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**Abstract**

The Note argues that punitive damages should be recovered under the Warsaw Convention in cases of wilful misconduct.The Note traces the history and intentions of the drafters of the Pact, analyzes the legal controversy in the U.S. courts concerning the recoverability of punitive damages in similar cases, and concludes that the threat of punitive damages may encourage air carriers to improve safety conditions in international transportation.

# THE RECOVERABILITY OF PUNITIVE DAMAGES UNDER THE WARSAW CONVENTION IN CASES OF WILFUL MISCONDUCT: IS THE SKY THE LIMIT?

## *INTRODUCTION*

The 1929 International Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention" or the "Convention")[1] governs a passenger's right of recovery for death or injury[2] on an international flight.[3] The Convention established a limitation of air

1. International Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

2. *See, e.g.*, Benjamins v. British European Airways, 572 F.2d 913, 916-19 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). In *Benjamins*, the U.S. Court of Appeals for the Second Circuit held that the Warsaw Convention created a private cause of action for wrongful death or personal injury. *Id.* at 916 (overruling Komlos v. Compagnie Nat'l Air France, 111 F. Supp. 393 (S.D.N.Y.), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954) and Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957)).

3. Warsaw Convention, *supra* note 1, art. 1, 49 Stat. at 3014, T.S. No. 876, at 16, 137 L.N.T.S. at 15. Article 1 provides as follows:

> (1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.
>
> (2) For the purposes of this convention the expression "international transportation" shall mean 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.
>
> (3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, 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.

carrier liability[4] for the death or bodily injury of a passenger[5] and unlimited liability for damage, including death or bodily injury, caused to a passenger resulting from the wilful misconduct of an air carrier or its employees.[6] The Warsaw Convention, however, is silent as to the types of damages recoverable in actions arising under it, including those actions that involve wilful misconduct.[7] This silence has given rise to some U.S. courts allowing an air carrier's liability in cases of wilful misconduct to include an award of punitive damages,[8] whereas

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*Id.*

4. *Id.* art. 22, 49 Stat. at 3019, T.S. No. 876, at 22, 137 L.N.T.S. at 25. Article 22(1), which sets the limit on liability for passenger death and injury, provides that

> [i]n 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 passengers may agree to a higher limit of liability.

*Id.*

5. *Id.* art. 17, 49 Stat. at 3018, T.S. No. 876, at 21, 137 L.N.T.S. at 23. Article 17 provides that

> [t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

*Id.*

6. *Id.* art. 25, 49 Stat. at 3020, T.S. No. 876, at 23, 137 L.N.T.S. at 27. Article 25 provides as follows:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

*Id.*

7. *See* Warsaw Convention, *supra* note 1; *see also* Mertens v. Flying Tiger Lines, Inc., 341 F.2d 851, 858 (2d Cir.) ("It seems clear that the Warsaw Convention left [the issue of which items of damages are recoverable] . . . to the internal law of the parties to the Convention."), *cert. denied* 382 U.S. 816 (1965); Cohen v. Varig Airlines, 62 A.D.2d 324, 334, 405 N.Y.S.2d 44, 49 (1st Dep't 1978) ("Damages [for the wilful delay of plaintiff's baggage] should be awarded in accordance with the laws of New York.").

8. Two courts have held that punitive damages are recoverable in cases involving wilful misconduct. *See* In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Int'l Airport, Pak. on Sept. 5, 1986, 729 F. Supp. 17 (S.D.N.Y. 1990);

other U.S. courts have denied an award of punitive damages in such cases.[9]

This Note argues that punitive damages should be recoverable under the Warsaw Convention in cases of wilful misconduct. Part I discusses the intentions of the drafters of the Warsaw Convention, the history of the Warsaw Convention, and the provisions of the Convention that relate to recoverable damages and wilful misconduct. Part II sets forth the legal controversy in U.S. courts concerning the recoverability of punitive damages in cases involving wilful misconduct. Part III argues that the minutes of the Warsaw Convention indicate that the drafters intended that where wilful misconduct exists, damages are determined by reference to local law, which may include an award of punitive damages when factually appropriate. This Note concludes that the threat of punitive damages may encourage air carriers to improve safety conditions in international transportation.

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In re Korean Airlines Disaster of Sept. 1, 1983 MDL 565 Misc. No. 83-0345 (D.D.C. Aug. 3, 1989); *see also infra* notes 130-40 and accompanying text (discussing *In re Hijacking of Pan Am* decision allowing recovery of punitive damages in case involving wilful misconduct under Warsaw Convention); *infra* notes 127-29 and accompanying text (setting forth jury instructions in *Korean Airlines Disaster* and ruling of court where punitive damages were awarded by jury verdict). A third court stated, in dicta, that punitive damages are recoverable in cases of wilful misconduct. *See* Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982); *see also infra* notes 122-25 and accompanying text (discussing suggestion of *Hill* court that punitive damages should be awarded in wilful misconduct case under Warsaw Convention).

9. Four cases have denied recovery of punitive damages in cases involving wilful misconduct. *See, e.g.*, Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990); In re Air Disaster in Lockerbie, Scot. on Dec. 21, 1988, 733 F. Supp. 547 (E.D.N.Y. 1990), *reargument denied and certification for an interlocutory appeal granted*, 736 F. Supp. 18 (E.D.N.Y. 1990); In re Air Crash Disaster at Gander, Nfld. on Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987); Harpalani v. Air-India, Inc., 634 F. Supp. 797 (N.D. Ill. 1986); *see also infra* notes 58-76 and accompanying text (discussing *Floyd* analysis denying recovery of punitive damages in wilful misconduct case under Warsaw Convention); *infra* notes 102-20 and accompanying text (setting forth reasoning in *Lockerbie* case for denying punitive damage recovery in case involving wilful misconduct); *infra* notes 87-101 and accompanying text (discussing reasoning of court in *Gander* for refusing to allow punitive damage recovery in wilful misconduct case under the Warsaw Convention); *infra* notes 77-86 and accompanying text (detailing analysis of *Harpalani* court for denying recovery of punitive damages in case involving wilful misconduct under Warsaw Convention). One court has stated, in dicta, that punitive damages are not recoverable in cases involving wilful misconduct. *See* Thompson v. British Airways, 1989 WL 43997 (D.D.C. Apr. 18, 1989) (WESTLAW, DCTU database), *aff'd*, 901 F.2d 1131 (D.C.Cir.1990); *see also infra* note 57 (discussing *Thompson* analysis that punitive damages should not be awarded in wilful misconduct case under Warsaw Convention).

## I. *THE WARSAW CONVENTION AND WILFUL MISCONDUCT*

### A. *History of the Warsaw Convention*

The signatories to the 1929 Warsaw Convention sought to fulfill two goals: the creation of uniform principles of liability in the area of international aviation[10] and a limitation of air carrier liability.[11] The intent behind these goals was to aid the fledgling airline industry,[12] which in 1929 had limited international routes[13] and could carry passengers only during the day-

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10. Warsaw Convention, *supra* note 1, preamble, 49 Stat. at 3014, T.S. No. 876, at 16, 137 L.N.T.S. at 15. The preamble of the Warsaw Convention noted the goals of the signatories:

> Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,
>
> Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention . . .

*Id.*

Mr. Lutostanski, Dean of the Faculty of Law of Warsaw, in his speech at the first session of the delegates at the second conference, stated that the delegates were

> gathered in order to improve life, in order to render a legal text that daily life urgently requires. International air carriage is multiplying, international lines are being created, air travelers pass from country to country and even to distant continents, in the same way, the speed required for carriage of goods and baggage urges recourse to air carriage. *Common rules to regulate international air carriage have become a necessity. Besides, it is necessary to fix rules of liability rightly considered by the CITEJA as intimately bound up with the problem of transportation.*

SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, OCTOBER 4-12, 1929, at 13 (R. Horner & D. Legrez trans. 1975) (emphasis added) [hereinafter MINUTES]. For a discussion of CITEJA, see *infra* notes 21-22 and accompanying text. *See generally* Cagle, *The Role of Choice of Law In Determining Damages For International Aviation Accidents*, 51 J. AIR L. & COM. 953, 955 (1986) (discussing two goals of Convention).

11. MINUTES, *supra* note 10, at 13; *see* Cagle, *supra* note 10, at 955.

12. MINUTES, *supra* note 10, at 11. Mr. Zaleski, Minister of Foreign Affairs of the Republic of Poland, remarked that "[t]oday the air is conquered; beside[s] communication by land transport and by sea, air navigation has become a reality. But this new means of communication requires not only organization, it requires further the creation of provisions of law analogous to those which regulate the other means of communication." *Id.*; *see* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967) (discussing intention of drafters of Warsaw Convention).

13. L. KREINDLER, AVIATION ACCIDENT LAW § 11.01[2], at 11-3 (1987). For example in 1929, Air France travelled only to France, England, and Africa, while Pan

light hours.[14] In order to expand, the airline industry needed both capital[15] and insurance coverage.[16] In addition, the industry required protection from unpredictable and economically crippling liability claims arising under different legal systems.[17] The drafters of the Convention anticipated that a uni-

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American World Airways, the sole U.S. international air carrier at the time, travelled only to Cuba and Key West. *Id.*

Between 1925 and 1929, domestic and international flights carrying passengers had a fatality rate of 45 passengers per 100 million passenger miles. Lowenfeld & Mendelsohn, *supra* note 12, at 498. Passenger capacity on larger aircraft was 15 to 20 people per flight, and the aircraft travelled at speeds of 100mph. *Id.* at 498.

Between 1980 and 1989, there were over 4000 deaths in aircraft disasters. 1990 WORLD ALMANAC 545-46 (listing some notable aircraft disasters since 1937). In the United States alone, from 1980 to 1987 there were 185 air carrier accidents with 1020 fatalities. 1989 STATISTICAL ABSTRACT OF THE UNITED STATES chart no. 1001.

14. L. KREINDLER, *supra* note 13, § 11.01[2], at 11-2. Mr. De Vos, the delegate from Belgium and also the Reporter at the conference, remarked at the second session of the drafters on October 5, 1929 that

> [air] carriage assumes unexpected proportions every day; in my country alone, on one single aerodrome in the summer season, there are up to 36 departures of regular lines by day. Aircraft go faster and faster every day, to the point that the Fokker, the Farman, soon are going to appear as the tools of yesteryear. We still hear the deafening sound of the Super-Marine that just won the Schneider cup, at a speed of some 600 kilometers an hour, and, we have before us the colossal wing span of the Do-X which, on Lake Constance, has just demonstrated the possibility that tomorrow, in all countries, facilities will be set up for both day and night flights!

MINUTES, *supra* note 10, at 23.

15. Lowenfeld & Mendelsohn, *supra* note 12, at 499. Air carriers had difficulty attracting capital investors because of the fear that a single accident would have severe adverse economic effects on an air carrier. *Id.* The drafters hoped that a limitation of air carrier liability would alleviate this concern. *Id.*

16. Acosta, *Wilful Misconduct Under The Warsaw Convention: Recent Trends and Developments*, 19 U. MIAMI L. REV. 575 (1965). The United States, which was not a drafter of the Convention, expressed similar concerns regarding insurance coverage when considering its membership to the Convention in 1934. Lowenfeld & Mendelsohn, *supra* note 12, at 499. In transmitting the Warsaw Convention to the Senate, Secretary of State Cordell Hull wrote that

> [i]t 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 air transportation, and equitable as such limitation will afford the carrier a more definite 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.

Senate Comm. on Foreign Relations, *Message from the President of the U.S. Transmitting a Convention for the Unification of Certain Rules*, S. EXEC. DOC. NO. G. 73d Cong., 2d Sess. 3-4 (1934).

17. Lowenfeld & Mendelsohn, *supra* note 12, at 498-99 ("[S]ince aviation was

form system of law and limitation of liability would fulfill these needs of the airline industry.[18]

The Warsaw Convention was the product of two international conferences on private aeronautical law.[19] The first conference, held in Paris in 1925 (the "1925 Conference"), produced a preliminary draft.[20] The 1925 Conference also created the International Technical Committee of Aeronautical Legal Experts (the "CITEJA").[21] The CITEJA met several times between 1926 and 1928 to amend the preliminary draft produced at the 1925 Conference in anticipation of the second international conference.[22]

The second conference, held in Warsaw in 1929 (the "1929 Conference"), included representatives from thirty-two nations, the League of Nations, and the International Commission of Air Navigation.[23] The United States did not send dele-

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obviously going to link many lands with different languages, customs, and legal systems, it would be desirable to establish at the outset a certain degree of uniformity.").

18. MINUTES, *supra* note 10, at 23. Mr. De Vos stated that "[t]he air carriers expect to give to them, as well as to the insurers, the legal basis of their operation. . . . What the engineers are doing for machines, we, lawyers, we must do the same for the law." *Id.*

19. Lowenfeld & Mendelsohn, *supra* note 12, at 498 (setting forth drafting history of Warsaw Convention); *see* Cagle, *supra* note 10, at 955 (discussing history of Warsaw Convention).

20. MINUTES, *supra* note 10, at 18. Mr. De Vos, the delegate from Belgium and the Reporter at the conference, explained that "out of [the first conference] came a first draft of a Convention on the liability of the air carrier, based upon the preliminary draft which the French Government had transmitted to the different governments." *Id.*

21. *Id.* at 18-19. Mr. De Vos explained that "out of [the 1925 Conference] came as well a permanent committee of legal experts elegantly called the Comite International Technique d'Experts Juridiques Aeriens, more simply the CITEJA." *Id.*

22. *Id.* at 245. In November 1925 the work of the CITEJA began and involved modification of the conference's draft while the 1925 Conference remained in session. *Id.* The CITEJA continued its work in Paris in 1926 and in March, April, and June of 1927, in Brussels in November of 1927, in Paris in March of 1928, and finally in Madrid in May of 1928. *Id.* at 245-46. Mr. De Vos, Reporter at the 1929 Conference, stated at the opening session of the delegates that "[t]he CITEJA undertook the study and preparation of texts on the subject of private aeronautical law. It resumed work on the draft on the liability of the air carrier, not in order to modify it radically, but to define clearly certain points, to complete it in a new form, that of contract." *Id.* at 19.

23. *Id.* at 5-10. The following countries sent delegates to take part in the 1929 Warsaw Conference: Austria, Belgium, Brazil, Bulgaria, China, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain (Australia and the Union of South Africa), Greece, Hungary, Italy, Japan, Latvia, Luxembourg, Mexico,

gates, but did send observers to the conference.[24] The 1929 Conference modified the preliminary draft prepared by the CITEJA between 1926 and 1928.[25] The 1929 Conference received numerous proposals and amendments submitted by the represented nations in response to the CITEJA draft.[26] As a result, the 1929 Conference formed a preparatory committee.[27] The role of this committee was very limited; it was permitted to address proposals that concerned only the mere wording of the draft that did not affect the substance of the document.[28] The committee was not permitted to change proposals that sought to revise the substance of the draft articles, but instead was allowed only to organize them for discussion by the delegates.[29] The 1929 Conference concluded on Octo-

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the Netherlands, Norway, Poland, Romania, Spain, Sweden, Switzerland, the Union of Soviet Socialist Republics, Venezuela, and Yugoslavia. *Id.*

The following countries were invited to take part in the conference but did not send any delegates: Albania, Chile, Columbia, Dominican Republic, Canada, India, Ireland, Guatemala, Iraq, Lithuania, Monaco, Paraguay, Portugal, Siam (now Thailand), and Turkey. *Id.* at 3-10.

24. *Id.* at 10. The observers from the United States were Mr. John Ide and Mr. McCeney Werlich. *Id.*; *see* Lowenfeld & Mendelsohn, *supra* note 12, at 502.

25. MINUTES, *supra* note 10, at 17. The 1929 Conference considered the draft of the CITEJA as well as documents, amendments, and proposals submitted by represented nations. *Id.*

26. *Id.* at 19. Mr. De Vos commented that he was a "little disturbed by the number of amendments which [were] presented to [the conference]." *Id.* at 19.

27. *Id.* at 18. The preparatory committee consisted of Mr. Orme Clarke (Great Britain), Mr. Giannini (Italy), Mr. A. Sabanin (USSR), Mr. Muguiro Y Pierrard (Spain), Mr. Edmond Pittard (Switzerland), Mr. Ernest Arendt (Luxembourg), Mr. Vicomte Motono (Japan), Mr. Georges Ripert (France), Mr. Leon Babinski (Poland), Mr. Henri De Vos (Belgium), and Mr. Otto Riese (Germany). *Id.* at 27.

28. *Id.* at 18. During the 1929 Conference, Mr. De Vos, the reporter, at the opening session of the delegates, explained that "[w]hen, during the course of this discussion we ascertain that there are proposals that are mere questions of wording, we will refer them to a preparatory committee." *Id.*

29. *Id.* Mr. Ripert, the delegate from France, at the opening session of the delegates, explained that

> [t]he role of the [preparatory] committee is not to examine the substance of the amendments. But amendments have been submitted by delegations which had no knowledge of each other and which had no knowledge of the amendments submitted by other delegations. It is necessary, therefore, to proceed to a preparatory work, to coordinate these amendments and to give direction to the debates. Therefore, the sole object of this committee would be to indicate in which order the amendments would be discussed, to see those which are similar, those which, on the contrary, are different, and to present questions before the conference. It will never pass upon the substance, but upon the presentation of the amendments.

*Id.*

ber 12, 1929 with the signing of the Warsaw Convention,[30] which came into force in February 1933.[31]

Over one hundred countries adhere to the Warsaw Convention.[32] The United States became a signatory to the Convention in 1934 by proclamation of President Franklin Roosevelt, nine years after negotiations for the first draft of the Convention were initiated.[33] As a result of U.S. accession, the Convention has become part of U.S. law, superseding all other international aviation law[34] and preempting any local or state law contrary to its provisions.[35]

### B. *Convention Provisions Relating to Recoverable Damages and Wilful Misconduct*

Three articles of the Convention provide for air carrier liability.[36] First, article 17 provides a passenger on an interna-

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30. *Id.* at 236.

31. Warsaw Convention, *supra* note 1, 49 Stat. at 3023-25, T.S. No. 876 at 15, 137 L.N.T.S. at 33, 35, 37.

32. U.S. DEP'T OF STATE, TREATIES IN FORCE (1990).

33. 49 Stat. 3000, T.S. No. 876 (1934). One month prior, "without debate, committee hearing, or report, the Senate gave its Advice and Consent by voice vote." Lowenfeld & Mendelsohn, *supra* note 12, at 502 (citing 78 CONG. REC. 11,582 (1934)).

34. Acosta, *supra* note 16, at 575.

35. *See, e.g.*, In re Mexico City Air Crash on Oct. 31, 1979, 708 F.2d 400, 418 (9th Cir. 1983) (holding that state statute that attempted to limit recovery permitted under the Warsaw Convention was preempted because it was contrary to Convention's terms); *see also* L. KREINDLER, *supra* note 13, § 11.01[2], at 11-3, 11-4 ("Provisions of state or local law contrary to the Convention's terms are preempted.").

Preemption occurs by virtue of the supremacy clause of article VI of the U.S. Constitution, which states in part that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

36. *See* MINUTES, supra note 10, at 205; *infra* notes 38-40 and accompanying text (setting forth the three articles of Convention which provide basis of air carrier liability). The drafters considered the limitation on air carrier liability the more important of the two goals. MINUTES, *supra*, note 10, at 205. Indeed, the drafters considered three articles (articles 17, 18, and 19) that provided air carrier liability for passengers, baggage, and damage due to delay, respectively, as the most important articles of the Convention. *Id.* Mr. Giannini, President of the preparatory committee, remarked that "[a]s our colleagues certainly recall, these are perhaps the most important articles of the Convention." *Id.*

tional flight with a cause of action[37] for wrongful death or bodily injury if such death or injury was caused by an accident on board the aircraft or in the process of embarking or disembarking.[38] Second, article 18 provides a basis of air carrier liability for damage caused to baggage and cargo.[39] Third, article 19 provides for air carrier liability for damage resulting from delay in the transportation of passengers, baggage, or cargo.[40]

Damage actions brought under articles 17, 18, and 19 are

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37. Benjamins v. British European Airways, 572 F.2d 913 (2d Cir.), *cert. denied*, 439 U.S. 114 (1979). It was not until the *Benjamins* case that U.S. courts interpreted the Warsaw Convention as granting a passenger a cause of action under article 17 for wrongful death or bodily injury. *Id.* at 916-19. To many, however, it was obvious that the Convention did grant a private right of action. *See, e.g.*, Salamon v. Koninklijke Luchtuaart Maatschappij, N.V., 107 N.Y.S.2d 768, 773 (N.Y. Co. Sup. Ct. 1951) ("If the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do."), *aff'd mem.*, 281 A.D.2d 965, 120 N.Y.S.2d 917 (1st Dep't 1953); *see* Lowenfeld & Mendelsohn, *supra* note 12, at 517 ("[I]t was apparently always assumed that the Convention created a right of action.").

38. Warsaw Convention, *supra* note 1, art. 17, 49 Stat. at 3018, T.S. No. 976, at 21, 137 L.N.T.S. at 23. For the text of article 17, see *supra* note 5.

Many of the terms of article 17 have been litigated. L. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 59 (1988). One such term has been "accident." *See, e.g.*, Day v. Trans World Airlines, Inc., 528 F.2d 31, 34 (2d Cir. 1975) ("accident" under article 17 can occur in airport lounge while passengers await international flight), *cert. denied*, 429 U.S. 890 (1976); *cf.* Martinez Hernandez v. Air France, 545 F.2d 279, 283 (5th Cir. 1976) (plaintiffs were not "disembarking" when they had left plane, went through terminal and presented passports to authorities), *cert. denied*, 430 U.S. 950 (1977); Knoll v. Trans World Airlines, 610 F. Supp. 844, 846 (D. Col. 1985) (plaintiff was not "disembarking when she had left plane, went through jetway and walked past gate). The meaning of "bodily injury" has also been litigated. *See, e.g.*, Husserl v. Swiss Air Transp. Co., Ltd., 351 F. Supp. 702 (S.D.N.Y. 1972) (holding that "bodily injury" includes mental injuries), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *cf.* Rosman v. Trans World Airlines, 34 N.Y.2d 385, 400, 314 N.E.2d 848, 859, 358 N.Y.S.2d 97, 109-10 (1974) (damages for psychic trauma only recoverable if caused by objective bodily injuries and not recoverable if caused from nonbodily manifestations of trauma).

39. Warsaw Convention, *supra* note 1, art. 18, 49 Stat. at 3019, T.S. No. 876, at 21, 137 L.N.T.S. at 23, 25. Article 18(1) provides that "[t]he carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." *Id.* Air carriage of cargo was made to resemble maritime carriage by the provision of a carrier *defense* based on negligent navigation. *See cf.* Carriage of Goods by Sea Act, 46 U.S.C. § 1304(2)(a) (1986).

40. Warsaw Convention, *supra* note 1, art. 19, 49 Stat. at 3019, T.S. No. 876, at 21, 137 L.N.T.S. at 25. Article 19 provides that "the carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods." *Id.*

subject to article 24 of the Convention.[41] Article 24(1) of the Convention provides that damage actions arising under articles 18 and 19 are subject to the Convention's conditions and limits.[42] Article 24(2) provides that the same limitations apply to actions arising under article 17 "without prejudice" to the determination as to who may sue and what the parties' rights are.[43]

The Convention sets various limits on the monetary amount of a damage award. Article 22 of the Convention originally limited an air carrier's liability under article 17 to US$8,300 for the damage sustained to a passenger.[44] This figure, however, has been increased on two occasions.[45] First, the Hague Protocol, which amended the Warsaw Convention in 1955, raised the liability limitation to US$16,600.[46] Second,

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41. *See infra* notes 42-43 and accompanying text (discussing article 24(1) and 24(2)).

42. Warsaw Convention, *supra* note 1, art. 24, 49 Stat. at 3020, T.S. No. 876, at 22, 137 L.N.T.S. at 27. Article 24(1) provides that "[i]n the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." *Id.*

43. *Id.* Article 24(2) provides that "[i]n the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." *Id.*

44. *Id.* art. 22, 49 Stat. at 3019, T.S. No. 876, at 22, 137 L.N.T.S. at 25. For the text of article 22(1), see *supra* note 4.

The official French text of the Convention limited liability to 125,000 Poincare francs, which at the time of the 1929 Conference was equal to US$4,898. Lowenfeld & Mendelsohn, *supra* note 12, at 499 n.10 (citing Clare, *Evaluation of Proposals to Increase the "Warsaw Convention" Limit of Passenger Liability*, 16 J. AIR L. & COM. 53, 54, 57 (1949)). In 1933, 125,000 Poincare francs was equal to US$8,300. L. KREINDLER, *supra* note 13, § 11.01[2], at 11-3.

45. Cagle, *supra* note 10, at 957-58 (discussing U.S. criticism of low liability limit of 1929 Convention). Much of the criticism surrounding the low liability limit focused on the fact that in the "United States, France, Great Britain and other developed countries awards in personal injury and death actions were far higher than the limits permitted by the Warsaw Convention." Lowenfeld & Mendelsohn, *supra* note 12, at 504. Soon after the Convention, attempts to revise the Warsaw Convention began: in Cairo in 1946, in Madrid in 1951, in Paris in 1952, and in Rio de Janeiro in 1953. *Id.* at 502-03; *see* S.M. SPEISER & C.F. KRAUSE, AVIATION ACCIDENT LAW 696 (1975) ("The Warsaw Convention has had a questionable past and possesses a dubious future.").

46. The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371. This Protocol is generally referred to as the Hague Protocol. R.H. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER 5 (1981). The Hague Protocol was the result of the work done by the Legal Committee of the International Civil Aviation Organization (the "ICAO"), which decided to amend certain of the Warsaw

in response to a possible denunciation of the Warsaw Convention by the United States,[47] air carriers increased the limit to US$75,000 by adopting the Montreal Agreement in 1966.[48]

Article 25, however, deprives the air carrier of this monetary limit of liability when the air carrier or its employees engage in wilful misconduct that causes the death or bodily injury of a passenger that is actionable under article 17.[49] In addi-

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Convention articles instead of revising the entire Convention. *Id.* The ICAO met in Rio de Janeiro in 1953 and drafted a Protocol known as the "Rio de Janeiro draft." *Id.* (citing ICAO Doc. 7686, Vol. II, at 76). This draft was then used by the International Conference on Private Air Law held in September 1955 at the Hague, which adopted the Hague Protocol. MANKIEWICZ, *supra*, at 5-6 (citing Minutes and Documents of the Conference in ICAO Doc. 7686, Vols. I & II.). In addition to increasing the air carrier liability to US$16,600 in cases of death or bodily injury under article 17, the Hague Protocol also redefined "wilful misconduct," decreased the complexity of the contents of documents of travel, and extended the benefit of a limitation of liability to the servants and employees of the air carrier as long as they acted within the scope of their employment. *Id.* at 6. The Hague Protocol has three official languages: French, English, and Spanish. However, it provides that the French language will prevail if there is an inconsistency. *Id.*

The United States has never adhered to the Hague Protocol because of its dissatisfaction with the low liability limits. L. KREINDLER, *supra* note 13, § 11.01[7], at 11-6. While the majority of the delegates wanted a US$13,300 limit, the United States favored a limit of US$25,000. Cagle, *supra* note 10, at 957. Because the United States has never adhered to the Hague Protocol, the 1929 Warsaw Convention still applies in the United States. L. KREINDLER, *supra* note 13, § 11.01[7], at 11-6; *see* Cagle, *supra* note 10, at 953.

47. 50 U.S. DEP'T OF STATE, BULL. 923 (1965); *see* S.M. SPEISER & C.F. KRAUSE, *supra* note 45, at 696. On November 15, 1965, the United States served a notice of denunciation of the Warsaw Convention to take effect on May 15, 1966. 50 U.S. DEP'T STATE, BULL. 923 (1965). The continued dissatisfaction of the United States with the low liability limit of the Warsaw Convention resulted in this notice. L. KREINDLER, *supra* note 13, § 11.01[7], at 11-6.

48. Cagle, *supra* note 10, at 958. Almost immediately, in order to avoid denunciation by the United States, a meeting between most of the major airlines and the International Civil Aeronautical Organization, of which the United States is a member, was held in February 1966 in Montreal. *Id.* This produced what is commonly known today as the Montreal Agreement. *Id.*; *see* Agreement Relating to Liability Limitations of the Warsaw Convention, Agreement CAB 18900, *adopted on* May 13, 1966, 49 U.S.C. § 1502 (1982); *see also* L. KREINDLER, *supra* note 13, at § 11.01[7], at 11-16, 11-17 (discussing events leading to Montreal Agreement); S.M. SPEISER & C.F. KRAUSE, *supra* note 45, at 696 (discussing history of Montreal Agreement). The Montreal Agreement is not a treaty but rather an agreement between air carriers pursuant to article 22(1) of the Warsaw Convention, which allows an air carrier and prospective passengers to agree on a higher limit of liability. Warsaw Convention, *supra* note 1, art. 22, 49 Stat. at 3019, T.S. No. 876, at 22, 137 L.N.T.S. at 25. For the text of article 22(1), see *supra* note 4.

49. Warsaw Convention, *supra* note 1, art. 25, 49 Stat. at 3006, T.S. No. 876, at 8, 137 L.N.T.S. at 27. For the text of article 25, see *supra* note 6. This idea of unlimited liability, however, was not incorporated into the preliminary draft created by the

tion, article 25 deprives a carrier of a limitation of liability for damage due to wilful delay under article 19.[50] Furthermore, article 25 provides that the law of the forum hearing the case determines whether the alleged conduct constitutes wilful misconduct.[51]

Article 28 of the Convention provides a plaintiff with four

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first conference in Paris in 1925. H. DRION, LIMITATIONS OF LIABILITIES IN INTERNATIONAL AIR LAW 44 (1954). The CITEJA was the first to incorporate the idea in its draft submitted to the second conference in Warsaw in 1929. *Id.*

50. *See* Cohen v. Varig Airlines, 62 A.D.2d 324, 333, 405 N.Y.S.2d 44, 48 (1st Dep't 1978).

51. Warsaw Convention, *supra* note 1, art. 25, 49 Stat. at 3020, T.S. No. 876, at 23, 137 L.N.T.S. at 27. For the text of article 25, see *supra* note 6. *See* R.H. MANKIEWICZ, *supra* note 46, at 122. The use of the terms "wilful misconduct" or "default equivalent to wilful misconduct" in article 25 was the product of negotiations at the second conference held in Warsaw in 1929. MINUTES, *supra* note 10, at 60.

Because the official language during the Second Conference was French and the official text of the Convention was in French, the drafters proposed the French term "*dol*" to denote the word misconduct under article 25. *Id.* "*Dol*" in French means an "act or omission done intentionally to cause a harm." R.H. MANKIEWICZ, *supra* note 46, at 122 (citing Gallais c. Aero Maritime, 1954 R.F.D.A. 184 (T.G.I. Seine, 28 April 1954)). The nearest analogy to "*dol*" in the common law, however, was "wilful misconduct," which encompasses both reckless and intentional acts. L. GOLDHIRSCH, *supra* note 38, at 121. In an attempt to accommodate this discrepancy, the drafting committee issued a proposal, which was adopted by the Conference, incorporating into the language of article 25 the idea of "conduct equivalent to wilful misconduct," which would be determined by the law of the court hearing the case. Warsaw Convention, *supra* note 1, art. 25, 49 Stat. at 3006, T.S. No. 876, at 23, 137 L.N.T.S. at 27; *see* Minutes, *supra* note 10, at 62 (setting forth negotiations regarding wording of today's article 25); R.H. MANKIEWICZ, *supra* note 46, at 122 (discussing history and subsequent interpretations of article 25).

U.S. courts have defined "wilful misconduct" as either "the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage" or the "intentional performance of an act in such a manner as to imply reckless disregard of the probable consequence of the performance of the act." Pekelis v. Transcontinental Air, Inc., 187 F.2d 122, 124 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *see* Republic Nat'l Bank v. Eastern Airlines, Inc., 815 F.2d 232, 238-39 (2d Cir. 1987); *see also* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 536 (2d Cir. 1965) ("knowledge that damage would probably result" is necessary element of wilful misconduct), *cert. denied*, 382 U.S. 983 (1966); KLM v. Tuller, 292 F.2d 775, 779 (D.D.C.) (carrier's "failure to instruct passengers as to location and use of life vests" constituted wilful misconduct), *cert. denied*, 368 U.S. 921 (1961).

One English court explained that wilful misconduct is

> misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. . . . To be guilty of wilful misconduct, the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the

alternative forums in which to bring a damage action under the Convention: the domicile of the air carrier, the principal place of business of the air carrier, the place of business where the contract for carriage was made, or the place of destination.[52] Whichever forum the plaintiff chooses, the court hearing the case is authorized under article 28 to apply its own law regarding procedural questions.[53] Article 29 of the Convention, however, provides a two-year limitation period in which the plaintiff may bring a damage action.[54]

## II. *THE INTERPRETATION OF THE WARSAW CONVENTION BY U.S. COURTS IN CASES OF WILFUL MISCONDUCT*

The Warsaw Convention's silence on the issue of punitive damages has led some U.S. courts to deny the recovery of punitive damages in cases involving wilful misconduct, whereas other courts have determined that punitive damages are available in such situations. Plaintiffs who have sought to recover

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result may be; all the problems . . . must be evidenced in the light of that definition.

R.H. MANKIEWICZ, *supra* note 46, at 124-25 (citing Horabin v. BOAC, [1952] 2 All E.R. 1006, USAR 549 (Q.B. 1953)).

52. Warsaw Convention, *supra* note 1, art. 28, 49 Stat. at 3021, T.S. No. 876, at 23, 137 L.N.T.S. at 27, 29. Article 28(1) provides as follows:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he had a place of business, through which the contract has been made, or before the court at the place of destination.

*Id.*

The domicile of the carrier under article 28 is the carrier's place of incorporation. Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 802 (2d Cir. 1971). In addition, the carrier's principal place of business is generally where it operates its headquarters. *Id.*

53. Warsaw Convention, *supra* note 1, art. 28(2), 49 Stat. at 3021, T.S. No. 876, at 23, 137 L.N.T.S. at 29. Article 28(2) provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." *Id.*

54. *Id.*, art. 29, 49 Stat. at 3021, T.S. No. 876, at 23, 137 L.N.T.S. at 29. Article 29 provides as follows:

> (1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.
>
> (2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

*Id.*

punitive damages as a result of the wilful misconduct of an air carrier have based their claims on a violation of articles 17 and 19 of the Warsaw Convention[55] or on state tort law.[56]

### A. *Courts Denying a Punitive Damage Recovery*

Several courts have denied a punitive damage recovery in cases alleging wilful misconduct of an air carrier.[57] The only U.S. court of appeals case to address the issue of a punitive damage recovery in a wilful misconduct case was *Floyd v. Eastern Airlines, Inc.*[58] In *Floyd*, the Court of Appeals for the Eleventh Circuit denied plaintiffs' claim for punitive damages brought under the Warsaw Convention and under state tort law for intentional infliction of emotional distress.[59] The plaintiffs alleged that the airline's maintenance personnel were

55. *See, e.g.*, Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990); In re Air Disaster in Lockerbie, Scot. on Dec. 21, 1988, 733 F. Supp. 547 (E.D.N.Y. 1990), *reargument denied and certification for an interlocutory appeal granted*, 736 F. Supp. 18 (E.D.N.Y. 1990); In re Air Crash Disaster at Gander, Nfld. on Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987); Harpalani v. Air-India, Inc., 634 F. Supp. 797 (N.D. Ill. 1986).

56. *See, e.g., Floyd*, 872 F.2d 1462; In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi, Airport, Pak. on Sept. 5, 1986, 729 F. Supp. 17 (S.D.N.Y. 1990); *In re Air Disaster in Lockerbie*, 733 F. Supp. 547; *In re Air Crash Disaster at Gander, Nfld.*, 684 F. Supp. 927.

57. *See infra* notes 58-120 and accompanying text (summarizing U.S. case law denying punitive damage recovery under Warsaw Convention). In *Thompson v. British Airways*, the U.S. District Court for the District of Columbia granted defendant airline's motion to strike plaintiffs' claim for punitive damages based on the airline's alleged wilful misconduct in its treatment of plaintiffs and handling of their baggage on an international flight. *Thompson*, WL 43997 (D.D.C. Apr. 18, 1989) (WESTLAW, DCTU database) *aff'd*, 901 F.2d 1131 (D.C.Cir. 1990). As a result of a delay, plaintiffs were unable to change to their connecting flight. *Id.* at 2. The airline arranged a later flight for them, which was again delayed, causing them to miss a connecting flight. *Id.* at 3. The airline then arranged another flight for them on another airline. *Id.* After boarding this second flight, plaintiffs were asked, but refused, to change their seats. *Id.* The airline refused to serve plaintiffs any food or beverage. *Id.* After landing, plaintiffs discovered that their baggage was lost. *Id.* The airline was able to retrieve the baggage sometime later and at the plaintiffs' request repaired any damaged pieces. *Id.* The court held that because the carrier was not guilty of wilful misconduct, plaintiffs' claim was subject to the Convention's limitation of liability that barred a recovery of punitive damages. *Id.* at 9. The court reasoned that "[t]he Warsaw Convention provides a liability limitation: to allow for punitive damages would go against the intent of the Convention." *Id.* The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's holding that there was no evidence of wilful misconduct. The court, however, refused to address the issue of punitive damages. 901 F.2d 1131.

58. 872 F.2d 1462 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990).

59. *Id.* at 1485, 1489.

guilty of wilful misconduct by failing to correct a known engine problem that caused the aircraft's three engines to lose power while in flight.[60] In rejecting plaintiffs' argument that article 25 of the Warsaw Convention created an independent cause of action for punitive damages, the Eleventh Circuit relied on the structure of the Convention, later actions taken by the signatories, and U.S. case law.[61]

The court found that the drafters of the Convention structured the language of article 17 to provide only a compensatory damage recovery, limited to US$75,000 by the terms of article 22.[62] This limitation on compensatory liability under article 22, according to the court, is unavailable to a carrier that engages in wilful misconduct as provided by article 25.[63] Thus, where wilful misconduct exists, article 25 provides for only unlimited compensatory damages, but does not provide for punitive damages.[64] This relationship between article 22 and article 25, according to the court, was confirmed by the later actions of the signatories to the Warsaw Convention who, during the negotiations on the Hague Protocol proposed an amendment to article 25 that sought to refer expressly to article 22.[65] Moreover, the court found that courts were in general agreement that actions arising under article 25 in cases of

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60. *Id.* at 1466. Plaintiffs were flying from Florida to the Bahamas. *Id.*

61. *Id.* at 1483.

62. *Id.* The court reasoned that

> [t]he provisions of the Convention which create liability for injuries to passengers, damage to baggage and cargo, and delay, Articles 17, 18 and 19, are entirely compensatory in tone and structure. If a litigant is able to state a claim pursuant to one of these provisions, then Article 22, as modified by the Montreal Agreement, imposes a $75,000 limit on the carrier's liability which is created in Articles 17-19.

*Id.* (citations omitted).

63. *Id.* at 1484. According to the court, the reference in article 25 to "provisions of the Convention which exclude or limit . . . liability" refers only to the monetary limit on liability in article 22 and does not provide a basis for creating an independent cause of action for punitive damages. *Id.* (citing H. DRION, *supra* note 49, at 260-61). The court reasoned that "[i]n cases of wilful misconduct, Article 25 strips the carrier of the liability limitation on compensatory damages." *Id.* at 1483.

64. *Id.*

65. *Id.* The court noted that "[t]he amended article 25 specifically stated that '[t]he limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with the intent to cause damage or recklessly and with knowledge that damage would probably result.'" *Id.* (citing Hague Protocal Art. XIII, *reprinted in* L. KREINDLER, AVIATION, LAW DOCUMENTS SUPP. at 959).

wilful misconduct remained subject to the Convention and were not independent of the Convention.[66]

The court also dismissed plaintiffs' claim for punitive damages under state tort law for intentional infliction of emotional distress.[67] The court held that the state claim conflicted with the Warsaw Convention and thus, was preempted.[68] The court gave four reasons for its holding.

First, the court relied on the language and history of article 17, particularly the phrase "damage sustained," for the proposition that article 17 provided only a compensatory damage recovery.[69] The court interpreted the language "damage sustained" according to its French legal meaning[70] and found that in France, actions under the Warsaw Convention are determined according to contract law, under which punitive damages are not recoverable.[71] Second, the court looked to the drafters' intentions and the subsequent actions of the signato-

66. *Id.* at 1483-84. The court relied on several courts' analyses that have interpreted article 25 as removing the monetary limitation on liability under article 22 of the Convention. *Id.* (citing Highlands Ins. Co. v. Trinidad and Tobago (BWIA Int'l) Airways Corp., 739 F.2d 536 (11th Cir. 1984); Stone v. Mexicana Airlines, Inc., 610 F.2d 699 (10th Cir. 1979); In re Air Crash Disaster at Gander, Nfld., 684 F. Supp. 927 (W.D. Ky. 1987); Harpalani v. Air-India, Inc., 634 F. Supp. 797 (N.D. Ill. 1986); Magnus Elecs., Inc. v. Royal Bank of Can., 611 F. Supp. 436 (N.D. Ill. 1985)).

67. Floyd v. Eastern Airlines, 872 F.2d 1462, 1489 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990).

68. *Id.*

69. *Id.* at 1486. The court stated that

> the text of the Convention does not explicitly address the issue of punitive damages. However, we do not think plaintiffs can take much comfort in this "silence." The basis for recovery for passengers who suffer death or personal injury in international air travel is Article 17 of the Convention. Our study of the text and structure of the Convention, and the concurrent and subsequent legislative history persuade us that Article 17 is entirely compensatory in nature.

*Id.*

70. *Id.* The court interpreted the U.S. Supreme Court case *Air France v. Saks* as standing for the proposition that French legal meaning controls the interpretation of the terms of the Convention. *Floyd*, 872 F.2d at 1486 (citing Air France v. Saks, 470 U.S. 392, 399 (1985)). The court further noted, however, that the plaintiffs failed to find any authority indicating that the French legal meaning of the term "dommage survenu" in article 17 allows a punitive damage recovery. *Id.* at 1486. The court also found no authority indicating punitive damages were available under the Convention. *Id.*

71. *Id.* The court noted that France follows a civil law system where "an action under the Warsaw Convention sounds in contract." *Id.* (citing Block v. Compagnie Nationale Air France, 386 F.2d 323, 331 (5th Cir.), *cert. denied*, 392 U.S. 905 (1968); MATTE, TREATISE ON AIR-AERONAUTICAL LAW 403-04 (1981)). The court explained

ries.[72] The court noted that if the drafters intended to award punitive damages, they would have discussed this issue in their negotiations or, more importantly, in article 25, which addresses actions that are more likely to give rise to punitive damages.[73] The court further noted that the signatories never contested the translation of "damage sustained" from the French term "*dommage survenu*" at the adoption of the official English version of the Warsaw Convention at the Hague in 1955.[74] Third, the court found that disallowing a state law claim for punitive damages would be consistent with the two goals of the Warsaw Convention, which were to provide a uniform body of law and to limit air carrier liability.[75] Finally, the court found its holding to be consistent with U.S. case law addressing the issue of a punitive damage recovery under the Warsaw Convention.[76]

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that although "[t]he parties may agree to a penalty clause, . . . punitive damages generally are not available in contract actions." *Id.* at 1486.

72. *Id.* at 1483.

73. *Id.* at 1486. The court found

> significance in the fact that the only provision of the Convention which addresses remedies for intentional or reckless acts by the carrier, acts usually associated with the recovery of punitive damages in the United States, did not address the issue of punitive damages at all. Rather, as we have already demonstrated, Article 25 provided only that the strict limit on liability for compensatory damages was to be lifted in cases of intentional or willful acts.

*Id.* at 1486-87.

74. *Id.* The court also noted that the term "damage sustained" was used in the Guatemala Protocol, which had also been considered by the U.S. Senate. *Id.* (citing L. KREINDLER, AVIATION LAW DOCUMENTS Supp. at 955, 975 (official translation, Guatemala Protocol)). The court found that "[n]owhere in the Minutes of the Convention is there any mention of deterring misconduct by imposing punitive damages on derelict air carriers. Thus, the concurrent legislative history supports the interpretation that the Convention contemplates recovery of only compensatory damages." *Id.* at 1487 (citations omitted).

75. *Id.* The court noted that "[h]olding that punitive damages are unavailable in an action governed by the Warsaw Convention furthers the goal of certainty of liability." *Id.* The court further reasoned that

> [t]he recovery of punitive damages would also be inconsistent with the goal of the Convention to provide a comprehensive and uniform scheme governing liability of the airlines in the areas covered by the Convention. The text of the Convention [and] [t]he preamble of the Convention declare[] the intent of the signatory nations as "regulating in a uniform manner the conditions of international transportation in respect of the liability of the carrier."

*Id.* at 1488 (citations omitted).

76. *Id.*

In *Harpalani v. Air-India, Inc.*,[77] the U.S. District Court for the Northern District of Illinois granted the defendant air carrier's motion to strike a claim for punitive damages brought by airline passengers.[78] The passengers brought an action under article 19 of the Convention, claiming that the air carrier's wilful misconduct, as provided in article 25, caused their delay in transportation on an international flight.[79] The court held that the Warsaw Convention did not permit a recovery of punitive damages in cases of wilful misconduct.[80]

The court gave three reasons for its holding. First, the court found that article 19 of the Convention limits recovery to compensatory damages in cases of delay in transporting passengers, baggage, or cargo.[81] According to the court, in cases of wilful delay, article 25 removes this limitation upon compensatory damages, thus, providing for only unlimited compensatory damages.[82] Second, the court found that nothing in the history of the Convention supported allowing a recovery of punitive damages,[83] and an award of punitive damages would be "unrelated" to the drafters' goals of limited liability and insurability.[84] Third, the court noted that prior cases had limited damage recovery to actual losses in cases of wilful misconduct

77. 634 F. Supp. 797 (N.D. Ill. 1986).

78. *Id.* at 799.

79. *Id.* at 798. Plaintiffs purchased round trip tickets and were excluded from their flight on a stopover. *Id.* Plaintiffs alleged that for six days the airline did not arrange for a continuing flight although there were available seats. *Id.*

80. *Id.* at 799.

81. *Id.* The court reasoned that "[a]rticle 25 is most reasonably interpreted as an exception of the Convention's limitations on the recovery of compensatory damages, not as authority for a form of damages not permitted elsewhere in the Convention." *Id.*

82. *Id.* The court explained that "[o]nly three of the Convention's articles, Articles 17-19, create any basis for carrier liability, and the terms of each plainly limits liability to compensatory damages." *Id.* Specifically, the court noted that "[a]rticle 17 and 18 subject carriers to liability for 'damages sustained' in the event of certain occurrences, while Article 19 creates liability for 'damages occasioned by' certain occurrences." *Id.* at 799 n.1.

83. *Id.* at 799.

84. *Id.* The court stated that the Convention provisions that limited liability served to "adequately compensate passengers for most losses, yet would also be sufficiently low to permit carriers to insure against losses at reasonable rates." *Id.* A punitive damage recovery, according to the court, "would be inconsistent with this scheme, both because carriers cannot insure against such awards, and because the purpose of punitive damages—to punish and deter, . . . —is unrelated to the signatories' goal of ensuring minimally adequate compensation." *Id.* (citations omitted).

arising under the Warsaw Convention[85] and that only one court, in dicta, suggested that punitive damages may be recovered.[86]

In *In re Air Crash Disaster at Gander, Newfoundland* ("*Gander*"),[87] the plaintiffs brought a cause of action under the Warsaw Convention, seeking both punitive and compensatory damages.[88] The U.S. District Court for the Western District of Kentucky granted the defendant air carrier's motion for partial summary judgment on the issue of punitive damages in a wrongful death action brought by the survivors of servicemen killed aboard an airplane that crashed during takeoff.[89] The court held that punitive damages were not recoverable in an action brought under the Warsaw Convention.[90]

In so holding, the court relied on the "obvious meaning" of the Convention[91] and interpreted the phrase "damage sus-

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85. *Id.* (citing Butler v. Aeromexico, 774 F.2d 429, 431 (11th Cir. 1985) (holding that controlling law, Alabama law, conflicted with Warsaw Convention because it allowed only recovery of punitive damages in wilful misconduct actions); Mereck Co. v. Swiss Air Transp. Co., Ltd., 19 Av. Cas. (CCH) ¶ 18,190 (S.D.N.Y. Dec. 6, 1985) (WESTLAW, DCTU database) (awarding full value of plaintiff's experimental vaccines which were damaged as a result of wilful misconduct of the air carrier); Tarar v. Pakistan Int'l. Airlines, 554 F. Supp. 471 (S.D. Tex. 1982) (awarding full recovery to plaintiffs for emotional distress caused by wilful misconduct of air carrier in handling remains of deceased family member); Cohen v. Varig Airlines, 62 A.D.2d 324, 405 N.Y.S.2d 44 (1st Dep't 1978) (awarding full compensation for luggage lost as a result of wilful misconduct of air carrier)).

86. Harpalani v. Air-India, Inc., 634 F. Supp. 797, 799 (N.D. Ill. 1986). The court noted that the court in *Hill v. United Airlines, Inc.*, in dicta, suggested that punitive damage may be recoverable. *Id.* (citing Hill v. United Airlines, Inc., 550 F. Supp. 1048, 1055-56 (D. Kan. 1982)); *see infra* notes 105-06 (discussing *Hill* analysis). The *Harpalani* court criticized the *Hill* court for not "carefully examining the authority for punitive awards." *Harpalani*, 634 F. Supp. at 799.

87. 684 F. Supp. 927 (W.D. Ky. 1987).

88. *Id.* at 930.

89. *Id.* On December 12, 1985, an Arrow Air aircraft crashed on takeoff. *Id.* The passengers consisted of U.S. servicemen en route from Cairo, United Arab Republic to Fort Campbell, Kentucky. *Id.*

90. *Id.* at 933.

91. *Id.* at 931. The court, in following the U. S. Supreme Court decision in Air France v. Saks, 470 U.S. 392 (1985), began its analysis of the Warsaw Convention by looking first to the Convention's text and context. In re Air Crash Disaster at Gander, Nfld., 684 F.Supp. 927, 931 (W.D.Ky. 1987). The court explained that in interpreting the Warsaw Convention, "[t]he language of the Convention controls unless application of that language according to its obvious meaning would result in a holding inconsistent with the intent or expectations of the Convention's signatories." *Id.* at 930 (citing Sumitomo Shoji Am. Inc. v. Avaglaiano, 457 U.S. 176, 180 (1982)). The court explained, however, that "[i]n cases of an inconsistent result, the Conven-

tained" in article 17 as limiting recovery to compensatory damages.[92] The court reasoned that punitive damages are not damages one can "sustain"; rather, they are awarded to punish and to deter.[93] The court accordingly found that article 25 denies an air carrier the benefit of limited compensatory liability where there is wilful misconduct.[94] Thus, an action under article 25, the court reasoned, would subject an air carrier guilty of wilful misconduct to an unlimited amount of compensatory damages but not to punitive damages.[95] According to the court, this interpretation of article 17 and article 25 conformed with the signatories' intentions to provide a uniform body of

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tion should be interpreted to best effectuate its evident purposes." *Id.* at 930-31 (citing Reed v. Wiser, 555 F.2d 1079, 1088 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)).

92. *Gander*, 684 F.Supp. at 931. The court reasoned that

> [o]n its face, the text of Article 17 . . . is entirely compensatory in tone. It establishes liability only for "damages sustained" or "bodily injury suffered" by a passenger. . . . Defendants point out that the translation of "*dommage survenu*" as "damages sustained" is the translation which was before the Senate when it considered the Warsaw Convention in March 1934. It is also the text considered by the Supreme Court to be the definitive English translation of the Convention. This court shall likewise consider the English translation in 49 U.S.C. App. sec. 1502 note (1976) to be the correct legal translation.

*Id.* (citations omitted).

93. *Id.* at 931. The court explained that

> [p]unitive damages are not "damage sustained" by a particular plaintiff. Rather, they are private fines levied by civil juries to punish a defendant for his conduct and to deter others from engaging in similar conduct in the future. They are an award over and above what is necessary to compensate a party for his injury. Punitive damages are not measured solely by the "bodily injury suffered" by a plaintiff, rather, imposition of punitive damages is determined according to other factors such as the outrageousness of the injurious act, the defendant's culpability, the defendant's motives and intent, and the nature and extent of the harm to the plaintiff. Consequently, punitive damages do not fall within the liability established by the terms of Article 17.

*Id.* at 931-32 (citations omitted).

94. *Id.* at 932. The court explained that

> [t]he Warsaw Convention sets the parameters of the right of recovery in article 17 at compensatory damages. When read in this light, the exclusion[] from limitation in Article[] . . . 25 [is] most reasonably interpreted as [an] exception[] to the limitations on the recovery of *compensatory* damages within the Convention, not as authority for the recovery of *punitive* damages. Consequently, article[] . . . 25 do[es] not authorize recovery of punitive damages.

*Id.* (emphasis in original) (citations omitted).

95. *Id.*

law, a limitation of liability, and expanded insurance coverage to air carriers,[96] while an award of punitive damages would be inconsistent with these goals.[97] The court also found that U.S. case law had consistently denied a recovery of punitive damages under the Warsaw Convention, limiting recovery instead to compensatory damages.[98]

In addition, the court held that because the terms and history of the Warsaw Convention bar punitive damages, the Convention preempted state law claims for punitive damages.[99] The court held, however, that state law claims against an air carrier for compensatory damages were permitted as an additional related cause of action for a plaintiff.[100] In so holding, the court modified its ruling on an earlier motion in the case, in which the court failed to specify which state law claims were permitted by the Convention and which were preempted.[101]

In *In re Air Disaster in Lockerbie, Scotland on December 21, 1988* ("*Lockerbie*"),[102] the survivors of passengers killed aboard Pan American World Airways Flight 103 brought an action seeking punitive damages.[103] The plaintiffs alleged that the airline's wilful misconduct caused the aircraft to explode over Lock-

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96. *Id.* at 933.

97. *Id.*

98. *Id.* (citing Butler v. Aeromexico, 774 F.2d 429, 431 (11th Cir.), *reh'g denied*, 781 F.2d 905 (1985); Harpalani v. Air-India, Inc., 634 F. Supp. 797 (N.D. Ill. 1986)).

In addition, the court declined to adopt the decision in Hill v. United Airlines, Inc., 550 F.Supp. 1048 (D. Kan. 1982), because "[t]he reasoning in *Hill* is not logically consistent and the court's holding is of dubious precendential value in this case." *In re Air Crash at Gander, Nfld.*, 684 F. Supp. at 933. The court, instead, followed the reasoning of other courts that have granted damages "based only on actual losses." *Id.*

99. *Id.*

100. *Id.*

101. *Id.* The court explained that in its earlier case it had

> stated that the Warsaw Convention does not exclude claims against carriers arising under state law. *See* In re Aircrash Disaster at Gander, Nfld., 660 F. Supp. 1202, 1221 (W.D. Ky. 1987). At that time, the court did not specify which state law claims were allowed under the Convention and which were preempted by the Convention. The court now holds that the Warsaw Convention by its terms and history allows *compensatory* damages claims against carriers under state law but excludes *punitive* damages claims.

*Id.* (emphasis in original).

102. 733 F. Supp. 547 (E.D.N.Y. 1990), *reargument denied and certification for an interlocutory appeal granted*, 736 F. Supp. 18 (1990).

103. *Id.* at 548.

erbie, Scotland.[104] The U.S. District Court for the Eastern District of New York denied plaintiffs' claims for punitive damages, holding that the Warsaw Convention barred such claims regardless of whether the case involved wilful misconduct.[105] The court held that a recovery of punitive damages would be inconsistent with the drafters' intentions of uniformity and limited liability.[106]

In rejecting the plaintiffs' argument that forum law applied to the issue of damages, the court reasoned that the Warsaw Convention's silence on the issue of punitive damages could not be interpreted as authorization for the application of local law to a punitive damage claim.[107] In addition, the court found no express authorization in the Convention that would justify an award of punitive damages.[108]

Instead, the court relied on the "natural meaning" of article 24 of the Convention and found that the drafters of the Warsaw Convention intended to bar punitive damage claims.[109] Under article 24, personal injury and death actions under article 17 "however founded" are governed by the Convention's "conditions and limits."[110] The court reasoned that this language expressly denied an award of punitive damages because a "limit" of the Convention included a uniform limit of liability, whereas a recovery of punitive damages would ex-

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104. *Id.*

105. *Id.* at 553.

106. *Id.* The court relied on the rule of interpretation espoused by the U.S. Supreme Court in *Air France v. Saks*, that "courts are obligated 'to give the specific words of the [Warsaw Convention] *a meaning consistent with the shared expectations of the contracting parties.*' " *Id.* at 549 (emphasis in original). The court went on to explain that "the primary shared expectation of the contracting parties was to set some uniform limit on an airline carrier's liability in order to promote the civil aviation industry which at the time of the Warsaw Convention was in its infancy." *Id.* In accordance with this shared expectation of the parties, the court concluded that "the Warsaw Convention bars plaintiffs' punitive damage claims whether or not wilful misconduct exists." *Id.* at 554.

107. *Id.* at 550-51. The court reasoned that "[s]ince the application of local law to punitive damage claims would be inconsistent with the primary goal of the Warsaw Convention, this Court may not find that the treaty's mere silence authorized punitive damage claims to be governed by local law." *Id.* at 550.

108. *Id.* The court further reasoned that "in order for a court to find that a provision inconsistent with the entire scheme of the Warsaw Convention exists, the provision would have to be express and explicit." *Id.*

109. *Id.* at 551.

110. Warsaw Convention, *supra* note 1, art. 24, 49 Stat. at 3020, T.S. No. 876, at 22, 137 L.N.T.S. at 27. For text of article 24, see *supra* notes 42 & 43.

tend liability under the Convention.[111]

Article 24 also provides that the limits of the Convention are to be applied "without prejudice" to the parties bringing suit and their rights.[112] According to the court, the phrase "without prejudice" was not authority for applying forum law so as to award punitive damages but was included only so that forum law would be applied to the issue of distribution among heirs of the amount recovered under the Warsaw Convention.[113]

The court also rejected the plaintiffs' argument that article 25 created an independent cause of action for punitive damages.[114] In so holding, the court again relied on the Convention's stated goals of uniformity and limited liability.[115] The court reasoned that if the drafters intended to create an independent cause of action for punitive damages, they would have had to deny the benefits of the Convention to an air carrier that engaged in wilful misconduct resulting in damages.[116] Instead, the court found that the drafters provided that only "provisions" of the Convention were inapplicable to a carrier guilty of wilful misconduct.[117] Therefore, the court found that the drafters intended that a carrier that engaged in wilful mis-

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111. In re Air Disaster in Lockerbie, Scot. on Dec. 21, 1988, 733 F. Supp. 547, 551 (E.D.N.Y. 1990), *reargument denied and certification for an interlocutory appeal granted*, 736 F. Supp. 18 (E.D.N.Y. 1990).

112. Warsaw Convention, *supra* note 1, art. 24, 49 Stat. at 3020, T.S. No. 876, at 22, 137 L.N.T.S. at 27. For text of article 24, see *supra* notes 42 & 43.

113. *In re Air Disaster in Lockerbie*, 733 F. Supp. at 551.

114. *Id.* at 552.

115. *Id.*

116. *Id.*

117. *Id.* at 551. The court relied on *Floyd v. Eastern Airlines, Inc.* in reasoning that

> "[the] minutes of the negotiations on the Hague Protocol, an amendment to the Convention, indicate that the delegates understood article 25 as referring only to article 22 which establishes monetary limits for recoveries under the Convention." . . . Moreover, since allowing the application of various punitive damage laws would defeat the Warsaw Convention's primary goal of uniform and limited liability, Article 25 may not be interpreted as authorizing an independent cause of action for punitive damage claims and be consistent with the shared expectations of the parties. It seems more likely that if the parties intended that carriers which engaged in wilful misconduct would be subject to punitive damage claims, Article 25 would have provided that the entire Warsaw Convention, rather than just certain provisions, was inapplicable in such cases.

*Id.* at 551-52 (quoting Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1483 (11th Cir. 1989)).

conduct would remain subject to a suit brought under the Convention and would not be the subject of a suit brought independently of the Convention.[118]

Finally, the court interpreted the language of article 17 and concluded that the only damages recoverable under article 17 are those "sustained" in cases of bodily injury or wrongful death.[119] Accordingly, the court concluded that because punitive damages are not "sustainable" damages, they are not recoverable under the Warsaw Convention.[120]

### B. *Courts Awarding a Punitive Damage Recovery*

The first U.S. case to address the issue of a punitive damage recovery under the Warsaw Convention was *Hill v. United Airlines*.[121] In *Hill*, plaintiffs alleged that the air carrier intentionally misrepresented information regarding the plaintiffs' connecting flight.[122] Plaintiffs claimed that as a result of missing their connecting flight an important business deal was delayed for one month.[123] The U.S. District Court for the District of Kansas held that such conduct by the air carrier constituted wilful misconduct under the Warsaw Convention.[124] The court held that wilful misconduct makes an air carrier liable for an unlimited amount of liability and, in dicta, suggested that unlimited liability may include an award of punitive damages.[125]

It was not until 1989, however, that a jury ever awarded

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118. *Id.* at 552.

119. *Id.* at 552-53. The court relied on the analysis by the court in *Floyd* of the French term "*dommage survenu*" as well as its own recourse to a French-English dictionary. *Id.*; *see supra* notes 70-74, and accompanying text (discussing *Floyd* court's analysis of "*dommage survenu*").

120. In re Air Disaster in Lockerbie, Scot. on Dec. 21, 1988, 733 F. Supp. 547, 553 (E.D.N.Y. 1990), *reargument denied and certification for an interlocutory appeal granted*, 736 F. Supp. 18 (E.D.N.Y. 1990).

121. 550 F. Supp. 1048 (D. Kan. 1982).

122. *Id.* at 1049-50.

123. *Id.* at 1050-51.

124. *Id.* at 1055. The court ruled that the plaintiffs by alleging the tort of intentional misrepresentation had "invoked the 'wilful misconduct' exception to defendant's limitations of liability under the Warsaw Convention." *Id.*

125. *Id.* The court found that "while the Warsaw Convention is basically the controlling law in this case, plaintiffs have properly invoked the provisions of Article 25(1), which make an exception to defendant's limited liability and might entitle plaintiffs to recover actual and punitive damages . . . if they prove the elements of intentional misrepresentation." *Id.* at 1056.

punitive damages in a wilful misconduct case brought under the Warsaw Convention.[126] In *In re Korean Airlines Disaster of September 1, 1983*,[127] a jury for the U.S. District Court for the District of Columbia awarded US$50 million in punitive damages to the families of passengers killed aboard a Korean aircraft.[128] Chief Judge Aubrey E. Robinson, the presiding judge, affirmed the jury award without opinion.[129]

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126. *Aviation*, in VERDICTS, SETTLEMENTS & TACTICS, Oct. 1989, at 332 [hereinafter VERDICTS].

127. MDL 565 Misc. No. 83-0345 (D.D.C. Aug. 3, 1989).

128. VERDICTS, *supra* note 126, at 332 (citing In re Korean Airlines Disaster of Sept. 1, 1983, MDL 565 Misc. 83-0345 (D.D.C. Aug. 3, 1989)). A Soviet Union fighter plane was shot down over the Sea of Japan near Sahkalin Island. *Id.* at 331-32.

129. *See In re Korean Airlines Disaster*, MDL 565 Misc. No. 83-0345 (D.D.C. Aug. 3, 1989), Record at 1645, lines 18-22. Chief Judge Robinson, in addressing defense counsel's question regarding defendant's motion to dismiss plaintiffs' claim for punitive damages, answered that "I have read [the memorandum], and I have gone around and around in my own mind and with my clerk about it, but in the scheme of things, . . . our view of the treaty differs from your view." *Id.*

The Judgment on the Verdict Form read as follows:

> 1. Do you find from the evidence that on August 31 to September 1, 1983, the flight crew of KOREAN AIR LINES Flight No. KE 007 committed "wilful misconduct" as I have defined that term for you? YES.
>
> 2. Do you find that the "wilful misconduct" of the flight crew of KOREAN AIR LINES Flight No. 007 was a proximate cause of the shoot down by the Soviet Military? YES.
>
> Now therefore, pursuant to said answers, and by its determination, as stated in a supplemental verdict, the Jury finds that plaintiffs are entitled to punitive damages in the amount of FIFTY MILLION DOLLARS ($50,000,000.00).

*Id.* (Judgment on the Verdict, Aug. 3, 1990). The form ended with the signature of Chief Judge Aubrey E. Robinson approving the jury award. *See id.*

Plaintiffs submitted a memorandum of law in opposition to defendant's motion to dismiss plaintiffs' claim for punitive damages. Memorandum of Points and Authorities In Opposition To The Motion Of Korean Air Lines To Dismiss Plaintiffs' Claims For Punitive Damages, In re Korean Airlines Disaster of Sept. 1, 1983, MDL 565 Misc. 83-0345 (D.D.C. Aug. 3, 1989) [hereinafter Brief for Plaintiffs]. Plaintiffs argued that the Warsaw Convention permits local law to decide the issue of recoverable damages in cases of wilful misconduct under article 25. Brief for Plaintiffs, *supra*, at 4 (citing Block v. Compagnie Nationale Air France, 386 F.2d 323, 331 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968)). In addition, plaintiffs relied on several cases that have interpreted article 24 as authorizing the application of the forum law, including its choice of law, to the issue of damages. Brief for Plaintiffs, *supra*, at 4-5 (citing Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1002 (9th Cir. 1987); In re Aircrash in Bali, Indonesia, 684 F.2d 1301, 1305 (9th Cir. 1982); Mertens v. Flying Tiger Lines, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965)).

Plaintiff also noted that "[t]he death damage laws of Warsaw signatories England, France, Mexico, Norway, West Germany, Switzerland and Turkey each provide for recovery of punitive damages or that the degree of a defendant's fault is taken

Five months after this award, the U.S. District Court for the Southern District of New York in *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986* addressed the issue of whether the Warsaw Convention permits a punitive damage recovery in a state law action.[130] In *In re Hijacking of Pan Am*, the court allowed the passengers and the families of those killed during an airline hijacking to maintain a state tort law claim for punitive damages against the air carrier.[131] The court stated that even assuming state law causes of action for punitive damages are not permitted under article 17 of the Warsaw Convention in cases of wrongful death and bodily injury, punitive damages are recoverable under article 25 in cases of wilful misconduct.[132]

The court reasoned that the cause of action provided for by article 17 of the Warsaw Convention in cases of wrongful death or injury[133] is not the exclusive remedy.[134] The court found that a state law cause of action for punitive damages was an additional remedy because such a claim was not expressly or implicitly precluded by the language of the Convention or its legislative history.[135]

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into account in assessing compensatory damages," as well as the death damage laws of twenty-one U.S. states provide punitive damages where death occurs. Brief for Plaintiffs, *supra*, at 8-9 (citations omitted).

130. 729 F.Supp. 17 (S.D.N.Y. 1990).

131. *See id.* Defendant air carrier, Pan American World Airways, had moved for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure to dismiss plaintiffs' claims for punitive damages. *Id.* at 18. Pan American World Airways Flight 73 originated in Bombay, India en route to Kennedy Airport in New York. *Id.* at 18 n.1. At Karachi, Pakistan, a scheduled stop, armed terrorists hijacked the aircraft. *Id.* All parties agreed that because the flight was international the Warsaw Convention applied. *Id.*

132. *See id.* at 19-20.

133. *Id.* at 18 n.4.

134. *Id.* at 19. The court reasoned that in *Benjamins*, the U.S. Court of Appeals for the Second Circuit, in dicta, suggested that the Warsaw Convention provided an exclusive remedy. *Id.* at 19 n.6 (citing Benjamins v. British European Airways, 572 F.2d 913, 917-19 (2d Cir. 1978)). However, the court noted that the Second Circuit later held that the Convention did not provide the exclusive remedy. *In re Hijacking of Pan Am*, at 19 n.6 (citing Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936, 941-42 (2d Cir. 1980)).

135. *In re Hijacking of Pan Am*, at 19 (citing Chan v. Korean Airlines, Ltd., 109 S. Ct. 1676, 1683-84 (1989)). The court also relied on the reasoning of a 1989 Second Circuit case that held that "[s]ince a common law tort action for personal injury by definition includes the element of damages, including punitive damages when factually appropriate, the omission in the [state statute reviving otherwise time-barred as-

In so holding, the court relied on the language of article 24,[136] which it found contemplated state law causes of action not created by the Convention and which may include claims for punitive damages.[137] The court also found that the Warsaw Convention left the issue of the types of damages recoverable to the forum law.[138]

According to the court, however, even if article 17 of the Convention precluded a claim for punitive damages in cases of bodily injury or wrongful death, this preclusion would be a "limitation or exclusion of liability" not applicable in cases of wilful misconduct under article 25.[139] Thus, the court concluded that a state law cause of action for punitive damages is available as an additional remedy.[140]

## III. *PUNITIVE DAMAGES SHOULD BE RECOVERABLE UNDER THE WARSAW CONVENTION IN CASES INVOLVING WILFUL MISCONDUCT*

An international treaty is generally interpreted in accordance with the principles enumerated in article 31 of the Vienna

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bestos claims] and the legislative silence with respect to punitive damages do not preclude such a recovery." *In re Hijacking of Pan Am* at 19 (citing Racich v. Celotex Corp., 887 F.2d 393, 396 (2d Cir. 1989)) (citations omitted).

136. Warsaw Convention, *supra* note 1, art. 24, 49 Stat. at 3020, T.S. No. 876, at 22, 137 L.N.T.S. at 27. For text of article 24, see *supra* notes 42 & 43.

137. In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Airport, Pak. on Sept. 5, 1986, 729 F.Supp. 17, 19 (S.D.N.Y. 1990). The court relied on the language of article 24(1), which provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." *Id.* at 19. In addition, the court relied on the language of article 24(2), which provides that the Warsaw Convention applies "without prejudice" to the "respective rights" of persons suing. *Id.* at 19.

138. *Id.* at 19 (citing Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1002 (9th Cir. 1987); Cohen v. Varig Airlines, 62 A.D.2d 324, 334, 405 N.Y.S.2d 44, 49 (1st Dep't 1978)).

139. *In re Hijacking of Pan Am*, at 20. For the text of article 25, see *supra* note 6. The court noted that the standards for wilful misconduct under the Warsaw Convention are "virtually identical" to the standards under a state law claim. *Id.* at 20 n.7. The court found both required "a wilfulness or a reckless disregard of [a] plaintiff's rights." *Id.* Moreover, the court refused to accept defendant Pan American World Airways' literal reading of article 25, which "would require the Court to construe Article 25 as if it read 'the provision, to wit article 22, . . . which limits *the amount* of his liability' which would constitute a judicial alteration of the plain language of the Convention foreclosed by *Chan*." *Id.* at 20 (citing Chan v. Korean Airlines, Ltd., 109 S.Ct. 1676 (1989)) (emphasis in original).

140. *Id.* at 19.

Convention on the Law of Treaties.[141] Article 31 provides that when interpreting a treaty a good faith attempt should be made to ascertain the meaning of its terms and to accomplish its objectives.[142] Recently, the U.S. Supreme Court instructed

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141. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention]. The United States has not yet ratified this Convention. U.S. DEP'T OF STATE, TREATIES IN FORCE (1990).

142. Vienna Convention, *supra* note 141, art. 31, 1155 U.N.T.S. at 340. Article 31 of the Vienna Convention provides that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

*Id.*

In addition to this general rule of treaty interpretation, there are other approaches. E.S. YAMBRUSIC, TREATY INTERPRETATION 9 (1987). One view termed "clear sense" states that words in a treaty have their own meaning that must be upheld if logical and rational. *Id.* This view was followed until the beginning of the twentieth century and was criticized for ignoring the "inescapable necessity for *some* interpretation in the detailed application of *any* international agreement." *Id.* at 9-10 (quoting M.S. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 78 (1967) (emphasis in original)).

The second view is termed "emergent purpose." *Id.* at 10. This view "represents an extreme teleological viewpoint by which the notion of object or purpose [as expressed in article 31 of the Vienna Convention] is itself not a fixed and static one but it is liable to change or develop as experience is gained in the operation and working of the treaty or convention." YAMBRUSIC, *supra*, at 10-11 (citing ALVAREZ, LE DROIT INTERNATIONAL NOUVEAU—SON ACCEPTATION—SON ÉTUDE 106 (1960)).

The third view is termed "textual objectivity" and has two approaches. *Id.* at 11. One approach relies on extrinsic evidence to " 'confirm' the meaning arrived at within the framework of the text and the context found within the four corners of the treaty and its appendices." *Id.* The other approach to the "textual objectivity" view focuses on the text and the terms in its totality. *Id.* at 12.

The fourth view, termed "intention of the parties," interprets a treaty in accord-

courts to refer to the drafting and negotiation records of the Warsaw Convention[143] when interpreting an ambiguous provision of the Convention.[144] Thus, when interpreting the availability of punitive damages under the Warsaw Convention, it is particularly necessary to refer to the Convention's minutes and negotiation records because the text of the Convention is silent as to punitive damages.[145] Indeed, even the drafters of the Convention recognized the possibility that the Convention might be ambiguous.[146]

The minutes of the 1929 Conference, which resulted in the Warsaw Convention,[147] indicate that the Convention permits reference to state law to determine the types of damages recoverable in cases of wilful misconduct.[148] This is supported in the minutes where the delegates' discuss the redrafting of

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ance with the intention of the parties. *Id.* This view has been criticized for being fictional. *Id.*

143. Air France v. Saks, 470 U.S. 392 (1985). Justice O'Connor, writing for the majority, held that "[i]n interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation." *Id.* at 400 (citations omitted). The *Saks* case involved the issue of what constitutes an "accident" under article 17 of the Convention. *Id.* The court held that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. The Eleventh Circuit in *Floyd v. Eastern Airlines, Inc.*, however, relied on the *Saks* decision as holding that the French legal meaning controls the interpretation of the terms of the Convention. Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990); *see supra* note 70 and accompanying text (discussing *Floyd* interpretation of *Saks*).

144. Chan v. Korean Air Lines Ltd., 109 S. Ct. 1676 (1989). Justice Scalia, writing for the majority, held that the drafting history of the Warsaw Convention should only be consulted when the text of the Warsaw Convention is ambiguous. *Id.* at 1683-84. The *Chan* case involved the issue of proper notice of the damage limitation on a passenger ticket. *Id.* at 1678. The court held that "the Warsaw Convention does not eliminate the limitation of damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation." *Id.* at 1684.

145. *See* Warsaw Convention, *supra* note 1, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

146. MINUTES, *supra* note 10, at 32. As the drafters proceeded from article to article, they were aware that the words chosen in a particular article might not be an accurate reflection of the substance upon which they agreed. *Id.* For example, during the opening remarks at the third session of the drafters, Mr. Giannini, who presided over the preparatory committee, cautioned that "questions of wording are very irritating and that one can sometimes come to an agreement on substance and not on form." *Id.*

147. *See supra* notes 11-31 and accompanying text (discussing evolution of Warsaw Convention from 1929 Conference).

148. *See infra* notes 149-53 and accompanying text.

article 24(2) and article 25. Both articles were originally drafted as a single article by the CITEJA in 1928.[149] This 1928 draft contained a provision excluding recourse to forum law, an exclusion the drafters of the second conference considered very important.[150] However, as originally drafted, the provision only applied in cases of wrongful death or bodily injury and not in cases of wilful misconduct.[151] Although, the drafting committee at the 1929 Conference modified the article written by the CITEJA, it left intact the provision to exclude recourse to forum law in cases of wilful misconduct.[152] In addition, the drafters at the 1929 Conference left the provision untouched.[153] Thus, there were two opportunities at the 1929 Conference to insert a provision that would exclude recourse to common law in cases of wilful misconduct under article 25

149. Preliminary Draft of the Convention, art. 24, in MINUTES, *supra* note 10, at 265-66. The article drafted by the CITEJA in 1928, and submitted to the second conference, provided that

> [i]n the cases provided for in Article 21 [article 17 today], even in the case of death of the interested party, any liability action, however founded, can be brought only under the conditions and limits set forth by the present Convention.
>
> If the damage arises from an intentional illicit act for which the carrier is responsible, he will 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.

*Id*; *see, e.g.*, Air France v. Saks, 470 U.S. 392, 402 (1985) (relying on original draft of article 17 by CITEJA).

150. MINUTES, *supra* note 10, at 213. The provision appeared at the beginning of the article and read "any liability action however founded can only be brought under the conditions and limits provided for by the present Convention." *Id.* Sir Alfred Dennis from Great Britain stated that the provision was "a very important stipulation which touches the very substance of the Convention, because this excludes recourse to common law." *Id.*

151. *See supra* note 149 (providing text of article 24 in original draft).

152. MINUTES, *supra* note 10, at 211-12. The proposed article provided as follows:

> 1) In the cases provided for in Article 17, even in cases of death, *any liability action however founded can only be brought under the conditions and limits provided for by the present Convention*, . . .
>
> 2) The carrier shall not have the right to avail himself of the provisions of the present Convention which exclude or limit his liability, if the damage arises out of the willful misconduct of the carrier or from a fault which, according to the law of the tribunal which had taken jurisdiction, is considered as the equivalent of willful misconduct.

*Id.* (emphasis added).

153. *See* Warsaw Convention, *supra* note 1, art. 25, 49 Stat. at 3020, T.S. No. 876, at 23, 137 L.N.T.S. at 27. For the text of article 25, see *supra* note 6.

and twice the opportunity was declined. Such an obvious omission from article 25 supports the conclusion that a party injured by an air carrier's wilful misconduct has recourse to forum law, including the forum damage laws, which may include an award of punitive damages if factually appropriate.

Moreover, the Convention's silence as to the availability of punitive damages does not imply that they may not be awarded under the Convention in wilful misconduct cases. Indeed, the minutes indicate that the drafters did not intend for the Convention to cover all international air law issues.[154] In fact, the title of the convention, "Certain Rules Relating to International Carriage by Air," reflects this agenda.[155] Furthermore, one drafter noted that the Convention should not force one legal system on another.[156]

A review of several courts' decisions reveals that uniform *application* of the Convention and not uniform *results* was most likely the intention of the drafters.[157] For example, many countries apply an objective test to determine whether an air carrier engaged in wilful misconduct, while other countries apply a subjective test.[158] This disparity between tests, however, is in accordance with the goal of uniformity of application, because the Convention expressly authorizes a court to apply its own law to the issue of what constitutes wilful misconduct.[159] Uniform application of Convention rules in cases may also lead to different results. For example, in Canada, funeral expenses are not recoverable, while in France, courts award such ex-

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154. MINUTES, *supra* note 10, at 188. Mr. Giannini, President of the Committee, remarked that "this Convention does not provide for the entire matter." *Id.*

155. *See* Warsaw Convention, *supra* note 1, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. Mr. Giannini further stated that the title of the Convention "gives satisfaction to certain delegations such as the Czechoslovak Delegation, which asked that the word 'Certain' be added." MINUTES, *supra*, note 10, at 188.

156. MINUTES, *supra* note 10, at 19. Mr. De Vos stated that "the CITEJA understood that in this totally new matter laws are young and rare, that one could draw up texts without preconceived bias, without forcing the acceptance of one legal system or another, but to build a modern work in balance and freedom!" *Id.*

157. *See infra* notes 158-60 and accompanying text.

158. R.H. MANKIEWICZ, *supra* note 46, at 118-21. For example, the courts in France apply an objective test. *Id.* at 118 (citing Emery v. Sabena, 1965 R.F.D.A. 457). However, in Belgium a subjective test is applied. R.H. MANKIEWICZ, *supra* note 46, at 120 (citing Sauvage v. Air India, 1977 R.F.D.A. 203).

159. *See* Warsaw Convention, *supra* note 1, art. 25, 49 Stat. at 3006, T.S. No. 876, at 23, 137 L.N.T.S. at 27. For the text of article 25, see *supra* note 6.

penses.[160] Accordingly, even if one signatory would permit a recovery of punitive damages, this result does not defeat the drafters' goals as long as the forum court uniformly applied the principles of the Convention.

Most of the cases that have denied a recovery of punitive damages in cases of wilful misconduct have relied on the phrase "damage sustained" in article 17 to limit any recovery to compensatory damages.[161] The minutes indicate, however, that the drafters did not intend to incorporate the term "damage sustained" in article 17 to refer to, describe, or bar the types of damages recoverable.[162] Rather, they adopted the term "damage sustained" instead of "damages during" to en-

160. R.H. MANKIEWICZ, *supra* note 46, at 157.

161. *See supra* notes 70-74 and accompanying text (discussing *Floyd* court's analysis of "damage sustained" according to its French legal meaning and the drafter's intentions); *supra* notes 91-98 and accompanying text (discussing *Gander* court's reasoning of "damage sustained"); *supra* notes 119-20 and accompanying text (discussing *Lockerbie* court's analysis that punitive damages are not sustainable).

162. *See* MINUTES, *supra* note 10, at 166-67. Mr. Schonfeld, the delegate from the Netherlands, began the discussion:

> MR. SCHONFELD (Netherlands): It is said in this article [article 21, today's article 17] that the carrier is liable for all damage sustained during carriage notably in the case of death or injury. But in the two cases the death must occur during a carriage?
>
> MR. DE VOS, Reporter: We are in agreement on substance: It is necessary that the death or injury occur during carriage.
>
> MR. SCHONFELD (Netherlands): But if the death occurs one or two days after the end of carriage, it's considered as being sustained during the carriage and I believe, that, in this case, the situation is the same as in the case where the death is sustained during the carriage itself?
>
> MR. DE VOS, Reporter: We have a British proposal on this subject which asks for the omission of the words, "during carriage", in the first line of the text, and for the addition at the end of each of the clauses (a), (b), and (c) the words, "during the air carriage". This proposal seems to us, however, too absolute, but the wording could be modified.
>
> MR. SCHONFELD (Netherlands): You say that the carrier is liable in the case of death or injury: "sustained during carriage". You mean that the death must occur during the carriage?
>
> MR. DE VOS, Reporter: Not necessarily, but if we adopted the English wording, will your observation fail?
>
> MR. SCHONFELD (Netherlands): No, I say that the case where death occurs during carriage is the same as if death occurs some days after the end of carriage.
>
> MR. DE VOS, Reporter: We are quite in accord, and it's for this reason I say that the English proposal goes too far in asking that there be added simply "during air carriage". The accident can occur during the carriage and the death happen afterwards.
>
> MR. AMBROSINI (Italy): I propose eliminating the words "occurred

sure that the families of passengers who were injured during an international flight and died days later could maintain a wrongful death action rather than be limited to damages for mere wounding.[163] "Damage sustained" was, therefore, a term of inclusion rather than of exclusion and was never intended to limit the types of damages recoverable.[164] This may explain why there is no mention in the minutes of the Convention[165] or in the Convention itself[166] of the types of damages recoverable under the Warsaw Convention, regardless of whether a case involves wilful misconduct.

Moreover, the *Lockerbie* court, in rejecting plaintiffs' argument that article 25 authorizes an independent cause of action for punitive damage claims, reasoned that if the drafters intended to preclude the application of the entire Convention to a carrier that engaged in wilful misconduct, the drafters would have expressly so provided.[167] The court noted that Article 25 instead provides that "provisions" of the Convention would not apply, not that the entire Convention would not apply.[168] However, the minutes indicate that not only provisions, but the Convention was not applicable to a carrier that engaged in wilful misconduct.[169] Thus, it appears that courts denying pu-

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during carriage". The carrier is liable for damages in the case of death or accident, even if the period of carriage has already ended.

MR. DE VOS, Reporter: *We are in agreement in substance. It's a question of wording.*

MR. RIPERT (France): Couldn't one ask to change the order of the paragraphs, to end the article by the definition of carriage?

MR. DE VOS, Reporter: It's a question which we will consider in drafting committee.

THE PRESIDENT: No one makes any objection? The article is adopted.

*Id.* (emphasis added).

163. *See id.*

164. *See id.*

165. *See generally* MINUTES, *supra* note 10 (where delegates never addressed which items of damage recoverable).

166. *See generally* Warsaw Convention, *supra* note 1, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (where recoverable damages under Warsaw Convention not mentioned).

167. In re Air Disaster in Lockerbie, Scot. on Dec. 21, 1988, 733 F. Supp. 547, 552 (E.D.N.Y. 1990), *reargument denied and certification for an interlocutory appeal granted,* 736 F. Supp. 18 (E.D.N.Y. 1990).

168. *Id.*

169. MINUTES, *supra* note 10, at 62. Mr. Ripert from France stated that "[a]s much as it is just not to apply the Convention to the carrier when he has committed an intentional illicit act, so it is unjust to take away from him the benefit of the Con-

nitive damage awards have improperly construed the term "provision" in article 25. Moreover, it appears that courts have ignored the warning of the delegates that the articles may reflect more of an agreement on substance than an agreement on form.[170]

Additionally, the *Floyd* court argued that if the drafters intended that punitive damages be awarded in a wilful misconduct case, the drafters would have stated so in article 25.[171] Punitive damages, however, are unique to the United States,[172] which was not a drafter of the Warsaw Convention.[173] Thus, the absence of any reference to punitive damages should not be dispositive of whether such damages are ever available under the Warsaw Convention.

## *CONCLUSION*

Concerns about the safety of international flight have heightened in recent years. Terrorist activity has no boundaries, and passenger aircraft more than twenty years old continue to fly despite their known wear and tear. Although the Warsaw Convention did not expressly provide for a recovery of punitive damages in cases of wilful misconduct, the negotiations leading to the Warsaw Convention suggest that punitive damages are recoverable in such cases. Perhaps the threat and the economic reality of punitive damages will force air carriers to increase safety measures aboard passenger aircraft.

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vention when it is not the carrier himself but his servant who has committed this act." *Id.*

170. MINUTES, *supra* note 10, at 32. During the opening remarks at the third session of the drafters, Mr. Giannini, who presided over the preparatory committee, cautioned that "questions of wording are very irritating and that one can sometimes come to an agreement on substance and not on form." *Id.*

171. *See supra* notes 58-76, and accompanying text (discussing the reasoning of *Floyd* court).

172. L. KREINDLER, *supra* note 13, § 11.01[2], at 11-3.

173. *See supra* note 24 and accompanying text (noting that United States had sent two observers to the 1929 Warsaw Conference).

* J.D. Candidate, 1991, Fordham University. The Author dedicates her Note to the victims of Pan Am Flight 103 and their families.