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## The Interpretation of the Warsaw Convention in Wrongful Death Actions

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# The Interpretation of the Warsaw Convention in Wrongful Death Actions

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## **Abstract**

Demonstrates that the Warsaw Convention, properly interpreted, creates a liability limitation which is legal and not contractual. The Convention's limits apply, by its terms, to any cause of action arising out of injury in international air transportation regardless of whether it is founded in contract or in tort or in any other manner.

## NOTES

### THE INTERPRETATION OF THE WARSAW CONVENTION IN WRONGFUL DEATH ACTIONS

#### INTRODUCTION

The Warsaw Convention<sup>1</sup> is a multilateral treaty drafted at Warsaw, Poland in 1929 for the purpose "of regulating in a uniform manner the conditions of international transportation by air."<sup>2</sup> The Convention accomplished this by establishing uniform rules governing documentation and the resolution of claims arising out of international air transportation.<sup>3</sup> The provisions of the Convention which impose a presumption of liability against the carrier<sup>4</sup> while, at the same time, limiting the amount of that liability<sup>5</sup> were considered to be the most important.<sup>6</sup>

There has been a considerable amount of litigation concerning the conditions and circumstances under which the Warsaw Con-

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. Although not a participant at the Warsaw conference which drafted the Convention, the United States, by the advice and consent of the Senate, on June 15, 1934 adhered to the Treaty. The President declared adherence on June 27, 1934 and the declaration was deposited, by the United States, at Warsaw on July 31, 1934 and was proclaimed effective on October 29, 1934. See *Warsaw Convention, Relative to International Transportation by Air*, 1934 U.S. AV. REP. 245.

2. Warsaw Convention, *supra* note 1, Preamble.

3. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967) [hereinafter cited as Lowenfeld & Mendelsohn].

4. Warsaw Convention, *supra* note 1, art. 17.

5. The Convention provides that the carrier's liability for injuries to passengers "shall be limited to the sum of 125,000 francs," Warsaw Convention, *supra* note 1 art. 22(1). The limitation of 125,000 francs or approximately \$8300 no longer applies to flights to, from or with an agreed stopping place in the United States. On these flights the limits have been raised to \$75,000 by the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement No. 18900, approved by CAB Order No. E-23680, May 13, 1966, CAB Docket 17325, 31 Fed. Reg. 7302 (1966) [hereinafter cited as Montreal Agreement].

6. Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw Minutes 20 (remarks of Mr. DeVos), 205 (remarks of Mr. Giannini) (R. Horner & D. Legrez trans. 1975) [hereinafter cited as Warsaw Minutes]; Lowenfeld & Mendelsohn, *supra* note 3, at 499.

vention's liability limitations will apply.<sup>7</sup> The recent decision in *In re Air Crash in Bali, Indonesia*,<sup>8</sup> however, has raised the further question to whom these limitations apply. The *Bali* court, applying California law to wrongful death actions arising out of the April 22, 1974 air crash in Bali, Indonesia, determined that the Warsaw Convention merely provides air carriers with a contractual limitation of liability,<sup>9</sup> and that such a limitation can be enforced only against those in privity of contract.<sup>10</sup> The court concluded that since the wrongful death plaintiffs were not parties to the contract of carriage, the Convention could not be applied to diminish their recovery.<sup>11</sup>

The result in the *Bali* case cannot be treated as merely a quirk of local law. If the proposition that the Warsaw Convention merely provides for a contractual limitation of liability is accepted, similar results can be expected in other jurisdictions. The California wrongful death statute,<sup>12</sup> to the extent that it creates an independent cause of action with a measure of damages distinct from that of any cause of action the deceased may have had,<sup>13</sup> is in conformity with the wrongful death statutes<sup>14</sup> of most jurisdictions.<sup>15</sup> There is a distinction, however, in that most states having such statutes require, as a condition precedent to maintaining an action, that the deceased, at the time of his death, had the right to sue,<sup>16</sup> while there is no such requirement in the California statute.<sup>17</sup> In the

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7. See, e.g., *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975) (mental anguish and hijacking); *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964) (charter flights), *aff'd*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Ross v. Pan Am. Airways, Inc.*, 299 N.Y. 88, 85 N.E.2d 880 (1949) (delivery of ticket).

8. 462 F. Supp. 1114 (C.D. Cal. 1978).

9. *Id.* at 1117, 1126.

10. *Id.*

11. *Id.*

12. Cal. Civ. Proc. Code § 377 (West Cum. Supp. 1979).

13. *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1117 (C.D. Cal. 1978); *Marks v. Reissinger*, 35 Cal. App. 44, 51-53, 169 P. 243, 246-47 (1917); *Earley v. Pacific Elec. Ry.*, 176 Cal. 79, 81, 167 P. 513, 514 (1917).

14. Similar statutes are in effect in a majority of states. 1 SPEISER, RECOVERY FOR WRONGFUL DEATH § 2:1 (2d ed. 1975). These statutes are patterned after Lord Campbell's Act, 9 and 10 Vict. C.93 (1846). *Id.* They are sometimes referred to as "true" wrongful death statutes. *Id.* §§ 5:1, 5:14. This Note will deal exclusively with this type of statute and actions arising thereunder.

15. See generally *id.* § 3:1.

16. *Id.* § 5:14.

17. *Robinson v. Leigh*, 153 Cal. App. 2d 730, 315 P.2d 42 (1957); *Marks v. Reissinger*, 35 Cal. App. 44, 169 P. 243 (1917); *Earley v. Pacific Elec. Ry.*, 176 Cal.

context of a pre-injury contractual limitation of liability this may be a distinction without a difference. Since the amount and measure of damages in a "true" wrongful death action are different than in the cause of action of the deceased,<sup>18</sup> it would seem to be of no consequence that the amount recoverable in the wrongful death action is greater than that which the injured person could have recovered in his own behalf. It is the existence of the right of action in the deceased and not its measure which satisfies the technical requirement.<sup>19</sup>

If the decision in *Bali* is followed, the probability that a significant number of jurisdictions would not apply a contractual limitation of liability against the surviving next of kin presents a very real danger that the Warsaw Convention may be circumvented in wrongful death actions. This would frustrate one of the main objectives of the Convention<sup>20</sup> by excluding from its purview a large number of cases to which it explicitly applies.<sup>21</sup>

This Note will demonstrate that the Warsaw Convention, properly interpreted, creates a liability limitation which is legal and not contractual. The Convention's limits apply, by its terms, to any cause of action arising out of an injury in international air transportation regardless of whether it is founded in contract or in tort or in any other manner.

### I. INTERPRETING THE WARSAW CONVENTION

As recognized by the court in *Bali* the Warsaw Convention is a federal treaty.<sup>22</sup> As such it has the force and effect and is of equal stature with any other federal law.<sup>23</sup> Although the *Bali* court, in in-

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79, 167 P. 513 (1917). Even in this respect, California is not alone. *See, e.g.*, *Brown v. Moore*, 247 F.2d 711 (3d Cir.) (applying Pa. law), *cert. denied*, 355 U.S. 882 (1957); *Goodyear v. Davis*, 114 Kan. 557, 220 P. 282 (1923) (construing Federal Employer's Liability Act); *Phillips v. Community Traction Co.*, 46 Ohio App. 483, 189 N.E. 444 (1933); *Rowe v. Richards*, 35 S.D. 201, 151 N.W. 1001 (1915).

18. *Supra* note 15.

19. *See, e.g.*, *Mangus v. Miller*, 35 Colo. App. 335, 535 P.2d 219 (1975); *Lincoln v. Detroit & M. Ry.*, 179 Mich. 189, 146 N.W. 405 (1914).

20. The fundamental objective of the Convention was to establish uniform rules governing international transportation by air. *See* note 29 *infra* and accompanying text.

21. Article 17 provides in pertinent part: "The carrier shall be liable for damage sustained in the *event of the death* or wounding of a passenger . . ." Warsaw Convention, *supra* note 1 art. 17 (emphasis added).

22. 462 F. Supp. at 1124.

23. *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971); U.S. CONST. art. VI.

terpreting the Convention, felt constrained to "consider what result is demanded by federal public policy,"<sup>24</sup> it apparently failed to appreciate that the Convention is itself an expression of that policy.<sup>25</sup> The accomplishment of the purposes and goals of a treaty or other compact is the national policy in the areas affected.<sup>26</sup> Thus, the federal public policy relating to international air law is found by an examination of the purposes and goals of the Warsaw Convention. This approach is analogous to the widely accepted doctrine that a treaty should be interpreted so as to give effect to its purposes to the greatest extent possible.<sup>27</sup> It is necessary, therefore, to investigate the purposes of the Convention in order to properly and faithfully construe it and apply its provisions to the question to be resolved.<sup>28</sup>

The drafters' conception of the Convention's purposes, as reflected in the preamble, was to "regulate in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier."<sup>29</sup> The drafters were interested in uniformity in the results of the Convention's application.<sup>30</sup> The desired uniformity cannot be attained if the Convention's provisions are construed solely

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24. 462 F. Supp. at 1124.

25. See *United States v. Pink*, 315 U.S. 203 (1942).

26. *Id.* at 224-25.

27. *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940); *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed v. Wiser*, 555 F.2d 1079, 1088 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966).

28. See generally 5 MOORE, INTERNATIONAL LAW DIGEST § 763 (1906).

29. Warsaw Convention, *supra* note 1, Preamble. The primacy of the objective of providing a uniform system governing international air transportation has been recognized in the case law. See *Reed v. Wiser*, 555 F.2d 1079, 1083 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). The Second Circuit has recently overturned its own long standing interpretation of the Convention, as not creating a cause of action, basing its decision largely on the need for uniformity in international air law. *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). The objective of uniformity has also been recognized by the commentators. See, e.g., 1 P. MARTIN, J. MCCLEAN, E. MARTIN, J. BRISTOW & J. BROOKS, SHAWCROSS AND BEAUMONT AIR LAW 338 (4th ed. 1977) [hereinafter cited as SHAWCROSS & BEAUMONT]; Lowenfeld & Mendelsohn, *supra* note 3, at 498; Orr, *The Warsaw Convention*, 31 VA. L. REV. 423, 425-26 (1945); Comment, *Air Passenger Deaths Resulting from Injuries Sustained on or Over the High Seas and at Unknown Places; Including Considerations of the Death on the High Seas Act, of the Warsaw Convention, and of Presumptions of Foreign Law*, 41 CORNELL L. Q. 243, 259 (1956).

30. See Warsaw Minutes, *supra* note 6, at 34-36, 40-41, 66.

within the framework of contract or tort law as applied in the differing legal systems of the various member states. The delegates undertook their task free of the constraints of existing legal systems.<sup>31</sup> They met to create an entirely new system of law, an international code of the air.<sup>32</sup>

While the Convention deals with many aspects of international air carriage, the articles dealing with the liability of the carrier were considered to be of particular importance.<sup>33</sup> In accomplishing the fundamental objective of establishing a uniform system of liability the Convention provided a limitation of liability<sup>34</sup> in favor of and a presumption of liability<sup>35</sup> against the carrier. While it was believed that this system would benefit passengers and shippers by assuring them a cause of action, lessening litigation costs and eventually resulting in lower transportation charges,<sup>36</sup> it is generally accepted that the main purpose in limiting the liability of the carriers was to foster the growth of the then infant industry.<sup>37</sup> The limitation was meant to protect the carrier from the potentially destructive liability to which a carrier might be exposed in the case of an air disaster.<sup>38</sup> This protection, in addition to attracting capital which might otherwise be invested in safer industries, provided the carrier with a more equitable and certain basis for obtaining insurance.<sup>39</sup>

31. *Id.* at 19 (remarks of Mr. DeVos).

32. *Id.* at 23 (remarks of Mr. DeVos).

33. See note 6 *supra* and accompanying text.

34. See note 5 *supra* and accompanying text.

35. The result of shifting the burden of proof to the carrier to show that it was not negligent is reached by reading art. 17, see note 21 *supra*, together with art. 20(1) which provides: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Warsaw Convention, *supra* note 1, art. 20(1). Under the terms of the Montreal Agreement, note 5 *supra*, the carriers agree not to invoke the art. 20(1) defense, thereby establishing a system of absolute liability on covered flights. See generally Lowenfeld & Mendelsohn, *supra* note 3, at 599-601.

36. Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules Relating to International Transportation by Air, S. Exec. Doc. No. G., 73d Cong., 2d Sess. 3-4 (1934), reprinted in 1934 U.S. AV. REP. 239, 242 (report of Secretary of State Cordell Hull) [hereinafter cited as Report of Cordell Hull].

37. See, e.g., *Dunn v. Trans World Airlines Inc.*, 589 F.2d 408, 410-11 (9th Cir. 1978); *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975); 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.01(2) (1978); Lowenfeld & Mendelsohn, *supra* note 3, at 498.

38. 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.01(2) (1978).

39. Report of Cordell Hull, *supra* note 36, at 292; D. GOEDHUIS, NATIONAL AIR

The presumption of liability of the carrier, while facilitating the recovery of the passenger and reducing litigation costs,<sup>40</sup> also serves as a necessary quid pro quo for the limitation of liability.<sup>41</sup> In effect, the Convention trades off the presumption of liability for the liability limitation.<sup>42</sup> In view of the difficulties an injured passenger might encounter in prosecuting a cause of action under differing legal systems this was considered a valid compromise.<sup>43</sup>

The balance thus struck by the drafters will undoubtedly collapse if either provision is effectively circumvented. If the Convention's liability limitation is avoided "not only will the purpose of defining the limits of the carrier's obligations be circumvented, but in the process the Convention's most fundamental objective of providing a uniform system of liability and litigation rules for international air disasters will be abandoned as well."<sup>44</sup> Although it is often argued that the airline industry is no longer in its infancy and that the original motivation for the Convention is no longer present,<sup>45</sup> it is clear that the High Contracting Parties have not abandoned the Convention's primary goal of uniformity of liability in international air carriage.<sup>46</sup>

The notion that the airline industry has matured beyond the need for protection from catastrophic loss is itself subject to ques-

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40. See note 36 *supra* and accompanying text.

41. H. DRION, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* 28 (1954) [hereinafter cited as DRION]; Whitehead, *Still Another View of the Warsaw Convention*, 33 J. AIR L. & COM. 651, 654 (1967) [hereinafter cited as Whitehead].

42. *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 411 (9th Cir. 1978); Lowenfeld & Mendelsohn, *supra* note 3, at 500.

43. Report of Cordell Hull, *supra* note 36, at 242; *Hague Protocol to Warsaw Convention: Hearings on Exec. H Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 20 (1965) (statement of N.E. Halaby, Administrator, FAA) [hereinafter cited as *Hague Hearings*].

44. *Reed v. Wiser*, 555 F.2d 1079, 1092 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

45. See, e.g., *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1125-26 (C.D. Cal. 1978); *Hearings on Exec. A&B Before the Senate Comm. on Foreign Relations*, 95th Cong. 1st Sess. 101 (1977) (prepared statement of Lee S. Kreindler) [hereinafter cited as *Aviation Protocol Hearings*].

46. *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975). See *Benjamins v. British European Airways*, 572 F.2d 913, 917 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); Swart, *Prospects of Amendment of the Warsaw Convention*, 33 J. AIR L. & COM. 616, 617 (1967) [hereinafter cited as Swart]; 54 DEP'T STATE BULL. 955-57 (June 13, 1966).



tion and has been strongly criticized.<sup>47</sup> Furthermore, even if we were to assume that the United States carriers have grown to a position of sufficient financial strength to meet the growing burdens of capital expenditure and increased loss exposure,<sup>48</sup> the same is not true of many of the smaller foreign carriers.<sup>49</sup> For the United States to adopt a parochial attitude and either impose on these carriers an unlimited liability or, in the alternative, effectively deny them access to the American travelling public would expose them to the risk of economic failure and could lead to undesirable diplomatic consequences.<sup>50</sup>

The *Bali* court argued that the Convention's remaining utility is only as "a general international expression of the need for uniform air laws"<sup>51</sup> and that the "liability limitation is no longer viable."<sup>52</sup> While this might be so if the *Bali* decision is accepted, it does not follow from any cited authority.<sup>53</sup> In making this assertion the court contended that the United States denunciation of the Warsaw Convention, the approval of the Montreal Agreement and subsequent withdrawal of denunciation indicated that the United States preferred the right to a high damage recovery to uniformity

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47. *Aviation Protocol Hearings*, *supra* note 45, at 41 (prepared statement of James E. Landry, Vice President and General Counsel, Air Transp. Assoc. of Am.), 114 (report of ABA, Sec. of Int'l Law); Stephen, *The Montreal Conference and International Aviation Liability Limitations*, 33 J. AIR L. & COM. 554, 581-86 (1967) [hereinafter cited as Stephen].

48. See I Minutes, Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol, Montreal, February 1-15, 1966, ICAO Doc. 8584-LC/154-1, viii [hereinafter cited as Montreal Minutes]; SHAWCROSS & BEAUMONT, *supra* note 29, at 341.

49. Montreal Minutes, *supra* note 48, at 14 (remarks of the delegate of the U.S.S.R.), 16 (remarks of the delegate of the Congo), 19-20 (remarks of the IATA observer), 21 (remarks of the delegate of Mali); Stephen, *supra* note 47, at 585.

50. *Aviation Protocol Hearings*, *supra* note 45, at 41 (prepared statement of James E. Landry, Vice President and General Counsel, Air Transp. Assoc. of Am.), 50 (statement of Floyd D. Hall, Chairman of the Exec. Comm., IATA), 110 (prepared statement of Charles N. Brower, ABA Int'l Law Sec.); Montreal Minutes, *supra* note 48, at 14 (remarks of the delegate of Senegal), 21 (remarks of the delegate of Mali).

51. 462 F. Supp. at 1124.

52. *Id.*

53. The only authority cited by the court is a Department of State Press Release, *id.*, which declares that "the interests of the United States travelling public and of international civil aviation would be best served by continuing within the framework of the Warsaw Convention . . ." Dep't of State Press Release No. 110 (May 13, 1966), *reprinted in*, 54 DEPT STATE BULL. 955-56 (June 13, 1966). It goes on to say that the acceptance of the Montreal Agreement has "assured the continuation of the uniform system of law . . . and . . . demonstrated again the viability of the system . . ." *Id.*

with respect to the liability limitation.<sup>54</sup> It is, of course, indisputable that the United States dissatisfaction with the Warsaw system was due to the low level of the liability limitation.<sup>55</sup> The withdrawal of denunciation in conjunction with the consummation of the Montreal Agreement, however, reaffirmed the United States commitment to the Warsaw system, provided that the level of the limitation was sufficient, in the eyes of the government, to protect American passengers.<sup>56</sup>

During the time since the approval of the Montreal Agreement, the United States has supplied the primary impetus in efforts to modernize the Warsaw system.<sup>57</sup> The improvements sought include provisions allowing carriers to take advantage of technological advances such as electronic ticketing,<sup>58</sup> but the main thrust of the United States effort has been to increase the level of recoveries for personal injuries and death.<sup>59</sup> Any doubt as to the official United States position with respect to the continued vitality of the Warsaw system was removed during the 1977 Senate hearings on the Montreal Protocols.<sup>60</sup> At that time, representatives of the Civil Aeronautics Board, the Department of State and the

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54. 462 F. Supp. at 1124.

55. Dep't of State Press Release No. 268 (Nov. 15, 1965), reprinted in 53 DEP'T STATE BULL. 923-25 (Dec. 6, 1965); *Hague Hearings*, supra note 43, at 19 (statement of N.E. Halaby, Administrator, FAA). See, e.g., *Reed v. Wiser*, 555 F.2d 1079, 1086 (2d Cir.), cert. denied, 434 U.S. 922 (1977); *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975).

56. Dep't of State Press Release No. 110 (May 13, 1966), reprinted in, 54 DEP'T STATE BULL. 955-56 (June 13, 1966).

57. *Aviation Protocol Hearings*, supra note 45, at 13 (prepared statement of Linda Heller Kamm, General Counsel, Dep't of Transp.), 37 (statement of James E. Landry, General Counsel, Air Transp. Assoc. of Am.), 52 (prepared statement of Floyd D. Hall, Chairman of the Exec. Comm., IATA), 110 (prepared statement of Charles N. Brower, ABA, Sec. of Int'l Law).

58. *Id.* at 3 (statement of Herbert J. Hansell, Legal Advisor, Dep't of State), 10 (statement of Linda Heller Kamm, General Counsel, Dep't of Transp.), 46 (prepared statement of James E. Landry, General Counsel, Air Transp. Assoc. of Am.).

59. *Id.* at 11 (prepared statement of Linda Heller Kamm, General Counsel, Dep't of Transp.), 41 (prepared statement of James E. Landry, General Counsel, Air Transp. Assoc. of Am.).

60. *Aviation Protocol Hearings*, supra note 45. The Protocols under consideration contain the most recent revisions of the Warsaw Convention, relating to passengers (Montreal Protocol 3) and cargo (Montreal Protocol 4). *Id.* at 4 (statement of Herbert J. Hansell, Legal Advisor, Dep't of State). Protocol 3 is essentially the Guatemala Protocol, note 125 *infra*, with the Special Drawings Rights of the International Monetary Fund (SDR) replacing the "Poincaré Franc" as the monetary unit in which the limitation of liability is expressed. *Aviation Protocol Hearings*, supra note 45, at 41 (prepared statement of James E. Landry, General Counsel, Air Transp. Assoc. of Am.).

Department of Transportation made strong statements in favor of continued United States participation in a modified Warsaw system.<sup>61</sup> While the United States has advocated modifications of the Warsaw system in addition to increased recoveries,<sup>62</sup> it has continuously adhered to the principle of limitation so that carriers are insulated from liability for more than a fixed and determinable sum for injuries arising out of international air transportation.<sup>63</sup>

It is the function of the courts to interpret and apply the Convention's provisions so that this continuing and explicit federal policy is carried out.<sup>64</sup> Court decisions which would effectively except wrongful death actions from the coverage of the Warsaw system may result in a de facto withdrawal of the United States at a time when its government is working strenuously to save the system in a much improved and modernized form. Such decisions tend to impair the credibility of the United States and may be damaging to the diplomatic effort.<sup>65</sup>

## II. THE NATURE OF THE LIABILITY LIMITATION

### A. Effect of Articles 1 and 3

Central to the result in *Bali* is the court's interpretation of the Warsaw Convention as creating contractual limitation of liability.<sup>66</sup> In accepting the contractual theory the court apparently relied on the fact that the Convention applies only when there is international transportation "according to the contract made by the parties."<sup>67</sup> The applicability of the Convention is dependent upon the contract only to the extent that it is the contract which determines

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61. *Aviation Protocol Hearings*, *supra* note 45, at 5-6 (prepared statement of Herbert J. Hansell, Legal Advisor, Dep't of State), 11-12 (prepared statement of Linda Heller Kamm, General Counsel, Dep't of Transp.), 17 (prepared statement of Peter B. Schwarzkopf, Assistant General Counsel, Int'l Affairs, CAB).

62. Note 58 *supra* and accompanying text.

63. *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

64. See *United States v. Pink*, 315 U.S. 203, 224-25 (1942); *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Chicago, B. & Quincy R.R. v. McGuire*, 219 U.S. 549, 564-65 (1911); *Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

65. See, e.g., Caplan, *Insurance, Warsaw Convention, Changes Made Necessary by the 1966 Montreal Agreement and Possibility of Denunciation of the Convention*, 33 J. AIR L. & COM. 663, 668-69 (1967) [hereinafter cited as Caplan].

66. See note 9 *supra* and accompanying text.

67. Warsaw Convention, *supra* note 1, art. 1(2). See 462 F. Supp. at 1119.

whether the contemplated transportation is international.<sup>68</sup> It is the existence of such a contract and not the contract itself which makes the Convention applicable.<sup>69</sup>

The rationale for the emphasis on the contract in this regard is that the applicability of the Convention is determined in advance, by virtue of the agreement, and is not dependent on the actual route taken or other criteria which may be controlled by fortuitous circumstances.<sup>70</sup> Instead, the application of the treaty, and thereby the limitation of liability, arises by virtue of the existence of a contract with specified stopping places.<sup>71</sup> The contract is not one for the limitation of liability or for the application of any other provision of the Convention, but given such a contract the Convention automatically applies of its own force, "not because the parties have so agreed."<sup>72</sup> "[T]he limitation of liability . . . is not a contractual but a legal one . . . ."<sup>73</sup> The distinction is well drawn in the case of *Garcia v. Pan American Airways*.<sup>74</sup> In that case the next of kin, bringing suit in their own right, pursuant to the wrongful death

68. The Convention defines international carriage as "any carriage in which, according to the contract made by the parties, the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within the territory . . . of another Power." Warsaw Convention, *supra* note 1, art. 1(2). See, e.g., *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 333-34 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Ross v. Pan Am. Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 885 (1949); *GOEDHUIS, supra* note 39, at 121; 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.05(1) (1978); *SHAWCROSS & BEAUMONT, supra* note 29, at 393.

69. *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Ross v. Pan Am. Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 885 (1949).

70. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 332 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Egan v. Kollsman Instr. Corp.*, 21 N.Y.2d 160, 165-66, 234 N.E.2d 199, 201, 287 N.Y.S.2d 14, 17 (1967), *cert. denied*, 390 U.S. 1039 (1968); *Ross v. Pan Am. Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 885 (1949); *GOEDHUIS, supra* note 39, at 121.

71. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 333-34 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Ross v. Pan Am. Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 885 (1949); *Garcia v. Pan Am. Airways*, 269 A.D. 287, 290, 55 N.Y.S.2d 317, 320-21 (1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946). For the view that this system leads to "preposterous results," see 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.05(1) (1978).

72. *Ross v. Pan Am. Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 885 (1949).

73. *DRION, supra* note 41, at 162. See *Warsaw Minutes, supra* note 6, at 42 (remarks of Sir Alfred Dennis).

74. 269 A.D. 287, 55 N.Y.S.2d 317 (1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946).

law of Portugal,<sup>75</sup> contended that the agreement of the deceased to limit liability was not binding on them in such an action.<sup>76</sup> The court, in affirming the denial of plaintiff's motion to strike certain affirmative defenses, treated this contention as relating only to the defense that the provisions of the Convention were expressly applicable by the agreement of the parties, as embodied in the ticket, and not to the primary defense that the transportation of the decedent came within the terms of the Convention.<sup>77</sup>

The *Bali* court also relied upon the provisions of Article 3<sup>78</sup> which require that the carrier deliver a ticket to the passenger containing specified information, including a statement that the transportation is subject to the rules of the Warsaw Convention.<sup>79</sup> If a proper ticket is not delivered to the passenger, the carrier is precluded from asserting the liability limitation.<sup>80</sup>

Some courts have been strict in construing the delivery requirement. In *Mertens v. Flying Tiger Line, Inc.*,<sup>81</sup> it was found that delivery of a ticket after the passenger had boarded the plane was insufficient.<sup>82</sup> It has also been held that delivery at the boarding ramp was insufficient<sup>83</sup> and that the requirement was not met by the delivery of a ticket in which the notice of the applicability of the Convention was "camouflaged in Lilliputian print . . ."<sup>84</sup>

The court in *Bali* found support for its contractual approach in these and other ticket notice cases<sup>85</sup> and to that extent has misread them.<sup>86</sup> The decisions have focused on giving the passenger adequate notice of the liability limitation so that he can protect himself by obtaining insurance or by other means.<sup>87</sup> These cases have not

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75. *Id.* at 289, 55 N.Y.S.2d at 319.

76. *Id.* at 293, 55 N.Y.S.2d at 322-23.

77. *Id.*

78. 462 F. Supp. at 1119-20.

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

80. *Id.* art. 3(2); *e.g.*, *Ross v. Pan Am. Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 885 (1949).

81. 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

82. *Id.* at 857.

83. *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 498 (9th Cir. 1965).

84. *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, 243 (S.D.N.Y.), *aff'd* 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).

85. 462 F. Supp. at 1121.

86. The *Bali* court asserted that the ticket notice cases demonstrated "the courts' protection of injured parties from Warsaw's liability limitations, in part through contractual and contract-like principles." 462 F. Supp. at 1122-23.

87. *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (9th Cir. 1965);

interpreted the non-delivery of a proper passenger ticket as having any contractual significance. The Convention itself provides that the absence, irregularity or loss of a passenger ticket does not affect the contract of transportation.<sup>88</sup> The contract would still be subject to the provisions of the Convention<sup>89</sup> even though the carrier would be estopped from asserting the provisions providing for a limitation of liability.<sup>90</sup> A close reading of Article 3(2) reveals that the provisions of the Convention are not incorporated into the contract of carriage but rather that the contract is "subject to" the Convention.<sup>91</sup>

### B. *Effect of the Montreal Agreement*

The Montreal Agreement<sup>92</sup> is, according to its terms, a "special agreement" within the meaning of Article 22(1) of the Warsaw Convention.<sup>93</sup> Article 22(1) clearly contemplates a contract between the passenger and the carrier whereby the carrier agrees to an increased liability limit.<sup>94</sup> This is obviously a simplistic view of the

*Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 856-57 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, 239 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968). The drafters of the Convention expected that passengers would be covered by insurance. Warsaw Minutes, *supra* note 6, at 40 (remarks of Mr. Flandin), 47 (remarks of Mr. Giannini), 48 (remarks of Mr. Ripert). One of the arguments advanced in favor of retaining a system of limited liability is that it is more equitable to distribute the risk through insurance rather than through the carrier. Swart, *supra* note 46, at 617. The rationale is that if the carrier is forced to pay unlimited damages it will pass along the cost to all passengers equally so that the "poor" passengers, those whose recoveries would be less than the liability limits in any event, are forced to pay for the relatively few "affluent" passengers. *Id.*

88. "The absence, irregularity or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless 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 1, art. 3(2) (emphasis added).

89. *Id.*; *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 496-97 (9th Cir. 1965); *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801, 808 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

90. *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 496-97 (9th Cir. 1965); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 856-57 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Ross v. Pan Am. Airways*, 299 N.Y. 88, 97, 85 N.E.2d 880, 885 (1949).

91. Warsaw Convention, *supra* note 1, art. 3(2) (quoted at note 88 *supra*).

92. Note 5 *supra*.

93. *Id.* See, e.g., 54 DEP'T STATE BULL. 955-57 (June 13, 1966); Lowenfeld & Mendelsohn, *supra* note 3, at 597.

94. "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . . Nevertheless, by special

Montreal Agreement which bears little resemblance to a freely negotiated contract.<sup>95</sup> While the Montreal Agreement is described as a special contract, its status as such and indeed the very designation of "Montreal Agreement" has been criticized.<sup>96</sup> Regardless of what it purports to be, the Montreal Agreement is not a contract between the passenger and the carrier. In reality, it is an agreement between the world's international carriers and the United States government whereby the carriers agree that they will not assert certain protections of the Warsaw Convention in exchange for the agreement of the United States to withdraw its denunciation of the Convention.<sup>97</sup> Analyzed contractually, it would appear to be a third party beneficiary contract, the intended beneficiaries of which are the passengers and their families.

The characterization of the Montreal Agreement as a special agreement pursuant to Article 22(1) is merely an attempt to justify the United States' action<sup>98</sup> which some observers consider to be a unilateral amendment of the Convention.<sup>99</sup> The fallacy of this attempted justification is pointed out by the inability of Article 22(1) to validate the more fundamental modification of the Convention caused by the adoption of a system of absolute liability.<sup>100</sup>

Assuming, however, that the Montreal Agreement is a special agreement pursuant to Article 22(1), the assertion that it provides "an authoritative rule . . . as to the meaning of the original Warsaw Convention's limitation of liability" which establishes that the Convention's liability limitation is contractual<sup>101</sup> cannot be sustained.

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

95. See, e.g., Milligan, *The Warsaw Convention—Did the Carriers Take All Possible Measures to Avoid the Damage to the Convention or Was It Impossible For Them to Take Such Measures?*, 33 J. AIR L. & COM. 675 (1967).

96. See *Discussion—Session One, Symposium on the Warsaw Convention*, 33 J. AIR L. & COM. 542, 545 (1967) (remarks of Prof. Mankiewicz).

97. See generally Hildred, *Air Carriers' Liability: Significance of the Warsaw Convention and Events Leading Up to the Montreal Agreement*, 33 J. AIR L. & COM. 521, 524-25 (1967) [hereinafter cited as Hildred].

98. Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519, 529 (1972) [hereinafter cited as Mankiewicz].

99. Hildred, *supra* note 97, at 521; Whitehead, *supra* note 41, at 656.

100. The imposition of absolute liability is accomplished by the agreement of the carrier not to "avail itself of any defense under Article 20(1) of said [Warsaw] Convention." Montreal Agreement, *supra* note 5. See Caplan, *supra* note 65, at 670-710.

101. In re Air Crash in Bali, Indonesia, 462 F. Supp. 1114, 1123 (C.D. Cal. 1978).

The *Bali* court reasoned that if it were not, it could not be modified by a scheme which is "clearly contractual."<sup>102</sup> This line of reasoning is unpersuasive. The assumption appears to be that if the Convention can be modified by such a contract it must be, essentially, contractual in nature, and impliedly, that if it cannot be modified by contract it is not contractual in nature. With the exception of the very narrow and explicit provision of Article 22(1) for the increase of the limit of liability,<sup>103</sup> the Convention provides generally that its provisions cannot be altered by contract or special agreement.<sup>104</sup> Does this indicate that the Convention is not contractual in nature? What it does point out is that this line of reasoning, if it has any validity at all, is inconclusive when applied to the Warsaw Convention.

Whatever value the Montreal Agreement may have in interpreting the Warsaw Convention can be appreciated only through a consideration of the circumstances leading to its adoption.

On November 15, 1965 the United States, due solely to its dissatisfaction with the low limits of liability, served notice of its denunciation of the Warsaw Convention.<sup>105</sup> The fear that the entire Warsaw system would collapse if the United States' denunciation was permitted to take effect<sup>106</sup> added a sense of urgency to the events culminating in the Montreal Agreement.<sup>107</sup>

After an emergency meeting convened by the International Civil Aviation Organization (ICAO)<sup>108</sup> failed to produce any hope of an early diplomatic solution,<sup>109</sup> Article 22(1)'s provision for a special agreement was considered as the only viable alternative to allowing the denunciation to take effect.<sup>110</sup> Initially, the prospects for success seemed remote.<sup>111</sup> The combined efforts of the United States and the International Air Transport Association (IATA), how-

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102. *Id.*

103. Warsaw Convention, *supra* note 1, art. 22(1) (quoted at note 94 *supra*).

104. "Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by the Convention . . . shall be null and void." Warsaw Convention, *supra* note 1, art. 32.

105. 53 DEP'T STATE BULL. 923-25 (Dec. 6, 1965).

106. Lowenfeld & Mendelsohn, *supra* note 3, at 590.

107. *Id.* at 563. See Montreal Minutes, *supra* note 48, at v.

108. The meeting was convened in Montreal "as a matter of urgency." Montreal Minutes, *supra* note 48, at v.

109. Lowenfeld & Mendelsohn, *supra* note 3, at 575.

110. See generally *id.* at 586-88.

111. *Id.* at 590.



ever, succeeded in obtaining the acceptance of the proposed agreement in time to allow the United States to withdraw its notice of denunciation two days prior to its scheduled effective date.<sup>112</sup>

Contrary to the position taken by the *Bali* court,<sup>113</sup> the events leading to the approval of the Montreal Agreement demonstrate that it cannot be viewed as an authoritative interpretation by the United States as to the nature of the Convention's liability limitation. It is a "jerry built" attempt to resolve the United States' dissatisfaction with the low limit of liability,<sup>114</sup> "contrived in haste and presented to the world's airlines as something of a Hobson's choice."<sup>115</sup>

### III. ARTICLE 24 IS CONCLUSIVE

Article 24<sup>116</sup> should, in any event, resolve any doubt as to the Convention's application in wrongful death actions.<sup>117</sup> Article 24 recognizes that under the laws of different countries the passenger or his representative might bring an action either in tort or in contract.<sup>118</sup> The purpose of the article is "[t]o prevent the carrier from falling under a regime of liability other than that of the Warsaw Convention."<sup>119</sup> Article 24 was meant to apply to wrongful death actions so as to preclude the surviving next of kin of a deceased passenger from maintaining an action against the carrier beyond the scope of the Convention's provisions. This is demonstrated by the

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112. *Id.* at 594-96.

113. Note 101 *supra* and accompanying text.

114. Whitehead, *supra* note 41, at 661.

115. *Id.* at 656.

116. (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention. (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, *supra* note 1, art. 24.

117. Article 24 has been interpreted as establishing that the Convention provides the exclusive relief for any injury resulting from an accident in international air carriage. *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1244-45 (S.D.N.Y. 1975). See, e.g., *DRION*, *supra* note 41, at 135; *GOEDHUIS*, *supra* note 39, at 266-70; *Warsaw Minutes*, *supra* note 6, at 255 (report of Mr. DeVos).

118. *DRION*, *supra* note 41, at 135-36; *GOEDHUIS*, *supra* note 39, at 267.

119. *GOEDHUIS*, *supra* note 39, at 267. The drafters of the Convention apparently agreed that the effect of article 24 "however founded" language was to "exclude recourse to common law." *Warsaw Minutes*, *supra* note 6, at 213 (remarks of Sir Alfred Dennis). See *Mankiewicz*, *supra* note 98, at 530-31.

draft presented to the Warsaw Delegates by CITEJA<sup>120</sup> which provided that any action "even in the case of death of the interested party" would be subject to the limits of the Convention.<sup>121</sup> This phrase was not retained in the final version of the Convention, apparently for stylistic reasons,<sup>122</sup> and it is clear that no substantive change was intended.<sup>123</sup>

The "however founded" language of Article 24, when taken in conjunction with the reference to Article 17, can only mean that any action that may be maintained against the carrier with respect to the death of a passenger is subject to the Convention's provisions. The clear intendment of the phrase, "however founded," is to prevent the circumvention of the Convention by treating it as applicable only to actions in contract while permitting an unlimited action in tort, and vice versa.<sup>124</sup> The drafters of the Guatemala Protocol,<sup>125</sup> apparently concerned about efforts to avoid the Convention's provisions, strengthened the language of Article 24 by providing that all actions "whether under this Convention or in contract or in tort or otherwise" shall be subject to the conditions of the Convention.<sup>126</sup> In so doing they were attempting to preclude the very method of circumvention employed by the court in the *Bali* opinion.

The question not reached by the Warsaw Convention is who,

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120. The Comité International Technique d'Experts Juridique Aériens was formed by the First International Conference on Private Air Law, Paris 1925 and prepared the draft Convention presented to the delegates at Warsaw. SHAWCROSS & BEAUMONT, *supra* note 29, at 339.

121. Warsaw Minutes, *supra* note 6, at 265.

122. The draft of article 24 which was put to a vote and adopted with modifications, contained three paragraphs. *Id.* at 211-14. The first encompassed what is now article 24 and included the phrase "even in the case of death." *Id.* at 211. The second and third paragraphs are now contained in article 25. *Id.* at 214. The task of dividing the original article 24 into two separate articles was referred to the drafting committee, *id.* at 213, which deleted the phrase. The President of the drafting committee subsequently described the revision of article 24 as "merely a formal one." *Id.* at 229.

123. The drafting committee may have considered it surplusage since art. 24 incorporates art. 17 which explicitly applies in cases of death. Warsaw Convention, *supra* note 1, arts. 24, 17.

124. Mankiewicz, *supra* note 98, at 530-31.

125. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, March 8, 1971, ICAO Doc. 8932 (1971) [hereinafter cited as the Guatemala Protocol], *reprinted in* 64 DEP'T STATE BULL. 555 (April 26, 1971).

126. *Id.* art. IX; Mankiewicz, *supra* note 98, at 531.

in the event of death, has the right to sue and what are the compensable damages.<sup>127</sup> In leaving this question to be resolved by the law of the forum<sup>128</sup> the drafters assumed the Convention encompassed situations in which the damage action would be brought by persons other than the passenger or his personal representative and that such actions would be subject to the liability limitation.<sup>129</sup> In fact, it has generally been agreed that the Convention's limitation of liability applies "to the aggregate of claims made by the heirs or dependent members of the family of the fatally injured passenger."<sup>130</sup> Privity of contract is not required in order to subject a claimant to the limitation of liability.<sup>131</sup>

The courts of the United States have consistently applied the Convention's limits to wrongful death actions brought by persons suing in their own right.<sup>132</sup> In *Komlos v. Compagnie Nationale Air France*,<sup>133</sup> the court, applying the law of Portugal to a wrongful death action,<sup>134</sup> expressly found that the action was one in tort and not in contract.<sup>135</sup> The court went on to say that the limitation of liability provided by Article 22 was not a contractual defense but rather a condition "attached to the 'cause of action.'"<sup>136</sup> In reaching this conclusion the court, referring to Article 24, found that while the Convention did not address the question of who has the right to sue, it did attach "a number of conditions to the right

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127. Warsaw Minutes, *supra* note 6, at 255 (report of Mr. DeVos).

128. See, e.g., *Benjamins v. British European Airways*, 572 F.2d 913, 922 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (Van Graafeiland, J., dissenting); *Reed v. Wiser*, 555 F.2d 1079, 1092 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); GOEDHUIS, *supra* note 39, at 270.

129. Warsaw Minutes, *supra* note 6, at 255 (report of Mr. DeVos); DRION, *supra* note 41, at 135-36, 324.

130. Mankiewicz, *supra* note 98, at 528; see DRION, *supra* note 41, at 327.

131. DRION, *supra* note 41, at 135, 162. See, e.g., *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.) (by implication), *cert. denied*, 434 U.S. 922 (1977); *Garcia v. Pan Am. Airways*, 269 A.D. 287, 55 N.Y.S.2d 317 (1945) (by implication), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946).

132. See, e.g., *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Garcia v. Pan Am. Airways*, 269 A.D. 287, 55 N.Y.S.2d 317 (1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946).

133. 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 384 U.S. 820 (1954).

134. *Id.* at 404.

135. *Id.* at 401.

136. *Id.*

of action created by the *lex loci* . . . ."<sup>137</sup>

The more recent case of *Reed v. Wiser*,<sup>138</sup> applied the "however founded" language of Article 24<sup>139</sup> to preclude recovery against agents of the carrier, not party to the contract of carriage, for amounts in excess of the liability limits of the Convention.<sup>140</sup> In interpreting Article 24 the court pointed out that to the extent that the word "cases" might be interpreted to mean lawsuit it is an inaccurate translation of the French word *cas*, which might be more accurately understood to apply the conditions and limits of the Convention to any cause of action arising out of "events" contemplated by Article 17.<sup>141</sup> The death of a passenger is clearly an event covered by Article 17<sup>142</sup> therefore, any action "however founded" arising from such death is subject to the limitations provided by the Convention.<sup>143</sup>

### CONCLUSION

Even if the limitation of liability provided by the Convention were contractual, the determination by the courts of a state that no contract of a decedent can interfere with the rights of dependents in a wrongful death action established under its laws<sup>144</sup> must fall as contrary to the superior federal public policy expressed in the Warsaw Convention.<sup>145</sup> It is important "that the purpose of the Warsaw system and the intent of its drafters . . . must . . . have been to establish the exclusive relief available for damages resulting from an injury sustained in international transportation."<sup>146</sup>

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137. *Id.* at 403. The Second Circuit now holds that the Warsaw Convention not only conditions but, in fact, creates a cause of action for injury and death in international air transportation. *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); see Note, *The Warsaw Convention—Does It Create a Cause of Action*, 47 FORDHAM L. REV. 366 (1978).

138. 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

139. See note 116 *supra*.

140. 555 F.2d at 1093.

141. *Id.* at 1084; see also *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1245 (S.D.N.Y. 1975).

142. See note 21 *supra*.

143. See note 119 *supra* and accompanying text.

144. See notes 10-11 *supra* and accompanying text.

145. *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801, 810-11 (N.D. Cal. 1964), *aff'd* 386 F.2d 323 (1967), *cert. denied*, 392 U.S. 905 (1968); *Indemnity Ins. Co. of N. Am.*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944). See *United States v. Pink*, 315 U.S. 203, 230-31 (1942); *United States v. Belmont*, 301 U.S. 324, 331 (1937).

146. *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975). See note 119 *supra* and accompanying text.

The very foundation of the treaty will be undermined if an injury contemplated by the provisions of the Convention is permitted to give rise to an independent cause of action not subject to the Convention's conditions and limits.

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