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## Up in the Air Without a Ticket: Interpretation and Revision of the Warsaw Convention

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# Up in the Air Without a Ticket: Interpretation and Revision of the Warsaw Convention

James K. Noble III

## **Abstract**

This Note will examine the validity of the Convention's objective contract approach to defining "international transportation." Although the Convention's requirements will be discussed separately, the focus will be upon the "regulated contract" and the relationship between article 1 and article 3 of the Convention. The need for revising the Convention will be discussed and a proposal for a new definition of "international transportation" will be made.

# UP IN THE AIR WITHOUT A TICKET: INTERPRETATION AND REVISION OF THE WARSAW CONVENTION

## INTRODUCTION

The Warsaw Convention system<sup>1</sup> limits an airline's liability<sup>2</sup> for injuries sustained by "international"<sup>3</sup> air travelers. Application

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. The only official text is in French. This Note will use the United States' translation.

The United States' continued adherence to the treaty is based upon the private agreement called the Montreal Agreement. CAB Agreement No. 18,900, *reprinted* in 2 C. SHAWCROSS & M. BEAUMONT, AIR LAW D43-49 (4th ed. 1982) (with list of member carriers) (approved by CAB Order No. E-23,680, 31 Fed. Reg. 7302 (1966)) [hereinafter cited as Montreal Agreement]. This interim arrangement allows passengers to recover up to U.S.\$75,000 and requires the airlines to waive the Convention's "due care" defense. *Id.* § 1. Moreover, the carrier must "at the time of delivery of the ticket," provide each passenger with a "notice" that the Convention may be applicable. *Id.* § 2. The "notice" must be in at least 10 point type and in contrasting colors. *Id.* By securing a uniform standard of notice, the Montreal Agreement allows the courts to make a swift determination of the parties' rights and liabilities. *In re* Air Crash Disaster at Warsaw, Poland, 535 F. Supp. 833, 838 (E.D.N.Y. 1982).

The Montreal Agreement is a "special contract" between passenger and carrier. Warsaw Convention, *supra*, art. 22(1). The CAB has promulgated rules to preempt state and local law. Both parties are conclusively presumed to have assented to the terms of the "special contract," notwithstanding the parties' lack of actual consent. Waiver of Warsaw Convention Limits and Defenses, 48 Fed. Reg. 8042 (1983)(to be codified at 14 C.F.R. § 203)(effective Mar. 26, 1983); *see* 47 Fed. Reg. 25,019 (1982)(notice of proposed rulemaking); *see also* Notice of Terms of Contract of Carriage, 48 Fed. Reg. 6317 (1983)(to be codified at 14 C.F.R. § 253)(effective Feb. 11, 1983), 47 Fed. Reg. 28,681-82 (1982)(notice of proposed rulemaking, to require two separate "conspicuous" written notices of contract terms); *see generally* Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1976), *amended by* 49 U.S.C. § 1551 (Supp. 1978)(CAB authority to regulate).

2. Warsaw Convention, *supra* note 1, art. 22. The limit of 125,000 French Poincare (Gold) Francs originally converted into U.S.\$4,898. Reilly, *The Warsaw Ticket to Judicial Treaty Revision—Will We Do It Again?*, 43 ST. JOHN'S L. REV. 396, 397 n.4 (1969). In 1933, with the devaluation of the United States dollar, the limit was U.S.\$8,955.21. 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.03 (Supp. 1981). The fluctuations have continued. 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11.36 (1978); *see infra* note 126.

Only the "carrier" is protected by the Convention's limits of liability. Now other defendants such as manufacturers or governmental units are sued in disaster cases. This development in the law was unforeseen by the drafters of the Convention. *See* SECOND INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, OCTOBER 4-12, 1929, WARSAW (MINUTES) 20-22 (R. Horner & D. Legrez trans. 1975)[hereinafter cited as MINUTES]; *see, e.g., In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975)(203 suits by 337 decedents primarily against the manufacturer), *cited in* Reed v. Wiser, 555 F.2d 1079, 1091 (2d Cir. 1977); *see also* Kennelly, *Aviation Law: International Air Travel—A Brief Diagnosis and Prognosis*, 6 CAL. W. INT'L L. J. 86, 95-97 (1975).

of the Convention is based solely upon the passenger ticket, a "regulated contract"<sup>4</sup> between the passenger and the carrier.<sup>5</sup> Both the advantages and the disadvantages of using the contract to determine the applicability of the Convention have long been recognized.<sup>6</sup> Recently, the problems with this system were highlighted in *Stratis v. Eastern Air Lines*.<sup>7</sup>

The issue in *Stratis* was whether the passenger was engaged in "international transportation" while flying from New Orleans to New York. Ultimately, *Stratis* was to return to Greece, but his

The term "carrier" includes the airline's employees and agents. *Reed v. Wisner*, 555 F.2d at 1092-93; see Protocol Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, art. XIV, 478 U.N.T.S. 371, 383 (limits on liability apply to servant or agent acting within the scope of his employment)[hereinafter cited as Hague Protocol].

3. Warsaw Convention, *supra* note 1, art. 1. See MINUTES, *supra* note 2, at 19, 153; see also *infra* note 24.

4. Warsaw Convention, *supra* note 1, arts. 1, 3. See MINUTES, *supra* note 2, at 22. Application of the Convention is based solely upon the passenger ticket. *Id.* See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 500-01 (1967). The Convention regulates the terms and legal effect of this standard form contract. MINUTES, *supra* note 2, at 42 (Mr. Dennis, Great Britain: Convention replaces the rule of freedom of contract with international regulation); see Warsaw Convention, *supra* note 1, preamble; see also Letter of Secretary of State Cordell Hull to Senator Wheeler (Aug. 19, 1935), reprinted in 79 CONG. REC. 13,987-88 (1935)(one of the most important functions of the Convention was to regulate the "form and legal effect" of the contract). The Convention establishes a contract approach similar to the objective theory of contract law. The approach is based upon the legal meaning of the French term *stipulations* ("contract" in the United States translation) used throughout the text. See G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 88 (1977)("regulated contracts, such as the contract of carriage by air, are quite common in France."); see also *Bloch v. Compagnie Nat'l Air Fr.*, 386 F.2d 323, 330 (5th Cir. 1967)("binding meaning of the terms [of the Convention] is the French legal meaning"), *cert. denied*, 392 U.S. 905 (1968). The rule is to be applied uniformly by courts of the High Contracting Parties in all matters concerning contracts for "international transportation." *Grein v. Imperial Airways*, [1937] 1 K.B. 50, 74-75 (C.A. 1936).

5. The Convention also applies to the carriage of goods by air. Warsaw Convention, *supra* note 1, arts. 4, 22.

6. See Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1, 6-13 (1936).

This emphasis upon the intention of the parties permits a certainty in the application of the Convention, and makes it unaffected by an incidental occurrence . . . . A disadvantage of using the contract of the parties as the determinative factor, rather than . . . nationality of the aircraft (the suggestion of the Brazilian delegation) is that in one accident the liability of the carrier to different passengers may be governed by different laws.

*Id.* at 6-7. There is also "the difficulty in proving what the parties intended . . . . Perhaps these difficulties are unavoidable." *Id.* at 10-11.

7. *Stratis v. Eastern Air Lines*, 682 F.2d 406 (2d Cir. 1982), *rev'g*, 75 Civ. 1151 (E.D.N.Y. 1979)(not officially reported); see Sullivan, *supra* note 6, at 6-13; see also *supra* note 4.

ticket with Eastern Air Lines authorized purely domestic carriage.<sup>8</sup> The circuit court's interpretation of the Convention broadens its application to domestic flights.<sup>9</sup> The court's analysis raises doubts concerning the vitality of the Convention's fifty year old "regulated contract,"<sup>10</sup> and brings to light the disadvantages of the present definition of international transportation which seriously affects travelers on domestic flights.<sup>11</sup>

This Note will examine the validity of the Convention's objective contract approach to defining "international transportation."<sup>12</sup> Although the Convention's requirements will be discussed separately,<sup>13</sup> the focus will be upon the "regulated contract" and the relationship between article 1 and article 3 of the Convention.<sup>14</sup> The need for revising the Convention will be discussed and a proposal for a new definition of "international transportation" will be made.<sup>15</sup>

## I. EVOLUTION OF THE WARSAW CONVENTION

### A. The Warsaw Convention

The essential purpose of the Convention was to provide the world's fledgling airline industry with a "legal basis" for its opera-

8. *Stratis*, 682 F.2d at 408-12. See *infra* notes 84-103 and accompanying text.

9. See *infra* note 91. Application of the Convention's limitations to domestic travel has never been necessary to achieve the Convention's purpose. See *infra* note 17. Today, although few passengers are aware of it, the distinction between "international" and "domestic" transportation can produce a staggering difference in the amount recoverable from carriers. For example, if Eastern had been the only responsible defendant, the plaintiff in *Stratis* would have been unable to recover over U.S.\$1,000,000 in damages. See *infra* note 78; see also *infra* text accompanying notes 57-58.

10. The developments in contract law and ticketing technology have left the "regulated contract" a relic of the past. See Hague Protocol, *supra* note 3; Guatemala City Protocol, *infra* note 119; Montreal Protocols, *infra* note 146. The United States, however, continues to adhere to the original Convention. The courts are thus confronted with the problem of applying the Convention in light of present day practices. The results have been inconsistent, undermining the certainty which the Convention sought to introduce to the law governing contracts for international transportation. See *infra* note 58.

11. See *infra* notes 126-32.

12. See *infra* notes 33-45.

13. See *infra* text accompanying notes 68-88, 104-16.

14. See *infra* text accompanying notes 49-53, 89-98, 117-21.

15. See *infra* text accompanying notes 122-59.

tion.<sup>16</sup> To achieve this goal, the Convention had to clarify the law governing international flights.<sup>17</sup> The Convention, therefore, has established an "international code declaring the rights and liabilities of the parties to contracts of international carriage by air."<sup>18</sup>

The Convention creates an unambiguous system<sup>19</sup> of limited carrier liability<sup>20</sup> based solely upon the contract of carriage.<sup>21</sup> To reduce the potential inequality of bargaining power between the

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16. MINUTES, *supra* note 2, at 13, 18-23. Private investors and insurance companies feared the uncertainty in the law governing international flights. See Lowenfeld & Mendelsohn, *supra* note 4, at 499-500 (explaining Secretary of State Cordell Hull's Message transmitting the Convention, *infra* note 54). Potential liability for a single accident was staggering. *Id.* Moreover, litigation practices and laws would vary depending upon where the suit was brought. See *id.* at 498-99. The Convention, by eliminating the uncertainty in the law governing the contracts for international transportation, encourages the parties to settle their rights and liabilities before the flight. The "legal basis" for operation enabled the airline industry to obtain insurance and secure private investment. See *Dunn v. TWA*, 589 F.2d 408, 410-11 (9th Cir. 1978); *Reed v. Wisner*, 555 F.2d at 1089-93, *Block v. Compagnie Nat'l Air Fr.*, 386 F.2d at 327 (quoting Secretary of State Cordell Hull's Message transmitting the Convention, *infra* note 54). See also Lowenfeld & Mendelsohn, *supra* note 4, at 497-500.

The Convention is often compared to the Price-Anderson Act, 42 U.S.C. § 2210 (1976), which limits the recovery for injuries resulting from nuclear power plant accidents. See *In re Aircrash Disaster in Bali, Indonesia*, 684 F.2d 1301, 1310 (9th Cir. 1982).

17. *Grein*, [1937] 1 K.B. at 74-75. "There was no necessity for any agreement as to carriage performed within the territory of one State . . ." *Id.* at 76. The drafters also recognized that limiting the liability of an "influential and economically strong" airline industry "would be inequitable and could influence negatively the development of air carriage." MINUTES, *supra* note 2, at 39 (Mr. Sabanin, U.S.S.R.).

18. *Id.* at 75. "The desirability of such an international code for air carriage is apparent. Without it questions of great difficulty as to the law applicable to a contract of international carriage by air would constantly arise." *Id.* See *supra* note 16.

19. See MINUTES, *supra* note 2, at 153 (Mr. Pittard, Switzerland: "We must give the public rules which it understands.").

20. The Convention establishes a presumption of carrier liability as a quid pro quo for limiting the passenger's recovery. MINUTES, *supra* note 2, at 37-39; Lowenfeld & Mendelsohn, *supra* note 4, at 500. It can be argued that the Convention is self-executing and creates its own cause of action which, however, is not exclusive. See *Benjamins v. British Eur. Airways*, 572 F.2d 913, 918-19 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Hill v. United Airlines*, 550 F. Supp. 1048, 1054 (D. Kan. 1982). See also *Calkins, The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217, 323 (1959) (parts one and two). *But see Maignie v. Compagnie Nat'l Air Fr.*, 549 F.2d 1256, 1258 n.2 (9th Cir.) ("It is true that the Warsaw Convention does not create a cause of action, but merely creates a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the injury alleged."), *cert. denied*, 431 U.S. 974 (1977).

The Montreal Agreement provides that the carrier may not avail itself of the article 20 "due care" defense. Montreal Agreement, *supra* note 1, § 1.

21. MINUTES, *supra* note 2, at 22. For the passenger, the "contract" is the passenger ticket. See *id.* at 19-22, 148-155; see also *supra* note 4; *infra* notes 22, 33-53, 81; H. DRON, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 54-57 (1954).

parties, the Convention regulates the terms and legal effect of the contract. Uniform rules respecting the documents embodying the parties' agreement have been established.<sup>22</sup> For the Convention to be applicable the requirements of article 1 and article 3 must be met.<sup>23</sup>

Article 1(1) states that the Convention applies "to all international transportation of persons."<sup>24</sup> As defined by article 1(2), transportation is "international" only when

*according to the contract made by the parties,*<sup>25</sup> the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there

22. *Block*, 386 F.2d at 331-32 ("It is clear that the framers did not intend to endorse or encourage bargaining between the parties. The Convention assumes the passenger's inadequate ability to bargain."). *MINUTES*, *supra* note 2, at 38-39 (Mr. Sabanin, U.S.S.R.: "[T]here is no other means of carriage where the inequality between these two parties to the contract is greater."). *Id.* at 42 (Mr. Dennis, Great Britain: "In the Convention we propose to replace a system of free contract by a system of law, of regulation, . . . [which] must be of such a nature that they can appear in a just, equitable contract between equal parties placed upon equal footing.").

The Convention adopted rules to be applied by the courts of the High Contracting Parties to all contracts for international transportation. *Grein*, [1937] 1 K.B. at 75. The rules allowed parties to rely upon the writing to determine their rights and liabilities. *See supra* notes 4, 16. Decisions in the United States on the question of ticket applicability have allowed passengers to avoid the Convention's limitations based upon a theory of procedural unconscionability. *See cases cited infra* note 105. Some courts have examined whether delivery of the ticket informed the passenger of the contract terms, influenced by the passenger's inability to read and comprehend the ticket language. *See, e.g.*, *Sofranski v. KLM Royal Dutch Airlines*, 68 Misc. 2d 402, 404, 326 N.Y.S.2d 870, 872 (N.Y. Civ. Ct. 1971)(the limit placed by article 26 on time allowed for complaints); *see also infra* notes 76, 130. Other courts adopt a reasonable person standard and concentrate on ticket contents. *See, e.g.*, *O'Rourke v. Eastern Air Lines*, 16 Av. Cas. (CCH) 18,367, 18,370 (E.D.N.Y. 1982); *Abdul-Haq v. Pakistan Int'l Airlines*, 101 Misc. 2d 213, 214-15, 420 N.Y.S.2d 848, 850 (N.Y. Sup Ct. 1979)(distinguishing provisions which limit the carrier's liability from those which require a timely complaint). *See also infra* notes 58-68, 113.

23. *Grein*, [1937] 1 K.B. at 74-75; Warsaw Convention, *supra* note 1, arts. 1, 3. *See MINUTES*, *supra* note 2, at 18-23, 35-36, 148-155. The Convention's goal of uniformity specifically relates to the law governing the documented contract.

24. Warsaw Convention, *supra* note 1, art. 1(1). The Convention's broad definition of "international" includes flights within the territory of a single High Contracting Party. *See MINUTES*, *supra* note 2, 246-47; *infra* note 53.

25. Warsaw Convention, *supra* note 1, art. 1(2)(emphasis added). The passenger ticket is the critical element in defining the character of the flight. The relationship between article 1 and article 3 is essential to clear understanding of the command of the Convention. *See Grein*, [1937] 1 K.B. at 74-76; *infra* text accompanying notes 49-53.

is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.<sup>26</sup>

The use of the singular in the article 1(2) phrase "place of departure and the place of destination"<sup>27</sup> was clarified in article 1(3), which provides that

[t]ransportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be undivided transportation, *if it has been regarded by the parties as a single operation*,<sup>28</sup> whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.<sup>29</sup>

26. Warsaw Convention, *supra* note 1, art. 1(2). "[T]he place of departure and the place of destination mean the places at which . . . the contractual carriage begins and ends; and . . . agreed stopping place means any place at which under the particular contract the aeroplane is to descend in foreign territory . . ." *Grein*, [1937] 1 K.B. at 81. For example, Country A is a High Contracting Party. Country B is not a High Contracting Party. X and Y are passengers sitting together on a flight from A to B. X has a roundtrip ticket A-B-A. X is engaged in "international transportation." Y's ticket covers the flight from Country A to Country B. Y is not engaged in "international transportation." For five hypothetical cases designed to show the "inequalities and incongruities" in the Convention definition, see Kennelly, *supra* note 2, at 88-93.

When the article 3 contract requirements are not met, the actual agreement between the parties must be proven. See *Block*, 386 F.2d at 334 ("both the carrier and the passenger must have consented to the particular route"). See also *infra* note 37.

27. Warsaw Convention, *supra* note 1, art. 1(2). Each contract has one place of departure and one destination. *Grein*, [1937] 1 K.B. at 78-79.

28. Warsaw Convention, *supra* note 1, art. 1(3) (emphasis added). A series of contracts is treated as a single unit only when both "parties" regard the entire transportation as a "single operation." *Grein*, [1937] 1 K.B. at 78.

29. Warsaw Convention, *supra* note 1, art. 1(3). Emphasis is on the common intention of the "parties." *Galli v. Re-Al Brazilian Int'l Airlines*, 29 Misc. 2d 499, 500-01, 211 N.Y.S.2d 208, 209-10 (N.Y. Sup. Ct. 1961). The mere fact that there is a series of contracts including one for "international transportation" does not make each domestic segment "international." The carrier must know of the other arrangements. *Stratton v. Trans-Canada Air Lines*, 32 D.L.R.2d 736, 742-43 (B.C. 1962); see *P.T. Airfast Servs., Indonesia v. Superior Ct.*, 139

The essential requirement for applicability of the Convention is the contract between the parties.<sup>30</sup> Each contract has one place of departure and only one destination.<sup>31</sup> When transportation involves more than one contract, the series may constitute only one destination if the common intention of the parties is to consider the transportation as a single operation.<sup>32</sup>

The Convention requires the parties' contract to be written and delivered to the passenger.<sup>33</sup> The passenger ticket, which is the contract, must contain an "indispensable minimum" of particulars.<sup>34</sup> Article 3 states:

(1) For the transportation of passengers<sup>35</sup> the carrier<sup>36</sup> must deliver<sup>37</sup> a passenger ticket<sup>38</sup> which shall contain the following particulars:<sup>39</sup>

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Cal. App. 3d 162, 188 Cal. Rptr. 628 (Cal. Ct. App. 1983); *see also Hearings on Exec. A & B, infra* note 146, at 128-29 (statement of William F. Kennedy, Aerospace Indus. Ass'n) ("A passenger who buys separate tickets is not subject to the Convention while on the domestic leg."). *Cf. Mohammed v. Air Can.*, 12 Av. Cas. (CCH) 18,023-24 (N.Y. Sup. Ct. 1973) (passenger exchanged tickets); Judgment of Mar. 26, 1969, Trib. gr. inst., Paris, 23 *Revue Francaise de Droit Aerien, Jurisprudence* 321, 323 (local excursion flight in Mexico held not part of overall international transportation). One reason for the requirement is that the airline consents to jurisdiction at "the place of destination." Warsaw Convention, *supra* note 1, art. 28; *see Berner v. United Airlines*, 2 Misc. 2d 260, 149 N.Y.S.2d 335 (1956), *aff'd*, 3 A.D.2d 9, 157 N.Y.S.2d 884, *aff'd*, 3 N.Y.2d 1003, 147 N.E.2d 732, 70 N.Y.S.2d 340 (1957); *see also Karfunkel v. Compagnie Nat'l Air Fr.*, 427 F. Supp. 971, 974-75 (S.D.N.Y. 1977) (destination is determined by the ticket).

30. *Block*, 386 F.2d at 330 ("The applicability . . . undeniably is premised upon a contract."); *see supra* notes 4, 22; *infra* notes 33-44, 81. The ticket is the Convention regulated contract between the parties. *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1120-21 (C.D. Cal. 1978), *rev'd on other grounds*, 684 F.2d 1301 (9th Cir. 1982) (reversed on grounds that the treaty preempts state contract law); *Glenn v. Compania Cubana de Aviacion*, 102 F. Supp. 631, 634 (S.D. Fla. 1952); *Grein*, [1937] 1 K.B. at 74-77. For a discussion of the district court decision in *Bali*, *see Note, The Interpretation of the Warsaw Convention in Wrongful Death Actions*, 3 FORDHAM INT'L L. F. 71 (1979).

31. *See supra* note 27.

32. *See supra* notes 27-29 and accompanying text.

33. Warsaw Convention, *supra* note 1, art. 3(1). For the contract to involve "international transportation" within the Convention definition, the article 3 requirements must be met. The document of carriage must be delivered containing the specified particulars. *See infra* notes 34-45 and accompanying text. Delivery has been extensively interpreted. *See cases cited infra* notes 105, 113.

34. MINUTES, *supra* note 2, at 150 (Mr. De Vos, Reporter: "[W]e have retained only the indispensable minimum to be able to consider the carriage as international carriage in the meaning of the Convention.>").

35. Warsaw Convention, *supra* note 1, art. 3(1). The carrier must physically deliver the ticket to the passenger. The term "passenger" is undefined. Delivery to one in a position to

- (a) The place and date of issue;<sup>40</sup>
- (b) The place of departure and of destination;<sup>41</sup>
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;<sup>42</sup>
- (d) The name and address of the carrier or carriers;<sup>43</sup>
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.<sup>44</sup>

receive the ticket for the traveler fulfills the requirement. *See* *Ross v. Pan Am. Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955); *see also* *Block*, 386 F.2d at 334.

36. Warsaw Convention, *supra* note 1, art. 3(1). The Convention does not define the scope of the term "carrier," which for the purposes of article 3 means the party with whom the contract is made. One court has indicated that to bind the "carrier," a ticket agent may need more than the mere authority to write tickets on a commission basis. *See* *Qureshi v. KLM Royal Dutch Airlines*, 102 D.L.R.3d 205, 207 (N.S. 1979)(dictum). *But see* Judgment of Mar. 23, 1976, Bundesgerichtshof, W. Ger., 1976 Monatschrift fur Deutsches Recht 833, *reprinted in* [1976] 2 REVUE DE DROIT UNIFORME 324 (station which works with travel company to issue tickets is sufficient).

37. Warsaw Convention, *supra* note 1, art. 3(1). The burden of showing that delivery has taken place should rest upon the party asserting the Convention's applicability. *See* *Glenn*, 102 F. Supp. at 634; *compare* *Manion v. Pan Am. World Airways*, 55 N.Y.2d 398, 405, 434 N.E.2d 1060, 1062, 449 N.Y.S.2d 693, 695 (1982)("The airline is in the best position to show delivery, having access to its own records and copies of tickets sold and actually used for passenger travel.") *with* *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1198-1200 (3d Cir. 1978) ("A requirement that an airline be required to prove delivery of a ticket to each passenger imposes an enormous and costly burden on the airline as compared with the burden of the individual passenger concerned who asserts liability in excess of the limits permitted by the Warsaw Convention." *Id.* at 1199).

38. Warsaw Convention, *supra* note 1, art. 3(1); *see supra* notes 4, 22.

39. Warsaw Convention, *supra* note 1, art. 3(1). The official French text states that the ticket shall contain *les mentions suivantes* (the following provisions).

40. Warsaw Convention, *supra* note 1, art. 3(1)(a). The requirement establishes where the contract was made. The airline consents to jurisdiction "where he has a place of business through which the contract has been made." *Id.* art. 28. *See supra* notes 29, 36.

41. Warsaw Convention, *supra* note 1, art. 3(1)(b). "The only determining factor [of Convention applicability] is the place of origin and destination of the passenger as shown on the ticket or contract of carriage." *Hague Protocol To Warsaw Convention: Hearings on Exec. H Before the Comm. on Foreign Relations*, 86th Cong., 1st Sess. 3 (1965)(statement of Leonard Meeker, Legal Advisor-Designate, Dep't of State)[hereinafter cited as *Hearings on Exec. H*]; *see infra* note 81.

42. Warsaw Convention, *supra* note 1, art. 3(1)(c). The international character of the contract may depend upon this particular. *See, e.g., Grein*, [1937] 1 K.B. at 80. For an example, *see infra* note 53.

43. Warsaw Convention, *supra* note 1, art. 3(1)(d). When transportation involves more than one carrier, each carrier's name must appear upon the passenger ticket. *But see id.* art. 8(e)(air waybill requires only the first carrier's name).

44. *Id.* art. 3(1)(e). *See infra* note 58.

The requirements ensure a standard form contract for international air transportation. Furthermore, it allows for easy administration and rapid determination of the parties' rights.<sup>45</sup>

The prescription of article 3(1) is relaxed by the limited exception provided in article 3(2).<sup>46</sup> While the carrier must still deliver the ticket containing the essential particulars to avail itself of the limitation on liability, an insignificant "irregularity" will be excused.<sup>47</sup> The delivery sets the terms of the contract. Any subsequent "absence" or "loss" of the ticket will be without effect.<sup>48</sup>

45. The ticket provides the courts with an objective basis for applying the Convention. See *supra* notes 4, 22. See also *Poland*, 535 F. Supp. at 838.

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

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

*Id.*

Mr. De Vos, the Reporter, analyzed the requirements of article 3 for the delegates: "The essential thing, in this regard, is the sanction, . . . which consists in depriving the carrier who would carry travelers . . . without documents or with documents not conforming to the Convention, of the benefit of the advantages provided by the Convention." MINUTES, *supra* note 2, at 20 (emphasis added); see *infra* note 48.

47. An "irregularity" exists when the writing does not accurately state the contract term due to a mistranscription or a negligent omission. See *Collins v. British Airways Bd.*, 1982 Q.B. 734 (C.A. 1981) (article 4(2) "irregularity" in baggage check); *Grein*, [1937] 1 K.B. at 82-85. When sufficient evidence of the actual agreement is introduced, an insignificant defect may be excused. *Id.* at 82. The omission of the "agreed stopping places," for example, will be excused when the international character of the contract is not dependent upon that particular. See *Preston v. Hunting Air Transp. Ltd.*, [1956] 1 Q.B. 454; see also *infra* notes 108-12 and accompanying text.

48. Without a prior delivery of the passenger ticket, there can be no article 3(2) "absence" or "loss." The party seeking to apply the Convention, however, will have to prove that the requisite delivery has been made. See *supra* notes 34-44.

The exception provided by article 3(2), *supra* note 46, is designed to be narrowly construed. The preliminary draft of the Convention stated:

If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, or if the ticket does not contain the particulars indicated hereabove, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from the faults of his servants.

MINUTES, *supra* note 2, at 258-59.

The Greek delegation did not favor the imposition of sanctions for omitting particulars it considered insignificant. *Id.* at 303-04. Other delegations disagreed and proposed additional particulars as required in other Conventions. *Id.* at 149-50. The Greek position prevailed. "But the consequence was that it was necessary to be much more severe for particulars

Thus, the interrelationship between article 1 and article 3 guarantees that the Convention's essential purpose will be achieved.<sup>49</sup> Article 1 defines "international transportation" according to the parties' contract.<sup>50</sup> Article 3 requires that the vital terms of the contract be included in the writing delivered by the carrier.<sup>51</sup> The interaction between the articles is based upon French legal principles similar to the the objective theory of contract law.<sup>52</sup> The rule allows parties to clearly establish their rights and liabilities prior to the initial flight, and courts to apply the Convention in a simple and uniform manner.<sup>53</sup>

*B. The Revision of the Warsaw Convention:  
the United States, the Hague Protocol,  
and the Montreal Agreement*

When the United States adhered to the Convention in 1934,<sup>54</sup> the broad scope of its applicability was not fully appreciated.<sup>55</sup>

imposed on the passenger ticket . . . ." *Id.* at 150. The formalities would be required except in "Act of God" cases. *Id.* at 86 (Mr. Pittard, Switzerland, citing a rescue pick up of passengers and goods as an example); see *Karfunkel*, 427 F. Supp. at 978.

49. See *supra* notes 16-18 and accompanying text.

50. See *supra* notes 24-26 and accompanying text.

51. See *supra* notes 33-45 and accompanying text; see also *Hearings on Exec. H*, *supra* note 41, at 50 (statement of Stuart G. Tipton, President, Air Transp. Ass'n)(The contract "must be written, it must be executed, it must be delivered.").

52. See *supra* notes 4, 22.

53. See *supra* notes 33-45 and accompanying text.

Application based on the contract also serves the drafters' purpose "to grasp the first opportunity to transform a domestic flight into an international one." Sullivan, *supra* note 6, at 8-9 (quoting De Vos, Reporter). Every contract has only one place of destination. Domestic flights, therefore, are often deemed "international transportation" under the Convention.

For example: A and B work for the same company in New York. Both are going to Chicago for a two day conference. While A returns to New York, B will continue his trip. B's ticket contains the following itinerary: Chicago, San Francisco, Portland, Toronto, Boston, and New York. Due to the pilot's negligence, however, the plane crashes on its approach into Chicago. Both A and B have a "destination" of New York. B's contract, however, contains a stop in a foreign territory. Even if Canada is not a High Contracting Party, B's recovery is limited by the Warsaw Convention. A's recovery is not limited. See *supra* notes 25-29 and accompanying text. See also *Hearings on Exec. H*, *supra* note 41, at 49-51 (statement of Stuart T. Tipton) (discussing the relationship between the ticket and the liability limitations).

The law governing domestic flights has never required international codification. See *supra* note 17. It had been hoped that the international limitation of liability would be applied internally through corresponding legislation. Lowenfeld & Mendelsohn, *supra* note 4, at 499. *But cf.* *Air Crash Bill Would Allow Federal Action*, 68 A.B.A. J. 1071 (1982)(discussion of proposed bill to provide for "fair and just pecuniary losses, including loss of care, comfort and society," and establish a federal cause of action for domestic air crashes).

54. On June 15, 1934, the Senate gave its advice and consent to the Warsaw Convention. There had been no debate, committee hearing, or report. 78 CONG. REC. 11,582 (1934).

Debate over the United States participation began soon thereafter and has continued ever since. Critics of the Convention have attacked the limitation on liability as a "barbaric . . . subsidy," used by the airlines "not only as a shield but as a club against the passengers."<sup>56</sup> The "felony" of the limitation is "compounded in

On July 31, the United States gave notice of adherence. On October 29, President Roosevelt proclaimed the Convention in effect as to the United States. 49 Stat. 3000, T.S. No. 876.

Some have questioned whether the Convention is actually a "treaty." See, e.g., Kennelly, *supra* note 2, at 98. The argument is based upon the difference between the broad definition of the "treaty" under the principles of international law, see Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(a), 8 I.L.M. 679, 681, *reprinted in* 63 AM. J. INT'L L. 875, 876 (1969) (entered into force January 27, 1980, 82 DEP'T ST. BULL., May 1982, at 78, but is not in force in the United States)[hereinafter cited as Vienna Convention], and the more restrictive definition in the United States. See RESTATEMENT (REVISED) OF FOREIGN RELATIONS OF THE UNITED STATES 71 introductory note 3, at 74 (Tent Draft No. 1, 1980), *quoted in* Weinberger v. Rossi, 102 S. Ct. 1510, 1514 n.5 (1982). The contention is that the Warsaw Convention is not a treaty within the United States definition because it was not ratified. This argument should be rejected. *Bali*, 684 F.2d at 1307 n.5; see *Block*, 386 F.2d at 337-38; *Kalish v. TWA*, 89 Misc. 2d 153, 157, 390 N.Y.S.2d 1007, 1010 (N.Y. Civ. Ct. 1977). The Convention preempts local law and policy and must be applied in good faith by the Courts. *Bali*, 684 F.2d at 1308-09; *Reed v. Wisner*, 555 F.2d at 1093; see U.S. CONST. art. VI; Vienna Convention, *supra*, arts. 26, 27.

The Senate's method of adhering to the Convention has left the courts with little evidence of what the legislative body intended, except for Secretary Hull's general statement. See Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934)[hereinafter cited as Transmitting Message], *quoted in Block*, 386 F.2d at 327.

55. See Sullivan, *supra* note 6, at 10.

56. The critics attacked the imposition of any liability limitation and not just the low amount recoverable. Lowenfeld & Mendelsohn, *supra* note 4, at 534-35.

The authors examined both sides of the debate that developed over the Hague Protocol. *Id.* at 534. State Bar Associations, insurance companies, law professors, and all major airlines argued for ratification. They contended that adopting a higher limit on liability would impede uniformity by discouraging developing nations from joining the Convention. Passengers would be hurt in two ways. First, they would be unable to recover the Convention's "international standard of fairness" in these areas. See, e.g., *Tramontana v. S. A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468, 470 (D.C. Cir. 1965)(plaintiff unsuccessfully sought to avoid Brazil's limit on recovery of U.S.\$170). Secondly, passengers would have to pay higher ticket prices to cover the airlines' increased insurance costs. See Lowenfeld & Mendelsohn, *supra* note 4, at 534; see also Transmitting Message, *supra* note 54. *But see* Hollings, *infra* note 146 (Today, "the actual cost to the airlines for liability insurance is . . . only 29 to 63 cents per round trip, and that's for unlimited coverage.").

Practicing attorneys and many Senators argued that the United States should withdraw from the Convention. They contended that the drastic difference between amounts recoverable under the Convention and the amounts awarded by United States juries could not be legally, rationally or morally justified. Lowenfeld & Mendelsohn, *supra* note 4, at 534-35. See, e.g., *Bar Report*, *infra* note 156, at 268 (dissent); see also 111 CONG. REC. 20,164-65 (1965)(Robert Kennedy analyzes and rejects the proposed system of mandatory insurance to accompany the Hague Protocol).

that less than one-half of one percent of the passengers in international traffic are even aware of it.”<sup>57</sup> The merit of the “regulated contract” was outweighed by the injustice in applying the limitations to unwary passengers.<sup>58</sup>

In 1955, the Hague Protocol amended the Convention.<sup>59</sup> The limit placed on the carrier’s liability was doubled to the equivalent of U.S.\$16,000. Article 3 was also substantially modified.<sup>60</sup> The change in article 3 lessened the evidentiary importance of the document of carriage.<sup>61</sup>

Article 3(2) of the Hague Protocol includes a new introductory sentence: “The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of car-

The argument has resumed today over the proposed Montreal Protocols to amend the Convention. See *infra* note 146. The arguments continue to be raised by the parties, although the American Bar Association’s position does not appear to be firm. See *ABA Reaffirms Support of Airline Accord*, 68 A.B.A. J. 1204 (1982). Those opposed to ratification have thus far won the debate. See *infra* note 145.

57. Lowenfeld & Mendelsohn, *supra* note 4, at 535 (quoting Senator Capehart); see Hollings, *infra* note 146.

58. The Convention’s emphasis on the the passenger ticket reflects the importance of the document of carriage in 1929. This is inconsistent with the current industry practices and the trend towards non-documentary ticketing. See *infra* note 148. In response, the courts have attempted to apply the Convention by rejecting a “literal” interpretation. See, e.g., *Eck v. United Arab Airlines*, 15 N.Y.2d 53, 59-60, 203 N.E.2d 640, 642, 255 N.Y.S.2d 249, 251-52 (1964). The issue is not what the treaty requires, but which purpose the requirement serves today. *Id.* These ad hoc judicial amendments often do violence to the text of the Convention. See *id.* at 63, 203 N.E.2d at 644, 255 N.Y.S.2d at 255 (Desmond, J., concurring). Courts are not the proper forum for treaty revision. *Reed v. Wiser*, 555 F.2d at 1093.

A significant problem with the “regulated contract” has been the required “statement” that the carriage is covered by the rules of the Convention. Warsaw Convention, *supra* note 1, art. 3(1)(e); see *supra* note 44. Courts have been particularly divided on the issue of whether that statement is adequate to bind passengers. See *supra* note 22.

The preliminary draft of the Convention did not list the “statement” as a particular which must be contained on the ticket in order to consider the carriage “international.” MINUTES, *supra* note 2, at 258; see *supra* note 34. Following article 3(1)(a)-(d), the draft contained the following statement: “The passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.” MINUTES, *supra* note 2, at 258. The Japanese delegation, concerned that the article’s structure made the command unclear, wanted the “statement” to be compulsory. *Id.* at 310. Article 3 was approved when subsection (1)(e) replaced the ambiguous “clause.” See *supra* text accompanying note 44.

59. Hague Protocol, *supra* note 2.

60. *Id.* art. 3. See *supra* note 58 and accompanying text.

61. As ticketing procedures developed, the ticket took on less significance in practice than the Convention had given it in law. The United States, however, still adheres to the unamended Convention which has created problems for the courts. See *supra* note 58; *infra* notes 126-59 and accompanying text.

riage.”<sup>62</sup> The required particulars were also modified to reflect this change. Specifically, article 3(1)(e) was amended to require the carrier to deliver a ticket containing notice that the Convention may be applicable.<sup>63</sup> The legislative history suggests an intent to allow each country to regulate the notice requirement.<sup>64</sup> The Civil Aeronautics Board (CAB), it should be observed, had expressed dissatisfaction with the limited notice provided to passengers of the Convention’s applicability.<sup>65</sup> Moreover, some courts in the United States refused to bind the passenger to the Convention when the delivery of the ticket did not provide him with a reasonable opportunity to take self-protective measures.<sup>66</sup>

The United States government, however, refused to ratify the Hague Protocol solely because the relief provided was deemed inadequate.<sup>67</sup> In 1965, the United States threatened to withdraw from the Convention unless the carrier’s liability were increased.<sup>68</sup>

62. Hague Protocol, *supra* note 2, art. 3(2). See *Hearings on Exec. H*, *supra* note 41, at 50 (statement of Stuart G. Tipton). The ticket would continue to clearly establish the rights of the parties to prevent disputes and the possibility of fraud by the carrier. *Id.*

63. Hague Protocol, *supra* note 2, art. 3(1)(c).

[A] notice to the effect that, if the passenger’s journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury. . . .

*Id.* See *Canadian Pac. v. Stampleman*, 72 D.L.R.3d 257, 263 (Can. 1976) (“notice” means “at least something which is in a form calculated to attract attention”).

Other examples of this change in the role of the passenger ticket include the amendments to article 3(1)(b) and article 3(1)(c) to require an “indication of the places of departure and destination,” and if the international character of the contract is dependent upon the “agreed stopping places . . . an indication of at least one such stopping place.” See Hague Protocol, *supra* note 2, art. 3(1)(a), (c).

64. Lowenfeld & Medelsohn, *supra* note 4, at 514.

65. 28 Fed. Reg. 11,775 (1963).

66. See cases cited *supra* note 58 and *infra* notes 113, 130.

67. *Reed v. Wiser*, 555 F.2d at 1087.

68. Dep’t of State Release No. 268 (Nov. 15, 1965), reprinted in 53 DEP’T ST. BULL. 923-24 (1965) (notice of denunciation delivered to the Polish government, effective date May 15, 1966); see Lowenfeld & Mendelsohn, *supra* note 4, at 546-52; see also *supra* notes 55-56.

The Warsaw Convention had achieved its two primary goals. First, the objective of establishing uniform rules concerning the contract of carriage had been “almost fully realized.” Calkins, *supra* note 20, at 343. By the end of 1965, 102 nations had joined the Convention, and 3 more ratified the treaty as amended only. A. LOWENFELD, *CASES AND MATERIALS* 964-69 (2d ed. Supp. 1981). Second, the Convention’s legal basis of operation had allowed the infant air transport industry to obtain insurance and investment capital. The industry has expanded beyond the expectations of the drafters. Reilly, *supra* note 3, at 397 (analyzing the effect of the Convention on the carriers’ liability exposure). Other reasons for

An interim arrangement was reached in 1966. The day before the United States' denunciation was to take effect, the airlines agreed among themselves to accept a "special contract" increasing their liability to U.S.\$75,000 for passengers departing from, destined for, or stopping over in the United States, according to the contract of carriage.<sup>69</sup> This interim arrangement, which came to be known as the Montreal Agreement,<sup>70</sup> also included a CAB approved article 3(1)(e) "statement" of applicability.

The United States government accepted the Montreal Agreement and withdrew notice of denunciation.<sup>71</sup> The Montreal Agreement, however, only temporarily resolved the problem of unreasonably low monetary limitations and did not modify the original

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allowing carriers to limit their liability include the following: (1) establish an international limit liability similar to that accorded shipowners; (2) spread the risk of liability; (3) allow passengers to obtain insurance; (4) facilitate quick settlements; and (5) unify the law with respect to the amount of damages. See H. DRON, *supra* note 21, at 12-43. A sixth reason is to obtain the airline's consent to plaintiff's choices of forum. See L. KREINDLER, *supra* note 2, § 11.06 n.54; see also *supra* note 29.

Critics assert that the Convention has served its purpose and is no longer necessary. See, e.g., Kennedy, *supra* note 56, at 20,165; see also Kennelly, *supra* note 2, at 99.

The district court in *Bali*, for example, found that the deregulation of the airline industry established a new federal policy that the "vigorous airline industry [must] . . . stand on its own feet." *Bali*, 462 F. Supp. at 1126. This change in policy, the court reasoned, allows it to limit the treaty's enforcement. *Id.* See *supra* notes 22, 58. But see *infra* note 99. This argument, however, misconceives the role of the courts in enforcing a multinational treaty and was rejected by the circuit court. *Bali*, 684 F.2d at 1308; see Note, *supra* note 30, at 76-77; see also *Reed v. Wiser*, 555 F.2d at 1093. Absent an explicit Congressional directive, the court should not abrogate or modify the terms of the treaty. See *Cook v. United States*, 288 U.S. 102, 120 (1933); see also *supra* note 54.

69. Montreal Agreement, *supra* note 1, § 1. See Lowenfeld & Mendelsohn, *supra* note 4, at 552-601 (history of the Montreal Conference). Cf. *Poland*, 535 F. Supp. at 837 (distinguishing special contracts). The French have viewed the Montreal Agreement as both a tacit amendment to the treaty and a violation of the text which assumes that the special contract would be the result of a negotiation initiated by the passenger. See G. MILLER, *supra* 4, at 185-86.

The limit is U.S.\$58,000 without attorney fees. Montreal Agreement, *supra* note 1, § 1. Other nations do not apply the Convention limits to an award of attorney fees. *Boehringer Mannheim Diagnostics, Inc., v. Pan Am. World Airways*, 531 F. Supp. 344, 354 (S.D. Tex. 1981).

70. Montreal Agreement, *supra* note 1, § 1. The Montreal Agreement allowed the Warsaw Convention to remain intact "pending the establishment of more permanent arrangements between the governments." *Block*, 386 F.2d at 325 n.1.

71. Dep't of State Releases Nos. 110-111 (May 13-14, 1966), reprinted in 54 DEP'T ST. BULL. 955-57 (1966).

Convention. Article 3's "regulated contract," as supplemented by the CAB approved "statement," remained intact.<sup>72</sup>

## II. STRATIS V. EASTERN AIR LINES

Eastern Air Lines Flight No. 66 crashed while attempting to land at New York's John F. Kennedy Airport on June 24, 1975.<sup>73</sup> Two Greek sailors, Efstratios Stratis and Grigorios Georgakis, were among the injured. They had been discharged from the S.S. *Paros* in Louisiana and in accordance with their Seamen's Articles, Greek Law, and the United States immigration laws, arrangements were made for their repatriation.<sup>74</sup>

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72. The CAB approved "statement" of applicability in effect codified the Hague Protocol "notice" requirement. See *supra* notes 1, 63. The Warsaw Convention ticket requirements remained otherwise unchanged. The consequence of this 17 year old "interim arrangement" has been that the "regulated contract" has not kept pace with developments of contract law and technology. See *supra* note 58.

73. N.Y. Times, June 25, 1975, at 1, col. 6. Eastern and the federal air traffic controllers were found negligent. *In re* Air Crash Disaster at John F. Kennedy Airport on June 24, 1975, 635 F.2d 67 (2d Cir. 1980). The disaster resulted in a 110 fatalities, a near record for an accident in the United States. N.Y. Times, June 26, 1975, at 1, col. 4. At the present time, all but six of the suits have been settled for an estimated total of U.S.\$30,000,000. N.Y. Times, Oct. 28, 1982, at B4, col 6.

74. *Stratis*, 682 F.2d at 409; *Georgakis v. Eastern Air Lines*, 512 F. Supp. 330 (E.D.N.Y. 1981) (Eastern collaterally estopped from relitigating the Warsaw Convention applicability issue), *vacated per stipulation*, 75 Civ. 1511 (E.D.N.Y. Sept. 23, 1981).

Eastern explained the plaintiff's arrangements:

[S]ince plaintiff was an alien, his entry into the United States was restricted [8 U.S.C. § 1282(a)], and his entry was only for the purpose of departing from this country "on a vessel or aircraft other than the one on which he arrived." 8 U.S.C. § 1282(a)(2). Under the applicable regulations, plaintiff had to make his application for landing privileges in person and the immigration officer had to be satisfied that definite arrangements for plaintiff's departure from the United States had been made. 8 C.F.R. §§ 252.1(c) & (d).

Brief for Defendant-Appellant Eastern Air Lines at 10, *Stratis v. Eastern Air Lines*, 682 F.2d 406 (2d Cir. 1982)[hereinafter cited as Eastern Brief].

8 U.S.C. § 1282(a) provides, *inter alia*, as follows:

"No alien crewman shall be permitted to land temporarily in the United States except as provided in this section and sections 1182(d)(3), (5) and 1283 of this title . . . ."

. . . .

Pursuant to the applicable regulations [8 C.F.R. Part 252-"Landing of Alien Crewman"] . . . an application on Form I-408 apparently was presented to the INS office in Baton Rouge, by . . . the vessel's local agents . . . a D-2 landing permit was issued to Mr. Stratis, and box IV, titled "ARRANGEMENTS FOR DEPARTURE FROM THE U.S. OF THE LISTED CREWMEN ARE (SCHEDULED TIME, DATE AND PORT OF DEPARTURE, AIR CARRIER AND FLIGHT NUMBER

The two young sailors boarded Flight No. 66 with tickets that covered only the domestic flight with Eastern.<sup>75</sup> The tickets were written in English. One sailor had a limited knowledge of English, and the other could read only Greek. Olympic Airways, in a completely separate transaction, held prepaid documents in the New York airport for the sailors' connecting flight to Greece. The Olympic tickets, in contrast to Eastern's domestic tickets, contained both the statement of applicability required by the Montreal Agreement and a Greek translation.<sup>76</sup> The Olympic tickets, however, lacked a date of issuance and a validation stamp and were never delivered.<sup>77</sup>

OR VESSEL"), identifies the following transportation for plaintiff: "Depart Baton Rouge Delta 412 0931/24th, Arrive Nola 0953, Depart Nola 1205 Eastern 66, Arrive Kenedy [sic] 1545, Depart Kenedy [sic] Olympic 418 1915/24th" (JA 420a-21a).

Eastern Brief, *supra*, at 16-18.

75. *Georgakis*, 512 F. Supp. at 331. The two Greeks had identical arrangements prepared by S.S. *Paros* acting through its agent Orion & Global Chartering Co. *Id.* Both received tickets authorizing travel on a Delta Airlines flight from Baton Rouge to New Orleans and Eastern Air Lines Flight No. 66 from New Orleans to New York. *Id.* See *supra* note 74.

76. *Stratis*, 682 F.2d at 419 (Newman, J., dissenting). The Greek plaintiff's difficulty with the language of the Eastern ticket influenced the district court.

Eastern also argued that the inclusion of the Warsaw/Montreal limitation of liability provision . . . was sufficient to meet the notice requirement . . . [T]he Court questioned "whether Mr. Stratis or anyone else for that matter, can be said to truly understand what this notice provision states," adding that "[w]hile the airlines' notice provision may certainly appear to be Greek to even a well-seasoned traveler, it certainly was not Greek to Mr. Stratis," . . .

*Georgakis*, 512 F. Supp. at 333 n.11 (quoting *Stratis Proceedings*, *infra* note 77, at 29). See *Moyer v. Port Auth. of N.Y. & N.J.*, 16 Av. Cas. (CCH) 18,081, 18,083-84 n.8 (E.D.N.Y. 1981)(*Stratis* and *Georgakis* found inapposite: the plaintiff in *Moyer* could read English). But see *Kennelly*, *supra* note 2, at 93 ("All passengers—babies, blind people, and illiterates—are theoretically bound . . .").

77. Transcript of the August 3, 1979 proceedings in *Stratis v. Eastern Air Lines*, 75 Civ. 1151, at 16-21, *clarified in Georgakis*, 512 F. Supp. at 331-332 [hereinafter cited as *Stratis Proceedings*]. The parties placed significant emphasis on whether the Olympic ticket was issued. Brief for Plaintiff-Appellee Efstratios Stratis at 9, *Stratis v. Eastern Air Lines*, 682 F.2d 406 (2d Cir. 1982)[hereinafter cited as *Stratis Brief*]. The circuit court agreed with Eastern that the ticket had been issued. *Stratis*, 682 F.2d at 409, 412. Issuance of an international ticket, standing alone, is not significant. The Convention's requirements must be met. Neither carrier delivered a ticket containing the essential particulars. See *supra* notes 33-44 and accompanying text. Cf. *Adamsons v. American Airlines*, 105 Misc. 2d 787, 790, 433 N.Y.S.2d 366, 369 (N.Y. Sup. Ct. 1980)(issuance of a ticket constitutes a conditional acceptance; plaintiff was not a "passenger" within the meaning of the Convention), *aff'd mem.*, 87 A.D.2d 785, 449 N.Y.S.2d 487 (1982).

78. See *Stratis*, 682 F.2d at 408. The total award was U.S.\$6,500,000. Sixty percent of the amount was to be paid by the New York City Health and Hospitals Corporation for malpractice. Forty percent would be paid by Eastern and the United States. *Id.* The Second

At trial, both Eastern and the United States air traffic controllers were found negligent and liable to Stratis in the amount of U.S.\$2,600,000.<sup>78</sup> Stratis moved for summary judgment striking Eastern's Warsaw/Montreal affirmative defense.<sup>79</sup>

### A. *The District Court Holding*

The district court<sup>80</sup> held as a matter of law that plaintiff was not engaged in "international travel" because the ticket he possessed authorized only domestic transportation.<sup>81</sup> The district court alter-

Circuit found the award to be excessive and plaintiff accepted remittitur to U.S.\$2,850,000. *See id.* at 414-17; *supra* note 8. Eastern, therefore, was liable for the amount of U.S.\$75,000 and the United States paid the difference of U.S.\$1,065,000. Georgakis was awarded U.S.\$1,000,000, *see Georgakis*, 512 F. Supp. at 331 n.2; but he too accepted a reduced amount. 75 Civ. 1511 (E.D.N.Y. Sept. 23, 1981).

79. *Stratis*, 682 F.2d at 408-09.

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

*Id.* at 409.

The slip opinion language more accurately expresses the circuit court's surprise. "The United States which has everything to gain from having Eastern held not entitled to limit its liability, omits to discuss the point in its brief." *Stratis v. Eastern Air Lines*, Nos. 81-6149, 81-6167, 81-6187, slip op. at 3784 (2d Cir. June 30, 1982). The court's surprise suggests a possible reason for finding the Convention applicable.

80. *Stratis Proceedings*, *supra* note 77. The decision has not been officially reported, but was quoted and explained in *Georgakis*, 512 F. Supp. 330.

81. *Stratis Proceedings*, *supra* note 77, at 15; *Georgakis*, 512 F. Supp. at 332. The district court's holding that the contract is evidenced by the ticket has a long line of case support. *See cases cited supra* notes 29-32, 41; *Goldberg v. El Al Isr. Airlines*, 13 Av. Cas. (CCH) 18,191-92 (S.D.N.Y. 1975); *Kelly v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 242 F. Supp. 129, 144-45 (E.D.N.Y. 1965).

In *Varkonyi v. S. A. Empresa de Viacao Aerea Rio Grandense*, 71 Misc. 2d 607, 336 N.Y.S.2d 193 (N.Y. Sup. Ct. 1972), the court found that ticket's designated termini automatically determine the applicability of the Convention. *See McCarthy v. East Afr. Airways*, 13 Av. Cas. (CCH) 17,385-86 (S.D.N.Y. 1974)(article 28). For the Convention to be applicable, the contract must designate the international point of departure and destination, or include an agreed stopping place in a foreign territory. *See supra* notes 41-42; *see also H. DRON*, *supra* note 21, at 51-57.

The district court's holding is supported by the "textual approach" to treaty interpretation. *See infra* text accompanying notes 117-20; *see also Vienna Convention*, *supra* note 54, arts. 31-33 (adopting the "textual approach"); *see generally Fothergill v. Monarch Airlines*, [1980] 2 All E.R. 696 (H.L.) (interpreting the Warsaw Convention using the Vienna Convention approach); Adede, *International Law From a Common Law Perspective: A Second Look*, 60 B.U.L. Rev. 46, 57-61 (1980)(explaining the "textual approach"). A corollary of

natively concluded that the domestic passenger ticket containing the CAB approved statement of applicability written only in English failed to provide plaintiff with a reasonable opportunity to take self-protective measures and rendered the Convention inapplicable.<sup>82</sup>

### B. *Analysis of the Circuit Court's Decision and the Requirements of the Convention*

The circuit court reversed the district court. The Second Circuit first established that Stratis was engaged in international transportation according to article 1. The court then held that the delivery of the Eastern ticket satisfied the demands of article 3.<sup>83</sup> The following analysis of the court's decision will discuss the requirements of each article separately.

#### 1. International Transportation

##### a. The Circuit Court's Analysis

The majority of the Second Circuit agreed with Eastern's bifurcated reading of the Convention articles to find that plaintiff was engaged in "international transportation."<sup>84</sup> Eastern made a

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interpretation is the "principle of integration: the meaning must emerge in the context of the treaty as a whole." I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 626 (3d ed. 1979). To avoid needless conflicts in the text, the articles of the Convention must be read as supporting each other. See *Bernier v. Bernier*, 147 U.S. 242, 246 (1893).

82. *Stratis Proceedings*, *supra* note 77, at 25-26; *Georgakis*, 512 F. Supp. at 333. See *infra* note 115.

83. *Stratis*, 682 F.2d at 410 n.4, 412-14. The circuit court's separation of the article 1 and article 3 issues created an unresolvable conflict between the commands of the treaty text. See *Stratis*, 682 F.2d at 412; *infra* text accompanying note 112. The conflict, however, is resolved by adopting the textual approach to interpretation. See *supra* note 81. The clarity of the text allows for a swift determination of the applicability of the Convention and discourages litigation of this issue. As the circuit court found, there is little case law on point. *Stratis*, 682 F.2d at 410-12. A major benefit of the Convention was to facilitate settlements. See *supra* note 68; see also *supra* note 53.

84. *Stratis*, 682 F.2d at 410 n.4. "We agree with Eastern that the undisputed facts, especially INS Form-I408, to which the [district] court never referred, establish that Stratis had a 'contract' within Article 1(3) for international travel. Acceptance of prepayment by Olympic constituted the formation of such a contract, irrespective of delivery of the ticket." *Id.*; see *supra* note 63. But see *Georgakis*, 512 F. Supp. at 332 (the *Stratis* district court found the INS form and the prepayment not to be determinative). The Olympic document, which lacked the date of issuance particular, was never delivered. There was no "contract" for

two-pronged argument to satisfy the definitional requirements of article 1.<sup>85</sup> First, Eastern stressed that a journey from the United States to Greece was "international transportation." Eastern then argued that the requirements of the United States Immigration and Naturalization Service (INS)<sup>86</sup> and the prepayment of the Olympic Airways ticket conclusively established that plaintiff considered the Eastern flight to be part of an article 1(3) "single operation."<sup>87</sup> Therefore, the Second Circuit concluded, plaintiff's flight to New York was "international transportation."<sup>88</sup>

#### b. Analysis of the Convention's Requirements

The threshold question of applicability must be answered by examining the "contract between the parties."<sup>89</sup> The definitional language found in article 1(2) is complemented by the prescription in article 3(1) that the "carrier must deliver a passenger ticket" containing the essential particulars.<sup>90</sup>

The *Stratis* court creates an unprecedented definition of "international transportation" by searching beyond the agreement between the parties.<sup>91</sup> The only contract between plaintiff and Eastern was for the purely domestic flight from Louisiana to New

international transportation within the meaning of the Convention. *Id.* at 333 n.9; see *Stratis* Brief, *supra* note 77, at 8; see also *supra* note 81.

Payment of the international ticket price may be sufficient evidence of the requisite "common intention" but only when the payment is to the particular airline in question. See, e.g., *Butz v. British Airways*, 421 F. Supp. 127 (E.D. Pa. 1976), *aff'd*, 566 F.2d 1168 (3d Cir. 1977).

85. Eastern Brief, *supra* note 74, at 4-23.

86. *Id.* at 7-11. See *supra* note 74.

87. Eastern Brief, *supra* note 74, at 7-11. Neither party, however, regarded the Eastern and Olympic flights as a "single operation." See *Stratis*, 682 F.2d at 419 n.7 (Newman, J., dissenting); *infra* text accompanying notes 95-98.

88. *Stratis*, 682 F.2d at 410 n.4; see *supra* notes 83-84.

89. *Bali*, 462 F. Supp. at 1121; Warsaw Convention, *supra* note 1, art. 1; see cases cited *supra* note 81; see also *infra* text accompanying notes 117-20.

90. Warsaw Convention, *supra* note 1, art. 3(1); see *supra* text accompanying notes 33-45, 49-53. The delivery of the ticket is a prerequisite to the Convention's application. See cases cited *infra* note 105. Delivery must be made "prior to the initiation of the first leg of the trip." *Manion v. Pan Am. World Airways*, 55 N.Y.2d at 403; 434 N.E.2d at 1061, 449 N.Y.S.2d at 694 (late delivery of ticket containing notice of the Convention's liability limitations is not excused); cf. *Fosbrok-Hobbes v. Airwork, Ltd.*, [1937] 1 All E.R. 108, 114 (K.B.) (passenger not bound by provisions in ticket delivered well after the contract had been made).

91. *Stratis*, 682 F.2d at 410 n.4; see *supra* note 81.

York.<sup>92</sup> Eastern's argument that the Stratis trip to Greece establishes "international transportation" ignores the Convention's uniform rules which relate "not to journeys, not to flights, not to points of journeys, but to carriage performed under one (or in cases falling under para. 3 more than one) contract of carriage."<sup>93</sup>

Eastern argued that plaintiff's compliance with the procedures required by the INS and the prepayment to Olympic Airways established his ultimate intention to return to Greece. The domestic flight, Eastern concluded, was part of an article 1(3) "single operation."<sup>94</sup> This disregards the Convention's use of the plural in the clause "regarded by the parties."<sup>95</sup> When the passenger's journey involves a series of contracts, the "common intention" to regard them as a single unit must be proven.<sup>96</sup> Eastern lacked the requisite intention because it had not issued and delivered a ticket for the international flight.<sup>97</sup> Plaintiff, therefore, had two contracts. The contract with Eastern, unaffected by the surrounding circumstances, was not for "international transportation."<sup>98</sup>

### c. The Result in *Stratis*

The *Stratis* definition creates many problems. In *Stratis*, application of the Convention limitations based upon the fortuitous

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92. See *supra* notes 75-77 and accompanying text.

93. *Grein*, [1937] 1 K.B. at 77. Interpretation of one article of the Convention must be read in light of the whole text. See *supra* note 81.

94. Eastern Brief, *supra* note 74, at 7-10, 16-23.

95. Warsaw Convention, *supra* note 1, art. 1(3); see *supra* notes 27-29 and accompanying text.

96. See cases cited *supra* notes 29, 32.

97. *Stratis*, 682 F.2d at 419 n.7 (Newman, J., dissenting) ("Eastern had no idea that Stratis was on the domestic leg of an international journey . . . Eastern would have had such knowledge if it had issued and delivered to Stratis a series of tickets for the entire journey including the final leg to Athens.").

98. In addition to the want of "common intention," neither carrier had fulfilled the requirements of article 3. *Id.* at 417-19 (Newman, J., dissenting); see *supra* notes 33-44. Plaintiff, therefore, could not have been engaged in "international transportation" within the meaning of the Convention. See *supra* notes 24-29 and cases cited *supra* note 81; see also *supra* text accompanying notes 30-32, 49-53 and *infra* text accompanying notes 117-20. The contract with Eastern was not left "open." See *Rinck v. Deutsche Lufthansa*, 57 A.D.2d 370, 395 N.Y.S.2d 7 (1977), *aff'd mem.*, 44 N.Y.2d 714, 376 N.E.2d 929, 405 N.Y.S.2d 456 (1978). Furthermore, it was not "completed" by the subsequent arrangements with Olympic Airways. See *Briscoe v. Compagnie Nat'l Air Fr.*, 290 F. Supp. 863 (S.D.N.Y. 1968).

event that plaintiff was being repatriated grants the negligent carrier a "windfall."<sup>99</sup> A carrier which does not regard the transportation as "international" does not have the opportunity to adjust its insurance in light of the Convention's limitations.<sup>100</sup> The converse is also true. A carrier which provides only domestic carriage would not guard against the Convention's application.<sup>101</sup> Moreover, the *Stratis* court looked beyond the passenger ticket's designated termini to find the Convention applicable. Without an objective basis to determine whether a passenger is engaged in international transportation, parties' rights and liabilities will remain in doubt and courts will be forced into an onerous fact-finding mission. Such an examination encourages litigation.<sup>102</sup> The Convention was designed to remove this uncertainty for the parties and to reduce complexity for the courts.<sup>103</sup>

## 2. The "Delivery" Requirement

### a. The Circuit Court's Analysis

Article 3 of the Convention requires the carrier to "deliver" a ticket to the passenger containing the essential terms of the parties' contract.<sup>104</sup> Plaintiff argued that the requisite delivery had not taken place, because the ticket for international transportation had

99. *Stratis*, 682 F.2d at 419 (Newman, J., dissenting). In 1919, Winston Churchill stated that Great Britain's struggling airline industry "must fly by itself, the government cannot possibly hold it in the air." O. ALLEN, AIRLINE BUILDERS 24 (1981). The United States followed this decree throughout the 1920's, but economic realities forced a change in policy. See *id.*, at 81-94; see also *supra* note 16; see generally N. TANEJA, U.S. INTERNATIONAL AVIATION POLICY 1-26 (1980) (charting the historical development). The success of the Convention, and the deregulation of the airline industry, has lead one court to opine that the United States has returned to its pre-Convention policy. See *Bali*, 462 F. Supp. at 1126. For a discussion of this point, see *supra* note 68. The actions taken by the United States in *Stratis* do not support this court's view. See *supra* note 79.

100. *Stratis*, 682 F.2d at 419 n.7 (Newman, J., dissenting); see *supra* notes 97-98.

101. Southwest Airlines, for example, is a purely domestic carrier without any interlining agreements. Southwest opposed the new rules binding it to the Montreal Agreement. The carrier apparently wishes to avoid the possibility that a court, following *Stratis*, could find that it was engaged in "international transportation." See 48 Fed. Reg. 8042 (1983); see also *supra* notes 94-98 and accompanying text.

102. See *supra* note 83.

103. See *supra* notes 16-23 and accompanying text.

104. See *supra* notes 34-44 and accompanying text.

not been received.<sup>105</sup> Eastern contended that the Convention does not require delivery of a ticket for international transportation as long as the domestic ticket contains the CAB approved notice.<sup>106</sup> Eastern, relying upon the reasoning of the court in the case of *Grey v. American Airlines*,<sup>107</sup> stated that the ticket's failure to specify Athens as the place of destination was an irregularity excused by article 3(2).<sup>108</sup>

The Second Circuit in *Stratis* rejected the arguments of both plaintiff<sup>109</sup> and Eastern.<sup>110</sup> Hence, the court was confronted with

105. Stratis Brief, *supra* note 77, at 9 (citing *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1967), and quoting *Bayless v. S. A. Empresa de Viacao Aerea Grandense*, 10 Av. Cas. (CCH) 17,881, 17,882 (S.D.N.Y. 1968) ("Compliance with the delivery requirement . . . is an absolute prerequisite to qualification for use of the defense provided by the Convention." *Id.*)); see *Stratis Proceedings*, *supra* note 77, at 29, quoted in *Georgakis*, 512 F. Supp. at 333 n.11.

106. Eastern argued that plaintiff was engaged in "international transportation" according to article 1(3) and that there was "no requirement in the Warsaw Convention the passenger have in his possession prior to injury all tickets covering his international transportation." Eastern Brief, *supra* note 74, at 14 (emphasis added).

Eastern relied upon the one paragraph per curiam opinion in *Manufactures Hanover Trust Co. v. American Airlines*, 23 A.D.2d 832, 259 N.Y.S.2d 277, 278 (1965), *rev'g*, 43 Misc. 2d 856, 252 N.Y.S.2d 517 (N.Y. Sup. Ct. 1964) (reversing on grounds that reliance on a United States tax statute definition of "international transportation" was improper for Convention purposes).

In *Stratis*, plaintiff responded to Eastern's argument by pointing out that in *Manufacturers Hanover* the ticket had been "purchased and issued and delivered." Stratis Brief, *supra* note 77, at 10 (emphasis added). Eastern, in its reply brief, stressed that the delivered ticket gave plaintiff "notice," and then restated its *Manufacturers Hanover* argument making one crucial change: "there is no requirement in the Warsaw Convention that the tickets for all of the flights be delivered for the limitation of liability provisions to be applicable." Reply Brief for Defendant-Appellant Eastern Air Lines at 6 n.6, *Stratis v. Eastern Air Lines*, 682 F.2d 406 (2d Cir. 1982) (emphasis added). The issue presented to the circuit court, therefore, was whether the Convention required the delivery of an international passenger ticket for the liability limitation to apply. *Stratis*, 682 F.2d at 409-10. See *supra* note 83 and accompanying text.

107. 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd on the opinion below*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956), *cited in* Eastern Brief, *supra* note 74, at 12-14.

108. Eastern Brief, *supra* note 74, at 13 (citing *Grey*, 227 F.2d at 284); see *supra* notes 46-48 and accompanying text.

109. *Stratis*, 682 F.2d at 410. The court distinguished both cases cited by plaintiff. In *Bayless*, the statement of applicability was printed in 4.5 point type. In *Mertens*, the passenger received his ticket only moments before boarding. *Id.*

110. *Id.* at 410-11; see *supra* note 106. In *Grey*, the ticket omitted the domestic stopping places and properly listed the place of departure as New York and the place of destination as Mexico. The omission did not change the international character of the contract, and therefore was an irregularity excused by article 3(2). See *supra* note 47.

In *Stratis*, however, the absence of an international point of destination on the Eastern ticket was not an omission. The delivered ticket accurately stated the parties' agreement to

what it perceived to be "conflicting directives" from article 3.<sup>111</sup> "If the 'absence' of a ticket does not affect the existence of the contract but the carrier 'must deliver' a ticket, what did the treaty-writers intend? We do not know, and to answer the question either way is equally arbitrary or reasonable as we see it."<sup>112</sup> The court was left with a novel question of law: whether delivery of an international ticket is a prerequisite for application of the Convention system. Unable to harmonize the text, the court rejected the article 3 requirements and instead relied upon its purpose as defined in *Lisi v. Alitalia-Linee Aeree Italiane*.<sup>113</sup>

In *Lisi*, the Court of Appeals for the Second Circuit stated that the purpose of the article 3 delivery requirement was to provide the passenger with sufficient notice to afford him a reasonable opportunity to protect himself against the Convention's limitation of liability.<sup>114</sup> The court in *Stratis* explained that if plaintiff "had reason to

engage in purely domestic transportation. See *supra* notes 74-75, 81. Moreover, failure to designate Athens as the international terminus would not be excused as an omission.

111. See *supra* note 83.

112. *Stratis*, 682 F.2d at 412 (footnote omitted).

"[The drafters] intended, just as they said, that a ticket must be delivered to the passenger; thereafter, the absence, even the loss, of that ticket . . . does not impair the contract of transportation or remove the limitation on liability." *Id.* at 419 (Newman, J., dissenting); see *supra* text accompanying notes 46-48.

113. 370 F.2d 508 (2d Cir. 1966), *aff'd without opinion by an equally divided court*, 390 U.S. 455, *reh'g denied*, 390 U.S. 929 (1968), *discussed in Stratis*, 682 F.2d at 411.

114. *Lisi*, 370 F.2d at 512 (citing *Mertens*, 341 F.2d at 856). The court held as matter of law that the delivered ticket failed the Convention's "delivery" requirement because the "exculpatory statements on which the defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else." 370 F.2d at 514. The *Lisi* court contrasted the notice given with that approved by the CAB, but suggested that the passenger must have actual knowledge of the contract terms. See *id.* at 514 n.10.

No foreign court has adopted the *Lisi* court's interpretation of the unamended Convention's delivery requirement. See, e.g., *Ludecke v. Canadian Pac. Airlines*, 98 D.L.R.3d 52 (Can. 1979)(the Canadian Supreme Court distinguished the case cited *supra* note 63, interpreting the Hague Protocol).

In the United States, the *Lisi* interpretation has been rejected, see *Bianchi v. United Air Lines*, 22 Wash. App. 81, 587 P.2d 632 (Wash. Ct. App. 1978), and limited only to "notice" of the liability limitations. *Molitch v. Irish Int'l Airlines*, 436 F.2d 42, 44 (2d Cir. 1970)(stating the rule followed by most courts); see *supra* note 22; see also *Parker v. Pan Am. World Airways*, 447 S.W.2d 731 (Tex. Civ. App. 1969)(failure to understand "65.5 milligrams of gold per kilogram" does not, as suggested in *Lisi*, invalidate the Convention).

In applying *Lisi*, courts have often taken an objective approach to define the notice requirement. See *supra* note 22; compare *Domangue v. Eastern Air Lines*, 531 F. Supp. 334, 341 (E.D. La. 1981) (the carrier does not have to show that the passenger knew of the contract terms it need only deliver a ticket that gives him "a reasonable opportunity to

know [that] his overall flight was international," the domestic ticket would achieve the article 3 purpose.<sup>115</sup> The court stressed the procedure required by the INS and the prepayment to Olympic Airways, and held that "the passenger is assumed to know the flight was international and the Convention does apply."<sup>116</sup>

#### b. Analysis of the Convention's Requirements

Article 1 and article 3 require the carrier to deliver the ticket for international transportation before the Convention will apply.<sup>117</sup> The ordinary meaning of the treaty, read as a whole with an eye towards its essential purpose, requires the contract for "international transportation" to meet the particulars of article 3.<sup>118</sup> This view is supported by the amendments adopted by other High Contracting Parties.<sup>119</sup> As Judge Newman recognized, the clearly expressed command of the Convention "is not satisfied by delivery of a ticket for a domestic flight."<sup>120</sup> When the ticket for international transportation is delivered, it must simply contain the CAB approved statement that the Convention may be applicable. This statement has established a uniform standard of notice and is sufficient as a matter of law.<sup>121</sup>

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become aware of the limitation of liability provision") *with Seth v. British Overseas Airways*, 329 F.2d 302, 307 (1st Cir. 1964) (lost baggage case; the ticket provides the passenger with a "blunt warning" to find out whether his carriage is "international" as defined by the Convention) and *Ciprari v. Servicos Aereos Cruzeiro do sul, S. A.*, 245 F. Supp. 819, 821 (S.D.N.Y. 1965) (non-Warsaw Convention case; passenger bound by the terms on ticket written in Portuguese in that he made no effort to discover their meaning).

The *Stratis* district court, influenced by the plaintiff's limited knowledge of English, held that the CAB notice was insufficient when contained on a domestic passenger ticket. Eastern, therefore, failed to satisfy the delivery requirement. See *Stratis Proceedings*, *supra* note 77, at 25-26, *quoted in Georgakis*, 512 F. Supp. at 333. See *supra* note 76.

115. *Stratis*, 682 F.2d at 412-13. This is a peculiar phrasing of the issue. If plaintiff were engaged in "international transportation," within the meaning of the article 1(3), by definition he would be aware that his "overall flight was international." See *supra* note 29.

116. *Stratis*, 682 F.2d at 413-14. See *supra* note 74.

117. Warsaw Convention, *supra* note 1, arts. 1, 3.

118. See *supra* notes 33-53, 81.

119. Guatemala City Protocol, Mar. 8, 1971, art. 2, 10 I.L.M. 613, 613.

Article 3(1)(b) requires the international agreed stopping place to be listed if the character of the contract is dependent upon this particular. *Id.* See *infra* text accompanying note 146. Subsequent actions of the High Contracting Parties may be examined as additional support under the "textual approach" to treaty interpretation. See *supra* note 81.

120. *Stratis*, 682 F.2d at 417 (Newman, J., dissenting).

121. *Poland*, 535 F. Supp. at 338; *O'Rourke v. Eastern Air Lines*, 16 Av. Cas. (CCH) 18,367, 18,370 (E.D.N.Y. 1982) (proposing English as a universal language to create a

c. The Result in *Stratis*

The decision reached by the Second Circuit in *Stratis*, in effect, deregulates the Convention contract.<sup>122</sup> Deregulation imposes upon the courts of the individual States the burden of defining the "contract between the parties." This destroys one advantage that the Convention's objective contract approach seemed to offer.<sup>123</sup>

The circuit court's rejection of the district court's alternative holding, however, demonstrates the court's willingness to apply the objective theory with respect to notice requirements.<sup>124</sup> Without considering whether the plaintiff knew of the notice provision, or whether he had the ability to comprehend its warning, the court held that the CAB approved statement was as a matter of law sufficient to afford a passenger a reasonable opportunity to take self-protective measures.<sup>125</sup> This perpetuates the disadvantages of the Convention's approach.

## III. THE NEED TO REVISE THE WARSAW CONVENTION

*Stratis* illustrates three problems associated with the United States continued adherence to the unamended Convention.<sup>126</sup> First,

uniform method of notice); Montreal Agreement, *supra* note 1, § 2; see *Domangue*, 531 F. Supp. at 341. *But see infra* note 134 and accompanying text (questioning the adequacy of the CAB approved statement).

122. Deregulation of the contract refers to the removal of the documentation requirements imposed by article 3 of the Convention. *Stratis* deregulates the contract by finding "international transportation" without delivery of the ticket. See *supra* notes 58, 81, 84.

123. See *supra* text accompanying notes 49-53; see also *supra* note 22 and *infra* notes 145-54 and accompanying text.

124. See text accompanying *supra* notes 115-16; *supra* note 121 and accompanying text.

125. *Stratis*, 682 F.2d at 412-13. The court was not persuaded by the dissent, which wrote that delivery of an international ticket should be required. Such tickets often contain not only the CAB approved statement but also a translation in the language of the place of destination. *Id.* at 417 (Newman, J., dissenting).

126. See *id.* at 410-13; see also *infra* text accompanying notes 127-32. Three other problems with the unamended Convention relate to its form of liability limitation. The first is that only the carrier's liability is limited. See *supra* note 3. The second problem is that the Montreal Agreement set the carrier's liability at U.S.\$75,000. A fixed monetary figure cannot continue to provide reasonable compensation during inflationary periods. See Reilly, *supra* note 2, at 418-23 (suggesting that a workable amending procedure be adopted); see also, 129 CONG. REC. S2245-46 (daily ed. Mar. 7, 1983)(statement of Sen. Hollings: "Adjusted for inflation, the real value of [U.S.]\$75,000 in 1966 dollars is approximately [U.S.]\$25,000 in 1983 dollars." *Id.* at S2246). The third difficulty stems from the United States abandonment of an official gold price. See *Franklin Mint Corp. v. TWA*, 690 F.2d 303, 311 (2d Cir. 1982)(declaring the Convention unenforceable in its present form); accord *In re Aircrash* at

the circuit court had problems interpreting and clarifying requirements of article 3.<sup>127</sup> The trouble stems from the Convention's emphasis on a delivered passenger ticket.<sup>128</sup> The second difficulty with the present system is the question of notice.<sup>129</sup> The Convention's approach has been rejected by modern courts that refuse to bind the passenger to liability limitations based solely upon an objective meeting of minds.<sup>130</sup> The third problem is the broad scope

Kimpo Int'l Airport, Korea, MDL-482 (C.D. Cal. Feb. 15, 1983), reprinted in 129 CONG. REC. S2257-58 (daily ed. Mar. 7, 1983). See also *Boehringer*, 531 F. Supp. at 352-53 (adopting the free market price as the conversion rate). In *Franklin Mint*, the Second Circuit stressed the need to ensure judgments of uniform value. *Franklin Mint*, 690 F.2d at 309. This was not the Convention's primary purpose. See *supra* note 68; see also *supra* text accompanying notes 16-18. Article 22 allows parties to "agree" to different amounts of recovery. Warsaw Convention, *supra* note 1, art. 22. Many carriers have included the "special contracts" in their tariffs. See 2 C. SHAWCROSS & M. BEAUMONT, AIR LAW 139-41 (4th ed. 1982). The United States, in accepting the Montreal Agreement, specifically endorsed the use of "special contracts." See Montreal Agreement, *supra* note 1. As a practical matter, judgments have not been of uniform value since the Hague Protocol. See Heller, *From Unification to Fragmentation in International Civil Aviation*, 22 GER. Y.B. INT'L L. 292, 309-10 (1979); see also *supra* note 2.

The purpose of the Convention was to establish the legal basis upon which an industry could operate. See *supra* notes 16-22 and accompanying text. The CAB has allowed airlines to base their liability upon the last official gold price. See CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974). Adoption of the CAB standard would promote the Convention's essential purpose. See *supra* notes 16-18. The multi-national treaty would not be abrogated or modified without the express command of the legislature. See *Cook v. United States*, 288 U.S. 102, 120 (1933). The courts, moreover, would not undermine the authority of the CAB by rendering nugatory its decision. See *North Am. Phillips Corp. v. Emory Air Freight Corp.*, 579 F.2d 229, 236 (2d Cir. 1978)(Oakes, J., concurring). The CAB rate should be adopted. *Poland*, 535 F. Supp. at 844.

127. See *supra* text accompanying note 112.

128. See *supra* note 58.

129. See *infra* text accompanying note 134; see also *infra* notes 130, 135-44.

130. See *Lisi*, 370 F.2d at 514; *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 168-69, 234 N.E.2d 199, 202-03, 287 N.Y.S.2d 14, 19 (1967), cert. denied, 390 U.S. 1039 (1968).

Under the Convention's objective contract approach, the passenger's subjective understanding is irrelevant. Cf. *Thompson v. London Midland & Scottish Ry.*, [1930] 1 K.B. 41 (C.A. 1929)(illiterate bound by terms). A court's willingness to look beyond the ticket to find a contract suggests that all factors should now be considered. Many of the procedural unconscionability indicators are found in ticket contracts. Moreover, as "international" passengers are left without alternative remedies and the U.S.\$75,000 limitation bears no reasonable relationship to the risks assumed by the parties, a substantive unconscionability attack may also be made. If the argument is accepted, the carrier would bear the burden of establishing that the passenger understood and actually assented. Cf. *Bank of Ind., Nat'l Ass'n v. Holyfield*, 476 F. Supp. 104, 109-11 (S.D. Miss. 1979)(lease agreement); *Weaver v. American Oil Co.*, 257 Ind. 458, 464, 276 N.E.2d 144, 148 (1971)(lease agreement); *Sofranski*, 68 Misc. 2d at 404, 326 N.Y.S.2d at 870 (Warsaw Convention article 26); see

of the Convention's definition of international transportation.<sup>131</sup> Application of the Convention to domestic transportation in the United States often produces harsh differences in the amounts recoverable by passengers on the same flight.<sup>132</sup>

The problems presented by the *Stratis* decision suggest that the United States should reexamine its position. If the United States is to remain a High Contracting Party, one of three approaches must be followed.

*A. Option 1: Continued Adherence to the Unamended Convention*

The first and least tenable option for the United States would be the continued application of the present system. The requirement of a written and delivered passenger ticket would present problems for carriers.<sup>133</sup> If courts follow *Stratis* and refuse to apply the article 3 requirements, the issue of notice remains. The Court of Appeals for the Ninth Circuit recently raised the question "whether the notice required by the CAB is adequate to advise a passenger of the effect of the limitation."<sup>134</sup> In addressing this issue, the court would balance the strengths of the objective approach against its weaknesses. On the one hand are the benefits of a uniform standard of notice permitting simple administration and rapid determination of the parties' rights.<sup>135</sup> The supporters of this position would argue that the passenger's difficulty with the language is immaterial.<sup>136</sup>

generally J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 336-47 (2d ed. 1977)(the modern view of adhesion contracts); C. SHAWCROSS & M. BEAUMONT, *supra* note 126, at 29-31 (Unfair Contract Terms Act 1977); S. WADDAMS, *THE LAW OF CONTRACTS*, 42-44 (1977)(ticket contracts); Spencer, *Signature, Consent, and the Rule in L'Estrange v. Graucob*, 32 *CAMBRIDGE L.J.* 104 (1973)(consent problems); Note, "No Hablo Ingles," 11 *SAN DIEGO L. REV.* 415 (1974)(resolution of language problems, with a discussion of the U.C.C. § 2-302 (1976) and the California approach).

131. *See supra* note 53.

132. *Id.* If the United States had not been a responsible defendant, *Stratis* would have been unable to recover over U.S.\$1,000,000 in damages. Application to domestic flights has never been necessary to achieve the Convention's purpose.

133. *See supra* note 58. The present system has many other problems which suggest that a complete revision of the Convention is necessary. These revisions, however, must be mandated by the legislature. *See Reed v. Wisner*, 555 F.2d at 1093.

134. *Bali*, 684 F.2d. at 1313 n.13. The court left the question unanswered.

135. *See supra* note 121 and accompanying text.

136. The Convention applies by its own terms without regard to the passenger's subjective understanding. *See supra* note 121.

The objective contract approach achieves the Convention's essential purpose.<sup>137</sup>

Those favoring a subjective approach would argue, on the other hand, that the drafters recognized the passenger's inferior bargaining position,<sup>138</sup> and that passengers would eventually need insurance to protect themselves from the limit placed on recovery.<sup>139</sup> Without actual knowledge of the airline's limited liability, the passenger is not afforded a reasonable opportunity to take self-protective measures.<sup>140</sup> A requirement that the airline prove that a passenger had such knowledge is consistent with the modern view of contract law.<sup>141</sup>

On balance, the advantages of the objective contract approach outweigh the faults inherent in the present system except when the passenger is on a domestic flight.<sup>142</sup> Passengers on a flight bound for a foreign land are more likely than domestic travelers to heed a warning captioned: "Advice to International Travelers on Limitation of Liability."<sup>143</sup> This problem is compounded when a passen-

137. *See supra* notes 16-23, 68. One of the most important goals was uniformity in the law applied by the courts of the High Contracting Parties with respect to contracts for international transportation. *See supra* note 18 and accompanying text. Uniformity is destroyed when the courts of the United States fail to apply the Convention approach. *See supra* notes 58, 113. The United States, by adhering to the Convention, has modified public policy with respect to the rule of contract law prohibiting agreements which abrogate or limit the liability of a common carrier. CAB Order No. E-3230, *reprinted in* C. SHAWCROSS & M. BEAUMONT, *supra* note 126, at D36-42; *see supra* note 68. *But cf.* *Alaska Airlines v. Sweat*, 568 P.2d 916, 926 (Alaska 1977) ("Regardless of whether such contracts [relieving responsibility] may be permitted by regulatory authorities, the traveling public is entitled to look for protection to the certificated carrier . . .").

138. *See supra* note 22.

139. MINUTES, *supra* note 2, at 48 (Mr. Ripert, France: "[A]t the present time those who travel by air have no need of special protection; if they have need of protection, they will find it . . . in insurance!"). Today, passengers are in great need of protection against the inadequate limitations imposed by the Convention. *See supra* notes 126, 132.

140. Passengers who are unable to read or understand the notice cannot be said to have a reasonable opportunity to guard against the limitations. *See supra* note 76; *see also supra* text accompanying notes 56-58.

141. *Supra* note 130.

142. The balance slightly favors the objective approach. First, a requirement that the airline ensure that each passenger understands the liability limitation and is aware of the need to purchase insurance is impracticable. This is compounded by placing the burden of proof on the carrier. As one court recently noted, proving delivery of a passenger ticket is difficult enough. *O'Rourke*, 16 Av. Cas. (CCH) at 18,369-70; *see supra* note 37. Second, the uncertainty in the law and the resulting increase in litigation undermine the Convention's purpose. *See supra* notes 16-18.

143. *Stratis*, 682 F.2d at 418 (Newman, J., dissenting). This is the caption required by the Montreal Agreement, *supra* note 1, § 2, *quoted in Stratis*, 682 F.2d at 413 n.10.

ger is unable to understand the notice.<sup>144</sup> In the end, the problems with the CAB notice are linked directly to the Convention's broad definition of international transportation which would remain if option 1 is adopted.

### B. Option 2: Ratification of the Montreal Protocols

On March 8, 1983, the Montreal Protocols failed to achieve the required two-thirds vote for ratification, but the Senate may reconsider the amendment.<sup>145</sup> Ratification of the Montreal Protocols would substantially amend article 3 without a corresponding change in article 1.<sup>146</sup> Article 3 of the original Convention would be deleted and replaced by the following:

(1) In respect of the carriage of passengers an individual or collective document of carriage shall be delivered containing:

144. A passenger must be able to read the notice to be afforded a reasonable opportunity to take self-protective measures. *See supra* note 76; *see also supra* note 130.

145. N.Y. Times, Mar. 9, 1983, at D6, col. 5-6. Senator Hollings led the fight against the Montreal Protocols. *See* 129 CONG. REC. S2245-52 (daily ed. Mar. 7, 1983)(statement of Sen. Hollings). The Senator began his attack by emphasizing the broad scope of the definition of "international transportation." *Id.* at S2245. He returned to this point later and cited an example of the harsh differences in the amounts recoverable by passengers on the same flight. *Id.* at S2246.

146. The Montreal Protocols are two related protocols, not yet in force, which incorporate all prior amendments to the Convention. Additional Protocol No. 3 Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, Int'l Civ. Av. Org. Doc. No. 9147; Additional Protocol No. 4 Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, Int'l Civ. Av. Org. Doc. No. 9148, *reprinted in* C. SHAWCROSS & M. BEAUMONT, *supra* note 126, at A28-28A (status as of April, 1982) [hereinafter cited as Montreal Protocols]. *See also Two Related Protocols Done At Montreal: Hearings on Exec. A & B Before the Comm. on Foreign Relations*, 95th Cong., 1st Sess. 46-47 (1977)(statement of James E. Landry, Vice President & Gen. Counsel, Air Transp. Ass'n)[hereinafter cited as *Hearings on Exec. A & B*].

The supporters claim that the Montreal Protocols end two current problems. *See* 129 CONG. REC. S2259 (daily ed. Mar. 7, 1983)(statement of Sen. Percy); *see also supra* note 126. A new liability limit of 100,000 units of Special Drawing Rights (approximately U.S.\$117,000) is combined with a proposed plan to provide U.S.\$200,000 in insurance. *See Hearings on Exec. A & B, supra*, at 58-63 (statement of Alan M. Ferguson, Vice-President, Prudential Ins. Co.). *See also* 129 CONG. REC. S2260 (daily ed. Mar. 7, 1983)(statement of Sen. Kassebaum, raising the *Tramontana* problem, *supra* note 56). Critics, however, attack the Protocols' insurance plan and the limit on liability in general. *See, e.g.*, Hollings, *Cheating Air Travelers*, N.Y. Times, Sept. 30, 1982, at 31, col. 1. More importantly, the Montreal Protocols remove the "willful misconduct" sanction. A carrier's egregious behavior will no longer prevent it from seeking the Convention's limit on liability. The removal of the sanction significantly shifts the public interest arguments against the limitations, and threat-

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

(2) Any other means which would preserve a record of the information indicated in a) or b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

(3) *Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage*, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.<sup>147</sup>

The revision serves two purposes. First, the carrier's use of modern ticketing procedures will not threaten its ability to rely on the Convention.<sup>148</sup> For example, a carrier which employed either non-documentary ticketing or shuttle-type contracting would still be covered.<sup>149</sup> The amendment's second purpose is to ensure a uniform

ens the constitutionality of the Convention. In the end, the United States could play the role of insurer. *See Bali*, 684 F.2d at 1311 (suggesting that the Warsaw Convention may constitute a "taking," forcing the United States to provide the injured with adequate compensation). *See also* 129 CONG. REC. S2250 (daily ed. Mar. 7, 1983)(statement of Sen. Hollings). Without the threat of litigating the "willful misconduct" issue, carriers will be more reluctant to settle claims. Kreindler, *Judicial Blows to Warsaw Convention*, N.Y.L.J. Nov. 1, 1982, at 1, col. 1; *see Hearings on Exec. A & B, supra*, at 94-102 (1977)(testimony of Lee S. Kreindler); *see also Hill v. United Airlines*, 550 F. Supp. 1048 (D. Kan. 1982)(containing a good review of the case law on "willful misconduct").

147. Montreal Protocols, *supra* note 146, art. 1 (emphasis added). The Protocols are designed to prevent courts from avoiding the Convention by creatively interpreting the delivery requirement. *See Mankiewicz, The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519, 533-34 (1972); *see also supra* notes 58, 113.

148. Montreal Protocols, *supra* note 146, art.1; *see supra* text accompanying note 147. *See also Hearings on Exec. A & B, supra* note 146, at 46 (statement of James E. Landry).

149. In shuttle-type contracting the passenger receives "a boarding pass at the gate, with or without a reservation, and then pays for the transportation on the plane." Terms of Contract of Carriage, 47 Fed. Reg. 28,681-82 (1982)(notice of proposed rulemaking). The CAB would require carriers employing non-documentary contracts and incorporating contract terms to deliver written notices to passengers. Delivery must be made either when the contract is made or prior to boarding whichever is earlier. The notice of liability limitations "would have to be of sufficient clarity and detail that the passengers would be aware, or should reasonably be aware, of the main features of the terms." *Id.* at 28,682.

application of the Convention. The delivery requirement is rendered nugatory. In theory, passengers would be bound by the Convention's liability limitations without notice.<sup>150</sup>

The problems inherent in *Stratis* would be codified by the ratification of the Montreal Protocols.<sup>151</sup> At the very least, the Protocols should be revised to allow the High Contracting Parties to adopt their own rules and regulations regarding delivery and notice requirements.<sup>152</sup> This would threaten uniformity but provide some protection for the passengers. For example, assuming that the CAB adopted notice requirements similar to the ones presently used, a carrier would not be able to argue that the Convention applied irrespective of notice.<sup>153</sup>

The Protocols, however, also leave the Convention's broad definition of international transportation intact. This places new emphasis upon the non-documented "agreement between the parties." Courts would face the difficult task of defining "international transportation," which would inevitably include ascertaining the parties' intent.<sup>154</sup>

### C. Option 3: An Alternative Amendment to the Convention

The Senate's rejection of the Montreal Protocols suggests that further negotiations are necessary.<sup>155</sup> Such negotiations should begin by redefining the term "international transportation," thereby limiting the scope of the Convention's applicability. Article 1(2), (3) should be deleted and replaced by the following:

150. See *supra* note 147 and accompanying text. By leaving the definition of the article 1(2) "agreement between the parties" to the courts, the Montreal Protocols may inadvertently provide a means of avoiding the Convention's applicability.

151. See *supra* text accompanying notes 122-25. The circuit court in *Stratis* and the Montreal Protocols remove the Convention's documentation requirements.

152. The principal aviation agreement governing scheduled commercial services provides rules for departure from international standards and procedures. See Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 38, 61 Stat. 1180, 1191, T.I.A.S. No. 1591, 51 U.N.T.S. 295 (ratified by the United States Aug. 9, 1946).

153. Cf. *Poland*, 535 F. Supp. at 836 (defendant argued *inter alia* that providing 8.5 point print was in substantial compliance with the CAB required 10 point print and "that the only penalty for failure to comply is a civil penalty of [U.S.]\$1,000 . . . for failure to comply with . . . tariffs on file with the CAB"). An amendment to the Convention must recognize that passengers need to make informed decisions with respect to self-protective measures. See *Boryk v. Argentinas*, 332 F. Supp. 405, 407-08 (S.D.N.Y. 1971).

154. See *supra* notes 24-32.

155. See *supra* note 145.

(2) For the purposes of this Convention, the expression *international transportation* means any carriage which, according to the schedule of the particular flight, originates and terminates within the territory of two High Contracting Parties. Carriage between two points within the territory of a single High Contracting Party is not international carriage for the purposes of this Convention.<sup>156</sup>

The proposed amendment would prevent the Convention from applying to purely domestic flights.<sup>157</sup> The revision would obviate the need for the courts to define the "agreement between the parties" and to search for the parties' common intention.<sup>158</sup>

A corresponding amendment to article 3 should then be adopted. This amendment would allow the carrier to employ new ticketing technology, but would also establish a minimum notice requirement.<sup>159</sup> The following language would suffice:

156. See *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. AIR L. & COM. 255, 266 (1959) (prepared by the Comm. on Aeronautics of the Bar Ass'n of the City of N.Y., presented Mar. 10, 1959) (recommending adoption of the Hague Protocol and application of the amended Convention only to actual international flights) [hereinafter cited as *Bar Report*]; cf. *Aanestad v. Air Can.*, 390 F. Supp. 1165 (C.D. Cal. 1975) (an anomalous decision involving an open contract, the court interpreted "place of destination" in article 28 to mean the destination of the particular flight), *appeal dismissed*, 549 F.2d 806 (9th Cir. 1977).

157. *Bar Report*, *supra* note 156, at 266-67. Application of the Convention to domestic flights has never been necessary. See *supra* note 17. The Convention's limit on liability is particularly harmful to passengers on domestic flights in the United States. See *supra* note 9; see also *supra* notes 142-44 and accompanying text. There is no rational basis for the harsh distinctions in the amounts recoverable between passengers on the same flight.

Under [the proposal], equal treatment, so far as limitation of liability is concerned, would extend to all passengers on an international flight (i.e., the Convention limits would apply) and to all passengers on a domestic flight (i.e., the Convention limits would not apply). The harsh discrimination which has resulted under the Convention as now applied would be obviated, a truer uniformity of judicial process would be achieved, and the Convention's limitations of liability would be confined to actual international carriage . . . .

*Bar Report*, *supra* note 156, at 267.

158. The proposed definition "international" permits a certainty in application without the disadvantages of the contract approach. See *supra* note 6.

159. Under the proposal, only article 3(3) of the Montreal Protocols' amendment to the documentation requirements would have to be deleted. See *supra* text accompanying note 147. With the additional *minimum standard of notice* proposal, the CAB could adopt more stringent standards. See *supra* note 149. Since the only passengers affected by the Convention would be those on international flights, many of the present problems would subside. See *supra* text accompanying notes 142-44. New procedures could be implemented actually to warn the international travelers of the effects of the limitations.

For international transportation of passengers, the carrier must deliver a written notice to the passenger when the contract is made or prior to boarding whichever is earlier. The notice shall contain a statement that the Convention is applicable and that the carrier's liability is limited. The statement shall be in the language(s) of the place in which the flight originates and is scheduled to terminate. A carrier which fails to deliver the written notice shall not be entitled to avail itself of this Convention's liability limitations.

This article establishes a minimum requirement and shall not prevent High Contracting Parties from imposing more stringent standards.

### *CONCLUSION*

The Warsaw Convention was introduced in 1929 to govern an infant industry with a uniform rule of law. Application of the Convention was based upon the passenger ticket. This approach sought to broaden the scope of coverage and to settle the parties rights and liabilities prior to the flight. Developments in contract law and technology have rendered the "regulated contract" a relic of the past. The Convention system must be revised. The Montreal Protocols' deregulation of article 3 without a corresponding change in article 1 exacerbates an already complex situation. Application of the Convention can no longer be based upon an agreement between the parties. By redefining "international transportation," the Convention would apply only to actual international flights. Moreover, by securing an adequate international standard of notice, new ticketing procedures could be employed and passengers would be afforded a reasonable opportunity to take self-protective measures. If the United States continues to adhere to the Warsaw Convention, amendments similar to those proposed in option 3 should be adopted.

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