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Recent Decisions

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RECENT DECISIONS

CHOICE OF LAW—WRONGFUL DEATH—GOVERNMENTAL-INTEREST ANALYSIS DETERMINES LAW APPLICABLE TO MEASURE OF DAMAGES IN CLAIMS ARISING FROM FOREIGN AIR CRASH

Defendants—the United States,[1] two American manufacturers,[2] and the foreign national airline[3] whose plane had crashed[4]—agreed to a formula among themselves for division of damages. This formula precluded litigation of the issue of liability[5] in wrongful death actions[6] arising from the March 3, 1974, crash of a McDonnell Douglas DC-10 near Paris. More than two hundred such suits had been consolidated in the Central District of California.[7] The choice of law to apply to the assessment of damages was the sole issue left for settlement or trial. Plaintiffs contended that damages should be awarded according to the laws of the countries where the vic-

1. The United States was joined as a defendant under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) *et seq.* (1970). The United States moved to dismiss plaintiffs' complaints on the contention that 28 U.S.C. § 2680(k) precluded suit against the United States for an accident "arising in a foreign country." The court denied the motion, reasoning that the acts and omissions alleged in the complaints occurred in California by the wrongful approval, certification as airworthy, and inspection of the plane, rather than where the negligence had its operative effect, *i.e.* the situs of injury. *See* Richards v. United States, 369 U.S. 1 (1962).

2. The DC-10 passenger airplane was designed, constructed, and tested in California by McDonnell Douglas and General Dynamics (subcontractor for the fuselage and doors), and owned by Turk Hava Yallari, A.O.

3. Turkish Airlines (Turk Hava Yallari, A.O.).

4. The crash occurred on March 3, 1974, shortly after takeoff from Paris, France, destroying the Douglas DC-10 and killing all 346 persons aboard, thirteen of whom were crewmen. The crash followed a depression explosion caused by a sudden opening of the door leading into the plane's pressurized bulk cargo compartment which resulted in damage to the control cables under the cabin floor.

5. The court had decided that the law of California and of the United States would govern the matter of product liability and negligence, as well as all other grounds of liability.

6. McDonnell Douglas and General Dynamics were present under the Court's diversity of citizenship jurisdiction. The basis of jurisdiction over Turkish Airlines was the Federal Tort Claims Act with both pendant and ancillary jurisdiction.

7. There were two hundred and three suits involving three hundred and thirty-seven decedents arising from the crash. Decedents were from twelve states of the United States and twenty-four foreign countries. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407 (1970), assumed jurisdiction over the various actions (191 of which were initially filed in the instant court) and consolidated them in the United States District Court for the Central District of California.

tims were domiciled at the time of the crash, rather than the law of California.[8] The United States District Court for the Central District of California, *held*, that the law of California would be applied to the issue of damages. Governmental interests of the United States and of the state of California in the design and manufacture of aircraft were significantly greater than the interest of any and all other states or nations, such as to require application of California law to the issue of damages. *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975).

The traditional choice of law rule for torts has been that of *lex loci delicti*, the "law of the place where the wrong took place".[9] *Lex loci* is a jurisdiction selecting rule[10] which was intended to excuse the forum from analyzing policies of the law, the reasons for their existence, or the effect that application of the law would have upon the interested parties and states. Whether justified under theories of comity[11] or vested rights,[12] the doctrine assumes that the situs of the wrong always has the greatest interest in its redress. Where the injury occurs in a jurisdiction other than the jurisdiction where the wrong giving rise to the injury occurred, the *lex loci* doctrine applies the law of the place where the harmful effect or injury first was felt.[13] Various exceptions, however, limit the application of the

8. Plaintiffs advanced arguments that damages should be awarded according to the laws of the countries where the victims lived at the time of the crash. Other damage rules suggested were those of: (1) California—which imposes no limits on death benefits; (2) the domicile of the claimants; (3) France; (4) Japan; and (5) California plus French "moral" damages. Several Japanese claimants urged application of Japanese law to the Japanese claimants and French law to all others, including Americans, due to the broader base for calculating damages. The Court rejected this argument, noting that it would deny defendants the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

9. GOODRICH, CONFLICT OF LAWS § 92 (4th ed. 1964) [hereinafter cited as GOODRICH]; *see* 15A C.J.S. *Conflict of Law* § 12(2)(b) (1967).

10. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933) [hereinafter cited as Cavers].

11. Comity is based on territorial sovereignty and is a result of the lack of extraterritorial force of a sovereign's laws. A sovereign enforces foreign law as a courtesy and only when that law does not contravene forum policy. *See* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 20-38 (3d ed. 1846); GOODRICH § 6.

12. The territorialist theory of vested rights assumed that a right had vested in the plaintiff and that the law of the place of the tort's commission gave "rise to an obligation . . . which . . . follows the person, and may be enforced wherever the person may be found." Slater v. Mexican Nat'l R.R., 195 U.S. 120, 126 (1904); *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 90 (1968).

13. Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1936) (Ohio law applied to govern damages in Ohio resulting from blasting done in West Virginia.)

lex loci choice of law rule. Under the penal law exception, the forum court will not enforce the penal laws of a sister state.[14] The public policy exception allows the court of the forum to refuse to apply the law of the place where the transaction or event occurs if that law conflicts with the public policy of the forum.[15] Courts also employed the substance-procedure distinction[16] and the characterization process.[17] Despite these complications, the doctrine received considerable impetus when it was adopted by the original *Restatement of Conflict of Laws*, in 1934.[18] It was argued that because *lex loci* seldom requires a law suit to determine applicable law, it encourages out of court settlements, gives uniform and predictable results,[19] reaffirms *stare decisis*[20] and discourages forum shopping.[21] Due to the numerous escape devices which evolved to allow courts to avoid application of *lex loci*, these advantages are no longer certain. Because the exceptions are result-oriented, and because substance-procedure and characterization carry different meanings in different states, *lex loci* no longer gives uniform and predictable results, nor does it discourage forum shopping.[22] Furthermore, strict application of the doctrine often produces unjust and anomalous results because it forces the courts to determine where the injury occurred, mechanically apply

14. The Antelope, 10 Wheaton 66 (1825).

15. *See generally* Paulsen, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

16. Grant v. McAuliffe, 41 Cal.2d 859, 866, 264 P.2d 944, 949 (1953) (survival of a cause of action is question of procedure and governed by forum law); *see also* Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957) (Court labeled an issue as one of procedure and then applied law of the forum).

17. If an imaginative court could characterize an issue in tort as an issue in contract, it could avoid applying the law of the place of the tort. *See generally* Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247 (1920).

18. RESTATEMENT OF CONFLICT OF LAWS §§ 379, 381, 383-88, 391 (1934).

19. In *Friday v. Smoot*, 211 A.2d 594, 597 (Del. 1965), the Delaware Supreme Court stated that "[i]t may well be that the rule of *lex loci delicti* in some instances may appear arbitrary and unfair, but . . . it has one positive asset. It is certain."

20. Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d. 137 (1969) (*stare decisis* followed in action of New York resident against Michigan resident for wrongful death in Ontario).

21. Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970) (Court applied law of Maine to injuries suffered in Massachusetts accident where both parties were Maine residents).

22. *See generally* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 166 (1942).

the law of the situs, and ignore policy considerations.[23] Numerous attacks[24] upon *lex loci* have come from those advocating increased flexibility and analysis in selecting the applicable law. As the vested rights approach lost support,[25] the more flexible *local law theory*[26] arose, allowing the forum to concede that foreign law is appropriate but to refuse to apply that law if it is contrary to the policy of the forum. The advent of the local law theory brought acceptance of the idea that each state's courts can decide which laws should govern questions arising from a given transaction. While less arbitrary than the vested rights and comity theories,[27] the local law theory fails to establish guidelines to determine when *lex loci* should not govern; in reality, local law is a primitive form of interest analysis. With this relative freedom to apply different laws, courts began to substitute more analytical and equitable approaches for *lex loci*. A major step in this direction was taken by the *Restatement (Second) of Conflict of Laws*, which revised its original position[28] and adopted the approach that the law of the state having the most significant relationship with the occurrence and with the parties determines their tort rights and liabilities.[29]

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23. *Victor v. Sperry*, 163 Cal. App. 2d 518, 329 P.2d 728 (1958), graphically demonstrates the lengths to which this point can be taken. There, a California resident injured in a collision in Mexico was allowed to recover only a percentage of two dollars per day for lost wages under Mexican law. The California court said this Mexican limitation was not contrary to California public policy.

24. A. DICEY, CONFLICTS OF LAWS 937 (7th ed. 1958); Cavers, 178 (1933).

25. As writers and courts recognised that, within constitutional due process limits, no state is compelled to apply the laws of another state, those rights previously denominated as "vested" were no longer so considered. For clarification of the approaches adopted by legal scholars and authority for in-depth study *see* 47 N.C.L.REV. 407 n.1 (1969).

26. GOODRICH § 6.

27. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 367 (1945). Opponents argued that comity gave judges too much discretion in determining whether a foreign law was contrary to forum policy and that such discretion might run afoul of the full faith and credit clause.

28. RESTATEMENT OF CONFLICT OF LAWS § 384 (1934): "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1969); *see* Cheatham & Reese, *A Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952) for a summary of elements affecting choice of law rules:

(1) The needs of the interstate and international systems;

(2) A court should apply its own local law unless there is a good reason for not doing so;

This significant alteration in the *Restatement* provided the impetus for the major shift in judicial thought articulated in the landmark decision of *Babcock v. Johnson*,[30] in which the law of New York—where the injured parties resided, the guest-host relationship arose, and the automobile trip began and was to end—rather than the law of Ontario, as the place of the accident, was applied. *Babcock* thereby rejected *lex loci* in favor of the *governmental interest* rule,[31] which gives controlling effect to the law of the jurisdiction having the greatest interest in and the most significant contacts with the specific issue raised in the litigation.[32] Among the increasing number of courts[33] adopting the governmental interest

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(3) A court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law;
(4) Certainty, predictability, uniformity of result;
(5) Protection of justified expectations;
(6) Application of the law of the state of dominant interest;
(7) Ease in determination of applicable law; convenience of the court;
(8) The fundamental policy underlying broad local law field involved;
(9) Justice in the individual case.

30. Babcock v. Johnson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

31. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Proposed Official Draft part II):

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

32. Babcock v. Johnson, 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749 (1963). Although the RESTATEMENT approach has been described as involving mainly the number of contacts of an event with a jurisdiction, whereas the *Babcock* governmental interest approach is based upon the *effect* that an event has upon the jurisdiction, it is probable that the two are so related as to constitute one approach. *See* Note, 23 VAND. L. REV. 420, 422 (1970). *See, e.g.*, Wilcox v. Wilcox, 26 Wis.2d 617, 634, 133 N.W.2d 408, 417 (1965).

33. McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966); Long v. Pan Am. World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (New York court neutral but had jurisdiction); *cf.* Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (court, as a matter of public policy, refused to apply Massachusetts law). *See generally* B. CURRIE, SELECTED

approach, the California Supreme Court in *Reich v. Purcell*[34] effectively analyzed the interest and policies of each jurisdiction involved. The court analyzed the purpose of the applicable statutes and then determined which jurisdiction had the greater interest in the controversy.[35] Consideration of the multiple factors involved in governmental interest analysis is supplemented in air crash litigation by the decision of the Supreme Court in *Richards v. United States* that aviation injury actions brought under the Federal Tort Claims Act[36] must be governed by the whole law of the place where the wrongful act occurred, including its conflict of law rules, rather than the law of the place where the death or injury occurred.[37] In most aviation crash cases not arising under this Act the "place of the wrong" is regarded as the state where the plane fortuitously crashes.[38] The damage limitations imposed by several states on recoveries for wrongful death in aviation cases demonstrates the substantial variation in accident recoveries for similar injuries and for variation even among victims of the same accident that can occur in applying various choice of law theories.[39]

The instant court[40] was not faced with the necessity of rejecting the *lex loci delicti* rule in favor of the governmental interest approach,[41] since that had been accomplished by *Reich*.[42] The court

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ESSAYS ON THE CONFLICT OF LAWS 181-87 (1963); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

34. Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (in wrongful death action of Ohio residents from collision in Missouri with California resident, Ohio unlimited recovery law applied rather than Missouri law limiting recovery to twenty-five thousand dollars).

35. 67 Cal. 2d at 556-57, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35.

36. 28 U.S.C. § 1346(b) et seq. (1970).

37. Richards v. United States, 369 U.S. 1 (1962).

38. Paoletto v. Beech Aircraft Corp., 464 F.2d 976 (3d Cir. 1972) (applied law of the place of injury rather than of the place of the negligence); Quandt v. Beech Aircraft Corp., 317 F. Supp. 1009 (D. Del. 1970) (applied Italian law).

39. Ten of fifty states have a statutory limitation on recovery for wrongful death: Colorado, $35,000; Kansas, $35,000; Massachusetts, $50,000; Minnesota, $35,000; Missouri, $50,000; New Hampshire, $60,000; Oregon, $25,000; Virginia, $50,000; West Virginia, $110,000; and Wisconsin, $35,500.

40. Peirson M. Hall, Senior District Judge, United States District Court for the Central District of California.

41. Challoner v. Day & Zimmerman, Inc., 44 U.S.L.W. 3262 (U.S. Nov., 1975). (In product liability suit, substantive law of Texas, rather than its conflict of law rules, applied in diversity action against ammunition manufacturer for injuries in Cambodia to servicemen from defective howitzer shell).

42. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

began by recognizing that the three aspects of a cause of action for wrongful death, *i.e.* compensation for survivors, deterrence of conduct and assessment of damages, are all primarily local in character. The court found that California has a special interest in deterring tortious conduct of the California defendants present in this case, avoiding the imposition of excessive financial burden on these defendants, and assessing uniform damages in order to provide certainty in fulfilling the three components of a wrongful death action. This certainly is necessary, the court noted, because "[a]nyone injured throughout the world should be assured that he can obtain recourse under the law of the state of design or manufacture."[43] Next the court recognized that the United States has a strong governmental interest in uniform rules, in preemption over non-uniform regulation, and in aviation commerce. The court noted that Congress placed aviation in the exclusive and complete control of the federal government with the passage of the Federal Aviation Act.[44] The court further observed that the United States also has an equally pervasive and exclusive interest in regulating the design, manufacture and general "airworthiness" of aircraft distributed world-wide.[45] The court recognized that this interest is clearly expressed in recent decisions of the Supreme Court holding that federal law should be used where there is a dominant federal interest.[46] In view of this federal interest in air safety and regulation, the court unexpectedly veered from the accustomed awarding of compensatory damages alone and adopted[47] and applied the Supreme Court's recent liberalization[48] of the phrase "pecuniary

43. 399 F. Supp. 732 at 746. For example, had plaintiffs brought their suit in France or England, a court there would most likely have applied the *lex loci delicti* rule. *See* 2 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 235-36 (2d ed. 1958) and the French authorities cited therein. *See generally* Cavers, *Legislative Choice of Law: Some European Examples*, 44 S. CAL. L. REV. 340, 350-51 (1971) and the French authorities cited therein.

44. Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq. (1970).

45. *Id.* at §§ 1423(c) and 1506. In the court's view the Act is an expression of the "clear intent" on the part of Congress to protect against the improper design and manufacture of aircraft. For a comparison of "airworthiness" with maritime law *see Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), where a unanimous Court held that an action for a death resulting from a vessel's unseaworthiness is maintainable under general maritime law. *See* Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974) (citing *Moragne*, court found survival action for pain and suffering).

46. Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974); Challoner v. Day & Zimmerman, Inc., 44 U.S.L.W. 3262 (U.S. Nov., 1975).

47. Under the Rules of Decision Act, 28 U.S.C. § 1652.

48. Sea-Land Services v. Gaudet, 414 U.S. 573 (1974). The *Sea-Land* case

loss" as used in admiralty[49] to the measurement of damages to include love and affection. Thus governmental interests of the United States and the state of California were such as to require application of the law of California to the issue of damages along with adoption of the phrase "pecuniary loss" as used in admiralty.

The importance of the instant decision lies in its application of governmental interest analysis to wrongful death actions arising from a mass disaster air crash, and the provocative parallels raised between current federal aviation law and developments in federal maritime law.[50] The instant court's recognition of the federal interest in aviation commerce[51] raises the possibility of creating a more complete body of aviation law that would govern the rights and duties of injured parties, as well as the measurement of damages. However, recent legislative attempts to enact comprehensive aviation legislation providing for exclusive federal jurisdiction over civil damage actions have failed due to congressional unwillingness to preempt a state's interest in protecting its citizens who have been injured or are defendants in wrongful death actions.[52] How-

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specifically authorizes the recovery of damages for loss of support and contribution, services, society, mental anguish, and funeral expenses in a wrongful death action under general maritime law.

49. 46 U.S.C. §§ 761-68.

50. Note 47 *supra*. The development of federal maritime laws provides an intriguing parallel for the development of federal aviation law. Although federal maritime law is supported by a constitutional grant of admiralty jurisdiction unlike aviation jurisdiction, little difference exists between the federal interest in promoting and regulating shipping, and promoting and regulating aviation. To deny aviation similar treatment (even in the allowance for damages for "pecuniary loss"—which was granted by the Supreme Court in *Sea-Land*, *see* note 47 *supra*) ignores the crucial fact that virtually all commerce moved upon water and aviation was unsuspected when the United States Constitution was drafted. *See* Craig & Alexander, *Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests, and Teapots*,37 J. AIR L. & COM. 3, 18 (1973).

51. The objective of the Federal Aviation Act of 1958 is to foster the development of aviation commerce. 49 U.S.C. § 1346 (1970).

52. The "Holtzoff Bill" introduced into the Senate in 1968, provided for exclusive federal jurisdiction over civil actions arising out of the operation of aircraft. S. 3305, 90th Cong., 2d Sess. § 1 (1968). As a result of opposition, the "Admiralty Bill," patterned after the Death on the High Seas Act, 46 U.S.C. §§ 761-62 (1970), was introduced, and provided for exclusive federal jurisdiction over any action for damages from injury or death for any breach of duty arising in the course of aviation activity. S. 3306, 90th Cong., 2d Sess. § 1 (1968). Due to attacks on the breadth of the "Admiralty Bill's" provisions, the "Tydings Bill," S. 691, 91st Cong., 1st Sess. § 1 (1969) was introduced, limiting federal jurisdiction to those cases involving substantial numbers of people and suits in multiple jurisdictions.

ever, application of governmental interest analysis impliedly acknowledges that a state may have legitimate interests other than that of protecting its own citizens against plaintiffs from outside the forum state. While each case must be approached on its own facts and circumstances, the competing and often overlapping interests of federal and state government in particular substantive rights such as measurement of damages for wrongful death must be determined by the court. But while governmental interest analysis is clearly the modern trend,[53] a large number of courts[54] who are eager to avoid the spectre of *ad hoc* adjudication continue to apply *lex loci* with vigor. The instant decision typifies the unbiased qualitative analysis of relevant governmental interests required to enable the newer approach to surpass the *lex loci delicti* principle as an equitable and viable instrument for the judiciary. Governmental interest analysis certainly must include consideration of *lex loci* among the interests that the particular jurisdiction might have. But to terminate the analysis upon arrival at *lex loci* would condemn the approach to a mechanical and unimaginative emphasis of the fortuity of an incident over which a tortfeasor has little control. Governmental interest analysis requires that the attention of the court shift from the quantity of contacts (as with the *Restatement of Conflicts of Laws*) as being intrinsically meaningful, and instead focus upon the quality of contacts (as in *Babcock*) and the actual issues and facts to determine the extent of each state and nation's interest.[55]

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53. *See* cases collected in Annot., 29 A.L.R. 3D 603, 614-15, 623-24 (1970); *see* Beaulieu v. Beaulieu, 265 A.2d 610, 615 (Me. 1970) (indicating that appellate courts having had the opportunity to reevaluate their position have adopted the modern rule by at least a two to one margin).

54. Haller, *Death in the Air: Federal Regulation of Tort Liability a Must*, 54 A.B.A.J. 382, 386, n. 14 (1968).

55. The "Choice-Influencing Considerations" approach proposed by Robert Leflar, *see* 54 CAL. L. REV. 1584, 1585-88 (1966), consists of five major choice-influencing considerations: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the "Better Rule of Law", which incorporates all or most of the factors ordinarily influencing choice of law decisions. Leflar's method is more comprehensive than governmental interest analysis in that it offers a rational solution to a conflicts situation in which more than one state has a valid interest, it incorporates governmental interest analysis, and it encompasses the "most significant relationship" of the RESTATEMENT 2d.

EUROPEAN COMMUNITIES—FREE MOVEMENT OF WORKERS—COURT OF JUSTICE SETS GUIDELINES FOR USE BY MEMBER STATES OF THE PUBLIC POLICY EXCEPTION IN ARTICLE 48

Plaintiff, Italian national Roland Rutili, was a life-long resident of France, where he worked and participated in political and trade union activities.[1] In mid-1968, the French Minister for the Interior issued a deportation order against him, which was changed a month later to an order requiring plaintiff to move from where he and his family had been living to another part of France.[2] The second order was withdrawn by the Minister shortly thereafter. In 1970,[3] Rutili's application for a residence permit as a national of a Member State of the European Economic Community (EEC) was granted, but with a prohibition on residence in certain areas, including his current home, Audun-le-Tiche.[4] Plaintiff consequently brought a proceeding before the Administrative Tribunal of Paris seeking annulment of the territorial limitation on his residence permit. Not until the actual procedure before the Tribunal did Rutili learn of the Minister's grounds for the restrictions—that plaintiff's participation in the 1967 Parliamentary elections campaign and the May 1968 political demonstrations had been the cause of complaint, and that his presence in the areas in which he had been living was "likely to disturb public policy," as per article 48(3) of the EEC Treaty (Treaty).[5] Plaintiff contended before the Tribunal that the Minister's decision was, *inter alia*, without legal justification under Community law, an infringement of the funda-

1. Plaintiff Rutili held a privileged resident's permit. His domicile was Audun-le-Tiche, a village approximately 250 kilometers east of Paris.

2. France is divided for administrative purposes into departments. The order required plaintiff's family to move from the department of Meurthe-et-Moselle to the department of Puy-de-Dôme, approximately 360 kilometers south of Paris.

3. The record is devoid of information concerning what kind of residence permit plaintiff had between 1968 and 1970. Apparently, he and his family continued to reside in Audun-le-Tiche.

4. This permit was issued under the French Decree on January 5, 1970. Article 6 which states that residence permits "shall be valid throughout French territory unless otherwise decided in an individual case by the Minister for the Interior on grounds of public policy." Rutili v. Minister for the Interior, [1975], E.C.R. ___ [Court Decisions 1975 Transfer Binder] CCH COMM. MKT. REP. ¶ 8322, at 7781, ___ Comm. Mkt. L.R. ___ (1975) [hereinafter cited as Rutili].

5. Treaty Establishing the European Economic Community (EEC), *entered into force* Jan. 1, 1958, 298 U.N.T.S. 3. The authoritative English text of the Treaty may be found in *Treaties Establishing the European Communities* (Office of Official Publications of the European Communities, 1973) [hereinafter cited as EEC Treaty].

mental right of freedom of movement of workers under article 48 of the Treaty,[6] and a violation of the principle of non-discrimination under article 7 of the Treaty.[7] The Administrative Tribunal decided to stay its proceeding pursuant to article 177[8] of the Treaty until the European Court of Justice could make a preliminary ruling on the Common Market issues involved.[9] The

6. *Id.* Article 48 provides:

(1) The free movement of workers shall be ensured within the Community not later than at the date of the expiration of the transitional period.

(2) This shall involve the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration, and other working conditions.

(3) It shall include the right, subject to limitations justified by reasons of public policy, public safety and public health:

(a) to accept offers of employment actually made;

(b) to move about freely for this purpose within the territory of Member States;

(c) to stay in any Member State in order to carry on an employment in conformity with the legislative and administrative provisions governing the employment of the workers of that State; and

(d) to live, on conditions which shall be the subject of implementing regulations to be laid down by the Commission, in the territory of a Member State after having been employed there.

(4) The provisions of this Article shall not apply to employment in the public administration.

7. *Id.* Article 7 provides:

Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.

The Council may, acting by means of a qualified majority vote on a proposal of the Commission and after the Assembly has been consulted, lay down rules in regard to the prohibition of such discrimination.

8. *Id.* Article 177 provides:

The Court of Justice shall be competent to make a preliminary decision concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community; and

(c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.

9. The two questions submitted by the Tribunal were: (1) "Does the expres-

Court of Justice held that the limitations on the use of the public policy exception to freedom of movement of workers found in article 48(3) of the Treaty apply to decisions involving individual alien workers, and designated guidelines for the proper utilization of this exception by Member States.[10] *Rutili v. Minister for the Interior*, [1975] E.C.R. ____, 2 CCH Comm. Mkt. Rep. ¶ 8322, ____ Comm. Mkt. L.R. ____ (1975).

The concept of free movement of workers within the Community and the valid public policy exception to that concept as embodied in article 48 of the Treaty have been explained and interpreted by a number of directives, regulations and cases that provided the base upon which the guidelines produced in the instant case were built. Council Directive No. 64/221, article 3(1) provides that measures taken by a national government on public policy grounds must be based only on the personal conduct of the individual in each case.[11] This directive also sets procedural standards for the

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sion 'subject to limitations justified on grounds of public policy' used in Article 48 of the Treaty Establishing the EEC concern merely the legislative decisions which each Member State of the EEC has decided to take in order to limit within its territory the freedom of movement and residence for nationals of other Member States or does it also concern individual decisions taken in application of such legislative decisions?" (2) "What is the precise meaning to be attributed to the word 'justified'?"

10. The public policy guidelines set by the Court were as follows:

(1) Measures restricting freedom of movement of workers taken by a Member State on the public policy ground must be weighed in light of all existing Community rules that limit the discretionary power of Member States to utilize this ground, and that ensure the protection of rights of those persons subject to the restrictive measures;

(2) Any restrictive measure taken by a Member State must be based exclusively on the personal conduct of the individual worker concerned;

(3) No restrictive measure can be taken that serves a purpose unrelated to the requirements of public policy;

(4) No restrictive measures can be taken that limits properly exercised trade union rights;

(5) A Person against whom a restrictive measure has been taken must be informed immediately of the reasons for the measure, so that he may make effective use of his legal remedies.

Rutili, at 7779-80.

11. Council Directive No. 64/221, article 3(1) provides:

Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.

[1964] Official Journal of the European Communities 118 [hereinafter cited as [1964] J.O.]. (Article 189 of the EEC Treaty provides that "Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.").

application of the public policy exception to the free movement concept. It provides for notification of the grounds on which the restrictive ruling is based, and right of defense before a competent authority.[12] Council Directive No. 68/360, article 6(1)(a) states that any residence permit granted to a Community worker must be valid throughout the Member States.[13] Council Regulation No. 1612/68, article 8 requires that Community workers have equality of treatment in union membership and equal opportunity to exercise trade union rights.[14] In the *Van Duyn* case, the Court of Justice held that both article 48 of the Treaty and article 3(1) of Directive 64/221 are directly applicable to free movement cases without implementing legislation by Member States, thus conferring upon individuals rights that the national courts must protect,[15] and re-

12. Directive 64/221, articles 6 and 9 provide:

> The person concerned shall be informed of the grounds of public policy, public security, or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved.
>
> Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or order the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides.

[1964] J.O. 118.

13. Council Directive No. 68/360, article 6(1)(a) provides:

> (1) The residence permit:
>
> (a) must be valid throughout the territory of the issuing Member State;

[1968] J.O. 485, 1 CCH Comm. Mkt. Rep. ¶ 1035F.

14. Council Regulation No. 1612/68, article 8 provides:

> A worker who is a national of one Member State and employed in the territory of another Member State shall be entitled to equal treatment with respect to membership in labor unions and the exercise of union rights, including the right to vote; he may be excluded from taking part in the administration of the government organizations and from exercising a governmental function. He shall, in addition, be eligible to hold office in organizations.

[1968] J.O. 475, 1 CCH Comm. Mkt. Rep. ¶ 1031H (article 189 of the EEC Treaty provides that "Regulations shall have a general application. They shall be binding in every respect and directly applicable to each Member State.").

15. The rights determined by the Court to be enjoyed by individuals include the prohibition of discrimination against workers based on nationality, and the

quiring that the public policy exception be strictly interpreted.[16] The need for strict interpretation was echoed by the Court the following year in the *Bonsignore* case.[17] In that case, the "personal conduct" rule of article 3(1) of Directive 64/221 was defined to require that restrictive action cannot be taken by a Member State under the public policy exception for reasons of a "general preventive nature."[18] As the Court in the instant case points out, these directives, regulations and cases are an application of the general principle of non-discrimination, found in article 7 of the Treaty and articles 8-11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to the specific topic of the freedom of movement of Community workers.[19]

In the instant case, the Court of Justice focuses upon the explication of the public policy exception. First, in deciding whether the limitations to the public policy exception apply to individual decisions, the Court ruled that the proper use of the public policy

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requirement that restrictive measures taken on public policy grounds be based exclusively on the personal conduct of the individual concerned. *Supra* notes 6 & 11; Van Duyn v. Home Office, [1974] E.C.R. 1337, [Court Decisions 1975 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8283, 12 Comm. Mkt. L.R. 109 (1975). In this case, plaintiff, a Dutch national, was refused leave to enter the United Kingdom for the purpose of taking employment as a secretary with the Church of Scientology at its college in England. The Immigration officer refusing entry did so on the basis of the nation's Immigration Act of 1971, section 4(1), which permits exclusion where it is conducive to the public good.

16. "It should be emphasized thatthe concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to review by the institutions of the Community. *Id.* at 7227.

17. Bonsignore v. Overstadtdirektor of Cologne [1975] E.C.R. 297, [Court Decisions 1975 Transfer Binder] Comm. Mkt. Rep.P 8298, ____ Comm. Mkt. L.R. ____ (1975) [hereinafter cited as Bonsignore]. In this case, plaintiff, an Italian national residing and working in Germany, was ordered deported after being convicted of negligent homicide. The order was issued pursuant to a German law providing for deportation for reasons of public policy.

18. A restrictive measure taken under the aegis of the public policy exception cannot be taken by a Member State for the purpose of deterring similar conduct by other foreign nationals in the future. Rather, there must be a "special preventive nature," *i.e.* the action can be validly taken through use of the public policy exception only where it is necessary against the particular individual's future conduct. *Id.* at 7483.

19. Rutili 7778. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1955) (articles 8-11 provide for individual freedoms).

exception applies not only to legislative measures taken by Member States to limit freedom of movement,[20] but also to decisions based on that legislation that affects ths movement of individual workers. The Court arrived at this view by looking to: (1) the holding in the *Van Duyn* case that article 48 of the Treaty and its implementing Directive 64/221 confer rights directly on nationals of Member States; (2) article 3 of Directive 64/221 and the ruling in the *Bonsignore* case that measures taken by national governments on the ground of public policy be based only on the personal conduct of the individual alien worker concerned; and (3) the necessary availability of judicial review of the exercise of discretionary power by national authorities.[21] Secondly, as to what is the precise meaning of the word "justified", found in article 48(3) of the Treaty, the Court defined public policy standards in terms of substance, procedure and discrimination. In order to determine whether there is a sufficiently serious threat to public policy,[22] the Court turned its attention to articles 2[23] and 3[24] of Directive 64/221, article 8 of Regulation 1612/68,[25] and the European Human Rights Convention[26] to determine the substantive guidelines set forth in

20. *See, e.g.*, French Decree of January 5, 1970, Rutili.

21. "This conclusion is based in equal measure on due respect for the rights of the nationals of Member States, which are directly conferred by the Treaty and by Regulation No. 1612/68, and the express provision in article 3 of Directive No. 64/221 which requires that measures taken on grounds of public policy or public security "shall be based exclusively on the personal conduct of the individual concerned." This view of the matter is all the more necessary inasmuch as national legislation on the protection of public policy and security usually reserve to the national authorities discretionary powers which might escape all judicial review if the courts were unable to extend their examination to individual decisions taken pursuant to the reservation contained in article 48(3) of the Treaty." Rutili 7777.

22. ". . . restrictions cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move within it unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy." Rutili 7777-7778.

23. Council Directive 64/221, article 2 provides:

(1) This Directive relates to all measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health.

(2) Such grounds shall not be invoked to service economic needs.

[1964] J.O. 118.

24. Council Directive 64/221, art. 3(1), [1964] J.O. 118.

25. Council Directive 68/360, art. 6(1)(a), [1968] J.O. 485.

26. Materials cited note 19 *supra*.

this opinion, finding that: (1) measures restricting freedom of movement of workers must be weighed in light of all Community rules that limit a Member State's discretion in using this ground, and that ensure the protection of rights of those persons subject to the restrictive measures; (2) restrictive measures must be based solely on the personal conduct of the individual worker involved; (3) restrictive measures may not serve a purpose unrelated to the requirements of public policy; and (4) no measure may restrict properly exercised trade union rights.[27] For procedural guidelines, the Court looked to articles 6, 8 and 9 of Directive 64/221,[28] finding that both notice to the individual of the public policy grounds that form the basis for the restrictions on movement taken against him, and the right to appeal the imposition of those restrictions are required.[29] The Court then considered the existence of discrimination, finding through an interpretation of article 48 of the Treaty[30] and Directive 68/360[31] that public policy limitations on residence under article 48(3) of the Treaty[32] can apply only with respect to the whole of the state.[33] Hence, the Court found, a partial territorial restriction on residence, as imposed on plaintiff in the instant case, must come under the scrutiny of the non-discrimination provision of article 7 of the Treaty.[34] A Member State cannot impose such a restriction upon foreign workers "except in circumstances where such prohibitions may be imposed on its own nationals."[35]

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27. Rutili 7777-7780.

28. Council Directive 64/221, arts. 6, 9 [1964] J.O. 118.

29. "It is clear . . . that any person . . . must be entitled to a double safeguard comprising notification to him of the grounds on which any restrictive measure has been adopted in his case and the availability of a right of appeal." Rutili 7778.

30. EEC Treaty art. 48.

31. Council Directive 68/360, art. 6(1)(a), [1968] J.O. 485.

32. EEC Treaty art. 48.

33. "The right of entry into the territory of the Member States and the right to stay there and to move freely within it is defined in the Treaty by reference to the whole territory of these States and not by reference to its internal subdivisions. The reservation contained in article 48(3) concerning the protection of public policy has the same scope as the rights whose exercise may, under that paragraph, be subject to limitations. It follows that prohibitions on residence under the reservation inserted to this effect in article 48(3) may be imposed only in respect of the whole of the national territory. Rutili 7779.

34. EEC Treaty art. 7.

35. Seemingly contra is part of the Van Duyn ruling in which the Court allowed treatment of the foreign national different from that of a citizen. How-

As Advocate General Mayras points out in the instant case, *Rutili* takes its place in line after *Van Duyn* and *Bonsignore*, and allows the Court to "define more clearly the outlines of the concept of public policy contained in article 48(3) of the Treaty."[36] The concept of freedom of movement of workers, and the prohibition of discrimination on the basis of nationality of workers are both essential to the realization of a true economic community that is mindless of political borders. While derogation from those fundamental principles through the article 48(3) public policy exception should be allowed at the discretion of Member States, which are themselves best able to determine when it is necessary, that discretion must be strictly limited to its valid uses. The Court's discussion of the use of the public policy exception in the instant case goes a long way in providing tangible, clear-cut guidelines and criteria to be used by Member States' national courts in reviewing the validity of administrative acts taken under article 48(3) of the Treaty. In the instant case, the application of the Court's delineated standards by the Administrative Tribunal of Paris to the facts of Rutili's case may lead to the striking down of the territorial restriction on his residence permit. This is particularly possible if the French Minister for the Interior actually made the restriction to prevent Rutili from continuing to engage in valid political and trade union activities in his hometown, or to discourage other resident foreign workers from doing the same. The future may well bring continued strengthening and specification, by the European Court of Justice, of Council regulations and directives implementing article 48 of the Treaty, so that a Member State will no longer be able to invoke the public policy ground merely to harass and rid itself of an "undesirable", trouble-making alien worker who is a citizen of the European Economic Community, in contravention of his basic Treaty right of free movement.

Heidi A. Rohrbach

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ever, there it was found that the restriction made did fit within article 48(3) of the Treaty. Rutili 7228.

36. Rutili 7780.

37. ". . . the freedom of movement of workers . . . [and] . . . the right to reside and to be employed in the host State . . . are individual rights that are essential to the realization of the Common Market which, far from being limited to the unhindered trade in goods, necessarily involves individual mobility and guaranteed access to the territory of each Member State for the purpose of employment there." Bonsignore 7488.

38. See comments by Advocate General Mayras (undesirable aliens). *Id.* at 7490.

TAX TREATIES—UNITED STATES MAY USE THE INTERNAL REVENUE CODE SUMMONSING AUTHORITY TO OBTAIN DOMESTIC INFORMATION SOLELY TO AID A FOREIGN DOMESTIC TAX INVESTIGATION PURSUANT TO A TAX TREATY

Canadian tax authorities requested American assistance with their investigation of the potential Canadian tax liability of Westward Shipping Ltd., a Canadian corporation that is neither a United States resident nor taxpayer. The request was made pursuant to the Income Tax Treaty of 1942 between the United States and Canada[1] (Treaty), which provides for exchange of information[2] to aid in the prevention of tax evasion. In order to obtain the requested information the United States Internal Revenue Service (IRS) issued administrative summonses to appellees Bank of Tokyo and A.L. Burbank & Co.,[3] both located in New York

1. Convention and Protocol with Canada respecting Double Taxation, March 4, 1942, 56 Stat. 1399; T.S. No. 983. There have been several revisions of the Treaty, none of which affect the issue in this case: Supplementary Convention, June 12, 1950, [1951] 2 U.S.T. 2235, T.I.A.S. No. 2347; Supplementary Convention, Aug. 8, 1956, [1957] 2 U.S.T. 1619, T.I.A.S. No. 3916; Supplementary Convention, Oct. 25, 1966, [1967] 3 U.S.T. 3186, T.I.A.S. No. 6415.

2. The exchange of information provisions are:

Article XIX:

With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

The information to be furnished under the first paragraph of this article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.

Article XXI:

1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

2. If the Commissioner in the determination of the income tax liability of any person under any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada.

3. According to the District's Court's opinion in this case, *United States v.*

City, requiring them to produce books and records that were relevant to the Canadian investigation. The IRS cited its summons and examination authority found in the 1954 Internal Revenue Code (IRC) section 7602.[4] Westward filed written objections with the IRS to contest the disclosure of information solely to be turned over to a foreign country; it contended that the summonses were not authorized by the Treaty nor the IRC. The IRS did not seek to enforce its summonses, but instead issued a new summons requesting from Burbank the same information as was previously solicited, but claimed to require it in respect of Burbank's domestic tax liability. Westward obtained an order in United States district court[5] on an application to quash this new summons. This proceeding led to a stipulation among the parties that Burbank would be stayed from complying with the last summons until the United States Government should move for enforcement. The Government decided instead to enforce the original summonses in the instant proceeding. The district court held[6] that the summon-

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A.L. Burbank, 34 Am. Fed. Tax R.2d 74-5762 (1974), the summons to Bank of Tokyo referred to nothing more than the American tax liability of Westward, while the summons to Burbank states: "For Information Required Pursuant to the Provisions of the Internal Revenue Code of 1954 and Article 19 of the Income Tax Treaty Between Canada and the United States." 34 Am. Fed. Tax R.2d at 74-5763.

4. INT. REV. CODE OF 1954, § 7602:

Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

5. U.S. District Court, Southern District of New York, which subsequently heard the instant case.

6. 34 Am. Fed. Tax R.2d at 74-5762. This discussion is concerned only with the central issue of the legality of the summonses. The peripheral issues, the

ses were illegal because there is no authority in the Treaty or the IRC for issuance of an IRS summons solely for the purpose of aiding Canadian tax authorities in a Canadian tax investigation. On appeal to the Second Circuit Court of Appeals, *held*, affirmed in part and reversed in part. When an American tax treaty provides for exchange of information between cosignatories, the IRS may use its summons authority to obtain information from American-based corporations for use in a foreign tax investigation although there is no United States interest in the investigation and no claim that United States income taxes are potentially due and owing. *United States v. A.L. Burbank & Co., Ltd.*, 525 F.2d 9 (2d Cir. 1975).

A treaty, like the Constitution and the federal laws, is the supreme law of the land.[7] If a treaty and a federal statute conflict, the later of the two overrides the earlier act.[8] However, courts will always attempt to construe two acts to give effect to both of them if possible.[9] Repeal by implication is not favored;[10] specifically, the intent of Congress to abrogate a treaty by a subsequent statute must be clearly expressed.[11] Thus proper construction of each of the acts in question is crucial to resolving conflicts between the two, and treaty interpretation has been the object of extensive study.[12] Ascertaining the intent of the parties is the primary objec-

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renewed opposition by Burbank and Bank of Tokyo and the unsuccessful intervention by Westward, have been omitted.

7. U.S. CONST. art. VI, cl. 2:
"This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."

8. Head Money Cases, 112 U.S. 580, 599 (1884) (a treaty is superseded by a federal statute only to the extent of its domestic effect. The treaty remains in force as an international obligation). 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 185, 194-95 (1943).

9. Morton v. Mancari, 417 U.S. 535, 551 (1974) (two conflicting federal statutes); Whitney v. Robertson, 124 U.S. 190, 194 (1887) (conflict between treaty and federal statute).

10. Universal Interpretive Shuttle Corp. v. Metropolitan Area Transit Comm'n, 393 U.S. 186, 193 (1968); Chew Heong v. United States, 112 U.S. 536, 549 (1884) (both restating the established principle of law).

11. United States v. Borden Co., 308 U.S. 188, 198 (1939) (the intention of Congress "must be clear and manifest"); Cook v. United States, 288 U.S. 102, 120 (1933).

12. For excellent examples of criteria used for treaty interpretation, see RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 146, 147 (1965) [hereinafter cited as RESTATEMENT]; Vienna Convention of the Law of Treaties, art. 31-32, U.N. Doc. A/CONF. 39/27, May 23, 1969 *as reported in* 63 AM. J. INT'L L. 875, 885 (1969) [hereinafter cited as Vienna Convention].

tive of treaty interpretation and the Supreme Court has consistently advocated liberal construction of treaty language to best determine intended rights and obligations of the consignatories.[13] Although the parties generally desire equality and reciprocity between them, the United States abides by its own construction of each convention notwithstanding its cosignor's possible analysis to the contrary.[14] Full treaty status is accorded to tax treaties, assuming that they are self-executing.[15] There is some question, however, whether tax treaties are self-executing or executory.[16] Final determination of this question is a matter of judicial interpretation[17] and there is some case authority supporting the self-executing status of tax treaties.[18] It has also been suggested that this question

13. Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940) (" . . . we should construe the treaty liberally to give effect to the purpose which animates it"); Factor v. Laubenheimer, 290 U.S. 276, 293 (1933) (Treaty "obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them"); *see* CHANG, THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS, ch. VII (1968 ed. 1933).

14. Factor v. Laubenheimer, 290 U.S. 276, 298 (1933); Charlton v. Kelly, 299 U.S. 447, 473 (1913). Even if the failure to reciprocate is deemed a material breach of the treaty obligation instead of a contrary interpretation, according to international law the treaty is considered only voidable by the complying party and unilateral adherence may continue. *See, e.g.*, Vienna Convention, art. 60.

15. A treaty is self-executing if it is made on behalf of the United States and manifests an intention that it shall become effective as domestic law of the United States at the same time it becomes binding on the United States. An executory treaty requires congressional action for implementation. *See* RESTATEMENT § 141 and comment (a). With respect to a treaty and an act of legislation, "if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing." Whitney v. Robertson, 124 U.S. 190, 194 (1887).

16. *See* Brecher, *Relationship of, and Conflicts Between Income Tax Treaties and the Internal Revenue Code*, 24 TAX EXEC. 175, 182 (1971-72) [hereinafter cited as Brecher] (assuming that tax treaties are self-executing); Statement by Mitchell B. Carroll, Special Tax Consultant to the National Foreign Trade Council, at *Hearings Before a Subcomm. of the Comm. of Foreign Relations U.S. Senate*, 82nd Cong., 1st Sess., at 27-28. *reproduced in* 1 LEG. HIST. OF U.S. TAX CONV. 535-36 (1962) (assuming that tax treaties are not self-executing).

17. "Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation." RESTATEMENT § 154(1).

18. *See* Brecher, at 179-83. Brecher cites, for example, *American Trust Co. v. Smyth*, 247 F.2d 149, 153 (9th Cir. 1957) *rev'g* 141 F. Supp. 414, and *Georges Simenon*, 44 T.C. 820, 835 (1965), both of which determined that the respective tax treaties being scrutinized were the supreme law of the land. However, no distinction was drawn in either case between self-executing and executory treaties.

has been made moot by the enactment of the 1954 IRC which appears to provide the necessary legislative implementation.[19] IRC section 7852(d) provides that "[n]o provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title."[20] In the instant case, the "treaty obligation" is the furnishing to a cosignatory of information which each party is in a position to obtain under its respective revenue laws.[21] The IRC "provision" referred to in section 7852(d) is, in the instant case, section 7602, which directs the IRS's summonsing and examination authority to the determination of liability *"for any internal revenue tax"* (emphasis supplied).[22] These words could be construed as language of limitation,[23] restricting the use of summons and examination to determination of American tax liability. The IRS acquiesced to Canadian limitations on the application of the exchange of information provision when, in prescribing in its Manual[24] the proper method to request information from Canada about a Canadian taxpayer, it states that "Canadian tax authorities are authorized to furnish only that information which they can obtain under the revenue laws of Canada."[25] Variance

19. Brecher suggests this possibility based upon §§ 894(a) and 7852(d) of the IRC. § 7852(d) will be discussed in the text. *Id.* at 179.

20. INT. REV. CODE OF 1954, § 7852(d). The 1954 IRC was enacted on August 16, 1954.

21. *See* note 2 *supra*. The court addressed the problem which arose when the IRS summonsed the information by implementation of its statutory power. Another related issue is whether the IRS is compelled by the Treaty to obtain this information. The language employed by this Treaty with respect to the agreement to supply information upon request is permissive, unlike many other American tax treaties. *See* King, *Fiscal Cooperation in Tax Treaties*, 26 TAXES 889, 893 (1948). Similarly, the regulations which accompany this Treaty illustrate the nonobligatory nature of the Canadian-American agreement to exchange information in specific cases. The IRS Commissioner "may" furnish requested information to the Canadian Minister. Reg. § 519.120, 1 CCH TAX TREATIES (1967) ¶ 1254 (T.D. 5206). In contrast, article XX of our original Income Tax Treaty with the United Kingdom is an example of a mandatory provision as interpreted by the accompanying regulation which states that the Commissioner "shall" furnish such information. Reg. § 507.121, 2 CCH TAX TREATIES (1966) ¶ 8151 (T.D. 5569). This issue, however, became moot as soon as the IRS decided to comply with the Canadian request.

22. The regulation uses the same words. Treas. Reg. § 301.7602 (1959) *as amended* T.D. 7297 (1973).

23. It was considered as such by the district court. 34 Am. Fed. Tax R.2d at 74-5765.

24. 4 CCH INTERNAL REVENUE MANUAL (1975).

25. *Id.* § 9265.2(3).

between the two parties with respect to the obtainability of information could lead to a conflict about reciprocity. Notwithstanding the general American position on reciprocity of treaty obligation to the contrary, the report of the Acting Secretary of State laying the convention before President Roosevelt explained that the Treaty's exchange of information articles were to be administered on a reciprocal basis.[26] Thus there is a conflict between case law doctrine and the specific facts in this case. These conflicts of law and fact present a question of first impression in this country:[27] whether the United States, as party to a tax treaty which is reliant upon the IRS for enforcement, may use the IRC summonsing power to obtain domestic information solely to aid a foreign domestic tax investigation.

In the instant case the court agreed with the district court that the Treaty does not provide independent compulsory process for obtaining information but depends instead upon IRC section 7602 for implementation. The court did not agree, however, with the lower court's conclusion that the phrase in section 7602—"for any internal revenue tax"—should be read so narrowly as to disallow the issuance of an IRS summons solely to aid a Canadian domestic tax investigation. Since the avowed intent of the cosignatories was to provide cooperative exchange of information to prevent tax evasion, the court believed that to require concurrent tax liability in both states for valid exercise of the IRS's summons and examination authority would totally frustrate the Treaty. The court recognized that other American tax treaties with comparable exchange of information provisions would also be frustrated by such a narrow reading.[28] In addition to calling for the full use of the section 7602 investigative tools, the court advocated broad construction of the Treaty. The court said that liberal interpretation of treaties is a well-settled rule and is essential to the enforcement of the parties' intent. The court then noted that even if section 7602 were as narrow as appellees Burbank and Bank of Tokyo contended, section 7852(d), enacted after the Treaty, would render section 7602

26. "By means of these articles [XIX, XX, XXI], there will be obtained by the United States, upon a reciprocal basis, (a) information on a comprehensive scale with respect to income derived by residents of the United States from Canadian sources and (b) information in the case of specific taxpayers with respect to whom information is available in Canada." *Report of Sumner Welles, Acting Secretary of State, to President Franklin D. Roosevelt*, March 6, 1942, *reproduced in* 1 LEG. HIST. OF U.S. TAX CONV. 449 (1962).

27. United States v. A.L. Burbank & Co., Ltd., 525 F.2d 9, 11 (2d Cir. 1975).

28. 525 F.2d at 12-13.

unenforceable.[29] The court then turned to specific arguments of the appellees. The appellees urged that great weight be given to the Treaty's practical construction,[30] that is, the meaning given by the department of government particularly concerned with the Treaty. They cited the Internal Revenue Manual with its implicit acquiescence to Canada's revenue law limitations upon information obtainment. The court, however, concluded that the record did not establish this as the official Canadian position, but, even if it were so, Canada's position would not represent the American interpretation. According to the Government, the position it argues in the instant case is consistent with its position in the past, and has never been challenged. The court saw nothing in the record to contradict the Government's representation.[31] The appellees readdressed themselves to the Manual provision and claimed that since reciprocity of exchange of information was intended, then a burden that is greater on the United States than on Canada is inconsistent with this intention. The court refuted this argument by citing precedents holding that even though a treaty has ceased to be reciprocal the treaty must either be denounced or adhered to according to the obligations originally required by the treaty.[32] Thus, concludes the court, the Canadian interpretation is not relevant.[33] Finally, the court directed itself to the model income tax treaty drafted by the Organization for Economic Cooperation and Development (OECD)[34] of which Canada and the United States are members. The appellees asserted that the exchange of infor-

29. 525 F.2d at 14.

30. "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." Kolovrat v. Oregon, 366 U.S. 187, 194 (1960). *See also* Factor v. Laubenheimer, 290 U.S. 276, 295-96 (1933).

31. 525 F.2d at 15.

32. The court cited *Charlton v. Kelly*, 229 U.S. 447 (1913) and *Factor v. Laubenheimer*, 290 U.S. 276 (1933). 525 F.2d at 15.

33. *See also* note 14 *supra*.

34. ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT, DRAFT DOUBLE TAXATION CONVENTION ON INCOME AND CAPITAL (1963), *reprinted in* 1 CCH TAX TREATIES ¶ 151. The Organization for European Economic Cooperation (OEEC) created its Fiscal Committee in 1956 to study fiscal questions with respect to double taxation. The OEEC became the OECD in December 1960, as Canada and the United States joined the previous eighteen members. The Fiscal Committee continued and, after issuing four study reports, produced the model treaty. Kragen, *Double Income Taxation Treaties: The O.E.C.D. Draft*, 52 CALIF. L. REV. 306, 308 (1964).

mation article[35] of this Draft Convention subordinates any treaty requirements to the laws and administrative practice of each cosignatory and that the United States intended to adapt the provisions in their tax treaties to the provisions in the Draft Convention. The Government introduced the Draft Convention's Revised Commentary,[36] which authorized special investigations and use of adminis-

35. Art. 26 provides:

2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

36. The pertinent provisions of the Revised Commentary are quoted in the opinion:

12. This paragraph (Paragraph 2 of the Model Treaty) embodies certain limitations to the main rule in favor of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. *However, types of administrative measures authorized for the purpose of the requested State's tax must be utilized even though invoked solely to provide information to the other Contracting State.* Likewise, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article.

14. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, *which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons provided the tax authorities would make similar investigations or examination for their own purposes. This means that the requested State has to collect the information the other State needs in the same way as if its own taxation was involved,* under the proviso mentioned in paragraph 13 above. 525 F.2d at 16 (emphasis supplied).

According to a case footnote, the appellees introduced paragraph 13 at oral argument in answer to paragraphs 12 and 14. Also in this note the court quoted the paragraph and dismissed it. Paragraph 13 reads:

13. Furthermore the Requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage

trative tools to be employed by each state for its own purposes, even if utilized solely to provide information for the other cosignatory. The court observed that, even if the appellees' contentions about the Draft Convention were correct, the subsequent Revised Commentary reinforced the Government's position.[37] The court therefore concluded that it was proper to use American administrative summonses solely to assist in the investigation of a potential Canadian tax liability in accordance with this tax treaty.[38]

The two courts that passed judgment on the instant case based their adverse decisions on divergent rationales that in turn reflect different policies. Since each opinion is adequately supported by a logical legal analysis, it is each court's underlying policy consideration that merits inspection. The district court found the two acts consistent based upon a literal reading of the provisions in question. In accordance with the district court's line of thinking if the treaty provisions were meant to have any different connotation, then the Treaty or the IRC could be altered through legislative channels. Consistent with this view, foreign corporations like Westward should not be penalized nor should domestic corporations like Burbank and Bank of Tokyo be harrassed by procedures which arise from an imprecise reading of the two acts. While the ordinary meaning of the words employed is a factor in interpreting treaties, however, the intent of the parties should first be determined and then should itself be the determining factor in settling disputes like the instant case. Therefore strict construction of treaty words should be avoided if it would be contrary to the parties' intentions. A treaty expands the scope of each nation's rights and duties as it removes unwanted obstacles to international cooperation. This Treaty is the result of an attempt to make international intercourse more practicable by solving problems of double taxation and fiscal evasion. The exchange of information provisions should be looked at as being a means to an end and must be construed in a manner consistent with the purpose of the entire Treaty. This was the approach taken by the appellate court. Although its holding and rationale are not challenged here, one might question the comprehensiveness of the court's supportive analysis.

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of the information system of the other Contracting State if it is wider than its own system. 525 F.2d at 16, n.6.

The court interpreted "wider" differently than did the appellees and relied predominantly upon paragraphs 12 and 14 for its decision.

37. 525 F.2d at 16.

38. 525 F.2d at 16-17.

For example, it seems that the controversy built around the OECD Draft Convention and its Revised Commentary obscured the threshold issue of the applicability of the Draft Convention to the instant case. Whatever retroactive weight the Draft Convention might have is undermined by the fact that this Treaty's unique article XXI contains language that is conspicuously different from the terms shared by comparable provisions in the Draft Convention and several other American tax treaties.[39] Similarly, the court spent little time with the specific factors that have a bearing on this Treaty and chose to rely predominantly upon general doctrines such as broad treaty construction and the lack of a reciprocity requirement between the parties. Instead of dismissing the Treaty's practical construction as manifested by the Internal Revenue Manual, it might have examined the Treaty's legislative history and taken notice of the Acting Secretary of State's report with respect to intended reciprocity.[40] The Manual together with the Secretary's report present a strong indication of the intent of the cosignatories. It should not have been summarily discarded on the basis of general principles of treaty construction. The exchange of information articles in many American treaties are critical empowering provisions upon which the treaties rely and upon which there has heretofore been no litigation.[41] The court has now determined that the reach of such provisions is as wide as the administrative measures authorized to gather information for any domestic investigation.

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39. *See* notes 2, 35 *supra*; *e.g.*, Income Tax Treaty with France, July 28, 1967, [1968] 4 U.S.T. 5281, T.I.A.S. No. 6518, which has an exchange of information provision (art. 26) virtually the same as that of the Draft Convention.

40. *See* note 26 *supra*.

41. Exchange of information provisions of American tax treaties have been discussed. *See, e.g.*, S. ROBERTS & W. WARREN, U.S. INCOME TAXATION OF FOREIGN CORPORATIONS AND NONRESIDENT ALIENS P IX/16 (1971). However, the specific issue presented in this case has not been previously addressed.

TREATY INTERPRETATION—WARSAW CONVENTION— PASSENGERS UNDERGOING SEARCH PREREQUISITE TO BOARDING ARE ENGAGED IN OPERATIONS OF EMBARKING

Plaintiffs, passengers on defendant international airline, brought an action under the Warsaw Convention to recover damages[1] for personal injuries suffered during an attack by "Black September" terrorists on the transit lounge at Hellenikon Airport, Athens, Greece. Plaintiffs had presented their tickets to defendant's checking desk on the upper level of the airport, had proceeded through passport and currency control, and had descended to the lower-level lounge from which they could not leave without again clearing passport and currency control on the upper level. At the time of the attack they were lined up for a hand baggage and personal search conducted by Greek police. Plaintiffs allege that they were injured while engaged in the "operations of embarking," for which injuries article 17[2] of the Warsaw Convention makes the carrier absolutely liable. Both parties moved for summary judgment on the issue of liability. Faced with the question of whether "operations of embarking" in article 17 should encompass the plaintiffs' actions, the district court outlined eleven steps essential to the action of embarking.[3] It held that plaintiffs, being in the

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 87, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. The Convention was concluded at Warsaw, Poland. The official text is in French; the English version is provided at 49 Stat. 3014.

2. Article 17 provides:

"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.*" (emphasis supplied).

3. The court said the passengers "could not board the aircraft until they:

1. presented their tickets to TWA at the checking desk on the upper level;
2. obtained boarding passes from TWA;
3. obtained baggage checks from TWA;
4. obtained an assigned seat number from TWA;
5. passed through passport and currency control imposed by the Greek Government;
6. submitted to a search of their persons for explosives and weapons by Greek police;

midst of these essential steps, were entitled to the protection of absolute liability. On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. When passengers scheduled to depart on flights within the Warsaw Convention's coverage have entered an airport area reserved exclusively for them and are in the process of undergoing a search prerequisite to boarding, the airline on which they are ticketed is absolutely liable for any injuries incurred under the Warsaw Convention. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975).

The Warsaw Convention, "the most widely adopted private law theory in the history of mankind,"[4] was designed to provide uniform rules on the transportation of goods and passengers in international air carriage.[5] The Convention is contractual in nature[6] and therefore all carriage governed by the Convention rests on "the consent of the carrier to transport the passenger . . . and the consent of the passenger . . . that the transport take place."[7] The Convention is not meant to regulate the passenger-carrier relationship on an international basis.[8] Instead, its purpose is to set forth some uniform boundaries on the liability of carriers engaging in air transportation among nations.[9] Chief among these boundaries is the accident cost burden to be borne by the carriers[10] and the bases

7. submitted their carry-on baggage for similar inspection by Greek police;
8. walked through Gate 4 to Olympic's bus;
9. boarded the bus;
10. rode in the bus a distance of 100 yards; and
11. walked off the bus and onto the aircraft."

393 F. Supp. 217, 221 (1975).

4. Landry, *Swift, Sure and Equitable Recovery—A Developing Concept in International Aviation Law*, 47 N.Y.S.B.J. 372, 373 (1975).

5. *See generally* D. GOEDHUIS, NATIONAL AIR LEGISLATIONS AND THE WARSAW CONVENTION (1937).

6. See discussion in *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

7. 386 F.2d at 334.

8. *See* Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957). *See also* Zousmer v. Canadian Pacific Air Lines, 307 F. Supp. 892 (S.D.N.Y. 1969); Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953).

9. Orr, *The Warsaw Convention*, 31 VA. L. REV. 423, 426 (1945). *See also* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11.01 (rev. ed. 1971) [hereinafter cited as KREINDLER].

10. *See* Eck v. United Arab Airlines, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964).

for passenger rcovery.[11] Article 22 of the original 1929 Convention limited the amount of damages recoverable by an injured passenger to $8,300; the original article 20(1) further provided the carrier with a full defense if it could prove it had taken all necessary measures to avoid the damage.[12] The United States, an adherent to the Convention in 1934, gave formal notice of withdrawal in 1965 because of widespread belief that the recovery limits were inadequate to protect American foreign travelers.[13] The United States withdrew its denunciation in 1966, however, after virtually all international air carriers agreed to increase the limit of liability to $75,000 and to waive the article 20(1) defense.[14] Under this "Montreal Agreement,"[15] the carriers accepted absolute liability, provided the transportation was international in scope and began or ended at a point in the United States.[16] Soon after the Montreal Agreement was accepted, the problem of injury to passengers from actions outside the airline's control had developed into an important controversy.[17] Interpreting article 17 in particular, the courts

11. Rosman v. Trans World Airlines, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

12. KREINDLER § 11.02. Article 20(1) provides, "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."

13. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 546 (1967) [hereinafter cited as Lowenfeld & Mendelsohn].

14. *The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. AIR L. & COM. 243, 248 (1966).

15. C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966). Procedurally, each airline files a contract with the Civil Aeronautics Board stating that it will abide by the Agreement's terms. Originally it was contemplated that the Convention would be formally amended to include these terms but this has not happened. *See* DEP'T STATE BULL. 923 (1965). In 1971 a protocol adopted at a diplomatic conference in Guatemala proposed an increase in the liability ceiling to $100,000. The United States has not yet become a signatory to this Guatemala Protocol. *See* KREINDLER §§ 12B.01-12B.04; Mankiewicz, *The 1971 Protocol of Guatemala City*, 38 J. AIR L. & COM. 519 (1972).

16. Lowenfeld & Mendelsohn, at 597.

17. The most serious threat to passenger safety was seen as hijacking. Two multilateral treaties have been promulgated recently to discourage the rising tide of hijacking incidents in international air travel. They are: (a) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, [1971] 2 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971) (This treaty imposes an obligation on the parties to establish criminal jurisdiction over the offense, without regard to the registration of the aircraft or the location of the act); (b) The Montreal Convention for the Supression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, [1973] 1 U.S.T. 565, T.I.A.S. No. 7570 (effective

were faced with "the inherent difficulty of freezing into words the exact limitations of a law—[drawing] a line on one side of which liability exists and is absent on the other."[18] Several American opinions dealing with injuries incurred in disembarking found that liability ceased upon the passenger's arrival at certain geographical limits—a "safe point"—within the terminal.[19] A passenger injured by a fall in the baggage delivery and customs clearance area was denied recovery on this basis in *McDonald v. Air Canada*,[20] even though she remained "in the status of a passenger of [the] carrier while inside the building."[21] European courts have tended to define the issue in similar terms.[22] A French court of appeals reversed a Warsaw Convention-based damages judgment to a passenger injured while crossing the "customs garden" to the side of the airport traffic apron. The court concluded that the customs garden did not present "risks inherent in aeronautical operations."[23] More recently, significant support for a theory of geographical limits to liability was provided by the United States District Court for the Western District of Pennsylvania in

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Jan. 26, 1973) (This treaty contains the same provisions as does the Hague Convention, but applies them specifically to acts of sabotage, other acts of violence against persons on board an aircraft, and the destruction of aircraft).

For a further discussion of the scope of this hijacking threat, see *Symposium—Skyjacking: Problems and Potential Solutions*, 18 VILL. L. REV. 985 (1973).

18. Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1, 19-20 (1936). The 1929 draft provision on liability had defined air carriage as extending from the moment passengers, goods, and baggage entered the airport of departure to the moment they exited the airport of arrival. The delegates to the Convention conference rejected the draft article, and it was split into two provisions. Article 18, relating to baggage and goods, remained the same, but article 17, relating to passengers, extended liability only to those accidents occurring on board the aircraft and during embarking and disembarking. Evangelinos v. Trans World Airlines, 396 F. Supp. 95, 100 (W.D. Pa. 1975).

19. *See, e.g.*, Klein v. K.L.M. Royal Dutch Airlines, 46 A.2d 679, 360 N.Y.S.2d 60 (1974); Felismina v. Trans World Airlines, 13 Av. Cas. 17-145 (S.D. N.Y. 1974). Neither court, however, defines "safe point" other than to note that it is reached once the passenger descends from the plane and enters the terminal.

20. 439 F.2d 1402 (1st Cir. 1971).

21. 439 F.2d at 1405.

22. *See, e.g.*, the judgment of the Court of Appeal of Berlin, reported in 2 SHAWCROSS & BEAUMONT, AIR LAW 86 (Supp. 1975) [hereinafter cited as SHAWCROSS & BEAUMONT].

23. Maché v. Air France, Revue Francaise de Droit Aerien 228 (1966), *as reported in* 33 J. AIR L. & COM. 207 (1967).

Evangelinos v. Trans World Airlines,[24] decided four months after the district court disposition of the instant case. The court examined in well-documented detail the evolution of article 17, from a provision which imposed liability from the time passengers entered the airport of departure until the time when they exited from the airport of arrival, to its present status. Concluding that "operations of embarkment" defined "geographical limits rather than an activity,"[25] the court denied summary judgment on the issue of liability to plaintiffs injured in the same terrorist attack in Hellenikon Airport. The court conceded that the analysis behind the "steps" outlined in the district court disposition of the instant case was sound; yet the result, the Pennsylvania court noted, extended Warsaw Convention liability "far beyond anything that was within the contemplation of the [signatories]."[26]

In the instant case the court held that application of article 17 should be determined by reference to the activities of the passengers as they proceeded to departure. The court believed that the language of article 17 neither expressly excluded events occurring within the terminal, nor restricted embarkation procedures according to geographic limits. In this case the passengers had surrendered their tickets and had passed through passport control; they were assembled in a restricted area; they had been directed by an agent of the airline to line up to undergo a search prerequisite to boarding. The court found that these limitations on the passengers' movements, preventing them from "roaming at will in the terminal,"[27] placed them within the course of embarking.[28] The court also found that an expansive construction of the article followed the modern concept of an air carrier's responsibility for accident costs. Not only can airlines more effectively distribute the financial burden of injuries,[29] the court said, but also charging the

24. 396 F. Supp. 95 (W.D. Pa. 1975).

25. 396 F. Supp. at 101.

26. 396 F. Supp. at 102.

27. 528 F.2d at 33.

28. The court emphasized the involvement of the airline's personnel in limiting the movements of passengers by distinguishing it from *McDonald v. Air Canada*. Since the plaintiff in *McDonald* was standing near the baggage pickup area after deplaning, she was "not acting . . . at the direction of the airlines . . ." or ". . . performing an act required for . . . disembarkation." 528 F.2d at 34, n.8.

29. One of the policies underlying the Convention is the redistribution of accident costs to all passengers through insurance. In *Husserl v. Swiss Air Transport Co.*, the court found the airline liable for a passenger's bodily injury and

airlines with this responsibility would encourage higher standards of airport safety for passengers. From a practical perspective, the court noted that denial of article 17 coverage to injuries such as these would force passengers to seek redress in expensive foreign litigation, thus precluding rapid recovery of damages.[30] The court concluded that a primary goal of the Warsaw Convention was protection of the passenger.[31] The treaty created, the court declared, "a system of liability rules that would cover all the hazards of air travel."[32] The court therefore found that adherence to an interpretation of article 17 based on location rather than passenger activity, would frustrate the intent of the Convention's drafters to provide an instrument adaptable to the changing structure of international aviation.

The court has shifted the passenger-airline relationship from a contractual one to a regulatory one not justified by the conditions of international air travel. As a result of this decision, an airline is absolutely liable under the Warsaw Convention for injury to a passenger within the air terminal if the court can determine that the passenger was in fact engaged in an activity required for boarding. This holding satisfies the needs presented by the bizarre set of circumstances in the instant case. Taken one step further, however, it also means that an airline would be absolutely liable for a passenger who, having had his ticket and passport checked, stumbles over a chair and injures himself. This broad interpretation of article 17 ignores the extent to which the airline actually controls passengers' activities. Few of the boarding procedures on international flights are initiated by the airline itself. Furthermore, unlike a bus or railroad station, an air terminal is a public facility, usually provided by a government entity for use by a number of carriers.[33]

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mental anguish because: (1) the carrier had a responsibility to avoid such incidents, since it physically controlled the planes; (2) the carrier was better able to assess the risks of air travel and insure against them; and (3) it was able to redistribute the costs of these steps. 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd* 485 F.2d 1240 (1973). *See also* Rosman v. Trans World Airlines Inc., 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974); Krystal v. BOAC, 403 F.Supp. 1322 (D.C. Cal. 1975).

30. 528 F.2d at 34.

31. As support for its finding, the court listed, in a footnote, the opinions of a variety of commentators. Ironically, the commentators agreed only that liability attaches when the passenger is under the direct control of the airline. *See* 1 SHAWCROSS & BEAUMONT, at 441-42.

32. 528 F.2d at 38.

33. An exception might be those terminals constructed and operated solely by

Restriction of boarding passengers in a large general-use lounge may be a condition forced on the carrier by the terminal's layout.[34] Also, customs and passport checks, prerequisites to international travel, are functions solely of a state's police power. No international airline would be able to operate if it refused to acquiesce to these official "steps." It would be more appropriate, then, to apply a geographic analysis of liability, rather than an activity-oriented analysis, to injuries within an air terminal. The "safe point" theory, applied in *Evangelinos* and others, relies on the location of the passenger within the building itself. Location is a primary factor in the instant case. The terrorist attack was planned in secret and conducted in an area necessarily removed from the exclusive control of defendant's personnel because of the presence of the "flight desks" of other airlines.[35] The passengers were preparing to undergo search procedures required by the Greek police. They could not physically commit themselves to the singular care of the defendant until they passed the search area. The victims were therefore beyond that stage where defendant could have effected any significant protective measures, even if it had attempted them. If absolute liability under the Convention is based on the presumption that the carrier can control the risk to which passengers are exposed, then liability should not attach in the instant case. It might be argued that the policy behind the decision was to rest responsibility to guard against arbitrary destructive acts upon those more financially able to bear the burden of protective measures, the airlines. In effectuating such a policy, however, the court has exposed carriers to a duty of unlimited proportion. Carriers may become insurers for passenger activities only minutely related to air transportation. The geographic analysis would define a carrier's responsibility to protect passengers in more feasible

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one airline, which are often found in the largest international airports such as Kennedy Airport in New York and Orly Airport in Paris.

34. *See* Sullivan, *supra* note 18, at 21. He suggests that the rule cannot be stated "in terms of station gates or other aspects of the physical situation which would not be everywhere duplicated."

35. In fact, the attack was made on this group of passengers by mistake. The terrorists had meant to encounter a group of TWA passengers bound for Israel. 393 F. Supp. 217, 219.

36. *See* Heller, *Notes on the Proposed Revision of Article 17 of the Warsaw Convention*, 20 INT'L & COMP. L.Q. 142, 146-47 (1971). He proposes that article 17 be amended to apply only limited liability to operations of embarking and disembarking; absolute liability would then attach only to injuries incurred on board an aircraft in flight.

terms. Further, it would both fulfill the policy of the Warsaw Convention to insure against the risks of international flight and avoid penalizing carriers for capricious acts against which they could not defend.

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