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THE WARSAW TICKET
TO JUDICIAL TREATY REVISION
—WILL WE DO IT AGAIN?

THOMAS W. REILLY *

INTRODUCTION

The "Warsaw ticket," the international air carriers' ticket to extremely limited liability exposure, was recognized in its early years as an automatic, judicially-supported international carte blanche limitation on air disaster damage costs. When actuarialized against the steadily decreasing number of fatal airline accidents per one hundred million passenger miles, it reduced the annual liability exposure of individual airline companies to considerably less than the average annual cost of merely maintaining their operating equipment, not including actual replacement or purchase of new aircraft. Even more graph-
ically, the total recovery for fatality cases, both by way of judgment and settlement, was only a small fraction of the amount U.S. carriers received as revenue for "excess baggage." The Warsaw Convention liability limitation of 125,000 "Poincare francs"—approximately $8,291—was low even in 1929 but was deliberately so in the international interest of rapid development and expansion of international air transportation. The members of the two international conferences (Paris-1925, Warsaw-1929) and particularly the CITEJA recognized that aviation was in its infancy and had tremendous potential, but that it would be slow getting off the ground if those with the necessary capital could not be protected against financial disaster resulting from a single airline catastrophe. Many other grounds for limitation of liability of air carriers have been advanced including a comparison with the statutory devices affording global limitations on the liability of shipowners under maritime law.6

There can be little doubt that the Warsaw Convention liability limitation has yielded the desired results in terms of an expansion of international air transportation to an extent undreamed of by even the forward-looking experts in the CITEJA created by the 1925 Paris Conference. Attraction of capital and safe-guarding of miniscule assets are no longer the worrisome considerations for today's behemoth airline corporations that they were in 1929 or in

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4 The U.S. dollar equivalent of $8,291.87 has been in effect since devaluation of the U.S. dollar in 1933. Prior to that and at the time of the Warsaw Convention (1929), the American equivalent was $4,899.

5 The interim Comité International Technique d'Experts Juridique Aériens was formed in 1926 as a result of the Paris Conference of 1925. Although the United States was not represented at the conference, it sent an observer. The CITEJA, consisting of a group of persons appointed by their respective governments, met frequently between 1926 and 1939, and contributed significantly to many international aviation law conferences, particularly to the drafting and signing of the Warsaw Convention in 1929, "relating to the unification of certain rules governing international carriage by air," and to the Rome Convention of 1933 relating to ground damage caused by aircraft. ICAO, the International Civil Aviation Organization created as a result of the Chicago Conference of 1944, now has its Legal Committee performing some of the functions performed by CITEJA prior to World War II. D. Bilyou, AIR LAW 11-12, 124 (2d ed. 1964).

6 H. DriOn, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 1, 3 (1954); Lowenfeld & Mendelsohn, supra note 2, at 499.
the Thirties when this was a struggling, infant industry. The promotional preferential treatment of international air carriers by artificially-imposed limits to their actual legal liability for damages is no longer socially or economically justified. The American courts in recent years have squirmed uncomfortably in the sack-cloth of Convention-created liability limits in the face of three major socio-economic facts of life that are radically different today than they were in the early years of international air transportation. The first factor—the tremendous financial strength of the major international air carriers today—we have already mentioned. The major international carriers are well able to assume the burden of full legal liability to the same extent as all other major business corporations. For those that cannot do so with their own capital, reasonable insurance rates are available for all or any part of the load. The second factor, the desired expansion, has been accomplished, and neither rain nor sleet nor headline-size lawsuit judgments can be expected to in any way retard the tremendous growth in airline operations and prosperity that is conservatively predicted for the future into and including the Supersonic Transport era. The third factor is the vast escalation in the cost of living of Americans and others and the consequent lowering of the value of the dollar—with the result that $8,300 today will sometimes not completely cover the replacement cost of a decedent's luxury automobile much less reimburse his widow for the monetary value of his life. The result is that the "underdog" position has changed. In the public's mind, "Infant Airlines" have become "Gigantic Airlines International," and the litigious passenger's estate representative presumably bent on bankrupting a struggling airline with a single lawsuit has become, instead, the classic victimized widow and orphan who will be reimbursed with "pennies" for the loss of the breadwinner.7

Thus, as might be expected, just as there were many arguments advanced as to the importance and need for liability limitations in the Twenties—the early days of commercial aviation, so it came to pass that in the Fifties and Sixties we began to hear a long line of arguments for eliminating the limitations. In December 1961 there was a meeting of the Interagency Group on International Aviation in the New State Department Building, Washington, D.C., with FAA Administrator Najeeb Halaby as chairman, convened to consider the relationship of the United States to the Warsaw Convention and the Hague Protocol, and many of the arguments against the Convention’s liability limitations (advocating either raising the limits by ratifying the Hague Protocol or renouncing Warsaw completely) were presented by bar associations, leading negligence trial attorneys, trial lawyers’ associations, law professors, and representatives of other interested groups. Top level representatives of the Departments of Defense, Labor, Commerce, Justice, the State Department and the Civil Aeronautics Board participated. The issues, as posed by Mr. Halaby on the first day of the oral presentations, were “whether or not the Secretary of State should recommend that the President withdraw the request to the Senate for advice and consent to the Hague Protocol” and “secondly, whether or not the United States should withdraw from participation in the Warsaw Convention.” In his opening statement Chairman Halaby acknowledged that, based upon written comments submitted to the public docket opened on the subject some three months prior to the hearing, “the central criticism we have received is the

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9 The President’s Interagency Group on International Aviation (IGIA) is composed of representatives of the Departments of State, Commerce and Defense, the Federal Aviation Administration (formerly Federal Aviation Agency), and the Civil Aeronautics Board. Exec. Order No. 10883, 3 C.F.R. 414 (1960) terminating the Air Coordinating Committee (ACC) and providing for the establishment of IGIA by the FAA Administrator pursuant to the Federal Aviation Act, 72 Stat. 737 (1958), 49 U.S.C. § 1301 et seq. (1964).

limited liability with respect to passengers for death or personal injury where willful conduct cannot be proved . . . this seems to be the most controversial aspect of the Convention." As an eventual result of the IGIA proceedings chaired by FAA Administrator Halaby, several years of receiving comments from interested parties, recommendations to Congress, and the later Senate hearings on the same subject, it became obvious that a radical change in the Convention liability limitation, insofar as United States participation was concerned, was imminent.

Meanwhile, as sort of a second front, in view of the changing conditions, American courts in recent years have gone to great lengths to effect a sort of "judicial treaty revision," to accord substantial justice, in the face of liability limitations that the courts and even the U.S. Department of State had come to feel were unconscionable and unnecessary. The favorite target for the U.S. courts' avoidance of the Convention limits has been the form of the "Warsaw ticket" itself. The courts have dug deep for what the author believes to be artificial distinctions surrounding the ticket notice, in a concededly well-meaning desire to offset the present-day unreasonableness of the liability limitation—distinctions found in everything from the type and time of "delivery" of the ticket, to the size of its printing, the apparent or not so apparent meaning of what it says, what the Convention "really meant" by delivery, what the "real purpose" of the ticket and notice are, what the "average person" would believe after reading the Warsaw Convention notice on the ticket, etc., ad absurdum. All this in the face

11 Id. at 3.
12 Senate Foreign Relations Committee hearings in May, 1965, Chairman Senator Fulbright. Hearings on the Hague Protocol to Warsaw Convention before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess. (1965). The final Senate Committee report recommended ratification of the Hague Protocol, but only if a compulsory insurance bill were to be enacted by Congress, and if not, then recommended that the State Department denounce, formally, both the Warsaw Convention and the Hague Protocol. S. Exec. Rep. No. 3, 89th Cong., 1st Sess. 7 (1965).
13 State Department memorandum, July 26, 1961, prepared by Assistant Legal Advisor Ely Maurer, advising FAA Administrator Najeeb Halaby that the State Department had serious questions concerning the desirability of the Warsaw Convention liability limitation, even with the proposed increase to $16,600 that would be effected by ratifying the Hague Protocol.
of the fact of life that the standard "Warsaw ticket notice" has been substantially unchanged through all the millions of international tickets sold and all the years that transpired from the time American courts uniformly held that the ticket notice, its printing, form, contents, etc., were "legally sufficient"\(^4\) to allow operation of the Convention limitation, up to the latest cases where now that same ticket notice has become "obviously" inadequate.\(^5\)

The so-called "IATA Proposal" announced by the U.S. State Department on May 13, 1966, and approved by the Civil Aeronautics Board\(^6\) as an agreement by the carriers to be effective May 16, 1966, in effect raised the limit of liability to $75,000 including the costs of litigation, without regard to fault on the part of the carrier. This "voluntary" proposal of the carriers (through the Montreal headquarters of IATA via Director General Sir William Hildred and his successor Knut Hammarskjold) was, of course, the result of the tremendous pressure in this country\(^7\) to either raise the limits drastically or to "get out of the Warsaw Convention";\(^8\) and more specifically it was the result of the carriers' last-minute effort to get the United States Government to withdraw its November 15, 1965, six-month notice of denunciation\(^9\) which was to be effective May 15, 1966.


\(^7\) For an excellent summary of the events leading up to the "Interim Arrangement" or "Montreal Agreement" of the International Air Carriers, through IATA (International Air Transport Association), see Hildred, "Air Carriers' Liability: Significance of the Warsaw Convention and Events Leading Up to the Montreal Agreement," 33 J. Am. L. & Com. 521 (1967). See also Lowenfeld & Mendelsohn, supra note 2, at 504-06.

\(^8\) N.Y. Times, April 18, 1959, at 22, col. 1.

\(^9\) The terms "denunciation" and "Notice of Denunciation" do not imply either official criticism of the Warsaw Convention by a member state nor any flagrant disregard of its provisions. Rather, those terms are used only in their technical sense, whereby the Convention itself sets forth the formal means for member states to withdraw from participation in the Convention's restrictions.
This new "Interim Arrangement" has radically changed the recovery prospects for an international air traveller, on a flight to or from the U.S. or with a point in the U.S. as an agreed stopping place, not only in the raising of the monetary limit but also by the addition of a new "absolute liability" proviso. Furthermore, the "Warsaw ticket notice" situation has also been markedly changed in both size of print and in clear statement of "exact" monetary amounts applicable under both the new "Special Agreement" and, should the passenger be travelling by a carrier not a party to the new "Special Agreement," the U.S. dollar limitations under the Warsaw Convention or Hague Protocol limits ($8,290 or $16,580), whichever is applicable. Incidentally, this notice is in the form of a ticket-envelope insert, rather than hidden away "in microscopic type... camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded" onto the back of the ticket itself, which the ticket agent heretofore customarily stapled, notice underneath, inside the ticket envelope.

However, in spite of the radical changes wrought by the present "Special Agreement" of the Interim Arrangement, the rationalizations used by American courts, in the closing years of universal Warsaw Convention limitation applicability, should remain of interest for the international lawyer, not just for the historical significance of those decisions, but prospectively as well. It is the opinion of the writer that the "Interim Arrangement" will be just that. It cannot be a permanent solution, and as the years roll on, in perhaps only a decade, history may very well repeat itself—and as the "adequate" new limitation gradually becomes itself "out of touch with reality" in terms of national

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20 A State Department statement, issued the same day as the Notice of Denunciation, expressed the position that the United States would accept a $75,000 limit as an "interim solution" in anticipation of a subsequent permanent arrangement with a $100,000 limit. The agreement has been called the "Montreal Agreement" by IATA and the "Warsaw Convention Liability Agreement" by the C.A.B. C.A.B. Press Release No. 66-77, June 9, 1966. For full text of the agreement, see C.A.B. Agreement No. 18990, approved by Order E-23680, May 13, 1966, Docket No. 17325. The agreement was initially signed by 11 U.S. and 17 foreign air carriers. As of April 17, 1967, 42 U.S. and 21 foreign carriers had signed.

average cost-of-living, average incomes, ever-increasing judgment amounts recovered in non-“Special Agreement,” non-international aviation disaster cases versus vastly increased financial independence of all major air carriers, we may once again hear repeated a legislator’s charge of the “felony” \(^{22}\) of liability limitation by international treaty, and a concurrent judicial exercise in treaty revision by “re-interpretation” of the adequacy of ticket notices, size of printing, what the conditions thereon could “possibly mean to the average travelling man,” and what the “real purpose” of the ticket notice is.

It is with the latter consideration in mind that we embark upon this brief survey and commentary on the “Warsaw ticket” cases, and what they may mean for the future, with some recommendations for treaty provisions that might avoid the necessity for future “judicial treaty revisions” or judicial “clarification” of present and future international liability limitation agreements.

Most important, the lessons revealed by the “Warsaw ticket” cases as to the gradual evolution of judicial propensities to first uphold the spirit of an international treaty, and then later to emasculate it, when they come to regard it as oppressive, are valuable lessons for the future—not only of air law—but for international space law, as well. For our first passenger-carrying ventures into outer space are sure to be beset by the same liability problems and the same need for promotional protection and artificially-imposed limitations on liability, as were our early infant international airline ventures. Here, then, is a golden opportunity for us to profit from the mistakes and pitfalls of the past, as illustrated by the “Warsaw ticket” cases, and to acknowledge the folly of foregoing the appropriate treaty-amending process until, in effect, it is being attempted, clumsily, by individual local, domestic courts on an ad hoc basis. Certainly, our international space treaties will be only as effective as the extent to which local courts will give support to them—as is the case for our international aviation treaties.

\(^{22}\) Letter from Senator Homer Capehart to IGIA, November 10, 1961, expressing his dissatisfaction with the Warsaw Convention limitation.
Tian WARSAW CONVENTION AND ITS TICKET UPHeld

 Construing the Treaty “So As to Accomplish its Obvious Purposes”

In the famous “Jane Froman case,” the highest court in New York affirmed the application of limited liability to a Warsaw Convention ticket issue, against claims that due to the unusual nature of the ticket delivery (delivery not to “Jane Froman” but to the U.S.O. troupe manager) the Convention limitation should be avoided. The rationale in the opinion is interesting as it shows wholehearted support for the “obvious purposes” of the Convention and, while remembering that this was a 1949 decision, sets up an interesting comparison with subsequent opinions over ten years later that strained to avoid the Convention limitation in any way possible, but most specifically with the “delivery” aspects of the ticket. In the opinion of the author, had this case come up for decision in the mid-1960’s, it undoubtedly would have been decided exactly contrary (certainly so in the federal courts). From Judge Desmond’s opinion:

The Convention itself does not say, nor does appellant argue, that the language of article 3 makes physical delivery of the ticket into the passenger’s own hand a requisite for the limitation of liability. But, says appellant, there must be delivery to someone authorized by the passenger to take, for the passenger, delivery of a ticket expressing the limitation—and Abraham, says appellant, was never commissioned by her to receive a ticket for her and never licensed to accept, for her but without her knowledge, a ticket which by its terms, and because of its points of departure and return, put into operation against her although unknown to her, the drastic restrictions of the Warsaw Convention.

The facts were summarized as follows:

At the airport, Abraham ‘lined up all the performers’ in front of desks and ‘placed in front of each his or her passport and ticket’; defendant’s clerks tore off from each ticket the New York-to-Lisbon stub, and passed the rest of the tickets and the passports

24 Id. at 95-96, 85 N.E.2d at 884.
along the desk at which were seated customs inspectors, the performers likewise moving along in front of these desks as their tickets and passports were passed down the line; at the end of the line of desks the tickets and passports were handed back to Abraham, who held them until the plane's impending departure was signalled, when he put in the hands of each performer her passport and a slip of paper (not the ticket itself) admitting her to the plane; Abraham gave the tickets to another U.S.O. Camp Shows, Inc., employee or representative, who boarded the plane but was killed in the crash, the tickets being lost.\textsuperscript{25}

With the delivery of the ticket to appellant placed squarely in issue, coupled with facts showing clearly that appellant had not only not been handed her tickets nor had she ever touched them, the evidence also disclosed that up to the time of the crash they were never in her possession—not even after she boarded the plane. In view of the state of the evidence before it, the court's next quoted statement shows the lengths to which courts would then go to uphold the "obvious purposes" of the treaty:

Whether or not all this added up, as a matter of law, to a sufficient showing of authority in Abraham, it can hardly be disputed that, when a ticket bearing appellant's name and all particulars as to the intended route as well as a reference to the Warsaw Convention limitation, was in front of appellant on the table in the airport, she, by thereafter boarding the plane as a traveler on that ticket, impliedly, if not expressly, ratified and adopted what had been done by the Army, and later by Abraham, in taking out that ticket in her name.

Thus, the special, and undisputed, facts in these affidavits make impossible, as matter of law, any finding other than that the ticket was "delivered", and so it was right to hold that the top limit of recovery was $8,219.87.\textsuperscript{26}

Even more interesting, in view of later decisions, is the court's discussion of the purposes of the Warsaw Convention's limitation versus ticket "delivery" requirements, and the absence of any necessity for individual (versus High

\textsuperscript{25} Id. at 95, 85 N.E.2d at 883 (emphasis added).
\textsuperscript{26} Id. at 96, 85 N.E.2d at 884 (emphasis added).
Contracting Parties) assent to the liability limitation for its existence and validity:

Plaintiff, of course, was presumed to know the law and was bound thereby. Furthermore, while the Convention speaks of transportation under a 'contract' and requires delivery of a ticket warning of the limitation, it is plain that the limitation is one created by the Convention itself, and is not the product of consensual arrangements between the parties. ... Parenthetically, we note that under New York cases and cases elsewhere, even where the limitation is purely contractual, acceptance of a transoceanic ticket stating the limitation 'gives rise to an implication of assent' whether the ticket be read by the passenger or not. ... [T]his treaty, like any other statute, must be construed reasonably and so as to accomplish its obvious purposes. ...

Those aims would be poorly served by any holding that the limitation of liability is available only when a carrier can produce affirmative proof not only that the passenger ticket complied with the Convention, but that the individual who bought that ticket at the carrier's ticket counter, was the passenger himself or someone specifically authorized by the passenger to consent, on the latter's behalf, to limit liability.²⁷

Lest the remarks prefacing this quoted passage from Judge Desmond's decision mislead the reader as to this writer's position, I am of the firm opinion that the kind of support given here to applicability of the Warsaw Convention is absolutely essential to the universal acceptance of any international treaty, and that the later cases gradually watering down the almost automatic applicability of the Convention limitation unfortunately misconstrued the intent and purposes of the international representatives at the Convention. To be sure, this later misinterpretation was done for a humanitarian purpose—to effect relief from what had become an overly oppressive, archaic and unnecessarily low maximum limit of recovery. However, the appropriate remedy should have been an actual change in the international agreement itself by the parties thereto. (Concededly, the change that ultimately did take place was not accomplished as an amendment to Warsaw, but by a waiver agreement among the international air carriers affected thereby.)

²⁷ Id. at 97-98, 85 N.E.2d at 885-86.
To put it another way, there would seem to be basic legal and ethical objections to the local judiciary of one member international state in effect emasculating or “amending” a treaty by the application of the strained logic of “re-interpretation.” Certainly we would be the first to complain if our United States air carriers were suddenly to be “hit” by a series of huge liability judgments in a foreign land by the sheer “re-interpretation” of the Warsaw Convention by local courts in that foreign land eliminating limitation provisions. The fact that a lifting of the limits proved to be socially desirable does not erase the questionable procedure of local, domestic courts “amending” treaty provisions and re-evaluating treaty intentions. To the extent that our courts hold such treaties “sacred,” only to that extent are our American businesses reciprocally protected. Of course, it appears that the rapidly developing course of events in this country, highlighted by the “hardship” decisions adhering to the Convention’s limitations, gave impetus to the eventual official change of position on the desirability of continued U.S. participation with such low limits. Meanwhile, however, by the time our State Department went through the more appropriate procedure of Notice of Denunciation, conferences and negotiations with affected parties, agreements on compromise, and subsequent re-adherence to the Convention, our American courts had already worked out some “compromises” of their own.

“Technical Omissions” From Warsaw Ticket No Barrier to the Limitation

In spite of the clear requirement of Article 3(1)(c) of the Warsaw Convention, the United States Court of Appeals for the Second Circuit refused, in 1955, to avail itself of the golden opportunity to avoid the operation of the Convention limitation by citing the absence from the ticket of the “agreed stopping places.” Obviously, the prevailing judicial mood was then still one of abiding by the Convention.

In Grey v. American Airline Inc.,28 the court had a case before it arising from the crash, at Love Field, Dallas,

28 227 F.2d 282 (2d Cir. 1955).
Texas, of an international flight, an American Airlines' Douglas DC-6 on a scheduled flight from New York to Mexico City, via Washington, D.C. and Dallas. The parents of the infant plaintiffs and twenty-six persons, also passengers, were killed in that crash on November 29, 1949. On the ticket issue, the court stated briefly:

While plaintiffs contended that the Warsaw Convention was not applicable, because the passenger tickets issued to decedents did not make reference to the intermediate 'agreed stopping places' of Washington, D.C., and Dallas, Texas, motions to strike the usual Warsaw Convention limitation of liability defenses, based upon this technical and wholly unsubstantial alleged omission, were denied before trial by Judge Noonan. We agree with Judge Noonan's reasoning and see no occasion to elaborate upon his carefully prepared opinion.29

The Ticket Does Not Leave the Passenger in the Dark

Although Seth v. British Overseas Airways Corporation 30 was a baggage liability case, language in the opinion indicates that as late as March 1964, some federal courts still had the attitude that the vague statements on the back of the ticket, referring the uninitiated traveller to the Warsaw Convention for the carrier's limitation on liability for loss, gave the passenger "fair warning":

Seth's main contention is that the statement on the passenger ticket that: 'Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called "the Convention"), unless such carriage is not "international carriage" as defined by the Convention,' does not constitute compliance with sub-paragraph (h) of Article 4(3), supra, requiring: 'A statement that the transportation is subject to the rules relating to liability established by this convention.' The argument in a nutshell is that the 'unless' clause destroys what otherwise would constitute compliance with sub-paragraph (h) because considered as a whole the statement on the ticket does not categorically inform the passenger that his transportation is subject to the Convention.

29 Id. at 284 (emphasis added).
30 329 F.2d 302 (1st Cir. 1964).
We do not agree.

The statement on the ticket quoted above gives the passenger clear notice that limitations on the carrier's liability for the loss of checked baggage are provided by the Warsaw Convention and that the carrier will avail itself of those limitations if it can. *The ticket does not leave the passenger in the dark as to a hidden risk he might not appreciate. It gives him fair warning of the existence of limitations on the carrier's liability which he can avoid only on showing that the carriage undertaken by the carrier is not 'international carriage' as defined in the Warsaw Convention.*

**A CHINK IN THE ARMOR**

*Eck v. United Arab Airlines, Inc.* was a New York State case that once again reaffirmed, as late as March 1964, the by then accepted rule of support for the intended provisions of the Warsaw Convention, in spite of any individual hardships it might entail. However, in a footnote certain catchphrases appeared which were to later find their way into opinions of federal courts not so inclined to support the Convention.

It is true, for example, that the language on the ticket which states that the Warsaw Convention may be applicable is *regretfully abstruse and terse, and no doubt quite uninformative to most travellers.* This assumes that the *Lilliputian typography of the ticket addendum allows of any communication. It is legally sufficient, however, under the terms of the Warsaw Convention.*

**THE WALL IS BREACHED**

*Mertens v. Flying Tiger Line, Inc.* arose from the crash of an airliner that had been chartered by the Air Force to transport military personnel and military cargo from Travis Air Force Base, San Francisco, to Tachikawa Air Force Base, Tokyo, Japan. On the first claim of exception to the Convention, the court held that this was not

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31 Id. at 306-07 (emphasis added).
34 341 F.2d 851 (2d Cir. 1965).
transportation performed by the United States, but was for the United States, and therefore on that ground alone the Convention would still be applicable. However, on the question of delivery of the “Warsaw ticket,” the facts showed that Lt. Mertens, plaintiffs’ decedent, was not given his ticket until after he boarded the plane. The court held that delivery of the ticket was not adequate as a matter of law and that the Convention limitation on damages was therefore not applicable. The Second Circuit Court of Appeals, in its unanimous decision, also stated:

We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. Such self-protective measures, could consist of, for example, deciding not to take the flight, entering a special contract with the carrier, or taking out additional insurance for the flight....

We also base our conclusion on the fact... that the statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable, especially in an aircraft about to take off. Under all these circumstances it could not be said that Lieutenant Mertens had a reasonable opportunity to take any measures to protect himself against the limitation of liability. ...

Thus, with Mertens we have the first breakthrough, shattering the wall of judicial respect for the Convention’s liability limitations. Furthermore, it enunciated new “rules” which would enable other courts to find it easier to abrogate the Convention’s restrictions. Each case could now be tested on its facts to determine whether the passenger’s ticket had been “delivered in such a manner as to afford a reasonable opportunity” for the passenger to protect himself independently of the Convention limitation and presumption of liability. Additionally, now a decision as to applicability or non-applicability of the Convention’s limitations could also be couched in terms of the readability of the printing on the ticket. (This, now, in disregard of the fact that the notice on the ticket had been relatively standard, without deviation, with literally millions of such

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35 Id. at 856-57 (emphasis added).
identical tickets issued prior to the date of this decision.) Consider also the fact that both the original Article 3 of the Convention and the amended Article 3 of the Warsaw Convention Protocol still contained the statement: "The absence, irregularity or loss of the passenger ticket does not affect the existence or validity of the contract of carriage which shall nonetheless, be subject to the rules of this Convention." Collaterally, by the time of the Mertens decision, public and Congressional doubt as to the propriety of the Warsaw limitation had already been building to serious proportions and consideration was already being given to the possibility of the United States abrogating the Warsaw Convention (the incipient pressure starting most significantly as early as 1949 resulting from the celebrated "Jane Froman case").

Not surprisingly, the Mertens decision was followed shortly thereafter by the decision of another circuit also eliminating the Convention's applicability, also based on the manner of delivery of the ticket, and also alluding to the readability of the ticket's Warsaw notice. The Ninth Circuit Court of Appeals, in Warren v. Flying Tiger Lines, Inc., stated:

In March, 1962, an aircraft owned and operated by Flying Tiger, disappeared enroute from Travis Air Force Base, California to Vietnam. The plane was under charter to the United States Air Force. . . .

An issue common to all cases is whether the so-called Warsaw Convention . . . applies to limit Flying Tiger's liability to $8,300 for each person killed. . . .

The passengers on this flight were selected exclusively by MATS. On the morning in question each serviceman so selected appeared at the MATS window at Travis Air Force Base and displayed his orders. Each was given a MATS boarding pass and a MATS claim check. The servicemen then went to the boarding gate where they were checked through by military personnel. . . .

On the front of the boarding tickets passed out by the Flying Tiger stewardess at the foot of the ramp, however, it was stated that the transportation was 'subject to the rules relating to liability estab-

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37 352 F.2d 494 (9th Cir. 1965).
lished by the Convention . . . if such transportation is "international transportation" as defined by said Convention." There were also conditions referring to the Convention printed on the back of the boarding tickets. However, as the trial court found, it would be difficult for one to read the fine print on the back of these tickets without a magnifying glass . . . .

None of the passengers were afforded a reasonable opportunity of even reading the tickets, much less obtaining additional insurance, before they were accepted by boarding the plane. The passengers were thereby deprived of a right which was intended to be afforded them as a concomitant to the carrier's right to limit its liability . . . . We regard as immaterial the fact that the passengers could have purchased additional flight insurance at Honolulu. They had already been accepted as passengers without an adequate delivery of tickets having been made. Before boarding the plane at Travis they were entitled to adequate notice which would have enabled them to purchase additional insurance covering the entire flight.38

A year later, in Lisi v. Alitalia,39 a federal district court summarized the now fully-developed judicial objections to the "Warsaw ticket":

The Warsaw Convention specifies that the provisions of the Convention which exclude or limit airline's liability are unavailable unless the airline delivers a passenger ticket and baggage check. The Convention also requires that the ticket and check contain "(a) statement that the transportation is subject to the rules relating to liability established by this convention." Read together, the intent of these requirements is to afford the passenger a reasonable opportunity to take measures to protect himself against the airline's exclusion or limitation of its liability . . . . We hold, therefore, that compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable . . . . Thus, if the tickets and checks issued here did not so notify the passenger, the challenged affirmative defenses are unavailable and must be dismissed.40

The footnotes printed in microscopic type at the bottom of the outside front cover and [ticket] coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are

38 Id. at 495, 496, 497, 498.
40 Id. at 239 (emphasis added).
virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.

'Lilliputian typography' ... which must be read through 'a magnifying glass,' ... is at war with the intent of the Convention.\textsuperscript{41}

The \textit{Lisi} decision was affirmed\textsuperscript{42} by a divided Second Circuit Court of Appeals in an opinion which contained the following interesting language:

It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision it must not become, as Justice Frankfurter stated it, a 'verbal prison.' \textsuperscript{43}

The language in the dissent was equally interesting:

The majority in their opinion indulge in judicial treaty-making. The language of the treaty (referred to as the Warsaw Convention) is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem. . . .

The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. . . . The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts. Judicial predilections for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice.\textsuperscript{44}

On certiorari, the Supreme Court of the United States affirmed \textit{Lisi} "by an equally divided Court."\textsuperscript{45}

As far as this country's courts have gone to extirpate the Warsaw Convention limitation in recent years, none, however, have gone as far as plaintiff-appellant in \textit{Berguido}

\footnotesize{\textsuperscript{41} Id. at 243 (emphasis added).\textsuperscript{42} 370 F.2d 508 (2d Cir. 1966).\textsuperscript{43} Id. at 511.\textsuperscript{44} Id. at 515.\textsuperscript{45} 390 U.S. 455 (1968).}
v. Eastern Air Lines, Inc. would have them go. In that case plaintiff argued that not only did the Convention limitation not apply to his claim, but that, at one and the same time, he was entitled to "absolute and unlimited liability without fault" on the part of the defendant carrier by virtue of that same Convention.

The defendant airline had pleaded the Warsaw Convention limitation of $8,300, but plaintiff urged that a theory of absolute and unlimited liability should apply due to an alleged failure of the airline to comply with Article 3(1) of the Convention. Plaintiff argued that article 17 provided for such unlimited absolute liability unless a carrier proves he has complied with article 3(1) by actual delivery of an adequate ticket to decedent showing all agreed stopping places and the Convention's limitation of liability provisions. An attempt was also made by plaintiff to show inadequacy of the ticket. (The "absolute" liability aspect became important to plaintiff on appeal as the trial court had found that the defendant had been guilty of neither willful misconduct nor even simple negligence, and accordingly had entered judgment against defendant for $8,300 pursuant to Warsaw.) The Third Circuit, however, dismissed plaintiff-appellant's appeal (addressed to the

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47 Warsaw Convention, open for signature, Oct. 29, 1929, 49 Stat. 3000, 3001, 3015 (English Translation):

1. For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
   (a) the place and date of issue;
   (b) the place of departure and of destination;
   (c) the agreed stopping places, provided that the carrier may reserve right to alter the stopping places in case of necessity, and that if he exercises that right the alterations shall not have the effect of depriving the transportation of its international character;
   (d) the name and address of the carrier or carriers;
   (e) a statement that the transportation is subject to the rules relating to liability established by this Convention.

48 Warsaw Convention, open for signature, Oct. 29, 1929, 49 Stat. 3000, 3001, 3015 (English Translation), Chap. III, "Liability of the Carrier": Article 17—The 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.
amount of judgment—plaintiff sought $375,000 instead of
the $8,300 awarded below). The court found, with Judge
Kalodner dissenting, that article 17 gave no indication of
the extent of the carrier's liability, that it must be read
with article 22(1) and that so analyzed it would not sup-
port a theory of absolute unlimited liability as being a
penalty for a failure to comply with the technical Conven-
tion requirements regarding the ticket, its adequacy or
delivery. Stated another way, the court ruled that if non-
compliance with the requirements of the Convention had
been proved, so as to remove the carrier from protection of
the Convention, the plaintiff is then still left with the bur-
den of proving negligence, although the amount of recovery
would then be unlimited. Judge Kalodner's dissent attacked
the adequacy of the form of Warsaw notice given with a
passenger's ticket, citing the Lisi district court decision
with approval.

It might indeed be a novel precept to many interna-
tional lawyers, and international "High Contracting Par-
ties" as well, if the implied doctrine of Mertens, Warren
and Lisi were to gain general acceptance, namely, that
henceforth the validity and binding effect of an interna-
tional treaty duly enacted into domestic law by the "High
Contracting Parties" shall depend upon whether or not the
individual citizen later sought to be held to its terms had
actual personal knowledge of the treaty or carried on his
immediate person a complete and easily readable copy of

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49 Warsaw Convention, open for signature, Oct. 29, 1929, 49 Stat. 3000,
3006, 3019 (English Translation), Article 22(1): In the carriage of persons the liability of the carrier for each pas-
senger is limited to the sum of 125,000 francs. Where, in accordance
with the law of the court to which the case is submitted damages
may be awarded in the form of periodical payments, the equivalent
capital value of the said payments shall not exceed 125,000 francs.
Nevertheless, by special contract, the carrier and the passenger may
agree to a higher limit of liability.

50 369 F.2d at 879.

51 Id. at 886.
the pertinent portions of said treaty. The potential effect on space law is even more interesting. It would appear that, if our astronauts and the Russians are to be mutually bound and reciprocally benefitted by any present and future space treaties, we should insist that the Russian astronauts carry with them, in addition to their portable air-conditioning unit and liquid food bottles, a briefcase containing the currently effective outer space treaties of the world (in clearly legible, understandable, and easily readable form, of course).

In visually comparing the new "Special Agreement" ticket insert with the old Warsaw Convention ticket notice it can readily be seen that several of the classic judicial objections to the form of the notice have been eliminated. The size of the print is no longer "miniscule," the volume of verbiage is considerably reduced, the fact that the notice concerns a limitation of liability is clearly stated in large, headline-style, capitalized print, and the exact monetary amounts of the limitations are clearly expressed in U.S. dollars. However, analyzing the background of the Warsaw ticket cases a little more deeply than that, few lawyers would conclude that such changes are in reality a permanent cure for the underlying problem, as few would conclude that those original judicial objections as to the "form of the printing" constituted the true sine qua non of the

52 See also Berquido v. Eastern Air Lines, Inc., 369 F.2d 874, 886 (3d Cir. 1966) (dissenting opinion), wherein Judge Kalodner argues that he would not uphold the Warsaw Convention limitation even if the ticket notice had been "printed in readily discernible manner."

An even more startling judicial view was expressed recently in a state court case:

The Court further finds that the provisions of the Warsaw Convention Treaty which would restrict damages in this case to approximately $8,300 are unconstitutional and therefore not enforceable because they violate the due process and equal protection clauses of the United States Constitution. The Court finds that such provisions are arbitrary, irresponsible, capricious and indefensible as applied to this case, in that such provisions would attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved in this case. Such unjustifiable, preferential treatment of airlines is unconstitutional. The Court finds that such preferential discrimination to airlines does not apply to manufacturers or even to the United States Government.

essential problem. The genesis of the problem was socio-economic. Therefore, remedies for the future should look to flexibility in providing for just such socio-economic changes, if international treaties are to have any lasting effect, and if they are to be universally respected and enforced.

**Similar Developments Could Affect Future Space Transportation Treaties**

We turn now to consider the possibility that future courts interpreting future “Warsaw-type” treaties in the field of international outer space transportation, might be tempted to repeat the exercise of our just-discussed “Warsaw limitation” cases. Just as air law, to a certain extent, evolved from the principles of the law of the sea, so in all probability space law will be a further development of air law. Consequently, any general problems experienced in international air transportation law may well re-appear during the evolutionary stage of space transport law. Although the Soviet and American legal systems have been a retreat from the absolute liability theory in aviation damage cases, the general tendency of the world’s legal systems has been to impose strict liability when the damage is caused by what society deems to be “ultrahazardous” activity. And there can be little doubt that space exploration is today generally considered to be a type of activity involving an

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53 We are here, of course, not considering at all the problems and arrangements between States concerning liability for State-operated space flights and resultant damage. As to that subject we might here just parenthetically note that the United Nations Ad Hoc Committee on the Peaceful Uses of Outer Space has already agreed to the United States’ proposal that the International Court of Justice should be given jurisdiction to decide disputes between States as to liability for injury or damage caused by space vehicles. Lyon, *Space Vehicles, Satellites and the Law*, 7 McGill L. J. 271 (1961), quoted in D. Belyou, *Air Law* 332 (2d ed. 1964).


55 Haley, *supra* note 54, at 263.
unusual risk of harm to the public.\textsuperscript{66} This being the case, there can be little doubt that when the time comes for individual entrepreneurs to venture into the field of outer space transportation, without the almost unlimited financial resources of the international space power governments available to protect them, once again a treaty limiting liability will be seriously proposed. Such a treaty would no doubt encompass both surface damage to third persons and space vehicle passenger injury/death situations.

Should such space transportation treaties come about, undoubtedly the liability limitations incorporated would have only temporary correlation to the economics of the average victim's reasonable requirements. Again, the strong lobbying pressures of the transportation interests involved would continually oppose and retard any official international change in the maximum limits once established under the then-effective treaty. Voila! The courts again would see themselves as the only realistic solution—via artificial technicality-searching on an ad hoc basis, in an "interpretive" search for "substantial justice."

**RECOMMENDATIONS:**

**MECHANICALLY OPERATIVE TREATY PROVISIONS ON LIABILITY LIMITS**

The following recommendations or suggestions for adding flexibility to the portions of international treaties prescribing fixed maximum monetary liability limits are intended only as a starting point in the direction of considering the practical feasibility of injecting some workable system of change into an area of such treaties where, by the inherent nature of the subject matter, change is inevitable. Certainly many other bases than those recommended can be imagined that would be as simple, at least as workable, just as objectively determinable, and yield the desired

\textsuperscript{66} Id. at 264. (This opinion should, of course, be compared with the statistical record of extremely little surface damage to date from space ventures.)
flexibility in the area where the treaty must remain comparatively fluid if the treaty is to have lasting effect. It is submitted that the suggested approaches could have application in both present international aviation treaties and in future international outer space treaties as well, after we have progressed beyond the space exploration stage into the space transportation era.

Two alternative procedures are suggested, together with an independent recommendation that could be effective, additionally, along with whichever basic alternative procedure is used. The first alternative would be for a provision within the treaty itself (as by an additional protocol to the Warsaw Convention, or in the case of a new space transportation treaty, by inclusion in the basic agreement itself) providing for an "automatic" re-convening of a treaty-amending commission limited to consideration of amending the maximum liability limits "immediately" upon the occurrence of certain economic guideline factors. "Immediately," of course, could be defined to be the next regularly scheduled meeting of the "Assembly" or other sovereign governing body of the organization, or at the next annual meeting of the sovereign body, or at a special meeting of the treaty-amending commission itself to be scheduled "no later than six months after the occurrence" of the events programmed in the economic guideline factors. However, the important feature is that it would be compulsory that the treaty-amending commission submit to the sovereign body a proposed amendment to the liability limitation figure duly based upon an evaluation of the predetermined economic guideline factors. This proposed treaty amendment would then receive priority consideration on the agenda at the next meeting of the sovereign body, and a general vote upon it would then also be mandatory.

Inherent in the mechanics of this proposal, and also in the one to follow, would be the establishment of a permanent economics commission with the duty of compiling and maintaining current statistics yielding the key "economic guideline factors" that would trigger the action in these two alternative proposals. The permanent economics com-
mission would necessarily have the concomitant power to demand production of statistical information on a regular basis from all "High Contracting Parties" with which to maintain currency on the occurrence or non-occurrence of the key triggering factors.

The second alternative appears to be more simple, yet upon further analysis may prove to be more difficult upon which to get universal agreement, precisely for the reason that it is "too simple, too automatic." However, in the interest of provoking more thought upon the subject and as a challenge for international lawyers to originate more adaptable, more universally acceptable alternatives, let us consider it for a moment. Using virtually the same key "economic guideline factors" as in the first alternative, we might use the occurrence of a certain predetermined substantial change in those guideline factors to trigger an "automatic amendment" of the treaty itself by an automatic change (theoretically, up or down) in the maximum monetary limits of liability, pursuant to a formula to be embodied in the treaty itself (or a protocol thereto), much as the cost of living index, consumer price index, or local prevailing wage rates are used as key triggering factors today in many large industrial union contracts and in certain areas of government employment (e.g., Federal "Wage Board" employees). As mentioned in the prior proposal, the constant monitoring of the key "economic guideline factors" by a permanent economics commission created for that purpose would be a prerequisite to both proposals. In the case of this second proposal, however, certain legal mechanics would have to be devised whereby an evaluation, determination and announcement by the economics commission would "automatically" amend the monetary amounts specified in the treaty to the extent reported necessary by the commission, after a certain stipulated time period had elapsed from the announcement date. The purpose of the stipulated time period after announcement would be to

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allow a reasonable time for challenge and counterstudy by any interested "High Contracting Party." After a challenge had been duly filed, the "automatic" feature of the amendment could be postponed by majority vote of the "Assembly" but with a definite scheduled date for a general vote on the validity of the conclusion of the permanent economics commission in light of the conflicting evidence produced by the challenger.

In both of the above alternative proposals the arbitrary standards to be monitored could be any or all of the following, or others as they may appear to directly relate to the "hardship" or "unrealistic" aspects of whatever happens to be the current maximum monetary liability limitations. In any event, a predetermined minimum percentage change would be required to trigger the actions referred to in the proposal, and the base year for computing relative changes would be the year of the latest change to the liability limitation figures in the treaty itself.

**Key Economic Guideline Factors**

1. Average cost of living per capita in state having highest cost of living;
2. Average annual income per capita in state having the highest per capita income;
3. Actuarial computation of the average monetary value of a human life to dependent survivors in the state having the highest standard of living;
4. Size of the gap between non-limitation case recoveries against carriers and limitation case recoveries;
5. Relationship between actual liability exposure experience of carriers and their gross revenues, net revenues, gross operating costs, net operating costs, and insurance rates.

The reason for using the base figures as those from the state having the highest cost of living, highest annual income, etc., is that such a state would be the first to feel the hardship or "unrealistic" aspect of an outdated liability
limitation. At the same time, states not nearly so well situated would not be adversely affected by an upward change in the maximum monetary limitation because in the economic nature of things their exposure experience (i.e., their carriers') should be greatest "at home," wherein legal recoveries could be expected to be, on the average, well below the maximum of the new liability limits. This considers that their area of maximum operations would encompass their own territory and their own nationals. Of course, to the extent that they "go where the money is," their exposure will increase but so will their revenue, and their capacity to respond to larger judgments.

An additional recommendation, independent of the foregoing two alternatives, is that a sort of limited international court be created to decide questions of interpretation of the prevailing liability limitation treaty. As we have seen in our review of the series of Warsaw ticket cases, local courts are not bashful about volunteering their own versions of what the treaty-creators "really meant," even to the point of sterilizing the obvious protective intent of the liability limitation portions of a treaty. If there were an international judicial commission directly related to the treaty-making organization itself to which interested parties could turn for an authoritative pronouncement on questions of treaty interpretation, this might forestall or preclude purely local, domestic courts from giving their interpretations to the point of completely removing benefits from parties designed to be protected by that treaty.

To the foregoing extent, the author would recommend that a "disputes clause" be enacted as part of the treaty limiting carrier liability. This clause would provide for mandatory arbitration or judicial decision by the international judicial council in all cases involving treaty interpretation, and this procedure would be available, not just between "states," but also to any international carrier of a member state who alleges that the attempted interpretation of a treaty by a local domestic court will substantially prejudice its rights to protection or benefits under that treaty. Accordingly, provision would be made that the domestic law
of all member states shall provide that such interpretive decisions of the international judicial council shall be accorded judicial notice and "full faith and credit" in all the courts of the land in all lawsuits, public and private.

CONCLUSION

No portion of a treaty, or any other type of law for that matter, can be expected to remain permanently satisfactory if it specifies fixed monetary figures as the basis for reasonable reimbursement for the economic consequences of accidental death or injuries. Accordingly, it has been suggested herein that some more flexible formula be embodied either in the treaty itself or in some viable, workable treaty-amending procedure. The reciprocal benefits to be had from the universal recognition of the sanctity of international treaties dictate that we not allow, by default, treaties to be sterilized or "amended" by the ad hoc decisional law of local domestic courts.