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Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation

Perry S Bechky

MISMANAGEMENT AND MISINTERPRETATION: U.S. JUDICIAL IMPLEMENTATION OF THE WARSAW CONVENTION IN AIR DISASTER LITIGATION

PERRY S. BECHKY*

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* Honors Attorney, U.S. Department of Treasury, Office of the General Counsel. I extend my sincere thanks to Judge Jack Weinstein, Professors Louis Henkin and Harold Korn of Columbia Law School, and Paul Larsen of the U.S. Department of Transportation for their encouragement and their helpful comments. The views expressed in this article are my own and do not represent the views of the Treasury Department or the United States Government.

THE SOVIET UNION destroyed Korean Airlines Flight #007 over the Pacific. Terrorists destroyed Pan American Flight #103 over Lockerbie, Scotland. In both tragedies, as in numerous other airplane crashes, hundreds died. A familiar pattern has emerged: headline news, public shock and outcry, and government investigations.

A less publicized, but equally clear, pattern has also developed: the victims' families shortly hire lawyers, thereby beginning a long, complex process of litigation. For example, lawyers began working on the case immediately after Pan Am #103 crashed in December 1988, but the federal jury did not reach its verdict until July 1992[1] and the litigation continues today—over six years later.[2]

On April 4, 1989, less than four months after the crash of Flight #103, the Judicial Panel of Multidistrict Litigation consolidated the eighteen suits already pending in four federal districts.[3] The Panel also noted that "numerous additional related actions" were pending in "various district

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[1] *Pan Am Ruled Liable in Flight 103 Bombing: Damages Could Amount to $300 Million*, WASH. POST, July 11, 1992, at A3.

[2] A divided Second Circuit upheld the verdict in January 1994, Pagnucco v. Pan Am. World Airways, 1994 WL 25773 (2d Cir. Jan. 31, 1994), but the defendants petitioned for a rehearing and the court withdrew its decision. On reconsideration, the court affirmed the liability verdict, but remanded the case to the district court to recalculate the damages. Pagnucco v. Pan Am. World Airways, 1994 WL 498454, at *45 n.1 (2d Cir. Sept. 12, 1994).

[3] *In re* Air Disaster at Lockerbie, Scot., on December 21, 1988, 709 F. Supp. 231, 232 (J.P.M.L. 1989). The Panel consolidated the actions before Judge Platt of the Eastern District of New York.

courts."[4] Other plaintiffs brought state wrongful death actions, and the district court certified an interim appeal to resolve the resulting conflict of laws question.[5]

In total, the Lockerbie plaintiffs sued Pan Am for several hundred million dollars. If the verdict finding Pan Am guilty of "willful misconduct" survives the pending challenges, the 210 plaintiffs seem likely to win a judgment worth many millions of dollars.[6] Even so, however, Pan Am's bankruptcy (for which the Lockerbie disaster and this litigation are at least partly responsible)[7] may prevent them from collecting much of the damage award[8] and their longtime lawyers are sure to claim much of their winnings. Meanwhile, at least 549 Lockerbie residents have sued Pan Am[9] and the airline has sued the Government of Libya and

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[4] *Id.* at 232 n.1. Fifty-four plaintiffs brought a significant "tag-along" action in the Southern District of Florida, which was consolidated in January 1991. Pan Am. World Airways v. Coker, 950 F.2d 839, 842 (2d Cir. 1991).

[5] *In re* Air Disaster at Lockerbie, 709 F. Supp. at 231.

[6] Estimates vary considerably. *Compare Pan Am Ruled Liable in Flight 103 Bombing: Damages Could Amount to $300 Million*, WASH. POST, July 11, 1992, at A3 *with* John Arlidge, *Court Paves Way for £500 Million Claim over Lockerbie*, INDEPENDENT, Feb. 2, 1994, at 5.

The first jury award was announced on July 22, 1992: $9.23 million. Plaintiffs had sought a whopping $25.25 million. This award may well prove to be above the average received by the families of Lockerbie victims, since $6 million of the damages represented the lost earnings of a successful attorney. The still-large remainder of over $3 million, however, compensated his family for the loss of their husband and father—a type of damages which will be available to the families of many victims. David Von Drehle, *Family Awarded $9 Million in Pan Am Bombing Case*, WASH. POST, July 23, 1992, at A3. Only two other damage verdicts have been rendered thus far: $9 million for another attorney and $1.74 million for an electrician/part-time musician. Pagnucco v. Pan Am. Airways, 37 F.3d 804, 804 (2d Cir. 1994). The Second Circuit vacated these three damage awards and remanded the case for further proceedings on the calculation of damages for loss of society and support. *Id.* at *25. The damage trials for 207 passengers still await. *Id.* at *2.

[7] *See* James Ott & Anthony L. Velocci, Jr., *Inability to Adapt in New Era of Aviation Doomed Pan Am*, AV. WK. & SPACE TECH., Dec. 23, 1991, at 28 (quoting Najeeb Halaby, former head of Pan Am and the Federal Aviation Administration, describing the Lockerbie disaster as the "fatal blow").

[8] If Pan Am's insurance proves insufficient to cover the awards, plaintiffs will have to compete with Pan Am's other creditors to collect their damages. Plaintiffs believe Pan Am's insurance will cover up to $750 million in damages. Ronald Sullivan, *Court Upholds Pan Am 103 Awards*, N.Y. TIMES, Feb. 1, 1994, at D2. The bankruptcy also further complicates the litigation. *See* Murray v. Pan Am. World Airways, 16 F.3d 513 (2d Cir. 1994).

[9] *Murray*, 16 F.3d at 514.

the two Libyans accused in the bombing.[10] In short, the Lockerbie litigation is a mess[11]—a mess of the sort the Multidistrict Litigation Act is intended to mitigate.[12]

It is also the precise sort of mess which the Convention for the Unification of Certain Rules Relating to International Transportation by Air (done at Warsaw, 12 October 1929)—a treaty generally known as the Warsaw Convention[13]—is intended to eliminate. This article argues that the Convention embodies a trade-off between plaintiff passengers and defendant airlines which could effectively promote the timely, efficient resolution of air crash litigation. In fact, the Convention's formula—strict liability coupled with a low damage cap—is particularly designed to promote settlement, the most efficient means of resolving mass tort litigation.

Nevertheless, as the Lockerbie case shows, the system has not promoted settlement or other forms of rapid resolu-

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[10] Pan Am claimed $300 million in damages, based on lost business and the value of the destroyed 747. The suit may be seen, however, as an attempt to obtain indemnification from Libya and the accused terrorists for the amount Pan Am may have to pay the victims' families. James Wires Forrester, *Pan Am $300 Million Lawsuit to Fund Damages—Lawyer*, REUTER LIBRARY REP., Dec. 16, 1993, *available* in LEXIS, Nexis Library.

[11] The same could be said of the KAL litigation, now in its eleventh year. Some—but only some—of the continuing litigation is explained by a dramatic new development in the case: in 1992, Boris Yeltsin released Flight #007's "black box," which the Soviets had kept secret for years. Based on this new evidence, KAL moved to vacate the judgment against it, causing the Judicial Panel on Multidistrict Litigation to consolidate the matter a second time before Judge Robinson of the D.D.C. *In re* KAL, 1994 WL 143009 (J.P.M.L. Apr. 12, 1994). Judge Robinson denied the motion, finding that the motion was untimely and the new evidence was unlikely to change the verdict. *In re* KAL, 156 F.R.D. 18 (D.D.C. 1994). The carrier has appealed. Plaintiffs ordered that the case remain consolidated pending the outcome of KAL's appeal. *In re* KAL, unpublished order, Nov. 29, 1994 (copy on file with the author). Other legal battles over damage awards will then continue. *See* Steven Pounian, *Korean Air Lines Flight #7 — Ten Years Later*, N.Y.L.J., Dec. 29, 1993, at 3; *Korean Air Lines 007 Disaster Litigation — Damage Awards Rendered in Ten Passenger Cases*, 12 LLOYD'S AVIATION LAW (July 15, 1993).

[12] 28 U.S.C.S. § 1407 & n.2 (Law. Co-op. 1988).

[13] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1988) [hereinafter Warsaw Convention].

tion.[14] This article, therefore, explores the implementation of the Warsaw Convention by American courts, including their approach to mass tort management and treaty interpretation. Specifically, the article evaluates the Warsaw Convention cases according to the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties and a test for mass tort management developed by Judge Jack Weinstein, a leading authority on the subject. These two separate standards are actually linked: since the Warsaw Convention is designed to promote mass tort management, misinterpretation of the Convention is linked to the mismanagement of air disaster cases.

Part I of this article describes the Warsaw Convention. Part II then presents criticisms of the Convention, that have led to subsequent developments in the "Warsaw system." Parts III and IV present the principles of treaty interpretation and mass tort management that judges should apply in international air disaster cases. Part V then examines how American judges have applied these principles to resolve a variety of issues which have arisen in implementing the Warsaw Convention. The article concludes by proposing the establishment of a "shadow" court to hear Warsaw Convention cases as a partial solution to the current misinterpretation and mismanagement; a more complete solution

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[14] It should be noted, however, that the Lockerbie litigation cannot be evaluated entirely on the basis of economics and efficiency. Beyond compensation, the plaintiffs also sought a public forum to voice their complaints against Pan Am and a determination, by a jury of their peers, that the airline was responsible for the tragedy. The ongoing litigation has also facilitated the families' access to the media, where they have successfully pushed for security legislation, an anti-terrorism treaty, a memorial at Arlington National Cemetery, and United Nations sanctions against Libya. *See* Alan R. Schwartz & Michael J. Bayer, *Pan Am Flight 103 and the Aviation Security Improvement Act of 1990*, LOGISTICS & TRANSP. REV., Mar. 1992, at 61; David Hughes, *Treaty Approved at ICAO Conference Requires Markings on Plastic Explosives*, 134 AV. WK. & SPACE TECH., Mar. 25, 1991, at 63; U.N.S.C. Res. 731, 748, 883. Public concerns about Flight #103 may also have been allayed by a sense that "justice has been done" by the jury verdict. Also, the Pan Am court spectacle should encourage other airlines to enforce security measures more thoroughly than did Pan Am.

Nevertheless, generally speaking, resolving mass torts efficiently benefits plaintiffs, defendants, and the courts. Yet, aspects of American judicial implementation of the Warsaw Convention have thwarted this goal. *See* discussion *infra* part IV.A.

will depend on action by the political branches to modify the Warsaw Convention.

I. THE WARSAW CONVENTION

Inspired by Charles Lindbergh's historic flight across the Atlantic in 1927, the international community sought to facilitate the emerging industry of international air travel. International flights presented numerous legal questions, however. What law would govern landing rights in foreign countries? Overflight rights? Emergency landing rights? Would an airline have to comply with the ticketing obligations imposed by the country of ticket purchase, departure, or destination, or all three? What law would govern the suit of American, British, French, and German passengers injured if a German airline crashed while flying over France between Britain and Germany? What about the damage caused on the ground where the plane crashed in France?

These last two questions could be answered by traditional conflicts of law methods, the penultimate with some difficulty. The other questions had to be answered by international law. The Chicago Convention of 1944 failed to establish multilateral rules regulating international air carriage, so international travel today remains governed by a series of bilateral Air Services Agreements.[15] The Rome Surface Damage Convention of 1952 governs "Damage Caused by Foreign Aircraft to Third Persons on the Surface," as its formal title indicates.[16] The first and foremost instrument governing international air travel is the Warsaw Convention of 1929, which establishes uniform multilateral rules for documentation and airline liability.[17] The United States adhered to the Convention in 1934.

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[15] STUART M. SPEISER & CHARLES F. KRAUSE, 1 AVIATION TORT LAW 630 (1978).

[16] Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, 310 U.N.T.S. 181, *reprinted in* 19 J. AIR L. & COMMERCE 447 (1952) [hereinafter Rome Convention]. The United States participated in the negotiations in Rome, but neither signed nor ratified the Surface Damage Convention. SPEISER & KRAUSE, *supra* note 15, at 630-31. The Rome Convention establishes a scheme similar to the Warsaw Convention's. *Id.*

[17] Warsaw Convention, *supra* note 13.

As the U.S. Constitution proclaims treaties to be "the supreme law of the Land,"[18] the Convention has, since 1934, governed all U.S. litigation involving "international transportation of persons, baggage, or goods performed by aircraft for hire."[19] Although the Convention applies to all litigation from damages due to delays (Article 19) to lost baggage (Article 18) to burns caused by spilled coffee (Article 17), the Convention is most controversial—both legally and politically—when it involves mass torts, namely, air crashes (also Article 17).[20] Only claims against the carrier (and its agents and employees) for injuries to passengers are covered. Employees[21] and other victims[22] must seek

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[18] U.S. CONST. art. VI. *See* discussion *infra* part V.A.

[19] Warsaw Convention, *supra* note 13, art. 1(1). Article 1(2) defines the term "international transportation" for the purposes of establishing the Convention's scope. A flight need not actually cross international borders to be deemed "international transportation" under Article 1. *See, e.g.*, Grey v. American Airlines, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) (holding Warsaw Convention applies where a flight from New York to Mexico crashes while landing for a scheduled stop in Dallas). Indeed, passengers injured during a crash at take-off at Kennedy Airport on a flight to San Francisco where they would have changed planes before flying to Tokyo, may also be governed by the Convention—even if they are American citizens flying on a U.S. carrier, and even though foreign nationals on the same flight whose destination was San Francisco would be governed by state tort law. *See, e.g.*, Jack v. Trans World Airlines, 854 F. Supp. 654 (N.D. Cal. 1994) (applying Convention to three passengers with "international" tickets).

Non-"international" travel is governed solely by domestic law, though some countries (*e.g.* France) have chosen to apply the Convention's rules domestically. GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS 4 (1977).

[20] Article 17 states:

> The carrier shall be liable for damage sustained [*dommage survenu*] in the event of the death or wounding of a passenger or any other bodily injury [*lésion corporelle*] 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.

[21] *See, e.g.*, Sulewski v. Federal Express Corp., 749 F. Supp. 506, 510 (S.D.N.Y. 1990), *aff'd* 933 F.2d 180 (1991); Coker v. Pan Am. World Airways, 950 F.2d 839, 848 (2d Cir. 1991) (distinguishing the "Rosenkranz action" for a crew member from the passengers' claims). Sixteen crew members died on Flight #103. PRESIDENT'S COMM'N ON AVIATION SECURITY & TERRORISM, REPORT 131-37 (1990).

[22] For example, the Pan Am crash killed eleven people on the ground in Lockerbie. PRESIDENT'S COMM'N ON AVIATION SECURITY & TERRORISM, *supra* note 21. Claims related to their deaths are governed by state tort law, not by the Warsaw Convention, since the United States has not adhered to the Rome Convention, *supra* note 16. *See generally* Murray v. Pan Am. World Airways, 16 F.3d 513 (2d Cir. 1994)

their remedies elsewhere. Airlines are liable only for "damage sustained" by the plaintiff, *i.e.* compensatory damages, thereby precluding claims for punitive damages.[23] The Convention allows the carrier to escape liability in certain circumstances, but only if it "proves" that the facts so warrant.[24]

In the leading article on the Warsaw Convention, Andreas Lowenfeld and Allan Mendelsohn describe the Convention's purposes. First, the Convention establishes "a certain degree of uniformity" in documentation and, "to a degree," in the procedural and substantive law of aviation litigation.[25] American courts have often placed greater emphasis on the Convention's role in establishing uniformity of law than did Lowenfeld and Mendelsohn. The Second Circuit, for example, has recognized uniformity as the "most fundamental objective" of the Convention.[26] The Warsaw Convention's formal title also supports this emphasis on the purpose of uniformity: The Convention for the *Unification* of Certain Rules Relating to International Carriage by Air.[27]

(upholding transfer of claims of 549 Lockerbie residents from Florida state court to S.D.N.Y.).

[23] *See* discussion *infra* part V.B.

[24] Under Article 20, an airline is not liable for an "accident" if it can prove it took "all necessary measures to avoid the damage or that it was impossible . . . to take such measures." Warsaw Convention, *supra* note 13. (As the discussion *infra* part II shows, however, many airlines waived this defense in the Montreal Agreement.) Likewise, Article 21 permits courts to negate or reduce damages in accordance with the local law of contributory or comparative negligence. *Id.*

[25] Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

[26] Reed v. Wiser, 555 F.2d 1079, 1090 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) (stating that the Convention "supersede[s] . . . the scores of differing domestic laws," thereby avoiding "jungle-like chaos."). *See also* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 256, 258 (1984); *id.* at 264 (Stevens, J., dissenting) ("International uniformity, naturally, was the touchstone of the Convention."); *In re* Mexico City Aircrash, 708 F.2d 400, 415-16 (9th Cir. 1983) ("[T]he cardinal purpose of the [Convention] is to ensure the existence of a uniform and universal system of recovery for losses incurred in the course of international air transportation.").

[27] Warsaw Convention, *supra* note 13 (emphasis added). *Accord* preamble ("Having recognized the advantage of regulating in a uniform manner the conditions . . . of liability of the carrier, [the signatories] . . . have concluded and signed the following convention.").

According to Lowenfeld and Mendelsohn, the Convention's second purpose—limiting airlines' liability—was "clearly recognized to be the more important" goal.[28] Article 22(1) limits liability for personal injury to 125,000 gold *francs*, which can be converted to $8300 by the formula in Article 22(4) of the Convention.[29] This damage cap was "low even in 1929."[30] Article 24 makes exclusive the remedies available under the Convention.[31] The negotiators considered an exclusive damage cap necessary to allow airlines the certainty in liability needed to obtain insurance at a cost low enough to make aviation economically viable.[32]

Thus, the two overriding purposes of the Warsaw Convention may be described as the promotion of *uniformity* and *certainty* in air litigation. The Convention should be interpreted in light of these purposes.[33] Other purposes can be identified from specific articles, or by reading specific provisions in light of the goals of uniformity and certainty. For example, Chapter III of the Convention, titled "Liability of the Carrier," reveals a purpose (related to, but distinct from, the purpose of certainty) to promote the *efficient resolution of air litigation*, a purpose which is particularly relevant to mass torts litigation arising from air disasters.[34]

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[28] Lowenfeld & Mendelsohn, *supra* note 25, at 499.

[29] For a discussion of Article 22's conversion formula in the context of airline liability for lost baggage, *see Franklin Mint*, 466 U.S. at 260.

[30] Lowenfeld & Mendelsohn, *supra* note 25, at 499.

[31] *See* discussion *infra* part V.C.

[32] Lowenfeld & Mendelsohn, *supra* note 25, at 499 (quoting Secretary of State Cordell Hull). While airlines clearly benefit from the low level of the damage cap, they also benefit separately from the principle of certainty. A fixed damage cap—even at higher levels—would still be important in purchasing liability insurance. *See Franklin Mint*, 466 U.S. at 256, 258 (identifying the establishment of "a stable and predictable [liability limit] on which carriers can rely," *i.e.* certainty, as a purpose of the Convention).

[33] *See* discussion *infra* part III.

[34] Warsaw Convention, *supra* note 13, arts. 17-30. *See In re* Korean Airlines Disaster of September 1, 1983, 932 F.2d 1475, 1489-90 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 616 (1991) [hereinafter *In re* KAL]. *Cf.* FED. R. CIV. P. 1 (identifying the "just, speedy, and inexpensive" resolution of claims as the goals of federal courts). *See* discussion *infra* parts II and IV.A.

II. CRITICISMS OF THE WARSAW CONVENTION

Secretary of State Cordell Hull believed the damage cap would benefit both passengers and airlines, by "affording a more definite basis of recovery, . . . tending to lessen litigation, . . . aid[ing] in the development of international air transportation, . . . [and] reduc[ing] transportation charges."[35] Nevertheless, the airlines clearly have been the primary beneficiaries of the damage cap—so much so that passengers' objections to the cap have fueled discontent with the Convention. Understandably, frustration increases when time passes while damage awards stagnate. Frustrations have been particularly strong in this case because it is understood that the low damage awards were justified in 1929 to protect a "fledgling industry," but the industry has subsequently matured and now could buy insurance to pay higher damage awards.[36]

Yet, passengers were "not entirely neglected."[37] Articles 17-19 of the Convention establish airline liability for passengers' damages, with Article 17 concerning personal injury. Article 17 shifts the burden of proof to the carrier, benefiting passengers even though it falls short of strict liability.[38] The exchange of a shift in the burden of proof for a damage cap constitutes the "essential bargain" embodied in the Convention,[39] and its primary advantage in facilitating settlement of mass tort litigation. Passengers also benefit from Article 25, which waives the damage cap where the airline is found guilty of "willful misconduct."[40] Finally, Article 23 of the Convention protects passengers from contracts of adhe-

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[35] *Quoted in* Lowenfeld & Mendelsohn, *supra* note 25, at 499.

[36] *See* discussion *infra* part V.A.

[37] Lowenfeld & Mendelsohn, *supra* note 25, at 500.

[38] In one class of cases, the benefit to plaintiffs of this shift in the burden of proof is especially clear: slips and falls at the airport. Article 17 applies if the plaintiff can show that the slip occurred "in the course of any of the operations of embarking or disembarking." Much litigation involves the interpretation of this phrase, with plaintiffs arguing for the Convention to apply and carriers arguing against—reversing the typical posture of Convention litigation. *See, e.g.*, Schroeder v. Lufthansa German Airlines, 875 F.2d 613, 627 (7th Cir. 1989).

[39] Lowenfeld & Mendelsohn, *supra* note 25, at 500.

[40] *See* discussion *infra* part V.B.

sion by prohibiting contracts that set damage caps lower than the Convention's, even though Article 22(1) allows "special contract[s]" setting "a higher limit of liability."[41]

Passengers and, especially, the plaintiffs' bar regarded their benefits under the Convention as inadequate compensation for the low damage cap. The damage cap, which was "low even in 1929,"[42] seemed like a heinous anachronism by the 1960s. While criticism focused on the low level of the damage cap, passengers were willing to abandon the Convention altogether because many of their benefits under it had vanished. For example, the rise of the doctrine of *res ipsa loquitur* (as documented in subsequent editions of *Prosser on Torts*)[43] meant that "the Warsaw shift in the burden of proof—important as it was in 1930—no longer provided any substantial benefit to passengers that would be unavailable without the Convention."[44] Yet, these changes merely made the Convention less valuable to plaintiffs; they did not make the Convention actually hurtful to plaintiffs' interests.[45] Thus, their anger focused on the damage cap and, if that problem could be remedied, they

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[41] *See In re* KAL, 932 F.2d 1475, 1489 (D.C. Cir. 1991) (quoting *Second International Conference on Private Aeronautical Law: Minutes* (Warsaw 1929) at 47 (Robert C. Horner & Didier Legrez trans. 1975) (statement of Georges Ripert of France)).

[42] Lowenfeld & Mendelsohn, *supra* note 25, at 499.

[43] *Id.* at 520-21 (comparing W. PROSSER, TORTS 296 (1st ed. 1941) with W. PROSSER, TORTS 220-21 & nn.28-30 (3d ed. 1964)).

[44] *Id.* at 522. Other common law developments also diminished the Convention's value to plaintiffs. Conflict of law rules were changing to allow a forum to protect its residents from unfavorable laws in other forums, thus diminishing the value of the Convention's uniform damage standard in protecting Americans from even lower damage awards abroad. *Id.* at 526, 532.

Similarly, case law at the time "knocked down" "one of the main props in the argument for the Warsaw Convention": a guaranteed right of action under Article 17. *Id.* at 517-18. The Second Circuit held in Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957), that the Convention did not create an independent cause of action, but merely established rules governing suits brought under other causes. The Second Circuit eventually reversed itself in 1978, Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1144 (1979), but it is understandable that plaintiffs' frustrations would have peaked in the 1960s.

[45] The Convention does harm some plaintiffs in one other respect: a plaintiff cannot obtain jurisdiction in the United States over a foreign airline for a case subject to the Warsaw Convention, even if the defendant has sufficient contacts with the United States to satisfy constitutional requirements for *in personam* jurisdiction, un-

were willing to preserve the benefits of the Convention in promoting international cooperation and uniformity, and thereby avoid difficult conflicts of law questions.[46]

Lowenfeld and Mendelsohn describe in great detail the subsequent events, in which they both were personally involved as State Department attorneys. In short, U.S. frustrations with the damage cap rose to the level where the United States decided to demand an increase in the maximum liability or to withdraw from the Convention altogether. Diplomatic efforts to satisfy American concerns by negotiating an increase failed, because many countries believed the U.S. demands for a cap of $100,000 (or a temporary increase to $75,000 pending further negotiations) to be excessive.[47] As a result, the United States "denounced" the Convention on November 15, 1965,[48] meaning that the Convention would cease to bind the United States six months later.[49] In a last minute flurry, however, the United States reached agreement on a compromise with all airlines operating in the U.S. and withdrew its denunciation on May 13, 1966—two days before the final deadline, "final" because it is inconceivable that two-thirds of the Senate ever would have consented to adhering to the Convention anew.[50]

This compromise is embodied in a contract signed by all airlines which operate in the United States. The agreement was filed with, and approved by, the Civil Aeronautics Board (CAB). The United States is not a party to the agreement, nor are any other countries. Thus, the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol—commonly known as the Mon-

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less this country also happens to be one of the four sites for litigation permitted by Article 28. Lowenfeld & Mendelsohn, *supra* note 25, at 522-26.

[46] Lowenfeld & Mendelsohn, *supra* note 25, at 532, 578-86.

[47] *Id.* at 551-52.

[48] *Id.*

[49] Warsaw Convention, *supra* note 13, art. 39.

[50] U.S. CONST. art. II, § 2, cl. 2. *See* Lowenfeld & Mendelsohn, *supra* note 25, at 570-75, 587-90.

treal Agreement[51]—cannot be regarded as a treaty, although it modifies the provisions of the Warsaw Convention for the purposes of its implementation in the United States.[52]

In the Montreal Agreement, the airlines waived the $8,300 damage cap, setting instead a higher limit of $75,000. This change can be reconciled with the Warsaw Convention by regarding it as a "special contract" establishing a higher damage cap pursuant to Article 22(1).[53] The airlines also waived their defenses of taking "all necessary measures" and of impossibility.[54] Thus, the Montreal Agreement moves beyond the Convention's shift in the burden of proof towards strict liability,[55] leaving only the defense of comparative negligence.[56]

The Montreal Agreement, however, is limited in scope. It only applies to flights where the United States is the place of departure or destination, or a planned stop en route. Therefore, it does not apply to American citizens traveling between two foreign countries or to passengers on flights which crash in the United States without intending to stop here. In these cases, different (and, in reality, always lower) damage caps apply. The exact rules would depend on which protocols[57] the relevant countries had signed. Thus,

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[51] CAB Agreement 18900, 31 Fed. Reg. 7302 (1966), *reprinted in* U.S.C.S. CONVENTIONS 549-52 (Law. Co-op. 1983) [hereinafter Montreal Agreement].

[52] *See* Eastern Airlines v. Floyd, 499 U.S. 530, 549 (1991). *See also* Lowenfeld & Mendelsohn, *supra* note 25, at 601 (concluding "that almost overnight, and without normal constitutional and legislative processes, the character of a major international treaty changed completely"). The anomalous character of the Montreal Agreement was relevant to the Supreme Court's determination of liability in *Korean Air Lines*. *See* discussion *infra* part V.B.

[53] Warsaw Convention, *supra* note 13, art. 22(1).

[54] *Id.* art. 20(1).

[55] Indeed, several American courts have characterized the Montreal regime as "absolute liability." *See, e.g.*, Sheris v. The Sheris Co., 188 S.E.2d 367 (Va. 1972), *cert. denied*, 409 U.S. 878 (1972). The Supreme Court, however, has pronounced that this "characterization is not entirely accurate. . . . [The liability is] 'absolute' only in the sense that an airline cannot defend a claim on the ground that it took all necessary measures to avoid injury." Air France v. Saks, 470 U.S. 406 (1985).

[56] Warsaw Convention, *supra* note 13, art. 21.

[57] The protocols to the Warsaw Convention are: Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air,

it can be argued that the "Warsaw system" (consisting of the Warsaw Convention, the subsequent protocols, and the Montreal Agreement) defeats the very purpose of the original Convention: uniformity. The different rules resulting from the various protocols and, importantly, the Montreal Agreement, may require courts to answer the conflicts of law questions the Convention sought to avoid.[58]

The Montreal Agreement has influenced U.S. implementation of the Convention in personal injury and wrongful death cases for nearly thirty years. It has proved remarkably long-lived for an agreement, born of the necessity of a deadline, originally known as the Montreal *Interim* Agreement.[59] Understandably, frustration with the Montreal Agreement's damage cap has grown over time, as other tort remedies have skyrocketed. Indeed, the Montreal Agreement even fell short of the U.S. goals back in 1966.[60] These frustrations have fueled periodic efforts since 1966 to mod-

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opened for signature Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on Oct. 12, 1919, as Amended by the Protocol Done at The Hague on Sept. 28, 1955, done Mar. 8, 1971, ICAO Doc. No. 8932 (1971) [hereinafter Guatemala City Protocol], *reprinted in* 65 AM. J. INT'L L. 670 (1971); and the Additional Protocols Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done Sept. 25, 1975, ICAO Document Nos. 9145-9148 [hereinafter Montreal Protocols], *reviewed in* Marian Nash Leich, *Current Development: The Montreal Protocols to the Warsaw Convention on International Carriage by Air*, 76 AM. J. INT'L L. 412 (1982). The United States signed the Hague Protocol in 1956, the Guatemala City Protocol in 1971, and the third and fourth Montreal Protocols in 1975, but the Senate has not consented to any of them. *See infra* note 59. Only the Hague Protocol is presently in force among its signatories and it seems unlikely the others will ever become effective unless the United States ratifies them. *See* SPEISER & KRAUSE, *supra* note 15, at 681 & n.35.

[58] Lowenfeld & Mendelsohn, *supra* note 25, at 568-69. They offer a partial defense to these criticisms: "a loss of some uniformity was better than what many expected to ensue [from U.S. denunciation of the Convention]—general chaos." *Id.* at 569.

[59] CAB Order, 31 Fed. Reg. 7302 (1966), *reprinted in* U.S.C.S. CONVENTIONS 549, 551 (Law. Co-op. 1983); *see also* Lowenfeld & Mendelsohn, *supra* note 25, at 601-02.

[60] The United States originally described the Agreement as a "provisional arrangement" pending negotiation of an "international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability." CAB Order, 31 Fed. Reg. 7302 (1966), *reprinted in* U.S.C.S. CONVENTIONS 549, 551 (Law. Co-op 1983). *See generally* Lowenfeld & Mendelsohn, *supra* note 25, at 563-75 (discussing the proceedings of the Montreal Conference).

ify the Warsaw system further. Most recently, the Clinton Administration endorsed ratification of the Montreal Protocols,[61] which would raise the liability limit to approximately $138,000.[62] The Protocols also expressly permit each signatory to establish a supplemental compensation plan for additional damages.[63]

III. TREATY INTERPRETATION

The Warsaw Convention is a treaty. The United States entered it through the procedures required by both international law and the U.S. Constitution. It now has the status of a treaty in both international and domestic law.[64] When hearing international air disaster cases, therefore, American judges must never forget that it is *a treaty* they are expounding[65]—not domestic legislation. While treaty interpretation is fundamentally the same as interpreting any

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[61] David Field, *Clinton Proposal to Ease Claims in Airline Disasters Draws Praise*, WASH. TIMES, Jan. 10, 1994, at A19. Past efforts to ratify Warsaw Convention protocols have consistently fallen short of the two-thirds vote needed in the Senate for consent. U.S. CONST. art. II, § 2, cl. 2. In particular, the Senate rejected the Montreal Protocols in 1983 by a 50-42 vote *for* consent. Trans World Airways v. Franklin Mint, 466 U.S. 243, 250 n.18 (1984). For a discussion of the difficulties (intended by the Founders) in obtaining Senate consent to treaties, *see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 130 n.4, 132-33 & n.12 (1972) [hereinafter HENKIN, FOREIGN AFFAIRS].

[62] Recognizing the demise of the gold standard, the international community set the Protocol's damage cap at 100,000 Special Drawing Rights (SDR), a "basket" of currencies used by the International Monetary Fund (IMF). According to the IMF, "The value of the U.S. dollar in terms of the SDR is the reciprocal of the sum of the dollar values, based on the market exchange rates, of specified quantities of the U.S. dollar, Deutsc[h]e mark, French franc, Japanese yen, and pound sterling." 47 INT'L FIN. STATISTICS 4 (Feb. 1994). The $138,000 figure used for the Protocol's damage cap in this article is based on the average dollar value of the SDR in December, 1993. *Id.*

[63] If the Senate were to consent to the Protocols, it would probably require, as a condition of its consent, that the United States establish such a fund. *See* Leich, *supra* note 55, at 416 (1982) (listing this requirement among the conditions set by the Senate Committee on Foreign Relations when it last considered the Protocols); PRESIDENT'S COMM'N ON AVIATION SECURITY & TERRORISM, REPORT 106 (1990) (recommending ratification, coupled with a supplemental plan and negotiations to raise the cap further); Thomas J. Whalen, *The Supplemental Compensation Plan to the Warsaw Convention*, 11 LLOYD'S AVIATION LAW 2, 3-4 (Aug. 1, 1992).

[64] *See* discussion *infra* part V.A.

[65] *Cf.* McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

other document, its international character demands a certain sensitivity.

Most importantly, judges should ensure that their approach to treaty interpretation is consistent with that established by the Vienna Convention on the Law of Treaties[66]—or, better yet, they should rely on the Vienna Convention as a tool in interpreting other treaties. The United States signed the Convention in 1970, but the Senate has not acted on it. Until it is entered through the procedures required by Article II of the Constitution, the Convention will not be the "supreme law of the land" under Article VI.[67]

Nevertheless, for several reasons, the Vienna Convention is highly relevant to treaty interpretation by U.S. courts. First, the Convention is widely recognized as the type of treaty known as a "codification" of customary international law,[68] which the Supreme Court has held to be binding on the United States.[69] That is to say that the Vienna Convention describes existing international law, rather than creating new law. Second, the federal government accepts that the Convention "is already recognized as the authoritative guide to current treaty law and practice."[70] This view may explain the Senate's lackadaisical response, *i.e.* there is no

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[66] Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf. 39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

[67] Indeed, even if the United States had ratified the Vienna Convention, the Convention's own terms preclude its literal application to the Warsaw Convention, as it only applies to later treaties. *Id.* art. 4. Nevertheless, for the reasons discussed in the accompanying text, the Vienna Convention's *principles* are relevant to understanding the Warsaw Convention. *See* RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES 146-47 nn.5-6 (1986) [hereinafter RESTATEMENT (THIRD)].

[68] *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW 387 (2d ed. 1987) [hereinafter HENKIN, CASEBOOK]; Advisory Opinion on Namibia, 1971 I.C.J. 16, *reprinted in* HENKIN, CASEBOOK at 485, 486.

[69] The Paquete Habana, 175 U.S. 677 (1900). For a discussion of the arguments for and against judicial reliance on customary international law, *see generally* Lea Brilmayer, *International Law in American Courts*, 100 YALE L.J. 2277 (1991).

[70] S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971), *reprinted in* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. Prt. 103-53, at 318-28 (2d ed. 1993). *See also* Statement (unpublished) of Carl F. Salons, Acting Legal Adviser, Department of State, before the Senate Foreign Relations Committee regarding the Convention on the Law of Treaties, Aug. 3, 1972, *quoted in id.* at 20 (stating that the Vienna Convention is widely regarded as a "major achievement in the development and codification of international law").

need to vote on a treaty the substance of which is already binding.[71] Third, the *Restatement (Third) on the Foreign Relations Law of the United States*, which is persuasive authority to American courts, bases its rules for treaty interpretation on the Vienna Convention.[72] Finally, there is some judicial precedent for relying on the Convention.[73]

For all these reasons, American judges *should* rely on the Vienna Convention when interpreting treaties. Accordingly, this article evaluates the validity of judicial interpretations of the Warsaw Convention by their consistency with the approach required by the Vienna Convention.

A. ARTICLE 31(1)

The most relevant provision of the Vienna Convention is Article 31(1), which provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[74] Article 31(1) therefore mandates that the Warsaw Convention should be inter-

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[71] The Vienna Convention has also been caught in a constitutional controversy unrelated to its merits over which other international agreements must be submitted to the Senate for consent. The Foreign Relations Committee approved the Vienna Convention, but attached as a condition an "understanding" unacceptable to the Executive, so the full Senate never acted on the Convention. *Id.* at 21-25.

[72] *See* RESTATEMENT (THIRD), *supra* note 67, § 325, cmt. a, rptr. note 4 (1986) (revealing a certain tension about the extent to which the Vienna Convention should be regarded as customary law binding on the United States).

[73] *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 29 n.5 (1982) (referring to Article 2 as evidence that international law does not distinguish between treaties and other international agreements); Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1361 (2d Cir. 1992), *rev'd on other grounds sub nom.* Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993) (applying Article 32 to the United Nations Convention on the Status of Refugees); Day v. Trans World Airlines, Inc., 528 F.2d 31, 33, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (applying Article 31 to the Warsaw Convention); Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 707 n.6 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (same); United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978) (applying Article 36 to the High Seas Convention); Hyosung v. Japan Airlines, 624 F. Supp. 727, 728 (S.D.N.Y. 1985) (applying Article 40 to the Warsaw Convention); Acrilocos v. Regan, 617 F. Supp. 1082, 1086-87 (C.I.T. 1985) (arguing for reliance on the Vienna Convention when construing treaties and applying Article 31 to a trade agreement with Mexico).

[74] *Cf.* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699-700 (1988) (setting forth a general approach to treaty construction); Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967) (same, following RESTATEMENT (SEC-

preted, consistently with the ordinary meaning of its terms, to give effect to its basic purposes of uniformity and certainty.[75] Concern for the purpose of a treaty should not be taken so far, however, as to lose the primary emphasis on the ordinary meaning of the terms themselves.[76]

The interpretation of a treaty with the purpose of establishing international uniformity raises certain complications.[77] Article 31(1) obligates American judges to interpret the Warsaw Convention in "good faith," based on the "ordinary meaning" of the terms given their "context" and "object and purpose" as they see it. Yet, the purpose of uniformity would be defeated if American judges interpreted the treaty (substantially) differently from the interpretations given in Argentina, Britain, or China.[78] So, while

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OND) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES), *cert. denied*, 392 U.S. 905 (1968).

[75] *Cf. Volkswagenwerk*, 486 U.S. at 711 (1988) (Brennan, J., concurring) (quoting Rocca v. Thompson, 223 U.S. 317, 331-32 (1912) (The Court has a "duty to read the [treaty] 'with a view to effecting the objects and purposes of the States thereby contracting.' ")); Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 546 n.11 (1991); Reed v. Wiser, 555 F.2d 1079, 1087-1092 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *see also* Air France v. Saks, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.") (quoting *Reed*, 555 F.2d at 1090).

[76] This approach seeks to find the object and purpose of a treaty primarily in its text—rather than in the drafters' subjective intent—so it may be characterized as following the "effectiveness" principle of interpretation, as distinct from the teleological approach. That is, the object and purpose are to be used to give effect to the treaty's text, not to depart therefrom. Indeed, when preparing the Vienna Convention, the International Law Commission believed the object and purpose of a treaty would be found principally in its preamble. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 118, 130-31 (2d ed. 1984). Thus, if the Supreme Court had made reference to the Vienna Convention, Article 31 might have helped resolve a dispute in which the dissent accused the Court of having too much regard for the purposes of the Warsaw Convention, at the expense of the text itself. *See* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 277-78 & n.6, 283 n.13 (1984) (Stevens, J., dissenting).

[77] Other treaties promoting international uniformity among domestic legal regimes include the Uniform Copyright Convention and the United Nations Convention on the International Sale of Goods. *See generally* V. Susanne Cook, Note, *The Need For Uniform Interpretation of the United Nations Convention on the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988) (relying on the Vienna Convention as the basis for interpretation and comparing Warsaw Convention cases).

[78] For a list of signatories to the Convention, *see* U.S.C.S. CONVENTIONS 548 (Law. Co-op. 1983). For a comparative discussion of the Warsaw Convention's implementation by the courts of several signatory countries, *see* GEORGETTE MILLER, LIABILITY

Article 31's "good faith" surely requires the exercise of independent judgement, it also obligates American judges to consider the interpretations of other state-parties. Indeed, a unanimous Supreme Court recognized in a Warsaw Convention case that "the opinions of our sister signatories [are] entitled to considerable weight."[79] American courts should reconcile U.S. and foreign interpretations when possible and explain why another state's view is being rejected when not,[80] but the United States is not bound by foreign interpretations.[81] The Warsaw Convention cases reveal that American courts sometimes consider foreign interpretations,[82] though not in a regular or systematic way. Thus, the domestic implementation of a multilateral uniform code can be seen as a grand federalist scheme, analogous perhaps to U.S. Circuit Courts' responsibility to consider (but not to follow) the views of other circuits.

Indeed, the purpose of uniformity raises more familiar problems as well. For the United States to participate in a uniform international regime, the Warsaw Convention must be interpreted (reasonably) uniformly by American courts[83]—both federal and state.[84] This requirement for

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IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS (1977). Miller's comparative study seeks to promote uniformity in interpretation, because "[d]ivergent interpretations of a uniform text will in fact annihilate the unification achieved in principle." *Id.* at 1.

[79] *Saks*, 470 U.S. at 404 (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978)). *Cf. Floyd*, 499 U.S. at 550-51 ("We must also consult the opinions of our sister signatories.... [to which] deference [is] owed."); 30 Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.).

[80] *See Floyd*, 499 U.S. at 550-51 (considering, and rejecting, Israeli Supreme Court's interpretation of *lésion corporelle* in Article 17 of the Warsaw Convention).

[81] Jesse Lewis (The David J. Adams) Claim (U.S. v. Grt. Br.), 6 U.N.R.I.A.A. 85 (1921) (arbitral tribunal held that the "fundamental principle of the juridical equality of states" prevents one party to a treaty from being bound by the judicial interpretations of another party), *reprinted in* HENKIN, CASEBOOK, *supra* note 68, at 440, 441.

[82] *See, e.g.*, Benjamins v. British European Airways, 572 F.2d 913, 918-19 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Franklin Mint*, 466 U.S. 243, 257-58 & n.31; *Saks*, 470 U.S. at 404; *see also* RESTATEMENT (THIRD), *supra* note 67, § 325, rptr. n.4.

[83] *See In re* Air Disaster at Lockerbie, 928 F.2d 1267, 1274 (2d Cir.), *cert. denied sub nom.* Rein v. Pan Am. World Airways, 112 S. Ct. 331 (1991) ("uniformity has national as well as international application"); Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 737 F.2d 456, 459 (5th Cir. 1984) ("uniformity has both an international and intranational application"), *appeal dismissed, cert. denied*, 469 U.S.

the uniform interpretation of a treaty is akin to the ordinary view of a single federal law in interpreting statutes,[85] except that the failure is particularly acute where the very purpose of the treaty is to establish uniformity. Thus, it is interesting that the DC Circuit announced a major development in the responsibilities of one appeals court towards the contrary precedents of another as a result of a difference with the Second Circuit over the proper interpretation of the Warsaw Convention.[86]

B. ARTICLE 32

Article 32 of the Vienna Convention establishes rules for the use of drafting histories (*travaux préparatoires*) in interpreting treaties, allowing "recourse . . . to supplementary means of interpretation . . . to determine the meaning when the interpretation according to article 31 . . . [is] ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable."[87] The *Restatement (Third)* indicates that Article 32 reflects a compromise between states that rely on legislative histories when constructing statutes

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1186 (1985); Block v. Compagnie Nationale Air France, 386 F.2d 323, 337-38 (5th Cir. 1967) ("A multilateral treaty is rather like a 'uniform law' within the United States."), *cert. denied*, 392 U.S. 905 (1968); Thomas M. Franck, *The Courts, the State Department and National Policy*, 44 MINN. L. REV. 1101, 1103 (1960) ("[A] state which does not speak with a single voice or, at least, with a single mind, cannot address itself effectively to any problem of international law.").

[84] *See* Chisholm v. Georgia, 2 Dall. 419, 474 (U.S. 1793) (Op. of Jay, C.J.); Vienna Convention, *supra* note 66, art. 29; HENKIN, CASEBOOK, *supra* note 68, at 526 n.6 ("A federal state is also responsible for the fulfillment of treaty obligations in its entire territory irrespective of internal division of powers."); *cf.* HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 129 n.3 (quoting Madison at the Constitutional Convention).

[85] *See* H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963).

[86] *See* discussion *infra* part IV.B.

[87] Article 32 reflects the Permanent Court of International Justice's view that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself." The S.S. Lotus, P.C.I.J., Ser. A., No. 10, at 16 (1927). While many notable authorities attacked the *Lotus* decision, arguing for "quasi-habitual" resort to the *travaux préparatoires*, the international community retained the traditional view codifying the law of treaties in the Vienna Convention. MYRES S. MCDOUGAL, HAROLD S. LASSWELL & JAMES C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER, 122-32 (1967).

and other states that do not.[88] Thus, international law tolerates less frequent resort to *travaux préparatoires* for treaty interpretation than many American judges rely on legislative history.[89]

The Supreme Court appeared to recognize this principle when it declared: "When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used. Other general rules of construction may be brought to bear on difficult or ambiguous passages."[90] Yet, the Court has also stated, without qualification, "In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation."[91] Accordingly, many U.S. courts have engaged in lengthy analyses of the *travaux préparatoires* without making any determination that recourse to such supplementary means of interpretation was necessary.[92]

Nor is the approach of the American conservative reaction—adherents to the so-called "plain meaning" rule—consistent with international law. In *Chan v. KAL*, for ex-

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[88] British courts, for example, will not consider legislative history when construing Acts of Parliament, but the House of Lords has endorsed cautious resort to *travaux préparatoires* when interpreting treaties. Fothergill v. Monarch Lines, (1981) A.C. 251 (considering the minutes of the Hague Conference of 1955 to interpret the Warsaw Convention as modified by the Hague Protocol), *quoted in* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 144-47 (2d ed. 1984).

[89] Nevertheless, the International Court of Justice seems to rely on *travaux préparatoires* more frequently than Article 32 authorizes. RESTATEMENT (THIRD), *supra* note 67, § 325, cmts. e, g, rptr. notes 1, 4; *see also* HENKIN, CASEBOOK, *supra* note 68, at 447-48 & 448 n.1.

[90] Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699-700 (1988) (citations omitted). *See also Floyd*, 499 U.S. at 593.

[91] *Saks*, 470 U.S. at 400. *See also* Block v. Compagnie Nationale Air France, 386 F.2d 323, 336 (5th Cir. 1967) (arguing that American courts must always "consider[ ] the conception, parturition, and growth of the [C]onvention," even where the text appears "unambiguous"), *cert. denied*, 392 U.S. 905 (1968).

[92] *See, e.g., Saks*, 470 U.S. at 400. Quoting Article 32, Justice Blackmun once reproved the Court's excessive "[r]eliance on a treaty's negotiating history (*travaux préparatoires*)," describing such reliance as "a disfavored alternative of last resort." Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2571 (1993) (Blackmun, J., dissenting). The court below had also relied on Article 32 to limit reliance on the *travaux préparatoires*. 969 F.2d 1350, 1361 (2d Cir. 1992). For a better approach, see *Floyd*, 499 U.S. at 542 (concluding that an alternative interpretation was "plausible, and the term is both ambiguous and difficult" before considering "additional aids to construction").

ample, Justice Scalia, writing for the Court, rejected reference to the *travaux préparatoires* where "the result the text produces is not necessarily absurd."[93] Justice Scalia's approach parallels the Vienna Convention's "manifestly absurd or unreasonable" test, but disallows reference to the *travaux préparatoires* in cases where the meaning is "ambiguous or obscure." Apparently believing that if the result is "not necessarily absurd," the "text is clear," the Court concluded, "We must thus be governed by the text . . . whatever conclusions might be drawn from the intricate drafting history. . . ."[94] The Court thus persisted with a "plain meaning" approach, refusing to consider the *travaux préparatoires*—even though the two sentences of text at issue embody an obvious tension.[95] Justice Brennan's concurring opinion rightly criticized the Court for its "self-affixed blindfold that prevents the Court from examining anything beyond the treaty language itself."[96] But the concurrence may have erred by relying on the *travaux préparatoires* more than Article 32 authorizes.[97]

Thus, both the Court and the concurrence erred by applying tests derived from their general approaches to the use of legislative history in construing domestic legislation. Apparently, neither opinion considered whether different

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[93] Chan v. Korean Air Lines, 490 U.S. 122, 134 (1989).

[94] *Id.* Contrary to the assertion in the accompanying text, Justice Scalia does state that the drafting history "may of course be consulted to elucidate a text that is ambiguous." *Id.* (citing *Saks*, 470 U.S. at 392, though not quite accurately). The context of that statement, however, makes clear that Justice Scalia believes a text is only "ambiguous" if its result is "necessarily absurd." In essence, his approach collapses Article 32's first prong into the second. Vienna Convention, *supra* note 66, art. 32.

[95] The first sentence of Article 3(2) of the Warsaw Convention states that an "irregularity" in the "passenger ticket" does not waive the damage cap. "Nevertheless," the second sentence expressly waives the damage cap if a "carrier accepts a passenger without a passenger ticket having been delivered." The text fails to address an important question: when is a ticket so defective that one cannot describe it as an "irregular[ ]" "passenger ticket" but must instead conclude that no "passenger ticket," as defined in Article 3(1), was ever "delivered"? When judges must draw a line between such obviously conflicting textual provisions, they should be able to consult the *travaux préparatoires* for guidance as to where to draw that line. For further discussion of Article 3 of the Warsaw Convention, *see* discussion *infra* part V.B.

[96] *Chan*, 490 U.S. at 136, 138 n.5, 141.

[97] *Id.* at 137-47.

rules govern in an international context. Such failures by American judges could embarrass the United States in international fora. If American judges apply domestic principles on the use of drafting history rather than the international standards embodied in Article 32 of the Vienna Convention, "an international tribunal might find the United States interpretation erroneous and United States action pursuant to that interpretation a violation of the agreement."[98]

C. FRENCH TEXT

The Warsaw Convention was negotiated, written and authenticated in French.[99] The use of a single language furthers "uniformity of interpretation, which was one of the paramount objectives of the Convention."[100]

The State Department translated the Convention into English, but the translation is unofficial and President Roosevelt made the French version of the treaty.[101] While the English version is relevant to understanding the Senate's understanding of the Convention, the French version is binding U.S. law.[102] Therefore, while judges may use the English text generally for convenience, they have an obliga-

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[98] RESTATEMENT (THIRD), *supra* note 67, § 325, cmt. g. *See also* HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 167 & n.128. The problems posed by U.S. overreliance on *travaux préparatoires* are compounded by the Supreme Court's determination that the views of U.S. negotiators are "entitled to great weight." Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 536 n.19 (1987). An international tribunal, plainly, would not give "great weight" to the views of any one negotiating delegation. Indeed, were the courts of each signatory to defer to its own negotiators' views, the resulting discrepancies would destroy by interpretation the uniformity the signatories achieved by diplomacy.

[99] Warsaw Convention, *supra* note 13, art. 36.

[100] Reed v. Wiser, 555 F.2d 1079, 1082 n.5 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

[101] President Roosevelt officially proclaimed U.S. adherence to the convention "done at Warsaw, in the French language, October 12, 1929" printed "word for word" (in French) in the Proclamation. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3013. The unofficial English translation follows the Proclamation. *Id.* at 3014.

[102] *See Saks*, 470 U.S. at 397 (calling French the "governing text of the Convention"). *See also* Lawrence B. Goldhirsch, The Warsaw Convention Annotated 178 (1988) (discussing British, Swiss and New Zealand cases giving precedence to the French text of the Convention).

tion—as a matter of domestic law[103]—to consider the French text.[104] Accordingly, the Supreme Court has declared: "we *must* consider [the text's] French legal meaning."[105] This is particularly important where the French concept is imperfectly captured by the English translation, as is the case when Article 25's *dol* is translated as "willful misconduct."[106]

The role of the French text also means that the "plain meaning" rule is ill-suited to interpretation of the Warsaw

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[103] Had the Senate consented to, and the President proclaimed, the English text, that version would have been binding in domestic law. This would not have affected American obligations under international law, however. Since the Convention was authenticated in French, the French text is the binding version in international law. Vienna Convention, *supra* note 66, art. 10. If the U.S. reliance on a translation led to any discrepancies from the binding French, the United States would be in violation of its international obligations. Article 27 of the Vienna Convention precludes the use of "internal law" as an excuse for a breach of treaty. This is why countries often negotiate and write a treaty in several languages, each of which would then be equally binding. Vienna Convention, *supra* note 66, art. 33; RESTATEMENT (THIRD), *supra* note 67, § 325, cmt. f. U.S. policy now strongly favors authentication of all treaties in English, with equal authentication in such other languages as are necessary. State Department Circular 175, §§ 723.5, 741, *reprinted in* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. Prt. 103-5, at 307, 313 (2d ed. 1993). Even the Warsaw Convention's protocols have official English texts, though—in deference to the original—the French text prevails in case of discrepancies. *See, e.g.*, Hague Protocol, *supra* note 57, art. 27. Of course, a court interpreting a treaty authenticated in multiple languages should consider the various texts and strive to "conform[ ]" the interpretations "to each other." United States v. Percheman, 32 U.S. (7 Pet.) 51, 88-89 (1833) (Marshall, C.J.) (reversing an earlier interpretation of the English text of a treaty in light of the Spanish text); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1356 (2d Cir. 1992), *rev'd on other grounds sub nom.* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549, 2563-64 (1993) (interpreting "return" in Refuges Convention in light of French term *refouler*).

[104] Judges may satisfy this obligation in several ways which accommodate their convenience. The Supreme Court once presented the bulk of the text in English, only using French for the terms in dispute. *Floyd*, 499 U.S. at 536. Likewise, the *KAL* court, after completing its analysis in English, "satisfied [itself] that 'damage sustained' . . . is an accurate translation of '*dommage survenu.*' " *In re* KAL, 932 F.2d at 1486.

[105] *Saks*, 470 U.S. at 399 (emphasis added); *see also Floyd*, 499 U.S. at 535-36. The Court errs, however, by suggesting that the obligation to consider the French text derives from the fact that "the [Warsaw] Convention was drafted in French by continental jurists." *Id.* at 536. Rather, the obligation exists in international law because the Convention was *authenticated* in French and in domestic law because the Convention was *proclaimed* in French. *See supra* notes 96-101 and accompanying text.

[106] *See* discussion *infra* part V.B.

Convention, unless the judge argues that the meaning is plain in French.[107] Thus, the Supreme Court, per Justice Scalia, erred by hinging its interpretation of Article 3(2) on the definition of "irregularity" in Webster's Second International Dictionary, without referring to the definition of *l'irrégularité* in a French dictionary,[108] even though the Court had previously consulted French cases and dictionaries.[109]

IV. MASS TORT LITIGATION UNDER THE WARSAW CONVENTION

The international community intended the Warsaw Convention to serve as a tool in resolving aviation litigation. Secretary of State Hull declared its "tend[ency] to lessen litigation" to be one of its primary advantages.[110]

It soon became clear, however, that the Convention had failed in this regard. Therefore, improving its usefulness in "lessen[ing] litigation" has consistently been one of the United States primary objectives in subsequent negotiations.[111] For example, as early as the Hague Conference of 1955, the United States advocated a "settlement inducement clause,"[112] which the international community

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[107] The Second Circuit once used a French-English dictionary to interpret the French text differently than the unofficial English translation would suggest and concluded that its decision reflected the plain meaning in French. Reed v. Wiser, 555 F.2d 1079, 1084 (2d Cir.), *cert. denied*, 432 U.S. 922 (1977).

[108] *Chan* 490 U.S. at 128.

[109] *Saks*, 470 U.S. at 396-402; *see also Floyd*, 499 U.S. at 534-43.

[110] Lowenfeld & Mendelsohn, *supra* note 25, at 499 (citing S. Exec. Doc. No. 6, 73d Cong., 2d Sess. 3-4 (1934)) .

[111] *See* U.S. Department of State, Letter of Transmittal, S. Exec. Doc. B., 95th Cong., 1st Sess. viii (1977) ("For nearly two decades, the United States has been in the forefront in urging amendments to the Warsaw Convention . . . to encourage rapid settlement of claims at a fair level for Americans. The 1970 Presidential Statement on International Air Transportation Policy stated that the primary objectives of the United States in the revision of the Warsaw Convention were 'certainty, speed, and sufficiency of recovery by the injured party.' "). *But see* O'Rourke v. Eastern Air Lines, 730 F.2d 842, 853-54 n.20 (2d Cir. 1984) (mistakenly citing Lowenfeld & Mendelsohn, *supra* note 25, to support its assertion that the "speedy resolution of claims was apparently not an important United States objective at the [Montreal] conference").

[112] *See* Lowenfeld & Mendelsohn, *supra* note 25, at 507.

adopted at Guatemala City in 1971.[113] Similarly, the United States has supported strict liability for carriers since 1965.[114] And, as the discussion below shows, Washington's incessant pressures to raise the damage cap[115] should also be characterized as efforts to "lessen litigation."

U.S. efforts led to the Montreal Agreement's movement towards strict liability, the expected results being reduced litigation, quicker settlements, and more valuable recoveries by plaintiffs.[116] Speedy recovery was a primary objective: "settlement could begin immediately, without waiting for accident investigations."[117] "Quicker and less expensive settlements" would mean "less time and less money going for litigation, . . . drastically reduc[ing]" attorney involvement and fees, and avoiding "delay, [the need for] accident investigation at remote locations, [and] complex conflict of law questions."[118] Lowenfeld and Mendelsohn even went so far as to speculate whether air crash claims would be "handled like health or life insurance claims—with forms and perhaps interviews with the plaintiff and with the decedent's employer, but without any litigation."[119] They con-

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[113] Guatemala City Protocol, *supra* note 57, art. 8. "[T]he Guatemala City Protocol contains a provision known as the 'settlement inducement clause,' which permits a court to impose attorney's fees if the carrier has not within six months of a claim involving passenger injury or death made an offer to settle at an amount at least equal to the ultimate recovery." U.S. Department of State, Letter of Transmittal, S. Exec. Doc. B., 95th Cong., 1st Sess. vi (1977).

[114] According to Lowenfeld & Mendelsohn, the U.S. delegation to the Montreal Conference (which included both of them) regarded strict liability as a "substantial benefit to passengers in terms of speed and certainty of recovery and probably reduction of legal expenses as well. Not only in litigated cases but more importantly in settlement talks elimination of the issue of fault was likely to work in the claimant's favor." Lowenfeld & Mendelsohn, *supra* note 25, at 571.

[115] In 1955, the United States advocated a liability limit of $25,000, but had to settle for $16,600. Hague Protocol, *supra* note 57, art. 11; Lowenfeld & Mendelsohn, *supra* note 25, at 506-09. In 1965, the U.S. sought a protocol raising the limit to $100,000, but only achieved $75,000 in the Montreal Agreement, *supra* note 51. Under U.S. pressure, the international community increased the damage cap to $100,000 in 1971 and to $138,000 in 1975. Guatemala City Protocol, *supra* note 57, art. 8; Montreal Protocol No. 3, *supra* note 57, art. 2.

[116] Lowenfeld & Mendelsohn, *supra* note 25, at 587.

[117] *Id.* at 593.

[118] *Id.* at 600-01.

[119] *Id.* at 600.

cluded that "the success of the [Montreal Agreement] will depend on the accuracy of the prediction that cases will be settled quickly and economically."[120]

A. THE WEINSTEIN TEST

Applying a standard developed by Judge Weinstein[121] to measure the success of mass torts resolution shows that the Montreal Agreement has fallen short of Lowenfeld and Mendelsohn's high hopes. Judge Weinstein describes the five "equities"—"the concrete issues of fact and fairness of the particular situation . . . [to be considered] in fashioning remedies" in a mass torts case. These are:

> 1) fairly and expeditiously compensating numerous victims, and
> 2) deterring wrongful conduct where possible, while
> 3) preventing overdeterrence in mass torts from shutting down industry or removing needed products from the market,
> 4) keeping the courts from becoming paralyzed by tens or even hundreds of thousands of repetitive personal injury cases, and
> 5) reducing transactional costs of compensation.[122]

The Weinstein test embodies an obvious tension between equities #2 and #3. A platonic judge equally motivated by both equities would set damages at the ideal level where wrongful conduct is deterred, but legitimate conduct is not. The Warsaw Convention recognizes this tension. Article 22 protects the aviation industry from "shutting down" by setting a fixed damage cap in order to depress insurance costs and in turn ticket prices. Article 25 deters "wrongful conduct," however, by waiving the damage cap for *dol* (*i.e.* "willful misconduct").

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[120] *Id.*

[121] Jack B. Weinstein, a federal judge in the Eastern District of New York since 1967, is widely regarded as a leading authority on mass tort cases. He has presided over cases involving, *inter alia*, air crashes, asbestos, and Agent Orange.

[122] Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 274.

The other three equities seek efficiency through consolidation, speed, and avoidance of duplication—in a word, efficiency. While not so obviously embedded in the Convention's text as are equities #2 and #3, the other three equities are also present. Plaintiffs benefit from Article 17's presumption of airline liability or, better yet, the Montreal Agreement's strict liability. Taken together, Articles 17 and 22 constitute the Convention's "essential bargain."[123] In a regime where the defendant is strictly liable for compensatory damages up to a low amount, there should be little to litigate. Only the extent of damages (up to the limit) must still be proven; but with today's tort law it should be relatively straightforward to show that the victim of an air disaster suffered damages worth at least $75,000.[124] Thus, the essential bargain creates strong incentives to settle aviation litigation. Settlement is the fastest, fairest, least burdensome, least expensive, and, therefore, the most equitable means of resolving mass tort litigation.

Yet, as the lengthy Pan Am and KAL litigation shows, the system has not worked. The parties did not settle, but instead found matters to litigate. This failure has occurred despite the fact that airplane crashes, as single event disasters, are among the easiest mass torts to resolve: causality is easy to prove (and the Convention even eliminates the need to prove it); the injuries of all potential plaintiffs are proximate in time and space; there is an overwhelming commonality of fact, so discovery (to the extent it is necessary at all) is much simplified; there is a single defendant; and since only passengers (or, in wrongful death cases,

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[123] Lowenfeld & Mendelsohn, *supra* note 25, at 500.

[124] *Cf.* Windbourne v. Eastern Air Lines, 479 F. Supp. 1130, 1141 (E.D.N.Y. 1979) (discussing the carrier's liability for damages proven up to $75,000), *rev'd*, 632 F.2d 219 (2d Cir. 1980). It should be noted, however, that in the 1960s the damage cap of $75,000 was high enough that it might have required litigation over lost expected wages to determine the actual damages to be received. Indeed, the cap was sufficiently high when coupled with strict liability that Robert Kennedy denounced it as "highly dangerous," and the Air Line Pilots Association feared it would impede investigations by creating "sufficient incentive for psychotics to plant bombs aboard airliners without purchasing additional insurance." Lowenfeld & Mendelsohn, *supra* note 25, at 592.

their heirs)[125] may sue under the Convention, all the potential plaintiffs are readily identifiable.[126] The failure has also occurred despite the additional benefits of the Multidistrict Litigation Act,[127] under which virtually all air crash litigation has been consolidated, and has remained consolidated, without remand to the transferor districts.[128]

While it is true that the Pan Am and KAL cases raised the question of *dol*, which both the Convention and the Weinstein equities recognize as a potential source of litigation, the system's troubles run far wider and deeper than the foreseeable difficulties in implementing Article 25. The root of the trouble is that the Convention shortshrifts equity #1: it sets the damage cap too low.[129]

As a result, plaintiffs—believing that the Convention weighs defendant's interests (equity #3) more heavily than their own interests (equities #1 and #2)—have chosen to litigate rather than settle at the Montreal limits. The litigation frequently raises questions based on Article 25 (equity #2),[130] but plaintiffs have found numerous other avenues as

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[125] The Convention leaves it to the court to determine according to its own law, including its choice of law rules, who may bring a wrongful death action. Warsaw Convention, *supra* note 13, art. 24(2).

[126] *See* Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 6-7 (1986).

[127] 28 U.S.C. § 1407 (1988 & Supp. 1993). As the discussion *infra* part IV.B. reveals, however, the handling of air disaster litigation would be much worse without the Multidistrict Litigation Act.

[128] *See* WINDLE TURLEY, AVIATION LITIGATION §§ 12.01, 12.02, 12.03, 12.06 (1986 & Supp. 1993). The *Lockerbie* and *KAL* cases remained consolidated for determinations that the carriers had committed "willful misconduct" responsible for the disasters. The *KAL* cases were then transferred back to their original districts to set damages, but were subsequently consolidated again to resolve KAL's motion for a new trial on liability. *In re* KAL, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 616 (1991); *In re* KAL, 1994 WL 143009 (J.P.M.L. Apr. 12, 1994). When litigation is completed concerning the damage awards for three Lockerbie victims, whose cases will establish "the law of the case" regarding damages, the other Lockerbie actions may be returned to their original districts too. *See* Pagnucco v. Pan Am. World Airways, Inc., 1994 WL 498454 (2d Cir. Sept. 12, 1994).

[129] *See* Russell Weintraub, *Methods For Resolving Conflict of Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 143 (criticizing the Warsaw Convention as "[t]he wrong way to unify liability law so as to simplify litigation of mass torts," because the damage cap is too low).

[130] Article 25 may be the single most litigated article in air disasters. See discussion *infra* part V.B. One may thus regard Article 25 as the cause of avoidable litiga-

well. Many judges have agreed that the Convention's imbalance creates inequities, and have used their equitable powers to restore balance—sometimes at the expense of the Convention.[131] The existence of such favorable precedents, of course, also dissuades subsequent plaintiffs from settling, thereby even further thwarting the Convention's intended system.[132]

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tion, in which case potential remedies are available. Article 25 could be deleted, creating an "unbreakable" damage cap (presumably set higher than the current level) and eliminating all issues to litigate other than determination of damages up to the cap. Thus, the Montreal Protocols would establish an unbreakable limit of approximately $138,000.

Alternatively, Article 22 could be removed, eliminating the damage cap and, therefore, the need to litigate to escape it. *See* CAB Order, 31 Fed. Reg. 7302 (1966), *reprinted in* Warsaw Convention U.S.C.S. CONVENTIONS, app. at 549, 551 (Law. Co-op. 1983) (announcing the U.S. goal in future aviation negotiations as "international agreement on limits of liability in the area of $100,000 per passenger or on uniform rules without any limit of liability"); *Editor's Note*, 11 LLOYD'S AVIATION LAW 1, 2 (Aug. 1, 1992) [hereinafter *Editor's Note*].

The choice between possible remedies would depend on how one balances the equities. Both approaches further equities #4 and #5, while eliminating the damage cap emphasizes #1 and #2 and the "unbreakable" damage cap serves #3.

The approaches may also be combined: The Clinton Administration has endorsed both ratifying the Montreal Protocols to raise the damage cap and establishing a passenger-funded Supplemental Compensation Plan to cover all compensatory damages above the cap. *See* Montreal Protocol No. 3, *supra* note 57, art. 9 (incorporating the earlier protocols); Guatemala City Protocol, *supra* note 57, art. 14 (expressly permitting signatories to establish supplemental compensation schemes). While this approach preserves Article 22 itself, it nevertheless eliminates the need for escape. Once again, determination of damages would remain the only outstanding issue to litigate. By compensating passengers from a source other than the airlines, this approach serves equities #1 and #3, but not #2. The government could promote equity #2 by imposing fines or other penalties (e.g. suspending a carrier's license or criminal punishment of responsible employees) to deter wrongful conduct, but the money raised by such fines could not be donated to the supplemental compensation plan. Guatemala City Protocol, *supra* note 57, art. 14.

[131] *See* discussion *infra* part V.

[132] A similar analysis could also be conducted using Judge Weinstein's parallel list of seven goals for a scheme to manage mass tort litigation: 1) concentration of decision-making authority before one or a few judges; 2) a single forum; 3) a single substantive law; 4) adequate judicial support facilities; 5) reasonable fact-finding procedures; 6) a damage cap, including limits on punitive damages and pain and suffering, and a method of allocating damages among several defendants; and 7) a single distribution plan. Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 TOURO L. REV. 1, 8-10 (1988).

The effective implementation of these seven goals would allow for results in accordance with the five equities. Indeed, a system which implemented the goals would be well-suited to encourage settlement, the solution which best satisfies the five equities.

B. Uniformity Among Connected Cases

For all its shortcomings, the current system for resolving air disaster litigation in the United States has generally managed to avoid even worse results. A treaty intended to promote uniformity requires, at the very minimum, that plaintiffs who suffered identical injuries on the same flight have their cases decided under the same law.[133] The United States surely fails its most basic obligation in implementing the Convention whenever such similarly-situated plaintiffs receive different judgments merely because they sued in different district courts which interpreted the Convention differently. Credit for minimizing such disparities is due to Congress, for passing the Multidistrict Litigation Act, and to the courts, for their implementation of the Act.

1. Multidistrict Consolidation

The Multidistrict Litigation Act authorizes the Judicial Panel on Multidistrict Litigation to consolidate separate

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The Warsaw Convention itself provides for several of these goals: #3, a single substantive law (*i.e.* uniformity); #5, the essential bargain minimizes the need for fact-finding; #6, a damage cap (which has been interpreted to exclude punitive, but not pain and suffering damages, even in cases of willful misconduct). See discussion *infra* part V.C. The Multidistrict Litigation Act, which complements the Convention and assists its domestic implementation, additionally provides for goals #1, a single judge, and #2, a single forum. Judges could benefit from additional resources (#4) in their efforts to interpret the Convention, *see* discussion *infra* part VI., but this does not appear to affect (except indirectly) the fundamental problem of discouraging settlements. And distribution of the judgment (#7) does not raise many problems in an air disaster where, unlike asbestos litigation, all of the victims and all of their damages have been identified before the judgment is rendered. Thus, the Convention, in combination with the Multidistrict Litigation Act, would appear to be well-designed to satisfy Judge Weinstein's goals, yet it has failed for the reasons discussed in the accompanying text.

[133] Regrettably, a caveat must be added to this sentence: Two passengers on the same flight will only have their cases decided under the same law where both are subject to the Convention. The Convention only applies to "international" flights, and the term is defined such that one passenger may be "international" but not another on the same flight. *See supra* note 19. Even two "international" passengers may have different statuses under the Convention, depending on whether they are travelling one-way, round-trip, or through third countries. *See* Lowenfeld & Mendelsohn, *supra* note 25, at 500-01, 503, 511 & n.58. These defects in the Convention do not affect the basic point: The United States must treat similarly-situated plaintiffs subject to the Convention uniformly.

claims involving similar questions of law or fact before a single district court of its choosing. Almost all major air crashes have been consolidated; indeed almost 20% of the Panel's cases have involved airplanes.[134]

In the case of an air disaster, one cannot question the decision to consolidate. The presence of a single defendant sued by numerous plaintiffs in various districts asking identical questions of law based on a single set of facts argues strongly for consolidation. As the Panel declared when consolidating the forty-two actions then pending against KAL, consolidation would

> best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. . . . [Consolidation] is thus necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.[135]

Consolidation is especially important in Warsaw Convention cases. By bringing related claims from the same flight to a single forum, before a single judge, the Multidistrict Litigation Act serves as an essential guarantor of the most basic requirement of uniformity: decide cases arising from the same crash under the same law.

Given the strong arguments favoring consolidation, sometimes the only real question is where to consolidate. In *KAL*, for example, actions were brought in eight districts[136] and the various parties advocated consolidation in five districts.[137] The Panel noted that none of the forums

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[134] TURLEY, *supra* note 128, §§ 12.01, 12.06.

[135] *In re* KAL, 575 F. Supp. 342, 343 (J.P.M.L. 1983).

[136] The breakdown of actions by district follows: Southern District of New York (15), District of Columbia (8), Northern District of California (7), Eastern District of New York (6), Eastern District of Michigan (3), Northern District of Illinois (1), District of Massachusetts (1), District of New Jersey (1). *Id.*

[137] Defendant KAL moved to consolidate in the D.D.C., defendant Boeing cross-moved for consolidation in the Western District of Washington, and plaintiffs in eleven actions cross-moved for consolidation in either the Southern or Eastern Districts of New York. Other than the movants and cross-movants, plaintiffs in twelve actions and defendant the United States favored the D.D.C., plaintiffs in two actions agreed with the cross-movant plaintiffs advocating the New York districts, plaintiffs

advocated "could be characterized as the nexus of this litigation involving an overseas air disaster," thereby depriving the Panel of its primary test for choosing consolidation sites in airplane cases: the location of the accident.[138] Instead, the Panel selected Washington for convenience in obtaining discovery from the federal government and because the "litigation implicate[s] sensitive areas" of foreign policy.[139]

The Panel's decision may well have been determinative in this case because the district court[140] re-evaluated and ultimately rejected established Second Circuit precedent in a way which would have been inconceivable (not to mention impermissible) for a court in either the Southern District of New York or the Eastern District of New York.[141] After the Court of Appeals affirmed the district court's opinion,[142] the Supreme Court granted certiorari[143] to resolve the resulting "circuit split"—thereby preserving uniformity in U.S. implementation of the Convention's

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in seven actions and defendant Litton Industries favored the Southern District of New York, and one plaintiff preferred consolidation in the Northern District of California. *Id.*

[138] Absent "unusual circumstances" warranting a departure, "the situs of the crash is generally the most appropriate transferee district." *In re* Mid-Air Collision near Fairland, Indiana, 309 F. Supp. 621, 622-23 (J.P.M.L. 1970). *See* TURLEY, *supra* note 128, § 12.06.

[139] *In re KAL*, 575 F. Supp. at 343.

[140] *In re* KAL, 664 F. Supp. 1463, 1474 (D.D.C. 1985).

[141] A strong case could have been made for these fora: half of the actions were pending there, plaintiffs in twenty actions and one defendant favored consolidation there, KAL Flight #007 departed from Kennedy Airport in the Eastern District (though the flight stopped in Alaska to refuel and discharge passengers before crossing the Pacific), and the Second Circuit courts (presumably because of the location therein of Kennedy Airport and many airlines' corporate headquarters) have extensive experience with Warsaw Convention litigation. *See In re* Air Crash at Bali, Indonesia on April 22, 1974, 400 F. Supp. 1402, 1403 (J.P.M.L. 1975) (consolidating in the district where most of the actions were pending); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 405 F. Supp. 316, 319 (J.P.M.L. 1975) (consolidating in the district preferred by most of the parties); *In re* Lockerbie, 709 F. Supp. 231, 232 (J.P.M.L. 1989) (consolidating in the E.D.N.Y, which includes the airport where the flight from Europe was destined to land, where the defendant airline's principal place of business was located in the neighboring S.D.N.Y.).

[142] *In re* KAL, 829 F.2d 1171, 1173 (D.C. Cir. 1987).

[143] Chan v. Korean Air Lines, 485 U.S. 986 (1988).

damage cap.[144] The *KAL* case thus highlighted the Supreme Court's role as the ultimate guarantor of uniformity within the United States. Yet, the Supreme Court hears too few cases to regularly promote uniformity in air disaster litigation. One of the primary advantages of the Multidistrict Litigation Act, therefore, is that consolidation minimizes the occurrence of splits demanding Supreme Court review—and largely avoids the prospect of such splits in connected cases arising from the same disaster.

Cases are only consolidated, however, for pre-trial determination of common issues and are sometimes returned to their original districts for individual trials on damages. In at least one air disaster, the circuits split on the proper measure of damages in a previously consolidated case.[145] Despite the serious threat to uniformity posed by this split, the Supreme Court failed to resolve this issue.[146] Also, in connected cases stemming from a single hijacking, several courts reached opposing conclusions on the carrier's liability for mental injuries unconnected with physical harm.[147]

2. *In re KAL: Does Van Dusen Govern Multidistrict Consolidations?*

Half of the actions consolidated in *KAL* were originally filed in either the Eastern or Southern District of New York, both in the Second Circuit.[148] These plaintiffs could have

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[144] *See Chan*, 490 U.S. 122. *See* discussion *infra* part V.B.

[145] *Compare* Domangue v. Eastern Air Lines, 722 F.2d 256, 262 (5th Cir. 1984) (awarding plaintiffs pre- and post-judgment interest even though total damages exceed the damage cap) *with* O'Rourke v. Eastern Air Lines, 730 F.2d 842, 845 (2d Cir. 1984) (holding that the Convention precludes interest awards where total damages exceed the damage cap). On the merits of these cases, *see* discussion *infra* part V.C.

[146] Mahfoud v. Eastern Air Lines, 479 F. Supp. 1130 (W.D. La. 1982), *aff'd without opinion*, 729 F.2d 777 (5th Cir. 1984), *aff'd without opinion by an equally divided court*, 474 U.S. 213 (1985).

[147] *Compare* Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238, 1251 (S.D.N.Y. 1975) (holding carrier liable) and Herman v. TWA, 314 N.E.2d 848 (N.Y. 1974) (holding carrier liable if mental injuries are manifested physically, e.g. by rash) *with* Burnett v. TWA, 368 F. Supp. 1152, 1156 (D.N.M. 1973) (holding carrier not liable). The Supreme Court resolved this legal issue in an unrelated case. *Floyd*, 499 U.S. 530 (1991).

[148] *In re* KAL, 575 F. Supp. 342, 343 (J.P.M.L. 1983).

reasonably expected that their suits would follow the Second Circuit precedents which firmly established a certain exception to the damage cap.[149] When their suits were consolidated in the District for the District of Columbia, where Judge Robinson rejected the Second Circuit precedents, the New York plaintiffs appealed on two grounds. Not only did they argue that the D.C. Circuit should adopt the Second Circuit rule, but that Judge Robinson erred in applying the opposite rule *to them.* These plaintiffs argued that their actions should be governed by the law of their original jurisdiction, that the transferee court is obligated to apply the law of the transferor court. This is the rule for state-federal transfers established by the Supreme Court in *Van Dusen v. Barrack.*[150] The *Van Dusen* Court declared that venue transfers in diversity actions result in "but a change of courtrooms."[151]

The *KAL* appeals court[152] stated: "The question before us is whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims."[153] The court then declined to apply *Van Dusen* to multidistrict consolidations for several reasons. First, *Van Dusen* is part of the *Erie*[154] line of cases on federalism, so "the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal, not state."[155]

Second, considerations of the nature of the federal judicial system mandate this result. The so-called "norm of independent judgment" requires federal judges to decide

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[149] See discussion *infra* part V.B.

[150] 376 U.S. 612 (1964).

[151] *Id.* at 639.

[152] Judge (now Justice) Ruth Ginsburg wrote the majority opinion. Judge Douglas Ginsburg concurred. To avoid confusion, the text simply refers to the "majority" (or the "court") and the "concurrence" without mentioning the judges by name.

[153] *In re KAL*, 829 F.2d at 1174. The court treated this as a question of first impression, although it noted that the Judicial Panel on Multidistrict Litigation once assumed, after "only fleeting consideration," that *Van Dusen* governed multidistrict consolidations. The court failed to note that several other courts had also ruled on this issue. See *infra* note 164.

[154] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[155] *In re KAL*, 829 F.2d at 1174.

cases without blindly following the precedents of other jurisdictions. Thus, the D.C. District Court is bound solely by the case law of the D.C. Circuit and the Supreme Court; the rules of all other jurisdictions will be followed only if they are sufficiently persuasive to so warrant.[156]

Similarly, federal law should be regarded as "a single body of law."[157]

> Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit court interpretations simultaneously is inherently self-contradictory. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.[158]

The court also suggested that uniformity and efficiency, the purposes of multidistrict consolidation,[159] would be

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[156] *See id.* at 1175 (quoting Richard L. Marcus, *Conflict Among Circuits and Transfers within the Federal Judicial System*, 93 YALE L.J. 677, 702 (1984) ("There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review."). This argument cannot be disputed; it is inherent in the judicial hierarchy. Nevertheless, the argument does not seem to resolve the question before the court. Rather, the hierarchy argument justified Judge Robinson's decision to reconsider the Second Circuit precedents, without determining whether *Van Dusen* required that he apply the Second Circuit rules to claims transferred from there.

[157] *Id.* (quoting H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963)).

[158] 829 F.2d at 1175-76. Ironically, although the court below also declined to apply tranferor precedent to claims transferred from the Central District of California, *In re* KAL, 664 F. Supp. 1478 (D.D.C. 1986), it engaged in the precise sort of "inherently contradictory analysis" condemned by the circuit court. The district court, expressly applying *Van Dusen*, noted that the transferor district's "decisions could not be ignored." Instead, the D.D.C. determined that an examination of the case law indicated that the Central District of California would not follow those earlier decisions today. *In re KAL*, 664 F. Supp. at 1481.

[159] The similarities between the purposes of the Multidistrict Litigation Act and the Warsaw Convention suggest the connection between proper interpretation of the Convention and the proper management of mass torts. The court could have—*should* have—justified its decision on the Warsaw Convention's purposes as well, for the United States cannot claim to meet its obligation to implement a treaty intended to promote uniformity if plaintiffs in the *same case* are treated differently. Thus, the

thwarted by the application of the *Van Dusen* rule in this context.[160] The concurrence explored this further, arguing that such an approach would "frustrate" the purpose of the Multidistrict Litigation Act " 'to promote the just and efficient conduct' of multidistrict actions . . . by 'eliminat[ing] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts.' "[161] Indeed, both the majority and the concurrence suggested that such an approach would not only frustrate the advantages of consolidation, but might even make consolidation more burdensome than separate consideration by "generating rather than reducing the duplication and protraction Congress sought to check" and having "transferee judges burdened with the hopelessly complex task of sitting as several federal judges at once."[162]

In *KAL*, the D.C. Circuit, in a ruling on a fundamental question of the structure of the American judicial system certain to affect all subsequent multidistrict consolidations, took a narrow view of a major Supreme Court case and preserved the integrity of the Multidistrict Litigation Act. The court recognized the importance of its decision and twice invited "Higher Authority"—namely, Congress or the Supreme Court—to review the decision.[163] Yet, the Supreme Court did not address the *Van Dusen* question on review, perhaps because the circuits had not "split" on the *Van Dusen* issue,[164] only on the merits of the *KAL* case it-

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court's decision appears to represent the absolute minimum obligation the Convention places on the United States.

[160] *In re KAL*, 829 F.2d at 1175.

[161] *Id.* at 1179 (quoting *In re* Plumbing Fixtures Cases, 298 F. Supp. 484, 491-92 (J.P.M.L. 1968)).

[162] *Id.* at 1176, 1184.

[163] *Id.* at 1174, 1176. In fact, the very purpose of the concurrence was to "surface preliminarily some ameliorative steps open only to Congress." *Id.* at 1176 (Ginsburg, J., concurring).

[164] The D.C. Circuit appears to have been the first circuit court to address this issue, but the earlier decisions of the Judicial Panel on Multidistict Litigation had uniformly ruled (albeit with little analysis) that *Van Dusen* applied to Multidistrict consolidations. *See In re* Air Crash at Boston, Mass. on July 31, 1993, 399 F. Supp. 1106 (D. Mass. 1975); *In re* Four Seasons Sec. Laws Litig., 370 F. Supp. 219 (W.D. Okla. 1974); *In re* Air Crash Disaster near Hanover, N.H. on Oct. 25, 1968, 314 F.

self.[165] In any event, it appears that Supreme Court review of this issue may have been unnecessary. The D.C. Circuit view has been accepted elsewhere,[166] including importantly the Second Circuit, which might have objected to the *KAL* interpretation of *Van Dusen* as a means of defending the interests of New York plaintiffs in its own precedents.[167] Still, a related issue may yet reach the Supreme Court, as the Second and Seventh Circuits have split over whether amendments to the 1934 Securities Act have created a statutory exception to *KAL*'s general rule.[168]

V. JUDICIAL IMPLEMENTATION OF THE WARSAW CONVENTION

Plaintiffs, naturally enough, have consistently sought to escape the damage limitations imposed by the Warsaw Convention. Plaintiffs' arguments can be classified in three categories: challenges to the validity of the Convention; exceptions to the damage cap within the Convention itself; and the existence of remedies beyond (and notwithstanding) the Convention.

It is, of course, the institutional task of the plaintiffs' bar (not to mention the source of much additional income to the attorneys involved) to argue zealously that the facts of their client's cases warrant unlimited damages. It is the in-

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Supp. 62 (J.P.M.L. 1970); *In re* Plumbing Fixtures Litig., 342 F. Supp. 756, 758 (J.P.M.L. 1972).

[165] See discussion *infra* part V.B.

[166] *See, e.g., In re* Air Crash at Detroit Metro Airport, 791 F. Supp. 1204, 1212-13 (E.D. Mich. 1992); *In re* Donald J. Trump Casino Sec. Litig., 793 F. Supp. 543, 548 (D.N.J. 1992), *cert. denied*, 114 S. Ct. 1219 (1994).

[167] Coker v. Pan Am. World Airways, 950 F.2d 839, 847-48 (2d Cir. 1991).

[168] *Compare* Menowitz v. Brown, 991 F.2d 36, 40-41 (2d Cir. 1993) (holding transferee court is not bound by law of transferor court despite Section 27A of the 1934 Act) *with* Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1126-27 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 883 (1994) (holding Section 27A mandates that transferee courts must apply law of transferor court, creating an exception to the ordinary rule of *KAL*). While the Seventh Circuit purported to agree with *KAL*, its reasoning suggests a broad challenge to *KAL*, particularly by disputing whether *Van Dusen* is limited to cases governed by state law. *See supra* notes 146-47 and accompanying text. Indeed, based on *Eckstein*'s reasoning, Judge Hogan of the D.D.C. construed narrowly the D.C. Circuit's decision in *KAL*. *In re* United Mine Workers of Am. Employee Benefits Plan Litig., 1994 U.S. Dist. Lexis 7491 (D.D.C. 1994).

stitutional task of judges to identify and police plaintiffs' excesses. In some cases, however, American judges have assisted plaintiffs in evading Article 22—even when this required forcing a square peg into a round hole, or drilling a new hole in the Convention.

Various cases have questioned the Convention's validity, expanded its loopholes, and found other domestic remedies available. Thus, courts have encouraged plaintiffs' (or, at least the plaintiff bar's) natural tendency to litigate in search of new, wider paths to unlimited damages. As a result, the ability of the Convention to facilitate rapid settlements has been severely constrained.

The Convention gives short shrift to Weinstein equity #1 by fixing the damage cap inequitably low, so American judges understandably are tempted to use their equitable powers to circumvent the damage cap.[169] Nevertheless, judges must not let this temptation lead to decisions inconsistent with sound interpretation of the Convention. Such excesses attack the Convention and defeat its purposes, including dispute settlement, by unnecessarily encouraging and complicating litigation.

While such excesses in the name of equity should be roundly criticized as "judicial treaty-making,"[170] *i.e.* rewriting the treaty to suit the judge's preferences, not all decisions favoring plaintiffs was lent this condemnation. Those cases exhibiting a sound approach to treaty interpretation (i.e., an approach consistent with the Vienna Convention) should be applauded, even where a plaintiff's judgment will predictably spur future litigation. Such decisions do not attack the Warsaw Convention, but show the Warsaw Convention's limitations as a mechanism for resolving mass tort litigation.

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[169] *See generally*, Weinstein & Hershenov, *supra* note 122, at 272, 327, (citing such judicial attitudes as "equity will not suffer a wrong to be without a remedy" and "equity is the perfection of the law").

[170] The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71-73 (1821) (Story, J.), *quoted in* Trans World Airways v. Franklin Mint Corp., 466 U.S. 243, 263-64 (1984) (Stevens, J., dissenting). *See also* Lisi v. Alitalia-Linee Aeree Italiane S.p.A., 370 F.2d 508, 514 (2d Cir. 1966) (Moore, J., dissenting), *aff'd*, 390 U.S. 455 (1967).

A. CHALLENGES TO THE VALIDITY OF THE CONVENTION

1. *Constitutional Challenges*

The Constitution establishes the status of treaties in U.S. law. Once the President, with the consent of two-thirds of the Senate, "makes" a treaty,[171] it becomes "the supreme law of the land."[172] In short, treaties are subordinate to the Constitution;[173] have equal rank with federal statutes, with the later in time prevailing in a conflict;[174] and "preempt" conflicting state law.[175] Being subordinate to the Constitution, treaties are subject to the same constitutional attacks as are statutes.[176] The Warsaw Convention, accordingly, has faced—and survived—challenges based on substantive due process,[177] equal protection,[178] the right to travel,[179] failure

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[171] U.S. CONST. art II, § 2, cl. 2.

[172] U.S. CONST. art. VI, cl. 2. As the courts have interpreted this article, a treaty becomes "the supreme law of the land" only if it "self-executes." *See infra* notes 178-80 and accompanying text.

[173] *See* Reid v. Covert, 354 U.S. 1, 16-19 (1957) (ending earlier doubts about this proposition stemming from the structure of Article VI and dicta by Justice Holmes in Missouri v. Holland, 252 U.S. 416, 433 (1920)). *See* HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 137-140.

[174] Head Money Cases, 112 U.S. 580, 599 (1884) (later statute prevails); The Cherokee Tobacco, 78 U.S. 616, 621 (1871) (same); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (same); Cook v. United States, 288 U.S. 102, 118 (1933) (later treaty prevails). *See also* RESTATEMENT (THIRD), *supra* note 67, § 115; HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 163-64.

[175] Howenstein v. Lynham, 100 U.S. 483, 488-90 (1879); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); *see also* HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 129 & n.3, 165-67; RESTATEMENT (THIRD), *supra* note 67, § 115, cmt. e, rptr. n.5.

[176] There is one exception to this rule: all treaties, regardless of subject matter, fall within the enumerated powers of the federal government. Missouri v. Holland, 252 U.S. 416, 432-34 (1920) (Holmes, J.) (holding that the United States could enter a treaty with Britain on bird migration from Canada, and implement it by federal legislation, even though Congress could not otherwise enact a statute on that subject). Nevertheless, this distinction—significant as it was in 1920—is meaningless today, as no statute has been overturned on these grounds since the rise of modern Commerce Clause jurisprudence in the 1930s. *Compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (reading Congressional power to legislate under the Commerce Clause restrictively) *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (reading Congressional power to legislate under the Commerce Clause expansively). *See generally* HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 142-48 (1972).

[177] *In re* Aircrash in Bali, Indonesia, 684 F.2d 1301 (9th Cir. 1982).

[178] *Id.* at 1312. Strictly speaking, since plaintiffs challenged an act of the federal government, not a state, the suit hinged on the equal protection component of Fifth

to follow constitutionally mandated procedures,[180] the takings clause,[181] the infringement of Congress's power to regulate commerce by the President and Senate through the treaty-making power,[182] the right to a jury trial,[183] and the right of access to federal courts.[184] An Illinois state court purported, in dicta, to declare the Convention unconstitutional, but that decision was subsequently withdrawn and has not been followed elsewhere.[185]

Under the "last in time" rule, subsequent legislation passed by Congress incapable of reconciliation with the Convention would impliedly repeal the Convention for domestic purposes to the extent mandated by a fair interpretation of the legislation.[186] But, "where fairly possible," a statute should be "construed so as not to conflict with . . . an international agreement of the United States."[187] Accordingly, in holding that Congress did not impliedly abrogate the Convention by repealing the Par Value Modification Act in 1978, the Supreme Court stated that

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Amendment due process, rather than the Fourteenth Amendment's Equal Protection Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[179] 684 F.2d at 1310.

[180] *Id.* at 1307 n.5. Plaintiffs argued that the Senate never consented to the Convention, presumably based on the fact that the Senate acted "without debate, committee hearing, or report . . . by voice vote." Lowenfeld & Mendelsohn, *supra* note 25, at 502. The court cited the Congressional Record notice of consent and observed that the Senate had many years to correct any misunderstandings in this regard.

[181] Indemnity Ins. Co. v. Pan Am. Airways, 58 F. Supp. 338, 339-40 (S.D.N.Y. 1944).

[182] *Id.* at 340.

[183] Pierre v. Eastern Air Lines, 152 F. Supp. 486, 489 (D.N.J. 1957).

[184] McCarthy v. East African Airways, 13 Avi. 17,385, 17,386 (S.D.N.Y. 1974), *aff'd sub nom.* Fay v. East African Airways, 517 F.2d 1395 (2d Cir. 1974).

[185] Burdell v. Canadian Pac. Airlines, 10 Avi. 18,151 (Ill. Cir. Ct. 1968) (holding Convention inapplicable to flight to Singapore, a non-signatory; then addressing constitutionality of Convention in dicta), withdrawn 11 Avi. 17,351, 17,354 (1961) (stating that although the court finds "plaintiff's contentions to be persuasive," in light of the finding that the case did not concern "international transportation," as defined in Article 1 of the Convention, "the Court feels constrained to forego ruling on any arguments regarding the Convention's constitutionality").

[186] RESTATEMENT (THIRD), *supra* note 67, § 115.

[187] *Id.* § 114. *Cf.* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (stating "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

"[t]here a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."[188]

Chief Justice Marshall found that the supremacy clause determined another aspect of treaties' status: Treaties are "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."[189] Nevertheless, if "the parties engage[ ] to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[190] U.S. law thus distinguishes between "self-executing" and "non-self-executing" treaties.[191] The Supreme Court has expressly held that the Warsaw Convention is self-executing.[192]

By their nature, all treaties create international obligations between the signatory states. American courts recognize that some self-executing treaties also create privately enforceable rights.[193] Cases "arising under" a self-executing treaty may be brought in federal court and may be removed

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[188] *Franklin Mint*, 466 U.S. at 251-53. *Cf.* RESTATEMENT (THIRD), *supra* note 67, § 115, cmt. a.

[189] Foster and Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[190] *Id.* For example, the United States cannot spend money pursuant to a treaty, unless Congress appropriates the funds by statute. U.S. CONST. art. I, § 9; *see* HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 159 & n.98.

[191] *See generally* HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 156-62. The Supreme Court has recognized the Senate's power to place conditions on its consent. Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869). In particular, the Senate may require, as a condition of its consent, that a treaty be regarded as non-self-executing. United States v. American Sugar Co., 202 U.S. 563 (1906). *See, e.g.*, S. Exec. Rep. No. 2., 99th Cong., 2d Sess. 26 (1985) (declaring the Genocide Convention a non-self-executing treaty), *reprinted in* Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612, 621 (1986). If the Senate is silent, courts give "great weight" to the President's view in determining whether a treaty is self-executing. Courts will also consider whether the treaty creates judicially manageable standards. *See* Sei Fujii v. State, 242 P.2d 617, 620-622 (Cal. 1952) (holding U.N. Charter is not self-executing).

[192] *Franklin Mint*, 466 U.S. at 252, 276 n.5.

[193] Head Money Cases, 112 U.S. 580, 598-99 (1884). *See also* RESTATEMENT (THIRD), *supra* note 67, § 907(1); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992).

there from state court.[194] The Warsaw Convention creates both a civil cause of action[195] and a defense.[196] Thus, if an injured passenger sued an airline for compensatory and punitive damages in a case subject to the Convention, the Court should grant the defendant's motion for partial summary judgment against the punitive damages.[197]

Based on the unique history of the Warsaw Convention, plaintiffs could argue that the Convention expired in 1966, because President Johnson lacked the power to withdraw his denunciation during the six months before it took effect.[198] There is no constitutional basis, however, for such a limitation on Presidential control over foreign policy. Moreover, the courts would likely find that such a claim sought unwarranted judicial interference in foreign policy and thus presented a nonjusticiable "political question."[199]

2. *International Law Challenges*

As Professor Henkin has noted, "[t]he status of a treaty as law of the land derives from and depends on its status as a valid, living treaty of the United States."[200] Therefore, treaties may be challenged not only on domestic legal grounds, but also under international law.[201]

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[194] U.S. CONST. art. III; 28 U.S.C. §§ 1331, 1441. *Cf.* Chisholm v. Georgia, 2 Dall. 419, 474 (U.S. 1793) (Op. of Jay, C.J.).

[195] Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

[196] Reed v. Wiser, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

[197] *See* discussion *infra* part V.B.

[198] *See* discussion *supra* part II. Conversely, others have argued that the President lacked the power to denounce the Convention without Senate consent. *See, e.g.*, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580 (1967).

[199] *Cf.* Goldwater v. Carter, 444 U.S. 996 (1979) (finding nonjusticiable a Senator's claim that the President could not terminate a defense treaty with Taiwan unless two-thirds of the Senate consented). Justice Brennan, dissenting, ruled for the President on the merits, as did the Court of Appeals. *Id.* at 1006; 617 F.2d 697, 705-07 (D.C. Cir. 1979) (en banc). *See also* RESTATEMENT (THIRD), *supra* note 67, § 339; HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 136, 168-70; SENATE FOREIGN RELATIONS COMMITTEE, TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER (1978) (compiling materials).

[200] HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 160.

[201] *See* Vienna Convention, *supra* note 66, arts. 42-68 (identifying grounds for the invalidation or termination of treaties).

Some claims raise both issues: for the Convention to remain U.S. law today, President Johnson must have had the power to withdraw his denunciation under both constitutional and international law. Indeed, at the time of the denunciation, the United States and other signatories considered and rejected—the view that international law precluded such withdrawals.[202] No state-party has ever claimed that its Convention obligations to the United States terminated in 1966. Just three years later, in the Vienna Convention, the international community codified this state practice as a rule permitting such withdrawals.[203]

In another aviation case, the plaintiff argued that the United States' abandonment of the gold standard, on which the Warsaw Convention bases its damage cap,[204] constituted a "fundamental change of circumstances" invalidating the Convention and barring future enforcement of the cap. The Supreme Court properly recognized that international law allows a state-party to a treaty to invoke the doctrine of *rebus sic stantibus* under certain circumstances to excuse its non-performance of its treaty obligations.[205] The Court then rejected plaintiff's misreading of this doctrine: "But when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine on their behalf."[206]

With this eminently sensible conclusion—reached, regrettably, without reference to the Vienna Convention—the Court affirmed a basic principle of U.S. foreign relations law: the Executive (with the consent of the Senate) makes treaties that remain positive law, binding on private persons, the government, and the Judiciary, unless repudiated by the Executive or the Legislature.

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[202] Lowenfeld & Mendelsohn, *supra* note 25, at 550 & n.177.

[203] Vienna Convention, *supra* note 66, art. 68.

[204] Warsaw Convention, *supra* note 13, art. 22.

[205] *See* Vienna Convention, *supra* note 66, art. 62.

[206] *Franklin Mint*, 466 U.S. at 253; *cf.* Charlton v. Kelly, 229 U.S. 447, 473-76 (1913) (holding a "voidable" treaty remains binding law unless "voided" by the Executive branch).

3. *Equitable Challenges*

The Judiciary has sometimes forgotten this basic principle of treaty law, apparently regarding treaties as an illegitimate half-sibling of statutes, not really the supreme law of the land. Recognizing that the Convention shortshrifts passengers' interests by setting the damage cap too low, some judges apparently believe their equitable powers allow them to set the Convention aside to avoid its unfairly low damage cap.[207]

The argument typically proceeds as follows: the Convention set the damage cap low in 1929 to protect a "fledgling industry,"[208] but the industry has subsequently matured and is now capable of paying higher damage awards. Further, the risks of aviation in 1929 were both very high and poorly understood, making insurance commercially infeasible without a strict damage cap, but aviation is much safer now and the risks are well known. Therefore, the damage cap is no longer necessary (or less so) and should not be (strictly) enforced.[209] Some judges have added, apparently deeming it legally relevant, that the United States has advocated a higher damage cap[210] and that various Members of Congress have criticized the cap.[211]

These arguments are sound on their facts, but fatally flawed in their logic. It is true that the aviation industry has matured, safety has improved, the risks are well understood,

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[207] *See* discussion *supra* part IV.A.

[208] For a vivid description of the aviation industry in 1929, *see* Lee Kriendler, 1 Av. Accident L. 342 (1963), *quoted in*, Berner v. British Commonwealth Pacific Airlines, Ltd. 219 F. Supp. 289, 322-23 n.18 (1963).

[209] *See, e.g.*, Reed v. Wiser, 414 F. Supp. 863, 866 (S.D.N.Y. 1976), *rev'd*, 555 F.2d 1079, 1092 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *In re* Air Crash in Bali, Indon., 462 F. Supp. 1114, 1124-26 (C.D. Ca. 1978), *rev'd*, 684 F.2d 1301, 1308 (9th Cir. 1982).

[210] *In re* Air Crash in Bali, Indon., 462 F. Supp 1114, 1124 (C.D. Ca. 1978), *rev'd*, 684 F.2d 1301, 1308 (9th Cir. 1982). In an equally impermissible variant of this argument, the Fifth Circuit justified a decision to allow certain damages above the cap as being consistent with *the purposes of the Montreal Agreement* to "allow victims a more adequate recovery," as if this somehow modified *the Convention's* purpose of certainty. Domangue v. Eastern Air Lines, 722 F.2d 256, 261-63 (5th Cir. 1984).

[211] Reed v. Wiser, 414 F. Supp. 863, (S.D.N.Y. 1976), *rev'd*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

the United States has advocated raising the damage cap, and Members of Congress have criticized the cap. But all of these facts are completely irrelevant to the judicial function in deciding aviation cases. The Warsaw Convention is positive law, the supreme law of the land.[212]

Since Lyndon Johnson withdrew his denunciation of the Convention in 1966, six successive Presidents have declined to exercise their power to denounce the Convention again. Congress has never passed legislation to prevent the Convention's domestic enforcement. Therefore, whatever a judge might think about the policies underlying the United States continued adherence to the Convention, it remains the law and the judge must enforce it.[213] The constitutional principle of separation of powers simply does not permit the Judiciary to second-guess the policy determinations of the political branches.[214]

Justice Stevens expressed this point unequivocally:

> [T]hough application of the Warsaw Convention's liability limitation is anachronistic in today's world of aviation, we are obliged to enforce it so long as the political branches of the Government adhere to the Convention. The maxim that *cessante ratione legis, cessat et ipsa lex*, applicable to the common law, does not govern the judiciary in cases involving application of positive law.[215]

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[212] As the Second Circuit stated when reversing a district court opinion that endorsed the fledgling industry argument, "These arguments misconceive our function. We do not sit to decide whether laws are no longer necessary or to assess the diplomatic consequences of their abandonment . . . . [U]ntil one of our sister branches declares otherwise, the Warsaw Convention remains the Supreme law of the land." *Reed*, 555 F.2d at 1073.

[213] *See Saks*, 470 U.S. at 399 (quoting *Reed*, 555 F.2d 1079); *Floyd*, 499 U.S. at 546 (stating "Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read '*lésion corporelle*' in a way that respects that legislative choice.").

[214] *Compare In re* Air Crash in Bali, 462 F. Supp. at 1125 (questioning the "wisdom" of continued adherence to the Convention) *with In re* KAL, 664 F. Supp. at 1474-75 (recognizing obligation to enforce damage cap, despite personally finding it "disturbing").

[215] Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 273 (1984) (Stevens, J., dissenting).

B. Exceptions to the Damage Cap Under the Convention

The Warsaw Convention includes two relevant exceptions to Article 22's damage cap: *dol*[216] and failure to deliver a passenger ticket.[217]

1. Dol

Much air disaster litigation surrounds Article 25(1), which reads:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to willful misconduct.[218]

This article openly invites plaintiffs to litigate.[219] When is an act or omission willful? Just what behavior is the equivalent or willful misconduct? Is the test subjective or objective? Must the damage have been foreseeable? How proximate must the cause be? Must the act or omission be a single (major?) event which "caused" the damage, or can a series of small decisions trigger Article 25? And what legal consequences result from a finding of willful misconduct?

American courts have grappled with all these questions. Underlying all analysis of Article 25 should be the French concept of *dol*, because the French text of the Convention is binding U.S. law.[220] An element of *dol* is the intent to cause harm.[221] "Willful misconduct," the term used in the unofficial English translation of Article 25, imperfectly captures the essence of *dol*, because—although willfulness would

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[216] Warsaw Convention, *supra* note 13, art. 25.

[217] *Id.* art. 3.

[218] *Id.* art. 25(1).

[219] Article 25 has long been subject to criticism. *See* Lowenfeld & Mendelsohn, *supra* note 25, at 503.

[220] *See* discussion *supra* part III.C.

[221] Gallais v. Aéro Maritime, Ltd., 1954 R.F.D.A. 184 (T.G.I. Seine 1954), *discussed in* 22 J. Air L. & Com. 99 (1955).

seem to require intent—as a term of art it does not in fact do so. Instead, courts have generally regarded "willful misconduct" as equivalent to recklessness or gross negligence.[222]

As a result, many American judges have found "willful misconduct"[223] and accordingly waived the damage cap in circumstances far beyond the French concept of *dol.*[224] One case found willful misconduct where a plane crashed into a mountain while violating a safety regulation setting the minimum altitude.[225] Another case found willful misconduct where the crew failed to radio mayday when crashing into a river and then was unable to maneuver a lifeboat to save a passenger on the plane's tail.[226] A third case found willful misconduct where an airplane crashed while attempting to land in poor visibility even though the crew knew the risks of doing so.[227] KAL lost a motion for summary judgment against plaintiffs' claim of willful misconduct, where plaintiffs argued that the pilot violated ordinary procedures by attempting to navigate without an "inertia navigation system," which he knew to be broken,

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[222] W. PAGE KEETON, PROSSER AND KEETON ON TORTS 212-14 (5th ed. 1984). In criminal law, by contrast, "willfully" is a stricter standard of mental culpability than "recklessly" or "negligently." *See* MODEL PENAL CODE § 2.02(2) (Proposed Official Draft 1962) (defining the four standards of mental culpability: purposely, knowingly, recklessly, negligently); § 2.02(8) (identifying willfully as equivalent to knowingly, "unless a purpose to impose further requirements appears in the text").

[223] Of course, juries generally make the finding of willful misconduct. This point addresses the legal definition of willful misconduct, as it impacts the judgment through motions for summary judgment, jury instructions, motions for judgment notwithstanding the verdict, and appeals.

[224] Many courts have expressly defined "willful misconduct" to include "reckless disregard." *See, e.g.*, American Airlines v. Ulen, 186 F.2d 529, 533 (D.C. Cir. 1949). One judge even instructed the jury to find willful misconduct if the pilot was "careless" and, when the jury nevertheless found for the carrier, granted plaintiff a judgment notwithstanding the verdict. Berner v. British Commonwealth Pac. Airlines, 219 F. Supp. 289 (S.D.N.Y. 1963), *rev'd*, 346 F.2d 532, 536-38 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

[225] American Airlines v. Ulen, 186 F.2d 29 (D.C. Cir. 1949).

[226] KLM Royal Dutch Airlines v. Tuller, 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961). The court also upheld a willful misconduct verdict as reasonable based on the airline's minimal safety instructions even though these complied with relevant Irish law. *Id.* at 779.

[227] Butler v. Aeromexico, 19 Avi. 17,961 (11th Cir. 1985).

thereby causing the plane to fly off-course where Soviet fighters destroyed it.[228]

In transforming *dol* to gross negligence, American courts have avoided the difficult task of determining whether a defendant airline subjectively intended to cause harm. Recognizing these difficulties, the international community proposed amending Article 25 to include reckless acts and omissions.[229] Even France has defined *dol* by statute to include "inexcusable negligence."[230] The United States, however, has neither ratified the Hague Protocol nor enacted relevant legislation, so American courts remain bound by the original Article 25, including the traditional French definition of *dol.*

The American case law may nevertheless be justified by the "curious," "unhappy"[231] wording of Article 25: the damage cap is waived in cases of *dol* or such misconduct as is considered "in accordance with the law of the court to which the case is submitted" to be "equivalent" to *dol.* While "willful misconduct," which includes recklessness, is an inappropriate translation of *dol* it may be regarded as the common law's equivalent of *dol.* The *travaux preparatories* support this view.[232] If this interpretation is proper it is nev-

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[228] *In re* KAL, 704 F. Supp. 1135 (D.D.C. 1988). If proven, other allegations against KAL would clearly support a finding of *dol.* After destroying Flight #007, the Soviets accused KAL of deliberately violating Soviet airspace to spy. The Soviets also claimed that the pilots ignored radio contacts and warning shots. With the end of the Cold War, however, Boris Yeltsin released documents—including the transcript of Flight #007's black box—which show that the pilots were unaware of their predicament before the fatal strike, thereby undermining the Soviet claims. Michael Dobbs, *KAL 007 Fell Amid Chaos,* N.Y. TIMES, Oct. 16, 1992, at A1. Indeed a lawyer for the *KAL* plaintiffs has conceded that the black box has "probably ended any contention th[at] Flight 7 was on a spy mission." Pounian, *supra* note 10, at 3.

[229] Hague Protocol, *supra* note 57, art. 13.

[230] Civil Aviation Code 321-4, *discussed in* Delgado v. Pan Am. World Airways, 16 Avi. 18,462, 18,466 (P.R. 1982).

[231] Berner v. British Commonwealth Pac. Airlines, 219 F. Supp. 289, 322 (S.D.N.Y. 1963), *rev'd on other grounds,* 346 F.2d 532 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966).

[232] The meaning of Article 25 appears to be sufficiently "ambiguous or obscure" to warrant resort to the *travaux preparatories,* especially given the lack of a suitable common law term to use in translation. *See* discussion *supra* part III.B. The "equivalent of" clause seems to have been added in response to the remarks of the British delegate (two Americans were present, but only as observers" that "We have

ertheless unfortunate, because it reads narrowly an exception intended to be a "very restrictive concept,"[233] thereby seriously undermining the Convention's purpose of certainty. By allowing the courts of each signatory to determine whether Article 25 hinges on intentional wrongdoing or mere recklessness negligence, this interpretation also threatens the purpose of uniformity.

Once *dol* has been found, there remains the question whether the Convention continues to limit judicial discretion to grant damages otherwise available in domestic law. For example, may a court award punitive damages in cases of willful misconduct? After a former security officer accused Pan Am of "play[ing] Russian roulette" with passengers' lives through its lax security, a federal jury found that such laxness constituted willful misconduct responsible for the Lockerbie bombing.[234] The *Lockerbie* court held that

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with us the expression 'willful misconduct.' I believe it covers all that you want to say; it covers not only acts committed deliberately, but also *acts d'insouciance sans egard aux consequences*" *i.e.*, acts of carelessness done without regard for the consequences. *Id.* at 321. thus, the *travaux preparatories* suggest that *dol* and the equivalent thereof should be translated together as "willful misconduct." The official English translation errs by directly equating *dol* with "willful misconduct," which renders the "equivalent of" clause completely meaningless. *See id.*

[233] Delgado v. Pan Am. World Airways, 16 Avi. 18,462, 18,466 (P.R. 1982) (quoting Georges Ripert, the French delegate at Warsaw).

[234] Laurie Goodstein, *Pan Am was Lax in Security, Bomb Trial Witnesses Charge*, WASH. POST, June 1992, at A2; *Pan Am Ruled Liable in Flight 103 Bombing*, WASH. POST, July 11, 1992, at A3. The Second Circuit upheld the verdict. Pagnucco v. Pan Am. World Airways, 1994 WL 498454 (2d Cir. Sept. 12, 1994).

In light of the lengthy lawsuits and massive damage awards for KAL and Lockerbie, the two major air disasters of the 1980s, it is interesting to consider that the United States apparently once contemplated amending the Convention by protocol to eliminate airline liability "if it proves that the accident which caused the damage was the result of a wil[l]ful act by a third party intended to, and having the effect of, destroying the aircraft." Lowenfeld & Mendelsohn, *supra* note 25, at 570-70 & n.252. Had this provision become law, both Pan Am and KAL would have avoided *all* liability for these tragedies even though juries determined that the airlines' misconduct allowed the third party to act. Apparently, even a foreseeable consequence of a foreseeable intervening act would have completely eclipsed the carrier's own liability, contravening ordinary principles of tort law and further skewing the imbalance between Weinstein equities #2 and #3. *See* W. PAGE KEETON, PROSSER AND KEETON ON TORTS 305 (5th ed. 1984). For a list of airplane sabotage incidents from 1949-89, *see* PRESIDENT'S COMM'N ON AVIATION SECURITY & TERRORISM, REPORT, *supra* note 21, at 60-66.

the Convention *always* prohibits punitive damages.[235] The court demonstrated a sophisticated approach to treaty interpretation by relying on the French text, looking to the implementation in several other countries, and striving to fulfill the Convention's purposes. In short, it concluded that punitive damages were beyond the scope of the French text of Article 17 as it would be understood by a French civil lawyer. Thus, even though Article 25 waives Article 22's damage cap, it is Article 17 which establishes the injuries for which the carrier is liable: namely, *dommage survenu* or damages sustained, *i.e.*, compensatory damages only.[236] Article 25 simply does not affect the scope of Article 17, only Article 22's monetary cap.[237]

The *Lockerbie* court declined to follow the one case, *KAL*, where a U.S. court allowed punitive damages, stating that "the presiding judge affirmed the jury award . . . without opinion."[238] The D.C. Circuit, agreeing with *Lockerbie*, subsequently overturned the $50 million punitive damage award.[239] *KAL* noted that the Convention should be interpreted to exclude punitive damages because they "would be controversial for most signatory countries," and the purpose of uniformity requires a construction which avoids a "potential source of divergence."[240]

In *Floyd*, the Supreme Court held that a passenger in a plane which narrowly avoided crashing could not collect damages for emotional distress unconnected to any *lesion*

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[235] *In re* Air disaster at Lockerbie, Scot. on December 21, 1988, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S.Ct. 331 (1991).

[236] *Id.* at 1280-81.

[237] *Id.* at 1285.

[238] *Id.* at 1277.

[239] *In re* KAL, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991). The *KAL* opinion paralleled *Lockerbie* showing concern for: the purposes of uniformity and efficiency; the "shared expectations of the contracting parties"; the French text, understood "in accordance with [its] French legal meaning"; and foreign interpretations of Article 17 and attitudes towards punitive damages generally. *Id.* at 1485-90.

[240] *Id.* at 1487 (quoting *Floyd*, 499 U.S. at 552). The *Lockerbie* and *KAL* decisions have been criticized in Kelly Compton Grems, *Punitive Damages under the Warsaw Convention*, 41 AM. U. L. REV. 141 (1991), but the criticisms, based as they are on domestic law, give insufficient weight to international principles of treaty interpretation and the Convention's purposes of uniformity and certainty.

corporelle (*i.e.*, bodily injury).[241] The Court expressly declined to address whether damages are available for emotional harm connected to bodily injury,[242] an issue which becomes important in cases of *dol.* Judge Weinstein recently addressed this issue, taking a narrow, though defensible, view of both *Floyd* and *In re Lockerbie.*[243] After a jury found that TWA's lax security constituted willful misconduct and that a passenger suffered pain and suffering as he fell to his death from the airplane after a bomb exploded, Judge Weinstein held that his heirs could collect unlimited pain and suffering damages once Article 25 waived Article 22.[244] This approach is consistent with *In re Lockerbie* in that emotional damages for pain and suffering are compensatory in nature, so long as one does not read Article 17 so narrowly as to apply to compensation only for *physical* damages sustained. The same analysis would permit collection of damages for loss of parental and spousal companionship and support.[245]

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[241] *Floyd*, 499 U.S. at 530. For an unusual case following *Floyd*, *see* Yin Yee Li v. Quaraishi, 780 F. Supp. 117 (E.D.N.Y. 1992).

[242] *Floyd*, 499 U.S. at 551.

[243] *In re* Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on Apr. 2, 1986, 778 F. Supp. 625 (E.D.N.Y. 1991) (Weinstein, J.), *rev'd on other grounds sub nom.* Ospina v. Trans World Airlines, 975 F.2d 35 (2d Cir. 1992) (reversing judgment of *dol* without addressing availability of pain and suffering damages), *cert. denied*, 113 S. Ct. 1944 (1993). Judge Weinstein took a sophisticated approach to treaty interpretation, relying on the French text and examining Israeli precedent. *Id.* at 638-40. But he appears to give insufficient weight to the purpose of uniformity. *Id.* at 639-40. And, in narrowing *In re Lockerbie* he seems motivated by an impermissible concern to protect plaintiffs from damage cap designed to protect a "fledgling industry," which "is not still 'fledgling.' " *Id.* at 641. *See* discussion *supra* part V.A.

[244] *Compare* Jack v. Trans World Airlines, 854 F. Supp. 654 (N.D. Cal. 1994) (holding "[o]nly emotional distress flowing from the bodily injury is recoverable") *with* Pounian, *supra* note 10, at 3 (discussing cases which award survivors as much as one million dollars for the pre-impact fear of deceased KAL passengers).

[245] *See, e.g.*, Pagnucco v. Pan Am. World Airways, 1994 WL 498454, at *25 (2d Cir. Sept. 12, 1994) (holding that general principles of maritime law applicable to interpreting the Warsaw Convention permit recovery for loss of society by spouses and dependents and for loss of support by spouses, minor children and adult children who suffer financially). This decision, reached on reconsideration of the *Lockerbie* case, will impact the ongoing *KAL* litigation. *See* Pounian, *supra* note 10, at 3 n.5; *Korean Air Lines 007 Disaster Litigation — Damage Awards Rendered in Ten Passenger Cases*, 12 LLOYD'S AVIATION LAW 1 (July 15, 1993).

2. *Adequate Delivery*

Under Article 3, if an airline fails to deliver a ticket to the passengers, they are not bound by the damage cap.[246] This could happen, for example, in the case of individual passengers on a chartered flight. Plaintiffs have repeatedly claimed that Article 3 goes further: beyond requiring mere delivery of a ticket, Article 3 requires the airline to deliver an adequate ticket adequately. Under this interpretation, Article 3 punishes inadequacies with the Convention's ultimate sanction: unlimited liability. A line of cases beginning in 1965, at the height of American frustration with the Warsaw Convention in the period preceding the Montreal Agreement,[247] accepted this view.

After the Second Circuit held that military personnel who were delivered their tickets after boarding the plane were not subject to the damage cap,[248] the Ninth Circuit extended the ruling to soldiers who received their tickets immediately before boarding.[249] These cases held that the airline delivered the ticket inadequately (*i.e.* too late) and therefore waived the benefit of the damage cap. The courts reasoned that the purpose of Article 3(1)(e) was to afford passengers notice of the damage cap so that they could take measures to protect themselves from the risk of uncompensated damages. They could purchase travel insurance, ne-

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[246] Article 3(1) of the Warsaw Convention provides:

> For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: . . . (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 3(2) reads:

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

Warsaw Convention, *supra* note 13, art. 3.

[247] *See generally* Lowenfeld & Mendelsohn, *supra* note 25.

[248] Mertens v. Flying Tiger Lines, Inc., 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

[249] Warren v. Flying Tiger Lines, Inc., 352 F.2d 494 (9th Cir. 1965).

gotiate a higher damage cap with the airline,[250] choose to fly on a different airline,[251] or even decide not to fly altogether. The courts then interpreted Article 3 in light of this object and purpose, by requiring that airlines provide the notice sufficiently before the flight to allow passengers to take protective measures.[252]

The next year, the Second Circuit held in *Lisi* that the damage limitation did not apply when the airline printed the statement required by Article 3(1)(e) in type so small as to be illegible.[253] Airlines could only satisfy the purpose of notice when the statement that "the transportation is subject to the rules relating to liability established by this convention" was printed legibly.[254] *Lisi* thus expanded the requirement from adequate delivery of a ticket to delivery of an adequate ticket.[255]

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[250] Article 22(1) expressly allows such "special contracts." Warsaw Convention, *supra* note 13, art. 22(1).

[251] A passenger could choose to fly on a safer airline, or on an airline, like All Nippon Airways, which voluntarily agrees to pay damages above the cap. *See DOT Approves Waiver by ANA of Warsaw Convention/Montreal Agreement Limits of Liability*, 12 LLOYD'S AVIATION LAW 1 (Feb. 1, 1993)

[252] *Warren* declared this to be an "implied requirement" of Article 3(2). *Warren*, 352 F.2d at 498 (1965).

[253] Lisi v. Alitalia-Linee Aeree Italiane S.p.A., 370 F.2d 508, 514 (2d Cir. 1966), *aff'd without opinion by an evenly divided court*, 390 U.S. 455 (1968). The tickets at issue were printed in 4.5 point type, which the court described as "camouflaged in Lilliputian print in a thicket of 'conditions of contract'. . . . Indeed, [they] are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that . . . their presence is concealed." *See also* Lowenfeld & Mendelsohn, *supra* note 25, at 512-14.

[254] *Lisi*, 370 F.2d at 511.

[255] Of course, it does not necessarily follow that the remedy for delivery of a ticket with an inadequately small statement is unlimited liability. The court seemed to find such a remedy particularly appropriate where the required statement was a declaration of limited liability. The court declared a "quid pro quo": to qualify for the damage cap, the airline had to notify the passenger. Citing the "*ratio decidendi*" of *Mertens, Lisi* found unlimited liability an appropriate remedy because the inadequate notice deprived passengers of the opportunity for self-protection from the possible harms of the damage cap. *Lisi*, 370 F.2d at 513.

Thus, the court distinguished a contrary precedent which refused to waive the damage cap for a violation of Article 3(1)(c), which requires that the passenger ticket state all "agreed stopping places," subject to changes due to emergency. The flight from New York to Mexico City crashed while landing in Dallas, a stop not listed on the passenger ticket. Grey v. American Airlines, Inc., 227 F.2d 282 (2d Cir.

Lisi furthered the object and purpose of notice by creating strong incentives for compliance with Article 3(1)(e), and furthered uniformity in documentation, by ensuring that all passenger tickets would be legible.[256] One could argue, however, that, in pursuit of uniformity, *Lisi* sacrificed certainty. After all, *Lisi* allowed any court (or, even more unpredictably, any jury) to determine whether a given ticket provided minimally adequate notice. The consequences of such a determination were enormous: the difference between $8,300 and unlimited liability. Thus, where the Convention sought to guarantee the predictability needed for airlines to obtain liability insurance at reasonable rates, under *Lisi*, there would be uncertainty. This uncertainty would result in higher premiums and higher ticket prices, perhaps high enough to threaten the industry. Where the Convention sought to facilitate rapid settlements, there would be much litigation.

Yet, it proved possible to implement *Lisi*'s minimal adequacy requirement without destroying the Convention. Clear guidance as to what constituted a minimally adequate ticket was needed.[257] The Civil Aeronautics Board (CAB) provided the necessary guidance, fixing a minimum of ten point type.[258] And in the Montreal Agreement, all interna-

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1955), *cert. denied*, 350 U.S. 989 (1956). *Lisi* distinguished *Grey* on the grounds that the missing information did not affect the passengers' ability to take self-protective measures and so did not affect the Warsaw "quid pro quo." *Lisi*, 370 F.2d at 513. *See also* Republic Nat'l Bank v. Eastern Airlines, 639 F. Supp. 1410 (S.D.N.Y. 1986), *aff'd*, 815 F.2d 232 (2d. Cir. 1987). While this distinction is reasonable, and may be justified as fulfilling the Convention's "object and purpose," it must be noted that it lacks a textual basis. *See* discussion *infra* note 249.

[256] *Lisi* did not impose a strict rule that would result in identical airline tickets, but by imposing a requirement of adequacy akin to the common law notion of reasonableness, it ensured that all tickets would be uniform in so far as they would all contain the Article 3(1)(e) information in type which is reasonably (*i.e.* at least minimally) legible.

[257] *Lisi* itself did not provide such guidance, but then it would have been inappropriate dictum for the court to set a minimum type size. It was entirely appropriate for a common law court to hold that 4.5 point type is too small without deciding whether 6 or 8 point type would be adequate. The common law system required the *Lisi* court to leave such hypothetical situations for future cases to decide.

[258] 14 C.F.R. § 221.175 (1994).

tional airlines operating in the United States accepted this ten point standard.[259]

These developments pushed airlines to eliminate "*Lisi*-type" tickets, which had been common at the time.[260] Even so, however, occasional cases arise involving tickets with smaller print. Armed with the CAB and Montreal rules, courts strictly enforced the ten point requirement. A "bright line" rule thus replaced *Lisi*'s minimal adequacy test.[261] This "bright line" rule furthered the purposes of notice, uniformity (*i.e.* all tickets must be written in at least ten point type) and certainty (*i.e.* all carriers who violate the rule will be sanctioned with unlimited liability).[262] The leading case, *In re Warsaw*, expressly noted that a strict rule was preferable to the unpredictability of the minimal adequacy approach.[263]

The *Mertens-Lisi-In re Warsaw* line was undoubtedly the dominant U.S. interpretation of the Warsaw Convention when Korean Airlines Flight #007 crashed in 1983. But the ensuing litigation over KAL's use of tickets printed in eight

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[259] Montreal Agreement, *supra* note 51, at 552.

[260] SPEISER & KRAUSE, *supra* note 15, at 755-56. For a discussion of the Canadian cases on "*Lisi*-type" tickets, *see id.* at 757-59.

[261] *In re* Air Crash Disaster at Warsaw, Pol. on Mar. 14, 1980, 705 F.2d 85, 86-87 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (holding "the difference between 8.5 and 10-point type, we are told by LOT [Polish Airlines], is 15/270ths of an inch, based on 72 type points to the inch. However minimal a 1.5 point difference in type size might seem, we conclude that it is enough to . . . [hold] that the [plaintiffs] in this case are not subject to the liability limitation established by the Montreal Agreement") [hereinafter "*In re* Warsaw"]. *See also* Trivelloni-Lorenzi v. Pan Am. Airways, 789 F.2d 1092, *reh'g granted*, 795 F.2d 381 (5th Cir. 1986), *on reh'g*, 821 F.2d 1147 (5th Cir. 1987) (waiving damage cap for tickets printed in 9-point type); *In re* Air Crash Disaster near New Orleans, La. on July 9, 1982, 789 F.2d 1092, 1098 (5th Cir. 1986), *aff'd on reh'g*, 821 F.2d 1147, 1171 (1987).

[262] While the certainty of unlimited liability in a class of cases would not help airlines obtain inexpensive insurance, the rule may fairly be analogized to Article 25, which waives the damage cap in cases of willful misconduct. *Cf. In re* Air Crash Disaster at Gander, 660 F. Supp. 1202 (W.D. Ky 1987).

[263] The court stated:

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

In re Warsaw, 705 F.2d at 90 n.10.

point type culminated in a 1989 Supreme Court decision that repudiated the Second Circuit precedents.

The Judicial Panel of Multidistrict Litigation consolidated *KAL* before Chief Judge Aubrey Robinson of the DDC, who rejected *Lisi*, arguing that the "plain meaning" of Article 3(2) preserves the damage cap regardless of any "irregularit[ies]" in the passenger ticket.[264] The court made no attempt to reconcile the two conflicting sentences of Article 3(2). Nor did Judge Robinson consider the logical conclusion of his argument. Is there some point where a ticket becomes so irregular as to fail to qualify as a ticket? What if the document contains none of the five particulars required by Article 3(1)? What if the airline delivered a blank form or an Article 3(1)(e) statement so small it "literally could be read only with a magnifying glass?"[265] What if the document contained inaccuracies due to error or fraud? Clearly, there must be some minimum requirements to qualify as a passenger ticket under Article 3(2), and the particulars required by Article 3(1) seem as reasonable a candidate as any for the proper definition of passenger ticket.

The Supreme Court, per Justice Scalia, followed Judge Robinson's "plain meaning" approach.[266] The Court read Article 3(2) to uphold the damage cap in cases of tickets with "irregularit[ies]," including small type size.[267] The cap is waived "only [when] the carrier[ ] fail[s] to deliver any document whatever, or . . . [delivers] a document whose shortcomings are so extensive that it cannot reasonably be described as a 'ticket' (for example, a mistakenly delivered blank form, with no data filled in)."[268] Thus, Justice Scalia improved on the district court opinion by at least trying to reconcile the two sentences of Article 3(2). Yet, while he proclaimed his "unreasonably extensive shortcomings" test

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[264] *In re* KAL, 664 F. Supp. 1463, 1474 (D.D.C. 1985).

[265] *See* Chan v. Korean Air Lines, 490 U.S. 122, 129, 150 (1989).

[266] *Id.* at 122.

[267] *Id.* at 128.

[268] *Id.* at 128-29.

to be different in kind from *Lisi*'s minimal adequacy test, it merely drew the line in a different place, a place unsupported by the text of Article 3(1) at that.

Justice Scalia deserves credit for citing a parallel decision by the Supreme Court of Canada, thereby fulfilling the obligation of state parties to seek to harmonize their interpretation with the interpretations of other parties, especially where establishing uniformity is a primary purpose of the treaty. In most other respects, however, the Court failed to recognize the differences between treaty interpretation and the interpretation of domestic texts. The Court's treatment of the *travaux préparatoires* and reliance on the "plain meaning" of the unofficial English translation appear inconsistent with the Vienna Convention.[269] The Court also dismissed an attempt to reconcile Articles 3(1) and 3(2) because there is "no textual basis" for it, without inquiring into the object and purpose as the Vienna Convention mandates.[270]

The Court clearly rejected the view that Article 3 embodies a purpose of notice. In particular, the Court plainly repudiated *Lisi*.[271] Despite the attack on its predecessor, it

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[269] *See* discussion *supra* part III.

[270] The Court stated:

> It may seem reasonable enough that a carrier "shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability" when the ticket defect consists precisely of a failure to give the passenger proper notice of those provisions. But there is no textual basis for limiting the "defective-ticket-is-no-ticket" principle to that particular defect. Thus, the liability limitation would also be eliminated if the carrier failed to comply, for example, with the requirement of Article 3(1)(d) that the ticket contain the address of the carrier.

Chan, 490 U.S. at 130. If Justice Scalia had regard for the object and purpose of notifying passengers of the damage cap in order to enable self-protection, rather than relying solely on the text, he might have found it possible to distinguish Article 3(1)(e)'s requirement for a statement of notice from the other particulars in Article 3(1). Once Article 3(1)(e) had been distinguished, Justice Scalia might have reached the reasonable enough conclusion that the statement and the damage cap are linked. It may be for precisely this reason that Justice Scalia was unable to cite any cases waiving the damage cap for failure to print adequately the other four particulars in Article 3(1). Compare the Second Circuit's approach, *supra* note 232.

[271] It is unclear whether the Court regarded *Mertens* as consistent with Article 3(2), since *Mertens* involved physical delivery and so falls more squarely within the

might have been possible to reconcile Justice Scalia's opinion with *In re Warsaw*: although Article 3(2) does not require adequate notice, KAL is bound by the ten point rule established by the CAB Order and the Montreal Agreement. The Court argued, however, that the CAB Order should not be read into Article 3 and did not independently provide for unlimited liability as punishment for failure to comply with the ten point rule.[272] Instead, the United States is limited to the ordinary sanctions for CAB violations (*e.g.* suspending the airline).[273]

Justice Scalia did not consider the Montreal Agreement argument, believing that the Court's repudiation of *Lisi* rendered it unnecessary.[274] Instead, the Court left that issue to Justice Brennan, speaking for the four concurring Justices. Indeed, the issue was crucial to the concurrence. Since Justice Brennan stated that *Lisi* "may well have been correctly decided,"[275] the decision to concur rather than dissent hinged on two factors. First, even though 4.5 point type may be inadequate (especially given *Lisi*'s characterization of the facts),[276] KAL's eight point type "was surely 'adequate' under any conventional interpretation of that term."[277] Second, the concurrence expressly rejected *In re Warsaw*'s bright line rule: "The Montreal Agreement is a private agreement among airline companies, which cannot and does not purport to amend the Warsaw Convention."[278]

The concurrence thus recognized Montreal's anomalous character: neither a treaty nor a statute, but a contract among all airlines flying in the United States, waiving cer-

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purview of the second sentence. *See Chan*, 490 U.S. at 128; *see also In re KAL*, 664 F. Supp. 1463, 1473 (D.D.C. 1985).

[272] *Chan*, 490 U.S. at 126 n.2.

[273] *See In re KAL*, 664 F. Supp. at 1476.

[274] *Chan*, 490 U.S. at 126. Justice Scalia believed the Montreal Agreement could only be relevant as the "standard of adequate notice" under *Lisi* and since the Court rejected *Lisi* it need not identify the standard.

[275] *Chan*, 490 U.S. at 150.

[276] *See supra* note 230.

[277] *Chan*, 490 U.S. at 151.

[278] *Id.* at 150; *see also In re KAL*, 664 F. Supp. at 1476. The Second Circuit had rejected this distinction as "sophistic." *In re Warsaw*, 705 F.2d at 90-91.

tain of their treaty rights.[279] This unanimous view of the Court is consistent with the Vienna Convention on the procedures required to make or amend a treaty.[280] By analogy, it is also consistent with the Court's strict view of the procedures necessary to pass domestic legislation.[281]

Nevertheless, although the Montreal Agreement technically cannot be regarded as an amendment to the Warsaw Convention, one cannot help but wonder whether the Court should have read the two instruments together to determine passengers' contractual rights under Montreal. After all, the airlines signed this agreement waiving their treaty rights not for the benefit of their co-signatories but of a third party, the flying public. Thus, the decision deprived passengers, the Montreal Agreement's intended third-party beneficiaries, of standing to contest certain violations, holding in effect that passengers benefit from the higher damage cap and the defense waivers, but not from the ten point type requirement.[282]

Instead, the Supreme Court further shifted the balance of the Warsaw system's trade-offs in favor of the airlines. The Court eliminated the requirement of notice and thwarted the advances in uniformity of documentation by inviting the return of "*Lisi*-type" tickets. As a result, plaintiffs and lower courts are likely to become ever more frustrated with the Convention's damage cap, possibly fueling searches for new escape routes. The result, of course, would be less uniformity of substantive law and more uncertainty.

C. Remedies Available Beyond the Convention

Imagine a passenger on an international flight destined for the United States, who is severely burned when a flight attendant negligently spills coffee on her. Her injuries require hospital care, forcing her to miss work; all the while,

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[279] *See generally* Lowenfeld & Mendelsohn, *supra* note 25.
[280] Vienna Convention, *supra* note 66, arts. 6-25.
[281] INS v. Chadha, 462 U.S. 919 (1983).
[282] *See In re Warsaw*, 705 F.2d at 90-91.

she suffers much pain. Recognizing that her total damages clearly exceed the Montreal Agreement limit of $75,000, the carrier quickly offers to settle at $75,000. If she sues the airline for more than $75,000 under a state law action for *respondeat superior*, may the carrier have the case dismissed? If not, does the Convention nevertheless restrict her total remedies to the Montreal limit? May she sue the flight attendant for unlimited damages? Is the airline liable for attorney fees and interest on the judgment beyond the damage cap?

The Supremacy Clause underlies the answers to all of these questions: the Warsaw Convention preempts state law to the extent of any conflict.[283] If a claim falls within the scope of the Convention, plaintiffs may obtain remedies only to the extent consistent with the Convention. This suggests a two-step inquiry: a remedy is available beyond the Convention only if either (1) the claim falls outside the Convention's scope or (2) the Convention permits the remedy.

The first step turns largely on Article 1, which states that the Convention "shall apply" to "all international transportation . . . by aircraft for hire." Article 1 thus limits the Convention's scope: the Convention simply does not apply to surface transportation[284] or non-"international" flights.[285] Likewise, the Convention does not apply to gratuitous flights performed by someone other than "an air transpor-

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[283] *See* discussion *supra* part V.A. The courts have recognized two circumstances where, absent express intent to preempt, federal law impliedly preempts state law: where federal law occupies a field by regulating so pervasively as to leave no room for state action and where state laws might frustrate a national interest in uniformity. *See In re* Lockerbie, 928 F.2d 1267, 1274-75 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 331 (1991), and cases cited therein. In one case, the Supreme Court preempted a state law for being inconsistent with a federal statute intended to promote international uniformity. Ray v. Atlantic Richfield Co., 435 U.S. 151, 166-68 (1978), discussed in *id.* at 1277-78. *See generally* GERALD GUNTHER, CONSTITUTIONAL LAW 291-300 (12th ed. 1991).

[284] The Convention does govern surface transportation at the airport and may be extended by contract to other surface transportation connected with air travel subject to the Convention. Warsaw Convention, *supra* note 13, arts. 18, 31.

[285] *See supra* note 18.

tation enterprise"[286] or to flights "performed under the terms of any international postal convention."[287] The Convention places absolutely no restrictions on lawsuits by plaintiffs whose claims fall beyond its scope; their claims are subject entirely to domestic law.[288]

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[286] Warsaw Convention, *supra* note 13, art. 1(1).

[287] *Id.* art. 2(2).

[288] In one respect, it is quite difficult to identify the limits of the Convention's scope. If Articles 1 and 2(2) established the sole limits on the Convention's scope, the Convention would then preempt *all* other claims touching "international transportation . . . by aircraft for hire." In that case, Articles 17-19 would establish the sole basis for liability of "international" carriers, meaning that airlines would be immune from contractual, antitrust, environmental or other state law claims in their "international" operations. One court has expressly noted the "absurdity" of this position. Beaudet v. British Airways, 853 F. Supp. 1062, 1070 (N.D. Ill. 1994).

Thus, it appears that Articles 17-19 might also establish certain limits on the Convention's scope. For example, Article 17, which establishes carrier liability to passengers for personal injury or wrongful death, does not preempt state tort claims by employees. Instead, employee claims lie outside the Convention's scope, which must therefore be limited by Article 17. *Cf.* California v. ARC Am. Corp., 490 U.S. 93, 105 (1989) (holding that, in the absence of a contrary Congressional purpose, the Clayton Act does not preempt state law antitrust actions by indirect purchasers, even though federal law only provides for recovery by direct purchasers).

Nevertheless, the view that claims which lie outside Article 17 may proceed in state law should not be taken too far. It would gut the damage cap if carriers were liable under the Convention for claims under Articles 17-19 and were subject to unlimited liability in tort law for all other claims. It would be absurd, for instance, to conclude that, because Article 17 only applies to *dommage survenu*, the Convention limits compensatory damages, but plaintiffs could collect unlimited punitive damages under state law.

It also seems difficult to accept the Third Circuit's reasoning that the Convention limits remedies where an "accident" occurs, but a plaintiff whose injury is completely internal may collect unlimited damages. Abramson v. Japan Airlines, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985) (holding that aggravation of a passenger's hernia due to the crew's failure to provide adequate space for him to lie down to administer a self-help remedy is not an "accident" under Article 17, so the carrier is not liable under the Convention, but it may be liable under state law). Such reasoning would expose a negligent airline to greater liability to a passenger injured by fist fighting, falling down drunk, or attempting suicide than to innocent passengers killed in a plane crash. Price v. British Airways, 1992 WL 170679 (S.D.N.Y. 1992) (granting the defendant's motion for summary judgment where parties agreed the case was governed by the Convention, on the grounds that a fistfight between passengers is not an "accident," because it is unrelated to the operation of the aircraft); Levy v. American Airlines, 1993 WL 205857 (S.D.N.Y. June 9, 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994) (following *Price*, found that no "accident" occurred where a prisoner being transported attempted suicide and was restrained by federal agents and held that plaintiff's action could proceed under state law); Padilla v. Olympic Airways, 765 F. Supp. 835 (S.D.N.Y. 1991) (holding the carrier was not liable under the Convention because no "accident" occurred where a drunk

The second step of the inquiry hinges on Article 24, which reads in part: "any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention." Article 24 makes clear that the Convention prevents plaintiffs from circumventing its damage cap through state law. For claims falling within the Convention's scope, then, the Convention precludes the collection of any remedy above the damage cap, except as the Convention permits.[289]

In the face of Article 24, a federal judge in California plainly erred by holding that Article 22 did not limit the claims of survivors of deceased passengers who were themselves not passengers. The court reasoned that the Convention regulates the passenger-carrier contract, but not California wrongful death law.[290] In other words, the court believed that Article 22's damage cap applied only to dam-

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passenger collapsed in the bathroom, without addressing whether an action could proceed under state law because plaintiff did not bring a state law claim).

Instead, some limitations in Article 17 must not limit the Convention's scope, but instead limit the carrier's liability by preempting damages beyond Article 17 for claims arising from transportation within Article 1. *Cf.* United States v. Smith, 499 U.S. 160 (1991) (holding that the Federal Tort Claims Act immunizes federal employees from tort suits arising from acts within the scope of their employment, even where the Act excludes governmental liability for their acts). Perhaps recognizing the difficulty of drawing this line, the Supreme Court has twice declined to do so. Air France v. Saks, 470 U.S. 392, 407 (on state law claims where no "accident" occurred); Eastern Airlines v. Floyd, 499 U.S. at 546 (on state law claims where no *lésion corporelle* occurred). In deference to the Court, and because identifying the precise scope of the Convention falls beyond the scope of this article, this author will (at least for the present article) likewise decline.

[289] The mandatory language of Article 1—the Convention "*shall* apply"—supports this conclusion. *Compare* Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 534 & n.15 (1987) (holding permissive language of Hague Evidence Convention renders it non-exclusive) *with* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (holding that, due to its mandatory language, the Hague Service Convention "preempts inconsistent methods of service prescribed by state law in all cases . . . within Article 1"). To the extent that *Aérospatiale* may be understood to have established more general arguments against the exclusivity of treaties, these have been negated by *Volkswagenwerk*; furthermore, two of these arguments would not apply to the Warsaw Convention and the third is "illusory." *Aérospatiale*, 482 U.S. at 540 n.25, 565-66 (Blackmun, J., concurring).

[290] *In re* Air Crash in Bali, Indon., 462 F. Supp. 1114 (C.D. Ca. 1978), *rev'd*, 684 F.2d 1301 (9th Cir. 1982). The district court decision reeks of hostility to the damage cap, which it purports to justify with a "fledgling industry" argument. *Id.* at 1125. The opinion confesses as much, identifying itself as part of a trend that dem-

ages available under the Convention, without limiting plaintiffs' ability to collect higher damages under state tort law.

This distinction is untenable. The international community recognized in adopting Article 24 that a damage cap simply cannot function unless those damages it allows are exclusive. Permitting state law routes around the damage cap would thwart the Convention's purposes of uniformity and certainty.[291] The Convention also could not promote settlement of mass tort claims, because the prospect of other, higher remedies would gut the Convention's "essential bargain." Thus, Article 24 expressly applies the damage cap to "any action, however founded," in "the cases covered by" Articles 17-19. Since Article 17 includes actions for the "death . . . of a passenger," Article 24 applies to wrongful death actions and the Convention preempts state law to the extent it allows survivors to collect damages greater than $75,000.

Likewise, the Convention preempts state law to the extent that law allows plaintiffs to collect unlimited damages against airline employees. Since Articles 17 and 22 both refer to the liability of the carrier, plaintiffs have argued that the Convention's damage cap only protects the carrier, leaving other potential defendants (for example, employees, agents and manufacturers) open to suit for unlimited damages. The Second Circuit rejected plaintiffs' efforts to sue an airline pilot, however, recognizing that such damages would really be paid by the carrier and ultimately the flying public through higher ticket prices, which would defeat the purpose of certainty.[292] Also, such suits against em-

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onstrates "the courts' protection of injured parties from Warsaw's liability limitations." *Id.* at 1122-23.

[291] The court of appeals rejected the passenger-carrier distinction for thwarting "the full purposes and objectives of Congress," because uniformity and certainty both require that the Convention preempt state tort law. *In re Bali*, 684 F.2d at 1307-08 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[292] Reed v. Wiser, 555 F.2d 1079, 1081 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). The Supreme Court applied similar logic in upholding a mandatory forum clause in a form contract for cruise ship passengers, on the grounds that passengers also benefit from the clause through lower ticket prices due to the carrier's reduced legal

ployees would be governed by local tort law, thereby defeating uniformity.[293] The international community recognized this principle by expressly applying the damage cap to a carrier's employees and agents.[294]

Plaintiffs whose claims fall within the scope of the Convention thus have their remedies limited to the damage cap of $8,300, except as permitted by the Convention, such as the exceptions in Articles 3 and 25.[295] The most important exception for modern American plaintiffs, of course, is Article 22(4), which permits the Montreal Agreement, as a "special contract," to raise the damage cap to $75,000. More precisely, the Montreal Agreement sets the damage cap at "$75,000 *inclusive* of legal fees and costs, except that, in the case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be U.S. $58,000 *exclusive* of legal fees and costs."[296]

Thus, the Montreal Agreement plainly fixes the availability of attorney fees for claims falling within *its* scope, *i.e.*, wrongful death and personal injury claims stemming from "international" flights to or from the United States. A plaintiff in most U.S. jurisdictions who collected $60,000 in damages may be awarded $10,000 in attorney fees, because the total would remain below $75,000; plaintiffs in some jurisdictions may receive unlimited legal fees, but only $58,000 in other damages.

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costs. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991). The logic of *Shute* is much more compelling in the case of airline liability, where so much more money is involved that the added costs would have to be passed on to consumers. In essence, higher damage caps amount to requiring passengers to purchase travel insurance. Moreover, those added costs would unfairly require passengers of average income to subsidize wealthy passengers' insurance costs: all passengers would pay the same surcharge, but the wealthy would recover more for the same injury because the damages hinges on income. *See supra* note 6.

[293] *Reed*, 555 F.2d at 1089.

[294] Hague Protocol, *supra* note 57, art. 14; Guatemala City Protocol, *supra* note 57, art. 11. Likewise, when the international community authorized signatories to establish supplemented compensation plans, it forbade the taxation of carriers and their employees and agents to fund such schemes. Guatemala City Protocol, *supra* note 57, art. 14.

[295] *See* discussion *supra* part V.B.

[296] Montreal Agreement, *supra* note 51, at 552 (emphasis added).

Attorney fees present a harder question for some non-Montreal claims.[297] They are only available—even below the damage cap—if they are regarded as *dommage survenu*, or compensatory damages. And the text of Article 22, read in the light of its object and purpose of certainty, strongly suggests that attorney fees should not be available beyond the damage cap. This was the view of the United States, which, according to the Supreme Court, is "entitled to great weight."[298] But the United States was alone in this view. Countries where courts regularly award fees to the prevailing party (*e.g.* Britain) argued that the Convention did not affect this ordinary principle of their domestic judicial systems.[299] And, since the Supreme Court has also stated that the Convention's purpose of uniformity forbids its interpretation in a manner likely to cause difficulties for other signatories,[300] in this instance the purposes of uniformity and certainty suggest opposing interpretations.[301]

Related considerations apply to interest awards (pre- and post-judgment). Given the lengthy litigation which often follows air disasters, interest can amount to a significant percentage of the total damages.[302] If interest awards are regarded as compensatory,[303] then they are clearly permissible in cases where total damages remain below the damage cap or Articles 3 or 25 waive the cap.[304]

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[297] On attorney fees in cases concerning damaged cargo, *see* Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985).

[298] Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 536 n.19 (1987).

[299] Lowenfeld & Mendelsohn, *supra* note 25, at 507-08.

[300] Eastern Airlines v. Floyd, 499 U.S. 530, 552 (1991).

[301] Ratifying the Montreal Protocols would resolve this issue, because Article 2 amends Article 22 of the Convention to allow fees under some circumstances and provides that "[t]he costs of the action including lawyers' fees shall not be taken into account in applying the limits under this Article."

[302] Interest in one case totalled $31,604.79 on a $75,000 award. The court derived this figure from New York's statutory interest rates of 6% and 9%, which substantially undervalued the actual interest rates during the period 1975-82. O'Rourke v. Eastern Air Lines, 730 F.2d 842, 851 n.14 (2d Cir. 1984).

[303] *See, e.g.*, Zicherman v. Korean Air Lines, 814 F. Supp. 605 (S.D.N.Y. 1993), *aff'd in relevant part*, 1994 WL 685690 (2d Cir. Dec. 5, 1994).

[304] *Id.* (allowing pre-judgment interest where defendant was found guilty of *dol*).

The law becomes murky, however, where plaintiffs seek interest above the damage cap in cases not covered by Articles 3 or 25. In connected cases arising from the same crash, the Second and Fifth Circuits split on this issue; an evenly divided Supreme Court failed to resolve the split.[305] While recognizing the Convention's purposes of uniformity and certainty, the Fifth Circuit believed that the [*Montreal Agreement's*] purposes of raising awards and promoting efficient resolution of claims allowed courts to award both pre- and post-judgment interest even where the total damages exceed the cap.[306] The court's reasoning is implausible. Even if one accepts that a private agreement can modify the purposes of a treaty—and that Montreal in fact did so—an agreement which expressly sets a fixed damage cap of $75,000 cannot contain a purpose which justifies awarding damages above that cap.

Nevertheless, the Second Circuit also erred in reaching the opposite conclusion.[307] The court properly recognized that the purposes of uniformity and certainty argued against allowing interest awards above the cap, but erred by denying the existence of a third purpose: the efficient resolution of disputes.[308] The court thus avoided the need to resolve tensions among the Convention's purposes. Unfortunately, this approach proves too facile. A preferable approach would recognize all the Convention's purposes and then prioritize the overriding purposes of uniformity and certainty. Also, the court should have relied on the absence of textual support for an exception for interest to the fixed damage cap, as courts may not deviate from a treaty's text to "better" promote its purposes.[309]

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[305] Mahfoud v. Eastern Air Lines, 479 F. Supp. 1130 (W.D. La. 1982), *aff'd without opinion*, 729 F.2d 777 (5th Cir. 1984), *aff'd without opinion by an equally divided court*, 474 U.S. 213 (1985). An unresolved circuit split is particularly unfortunate in connected cases decided under a law intended to promote uniformity. *See* discussion *supra* part IV.

[306] Domangue v. Eastern Air Lines, 722 F.2d 256 (5th Cir. 1984).

[307] O'Rourke v. Eastern Air Lines, 730 F.2d 842 (2d Cir. 1984). *Accord* Deere & Co. v. Deutsche Lufthansa Aktiengesell-schaft, 855 F.2d 385, 391-92 (7th Cir. 1988).

[308] *O'Rourke*, 730 F.2d at 853-54 n.20.

[309] *See* discussion *supra* part III.A.

The Fifth Circuit is on stronger ground in awarding post-judgment interest, which more clearly promotes efficiency. Such awards also present fewer difficulties regarding certainty, because the principle of certainty hinges on fixing carriers' *costs*, not on the size of plaintiffs' awards per se. Given the time-value of money, awarding post-judgment interest merely keeps the carrier's liability costs constant at $75,000. Thus, refusing to award post-judgment interest would allow carriers to reduce their real costs below the Montreal limit by delaying payment of judgments, clearly thwarting the purpose of speedy resolution.[310] Further, the local concern for prompt execution of judicial decisions may well take precedence over the international interest in certainty of air litigation.

While it is clear that the Convention establishes the exclusive [*remedy*] for passenger claims, some courts have gone further, finding that the Convention also establishes the exclusive [*cause of action*].[311] In other words, under this view, the Convention not only preempts those state remedies which contravene the Convention, but preempts state tort actions altogether. Thus, a defendant airline could quash a suit brought under a state law theory such as negligence; plaintiffs could only sue under the Convention.[312] Justify-

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[310] Of course, a similar argument could also be made to support pre-judgment interest: in order to keep the carrier's liability costs constant, the $75,000 should be fixed from the time of the accident. *See O'Rourke*, 730 F.2d at 859-60 (Pratt, J., dissenting). This has indeed been the practice in other fields (*e.g.* Title VII). *Domangue*, 722 F.2d at 263-64. In those fields, however, federal law seeks to maximize both the compensation to the plaintiff and the punishment against the defendant, whereas the Convention's primary purpose is to restrict carrier liability. The contrary views of latter day U.S. policy-makers supporting greater recoveries for air passengers are legally irrelevant until the Convention is modified or terminated. *Floyd*, 499 U.S. at 552. It also seems inappropriate to award pre-judgment interest given the procedural posture of many aviation cases: carrier willingness to settle at the damage cap and plaintiff-driven litigation to circumvent the cap. *See O'Rourke*, 730 F.2d at 853-54 n.20; LEE S. KRIENDLER, 3 AVIATION ACCIDENT LAW 27-3-27-4 (1978).

[311] *See, e.g., In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 928 F.2d 1267, 1273-78 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985).

[312] To reach this conclusion, of course, one must first accept that the Convention itself creates an independent cause of action. After an early New York State case

ing this interpretation, the Second Circuit argued that state law causes "could [not] fail to frustrate the purposes" of uniformity and certainty.[313]

Nevertheless, the Second Circuit's interpretation cannot be reconciled with the Convention's text. Article 24's reference to "any action for damages, *however founded*,"[314] clearly contemplates the existence of causes other than the Convention.[315] Since the Convention permits other causes, it does not preempt state causes.[316] Instead, the Convention preempts only those state law remedies which conflict with the Convention's own, exclusive remedies.

This result is accurate because it is mandated by the Convention's text, but unfortunate because it is inconsistent with the Convention's purposes. Where a plaintiff brings a

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proclaimed, "[i]f the convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do," Salamon v. Koninklijke Luchvaart Maatschappij, N.V., 107 N.Y.S.2d 768, 773 (N.Y. Sup. Ct. 1951), the Second Circuit twice held the opposite. Komlos v. Compagnie Nationale Air France, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). After considering the French text of Article 24, implementation in Britain and Canada, the purpose of uniformity, *Noel*'s possible inconsistency with Article 17 and the benefits of the Multidistrict Litigation Act, the Second Circuit rightly reversed itself. Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

[313] *In re Lockerbie*, 928 F.2d at 1275.

[314] The governing French text of this phrase reads: "*à quelque titre que ce soit.*"

[315] *See* Rhymes v. Arrow Air, Inc., 636 F. Supp. 737 (S.D. Fla. 1986); *In re* KAL, 932 F.2d 1475, 1491-92 (D.C. Cir.) (Mikva, J., dissenting in part), *cert. denied sub nom.* Dooley v. Korean Air Lines, 112 S. Ct. 616 (1991). The opposing views of *Rhymes* and *In re* Lockerbie clashed in a later stage of the Lockerbie litigation, when plaintiffs who sued in both state and federal court in Florida opposed consolidation of their federal claims in the Eastern District of New York. The Second Circuit ordered the consolidation, Coker v. Pan Am. World Airways, 950 F.2d 839, 847-48 (2d Cir. 1991), following the D.C. Circuit's decision in *KAL* that *Van Dusen* does not apply to multidistrict litigation. *See* discussion *supra* part IV.B.

[316] Even the Second Circuit appears to recognize this point, distinguishing between "state causes of action *outside* the Convention," which it finds unavailable, and "state causes of action *under* the Convention," which may be available. *In re* Lockerbie, 928 F.2d at 1282-85 (emphasis added). It is unclear what results from this distinction. For example, do federal courts have federal question jurisdiction under 28 U.S.C. § 1331 for state actions in negligence "under" the Convention? Instead of (potentially) absorbing state law into federal law, the court should have recognized that the Convention does not preempt what it permits and thus leaves state causes alone.

state tort claim in state court without mentioning the Convention in a well-pleaded complaint, the defendant airline may not invoke a Convention defense as grounds to remove the suit to federal court.[317] This in turn prevents the suit's multidistrict consolidation,[318] thereby requiring wasteful, repetitive litigation.[319] Furthermore, by multiplying the number of judges to interpret the Convention and juries to determine critical facts, the existence of state causes threatens uniformity. In particular, reliance on state causes of action could result in the antithesis of uniformity—different results for similarly situated passengers on the same flight[320]—if juries in connected cases reached different verdicts on a central issue (*e.g.* the existence of *dol*) or if choice of law analysis required application of the laws of several states to passengers on the same flight. And since airlines cannot predict which state law(s) will apply, allowing state causes also destroys certainty.[321]

The Second Circuit accurately identified the threat state causes pose to the Convention's purposes, but erred by putting the Convention's purposes ahead of its text.[322] Since the text allows state causes, all the policy arguments against them are appropriately directed towards the political branches, not the courts. Indeed, as the Second Circuit observed in striving to promote uniformity by considering the Convention's implementation in other signatories (focusing on other federal states), "England, Canada and Austra-

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[317] The removal jurisdiction of federal courts may be based on a federal complaint but not on a federal defense. 28 U.S.C. § 1441. At least in theory, a defendant airline may be able to remove a disaster case to federal court based on its diversity jurisdiction. *See generally* PAUL M. BATOR, ET AL., HART & WECHSLER'S—THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1052-57, 1767-88 (3d ed. 1988).

[318] *See In re* Air Crash Disaster at Charlotte, 393 F. Supp. 1404, 1405 n.1 (J.P.M.L. 1975). The district court must have subject matter jurisdiction to transfer a claim. Bancohio Corp. v. Fox, 516 F.2d 29, 32 (6th Cir. 1975).

[319] The unnecessary costs of repetitive litigation are particularly troubling where the defendant is bankrupt. *See* Coker v. Pan Am. World Airways, 950 F.2d 839, 847 (2d Cir. 1991).

[320] *See* discussion *supra* part IV.

[321] *See In re* Air Disaster at Lockerbie, Scot., 928 F.2d 1267, 1273-76, 1287-88 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

[322] *See* discussion *supra* part III.A.

lia have all enacted implementing statutes that make an Article 17 action" exclusive.[323] But the court should have left this matter to Congress, instead of achieving by interpretation what other signatories achieved by legislation.[324] If Congress wishes to legislate to preempt state causes of action, it has the constitutional power to do so;[325] the President may also negotiate and, with Senate consent, enter a protocol to amend Article 24.

VI. CONCLUSION

In the adequate delivery line of cases, the Supreme Court promptly resolved a circuit split over the interpretation of the Warsaw Convention. In so doing, the Court imposed a single interpretation of the Convention on all courts in the United States, thereby avoiding forum shopping and choice of law problems.[326] In other words, the Court preserved the Convention's purposes of uniformity and certainty.

Nevertheless, it cannot be expected that the Supreme Court will resolve every possible circuit split in interpreting the Warsaw Convention. The Court simply receives too many petitions of certiorari, and grants too few writs, to re-

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[323] *In re Lockerbie*, 928 F.2d at 1274.

[324] *In re* Korean Air Lines Disaster of Sept. 1, 1985, 932 F.2d 1475, 1492 (D.C. Cir. 1991) (Mikva, J., dissenting in part). Note, however, that while other signatories may require legislation to implement a treaty at all, the American constitutional system allows judges to directly implement "self-executing" treaties. Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). *Cf.* Indemnity Ins. Co. v. Pan Am. World Airways, 58 F. Supp. 338, 340 (S.D.N.Y. 1944).

[325] The "necessary and proper" clause allows Congress to legislate to implement treaties. Missouri v. Holland, 252 U.S. 416 (1920). The foreign commerce, interstate commerce, and federal court jurisdiction clauses are also apropos.

[326] A split on this issue would have given plaintiffs an enormous financial interest in applying Second Circuit law, while defendant airlines would have had an equal incentive to prefer D.C. Circuit law. Such diverging interests could prevent consolidation under the Multidistrict Litigation Act, making air crash litigation an even greater burden on the judicial system. While the Judicial Panel on Multidistrict Litigation has consolidated cases in districts opposed by a party due to differences in the laws of the transferor and transferee districts, *In re* Air Crash Disaster near Hanover, N.H. on Oct. 25, 1968, 314 F. Supp. 62, 63 (J.P.M.L. 1970); *In re* Plumbing Fixtures Litig., 342 F. Supp. 756, 958 (J.P.M.L. 1972), those rulings assumed that the transferee court would follow the transferor's law, or assumption the D.C. Circuit rejected in *KAL*. *See* discussion *supra* part IV.B.

solve the countless issues sure to arise in future air crash litigation. And, at least once, an evenly divided court failed to resolve a circuit split.[327] Clearly, whenever the Court acts, it promotes uniformity—at least within the United States—by establishing a single rule for the lower courts to follow. But even where the Court resolutely settles a matter for the purposes of the Convention's implementation in the United States, it does not necessarily reach the right decision—"right" in the sense that it interprets the Convention according to the international law of treaty interpretation in such a way as to promote *international* uniformity.

Thus, it appears that reliance on the Supreme Court to ensure the proper implementation of the Convention would be misplaced. An alternative mechanism seems preferable: the establishment of a "shadow"[328] court to handle mass tort litigation under the Warsaw Convention. A shadow court responsible at the trial level for all international air disasters would promote uniformity even in cases which do not reach the Supreme Court.[329]

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[327] Mahfoud v. Eastern Air Lines, 479 F. Supp. 1130 (W.D. La. 1982), *aff'd without opinion*, 729 F.2d 777 (5th Cir. 1984), *aff'd without opinion by an equally divided court*, 474 U.S. 213 (1985).

[328] A "shadow" court is so-named because it is not a permanent organization, but is rather a panel of federal judges who ordinarily sit as generalists, but who come together temporarily to handle a specific matter. Thus, a group of judges could be assigned to hear all mass tort litigation arising under the Warsaw Convention, using a definition of mass torts based on the number of plaintiffs and the amount of damages to ensure that only major, complex cases triggered the shadow court mechanism. The worst air disasters would satisfy, for example, the conditions of eligibility proposed by an ABA Commission: "at least 250 civil tort claims arising from a single accident . . . each of which involves a claim in excess of $50,000 for wrongful death, personal injury, or physical damage to or destruction of tangible property . . . pending in different federal district courts or in one federal district court and one or more state courts." ABA, COMM'N ON MASS TORTS, REP. TO THE HOUSE OF DELEGATES (1989). *Cf.* Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 TOURO L. R. 1, 14-16 (1988) (discussing proposed legislation to provide for federal subject matter jurisdiction in "multiparty, multiforum" cases in which at least twenty-five people bring claims for at least $50,000 arising from a "single event or occurrence").

[329] *Cf.* Edward D. Re, *Litigation before the United States Court of International Trade*, 19 U.S.C.A. 1994 Supp. xiii, xviii (arguing that the creation of a single trial court for international trade litigation promotes the Constitutional mandate for uniformity in tariffs by ensuring "the consistent application of the customs and trade laws").

Furthermore, a shadow tribunal would provide advantages over the present system for mass tort management.[330] The existence of such a tribunal would preclude the need for the Judicial Panel on Multidistrict Litigation to determine whether to consolidate. There would be no risk of the mess which would follow should the Panel decide against consolidation: conflicts of law, forum shopping, inequities resulting from different treatment for identically situated plaintiffs, transfer motions, etc. And a shadow court is even preferable to consolidation, because it brings the case together for trial as well as pre-trial and it precludes the possibility that a circuit court may split from the District of Columbia Circuit's decision on *KAL*'s *Van Dusen* question in a Warsaw Convention case.[331]

Nevertheless, the vast majority of air disaster cases are (and remain) consolidated,[332] and Judge Weinstein believes that existing mechanisms handle such "single event" cases well enough that they do not warrant resolution by shadow courts, which should be reserved for "mass exposure" cases like asbestos litigation.[333] This may be true for domestic air disasters, but a shadow court offers additional advantages for litigation involving international crashes by serving as a mechanism to implement the Warsaw Convention.

By eliminating the multiplicity of trial courts, a shadow tribunal would necessarily promote uniformity and certainty—in much the same way that a Supreme Court decision does, but on a more routine basis. Through experience, the court would gain familiarity with the basics of treaty interpretation (*e.g.* the Vienna Convention), thereby promoting consistency with other signatories' interpretations (*i.e.* uniformity). The court should have access to more considerable support resources than would individ-

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[330] To realize these benefits, the shadow court's organic statute should expressly preempt state law causes of action for matters falling within the scope of the Convention. *See* discussion *supra* part V.C.

[331] *See supra* note 157.

[332] TURLEY, *supra* note 128, §§ 12.01, 12.06 (1986).

[333] *See* Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 5-7 (1986).

ual district judges: access to the *travaux préparatoires*, French-speaking staff, and an extensive comparative law library.[334] In short, a court which routinely interpreted a treaty could be expected to be sensitive to the differences between interpreting treaties and statutes, which, in the end, may prove even more valuable than its subject-matter expertise.[335]

Even so, however, simply establishing a shadow tribunal would be insufficient, because it fails to address the root cause of the misinterpretations of the Warsaw Convention: the damage cap is too low. The vast difference between the Convention's maximum remedies and the damages which plaintiffs can collect under an ordinary tort action for wrongful death or personal injury encourages plaintiffs to litigate. Furthermore, the cap is so low as to encourage ju-

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[334] *See* RESTATEMENT (THIRD), *supra* note 67, § 325, rpts. note 3. For a good comparative study of judicial implementation of the Convention, *see generally* GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS (1977).

[335] A less dramatic proposal would offer some of the advantages of a shadow court; the Judicial Panel on Multidistrict Litigation could routinely transfer Warsaw Convention disaster cases to the same district court, such as the Eastern District of New York or the District of the District of Columbia. The Panel's reasoning in *In re KAL*, 575 F. Supp. at 343, would allow regular consolidation before an "expert" district. That district would then receive the additional resources proposed for the shadow court in the accompanying text. Alternatively, the Panel could regularly consolidate cases before a small number of courts in different circuits, thereby allowing fresh, independent analysis of the issues, unencumbered by circuit precedents. Such an approach, of course, would depend on the Supreme Court to preserve uniformity by resolving any resulting circuit splits.

These approaches would require certain changes in the Panel's policies for selecting the transferee forum, particularly its preference for consolidation in the district where the situs of an accident is located. *See In re* Mid-Air Collision near Fairland, Ind., 309 F. Supp. 621, 622-23 (J.P.M.L. 1970). While the reasoning of *KAL* seems to support frequent consolidation in an "expert" district, the Panel had previously rejected an argument for consolidation in the D.D.C. based on its experience with unrelated, though similar, securities litigation. *In re* Tenneco Inc. Sec. Litig., 426 F. Supp. 1187-89 (J.P.M.L. 1977). The Panel also is "reluctant" to consolidate a case in a district where none of the actions are pending, though there is precedent for doing so. *In re* Sundstrand Data Control, Inc. Patent Litig., 443 F. Supp. 1019, 1021 (J.P.M.L. 1978). And, in a case with no actions pending in the Western District of Washington, the Panel rejected an argument by defendant Boeing which would have resulted in the consolidation of most Warsaw Convention cases there, where Boeing's headquarters are located. *In re* Air Crash Disaster near Papeete, Tahiti, on July 22, 1973, 397 F. Supp. 886, 887 (J.P.M.L. 1975).

dicial sympathy for the plaintiffs—resulting in a pattern of pro-plaintiff precedents, which in turn encourages subsequent plaintiffs to sue as well.[336] This failure has prevented the Convention from facilitating settlements, so litigation has been the norm in air disasters. Despite the fact that the United States was advocating a higher limit even back at the Montreal Conference, the damage cap has not been raised in over twenty-five years—a period during which tort remedies generally have skyrocketed. This fact has brought the otherwise sound Warsaw system into disrepute, and may some day even result in a judgment that the cap is so low as to be unconstitutional. One can propose remedies to narrow loopholes in the Convention, and to foreclose alternative causes of action, but these remedies can only be temporary. Unless the root problem is addressed by raising the damage cap to an equitable level (and perhaps indexing it to stay there despite inflation),[337] the judiciary will continue to find ways to circumvent it.

Nevertheless, it is not the role of the judiciary to address this root problem. So long as the Warsaw Convention re-

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[336] Indeed, it may be said that plaintiffs today are escaping from the $75,000 cap as beneficiaries of the 1960s precedents in which judges demonstrated their hostility to the pre-Montreal cap of $8300.

[337] The Senate Foreign Relations Committee and the Supreme Court, in dictum, have recognized the need for periodic adjustments of a fixed damage cap. Marian Nash Leich, *Current Development: The Montreal Protocols to the Warsaw Convention on International Carriage by Air*, 76 AM. J. INT'L L. 412, 414 (1982) (quoting a Committee report stating that "it will be desirable to seek continued increases in the agreed limit to keep pace with inflation and other circumstances"); *Franklin Mint*, 466 U.S. at 256 (recognizing that "in the long term, effectuation of the Convention's objective of international uniformity might require periodic adjustment by the CAB of the dollar-based limit [of liability for baggage] to account both for the dollar's changing value relative to other Western currencies and, if necessary, for changes in the conversion rates adopted by other Convention signatories").

While indexing would theoretically ensure that damage awards remain at equitable levels despite inflation, it would raise numerous practical difficulties if included in a uniform Convention. If damages were indexed separately to each nation's inflation rate, it would create a public perception that awards were unfairly rising faster in some countries, even though uniformity in real values would be preserved. Conversely, if damages were indexed to an average world inflation rate (or to the inflation rate of a single country), then passengers in low-inflation countries would be eligible to receive higher real awards than would residents of high-inflation countries.

mains the "supreme law of the land," the judiciary must enforce it—subject only to constitutional limitations.[338] A proper solution may only be effected by the political branches. By refraining from waiving the damage cap ad hoc in high publicity cases, the courts would allow public concerns to heighten until the public compelled Congress to act, thereby resulting in a generally applicable, democratic solution.

Of course, a Congressionally-enacted solution would not necessarily work. In particular, simply raising the damage cap would not suffice. Just as plaintiffs today continue to benefit from the pre-Montreal precedents, future plaintiffs could benefit from today's law even if the damage cap were increased. A lasting solution would require a break from current law, a change sharp enough to instruct the courts to abandon the anti-Warsaw precedents. Thus, for example, Congress should clearly indicate the extent to which the Convention preempts other causes of action and the permissible sanctions judges may impose against airlines found guilty of "willful misconduct" or failure to provide an Article 3(1)(e) statement in ten point type. Congress could also usefully define such concepts as "willful misconduct" and "passenger ticket."

Congress could raise the damage cap by statute, either by overriding Article 22[339] (thereby placing the increased burden on the airlines) or by creating a supplemental compensation scheme (thereby placing the burden on the taxpayers). In fact, the Clinton Administration has endorsed ratification of the Montreal Protocols, which specifically permit such supplementary compensation schemes.[340]

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[338] *See* discussion *supra* part V.A.

[339] Under the "later in time" rule of the Supremacy Clause, Congress always retains the power to override the domestic effects of treaties with subsequent legislation. *See* RESTATEMENT (THIRD), *supra* note 67, § 115, cmt. a, rptr. note 1. As such an approach would involve a clear breach of U.S. international obligations, *Id.* at cmt. b; HENKIN, CASEBOOK, *supra* note 68, at 206-07 (quoting Secretary of State Charles Evans Hughes) it should be disfavored, particularly where internationally acceptable solutions are available.

[340] Senator Mitchell proposed a compensation plan in the 102d Congress, which passengers would fund by paying an earmarked tax of three to five dollars on ticket

This approach would enable the United States to work with the world community to forge a new consensus, thereby satisfying its equitable concerns without breaching its international obligations.

Indeed, apart from the particular merits of the plan under consideration, it is preferable for the United States to effect change by negotiating and ratifying a new protocol, rather than enacting a statute in breach of the Warsaw Convention. Such an approach would enable the United States to retain the Convention's benefits generally, while eradicating the unacceptably low damage cap and directing the courts to interpret the Convention to maximize the fulfillment of its purposes: promoting international uniformity, encouraging dispute resolution by settlement, and maintaining a damage cap at a level which protects passengers' equitable interests, airlines' financial interests, and the interests of both in certainty.

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sales, to be collected by the airlines. The scheme would cover all compensatory damages above the cap. S. 2945, 102d Cong., 2d Sess. (1992). It seems likely that the Senate would require the establishment of a supplementary compensation mechanism as a condition of its consent to the Montreal Protocols. Thomas J. Whalen, *The Supplemental Compensation Plan to the Warsaw Convention*, 11 LLOYD'S AVIATION LAW 2, 3-4 (Aug. 1, 1992). The Senate may require domestic acts by the President as a condition of its consent to entering a treaty. HENKIN, FOREIGN AFFAIRS, *supra* note 61, at 134 & nn. 20, 24.