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## Aviation – Article 22 of the Warsaw Convention – Supreme Court Adopts a Purpose Approach to Enforce an Anachronistic Convention System

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# Aviation – Article 22 of the Warsaw Convention – Supreme Court Adopts a Purpose Approach to Enforce an Anachronistic Convention System

James K. Noble III

## **Abstract**

This section discusses the recent Supreme Court decision in *Trans World Airlines v. Franklin Mint Corp.* which includes an approach to Article 22 of the Warsaw Convention which addresses issues in aviation.

## RECENT DEVELOPMENT

AVIATION—ARTICLE 22 OF THE WARSAW CONVENTION—SUPREME COURT ADOPTS A PURPOSE APPROACH TO ENFORCE AN ANACHRONISTIC CONVENTION SYSTEM—*Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445 (U.S. Apr. 17, 1984).

### INTRODUCTION

The Supreme Court's decision of April 17, 1984 in the case of *Trans World Airlines v. Franklin Mint Corp.*<sup>1</sup> is of great significance to all international air carriers and to the users of the services they provide. At issue in *Franklin Mint* was the amount recoverable by shippers for packages lost during international<sup>2</sup> carriage by air.<sup>3</sup> The *Franklin Mint* Court was also asked to determine the proper role of the Judicial Branch of the United States government in enforcing and interpreting multilateral treaties.<sup>4</sup>

This Recent Development begins with a discussion of the problems associated with continued adherence by the United States to

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1. 52 U.S.L.W. 4445 (U.S. Apr. 17, 1984), *aff'g in part, rev'g in part*, 690 F.2d 303 (2d Cir. 1982).

2. The 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], only applies to "international transportation." *Id.* art. 1. The term "international" is defined by the Convention as

any transportation in which, *according to the contract made by the parties*, 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 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.

*Id.* art. 1(2) (emphasis added). For a discussion of the current problems associated with the interpretation of this article, see Note, *Up in the Air Without a Ticket: Interpretation and Revision of the Warsaw Convention*, 6 FORDHAM INT'L L.J. 332 (1983).

3. *Franklin Mint*, 52 U.S.L.W. at 4447.

4. See, e.g., Petition for a Writ of Certiorari to the United Court of Appeals for the Second Circuit at point I, *Franklin Mint*, 52 U.S.L.W. at 4445 [hereinafter cited as TWA Petition]; Respondent's Brief at point I, *Franklin Mint*, 52 U.S.L.W. at 4445 (TWA arguing that both petitions should be granted).

the unamended Warsaw Convention.<sup>5</sup> The *Franklin Mint* decision—the Supreme Court’s first opinion on the Convention<sup>6</sup>—is then examined.<sup>7</sup> Finally, other relevant developments and the need for a legislative revision of the Convention system are discussed.<sup>8</sup>

## I. THE WARSAW CONVENTION SYSTEM

“After the United Nations Charter, the Warsaw Convention is the most widely adopted treaty.”<sup>9</sup> Drafted at international conferences in 1925 and 1929, the Convention’s principal purpose was to provide the world’s infant airline industry with a “legal basis” for its operation.<sup>10</sup> To achieve this purpose, the Convention “creates

5. See *infra* text accompanying notes 41-44. The United States adheres to the unamended Warsaw Convention, *supra* note 1, and has not ratified any of the protocols amending this treaty. See, e.g., Guatemala City Protocol, Mar. 8, 1971, 10 I.L.M. 613; Protocol Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter cited as Hague Protocol]; see also *infra* text accompanying notes 36-40 (Montreal Protocols, *infra* note 36, failed to achieve the two-thirds vote required for ratification).

The continued adherence by the United States to the treaty is based upon a 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-23,690, 31 Fed. Reg. 7302 (1966)) [hereinafter cited as Montreal Agreement]. See also *infra* text accompanying notes 21-40 (discussing the history of attempts to amend the convention system).

The Convention’s only official text is in French, and the “binding meaning of the terms is the French legal meaning.” *Block v. Compagnie Nat’l Air Fr.*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). By adopting the “principle of primacy of the French legal system,” the drafters hoped to ensure a uniform construction of the Convention provisions. See *id.* The rules created by the Convention are to be applied uniformly by courts of the High Contracting Parties in all matters concerning contracts for international transportation by air. *Grein v. Imperial Airways*, [1937] 1 K.B. 50, 74-75 (C.A. 1936). This Recent Development uses the United States’ translation found in 49 Stat. 3000, T.S. No. 876.

6. Prior to *Franklin Mint*, the Supreme Court had not delivered an opinion construing the Warsaw Convention. Perhaps the closest the Court came to rendering such an opinion was in *Lisi v. Alitalia—Linee Aeree Italiane*, 390 U.S. 929, *denying reh’g* 390 U.S. 455 (1968), *aff’d by an equally divided Court mem.* 370 F.2d 508 (2d Cir. 1966).

7. See *infra* text accompanying notes 45-100.

8. See *infra* text accompanying notes 101-21.

9. Brief Amicus Curiae of International Air Transport Association in Support of Petitioner Trans World Airlines, Inc. at point I(A) & n.9, *Franklin Mint*, 52 U.S.L.W. at 4445 (citing A. LOWENFELD, AVIATION LAW § 4.1, at 7-98 (2d ed. 1981)).

10. See SECOND INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, OCTOBER 4-12, 1929, WARSAW (MINUTES) 13, 18-23 (R. Horner & D. Legrez trans. 1975) [hereinafter cited as MINUTES]. The need for a “legal basis” may be summarized as follows:

Private investors and insurance companies feared the uncertainty in the law governing international flights. . . . Potential liability for a single accident was

internationally uniform rules governing air carriage of passengers, baggage and cargo."<sup>11</sup>

The United States did not participate in the Convention's drafting, sending only an observer to the international conference.<sup>12</sup> Five years later, President Roosevelt submitted the Convention to the Senate.<sup>13</sup> In his message transmitting the Convention, Secretary of State Cordell Hull stated:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.<sup>14</sup>

Without any floor debate, committee hearing, or report, the Senate gave its advice and consent by voice vote on June 15, 1934.<sup>15</sup> On

staggering. . . . Moreover, litigation practices and laws would vary depending upon where the suit was brought. . . . 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. . . .

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.

Note, *supra* note 2, at 335 n.16 (citing *In re Air Crash Disaster in Bali, Indonesia*, 684 F.2d 1301, 1310 (9th Cir. 1982); *Dunn v. Trans World Airlines*, 589 F.2d 408, 410-11 (9th Cir. 1978); *Reed v. Wiser*, 555 F.2d 1079, 1089-93 (2d Cir. 1977); *Lowenfeld & Mendelsohn, The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-501 (1967)).

11. See *Franklin Mint*, 52 U.S.L.W. at 4446; *Grein v. Imperial Airways*, [1937] 1 K.B. 50, 74-75 (C.A. 1936); see, e.g., *Warsaw Convention*, *supra* note 1, arts. 3-16 (rules for transportation documents); see also *infra* note 18 and accompanying text (liability limitation).

12. *Franklin Mint*, 52 U.S.L.W. at 4452 (Stevens, J., dissenting).

13. See Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. EXEC. DOC. NO. C, 73d Cong., 2d Sess. 3-4 (1934), quoted in *Block v. Compagnie Nat'l Air Fr.*, 386 F.2d 323, 327 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).

14. *Id.*

15. 78 CONG. REC. 11,582 (1934).

July 31, 1934, the United States gave notice of adherence and, on October 29, President Roosevelt proclaimed the Convention in effect as to the United States.<sup>16</sup>

Debate over United States participation in the Convention began soon thereafter and has continued ever since.<sup>17</sup> Supporters of the Convention have consistently maintained that international uniformity and the Convention's limitation on liability protect both the carriers and users of the services they provide.<sup>18</sup> The thrust of the critics' attack since the 1950's has been against the Convention's liability limitation.<sup>19</sup> Critics assert not only that the liability limitation is too low, but also that conditions in the airline industry have changed so dramatically that no limitation can be legally, rationally, or morally justified.<sup>20</sup>

As supporters and critics have continued to assert the same arguments for over thirty years, the history of United States attempts to amend the Convention may be characterized as cyclical inertia. In 1955, the Hague Protocol<sup>21</sup> amended the Convention by, *inter alia*, doubling the amount recoverable by passengers to the equivalent of U.S.\$16,000.<sup>22</sup> The United States government, however, refused to ratify the Hague Protocol solely because the relief provided was deemed inadequate.<sup>23</sup> In 1965, the United States threatened that it would withdraw from the Convention unless the limit on carrier liability was increased.<sup>24</sup> On May 14, 1966, the day

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16. See Warsaw Convention, *supra* note 1.

17. See Note, *supra* note 2, at 342-46.

18. See Lowenfeld & Mendelsohn, *supra* note 10, at 534-35; Note, *supra* note 2, at 342 n.56. Aside from the Convention's principal purpose, see *supra* note 10 and accompanying text, the reasons for limiting the carrier's liability include: (1) establishing an international liability limit similar to that accorded shipowners; (2) spreading the risk of liability; (3) allowing passengers to obtain insurance; (4) facilitating quick settlements; (5) unifying the law with respect to the amount of damages, see H. DRION, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* 12-43 (1954); (6) obtaining the airline's consent to plaintiff's choice of forum, see 1 L. KREINDER, *AVIATION ACCIDENT LAW* § 11.06 n.54 (Supp. 1981).

19. See *supra* note 18.

20. See, e.g., *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. AIR L. & COM. 255, 268 (1959) (view of the dissenting members of the Comm. on Aeronautics of the Bar Ass'n of the City of N.Y.); see also *infra* text accompanying notes 21-27, 31-37.

21. Hague Protocol, *supra* note 5.

22. See *id.* art. 11.

23. See *Reed v. Wiser*, 555 F.2d 1079, 1087 (2d Cir. 1977).

24. 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,

before the United States denunciation was to take effect, the airlines agreed among themselves to accept a "special contract" increasing their liability ceiling to U.S.\$75,000 for passengers departing from, destined for, or stopping over in the United States.<sup>25</sup> This interim arrangement came to be known as the Montreal Agreement.<sup>26</sup> It was accepted by the United States, which withdrew its notice of denunciation.<sup>27</sup>

The Montreal Agreement, however, resolved the problem of an unreasonably low monetary limitation only temporarily and resulted in continued adherence by the United States to the unamended Convention. The number of problems associated with this interim arrangement increased over the next few years.<sup>28</sup> In particular, three problems emerged from the unamended Convention's form of liability limitation.<sup>29</sup> First, only the carrier is protected by the limit placed on liability, and not other defendants such as manufacturers and governmental units which are now sued in air disaster cases.<sup>30</sup> Second, the Montreal Agreement set the carriers' liability limit at U.S.\$75,000. A fixed monetary figure cannot continue to provide reasonable compensation during inflationary pe-

1966). The Warsaw Convention achieved the two primary goals of the drafters: establishing uniform rules concerning the contract of carriage, *see* Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR. L. & COM. 323, 343 (1959); providing the legal basis of operations which would enable an infant industry to obtain insurance and investment capital, *see* Reilly, *The Warsaw Ticket to Judicial Treaty Revision—Will We Do It Again?*, 43 ST. JOHN'S L. REV. 396, 397 (1969) (analyzing the effect of the Convention on the carriers' liability exposure). The critics, therefore, asserted that the Convention had served its purpose and was no longer necessary. *See, e.g.*, 111 CONG. REC. 20,164-65 (1965) (statement of Sen. Robert Kennedy).

25. Montreal Agreement, *supra* note 5, § 1. *See also* Lowenfeld & Mendelsohn, *supra* note 18, at 552-601 (history of the Montreal Conference); Note, *supra* note 2, at 345 n.69 (noting the French view that the Montreal Agreement is both a tacit amendment to the treaty and a violation of the treaty text).

26. Montreal Agreement, *supra* note 5, allowed the Warsaw Convention to remain intact "pending the establishment of more permanent arrangements between the governments." *Block v. Compagnie Nat'l Air Fr.*, 386 F.2d 323, 325 n.1 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

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

28. *See* Note, *supra* note 2, at 345, 356-58 & n.126.

29. *Id.* at 356 n.126; *infra* text accompanying notes 30-35.

30. *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). This development in the law was unforeseen by the Convention's drafters. *See* MINUTES, *supra* note 10, at 20-22.

riods.<sup>31</sup> The third difficulty is presented by article 22 of the unamended Convention, which sets the limit on carrier liability as follows:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be *limited to the sum of 125,000 francs*. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be *limited to a sum of 250 francs per kilogram*, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be *limited to 5,000 francs per passenger*.

(4) *The sums mentioned above shall be deemed to refer to the French franc consisting of 65[1/2] milligrams of gold at the standard fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.*<sup>32</sup>

In 1978, with the repeal of the Par Value Modification Act,<sup>33</sup> the United States abandoned an "official gold price."<sup>34</sup> The problem

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31. See Reilly, *supra* note 24, at 418-23 (suggesting that a workable amending procedure be adopted). "Adjusted for inflation, the real value of \$75,000 in 1966 dollars is approximately \$25,000 in 1983 dollars." 129 Cong. Rec. S2246 (daily ed. Mar. 7, 1983) (statement of Sen. Hollings); see also *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4449 (U.S. Apr. 17, 1984) (discussing the problem of the CAB's decision to adhere "to a constant \$9.07 per pound liability limit" during the inflation period between 1978 and 1984).

32. Warsaw Convention, *supra* note 1, art. 22 (emphasis added).

33. Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660, 2661 (1976) (effective Apr. 1, 1978). For a discussion of this Act, see *TransWorld Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4446-47 (U.S. Apr. 17, 1984); *Boehringer Mannheim Diagnostics v. Pan Am. World Airways*, 531 F. Supp. 344, 349-51 (S.D. Tex. 1981).

34. See *Franklin Mint*, 52 U.S.L.W. at 4446-47. The last official gold price—U.S.\$42.22 per ounce—was adopted by the Civil Aeronautics Board (CAB) in its tariff



presented, therefore, is how to interpret and enforce the Convention's gold clause.<sup>35</sup>

In 1983, the Senate was again asked to vote on a proposed substantial revision of the Warsaw Convention, known as the Montreal Protocols.<sup>36</sup> Supporters claimed that the revision would solve two of the current problems.<sup>37</sup> Critics, however, again attacked both the low amount recoverable<sup>38</sup> and the limit on liability in general.<sup>39</sup> On March 8, 1983, the Montreal Protocols failed to achieve the required two-thirds vote for ratification.<sup>40</sup>

requirements to convert the Convention's liability limit into United States currency. See CAB Order 74-1-16, 74 Fed. Reg. 1526 (1974). "Since 1978 the CAB has actively reviewed this \$9.07 per pound liability limit. As of 1979, however, the CAB continued to sanction the use of the last official price of gold . . . as a conversion factor." *Franklin Mint*, 52 U.S.L.W. at 4447 (footnotes omitted). For a discussion of the authority delegated to the CAB by Congress under the Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1976), amended by 49 U.S.C. § 1551 (Supp. V 1981), see *Franklin Mint*, 52 U.S.L.W. at 4446-47.

35. See *infra* text accompanying notes 48-100.

36. The Montreal Protocols are two related protocols, not yet in force, which incorporate all prior amendments to the Warsaw Convention, *supra* note 1. 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. No. 9148, reprinted in 2 C. SHAWCROSS & M. BEAUMONT, *AIR LAW* at A28-28A (status as of 1982) [hereinafter cited as Montreal Protocols]; see also Note, *supra* note 2, at 360-62 (discussing the Montreal Protocols and focusing on the changes in the Convention's ticketing requirements).

37. Note, *supra* note 2, at 360 n.146. The problem of a conversion factor would be solved by establishing a new liability limit based on units of Special Drawing Rights (SDR). *Id.* See *Franklin Mint*, 52 U.S.L.W. at 4446-47 (discussing the developments of the international monetary system and the Montreal Protocols). Supporters also contend that the problem of insufficient compensation to injured passengers would be solved by the addition of a plan to provide U.S.\$200,000 in insurance. See, e.g., *Two Related Protocols Done At Montreal: Hearings on Exec. A & B Before the Comm. on Foreign Relations*, 95th Cong., 1st Sess. 58-63 (statement of Alan M. Ferguson, Vice-President, Prudential Ins. Co.) [hereinafter cited as *Hearings on Exec. A & B*]. But this proposed insurance plan and that which was proposed to accompany the Hague Protocol, *supra* note 5, have been strongly criticized. See, e.g., 111 CONG. REC. 20,164-65 (1965) (Sen. Robert Kennedy analyzing and rejecting the proposed system of mandatory insurance to accompany the Hague Protocol); Hollings, *Cheating Air Travelers*, N.Y. Times, Sept. 30, 1982, at 31, col. 1 (attacking the proposed insurance plan to accompany the Montreal Protocols).

38. See, e.g., Hollings, *supra* note 37.

39. See, e.g., *id.* Critics also make a two-pronged attack against the Montreal Protocols' removal of the Convention provision which bars carriers from relying upon the Convention's limits on liability in cases involving willful misconduct. First, such removal shifts the public interest arguments against the limitations, and threatens the constitutionality of the Convention. In the end, the United States could play the role of an insurer. See, e.g., *In re Aircrash Disaster in Bali, Indonesia*, 684 F.2d 1301, 1311 (9th Cir. 1982) (suggesting that the Convention may constitute a "taking," thereby forcing the United States to provide the injured with

Thus, the United States continues to adhere to the unamended Convention, despite substantial problems of interpreting and enforcing this multilateral agreement.<sup>41</sup> For example, because it was never ratified, some have questioned whether the Convention is technically a United States "treaty."<sup>42</sup> More importantly, United States practice under the Convention yields little specific guidance for courts attempting to interpret its anachronistic provisions.<sup>43</sup> In *Franklin Mint*, for example, the repeal of the gold standard left both the interpretation and the enforceability of a major article in the multilateral treaty open to question.<sup>44</sup>

## II. TRANS WORLD AIRLINES V. FRANKLIN MINT CORP.

### A. Facts and Lower Court Holdings

In March 1979, Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services (Franklin Mint) contracted with Trans World Airlines (TWA) for the carriage by air of numismatic materials from the United States to England.<sup>45</sup> The packages delivered to TWA were worth more than U.S.\$6500, but Franklin Mint did not make a special declaration of value.<sup>46</sup> The

adequate compensation). See also 129 CONG. REC. S2250 (daily ed. Mar. 7, 1983) (statement of Sen. Hollings). Second, without the threat of litigating the "willful misconduct" issue, carriers will be more reluctant to settle claims. See, e.g., *Hearings on Exec. A & B, supra* note 37, at 94-102 (statement of Lee S. Kreindler, Esq.).

40. 129 CONG. REC. S2270, S2279 (daily ed. Mar. 8, 1983). "On November 17, 1981, the Senate Committee on Foreign Relations reported in favor of consenting to ratification." *Franklin Mint*, 52 U.S.L.W. at 4447 n.18. But, led by Senator Hollings, the critics prevailed when on March 8, 1983, "by a vote of 50 to 42 in favor of ratification, the Senate failed to reach the two-thirds majority required for consent. The matter remains on the Senate calendar." *Id.* (citing S. EXEC. REP. NO. 98-1 (1983); S. EXEC. REP. NO. 97-45 (1981); 129 CONG. REC. S2270, S2279 (daily ed. Mar. 8, 1983)).

41. See Note, *supra* note 2, at 356-57; *infra* text accompanying notes 112-19.

42. See, e.g., Kennelly, *Aviation Law: International Air Travel—A Brief Diagnosis and Prognosis*, 6 CAL. W. INT'L L.J. (1975), discussed in Note, *supra* note 2, at 341-42 n.54.

43. See *supra* text accompanying notes 12-16.

44. See *infra* text accompanying notes 58-64.

45. *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303, 304 (2d Cir. 1982), *aff'd in part, rev'd in part*, 52 U.S.L.W. 4445 (U.S. Apr. 17, 1984). As both the United States and the United Kingdom are High Contracting Parties, the transportation was "international" and the Convention applied. See *supra* note 2.

46. *Franklin Mint*, 690 F.2d at 304. "Had such a declaration been made, and additional fee paid, Franklin Mint would have been able to recover in an amount not exceeding the

packages were lost and Franklin Mint brought suit to recover damages in the amount of U.S.\$250,000. The parties stipulated that TWA was responsible for the loss, thus the only question was the amount of liability.<sup>47</sup>

The district court ruled that under the Convention TWA's liability was limited to U.S.\$6,475.98.<sup>48</sup> In reaching this conclusion, Judge Knapp applied the last official gold price because it "has been . . . espoused by the Civil Aeronautics Board ('CAB'), the government agency most intimately concerned with transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs."<sup>49</sup>

The Court of Appeals for the Second Circuit affirmed, but also ruled that sixty days from the issuance of the mandate the limits on liability would be unenforceable.<sup>50</sup> The court found that the Convention system required a factor for converting the liability limit into dollars.<sup>51</sup> However, because of the international disarray as to a proper unit, and the lack of domestic legislation implementing the Convention by establishing a unit of conversion, the choice of the proper unit was left with the courts.<sup>52</sup> As courts lack the authority to make such a selection, the limits are unenforceable.<sup>53</sup> In reaching this conclusion, the court rejected the CAB's choice of the last official gold price stating: "While Congress may not have focused explicitly upon the Convention in repealing the [Par Value Modification] Act, its purpose, abandonment of a price which was out of touch with economic reality, plainly encompasses use of that price to convert judgments to United States currency values."<sup>54</sup> The court

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declared value." *Franklin Mint*, 52 U.S.L.W. at 4445 n.2 (citing Warsaw Convention, *supra* note 5, art. 22(2), *quoted in supra* text accompanying note 32).

47. *Franklin Mint*, 52 U.S.L.W. at 4445.

48. *Franklin Mint Corp. v. Trans World Airlines*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981), *aff'd*, 690 F.2d 303 (2d Cir. 1982), *aff'd in part, rev'd in part*, 52 U.S.L.W. 4445 (U.S. Apr. 17, 1984).

49. *Id.*, *quoted in* *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303, 305 (2d Cir. 1982).

50. *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303, 311-12 (2d Cir. 1982), *aff'd in part, rev'd in part*, 52 U.S.L.W. 4445 (U.S. Apr. 17, 1984).

51. *Id.* at 309.

52. *Id.* at 309-11.

53. *Id.* at 311-12.

54. *Id.* at 311.

also rejected the other alternatives: the free market price of gold;<sup>55</sup> the current French franc;<sup>56</sup> and the Special Drawing Right.<sup>57</sup>

### B. Importance of Franklin Mint

Whether the courts of the United States should enforce article 22's gold clause and, if so, what conversion rate should be followed, are issues that go to the heart of the Convention. Resolution of these issues, however, left the federal courts in "complete disarray."<sup>58</sup> Moreover, the *Franklin Mint* declaration of unenforceability caused several foreign governments to express their view that United States

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55. *Id.* at 310.

Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability. The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand. The current French franc is similarly flawed. To enforce it would be a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

*Id.*

56. *Id.*

57. *Id.* at 310-11.

The inappropriateness of our adopting the SDR's as the unit of conversion is plain. The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use the SDR's is only the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's per kilogram of baggage. In effect, we would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body.

*Id.*

58. Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit at point I, *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445 (U.S. Apr. 17, 1984) [hereinafter cited as *Franklin Mint Petition*]. See, e.g., *Kern v. Northwest Airlines*, 562 F. Supp. 232, 239 (N.D. Ill. 1983) (rejecting the *Franklin Mint* approach in favor of that used in *In re Air Crash Disaster at Warsaw, Pol.*, 535 F. Supp. 833, 844 (E.D.N.Y. 1982) (adopting the CAB standard)); accord Note, *supra* note 2, at 356-57 n.126; see also *In re Aircrash at Kimpo Int'l Airport, Korea*, 558 F. Supp. 72, 74-75 (C.D. Cal. 1983) (citing *Franklin Mint*, but finding the Convention provision unenforceable in the pending cases and stating that the parties presumptively knew that the "international disarray" would prevent the Warsaw Convention from shielding them from liability); *Boehringer Mannheim Diagnostics v. Pan Am. World Airways*, 531 F. Supp. 344, 353 (S.D. Tex. 1981), (finding the limit set by the CAB null and void and adopting the free market price of gold).

relations in international aviation would be seriously affected,<sup>59</sup> and raised a substantial question concerning the constitutional powers of the judiciary to abrogate a major provision of a multilateral treaty still regarded by the United States as a "binding international agreement."<sup>60</sup>

These issues were presented to the Supreme Court as both TWA and Franklin Mint petitioned for certiorari.<sup>61</sup> TWA "challenged the Court of Appeals declaration that the Convention's liability limit is prospectively unenforceable. . . . Franklin Mint contended that the Court of Appeals holding should have been retrospective as well;"<sup>62</sup> that is, article 22 should be held unenforceable from April 1978.<sup>63</sup> The Supreme Court granted both petitions.<sup>64</sup>

#### D. Supreme Court's Decision

Justice O'Connor delivered the Supreme Court's first opinion on the fifty-year-old Convention, which seven other Justices joined.<sup>65</sup> The Court concluded "that the Convention's cargo liability limit remains enforceable in the United States and that the [conversion rate sanctioned by the CAB] is not inconsistent with the Convention. Accordingly, [the Court affirmed] the judgment of the Court of Appeals but [rejected] its declaration that the Convention is prospectively unenforceable."<sup>66</sup> Justice Stevens, in a dissenting opinion, agreed with the majority that although the "liability limitation is anachronistic in today's world of aviation, [the Court is] obliged to enforce it so long as the political branches of the Government adhere to the Convention."<sup>67</sup> Justice Stevens, however, dis-

59. Brief for the United States as Amicus Curiae at 2, *Franklin Mint*, 52 U.S.L.W. at 4445.

60. Respondent's Brief, *supra* note 4, at point II.

61. See *Franklin Mint* Petition, *supra* note 58; TWA Petition *supra* note 4. See also *supra* notes 58-60.

62. *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445-46 (U.S. Apr. 17, 1984).

63. *Franklin Mint* Petition, *supra* note 58; see also *supra* note 33 (the repeal of the Par Value Modification Act).

64. See *Franklin Mint*, 52 U.S.L.W. at 4446.

65. *Id.* at 4445-49; see *supra* note 6.

66. *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4446 (U.S. Apr. 17, 1984).

67. *Id.* at 4453 (Stevens, J., dissenting).

agreed with the way the majority "enforced" the provision,<sup>68</sup> and argued that the free market gold price<sup>69</sup> is the only proper conversion rate.<sup>70</sup>

### 1. A Valid and Enforceable Treaty.

With little discussion, all nine Justices agreed that the Warsaw Convention is a valid self-executing United States treaty.<sup>71</sup> "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."<sup>72</sup> Thus, because "[n]either the legislative history of the Par Value Modification Acts, the history of the repealing Act, [n]or the repealing Act itself, make[s] any reference to the Convention," the treaty remains enforceable.<sup>73</sup>

### 2. Change in Conditions Since Promulgation Did Not Render the Convention Nonbinding.

Both the majority<sup>74</sup> and the dissent<sup>75</sup> disagreed with Franklin Mint's assertion that the substantial change in conditions rendered the Convention nonbinding.<sup>76</sup> The majority stated:

A treaty is in the nature of a contract between nations. The doctrine of *rebus sic stantibus* does recognize that a nation that is a party to a treaty might conceivably invoke changed circum-

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68. See *id.* at 4450 (Stevens, J., dissenting).

69. See *supra* note 55.

70. *Franklin Mint*, 52 U.S.L.W. at 4453 (Stevens, J., dissenting); accord *Boehringer Mannheim Diagnostics v. Pan Am. World Airways*, 531 F. Supp. 344, 352-53 (S.D. Tex. 1981).

71. *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4447 (U.S. Apr. 17, 1984) (majority); *id.* at 4450 (Stevens, J., dissenting). "Though the Convention permits individual signatories to convert liability limits into national currencies by legislation or otherwise, no domestic legislation is required to give the Convention force of law in the United States." *Id.* at 4447 (majority). The Court, therefore, rejected the Second Circuit's concern over the lack of implementing legislation. See *id.* See also *Franklin Mint*, 690 F.2d at 309-311, discussed in *supra* text accompanying note 52 (Second Circuit's approach).

72. *Franklin Mint*, 52 U.S.L.W. at 4447 (citing *Cook v. United States*, 288 U.S. 102, 120 (1933)).

73. *Franklin Mint*, 52 U.S.L.W. at 4447.

74. *Id.*

75. *Id.* at 4453 (Stevens, J., dissenting).

76. See, e.g., Brief of Amicus Curiae Mark Hammerschlag and Ellen Van Fleet in Support of Franklin Mint Corporation at point I(B), *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445 (U.S. Apr. 17, 1984) (arguing the doctrine of *rebus sic stantibus*).

stances as an excuse for terminating obligations under a treaty. But when the parties to a treaty continue to assert its vitality a private person who finds the continued existence of a treaty inconvenient may not invoke the doctrine on their behalf.<sup>77</sup>

The dissenter also recognized that as long as the political branches of government continue to adhere to a treaty, courts are obliged to enforce it no matter how anachronistic it may be.<sup>78</sup> Justice Stevens stated: "The maxim that *cessante ratione legis, cessat et ipsa lex* [the reason of the law ceasing, the law itself also ceases], applicable to the common law, does not govern the judiciary in cases involving application of positive law."<sup>79</sup>

### 3. Application of the CAB-Sanctioned Conversion Rate.

The majority found that the Convention specified "liability limits in terms of gold francs," but invited the "signatories to make the conversion into currencies for themselves. In the United States the CAB has been delegated the power to make the conversion, and has exercised that power most recently in Order 74-1-16."<sup>80</sup> Thus, the Court disagreed with the Second Circuit's reasoning that the repeal of the Par Value Modification Act constituted an abandonment of the unit of conversion specified in the Convention<sup>81</sup> that required the court to "substitute" a new term.<sup>82</sup> Rather, the majority found that the issue presented to the Court was "whether the CAB's Order is inconsistent with [either domestic legislation or] the Convention."<sup>83</sup>

The majority believed that it was "clear" that no conflict existed with domestic legislation.<sup>84</sup> However, the question of

77. *Franklin Mint*, 52 U.S.L.W. at 4447.

78. *Id.* at 4453 (Stevens, J., dissenting).

79. *Id.*

80. *Id.* at 4447-48 n.25.

81. *Id.* See also *supra* text accompanying note 54 (Second Circuit's approach).

82. *Franklin Mint*, 52 U.S.L.W. at 4447-48 n.25. See also *supra* text accompanying note 52 (Second Circuit's approach).

83. *Franklin Mint*, 52 U.S.L.W. at 4447-48 n.25. See also *supra* note 34 (discussing the CAB Order).

84. *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4448 (U.S. Apr. 17, 1984). "[W]hen Congress repealed the Par Value Modification Act it did not suggest that the CAB should thereafter use a different conversion factor. Indeed, there is no hint that either of the political branches expected or intended that Act to affect the dollar equivalent of the Convention's liability limit." *Id.* The Court, therefore, rejected the Second Circuit's implicit abandonment approach, quoted in *supra* text accompanying note 54.

whether a conflict with the treaty existed was “more debatable”<sup>85</sup> due to the “several and sometimes contradictory purposes” of the liability limitation:<sup>86</sup>

(1) “to set some limit on carrier’s liability;”<sup>87</sup>

(2) “to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry;”<sup>88</sup>

(3) “to link the Convention to a constant *value*, that would keep step with the average value of cargo carried and so remain equitable for carriers and transport users alike.”<sup>89</sup>

The majority found that the CAB’s chosen conversion rate was consistent with the first two purposes.<sup>90</sup> With respect to the third purpose, the majority recognized that “in an inflationary economy a fixed, dollar based limit may fail in the long term” to achieve an equitable result. However, the CAB’s decision to “adhere, in the six years since 1978, to a constant \$9.07-per-pound liability limit” was not inconsistent with the Convention.<sup>91</sup> In reaching this conclusion, the Court examined “the conduct of the parties in implementing” the Convention over the last fifty years and found that all “allowed the value of the liability limit . . . to decline substantially.”<sup>92</sup>

Finally, the majority rejected the dissenter’s “tying [of] the Convention’s liability limit to today’s gold market [because it] would fail to effect any purpose of the Convention’s framers, and would be inconsistent with well-established practice, acquiesced in by the Convention’s signatories over the past 50 years.”<sup>93</sup>

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85. *Franklin Mint*, 52 U.S.L.W. at 4448.

86. *Id.* Cf. *infra* text accompanying notes 104-06 (Fifth Circuit noting the different purposes of the Warsaw Convention, *supra* note 1, and the Montreal Agreement, *supra* note 5).

87. *Franklin Mint*, 52 U.S.L.W. at 4448.

88. *Id.*

89. *Id.* at 4449.

90. *Id.* at 4448-49.

91. *Id.* at 4449.

92. *Id.* See also Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(3)(b), 8 I.L.M. 679, 692, *reprinted in* 63 AM. J. INT’L L. 875, 885 (1969). In the interpretation of a treaty, “there shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes agreement of the parties regarding its interpretation.” *Id.*

93. *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4449 (U.S. Apr. 17, 1984). See also *Franklin Mint Corp. v. Trans World Airlines*, 690 F.2d 303, 310 (2d Cir. 1982), *quoted in supra* note 55 (Second Circuit’s rejection of the free market price).



In his dissent, Justice Stevens argued that the majority's use of the "purposes" of the Convention resulted in a "rewritten" rather than an enforced article 22.<sup>94</sup> Treaties, he asserted, are to be interpreted according to a "literal" approach,<sup>95</sup> and read "in light of the conditions and circumstances existing at the time they were entered into."<sup>96</sup> Focusing his attention solely on the gold clause, Justice Stevens concluded that "[t]he plain language of the Convention, the deliberations of the delegates, and the contemporary law of nations leave no question as to the intent of the gold clause: 'Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold.'"<sup>97</sup> Notwithstanding the change in conditions that has rendered the gold standard a "relic," Justice Stevens stated: "We are as obliged to apply the standard of value agreed upon by the Convention as we are obliged to apply the liability limitation. Indeed, of course, it is meaningless to attempt to speak of one without the other; a liability limitation has no meaning without reference to a standard of value."<sup>98</sup> Thus, the dissenter concluded, the rate of conversion is the market rate at which the United States dollar exchanges for gold<sup>99</sup> and the limit set by the CAB "is void under Article 23 of the Convention which nullifies '[a]ny provision tending to relieve [a] carrier of liability or to fix a lower limit than that which is laid down in this convention.'"<sup>100</sup>

### III. OTHER DEVELOPMENTS CONCERNING THE WARSAW CONVENTION SYSTEM

The Courts of Appeal for the Second and Fifth Circuits have recently split on the question whether the Warsaw Convention system allows an award of prejudgment interest above the liability limitation in wrongful death actions.<sup>101</sup> In *Domangue v. Eastern*

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94. *Franklin Mint*, 52 U.S.L.W. at 4450 (Stevens, J., dissenting).

95. *Id.* (Stevens, J., dissenting) (citing *Five Per Cent. Discount Cases*, 243 U.S. 97, 106 (1917)).

96. *Id.* (Stevens, J., dissenting) (quoting *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912)).

97. *Id.*, 52 U.S.L.W. at 4452 (Stevens, J., dissenting) (quoting *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 302 (1935)).

98. *Id.*, 52 U.S.L.W. at 4453 (Stevens, J., dissenting).

99. *Id.* (Stevens, J., dissenting).

100. *Id.* (Stevens, J., dissenting) (quoting *Warsaw Convention*, *supra* note 1, art. 23)).

101. See cases cited *infra* notes 102, 109.

*Air Lines*,<sup>102</sup> a unanimous Fifth Circuit held that “post-judgment and pre-judgment interest may properly be awarded *in addition to* the \$75,000.00 limitation on judgments contained in the Warsaw Convention and Montreal Agreement.”<sup>103</sup> The court stated that in attempting to answer whether such an award is “*inconsistent with the purposes* of Warsaw/Montreal . . . [an e]xamination of the history of the Warsaw Convention and Montreal Agreement is critical.”<sup>104</sup> The court determined that the Convention’s purpose was to enable “an infant industry” to grow by allowing affordable insurance protection,<sup>105</sup> and that the Montreal Agreement had the additional and not entirely consistent purposes of increasing the amount of compensation for injured passengers and encouraging “speedy dispositions of claims.”<sup>106</sup> Adopting a balancing approach, the court found the award of interest above the liability limitation proper because it served the objectives of the Montreal Agreement and did not defeat the Convention’s initial purpose.<sup>107</sup> The court concluded that “if the drafters of the Montreal Agreement had wanted interest to be included within the \$75,000.00 limitation, they could have so stipulated.”<sup>108</sup>

The Second Circuit in *O’Rourke v. Eastern Air Lines*<sup>109</sup> disagreed with the Fifth Circuit’s interpretation of the Montreal Agreement.<sup>110</sup> The *O’Rourke* court stated that “payment of pre-

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102. 772 F.2d 256 (5th Cir. 1984).

103. *Id.* at 264 (emphasis added).

104. *Id.* at 260-61 (emphasis added).

105. *Id.* at 261 (citing *Block v. Compagnie Nat’l Air Fr.*, 386 F.2d 323, 336 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968)).

106. *See id.* at 261-62.

107. *See id.* at 262-64 (postjudgment and prejudgment interest).

108. *Id.* at 263 (postjudgment interest).

109. Nos. 83-6065, 83-6071, slip op. at 2143 (2d Cir. Mar. 2, 1984).

110. *Id.* at 2164-65 n.20 (noting that the *Domangue* decision had been rendered after oral argument in *O’Rourke*). The majority also distinguished *Domangue* because in *O’Rourke* plaintiffs sought “an award of prejudgment interest pursuant to *state law*.” *Id.* (emphasis added). *But see id.* at 2177-78 (Pratt, J., dissenting). The dissenter found that the “central purpose” of Warsaw/Montreal was “‘to fix at a definite level *the cost to airlines* to cover such damages.’” *Id.* at 2177 (quoting *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir. 1977) (emphasis in *Reed*)). Such purpose would not be affected by requiring the carrier to pay “interest on the \$75,000 award from the time of the accident to the time of judgment.” *Id.* The dissenter agreed with the Fifth Circuit that, “[a]bsent any language in, or purpose behind, either the Montreal Agreement or the Warsaw Convention that would preclude interest, . . . prejudgment interest should be available to victims of air disasters who recover under the Montreal Agreement.” *Id.* at 2178.

judgment interest would not advance any of the underlying objectives of the Convention or the agreement, but it would undercut" the Convention's two major objectives:<sup>111</sup> "to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages; . . . [and,] to establish a uniform body of world-wide liability rules to govern international aviation."<sup>112</sup> The court concluded that "[i]n absence of any contrary intent on the part of the framers, we may not read into [the Warsaw Convention System] a provision that allows the payment of prejudgment interest above the \$75,000 liability limitation."<sup>113</sup>

#### IV. THE NEED TO REVISE THE WARSAW CONVENTION SYSTEM

The recent cases have once again pointed out the major problem associated with the continued adherence by the United States to the unamended Convention: courts are faced with the difficult task of interpreting and enforcing the treaty's anachronistic provisions.<sup>114</sup> This difficulty has arisen most particularly in cases involving the interpretation of the treaty's ticketing requirements, which are often inconsistent with current industry practices.<sup>115</sup> In such cases, courts have often attempted to apply the Convention by rejecting a "literal" interpretation in favor of a "purpose" ap-

111. *Id.* at 2164-65 n.20.

112. *Id.* at 2162 (quoting *Reed*, 555 F.2d at 1089-90 (emphasis in *Reed*)). *But see id.* at 2177-78 (Pratt, J., dissenting).

113. *Id.* at 2164. *But see id.* at 2178 (Pratt, J., dissenting).

114. *See, e.g.*, cases cited *supra* notes 1, 58, 102, 109; *see also Saks v. Air Fr.*, 724 F.2d 1383 (9th Cir. 1984) (interpreting "accident"), *discussed in infra* note 115; Note, *supra* note 2, at 356-58 (discussing *Stratis v. Eastern Air Lines*, 682 F.2d 406 (2d Cir. 1982) and the problems courts face interpreting and enforcing the Convention's ticketing requirements); *cf. In re Air Crash Disaster at Malaga, Spain*, 577 F. Supp. 1013, 1014-15 (E.D.N.Y. 1984) (determining "place of destination" for purposes of Warsaw Convention, *supra* note 5, art. 28).

115. *See, e.g.*, *Stratis*, 682 F.2d at 410-12, *discussed in* Note, *supra* note 2, at 346-58; *id.* at 343 n.58 (citing *Eck v. United Arab Airlines*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964); *cf. Spain*, 577 F. Supp. at 1014-15 (determining "place of destination" for purposes of Warsaw Convention, *supra* note 4, art. 28). Cases requiring the courts to define "accident" have also posed major problems for courts. *See, e.g.*, *Saks*, 724 F.2d at 1384-90. In *Saks*, the majority adopted a "purpose" approach to interpretation and held that permanent loss of hearing allegedly caused by normal cabin pressure was an "accident." *Id.* at 1384-88. The dissenter adopted a "literal" approach to interpretation and agreed with the Third Circuit that an "unusual or unexpected occurrence" must be found for the carrier to be liable. *Id.* at 1388-90 (citing *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1197-98 (3d Cir. 1978) (adopting the textual distinction between accidents and occurrences)).

proach.<sup>116</sup> The issue is not what the treaty requires, but which purpose the requirement serves today.<sup>117</sup> The obvious problem with such an approach is that it often results in ad hoc judicial amendments that do violence to the text of the Convention.<sup>118</sup> Courts are not the proper forum for treaty revision.<sup>119</sup>

The problems presented by the present system suggest that the United States should reexamine its current position.<sup>120</sup> If the United States is to remain a "High Contracting Party," a revised form of the Montreal Protocols should be ratified.<sup>121</sup>

*James K. Noble III*

116. See, e.g., *Eck*, 15 N.Y.2d at 59-60, 203 N.E.2d at 642, 255 N.Y.S.2d at 251-52. See also *supra* note 115 (discussing *Saks v. Air Fr.*, 724 F.2d 1383 (9th Cir. 1984)).

117. See, e.g., *Eck*, 15 N.Y.2d at 59-60, 203 N.E.2d at 642, 255 N.Y.S.2d at 251-52.

118. See, e.g., *id.* at 63, 203 N.E.2d at 644, 255 N.Y.S.2d at 255 (Desmond, J., dissenting); see also text accompanying notes 94-96 (dissenter in *Franklin Mint* arguing that the Court's purpose approach effectively rewrote an article of the Convention).

119. See *Reed v. Wiser*, 555 F.2d 1079, 1093 (2d Cir. 1977); see, e.g., *In re Aircrash Disaster in Bali, Indonesia*, 684 F.2d 1301, 1308 (9th Cir. 1982). In *Bali*, the district court found that the deregulation of the airline industry established a new federal policy that the "vigorous airline industry [must] . . . stand on its own feet." *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1126 (C.D. Cal. 1978), *rev'd*, 684 F.2d 1301 (9th Cir. 1982). Such a change in policy, the court reasoned, allows the courts to limit the treaty's enforcement. *Id.* This reasoning, however, misconceives the role of the courts in enforcing a multinational treaty and was rejected by the circuit court. See *Bali*, 684 F.2d at 1308. 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.J. 71 (1979).

In his dissent in *Franklin Mint*, Justice Stevens wrote:

Some students of the Court take for granted that our decisions represent the will of the judges rather than the will of law. This dogma may be the current fashion, but I remain convinced that such remarks reflect a profound misunderstanding of the nature of our work. Unfortunately, however, cynics—parading under the banner of legal realism—are given a measure of credibility whenever the Court bases a decision on its own notions of sound policy, rather than on what the law commands. It does so today. The task of revising an international treaty is not one that this Court has authority to perform.

*Franklin Mint*, 52 U.S.L.W. at 4455 (Stevens, J., dissenting) (footnotes omitted).

120. See *supra* text accompanying notes 28-40; see also Note, *supra* note 2, at 356-64 (discussing the problems with the Convention's ticketing requirements and broad definition of "international" as evidenced by *Stratis*, and proposing the ratification of a revised form of the Montreal Protocols).

121. The revised Montreal Protocols should, *inter alia*, retain the Convention's "willful misconduct" exception, see *supra* note 39, improve the proposed insurance plan, see *supra* notes 37-40 and accompanying text, or provide a workable amending procedure to adjust the ceiling placed on liability during inflationary periods, see Reilly, *supra* note 24, at 418-23; see also *supra* note 31 and accompanying text (present problem with Montreal Agreement); limit the scope of the present definition of "international transportation" and substantially revise ticketing requirements. See Note, *supra* note 2, at 362-64.



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