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Air France v. Saks: An Accidental Interpretation of the Warsaw Convention

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AIR FRANCE V. SAKS: AN ACCIDENTAL INTERPRETATION OF THE WARSAW CONVENTION

INTRODUCTION

Since the United States adhered to the Warsaw Convention[1] in 1934, United States courts have struggled to construe the proper interpretation of the Convention's most innovative provision—limited airline liability for passenger injuries occurring from "accidents"[2] during international air travel.[3] In attempting to carve out the boundaries of the "accident" precept, courts have been at odds in formulating a uniform definition.[4] In a recent decision, the Supreme Court attempted to allay this confusion by developing a new standard based on the ordinary meaning of the term.[5] The Supreme Court, however, overlooked the unique meaning that the term "accident" engenders in the context of airline liability. In doing so, the Court set a standard that circumvents United States obligations under the Warsaw Convention.

This Comment analyzes the meaning of the term "accident" under article 17 of the Warsaw Convention. Part I discusses the historical background of the Convention as modified in part by the Montreal Agreement. Part II examines judicial attempts to define the term "accident" under article 17. Finally, Part III scrutinizes the courts' analy-

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. The official text of the Warsaw Convention is in the French language. This Comment uses the United States' translation, reprinted in 49 U.S.C. app. § 1502 (1982).

This Comment uses the terms "convention" and "treaty" interchangeably. The term "treaty" now is accepted as a generic term that embraces all kinds of international arrangements in written form. T. ELIAS, THE MODERN LAW OF TREATIES 14 (1974).

2. Warsaw Convention, *supra* note 1, at art. 17. The text of article 17 provides:

> The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the *accident* which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Id. (emphasis added).

3. Warsaw Convention, *supra* note 1, at art. 1(2) (defining scope of international air transportation for purposes of the Warsaw Convention). The Warsaw Convention comprehends transportation where the place of departure and the place of destination are within the territories of two parties to the Convention or within the territory of one party if there is a stopping place in another territory. *Id.*

4. *See infra* notes 48-89 and accompanying text (discussing judicial interpretations of the term "accident").

5. Air France v. Saks, 105 S. Ct. 1338, 1345 (1985) (construing the term "accident" used in article 17 of the Warsaw Convention from its ordinary meaning).

ses and proposes a more technically definitive standard for determining when an "accident" occurred for Warsaw Convention purposes.

I. THE WARSAW CONVENTION

The Warsaw Convention is the principal treaty governing air carrier liability in international air transportation.[6] Anticipating the growth of air transportation,[7] and aiming to facilitate the rapid expansion in international commercial operations,[8] many nations united to formulate a uniform body of regulation. The Warsaw Convention was the result of two international air conferences.[9] In concluding the Warsaw Convention in 1929, air strategists achieved two primary objectives: to provide a uniform system of regulation in a manner that would accommodate many countries with different legal systems;[10] and to limit airline liabil-

6. *See* 2 C. SHAWCROSS & M. BEAUMONT, AIR LAW (A)17-25 (4th ed. 1984) [hereinafter cited as 2 C. SHAWCROSS & M. BEAUMONT] (listing the more than 120 countries adhering to the Warsaw Convention). *See also* G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 1 (1977) [hereinafter cited as G. MILLER] (discussing primary role of Warsaw Convention in regulating international air transportation); A. LOWENFELD, AVIATION LAW § 4.1 (2d ed. 1981) (noting that the Warsaw Convention is the most widely adopted of all treaties after the United Nations Charter).

7. The airplane became a viable means of transportation in the late 1920's, profoundly affecting industrialized society. Charles A. Lindbergh's flight across the Atlantic Ocean in 1927 ushered in an era of widespread international air transportation. *See generally* C. LINDBERGH, THE SPIRIT OF ST. LOUIS (1953) (relating Lindbergh's own story of transatlantic flight); S. ALTSHUL & M. BENDER, THE CHOSEN INSTRUMENT (1982) (unfolding complete history of Pan American Airways, Inc., the first American international airline).

8. *See* A. LOWENFELD, AVIATION LAW § 2.1 (2d ed. 1981) (stating that airline operations in domestic and foreign travel totalled only 400 million passenger-miles between 1925-1929). In contrast, in 1985 alone, scheduled international and domestic air traffic was estimated at 168 billion tonne-kilometres. *1985 Scheduled Air Traffic Growth Continued, but at Lower Annual Rate*, 42 INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO) BULL. 10 (Feb. 1986).

9. *See* 1 C. SHAWCROSS & M. BEAUMONT, AIR LAW VII(I) (4th ed. 1984) [hereinafter cited as 1 C. SHAWCROSS & M. BEAUMONT] (tracing history of Warsaw Convention). The First International Conference of Private Air Law, held in Paris in 1925, adopted a resolution creating an International Technical Committee of Aerial Experts. *Id.* (In French, Comité Internationale Technique d'Experts Juridiques Aériens (CITEJA)). The committee was formed to study problems connected with private liability in the international operation of aircraft and to codify the law in this area. *Id.* The Second International Conference on Private Air Law reconvened in 1929 in Warsaw as a result of the CITEJA studies and deliberations and adopted the committee proposal thereby establishing the Warsaw Convention. *Id. See generally* Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. & COM. 27 (1932) (discussing development of Warsaw Convention); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967) [hereinafter cited as Lowenfeld & Mendelsohn] (providing detailed historical analysis of Warsaw Convention).

10. *See* Warsaw Convention, *supra* note 1, at preamble (recognizing specifically the advantage of uniformity in regulating international air transportation). *See also*

ity in order to protect the newly emerging and vulnerable airline industry from disabling losses.[11] The Warsaw Convention is a body of rules that provide a uniform framework for governing the legal rights and responsibilities of international air carriers, passengers, and shippers.[12] Moreover, the Convention provides a uniform system for documenting passenger tickets, baggage checks, and air-way bills.[13] These items form the contractual relationship between the carrier and passenger or shipper.[14] Fixing the rights and liabilities of the carrier and the passengers, the Convention helps alleviate confusion and conflict of laws uncertainties.[15]

Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977) (recognizing one purpose of Warsaw Convention as establishing world-wide liability rules to govern international aviation that would supersede differing local laws); Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971 (S.D.N.Y. 1977) (recognizing Warsaw Convention goal to create uniformity in actions arising from international air accidents); Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1154 (D.N.M. 1973) (stating Warsaw delegates recognized that international air transport would "link nations of vastly diverse cultural and legal systems" and anticipated uniformity through a controlling body of law). *See generally* Orr, *The Warsaw Convention*, 31 VA. L. REV. 423 (1945) (discussing Warsaw Convention purpose as effecting a uniformity of procedure and remedies).

11. *See* SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES, SEN. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934). Considering the Warsaw Convention liability limitation, Secretary of State Cordell Hull stated:

> It is believed that the principle of limitation will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Id.; *see also* Lowenfeld & Mendelsohn, *supra* note 9, at 499 (noting that the liability limitation was intended to encourage the growth of the infant airline industry by assisting airlines to "attract capital that might otherwise be scared away by the fear of a single catastrophic accident").

12. *See* Warsaw Convention, *supra* note 1, at preamble. (discussing the advantage of uniformity); *see also* Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 396, 314 N.E.2d 848, 854 (1974) (stating "[t]he apparent purpose of the entire Convention is uniformity among its diverse adherent Nations—the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered").

13. *See* Warsaw Convention, *supra* note 1, at arts. 3-16 (providing elaborate rules that regulate travel documents).

14. *Id.*; *see also* Warsaw Convention, *supra* note 1, at art. 33 (referring to consentual nature of contract for transportation); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 166-67, 287 N.Y.S.2d 14, 17-18, 234 N.E.2d 199, 201, *cert. denied*, 390 U.S. 1039 (1967) (discussing the Convention's emphasis on the instruments as evidence of a contract that settles, in advance, the application of the Warsaw Convention).

15. *See* 1 C. SHAWCROSS & M. BEAUMONT, *supra* note 9, at I(89) (relating that the Warsaw Convention eliminated many conflict of law questions that would otherwise arise); Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 ANNALS AIR & SPACE L. 151, 153 (1983) (stating that "[t]he most important reason for

The Warsaw Convention, however, receives its notoriety for placing an absolute limit on air carrier liability for passenger injury and death.[16] Article 17 presumes carrier liability for passenger injuries[17] caused by an "accident" occurring during air travel.[18] Accordingly, once a plaintiff passenger shows that an "accident" occurred, the burden of proof shifts from the passenger to the carrier. To avoid liability, the carrier must demonstrate that it acted without negligence.[19] In exchange for this presumption, the Convention limits the carrier's liability to the passenger.[20] Currently, under the Warsaw Convention, the ceiling for air carrier liability is approximately $8,300.[21]

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achieving uniformity was to avoid serious and complicated conflict of law problems which could arise in the absence of a treaty").

16. Warsaw Convention, *supra* note 1, at arts. 17, 22. Article 17 establishes liability for personal injury and death. Article 22 limits the carrier's liability. *Id.*

17. Warsaw Convention, *supra* note 1, at art. 17. The presumption, however, does not guarantee the injured plaintiff full recovery of the limited amount. A claimant can recover only the amount of damages proven not exceeding the liability ceiling; *see* Husserl v. Swiss Air Transport Co. (Husserl I), 351 F. Supp. 702, 708 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973) (predicating recovery under the Warsaw Convention on proof not only of an accident, but damages as well). *But see* Warsaw Convention, *supra* note 1, at art. 25 (permitting a claimant to pierce the liability ceiling under the Convention by proving that the carrier is guilty of wilful misconduct and recover proven damages in excess of the liability limit).

18. Warsaw Convention, *supra* note 1, at art. 17. The negotiating history of the Warsaw Convention reveals that article 17 was the subject of extensive debate. The Paris Conference specified that "[t]he carrier is liable for accidents, breakdowns, and delays." [1925 Paris] Conference Internationale de Droit Privé Aérien 87 (1936), *cited in* Air France v. Saks, 105 S. Ct. 1338, 1343 (1985). The Warsaw Conference, however, considered the revised draft that CITEJA submitted:

> The carrier shall be liable for damage sustained during carriage:
> (a) in the case of death, wounding, or any other bodily injury suffered by a traveler;
> (b) in the case of destruction, loss, or damage to goods or baggage;
> (c) in the case of delay suffered by a traveler, goods or baggage.

International Conference on Air Law Affecting Questions, Minutes, Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw 264-65 (R. Horner & D. Legrez trans. 1975) [hereinafter cited as Minutes].

19. *See* Warsaw Convention, *supra* note 1, at art. 17 (relieving plaintiff of the burden of proving negligence).

Presumptive liability is particularly helpful for plaintiffs in aviation tort cases because the expense and expertise required to prove negligence is often beyond the grasp of the injured victim. *See* B. Reukema, *No New Deal on Liability Limits for International Flights*, 18 INT'L LAW. 983, 994 (1984) (discussing plaintiff's difficult burden in proving airline negligence).

20. *See* Warsaw Convention, *supra* note 1, at art. 22 (limiting airline liability for personal injury or death in international transportation to 125,000 Poincaré francs per person).

21. *Id.*; *see* Block v. Compagnie Nationale Air France, 386 F.2d 323, 325 (5th Cir. 1967) (computing that 125,000 Poincaré francs converts into $8,291.87 U.S. dollars); *see also* Trans World Airlines, Inc. v. Franklin Mint Corp., 104 S. Ct. 1776, 1780 (1984) (holding that the official price of gold would continue to be used as unit to convert liability limits into U.S. dollars). *But see infra* notes 33, 38, and accompanying

The Convention also mitigates the harshness of the presumption of liability, allowing air carriers to assert certain defenses. First, the Convention permits airlines to rebut the presumption of liability with a due care defense.[22] An airline thus escapes liability by proving that it took reasonable measures to avoid the damage or that to take such measures was impossible.[23] Second, the Convention permits air carriers to avoid liability when the passenger's contributory negligence was a cause of the injury.[24] Third, the airline may claim that the suit was not timely filed and that the Convention's two year limitation therefore bars the claim.[25]

A. United States Participation

The United States, although an observer, was not an official party to the international air conferences that formulated the Convention.[26] Desiring to take advantage of the uniform scheme, however, the United States adhered[27] to the treaty in 1934.[28] Currently, the Warsaw Con-

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text (discussing Protocols and Agreements that amend or modify the Warsaw Convention's recovery limits).

22. Warsaw Convention, *supra* note 1, at art. 20(1). Article 20(1), the due care defense, provides: "The carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures." *Id.*

23. *Id.*

24. Warsaw Convention, *supra* note 1, at art. 21 (providing that the air carrier may be excused wholly or partly from liability when a passenger is contributorily negligent).

25. Warsaw Convention, *supra* note 1, at art. 29 (providing that action under the Warsaw Convention must be brought within a two-year time period); *see* Oliver v. Scandinavian Airlines System, 17 Av. Cas. (CCH) 18,283 (D. Md. 1983) (finding passenger's claim time barred under Warsaw Convention); Falcones v. Lan-Chile Airlines, 13 Av. Cas. (CCH) 18,366 (S.D.N.Y. 1976) (extinguishing passenger's claim not filed within Warsaw Convention limitation period); Bapes v. Trans World Airlines, Inc., 8 Av. Cas. (CCH) 17,354 (N.D. Ill. 1962) (dismissing wrongful death claim not filed within the article 29 time limitation); Finkelstein v. Trans World Airlines, Inc., 15 Av. Cas. (CCH) 17,379 (N.Y. Sup. Ct. 1978) (finding negligence suit brought more than two years after claim arose was time barred under Warsaw Convention).

26. *See* Minutes, *supra* note 18, at 10 (recognizing United States negotiators as official observers).

27. Warsaw Convention, *supra* note 1, at art. 38. Article 38 permits nations that were not parties to its formation to adopt the Warsaw Convention. Article 38 provides:

> (1) This Convention shall, after it has come into force, remain open for adherence by any state.
>
> (2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.
>
> (3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Id.

The United States adhered to the Convention subject to a reservation that the first

vention preempts domestic law[29] governing liability in international air transportation[30] because its treaty status makes it the supreme law in the United States.[31]

Since its adherence, however, the United States expressed dissatisfaction with the Convention's low ceiling on air carrier liability.[32] After

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paragraph of article 2 of the Convention should not apply to international transportation performed directly by the state. 78 CONG. REC. 11,582 (1934).

28. *See* 78 CONG. REC. 11,577 (1934) (Senate approving resolution of ratification supporting adherence to Warsaw Convention by voice vote without floor debate).

On July 31, 1934 the United States deposited its adherence instrument to the Warsaw Convention in the Poland Ministry of Foreign Affairs archives as directed by article 37 of the treaty. Lowenfeld & Mendelsohn, *supra* note 9, at 502. The Warsaw Convention was proclaimed effective for the United States on October 29, 1934. *Id.*

29. Dickens v. United States, 545 F.2d 886, 892 (5th Cir. 1977). Under domestic law, a carrier's liability for passenger injury or death generally is determined by principles of negligence. *Id.* Negligence claims brought under domestic aviation law often are aided by the common law doctrine of *res ipsa loquitor*, permitting an inference of negligence on the part of the carrier. W. KEATON, PROSSER AND KEATON ON THE LAW OF TORTS 242-47 (5th ed. 1984). Because American tort law holds the tortfeasor responsible for the costs of accidents for which he is at fault, the Convention's ceiling on the amount of damages recoverable is a diametric departure from American tort principles. *See* 129 CONG. REC. S2246 (daily ed. March 7, 1983) (statement of Sen. Hollings) (asserting that limited liability under Warsaw Convention destroys compensation goal of our tort law system).

30. *See* Chandler v. Jet Air Freight, Inc., 54 Ill. App. 3d 1005, 1008, 370 N.E.2d 95, 98 (1977) (determining international transportation under Warsaw Convention from contract for carriage, not international in character); Butz v. British Airways, 421 F. Supp. 127, 129 (E.D. Pa. 1976) (holding that Warsaw Convention provisions exclusively govern rights and liability of parties when contract for carriage provides for transportation between Warsaw Convention signatories); *see also* Husserl v. Swiss Air Transport Co. (Husserl II), 388 F. Supp. 1238, 1246-47 (S.D.N.Y. 1975) (noting that United States' substantive law governs actions that the Warsaw Convention does not comprehend).

31. U.S. CONST. art. VI, cl. 2 (supremacy clause); *see* Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (noting that treaties made under United States authority are binding law that judges in every state must follow); *see also* Dalton v. Delta Airlines, Inc., 58 F. Supp. 338, 339 (S.D.N.Y. 1944) (stating Warsaw Convention, an international treaty, is supreme law in the United States).

32. The United States began to propose revisions of the air carriers' liability limitation shortly after it adhered to the Warsaw Convention. *See* Lowenfeld & Mendelsohn, *supra* note 9, at 504 (underlying American concern was whether the limit had been set at the right level). Early proponents argued to raise the passenger recovery limit because airlines could obtain low-cost liability insurance. *Id.* at 502.

Current proponents of modifying the Warsaw Convention liability limit submit additional arguments. *See* Note, *Aviation: Liability Limitations for Wrongful Death or Personal Injury—A Contemporary Analysis of the Warsaw System*, 10 BROOKLYN J. INT'L L. 392, 394 (1984) (noting that the liability limitation under the Convention is inconsistent with the deregulatory concept that the airline industry is capable of performing without government protection); 129 CONG. REC. S2245 (daily ed. March 7, 1983) (statement of Sen. Hollings) (asserting strict limit on liability under Warsaw Convention inhibits adequate accident investigation thereby harming level of air safety).

several unavailing attempts to adequately increase the liability limit,[33] the United States submitted a notice on November 15, 1965 threatening denunciation of the Convention.[34] The notice made clear, however, that the United States desired to remain a part of the cooperative Warsaw system.[35] Before the United States could carry out its threat, a

33. *See, e.g.*, Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Sept. 28, 1955, art. XI, 478 U.N.T.S. 371, ICAO Doc. 7686-LC/140, *reprinted in* A. LOWENFELD, AVIATION LAW 955, 958 (2d ed. Doc. Supp. 1981) [hereinafter cited as Hague Protocol] (doubling liability limit to approximately $16,600); Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* March 8, 1981, ICAO Doc. No. 8932 (1971), art. VIII (1971) (*entered into force* March 8, 1981), *reprinted in* A. LOWENFELD, AVIATION LAW 975, 978 (2d ed. Doc. Supp. 1981) [hereinafter cited as Guatemala City Protocol] (increasing liability limit to approximately $100,000); Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw Oct. 12, 1929, as Amended by the Protocols Done at the Hague on Sept. 28, 1955, and at Guatemala City on Mar. 8, 1971, signed at Montreal on Sept. 25, 1975, art. II, *reprinted in* A. LOWENFELD, AVIATION LAW 985, 985 (2d ed. Doc. Supp. 1981) [hereinafter cited as Montreal Protocol No. 3] (raising maximum recovery limit to approximately $120,000 with $200,000 domestic supplemental compensation plan).

The United States has not ratified any of these Protocols. The Senate refused to consent to the Hague Protocol in stalled proceedings, insisting that a $16,000 liability limit was still too low. *See* Lowenfeld & Mendelsohn, *supra* note 9, at 504-16 (providing detailed history of Hague Protocol ratification controversy). The modified liability limit under the Guatemala City Protocol also failed to appease the United States. *See* Comment, *Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the Warsaw Convention*, 54 CHI.-KENT L. REV. 851, 854 (suggesting United States failure to ratify Guatemala Protocol due to inadequacy of $100,000 limitation and successful lobbying by air carriers). Most recently, the Senate rejected the modified liability scheme under the Montreal Protocols. 129 CONG. REC. S2270 (daily ed. March 8, 1983) (failing to achieve a two-thirds majority vote for Senate treaty consent in a 50-42 vote).

The only other variance of the Warsaw Convention is the Guadalajara Convention. Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air Performed by a Person Other Than the Contracting Carrier, *signed* Sept. 18, 1961, ICAO Doc. No. 8181, 500 U.N.T.S. 31 (entered into force May 1, 1964). This Convention does not modify the liability limitations, rather it clarifies the position of successive carriers.

34. *Department of State Press Release No.* 268, 53 DEP'T ST. BULL. 923-25 (1965). According to the Warsaw Convention, actual denunciation becomes effective six months after a country gives such notice. Warsaw Convention, *supra* note 1, at art. 39.

35. *Department of State Press Release No.* 268, 53 DEP'T ST. BULL. 923 (1965). The notice acknowledges:

> To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and the Hague Protocol but without the limits of liability for personal injury or death.

Id.

number of airlines voluntarily agreed to recast the liability scheme[36] pursuant to a provision in the Warsaw Convention that specifically stipulates that airlines may contract to increase the liability limit.[37] The contractual arrangements under this provision developed into the Montreal Agreement.[38]

B. THE MONTREAL AGREEMENT

The Montreal Agreement is a contractual variance of the Warsaw Convention. Undersigned by airlines with departures, arrivals, or connections in the United States,[39] the Agreement neither directly involves the member nations,[40] nor amends the Warsaw Convention.[41] Functionally, however, airlines that participate in the Montreal Agreement accept two major variances in the Warsaw Convention scheme of liability: (1) carriers concede liability up to a $75,000 ceiling, including legal fees and costs;[42] and (2) carriers relinquish the due care defense available under the Convention.[43]

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36. *Id.* The Proviso in the Denunciation Notice envisioned a provisional arrangement among principal international airlines to establish a higher liability limit. *Id.* Responding to the threat, the International Civil Aviation Organization (ICAO) held a conference in Montreal in 1966 in order to accommodate the Proviso and maintain United States participation in the Warsaw Convention. Lowenfeld & Mendelsohn, *supra* note 9, at 552.

37. Warsaw Convention, *supra* note 1, at art. 22(1) (providing that "by special contract, the carrier and the passenger may agree to a higher limit of liability").

38. CIVIL AERONAUTICS BOARD AGREEMENT NO. 18900, AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL (1966), *approved by* CIVIL AERONAUTICS BOARD, ORDER NO. E-23680, *reprinted in* 31 Fed. Reg. 7302 (1966) [hereinafter cited as Montreal Agreement].

39. *See id.* (describing the Montreal Agreement as including all international transportation which, according to the passenger ticket, includes a point in the United States as a point of origin, point of destination, or agreed stopping place); *see also* 48 Fed. Reg. 8048 (1983) (adopting rule by Civil Aeronautics Board (CAB) requiring all carriers with direct United States contact to adhere to the Montreal Agreement).

The CAB is now defunct. 49 U.S.C. § 1551(a)(3) (1982). Under the Airline Deregulation Act of 1978, the Department of Transportation, in consultation with the Department of State, now exercises power formerly possessed by the CAB over federal aviation and foreign air transportation. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 94 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

40. *See* Montreal Agreement, *supra* note 38 (noting that unlike other modifications of the Warsaw Convention, air carriers signed the Montreal Agreement rather than member nations); *see also* 2 C. SHAWCROSS & M. BEAUMONT, *supra* note 6, at (D)45-49 (listing air carriers participating in the Montreal Agreement).

41. *See* Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1259 n.6 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977) (stressing Montreal Agreement is not a treaty, but an agreement among airlines).

42. *See* Montreal Agreement, *supra* note 38 (noting that when legal fees and costs are awarded separately, the liability limit adjusts to $58,000 under the Montreal Agreement).

43. *Id.*; *see also supra* notes 22-23 and accompanying text (discussing due care

Eliminating the due care defense, the Montreal Agreement, in effect imposes an absolute liability system upon participating airlines for injuries occurring from "accidents" in international air travel.[44] The Agreement, however, only modifies the scheme of liability; it does not affect other provisions of the Warsaw Convention. The prerequisite contained in article 17 that an "accident" occur continues to trigger airline liability.[45] Thus, the airline faces absolute liability for all injuries incurred due to "accidents" in connection with a flight unless the passenger is at fault[46] or the claim arises after the two year statute of limitations.[47] The modified liability scheme under the Montreal Agreement consequently prompted court consideration of the "accident" question.

II. INTERNATIONAL AIR ACCIDENTS: ARTICLE 17 AND UNITED STATES COURTS

The Warsaw Convention predicates airline liability to passengers upon the occurrence of an "accident."[48] The Warsaw Convention, however, does not define the term "accident." Courts, therefore, must interpret article 17 to determine the meaning of the term as an element of liability.[49] Since the air carriers' adoption of the Montreal Agreement,

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defense available to air carriers under Warsaw Convention).

44. *See* Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977) (recognizing absolute liability under Montreal Agreement); Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977) (finding that the Montreal Agreement imposes absolute liability on air carriers).

45. *See* G. MILLER, *supra* note 6, at 109 (noting that while Montreal Agreement established absolute liability, it did not directly alter terms of article 17).

46. Williams v. Fidelity & Cas. Co., 442 F. Supp. 455, 457 (E.D. La. 1977) (retaining the air carriers' contributory negligence defense under the Montreal Agreement). This defense was maintained because of fear that higher limits, coupled with absolute liability would encourage sabotage. Montreal Agreement, *supra* note 38, at para. 1 (stating specifically that the Agreement will not affect the rights and liabilities of the carrier with regard to "any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger").

47. *See supra* note 25 and accompanying text (Warsaw Convention imposing two-year statute of limitations on any action brought under its terms).

48. *See* MacDonald v. Air Canada, 439 F.2d 1402, 1404 (1st Cir. 1971) (holding that the threshold requirement for liability under the Warsaw Convention is establishing that an accident has occurred under article 17); Lautore v. United Airlines, Inc., 16 Av. Cas. (CCH) 17,944, 17,944 (S.D.N.Y. 1981) (dismissing case because plaintiff conceded there had been no "accident" within meaning of article 17).

49. Another condition article 17 requires is that accidents take place while the passenger is physically on board the aircraft, or when entering or alighting from the aircraft. *See* Warsaw Convention, *supra* note 1, at art. 17 (mandating liability for accidents "on board the aircraft or in the course of any of the operations of embarking or disembarking").

courts experience the particular challenge to interpret the meaning of article 17's "accident" in conjunction with the Agreement's liability modification.[50] Courts advanced differing views of the "accident" issue until ultimately, the Supreme Court provided the definition in *Air France v. Saks.*

A. EARLY VIEW: ABSOLUTE LIABILITY

During the Convention's formative years, most cases brought under the Warsaw Convention involved airplane crashes or disappearances.[51] Although avoiding a critical analysis of the term, courts listed these occurrences as "accidents."[52]

After the United States completed the Montreal Agreement, a totally new scheme of liability emerged, and the interpretation of the accident prerequisite increased in importance.[53] Courts quickly expanded the breadth of the term "accident" to include hijackings[54] and terrorist

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Courts have struggled to construe this condition as well; *see* Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975) (developing a tripartite test based on passenger's activity, location, and control to determine that article 17 covered terrorist attack at departure gate); Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1262 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977) (adopting totality of surrounding circumstances test to determine questions of embarking or disembarking).

50. *See infra* notes 53-79 and accompanying text (discussing court disparity interpreting "accident" resulting from differing perspectives of the absolute liability standard).

51. *See, e.g.*, Grey v. American Airlines, Inc., 95 F. Supp. 756 (S.D.N.Y. 1950) (crashing plane); Indemnity Ins. Co. v. Pan American Airways, Inc., 58 F. Supp. 338 (S.D.N.Y. 1944) (crashing plane); Warren v. Flying Tiger Line, Inc., 234 F. Supp. 223 (S.D. Cal. 1964) (disappearing aircraft).

52. *See* Berguido v. Eastern Airlines, Inc., 369 F.2d 874 (3d Cir. 1966), *cert. denied*, 390 U.S. 996 (1968); Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 965 (1968); Domangue v. Eastern Airlines, Inc., 722 F.2d 256 (5th Cir. 1984) (finding that airplane crashes were clearly accidents under article 17).

53. *See* G. MILLER, *supra* note 6, at 109-10 (noting significance of determining conditions sufficient to hold air carrier liable subsequent to adoption of Montreal Agreement):

> [The Montreal Agreement] changes the whole outlook of the liability regime since the carriers that are party to it have agreed to raise the liability limit to $75,000 and more importantly, . . . to waive their right to use Article 20(1) of the Convention which allows them to avoid liability if they prove that they have taken all necessary measures to avoid the damage or that it was impossible to take such measures. Thus, the carrier is in effect subject to a regime of strict liability and it is essential to determine the conditions in which damage must occur before the carrier can be made responsible for it.

Id.

54. *See* Compagnie Nationale Air France v. Gilberto, 74 Ill. 2d 90, 101, 383 N.E.2d 977, 980, (1978), *cert. denied*, 441 U.S. 932 (1979) (finding airplane hijackings during international flights encompassed by article 17 accident meaning); Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971, 975 (S.D.N.Y.

attacks,[55] characterizing the airline's liability in these instances as absolute.[56] During this period, however, courts continually failed to carefully consider the meaning and scope of the "accident" limitation.[57]

Courts frequently relied on policy considerations to justify decisions. In the court's perspective, passenger protection was among the primary goals of the Warsaw Convention.[58] Persuaded by the prospects of quicker settlements and unhampered accident investigations, courts were confident that the Warsaw Convention, as modified by the Montreal Agreement, now compelled an absolute liability standard to better effectuate passenger protection.[59]

1977) (holding planned and deliberate hijackings are article 17 accidents); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322, 1333 (C.D. Cal. 1975) (hijacking was an "accident" within article 17 meaning); Husserl v. Swiss Air Transport Co. (Husserl I), 351 F. Supp. 702, 707 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973) (finding hijackings within "accident" ambit).

55. *See* Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 156 (3d Cir. 1977) (en banc) (holding terrorist attack is an article 17 accident); Day v. Trans World Airlines, Inc., 528 F.2d 31, 32 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (holding air carrier liable under article 17 for terrorist attack on passengers waiting to board aircraft). *But see* In re Tel Aviv, 405 F. Supp. 154, 155 (D.P.R. 1975), *aff'd*, Martinez Hernandez v. Compagnie Nationale Air France, 545 F.2d 270, 282 (1st Cir. 1976) (holding terrorist attack occurring in baggage claim area not an accident).

56. Reed v. Wiser, 555 F.2d 1079, 1081 (2d Cir. 1977). Although the Convention creates a presumption in favor of the plaintiff, the liability scheme remains based on fault. Under the Montreal Agreement, however, the airline, without the due care defense, is strictly liable for "accidents." *See* Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258-59 (9th Cir. 1977), *cert. denied*, 431 U.S. 974 (1977) (finding Montreal Agreement imposed absolute liability on air carriers); Day v. Trans World Airlines, Inc., 528 F.2d 31, 37 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (acknowledging Montreal Agreement absolute liability effect).

57. *See* Husserl v. Swiss Air Transport Co. (Husserl I), 351 F. Supp. 702, 706-07 (S.D.N.Y. 1972). The court in *Husserl I* first addressed the hijacking question. After noting that hijackings were an unanticipated gap in the Warsaw Convention liability scheme, the court focused on the Montreal Agreement absolute liability system to provide guidance on the issue. *Id.* The Agreement was attentive to the problem of intentional acts of sabotage and addressed it by shielding saboteurs from recovery under the Warsaw system. *Id.* The court inferred, however, that airlines should be liable for innocent victims of such occurrences. *Id.* The court did not directly address the "accident" question. Courts extended this reasoning to terrorist attacks, and again skirted the "accident" issue. The emphasis in the terrorist attack cases focused on the embarking/disembarking question, rather than the "accident" issue. *See supra* notes 49, 55 (discussing terrorist attacks).

58. *See* Day v. Trans World Airlines, Inc., 528 F.2d 31, 37 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (concluding that passenger protection is a primary goal of the Warsaw Convention).

59. *Id.* Courts reasoned that because the Convention functions to redistribute the costs involved in international air transportation, the carrier is in the best position to bear the burden of accident costs. Courts found that the airlines' adoption of absolute liability under the Montreal Agreement justified this result. *Id.*

B. ENCOUNTERING TURBULENCE

Applying an absolute liability standard, however, presented complications when courts faced unusual factual situations, such as passenger injuries on routine international flights not caused by abnormal occurrences.[60] These unusual injuries included hearing losses caused by normal cabin depressurization, and hernia and heart attacks occurring during the proper functioning of the aircraft. Earlier, courts had little trouble construing "accidents" from such events as airplane crashes,[61] severe turbulence,[62] hijackings,[63] terrorist attacks,[64] and accidental falls.[65] When presented with injuries occurring during normal flight operations, however, courts were forced to look deeper into the meaning and limitation of the "accident" prerequisite.

The court in *Warshaw v. Trans World Airlines, Inc.*,[66] was the first court confronted with this quandary.[67] After noting that the Montreal Agreement established an absolute liability standard without altering other provisions of the Convention, the court determined that all the prior cases recognizing accidents shared a common characteristic—an unusual, unanticipated incident as the immediate proximate cause of the injury.[68] The court, thereby, held that an abnormal happening[69] was the key to determining whether an "accident" occurred and thus the appropriate standard to determine air carrier absolute liability for passenger injuries.[70]

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60. *See infra* text accompanying notes 65-88 (presenting unusual factual situations from which Warsaw Convention "accidents" have been claimed).

61. *See supra* note 52 (recognizing airplane crashes as "accidents" under Warsaw Convention).

62. *See* Weintraub v. Capitol Int'l Airways, 16 Av. Cas. (CCH) 18,058 (N.Y. App. Div. 1981) (finding accident when air turbulence caused rapid descent of aircraft and resulted in passenger's hearing impairment).

63. *See supra* note 54 (finding hijackings encompassed by Warsaw Convention).

64. *See supra* note 55 (holding airlines liable for terrorist attacks under Warsaw Convention).

65. *See* Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611, 613 (S.D.N.Y. 1955) (finding accident when plaintiff fell from doorway after departure gate was removed); Oliver v. Scandinavian Airlines System, 17 Av. Cas. (CCH) 18,283, 18,284 (D. Md. 1983) (conceding "accident" occurred when intoxicated passenger fell on plaintiff). *But see* MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir. 1971) (finding "accident" did not occur when passenger fell in baggage claim area).

66. 442 F. Supp. 400 (E.D. Pa. 1977).

67. *Id.* at 401-05.

68. *Id.* at 410 (noting the lack of external factors that could have induced the injury, the court distinguished MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971)).

69. Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400, 413 (E.D. Pa. 1977).

70. *Id.* (implying that an unusual or unexpected happening engenders the common meaning of the term "accident"). Other courts have used the common meaning to in-

Persuaded that an abnormal happening was the appropriate standard, other courts found that airlines could not be held liable for a passenger's internal reaction occurring during normal aircraft operation without an abnormality or malfunction causing the injury.[71] Courts were not willing to make airlines the insurers of their passenger's health and to grant recovery under the Warsaw Convention merely because a plaintiff experienced an unfortunate incident during air travel.[72]

In *Air France v. Saks*,[73] the Ninth Circuit attempted to change the "accident" standard. In *Saks*, while the plane was in a routine descent for landing, a passenger suffered from a hearing loss after experiencing severe pain and pressure in her left ear.[74] The district court applied an unusual or abnormal occurrence standard and granted summary judgment for Air France.[75] The aircraft's depressurization system was not affected by anything unusual or unexpected. The district court, therefore, found Air France not liable for damages under the Warsaw Convention.[76]

C. Ninth Circuit's Absolute Liability Standard

On appeal, however, the Ninth Circuit explicitly rejected the "unusual or unexpected happening" standard.[77] Construing the Montreal

terpret article 17 terms. *See* MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir. 1971) (using the common meaning to define "disembarking"); Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 221 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (using the common meaning to define "embarking").

71. *See* DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1196 (3d Cir. 1978) (finding equilibrium loss during routine flight not article 17 "accident"); Abramson v. Japan Airlines, Co., 739 F.2d 130, 132 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1176 (1985) (finding aggravation of previous injury not "accident" under the Warsaw Convention).

72. *See* Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400, 413 (E.D. Pa. 1977) (demonstrating the court's sympathy for the plaintiff's plight, but the court did not go so far as to provide an actionable cause without some abnormal occurrence).

73. Saks v. Air France, 724 F.2d 1383 (9th Cir. 1984), *rev'd*, 105 S. Ct. 1338 (1985).

74. *Id.* at 1384. As a passenger on an international flight, Saks's suit for damages was governed by article 17 of the Warsaw Convention as modified by the Montreal Agreement. *Id.* Both instruments contractually bind the United States and Air France. *Id.*

75. *Id.* The district court relied on the seminal cases to support summary judgment. DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1196 (3d Cir. 1978); Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400, 412-13 (E.D. Pa. 1977) (applying unusual occurrence standard and finding that normal repressurization changes do not incite accidents).

76. Saks v. Air France, 724 F.2d 1383, 1384 (9th Cir. 1984).

77. Saks v. Air France, 724 F.2d 1383 (9th Cir. 1984), *rev'd*, 105 S. Ct. 1338 (1985).

Agreement as imposing absolute liability on airlines for all injuries proximately caused by occurrences during air travel, the court found that absolute liability attaches under the Montreal Agreement for all risks inherent in air travel.[78] Consequently, under the Ninth Circuit's standard, any occurrence associated with the operation of an aircraft triggers an article 17 "accident."[79] The Ninth Circuit's absolute liability standard broadened the scope of the term "accident" thus encompassing all incidents connected with air travel.

D. SAKS: UNUSUAL OR UNEXPECTED HAPPENING STANDARD

In *Air France v. Saks*, the Supreme Court reversed the Ninth Circuit decision, rejecting that circuit's absolute liability theory.[80] The Court specifically distinguished between the cause and effect of an injury,[81] holding that an accident must be the cause of the injury and not the injury itself.[82] Furthermore, the Court surmised that to hold airlines absolutely liable for passenger injuries under article 17 requires some link in the chain of causation between the injury and the unusual or unexpected event.[83]

To support its definition in *Saks*, the Supreme Court concluded that the Montreal Agreement did not in fact establish true absolute liability.[84] The Court reasoned that although the Montreal Agreement eliminates the due care defense, the Agreement does not expand the scope of carrier liability to include all risks inherent in air travel.[85] The Warsaw Convention continues to apply and therefore requires an "accident"

78. *See id.* at 1386-87 (reasoning that the Montreal Agreement created a shift from negligence to absolute liability for all injuries incurred from air "accidents").

79. *See id.* at 1384 (holding that a malfunction or abnormality was not a prerequisite for liability under the Warsaw Convention). The court argued that permitting an air carrier to assert that a passenger's injury was not caused by an accident would, in essence, permit the carrier to use the due care defense. An air carrier could not proceed with this argument, however, because the Montreal Agreement eliminated the due care defense, imposing absolute liability on airlines. Therefore, the Ninth Circuit held that liability would attach to injuries resulting even from normal aircraft operations. *Id.* at 1384-88.

80. Air France v. Saks, 105 S. Ct. 1338 (1985).

81. *Id.* at 1342. The Court stressed that "it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone." *Id.* (emphasis in original).

82. *Id.*

83. *Id.* at 1346.

84. *Id.*

85. *Id.* The Court noted that the characterization of the Montreal Agreement as imposing absolute liability is not accurate because liability is absolute only to the extent that an airline cannot utilize the due care defense. *Id.* The accident issue involves analysis of the nature of the event, not the care taken by the airline. *Id.*

before absolute liability attaches.[86]

Subsequent decisions construing "accident" under article 17 focused on the unexpected and unusual criteria enunciated in *Saks*. For example, one court held that a landing aggravating a neck injury could not be construed as an "accident" because it was not unusual or unexpected as a landing is an anticipated operation of every flight.[87] Another court held, however, that a bomb threat inducing a miscarriage was an "accident" under *Saks'* definition.[88] The court reasoned that the threat was an unexpected and unusual external event outside the normal operation of the aircraft. Therefore, the miscarriage induced by the bomb threat was an accident under the Warsaw Convention.[89]

III. THE WARSAW CONVENTION ACCIDENT STANDARD: CLEARED FOR LANDING

Because the Warsaw Convention is designed to provide uniform international law, courts must interpret the Warsaw Convention consistently.[90] The threat of absolute liability for airline "accidents" under the Montreal Agreement necessitates formulating a uniform definition of the term. The Supreme Court in *Saks* attempted to provide this uniform standard, requiring that an unusual or unexpected event cause the requisite "accident."[91] Although the Supreme Court recognized that causation is the fundamental element in determining carrier liability,[92] the unusual or unexpected criteria provides inadequate guidance in the context of airline liability, and is inconsistent with the purposes and expectations of the Warsaw Convention.[93] Failing to devise an aircraft-

86. *See id.* (emphasizing that "until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries not caused by accidents").

87. Salce v. Aer Lingus Airlines, No. 84-3444 (S.D.N.Y. May 1, 1985); *see also* Fischer v. Northwest Airlines, Inc., 623 F. Supp. 1064, 1065 (E.D. Ill. 1985) (holding that a heart attack, not the result of any unexpected or unusual external event connected with a flight, is not an "accident" within article 17 contemplation).

88. Salerno v. Pan American Airways, Inc., 606 F. Supp. 656 (S.D.N.Y. 1985).

89. *Id.* at 657.

90. *See* D. GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 10 (1937) (stressing text uniformity as well as interpretation uniformity for effective Warsaw Convention implementation).

91. Air France v. Saks, 105 S. Ct. at 1345.

92. *See supra* note 81 (Court recognizing causation element in *Saks*).

93. *See* Benjamins v. British European Airways, 572 F.2d 913, 918 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (stressing that courts should construe the Warsaw Convention to further its overall purpose and design even if that construction requires rejecting the literal meaning of a term); Eck v. United Arab Airlines, Inc., 15 N.Y.2d 53, 62, 255 N.Y.S.2d 249, 254, 203 N.E.2d 640, 643-44 (1964) (stressing that literal meaning of words should not defeat the purpose and policy of the Warsaw Convention as a whole).

connected standard, the Supreme Court undermined the uniformity it sought to establish. The design of the Warsaw Convention mandates an *aircraft* accident.

A. EFFECTUATING THE DESIGN OF THE WARSAW CONVENTION

The text of the Warsaw Convention and its negotiating history support a more technical standard for the term "accident" than the Supreme Court provided in *Saks*. The Warsaw Convention provides two distinct standards for air carrier liability: an "accident" is the threshold for recovery in article 17 for personal injury or death, whereas an "occurrence" is necessary to establish air carrier liability in article 18 for destruction or loss of baggage.[94] Therefore, an "accident" is plainly not synonymous with an "occurrence."[95] Because "occurrence" is a broader and more relaxed standard, it follows that "accident" requires more than an unusual or unexpected happening.

An examination of the terms of various proposals to amend the Warsaw Convention makes this distinction more apparent. The Guatemala Protocol[96] and the Montreal Protocol No. 4[97] both amend article 17, substituting the word "event" for "accident."[98] The Protocols suggest that the substitution of the word "event" for "accident" expands the scope of carrier liability under the Warsaw Convention.[99] The amended

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94. *Compare* Warsaw Convention, *supra* note 1, at art. 17, *with* Warsaw Convention, *supra* note 1, at art. 18(1) providing:

> (1) The carrier shall be liable for damages sustained in the event of destruction or loss of, or of damage to, checked baggage or goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

Id.

95. Air France v. Saks, 105 S. Ct. 1338, 1342 (1985). The Court stated that the drafters "otherwise logically would have used the same word in each article." *Id.*

96. *See* Guatemala Protocol, *supra* note 33, at art. IV (substituting word "event" for "accident").

97. *See* Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw on Oct. 12, 1929, as amended by the Protocol done at the Hague on Sept. 28, 1955, signed at Montreal Sept. 25, 1975, art. IV, *reprinted in* A. LOWENFELD, AVIATION LAW 985, 985 (2d ed. Doc. Supp. 1981).

98. Guatemala Protocol, *supra* note 33, at art. IV. The text of article 17 as amended provides:

> The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the *event* which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

Id. (emphasis added).

99. *See* Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 AM. J. COMP. L. 335, 337 (1972) (noting changes in article 17 intended to establish strict liability for all events).

article 17 under the Guatemala Protocol also excludes liability for injuries resulting "solely from the state of health of the passenger."[100] The exemption for the passengers' state of health indicates that the expansion still does not include every injury occurring during a flight, particularly internal physical reactions.[101] Since the United States is not a party to these Protocols[102] and thus continues to adhere to the original Warsaw Convention, courts remain bound to apply the article 17 "accident" requirement.[103]

B. SAKS: NO FLIGHT PLAN FILED

When considering an article 17 accident under the Warsaw Convention, the proper focus should be on a malfunction or interference in the operation of an aircraft. By linking an "accident" to aircraft operation, the carrier will be liable for mishaps happening within the airline's control of the functioning aircraft. This standard, however, will not create carrier liability for accidents occurring on board that have no connection with physical air transportation.[104] The Warsaw Convention does not impose liability for all events connected with international flights.[105] Recovery for damages under article 17 requires more than travel or an occurrence, it requires an accident.[106]

A more precise aircraft malfunction standard recognizes that causa-

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100. *See* Guatemala Protocol, *supra* note 33, at art. IV (providing state of health exemption).

101. *Accord* Saks v. Air France, 724 F.2d 1383, 1389 (9th Cir. 1984) (Wallace, J., dissenting) (declining to make air carriers liable for all incidents occurring during flight).

102. *See supra* note 33 (discussing United States' failure to ratify Protocols).

103. The judiciary is bound by a recognized principle of international law, *pacta sunt servanda*: treaty obligations must be observed. Geofroy v. Riggs, 133 U.S. 258, 270 (1890); *see also* Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977) (commenting "[o]ur duty is to enforce the Constitution, laws, and treaties of the United States, whatever they might be, and until one of our sister branches declares otherwise, the Warsaw Convention remains the supreme law of the land"); Lisi v. Alitalia-Linee Aeree Italienne, SPA, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968), *reh'g denied*, 391 U.S. 929 (1968) (Moore, J., dissenting) (stating "judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of government. . ."); Trans World Airlines, Inc. v. Franklin Mint Corp., 104 S. Ct. 1776, 1794 (1984) (Stevens, J., dissenting) (stating "as long as the political branches of our government choose to adhere to the Convention, the courts of the nation are obliged to enforce it as it was negotiated and written").

104. *See* M. MILDE, THE PROBLEMS OF LIABILITIES IN INTERNATIONAL CARRIAGE BY AIR, A STUDY IN PRIVATE INTERNATIONAL LAW 58 (Kafka trans. 1963) (claiming carrier is not liable for damages arising from events not deemed "accidents" in air traffic, e.g., a heart attack, a cerebral stroke, or a miscarriage during flight).

105. Saks v. Air France, 724 F.2d 1383, 1388 (9th Cir. 1984).

106. Warsaw Convention, *supra* note 1, at art. 17.

tion is the intrinsic basis for liability.[107] Concurrently, the standard disassociates itself from negligence to avoid undermining the Montreal Agreement that eliminated the due care defense. In accordance with the objectives of both the Warsaw Convention and the Montreal Agreement, this aircraft malfunction standard deters drawn out litigation on the liability issue.[108] Moreover, this standard alleviates extensive judicial inquiry, automatically excluding all injuries that occur during the normal operation of an aircraft and injuries caused by the peculiar physical conditions of passengers. At the same time, the standard includes hijackings and terrorist attacks as "accidents" since they interfere with the scheduled operation of the aircraft.

Courts, including the Supreme Court in *Saks*, alluded to a more technical standard, but failed to adequately define its scope or emphasize its utility.[109] Common sense dictates that linking the definition of "accident" to the operation of the aircraft, rather than resorting to its ordinary meaning,[110] best effectuates the intended purpose of the Convention. Furthermore, an aircraft accident standard is consistent with the context of the Convention as well as the genuine shared expectations of all the parties to the Convention.[111]

C. JUDICIAL LEGISLATION

The judiciary's tendency to expand the scope of Warsaw Convention "accidents" may be due to blurred perceptions of the treaty. Perceiving inequities in the Convention's low liability limits,[112] courts actively attempt to reconstruct these liability provisions to expand the carrier's

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107. *See* Landress v. Phoenix Mutual Life Ins. Co., 291 U.S. 491 (1934) (recognizing the fundamental distinction between an accident that is the cause of the injury and an injury that is the accident itself).

108. *See* Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400, 410 (E.D. Pa. 1977) (emphasizing the United States goal in maintaining its participation in the Warsaw Convention through the Montreal Agreement is the rapid settlement of disputes).

109. *See* Warsaw v. Trans World Airlines, Inc., 442 F. Supp. 400, 411 (E.D. Pa. 1977) (noting that the easiest way to solve the difficulty would be to limit absolute liability for *aircraft* accidents) (emphasis added).

110. *See* 1 LAW & COMMERCIAL DICTIONARY IN FIVE LANGUAGES 15 (1985) (defining "accident" as "an undesigned, sudden, and unexpected event"); 1 THE OXFORD ENGLISH DICTIONARY 55 (1933) (defining "accident" as "anything that happens without foresight or expectation").

111. *See* Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963) (stressing that specific words of treaties should be given meaning consistent with genuine shared expectations of the contracting parties).

112. *See* Stratis v. Eastern Airlines, 682 F.2d 406, 412 (2d Cir. 1982); Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977) (acknowledging that unfairness of liability limitation under the Warsaw Convention should not affect courts' interpretative role).

liability by broadening the scope of the "accident" prerequisite.[113] Courts, however, have no authority to alter the Warsaw Convention through active judicial interpretation.[114] Treaty revision is a function reserved for the political branches.[115] Courts possess an interpretive role in the treaty process, and can construe a treaty only within the guidelines established by executive and legislative action.[116]

CONCLUSION

The "accident" requirement is pivotal to airline liability under the Warsaw Convention. In ascertaining whether an "accident" occurred, courts responded with conflicting interpretations due to the Montreal Agreement's modified liability scheme. The Supreme Court in *Saks* ultimately defined an article 17 accident as an unusual or unexpected happening external to the passenger. The history of the Warsaw Convention, however, clearly indicates that the parties did not intend article 17 to apply to accidents unrelated to aircraft operations, a result that is inevitable under the broad terms of the Court's standard. Accordingly, if the United States intends to be a party to the uniform system of airline regulation, the Warsaw Convention warrants a more technically attuned definition of the "accident" standard.

Kathryn M. Nutt

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113. *See* Saks v. Air France, 724 F.2d 1383 (9th Cir. 1984) (attempting to expand air carrier liability for all accidents resulting from air travel).

114. Air France v. Saks, 105 S. Ct. 1338, 1346 (1985); Trans World Airlines, Inc. v. Franklin Mint Corp., 104 S. Ct. 1776, 1787 (1984).

115. The Court's role in relation to treaties was clearly described by Justice Story in The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821):

> In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty . . . We are to find out the intention of the parties, by just rules of interpretation applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Id. at 70.

116. *See* In re Korean Airlines Disaster of September 1, 1983, 19 Av. Cas. (CCH) 17,584, 17,594 (D.D.C. 1985) (noting that "[w]hile American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the *quid pro quo* agreed to by the political branches"); *see also* Note, *A Proposed Revision of the Warsaw Convention*, 57 IND. L. J. 297 (1982) (claiming alteration of Warsaw Convention is not prerogative of the judiciary and insisting that judicial branch uniformly adhere to liability limitations until action is taken by the executive branch).