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Chan v. Korean Air Lines: The United States Supreme Court Shoots Down Notice Requirements under the Warsaw Convention

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Note

Chan v. Korean Air Lines: The United States Supreme Court "Shoots Down" Notice Requirements under the Warsaw Convention

I. INTRODUCTION

The United States Supreme Court recently decided a case that may create legal turbulence for people traveling the international airways.[1]

1. Many air travelers would be surprised to learn that in the event of an air tragedy on an international flight, the maximum dollar amount they could recover in most cases is limited to $75,000. The limited recovery is imposed by an international treaty concerning international airline flights which was geared toward an infant airline industry. *See* A. TOBOLEWSKI, MONETARY LIMITATIONS OF LIABILITY IN AIR LAW 237 (1986) [hereinafter TOBOLEWSKI]. *See also* AIR TRANSPORT, 1988: THE ANNUAL REPORT OF THE U.S. SCHEDULED AIRLINE INDUSTRY 1 (1988), which gives the current statistics on air travel. In 1987, 447,307 million passengers flew the airways compared with 418,946 million passengers in 1986. The 1987 total is comprised of 416 million passengers flying domestically within the United States, while 31 million passengers embarked for international destinations, an increase over the 1986 figures of 394 million passengers flying domestically and 25 million passengers flying internationally. *Id.* at 3. *See also* U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, NAT'L DATA BOOK & GUIDE TO SOURCES, STATISTICAL ABSTRACT OF THE UNITED STATES 593 (1988) (noting that in 1986, 3,719 million total revenue miles were flown by the airlines, of which 3,318 million miles were in domestic travel and 401 million were in international travel); Address by Eugene J. McAllister, Asst. Sec. for Econ. and Bus. Aff., U. S. Dept. of St. (June 20, 1989), *reprinted by* U.S. Dept. of St., Bureau of Pub. Aff., Off. of Pub. Comm., Editorial Div. (S. Haynes ed. July 1989) (number of international passengers carried by U.S. airlines doubled in last decade from 16 million to 32 million; U.S. air carriers control 52% of international market). *Cf.* Cohen, *Happy Birthday: Agreement C.A.B. 18900: A Critical View of the Montreal*

Chan v. Korean Air Lines[2] [hereinafter *Chan*], necessitated interpretation of the *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, commonly called the Warsaw Convention,[3] in light of the *Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol*, known as the Montreal Agreement.[4] While Warsaw has many provisions, *Chan* involved only the notice requirements for passenger tickets. A majority of the Court determined that notice of the Warsaw Convention's applicability on a passenger ticket need not be given in the ten point type size specified by the Montreal Agreement.[5] The Supreme Court decided that notice of Warsaw's application on the passenger ticket is all that is required under the terms of the Convention.

The Warsaw Convention is an international treaty that has governed international air travel since 1933.[6] The Convention affords limited liability to international airlines that give notice on the passenger ticket of Warsaw's applicability to the particular flight.[7] If notice is not given, the airline can be held liable for claims in excess of the Warsaw Convention's limitations.[8]

The Montreal Agreement, a special contract permitted under the Warsaw Convention, increases the liability limitations under Warsaw.[9] The Montreal Agreement also specifies that notice of Warsaw's

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Interim Agreement and the Authority for its Implementation, 7 AIR L. 74, 76-77 (1982) [hereinafter Cohen] (only 400 million passenger miles flown in foreign and domestic air travel between 1925-1929; noting fatality rate of 45 deaths per 100 million passenger miles in 1970, 155 times that in 1929).

2. Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676 (1989).

3. 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 (1934), *reprinted in* note following 49 U.S.C. § 1502 (1982) [hereinafter Warsaw or Warsaw Convention].

4. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. 18900, 44 C.A.B. 819 (1966), *reprinted in* 31 Fed. Reg. 7302 (1966) [hereinafter Montreal Agreement].

5. *Chan*, 109 S. Ct. at 1684.

6. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 502 (1967) [hereinafter Lowenfeld & Mendelsohn] (substantial background of Warsaw process). Lowenfeld & Mendelsohn are recognized as the preeminent authorities on the historical background of the Warsaw system.

7. *See infra* notes 33-35 and accompanying text.

8. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 502.

9. *Id.* at 597 (detailed discussion of Montreal Agreement). *See* Warsaw Convention, *supra* note 3, at art. 22(1), which provides: "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." *Id. Cf. id.* at art. 23, which provides: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void . . . ." *Id.*

application must be printed in ten-point type size.[10] In *Chan*, Korean Air Lines [hereinafter KAL] gave notice of the applicability of the Warsaw Convention in eight-point type rather than the ten-point required by the Montreal Agreement.[11] With the increased volume of international air travel, as well as the vulnerability of international flights to terrorism, the likelihood of future air disasters is aggravated;[12] an increase in litigation of the limited liability provisions is inevitable. In the past, U.S. district courts have found the liability limitations inapplicable when notice provisions have been inadequate.[13] The *Chan* decision eliminates inadequate notice as a means to avoid the liability limitations under the Warsaw Convention.[14]

This note will discuss the *Chan* case and its significance to international air travel. Part I discusses the historical background of liability limitations in international air travel, including an analysis of the Warsaw Convention and the Montreal Agreement. Contained within Part I is a discussion which highlights the relevant provisions of both the Warsaw Convention and the Montreal Agreement, as well as a comparison of the spectrum of interpretation given these provisions by various U.S. Courts of Appeals. Part II analyzes the *Chan* case, while Part III addresses the constitutionality of the Warsaw Convention. Finally, Part IV discusses *Chan's* impact on international air travel in the United States, including a survey of the legal opinions surrounding liability limitations.

II. Historical Background

From the time the Warsaw Convention was enacted,[15] numerous amendments, reflected by superseding protocols, have been adopted in an effort to make recovery for damages incurred in an international air disaster more equitable and generous for international air travelers, particularly American passengers.[16] These amendments were the

10. *See infra* note 42 (Warsaw does not have a type size requirement).

11. Chan v. Korean Airlines, Ltd., 109 S. Ct. 1676, 1678 (1989).

12. *See generally* Recent Development, *Aviation Law—Warsaw Convention Liability Principles Extend to Damage From Terrorist Attack*, 6 Ga. J. Int'l & Comp. L. 600 (1976) (discussing applicability of Warsaw Convention to hijacking and other terrorist activity).

13. *See infra* notes 47-52 and accompanying text.

14. *Chan*, 109 S. Ct. at 1684.

15. The United States ratified the Warsaw Convention in 1934. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 502. The United States sent only an observer to the Convention and did not actively participate in the treaty discussions. *Id.*

16. *See generally id.* at 501-05 (discussing American dissatisfaction with liability limitations); Note, *International Liability Limitation Agreements*, 53 J. Air L. & Com. 839, 849-51 (1988) (discussing opposition to the liability limitations).

Hague Protocol,[17] the Guatemala City Protocol,[18] and the Montreal

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17. In an attempt to mollify critics of the low liability limitations in the Warsaw Convention, various countries adopted the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]. The United States has never ratified the Hague Protocol because it views the increased liability limits as insufficient. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 546-52; Cohen, *supra* note 1, at 77. The United States did not sign at the Hague Conference, but signed in 1956. *Id.* The purpose of the Hague Protocol was to retain the unification established by the Warsaw Convention, while simultaneously increasing Warsaw's liability limitations to $16,600, twice the amount allowed under the Warsaw Convention. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 505, 546-52; Jeffrey, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 811 (1983) [hereinafter Jeffrey] (analysis of Hague provisions). *See also Chan*, 109 S. Ct. at 1691 n.14 (1989) (Brennan, J., concurring)(if United States had ratified Hague, issue before Court would be settled).

The Hague Protocol also amends Article 3 of the Warsaw Convention. *See* Hague Protocol, *supra*, at art. 3, which states:

> 1. In respect of the carriage of passengers a ticket shall be delivered containing:
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> a) an indication of the places of departure and destination;
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> b) if the places of departure and destination are within the territory of a signing Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
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> c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.
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> 2. The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

Id. Cf. infra note 37 and accompanying text for discussion of Article 3 of the Warsaw Convention.

Article 3 of the Hague Protocol states that if a passenger ticket is delivered without notice of Warsaw's applicability, the airline loses the liability protections. Warsaw's Article 3 differs by providing loss of the liability protections only if a passenger ticket is not delivered. *See id.* Although the Hague's notice requirement adds more substance to Warsaw's Article 3, the Hague still does not address the adequacy of the notice.

Efforts to increase the liability limitations under the Warsaw Convention have occurred at other times. Chronologically, the Montreal Agreement, which did not amend the Warsaw Convention, occurred next. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 552-75. *See also infra* notes 38-44 for a discussion of the Montreal Agreement. However, even though the Montreal Agreement interjected an increase in the liability limitations under Warsaw, subsequent efforts continued in an attempt to reach a permanent solution to liability recoveries. These efforts were the Guatemala City Protocol and the Montreal Protocols.

18. The first attempt to increase the liability limitations under Warsaw which occurred after the Montreal Agreement came in 1971 with the Protocol to Amend the Convention of the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, *as amended by* the Protocol Done at the Hague, Sept. 28, 1955, ICAO Doc. No. 8932 (1971) [hereinafter Guatemala City Protocol]. The United States has signed the Guatemala City Protocol, but the U.S. Senate has not ratified it. *See* G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 161 (1977). [hereinafter MILLER]. The United States Senate's reluctance to

Protocols.[19] The amendments created a complex system of interna-

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ratify the Guatemala City Protocol was once again based upon the low liability limitations. *See* Comment, *Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the Warsaw Convention*, 54 CHI.-KENT L. REV. 851, 853 n.19 (1978) [hereinafter Comment, *Aviation Law*]. In order to become effective, the Guatemala City Protocol expressly requires ratification by 30 states, of which the total air traffic of five ratifying states must equal 40% of the total international air traffic. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 7 n.7, Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676 (1989). The United States has signed the Guatemala City Protocol, as well as the Montreal Protocols, discussed below, but the United States Senate has not ratified either. *See* Jeffrey, *supra* note 17, at 814. Article XX of the Guatemala City Protocol contains language which implicitly references the United States:

> This Protocol shall enter into force . . . on the condition, however, that the total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 by the International Civil Aviation Organization, of the airlines of five states which have ratified the Protocol, represents at least 40% of the total international scheduled air traffic of the airlines of member States of the International Civil Aviation Organization in that year . . . .

Guatemala City Protocol, *supra*, at art. XX. The Guatemala City Protocol increases Warsaw's liability limitations to $100,000, with a shift from presumptive liability to strict liability against the airlines. *See* Cohen, *supra* note 1, at 80-81. The distinction between presumptive and strict liability centers around the total amount of liability which may be imposed upon an airline. Under the Warsaw Convention, the Hague Protocol and even the Montreal Agreement, airlines are presumptively liable up to the amount listed in the respective document. However, airlines could be liable for much more if the Warsaw Convention is not found to be applicable. The Guatemala City Protocol would change the presumptive liability to strict liability, which means that the most that an airline could be liable to any one passenger is the amount provided in the Guatemala City Protocol, irrespective of whether the Warsaw Convention applies. Article 24 of the Guatemala City Protocol states:

> In this carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, . . . Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which give rise to the liability.

Guatemala City Protocol, *supra*, at art. 24. As a means to ensure that liability limitations keep pace with changes in the world community, the Guatemala drafters have also provided for periodic reassessments of the liability limitations. The Guatemala City Protocol amends the Warsaw Convention to add an Article 42. Proposed Article 42 would state:

> . . . Conferences of the Parties to the Protocol done at Guatemala City on the eight of March 1971 shall be convened during the fifth and tenth years respectively after the date of entry into force of the said Protocol for the purpose of reviewing the limit established in Article 22, paragraph 1 a) of the Convention as amended by that Protocol.

Id. at art. 42. Issues left unresolved by the Guatemala City Protocol soon prompted the Montreal Protocols.

19. The third attempt to amend Warsaw's liability limitations arose in four separate proposals known as the Montreal Protocols Numbers 1, 2, 3 and 4. *See* MILLER, *supra* note 18, at 37-38. Additional Protocol number 4 sought to simplify the documentation requirements for cargo carriage which included an unbreakable liability limit for damaged baggage and was not concerned with the carriage of passengers. *Id.* These protocols were signed by the participating countries in 1975. *Id.* The United States did not ratify any of the Montreal Protocols due to strong opposition from plaintiffs' attorneys and consumer groups who advocated unlimited liability. *See* 129 CONG. REC. § 2279 (daily ed. Mar. 8, 1983). *See also* Mayne, Jr., *Senate Rejects New Air Crash Liability Limits*, 8 LITIGATION NEWS 3(3) (1978) [hereinafter Mayne, Jr.] (Senate needed two-thirds majority vote to pass Montreal Protocols since amendments to Warsaw Treaty); Current Development, *The Montreal Protocols to the*

tional air regulation which varies the amount of recovery for an international air disaster depending upon whether the specific country has ratified a particular protocol.[20] The United States has not adopted any amendments to Warsaw and has agreed to only one special contract, the Montreal Agreement. Thus, U.S. law pertaining to international air carriage consists solely of the Warsaw Convention and the Montreal Agreement.

The interpretation of these two documents has created confusion among lower U.S. courts.[21] Since Warsaw itself does not have a type

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Warsaw Convention on International Air Carriage by Air, 76 AM. J. INT'L L. 412 (1982) [hereinafter Current Development, *Montreal Protocols*] (discussing Protocols and favorable view taken by U.S. Senate Committee on Foreign Relations). The Current Development was written before the rejection of the Montreal Protocols by the full Senate in 1983. Montreal Protocol numbers 1, 2, and 3 attempted to solve the inherent problems in the conversion of the various signatory nations' national currencies to the liability limitations contained in the Warsaw Convention and its progeny. *See* MILLER, *supra* note 18, at 37. Each additional protocol articulated standards for the previous amendments: Additional Protocol number 1, Warsaw Convention; Additional Protocol number 2, the amendment at the Hague; and Additional Protocol number 3, the Guatemala City amendments. Additional Protocol Number 3 would have changed the settlement medium at the Warsaw Convention to newly created Special Drawing Rights (SDR). SDR would replace the Warsaw Convention's gold standard by creating a unit of account valued on the basis of five national currencies. *Id.* The Montreal Protocols increased the maximum liability recovery to nearly $300,000, with unlimited reimbursement for medical expenses. *See* Current Development, *Montreal Protocols*, *supra*, at 413. Further, the Protocols terminated the wilful misconduct exception provided in the Warsaw Convention. *See* Warsaw Convention, *supra* note 3, at art. 25, ¶ 1, which states:

> The carrier should not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

Id. One additional document in the international air carrier arena is the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by A Person Other than the Contracting Party, June 15, 1964, 500 U.N.T.S. 31 [hereinafter the Guadalajara Convention]. The Guadalajara Convention covers situations where air carriage was performed by a person not a party to any of the other carriage agreements. The United States is not a signatory. *See* MILLER, *supra* note 18, at 38.

These attempts to amend the Warsaw Convention have not met with much success in the United States. The reluctance of the United States to ratify appears to be based upon the general disapproval of restricting plaintiffs' recovery potential. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 504-05; Comment, *Aviation Law*, *supra* note 18; Current Development, *Montreal Protocols*, *supra*. The most successful supplement to the Warsaw Convention's liability limitations is the Montreal Agreement.

20. *See* TOBOLEWSKI, *supra* note 1, at 231-32 (noting system has become complicated, complex and not fully understandable to traveling public). A "Protocol" is defined as the "records or minutes of a diplomatic conference or congress that show officially the agreements arrived at by the negotiators." WEBSTER'S THIRD NEW INT'L DICTIONARY 1824 (1st ed. 1961).

21. *See* Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968) (citing no international authority for treaty interpretation); *In re* New Orleans Air Crash, 789 F.2d 1092 (5th Cir. 1986); *In re* Warsaw Air Crash, 705 F.2d 85 (2d Cir. 1983); Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board, 479 F.2d 912 (D.C. Cir. 1973); Warren v. Flying Tiger Line, Inc., 352

size requirement, the lower courts have interpreted Warsaw's notice requirement for passenger tickets to be consistent with notice in the ten-point type as stipulated under the Montreal Agreement.[22] This section first discusses the relevant provisions of the Warsaw Convention. Next, it discusses the Montreal Agreement, concluding with a survey of lower U.S. court positions regarding notice requirements under Warsaw and the Montreal Agreement.

A. The Warsaw Convention

The Warsaw Convention[23] is a multilateral treaty[24] governing international air carriage.[25] Warsaw limits the liability of international air carriers to 125,000 poincare francs, the U.S. equivalent of $8,300, per person, for any accidents or injuries that occur while enplaning, deplaning or on-board an aircraft.[26] Soon after Warsaw's inception, the treaty's liability limits were recognized as inadequate.[27] Upon becoming a signatory to Warsaw, the United States initiated informal discussions aimed at increasing Warsaw's liability limitations.[28] These discussions resulted in various amendments to the Warsaw Convention.[29]

F.2d 494 (9th Cir. 1965); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Manion v. Pan American World Airways, 55 N.Y.2d 398, 434 N.E.2d 1060, 55 N.Y.S.2d 398 (1982); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968). *Cf.* Ludecke v. Canadian Pacific Airlines Ltd., 98 D.L.R.3d 52 (Can. 1979) (delivery of ticket all that is required; no adequacy of notice standard). *But see* Coccia v. Turkish Airlines, 108 Foro It. I 1586 (Corte cost. 1985), *reprinted and translated in* 10 AIR L. 294 (1985) (striking down liability limitations on personal injury and death as contrary to Italian Constitution).

22. The problem with this reasoning is that although the Warsaw Convention provides the framework upon which the Montreal Agreement is built, the Montreal Agreement does not amend Warsaw. Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676, 1692 (1989) (Brennan, J., concurring). *See supra* note 9 for a discussion of special contract.

23. *See* Warsaw Convention, *supra* note 3. Cases involving the Warsaw Convention are not uncommon. *See* Floyd v. Eastern Air Lines, 872 F.2d 1462 (11th Cir. 1989) (Article 17 of Warsaw Convention creates cause of action for intentional infliction of emotional distress); Schroeder v. Lufthansa German Airlines, 875 F.2d 1462 (7th Cir. 1989) (airline not liable under Warsaw Convention for actions of Canadian police investigating bomb threat). *See also In re* Aircrash in Bali, Indonesia, 871 F.2d 812 (9th Cir. 1989) (discussing wilful misconduct under Warsaw Convention).

24. BLACK'S LAW DICTIONARY 915 (5th ed. 1979) defines multilateral agreement as involving many parties. In this context, the Warsaw Convention involves many nations.

25. *See generally* Lowenfeld & Mendelsohn, *supra* note 6 (in-depth analysis of Warsaw and its progeny). The Warsaw Convention has 129 signatory countries. Cohen, *supra* note 1, at 74 (citing 1981 U.S. DEPARTMENT OF STATE TREATIES IN FORCE 259).

26. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 499-500. Embarking refers to the process of boarding an aircraft, while disembarking refers to the process of leaving the aircraft. *Id.*

27. *See id.* at 504-05.

28. *Id.*

29. *Id. See* Jeffrey, *supra* note 17, at 810.

1. Warsaw's Goals

The Warsaw Convention united the diverse nations linked together by the new aviation industry. The Warsaw Convention had two main goals: first, to establish uniform rules and regulations during the infant years of international air travel;[30] and second, to limit the potential liability of fledgling airlines for accidents that occurred while passengers embarked, disembarked or were on-board an aircraft.[31] In order to implement these goals, the drafters designed Warsaw to regulate numerous facets of air travel, of which only certain areas are relevant to this note.[32]

2. Convention Provisions Related to Passenger Tickets

The Warsaw Convention establishes a presumption of airline liability along with certain defenses which an airline may raise to rebut the claim.[33] Pursuant to Article 17, the air carrier is responsible for the death or wounding of a passenger if the injury occurs on-board the aircraft or while a passenger embarks or disembarks from the aircraft.[34] Articles 20 and 21 specify defenses which an airline can raise to a liability claim. Article 20 provides that a carrier is not liable if the carrier's agents have taken all necessary measures to avoid damage, while Article 21 permits the defense of contributory negligence.[35] Despite the defenses that an airline might raise, lower

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30. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 498-500, (international airlines served to unite nations with diverse legal systems).

31. *Id.*

32. *See, e.g.*, Warsaw Convention, *supra* note 3, at arts. 4 (baggage checks), 5 (air waybills).

33. *See supra* note 18 (discussing presumptive liability).

34. *See* Warsaw Convention, *supra* note 3, at art. 17, which states:

> 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.

Id.

35. *See id.* at art. 20, ¶ 1, which states: "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures" *Id.*; *see also id.* at art. 21 which provides: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." *Id. But see id.* at art. 25 which cancels the Warsaw Convention's protections for wilful misconduct by the airline. Article 25 states:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by wilful misconduct or by such default on his part as, in accordance with the law of the

state and federal courts in the United States have frequently found the defenses inapplicable and awarded damages in excess of the liability limitations stipulated in Warsaw.[36]

Under the Warsaw Convention, a passenger ticket must meet the requirements specified in Article 3, the principle article at issue in *Chan*. Article 3 of the Warsaw Convention provides:

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
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> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed upon stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercised that right, the alteration 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.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not effect 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 the 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.[37]

Article 3 is the only article in the Warsaw Convention that discusses the requirements for passenger tickets.

Although the Warsaw Convention states that notice of Warsaw's applicability must be given on the passenger ticket, it does not address the language or format required for the notice. Refusal of the United States to agree to any of the amendments to the Warsaw Convention led private air carriers to agree to an increase in the liability limitations through the Montreal Agreement.

B. Montreal Agreement

Frustration with the low liability limitations provided in the Warsaw Convention and the inability to reach agreement on recovery

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court to which this case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Id.

36. *See supra* note 21 (examples where lower courts have liberally interpreted the treaty).

37. *See* Warsaw Convention, *supra* note 3, at art. 3.

amounts acceptable to the United States caused the United States to give notice of its intention to denounce the Warsaw Convention.[38] In order to prevent the U.S. denunciation, international air carriers agreed to the Montreal Agreement as an interim accord effective until an acceptable amendment to Warsaw could be reached.[39] The Agreement is a special contract between individual airline companies and the United States government; it is sanctioned under the Warsaw Convention and increases Warsaw's liability limitations to either $75,000, inclusive of legal fees and costs, or to $58,000, exclusive of legal fees and costs.[40] The U.S. government requires acquiescence to the Montreal Agreement as a prerequisite for an airline engaged in international flight to land at or depart from U.S. airports.[41]

The Montreal Agreement embellishes otherwise ambiguous Warsaw provisions. In addition to increasing the Warsaw Convention's liability limitations, the Agreement specifically requires that notice under the Warsaw Convention contain particular language and be given in ten-point modern type, in ink contrasting with the stock upon which it is printed.[42] While notice and required type size are important

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38. *See* 53 DEP'T ST. BULL. 923 (1965); Lowenfeld & Mendelsohn, *supra* note 6, at 552. *See also* DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell*, 49 J. AIR L. & COM. 71, 80-81 (1983) [hereinafter DeVivo] (discussing United States decision to denounce the Warsaw Convention). Article 39 of the Warsaw Convention states:

> (1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the high Contracting Parties.
>
> (2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Warsaw Convention, *supra* note 3, at art. 39.

39. *See supra* note 4. *See also* Jeffrey, *supra* note 17, at 812-13 (discussing U.S. denunciation and interim accord).

40. *See* Montreal Agreement, *supra* note 4, at ¶ 1 which states:

> 1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage, filed by it with any government: . . .
>
> (1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of $58,000 exclusive of legal fees and costs.

Id.

41. *See* 14 C.F.R. § 213.7 (1989), stating: "It shall be a condition upon the holding of a foreign air carrier or other authority authorizing direct foreign scheduled air transportation that the holder have and maintain in effect and on file with the Board a signed counterpart of C.A.B. Agreement 18900. . . ." *Id. See also* Jeffrey, *supra* note 17, at 813 (discussing liability provisions of Montreal Agreement).

42. Paragraph 2 of the Montreal Agreement states:

> Each carrier shall at the time of delivery of the ticket, furnish to each passenger

provisions under the Montreal Agreement, the increase in liability limitations provided the primary impetus to its enactment.[43] Although the Montreal Agreement is a special contract under Warsaw, lower state and federal courts in the United States have interpreted Montreal as amending Warsaw.[44] As the following section illustrates, the U.S. Circuit Courts of Appeals have inconsistently defined the effect of the Montreal Agreement on notice requirements under the Warsaw Convention.

C. Split Among the Circuit Courts of Appeals

Adequacy of notice requirements under the Warsaw Convention had been considered by the U.S. Federal Circuit Courts of Appeals

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whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope: . . .

Montreal Agreement, *supra* note 4, at ¶ 2.

The actual advice required by the Montreal Agreement reads:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580. The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request. Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

Id.

Concurrently, United States law also requires that the notice be in 10-point type size. *See* 14 C.F.R. § 221.175a (1989), which states:

. . . [W]hen the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such a statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as 10-point modern type and in ink contrasting with the stock . . . .

Id.

43. *See* DeVivo, *supra* note 38, at 91.

44. *See supra* note 21 (for cases supporting cited proposition).

prior to the *Chan* decision.[45] The Second and the Fifth Circuits each have deliberated adequacy of notice disputes and have interpreted the Warsaw notice requirements as having been modified by Montreal. The D.C. Circuit Court of Appeals took an opposite position, a position which has now been adopted by the United States Supreme Court.[46]

In *In re Air Crash at Warsaw, Poland, on March 14, 1980*,[47] the Second Circuit Court of Appeals held that adequate notice of the liability limitation advice did not absolve the airlines of compliance with the ten-point type size requirement of the Montreal Agreement.[48] The court adopted a bright line ten-point type size standard,[49] finding the ten-point type size guideline less arbitrary than deciding case by case what constitutes adequate notice. Similarly, in *In re Air Crash Disaster Near New Orleans, Louisiana, on July 9, 1982*,[50] the Fifth Circuit Court of Appeals, asserting that "10 point type means exactly that, 10 point type,"[51] held that the defendant airline lost the limited liability protection under Warsaw because the nine-point type size on its ticket did not comply with Montreal's ten-point requirement.[52] The D.C. Circuit Court of Appeals specifically considered and rejected the Second Circuit's view[53] and held in *In re Korean Air Lines Disaster of September 1, 1983*,[54] that the airline could still avail itself of the liability limitations even though the advice notice was in eight-point rather than ten-point type size.[55] In order to resolve the split among the circuits, the United States Supreme Court granted certiorari in the *Chan* case.[56]

III. Chan v. Korean Air Lines

On April 18, 1989, with its decision of *Chan v. Korean Air Lines*,[57] the United States Supreme Court resolved the split among the Circuit

45. *Id.*
46. Chan v. Korean Air Lines, Ltd. 109 S. Ct. 1676, 1684 (1989).
47. 705 F.2d 85 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983), *reh'g denied*, 464 U.S. 978 (1983). *See also* Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968) (holding adequate notice required).
48. *In re Warsaw Air Crash*, 705 F.2d at 89.
49. *Id.*
50. 789 F.2d 1092 (5th Cir. 1986), *vacated*, 795 F.2d 382 (5th Cir. 1986), *reinstated*, 821 F.2d 1147 (5th Cir. 1987). The Court of Appeals adopted the District Court's opinion in full. *In re New Orleans Air Crash*, 821 F.2d at 1173.
51. *In re New Orleans Air Crash*, 789 F.2d at 1098.
52. *In re New Orleans Air Crash*, 821 F.2d at 1171.
53. *See supra* notes 47-49 and accompanying text.
54. 664 F. Supp. 1463 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd*, 109 S. Ct. 1676 (1989).
55. 829 F.2d 1171, 1172 (D.C. Cir. 1987).
56. Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676, 1679 (1989).
57. 109 S. Ct. 1676 (1989).

Courts of Appeals. Justice Scalia, joined by Chief Justice Rehnquist and Justices White, O'Connor and Kennedy, delivered the majority opinion. The majority affirmed the decision of the District of Columbia Circuit Court of Appeals, holding that failure to provide adequate notice is not sufficient to preclude the limitation of liability protections provided by Warsaw.[58] Although concurring, Justice Brennan, joined by Justices Blackmun, Marshall and Stevens, asserted the existence of an adequacy of notice standard under the Warsaw Convention.[59]

A. The Facts of the Case

On September 1, 1983, a Soviet Union fighter aircraft shot down KAL Flight 007 over the Sea of Japan killing all 269 passengers on board.[60] KAL Flight 007 was bound from Kennedy Airport in New York to Seoul, South Korea.[61] Since the flight originated at a U.S. airport and was bound for an international destination, the flight was subject to the provisions of both the Warsaw Convention and the Montreal Agreement.[62] The plaintiff-appellants were the survivors of the passengers killed on the flight. KAL, an international air carrier, was the defendant-appellee.

B. Procedural Aspects

Wrongful death actions were filed in several district courts by the survivors of the passengers killed on the flight.[63] The cases were consolidated for pretrial proceedings pursuant to 28 U.S.C. § 1407 and transferred to the District Court for the District of Columbia.[64]

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58. *Id.* at 1684.

59. *Id.* at 1692 (Brennan, J., concurring).

60. *Id.* at 1678. *See generally* N.Y. Times, Sept. 1-10, 1983 (articles discussing the downing of Flight 007).

61. *Chan*, 109 S. Ct. at 1678.

62. *See supra* notes 23-37 and accompanying text (discussing Warsaw Convention); *supra* notes 38-44 and accompanying text (discussing Montreal Agreement).

63. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676 (1989). In all, 17 actions were filed: 11 in the Southern and Eastern Districts of New York, three in the Eastern District of Michigan, two in the District for the District of Columbia, and one in the District for Massachusetts.

64. *Chan*, 109 S. Ct. at 1678. 28 U.S.C. § 1407 (1989) concerns multidistrict litigation and states in relevant part:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings . . . transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

Id.

All parties stipulated that their rights were governed by the Warsaw Convention.[65]

In the trial court, plaintiffs sought partial summary judgment based upon the fact that the issued passenger tickets had eight-point type size rather than the ten-point type size required by the Montreal Agreement.[66] They argued that the type size discrepancy denied KAL the benefits of the liability limitations offered by the Warsaw Convention.[67] The District Court denied the summary judgment motion because neither the Warsaw Convention nor the Montreal Agreement prescribed any sanction for failure to conform to the notice requirement.[68] The District Court judge certified the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[69] The appeal was taken on the issue of whether the Warsaw Convention damage limitations were applicable in light of defective notice under the Montreal Agreement.[70] The Court of Appeals affirmed the District Court, adopting its opinion in full.[71] The United States Supreme Court, noting the conflicting positions among the Circuit Courts of Appeals regarding adequacy of notice requirements under the Warsaw Convention and the Montreal Agreement, granted certiorari[72] to resolve the circuit split.[73]

C. The Majority Opinion

The Supreme Court held that an international air carrier does not lose the benefit of the damage limitations of the Warsaw Convention

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65. *Chan*, 109 S. Ct. at 1678.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1679. 28 U.S.C. § 1292(b) (1976 & Supp. 1989) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may, thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.
70. *Chan*, 109 S. Ct. at 1679.
71. *Id. See also* 829 F.2d 1171 (D.C. Cir. 1987) (adopting district court opinion in full).
72. 485 U.S. 986 (1988).
73. *Chan*, 109 S. Ct. at 1679.

by failing to provide ten-point type size notice of that limitation.[74] Conceding that the Montreal Agreement itself does not impose a sanction for failure to comply with the type size requirement, the plaintiffs [hereinafter petitioners] argued that the requirement is created by reading the Montreal Agreement in conjunction with the Warsaw Convention.[75] In this regard, the petitioners argued two points: first, that Article 3 of the Warsaw Convention precluded the limited liability protections if the air carrier failed to provide adequate notice;[76] and second, that the ten-point modern type, required by the Montreal Agreement, is the standard for adequate notice under Article 3 of Warsaw.[77] The Court rejected the first argument and therefore, did not reach the second.[78]

The Court noted that Article 3(1)(e) of the Warsaw Convention requires notice of the liability limitations, but that Article 3 does not impose any sanctions for failure to provide adequate notice.[79] The only sanction specified is in Article 3(2), and provides that the air carrier loses the liability limitations for nondelivery of a passenger ticket.[80] The majority noted that some U.S. courts have equated nondelivery of a passenger ticket with delivery of a passenger ticket which lacks adequate notice; applying a literal interpretation of Warsaw's language, the majority did not accept this equation.[81]

Writing for the majority, Justice Scalia looked at the plain language of Article 3(2) and determined that in order to maintain the limited liability protection, the airline need only deliver the ticket.[82] Justice Scalia posits that Article 3(2) is clear: unless otherwise specified, irregularity of notice does not prevent a document from being considered a passenger ticket and an irregularity does not eliminate the contractual damage limitations provided in the Warsaw Convention.[83] He continues by pointing out that the words "passenger ticket" in the first sentence of Article 3(2), cannot be expanded to impliedly include the requirements of the Warsaw Convention as set forth in

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74. *Id.* at 1684.
75. *Id.* at 1679.
76. *Id.*
77. *Id. See supra* note 37 and accompanying text for the full text of Article 3 of the Warsaw Convention.
78. *Chan*, 109 S. Ct. at 1679.
79. *Id.* at 1680.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Chan*, 109 S. Ct. at 1680-83.

Article 3(1).[84] According to Justice Scalia, since the language in the second sentence of Article 3(2) begins with the word "[n]evertheless," the second sentence must limit the first sentence.[85] Because the language in the second sentence of Article 3(2) refers to nondelivery, while the first sentence clearly states that there is no loss of liability for an irregular document, the liability limitations of the Warsaw Convention are not forfeited because of defective notice.[86] Justice Scalia concludes that a delivered document does not fail to qualify as a passenger ticket simply because it is irregular.[87]

The majority opinion further reasons that innumerable situations could arise in which nondelivery or irregularity of a passenger document is so egregious that the document could not be described as a ticket.[88] However, eight-point type instead of ten-point type was not considered to be such a shortcoming.[89] Specifically, defective delivery is quite different than no delivery at all.[90] Justice Scalia bolstered his argument that defective delivery is different than no delivery by comparing the language of Article 3(2), which covers passenger tickets, with other Warsaw provisions, including Article 4,

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84. *Id.* Article 3(1) of the Warsaw Convention provides:

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
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> (a) The place and date of issue;
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> (b) The place of departure and of destination;
>
> (c) The agreed upon stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercised that right, the alteration 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.

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

85. *Id.* at art. 3(2). Article 3(2) of the Warsaw Convention states:

> (2) The absence, irregularity, or loss of the passenger ticket shall not effect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts the 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.

86. *Chan*, 109 S. Ct. at 1682-83.

87. *Id.* at 1684.

88. *Id.* at 1681.

89. *Id.* "Quite obviously, the use of 8-point type instead of 10-point type for the liability limitation notice is not a shortcoming of such magnitude . . . ." *Id. See, e.g.*, Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968), in which the lower court judge characterized the notice provisions on a passenger ticket given in 4-point type "as camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'." *Lisi*, 370 F.2d at 514.

90. *Chan*, 109 S. Ct. at 1683.

pertaining to baggage checks, and Articles 8 and 9, concerning airway bills.[91] He noted that these articles contain identical language providing that if the relevant document is not delivered, the air carrier cannot avail itself of the liability limitations.[92]

The Court points out that Warsaw's drafting history should be consulted only to elucidate ambiguous text. The majority believes the text of the Convention is clear,[93] as evidenced by the specific language in Article 3, so that the drafting history need not be consulted.[94] Furthermore, the Court cannot judicially amend the treaty with language from the Montreal Agreement.[95] The majority concluded that the Warsaw Convention treaty stands as written, leaving any supplemental provisions to be added through international negotiations, not by the American judiciary.[96]

As an additional argument, the petitioners asserted that an absurd conclusion would result if Warsaw mandated loss of the liability limitations as a sanction for defective notice on baggage and air freight, but not for personal injury or death.[97] Justice Scalia rejects this argument, stating that the result is not necessarily absurd.[98] In order to show that the result was not absurd, he gives a quick analysis of what the Warsaw drafters may have intended.[99] First, he posits that one must consider, as far as baggage and air freight are concerned, the level of liability in relation to the profits of the carriage.[100] He explains that the drafters may have believed the $8,300 liability limitations were equitable as applied to passengers, so that even if a passenger did not purchase added insurance, the recovery would still be "fair."[101] In contrast, shippers misled by defective notice would not be compensated fairly because the recoverable amount was based upon an average value of goods which varies considerably from article to article.[102] In sum, he reasons that a

91. *See* Warsaw Convention, *supra* note 3, at arts. 4, 8, 9.
92. *Chan*, 109 S. Ct. at 1682-83.
93. *Id.* at 1683-85. *See also id.* at 1686 (Brennan, J., concurring) (majority erred by disregarding treaty hearings in their interpretation, noting majority's viewpoint finds no support in historical minutes).
94. *Id.* at 1683.
95. *Id.* at 1684 n.5.
96. *Id.* at 1684 (quoting *The Amiable Isabella*, 6 Wheat. 1, 71, 5 L. Ed. 191 (1821)).
97. *Chan*, 109 S. Ct. at 1683.
98. *Id.*
99. *Id.* at 1683.
100. *Id.*
101. *Id.*
102. *Chan*, 109 S. Ct. at 1683.

passenger is likely to purchase personal insurance to cover the possibility of disaster, regardless of whether notice was given on the ticket.

Second, Justice Scalia explains that liability limits on baggage and freight under Warsaw are comparatively much lower than for personal injury and death.[103] Notice regarding the liability limits is important to baggage shippers because they would recover less for lost or damaged baggage. Third, and most significantly to Justice Scalia, people are more likely to purchase additional flight insurance to compensate for personal injury or death than for baggage.[104] Thus, in the event of injury or death, passengers are likely to recover more than the liability provision amounts from collateral sources, such as flight insurance. These reasons give a plausible explanation for a finding that the consequences of inadequate notice for baggage or freight are distinguishable from inadequate notice to passengers.[105] He stresses that the result produced by the text of the treaty is not necessarily absurd, as the petitioners contend, nor can it be dismissed as drafting error.[106]

D. The Concurrence

Justice Brennan, in his concurring opinion, responds to what he terms the majority's "self-affixed blindfold"[107] by noting that the petitioners' position has been accepted by virtually every court in the United States that has considered it.[108] In his opinion, the text of the Warsaw Convention is susceptible to more than one plausible interpretation and, therefore, recourse to the drafting history is useful.[109] According to Justice Brennan, by looking at the drafting history, one could conclude that the document's actual words do not totally reflect the drafters' intent.[110] Justice Brennan interprets the Warsaw Convention by delicately tracing Article 3, noting that the reference

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103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Chan*, 109 S. Ct. at 1684 (Brennan, J., concurring). When discussing the majority decision not to adhere to the lower court opinions developed over the past years, Justice Brennan stated: "It deserves at least to be stated in full, and to be considered without the self-affixed blindfold that prevents the Court from examining anything beyond the treaty language itself." *Id.*
108. *Id.* at 1684.
109. *Id.* at 1684-85 (Brennan, J., concurring).
110. *Id.* at 1690.

to "passenger ticket" in Article 3(2) is merely a shorthand term incorporating all the particular requirements listed in Article 3(1).[111] According to Justice Brennan, the meaning ascribed to Article 3(2) does not have the meaning that the majority gives it.[112] While Justice Scalia reads the two sentences as separate, independent ideas,[113] Justice Brennan asserts that they incorporate each other, so that Article 3(2) denies Warsaw's benefits where a passenger ticket does not strictly comply with the notice requirements.[114]

Furthermore, Justice Brennan states that Justice Scalia's interpretation of Article 3 does not have any support in the drafting history.[115] Justice Brennan explains that, on the contrary, his own position has extensive support in the Warsaw drafting history.[116] He cites specific language which shows that the drafters clearly intended the loss of liability sanction to apply equally to passenger tickets, baggage and air freight.[117] He concludes by stating that the Warsaw Convention's drafting history indicates that loss of the liability protections for air carriers who fail to give adequate notice on passenger tickets was aimed at getting member nations to comply with the notice requirement. The drafting participants feared that otherwise the signatory nations would not voluntarily comply.[118]

Justice Brennan believes that since notice is required, it must meet some minimal standard of adequacy.[119] Although he does not accept the Second Circuit's bright line test,[120] Justice Brennan stops short of defining adequate notice. The concurrence joined in the judgment

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111. *Id.* at 1685-86.

112. *Chan*, 109 S. Ct. at 1685 (Brennan, J., concurring).

113. *Id.* at 1681 n.3, 1684 n.5, where the majority responds to the concurrence.

114. *Id.* at 1685 (Brennan, J., concurring).

115. *Id.* at 1686 n.5: "Without responding in detail to the literalist critique, I will say this: . . . one finds virtually no support for the Court's theory of what Article 3 means." *Id.*

116. *Id.* at 1686-87.

117. *Chan*, 109 S. Ct. at 1686-87 (Brennan, J., concurring). "[T]he sanction for transporting passengers without regular tickets is the same as that for the transportation for baggages and for goods." *Id.* at 1687 (citing App. to Brief for the United States as *Amicus Curiae* at 73a, 92a). Justice Brennan also quotes the language of the drafters before the final document was approved: "If . . . the carrier accepts the traveler without having drawn up a passenger ticket, *or if the ticket does not contain the particulars indicated hereabove. . . .*" *Id.* (emphasis in original).

118. *Id.* at 1685. To support his argument, Justice Brennan gave an in depth analysis of the positions various countries took during the negotiation phase at Warsaw. *Id.* at 1687-90. However, Justice Brennan ultimately concluded that it is impossible to say what the drafters at Warsaw intended: "[T]he record that has been preserved makes it impossible to say with certainty what the treaty makers at Warsaw intended . . . ." *Id.* at 1690.

119. *Id.* at 1692.

120. *Id. See supra* notes 47-49 and accompanying text for the Second Circuit's bright line test.

because they agree with KAL, that if there is an adequacy of notice requirement, the eight-point type used on KAL's passenger tickets is adequate.[121]

E. The Majority Responds to the Concurrence

While agreeing in the ultimate conclusion, the majority and concurring opinions reflect diametrically opposed positions in their analyses of the notice requirements under the Warsaw Convention. Justice Scalia gives Warsaw a literal interpretation, taking issue with the concurrence's argument in two lengthy footnotes.[122] At the same time, Justice Brennan may have been attempting to minimize or narrow the majority's opinion, viewing the issue as more complex than Justice Scalia is willing to admit.[123] Justice Brennan believes that the interpretation of the treaty requires a more sophisticated approach to judicial interpretation, and that the majority's plain language method is too simplistic.

Justice Scalia, in a footnote, responds to Justice Brennan's interpretation of Article 3.[124] Justice Scalia characterizes Justice Brennan's first argument against the majority opinion as "nonsensical."[125] Justice Brennan first argues that the "passenger ticket" language in Article 3(2) is merely a shorthand reference incorporating the requirements of a passenger ticket set forth in Article 3(1).[126] In Justice Scalia's view, the two sections of Article 3 reference two distinct ideas and should not be read together. Justice Scalia does not believe that the drafters would have used a "shorthand reference" to another provision in the same Article when they could have accomplished the same purpose by using the language "such passenger ticket."[127] Thus, according to Justice Scalia the drafters could not have intended that Article 3(2) incorporate the requirements of Article 3(1).[128]

In Justice Scalia's view, the concurrence's second argument against the majority is flawed because it assumes the correctness of the conjunctive reading of Article 3(1) and (2).[129] Justice Scalia maintains

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121. *Chan*, 109 S. Ct. at 1693 (Brennan, J., concurring). "Here, however, the notice given was surely 'adequate' under any conventional interpretation of that term." *Id.*
122. *Id.* at 1681 n.3, 1684 n.5, where the majority responds to the concurrence.
123. *Id.* at 1693 (Brennan, J., concurring).
124. *Id.* at 1681 n.3 (Scalia, J.).
125. *Id.*
126. *Chan*, 109 S. Ct. at 1685-86 (Brennan, J., concurring).
127. *Id.* at 1681 n.3 (Scalia, J.).
128. *Id.*
129. *Id.*

that Article 3(2) cannot possibly refer to Article 3(1), as the concurrence contends, because the second sentence in Article 3(2) begins with "[n]evertheless," which sets forth an exception to the first sentence of Article 3(2):

> As written, the second sentence plainly conveys the meaning that if the reason for the 'absence' of a passenger ticket [covered by the first sentence] is that a passenger ticket *was never delivered*, the carrier shall 'nevertheless'—despite the first sentence—be unable to avail himself of the rules excluding or limiting liability. [emphasis in original][130]

Justice Brennan, however, would read the two sentences as inclusive of one another despite the "nevertheless" language contained in Article 3(2).[131]

Justice Scalia continues his response to the concurrence by noting that Justice Brennan, completing an analysis the majority declined to make, concluded that the drafters' intention cannot be determined.[132] According to Justice Scalia, the finding that the drafters' intention cannot be determined supports the majority position that only the text of the treaty should be used to resolve the dispute.[133] In addition, Justice Scalia states that Justice Brennan assumes an adequacy of notice requirement under the Warsaw Convention "for the sake of argument" because the lower courts have found one for years.[134] Justice Scalia explains that the Court's duty is to determine, not to assume, the correctness of lower court decisions on statutory or treaty interpretation matters.[135] He ultimately concludes that had the concurrence's viewpoint been adopted, the decision would have been judicially inefficient because the concurrence never defines "adequate."[136] Therefore, unpersuaded by Justice Brennan's arguments, Justice Scalia maintains his literal approach to interpreting the text of the Warsaw Convention.

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130. *Id.*

131. *Chan*, 109 S. Ct. at 1685-86 (Brennan, J., concurring).

132. *Id.* at 1684 n.5 (Scalia, J.). "It is interesting, therefore, that the concurrence, after performing the examination we consider inappropriate, concludes that it is 'impossible to say with certainty what the treaty makers at Warsaw intended.'" *Id.*

133. *Id.*

134. *Id.* "In its last four pages, the concurrence assumes for the sake of argument that there is an 'adequate notice' requirement in the Warsaw Convention—an assumption that it justifies by the fact that '[c]ourts in this country have generally read [such a] requirement into the Warsaw Convention." *Id.*

135. *Id.* "Of course they have read in such a requirement, and of course determining the validity of doing so—rather than assuming it—was the very reason we selected this case for review." *Id.*

136. *Chan*, 109 S. Ct. at 1684 n.5.

F. Analysis of the Opinions

The results reached by the majority and concurrence in *Chan* illustrate different perspectives on treaty interpretation. The majority opinion indicates that judicial treaty making will no longer be tolerated when interpreting the Warsaw Convention. Rather, the executive and legislative branches must negotiate for any revisions deemed necessary. The concurrence, however, draws upon the extensive drafting history of the Warsaw Convention in order to create an equitable solution for international air travelers who land at or depart from U.S. airports. The analyses used by both Justices to reach their respective conclusions, however, may have shortcomings.

Justice Scalia takes a simple, straightforward approach to the analysis of an extremely important issue in U.S. aviation industry. He gives a literal interpretation to the Warsaw Convention, stating that the provisions could lead to no other conclusion than what is indicated in the clear import of the treaty language:

> We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that the petitioners and the Solicitor General have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous. . . . But where the text is clear, as it is here, we have no power to insert an amendment.[137]

Justice Scalia produces weak grounds to support his denial of the petitioners' claim that "[i]t would be absurd . . . for defective notice to eliminate liability limits on baggage and air freight but not on personal injury and death."[138] His analysis, which is not grounded in either the treaty's drafting history or in prior case law, consists of speculation as to what the drafters might have intended.[139] Justice Scalia's speculations regarding the underlying intention of the drafters places greater importance on baggage recovery than on the loss of life or injury caused by airline mishaps. Such speculation is ineffectual as a persuasive analytic device.

Justice Brennan, on the other hand, recognizes the diverse ways in which a complex world interacts, and uses a liberal treaty inter-

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137. *Id.* at 1683-84.
138. *Id.* at 1683. *See supra* notes 97-106 and accompanying text.
139. *Chan*, 109 S. Ct. at 1683. "These estimations of what the drafters may have had in mind are of course speculation. . . ." *Id.*

pretation method which relies on the treaty's drafting history. While his drafting error argument is not entirely persuasive, it does represent a sound analysis of the time and effort that went in to drafting the treaty, a point which the majority chooses to ignore. Justice Brennan's viewpoint is plausible given the extensive drafting history which culminated in the final treaty.

Like Justice Scalia's approach, however, the approach used by Justice Brennan is also puzzling. Brennan explains that the result the majority called absurd—the loss of liability protections for baggage and air freight but not for personal injury or death—is the exact result intended by the Warsaw drafters prior to the final document reaching the conference floor.[140] If the drafters had intended that the document contain a loss of liability penalty for noncompliance with the notice provisions of Article 3, they presumably would have included that sanction in the finished document. Although the drafters' intent may be relevant to explain ambiguous terms in the text, their intent is not useful if the drafters failed to incorporate the language, to which their historical intent refers, into the text of the treaty.

Chan resolves the circuit split in favor of the position taken by the D.C. Circuit: the Warsaw Convention does not eliminate the limitation on damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation.[141] The majority opinion, comprised of those Justices commonly referred to as the "conservative block,"[142] makes unlikely the possibility that future Warsaw Convention cases will be interpreted in other than a literal manner. The *Chan* decision signals to the executive branch that in order to rid international air travel of these low liability limitations, the executive branch needs to negotiate directly with the international community. The federal government can no longer look to the courts to circumvent the Warsaw liability limitations. The *Chan* case is a cohesive and definitive statement on the interpretation of the Warsaw Convention in conjunction with the Montreal Agreement. Since *Chan* suggests a rigid adherence to the Warsaw language, litigators may want to attack the treaty on constitutional grounds as a means to circumvent the liability limitations.

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140. *Id.* at 1687 (Brennan, J., concurring).
141. *Id.* at 1684.
142. *See* Howard, *Living with the Warren Legacy*, 75 A.B.A. J. 69 (1989).

IV. CONSTITUTIONAL ISSUES

As an international treaty entered into by the United States, the Warsaw Convention enjoys a presumption of constitutional validity; the United States Supreme Court has never declared a treaty unconstitutional.[143] Although cases raising constitutional challenges to the Warsaw Convention are not uncommon in the lower courts,[144] the U.S. Supreme Court has never ruled on its constitutionality.[145] Challenges to the constitutionality of the Warsaw Convention might be made under the Due Process Clause,[146] the Equal Protection Clause,[147] the Takings Clause,[148] or under a right to travel analysis.[149]

Under a substantive due process analysis, one would argue that liability limitations are economic regulations and are, therefore, not a rational means to achieve a legitimate purpose.[150] Specifically, the justifications for the Warsaw Convention have become outdated. The argument would be that the regulation of international air travel today bears no rational relationship[151] to Warsaw's original purposes: to protect the fledgling airline industry from exposure to unlimited liability and to induce countries to adhere to uniform regulations

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143. *See* Jeffrey, *supra* note 17, at 815-16.

144. *Id.* at 816-21. *See also* Comment, *Warsaw Convention Limitations on Aircarrier Liability: A Critical View*, 17 INTER.-AM. L. REV. 577, 597-606 (1986) [hereinafter Comment, *Aircarrier Liability*] (analyzing lower court cases raising constitutional issues in Warsaw challenges).

145. *See* Comment, *Aircarrier Liability*, *supra* note 144, at 815; Kelso, *Review of the Supreme Court's 1988-89 Term and Preview of the 1989-90 Term for the Transnational Practitioner*, 2 TRANSNAT'L LAW. 353 (1989). Petitioners did not raise any constitutional issues in *Chan*. They instead argued two points: First, that Article 3 of the Warsaw Convention removed the liability protections if the aircarrier failed to provide adequate notice of Warsaw's applicability on its passenger tickets. *Chan*, 109 S. Ct. at 1679. Second, that the Montreal Agreement's 10-point type requirement is the standard for adequacy under Article 3. *Id.* The majority answered the first argument in the negative, thereby making consideration of the second unnecessary. *Id.*

146. U.S. CONST. amend. V, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." *Id.*

147. U.S. CONST. amend. XIV, "nor shall any State. . .deny to any person within its jurisdiction the equal protection of the laws." *Id.*

148. U.S. CONST. amend. V, "nor shall private property be taken for public use, without just compensation." *Id.*

149. *See* Comment, *Warsaw Convention Liability Limitations: Constitutional Issues*, 6 NW. J. INT'L L. & BUS. 896 (1984) [hereinafter Comment, *Constitutional Issues*] (discussing constitutional arguments against Warsaw Convention).

150. *Id.* at 914.

151. The rational relationship test dictates that an enactment stands if the means used to accomplish a goal are rationally related to legitimate legislative objectives. *See, e.g.*, Lindsley v. Natural Carbonic Gas, Co., 220 U.S. 61 (1911) (applying rational relationship test); U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (applying the rational relationship test with a "bite").

regarding international air travel.[152] An argument aimed at the first purpose might succeed since airlines are now multibillion dollar industries.[153] The second argument, that of adherence to uniform regulation, however, is likely to fail under a rational relationship analysis. The government has a legitimate purpose in committing to low liability limitations as a bargaining strategy to induce countries to agree to uniform regulation.[154] A due process challenge to the Warsaw Convention is not likely to succeed since one of the original purposes—maintaining adherence to uniform regulation—of the Warsaw Convention undoubtedly remains valid today.[155]

Under an equal protection analysis, all persons must be treated alike under similar circumstances and conditions.[156] Thus, one could argue hypothetically that two passengers sitting side by side on an aircraft, one flying domestically, the other internationally, are not treated the same in the event of disaster: the international traveler is subject to limited recovery due to the applicability of the Warsaw Convention, while the other may be entitled to unlimited recovery under domestic laws.[157] An equal protection challenge to the Warsaw Convention may succeed if the liability limitations are found not to be rationally related to a legitimate purpose.[158] One author suggests that this argument, while strong on the merits, is not likely to prevail given the current composition of the Court, in which the majority does not protect individual rights over those of big business.[159] More importantly, disparate treatment of the passengers will likely be found rationally related to the United States' desire to provide uniformity of regulations in international air travel. Thus, an equal protection argument, while facially strong on its merits, will meet with questionable success.

Finally, claims arguing either a taking of property without just compensation[160] or an infringement on the right to travel are also

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152. *See supra* notes 30-32 and accompanying text.

153. *See* Comment, *Constitutional Issues*, *supra* note 149, at 899. *See also* Note, *Warsaw Convention Limitation on Liability: The Need for Reform After* Coccia v. Turkish Airlines, 11 FORDHAM L. REV. 132, 141-42 (1987). "Today, in contrast, assets of the larger airlines are measured in billions of dollars a piece and full insurance coverage is available." *Id.*

154. *See* Comment, *Constitutional Issues*, *supra* note 149, at 900.

155. *Id.*

156. *See* Comment, *Aircarrier Liability*, *supra* note 144, at 604 (citing *In re* Air Crash in Bali, Indonesia, 684 F.2d 1301, 1309 (9th Cir. 1982)). The Ninth Circuit rejected both economic regulation and right to travel equal protection arguments. *Id.*

157. *Id.*

158. *See* Comment, *Constitutional Issues*, *supra* note 149, at 900.

159. *See* Comment, *Aircarrier Liability*, *supra* note 144, at 599.

160. *See* Jeffrey, *supra* note 17, at 821 ("claim" is property right requiring just compensation within Fifth Amendment).

likely to fail. The Warsaw Convention limits only the amount of recovery; it does not bar claims for injury or damages.[161] Therefore, a claim that the Convention takes away a property right is unfounded under Warsaw because the right to recover limited compensation is allowed. A right to travel challenge is also likely to fail. The liability limits under Warsaw neither restrict the right to travel, nor penalize international travelers; they simply protect airlines from unlimited liability.[162]

Although the likelihood of prevailing on a constitutional challenge to the Warsaw Convention is questionable given the current viability of the treaty in the international community,[163] the constitutional arguments are sound and should be briefed and properly brought before the U.S. Supreme Court. The current composition of the Court and the *Chan* decision make it unlikely that the Court will find the liability limitation protections of the Warsaw Convention unconstitutional. Perhaps the best recourse for passengers seeking increased liability limitations is to resort to the executive or legislative process to compel a change in the legal system.

V. A Look to the Future

The *Chan* case is significant because the decision comes at a time when legal scholars have begun to predict the demise of the Warsaw Convention.[164] Since the Court has indicated that the Warsaw Convention provisions no longer will be thwarted by active judicial interpretation, these scholars will need to rethink their positions.[165] The conservative majority[166] of the Court will likely continue to take a traditional approach to cases involving interpretation of the Warsaw Convention and not succumb to pressure from the executive branch to judicially alleviate the liability limits through the use of tangential issues such as adequacy of notice.[167] The United States government,

161. *See* Comment, *Constitutional Issues*, *supra* note 149, at 900.

162. *Id. See In re* Aircrash in Bali, Indonesia, 684 F.2d 1303 (9th Cir. 1983) (international travel found constitutionally protected fundamental right, however, effects of liability limitations only incidental, shifting insurance costs, not preventing travel).

163. *But see supra* note 21 (foreign courts interpretation of Warsaw Convention).

164. *See generally infra* note 176 for alternatives to the Warsaw Convention system.

165. *Id. See also* Mayne, Jr., *supra* note 19 (commenting upon U.S. Senate's rejection of Montreal Protocols).

166. *See supra* note 142 and accompanying text.

167. *See supra* note 21 listing lower courts that have interpreted the Warsaw Convention. *See also* Johnson & Minch, *The Warsaw Convention Before the Supreme Court: Preserving the Integrity of the System*, 52 J. Air L. & Com. 93, 93 (1986) [hereinafter Johnson & Minch] (noting Supreme Court policy condemning judicial activism in treaty interpretation); Current Development, *Montreal Protocols*, *supra* note 19 (Presidents Ford, Carter and Reagan favored Montreal Protocols).

in an amicus brief for the *Chan* case, indicated that the longstanding view of the executive branch is that adequate notice is a precondition to enforcement of the Warsaw liability limitations.[168] This view is reflected in the Montreal Agreement and U.S. law, which both specify ten-point type size.[169] However, as the *Chan* majority explained, Warsaw has no specific type size requirement.[170] Thus, even though the United States government desires that adequate notice be required under the Warsaw Convention, the U.S. Supreme Court will not read an adequacy standard into the treaty, particularly where the language of the treaty is clear and unambiguous.[171]

The Warsaw Convention and its progeny are in dire need of reform. The *Chan* majority undoubtedly recognizes that the limited liability afforded to international air carriers undermines the traditional approach to American tort liability.[172] The Warsaw Convention liability limitations are outdated and low compared to the multimillion dollar settlements which American airlines pay after domestic disasters.[173] Although increasingly high damage awards by lower courts indicate judicial reluctance to honor the Convention's liability limits, the Supreme Court has in the recent past accepted more Warsaw cases for review, and the *Chan* case foreshadows an end to the circumvention of the liability limitations by U.S. courts.[174] However, inherent difficulty in reform lies in achieving equitable solutions for both the airlines and their passengers.[175] Various legal scholars have pro-

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168. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 2, Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676 (1989).

169. *See supra* note 42.

170. *See generally* Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676 (1989) (discussing notice requirements under Warsaw Convention).

171. *Id.* at 1683-84.

172. *See* Jeffrey, *supra* note 17, at 830; *See also* TOBOLEWSKI, *supra* note 1, at 231 (noting maximum recovery under Convention does not fulfill needs of international community for just compensation). *But see* Cohen, *supra* note 1, at 79-84 (current American thinking indicates Americans want limited liability but not at current unconscionable levels).

173. *See* Jeffrey, *supra* note 17, at 815. *See also* TOBOLEWSKI, *supra* note 1, at 235: "[O]ne cannot avoid the conclusion that the monetary limits as expressed by the Warsaw System, and as applied today, are not adequate and are based on principles which are now outdated or unacceptable." *Id.*

174. *See* Johnson & Minch, *supra* note 167, at 93 (noting increasing trend in Supreme Court review of Warsaw cases). In the first 50 years following the passage of Warsaw, no cases were decided. In the period until 1965, there are less than 12 federal appellate decisions. *Id. See also* Mayne, Jr., *supra* note 19, at 20 (noting cases frequently settle for more than $75,000 because courts tend to treat gross negligence as equivalent of wilful misconduct); Wall St. J., Aug. 7, 1989, at B4, col. 1 (discussing case where federal district court awarded punitive damages based on wilful misconduct finding of KAL in Flight 007 downing).

175. *See* Note, *Proposed Revision of the Warsaw Convention*, 57 IND. L.J. 297, 312 n.100, 313 (1982) [hereinafter Note, *Proposed Revision*] (referencing United States airlines competition

posed alternatives to the Warsaw Convention.[176] While these proposals do not solve all the problems associated with the liability provisions in international air transportation, and in fact may prove to be too complicated[177] or ethnocentric,[178] they do reflect the frustration with the current levels of compensation.

Most scholars, however, do not suggest complete abandonment of the Warsaw Convention;[179] instead they discuss the necessity to increase the liability limitations in order to provide uniform recoveries among airline passengers.[180] These analyses do not address the issue

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with governmental subsidized airlines of foreign nations). Further, the solution needs to consider that many of the foreign airlines are owned by the national governments of their home states. *Id.*

176. *See* TOBOLEWSKI, *supra* note 1, at 232, who suggests that liability ceilings should be set at a maximum level based upon the total amount of insurance carried by a particular type of aircraft. *Id. See also* Jacobs & Kiker, *Accident Compensation for Airline Passengers: An Economic Analysis of Liability Rules under the Warsaw Convention*, 51 J. AIR L. & COM. 589, 597-605 (1986) [hereinafter Jacobs & Kiker] (applying complicated algebraic formula leading to target level of compensation based upon actual economic loss incurred by death or injury; avoiding arbitrariness of maximum compensation provided by international agreements); Note, *Proposed Revision*, *supra* note 175 (proposing adequate compensation for American passengers under new tripartite system of recovery reflective of airline industry's financial status).

177. *See* Jacobs & Kiker, *supra* note 176.

178. *See* Note, *Proposed Revision*, *supra* note 175.

179. *But see* Note, *Torts—International Liability Limitation Agreements*, 53 J. AIR L. & COM. 839 (1988) (suggesting Warsaw is outdated and may need to be abandoned but abandonment is not within the province of the judiciary).

180. *See* Cohen, *supra* note 1; *See also* Dean, Jr., *American Liability in International Air Transportation: Time for a Change*, 4 AIR & SPACE LAW. 1 (1989) [hereinafter Dean, Jr.] (calling for ratification of Montreal Protocols). *See, e.g.*, Comment, *Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the Warsaw Convention*, 54 CHI.-KENT L. REV. 851, 863-68 (1978), for arguments in favor and opposed to the present system, ultimately concluding that "The government must feel compelled to renounce the treaty and to seek a new protocol that is more evenly matched between the competing interests of plaintiffs and the airlines." *Id.* at 866. *See also* Comment, *Aviation Law—Limitation of Liability of Airline Agents and Employees under the Warsaw Convention*, 12 SUFFOLK U.L. REV. 117 (1978) (discussing need to change liability limitations to a reasonable level or to renounce treaty in its entirety, but Warsaw remains legally binding). *See also* the following articles dealing with the *Franklin Mint* case: Note, *Torts—Liability Limitations Under the Warsaw Convention*—Trans World Airways, Inc. v. Franklin Mint Corp., 104 S.C. 1776 (1984), 50 J. AIR L. & COM. 155 (1984) (recognizing Supreme Court disdain for low liability limitations and calling upon executive branch to act to change them); Recent Development, *Aviation—Article 22 of the Warsaw Convention*, 7 FORDHAM L.J. 592 (1984) (discussing problems of continued adherence to treaty and calling for legislative revision of Convention system); Recent Development, *Aviation: Enforceability of Warsaw Convention Limits on Liability in the U.S.*—Franklin Mint v. TWA, 24 HARV. INT'L L.J. 183 (1983) (suggesting Supreme Court send message to legislature to revise treaty); Recent Development, Franklin Mint Corporation v. Trans World Airlines, Inc.: *Limiting Air Carrier Liability Under the Warsaw Convention*, 11 SYRACUSE J. INT'L L. & COM. 651 (1984) (discussing continued viability of Warsaw Convention after repeal of gold standard currency); Note, *The Demise of the Liability Limitations of the Warsaw Convention—An Unnecessary Fatality:* Franklin Mint Corp. v. Trans World Airlines, Inc., 57 ST. JOHN'S L. REV. 592 (1983) (recommending adoption

of whether the Warsaw Convention has outlived its usefulness.[181] Other scholars contend that U.S. credibility and influence abroad would be adversely affected if the damage limitations are abandoned or changed significantly.[182] Their opinions are based largely upon the fact that most of the impetus for change to the current system is due to U.S. dissatisfaction with the liability limitations as they currently stand.[183] Since various amendments designed to increase the liability limitations have failed to gain the requisite support for passage in the Senate, the United States could be disadvantaged in subsequent negotiations.[184] The time is ripe for the United States to once again reconsider its membership in the Warsaw Convention as it did when it gave notice of its intention to denounce membership in 1966.[185]

Have the Warsaw Convention and its limited liability provisions outlived their usefulness? At a minimum the liability limitations are grossly inadequate in the modern, industrialized world. Conversely, large damage awards, although expected by U.S. plaintiffs, may not be in the best interest of lesser developed countries. Certainly the *Chan* opinion will foster rejuvenated interest in this perplexing problem.

VI. CONCLUSION

Chan indicates that the U.S. Supreme Court, when interpreting Warsaw Convention cases, will strictly apply its provisions, maintaining adherence to the liability limitations found therein. No longer will "loopholes," such as inadequate notice, be tolerated. In light of *Chan*, those who believe that the judiciary is in the process of dismantling Warsaw will need to rethink their positions. The *Chan*

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of Special Drawing Rights to maintain continued adherence to Warsaw Convention); *See also* Comment, Saks: *A Clarification of the Warsaw Convention Passenger Liability Standards*, 16 INTER.-AM. L. REV. 539 (1985) (noting Supreme Court considers Warsaw a viable treaty but suggesting Congress might act since entirely new system needed for regulating air carrier liability).

181. *See generally supra* note 180 for references to articles dealing with the cited proposition. *But see* Jeffrey, *supra* note 17, at 806 n.3, (criticizing Warsaw's low liability limits); and at 830 (liability limits are an affront to full, adequate compensation and have outlived their usefulness). In addition, airlines today are powerful, safe, stable and insurable. *Id.*

182. *See* Dean, Jr., *supra* note 180. *See also* Current Development, *Montreal Protocols*, *supra* note 19 (indicating influence, authority and credibility of United States impaired in future negotiations if Montreal Protocols rejected).

183. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 504-05.

184. *See* Dean, Jr., *supra* note 180, at 9 (stating denunciation would subject United States to allegations it conducted its foreign policy in bad faith).

185. *See* Lowenfeld & Mendelsohn, *supra* note 6, at 546-52.

Court has signaled the end of the judicial activism that has permeated the lower courts' interpretation of Warsaw cases. The United States legislative and executive branches should accept the responsibility to rectify inequities regarding air carrier liability by negotiating internationally to make the system just for all airline passengers. After *Chan*, U.S. passengers traveling on international flights will not be able to rely on the judiciary to override the Warsaw Convention and award compensation which Americans consider reasonable for injuries or damages that might occur.

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