*,⁴³ DOHSA, which is an admiralty statute, would apply to any death claims but not to any survivor claims that lacked a maritime nexus. Of course, federal courts have found a way around this apparent inequity in Warsaw Convention cases by recognizing that the treaty creates its own cause of action and permitting a jury trial irrespective of DOHSA.

From the United States position, another significant distinction has been the applicable national language. Because the Hague Rules, with some modifications, have been incorporated into COGSA, a United States statute, the English language as stated therein is the legislation before a court. However, the Warsaw Convention was ratified in its original French language by the United States Congress, thereby creating, in some instances, a double layer for court interpretation. I say that it is a double layer of difficulty because the French text must be translated both into literal and legal English. This difficulty is not present with the maritime treaties.

The double layer problem is quite obvious in any Warsaw Article 25 consideration. Essentially, we take what is

⁴¹ See *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

⁴² 46 U.S.C. app. §§ 761-768 (1988).

⁴³ 409 U.S. at 271 n.20.

a civil law concept, "dol" in French, which has suggestions almost of felonious intent, and through skillful advocacy, jury trials, and the like, we have pretty well watered it down to a standard something around gross negligence or maybe just slightly less. That has been one of the major problems with the Warsaw Convention, as has already been touched upon by the previous speakers.

A final significant distinction is the emphasis in Warsaw-based litigation (both in terms of the volume of cases and amounts in controversy), particularly in the United States, toward wrongful death and personal injury claims. Although the Warsaw Convention covers both passengers and cargo, while Hamburg, of course, is concerned solely with cargo, there has been a preoccupation under Warsaw with personal injury and death cases. This preoccupation has created a "spillover" effect in some areas of equal applicability to provide a different and more liberal outcome in some cargo cases than might otherwise have obtained with a cargo loss in a purely shipping environment because of the practice of having passenger cases serve as precedent.

In contrast, there are some interesting and obvious similarities between the two regimes:

(1) Both the Warsaw Convention and the Hague Rules are creatures of European conferences held in the 1920s.

(2) Both were revised primarily due to their low liability limits. Revision of the Warsaw Convention came through the promulgation of the Hague Protocol of 1955 while change to the Hague Rules came about in the form of the Visby Amendments of 1968.

(3) As we speak, both are confronted with suggested new provisions: the Hamburg Rules in the maritime field and what are referred to as Montreal Protocols 3 and 4 in the aviation field.

A point of clarification is in order here. The Montreal Protocols are actually changes to the Warsaw Convention, as is the Hague Protocol. The Montreal Agreement re-

ferred to by Mr. Kreindler, which raised the limit of liability to \$75,000 where the aircraft moves into, out of, or has an agreed stopping place in the United States, is nothing more than a shotgun agreement between the United States government and the air carriers using the Warsaw provision that the passenger and the carrier can agree to a higher liability limit.

There are certain similarities of language that might result in future efforts by courts and/or advocates to rely on Warsaw-interpretation precedents in analyzing Hamburg-based cases. Because of our time restrictions this morning, I will discuss only two areas: liability limitation and jurisdiction.

LIABILITY LIMITATION

At the heart of liability limitation is the bill of lading (in the case of maritime shipments) and the airway bill (in the case of aviation shipments). Articles 5 through 16 of the Warsaw Convention deal with the airway bill. Changes in the Hague Protocol are minimal in regard to cargo. However, in Montreal Protocol Number 4, Articles 5 to 16 of original Warsaw are deleted and replaced. On the maritime side, Hamburg Articles 14 to 17 establish bill of lading requirements while non-bill of lading documents are covered in Article 18. Both Hamburg and Montreal Protocol Number 4 generally provide additional flexibility, but a detailed comparison exceeds our present consideration.

In regard to carrier liability, Articles 3(1) and (2) of Hague-Visby set forth the carrier's responsibilities. They include the use of due diligence to provide a seaworthy ship and, among other primary requirements, to man, equip, and supply the ship.

Under Hamburg Article 5(1), the carrier's liability for loss, damage, or delay cannot be avoided unless the carrier proves that it "took all measures that could reasonably be required to avoid the occurrence and its consequences." Under original Warsaw Article 18(1) and

Article 19, the carrier is absolutely liable for loss, damage, or delay of goods if the occurrence which causes the damage takes place during air transport or other times while the carrier is in charge of the goods. Similar to Hamburg, under Article 20(1) of original Warsaw, the carrier can avoid liability if it proves that all necessary measures have been taken to avoid the damage or that it was impossible to take such measures.

An interesting change worked by the Hague Protocol is the deletion of Article 20(2) from the Warsaw Convention. One of the few similar provisions between the Hague Rules and Warsaw is the liability defenses. Under Article 20(2), carriers are absolved from liability for damages caused by errors in piloting, handling of the aircraft, and navigation. The Hague Rules provide a similar defense for the "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."⁴⁴ It should be noted that the Hamburg Rules also do away with this defense.⁴⁵

Another area of comparison is the so-called "wilful misconduct" provision. Article 8(1) of the Hamburg Rules provides for the forfeiture of liability limitation if the loss resulted from an act or omission of the carrier done with intent to cause such loss, damage, or delay, or recklessly and with knowledge that loss would result. However, the origin of this provision is not the Warsaw Convention but rather the Athens Passenger Convention discussed by Professor Sweeney.⁴⁶

The amount and method of calculation of limitation also has changed from gold francs to SDR's in both the maritime and aviation treaties. This doesn't solve the problem insofar as low limits are concerned, but it is an improvement. Another built-in mechanism of the new treaties is a provision for a conference to review the limits. I will not go into the details, but in short it requires a cer-

⁴⁴ See *supra* note 32.

⁴⁵ See *supra* note 34 and accompanying text.

⁴⁶ See *supra* note 8 and accompanying text.

tain number of high contracting parties to request or invoke it. There also is a mechanism of indexing, awkward as it is, to change the limits of liability.

Insofar as the *Poincaré* franc is concerned, in *Trans World Airlines, Inc. v. Franklin Mint Corp.*⁴⁷ the United States Supreme Court, if it had been so inclined, could have wiped out the Warsaw Convention by ruling that the value of gold should be interpreted at current rates. This might have solved some of Mr. Kreindler's problems. Not all of them, perhaps, but it certainly would have made the limit so high that it would have avoided some litigation. The Court, however, did not so hold. Instead, it used the last Civil Aeronautics Board determination of the value of gold, which was substantially below current market rates. So SDR's are proposed both in Hamburg and in Montreal 3 and 4. However, the Hague Protocol to the Warsaw Convention did not change that. The Protocol simply doubled the amount. Nonetheless, the wilful misconduct provision of Article 25 is replaced by much stronger language. As we were chatting before this meeting, Professor Sweeney referred to it as the unbreakable clause and I think that is generally what the Hague interpretations have been so far. A carrier would have to have a pilot deliberately fly an airplane into the ground or into a mountain for Article 25 to remove liability limits.

JURISDICTION

In the area of jurisdiction there are two considerations: subject matter jurisdiction and judicial jurisdiction. The Warsaw Convention, and this is relatively unchanged in Montreal 3 and 4, provides for four judicial jurisdictions: 1) the place where the ticket was purchased, if the carrier has an agent or office there (this one is a little murky); 2) the place of incorporation or principal place of the business; 3) the domicile of the business; and, 4) the destination as shown on the ticket. The Hamburg Rules, on the

⁴⁷ 466 U.S. 243 (1984).

other hand, allow a fifth jurisdiction and that jurisdiction is the place which is agreed to by the parties in the bill of lading. Professor Sweeney pointed out, I believe I am correct, that we started with just that one and then they added the four that are in Warsaw.

There is one part of Warsaw that I find disturbing and I will take just a moment to comment on it.

There is a second part of Article 28 that provides that the domestic or internal aspects are to be determined by the forum. We had a case about ten years ago involving a Pan American plane going into New Orleans that crashed.⁴⁸ On appeal, the Fifth Circuit held that in spite of the fact that the Warsaw Convention applied to the transportation, the crash was in the United States (along with any negligent conduct), and the domicile and principal place of business of the carrier was in the United States, the case could be bifurcated. As a result, the court permitted Pan American to plead full liability and, after doing so, invoke *forum non conveniens* to deny jurisdiction to the plaintiffs to have the damages flowing from its liability determined in the United States, in spite of the language in Article 28(1) of the Warsaw Convention that specifically gives the plaintiff the option of that jurisdiction.

The Fifth Circuit came to its conclusion that jurisdiction questions are domestic issues under the Warsaw Convention by relying on Article 28(2) of the treaty, and cited for support *Piper Aircraft Co. v. Reyno*.⁴⁹ It should be noted, however, that neither *Piper* nor the earlier seminal case of *Gulf Oil Corp. v. Gilbert*⁵⁰ involved a treaty obligation of the United States. Moreover, *Piper* involved an aircraft crash in Scotland in which all of the victims were citizens and residents of Scotland, the aircraft was registered in Great Britain, the companies that owned and operated the plane

⁴⁸ See *In re Air Crash Disaster near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated and remanded*, 490 U.S. 1032 (1989).

⁴⁹ 454 U.S. 235 (1981).

⁵⁰ 330 U.S. 501 (1947).

were organized in the United Kingdom, the pilot and all of the decedents' heirs and next of kin were Scottish subjects, and the investigation of the mishap was conducted by the British authorities. In light of these differences, it is to be hoped that this will be an area of further study and judicial review.

There are some other aspects of similarity. I think in the area of jurisdiction one of the things that is important is to distinguish between what I have referred to as subject matter jurisdiction and judicial jurisdiction.⁵¹ In terms of subject matter jurisdiction, there are substantial differences between the Hamburg Rules and Warsaw. Warsaw is very rigid on this. It is controlled entirely by the ticket. The point of origin and destination must be in different high contracting parties, although if one has the same high contracting party and agreed in the ticket international stopping place, one also would have Warsaw subject matter jurisdiction. The jurisdictional aspects are not changed in terms of either the Hague Protocol or in terms of the Montreal Protocols. For Hague to be invoked, both the point of origin and point of destination on the ticket, if it is international, would have to be participants in Hague.

For the foregoing reasons, an article-by-article comparison of the Hamburg Rules, or even Hague-Visby, with the Warsaw Convention is, in my judgment, neither worthwhile nor productive for either the practitioner or the academician. However, a conceptual exploration of the topics of limitation of liability and jurisdiction in private international law, drawing upon both maritime and aviation law, should prove to be a stimulating and thought-provoking exercise in jurisprudence.

I see that I am about out of time. Therefore, in summation, allow me to say that it has been a pleasure to appear before you. Thank you very much.

⁵¹ See Carl E.B. McKenry, Jr., *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205 (1963).

PROFESSOR JARVIS: Thank you, Professor McKenry. We are now going to open the floor for questions. Before we do so, however, I would like to thank all of the panelists. I thought those were three excellent presentations.

PROFESSOR SPEEDY RICE (Gonzaga University): Have any studies been conducted to determine what impact the Japanese initiative has had on insurance?

MR. KREINDLER: The answer, Professor Rice, is yes, there have been studies. I heard of a report four or five years ago by John Brennan, who was then the Chairman of the Board of United States Aviation Underwriters. Mr. Brennan made a number of speeches in which he argued that there would be no substantial difference in the cost of insurance to abandon the limit completely. The incidence of accidents is so small and the field of potential exposure so large that it cancels itself out. In fact, factors other than accident experience play an important role in the fixing of rates. For example, the cost of reinsurance premiums is a more effective determinant of the insurance costs. As to formal studies, such as Rand studies and so forth, I do not know of any, but there are in the literature a good many references. It has been suggested that if the rates go up perhaps the limitations would begin to have an effect on insurance cost, but the rates so far have not gone up, and right now, I know that it is not costing JAL any more money for its insurance on an unlimited basis.

PROFESSOR STEVEN R. SWANSON (Hamline University): Following up on Professor Rice's question, would not widespread adoption of the Japanese initiative create incentives for carriers and insurers to thoroughly investigate crashes so as to avoid them — and unlimited liability — in the future?

MR. KREINDLER: I do not think it would, except in the sense that having undertaken the obligation to make a complete payment they would have about the same incentive as they have now to focus on other potential tortfeasors, such as the government and the manufacturers. That, of course, exists now. I do not have that much

faith in the motivation of insurers to do the kind of digging into the facts of these disasters that we do on the plaintiff's side. I have never seen anything comparable. It gets to be a philosophical question. Plaintiffs' lawyers, as you know, work on a contingent fee and there is a lot of built-in motivation in our system for getting to the bottom of things. I do not think you have anything exactly the same on the industry side.

PROFESSOR JARVIS: Professor Sweeney, did you want to comment on the impact of insurance in the investigation and possible prevention of maritime casualties?

PROFESSOR SWEENEY: Just a brief word. Those interested in this question should consult an article written by Professor Michael Sturley.⁵² He has examined the insurance question in the maritime field at great length. Effectively, the insurance argument is going nowhere. There is just not enough data available to determine whether a shift from COGSA to the Hamburg Rules would have any effect on insurance costs.

PROFESSOR GLENN H. REYNOLDS (University of Tennessee): Are the same insurance issues that have been debated in maritime and aviation law applicable to outer space law?

PROFESSOR SWEENEY: Well, the infant industry concept never really applied in American maritime statutory provisions, so it is something that is foreign to the maritime field.

MR. KREINDLER: I have a little problem accepting anyone involved in the space industry as an infant of any kind, industry or otherwise. I agree with Professor Sweeney that the infant industry rationalization was nonsense. From its infancy this baby has grown into full size and full health. I guess I go back to a more simplistic approach. To start with, when you are talking about damages, you are talking about someone who has been injured, or

⁵² See Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. & COM. 119 (1993).

someone who has been killed. You are basically considering, on the one side, an innocent victim of an accident, and on the other side the tortfeasor who was in control of the operation and certainly had more of an opportunity to prevent errors in the first place. Society must not forget that.

When you talk about limitations, the concept of limitation itself implies a limited amount. Whether it is \$500 or \$2 billion, it does not make any difference what the amount is. If there is a limitation, and it is to be effective, it means that it is less than the damages actually were. So starting with the fact that we are dealing with innocent victims and then considering limitation as something which necessarily imposes on the innocent victims a recovery that is less than the damages they have actually sustained, the answer to me is very simple. I just think that limitations are wrong. They are not reflective of the realities of the situation and the needs of society.

PROFESSOR MCKENRY: First of all, at least at the present, most issues of liability are going to come about in terms of property damage. That will change in time with more space travel by humans. It is a little complicated because of the fact that, with the exception of some of the commercial satellites, most of these matters raise issues of sovereign immunity. It seems to me that if there is an infant industry, by definition, you are balancing the risk, the burden of proof, and the responsibility of the defendant against the recovery and the magnitude of the recovery. The whole idea is basically that, in effect, we will make it easier to recover, but we are going to put a limit on the amount you can recover. The problem is that when that industry is no longer an infant industry you have a very difficult time of removing the limits. The Warsaw Convention is a good illustration of that. It is difficult to remove the infant industry protection because by then the industry is so strong that it is going to lobby to keep it, so this is the problem I see in the infant industry situation in regard to space.

PROFESSOR JARVIS: Professor McKenry's last point, that it is difficult to remove infant industry protection once the industry grows up, is a good one. The Shipowners' Limitation of Liability Act⁵³ was passed in 1851 to encourage the development of the American merchant marine. Although the Act is no longer needed, it remains in place because of the very strong lobbying efforts of the shipping industry.

PROFESSOR GREGORY C. SISK (Drake University): I see that the Hamburg Rules are written in several different languages. The Warsaw Convention was drafted in French, which is the only authentic and authoritative text. Professor McKenry referred to the problem of translation with respect to international agreements. The problem goes even deeper than that. With respect to the Warsaw Convention, American courts have looked beyond the French text to French law as a guide for the meaning of the treaty. The most significant example of this occurred in the case of *Eastern Airlines, Inc. v. Floyd*,⁵⁴ which raised the question of whether damages for emotional distress are recoverable under the Warsaw Convention. The United States Court of Appeals for the Eleventh Circuit decided this question after taking a lengthy tour through French law and concluding that recovery for mental injury would be permitted under French law.⁵⁵ This decision was reversed by the Supreme Court, which held that French law failed to shed any light on this issue and that the text of the Convention, read literally, required a physical injury to obtain recovery.

My own view, as argued in an article I have written,⁵⁶ is that an inquiry into one nation's law because an international agreement is written in that nation's language is misguided. This should be an exercise in treaty interpre-

⁵³ 46 U.S.C. app. §§ 181-189 (1988 & Supp. IV 1992).

⁵⁴ 499 U.S. 530 (1991).

⁵⁵ 872 F.2d 1462 (11th Cir. 1989).

⁵⁶ See Gregory C. Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lésion Corporelle*, 25 TEX. INT'L L.J. 127 (1990).

tation, not comparative law. I would be interested in the panel's thoughts on this problem in general, and in particular in Professor Sweeney's thoughts on whether drafting a text in multiple languages would avoid the problem of looking to domestic law to interpret international agreements.

PROFESSOR MCKENRY: I think that first of all you have, as I called it, two layers, which is the initial problem. One, as you pointed out, being the translation from one language to another, and the second one being the interpretation behind that language. The United Kingdom made Warsaw effective through its own language, which removed at least one of those problems. That is not always going to happen but as I mentioned the British are pretty good at that and it would seem to me that the European Community, or now the European Union, might give you a little laboratory in that regard because you have two systems, the Irish and the British on their common law base, and the others on a civil law base.

PROFESSOR SWEENEY: The Hamburg Rules were drafted only in English. All of the Working Group's formal sessions were, as is customary in the United Nations, done in all of the official languages, so that the formal sessions were always in English, French, Spanish, Russian, Chinese, and Arabic, but the actual drafting sessions were only in English. When the substantive work was completed after seven years, the language experts from the United Nations' headquarters in New York came to Hamburg to try and resolve into each of the linguistic specialties the various translation problems. I must say I have no idea what the Arabic and Chinese texts say, but I look at the amount of space given for the various provisions in the other languages and I think we are creating work for our students, the future lawyers of the world, and I do not think that I should take the bread out of their mouths. There are bound to be arguments about different shades of meaning in the six official language texts

because all texts are equally authentic. Just let me give you an example.

The text in English, Russian, and Spanish for, let us say, Article 12, might be two inches long, and all of a sudden you look at the French text and it is three inches long. I do understand why, but it is very hard when you are trying to compare texts to see why there should be far more words to put the same thought into the French language than it takes to put it into Spanish or English. Just a further word about international law. The International Court of Justice and the Vienna Convention on Treaties have a technique of harmonization of equally authentic texts that I think will have to be used in the future as we deal with these problems. Right now, no cases have come up and there have not yet been problems, but I predict there will be lots of problems in the future.

MR. KREINDLER: My approach, of course, is from the standpoint of an advocate. As you may recall, in the first *Lockerbie* case,⁵⁷ the one involving whether you could recover punitive damages under the Warsaw Convention, Judge Cardamone manufactured a brand new concept for us. He said we had to look to federal common law for standards of damages under the Warsaw Convention.⁵⁸ He did not, of course, bother to go on and tell us what federal common law is, or whether under federal common law we can recover loss of society. On that precise question, we have references, as you might guess, to French law, French precedents, and so forth. I think that maybe the advocate is not so far away from the students you were talking about, Professor Sweeney, because I kind of think that as a practical matter when you get to the question of advocacy, the advocate is likely to seize upon each and every basis for treaty interpretation he or she can think of, no matter what. No one has told us, and no one has told the courts, exactly which of the many standards of treaty

⁵⁷ See *In re Air Disaster at Lockerbie, Scotland*, on December 21, 1988, 928 F.2d 1267 (2d Cir.), cert. denied, 112 S. Ct. 331 (1991).

⁵⁸ *Id.* at 1270.

interpretation should be applied. The answer is that they all get discussed anyway, and there might be a slight balancing because the treaty is drawn in multiple languages, but all of the arguments are going to be made anyway.

PROFESSOR PETER WINSHIP (Southern Methodist University): I would like to add that one way to encourage uniform interpretation is to disseminate, as widely as possible, relevant opinions of courts and arbitral tribunals. As Professor Sweeney knows, UNCITRAL has undertaken to collect national court decisions and arbitral awards that construe UNCITRAL texts such as the Hamburg Rules. To do this, UNCITRAL has set up a system known as "CLOUT" (*Case Law On UNCITRAL Texts*). It has invited states to appoint "national correspondents" to collect relevant decisions and awards rendered in their jurisdictions and send them to UNCITRAL's Secretariat in Vienna with a brief digest. The Secretariat acts as a clearinghouse, periodically publishing the digests and making individual opinions available on request. If anyone is interested in CLOUT, I would be happy to supply further information after the session.⁵⁹

PROFESSOR GEORGE K. WALKER (Wake Forest University): What effect will the demise of the Soviet Union have on these matters?

PROFESSOR MCKENRY: I think that we need to watch the Foreign Sovereign Immunities Act (FSIA)⁶⁰ very closely. I watch each case to see how far they are willing to go in arguing that a state-owned carrier is eligible for some type of special treatment and, as you know, generally speaking, if it is a pure commercial operation, it is not a problem. But I would just add that I think that there is a little mischief, one way or another, in interpreting the FSIA. In the most recent aviation cases, the United States courts will take jurisdiction if the organization is a commercial un-

⁵⁹ *Editor's Note:* Professor Winship currently serves as one of the United States' two national correspondents. The other correspondent is Professor John O. Honnold of the University of Pennsylvania.

⁶⁰ 28 U.S.C. §§ 1602-1611 (1988).

dertaking and there is some business activity in the United States. However, the fact that an enterprise is commercial in nature will not keep the FSIA from applying if a sovereign government is whole or part owner, and there is still removal to the federal district court and a non-jury trial as a rule. It is also interesting to note that the choice of law issue has been distinguished from and treated differently in FSIA cases than in Federal Tort Claims Act⁶¹ cases, although the language is similar.

While I have the microphone, I would like to ask Professor Sweeney to comment on Hamburg's Annex on Common Understanding and what effect, if any, it has had on Articles 5, 6, and 8.

PROFESSOR SWEENEY: The early discussions in 1972 had reviewed the bases of liability that were possible, and early on it was decided to retain the fault basis and reject strict liability. At the conclusion of the Diplomatic Conference it was thought that since the language of Article 5 did not really spell out that it was a fault system, that it would be wise to say so somewhere. We could not find a convenient place to put it into the text of the treaty and, as a result, the so-called Common Understanding Annex was crafted. The Annex makes it clear that Hamburg imposes a reverse burden of proof.

The negotiations over Articles 5, 6, and 8 were extremely complex and lengthy. Articles 5, 6, and 8 were all negotiated together. It was a package deal and that is the reason that we can speak of a fault system of liability, a fault system that is limited in amount but possibly breakable.

In the final dealmaking, delegates were able to stress those affirmative positions that they felt essential while possibly losing those negative positions they desired but did not regard as essential. Thus, the instructions of our government insisted on a unit of limitation of liability that would cover the maximum amount of our trade by weight.

⁶¹ 28 U.S.C. §§ 2671-2680 (1988).

As it happened, 2§ SDR's covered 98.5% of our exports and 99.4% of our imports. The United States preferred that the limits be breakable, but we could not have both. In similar fashion, European shipowners represented by the Netherlands insisted that the unit limitation be unbreakable. They also preferred to retain the negligent navigation defense unchanged, but they could not have both. The fire provision — Article 5(4) — reeks of compromise, and that is an unfortunate legacy to future lawyers.

PROFESSOR JARVIS: Unfortunately, I see that our time has come to an end. On behalf of both Professor Straubel and myself and our respective sections, we thank you for attending this morning's session and we are especially grateful to our panelists for their insightful and thoughtful comments.

Comments

