



1967

Warsaw Convention: Treaty under Pressure

Jay Levine

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

 Part of the [International Law Commons](#), and the [Torts Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Jay Levine, Warsaw Convention: Treaty under Pressure, 16 Clev.-Marshall L. Rev. 327 (1967)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Warsaw Convention: Treaty Under Pressure

Jay Levine*

THE MAJOR UNITED STATES and foreign airlines have agreed¹ to absolute liability for provable damages up to \$75,000 for injury or death of passengers on Warsaw Convention² flights to, from, or stopping in, the United States. For the vast majority of Americans on international flights, the Agreement disposes of the Convention's liability limit of \$8,300.³ And the *Lisi* opinion⁴ of the Second Circuit may make the Convention a dead letter for accidents occurring before the Agreement.

Strains in the Warsaw Convention

Drafted in 1929, the protection of a foundling airline industry was a primary objective of the Convention. But the fostering of international air commerce also required some inducement to travelers. The Convention reconciled competing considerations:

- a. by creating a presumption of carrier liability;⁵
- b. by making it very difficult to rebut the presumption (to do so, the carrier must show that it had taken all necessary measures to avoid the damage or that it was impossible to have done so);⁶
- c. by limiting this presumptive liability to \$8,300;⁷
- d. by voiding any contractual lowering of this limit,⁸ and
- e. by imposing a burden on the claimant to prove wilful misconduct to recover in excess of the limit.⁹

At the Hague in 1955, twenty-six countries signed an amendatory Protocol¹⁰ to the Convention. The United States participated in the conference but did not sign the Protocol until 1956. The Protocol doubled the liability limit to \$16,600,¹¹ fostered the illusion that recoveries in

* Practising Law Institute (New York City), Education Publications Editor; member of the New York Bar.

¹ Agreement C. A. B. 18900; C. A. B. Order No. E-23680, 31 Fed. Reg. 7302 (1966).

² 49 Stat. 3000, T. S. 876 (1934).

³ *Id.*, Article 22(1).

⁴ *Lisi v. Alitalia-Linee Aeree Italiane*, Docket Nos. 30543-4-5-6-7, 2d Cir., Dec. 16, 1966, 9 CCH Av. L. Rep. § 18,374, affirming 253 F. Supp. 237 (S. D. N. Y. 1966), petition for rehearing in banc filed Dec. 29, 1966.

⁵ Warsaw Convention, Article 17, *supra*, n. 2.

⁶ *Ibid.*, Art. 20(1), *supra*, n. 2.

⁷ *Id.*, Art. 22(1), *supra*, n. 2.

⁸ *Id.*, Art. 23, *supra*, n. 2.

⁹ *Id.*, Art. 25, *supra*, n. 2.

¹⁰ The text of the Protocol may be found in 2 CCH Av. L. Rep. §§ 27, 101-128.

¹¹ Hague Protocol, Article XI, *supra*, n. 10.

the United States might go as high as \$25,000,¹² and endorsed a rigid interpretation of wilful misconduct.¹³ The Protocol came into force, among those countries that ratified it, on August 1, 1963.

We have never ratified the Protocol. Our desire for a higher limit had been a major reason for invoking the conference at the Hague, and our representatives had urged a figure higher than that settled upon. The Administration was irresolute in presenting the Protocol to the Senate and recommended ratification only if coupled with federal legislation providing for automatic compulsory insurance of an additional \$50,000 for each passenger.

The Senate Foreign Relations Committee was even less impressed by the Protocol. It recommended that if the insurance legislation did not pass the Congress by the time of adjournment in 1965, the State Department should withdraw from the Warsaw Convention.

Congress did not act on the compulsory insurance legislation in 1965. The State Department, threatening denunciation of the Convention, tried to persuade the U. S. lines voluntarily to increase their limits to \$100,000. They would not do so. With more brass than the carriers expected, the State Department then denounced the Convention on November 15, 1965.¹⁴ In accordance with the Convention's provision for denunciation,¹⁵ ours was to be effective in six months, on May 15, 1966.

The International Civil Aviation Organization, an intergovernmental body, convened in Montreal in February, 1966 to respond to our action. Our representatives opted for amendment of the Warsaw limit to \$100,000 but no figure could be settled upon. Indeed, views on an appropriate limit and on the sufficiency of data upon which to make a decision were so disparate that the conference left little hope of early amendment to the Convention.

On the failure of the ICAO conference, the Director General of the International Air Transport Association, an organization of U. S. and foreign *carriers* engaged in international transport, undertook what

¹² *Id.* The Protocol would have permitted a local court to add counsel fees to an award if that were local practice. There was no requirement to do so. Addition of counsel fees is not local practice in the United States in negligence cases.

¹³ Hague Protocol, Article XIV, *supra*, n. 10. The Protocol would have permitted unlimited liability on a showing that the pilot or other agent acted with intent to cause damage or recklessly and with knowledge that damage would probably result. This was essentially the instruction on wilful misconduct in the Jane Froman case. *Froman v. Pan American Airways*, 284 App. Div. 935, 135 N. Y. S. 2d 619 (1954), leave to appeal denied, 308 N. Y. 1050, cert. denied, 349 U. S. 947 (1955). The vitality of this rather strict definition was reaffirmed in *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F. 2d 532 (2d Cir. 1965), cert. denied 382 U. S. 816 (1965).

¹⁴ The Polish Foreign Ministry is the official depository of the Convention. Warsaw Convention, Articles 36-39, *supra*, n. 2. Our denunciation was effected by a note filed with the Ministry by our Ambassador in Warsaw. The text of the note is in Dept. of State Press Release No. 268, 15 Nov. 1965, reprinted at 31 J. Air L. & Com. 303 (1965).

¹⁵ Warsaw Convention, Article 39, *supra*, n. 2.

could not theretofore be accomplished. By the middle of May, 1966, IATA had secured the consent of 11 U. S. and 17 foreign carriers, and the assurances of others, to an agreement sufficient to warrant the State Department's withdrawal of our denunciation of the Convention. On May 14, 1966, one day before the denunciation would have been effective, we withdrew it.^{16, 17}

Vitamin Therapy

The Agreement¹⁸ builds upon the scope of the Convention, which scope depends on the places listed on the passenger ticket.¹⁹ The Convention applies if the place of departure or a place of destination are airports within two countries that adhere to the Convention,²⁰ even if there is a stop within a non-adherent or if the ticket provides for further transit on to a non-adherent. This further transit may be on another carrier. The Convention also applies to a round trip ticket for passage from an adherent, to a non-adherent, and back again.²¹ It would not apply to a round trip starting in a non-adherent, going directly to an adherent and also returning non-stop to the non-adherent.

The Agreement applies to transportation within the scope of the Convention in which a point in the United States is an agreed starting point, termination point or stopping point. A host of flight arrangements involving the Convention and the Agreement may be summarized as follows:

- a. An entire flight ticketed between the United States and another Warsaw adherent, with either as the point of origin or destination, even with stops in a non-adherent.
- b. An entire flight ticketed to include the United States and another Warsaw adherent as a segment of the flight, even if the ticket points start from, and/or continue on to, a non-adherent to Warsaw.
- c. A round trip ticket from the United States to and from a non-adherent (but not a round trip from the non-adherent, to the United States, and back again).

¹⁶ Withdrawal was also effected by a note filed by our Ambassador in Warsaw with the Polish Foreign Ministry. The text of the note is in Dep't State Press Release No. 110, 13 May 1966, reprinted at 32 J. Air L. & Com. 247 (1966).

¹⁷ A thorough study of the history of the U. S. relationship to the Warsaw Convention and of its efforts to improve the liability limit leading to the 1966 inter-airline agreement, is in Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497-602 (1967). A shorter treatment through the denunciation is in Kriendler, *The Denunciation of the Warsaw Convention*, 31 J. Air L. & Com. 291 (1965) and, for events thereafter and through the withdrawal of the denunciation, press releases of the State Department reprinted at 32 J. Air L. & Com. 243 (1966).

¹⁸ Agreement C. A. B. 18900, *supra*, n. 1.

¹⁹ Warsaw Convention, Article 1, *supra*, n. 2.

²⁰ For a list of Warsaw adherents, see 2 CCH Av. L. Rep. § 27, 053.

²¹ *E.g.*, Glenn v. Compania Cubana de Aviacion, S. A., 102 F. Supp. 631 (S. D. Fla. 1952) (round trip from U. S. to Cuba, a non-adherent).

Airline ticket offices generally have authority to provide, on their own ticket form, for connecting or return flights on another carrier. Both the Convention²² and the Agreement contemplate this practice. Also, it should be noted that the scope of the Convention and of the Agreement depend upon the points of origin, destination, or stops of a flight, not on the nationality of the carrier²³ or of the passenger.

As to liability limit, each signatory agrees to \$75,000 including legal fees and costs of litigation for death, wounding or other bodily injury. For jurisdictions where separate award is made of counsel fees and costs, the limit is \$58,000. This dichotomy will have little practical significance in the United States. Counsel fees are not awarded separately in crash cases.

The absolute nature of liability is effected by another provision of the Agreement: the carrier may not raise, in a case of death, wounding, or other bodily injury, its Warsaw defense that it has taken all necessary measures to avoid the accident or that it was impossible to do so. Nothing within the Agreement, however, is to affect the rights and liability of the carrier with regard to any claim brought by, or in respect to any person who wilfully causes damage which results in death, wounding or other bodily injury of, a passenger.

The Warsaw Convention allows a contributory negligence defense.²⁴ Its provision for such defense is not referred to in the Agreement, and the reservation respecting the saboteur is not a limitation on such defense. This defense would also be available against the saboteur who is on the plane but not if the saboteur is not a passenger. It is the latter possibility, although not exclusively, that prompted the Agreement's reservation respecting sabotage.²⁵ The reservation does not bar claimants having no relation to the saboteur.

Each signatory further agrees, on delivery of the ticket, to furnish to each passenger affected by the Convention, a notice in at least 10-point type (this page is 10-point type) of the limit of the Convention and of the higher limit of the Agreement. The notice may be (i) printed on the ticket, (ii) on a piece of paper placed with the ticket in the ticket envelope or attached to the ticket or (iii) on the ticket envelope.

Every signatory is also to keep at its ticket counters an up-to-date list of all other signatories. The Convention confines liability for death or personal injuries to the carrier performing the leg of the journey on

²² Warsaw Convention, Article 30(1), *supra*, n. 2.

²³ *E.g.*, Glenn v. Compania Cubana de Aviacion, S. A., *supra*, n. 21. Of course, only the Convention was involved in this case.

²⁴ Warsaw Convention, Article 21, *supra*, n. 2.

²⁵ Comments of the United States of America, Panel of Experts on Limits for Passengers under the Warsaw Convention and the Hague Protocol, September 30, 1966 (hereinafter, *Comments*). This document was prepared for a meeting of the International Civil Aviation Organization in January, 1967. The ICAO will publish the documents prepared for the meeting.

which the accident occurs.²⁶ A passenger who must connect with, or return on, another line and wishes to make one ticket arrangement covering his entire trip will be able to see if that other line subscribes to the Agreement. Withdrawal from the Agreement is to be on twelve months' notice to the C.A.B. and the other signatories.

Each signatory was to incorporate the Agreement into its tariffs, effective May 16, 1966, filed with the C.A.B. or with any other government. The liability limitation in the Convention authorizes variation upward by agreement between the carrier and the passenger.²⁷ Whether on the theory (a) that filed tariffs are incorporated in an agreement between the carrier and the passenger as evidenced by the ticket or (b) that the passenger is the beneficiary of an inter-line agreement, it is this authorization upon which the raising to the \$75,000 limit may be founded.

Inter-airline agreements must be filed for review and approval with the C.A.B.,²⁸ and the Agreement was conditioned on such approval. The Board approved on May 13, 1966.²⁹ In doing so, it provided that any carrier could become a party to the Agreement by filing a counterpart with the Board. The signatories climbed from 28 in May, 1966 to 80 in December.³⁰ Delta, National and United had agreed to everything except the waiver of the Warsaw defense respecting the taking of all possible measures. They too have now also agreed not to raise this defense. A few carriers have not signed the Agreement but have filed tariffs incorporating its essential provisions. If they seek some advantage by this course, it may be quicker withdrawal from the arrangement.³¹

The time period of the Convention's application to accidents—on board the aircraft or in any of the operations of embarking or disembarking³²—is not changed by the Agreement.

The Agreement makes no change in the Convention's system for baggage and cargo. For checked baggage and cargo, a conventional declared value system is employed as to damages. Unless the shipper declares the value and pays increased freight charges based on evaluation, a limit of liability of about \$7.50 per pound applies to checked baggage and cargo.³³ Liability is also presumed for checked baggage and

²⁶ Warsaw Convention, Article 30(2), *supra*, n. 2.

²⁷ *Ibid.*, Art. 22(1), *supra*, n. 2.

²⁸ Federal Aviation Act of 1958, § 412; 49 U. S. C. § 1382.

²⁹ C. A. B. Order No. E-23680, 31 Fed. Reg. 7302 (1966).

³⁰ A list of carriers that have signed the Agreement may be found at 2 CCH Av. L. Rep. § 27, 130.

³¹ Tariff amendments must be filed at least thirty days before their effective date. 14 C. F. R. § 221.160(a).

³² Warsaw Convention, Article 17, *supra*, n. 2.

³³ *Ibid.*, Art. 22(2), *supra*, n. 2.

cargo.³⁴ The carrier again has the defense that it took all necessary measures to avoid the damage or that it was impossible to take such measures.³⁵

For what the passenger carries aboard himself, the limit of liability is approximately \$330 per passenger regardless of the weight of the items.³⁶ There is no treaty presumption of liability for what the passenger carries aboard. However, it is generally impossible to reconstruct what the passenger checked or carried aboard.

As to goods and baggage, without distinguishing as to whether they are checked or unchecked, but not as to personal injuries or death, the Convention relieves the carrier from *respondet superior* liability for piloting or navigation errors, provided that in all other respects, the carrier took all necessary measures to avoid the damage.³⁷ This defense is virtually inactive.

The Agreement reverses a disparity in application that had been a telling argument against the Convention. Suppose two passengers are on a Cleveland to New York flight, but the ticket of one provides for continuation on to London. Suppose further, an accident occurs before reaching New York. The \$8,300 limit of the Convention would have bound the passenger going to London, but not the one going only to New York.³⁸

Now, the disparity will appear in a modified form. A passenger flying from, say, Rome to London, involved in an accident between those cities, will be bound by the Convention. His fellow passenger carrying a ticket for passage to New York may assert the Agreement.

The Agreement does not protect a person flying one way from the United States to a country that does not adhere to the Convention unless the ticketed stop is an airport within an adherent country, even if the carrier has signed the Agreement. As such passage is not international transportation within the meaning of the Convention, it is not covered by the Agreement. A few of the signers of the Agreement are carriers of nations that do not adhere to the Convention. Their signing does not bring their country within the Warsaw system. A one-way non-stop ticket between the United States and their home country would not be covered by the Agreement.

Nor, obviously, does the Agreement protect a passenger on a carrier that is not a signatory even if the flight is within the scope of the Convention and the Agreement. The number of non-signers should decline. The fact that each signatory to the Agreement has a list of all other

³⁴ *Id.*, Art. 18(1), *supra*, n. 2.

³⁵ *Id.*, Art. 20(1), *supra*, n. 2.

³⁶ *Id.*, Art. 22(3), *supra*, n. 3.

³⁷ *Id.*, Art. 20(2), *supra*, n. 2.

³⁸ *E.g.*, *Winsor v. United Air Lines, Inc.*, 153 F. Supp. 244 (E. D. N. Y. 1957).

signatories will induce signing to secure inter-line business. Also, the carriers are required to keep a poster notice on their ticket counters to the effect that the Warsaw Convention, and its limit of liability, may apply to a passenger's projected trip.³⁹ The C.A.B. is considering a different counter notice for the carriers that have signed.⁴⁰ Finally, on applications for renewal of foreign air carrier permits, the Board Counsel is taking the position that renewal be conditioned on signing the Agreement.

Americans travelling between two foreign countries on a ticket that does not include a point in the United States as origin, destination, or stopping place are not protected by the Agreement. Their flight may be subject to the Convention, if ticketed within its scope, to the Hague Protocol if between two adherents to that amendment of the Convention, or to neither.

Ironically, the passenger on a flight not covered by the Convention, the Hague Protocol, or the Agreement, may be the best protected. Sufficient contacts with a state with no limitation of liability may exist to permit enforcement of that state's cause as opposed to a possible limited cause of the locale of the accident. Many foreign causes incorporate the Warsaw and Hague limits and their presumption of liability.⁴¹ Forsaking such a foreign cause for one of a U. S. state entails forsaking the presumption. But if plaintiff can present no explanation of the accident, he can fall back on the doctrine of *res ipsa loquitur* which affords an inference of negligence that would at least get him to the jury.⁴²

However, if the cause settled upon by the significant contacts approach is itself limited, the limit may not give way to a policy of the forum against enforcing limitations. The federal courts have held that New York's policy against limits⁴³ will not give way to the limit of the appropriate foreign cause in a death action brought by non-residents⁴⁴ or in a personal injury action brought even by a New Yorker.⁴⁵ In a

³⁹ 14 C. F. R. § 221. 175.

⁴⁰ 31 Fed. Reg. 12573.

⁴¹ Tables summarizing the principles of foreign causes are in International Civil Aviation Organization, Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and the Hague Protocol, Vol. II—Documents, at pp. 29-50 (1966). ICAO Doc. No. 8584—LC/154-2.

⁴² Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 *Harv. L. Rev.* 497, 521-2 (1967). However, defendants have fared well when plaintiffs have had to depend on *res ipsa loquitur* in air crashes. *Sand, Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention*, 28 *J. Air L. & Com.* 260, 262 (1962).

⁴³ *Kilberg v. Northeast Airlines, Inc.*, 9 *N. Y. 2d* 34, 172 *N. E. 2d* 526, 211 *N. Y. S. 2d* 133 (1961).

⁴⁴ *Campbell v. Trans-World Airlines, Inc.*, 9 *CCH Av. L. Rep.* § 18, 223 (S. D. N. Y. 1965), affirmed Jan. 12, 1966 (2d Cir.), cert. denied, 385 *U. S.* 824 (1966) (Limit of New Mexico death statute enforced against non-residents of New York).

⁴⁵ *Ciprari v. Servicos Aereos Cruzeiro do sul, S. A.*, 359 *F. 2d* 855 (2d Cir. 1966), affirming 245 *F. Supp.* 819 (S. D. N. Y. 1965). (Brazilian limit enforced against New Yorker on business flight within Brazil.)

death action by a New Yorker his domicile and the interest of New York in the administration of his estate would be strong factors in inducing selection of New York's unlimited cause in the first place.⁴⁶

The passenger on a flight governed by the Convention or the Protocol, but not the Agreement, would be better protected had we not withdrawn our denunciation of the Convention. Although varied in many of its applications by the Agreement, it remains, as a treaty to which we adhere, part of the supreme law of the land. Its limits take precedence over state damage rules or policies. Constitutional attacks on the Convention's limit as a deprivation of property without due process,⁴⁷ as a denial of the right to jury trial⁴⁸ and as in excess of the treaty making power⁴⁹ have been tried without success.⁵⁰

As to causes governed by the Agreement, the C.A.B. calculates that its \$75,000 limit is sufficient for 76 per cent of airline passengers or their representatives.⁵¹ To establish absolute liability, the pleading would have to allege:

- a. that the airport locations on the ticket invoke the Convention;
- b. that one of the locations—of starting point, destination or stopping place—is within the United States; and
- c. that an accident occurred within flight or in the course of embarking or disembarking.

Writing in the *ABA Journal*,⁵² Milton G. Sincoff, a member of a firm that has been prominent in the development of air crash injury law, then recommends a motion for summary judgment on the sole issue of liability, where available under local practice, leaving only the issue of damages for trial. Where damages are greater than \$75,000, Mr. Sincoff recommends a second cause of action alleging wilful misconduct. The ensuing procedure would again be a motion for summary

⁴⁶ *Long v. Pan American World Airways*, 16 N. Y. 2d 337, 213 N. E. 2d 796, 266 N. Y. S. 2d 513 (1965). In *Long*, a plane disintegrated over the Delaware-Maryland border. The wreckage fell in Maryland. Plaintiffs' decedents had been Pennsylvanians. New York, as an impartial forum, enforced Pennsylvania's causes as opposed to Maryland's.

⁴⁷ *Indemnity Insurance Co. of North America v. Pan American Airways*, 58 F. Supp. 338 (S. D. N. Y. 1944).

⁴⁸ *Pierre v. Eastern Air Lines*, 152 F. Supp. 486 (D. C. N. J. 1957).

⁴⁹ *Indemnity Insurance Co. of North America v. Pan American Airways*, *supra*, n. 47.

⁵⁰ A broad constitutional attack on the Convention on all of these grounds was attempted in nine cases in 1964. But plaintiffs' vehicle was wrong, and the merits were never reached. Plaintiffs moved for the convening of a three-judge court pursuant to 28 U. S. C. §§ 2282 and 2284 to enjoin enforcement of the Convention, which had been or would have been raised in these cases as an affirmative defense. The court ruled that their petitions were lacking in equity and that the Convention, as a treaty, did not fit within the term "statute" in 28 U. S. C. §§ 2282 and 2284. *Boryk v. Aerolineas Argentinas* (and eight other cases), Civil Jury Nos. 64-2718 to 64-2726, S. D. N. Y., Sept. 29, 1964, 9 CCH Av. L. Rep. § 17, 273.

⁵¹ *Comments, supra*, n. 25.

⁵² Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 A. B. A. J. 1122 (1966).

judgment on the first cause relating to absolute liability followed by a trial on damages. If the verdict is in excess of \$75,000, that sum would be collected to, in effect, finance a subsequent trial to prove wilful misconduct. Success of this second trial would enable entry of judgment, subject to a credit for whatever has been paid, for the full verdict from the damage trial. Finally, Mr. Sincoff recommends a cause predicated on the carrier's failure to give effective notice of the limits on its liability.

Surgical Therapy

The Convention requires that notice of its liability terms be placed on the ticket⁵³ and that a carrier may not accept a passenger without a ticket having been delivered.⁵⁴ Failure to comply with either of these provisions entails loss to the carrier of the Convention's provisions limiting or excluding liability.⁵⁵ The ticket must be delivered in sufficient time to give the passenger a reasonable opportunity to protect himself, such as by buying flight insurance or staying home.⁵⁶ He might also make a special contract with the carrier, but this is never done.

Now, *Lisi* says that the passenger must have actual notice of the liability limitation and that the standard form ticket in use in international transportation since 1957 does not give it.⁵⁷ The ticket's mention of the Convention is too small and indistinct, and too confusing, to give notice.⁵⁸

Since 1963, all U. S. and foreign carriers have been required by the C.A.B. to give, to each passenger whose flight would be covered by the Convention and would involve departure or destination in the United States, a notice of the Convention in one of the same ways now permitted by the Agreement and also in 10-point type.⁵⁹ The language of this notice is similar to that dictated in the Agreement. The notice is also to appear, in letters at least one-fourth of an inch high, on a sign at each counter and ticket agency.⁶⁰

Lisi arose out of a crash, where tickets were issued in 1960, three years before the C.A.B. regulation for notice. However, the ticket stock in *Lisi* was agreed upon by the International Air Transport As-

⁵³ Warsaw Convention, Article 3(1), *supra*, n. 2.

⁵⁴ *Ibid.*, Art. 3(2), *supra*, n. 2.

⁵⁵ *Ibid.* The Convention literally imposes this penalty only for failure to deliver a ticket. *Lisi*, *supra*, n. 4, says that the penalty flows if a ticket is delivered but without the notice.

⁵⁶ *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir.), cert. denied, 382 U. S. 816 (1965); *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965).

⁵⁷ *Lisi v. Alitalia*, *supra*, n. 4.

⁵⁸ The body of the *Lisi* opinion discusses the size and obscurity of the notice. But a footnote mentions its ambiguity as another ground of inadequacy.

⁵⁹ 14 C. F. R. § 221. 175.

⁶⁰ *Ibid.*

sociation and has been used to date without significant variation by all international carriers. Indeed, not all the tickets in *Lisi* were issued by the defendant. Three were issued by T.W.A. and included the fatal Alitalia flight for a return from Rome.

It is questionable whether compliance with the alternatives offered by the C.A.B. regulation and the Agreement, of placing the notice on a piece of paper or on the ticket envelope, as opposed to placing it on the ticket, would be compliance with the Convention. The separate but accompanying notice may be deemed included in the contract with the passenger, the term used in the article of the Convention defining its scope. But the Convention article calling for notice specifies the ticket. The liability limitation in the Convention authorizes variation upward by special agreement. No authorization of variation appears in the Convention's provision for notice on the ticket.

However, the concept of effective delivery is itself a liberal interpretation of the notice provision of the Convention. The courts may be expected not to penalize a carrier merely because it has adopted an alternative promulgated by the C.A.B. or sanctioned by an agreement of which the C.A.B. has been an ardent sponsor. The Board also approved the standard ticket form involved in *Lisi*,⁶¹ but its role was far more passive. Similarly, it will be embarrassing to the C.A.B., our agency most active in executing air carrier regulation, not to defer to its choice of words and type size in interpreting the concept of effective delivery under the Convention.

The notice could, however, be considerably improved. Both the 1963 C.A.B. regulation and the Agreement expressly, and the Convention implicitly, call for giving of notice to those passengers affected by these arrangements. But the prescribed language in the C.A.B. regulation and the Agreement, probably because counter personnel cannot be relied upon to distinguish Warsaw or Agreement flights, describe a highly qualified and conditioned notice for indiscriminate distribution. The recipient does not know if his flight will actually be governed by these arrangements. It should be possible

- a. for the notice distinctly to say to a particular passenger that his flight is subject to these arrangements and
- b. to program a computer to absorb any arrangement of ticket points and to advise whether a particular ticket requires giving the specific notice to the traveller, just as ticket agents have an instrument at their counter that advises of the reservation status of a flight.

The C.A.B. regulation and the Agreement provoke another practical problem in light of *Lisi*. Many passengers never see their tickets or do not receive them from the airline, and they may have no occasion to

⁶¹ 24 C. A. B. 575 (1957).

see the counter notice. Husbands buy, hold and present tickets for their families. Secretaries buy tickets for their employers. The record in *Lisi* includes an affidavit by a claimant who was 18 at the time of the accident to the effect that he never saw the tickets; his mother had them. Also, the airlines accommodate latecomers and hold tickets until flight time for passengers who have reserved well in advance.

A similar problem arose twenty years ago in the *Froman* case. Miss Froman was injured on a U.S.O. tour. A tour manager handled all flight arrangements and ticket purchases. The Convention's notice provision is phrased ambiguously: "if the carrier accepts a passenger without a passenger ticket [with the notice on it] having been delivered. . ."⁶² To Miss Froman's contention that she personally had not been delivered a ticket and that she should not be bound by the Convention's limits, the court was able to say that the Convention does not require physical delivery of the ticket into the passenger's own hand.⁶³

It is more difficult to say that the ticket and notice must not go to each passenger under the C.A.B. regulation and the Agreement. Both say that the carrier shall, "at the time of delivery of the ticket," "furnish [the notice] to each passenger." The carriers will have difficulty securing the cooperation of the passengers in compliance with these requirements. Indeed, in the *Froman* case, the court observed that it would ill serve the objects of the treaty to insist that the recipient of the ticket with its notice in every case be the passenger.⁶⁴

For cases arising before 1963, *Lisi* answers many of these practical problems. The notice on the standard form international ticket is too small and too lacking in distinction to sustain effective delivery no matter who gets the ticket or when. But for post-1963 tickets, if concepts of agency or constructive receipt of the C.A.B. or Agreement notice are introduced to reconcile common practices with the language of these documents, they conflict with *Lisi's* interpretation of the treaty as requiring actual notice.

Where will the burden of pleading and proof be as to notice? In *Lisi*, the carrier pleaded the \$8,300 limit as a partial affirmative defense and that it has taken all necessary measures to avoid the accident, or such were impossible to take, as a complete affirmative defense. The notice issue arose on plaintiffs' motion to strike the defense. This suggests that it is for defendant to establish notice as a condition upon its assertion of defenses and not for plaintiff to plead and prove a breach of duty of defendant to give notice. That the Agreement changes the number in the Convention should not vary this allocation. Plaintiff will

⁶² Warsaw Convention, Article 3(2), *supra*, n. 2.

⁶³ *Ross v. Pan American Airways, Inc.*, 299 N. Y. 88, 95, 85 N. E. 2d 880, 884 (1949), cert. denied, 349 U. S. 947 (1955).

⁶⁴ *Id.* at 98, 85 N. E. 2d at 885-6.

be opting for defendant's inability to assert any limit. This allocation fairly reflects the ease of furnishing proof, particularly on the death of a passenger. It is consistent with the analysis in the *Froman* case:

that there must be a delivery of a ticket is thus a condition set up by the Convention itself, as a determinant of the applicability, or no, of the Convention's limited liability rules.⁶⁵

It is consistent also with the phrasing of the Convention's penalty for failure to give notice:

Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.⁶⁶

Prognosis Guarded

The Administration considers the Agreement only an interim one. It believes that empirical data and experience are yet needed to develop a resolution of the interests of the carriers, passengers and the courts. For example, the airlines have maintained that absolute liability, rather than being conducive to settlement, will increase the number of small or fraudulent claims or protract litigation. They reason that with the issue of liability secure to the claimant, he will be more obstinate in settling damages.

Also, the insurance burden on the industry, another of their arguments, cannot yet be calculated. The C.A.B. queried 60 U. S. carriers on changes in insurance costs because of the agreement.⁶⁷ The information returned is inconclusive. Rates for many carriers are adjusted retrospectively only. Where rates have been finally readjusted, the increases have greatly varied. There is some relationship to the volume of international business. Local service routes operating wholly within the United States and carrying few international passengers have been little troubled. At the other extreme, carriers whose passenger operations are primarily international charters, such as the lines who help carry the large number of summer tourists to Europe, have experienced high rate increases. But for the major U. S. and foreign carriers, it is too soon to calculate increases in rates and percentages of operating cost.

A few and admittedly inadequate phone calls to air crash specialty firms in New York City indicate that there will be little or no concession in contingencies for handling crash cases. A smaller slice of recoveries for legal fees is another object of the government. Damages must still be proved and it is expected that executors of estates will insist on crashing the \$75,000 barrier. But cases arising out of the first crash under the Agreement are only starting.

⁶⁵ *Id.* at 97, 85 N. E. 2d at 885.

⁶⁶ Warsaw Convention, Article 3(2), *supra*, n. 2.

⁶⁷ *Comments, supra*, n. 25.

Subject to the empirical data, the government is open to a range of possibilities including: ⁶⁸

- a. elimination of all limits,
- b. limits higher than \$75,000,
- c. limits lower than \$75,000, but with absolute liability and a relaxation of the test of wilful misconduct,
- d. passenger selection of the limit, with the ticket price varying with the choice.

Whatever the formula, the United States hopes not to depend on inter-airline agreement and will work for resolution in international treaty.

⁶⁸ *Id.*