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Chan v. Korean Air Lines, Ltd.: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention

By LARRY MOORE*

I. INTRODUCTION

In *Chan v. Korean Air Lines*,¹ the United States Supreme Court eliminated the notorious American Rule,² which interpreted the Warsaw Convention³ (modified by the Hague Protocol⁴ and the Montreal Agreement⁵). However, the Court left intact the delivery defense with regards to the Convention.

The case arose from the aircraft disaster of September 1, 1983, involving Korean Air Lines Flight 007 which accidentally strayed over the Soviet Union and was shot down. The crash resulted in the deaths of 269 passengers and crew members. Since the incident occurred while the air-

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1. — U.S. —, 109 S. Ct. 1676 (1989).

2. *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3rd 52 (Can. 1979). See *infra* text accompanying note 10 for a discussion of the American Rule.

3. Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention], reprinted in 49 U.S.C.A. § 1502 note at 430 (West 1976). The original Treaty Nations were: Austria, Belgium, Brazil, Bulgaria, China, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Japan, Latvia, Luxembourg, Mexico, Netherlands, Norway, Poland, Rumania, Soviet Union, Spain, Sweden, Switzerland, Venezuela, and Yugoslavia. Warsaw Convention, *supra*, at 3014, T.S. No. 876, 137 L.N.T.S. at 13, reprinted in 49 U.S.C.A. § 1502 note at 430 (West 1976).

4. The Hague Protocol, Sept. 28, 1955, 478 U.N.T.S. 371. This agreement was ratified by the other member nations in 1955, but was so unpopular that it was not submitted to the United States Senate for confirmation until 1959. It was still the subject of bitter debate in 1966 when the Montreal Agreement took effect. The Protocol was never formally ratified in the United States. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-501 (1967).

5. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, May 16, 1966, CAB 18900, approved by order E-23680, 31 Fed. Reg. 7,302 [hereinafter Montreal Agreement], reprinted in A.F. LOWENFELD, AVIATION LAW CASES AND MATERIALS 434 (Documents Supp. 1972).

plane was engaged in an international flight, the Warsaw Convention, which governs such flights, was in effect. The Warsaw Convention limits damages to US \$75,000 per person in an aircraft disaster. The plaintiffs filed a motion for summary judgment pleading the Montreal Agreement, which requires that all notices pursuant to the Warsaw Convention be given in ten-point type. The Warsaw notice on the tickets of these passengers was in eight-point type. The trial court denied the motion.⁶ The Court of Appeals for the District of Columbia upheld this decision.⁷ Previously the United States Courts of Appeal for the Second and Fifth Circuits had ruled in similar cases that the Warsaw Convention limitations were void and allowed unlimited liability.⁸ This decision, in effect, ignored the American Rule in applying the Warsaw Convention. The United States Supreme Court agreed with the Court of Appeals for the District of Columbia, and thus effectively terminated the American Rule as a trial tactic.⁹

The American Rule simply holds that in an aircraft disaster involving an international flight and personal injury or death, there is a limitation on the amount which can be recovered pursuant to the Warsaw Convention and its subsequent modifications. However, this limitation shall be removed, and the defendant airlines will be subject to unlimited liability, when the notice of this limitation is in fine print.¹⁰ The Montreal Agreement requires ten-point type size or larger.¹¹

Chan is of major importance in the area of international transportation law since it brings the interpretations of the Warsaw Convention by the United States federal courts in line with the courts of the rest of the world in the determination of damages for personal injury or death arising out of an airline accident during an international flight.

The Warsaw Convention set very definite limits on the amount of damages that could be collected as a result of an air disaster. This allowed the member nations to the Convention to conduct their international flights with the assurance that, regardless of the origination or destination of a flight, their exposure for damages in an accident would

6. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985).

7. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'g* 664 F. Supp. 1463 (D.D.C. 1985).

8. *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966); *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir. 1983); *In re Air Crash Disaster Near New Orleans, LA*, 789 F.2d 1092 (5th Cir. 1986).

9. *Chan v. Korean Air Lines*, ___ U.S. ___, 109 S. Ct. 1676, 1681 (1989).

10. *Ludecke v. Canadian Pacific Airlines*, 98 D.L.R.3rd 52, 56-57 (Can. 1979).

11. Montreal Agreement, *supra* note 5, para. 2, *reprinted in* A.F. LOWENFELD, *supra* note 5, at 434.

be uniform from nation to nation, except for cases of willful or deliberate injury. However, in the past when a United States court had jurisdiction, many foreign carriers frequently discovered to their shock that these courts allowed the plaintiff, through judicial interpretation, to obviate the Warsaw Convention and collect unlimited damages contrary to the letter and spirit of the Convention. This separate American Rule caused confusion and chaos in the international airline industry and resulted in enormous economic consequences for both United States and foreign companies. In *Chan*, the United States Supreme Court reaffirmed the right of Congress to make treaties without modifications by the courts. This decision restored order and predictability to airline damages in international cases.

By eliminating this rule, the United States Supreme Court finally resolved sixty years of questions surrounding this controversial treaty and reversed lower court decisions that consistently tried to avoid the limits that had been set forth in the Convention and its additions. This Article examines the historical background of this decision, including the Warsaw Convention, the Hague Protocol, the Montreal Agreement, the American Rule; the *Chan* case itself; and *Chan's* impact on American case law in international transportation law.

II. HISTORICAL BACKGROUND

A. The Warsaw Convention

The Warsaw Convention and its modifications and additions govern the liability of airlines for loss or injury that results from an aircraft accident while the aircraft is either involved in an international flight, or serving as a leg of any other international flight.¹² It limits recovery for personal injury, death, or property damage that may result from such a flight.¹³ The Warsaw Convention, enacted in 1929, stated as its purpose the protection of the fledgling aviation industry from disastrously large judgments that could result from an air accident and the provision of some uniformity among countries as to the content of tickets, baggage claim checks, and airbills.¹⁴ Indeed, most of the information on the standard airline ticket is required pursuant to the Warsaw Convention. In cases of death or personal injury, the total damages allowed under the initial treaty was 125,000 Poincar francs or 8,300 United States dollars.¹⁵

12. Lowenfeld & Mendelsohn, *supra* note 4, at 498-501.

13. *Id.* at 499.

14. *Id.* at 498-99.

15. *Id.* at 499.

From the beginning the United States saw this amount as too low.¹⁶ Criticism of the Convention was intense¹⁷ and reached a peak following *Ross v. Pan American Airways*.¹⁸ The *Ross* case arose when an American entertainer was critically injured while on a United Service Organizations [hereinafter USO] tour during World War II. The New York Court of Appeals held that the Warsaw Convention applied and the promising young star's recovery was limited to US \$8,300.¹⁹

In addition, a technical interpretation of the Warsaw Convention could lead to discrimination among individuals injured or killed in the same accident. For example, if a plane bound from New York to Paris crashed in international waters, all aboard the airplane would be subject to the limitations of the Warsaw Convention. However, if a flight from Chicago to New York crashed, victims traveling entirely within the United States would not be subject to the limitations, whereas victims whose journeys began outside the United States would be subject to such limitations.²⁰

B. The Hague Protocol

American complaints lead to an attempt by some treaty nations to modify the treaty amount in such a way as to satisfy the United States without offending other nations.²¹ A compromise resulted in the 1955 Hague Protocol, which raised the treaty limits to 250,000 Poincar francs or 16,600 United States dollars.²²

C. The Montreal Agreement

This increase of the treaty limits did not satisfy discontent within the United States. The debate within the Office of the President and the Congress over ratification of the Hague Protocol lasted for ten years. In 1965 the United States officially filed a Notice of Denunciation of the Convention, which not only rejected the Hague Protocol, but was the first step toward a withdrawal from the Warsaw Convention altogether.²³ The United States was prepared to withdraw unless the treaty limit was

16. *Id.* at 504.

17. *Id.* at 502-04.

18. 299 N.Y. 88, 85 N.E.2d 880 (1949).

19. *Id.* at 92-99, 85 N.E.2d 882-86.

20. *See* Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967).

21. Lowenfeld & Mendelsohn, *supra* note 4, at 506-07.

22. *Id.* at 504-09.

23. *Id.* at 510, 545-52; *see also* Notice Of Denunciation, 53 DEP'T ST. BULL. 923, 924-25 (1965).

raised to at least US \$100,000.²⁴ This led to months of negotiations between nations and airlines in an attempt to keep the United States a party to the Warsaw Convention.²⁵ In a somewhat unusual, final effort to save the Convention, the private air carriers of the member nations met in Montreal, Canada, and with strong persuasion and some arm twisting by their own governments, entered into a private agreement²⁶ raising the limit to US \$75,000.²⁷ The Montreal Protocol also established the ten-point type standard for notice of the limitations.²⁸

D. The American Rule

The American Rule developed in a line of cases that allowed circumvention of the Convention limits if the notice of limitation was not printed in ten-point type or larger.²⁹ After the controversy raised by the harsh results, at least by American standards, in the *Ross Case*,³⁰ American courts began to look for an avenue of escape from the terms of the Warsaw Convention. Initially, there appeared to be two sections which provided defenses to the Warsaw Convention by which relief could be granted: article 3 of the Warsaw Convention³¹ and the Montreal

24. Lowenfeld & Mendelsohn, *supra* note 4, at 552.

25. *Id.* at 549-51.

26. *Id.* at 595-96.

27. *Id.*

28. Montreal Agreement, *supra* note 5, para. 2, reprinted in A.F. LOWENFELD, *supra* note 5, at 434; Lowenfeld & Mendelsohn, *supra* note 4, at 597-98.

29. See *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 514 (2d Cir. 1966); *Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912, 914 (D.C. Cir. 1973); *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85, 90 (2d Cir. 1983); *In re Air Crash Disaster Near New Orleans, LA*, 789 F.2d 1092, 1098 (5th Cir. 1986); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 171, 234 N.E.2d 199, 202-03, 287 N.Y.S.2d 14, 19-20 (1967).

30. See *Ross v. Pan-American Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949).

31. Article 3 provides:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
- (d) The name and address of the carrier or carriers;
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

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

Agreement.³²

Defenses to the Warsaw Convention, for the purposes of this Article, are: (1) delivery defenses—a ticket was not delivered pursuant to article 3 subsection 2 of the Warsaw Convention; and (2) notice defenses—the notice found on a particular ticket did not conform to section 2 of the Montreal Agreement.³³

Ross, although unsuccessful, was one of the first cases to challenge the Warsaw Convention based upon delivery. The plaintiff, Janet Ross, was a performer for the USO during World War II. The Army bought the airline tickets for the performers, who had been assembled without knowledge of their destination or departure date. An agent took the performing troupe to the airport and gave a ticket and passport to each performer. When the plaintiff received her ticket, she tore off the ticket stub. The agent then took the tickets, handed them to the ticket taker, and held the passports in his custody.³⁴

The plaintiff argued that the agent's actions did not constitute delivery of a ticket. Since the plaintiff never had the ticket, she was unable to read the notice of limited liability. Furthermore, she argued, the agent

ger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Warsaw Convention, *supra* note 3, art. 3, 49 Stat. at 3001, T.S. No. 876, 137 L.N.T.S. at 15-17, reprinted in 49 U.S.C.A. § 1502 historical note at 431 (West 1976).

32. The Montreal Agreement provides in relevant part:

Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention . . . in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name the carrier) and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US \$75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US \$8,290, or US \$16,580.

Montreal Agreement, *supra* note 5, para. 2, reprinted in A.F. LOWENFELD, *supra* note 5, at 434-35 (footnote omitted).

33. This Article does not deal with Article 25 of the Warsaw Convention, which eliminates the limitation of liability in cases when the accident was caused by the "willful misconduct" of the carrier. Warsaw Convention, *supra*, note 3, art. 25, 49 Stat. at 3020, T.S. No. 876, 137 L.N.T.S. at 27, reprinted in 49 U.S.C.A. § 1502 historical note at 434.

34. *Ross*, 299 N.Y. 88, 93-95, 85 N.E.2d at 880, 883-84.

was not her agent but was an employee of the USO. However, the New York Court of Appeals ruled that this was a delivery of a ticket stating: "[I]t was no concern of the carrier as to what the arrangements were between the passenger and the person who took delivery of the ticket."³⁵

The effects of the *Ross* interpretation were modified in *Warren v. Flying Tiger Line*.³⁶ In *Warren*, the United States government contracted with the Flying Tiger Company to transport ninety-two troops to Vietnam in March 1962. Upon arrival at the airport, each soldier received a boarding ticket. A soldier had to show this ticket before he was allowed to board. The ticket did not conform to the Warsaw Convention since the Warsaw limitation was printed on the back in fine print that was difficult to read without a magnifying glass. The plane made intermediate stops in Hawaii, Wake Island, and Guam. It disappeared after leaving Guam on route to the Philippines and was never heard from again.³⁷

Although the Ninth Circuit noted that the tickets contained a warning that was in fine print, the court chose not to consider this in their final decision.³⁸ (However, since this was a pre-Montreal Agreement case, the ten-point type size requirement was not yet established.) Instead, the Ninth Circuit focused its analysis on the question of delivery: After delivery of the ticket, was there enough time for the soldiers to obtain other insurance coverage beyond the Warsaw limits? The Ninth Circuit ignored the fact that the plane made several stops where the soldiers could have bought additional insurance and ruled that the tickets were not delivered in such a manner as to allow the troops an opportunity to obtain additional insurance.³⁹ The Ninth Circuit apparently believed the delivery question alone was enough to resolve the matter.

The United States Court of Appeals for the Second Circuit decided *Mertens v. Flying Tiger Line*⁴⁰ during the same year as *Warren*. In *Mertens*, Lieutenant Mertens was killed in an air crash in Japan. Mertens was accompanying some military materials that were on board the plane. His ticket was not presented to him until he was aboard the plane. Unlike *Warren*, Mertens was not given any notice regarding liability limits prior to boarding the plane and since the plane did not land on route, he did not have an opportunity to buy additional insurance. As in *Warren*,

35. *Id.* at 98, 85 N.E.2d at 886.

36. 352 F.2d 494, 495-97 (9th Cir. 1965).

37. *Id.* at 497.

38. *Id.* at 498.

39. *Id.*

40. 341 F.2d 851 (2d Cir. 1965).

the Second Circuit ruled this was not delivery for purposes of the Warsaw Convention since the deceased was not afforded an opportunity to obtain other insurance to compensate for the low limits of the Convention. The Second Circuit again ignored the argument that the ticket was technically delivered.⁴¹

In *Warren and Mertens*, the courts moved away from the technical meaning of delivery of a ticket, which served as the basis for the decision in *Ross*, and considered whether the ticket was delivered in such a fashion as to allow the passengers an opportunity to obtain extra insurance after receiving the ticket. If delivery did not afford such an opportunity, there was no delivery of a ticket pursuant to the Warsaw Convention.

The rulings from *Warren and Mertens* were expanded by the United States Court of Appeals for the Second Circuit in *Lisi v. Alitalia-Linee Aeree Italiane*.⁴² In *Lisi*, an Italian plane crashed in Ireland while on route to the United States.⁴³ The Second Circuit relied on dicta in *Warren* that stated that the notice of the Warsaw limitations was in such fine print as to be no notice at all.⁴⁴ Thus, in *Lisi*, the Second Circuit ruled that the size of the print was so microscopic that for Warsaw Convention purposes it was the same as no notice and therefore required that the judgment limitations be removed.⁴⁵

The mandatory type size of the Montreal Agreement became the sole issue in *In re Air Crash Disaster at Warsaw, Poland*.⁴⁶ In this case, the warning was printed in 8.5-point type by the Polish airline.⁴⁷ Eight of the nine decedents were members of the United States Amateur Boxing Team.⁴⁸ The defendant airline argued that the type was large enough and delivered in a timely enough manner that the deceased had actual notice of the Warsaw limit.⁴⁹ The Second Circuit rejected this argument on grounds that the Montreal Agreement now required ten-point type and failure to meet this requirement eliminated the Warsaw protection.⁵⁰

The same rule was followed in *In re Air Crash Disaster Near New Orleans*.⁵¹ In this case, the required notice was in nine-point type, not

41. *Id.* at 853, 856-58.

42. 370 F.2d 508 (2d Cir. 1983).

43. *Id.* at 510.

44. *Id.* at 513-14.

45. *Id.* at 514.

46. 705 F.2d 85 (2d Cir. 1983).

47. *Id.* at 86.

48. *Id.*

49. *Id.* at 88-89.

50. *Id.* at 89-90.

51. 789 F.2d 1092 (5th Cir. 1986).

the ten-point type required by the Montreal Agreement.⁵² The United States Court of Appeals for the Fifth Circuit held that the ten-point requirement was mandatory for Warsaw protection and removed the limit on liability.⁵³

The New York Court of Appeals, which imposed the Warsaw Convention limits in the controversial *Ross* case, refused to apply the Convention in the unusual case of *Egan v. Kollsman Instrument Corp.*⁵⁴ In *Egan*, Mrs. Seiter bought a roundtrip ticket from New York City to Vancouver, Canada. Since bad weather had cancelled all flights out of Vancouver, Mrs. Seiter took a bus to Seattle, cashed in part of her ticket, and caught her scheduled flight to Chicago.⁵⁵ In Chicago, she missed her flight to New York,⁵⁶ but she obtained a new ticket for another airline's flight to New York. The plane crashed while attempting to land in New York.⁵⁷ The Warsaw notice on the initial ticket was printed in 4.5-point type.⁵⁸ Despite the fact that Mrs. Seiter bought an extra US \$25,000 in insurance before she left the New York airport and another US \$50,000 in insurance before she left the Seattle airport, the court ruled that because of the type size, the notice provision was insufficient under the Warsaw Convention to place the deceased on notice.⁵⁹

III. THE CHAN CASE

In *Chan*, the United States Supreme Court addressed the question of the Warsaw Convention for the first time in the Convention's sixty year history. In this case, a Korean airliner, traveling from New York City to Korea, strayed over the Soviet Union's territory and was shot down by a Soviet warplane.⁶⁰ The Warsaw Convention notice was printed in eight-point type instead of the ten-point type required by the Montreal Agreement.⁶¹ The Court of Appeals for the District of Columbia noted the type size did not comport with the Montreal Agreement, but upheld the District Court's denial of the plaintiff's motion to remove the protection

52. *Id.* at 1095.

53. *Id.* at 1098.

54. 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S. 14 (1967).

55. *Id.* at 164-67, 234 N.E.2d at 200, 287 N.Y.S. at 15-16.

56. *Id.* at 165, 234 N.E.2d at 200, 287 N.Y.S. at 16.

57. *Id.*, 234 N.E.2d at 200, 287 N.Y.S. at 16.

58. *Id.* at 164, 234 N.E.2d at 200, 287 N.Y.S. at 16.

59. *Id.* at 167 n.3, 168-72, 234 N.E.2d at 201 n.3, 202-04, 287 N.Y.S. at 18 n.3, 18-22.

60. *Chan v. Korean Air Lines*, ___ U.S. ___, 109 S. Ct. 1676, 1677-78 (1989).

61. *Id.* at ___, 109 S. Ct. at 1678.

of the Warsaw Convention.⁶²

This decision conflicted with precedents in other circuits. In resolving this conflict, the Supreme Court found that the Montreal Agreement imposes no sanction for failure to comply with its ten-point type requirement. The delivery of a ticket with a smaller type size, although technically a violation of the Montreal Agreement, could not be the basis for a denial of the limitation provided by the Warsaw Convention.⁶³

The Supreme Court attacked the line of cases which held issuing a ticket that failed to provide adequate notice of the Warsaw Convention limitations amounted to nondelivery of the ticket.⁶⁴ The Court held that such decisions amounted to a modification of a treaty, despite the clear text of such treaty.⁶⁵ In moving away from the decisions of American courts for the past forty-one years the Supreme Court stated:

These estimations of what the drafters might have had in mind are of course speculation, but they suffice to establish that the result the text produces is not necessarily absurd, and hence cannot be dismissed as an obvious drafting error. We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the Solicitor General have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous. . . . But where the text is clear, as it is here, we have no power to insert an amendment.⁶⁶

The concurring opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, however, indicated a willingness to retain the American Rule in a modified version.

If notice is indeed required, it must surely meet some minimal standard of "adequacy." All would agree, no doubt, that notice that literally could be read only with a magnifying glass would be no notice at all. . . . But there is a substantial difference between 4-point and 8-point type, particularly where, as here, the notice took the form of the "advice" prescribed by the Montreal Agreement and occupied a separate page in the ticket book. It cannot be said that the notice given here was "camouflaged in Lilliputian print in a thicket of [other conditions]."⁶⁷

62. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'g* 664 F. Supp. 1463 (D.D.C. 1985).

63. *Chan*, — U.S. —, 109 S. Ct. at 1681-82.

64. *Id.* at —, 109 S. Ct. at 1680.

65. *Id.* at —, 109 S. Ct. at 1680-84.

66. *Id.* at —, 109 S. Ct. at 1683-84.

67. *Id.* at —, 109 S. Ct. at 1692.

The concurring opinion also indicated that these Justices would be willing to keep the question open as to what is proper notice in order to retain the right to prohibit inadequate notice.⁶⁸

The Supreme Court leaves no doubt that lower courts must strictly interpret and adhere to the Warsaw Convention and may not exploit minor technicalities to circumvent the damage limitations of the Convention. The American Rule is officially dead.

IV. CONCLUSION

The *Chan* opinion reopens the controversy in the United States surrounding the Warsaw Convention. The United States has never agreed with the limitations placed on recovery in aircraft disasters. Even the 1966 increase of the limit to US \$75,000 was still less than the minimum dollar level that the United States espoused as necessary and adequate compensation—and that was twenty-three years ago.⁶⁹ The 75,000 dollar limit has not increased since 1966. Thus, with price inflation, the amount has become even more inadequate.

Prior to *Chan*, the only avenue of relief from these limitations that did not require a showing of willful negligence on the part of the airlines was the delivery provisions of the Warsaw Convention and the case-law defense of notice. Now, the United States courts must strictly enforce the Warsaw Convention and the notice avenue of relief is closed.

The Supreme Court's elimination of the notice defense renders what has always been seen as a bad law even worse. The forces that were temporarily mollified after the Montreal Agreement (probably not so much from the increase in liability that the Agreement allowed, but because the Agreement provided an avenue for escaping liability limits altogether) have now been provided with a major reason to again declare war against the Warsaw Convention, unless they are headed off by a new adjustment in the Montreal limitation figures.

In light of history and inflation, raising the recovery limit may ward off conflict over the Warsaw Convention. This process, if history is any guide, will be difficult. There were two areas of early conflict: (1) the conflict between the United States and the other member nations who were content with the low liability levels and did not want any increased limits; and (2) the conflict in the United States caused by those who were willing to abandon the Warsaw Convention because they believed that the limits were far too low. Therefore, any solution must be aimed at

68. *Id.*, 109 S. Ct. at 1692.

69. Lowenfeld & Mendelsohn, *supra* note 4, at 547-50, 595-96.

resolving both conflicts at the same time. One way of achieving this goal would be to get an average figure for the actual damages now awarded in member nations for injuries and for deaths arising out of domestic accidents. The member nations would then have a true economic basis for what these societies believe is the actual value of such an accident. This value could form the basis for another Montreal-type agreement. This is a better approach to the problem than merely having State Department officials decide upon an arbitrary figure as they did in Montreal. In this manner, a figure could be reached that reflects more closely the member nations beliefs as to the true economic value of an injury. While this method, or any other developed method, would be far from perfect, failure to achieve limits that are considered fair, especially in the United States, will only lead to United States courts once again trying to find a way to circumvent the limits.⁷⁰

70. Following the decision of the Supreme Court, a D.C. District Court jury in the case still found unlimited liability based upon "willful misconduct" on the part of the airlines and awarded a verdict of \$50,000,000 to 137 victims, a matter certain to be appealed. Though the issues surrounding print type may have been resolved, the *Chan* case is far from finished. Chicago Daily L. Bull., Aug. 3, 1989, at 1, col. 2.