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Some Comments on Burdell v. Canadian Pacific Airlines

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SOME COMMENTS ON BURDELL v. CANADIAN PACIFIC AIRLINES

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I. INTRODUCTION

Frank Burdell was the Far Eastern representative of an American heavy-equipment company, stationed in Singapore. At the end of February 1966, Burdell traveled to Tokyo on a Singapore-Bangkok-Hong Kong-Tokyo and return ticket, purchased in Singapore from Cathay Pacific but using Canadian Pacific Airlines for the Hong Kong-Tokyo portion of the journey. Canadian Pacific's flight 402 from Hong Kong to Tokyo on March 4, 1966, arrived over Tokyo in a fog, circled for about an hour, finally came in to land, and crashed into the rearwall at the end of the runway killing its crew of ten and all but ten of its sixty-two passengers, including Burdell. Burdell was 40 years old at the time of his death and was earning about $15,000 per year. He left a wife, Lois, aged 32, and three children, 18, 9, and 7 years old.

Shortly after the accident, Mrs. Burdell and her children returned to the United States, and in due course they brought suit against Canadian Pacific Airlines in the Circuit Court, Cook County, Illinois, Judge Nicholas J. Bua presiding.[1]

Canadian Pacific had an office in Chicago, and was properly served. Apparently the suit was commenced before the statute of limitations of any possible jurisdiction had run. Apart from these two points, everything else was confusion. This Comment takes up some of the issues raised in a long and in some ways surprising opinion of Judge Nicholas J. Bua in the Circuit Court, Cook County, Illinois, November 7, 1968.

II. WARSAW CONVENTION ISSUES IN BURDELL

A. Was This a Suit Within the Warsaw Convention?

The Convention for the unification of certain rules relating to international transportation by air, commonly known as the Warsaw Convention, establishes a complex

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[1]Burdell v. Canadian Pacific Airlines, No. 66 L 10799, (Cir. Ct., Cook County, Ill., 1968), reported in 8 INT'L LEGAL MATER. 83 (1968).

framework of rights and liabilities between passengers and carriers in international transportation.[2] The best known, though as we shall see not the only feature of the Warsaw system, is the limit on recovery in most cases of $8,300 per passenger. To come under the definition of international transportation to which the Convention applies (Article I), a voyage must involve transportation between the territories of two contracting parties or a round trip to and from the territory of a contracting party, with an agreed stopping place outside the territory of that party. Canadian Pacific argued that what was involved was a series of separate flights, so that the Hong Kong-Tokyo leg would be the test of whether the Convention applied. The Court - properly, in my view - dismissed this argument. Under Article I (3) of the Warsaw Convention, transportation, even though performed by successive carriers, is deemed to be one individual transportation if so regarded by the parties. Holding this transportation to be a Singapore origin - Singapore destination contract of carriage seems consistent with prevailing interpretations of Article I of the Warsaw Convention.

The argument about whether Singapore was the point of application of the Convention was important because there was doubt about whether Singapore was a party to the Convention. While Singapore was part of the British Empire it was clearly covered by the Convention. In July, 1963, Singapore, along with former British colonies of North Borneo and Sarawak became part of the Federation of Malayia, which shortly thereafter changed its name to Malaysia. The Federation of Malayia, upon gaining its independence in 1957, had assumed the rights and obligations of treaties entered into between the United Kingdom and other states "insofar as such instruments may be held to have application to or in respect of the Federation of Malaya." Thus the Warsaw Convention applied to Malaysia in 1963; furthermore, when Singapore became part of the Federation, Malaysia assumed the treaty rights and obligations of the new components, including Singapore, again presumably including the Warsaw Convention.

In 1965 Singapore seceded from Malaysia and became an independent and sovereign state, once more with a provision (annexed to the Independence of Singapore agreement) providing " ... any treaty, agreement or convention entered into before Singapore Day between the Yang de Pertuan Agong or the Government

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[2]Convention for the Unification of Certain Rules Relating to International Transportation by Air opened for signature October 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, reprinted with 1955 Protocol in HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 87TH CONG., 1ST SESS., AIR LAWS AND TREATIES OF THE WORLD 1332 (Comm. Print 1961). A lengthy account of the development of the United States Warsaw Convention policy appears in Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 49 (1967) [hereinafter cited as Lowenfeld & Mendelsohn].

of Malaysia and another country or countries, including those deemed to be so by (the provision in Malaysia's Constitution referred to above) shall insofar as such instruments have application to Singapore be deemed to be a treaty . . . between Singapore and that country or countries." The Illinois court could have discovered all of this by reading with some care the publication Treaties in Force issued annually by the United States State Department.[3] The court had that publication before it, but looking only in the multilateral section, it did not find Singapore's name on the list of the Warsaw Convention parties. Though the State Department's Deputy Legal Adviser wrote to the court that the Department considered Singapore to be an adherent to the Convention, the judge did not believe him. He preferred to rely on a letter from the Vice Director of the Legal and Treaty Department of Poland, (the depository of the Convention) stating that that Government had not received notification of Singapore's adherence to the Warsaw Convention. The court held that Singapore was not a party to the Convention at the time of the accident.

I have some sympathy with Judge Bua's problem here. Before the United States served notice of denunciation of the Warsaw Convention in November 1965, one of my tasks, as a State Department official, was to arrange for consultations with as many of our Convention partners as possible about the United States course of action. Assembling an accurate list of which countries this would involve proved most difficult. The International Civil Aviation Organization, the Government of Poland, and the State Department's Treaty Branch all had different lists, and it developed that a number of recently independent countries simply had never focused on the question of whether they did or did not intend to keep this particular Convention in effect by way of state succession. Nevertheless, I think Judge Bua erred here, on two grounds. First, it would seem to me that an official communication from the State Department ought to be conclusive in a court in the United States on the question of whether a given country is or is not a party to a treaty of which the United States is a party. Second, I believe the record of state succession as recited above is conclusive in the absence of a declaration by Singapore that it intends not to be bound. Thus it seems that Mr. Burdell's flight was a Warsaw flight, on the basis of origin and destination in Singapore.

The decision about Singapore's membership in Warsaw could have disposed of the case. But Judge Bua, apparently not confident on this point, proceeded to address a number of other possible issues, many of them not even pleaded.

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[3]DEP'T STATE, 1967 TREATIES IN FORCE 131 (Malaysia), 176 (Singapore). 1968 TREATIES IN FORCE 253, lists Singapore as a member of the Warsaw Convention, though with a footnote indicating some uncertainty. 1969 TREATIES IN FORCE 263, lists Singapore as a member, with a footnote referring to the instruments cited in the text.

B. Could Suit Be Brought in Chicago?

Canadian Pacific argued that though it was personally amenable to suit in Illinois, under the Convention this claim could not be heard there. It may be asked what difference it would make to Canadian Pacific, since the Convention prescribed a limit of liability of $8,300 wherever suit was brought. The answer is that Canadian Pacific knew very well why it wanted to avoid the Cook County Court, or indeed any court in the United States, though Canadian Pacific probably did not reckon with Judge Bua's view of the Convention. By now airlines are accustomed to a variety of techniques used by courts in the United States to escape from the Convention--from the issue of ticket delivery,[4] to the small print giving notice of the liability limit,[5] to findings of wilful misconduct in what ordinarily would be considered at best gross negligence.[6]

Understandably, Canadian Pacific moved to dismiss under Article 28 of the Convention. The airline was right -- Article 28 of the Convention says that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties at one of four places:

(1) the domicile of the carrier - here Canada

(2) the carrier's principal place of business - likewise Canada

(3) the place of business of the carrier through which the contract was made - not so clear but probably Singapore, on the theory that Cathay Pacific was acting as Canadian Pacific's agent and thus pro tanto Canadian Pacific was maintaining a place of business in Singapore

(4) the place of destination - here Singapore, if we accept the round trip theory discussed above. Illinois was not one of the places where suit might be brought under Article 28.

I have always considered Article 28 one of the Convention's most objectionable provisions. I can see no reason why a United States citizen flying Frankfurt-New York and return who crashes in New York should not bring suit in New York. The carrier does business in New York, the witnesses are there, the plaintiff or his survivors may be domiciled there or nearby. But the Convention says no .[7] If the

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[4]Mertens v. Flying Tiger Lines, 341 F.2d 851 (2d Cir. 1965); Warren v. Flying Tiger Lines, 352 F.2d 494 (9th Cir. 1965).

[5]Lisi v. Alitalia Linee Aeree Italiane S.p.A., 370 F.2d 508 (2d Cir. 1966).

[6]E.g., Pekelis v. Transcontinental and Western Air Inc., 187 F.2d 122 (2d Cir. 1951); Le Roy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965).

[7]See Bowen v. Port of New York Authority, 8 Av.Cas. 18, 043 (N.Y. Sup. Ct. 1964).

Warsaw Convention is ever renegotiated, I would hope Article 28 would be drastically revised or perhaps eliminated altogether. Meanwhile, it seems clear that in the Burdell case, even though the widow and children were domiciled in Chicago and Canadian Pacific had an office there, the Warsaw Convention limited suit to Singapore or Canada.[8] Judge Bua, at least by inference, accepted this conclusion. It was one reason for his determination that the Convention was unconstitutional.

C. What Was the Applicable Limit of Damages Under the Convention?

The Warsaw Convention limits the liability of a carrier to a passenger to 125,000 "Poincaré francs," which was not quite $5,000 when the Convention was drafted in 1929 and was equal to just under $8,300 since the devaluation of the dollar in 1933. Needless to say, this figure is wholly out of line with modern concepts of accident compensation, not only in the United States but in most other developed countries. Because of this fact, the United States served notice of denunciation of the Convention on November 15, 1965, to take effect (under Article 39) six months later, on May 15, 1966.[9] On the eve of the effective date, the United States withdrew its denunciation, in return for an interim arrangement whereby all major carriers agreed by contract filed with the C.A.B. that as to travel to, from, or through the United States the limit of liability would be $75,000 per passenger, and liability would be enforced without reference to fault on the part of the carrier.[10]

Canadian Pacific became a party to the so-called Montreal Agreement, but it would not have helped Burdell. Not only did the accident take place prior to the effective date of the Montreal Agreement, but also Burdell's ticket did not call for travel to, from, or through the United States. This gap was recognized at the time, but was agreed to in the hope that the Montreal Agreement would soon become world-wide in scope.[11] Thus far that step has not yet taken place, though the receptivity to higher limits than the Warsaw figures appears to be spreading.[12] In any event, as we have said, for Burdell's survivors all this would be no comfort.

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[8]For a more thorough discussion of the origin and application of Article 28, see Lownefeld & Mendelsohn 522-526.

[9]53 DEP'T STATE BULL. 923 (1965).

[10]54 DEP'T STATE BULL. 955-57 (1966); CAB Press Release 66-61, May 13, 1966; 31 Fed. Reg. 7302 (1966).

[11]See Lowenfeld & Mendelsohn, 597-99.

[12]See, e.g., Report of Subcommittee on Revision of the Warsaw Convention as amended by the Hague Protocol, ICAO Doc. No. LC/SC Warsaw Rep. 9-12-68. The September 1969 meeting of the Legal Subcommittee of ICAO did not come up with an agreed plan, and its documentation has not at this writing been released. However, the discussion proceeded to a large extent on modified versions of the Montreal Interim Agreement, that is with a limit of liability in the range $100,000-125,000 per passenger, absolute liability, and some incentive for the carrier to settle with the passenger prior to trial.

The plaintiffs might have had another escape. Under Article 25 of the Convention, the liability limit does not apply "if the damage is caused by [the carrier's] wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct." As one might guess from reading the quoted words, the standard of wilful misconduct has been most troublesome. Since Article 25 itself refers to the law of the forum on this issue, nothing approaching a uniform standard has been attained. On the basis of the limited description of the facts contained in the court's statement, it is my guess that wilful misconduct could have been found in this case. I am not aware, however, that any other passenger has prevailed under a wilful misconduct theory in claims arising out of this accident, even where, because of different ticket arrangements, it was possible to bring suit in the United States. In any event, to prove wilful misconduct would have required a full and elaborate trial with no assurance of the outcome. The most probable result would have been a settlement slightly above the $8,300 limit. Judge Bua, without addressing the Montreal Agreement or the possibility of a wilful misconduct recovery--indeed without any pleading by Canadian Pacific involving the limit-- held the Convention unconstitutional on the limitation of liability ground as well.

III. CONSTITUTIONALITY OF THE WARSAW CONVENTION

I must confess that in several years of considerable attention to the Warsaw Convention in all its ramifications, first as a government official and subsequently as a law teacher, it never occurred to me that the Convention could be held unconstitutional. I knew this had been tried once before in connection with a claim arising out of the same accident as the Jane Froman case in the forties.[13] The losing attorney had written his frustrations up in a book, contending that the Convention deprived his client of the right to a jury trial in violation of the Seventh Amendment.[14] But to have a judge actually repudiate a treaty which had had hundreds of cases decided under it, and had twice in the past year been presented to the Supreme Court, (though neither time with a clear expression from that Court)[15] struck me by surprise. I would examine the question in two parts.

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[13]Lee v. Pan American Airways, Inc., 275 App. Div. 855, 89 N.Y.S.2d 888 (2d Dept. 1949). For the case involving Jane Froman, see Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949).

[14]H. SHERMAN, THE SOCIAL IMPACT OF THE WARSAW CONVENTION (1952).

[15]Block v. Compagnie Nationale Air France, 392 U.S. 905 (1968), denying cert. to 386 F.2d 323 (5th Cir. 1967) (upheld defense under the Warsaw Convention in case involving charter flight); Alitalia-Linee Aeree Italiane S.p.A. v. Lisi, 390 U.S. 455 (1968), aff'g 370 F.2d 508 (2d Cir. 1966).

A. Can Any Treaty Be Declared Unconstitutional?

In the past, there has been some doubt on this score, primarily because of some rather uncharacteristic rumination by Justice Holmes in the famous migratory bird case.[16] In that case, the State of Missouri sought to enjoin federal enforcement of the Migratory Bird Treaty Act, on the ground that that Act dealt with matters reserved to the states under the Tenth Amendment. The argument was that the federal government cannot, through the treaty power, acquire powers it does not otherwise possess. After first pointing out the difference between Acts of Congress, which are the supreme law only when made pursuant to the Constitution, whereas treaties are supreme law when made under authority of the United States, the Court quickly added, "We do not mean to imply that there are no qualifications to the treaty-making power." If a treaty contained "any prohibitory words found in the constitution," as contrasted with "some invisible radiation from the general terms of the Tenth Amendment," then it would be unconstitutional and could, presumably, be voided by the Supreme Court.[17]

The confusion engendered by a too rapid reading of Missouri v. Holland, plus some vague language in two cases arising out of the Litvinov Assignment of 1933[18] spurred the controversy over the Bricker Amendment in the 1950's which (1) would have expressly stated that "a provision of a treaty which conflicts with the Constitution shall not be of any force and effect," and (2) would have provided that "a treaty shall become effective as internal law ... only through legislation which would be valid in absence of treaty."

The Bricker Amendment narrowly failed of adoption. I believe it clear, however, that the first goal of the Amendment corresponds to existing law. Thus if a treaty provision conflicts with a prohibition in the Constitution, it is void. For example, a prohibition on hate propaganda, as has been suggested in numerous proposals made in the United Nations, would almost certainly be void under the First Amendment's guarantees of freedom of speech and of the press, notwithstanding the fact that the First Amendment reads "Congress shall make no law . . .." In Reid v. Covert[19] (though the specific issue involved an executive agreement and not a treaty) the Supreme Court made this position completely clear. The verbal distinction alluded to by Justice Holmes, it explained, related only to the desire to maintain in effect treaties, including the Peace Treaty of 1783, made by the United States prior to the Constitution. "It would be completely anomalous to say that a treaty need not comply with the Constitution."[20]

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[16]Missouri v. Holland, 252 U.S. 416 (1920).

[17]252 U.S. 416, 433-34.

[18]United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

[19]354 U.S. 1 (1957).

[20]Id. at 17-18.

B. Is the Warsaw Convention Unconstitutional?

Judge Bua considered that both the provision of the Convention that would restrict the right of plaintiffs to bring suit in the United States and the provision relating to limitation on damages were "arbitrary, irresponsible, capricious and indefensible" and that they violated the due process and equal protection clauses of the United States Constitution. What, he asked, if 125,000 Poincaré francs were now worth only one dollar? Or what if the Convention provided that all suits must be brought in Warsaw, Poland? This set of rhetorical questions seems to me an inadequate substitute for constitutional analysis. On that basis, for example, any limitation of recovery in wrongful death actions could be similarly assailed. While the trend in the United States is away from such limitations, a number of states still have them, and none, so far as this writer knows, have ever been declared unconstitutional.[21] Indeed, until August 1967 -- after the accident that took Mr. Burdell's life -- Illinois had the lowest wrongful death limit in the United States: $30,000.[22] Absent the Warsaw Convention, presumably Mr. Burdell's widow would be bound by that limit. In sustaining the earlier limitations, the Supreme Court of Illinois said:

> The legislature took away no right when it enacted the statute. It created both the right and the remedy, and we think that its power to limit the maximum recovery in the action that it created can not be questioned. The fact that most States place no limit upon the amount recoverable, or that the legislative limit may seem unduly low when contrasted with recoveries in other actions, does not affect the power of the legislature, or the validity of its action.[23]

Whether, similarly, the Warsaw Convention created a cause of action is debatable.[24] It is now true, if it was not when

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[21]Some state constitutions do, however, contain express prohibitions against limits on recovery in wrongful death actions. See, e.g., ARIZ. CONST. art. 18, § 6; ARK. CONST. art. 5, § 32; KY. CONST. § 54; N.Y. CONST. art. 1, § 16; OHIO CONST. art. 1, § 19a; OKLA. CONST. art. 23, § 7; PA. CONST. art. 3, § 18; UTAH CONST. art. 16, § 5; WYO. CONST. art. 10, § 4.

[22]70 ILL. ANN. STAT. § 2, as amended, M.B. 626, § 2, (1967) Ill. Laws, 75th Gen. Ass., approved August 18, 1967. The amendment provides that only deaths occurring after the effective date will be free from the limitation.

[23]Hall v. Gillins, 13 Ill. 2d 26, 29, 147 N.E. 2d 352, 354 (1958).

[24]Two cases in the United States held that the Convention did not create a cause of action. Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957); 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). For a forceful argument that these cases were wrong, see Calkins, The Cause of Action under the Warsaw Convention, 26 J. AIR L. & COM. 217, 323 (1959).

the Convention was drafted, that nearly every country in the world has some form of damage action maintainable against a carrier, whether in the nature of a tort or a contract claim. It may be more correct to say that the Convention regulates the choice of forum, the standard and burden of proof, the period of limitation, and the measure of damages in claims between passengers (or shippers) and carriers than that it actively "creates" a cause of action.

But the argument in defense of the Convention does not rest on the concept of a grant, which, as the Illinois Supreme Court argues, may be limited if the grantor so chooses. The argument in favor of constitutionality of the Convention simply is that a limit on liability, especially when coupled with some arrangements about standards of liability and burden of proof of fault, is within the legitimate scope governmental regulation. However antiquated the amounts in Warsaw are, it would be most unfortunate, in my view, to sustain Judge Bua's contention that a damages limitation violates some concept of "substantive due process." Quite apart from air accidents, I think it is fair to say that we have not yet found an adequate system of accident compensation in the United States. Principles developed in the eighteenth and nineteenth centuries in England and America do not really work in the twentiety century. I do not know whether the ultimate solution is state insurance, automatic compensation, elimination of fault, comparative negligence, or some other plan. I would hope the legislatures, the Congress, and in the international area the countries of the world would experiment. One such experiment, mentioned earlier, is the Montreal Agreement, which combines a substantially higher limit with absolute liability. Doubtless that experiment too will have to be modified. But with no articulated standard, with no political mandate , for any court to strike down a system of accident compensation that includes a limit on liability, however obsolete, seems to me to be a misuse of the Constitution. It is worth remembering that if the common law of torts had been frozen into the Constitution, as Judge Bua would seem to suggest, repeal of the fellow servant rule and of assumption of risk, to name but two ancient barbarisms, might have been precluded, as might, today, the introduction of absolute liability or comparative negligence.

In fairness to Judge Bua, he had some additional points. Though not relevant to the case before him, he pointed to the provision in the Convention that applies even to domestic flights when the passenger holds a ticket including an international portion, so that two passengers sitting side by side are covered by two quite different regimes.[25] In a literal sense, Judge Bua is right in saying that the two passengers are not receiving equal protection. Similarly, he points out the anomaly of a low limit applicable to an airline but no limit applicable to the aircraft manufacturer, though both may have contributed to the accident.

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[25]Warsaw Convention art. 1(3).

Again, my reply is that these criticisms have merit. But they should, it seems to me, be addressed to the executive and legislative branches. All laws are, in a sense, discriminatory. Two widows bereaved as a result of airplane crashes, one caused by pilot error, the other caused by lightning, are also at present unequally protected, though either loss is the same. I, for one, would change this so that the carrier would bear the risk regardless of fault.[26] But the arguments for and against liability without fault are not all on one side, and it would not occur to me that the Constitution commands the adoption of my position.

Finally, Judge Bua considers the Warsaw limitation on place of suit to be unconstitutional. As noted earlier, I like Article 28 no better than Judge Bua does. It seems to me that if an international treaty should do anything on this issue, it should make it easier, not harder, to bring suit. Again, however, it seems hard for me to equate dislike with constitutional prohibition.

Overall, these brief reactions come down on the side of Professor Jaffe's warnings against "policy" or "political" judgments by judges without political mandate.[27] I would add only that these warnings seem to me particularly appropriate when what is involved is an international, and particularly a multilateral, agreement. It is not that such agreements are immune from review, or that there is some mystique about the foreign relations power. It is just that a judge, properly restrained in reversing political decisions of his own countrymen in Congress or state legislatures, ought, it seems to me, to be even more diffident in throwing aside the collective judgment of countries all around the globe. I would, accordingly find it quite unfortunate if on the grounds advocated by Judge Bua or on other grounds the appellate courts of this country would find the Warsaw Convention unconstitutional.

IV. CONCLUSION: A WORD TO TREATYMAKERS

The Warsaw Convention has never been popular in the United States. An attempt to double the limits from $8,300 to $16,600 in 1955 never made it through the United States Senate;[28] the notice of denunciation of the Convention in 1965, though not universally hailed, was probably more popular than the withdrawal of the denunciation in return for the Montreal Agreement six months later.

My experience has been that the aviation community, in the United States and particularly abroad, has never fully appreciated the depth of the hostility in this country to the Warsaw system. I view Burdell, whatever the detailed criticisms, as of a piece with Lisi, which held the standard Warsaw ticket ineffective to give the prescribed notice, and Mertens which went off on failure to deliver the ticket.[29] So long as carriers try

[26] See Lowenfeld & Mendelsohn 599-601.

[27] See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 475-76 (1965).

[28] See Lowenfeld & Mendelsohn 509-516.

[29] See Lisi v. Alitalia Linee Aeree Italiane S.p.A., 370 F.2d 508 (2d Cir. 1966); Mertens v. Flying Tiger Lines, 341 F.2d 851 (2d Cir. 1965).

to keep the print small, the notices hidden, and the amount of recovery limited, I suspect it will be very difficult to view any treaty -- including Warsaw or any revision -- as certain to govern the regime of airplane accident compensation. Until the limit is at least $100,000 with absolute liability and with the jurisdictional restrictions removed, but probably closer to $150,000, I doubt very much whether any new treaty could pass the twin hurdles of the Senate and the trial courts.