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NOTE

Chan v. Korean Air Lines, Ltd.: Skirting the Legislative History of the Warsaw Convention

I. INTRODUCTION

On September 1, 1983, over the Sea of Japan, a Soviet Union military aircraft destroyed a Korean Air Lines Boeing 747 en route from Kennedy Airport in New York to Seoul, South Korea. All 269 persons on board the plane were killed.¹

The Warsaw Convention ("Convention"),² a multilateral treaty governing the international carriage of passengers, baggage, and cargo by air, provides a per passenger damage limitation for personal injury or death. The Convention further provides that passenger tickets must include notice of this limitation, and a private accord among airlines known as the Montreal Agreement ("Agreement") states that this notice shall be in print size no smaller than 10-point type.³ In *Chan v. Korean Air Lines, Ltd.*,⁴ the United States Supreme Court held that international air carriers do not lose the benefit of the Warsaw Convention's damages limitation if they fail to provide notice of that limitation. Accordingly, the liability of Korean Air Lines was limited to \$75,000 per passenger.

¹ N.Y. Times, Sept. 2, 1983, at A1, col. 6.

² Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 1502 note (1982) [hereinafter Warsaw Convention]. For the text of the relevant portions of the Warsaw Convention, see *infra* notes 28, 74 and 105.

³ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18,900, 49 U.S.C. § 1502 note (1982), reprinted in Civil Aeronautics Board, Aeronautical Statutes and Related Material 515-16 (1974) [hereinafter Montreal Agreement]. For the text of the relevant portion of the Montreal Agreement, see *infra* note 24.

⁴ 109 S. Ct. 1676 (1989).

This Note first explores the majority and concurring opinions in *Chan* and concludes that the Court erred in enabling a carrier to benefit from the Warsaw Convention's damage limitation when the carrier has failed to warn its passengers of that limitation. This Note further discusses how the Court created a confusing and disturbing precedent by failing to interpret the Montreal Agreement in conjunction with the Warsaw Convention, and by wrongly relying on a literal reading of the Warsaw Convention for its conclusions. Finally, this Note asserts that the concurrence in *Chan* correctly resolved the fundamental issue by examining the drafting history of the Convention and concluding that an international air carrier cannot receive the benefit of the Convention's damage limitation if it fails to provide adequate notice of that limitation on passenger tickets. The concurrence failed, however, to appreciate the relationship between the Montreal Agreement and the Convention and replaced a clear standard of adequate notice with an unclear standard.

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 1, 1983, Korean Air Lines ("KAL") Flight KE 007, a Boeing 747, departed from Kennedy Airport in New York bound for Seoul, South Korea. Instead of following the prescribed safe route over international waters, the pilots flew the plane more than three hundred miles off course into the airspace of the Soviet Union.⁵ The plane was tracked, deliberately fired upon, and destroyed over the Sea of Japan by a Soviet military fighter aircraft.⁶ All 269 persons on board the plane were killed.⁷

Family members and estate representatives of victims of flight KE 007 filed wrongful death actions against KAL in several United States District Courts. These actions were transferred for pretrial proceedings to the United States District Court for the District of Columbia.⁸ All parties agreed that their rights were governed by the Warsaw Convention.⁹

The controversy centered on the per passenger damages limitation

⁵ N.Y. Times, Sept. 3, 1983, at 4, col. 1.

⁶ *Id.*, Sept. 2, 1983, at A1, col. 6.

⁷ *Id.*, Sept. 3, 1983, at 1, col. 5.

⁸ The actions were transferred pursuant to 28 U.S.C. § 1407. The statute provides in part: When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will provide for the just and efficient conduct of such actions. 28 U.S.C. § 1407 (1988).

⁹ *Chan*, 109 S. Ct. at 1678.

for personal injury or death.¹⁰ This limit was initially fixed in 1934 by the Warsaw Convention at approximately \$8,300.¹¹ In 1966, the limit was raised to \$75,000 by the Montreal Agreement, an agreement executed and approved by the United States Civil Aeronautics Board.¹² In addition to providing for a higher damages limitation, the Montreal Agreement required carriers to give passengers written notice of the Convention's damage limitation in print size no smaller than 10-point type.¹³ However, notice of the Convention's liability rules for flight KE 007 appeared on KE 007's passenger tickets in only 8-point type.¹⁴ Through a motion for partial summary judgment, the petitioners sought a declaration that this discrepancy deprived KAL of the benefit of the damages limitation.¹⁵

On July 25, 1985, the United States District Court for the District of Columbia denied the motion, finding that neither the Warsaw Convention nor the Montreal Agreement prescribes that the sanction for failure to provide notice in print size no smaller than 10-point type is the elimination of the damages limitation.¹⁶ The Court's opinion specifically considered and rejected a contrary Second Circuit decision.¹⁷

On September 24, 1985, the District Court certified for interlocutory appeal the question whether KAL is entitled to benefit from the limitation of damages provided by the Warsaw Convention and the Montreal Agreement despite its defective tickets.¹⁸ The District of Columbia Circuit Court allowed the appeal and affirmed, adopting the District Court's opinion in full.¹⁹

The United States Supreme Court granted certiorari to resolve the conflict among the Courts of Appeals.²⁰ The Supreme Court noted that in addition to the Second Circuit, the Fifth Circuit was in disagreement

¹⁰ *Id.*

¹¹ Warsaw Convention, *supra* note 2.

¹² Montreal Agreement, *supra* note 3.

¹³ *Id.*

¹⁴ The difference between 8-point type and 10-point type is 1/36th of an inch, based on 72 type points to the inch.

¹⁵ *Chan*, 109 S. Ct. at 1678.

¹⁶ *In re Korean Air Lines Disaster of September 1, 1983*, 19 Av. L. Rep. (CCH) 17,584 (D.D.C. 1985).

¹⁷ *See In re Air Crash Disaster at Warsaw*, 705 F.2d 85 (2d Cir. 1983), *cert. den.*, 464 U.S. 845 (1983). For a discussion of *Warsaw*, see *infra* notes 116-18 and accompanying text.

¹⁸ *Chan*, 109 S. Ct. at 1679. The District Court certified for interlocutory appeal under 28 U.S.C. § 1292(b) (1988).

¹⁹ 829 F.2d 1171 (D.C. Cir. 1987).

²⁰ 485 U.S. 986 (1988).

with the District of Columbia Circuit's resolution.²¹

III. SUPREME COURT OPINIONS

A. Majority Opinion

In *Chan*, the majority, by a five to four margin, held that international air carriers do not lose the benefit of the Warsaw Convention's damages limitation if they fail to provide adequate notice of that limitation.²² Writing for the majority, Justice Scalia stated that the only time a carrier is subjected to unlimited liability is when it "accepts a passenger without a passenger ticket having been delivered."²³

Petitioners, family members and estate representatives of eighteen passengers killed in the catastrophe, conceded that by itself, the Montreal Agreement imposed no sanction for failure to comply with its 10-point type requirement.²⁴ They argued, however, that such a requirement is created by reading the Montreal Agreement in conjunction with the Warsaw Convention.²⁵ Their argument proceeded in two steps. First,

²¹ See *In re Air Crash Disaster Near New Orleans, Louisiana* 789 F.2d 1092 (5th Cir. 1986). For a discussion of *New Orleans*, see *infra* notes 119-21 and accompanying text.

²² *Chan*, 109 S. Ct. at 1684.

²³ *Id.* at 1680. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy. Justice Brennan filed an opinion concurring in the judgment in which Justices Marshall, Blackmun, and Stevens joined.

²⁴ *Id.* at 1679. The relevant portion of the Montreal Agreement provides:

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

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

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

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

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

*Either alternative may be used. Montreal Agreement, *supra* note 3.

²⁵ *Chan*, 109 S. Ct. at 1679.

they asserted that Article 3 of the Warsaw Convention removes the protection of limited liability if a carrier fails to provide adequate notice of the Convention's liability limitation in its passenger tickets. Second, they contended that the Montreal Agreement's 10-point type requirement supplies the standard of adequate notice under Article 3 of the Warsaw Convention.²⁶ Because the Court rejected the first point, it did not reach the second.²⁷

Justice Scalia began the majority opinion by quoting the relevant portion of the Warsaw Convention.²⁸ In particular, Justice Scalia examined the first and second sentences of Article 3(2) of the Convention. According to his analysis, all that the second sentence of Article 3(2) requires in order to avoid its sanction is the delivery of a passenger ticket. Justice Scalia continued:

Expanding this to mean "a passenger ticket in compliance with the requirements of this Convention" is rendered implausible by the first sentence of Article 3(2), which specifies that "[t]he . . . irregularity . . . of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention."²⁹

Justice Scalia then noted that in addition to being incompatible with the language of the Convention, the proposition that delivery of a defective ticket is equivalent to failure to deliver a ticket, produces an absurd results.³⁰ Such an interpretation would require that even a minor defect in a ticket, totally unrelated to adequate notice, would eliminate the liability limitation.³¹

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1679-80. Article 3 of the Warsaw Convention provides:

(1) For the transportation of passengers the carriers must deliver a passenger ticket which shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
- (d) The name and address of the carrier or carriers;
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability. Warsaw Convention, *supra* note 2, art. 3.

²⁹ *Chan*, 109 S. Ct. at 1680.

³⁰ *Id.* at 1681.

³¹ *Id.* at 1681-82. Justice Scalia argued:

It may seem reasonable enough that a carrier "shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability" when the ticket defect consists

The majority further found that comparison of Article 3(2) with other provisions of the Convention provides additional proof that defective compliance with the notice provision does not eliminate the liability limitation.³² Justice Scalia observed that Sections II and III of the Convention provide parallel rules to Section I, including a liability limitation and a notice requirement for baggage checks and air waybills for cargo.³³ The majority pointed out, however, that Sections I, II, and III are identical in their requirements, but not in their remedies. Section I, which includes Article 3, provides no explicit remedy, yet Sections II and III specifically waive liability limits for the airline's failure to include the notice requirements in the documents.³⁴ Given the parallel structure of these three sections, the majority stated that "it would be a flouting of the text to imply in Section I a sanction not only withheld there but explicitly granted elsewhere."³⁵

Justice Scalia then noted that while the Convention's drafting history may be "consulted to elucidate a text that is ambiguous," the Court has no power to insert an amendment into a treaty where the text is clear.³⁶ Here, concluded Justice Scalia, the text is clear: "[T]he Warsaw Convention does not eliminate the limitation on damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation."³⁷

B. Concurring Opinion

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, concurred in the Court's judgment but disagreed with much of the Court's analysis. In contrast to the majority, Justice Brennan stated that he is prepared to accept the petitioners' argument that the Warsaw Convention does sanction failure to provide notice of its applicability with

precisely of a failure to give the passenger proper notice of those provisions. But there is no textual basis for limiting the "defective-ticket-is-no-ticket" principle to that particular defect. Thus, the liability limitation would also be eliminated if the carrier failed to comply, for example, with the requirement of Article 3(1)(d) that the ticket contain the address of the carrier. *Id.*

³² *Id.* at 1682.

³³ *Id.* A "waybill" is "a document that is prepared by the carrier transporting a shipment of goods that contains such information as the nature of the shipment, the name of its consignor and its consignee, its origin, route, destination, and the charges paid, and that serves as a means of identification, a guide for routing, and a basis for freight accounting and almost all other carrier records and statistics. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2588 (3d ed. 1966).

³⁴ *Chan*, 109 S. Ct. at 1682. Article 4(4) of Section II of the Warsaw Convention provides that if the baggage check does not contain notice of the liability limitation, the carrier shall not avail itself of the Convention's liability limitations. Article 9 of Section III of the Convention provides a similar rule for air waybills. Warsaw Convention, *supra* note 2, arts. 4(4), 9.

³⁵ *Chan*, 109 S. Ct. at 1683.

³⁶ *Id.* at 1683-84.

³⁷ *Id.* at 1684.

loss of its limit on liability.³⁸ However, Justice Brennan did not accept the position that Korean Air Line's 8-point notice was inadequate, as a matter of interpretation of the Warsaw Convention, "simply because of the carrier's obligation under a related agreement to provide 10-point notice."³⁹ Justice Brennan concluded that the notice given by KAL was adequate. He therefore concurred in the Court's judgment that KAL did not lose the benefit of the Convention's limit on liability.

Justice Brennan rejected the petitioners' contention that the Montreal Agreement established a bright line which should be taken to define what notice is adequate. The Montreal Agreement, argued Justice Brennan, "is a private agreement among airline companies, which cannot and does not purport to amend the Warsaw Convention."⁴⁰ He explained:

[T]he Agreement was concluded under pressure from the United States Government, which would otherwise have withdrawn from the Warsaw Convention. And most air carriers operating in the United States are required by Federal Aviation Regulations to become parties to the agreement. But neither the Montreal Agreement nor the federal regulations purport to sanction failure to provide notice according to the Agreement's specifications with loss of the Warsaw Convention's limits on liability. The sanction, rather, can be only whatever penalty is available to the FAA against foreign airlines that fail to abide by the applicable regulations, presumably including suspension or revocation of the airline's permit to operate in the United States.⁴¹

Justice Brennan began the concurrence by noting that the majority held that "the sanction of Article 3(2), which consists of the loss of the Convention's limitation on liability under Article 22(1), applies only when no passenger ticket at all is delivered."⁴² Justice Brennan argued that while this is a plausible reading of the Convention, it is not the only possible reading. Where more than one plausible reading exists, it is proper to consider the evidence found in the Convention's drafting history on the intent of the drafters of the document.⁴³

Justice Brennan next observed that strong evidence exists which indicates that the drafters of the Warsaw Convention may have meant something other than what the majority determined the Convention to mean.⁴⁴ The intent of Article 3(2), contended Justice Brennan, is "to hold the carrier to the obligations, but to deny it the benefits, of the Con-

³⁸ *Id.* at 1693 (Brennan, J., concurring in the judgment).

³⁹ *Id.*

⁴⁰ *Id.* at 1692 (Brennan, J., concurring in the judgment).

⁴¹ *Id.* (citations omitted).

⁴² *Id.* at 1684 (Brennan, J., concurring in the judgment).

⁴³ *Id.* at 1685 (Brennan, J., concurring in the judgment).

⁴⁴ *Id.*

vention, if it fails to comply with certain requirements.”⁴⁵ Thus, Article 3 does not necessarily exclude the interpretation that failure to provide the required notice will result in a loss of the limitation on liability.⁴⁶

The concurrence then turned to the drafting history of the Convention for further indications of the intent of the contracting governments regarding the consequences of inadequate notice of the damage limitation.⁴⁷ In particular, the concurrence examined the final draft submitted to the Warsaw Conference by the *Comité International Technique d’Experts Juridiques Aériens* (“CITEJA”), the committee of experts who drafted the Warsaw Convention. The concurrence noted that while the final text of the Convention clearly imposes sanctions for omission of the notice requirement in Article 4 (which specifies what information must be included in baggage checks), Article 3 (which specifies what information must be included in passenger tickets) is ambiguous on this point.⁴⁸ This is not the case, however, in the draft CITEJA presented to the Warsaw Conference. In the CITEJA draft, the sanction of removing the damages ceiling applies more clearly to the failure to give notice in passenger tickets than to the failure to give notice in baggage checks.⁴⁹

Justice Brennan then stated:

If there was any reason, therefore, for according the notice requirement less weight in Article 3 than in Article 4, it must have emerged at the Warsaw Convention itself. But there is no trace of such a purpose in the Warsaw minutes, as there surely would have been had a decision been made to reverse the relative treatment of the Article 3 and 4 sanctions provisions in the previous draft. It seems much more likely, therefore, that the difference between Articles 3 and 4 on this point was an unintended consequence of other changes that were made at the conference.⁵⁰

The concurrence next observed that even if Article 3 of the Warsaw Convention does remove the liability limit for failure to provide notice of the Convention’s liability provision, the petitioners’ argument requires the Court to determine whether there exists a requirement that the notice given be “adequate,” and, if so, whether the notice provided by Korean Air Lines met that standard.⁵¹

⁴⁵ *Id.*

⁴⁶ *Id.* at 1685-86 (Brennan, J., concurring in the judgment). Justice Brennan stated, “The Court’s difficulty in accepting this point . . . results precisely from the misplaced literalism and disregard of context already evident in its approach to this treaty.” *Id.* at 1686 n.5 (Brennan, J., concurring in the judgment).

⁴⁷ *Id.* at 1686 (Brennan, J., concurring in the judgment).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1690 (Brennan, J., concurring in the judgment).

⁵⁰ *Id.* (footnote omitted).

⁵¹ *Id.* at 1691 (Brennan, J., concurring in the judgment).

The concurrence argued that if notice is indeed required, it must certainly meet some minimal standard of "adequacy."⁵² Justice Brennan stated that "notice that literally could be read only with a magnifying glass would be no notice at all."⁵³ Justice Brennan concluded, however, that the 8-point notice provision at issue in *Chan* was clearly "adequate" under any accepted interpretation of that term.⁵⁴

IV. DISCUSSION AND ANALYSIS

A. The Warsaw Convention and the Montreal Agreement

1. *Pre-Warsaw Convention Proceedings*

The Warsaw Convention of 1929 was the product of an effort initiated by France to achieve an accord on private aviation law.⁵⁵ In 1925, forty-five nations sent delegates to Paris to participate in the first international conference on Private Aviation Law.⁵⁶ The delegates approved of a draft agreement prepared by France which provided for a limitation on air carrier liability and for the establishment of both passenger tickets and air waybills.⁵⁷ CITEJA, a committee of experts on private aviation law, was created to develop a draft agreement to be submitted to the conferees at a future conference.⁵⁸ At its third session, held in May 1928,

⁵² *Id.* at 1692 (Brennan, J., concurring in the judgment).

⁵³ *Id.*

⁵⁴ *Id.* at 1693 (Brennan, J., concurring in the judgment).

⁵⁵ Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Chan v. Korean Air Lines, Ltd.*, 109 S. Ct. 1676 (1989) (No. 87-1055) [hereinafter Amicus Brief].

⁵⁶ See *Air France v. Saks*, 470 U.S. 392, 401 (1985). This effort paralleled the effort concerning public aviation law which culminated in the International Convention for Aerial Navigation, adopted in Paris on October 13, 1919. See Sack, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention*, 4 AIR L. REV. 345, 345-346 (1933); Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 AIR L. REV. 25, 28 (1936); Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. 27, (1932); See also D. BILLYOU, AIR LAW 16-18 (2d ed. 1964).

⁵⁷ Amicus Brief, *supra* note 55 at 4 (citing the *travaux preparatoires*, documents relevant to the Warsaw Convention's drafting history). The original documents, including their English translations, are located in the National Archives, in RG 59, Boxes 5620 and 5621.

⁵⁸ *Id.* See generally M. SMIRNOFF, LE COMITE INTERNATIONAL TECHNIQUE D'EXPERTS JURIDIQUES AERIENS (C.I.T.E.J.A.) (1936). CITEJA established four commissions to draft agreements for CITEJA's full consideration. The issues of the air waybill and the liability of the air carrier towards shippers of goods and passengers were assigned to the Second Commission.

In April 1927, at CITEJA's second session, the Second Commission submitted a draft agreement concerning the form of the air waybill, which CITEJA approved, with revisions. However, CITEJA also asked the Second Commission to prepare a draft agreement joining the waybill agreement with an agreement on the liability of air carriers. In March 1928, the Second Commission met and prepared a new draft that included articles dealing with passenger tickets and baggage checks in a manner paralleling the provisions previously formulated for waybills. Amicus Brief, *supra* note 55, at 4 (citing the *travaux preparatoires*).

CITEJA approved a draft for submission to member nations at a conference to be held in Warsaw.⁵⁹

2. *The Warsaw Convention*

In 1929 in Warsaw, during the Second International Conference on Private Aviation Law, the delegates adopted a revised version of CITEJA's final draft, now known as the Warsaw Convention.⁶⁰ Chapter II of the Convention, entitled "Transportation Documents," establishes the requirements for passenger tickets (Article 3), baggage checks (Article 4), and air waybills (Articles 5-16), including their legal effect and operation, information that must be contained in each, and sanctions for violation of the Convention's requirements regarding such documents.⁶¹

Under Article 3(1), the carrier must deliver a "ticket" to the passenger, which must contain a "statement that the transportation is subject to the rules relating to liability established by th[e] convention."⁶² If, under Article 3(2), a "carrier accepts a passenger without a passenger ticket having been delivered," the carrier is "not . . . entitled to avail himself of those provisions of th[e] convention which exclude or limit his liability."⁶³

Under Article 22, the Convention establishes limitations on air carrier liability for any injury to passengers, and for damage to checked baggage or goods. The liability limitation for passengers was 125,000 francs (then approximately \$8,300).⁶⁴ Articles 20 and 21 provide the carrier with certain defenses to liability claims, and Article 25 removes the liability limitation "if the damage is caused by . . . wilful misconduct."⁶⁵ Finally, Article 39 gives a nation the right to formally withdraw from the Convention effective six months after notice of its denunciation.

The United States became a party to the Warsaw Convention in 1934, following a vote in the Senate.⁶⁶ There were no congressional hearings, reports, or debates on the Convention.⁶⁷

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Warsaw Convention, *supra* note 2, arts. 3-16.

⁶² *Id.* art. 3(1)(e).

⁶³ *Id.* art. 3(2).

⁶⁴ Amicus Brief, *supra* note 55, at 5.

⁶⁵ Warsaw Convention, *supra* note 2, art. 25.

⁶⁶ See 78 CONG. REC. 11,582 (1934); see generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 502 (1967) [hereinafter Lowenfeld & Mendelsohn].

⁶⁷ See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 273 (1984) (Stevens, J., dissenting).

3. *Post-Warsaw Convention Proceedings and the Montreal Agreement*

In 1955, the Hague Protocol was drafted at an international conference at The Hague, Netherlands.⁶⁸ The Hague Protocol amended the Warsaw Convention in two important respects. First, the liability limitation was approximately doubled to 250,000 francs (currently worth approximately \$20,000). Second, certain air carriers' defenses were eliminated.⁶⁹ The United States declined to ratify the Hague Protocol because it found insufficient the increase in liability limits for claims involving death or bodily injury.⁷⁰

On November 15, 1965, the United States gave notice of its intention to denounce the Warsaw Convention, and thus of its intention to withdraw in six months, pursuant to Article 39 of the Convention. At the same time, the United States stated that it would rescind its notice of denunciation if the contracting nations appeared likely to agree on increasing the liability limit to approximately \$100,000. On the eve of the planned denunciation, the carriers agreed to a \$75,000 liability limit and to other United States demands. The United States withdrew its proposed denunciation of the Convention in light of this Agreement, known as the Montreal Agreement of 1966.⁷¹

On May 13, 1966, the Civil Aeronautics Board announced its approval of the Montreal Agreement.⁷² Under the Montreal Agreement, virtually all air carriers conducting international flights into or out of the United States agreed to raise the liability limit for death or bodily injury to \$75,000 per passenger.⁷³ The carriers also agreed to waive their right to assert the due care defense provided by Article 20(1) of the Convention.⁷⁴ In addition, the carriers agreed "at the time of delivery of the ticket, [to] furnish to each passenger whose transportation is governed by the Convention" a notice, set out verbatim in the Agreement, advising

⁶⁸ See Lowenfeld & Mendelsohn, *supra* note 66, at 509.

⁶⁹ Amicus Brief, *supra* note 55, at 5 (citation omitted). Additionally, the Conference adopted the United States' proposal to amend Article 3 in two major respects. First, the notice requirement in Article 3(1) was changed to demand that the ticket include a statement that the Warsaw Convention "may be applicable" if the passenger's journey involves travel in more than one country and that the Convention "in most cases limits the liability of carriers." Second, Article 3(2) was revised to provide that "if . . . the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by . . . this Article, the carrier shall not be entitled to avail himself of the [Convention's liability limitation]." *Id.* at 5-6 (citation omitted).

⁷⁰ Lowenfeld & Mendelsohn, *supra* note 66, at 510-16, 532-46, 564.

⁷¹ See *id.* at 586-96.

⁷² Montreal Agreement, *supra* note 3.

⁷³ *Id.*

⁷⁴ *Id.* Article 20(1) of the Warsaw Convention provides: "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." Warsaw Convention, *supra* note 2, art. 20(1).

the international passenger that the Warsaw Convention's liability limitations may apply to the journey. The carriers agreed to print this notice "in types at least as large as 10 point."⁷⁵

B. The Majority's Novel Interpretation of the Warsaw Convention:
Making the Damage Limit Available to an Airline that Fails
to Adequately Warn the Passenger

The fundamental question presented by *Chan* concerns what conditions, if any, Article 3 of the Warsaw Convention imposes on an air carrier in order for the carrier to be entitled to avail itself of the Convention's limitation on liability. The *Chan* majority and concurrence arrived at different answers to this question because the treaty itself is susceptible to two conflicting interpretations. Article 3(1) of the Convention provides that "the carriers must deliver a passenger ticket which shall contain the following particulars," and lists among those particulars a "statement that the transportation is subject to the rules relating to liability established by this convention."⁷⁶ Article 3(2) then provides that "if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of th[e] convention which exclude or limit his liability."⁷⁷ A fair reading of these provisions, taken together, is that an air carrier has not "delivered a ticket" within the meaning of Article 3(2), unless the ticket contains the required "statement" of limited liability. Thus, if the ticket does not contain the required "statement" of limited liability, the carrier may not avail itself of the liability limitation.⁷⁸

When the treaty is considered as a whole, and when its drafting history is examined, it becomes clear that this reading, accepted by the *Chan* concurrence and rejected by its majority, was the reading intended by the treaty's authors. The text of the Warsaw Convention is not "clear," as the majority contends.⁷⁹ It is, therefore, wrong to disregard the evidence to be found in the Convention's drafting history on the intent of the governments that drafted the document. In fact, courts have frequently examined the Convention's drafting history. In *Air France v. Saks*,⁸⁰ Justice O'Connor noted that the *travaux préparatoires*, documents relevant to the Convention's drafting history, are published and generally available to litigants. Courts often refer to these documents to

⁷⁵ Montreal Agreement, *supra* note 3.

⁷⁶ Warsaw Convention, *supra* note 2, art. 3(1).

⁷⁷ *Id.* art. 3(2).

⁷⁸ Amicus Brief, *supra* note 55 at 13.

⁷⁹ *Chan*, 109 S. Ct. at 1683.

⁸⁰ 470 U.S. 392 (1985).

resolve ambiguities in the text.⁸¹

As Solicitor General Charles Fried stated in his amicus brief to the *Chan* court, the *travaux preparatoires* show that:

[v]irtually from the outset, the persons responsible for negotiating and drafting the treaty intended that the limitation of liability would not be available if notice of that limitation were not included in a passenger ticket, baggage check, or waybill. There is no compelling evidence that the treaty drafters at any time decided to distinguish, in that regard, passenger tickets from baggage checks and waybills.⁸²

This view has been articulated by a number of federal appellate courts. In affirming the decision of the District of Columbia Circuit⁸³ and holding that international air carriers need only to deliver a passenger ticket in order to benefit from the Warsaw Convention's damage limitation, the *Chan* majority deviated from a line of eight United States appellate court decisions which, over a period of two decades, uniformly held that an airline's failure to adequately warn a passenger negates the damage limit despite delivery of a ticket.⁸⁴ These appellate courts held that adequate warning was an essential prerequisite for the damage limit and gave the passenger an opportunity to take self-protective measures. With adequate warning, the passenger could purchase insurance, choose not to fly, or make a contract with the carrier for a higher limit of liability.

In *Warren v. Flying Tiger Line Inc.*,⁸⁵ the Ninth Circuit Court of Appeals examined a case in which an airplane disappeared en route from California to Vietnam.⁸⁶ The passengers were given their tickets on the foot of the ramp leading onto the plane, at which time they were required to board the plane immediately.⁸⁷ Since the passengers were not afforded a reasonable opportunity to read the tickets or obtain additional insurance before they boarded the plane, the Ninth Circuit denied Flying Ti-

⁸¹ *Id.* at 400.

⁸² Amicus Brief, *supra* note 55, at 15.

⁸³ 829 F.2d 1171 (D.C. Cir. 1987).

⁸⁴ See *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1966); *In re Air Crash Disaster near New Orleans, Louisiana*, 789 F.2d 1092, 1098 (5th Cir. 1986); *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85, 89-91 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 390 U.S. 816 (1965); *Manion v. Pan Am. World Airways, Inc.*, 55 N.Y.2d 398, 434 N.E.2d 1060 (1982); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199 (1967).

⁸⁵ 352 F.2d 494 (9th Cir. 1965).

⁸⁶ The airplane "was under charter to the United States Air Force and was carrying, in addition to its crew, ninety-six passengers, ninety-two of whom were United States soldiers." *Id.* at 495.

⁸⁷ *Id.* at 497.

ger the benefit of the Convention's damage limitation. The court held that "[t]he passengers were . . . deprived of a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability."⁸⁸

In *Mertens v. Flying Tiger Line Inc.*,⁸⁹ the Second Circuit Court of Appeals examined a case similar to *Warren*, in which a passenger ticket was delivered to a passenger only after he had boarded the plane. At the time of delivery of the ticket, the plane was parked on the ramp and was about to take off.⁹⁰ The Second Circuit held that the airline failed to comply with its Warsaw obligations and, as a result, lost the benefit of the Convention's damage limitation. The court stated:

We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. . . . The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air.⁹¹

The Second Circuit also based its conclusion that the limitation was inapplicable on the fact that "the statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable . . ."⁹²

Warren and *Mertens* were followed by *Alitalia-Linee Aeree Italiane, S.p.A. v. Lisi*⁹³, a case closer to the facts of *Chan*. In *Lisi*, an Alitalia airplane, while en route from Rome to New York, crashed shortly after taking off from Shannon, Ireland. The limitation of liability notice given to the passengers by Alitalia was printed in 4-point type. The United States Supreme Court, in an equally divided ruling,⁹⁴ affirmed the Second Circuit's holding that Alitalia could not claim the Convention's damage limitation because the notice was inadequate. The Second Circuit characterized the notice as "Lilliputian" and "virtually invisible," and held that to allow the airline to deliver such a notice and claim the limitation would render the Convention's terms meaningless.⁹⁵ The court further

⁸⁸ *Id.* at 498.

⁸⁹ 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965).

⁹⁰ *Id.* at 857.

⁹¹ *Id.* at 856-57. Similarly, in *Manion v. Pan Am. World Airways, Inc.*, 55 N.Y.2d 398, 434 N.E.2d 1060 (1982), the highest court in the State of New York held the limitation inapplicable since the airline did not deliver a ticket until after the passenger had completed the first leg of her trip.

⁹² 341 F.2d at 857.

⁹³ 390 U.S. 455 (1968).

⁹⁴ Justice Marshall did not participate in the Supreme Court's decision, apparently because he filed an amicus brief in *Lisi* as Solicitor General. Memorandum for Amicus United States (jurisdictional stage) at 7, *Alitalia-Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968).

⁹⁵ *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966).

declared:

The Convention's arbitrary limitations on liability — which have been severely and repeatedly criticized — are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which gives him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially.⁹⁶

Lisi was followed by *Egan v. Kollsman Instrument Corp.*⁹⁷, in which the highest court in the State of New York unanimously held that delivery of a notice in 4.5-point type violated Article 3 of the Warsaw Convention as a matter of law and resulted in liability for full damages. The court held that "a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention."⁹⁸

It is evident that, unlike the majority in *Chan*, the courts in *Warren*, *Mertens*, *Lisi*, and *Egan* each considered the language of Article 22 of the Convention when interpreting the language of Article 3.⁹⁹ Article 22 specifically provides that "the carrier and the passenger may agree to a higher limit of liability."¹⁰⁰ If, as the *Chan* majority contends, a carrier can benefit from the Convention's damage limitation by delivering a passenger ticket that makes no mention of that limitation, then the passenger is effectively deprived of his rights under Article 22. As the Second Circuit said in *Mertens*:

[T]here would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take . . . self-protective measures.¹⁰¹

⁹⁶ *Id.* at 512-13 (footnote omitted). The United States government supported the Second Circuit's holding. Memorandum for Amicus United States (jurisdictional stage) at 7, *Alitalia-Linee Aeree Italiane, S.p.A. v. Lisi*, 390 U.S. 455 (1968). In addition, *Lisi* has been cited with approval and applied by various United States Courts, including the Court of Appeals for the District of Columbia Circuit. See, e.g., *Deutsche Lufthansa v. Civil Aeronautics Board*, 479 F.2d 912, 917 (D.C. Cir. 1973); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1198 n.11 (3d Cir. 1987); *Block v. Compagnie Air France*, 386 F.2d 323, 325 n.2 & 334 n.32 (5th Cir. 1967).

⁹⁷ 21 N.Y.2d 160, 234 N.E.2d 199 (1967), *cert. denied*, 390 U.S. 1039 (1968).

⁹⁸ *Id.* at 169, 234 N.E.2d at 203.

⁹⁹ The Court in *Chan* noted that several courts, including the courts in *Warren*, *Mertens*, *Lisi*, and *Egan*, have equated non-delivery of a ticket, for purposes of Article 3(2), with the delivery of a ticket in a form that fails to provide adequate notice of the Warsaw limitation. The *Chan* Court then stated, "We cannot accept this interpretation." *Chan*, 109 S. Ct. at 1680.

¹⁰⁰ Warsaw Convention, *supra* note 2, art 22. The right to contract for a higher liability limit was an essential part of the Convention throughout its drafting history. The first draft proposals included that right. See Amicus Brief, *supra* note 55, at 21 n.16.

¹⁰¹ 341 F.2d 851, 857 (2d Cir. 1965).

In sum, the *Chan* majority's holding, that a carrier can benefit from the Convention's damage limitation by delivering a passenger ticket that makes no mention of that limitation, makes little sense when the Convention's drafting history is examined and when the articles of the Convention are considered as a whole. Justice Scalia erred in considering the language of Article 3 in isolation. Rather, he should have viewed the language of Article 3 in light of the overall purposes of the Convention. By relying on a literal reading of Article 3 for his assertions, Justice Scalia failed to give the specific words of the Convention a meaning consistent with the expectations of the contracting parties.¹⁰² As Judge Learned Hand stated, "words are such temperamental beings that the surest way to lose their essence is to take them at their face."¹⁰³

As a consequence of the Court's decision, international carriers have been given a one-sided advantage. A carrier embarking on an international flight can now benefit from the Convention's damage limitation without providing its passengers with a reasonable opportunity to take self-protective measures. These passengers effectively have been robbed of the opportunity to alter the amount of recovery available to them or their families in the event of a crash.

C. Failing to Read the Montreal Agreement in Conjunction with the Warsaw Convention

Both the majority and the concurrence in *Chan* failed to appreciate the special relationship between the Montreal Agreement and the Warsaw Convention. The Montreal Agreement is by its very terms a "special contract" under Article 22(1) of the Warsaw Convention.¹⁰⁴ Article 22(1) of the Convention provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability."¹⁰⁵ The Agreement "is consistent with the terms of the Convention and does not purport, or need, to 'amend' the Convention itself in order to be legally effective."¹⁰⁶ Although the Montreal Agreement binds only the carriers

¹⁰² *Air France v. Saks*, 470 U.S. 392, 399 (1985).

¹⁰³ 1942 Address by Judge Hand to the Massachusetts Bar Association.

¹⁰⁴ Montreal Agreement, *supra* note 3.

¹⁰⁵ The entire text of Article 22(1) reads as follows:

In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. Warsaw Convention, *supra* note 3, art. 22(1).

¹⁰⁶ Amicus Brief, *supra* note 55, at 25. While the Agreement is a private agreement among carriers, it is approved by the United States government. In addition, the United States obtained formal assurance of foreign governments whose carriers were participating in the Agreement that those

who are parties to it, it is fair to hold those carriers to the bargain struck.¹⁰⁷ Korean Air Lines signed the Agreement in 1969.¹⁰⁸

The Montreal Agreement sets forth explicitly the notice of limitation of liability which is required to be printed "in types at least as large as 10 point and in ink contrasting with the stock. . . ."¹⁰⁹ Hence, the parties to the Agreement have been give notice of the 10-point type standard and have agreed to its strict adherence. In return, they have benefited from the Agreement's \$75,000 damage limitation.¹¹⁰ As Solicitor General Fried observed, the standard, "once declared, hardly seems the sort to make ready compliance burdensome. Indeed, in many respects, the 10-point type standard would seem far preferable to air carriers than the more vague standard that notice must be 'adequate.'"¹¹¹

In any event, the 10-point type standard should be applied because it is the measure adopted in 1963 by the Civil Aeronautics Board ("CAB"),¹¹² the agency then responsible for determining the sufficiency of such notice on passenger tickets. Even before the Montreal Agreement, the CAB executed a rule requiring foreign air carriers to furnish a statement of liability limitations with each ticket in at least 10-point type.¹¹³ Although that rule did not profess to construe the Warsaw Convention itself, there is no reason why a court should apply a different standard of adequacy in Warsaw Convention cases within the jurisdiction of the United States.¹¹⁴

Indeed, the 10-point type notice requirement has been adopted by both the Second and Fifth Circuits.¹¹⁵ In *In re Air Crash Disaster at Warsaw, Poland*,¹¹⁶ the Second Circuit Court of Appeals held that an

governments would permit the Agreement to go into effect subject only to termination on twelve months' notice. See Lowenfeld & Mendelsohn, *supra* note 66, at 593-94.

¹⁰⁷ Amicus Brief, *supra* note 55, at 25-26.

¹⁰⁸ *Chan*, 109 S. Ct. at 1678. All foreign airlines must sign the Agreement as a condition of their Foreign Air Carrier Permit, which allows the conduct of business in the United States. See 14 C.F.R. § 213.7 (1990).

¹⁰⁹ Montreal Agreement, *supra* note 3.

¹¹⁰ As the Solicitor General stated in his amicus brief to the *Chan* Court:

[T]here is no bar to the air carriers agreeing to comply with the Convention's notice requirement in a particular manner. Certainly, the carriers are hard pressed to argue that a violation of the Montreal Agreement's notice standard is unrelated to the requirements of the Warsaw Convention, in implementation of which the Montreal Agreement was executed. Amicus Brief, *supra* note 55, at 10-11.

¹¹¹ *Id.* at 12.

¹¹² The Civil Aeronautics Board is now known as the Department of Transportation.

¹¹³ 14 C.F.R. § 221.175(a) (1990).

¹¹⁴ Amicus Brief, *supra* note 55, at 26-27.

¹¹⁵ See, *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *In re Air Crash Disaster Near New Orleans, Louisiana*, 789 F.2d 1092 (5th Cir. 1986).

¹¹⁶ 705 F.2d 85 (2d Cir. 1983).

airline's use of 8.5-point type rather than 10-point type to inform passengers of liability limitations prevented it from raising defenses under Article 20(1) of the Warsaw Convention.¹¹⁷ In its discussion of the Montreal Agreement, the Second Circuit observed:

The 10-point guideline is a clear one, and quite easy to follow. To be sure, any such line drawing has an arbitrary air, but [the airline] is a party to the line drawn and it seems to us less arbitrary to accept the 10-point standard than it would be to guess on a case-by-case basis at what constitutes 'adequate notice.'¹¹⁸

Similarly, the Fifth Circuit Court of Appeals, in *In re Air Crash Disaster Near New Orleans, Louisiana*,¹¹⁹ held that the \$75,000 limitation for the wrongful death of an international traveler did not apply where the notice of liability given to the decedents was in 9-point type, "not in the required 10-point type."¹²⁰ The Fifth Circuit stated that "10-point type means exactly that, 10-point type."¹²¹

The majority in *Chan* held that a carrier can benefit from the Warsaw Convention's damage limitation by delivering a ticket that makes no mention of that limitation. Thus, the majority did not address the question of whether the Montreal Agreement's 10-point type requirement supplies the standard of adequate notice under Article 3 of the Convention. While the concurrence did address this question, it failed to adopt the Montreal Agreement's 10-point standard, stating only that "some minimal level of adequacy is required. . . ."¹²²

The concurrence's view ignores the relationship between the Montreal Agreement and the Warsaw Convention. By substituting an unclear standard for a clear one, the concurrence "undermines the certainty needed by air carriers, passengers, and courts alike. It also fails to give appropriate weight to the Executive Branch's judgment regarding the relationship between type size and notice to passengers."¹²³

V. CONCLUSION

The *Chan* majority's conclusion that the delivery of a ticket invokes the Warsaw Convention's damage limit, irrespective of whether the airline gives any warning to the passenger, violates both the language and the history of the Convention. By relying on a literal reading of the Con-

¹¹⁷ *Id.* at 91.

¹¹⁸ *Id.* at 90 n.10.

¹¹⁹ 789 F.2d 1092 (5th Cir. 1986).

¹²⁰ *Id.* at 1098.

¹²¹ *Id.*

¹²² *Chan*, 109 S. Ct. at 1693 n.16 (Brennan, J., concurring in the judgment).

¹²³ Amicus Brief, *supra* note 55, at 24.

vention for its assertions, the *Chan* majority has given international air carriers an undeserved, one-sided advantage. As a result of this decision, international travelers effectively have been denied the opportunity to alter the amount of recovery available to them or their families in the event of a crash. While it is true that the language of Article 3 of the Convention should have been relevant to the majority's decision, it should not have become, as Justice Frankfurter stated, a "verbal prison."¹²⁴ If the majority had viewed the language of article 3 in light of the drafting history and overall purposes of the Convention, it would have found that adequate warning is an indispensable prerequisite for claiming the liability limitation.

Unlike the *Chan* majority, the concurrence, after considering the drafting history of the Convention and its Articles as a whole, correctly resolved the fundamental issue by ruling that adequate notice is a prerequisite for claiming the damage limit. However, Justice Brennan replaced a clear standard of adequate notice with an unclear one by failing to appreciate the relationship between the Montreal Agreement and the Warsaw Convention.

It is evident that the Montreal Agreement is, as its title states, an "Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol."¹²⁵ The Agreement's specific notice requirement is plainly intended to define the manner in which the Warsaw Convention's corresponding notice provision is to be satisfied.¹²⁶ The carriers who signed the Agreement are aware of both the liability limitation and the requirement of a particular form of notice. According to the concurrence's confusing ruling, these carriers can benefit from the \$75,000 liability limitation while simultaneously ignoring the 10-point type notice requirement.

If, as Justice Brennan correctly contends, "some minimal level of adequacy is required,"¹²⁷ then certainly it is better to have a clear, settled standard than it is to require courts and juries to conjecture on a case-by-case basis as to what constitutes "adequate notice." Surely such a disjointed approach would not further the Warsaw Convention's goal of "uniformity" in international air transportation.¹²⁸

Ian A. Schwartz

¹²⁴ *Sullivan v. Behimer*, 363 U.S. 335, 358 (1960) (Frankfurter, J., dissenting).

¹²⁵ Montreal Agreement, *supra* note 3.

¹²⁶ Amicus Brief, *supra* note 55, at 25.

¹²⁷ *Chan*, 109 S. Ct. at 1693 n.16 (Brennan, J., concurring in the judgment).

¹²⁸ Amicus Brief, *supra* note 55, at 27 (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984)).