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AVOIDING THE PERILS OF JUDICIAL TREATYWRITING: *IN RE KOREAN AIR LINES DISASTER*

Two years after Charles Lindbergh's historic flight across the Atlantic, the second of two international conferences completed work on an equally historic aviation treaty known as the Warsaw Convention (the "Convention").¹ The goal of the conferences had been twofold: first, to establish uniformity in documentation and legal procedure;² and second, to limit the potential liability of air

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (United States declaration of adherence deposited at Warsaw, Pol., July 31, 1934; proclaimed Oct. 29, 1934) [hereinafter Warsaw Convention, the Convention, or the treaty].

The Convention was the product of two international conferences, the first held in Paris in 1925, the second in Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens ("CITEJA"), which had been created by the Paris Conference. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967). While the United States did not participate in the interconference work performed by CITEJA and was only represented at the Warsaw Convention by an observer, it viewed the diplomatic activity favorably and deposited its instrument of adherence on July 31, 1934. *Id.* at 502.

² See Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483, 484 (1973); Lowenfeld & Mendelsohn, *supra* note 1, at 498-99. The Convention achieved nearly complete uniformity as to documentation and "to a large degree" regarding the procedure for resolving claims arising out of international transportation and the applicable substantive law. See Lowenfeld & Mendelsohn, *supra* note 1, at 498-99; see also Reed v. Wiser, 555 F.2d 1079, 1090-91 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) (treaty praised for its unifying aspects).

In 1965, the Federal Aviation Administration ("FAA") Administrator, testifying before the Senate Foreign Relations Committee, praised the Warsaw Convention for providing uniformity in the governance of the relationship between air carrier and passenger. See *Hague Protocol to Warsaw Convention: Hearings on Exec. H., 86th Cong., 1st Sess. Before the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 20 (1965) (statement of Najeeb Halaby, Administrator, FAA). Articles 3 through 16 of the Convention standardize the documentation required for passengers and cargo on international flights, while articles 26 through 31 standardize a variety of procedural rules regarding claims for loss and damage. See *In re Aircrash in Bali, Indonesia* on Apr. 22, 1974, 684 F.2d 1301, 1304-05 (9th Cir. 1982).

Early proponents of the treaty recognized the value of these unifying factors; and, in transmitting the Convention to the United States Senate in 1934, Secretary of State Cordell Hull wrote: "It is obviously an advantage to passengers . . . to have international uniformity with respect to . . . documents required in international air transportation." See SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES, SEN. EXEC. DOC. NO. G, 73d

carriers in the event of an accident.³ The limitation on liability favored the air carriers over the passengers, but the treaty sought to restrike the balance by creating a presumption of liability against the carriers.⁴ Despite its initial wholehearted acceptance of the Convention,⁵ the United States soon began to express dissatisfaction with the limitation on liability.⁶ The United States repeatedly

Cong., 2d Sess. 3-4 (1934), *reprinted in* 1934 U.S. Av. Rep. 239, 241 [hereinafter MESSAGE FROM THE PRESIDENT]. The Convention's latter day proponents have been quick to point out the same benefits. *See* A. Lowenfeld, Opening statement at the Special International Civil Aviation Organization Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol, held at Montreal, Can. (Feb. 1-15, 1966), *reprinted in* 54 DEP'T ST. BULL. 580, 581 (1966) [hereinafter Lowenfeld, Opening Statement].

³ *See* Lowenfeld & Mendelsohn, *supra* note 1, at 499. This second goal was the more important of the two, *see id.*, and has sparked the most controversy. *See* Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 806 (1983); *infra* note 6 and accompanying text.

Recently, courts and commentators have begun to question whether the liability limitation amounts to a taking under the fifth amendment. *See, e.g., Aircrash in Bali*, 684 F.2d at 1312-13; Comment, *After Bali: Can the Warsaw Convention be Proven a Taking Under the Fifth Amendment?*, 49 J. AIR L. & COM. 947, 967-88 (1984). The Convention has also been attacked on due process and equal protection grounds. *See, e.g., Comment, Due Process, Equal Protection and the Right to Travel: Can Article 22 of the Warsaw Convention Stand Up to These Constitutional Foes?*, 49 J. AIR L. & COM. 907, 921-33 (1984).

⁴ Article 17 of the Convention creates an express presumption that a flight-related accident is the result of carrier negligence. *See* Warsaw Convention, *supra* note 1, art. 17. The carrier may rebut the presumption, however, by proving all necessary measures were taken to avoid damages or that taking such measures would have been impossible. *See id.* art. 21(1); *Aircrash in Bali*, 684 F.2d at 1305. In exchange, article 22 limits the air carriers' liability to 125,000 Poincare francs—approximately \$8,300. *See* Note, *A Proposed Revision of the Warsaw Convention*, 57 IND. L.J. 297, 297 n.2 (1982). Secretary of State Hull noted that requiring the carrier to show lack of negligence was reasonable in light of the difficulty passengers at the time had in establishing the cause of an aviation accident. *See* MESSAGE FROM THE PRESIDENT, *supra* note 2, at 243. While acknowledging that the doctrine of *res ipsa loquitur* had aided some plaintiffs, the Secretary of State emphasized that it had yet to become the rule in all jurisdictions. *Id.* It is doubtful whether the Secretary's argument is still valid. *See generally* W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 39, at 246-47 (5th ed. 1984) (current safety records and technological advances have justified the use of *res ipsa loquitur*).

⁵ *See* 78 CONG. REC. 11,582 (1934). The Senate gave its advice and consent without debate, committee hearing or report. *See id.*

⁶ *See* Lowenfeld & Mendelsohn, *supra* note 1, at 502. While the diplomatic corps argued that the liability limit was too low, the genesis of American dissatisfaction lay much deeper, and indeed many would have preferred to discard the limitation altogether. *See* Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 530-32 (1967). In *Ross v. Pan American Airways*, 299 N.Y. 88, 85 N.E. 2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955), the plaintiff, who was known professionally as Jane Froman, was seriously injured when the plane bringing her from New York to Europe, where she was scheduled to entertain troops for the U.S.O., crashed just outside of Lisbon, Portugal. *See id.* at 91, 85 N.E.2d at 881. Despite extensive injuries and high medical bills, she recovered only \$8,300—a result which helped spur the momentum in the United States toward withdrawal from the Con-

sought reconsideration of the treaty,⁷ leading finally to the adoption in 1966 of the Montreal Agreement (the "Agreement"), in which air carriers agreed, among other things, to raise the liability limitation to \$75,000.⁸ To avoid the literal language of Convention article 3(2),⁹ which eliminates the limitation on liability only if the carrier fails to deliver a ticket, courts began to hold that failure to include adequate notice of the Convention's liability rules on the ticket would also result in the loss of the limitation.¹⁰ Recently,

vention. See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 294 (1965).

⁷ See Lowenfeld & Mendelsohn, *supra* note 1, at 590.

⁸ See Order of Civil Aeronautics Board Approving Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, reprinted in 31 Fed. Reg. 7302 (1966) (approved by CAB Order No. E-23680, May 13, 1966) [hereinafter Montreal Agreement].

Article 22(1) of the Warsaw Convention provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability." See Warsaw Convention, *supra* note 1, art. 22(1). Not all courts have recognized the Montreal Agreement as merely a "special contract" as provided for by article 22(1). See *In re Air Crash Disaster at Warsaw, Pol.* on Mar. 14, 1980, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983). In *Air Crash Disaster at Warsaw*, the Second Circuit interpreted the Montreal Agreement as, essentially, an amendment to the Convention. See *id.* at 89. Although the Montreal Agreement is relevant to any discussion of the Warsaw Convention, it is submitted that the Second Circuit overextended the argument when it suggested the Agreement actually modified article 3(1)(e). See *id.* The treaty cannot be modified by parties other than the countries adhering to it. See *In re Korean Air Lines Disaster*, 644 F. Supp. 1463, 1476 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987).

⁹ Warsaw Convention, *supra* note 1, art. 3(2). Article 3(2) provides that:

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

Id.

¹⁰ See *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 789 F.2d 1092, 1098, *vacated*, 795 F.2d 381 (1986), *aff'd on reh'g in relevant part*, 821 F.2d 1147 (5th Cir. 1987); *In re Air Crash Disaster at Warsaw, Pol.* on Mar. 14, 1980, 705 F.2d 85, 90 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 169, 234 N.E.2d. 199, 202-03, 287 N.Y.S.2d 14, 19-20 (1967), *cert. denied*, 390 U.S. 1039 (1968). See also *Warren v. Flying Tiger Line*, 352 F.2d 494, 498 (9th Cir. 1965) (tickets handed to passengers at foot of boarding ramp did not constitute delivery and therefore limitation unavailable); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir.) (ticket delivered to passenger after aboard aircraft did not constitute adequate delivery so liability could not be limited), *cert. denied*, 382 U.S. 816 (1965). *But cf.* *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955) (court upheld liability limitation when ticket did not contain names of agreed stopping places), *cert. denied*, 350 U.S. 989 (1956); R. MANKIEWICZ, *THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER*

however, in *In re Korean Air Lines Disaster*,¹¹ the United States Court of Appeals for the District of Columbia Circuit rejected this approach and held that a deficiency in notice will not prevent the air carrier from availing itself of the liability limitation.¹²

The plaintiffs' decedents in *In re KAL*, who were passengers on board defendant's commercial airliner, were killed when Soviet military aircraft destroyed the plane over the Sea of Japan.¹³ Defendant had delivered tickets to the plaintiffs' decedents prior to commencement of the trip.¹⁴ These tickets contained notice—printed in eight-point type size—of the applicability of the Warsaw Convention's liability limitations.¹⁵ The plaintiffs moved in district court for summary judgment, asserting that KAL should be liable for the full extent of the damages because the notice printed on the tickets was defective.¹⁶ In a memorandum opinion,

75 (1981) (notice requirement manifests "schizophrenic [sic] jurisprudence of American courts").

¹¹ 829 F.2d 1171 (D.C. Cir. 1987), *aff'g* 664 F. Supp. 1463 (D.D.C. 1985) [hereinafter *In re KAL*]. The court adopted as its opinion on the limitation of liability issue the comprehensive memorandum of the district court.

¹² *In re KAL*, 664 F. Supp. at 1467-77. Before reaching the merits of the Warsaw Convention claim, the court of appeals addressed the question of whether, upon transfer of a multi-district claim pursuant to 28 U.S.C. § 1407, the precedent of the transferor forum would bind the transferee court. *See In re KAL*, 829 F.2d at 1174. The D.C. Circuit concluded that while clearly the rule in diversity cases, *see Van Dusen v. Barrack*, 376 U.S. 612 (1984), the case law of the transferor court merits only "close consideration" on federal questions. *In re KAL*, 829 F.2d at 1176.

Had the court found itself bound under the *Van Dusen* rule to apply the law of the transferor forum, *stare decisis* would have compelled it to find, at least for those plaintiffs whose claims originated in the Second Circuit, that a deficiency in notice on the airline ticket would prevent the air carrier from availing itself of the Convention's liability limitation. *See id.* at 1174. The court further noted that, because a 28 U.S.C. § 1407 transfer is "for coordinated or consolidated pretrial proceedings," the case could eventually be returned for trial to the Second Circuit, where a different interpretation of the Warsaw Convention prevails. *Id.* at 1176. Acknowledging that this possibility provides "the most anomalous feature" of its decision, the court nonetheless declared that the Second Circuit should be bound by the D.C. Circuit's interpretation of the Warsaw Convention under the "law of the case" doctrine. *See id.*

¹³ *In re KAL*, 664 F. Supp. at 1464. The district court noted that the material facts in the case were not in dispute. *Id.*

¹⁴ *Id.* Article 3(1) of the Warsaw Convention states that the carrier "must deliver a passenger ticket." Warsaw Convention, *supra* note 1, art. 3(1).

¹⁵ Article 3(1)(e) of the Warsaw Convention requires that the ticket delivered to a passenger contain "[a] statement that the transportation is subject to the rules relating to liability established by this Convention." *See* Warsaw Convention, *supra* note 1, art. 3(1)(e). The Montreal Agreement expanded on this requirement, specifying in section 2 that a standard notice be printed in ink contrasting with the stock in at least ten-point type. *See* Montreal Agreement, *supra* note 8.

¹⁶ *In re KAL*, 664 F. Supp. at 1464. In essence, the plaintiffs based their motion for

the district court rejected plaintiffs' argument and denied the motion.¹⁷ On appeal, the Court of Appeals for the District of Columbia Circuit affirmed, adopting the district court's memorandum as its opinion.¹⁸

In denying plaintiffs' motion for summary judgment, District Judge Robinson turned first to the language of the Convention,¹⁹ where he found no evidence that failure to provide a statement regarding the Convention's applicability would trigger forfeiture of the defendant's liability limitation.²⁰ He then considered and rejected a contrary line of cases,²¹ and criticized existing case law as based on the judiciary's discontent with the liability limitation rather than concern with proper application of the Warsaw-Montreal system's provisions.²² Judge Robinson next examined the

summary judgment on a claim that the Montreal Agreement modified the notice requirement in the Warsaw Convention. *Id.* at 1467. They argued that the carrier's failure to print the Montreal Advice in at least 10-point type was tantamount to "non-delivery" of the ticket under article 3(2), triggering the forfeiture of the air carrier's liability limitation. *See id.*

¹⁷ *Id.* at 1464.

¹⁸ *In re KAL*, 829 F.2d at 1173. The court affirmed without dissent. *Id.*

¹⁹ *In re KAL*, 664 F. Supp. at 1472-73. Judge Robinson focused on article 3, sections 1(e) and (2). *Id.* *See also supra* notes 9 & 15 (quoting relevant provisions).

²⁰ *In re KAL*, 664 F. Supp. at 1472-73. The court asserted that, under article 3(2), inadequate notice may simply be an "irregularity" which will not affect applicability of the rules of the Convention. *Id.* Judge Robinson observed that "[a]rticle 3(2) appears directed to the entire ticket, which is evidence that a contract has been formed, and appears much less concerned with notice . . ." *Id.* at 1474.

²¹ *Id.* at 1472-75. The notice cases began with *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965), and *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965). *See In re KAL*, 664 F. Supp. at 1472-75. *Mertens* involved physical delivery of a ticket, but the court noted that the article 3(2) requirement was intended to provide the passenger with an opportunity to protect himself against the liability limitation by "deciding not to take the flight, entering a special contract with the carrier, or taking out additional insurance for the flight." *Mertens*, 341 F.2d at 856-57. In *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968), the court held that the Convention requires not only physical delivery of the ticket but also adequate notice of the treaty's liability rules. *See Lisi*, 370 F.2d at 513. Judge Robinson found the *Lisi* court's determination that the diminutive statement could be equated to non-delivery of the entire contract of carriage to be "somewhat extreme." *See In re KAL*, 664 F. Supp. at 1474. Moreover, Judge Robinson criticized the Second Circuit for, in essence, re-writing article 3(2), "which states that failure to include the statement of limitation on liability does not affect the applicability of the Convention's rules." *Id.* While the Second Circuit declared that the limitation on liability was balanced by the requirement of adequate notice, *see Lisi*, 370 F.2d at 512-13, Judge Robinson asserted that the actual *quid pro quo* for the limitation was not notice, but liability without fault. *See In re KAL*, 664 F. Supp. at 1474.

²² *In re KAL*, 664 F. Supp. at 1474. Judge Robinson noted there was "no evidence that the treaty drafters and signatories intended 'adequate notice' to affect the operation of the

Montreal Agreement's requirement that notice of the liability limitation be printed in ten-point type.²³ Declaring that the Agreement "may not be read wholesale into the Warsaw Convention,"²⁴ he criticized earlier decisions for incorporating the type-size requirement into the treaty.²⁵ Moreover, the Montreal Agreement was prompted by dissatisfaction with the liability limit, not with the adequacy of notice.²⁶

The court's approach in *In re KAL* rejected judicial precedent of more than twenty years.²⁷ While the opinion provided an excellent exposition of the Montreal Agreement's effect on the Warsaw Convention, it is submitted that the court's interpretation of the Convention itself was flawed in two related areas: first, in its insistence that article 3(2)'s delivery requirement be viewed as separate from rather than complementary to article 3(1)(e)'s notice requirements; and second, in its superficial examination of the treaty taken as a whole. This Comment will review the court's decision with reference to generally accepted techniques of treaty interpretation. By both reviewing the treaty's language and using extrinsic interpretive aids, this Comment will attempt to provide a cohesive method to resolve "notice" issues under the Warsaw-Montreal system.

ARTICLE 3 OF THE WARSAW CONVENTION

A strict and literal reading of article 3 of the Warsaw Convention would dictate that only non-delivery of the ticket triggers forfeiture of the liability limitation.²⁸ The *In re KAL* court, employ-

treaty limitation." *Id.* at 1474.

²³ See *id.* at 1474-77. Judge Robinson, addressing *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973), noted that, even assuming the existence of a notice requirement, the court had not yet addressed the question of what constitutes "adequate notice." *In re KAL*, 664 F. Supp. at 1475.

²⁴ *Id.* at 1476.

²⁵ *Id.* at 1475.

²⁶ *Id.* Judge Robinson found the Montreal Agreement was not an amendment to the Warsaw Convention, but merely a special agreement between contracting parties and signatories as provided for by the Convention. *Id.* at 1476. See Warsaw Convention, *supra* note 1, art. 22(1), (2).

²⁷ See *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

²⁸ See DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71, 86 (1983). See also *In re KAL*, 664 F. Supp. at 1472 (Convention applies

ing such an analysis, concluded that a mere defect in the notice on the ticket would not strip the defendant of the Convention's \$75,000 liability limit.²⁹ Exhibiting impatience with what it viewed as judicial treatywriting, the court posited that "treaty revision is not the right or responsibility of the judicial branch."³⁰ However, the laudable reluctance to engage in judicial revision of international compacts led to a somewhat myopic reading of article 3.³¹ The court viewed section 3(1)(e) as separate and distinct from section 3(2).³² It limited "delivery" to its literal meaning³³ and refused to consider 3(1)(e) and 3(2) as complementary aspects of an overall notice requirement.³⁴

Judge Robinson declared that the Agreement's ten-point type requirement "has been grafted onto the treaty as the next phase in the attempt to circumvent the treaty provision."³⁵ Refusal to make the Convention's liability limitation contingent upon compliance with the Montreal Agreement's non-treaty requirements is completely consistent with accepted techniques of treaty interpreta-

regardless of whether ticket is retained by passenger); *supra* note 9 (text of relevant provision).

²⁹ See *In re KAL*, 664 F. Supp. at 1474. While the court did not suggest that it was relying on a strict and literal reading of article 3, its approach was demonstrated by its reliance on *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (Can. 1979). See *In re KAL*, 664 F. Supp. at 1474. In *Ludecke*, the Supreme Court of Canada declared that "the words of art. 3(2) are plain and can admit of no misunderstanding. . . . The benefit of the limitation will be lost only where no ticket is delivered." *Ludecke*, 98 D.L.R.3d at 57.

³⁰ See *In re KAL*, 664 F. Supp. at 1476. The court suggested that "[w]here the political branches have been stymied, 'judicial treaty-making' to include notice has proved irresistible to some courts." *Id.*

³¹ See, e.g., *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 511-12 (1966) (a literal interpretation may well lead to misinterpretation), *aff'd by an equally divided court*, 390 U.S. 455 (1968). The *Lisi* court noted that the language of the Convention, while relevant, must not become a "verbal prison." *Id.* at 511 (quoting *Sullivan v. Behimer*, 363 U.S. 335, 358 (1960) (Frankfurter, J., dissenting)).

³² See *In re KAL*, 664 F. Supp. at 1472-73. Article 3(1)(e) requires a statement that the transportation is subject to the rules of the Convention, and article 3(2) provides that failure to deliver the ticket will result in the carrier's loss of its liability limitation. See Warsaw Convention, *supra* note 1, arts. 3(1)(e), 3(2).

³³ See *In re KAL*, 664 F. Supp. at 1472-73. See also *supra* note 28 and accompanying text (court's determination that essential question is whether ticket has been delivered into possession of passenger).

³⁴ See *In re KAL*, 664 F. Supp. at 1472-73. The *Lisi* court came to a contrary conclusion, arguing that "the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention." *Lisi*, 370 F.2d at 512. See also *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (9th Cir. 1965) (article 3(2) should not be read in isolation).

³⁵ See *In re KAL*, 664 F. Supp. at 1475.

tion.³⁶ However, the *In re KAL* court's assertion that article 3(2) is concerned with the physical delivery of the ticket only as evidence of a contract between the carrier and the passenger³⁷ is inconsistent with the fundamental Conference goal that airline passengers know of the applicability of the Convention's rules before traveling.³⁸ Furthermore, if the court's strict reading of article 3 were correct, the existence of 3(1)(e), requiring a "statement" that the transportation is subject to the Convention's liability rules, would be virtually unnecessary.³⁹

³⁶ See *id.* at 1475-76.

The application of the Montreal Agreement is somewhat confused by the court's discussion of *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973), where the D.C. Circuit upheld the CAB's authority to supplement article 3 by requiring notice of the Convention's applicability in 10-point type. See *id.* at 1475. In *Deutsche*, the court cited *Lisi* with approval, declaring that "[p]assengers . . . [should] not . . . be required to traverse an obstacle course . . . to successfully discover the nature of their rights and the substance of the carriers' limitations on liability." See *Deutsche*, 479 F.2d at 917. Judge Robinson attempted to avoid the problem presented in *Deutsche* by suggesting that, whatever the resolution of the issues presented by the Warsaw Convention's notice requirement, the court of appeals had yet to define "adequate notice." *In re KAL*, 664 F. Supp. at 1475. It is suggested that, in adopting the district court's decision, the court of appeals should expressly have overruled statements in *Deutsche* contrary to the current opinion. Had it done so, the current decision would have been based squarely on the court's holding that the statement required by article 3(1)(e) cannot be linked to the forfeiture provision in article 3(2). *Id.* at 1472-73.

³⁷ See *id.* at 1473.

³⁸ See *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 333-34 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). The court agreed that the contract plays an essential role in the Warsaw-Montreal system but it did not end its analysis there, electing instead to examine the obligations arising out of the contract. *Id.* From these obligations, the court extrapolated an intent on the part of the signatories to the agreement to "carry out the Conference goal that the rules of limited liability be known to both parties," a knowledge that would enable passengers to determine the amount of insurance they would need. *Id.*

³⁹ See *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 512 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). In *Mertens*, the ticket was delivered to plaintiffs' decedent after he boarded the plane; the court held as a matter of law that this did not constitute adequate delivery. *Mertens*, 341 F.2d at 857. The decision's true significance, however, is in the court's determination that article 3(2) requires the ticket to be delivered to the passenger in a manner which affords him "a reasonable opportunity to take measures to protect himself against the limitation of liability." *Id.* at 856. The court then intimated that the article 3(2) delivery requirement would make little sense unless the ticket were delivered "in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures," *id.* at 857, and that the article 3(1)(e) requirement regarding a statement of the carrier's liability limitation would be all but meaningless if it were not related to the delivery requirement. *Id.*

THE INTERPRETATION OF TREATIES

Strict construction of the language of a treaty or international agreement, without more, bypasses numerous canons of interpretation, many of which have been recognized by the Supreme Court.⁴⁰

In *Air France v. Saks*,⁴¹ the Supreme Court applied four interpretive aids to resolve Warsaw Convention issues: (1) the language of the treaty itself and the context in which it is used;⁴² (2) the legal meaning attached to the French text;⁴³ (3) the *travaux préparatoires*;⁴⁴ and (4) the case law of sister signatories.⁴⁵ The Court further noted that a review of the post-ratification actions of the signatories may help resolve issues arising under the treaty.⁴⁶ A compelling example of subsequent action by a signatory nation is the Civil Aeronautics Board's ("CAB") regulation requiring ten-point type for notice of the Convention's applicability.⁴⁷ While a

⁴⁰ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (1965). This Comment does not propose that the various canons of treaty interpretation are in and of themselves dispositive; like maxims, they may often be found contradictory of one another. See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950); see also J. STONE, *OF LAW AND NATIONS* 189 (1974) (canons of treaty interpretation leave a wide field for "uninhibited creative choice by the [c]ourt"). Nevertheless, the canons are helpful guides which merit review.

⁴¹ 470 U.S. 392 (1985). Resolution of the issue before the Court in *Air France* required a definition of "accident" as used in article 17 of the Warsaw Convention. *Id.* at 394-96.

⁴² See *id.* at 397; *Maximov v. United States*, 373 U.S. 49, 54 (1963). It is submitted that had the *In re KAL* court examined article 3(2) in the context of the entire Warsaw Convention, indeed within the context of article 3 itself, it would have recognized that its rigid interpretation of the delivery requirement was not consistent with the purpose behind article 3(1)(e). See also *In re Aircrash in Bali, Indonesia* on Apr. 22, 1974, 462 F. Supp. 1114, 1120 (C.D. Cal. 1978), *rev'd on other grounds*, 684 F.2d 1301 (9th Cir. 1982) (whenever possible, treaty provisions should be construed to be consistent with each other).

⁴³ *Saks*, 470 U.S. at 399. It appears, however, that there is no French case law to aid in the interpretation of the French text. See R. MANKIEWICZ, *supra* note 10, at 74.

⁴⁴ *Saks*, 470 U.S. at 400. In this instance, the *travaux préparatoires* (the preparatory work done on the treaty, including minutes from the meetings and debates) provided no real guidance for an understanding of article 3, and courts and commentators were left to speculate as to the intention of the drafters. See, e.g., DeVivo, *supra* note 28, at 110 (treaty drafters did not anticipate the judicial scrutiny to which article 3 has been subjected).

⁴⁵ *Saks*, 470 U.S. at 404. See also S. SPEISER & C. KRAUSE, 1 AVIATION TORT LAW § 11:6, at 641 (Convention should be interpreted as uniformly as possible). The district court did apply this canon by relying on *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (Can. 1979). See *In re KAL*, 664 F. Supp. at 1474. Nevertheless, the quest for international judicial symmetry cannot be dispositive of the issue. See *supra* note 40.

⁴⁶ *Saks*, 470 U.S. at 403. See also *Husserl v. Swiss Air Transp. Co., Ltd.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972) (tariff filed by airline reviewed to determine whether "accident" encompasses hijackings), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

⁴⁷ See 14 C.F.R. § 221.175(a) (1987).

regulation cannot itself create a duty requiring carriers to give notice to passengers,⁴⁸ its very existence indicates that the United States assumes such a duty exists and the CAB regulation merely clarifies the article 3(1)(e) provision requiring a "statement" as to the Convention's applicability.⁴⁹

While paying deference to the general rule that treaties should be interpreted liberally and with a keen appreciation of their purpose,⁵⁰ the *In re KAL* court never applied such an analysis to the Convention.⁵¹ The court, failing to find express language linking a failure to provide notice to loss of limited liability, ended its investigation.⁵² Yet, had it explored further, the court would have found a notice requirement compatible with one of the Convention's major goals, namely, the establishment of uniform documentation and legal procedure.⁵³

⁴⁸ Cf. *In re KAL*, 664 F. Supp. at 1476 (a government may not unilaterally dispose of treaty limitation).

⁴⁹ See Montreal Agreement, *supra* note 8, art. 2. The Agreement requires each carrier, when the ticket is delivered, to furnish passengers covered by the Warsaw Convention with a notice, printed in at least ten-point type, which provides that:

Passengers . . . are advised that the provisions of a treaty known as the Warsaw Convention may be applicable For such passengers . . . the Convention . . . provide[s] that the liability of . . . [the] carriers . . . for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US \$75,000 per passenger

. . . .

Additional protection can usually be obtained by purchasing insurance. . . .

Id.

⁵⁰ See *In re KAL*, 664 F. Supp. at 1471. The Supreme Court has long held that treaties are accorded a more liberal interpretation than private agreements, declaring that "we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). For a general discussion of the interpretation of the Warsaw Convention, see R. MANKIEWICZ, *supra* note 10, at 23-26.

⁵¹ See *In re KAL*, 664 F. Supp. at 1472-77. It is true that, in discussing adequate notice, the court criticized *Lisi* and related cases for failing to give weight to the history of the Warsaw-Montreal system, *id.* at 1473-74, and later wrote that "[n]othing in the debate or dissatisfaction with the [liability] limitation which led to the Montreal Agreement confirms the contention that 'adequate notice' was an issue." *Id.* at 1475. But these passing phrases, however apropos, are not indicative of a truly serious application of the standard techniques of treaty interpretation. See *supra* notes 40-50 and accompanying text.

⁵² See *In re KAL*, 664 F. Supp. at 1475; *supra* notes 28-29 and accompanying text.

⁵³ See *In re KAL*, 664 F. Supp. at 1464-66. While the court examined the Warsaw Convention, the decision followed the historical progression only of the limitation on liability. See *id.* Although the limitation on liability was the initial driving force behind the treaty, see Lowenfeld & Mendelsohn, *supra* note 1, at 499, that is no longer the case, particularly in the United States. See Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 830 (1983). The court recognized this fact, but failed to give it any weight in analyzing article 3(1)(e). See *In*

It is submitted that the more accurate analysis of article 3 is that offered by the Second Circuit in *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*⁵⁴ In *Lisi*, the district court found the notice of liability limitation on the ticket to be "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' . . ."⁵⁵ and the court of appeals agreed, declaring that "[t]he simple truth is . . . [that it is] so artfully camouflaged that [its] presence is concealed."⁵⁶ It is submitted that in reading 3(1)(e) and 3(2) as complementary, the *Lisi* court discerned the proper balance between the two sections.⁵⁷ The court reasoned that the Convention's arbitrary limitations on liability, which work to the benefit of the carriers, must be balanced by delivery to the passenger of a ticket complete with ade-

re *KAL*, 664 F. Supp. at 1472-74.

In 1965, when the United States formally denounced the Warsaw Convention, it did so "solely because of the convention's low limits of liability." See Text of Notice of Denunciation, reprinted in 53 DEP'T ST. BULL. 923, 924 (1965). The United States remained a signatory under the Convention, not because it felt the limitation on liability remained a key ingredient of the treaty, but rather because it recognized the continuing viability of the uniformity provided by the Convention as well as the value of international cooperation. See Lowenfeld, Opening Statement, *supra* note 2, at 580-81. It would seem, therefore, that the purpose of air carrier protection is no longer a preeminent justification for the treaty and has been supplanted by the desirability of a uniform international system. Cf. Martin, *The Defendant's View of Montreal*, 33 J. AIR L. & COM. 538, 538-41 (1967) (uniformity of documentation has been very beneficial). Since a primary canon of treaty interpretation is to look to the subsequent action of the parties, see *supra* note 46 and accompanying text, there no longer seems to be any need to pursue the strict interpretation of article 3(1)(e) rendered by the *In re KAL* court. Cf. *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 513 (2d Cir. 1966) (notice especially important in United States where no similar limits on domestic travel exist), *aff'd by an equally divided court*, 390 U.S. 455 (1968).

⁵⁴ *Lisi*, 370 F.2d at 513. The *Lisi* court argued that the *quid pro quo* for the "one-sided advantage" to the air carrier was the delivery of a ticket with adequate notice of the substantial liability limitation. *Id.* at 512-13. Viewed strictly, this is incorrect, because the *quid pro quo* envisioned by the drafters of the Convention was the liability limit in exchange for the shift in the burden of proof. See Lowenfeld & Mendelsohn, *supra* note 1, at 499-500. Yet it would seem that underlying the *Lisi* court's statement is an awareness of the changing values surrounding the Convention. Cf. *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 61, 203 N.E. 640, 643, 255 N.Y.S.2d 249, 253 (1964) (limiting interpretation to situation at time treaty drafted would be inequitable).

⁵⁵ *Lisi*, 253 F. Supp. 237, 243 (S.D.N.Y. 1966).

⁵⁶ See *Lisi*, 370 F.2d at 514.

⁵⁷ See Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 532 (1967). It is true that neither the Montreal Agreement, the requisite tariffs, nor the CAB order approving the tariffs expressly provided a sanction for failure to give notice. *Id.* Nevertheless, subsequent actions such as the Montreal Agreement have delineated a relationship between notice and the passenger's ability to protect himself against liability limitation, and it would seem that the breach of such a crucial duty should result in the loss of the liability limitation. Cf. H. DRION, LIMITATIONS ON LIABILITIES IN INTERNATIONAL LAW 267-68 (1954) (loss of limitation limited to non-delivery to ensure sanction related to seriousness of breach).

quate notice of the Convention's applicability.⁵⁸

A PROPOSED ANALYSIS

Resolution of Warsaw Convention claims involving lack of notice requires sensitivity not only to the goals of the Convention but to the historical treatment accorded the treaty itself.⁵⁹ It is essential to remember also that the Warsaw Convention, at least for most American passengers, has been supplemented by the Montreal Agreement.⁶⁰ Nevertheless, while it may shift the *quid pro quo* of the Convention,⁶¹ the Agreement does not amount to an amendment of the treaty.⁶² As a result, courts can resolve whether or not there is a notice requirement only through an examination of the Convention itself.⁶³

While this Comment has argued that the Convention does require notice, it has not identified the requirements of adequate notice.⁶⁴ It is here that the notice provision of the Montreal Agreement, which is modelled after an earlier CAB regulation, may provide guidelines to determine the adequacy of notice.⁶⁵ Because

⁵⁸ See *Lisi*, 370 F.2d at 512-13.

⁵⁹ See DeVivo, *supra* note 28, at 111-12. Although courts cannot simply disregard the Convention's liability limitations, they do have authority to "utilize the historical looking glass which has been welded by the recurrent reservations expressed by the United States over Article 22"—a method which should lead to a flexible interpretation of the treaty embracing a pragmatic resolution of the issues. *Id.* at 112.

⁶⁰ See Montreal Agreement, *supra* note 8. The Agreement applies to international transportation under the Convention, "which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place." *Id.*, art. 1.

⁶¹ See *In re KAL*, 664 F. Supp. at 1475-76.

⁶² See Montreal Agreement, *supra* note 8. The Agreement was signed by the carriers, not the parties to the Convention, and in it they agreed to raise the limit of liability to \$75,000, to waive any defense in article 20(1), and to furnish tickets with what has come to be known as the Montreal Advice. See *In re KAL*, 664 F. Supp. at 1475-76. The result is not that the Agreement alters the *quid pro quo*, which remains a shift in the burden of proof to the carriers in exchange for a limitation on liability, but merely that it recalibrates the two elements of the bargain. See *id.*

⁶³ See Warsaw Convention, *supra* note 1, art. 22. The Convention sets the carrier's liability at what amounts to \$8,300 but provides that, "by special contract, the carrier and the passenger may agree to a higher limit of liability." *Id.*, art. 22(1). The Montreal Agreement, then, is a special contract under which the carriers have agreed to raise the liability limitation, but it is in no way an amendment to the Convention. See *In re KAL*, 664 F. Supp. at 1476.

⁶⁴ The Convention itself simply requires that a "statement" as to the treaty's liability limitation be contained on the ticket; it offers no further guidance. See Warsaw Convention, *supra* note 1, art. 3(1)(e).

⁶⁵ See *In re Air Crash Disaster at Warsaw*, Pol. on Mar. 14, 1980, 705 F.2d 85, 89-90 (2d

the CAB has adopted the Agreement and has made its acceptance a condition precedent to receipt of a Foreign Air Carrier Permit to operate in the United States,⁶⁶ the Montreal Agreement has become compelling evidence of an executive branch determination that the Warsaw Convention's notice requirement may be met by strict compliance with the Agreement.⁶⁷ Nevertheless, because the Agreement does not amount to an amendment to the Warsaw Convention, it cannot be said that the Montreal Agreement's ten-point type requirement is absolutely necessary to constitute adequate notice.⁶⁸ As it stands now, the Montreal Agreement may provide a benchmark and nothing more.⁶⁹

As long as the United States remains a party to the Warsaw Convention,⁷⁰ American courts will be forced to wrestle with its provisions.⁷¹ Still, resolution of the difficulties presented by the

Cir.), *cert. denied*, 464 U.S. 845 (1983). Nevertheless, the Second Circuit appears to have overlooked the fact that the Montreal Agreement is not an amendment to the Convention and has held that the ten-point type guideline established in the Agreement amounts to a "bright-line" test for determining what constitutes adequate notice. *Id.* at 90. Although this result avoids the necessity of a case-by-case determination of whether or not the notice is adequate, such an arbitrary line should not simply be read into the treaty and courts should remain diligent in applying the Montreal Agreement as a special contract under the Convention rather than as an amendment to the treaty. *See In re KAL*, 664 F. Supp. at 1475. The "bright-line" rule would render carriers liable without limitation even though they may have complied with the Warsaw Convention's requirement, however undefined, of adequate notice.

⁶⁶ 14 C.F.R. § 211.20(t) (1987); DeVivo, *supra* note 28, at 88-95 (1983).

⁶⁷ *See In re Aircrash Disaster at Warsaw*, 705 F.2d at 90 ("the CAB's acceptance of the Montreal Agreement indicates a judgment by at least the executive branch that 10-point type was necessary to provide sufficient notice"). While this Comment has suggested that the Second Circuit erred in holding that the Montreal Agreement constituted a "bright-line" rule for determining the adequacy of notice, *see supra* note 65, it has not meant to suggest that the Agreement is irrelevant regarding notice, but only that it should not be the sole criterion for a determination of adequacy. *Cf. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 152 (1965) (in determining international agreement's effect as domestic law, court should give great weight to interpretation by executive branch).

⁶⁸ *See In re KAL*, 664 F. Supp. at 1476. *See also* DeVivo, *supra* note 28, at 102 (executive branch concerned about adequacy of notice, not specified type size, when Montreal Agreement negotiated).

⁶⁹ *See, e.g., Millikin Trust Co. v. Iberia Lineas Aereas De Espana, S.A.*, 11 Av. Cas. (CCH) 17,331, 17,332 (Sup. Ct. N.Y. County 1969) (eight-point type acceptable because "easily readable"), *aff'd mem.*, 36 App. Div. 2d 582, 317 N.Y.S.2d 734 (1st Dep't 1971). Indeed, it is submitted that the eight-point type notice provided by KAL may well have constituted adequate notice. It has simply been the contention of this Comment that the issue of notice must be addressed.

⁷⁰ *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) (executive branch continues to maintain Convention's liability limit enforceable in United States).

⁷¹ *See supra* note 10.

Convention will not quell American dissatisfaction with the treaty, for the prevailing mood in this country has been emphatic—as long as the Convention contains a limitation on liability it will be deemed unacceptable.⁷² It is clear, however, that this fundamental dissatisfaction with the Convention is beyond the pale of judicial authority and can be settled only by the political departments.⁷³

CONCLUSION

Concerned with what it viewed as judicial proclivity to rewrite those sections of the Warsaw Convention found most troublesome, the *In re KAL* court engaged in a strict reading of the treaty's provisions. The court's restrained review of the treaty led it to conclude that inadequate notice of the liability limitation does not require the loss of that limitation. It is submitted, however, that the court erred by pursuing a truncated review of article 3 and by overlooking the guiding principles behind—and the historical development of—the Warsaw Convention. The court's oversensitivity to the perils of judicial treatywriting resulted in a narrow interpretation of the Convention. A preferable solution to the issue would have been to follow the *Lisi* court's analytical guidelines for article 3 as well as the Supreme Court's guidelines for the resolution of Warsaw Convention issues.

Brian Whiteley

⁷² See L. KREINDLER, 1 AVIATION ACCIDENT LAW § 12B.03[1], at 58 (rev. ed. 1980 & Supp. 1987); DeVivo, *supra* note 28, at 75. "What is needed . . . is a new system which abandons all liability limitations and realizes that new monetary ceilings belabor the antiquity of an outdated system." DeVivo, *supra* note 28, at 75.

⁷³ See *In re KAL*, 664 F. Supp. at 1475. "While American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the *quid pro quo* agreed to by the political branches." *Id.*