Warsaw Convention Limitations on Aircarrier Liability: A Critical View

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WARSAW CONVENTION LIMITATIONS ON AIRCARRIER LIABILITY: A CRITICAL VIEW

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I. INTRODUCTION

The Warsaw Convention\(^1\) contains three limitations on the

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tort liability of international air carriers. Article 22 allows a carrier to place monetary limitations on baggage losses and personal injury; article 28 restricts venue. In the United States, considerable controversy has centered on the propriety of limiting private tort liability by treaty. Recent decay in the value of the limitations has made the problem more acute.

The monetary limitations were low in 1929 when they were drafted. Forty years of inflation and the institution of a “two tier” bifurcated price for gold in 1968 drove them lower. An April, 1984, Supreme Court decision to uphold the limitations on the basis of an outmoded and repealed “official” price for gold has forced them lower still.

In Trans World Airlines v. Franklin Mint Corporation, the Supreme Court pegged the Warsaw Convention limitation of liability for baggage and freight to the repealed 1973 official price for gold. This Supreme Court decision was the first to directly scrutinize the Warsaw Convention. A second decision regarding the

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2. Article 22 limits carrier liability to 250 gold francs per kilogram for checked baggage, 5,000 francs for baggage carried by the passenger, and 125,000 francs for each passenger for personal injury or death. It defines a franc as 65.5 milligrams of gold at a fineness of nine hundred thousandths. At the last official U.S. exchange rate of $42.22 per ounce, these figures convert to roughly $9.07 per pound of checked baggage, or about $10,000 per passenger. The Article permits a higher limitation by “special declaration” (for baggage) or “special contract” (for passengers). Warsaw Convention, supra note 1, art. 22.

Article 28 limits the venue to the territory of an adherent to the Convention, with a further restriction to the domicile of the carrier, the destination, or the place where the ticket was sold, if the carrier has an office there. Warsaw Convention, supra note 1, art. 28. Notably absent is the place of occurrence of the injury. The addition of the place of the accident as an available forum was debated by the conference, but the question was decided in the negative. A. Lowenfeld, Aviation Law 7-27 n.e (2d ed. 1981).

3. A. Lowenfeld, supra note 2, at 7-27.

4. One tier consisted of the free market, where the gold price was set by supply and demand; the other tier was the official price of $35 an ounce, which was maintained by the central banks of the seven nation Gold Pool solely for effectuating transfers among participating governments. Between 1968 and November of 1973, when the two-tier system was officially terminated, the free market price of gold nearly tripled. K. Rosen, Law and Inflation 53-54 (1982).

5. The term “lower” is here used in respect to value rather than an absolute figure. The nominal amount has increased slowly over the years, but at nowhere near the rate of inflation. See generally K. Rosen, Law and Inflation (1982) (excellent explication of nominalism, metallism, revalorization, and the effects of inflation in legal relationships).


Warsaw Convention in March, 1985, and an apparent split in the circuits on still a third Warsaw question indicate that the Supreme Court may soon consider the dichotomy between the limitations provisions of the Warsaw Convention and the principle of American law that everyone injured should have an adequate remedy.

In *Franklin Mint* the Court only decided with reference to the limitations on checked baggage; the venue and personal injury limitations were not at issue. The decision has powerful implications for these issues, however. This article will attempt to analyze the Court's opinion and project its possible effect on subsequent personal injury and venue litigation.

**II. BAGGAGE LIMITATIONS**

In March, 1979, Franklin Mint delivered four packages weighing 714 pounds to Trans World Airlines (TWA) for transportation from Philadelphia to London. They made no special declaration of value. The packages were lost and Franklin Mint brought suit for $250,000. TWA admitted liability but pleaded the limitation under the Warsaw Convention. The district court ruled that TWA's liability was limited to $6,475.98, calculated from the weight of the packages, the Warsaw Convention's limitation on liability, and the last official price of gold in the United States. The Second Circuit Court of Appeals affirmed, but also ruled that the limitations would become unenforceable sixty days from the issuance of the mandate. The Supreme Court affirmed that portion of the judgment of the court of appeals which affirmed the judgment of the district court, but rejected the declaration that the Convention is prospectively unenforceable.

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9. The Second and Fifth Circuits may have split on the issue of whether pre-judgment interest is included in the limitation of liability. The Second Circuit attempted to distinguish the Fifth Circuit opinion on the basis of application of state law as opposed to prudential awards, but the two courts seemed to have reached diametrically opposed results in analyzing the same crash. *See infra* notes 110-22 and accompanying text.

10. 466 U.S. 243.
11. *Id. at* 246.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
It should be noted at the outset that the opinion refers to a commercial transaction, with two merchants dealing at arms length in a contractual setting. What applicability the ruling will have in a less doctrinaire setting is uncertain.

Justice O'Connor delivered the Court's opinion. The question presented was whether TWA's tariff (which contained a liability limitation of $9.07 per pound of cargo) was inconsistent with the Warsaw Convention.\(^{18}\) The threshold question was whether the 1978 repeal of the Par Value Modification Act,\(^ {19}\) which eliminated an "official" price for gold in the U.S., rendered the Convention's gold-based liability limit unenforceable in this country.\(^ {20}\)

Continuation of the limit requires a choice of standard to replace the repealed "official" conversion rate. In its district court brief, TWA suggested three possible choices for a standard: (1) The Special Drawing Right (SDR) of the International Monetary Fund (IMF), (2) the last official price of gold in the U.S., or (3) the current exchange value of the French franc.\(^ {21}\) In its brief, Franklin Mint suggests a fourth alternative, the free market price of gold.\(^ {22}\)

As the circuit court noted, each of these solutions has a devastating argument against it.

The last official price of gold is a price which has been explicitly repealed by Congress... It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. The SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.\(^ {23}\)

The district court chose the last official price of gold in the United States as the appropriate unit of conversion.\(^ {24}\) The court of

\(^ {18}\) Id. at 245.
\(^ {20}\) Franklin Mint, 466 U.S. at 245.
\(^ {22}\) Id.
\(^ {23}\) Franklin Mint, 690 F.2d at 306.
\(^ {24}\) Id. at 309.
appeals acquiesced; but declared that it was beyond the court's power to select a new basis of conversion. It reasoned that Congress had abandoned the unit of conversion specified by the Convention; the repeal of the Par Value Modification Act was a legislative declaration that the United States would no longer recognize an official price for gold. Since there was no "official" price for gold in the United States, there could be no gold standard in the Convention. This apparently is where the court of appeals went astray, for the conversion factor was selected and promulgated by the Civil Aeronautics Board (CAB) in an administrative procedure authorized by Congress. The court's function was to review that selection for compliance with the law. This function becomes quite plain in the wording of the Supreme Court's decision.

The Court of Appeals correctly recognized that the Convention's liability limit must be converted into dollars. This requirement derives not from the Convention itself—the Convention merely permits such a conversion—but from the tariff requirements of § 403(a) of the FAA. 49 U.S.C. § 1373(a).

In 1979, when Franklin Mint's cargo was lost, TWA's tariffs set the carrier's cargo liability at $9.07 per pound. This tariff had been filed with and accepted by the CAB pursuant to § 403(a), and was squarely consistent with CAB Order 74-1-16. The $9.07-per-pound limit thus represented an Executive Branch determination, made pursuant to properly delegated authority, of the appropriate rate for converting the Convention's liability limits into United States dollars. We are bound to uphold that determination unless we find it to be contrary to law established by domestic legislation or by the Convention itself.

The Court disposed of the domestic legislation inquiry post haste. "It is clear, first, that the CAB's choice of a cargo liability limit of $9.07 per pound does not contravene any domestic legislation." The Court did not consider that the constitutional issue of liability limitation by treaty was before it, and chose only to consider the narrow issue of whether the Executive had the authority to set the value of a limit which the Court assumes is itself legal and proper. In this case, which sounds more in contract than in tort, the determination would certainly have been that the limita-

25. Id. at 311.
26. Id. at 309.
27. Franklin Mint, 466 U.S. at 254 (footnotes omitted).
28. Id.
tions were constitutional. In considering the narrow question it outlined for itself, the Court found that when Congress repealed the Par Value Modification Act, there was no hint that either of the political branches expected or intended that Act to affect the dollar equivalent of the Convention's liability limit.\(^2\)

The inquiry into the compatibility of the repeal of the Par Value Modification Act with the Convention itself is more debatable. This analysis requires an inquiry into the purposes of the Convention with respect to the inclusion of liability limits expressed in gold. According to the *Franklin Mint* opinion, the first and most obvious purpose was to set some limit on a carrier's liability for lost cargo. The Court suggests that any conversion factor will have this effect.\(^3\)

The second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry. Ignoring the fact that the industry is by no stretch of the imagination a fledgling industry after 55 years, the Court determined that $9.07 per pound meets this purpose.\(^31\) The Court reasoned that this figure is a stable and predictable limit upon which carriers can rely, and with occasional adjustments, it can become internationally uniform. According to the Court's analysis, since 1978 this dollar figure has maintained a relatively equal value with limitations set in SDR's.\(^32\) What the Court neglected to consider is that both SDR's and dollars are governmental money standards—subject to devaluation by inflation and other machinations of governments.\(^33\) The fact that they have varied together is more testament to the United States' power in international politics than to a maintenance of value equivalent of the dollar. As Justice Stevens noted in his dissent, the convention chose gold as a standard for precisely this reason.\(^34\) To abandon gold for an artificial standard is to rewrite the treaty.

The Court noted that "a third purpose of the Convention's gold-based limit may have been to link the Convention to a constant value, that would keep step with the average value of cargo

\(^{29}\) *Id.*

\(^{30}\) According to the Court, with regard to setting a limit, "a $9.07-per-pound liability limit is as reasonable as one based on SDR's or the free market price of gold." *Id.* at 256.

\(^{31}\) *Id.* at 256.

\(^{32}\) *Id.* at 256-57.

\(^{33}\) See generally K. ROSENN, supra note 5. (particularly chapter 3, *The Value of Money for Legal Purposes*, 36-61).

\(^{34}\) 466 U.S. at 265-68 (Stevens, J., dissenting).
carried and so remain equitable for carriers and transport users alike.\textsuperscript{35} Analyzing this purpose, the court fell prey to the parochialism that it warns against.\textsuperscript{36} Fluctuations in the price of a commodity can be viewed in two ways. The commodity can be said to vary in value, or the money in which it is priced can vary in value. The Court chose for its rationale a firm foundation in nominalism\textsuperscript{37} and discussed the wildly varying price of gold since the dollar was floated in 1978. It reached the conclusion that maintaining a gold price standard would be forcing the carriers to speculate in gold.\textsuperscript{38} Equally as logical would be an argument that adopting a dollar standard forces the shippers to speculate in dollars. In 1860 it was possible to buy a fine men’s suit for a twenty dollar gold piece.\textsuperscript{39} It is still possible to do so today.\textsuperscript{40} The gold in the gold piece and the value of the suit have varied together for over one hundred and twenty-five years, but the dollar, which the Court insists on using as a standard, has deteriorated so badly that the suit is now worth at least fifteen times what it was.

### III. Analysis

The timing of the \textit{Franklin Mint} decision is of particular interest. The Par Value Modification Act was repealed in 1978,\textsuperscript{41} leaving the United States without an official exchange rate for gold. Three months into 1979, Franklin Mint shipped a package containing valuable coins with a value equal to an equivalent

\textsuperscript{35} Id. at 258-59.
\textsuperscript{36} Id. at 256.
\textsuperscript{37} Nominalism is a monetary theory that debts should be discharged by using the face or nominal value of money, and not an equivalent value based on the intrinsic metallic value (metallism) or a price index (valorism) at the time the debt was incurred. Stated another way, nominalism holds that the value of money is the value imposed by the sovereign and not any intrinsic or equivalent value. \textit{See K. ROSEN, supra note} 5, \textit{at} 38-61.
\textsuperscript{38} 466 U.S. at 258.
\textsuperscript{39} Advertisement by Evans’ haberdashery (offering cashmere suits at $6, $10, $12, $15, $18, and $20), \textit{N.Y. Times}, Oct. 6, 1860, \textit{at} 5, col. 5.
\textsuperscript{40} Although the nominal price of a fine suit is now around $300, a twenty dollar gold piece (double eagle) contains 516 grains of .900 to 1.000 fine gold. \textit{I. HOMANS, THE COIN BOOK} (1872). There are 480 grains in a Troy ounce, the system used in measuring precious metals. \textit{Troy Weight} in 27 \textit{ENCYCLOPEDIA AMERICANA} 163 (1963). Thus the twenty dollar gold piece contains approximately one ounce of pure gold. The December 9, 1985, spot price for gold was approximately $320 per ounce, depending on the market. \textit{Gold}, \textit{Miami Herald}, Dec. 10, 1985, \textit{at} 9D, col. 5. Thus, discounting any numismatic value, the coin’s gold content alone is sufficient to purchase the suit after a hundred and twenty-five years.
weight of gold. Although the alleged value of the shipment was well above TWA's tariff limitation on liability, Franklin Mint made no special declaration of value. When the package was lost, Franklin Mint urged that the conversion factor in the Warsaw Convention should be judicially determined to be the free market price for gold. Had this suit been successful, the carriers would have been prevented from any meaningful limitation of liability by article 23, which provides that "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down by this convention shall be null and void." 42

Two merchants, dealing in good faith, at arms length, and schooled in the ways of commerce, should be allowed to contract for any apportionment of the risks of their contract that they believe equitable. 43 Franklin Mint was not a nescient traveler, bereft of luggage by some wily artisan, but a merchant, fully aware of the danger, and apparently willing to accept the risk in exchange for some advantage. It is interesting to speculate whether that advantage had to do with the savings in drayage or with the possibility of a profound impact on the law of carriage.

The Court did not accept the invitation to invalidate the limitations of liability by judicial fiat. Nor did it find the limitations unenforceable because of the lack of a standard. Throwing the responsibility firmly on the executive branch, the Court chose among poor alternatives 44 to reach the most equitable result it could without invalidating an international treaty supported by the Executive and consented to by the Senate.

The danger in this decision is that it sets a precedent which may be carried over into situations in which the parties are not merchants and are not willingly accepting the risk for advantage; indeed, in which one party may be unaware that there is any limitation other than the worth of his loss.

IV. PERSONAL INJURY

By far the most perplexing problems with the Warsaw Convention's limitations on liability are those dealing with personal in-

42. Warsaw Convention, supra note 1, art. 23.
44. See supra notes 20-25 and accompanying text (discussion of the alternatives available to the Court and the objections to each).
juries and wrongful death. Contractual limitation of tort liability for negligence has been held to be against public policy. On the other hand, cases have held that the convention preempts state laws which implement this policy. For example, the trial court in In re Air Crash in Bali, Indonesia applied the California rules on choice of law to find that the California substantive law should apply. The court held that the Warsaw limitation is based on a contract between the passenger and the carrier. Since California's Wrongful Death Statute does not permit a decedent to compromise by contract his survivor's right to recovery, the limitations could have no application against survivors. The Ninth Circuit reversed and held that although the district court may have concluded that the Warsaw Convention did not expressly preempt the state law, it failed to consider whether the application of California law would conflict with the congressional scheme embodied in the convention. Federal law may also preempt the application of state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Ninth Circuit held that such a conflict did exist, and that California law is preempted by the Warsaw Convention to the extent that the application of California law would prevent the application of the convention's limitation on liability. The Ninth Circuit, however, remanded, since the trial court did not reach the constitutional issues and improperly excluded evidence probative to the issue of "willful misconduct."

Many lower courts have gone to great lengths to find that the Warsaw Convention does not apply. In order to understand the reasoning for these decisions, it is necessary to analyze the historical basis of the Warsaw Convention.

V. INTERNATIONAL AGREEMENTS: BACKGROUND

There are three unique agreements that apply to international

45. Northwest Airlines v. Alaska Airlines, 351 F.2d 253 (9th Cir. 1965). See also Lowenfeld & Mendelsohn, supra note 1, at 584.
46. 462 F. Supp. 1114 (C.D. Cal. 1978), rev'd, 684 F.2d 1301 (9th Cir. 1982).
48. In re Air Crash in Bali, Indonesia, 684 F.2d at 1307.
50. In re Air Crash in Bali, Indonesia, 684 F.2d at 1308.
51. Id.
52. See generally Lowenfeld & Mendelsohn, supra note 1. For history subsequent to 1967, see also McKenry, Aviation Law Report, 14 LAW. AM. 113 (1982).
air transportation. The first is the Warsaw Convention. The other two, known respectively as the Hague Protocol and the Montreal Agreement, are modifications of the basic Warsaw Convention. Taken together, these three agreements purport to provide uniformity among signatories as to air transportation between "High Contracting Parties," the convention’s name for signatories and adherents. The most prominent effect of the agreements is to severely limit the liability of international air carriers. In the United States, where the official price for gold was $35 per ounce until 1971,\textsuperscript{53} the basic Warsaw Convention limited international airline travelers to a recovery of approximately $8,291 in an action for personal injury or wrongful death.\textsuperscript{54} The Hague Protocol, which took effect among signatories in August, 1963, addressed certain defects of language in the original convention and raised the limitation to $16,254.\textsuperscript{55} In 1965, the United States, who had failed to ratify the Hague Protocol because of controversy in the Senate over the inadequacy of the increase,\textsuperscript{56} denounced the Warsaw Convention and threatened to withdraw unless the limit was raised to a more realistic figure.\textsuperscript{57} An urgent meeting among air carriers in response to this denunciation resulted in the Montreal Agreement, which affects only those trips that operate in the United States. Relying on the special contract provisions of article 22 of the convention, the carriers agreed to file tariffs which waived the limitations provision up to $75,000.\textsuperscript{58} This figure is not pegged to the price of gold, but is in dollars. The carriers also agreed to waive the due care defense allowed by article 20.\textsuperscript{59} These waivers were deemed sufficient and the United States withdrew its denunciation.\textsuperscript{60} The Montreal Agreement was supposed to be an interim measure until the passage of a more permanent solution, the Guatamala Protocol.\textsuperscript{61} This protocol, however, has never taken ef-

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\textsuperscript{53} Franklin Mint, 466 U.S. at 248.
\textsuperscript{54} Warsaw Convention, supra note 1, art. 22.
\textsuperscript{55} Lowenfeld & Mendelsohn, supra note 1, at 509.
\textsuperscript{56} Id. at 512-16.
\textsuperscript{57} Id. at 497.
\textsuperscript{58} Id. at 588.
\textsuperscript{59} Id. at 587.
\textsuperscript{60} Id. at 497.
\textsuperscript{61} See Lowenfeld & Mendelsohn, supra note 1, at 552. This article does not refer to the Guatamala City Protocol by that name, but refers to it in a discussion on the United States' requirements to withdraw its denunciation: "an international agreement on limits of liability . . . in the area of $100,000." For history subsequent to 1967, see also McKenry, supra note 52. In addition to the Guatamala City Protocol, signed March 8, 1971, two other protocols were signed at Montreal on September 25, 1975, Montreal Protocols Nos. 3 & 4.
fect, and the Montreal Agreement is still the limit after nineteen highly inflationary years. It is interesting to note that if the Court in *Franklin Mint* had chosen the free market price for gold as a proper standard, a gold price of $350 would have yielded $82,910 as a limitation under the basic Warsaw Convention, and $165,820 under the Hague Protocol.

The limitations imposed by these agreements are carried forward under the color of freedom of contract. Due to industry wide uniformity, the contract involved (the airline ticket) takes on the attributes of an adhesion contract, where the prospective passenger can either accept the limitations or refrain from using the airlines as a mode of transportation. A comparison of the competing carriers’ ticket stock supports this proposition. Identical wording on American or Mexicana Airline’s tickets proclaims: “No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.” A traveler on one of these airlines has no power to bargain for the provisions of the contract. The contract offered is essentially the same for all International Air Transportation Association (IATA) carriers; hence no realistic choice exists.

**VI. INTERNATIONAL AGREEMENTS: ANALYSIS**

The limitations imposed by these agreements have an im-

The United States Senate has not ratified any of the Warsaw Convention Protocols. Ratification of any of them would have had a profound effect on *Franklin Mint*. The two Montreal Protocols set the limits in SDR’s, one of the alternatives Justice O’Connor considered and rejected. The Guatalamala City Protocol contains the following language in article 22 (4): “Conversion of the sums into national currencies other than gold shall, in the case of judicial proceedings, be made according to the gold value of such currencies at the date of judgment,” in other words, the free market price of gold. McKenry, *supra* note 52, at 116 (discussing Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977), cert. denied, 434 U.S. 922 (1977)). McKenry analyzed dicta in *Reed* and accurately predicted that the Second Circuit viewed the present article 22 limits as providing a conversion lower than a free market price of gold. His prognostication was vindicated several months later when the court decided *Franklin Mint* and chose the last official price for gold, approximately one-tenth the free market price. The fact that the case required such a choice at all vindicated another of his predictions: that it was doubtful that any of the Protocols would achieve acceptance in the near future, particularly in the United States.

62. The quoted paragraph is number 11 on a recent American Airlines ticket; it is paragraph 9 on both Mexicana’s and on an unidentified U.S. airline’s ticket reproduced in the Lowenfeld & Mendelsohn article. See Lowenfeld & Mendelsohn, *supra* note 1, at 513. At government behest, the Montreal Agreement among airlines addressed the subject of notice to the passenger. If anything, the adhesion nature of the contract was increased. The wording of the contractual portion of the ticket was made uniform virtually industry-wide.
mense effect on individual passengers. If a passenger is flying internationally between the territories of two High Contracting Parties on an air carrier which signed the Montreal Agreement, and the origin, destination, or an intermediate stop is in the United States, the absolute liability of the carrier, regardless of its negligence or the amount of damage inflicted on the customer, is $75,000.63 If medical bills were $500,000, the carrier responsible would only be liable for a maximum of $75,000, and the passenger would be responsible for the remaining $425,000 plus legal fees. Moreover, the limitation of liability is even more severe and unfair if the Montreal Agreement does not apply. If the High Contracting Parties were also signatories of the Hague Protocol and the proposed routing does not touch the United States, the limit is approximately $20,000, depending on current conversion rates.64 If only the basic Warsaw Convention applies, the limit to recovery, including hospital bills, legal fees, and incidentals, is about $10,000.65 Assuming that a passenger was properly ticketed, the only way to avoid these limitations is to prove "wilful misconduct" on the part of the carrier.66

VII. Venue

Limitation of venue provides additional protection for the carriers. Article 28 of the Convention provides that suit can be brought only in the territory of one of the High Contracting Parties. Venue is further limited to the destination of the journey, the domicile of the carrier, or the place where the ticket was sold, if the carrier has a place of business there.67 This sounds simple enough, but think of the New York businessman on vacation in Martinique who finds that he needs to make an unplanned trip to Mexico. He travels on Air France, and is killed when the crew negligently dozes off and the plane crashes in Florida. His widow and five children will find that it is uneconomical to sue. The maximum

64. Warsaw Convention as modified by the Hague Protocol, supra notes 1, 2.
65. Id.
66. Warsaw Convention, supra note 1, art. 25. See Lowenfeld & Mendelsohn, supra note 1, at 503-04. See also Brief for Plaintiffs in Support of Motion for Summary Judgment, Grosse v. Mexicana Airlines, No. 69 L 14247 (Cir. Ct. Ill. 1973) [hereinafter cited as Brief for Plaintiffs].
67. Warsaw Convention, supra note 1, art. 28.
the six of them can collect is $20,000. Additionally, suit must be brought in Paris, Mexico, or possibly Martinique, despite the fact that the aircraft crashed in the United States, the dead passenger was a United States citizen, and Air France has a strong presence in the United States market. Unfair? Possibly, but according to the Warsaw Convention as modified, the result is legal.

An argument can be made that in exchange for this restriction of venue, article 28 extended venue where it would not normally reach, particularly in the case of a round trip in which one of the legs is performed by a carrier which does not do business at the origin/destination. An example would be a round trip from New York: flying first to London on Pan American, then from London to Rome on British European Airways (BEA), who did not operate in the United States, and from Rome to New York on Alitalia. Theoretically, BEA could be sued in New York. However, even if jurisdiction can be extended over BEA by treaty, it will be difficult to attain service of process.

There are very few cases on this point because few carriers choose to eschew the lucrative United States market. The most applicable decision is Berner v. United Airlines, Inc.68 in which the lower court found that article 28 allowed jurisdiction in New York. The Appellate Division upheld jurisdiction without relying on article 28. The carrier, British Commonwealth Pacific Airlines (BCPA), moved to dismiss on grounds that (a) it was a foreign corporation not doing business in New York and therefore was not subject to the court’s jurisdiction, and (b) proper service of process on it had not been made. Plaintiff contended that jurisdiction existed by virtue of article 28, since the destination was New York.69 The lower court sustained this contention. The New York Appellate Division found, however, that BCPA’s general sales agency agreement with British Overseas Airways Corporation (BOAC) satisfied the requirement for “doing business in New York”; that service on BOAC in these circumstances was sufficient; and that in personam jurisdiction existed apart from the application of article 28.70 There is some doubt about the constitutionality of an extension of jurisdiction by treaty, particularly in cases not otherwise within the due process limitations on jurisdiction, and this may

69. Berner, 2 Misc. 2d at 263.
70. Id. at 264.
well account for the court’s avoidance of the subject.71 Thus far “the only accomplishment of Article 28 [has been] to preclude jurisdiction over foreign carriers in a certain number of cases where an action could have been brought if Warsaw had not been applicable.”72 This is not much of a bargain for the passenger.

VIII. Notice

Historically, one of the ways that courts have avoided applying the limitations is by finding that the passenger had inadequate notice. This frequently involved a finding that the Warsaw Convention’s ticketing requirements were not met. Under the Warsaw Convention, contractual knowledge has been held satisfied by timely delivery of a ticket containing adequate notice. The district court in In re Air Crash in Bali, Indonesia stated that

Liability limitation of the Warsaw Convention is one based upon contract between the parties to the contract of carriage; however, for the liability limitation to be effective, there must be a contractual acceptance, either actual or legal, of the limitation by the party against whom the limitation is sought to be imposed.73

Other recent cases bearing on this point are Georgakis v. Eastern Airlines, Inc.74 in which it was held that a Greek seaman who could not read the English notice on his domestic ticket was not adequately notified; and Manion v. Pan American Airways, Inc.75 in which there is an extensive discussion of the requirement of physical delivery of the ticket contract prior to commencing travel. If the ticket is delivered, however, English speaking passengers are generally held to have imputed knowledge of the ticket contract.

Imputed knowledge is a legal fiction in which a person is held responsible for knowledge that is open to his discovery and that the court believes he has a duty to discover.76 With regard to the ticket contract, the courts may be setting too rigid a standard for the average passenger.77

71. Lowenfeld & Mendelsohn, supra note 1, at 526 n.113.
72. Id. at 526.
73. In re Air Crash in Bali, Indonesia, 462 F. Supp. at 1114.
76. BLACK’S LAW DICTIONARY 683 (5th ed. 1979).
77. John J. Kennelly, a prominent aviation expert, expresses this opinion:
Commentators have noted the apparent preferential treatment of the international carriers at the expense of passengers, other carriers, the aircraft manufacturers, and even the U.S. Government.\textsuperscript{78} Let us now examine the policy considerations underlying this advantageous treatment.

\section*{IX. Policy}

In the fifty years since the United States signed the Warsaw Convention, numerous opinions have articulated the policy considerations underlying the limitations of liability. For the most part policy rationale divides into two main categories: protection of the fledgling airlines and uniformity of the rules with respect to international law.

Airlines occupy a unique position in the scheme of transportation. This is evidenced by the term applied to an international airline, “flag carrier,”\textsuperscript{79} and the fact that despite compelling economic considerations, only the Scandinavian countries have combined to form a joint venture airline. In short, airlines are a source of national pride and a method of world wide advertising; so much so that many countries maintain their national airline with subsidies in the face of staggering deficits that would bankrupt any other corporation. In addition, when the Convention was first drafted in the 1920’s, there was little aviation insurance; the fatality rate was 45 per 100 million passenger miles;\textsuperscript{80} and a single accident had the potential of wiping out a fledgling company. In 1934, when the United States adhered, the world was in a deep depression, business was stagnated, and the average annual wage was $1,137, in an economy with twenty to twenty-five percent unemployment.\textsuperscript{81} This

\begin{itemize}
\item We think that we are safe in saying that virtually none of the general public, and very few lawyers or judges, realize that their families might be limited to $8,291.87 or $16,582.00, or $75,000, if they are killed in an airline crash, even though the accident occurs in the United States, if the ticket calls for international travel.
\item Brief for Plaintiffs, supra note 66, at 133.
\item 78. Clifford W. Gardner, in an article entitled \textit{So You Are Going to Fly to London}, offers the opinion that, “From an airline’s or airline insurer’s point of view, I think this treaty is the greatest writing since the advent of paper money.” Gardner, \textit{Some Legal Advice: So You’re Going to Fly to London}, 43 A.B.A.J. 412, 413 (1951).
\item 80. Lowenfeld & Mendelsohn, supra note 1, at 498 n.3 (citing the 1965 \textit{ANNUAL REPORT OF THE ICAO COUNCIL TO THE ICAO ASSEMBLY} 13). The 1965 figure was 0.55 fatalities per 100 million passenger miles.
\item 81. Brief for Plaintiffs, supra note 66, at 120.
\end{itemize}
is in stark contrast to the situation today. Some of the larger airlines have assets measured in the billions of dollars;\(^2\) the fatality rate is approximately 0.41 per 100 million passenger miles;\(^3\) and the average per capita income is higher than the allowable recovery under the basic Warsaw Convention.\(^4\) Today we find financially strong companies with extensive insurance coverage and a liability exposure that has been reduced by a factor of over 100 to 1, who continue to hide behind the protection of a treaty from another era.\(^5\)

Even if protecting fledgling airlines were a rational and valid reason for abrogating an individual’s right to security in the early years of the airline industry, the necessity has long since disappeared. The maintenance of government imposed protection under present conditions is little more than an ill-disguised perpetuation of droit du Seigneur on a subservient populace.

The second major reason advanced in support of the Convention’s liability limitations is maintaining uniformity of rules in international law. Let us disregard for a moment the lack of uniformity evidenced by the patchwork of rules under the Warsaw Convention as modified by the Hague Protocol and waived by the Montreal Agreement. The basic goal, uniformity, is still valid today, perhaps more so than when the Convention was drafted. But there are many ways to bring divergent systems into uniformity. One or another system can be adopted in its entirety, several systems can be merged into a compromise solution, or the basic tenets of the conferees can become a starting point for an entirely new system drafted ab initio.

The United States faced a fait accompli when it joined the

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\(^82\) Eastern Airlines, Inc., 1982 Second Qtr. Interim Report 3 (n.d.) (the report showed a total property and equipment of $3,607,981,000).

\(^83\) This is the approximate statistical average for the years 1971 - 1981. Since the major air carriers had no fatalities in 1980 and 1981, this figure was zero for those years. I.C.A.O. Annual Report 13 (1983).

\(^84\) Per capita income rises 10.7\% to nearly $10,500, Miami Herald, Sept. 12, 1982, at 5A, col. 1 [hereinafter cited as Per Capita].

\(^85\) The impact of this antique treaty is best assessed in a hypothetical example. Imagine a Lockheed 1011 with 293 seats, all filled, flying on a route where the Montreal Agreement applies. If the aircraft crashes, killing all on board, and is completely demolished, it will cost the carrier (or more accurately the carrier’s insurer) between forty and forty-five million dollars to replace the aircraft. The maximum exposure for liability to passengers, however, is $21,975,000—about half the cost of the aircraft. Under the basic Convention, the total liability of the carrier for death or injury of passengers is $2,431,900, or less than one-sixteenth the value of the aircraft.
Warsaw Convention nations almost five years after the drafting. Before joining it should have determined whether its basic tenets were met. One tenet is best expressed by Rousseau:

Is the welfare of a single citizen any less the common cause than that of the whole state? . . . If we are to understand that it is lawful for the government to sacrifice an innocent man for the good of the multitude, then I hold this maxim as one of the most execrable rules tyranny ever invented, the greatest falsehood that can be advanced, the most dangerous admission that can be made, and a direct contradiction of the fundamental rules of society. 86

Rousseau's philosophy is as persuasive today as when it was written in 1755. The limitation provisions of the Warsaw Convention, however, seem to have neglected this basis tenet. Rousseau was an early advocate of the Social Contract Theory, an eighteenth century construct which reached its modern fruition in John Rawls' A Theory of Justice. 87 This theory is probably the one which most closely approximates the average American's ideas of government and justice. 88

According to Social Contract Theory, one has the choice of belonging to many societies or adhering to many contracts. Some of these have hierarchical relationships and some do not. Some are voluntary and some not so voluntary. One can belong to either the Elks Club or the Shrine or both without conflict between them. If the requirements of either become noxious one can withdraw with impunity. The Masons and the Catholic Church have at various times been mutually exclusive, but in United States judicial history neither has been mandatory, so one has the freedom to choose between them or to forgo both. If, however, one chooses to be the

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86. J. Rousseau, On Political Economy, para. 32 (1755).
87. J. Rawls, A Theory of Justice (1971). Rawls modernized and brought to a higher order of abstraction the traditional theory of the Social Contract as represented by Locke, Rousseau, and Kant. He has effectively reworked the theory in the area of historical validity, the most prominent objection to Locke's version.
88. Of the three most common social theories, Divine Right, Utilitarian, and Social Contract, the Social Contract is the one which most accurately describes the American system. Some elements of Utilitarianism are certainly present, and the government branches occasionally urge Divine Right. See, e.g., United States v. Curtis-Wright Export Corp., 299 U.S. 304, 318 (1936)(discussing source of power to regulate foreign affairs). Note, however, the second paragraph of the Declaration of Independence, particularly the second sentence: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,. . . ." This is a classic historical description of the Social Contract.
citizen of a state, by necessity and force of arms, one accepts the contract of federal citizenship, which by federal fiat is preemptive and paramount. Until recently that was as far as the hierarchy went. However, in recent years, there has been a disconcerting tendency to take the citizenry into a sort of World Citizenship, subordinating United States citizens' legitimate rights and interests to those of foreign countries, some of whom are militantly nationalistic and unconcerned with reciprocal concessions. The most marked difference in the United States and these countries is the government’s attitude toward the citizen. In the United States the sovereignty resides in the citizenry and the individual and his inalienable rights are prior to the state. In many countries with a history of feudalism, the primary concern is the state. The citizen is considered to be nothing more than a vassal. “The Bill of Rights, the protective shield of natural rights, marks the greatest difference between this country and those authoritarian states subscribing to materialistic statism.”9 These authoritarian states can afford the loss of a few citizens at $8300 each and consider the elevation of the maximum to $75,000 as “extortion.” Shortly after the Montreal Agreement, one commentator noted that:

There has been wide dissatisfaction with the carrier Interim Warsaw Liability Agreement (Montreal Agreement). The foremost criticism by both governments and carriers is that it was forced upon the world by the brute strength of the United States. The position of most governments in the Montreal Conference on Warsaw was that the United States denunciation was an extortion, since it was generally conceded that the convention could not be maintained without United States participation. Under-developed nations have been particularly critical, describing the United States action as a ploy calculated to take from the poor to give to the rich.90

One wonders whose purpose it was to take from the poor to give to the rich. The purpose of the United States’ action was the protection of individuals at the expense of multinational insurance companies, airline corporations, and governments.

Some argument has been made that the limitations result in an equitable exchange. In exchange for a limit on his recovery, the passenger receives a shift in the burden of proof of negligence. Some of the principals responsible for the original adherence to the Convention considered this a fair exchange. “The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.” Whether the value attributed to the shift in the burden of proof was sufficient to offset a limit in the allowable recovery to $8,300 is questionable. Assuming, arguendo, that this exchange was an equitable one, the changes of the last fifty years have constantly been in favor of the carrier and against the passenger. The allowable recovery has been whittled away by inflation and social progress until it is negligible. Despite frantic patchwork attempts by the Hague Protocol and the Montreal Agreement which went far toward destroying the uniformity of the Convention, the maximum recovery allowed will cover only a small fraction of the possible exposure to medical bills. In 1934, when the United States adhered to the convention, someone who earned $8,300 was economically well off. Today that figure is below the per capita income of forty-six of our states.

Other developments have had a tendency to reduce the value of what the passenger received in the exchange. Juridical tendency in the application of res ipsa loquitur doctrine has brought us almost to the point of strict liability in air crash cases. In addi-

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92. Per Capita, supra note 84 (article providing a list of the per capita income of the various states, only four fell below $8,300).

93. A. Lowenfeld, supra note 2, at 7-106.

94. It is interesting to trace the development of this tendency in Prosser's Text on Torts. In the first edition, published in 1941, Prosser states:

As a matter of common knowledge there are many accidents which may often occur without anyone's fault. . . . In the present state of development of aviation, most courts consider that airplane crashes are to be placed in this category.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 296 (1st ed. 1941).

In the 1955 edition Prosser states:

The earlier cases dealing with aviation took the position that there was not yet
tion, suits on breach of warranty have furnished a theory of recovery unavailable to passengers fifty years ago.\textsuperscript{95} Aside from the jurisprudential changes, technology has improved to the point where it is possible to reconstruct the last moments of even a non-survivable crash by the use of voice and flight data recorders. Government agencies determine and publish the proximate cause.\textsuperscript{96}

The overall effect of these developments is that the passenger gives up a substantial right against the airline in exchange for a juristic privilege which is no longer of substantial value to him. The one exception to this lack of value is in those cases in which the plaintiff has no cause of action,\textsuperscript{97} or the cause logically should have been directed at some other defendant than the airline.\textsuperscript{98} Allowing these actions to be maintained in the name of equity of con-

such common knowledge and experience of its hazards as to permit... a conclusion [as to negligence] from the unexplained crash of a plane. It is only the more recent decisions which have held that the safety record now established justifies the application of \textit{res ipsa loquitur}.  


And in the 1964 edition Prosser states:

[A]ll of the later cases now agree that the safety record justifies the application of \textit{res ipsa loquitur} to an unexplained airplane crash, or even to the complete disappearance of a plane.  


\textsuperscript{95} \textit{See generally} W. Keeton \& W. Prosser, Prosser and Keeton on The Law of Torts §§ 95-104 (1984). \textit{See also} Brief for Plaintiffs, \textit{supra} note 66, at 180 (Kennelly states: "When the Warsaw Convention Treaty was initially adopted, manufacturers and component part makers were not liable to passengers, the 'reason' being the absence of 'privity' between the manufacturers and the passengers. At that time, the doctrine of strict liability of manufacturers had not been conceived, let alone born.").  

\textsuperscript{96} The opinion portion of these reports is not admissible evidence, and the experts who compile them are prohibited by F.A.R. 435.4 from rendering expert opinion testimony in air crash cases. A. Lowenfeld, \textit{Aviation Accident Law} 18-7 (Sept. 1985 Cum. Supp.). What is admissible are the facts and fact patterns from which these conclusions were drawn. \textit{Ibid.}  

\textsuperscript{97} \textit{See}, e.g., MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971) (MacDonald fell in the baggage claim area after debarking from an international flight. There was no indication as to why she fell, and no evidence of negligence on the part of the carrier, and plaintiff claimed liability without fault under Warsaw as modified by Montreal. The Court of Appeals found that the international transportation had been completed and that the passenger was no longer covered by the Warsaw Convention).  

\textsuperscript{98} \textit{See}, e.g., Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975) (Two Palestinian terrorists attacked a line of passengers waiting to board a TWA flight from Athens to New York. Plaintiffs sued the airline, which had very little to do with security, because of the ease with which this could be done under the Montreal Agreement. The court found that the passengers, who were "embarking," were engaged in international transportation, and TWA was absolutely liable up to the limit of $75,000 regardless of fault).
tract only works further hardship on the plaintiff with a legitimate cause against the carrier, or for that matter, on the uninjured passenger who helps defray the costs with the price of his ticket.

American opinion has never been very favorable toward the Warsaw Convention. Evidence of this negative opinion can be found in the failure of the Senate to ratify the Hague Protocol. Insurers, as well, were aware of the criticisms leveled at the convention and the fact that ratification in 1934 was dependent on the unusual political situation at that time.99

In summation, the injured international passenger's vested right of action against the carrier that injured him may have been so severely diminished as to constitute a "taking" of this right by the government through its treaty power. If there is not adequate compensation, such taking may contravene the United States Constitution.100

XI. CONSTITUTIONALITY

Only a few lower court cases have considered and favorably resolved issues raising the constitutionality of the Warsaw Conven-


As to the revision of the Warsaw Convention, he wanted to make the American position clear. American insurers had had plenty of experience in dealing with the Convention and were fully alive to its defects, but generally speaking, it had enabled settlements to be made at lower figures than the average for non-Convention cases and its validity had been upheld and affirmed by the American courts in a series of cases. There were three dangers about revision. The first was that although revision would no doubt cure some of the defects, it might introduce new ones. In the second place, there was quite a serious danger that a revised Convention might not be ratified by the American Senate, since the Convention contained several principles which were completely repugnant to American law and the original Convention owed its easy passage through the Senate to the exceptionally wide powers exercised by President Roosevelt at that time. Finally, even if the revised Convention were passed, it would necessitate fighting a series of actions in the courts to establish its validity and the existing decisions would be rendered valueless.

Reprinted in The Insurance Industry: Hearings on S. Res. 231 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. 487 (1958) (paraphrasing statement of George G. Orr, Director of Claims for United States Aviation Underwriters, Inc., where he discussed the difference of opinion between the European Underwriters, who were urging revision of the convention, and the American Underwriters, who opposed revision).

100. U.S. CONST. amend. V.
tion. In *Pierre v. Eastern Airlines*, the district court found that the treaty did not violate the right to trial by jury guaranteed by the seventh amendment. The court held that "trial by jury" consisted of a panel of twelve men, neither more nor less; that the jury should be the trier of fact; that the trial should be in the presence of and under the supervision of a judge empowered to instruct the jurors as to the law; and that the verdict must be unanimous. So long as these elements are preserved, there is no violation of the constitutional right to trial by jury. Hence the Warsaw Convention does not violate the seventh amendment. There was no appeal, and the decision stands. An argument could be made that the convention interferes with the jury's perogative of trying facts, including liability and damages, but this is a weak theory of unconstitutionality of the convention.

Another lower court case of considerably more interest than *Pierre* is *Burdell v. Canadian Pacific Airlines*, an Illinois Circuit Court case with two opinions by Judge Bua. The history of these two opinions sheds some light on the dearth of opinions addressing the constitutionality issue. Canadian Pacific was attempting to limit liability recovery for Burdell's widow and three children to $8,300 and to force them to sue in Singapore, the origin and destination of his journey. Plaintiff's attorney, John Kennelly, filed a brief alleging (1) inapplicability of the convention on the grounds that Singapore was not a "High Contracting Party"; (2) insufficiency of the warning contained in the ticket; and (3) unconstitutionality of the limitation and restriction of venue clauses of the convention. Judge Bua, in a closely reasoned and powerful opinion, found for the plaintiffs on all three points. Canadian Pacific did not appeal, but settled for $215,000, or about twenty-six times the amount that they had sought as a limit. They also filed a motion requesting withdrawal of the ruling on constitutionality as "unnecessary." Judge Bua granted this motion and issued a new opinion in which he stated that although he found plaintiff's argu-

102. The court also found that Eastern's co-defendant, Cecil C. Foxworth, was not protected by the convention. *Id.*
103. 10 Av. Cas. (CCH) 18,151 (Cir. Ct. Ill. 1968), subsequent opinion, 11 Av. Cas. (CCH) 17,353 (1969) (withdrawing ruling on unconstitutionality).
104. 10 Av. Cas. (CCH) at 18,152-53.
105. *Id.* at 18,160-61.
106. 1968 U.S. Av. R. 1133, unnumbered footnote on title page. (No information on the settlement and subsequent motion appears in the CCH reporter).
107. *Id.*
ment on the constitutionality issue persuasive, he felt constrained to forgo ruling on that issue, in light of his finding that there was no international transportation as defined by the convention. In the context of individualism and the preservation of individual rights evidenced throughout the fifties and sixties, it is clear that the airlines, beneficiaries of this archaic windfall, would go to great lengths to preserve their advantage and prevent appellate review, particularly review of a compelling, articulate finding against them such as Judge Bua's.

Unfortunately for those who have come to expect the courts to protect individual rights, the Supreme Court seems to be moving toward less protection of the individual from government and big business. Justices Burger, Rehnquist, and O'Connor, generally considered the Court's conservative branch, have been criticized for adding "unnecessary" opinions on the merits of cases decided on narrow procedural grounds. This abrupt swing to the right

108. The summary of the constitutionality issue in Judge Bua's first opinion stated:

Provisions of the Warsaw Convention that would restrict the rights of parties to bring an action against an air carrier in a court of the United States, which would otherwise have jurisdiction, and that would restrict the damages recoverable in the event of an accident to approximately $8,300 violate the due process and equal protection clauses of the U.S. Constitution and are unconstitutional. Such provisions are arbitrary, irresponsible, capricious and indefensible when they attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved, and such unjustifiable preferential treatment of international air carriers is unconstitutional. 

Burdell, 10 Av. CAS. (CCH) at 18,151.

In a letter to U.S. Av. R. dated May 3, 1971, Judge Bua stated that although he had granted the motion to withdraw that portion of the opinion declaring the treaty unconstitutional on the basis that it was unnecessary to the opinion, the court was still persuaded that the venue and damage limitations portions of the treaty were unconstitutional. Burdell, 1968 U.S. Av. R. at 1133, n.*.

109. 11 Av. CAS. (CCH) 17,353.


112. This criticism came not from the liberal side, but from Justice Stevens who is generally considered a moderate. Hager, Justices' Tendency to 'Go Public' With Criticism of Each Other Aroused Concern, L.A.Times, Sept. 22, 1984, at 8A, col. 1 [hereinafter cited as Hager, Tendency to Go Public]; Hager, High Court, supra note 111.

An unprecedented series of public statements by Justices has given some insight into the dynamics of the Court's movement to the right. Justice Blackmun accused the Court of "moving to the right" and "going where it wants to go . . . by hook or by crook." Address by Justice Blackmun, Cosmos Club, Washington, D.C. (Sept. 18, 1984), reported in Hager, Tendency to Go Public, supra; Justice, supra note 110. Justice Marshall, addressing the judges of the Second Circuit, pointed out several rulings which he said showed a "very disturbing pattern" of denying effective remedies to people who believe their rights have been
and loss of concern with individual rights may have caused the international airlines to decide that the time is ripe to allow the question of the Warsaw Convention’s constitutionality to wend its way before the Court. Or perhaps the Court itself is “going out of its way” to make new law as Justice Stevens has suggested.\footnote{113}

After fifty years of silence on the Warsaw Convention, the Supreme Court has issued two opinions on the subject in the last year. As previously noted, the Franklin Mint decision has ominous portent for international travelers; the other case, while quite narrow, is of the same ilk.

The Court’s holding in *Saks v. Air France*\footnote{114} turned on the definition of “accident” in article 17 of the convention. Valerie Saks suffered a permanent loss of hearing in her left ear while traveling as an international passenger on Air France. The trial court granted summary judgment for Air France because she was unable to prove malfunction of the aircraft pressurization system.\footnote{115} The Ninth Circuit reversed and held that a showing of malfunction or abnormality in the aircraft’s operation is not a prerequisite for liability under the Warsaw Convention.\footnote{116} The court in its analysis cited dicta from *MacDonald v. Air Canada*\footnote{117} that the finding of an “accident” must precede the imposition of liability without fault.\footnote{118} The *MacDonald* court held that debarkation was complete and the Warsaw Convention did not apply.\footnote{119} Consequently, analysis in the decision of MacDonald’s failure to meet the burdens of the convention were superfluous. Troubled by the similarity of Air France’s assertion of “normal operation” to the defense of “due care” (supposedly waived by the Montreal Agreement), the Ninth Circuit searched for and found a workable definition of “aircraft accident” in the Convention on International Aviation.\footnote{120} An aircraft accident was defined as:

> an occurrence associated with the operation of an aircraft which

\footnote{113. Hager, Tendency to Go Public, supra. Justice Stevens, speaking at Northwestern University, accused the Court of “going out of its way” to make new law in rights cases. *Id.*
114. 724 F.2d 1383 (9th Cir. 1984), rev’d, 105 S. Ct. 1338 (1985).
115. *Saks*, 724 F.2d at 1384.
116. *Id.*
117. 439 F.2d 1402 (1st Cir. 1971).
118. *Id.* at 1385.
119. *MacDonald*, 439 F.2d at 1405.
120. The Convention on International Aviation is a multi-party treaty to which the United States is a signatory. *Saks*, 724 F.2d at 1385.
WARSAW CONVENTION takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.\textsuperscript{121}

Since Saks had suffered serious injury, the event met the criteria of this definition of accident and the Ninth Circuit held that Air France was liable for her damages.

The Supreme Court reversed and held that liability under article 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft.\textsuperscript{122}

\textit{Saks} limits recovery by injured parties who have a legitimate claim against airlines. This limitation arises when there is a control problem or malfunction in an aircraft pressurization system which affects one passenger seriously and which other passengers, because of superior physical tolerance, either do not notice or disregard. Saks could not establish that there had been a malfunction of the pressurization system.\textsuperscript{123} Although she was injured by a function of the aircraft, the Court placed on her the burden of proving that the operation which injured her was unusual or unexpected.\textsuperscript{124} The data necessary to do this (instrument readings, control settings, etc.) are in the control of the airline. Without access to them or evidence that another passenger was affected by the pressurization, her burden was insurmountable. Resolving this difficulty of proof was one of the advantages that the passenger was to gain in exchange for giving up her right to a full recovery.\textsuperscript{125} Now the Court has rescinded that advantage. It is unfair to revoke rights granted by the treaty without restoring the rights that were taken.

The issue in \textit{Saks} came before the Supreme Court because of a conflict of opinion between the Third and Ninth Circuits.\textsuperscript{126} Another such split has apparently arisen between the Second and Fifth Circuits on whether or not the $75,000 limitation of the Mon-

\begin{itemize}
\item \textsuperscript{121} 49 C.F.R. § 830.2 (1984).
\item \textsuperscript{122} Air France v. Saks, 105 S. Ct. 1338 (1985), \textit{rev'd}, 724 F.2d 1383 (9th Cir. 1984).
\item \textsuperscript{123} \textit{Id.} at 1340.
\item \textsuperscript{124} \textit{Id.} at 1341.
\item \textsuperscript{125} Message from the President, \textit{supra} note 91, at 3-4.
\end{itemize}
treal Agreement precludes the award of pre-judgment interest above that amount. In *Domangue v. Eastern Airlines*, the Fifth Circuit found that it did not; in *O'Rourke v. Eastern Airlines*, the Second Circuit held that it did. The two circuits came to opposite conclusions about whether a purpose of the convention was to expedite settling claims arising from air crashes. The Fifth Circuit found that expedition of claims was a valid purpose of the Convention and that pre-judgment interest advanced that purpose. The Second Circuit found that although the United States interests in the convention were unclear, it was apparent that one of them was not expediting the settlement of claims. Predictably, the Second Circuit then held that pre-judgment interest was not to be awarded if it caused the judgment to exceed the limitation.

Judge Pratt in his dissent analyzed the time value of money and concluded that by putting off payment for six and a half years, the airline earned $31,604.79 in interest on money that belonged to the plaintiff at the instant of the accident. Hence the cost was not $75,000 at all, but no more than $43,395.21, and perhaps significantly less.

These courts did not have before them the question of limitation of the recovery of the plaintiff. Both cases arose from the same accident, the crash of Eastern Airlines Flight 66 at John F. Kennedy International Airport on June 24, 1975. The United States Government, a second defendant, became liable because of the failure of one of the air controllers to notify Eastern of the micro-burst which caused the crash. In *Domangue* the government was assessed $564,446.50. In *O'Rourke* the court offered the plaintiff a conditional remittur of $779,981 or a new trial on damages. With an award of this amount, the government would

127. 722 F.2d 256 (5th Cir. 1984).
128. 730 F.2d 842 (2d Cir. 1984).
129. *Domangue*, 722 F.2d at 261.
130. *O'Rourke*, 730 F.2d at 852-54 & n.20.
131. Id. at 853.
132. Id. at 859-60 (Pratt, J., dissenting).
133. *O'Rourke*, 730 F.2d at 845; *Domangue*, 722 F.2d at 257.
134. A micro-burst is a meteorological phenomena characterized by intense down drafts of up to 75 meters per second. It is frequently associated with thunderstorms. See generally T. Fujita, *The Downburst* (1985).
137. *O'Rourke*, 730 F.2d at 859.
pay $704,981. Eastern would only pay $75,000 (either with or without interest) in each case. The reports of these cases do not contain information on the allocation of liability, but it is unlikely that the government is ten times more culpable than the airline for merely failing to warn them of bad weather. It is pertinent to note that Eastern Airlines had other notions of the equitable allocation of culpability; in a pretrial agreement they agreed to a 60/40 split with the United States.

In another case resulting from this same crash the court points out the anomaly of the government’s position.

Surprisingly, Stratis, who could not be affected by a limitation of Eastern’s liability because he has the United States as a responsible defendant, is the only one of the parties who argues in his appellate brief that the Convention is inapplicable. The United States, which had agreed to a split of any damages with Eastern, has had no need to discuss the point in its brief.

Since the United States paid more than its fair share in these three cases, maybe that is its intent. Under a fifth amendment theory of compensation for property taken by the government, awards of the courts that exceeded the limitations would be paid by the United States. Such a theory was advanced by the Ninth Circuit in its opinion remanding *In re Air Crash in Bali, Indonesia*. The district court applied California law, held that the Warsaw Convention did not apply, and did not reach the constitutional questions. The Ninth Circuit held that California law was preempted because it interfered with the Congressional intent evidenced in the Convention. Thus it was necessary to address the plaintiff’s three constitutional challenges to the limitations: (1) that the convention is so arbitrary and unreasonable as to deprive them of substantive due process; (2) that it deprives them of equal protection of the laws; and (3) that it impermissibly burdens their constitutional right to travel. The first two arguments are similar to the

138. *O’Rourke*, 730 F.2d at 845; *Domangue*, 722 F.2d at 258.
139. *In re Air Crash Disaster at John F. Kennedy Int’l Airport on June 24, 1975*, 635 F.2d 67 (2d Cir. 1979).
141. Id. at 409.
142. 684 F.2d 1301, 1310 (9th Cir. 1982), rev’g, 462 F. Supp. 1114 (C.D. Cal. 1978). See *supra* notes 45-50 and accompanying text (discussion of additional aspects of this case).
143. *In re Air Crash in Bali, Indonesia*, 684 F.2d at 1306.
144. Id. at 1308.
145. Id. at 1309.
arguments advanced in Duke Power Co. v. Carolina Environmental Study Group.\textsuperscript{146} Duke Power was concerned with the constitutionality of the Price-Anderson Act,\textsuperscript{147} which sets a limit on the maximum liability for injury resulting from nuclear power plant accidents. In Duke Power the Supreme Court held that the Price-Anderson Act, as economic regulation under the Commerce Clause, would not violate due process unless it was arbitrary or irrational.\textsuperscript{148} The Ninth Circuit did not discuss equal protection further, but extrapolated that article 22 of the convention, like the Price-Anderson Act, is economic regulation which is constitutional under the commerce clause unless arbitrary or unreasonable.\textsuperscript{149} Since the question was not before the court, it was unnecessary to determine whether article 22 was in fact arbitrary or unreasonable.

The Ninth Circuit briefly touched upon equal protection again, as well as rationality and unreasonableness, in analyzing the right to travel argument. The insurance required to meet the additional burden if the limitations did not apply would be insignificant.\textsuperscript{150} The cost to airlines of additional insurance would be less than the cost to individual passengers of purchasing trip insurance.\textsuperscript{151} Unlike the situation in Duke Power, where the potential liability was beyond the ability of private insurance companies to absorb, insurance is available, and the domestic carriers, which are not protected by the Warsaw Convention or similar legislation, are able to obtain it.\textsuperscript{152} After analyzing these factors, the court concluded: "[T]he plaintiffs' due process and right-to-travel arguments, while substantial, would fail if another remedy were available that would provide them with full compensation. We find that such a remedy is available under the Tucker Act, if the liability limitation constitutes a "taking" under the fifth amendment."\textsuperscript{153}

Since the lower court proceeding had evidentiary errors\textsuperscript{154} and did not reach the issues of notice and ticket delivery,\textsuperscript{155} the Ninth

\begin{itemize}
\item \textsuperscript{146} 438 U.S. 59 (1978).
\item \textsuperscript{147} 42 U.S.C. § 2210 (1976).
\item \textsuperscript{148} Duke Power Co., 438 U.S. at 83.
\item \textsuperscript{149} In re Air Crash in Bali, Indonesia, 684 F.2d at 1309.
\item \textsuperscript{150} Id. at 1310, citing, ICAO, 2 Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol 72-173 (1966).
\item \textsuperscript{151} L. Kreindler, Aviation Accident Law § 11.01[5] (1975).
\item \textsuperscript{152} In re Air Crash in Bali, Indonesia, 684 F.2d at 1310.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id. at 1305, 1313. Since the district court held that the Warsaw Convention did not apply, it excluded evidence on the issue of willful misconduct as irrelevant.
\item \textsuperscript{155} Id. at 1306 n.3.
\end{itemize}
Circuit did not reach the question of whether or not there had been a taking. It remanded the case for resolution of the evidentiary errors and findings consistent with its opinion. The question of taking is properly one for the Court of Claims when and if the Warsaw Convention Limitation is applied to these plaintiffs.\(^\text{156}\)

The Ninth Circuit gave short shrift to equal protection, since the question was not before it. No discussion of constitutionality, however, would be complete without some scrutiny of equal protection of the laws. "Equal protection to all is the basic principle on which rests justice under the law . . . . This clause . . . means . . . that all persons . . . shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed."\(^\text{157}\)

The most obvious case of unequal treatment under the Warsaw Convention is that of two passengers sitting side by side on a domestic flight. One of them is traveling between two domestic cities, and the other is continuing a journey which began outside the country. The aircraft crashes and both are injured. The intra-country passenger may recover damages to the extent that a jury finds that he is entitled to them; the international passenger is limited to whichever modification of Warsaw applies. Senator Butler, speaking of this hypothetical case, stated unequivocally, "In my opinion, it shows conclusively that we have already, by treaty, cut across the right of the American people to a full jury trial in the event of accident or death in a case such as that stated."\(^\text{158}\)

The passenger is not always the one who suffers from the application of this preferential treatment for international airlines. It can be the aircraft manufacturer, the component part maker, a domestic airline, or even, as we have seen, the U.S. Government. Suppose, for instance, that a passenger covered by the Warsaw Convention was aboard the plane that crashed in the Florida Everglades in December, 1972.\(^\text{159}\) Suppose, also, that his medical

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156. Id. at 1315-16.
159. In re Air Crash Disaster at Florida Everglades on December 29, 1972, 360 F. Supp. 1394 (J.P.M.D.L. June 28, 1973), subsequent opinion, 368 F. Supp. 812 (J.P.M.D.L. Dec. 14, 1973); subsequent opinion aff'g unreported D.C.S.D. Fla. ruling, 549 F.2d 1006 (5th Cir. 1977). These opinions resulted from a Lockheed 1011 crash which occurred outside Miami on December 29, 1972. The flight crew was distracted by a malfunction in the landing gear indicator and failed to properly monitor their altitude. A second malfunction in the autopilot allowed the aircraft to deviate from the selected altitude without the normal an-
bills and damages were $300,000. Assume that liability was assessed at seventy percent for the carrier, ten percent for the manufacturer, and twenty percent for the government controller. With an award of $300,000, the carrier would be assessed $210,000, the manufacturer $30,000, and the government $60,000. The carrier pleads the affirmative defense of the Warsaw Convention limitation, $75,000. That leaves $135,000 unpaid out of its share. Under the doctrine of joint and several liability, the manufacturer becomes liable for an additional $45,000 ($75,000 total), and the government is obligated to pay a total of $150,000, or one half of an accident for which they were twenty percent responsible. Equal protection? No. Rational justification? Probably not. The same basic concepts would apply in a collision between a general aviation aircraft and an international flight, or between a domestic and an international flight. If the international airlines may contractually limit their damages regardless of their negligence, similar protection should be granted to aircraft manufacturers, domestic airlines, private aircraft owners and operators, maintenance companies, air taxis, the U.S. Government, and everyone else connected with aviation.

nunciator warning to the flight crew. The government air controller noticed the altitude deviation, but his communication to the flight crew was ambiguous and failed to alert them to the danger. A subsequent investigation found that the autopilot malfunction was caused by the installation of non-compatible parts which allowed the remote possibility of failure. Further investigation revealed that the manufacturer was aware that the parts were incompatible, but considered the possibility of failure so remote that they failed to inform the carrier. Consequently, the proximate cause of the accident rested on the combined negligence of three parties.

160. Actually the airline conceded liability, and the government and the manufacturer agreed to contribution without admitting liability. In re Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006 (5th Cir. 1977). The percentages were given in a lecture on Aircraft Accident Litigation presented by one of the team of defense attorneys for the airline, and sponsored by Embry-Riddle Aeronautical University at Miami, Feb. 1980.

161. The solution given is only one of a complicated choice available to the trial court. This example and the one that follows are computed on a simplified version of the California rule for joint and several liability espoused in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 586, 578 P.2d 899, 903, 146 Cal. Rptr. 182, 186 (1978).

162. As a hypothetical case, suppose you own a light twin-engined aircraft and your daughter is at Miami's Tamiami Airport doing practice landings. Being inexperienced, she forgets to make a required radio call downwind. VIASA, enroute from Venezuela and making an approach to the wrong airport, hits her and they both crash. The jury finds that the missing radio call contributed 1% to the crash. Three hundred people on VIASA are killed or injured at an average cost of $300,000 each. What is your share of the liability? If VIASA is allowed to protect itself with the Warsaw Convention and Montreal Agreement, you will have to pay sixty-seven million five hundred thousand dollars. VIASA, 99% responsible, gets by with just twenty-two million dollars.
XII. Conclusion

After years of silence on the Warsaw Convention, the Supreme Court has spoken twice within a year. Both decisions have implications which tend to uphold the government's restriction on the rights of individuals. At this juncture it is difficult to ascertain whether the airlines, who have great control over which cases are settled and which are litigated, have decided that this Court is an appropriate forum for their purposes, or whether the Court is "reaching out" to cases that it rejected before. If the district court in *Bali* finds that there was no "wilful misconduct" and applies the liability limitations, the constitutionality issue could come before the Court as soon as the next term. If it does, it is likely that the conservative wing will prevail. There was no dissent in *Saks*; the only dissent in *Franklin Mint* was voiced by Justice Stevens.

One possible solution is that the Court will uphold the limitations but hold that they constitute a "taking" requiring compensation under the Tucker Act, as suggested by the Ninth Circuit. Some language in the majority opinion of *Franklin Mint* seems to support this conjecture.

The political branches, which hold the authority to repudiate the Warsaw Convention, have given no indication that they wish to do so.

Article 22(4) of the Convention permits conversion of the liability limit into "any national currency." In the United States the authority to make that conversion has been delegated by Congress to the Executive branch. The courts are bound to respect that arrangement unless the properly delegated authority is exercised in a manner inconsistent with domestic or international law.

Perhaps it is tenuous, but the Court could reach the conclusion that if the executive branch and the Congress want to severely

163. *In re Air Crash in Bali, Indonesia*, 684 F.2d at 1301.
165. *Franklin Mint*, 466 U.S. at 261 (Stevens, J., dissenting).
166. *In re Air Crash at Bali, Indonesia*, 684 F.2d at 1301.
167. *Franklin Mint*, 104 S. Ct. at 1787.
limit the citizens’ right to recover when injured, they may do so if they are willing to pay for the privilege.

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