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Stratis v. Eastern Air Lines: International or Non-International Transportation

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CASE COMMENT

Stratis v. Eastern Air Lines: International or Non-International Transportation

*by Patricia Barlow**

I. INTRODUCTION

The United States became a party to the Warsaw Convention[1] (Convention) on private international air law in 1934[2] which provided a uniform set of rules governing the liabilities and rights of passengers, shippers and carriers for death, injury or delay in international air transportation. The Convention, inter alia, limits the liability of the carrier to

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[1] The Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Jan. 31, 1930, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Convention]. This Convention was the result of two international conferences on private air law. The first was at Paris in 1925 and it established a group of experts known as the *Comité International Technique d'Experts Juridique Aériens* (C.I.E.T.E.J.A.) which prepared a draft of the Convention to be modified and subsequently adopted at the second conference at Warsaw in 1929.

[2] The United States ratified the Convention on July 31, 1934 after Secretary of State Cordell Hull presented the treaty to the Senate for consideration. Based on a voice vote of the Senate Committee on Foreign Relations, without being preceded by a debate, the Senate approved a resolution of United States adherence to the Warsaw Convention and, in accordance with the provisions of Article 38(2) of the Convention, filed the notice of adherence with the Polish Government. This manner of treaty adherence has been questioned, see Kennelly, *Aviation Law: International Air Travel—A Brief Diagnosis and Prognosis*, 6 CAL. W. INT'L L.J. 86, 98 (1975), where the writer claims that the United States never in fact signed the Convention and therefore questions whether or not the Convention is in fact a convention and, if so, whether or not it is constitutional.

a specified amount,[3] except in the case of non-delivery of a passenger ticket[4] or the carrier's willful misconduct.[5]

From the time that this treaty was first incorporated into the law of the United States,[6] its provisions have been subject to interpretation by many courts. The subject of this article is the holding of the United States Court of Appeals for the Second Circuit in *Stratis v. Eastern Air Lines*,[7] in which the court interpreted the "delivery" and "notice" provisions of the Warsaw Convention. The Court, however, failed to adequately address the question of "application" which in this case would have rendered the carriage "non-international" and thus outside the scope of the convention. The Second Circuit in *Stratis* held that the lia-

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[3] Article 22(2) was recently held to be unenforceable by the United States Court of Appeals for the Second Circuit in Franklin Mint v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982) (liability limits on cargo). *But see* Boehringer Maunheim Diagnostics, Inc. v. Pan Am. World Airways, 531 F. Supp. 344 (S.D. Tex. 1981); *see also* McGilchrist, *The Gold Franc in the U.S.: After Franklin Mint*, 1982 LLOYD'S MAR. & COM. L.Q. 281; McKenry, *Aviation Law Report*, 14 LAWYER OF THE AMERICAS 113 (1982).

[4] Article 3. *See* Mertons v. Flying Tiger Line, Inc., 35 F.R.D. 196 (S.D.N.Y. 1963), *aff'd*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), *reh'g denied*, 382 U.S. 933 (1965); Warren v. Flying Tiger Line, Inc., 234 F. Supp. 223 (S.D. Cal. 1964), *rev'd*, 352 F.2d 494 (9th Cir. 1965). However, in the case of Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968), it was held that if a passenger received a ticket with a notice which was difficult to read, notice was not adequately given and amounted to non-delivery of the ticket. *See* 42 NOTRE DAME LAW. 806 (1967), in which the writer criticizes the Court of Appeals for its failure to mention the citations in Alitalia's brief of the legislative history in support of the position that insufficiency of notice did not amount to non-delivery. It is also noted that the Court instead relied on its own view of the "overall purposes of the Convention" and on two cases which dealt with the question of "timeliness" of pre-flight delivery, which was not the question before the court. *See also* G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 83 (1977).

[5] Article 25. For personal injury and death cases where a finding of wilful misconduct has been upheld, see American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949) (damages of $25,000 affirmed); LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965) (court remands for recomputation of damages). *See also* Acosta, *Wilful Misconduct Under the Warsaw Convention: Recent Trends and Developments*, 19 U. MIAMI L. REV. 575, 586 (1965), discussing Capehart v. Aerovias Nacionales de Columbia, S.A., No. 10, 315-M-Civil-E.C. (E.D. Fla. 1963), where the jury returned a verdict of $227,500 but the case was subsequently settled for $200,000; KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 921 (1961) (damage award of $350,000 affirmed). *See generally* G. MILLER, *supra* note 4, at 193; McGilchrist, *Wilful Misconduct and the Warsaw Convention*, 1977 LLOYD'S MAR. & COM. L.Q. 539; R. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER ¶¶ 163-165 (1981).

[6] Since this is a "self-executing" treaty, no enabling statute is required to make this the law of the land. *See* Indemnity Ins. Co. v. Pan Am. World Airways, Inc., 57 F. Supp. 980 (S.D.N.Y. 1944), *aff'd on rehearing*, 58 F. Supp. 338 (S.D.N.Y. 1944), where it was held that as a treaty, the Warsaw Convention is the supreme law of the land by virtue of Article 6(2) of the U.S. Constitution.

[7] 682 F.2d 406 (2d Cir. 1982).

bility limits established by the Convention were to be applied based on the proposition that a passenger is assumed to know that a flight is international.[8] This article questions this principle since, as an examination of the law of "successive carriage" (as defined by the Convention and interpreted by the courts) will reveal, it cannot be asserted that there is a presumption that a passenger knows that a flight is international when one of the elements that the courts have used to determine this is the contractual consent of both parties. This is the element that gives all contractual arrangements force of law.

The legal significance of the distinction between "international" and "non-international" transportation will be considered the background against which the details of *Stratis* will be described. The meaning that has been given to the term "successive transportation" by the courts will then be examined, with emphasis on the elements considered important in determining the intentions of the parties in such transportation. After considering the guidelines that can be discerned from these decisions and the particular fact situations that have been held to amount to successive transportation, these principles will be applied to the facts of *Stratis*.

II. International and Non-International Transportation

Whether transportation is international or non-international has added legal significance in the United States in terms of recoverable damages since, unlike most other countries which are signatories to the Warsaw Convention,[9] the United States has not adopted, through legislative enactment, the Warsaw regime as the recovery basis in non-international transportation. One of the most frequently advanced explanations for this is that limiting the liability of a common carrier for death or injury due to negligence is contrary to public policy.[10] This rule has never extended to the transportation of goods. In the United States, air carriers have been able to limit liability for cargo and baggage by filing tariffs with the Civil Aeronautics Board,[11] with these limitations being subsequently upheld by the courts.[12] While until recently a few states limited recovery in their

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[8] *Id.* at 413.

[9] Most of the European countries, along with Australia, New Zealand, Singapore and Japan, have enacted legislation limiting the liability of the domestic air carriers based on the Warsaw Regime.

[10] Greer, *The Civil Liability of an Aviator as Carrier of Goods and Passengers*, 1 J. Air L. & Com. 241 (1930); D. Goedhuis, National Airlegislations and the Warsaw Convention 103 (1937); G. Miller, *supra* note 4, at 53.

[11] 49 U.S.C. § 1373 (1976). As to the present position, see Firemen's Fund Ins. Co. v. Barnes Electric, Inc. and United Airlines, Inc., 540 F. Supp 640 (N.D. Ind. 1982).

[12] *See, e.g.*, Tishman & Lipp Inc. v. Delta Airlines, 275 F. Supp. 471 (S.D.N.Y. 1967).

wrongful death statutes,[13] a majority of states consider these, too, to be against public policy. In *Kilberg v. Northeast Airlines*,[14] the New York Supreme Court, in applying the *lex loci delecti* rule, refused to enforce the limitation provisions of the Massachusetts Wrongful Death statute on the grounds of public policy.

The United States has different liability rules depending on whether a particular contract of transportation is international or non-international. The liability rules for the former are to be found in the provisions of the Warsaw Convention, while the common law rules of negligence form the recovery basis of the latter.[15] The significance of the difference between "limited" and "unlimited" liability inherent in the two systems of recovery is reflected in the average settlement figures of $70,900 for claims under the Warsaw Convention and $198,600 for non-Warsaw transportation of U. S. citizens.[16] It can, therefore, be asserted that the Warsaw/Montreal limit[17] is considerably less than the average award in most non-Warsaw cases.[18] This has been one of the most frequent criti-

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[13] Kansas, Massachusetts, Minnesota, Missouri, Virginia and Wisconsin have recently abolished these statutes. However, West Virginia still retains such a statute. *See* Tompkins, *Limitation of Liability by Treaty and Statute*, 36 J. AIR L. & COM. 421, 423 (1970), noting that there are no such limiting statutes for personal injury; 1 L. KREINDLER, AVIATION ACCIDENT LAW ¶ 13.03[2] (rev. 1980).

[14] 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961). *See* Kreindler, *Limitations on Liability in Aircraft Crash Cases: Some Reflections on Aviation Litigation Trends and Inequality*, 36 J. AIR L. & COM. 467, 473 (1970); L. KREINDLER, *supra* note 13, at ¶ 13.03[1]; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 528 (1967).

[15] *See generally* L. KREINDLER, *supra* note 13; S. SPEISER, RECOVERY FOR WRONGFUL DEATH (rev. 1975); SMEDLEY, *Wrongful Death-Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960); Tompkins, *The Aftermath of a Hijacking—Passenger Claims and Insurance*, 39 J. AIR L. & COM. 381 (1973); Levy, Protecting the Rights of Passengers in the United States (paper presented at the International Colloquim on Product Liability in Air and Space Transportation at Cologne (March 1977)).

[16] 129 CONG. REC. S2239 (daily ed. Mar. 7, 1983). These figures are based on the settlements of seven major air accidents from 1977 to February, 1983. For earlier statistics showing the differences in passenger recoveries in Warsaw and non-Warsaw cases, see Lowenfeld & Mendelsohn, *supra* note 14, at 554.

[17] Agreement C.A.B. 18900, 44 C.A.B. 819 (1966). This inter-carrier agreement limits the liability of the carrier for death, wounding or other bodily injury to the sum of $75,000, U.S. currency, inclusive of legal fees and costs, except the limit shall be the sum of $58,000, U.S. currency, exclusive of legal fees and costs. The carrier, however, waives the right to avail itself of any defense under Article 20(1) of the Warsaw Convention.

[18] For a discussion of the injustice which may result, see Kennelly, *The Warsaw Convention Treaty: Validity? Application? Inconsistencies! Absurdities! Injustices to Passengers, Airlines, Manufacturers and the United States Government*, 13 THE TRIAL LAW. GUIDE 35, 43 (1969) [hereinafter cited as *Treaty Validity*]; Kennelly, *Litigation of an Aircrash Case Against Manufacturer and Airline Which Resulted in Verdict for Two Million Dollars for Single Death*, 1965 THE TRIAL LAW. GUIDE 153 (1965); Kennelly, *supra* note 2, at 86 where the article is prefaced by the statement that subsequent to going to press, the

cisms of the Warsaw Convention. The inadequacy of the limitation provisions caused the United States to denounce the Warsaw Convention in 1965,[19] although the denunciation was withdrawn after the negotiation of the Montreal Agreement.[20]

Since the potential awards under the two different recovery rules are so significantly different, it is important that when legal advice is sought in this regard, the rights and liabilities of the parties in any fact situation can be determined with some degree of certainty. Prior to the *Stratis v. Eastern Air Lines* [21] decision, it could be asserted with certainty that when a passenger was issued a single ticket with, for example, the routing Los Angeles-New York-London, this was international carriage even if the delay or injury occured on the domestic leg of the journey between Los Angeles and New York. It could also be asserted that if two separate tickets had been issued, each with a different place of departure and destination, one from Los Angeles to New York and the other from New York to London, the Los Angeles to New York journey was not subject to the Warsaw Convention.[22] This certainty, however, appears to have been destroyed by the holding of *Stratis*.

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author completed a trial before a Chicago, Illinois jury which rendered a unanimous verdict of $5 million for a single death in air travel.

Damage awards in suits following the DC-10 Air Disaster at O'Hare International Airport in 1979 have been as high as $4.5 million for a single death, while $5 million was awarded to a victim of the New Orleans Air Disaster, 1980, by a U.S. District Court. INT'L AIR TRANSPORTATION ASS'N, 58 IATA LEGAL INFORMATION BULLETIN 17 (1983).

Currently pending in U.S. District Courts are the following significantly large claims: a claim for the sum of $2 billion which was filed on behalf of the family of a Florida horse trainer and his wife who were among the victims of the Pan Am Air Disaster in New Orleans, 1982, *id.* at 16; a single claim of $15 million was filed in the U.S. District Court in Washington, D.C., against Air Florida, American Airlines and Boeing Co. on behalf of a victim in the Air Florida accident in Washington, D.C., 1982, *id.* at 15; a complaint was filed in a U.S. District Court in Boston for three passengers seeking $10 million against World Airways for the Logan Airport, Boston disaster, 1982, *id.* at 15.

[19] On November 15, 1965, the U.S. government denounced the Warsaw Convention by delivery of the denunciation notice to the Polish Government through the U.S. Embassy in Poland, to become effective six months later on May 15, 1966. 53 DEP'T ST. BULL. 923 (1965). *See* Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965); Lowenfeld & Mendelsohn, *supra* note 14, at 546.

[20] After the International Civil Aviation Association convened a special meeting, 1966 ICAO Doc. No. 8584-LC/154-1 (minutes) and the IATA agreement was approved by the Civil Aeronautics Board, Agreement C.A.B. 18,900, 31 Fed. Reg. 7302 (1966), *reprinted in* 49 U.S.C. § 1502 (1970), the United States withdrew its notification of denunciation. 54 DEP'T ST. BULL. 955 (1966).

[21] 682 F.2d 406 (2d Cir. 1982).

[22] See Tompkins, *supra* note 15, at 385, commenting on the legal distinction between international and non-international transportation. The writer sees the individual passenger ticket as the controlling factor: "[t]he key to the applicability of one system or the other is simply the passenger ticket." *See also Treaty Validity*, *supra* note 18, at 38.

III. STRATIS V. EASTERN AIR LINES

Mr. Stratis, a Greek seaman, had been discharged from his ship at Baton Rouge, Louisiana, and was being repatriated at the expense of his employer. During the course of his repatriation journey, he was seriously injured in an aircraft accident. His journey involved transportation on a domestic ticket from Baton Rouge to New Orleans on Delta Air Lines, and then from New Orleans to New York on Eastern Air Lines. It was on the New Orleans-New York sector that the accident occurred, and Mr. Stratis was one of the eleven survivors of the one hundred and twenty-four passengers.

As far as the permissible extent of the airline's liability was concerned, these were all of the "relevant facts." The United States Court of Appeals for the Second Circuit did, however, consider material, the fact that Mr. Stratis had, at the time of the accident, a prepaid "advice" on an Olympic Airways flight that was scheduled to depart for Athens on the same day.[23] The transportation from Baton Rouge to New York, as evidenced in the domestic ticket, listed the place of departure as Baton Rouge and New York as the place of destination. Judge Bramwell, in an oral opinion for the District Court,[24] found that there were two separate contracts of transportation: one for domestic transportation and the other for international transportation. Eastern Air Lines' claim that the leg from New Orleans to New York was international transportation since the entire journey from Baton Rouge to Athens was "successive transportation" as defined in Article 1(3) of the Warsaw Convention was not accepted by the District Court on the basis of the following observation: "Since the international travel arrangements were not even communicated until after Mr. Stratis' domestic transportation was secured and, perhaps, not until he was airborne, it cannot be said, in the language of the *Egan* [*v. Kollsman Instrument Corp.*] court that Eastern accepted 'the passenger under a contract for international transportation.' "[25] The court felt that there had to be a contract for such international transportation. The court said that Eastern was a successive carrier only in domestic, not international, travel. This holding was relied on by the same

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[23] *Stratis*, 682 F.2d at 289.

[24] Transcript No. 75-CIV-1151 (1+ B) (S.D.N.Y) (Aug. 3, 1979).

[25] *Id.* at 20. The District Court, looking at the time sequence, noted that there was a distinct possibility that, since Mr. Stratis' flight from Baton Rouge departed at 9:31 a.m. on June 24, the same day the prepaid advice was organized in New York, that the arrangement for his Olympic Airways flight from New York to Athens was made after he had departed on the first leg of his journey to New York. *Id.* at 14. This view was confirmed in an Order (75c 1511 MDL 227) in which Judge Bramwell noted that he had miscalculated the time, but this did not affect the court's observation that the ordering of Mr. Stratis' international ticket may well have occurred when he was airborne.

court in the companion case of *Georgakis v. Eastern Air Lines.*[26] Since Messrs. Stratis and Georgakis had identical travel itineraries, the court applied the doctrine of collateral estoppel on the ground that Eastern Air Lines had had a full and fair opportunity to litigate the identical issues in the earlier case.

On appeal, Eastern Air Lines maintained that it was immaterial that the ticket for international transportation was not delivered because they argued that an international flight was contemplated by the parties. Stratis argued that the Warsaw Convention had no application since no passenger ticket had been delivered to him. The court, stating that this was a question of "application," and noting that a domestic ticket that did not show the ultimate overseas destination had been delivered, considered whether this was a technical irregularity or one that went to the very heart of the Convention's delivery requirements. The court then stated the following as the central issue: "The question is not whether Stratis knew his domestic flight could be subject to the Convention as a leg of an international flight under Article 1(3) . . . but *whether he had reason to know his overall flight was international.*"[27] Having concluded, by way of a footnote,[28] that this was international transportation under Article 1(3) on the ground that acceptance of prepayment by Olympic Airways resulted in the formation of a contract for international transportation irrespective of delivery, the court proceeded to examine the delivery requirements of Article 3(1). The court concluded that the purpose of this section was to provide the passenger with notice of the limitation provisions.[29] On the carriage in question, the notice requirement had been complied with since the domestic ticket that the plaintiff had been delivered included the notice. The court also concluded that, under Article 3(2), the absence of the passenger ticket did not affect the validity or existence of the contract of transportation.[30] Therefore, the Convention's notice and delivery provisions had been satisfied.

The court held that a passenger is assumed to know his flight is international when: (1) a prepaid ticket "advice" for the international flight is prepared and a ticket covering that flight is issued, though not validated or delivered to the passenger; and, (2) a contract for international transportation has been made and the passenger cannot cancel the international portion of the journey without running afoul of existing commitments to the immigration authorities.[31] The court also held that the lia-

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[26] 512 F. Supp. 330 (E.D.N.Y. 1981).

[27] 682 F.2d at 412 (emphasis added).

[28] *Id.* at 410 n.4.

[29] *Id.* at 410.

[30] *Id.* at 412.

[31] *Id.* at 412, 413.

bility limitation of the Convention applies when a passenger has been delivered a ticket from a domestic carrier that had given notice of the liability limitations.[32]

In a dissenting opinion, Judge Newman recognized that when the delivery requirement is satisfied by including in the ticket the notice of limitation and place of destination as defined by Article 1, the Convention applies to the domestic leg of an international journey. However, he could find nothing in the Convention that "excuses non-delivery of the ticket for travel to the foreign destination simply because a ticket for the domestic segment of a trip contains notice of the liability limitation applicable to foreign travel."[33] Placing great emphasis on the fact that for the Convention to apply in such transportation the destination must be stated on the ticket, he reasoned: "For the Convention to apply to Stratis, there must be delivery of his ticket for transportation to his 'destination,' Article 3(1)(b), which was Athens, whether the transportation is provided 'under the form of a single contract or of a series of contracts,' Article 1(3)."[34]

The conclusion of the majority that a passenger is assumed to know his flight is international in the case of successive transportation is examined here. The elements that other courts have considered as decisive in determining the nature of a particular contract of transportation will be examined, reserving the question of whether the *Stratis* case really was "international" transportation as defined by Article 1(3).

IV. The Meaning of Successive Transportation

A. *The Relevant Provisions of the Warsaw Convention*

Article 1(2) of the Warsaw Convention provides:

> For the purposes of this Convention, the expression "International transportation" means any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be [sic] a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this Convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this

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[32] *Id.* at 413.
[33] *Id.* at 418.
[34] *Id.*

Convention.[35]

The Convention, through the provisions of Article 1(3), extends this definition to cases involving successive transportation by determining such transportation to be undivided for the purpose of the application of the provisions of the Convention. Article 1(3) provides:

> Transportation to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided transportation if it has been agreed by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.[36]

Since the places of departure and destination are determinative of whether transportation is international, Article 1(3) makes it possible for these two points to be determined for the entire journey rather than each sector. However, as the words of Article 1(3) indicate, whether transportation is successive depends on whether "*it has been agreed by the parties as a single operation.*"[37] The Convention drafters had the parties' mutual intentions in mind,[38] both in this section and in Article 1(2).[39]

Before examining how courts have interpreted the intentions of the parties so that transportation may be defined as successive and, thus, international, it must be noted that the question of successive transportation not only arises in relation to Article 1(3), but also in the interpretation of "place of destination," which is one of the fora named under Article 28. As Miller notes, in the United States, courts do not seem to

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[35] Convention, *supra* note 1, at 3014, T.S. No. 876 at 16, 137 L.N.T.S. at 15.

[36] *Id.* at 3015, T.S. No. 876 at 17, 137 L.N.T.S. at 15.

[37] *Id.* (emphasis added).

[38] Galli v. Re-Al Brazilian Int'l Airlines, 29 Misc. 2d 499, 211 N.Y.S.2d 208 (N.Y. Sup. Ct. 1961). *See also* the Canadian case, Stratton v. Trans-Canada Air Lines, 32 D.L.R. 2d 736 (Brit. Col. Ct. App. 1962); the English case, Rotterdamsche Bank v. British Overseas Airways Corp., [1953] 1 All E.R. 675 (Q.B.); and G. MILLER, *supra* note 4, at 22.

[39] The overriding importance of the "contract between the parties" was seen by the Court of Appeals for the Fifth Circuit as a question of mutual consent in the case of Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1967). Judge Wisdom, delivering the opinion of the court, stated:

> The applicability of the Convention undeniably is premised upon a contract, but a contract of a particular kind. It is based on a contract of carriage that arises from a relationship between a "carrier" and the passengers. This contractual relationship requires only that the *carrier consent* to undertake the international transportation of the passengers from one designated spot to another, and that the *passenger* in turn consent to the undertaking.

Id. at 330-31 (emphasis added) (footnotes omitted).

distinguish between cases in which the place of destination is determined for the purposes of Article 1 and in which it is determined for the purposes of Article 28.[40] While this observation is not disputed, it is asserted that when the question of successive transportation is at issue under Article 1(3), the approach of the courts in determining the place of destination for the purpose of Article 28 has not been altogether uniform. While some courts have outlined elements that are determinative of the parties intentions, others have not done so.[41] Courts have interpreted the language of Article 1(3) by inquiring whether the parties intended the transportation in question as separate, independent contracts of transportation or part of one single operation.[42] Certain judicial principles have emerged to guide the courts in making this factual determination. Courts consider whether the unity of a single operation is intended, whether the contract of transportation is evidenced in a single ticket or a series of tickets, and whether the ticket(s) are delivered to the passenger at the beginning or during the journey.

B. How the Courts Have Interpreted the Words "Agreed by the Parties as a Single Operation"

Emphasizing the intent of the parties, the court in *Garcia v. Pan American World Airways, Inc.*[43] examined whether carriage with the routing New York-Bermuda-Lisbon-Natal-New York was successive transportation as defined by Article 1(3). The court, in concluding that

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[40] G. MILLER, *supra* note 4, at 19 n.69, 308.

[41] *See, e.g.*, Rinck v. Deutsche Lufthansa, 14 Av. Cas. (CCH) 17,554 (N.Y. Sup. Ct. 1975); Atlantic Fish & Oyster Co. v. Pan Am. Airways, Inc., [1950] U.S. Av. R. (Oceana) 23 (Ill. Cook Co. 1948) (cases where the courts have not outlined elements determinative of the parties intentions). *See also* Karfunkel v. Nationale Air France, 427 F. Supp. 971 (S.D.N.Y. 1977); Vergara v. Aeroflot, 390 F. Supp. 1266 (D. Neb. 1975); Briscoe v. Compagnie Nationale Air France, 290 F. Supp. 863 (S.D.N.Y. 1968); McCarthy v. East African Airways Corp., 13 Av. Cas. (CCH) 17,385 (S.D.N.Y. 1974); Parkinson v. Canadian Pacific Airlines Ltd., 10 Av. Cas. (CCH) 17,967 (S.D.N.Y. 1968), *aff'd on rehearing*, 10 Av. Cas. (CCH) 18,237 (1969); Khan v. Compagnie Nationale Air France, [1964] 1 U.S. Av. R. (Oceana) 109 (S.D.N.Y.); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968); Felsenfeld v. Societé Anonyme Belge d'Exploitation de la Navigation Aerienne, 234 N.Y.S.2d 351 (N.Y. Cir. Ct. 1962); Mohammed v. Air Canada, 12 Av. Cas. (CCH) 18,023 (N.Y. Sup. Ct. 1973); Garcia v. Pan Am. World Airways, Inc., 183 Misc. 258, 50 N.Y.S.2d 250 (N.Y. Sup. Ct. 1944), *aff'd*, 269 A.D. 287, 55 N.Y.S.2d 317 (1945), *aff'd* 295 N.Y. 852, 67 N.E.2d 257 (1946), *cert. denied*, 329 U.S. 741 (1946); Stratton v. Trans-Canada Air Lines, 32 D.L.R.2d 736 (Brit. Col. Ct. App. 1962); Rotterdamsche Bank v. British Overseas Airways Corp., [1953] 1 All E.R. 675 (Q.B.) (cases where the courts have outlined elements determinative of the parties intentions).

[42] *See infra* notes 43-72 and accompanying text.

[43] 183 Misc. 258, 50 N.Y.S.2d 250 (N.Y. Sup. Ct. 1944), *aff'd*, 269 A.D. 287, 55 N.Y.S.2d 317 (1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257 (1946), *cert. denied*, 329 U.S. 741 (1946).

this was successive transportation maintained this holding on the grounds that there had been a single fare for the entire journey and that the ticket had set forth New York as the place of departure and destination.[44] Consequently, the parties intended this to be one undivided carriage and not two separate, independent contracts of transportation from New York to Lisbon, and then from Lisbon to New York.

The fact that a new ticket is not issued is not, however, determinative of whether there is undivided transportation. In *Parkinson v. Canadian Pacific Airlines, Ltd.*,[45] the place of departure and destination was listed in the ticket as Buffalo, New York, although the passenger made a carrier change on what proved to be the fatal leg of the journey. The court, in determining whether this was a novation of the original contract, concluded that, since a new ticket was not issued and there was no change in the fare or the place of destination, there was not a novation.[46] As one scholar has observed: "The court gave the fact that the ticket reflected the original route as much importance as the absence of delivery of a new ticket."[47] In this sense, the non-delivery of a new ticket was not conclusive. However, the court attached equal significance to the fact that there was no fare change.

The significance of a fare change was considered in the case of *Vergara v. Aeroflot*,[48] where the issue before the court was whether the issuance of two new tickets amounted to two independent contracts of transportation. The original ticket listed Omaha, Nebraska as both the place of departure and destination. In the course of the journey, due to unforeseen circumstances, a carrier change was made. The substitute carrier, upon removing two coupons from the original booklets of the two passengers, issued two new tickets. The court, on the basis that an airline ticket is a highly modifiable contract, concluded that the original contract of carriage was not modified since there had been no fare change, and the substitute carrier, Aeroflot, was aware of the ultimate destination, the stopping places, and that two coupons had been removed from the original ticket.[49] This case was factually similar to *Parkinson* in that, although achieved by means of a different method, the new tickets were issued "in exchange" for the original tickets.

In this sense, *Parkinson* and *Vergara* are similar to the case of *Egan v. Kollsman Instrument Corporation.*[50] In *Egan*, a new ticket was issued

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[44] *Id.* at 260, 50 N.Y.S.2d at 251.

[45] 10 Av. Cas. (CCH) 17,967 (S.D.N.Y. 1968), *aff'd on rehearing*, 10 Av. Cas. (CCH) 18,237 (1969).

[46] *Id.* at 17,969.

[47] G. MILLER, *supra* note 4, at 23 n.92.

[48] 390 F. Supp. 1266 (D. Neb. 1975).

[49] *Id.* at 1269.

[50] 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039

on the final leg of a round trip journey. The original ticket listed New York as the place of departure and destination with a series of agreed stopping places throughout Canada and the United States. On the final leg, which proved to be the fatal leg of the journey, the passenger, due to inclement weather, had to be rescheduled on a flight other than the one originally intended. The rescheduled carrier, American Airlines, issued a new ticket under the heading, "complete routing this ticket and conjunction tickets," and specified the place of departure and destination as New York. The issue before the New York Court of Appeals was whether this leg of the journey was part of "international transportation" pursuant to Article 1(3) of the Warsaw Convention. Emphasizing the parties' intentions as material in the resolution of this issue, the court concluded that since the new tickets were issued "in exchange for" the original tickets—restating the originally assigned place of departure and destination—and since there was no fare change, this was determinative of their intent that this was one leg in undivided transportation.[51]

In *Mohammed v. Air Canada*,[52] there was a change of fare and a change in the destination originally stated in the ticket, and the court held that this amounted to a separate contract of carriage and not one leg in undivided transportation.[53] The Court of Appeals of British Columbia reached the same conclusion in the case of *Stratton v. Trans-Canada Air Lines*.[54]

When a change in carrier is involved by means of attaching a "revalidation form" on the original ticket, this, according to the Court in *Briscoe v. Compagnie Nationale Air France*,[55] is only a successive carrier within the meaning of Article 1(3) if such change could have been contemplated by the parties at the time the contract was made. In this case, the ticket had been left "open" for certain sectors of the journey. The court's reasoning was consistent with that of the English Court in *Rotterdamsche Bank v. British Overseas Airways Corp.*,[56] which involved an open air waybill. Since it was stated on the air waybill that a sector of the journey would be undertaken by another airline, the court held that this

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(1968).

[51] *Id.* at 165-68, 234 N.E.2d at 200-02, 287 N.Y.S.2d at 16-18.

[52] 12 Av. Cas. (CCH) 18,023 (N.Y. Sup. Ct. 1973).

[53] *Id.* The court relied primarily on the fact that immigration authorities would not allow the decedent to complete the return portion of her round trip ticket to establish that a wholly new contract of carriage was created.

[54] 32 D.L.R.2d 736, 741 (Brit. Col. Ct. App. 1962), where the passenger had endorsed the ticket with the routing Seattle-Victoria-Vancouver to another carrier with no fare change for the more direct routing Seattle-Vancouver.

[55] 290 F. Supp. 863, 866 (S.D.N.Y. 1968).

[56] [1953] 1 All E.R. 675 (Q.B.).

should have been in the contemplation of the parties.[57]

When more than one ticket is issued, determining the parties' intentions cannot solely be based on the conclusion that the issuing of two separate tickets is presumptive evidence of two separate contracts of transportation, although this is a permissible conclusion. The courts have, however, in such circumstances carved out certain guidelines for determining the parties' intentions. One of the earliest cases in which the question arose as to whether two separate tickets evidenced two separate contracts of carriage for determining the place of destination was *Felsenfeld v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne.*[58] One ticket was from Tel Aviv to Brussels, the leg of the journey on which the accident occurred, and the other ticket was from Brussels to New York. The court, in determining whether these were two separate contracts or a single contract of carriage, balanced the interests of the parties. The court reasoned that the plaintiff should not be penalized by the policies of the particular airline that issues separate tickets and the defendant should not profit from its failure to set forth the true destination on the passenger ticket.[59] Applying this test, the court held that since the entire trip had been paid at the beginning, and since visas had only been issued for the United States—which had been communicated to the airline at the beginning of the journey—the two tickets were for a single contract of carriage, the place of destination being New York.[60]

This is a case in which clearly the passengers had requested to be transported to New York and the carrier had consented to that request. This is confirmed in the court's opinion, where it is stated: "In this case the Felsenfelds affirm that they not only disclosed their destination to be New York but the defendant agreed to transport them there."[61] The court pointed out that when the place of destination had been conveyed to the carrier, which failed to include this in the ticket, the carrier should not receive the benefit of this error.[62] The consensual nature of the contract of carriage was emphasized by the court in that even though the ticket must include the place of destination, when this is omitted due to inadvertence on the part of the carrier or due to the particular method of issuing tickets used by the carrier, the place of destination will be based on the prior agreement between the passenger and carrier.

However, in the later case of *Khan v. Compagnie Nationale Air*

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[57] *Id.* at 680.

[58] 234 N.Y.S.2d 351 (N.Y. Cir. Ct. 1962).

[59] *Id.* at 354.

[60] *Id.* at 353-54.

[61] *Id.* at 353.

[62] *Id.* at 353-54. Since this was an Article 28 case, if the place of destination was not held to be New York, suit could not be brought there.

France,[63] even though the carrier knew the final destination but issued a separate ticket, this was held to amount to a separate contract of transportation and not part of the original undivided journey evidenced in the original ticket. The plaintiff, having purchased a K.L.M. ticket with the routing New York-Geneva-Paris-London-Amsterdam-Montreal, arrived in Paris to find that Air France, the carrier on the Paris-London sector, would not honor this sector on the original ticket. The plaintiff had to purchase a separate Air France ticket which the court held was not part of the original contract of transportation.[64] This case obviously involved an additional fare, and even though the carrier had knowledge of the final destination of the plaintiff's journey, it did not include the destination in the ticket as it was not regarded as one single operation by the carrier.[65]

When a separate ticket was purchased "en route" for a sector of the journey, even though the passengers had conveyed their ultimate destination to the agent, the court, in *McCarthy v. East African Airways Corp.*,[66] saw no unity between the two contracts of carriage evidenced in the two separate tickets. In this case, the passengers had proposed travel from Nairobi to New York via London. The travel agent, unable to provide tickets beyond London, advised the passengers to purchase their tickets to New York in London. The court held that, even though the travel agent knew of the ultimate destination, this was not evidenced in the ticket.[67] Although not relied on by the court in reaching its conclusion, the facts as stated indicate that there were two separate fares and probably two different carriers. In *Felsenfeld*,[68] the court did not view failure to list the ultimate destination on the ticket as material when the same carrier was involved and the air fare was paid at the beginning of the journey.

The fact that the consent of both parties to the contract of carriage is determinative of whether transportation is successive as defined by Article 1(3) was emphasized by the court in the case of *Karfunkel v. Compagnie Nationale Air France*.[69] Having purchased tickets separately, but from the same travel agent in New York, the plaintiffs had a series of tickets entitling them to depart from and return to New York, with a series of stopping places throughout Europe and the Middle East. They

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[63] [1964] 1 U.S. Av. R. (Oceana) 109 (S.D.N.Y.).

[64] *Id.* at 110.

[65] *See* Note, *Expanding Jurisdiction Under Article 28 of the Warsaw Convention*, 12 J. INT'L L. & ECON. 509, 523 n.62 (1978), where the author, commenting on this decision, states that the "issue apparently revolves around whether only a single 'party' regards the journey as a single operation, or whether both 'parties' recognize it as such."

[66] 13 Av. Cas. (CCH) 17,385 (S.D.N.Y. 1974).

[67] *Id.* at 17,386.

[68] 234 N.Y.S.2d at 353-54.

[69] 427 F. Supp. 971 (S.D.N.Y. 1977).

then purchased additional tickets on Air France from Tel Aviv to Paris so they could take advantage of the special reduced fare available for transportation between the Middle East and Europe. It was on the Tel Aviv to Paris flight that the plaintiffs suffered injury due to a terrorist attack.

The issue before the court was whether this flight was performed under a separate contract of transportation or part of successive transportation with New York being the place of departure and destination. Concluding that the later ticket was purchased independently of the earlier tickets, apparently without reference to New York as the place of destination, the court emphasized that for this to have been successive transportation within Article 1(3), it would have had to have been intended as such by both parties. Judge Wyatt stated:

> If *both* Air France and the plaintiffs regarded the flight from Tel Aviv to Paris as a connecting flight in "one undivided transportation" to New York, then New York might be the "place of destination" of the Karfunkels for the purposes of Article 28. The evidence shows, however, that Air France did not so regard the transportation it contracted to provide the Karfunkels.[70]

The conclusion that the issue of undivided transportation turns on the intentions of *both* parties is consistent with the Canadian case of *Stratton v. Trans-Canada Air Lines*.[71] This is also a case in which the ticket was purchased after the commencement of the journey. The court emphasized that in such circumstances, both parties must have knowledge of the overall arrangements if it is to amount to successive carriage. In concluding that there was no such knowledge, the court relied on the fact that there was a new ticket and a new fare. The court stated that "[t]he documents issued at Vancouver relating to the flight in question . . . indicate that such flight was regarded by Stratton and [Trans-Canada Air Lines], the parties thereto, as a distinct and separate flight on a distinct and separate contract based on its own distinct and separate consideration."[72]

C. *General Principles*

Based on the foregoing analysis of the case law, the following summary recapitulates the pertinent principles that guide courts when inquiring into the question of successive transportation:

1. When the contract of transportation is evidenced in one ticket for transportation with one or more agreed stopping places, this is undivided transportation when the ultimate destination is stated in the ticket

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[70] *Id.* at 974.

[71] 32 D.L.R.2d 736 (Brit. Col. Ct. App. 1962).

[72] *Id.* at 749.

and there is a single fare for the entire journey;[73]

2. This rule is not displaced in any way when additional tickets are issued so long as there is no change in the fare and the ultimate destination is stated in the additional ticket(s);[74]

3. However, if the ultimate destination is not stated in the additional ticket and there is a separate fare, these are elements that indicate a separate, independent contract of transportation that is not intended to be part of one undivided carriage;[75]

4. Where the carrier consents to transport the passenger to a specified destination but, due to the policy of the airline, separate tickets are issued for each sector of the journey, when the entire fare has been paid at the beginning, this amounts to successive transportation;[76]

5. Where there are different carriers involved, a carrier may indicate that there is no intention for a leg of the journey to be part of successive transportation by issuing a separate ticket, charging a separate fare and not including the otherwise ultimate destination in the ticket;[77] and, finally,

6. Successive transportation is a question of the intentions of *both* parties,[78] and when an additional ticket has been purchased en route, in order to establish the mutual intention of undivided transportation, the carrier must have knowledge of any additional contracts of transportation. When there is no reference made in the ticket to the ultimate destination, and there is a separate fare, this indicates that the carrier does not have the requisite knowledge of the overall transportation necessary for the transportation in question to be successive transportation within

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[73] Karfunkel v. Air France, 427 F. Supp. 971 (S.D.N.Y. 1977); Briscoe v. Compagnie Nationale Air France, 290 F. Supp. 863 (S.D.N.Y. 1968); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968); Felsenfeld v. S.A.B.E.N.A., 234 N.Y.S.2d 351 (N.Y. Cir. Ct. 1962); Garcia v. Pan Am. World Airways, Inc., 183 Misc. 258, 50 N.Y.S.2d 250 (N.Y. Sup. Ct. 1944), *aff'd*, 269 A.D. 287, 55 N.Y.S.2d 317 (1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946); Stratton v. Trans-Canada Airlines, 32 D.L.R.2d 736 (Brit. Col. Ct. App. 1962); Rotterdamsche Bank v. British Overseas Airways Corp., [1953] 1 All E.R. 675 (Q.B.). Except for *Briscoe*, these cases emphasize the use of a single fare for the entire journey, as do Vergara v. Aeroflot, 390 F. Supp. 1266 (D. Neb. 1975); Parkinson v. Canadian Pacific Airlines, 10 Av. Cas. (CCH) 17,967 (S.D.N.Y. 1968), *aff'd on rehearing*, 10 Av. Cas. (CCH) 18,237 (1969); Khan v. Compagnie Nationale Air France, [1964] 1 U.S. Av. R. (Oceana) 109 (S.D.N.Y.).

[74] *Karfunkel*, 427 F. Supp. at 974-75; *Vergara*, 390 F. Supp. at 1269-70; *Egan*, 21 N.Y.2d at 165-68; *Stratton*, 32 D.L.R.2d at 748-49.

[75] *Karfunkel*, 427 F. Supp. at 974-75; *Khan*, [1964] U.S. Av. R. at 110; *Stratton*, 32 D.L.R.2d at 748-49.

[76] *Felsenfeld*, 234 N.Y.S.2d at 354.

[77] *Khan*, [1964] U.S. Av. R. at 110.

[78] *Karfunkel*, 427 F. Supp. at 977; *Briscoe*, 290 F. Supp. at 866; *Egan*, 21 N.Y.2d at 166-67; Galli v. Re-Al Brazilian Int'l Airlines, 29 Misc. 2d 499, 211 N.Y.S.2d 208 (N.Y. Sup. Ct. 1961); *Stratton*, 32 D.L.R.2d at 749.

the meaning of Article 1(3) of the Warsaw Convention.

V. APPLICATION

In *Stratis*[79] the court stated the central issue to be whether the passenger had reason to know that his overall flight was international. The court concluded that Mr. Stratis had reason to know since there was evidence of a prepaid ticket "advice" and, in addition, he could not cancel his international ticket without running afoul of his commitments to the immigration authorities of the United States.[80] Had the question of successive transportation as defined in Article 1(3) of the Warsaw Convention (Convention) been adequately addressed in light of the principles discussed herein, the issue for determination by the court would have been whether the facts indicated that both parties intended the domestic flight from Baton Rouge to New York to be part of one undivided journey from Baton Rouge to Athens.

Since successive transportation is a question of the intentions of both parties to the contract of transportation, in this case Mr. Stratis and Eastern Air Lines, the intentions of each will be considered.

A. The Intentions of Mr. Stratis

As far as can be ascertained from the facts, there is nothing to substantiate the appellate court's holding that Mr. Stratis intended the leg of the journey from New Orleans to New York to be part of one undivided journey from Baton Rouge to Athens. As suggested by the trial court and not in any way disputed by the Court of Appeals, at the time this passenger departed from Baton Rouge, it was not clear whether the arrangements with Olympic Airways in New York were completed. The view of the Court of Appeals, that international transportation was contemplated by Mr. Stratis, could not be based on the existence of a contract of transportation. Such contractual relations only came into existence after the ticket "advice" had been issued and, in light of the time sequence of the events, that ticket "advice" was issued after the departure of Delta flight 416 from Baton Rouge. The position maintained by the Court of Appeals which relies on the commitments to the immigration authorities is inconsistent with the language of the Convention. Article 1(2) requires that there be a contract in existence to determine whether transportation is international, not a contemplated contract.[81] Article 1(2) states: "[T]he expression 'international transportation' [shall] mean any transportation

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[79] 682 F.2d 406 (2d Cir. 1982).

[80] *Id.* at 412.

[81] *See supra* note 35 and accompanying text.

. . . according to the *contract made by the parties* . . . ."[82] Therefore, it was not possible that the passenger could have contemplated his journey as being part of undivided transportation since no contract for transportation from New York to Athens was even in existence at the time of departure from Baton Rouge.

B. The Intentions of Eastern Air Lines

Before examining the intention of Eastern Air Lines, reference must be made to the fact that the Court of Appeals relied on the prepaid ticket "advice" as constituting the formation of a contract in order to establish that Mr. Stratis had a contract for successive transportation within the meaning of Article 1(3). This was a contract between Mr. Stratis and Olympic Airways. The party whose intentions are relevant for the purpose of Article 1(3), however, is Eastern Air Lines, since it was on Eastern's flight 66 that the accident occurred.[83] Thus, it is Eastern's and not Olympic's intentions that are relevant to the determination of whether the contract of transportation was, through the operation of Article 1(3), part of one undivided transportation.

As far as Eastern's intentions are concerned, it is submitted that it would be difficult, if not impossible, to establish that Eastern Air Lines intended flight 66 to have been part of undivided transportation to Athens. Had it been stated in the ticket that the place of destination was Athens, and had a fare for the entire journey been paid at the commencement of the transportation and indicated in the ticket, then the court could have relied on these elements as indicating that Eastern intended flight 66 as part of undivided transportation. However, such elements were not present and therefore since both contracts of transportation were concluded independently in terms of time, place and fare,[84] there is no evidence to substantiate that it was the intention of Eastern Air Lines that flight 66 was part of undivided carriage from Baton Rouge to Athens for the passenger, Mr. Stratis.

VI. CONCLUSION

The *Stratis* Court, by failing to adequately address the language and intent of Article 1(3), proceeded to engage in an exercise of judicial acro-

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[82] *Id.* (emphasis added).

[83] *See supra* note 69 and accompanying text. The carrier on each sector of the journey must regard the carriage as "undivided transportation." In the *Karfunkel* case, since the "accident" occurred on the sector where Air France was the carrier, it is the intentions of Air France that are relevant.

[84] Although not specifically referred to in the judgment, it can be assumed from the facts that, since the tickets were purchased independently, there were two separate fares.

batics with the "notice" and "delivery" provisions of the Convention which were irrelevant to the true issue before the Court.[85] This resulted in the limitation provisions of the Warsaw Convention being extended to a case of non-international transportation.

The issue of successive transportation does indicate that without the passenger ticket it will be difficult to ascertain the parties intentions as to whether transportation is successive. If the Guatemala City Protocol[86] is brought into force, which no longer makes delivery of a passenger ticket necessary,[87] then, as this article demonstrates, the passenger ticket still has an important role to play, even though absence of delivery will no longer deny the carrier the right to limited liability. Despite this, the passenger ticket will still be decisive in determining the difference between international and non-international transportation in the United States. This makes the difference between limited and unlimited liability.

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[85] As an alternative, the court in Day v. Trans World Airlines, 393 F. Supp. 217 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), found liability under Article 17 of the Warsaw Convention by considering all the factual circumstances in light of the plain meaning and historical background of the Convention. The Second Circuit could have followed this reasoning and enunciated a test that would guide future courts in determining the question of successive carriage under Article 1(3) of the Warsaw Convention.

[86] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Mar. 8, 1971, ICAO Doc. 8932 (1971). This Protocol has not yet received the number of ratifications required to bring it into force.

[87] *Id.* at art. 11.