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Maritime Insurance Co. Ltd. v. Emery Air Freight Corp.

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Cover Page Footnote
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NOTES

Maritime Insurance Co. Ltd. v. Emery Air Freight Corp.

In a recent decision, Maritime Insurance Co. Ltd. v. Emery Air Freight Corp., the United States Court of Appeals for the Second Circuit held that an air carrier transporting cargo internationally is subject to full liability for the loss or damage of cargo, if the carrier fails to comply completely with international documentary requirements. The decision, which required interpretation of the Warsaw Convention [hereinafter the Convention or the Treaty], rejected the argument that certain information, though formally required by the Convention to be listed on an air waybill, need not be listed if the information is commercially insignificant and causes no prejudice to the shipper of the goods. The opinion reflects the continuing trend towards a more literal interpretation of the Convention's provisions regarding air cargo transportation and away from the "purpose-oriented" approach which traditionally has guided judges in their construction of the Treaty.

This Note analyzes the Maritime decision's interpretation of the Warsaw Convention's documentary requirements for international air cargo carriers. Part I of the Note examines the factual and legal background of the Maritime decision. Part II discusses the history

2 Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]. The original text of the Convention was written in French. The French text controls in any dispute concerning the proper interpretation of the Convention. See Eastern Airlines, Inc. v. Floyd, 111 S.Ct. 1489, 1493 (1991). Official translations of the Treaty were written in Spanish and English. In addition, an unofficial American translation of the Treaty exists. Generally, the official and unofficial translations of the Warsaw Convention remain true to the original French text. Therefore, for purposes of simplicity, this Note cites to the official English translation of the Treaty. However, ambiguities in the original French text and discrepancies among the various translations and the original text have caused some serious interpretative problems. See infra notes 58-65 and accompanying text (discussing the ambiguities of Article 8(h) and (i)). When discussing these provisions, the Note will provide the original French text, the official English translation, and the unofficial American translation of these provisions.
3 A waybill is a "written document made out by [a] carrier listing point of origin and destination, consignor and consignee, and describing goods included in shipment . . . . Such constitutes the written description of the shipment in the event of any claim." Black's Law Dictionary 1593 (6th ed. 1990).
and scope of the Warsaw Convention. Part III describes the two different interpretative approaches that courts have taken toward the Convention and describes the cases which have developed these competing jurisprudential philosophies. Part IV evaluates and critiques the *Maritime* decision. Finally, the Note concludes that, although the Second Circuit's holding is jurisprudentially correct and properly construes the Convention, the decision serves no commercial or legal purpose. Attributing the inequitable result of the case to the archaic requirements of the Convention, the Note asserts that the *Maritime* decision illustrates the need for the United States to rethink its continued participation in the Warsaw Convention.


A. Factual Background

On October 28, 1988, Continent-Wide Enterprises, Ltd. (Continent-Wide) delivered $58,220 worth of photographic equipment to the offices of Emery Air Freight Corporation (Emery) in Panama.\(^4\) On the same day, Emery issued an air waybill which acknowledged the receipt of the equipment in good condition and which stated that the Warsaw Convention governed the carriage.\(^5\) Under the terms of the waybill, Emery agreed to transport the equipment by air to Continent-Wide's offices in Toronto.\(^6\) Emery routed the equipment through Miami and contracted with Pan Am Airlines to perform the first leg of the carriage.\(^7\) The goods, however, were mislaid or misdirected en route, and Continent-Wide never received its photographic equipment.\(^8\)

A timely claim for the full value of the lost equipment was presented to Emery by Maritime Insurance Company Ltd. (Maritime), which was Continent-Wide's insurer and subrogee.\(^9\) Emery, claiming that its liability was limited under the Convention, rejected Maritime's claim and countered with a settlement offer of $4,435.23 based on the weight of the lost goods.\(^10\) Maritime refused Emery's settlement, contending that Emery was not entitled to limited liability under the Convention because Emery omitted some of the required particulars on its waybill.\(^11\) Specifically, Maritime noted that the waybills did not list the place and date of the execution of the

\(^{4}\text{No. 92-7672, 1993 WL 4963 at *1 (2d Cir. Jan. 13, 1993).}\)

\(^{5}\text{Id.}\)

\(^{6}\text{Id.}\)

\(^{7}\text{Id.}\)

\(^{8}\text{Id.}\)

\(^{9}\text{Id.}\)

\(^{10}\text{Id. (citing Warsaw Convention, supra note 2, art. 22). For a discussion of Article 22 of the Convention, see infra notes 21, 53-55 and accompanying text.}\)

\(^{11}\text{1993 WL 4963 at *1 (citing Warsaw Convention, supra note 2, arts. 8, 9). For a discussion of Articles 8 and 9 of the Convention, see infra notes 56-72 and accompanying text.}\)
waybill, the stopping place, the name of the first carrier, and the volume and dimensions of the goods, as required by Article 8(a), (c), (e), and (i), respectively.  

B. The District Court Opinion

Maritime filed suit against Emery in United States District Court for the Southern District of New York for the full value of the lost equipment. Soon thereafter, Maritime moved for summary judgment. The district court denied Maritime’s motion. In its opinion, the court first considered whether the waybill’s omission of the dimensions and volume of the cargo constituted a violation of Article 8(i) so as to preclude Emery from claiming limitation of liability under the Convention. The district court held that a Second Circuit precedent, Exim Industries v. Pan American World Airways, Inc., controlled the resolution of the case. In Exim, a carrier that had omitted the volume and dimensions of its cargo on its waybill was found nevertheless to be entitled to the Convention’s limitation of liability. Adhering to precedent, the court concluded that the waybill’s omission of the volume and dimensions of Continental’s equipment was “technical and insubstantial” and did not prejudice the shipper. Therefore, the district court held that the waybill’s omissions did not preclude limitation of Emery’s liability.

Next, the court considered whether the omission of the date and place of the waybill’s execution, the intermediate stopping places, and the name of the carrier violated Article 8 and barred Emery, as consignee of the goods, from claiming the limitation of liability provided in Article 22 of the Convention. Unlike Exim, which only involved the interpretation of subsections (h) and (i) of Article 8, the issue presented in Maritime required the district court to interpret the language of subsections (a), (c), (e), and (i). Maritime argued that Exim’s “commercially significant omission” analysis was not the

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12 1993 WL 4963 at *1 (citing Warsaw Convention, supra note 2, art. 8(a), (c), (e), (i)). For a discussion of these subdivisions, see infra notes 56-72 and accompanying text.
13 1993 WL 4963 at *1. Emery filed a third-party complaint against Pan Am, but the complaint was dismissed after Pan Am filed a Chapter 11 bankruptcy petition. Id. n.1.
15 Id.
16 Id.
17 754 F.2d 106 (2d Cir. 1985). For a discussion of the Exim decision, see infra notes 95-103 and accompanying text.
18 Id.
19 Maritime, 769 F. Supp. at 128 (citing Exim, 754 F.2d at 108).
20 Id.
21 Id. at 129.
22 754 F.2d at 106. For a discussion of subsections (h) and (i) of Article 8 of the Warsaw Convention, see infra notes 58-65 and accompanying text.
proper method of interpreting subsections (a), (c), and (e) of Article 8, which, unlike subsections (h) and (i) of that same article, were clear and unambiguous.\textsuperscript{23} Rather, Maritime contended that recent decisions of the United States Supreme Court and the Second Circuit Court of Appeals required the court to construe strictly the Warsaw Convention and to read subsections (a), (c), and (e) literally.\textsuperscript{24} Despite the novelty of the issue and Maritime's references to recent precedents, the district court nevertheless found \textit{Exim} to be controlling and employed that case's "commercially significant omission" test to analyze Maritime's claim.\textsuperscript{25} Accordingly, the district court denied Maritime's motion for summary judgment on this issue, concluding that material questions of fact remained as to whether the shipper, Continent-Wide, was prejudiced by the omission of these other particulars.\textsuperscript{26}

\subsection*{C. The Decision of the Second Circuit Court of Appeals}

Maritime appealed the denial of summary judgment, asserting that the court erred in requiring Maritime to demonstrate that the omissions from the waybill were "commercially significant."\textsuperscript{27} The Second Circuit Court of Appeals agreed with Maritime's argument and reversed the lower court's decision.\textsuperscript{28} The court of appeals, while acknowledging the continuing validity of the \textit{Exim} decision, held that \textit{Exim} should be limited to its facts and that the "commercially significant omission" test was inapplicable to the case at bar.\textsuperscript{29} The appellate court distinguished \textit{Exim} from \textit{Maritime} by emphasizing that the subsections at issue in \textit{Exim}—Articles 8(h) and (i)—were ambiguous and subject to various interpretations, while \textit{Maritime} involved Article 8(a), (c), and (e), which were clearly and unambiguously written.\textsuperscript{30} Citing the recent United States Supreme Court opinion of \textit{Chan v. Korean Air Lines},\textsuperscript{31} the Second Circuit stated that its role was to construe the treaty strictly as written and not to insert amendments into the document.\textsuperscript{32} Applying a strict, literal construction of the Convention, the appellate court concluded that, because Emery failed to list all of the required particulars and because Article

\begin{tabular}{l}
\textsuperscript{24} Maritime, 769 F. Supp. at 129-30 (citing Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); Buonocore v. Trans World Airlines, 900 F.2d 8 (2d Cir. 1990); Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705 (2d Cir. 1990)). \\
\textsuperscript{25} Id. \\
\textsuperscript{26} Id. \\
\textsuperscript{27} Id. at *1. \\
\textsuperscript{28} Id. \\
\textsuperscript{29} Id. at *2. \\
\textsuperscript{30} Id. \\
\textsuperscript{31} Chan v. Korean Air Lines, 490 U.S. 122 (1989). For a discussion of the \textit{Chan} decision, see infra notes 104-116 and accompanying text. \\
\textsuperscript{32} Maritime, No. 92-7672, 1993 WL 4963 at *2 (citing Chan, 490 U.S. at 134). 
\end{tabular}
9 prohibits carriers from limiting their liability if Article 8's particulars are absent from the waybill, Maritime was clearly entitled to summary judgment.33

II. The Warsaw Convention

A. The History of the Convention

In 1925 and 1929, diplomats from around the world convened in Paris and Warsaw to address the legal problems confronting the incipient international air transportation industry.34 From these meetings arose the Warsaw Convention of 1929,35 a multilateral treaty intended to govern the international air carriage of passengers, baggage, and cargo.36 The Convention went into effect in 1932, but the United States, which did not participate in the Treaty's drafting, did not become a signatory until 1934.37

The Warsaw Convention regulates international air transportation in two general ways. First, the Convention establishes internationally uniform rules providing the rights and liabilities of international air passengers and carriers.38 Included in the Convention are standards for documents such as air waybills, tickets, and baggage claim checks.39 Second, the Treaty establishes liability limitations for air carriers transporting passengers, baggage, or cargo.40 The drafters adopted these limitations fearing that unrestricted damages claims would deter capital investment and irreparably cripple the fledgling air transportation industry.41

Critics assailed the Convention's liability limitations, contending that the caps were intolerably low, especially with respect to claims by injured passengers.42 Such criticism sparked various attempts to

33 Id. at *3.
35 Warsaw Convention, supra note 2, 49 Stat. at 3000, 137 L.N.T.S. at 11.
37 Lowenfeld & Mendelsohn, supra note 34, at 501-02.
38 Id. at 498-99.
39 Warsaw Convention, supra note 2, art. 8, 49 Stat. at 3016, 137 L.N.T.S. at 19 (air waybill requirements); id., art. 3, 49 Stat. at 3015, 137 L.N.T.S. at 15, 17 (passenger ticket requirements); id., art. 4, 49 Stat. at 3015, 137 L.N.T.S. at 17 (baggage check requirements).
40 Id., art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23 (liability limitation for passenger injuries or deaths); id., art. 22, 49 Stat. at 3019, 137 L.N.T.S. at 25 (liability limitation for loss or damage of baggage or cargo). See Lowenfeld & Mendelsohn, supra note 34, at 499-500 (discussing the liability limitations).
41 Lowenfeld & Mendelsohn, supra note 34, at 499.
42 Id. at 504.
amend the Treaty. In 1955, international leaders met and drafted the Hague Protocol, which proposed doubling the amount recoverable by injured passengers, among other amendments to the Convention. While numerous countries ratified the Hague Protocol, the United States did not, finding the increased liability limitations still inadequate. This dissatisfaction led to American denunciation of the Warsaw Convention in 1965. In response, air carriers independently agreed to increase the liability limitations under the Warsaw Convention and to assume strict liability for passenger injuries. This agreement, known as the Montreal Agreement, resulted in a retraction of the United States’ denunciation of the Convention. Several other attempts to reform the Warsaw Convention, such as the Guatemala Protocol and the Montreal Protocols of 1975, were also rejected out of hand by the United States. Consequently, only the original Warsaw Convention and the Montreal Agreement are binding law in the United States.

B. The Convention’s Regulation of Air Cargo

The key provisions of the Warsaw Convention governing the international transportation of air cargo are contained in Articles 8, 9, 18, and 22. Under the Convention, an air carrier is presumed lia-

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44 Lowenfeld & Mendelsohn, supra note 34, at 507.
45 Id. at 509.
46 Id. at 546-52; Bell, supra note 36, at 848, 858 n.57 (citing U.S. Gives Notice of Denunciation of Warsaw Convention, 55 DEP'T ST. BULL. 923 (1965)).
48 Lowenfeld & Mendelsohn, supra note 34, at 596.
51 Bell, supra note 36, at 849-50. Last year Congress again considered whether the United States should adopt the Montreal Protocols. See 138 CONG. REC. S17843-02, S17845-02 (daily ed. Oct. 8, 1992). Despite the Bush Administration’s calls for adopting the Montreal Protocols, Congress tabled consideration of the matter. Id.
52 These provisions also govern the transportation of checked baggage; however, this Note does not specifically discuss the judiciary’s treatment of checked baggage under the Warsaw Convention. For a discussion of the general issues involved in checked baggage cases, see Stephen C. Fulton, Airline Baggage Claims: A Tour Through the Legal Minefield, 5 FLA. INT'L L. J. 349, 356-369 (1990).
ble for the loss or damage of cargo;\textsuperscript{54} however, liability is limited to $20 per kilogram of lost goods unless the consignor specifically declares, at the time it tenders the goods to the carrier, the value of the goods and pays a supplementary fee.\textsuperscript{55} An air carrier, however, is not entitled to avail itself of the liability limitations if the carrier accepts goods without making out an air waybill or if the carrier does not list all of the information required by the Convention on the air waybill.\textsuperscript{56}

Article 8 of the Convention requires an air waybill to contain the following particulars: the place and date of the airbill's execution (Article 8(a)); the place of departure and destination (Article 8(b)); the agreed stopping places (Article 8(c)); the names and addresses of the consignor, the first carrier, and the consignee (Article 8(d), (e), and (f), respectively); the nature of the goods (Article 8(g)); the number of packages, the method of packing, and particular marks or numbers upon the packages (Article 8(h)); the weight, quantity, volume, or dimensions of the goods (Article 8(i)); and a statement that the transportation is governed by the Convention (Article 8(q)).\textsuperscript{57} If the air waybill omits these required particulars, then, under the terms of the Convention, the carrier is subject to full liability.

Both commentators and judges have criticized the documentary requirements of Article 8 on several grounds. A common target of criticism is the unclear language of subsections (h) and (i) of Article 8.\textsuperscript{58} These ambiguities are attributable both to the imprecise draft-
ing of the original drafters and to the loose translation of the Convention by several countries. With respect to subsection (h), the original French text stated that the waybill must contain "le nombre (the number), le mode d’emballage (the method of packing), les marques particulieres (the particular marks) ou les numeros des colis (or the number of packages)." The official British and unofficial American translations, however, adopt a slight but significant variation from the French text. These translations read: "The number of packages, the method of packing, and the particular marks or numbers upon them." This discrepancy has created confusion as to whether Article 8(h) requires the listing on the waybill of only one of the four particulars specified in the subsection or whether it requires the recording of three of the four particulars (the number, the method of packing, and either the particular marks or numbers of packages).

Similar ambiguity clouds the interpretation of subsection (i). The original French text of the Convention can be read to require the inclusion on the waybill of three of the four particulars, the listing of only one of the four particulars, or the recordation of only those "commercially significant" particulars in Article 8(i).

Critics of the Warsaw Convention also argue that Article 8 and the entire regulatory scheme of the Treaty are anachronistic and ill-suited to govern modern air transportation. Noting the radical changes and developments in the international air industry from the time of the Convention's drafting to today, commentators acknowl-

59 Warsaw Convention, supra note 2, art. 8(h), 49 Stat. at 3003, 137 L.N.T.S. at 19 (original French text of Treaty).
60 Id., art. 8(h), 49 Stat. at 3016, 137 L.N.T.S. at 19 (official British translation) (emphasis added); 49 U.S.C. app. s, 1502 note (American translation) (emphasis added). While the original French text separates the second and third particulars with a comma, the official British and unofficial American translations of Article 8(h) insert the word "and" after the second comma.
61 See, e.g., Distribuidora Dimsa, 976 F.2d at 96-97 (containing an excellent discussion of the debate regarding whether to read subsection (h) disjunctively or conjunctively).
62 The original French text of Article 8(i) reads as follows: "(i) Le poids, la quantité, le volume ou les dimensions de la marchandise . . . ." Warsaw Convention, supra note 2, art. 8(h), 49 Stat. at 3003, 137 L.N.T.S. at 18. Literally translated into English, the subsection reads: "The weight, the quantity, the volume, or dimensions of the goods." Distribuidora Dimsa, 976 F.2d at 96. The unofficial American translation, however, varies from a strict translation of the French by adding a comma after "volume" and deleting the word "the" before the word "dimensions."
63 See, e.g., Ronald Schmid, Legal Consequences of the Chan v. Korean Airlines Judgment for Cargo Cases, 16 AIR L. 22, 24 (1991) (advocating a strictly conjunctive reading of subsection (i)).
64 See, e.g., H. Drion, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 311 (1954) (advocating a strictly disjunctive reading).
65 See, e.g., Distribuidora Dimsa, 976 F.2d at 97; Exim Indus., Inc. v. Pan Am. Airways, Inc., 754 F.2d 106, 108 (2d Cir. 1985) (adopting "commercially significant particular" test).
66 See, e.g., Adelson, supra note 36, at 966 (noting U.S. dislike of the Convention); Nobel, supra note 36, at 608 (discussing the difficult task that courts face in "interpreting and enforcing the treaty's anachronistic provisions").
edge that "a lot of the requirements in Art. 8 ... are of no practical commercial significance for cargo handling in our days." Given the modern operations of air carriage, they contend, the documentary requirements of Article 8 are "overly stringent" and commercially impracticable.

Several reform efforts have attempted to amend Article 8 in order to correct its deficiencies. The Hague Protocol of 1955 deleted all but three of the particulars required by the Convention. Similarly, the Montreal Protocols eliminated most of Article 8's requirements, greatly simplifying the documentary burden on carriers. The United States, however, has not ratified either of these agreements. Consequently, all shipments of cargo to and from American soil continue to be governed by the waybill requirements of the 1929 Warsaw Convention.

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69 See Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705, 713 (2d Cir. 1990) (Van Graafeiland, J., concurring in part and dissenting in part) (stating that the framers of the Convention, had they envisioned the complexities of modern air transportation, "would have recognized the impracticability of listing all of the particulars" required by Article 8); Müller-Rostin, supra note 68, at 283; Schmid, supra note 63, at 24.
70 Hague Protocol of 1955, supra note 43, art. VI. The three waybill requirements under the Hague Protocol are: the places of departure and destination; the intermediate stopping place, if the places of departure and destination are within the same country but the intermediate stopping place is in another country; and notice that the Warsaw Convention governs the transportation. Id.
71 Montreal Protocol No. 4, supra note 50, art. III. The Montreal Protocol proposed amending Article 8 of the Warsaw Convention so as to require only the following information on the air waybill: the places of departure and destination; the intermediate stopping place, if the places of departure and destination are within the same country but the intermediate stopping place is not; and the weight of the shipment. Id. More significantly, under the Montreal Protocol, the omission of any of these three waybill requirements would not automatically deprive the consignor of the Convention's limitation of liability protections; rather, the consignor would only be liable for damages caused directly by "the irregularity, incorrectness or incompleteness of the particulars and statements" on the air waybill. Id.
73 The applicability of the Convention to a cargo shipment depends on the air waybill. If the place of departure and of destination are both within countries that are members of the Convention, then all flights between those two countries are subject to the Convention. However, if either the place of departure or of destination is within a country which does not participate in the Convention, then the Convention does not apply. Lowenfeld & Mendelsohn, supra note 34, at 501. Accordingly, the Convention governs all flights between the United States and other countries participating in the Convention. Agreements, such as the Hague Protocol, not yet ratified by the United States have no effect on these flights.
III. Background Law

A. Judicial Interpretation of the Warsaw Convention Prior to Chan v. Korean Air Lines

As discussed above, courts and commentators have expressed their dissatisfaction with the Convention since its adoption by the United States in 1932. Finding the provisions of the Convention, especially those concerning air carriers' limited liability for passenger injuries, to be inequitable and poorly drafted, judges took it upon themselves to "revise" the document by interpreting its provisions loosely. Focusing their analyses on whether the purpose of the Warsaw Convention was fulfilled in a case even though the literal requirements of the treaty were not satisfied, these judges compensated for the inability of the Executive and Legislative Branches to modify and reform the outdated provisions of the Convention.

While this judicial revisionism was most evident in decisions concerning personal injuries to passengers, judges also routinely employed the "purpose-oriented" approach in air freight cases. Unlike personal injury cases where courts were prone to interpret the Convention in favor of the injured plaintiff, courts in air cargo disputes tended to construe the Treaty in favor of the defendant-carrier by limiting liability despite apparent non-compliance with Article 8. Motivating this looser construction of the Warsaw Convention in air cargo cases was the assumption that the commercial shippers bringing cargo claims had a stronger bargaining position with air carriers and thus needed less protection against limited liability than the non-commercial passengers who brought most pas-

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74 See supra Part I.
76 See, e.g., Schmid, supra note 63, at 22 ("In the past we often learned that US [sic] Courts do not hesitate to amend the plain wording of the Warsaw Convention through self-willed interpretations in order to arrive at a result desired. The reason why some US judges follow their own philosophical views is that they want to protect the carrier's opposing party to the air transportation contract (passenger or consignor) as the liability limitations set out in the 1929 Convention are considered to be inadequate"); Adelson, supra note 36, at 966 ("The United States has in the past expressed its dislike of the Warsaw Convention . . . . Dissatisfaction with the Treaty, however, has not yet led to the kind of legislative action that will meaningfully protect passengers. Instead, protection came from the courts which confined the Treaty to its purpose as best they could, hoping to avoid the unfairness.").
77 For discussions of the "purpose-oriented" approach to judicial interpretation of the Warsaw Convention, see Adelson, supra note 36, at 943-51; Noble, supra note 36, at 608-09.
78 See, e.g., Bell, supra note 36, at 865 ("Almost without exception, courts considering Article 8 of the Warsaw Convention . . . . have attempted to determine whether the purpose of the Warsaw Convention was fulfilled even absent strict compliance with the terms of the Convention.").
79 Id.
senger and baggage claims.\textsuperscript{80}

The liberal judicial construction of Article 8 is rooted in a series of cases decided in the late 1940s and 1950s.\textsuperscript{81} These early decisions involved Article 8(c), the subsection that requires the listing of agreed stopping places on the air waybill.\textsuperscript{82} In these cases, courts focused not on whether the air carriers technically complied with the exact text of the Convention, but rather on whether the carriers' acts satisfied the purpose underlying Article 8's requirements. Since the purpose of Article 8(c) was simply to give notice to the shipper of the international nature of the carriage and of the applicability of the Warsaw Convention to the flight, if a carrier's acts provided such notice, then Article 8(c) was satisfied. For example, in \textit{Kraus v. Koninklijk Luchtvaart Maatschappij, N.V.},\textsuperscript{83} a carrier's reference on its waybill to its published timetable was found to satisfy Article 8(c) because it provided the shipper with constructive notice of the international character of the shipment.\textsuperscript{84}

Some courts construed Article 8(c) even more liberally than the \textit{Kraus} court. In \textit{Flying Tiger Line, Inc. v. United States}\textsuperscript{85} and \textit{American Smelting & Refining Co. v. Philippine Air Lines, Inc.},\textsuperscript{86} two carriers were permitted to limit their liability even though their respective waybills failed to indicate the agreed stopping places, either explicitly or by reference to the carriers' published timetables.\textsuperscript{87} Both decisions reasoned that, despite the explicit text of Article 8(c), the listing of the places of departure and destination, which made the international character of the flight apparent, satisfied the "stopping places" requirement.\textsuperscript{88}

When European tribunals later confronted similar disputes concerning the interpretation of Article 8, they also adopted a "purpose-oriented" approach in their interpretation of the Convention.\textsuperscript{89}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{82} The text of Article 8(c) requires the air waybill to contain the "agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity . . . ." Warsaw Convention, \textit{supra} note 2, art. 8(c), 49 Stat. at 3016.
\item \textsuperscript{83} 92 N.Y.S.2d at 315.
\item \textsuperscript{84} \textit{Id.} at 316.
\item \textsuperscript{85} 170 F. Supp. 422 (Ct. Cl. 1959).
\item \textsuperscript{87} \textit{Flying Tiger}, 170 F. Supp. at 422; \textit{American Smelting}, 141 N.Y.S.2d at 818.
\item \textsuperscript{88} \textit{Flying Tiger}, 170 F. Supp. at 422; \textit{American Smelting}, 141 N.Y.S.2d at 818; \textit{Kraus}, 92 N.Y.S.2d at 315.
\end{itemize}
\end{footnotesize}
Corocraft Ltd. v. Pan American Airways, Inc., a British court was confronted with the task of interpreting the ambiguous language of the original French text of Article 8(i). The British court applied a practical construction of the Article "so as to make good sense amongst commercial men." Under this practical reading of the Treaty, the court concluded that Article 8(i) did not require that the waybill "state every particular, no matter how useless, or irrelevant. It only requires those particulars to be stated so far as they are necessary or useful for the purpose in hand." The court thus held that the listing of only one of the four particulars specified in Article 8(i)—the weight of the goods—satisfied the Convention's requirements.

The Corocraft opinion and its European brethren greatly influenced the United States Court of Appeals for the Second Circuit in Exim Industries, Inc. v. Pan American World Airways, a case which best reflects the "purpose-oriented" approach to interpreting Article 8 in American jurisprudence. At issue was the extent of Pan Am's liability for lost cargo belonging to Exim Industries.

Exim made two shipments of silk blouses to New York from India, which the contract carrier, Pan Am, lost the goods en route. Pan Am asserted that its liability for the lost cargo was limited under the Warsaw Convention and that it only owed Exim $8,740. In response, Exim argued that Pan Am was not entitled to avail itself of the Treaty's protection because of Pan Am's failure to comply with the requirements of Article 8. Specifically, Exim contended that the waybill for the first shipment omitted the method of packing and marking of the cargo in violation of Article 8(h) and that the second waybill failed to mention the volume or dimensions of the cargo as required by Article 8(i).

The United States Court of Appeals for the Second Circuit ruled that, despite the waybills' omissions, Pan Am was entitled to limit its

90 1 Q.B. at 616.
91 For the original text of Article 8(i), see supra note 62. The Court gave the original French text priority over the British version of the Article, which was not ambiguously worded. GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 102 (1977).
92 Müller-Rostin, supra note 68, at 282 (quoting Corocraft, 1 Q.B. at 616).
93 Corocraft, 1 Q.B. at 616.
94 Id.
95 754 F.2d 106 (2d Cir. 1985).
96 Id. at 107.
97 Id.
98 Id.
99 Id. at 108. Exim also contended that Pan Am violated Article 8(q), which requires a statement that the Warsaw Convention governs the carriage, because the waybill merely stated that the Convention "may" be applicable to the cargo transportation. Id. at 108. The Court of Appeals rejected this argument, finding that the statement satisfied the purpose of the requirement, which was to give the shipper "reasonable notice of the likelihood that the Convention would be applicable." Id.
liability under the Warsaw Convention. Noting the ambiguity of the language of subsections (h) and (i), the court asserted that "only those particulars having practical commercial significance with respect to the shipment involved need be incorporated in the waybill." The court cited several foreign decisions, such as Corocraft, that construed Article 8 similarly and emphasized that the United States should adopt the same interpretation, in part, to "further the desirable policy of uniformity" in treaty interpretation.

The court then concluded that the omissions in each of the waybills were of little or no commercial significance since they were "technical and insubstantial omissions that did not prejudice the shipper."

B. The U.S. Supreme Court and Chan v. Korean Air Lines

The trend towards a "purpose-oriented" approach to judicial interpretation of the Warsaw Convention ended in 1989 with the United States Supreme Court's decision in Chan v. Korean Air Lines. In Chan, family members of victims of an international air disaster filed wrongful death actions against the carrier Korean Air Lines for damages. Korean Air Lines claimed that it was entitled to limited liability under the Warsaw Convention. The plaintiffs protested, noting that Korean Air Lines failed to provide notice to its passengers in the required type size of the carrier's limited liability for personal injuries. The plaintiffs, while conceding that the Convention by itself imposed no specific sanction for such non-compliance, argued that the Convention, read in conjunction with the Montreal Agreement, operated to destroy the carrier's entitlement under the Convention to limited liability.

101 Id.
103 Id. The "commercially insignificant omission" analysis applied in Exim has also been used to interpret the Convention's documentary requirements in baggage claim cases. See Republic Nat'l Bank of N.Y. v. Eastern Airlines, Inc., 815 F.2d 232 (2d Cir. 1987).
105 Id. at 123. On September 1, 1983, a Soviet Union military aircraft shot down a KAL airplane over the Sea of Japan. All 269 passengers on board died. The KAL flight originated in New York and was headed to Seoul, South Korea. Id. Due to the international character of the flight, it was governed by the Warsaw Convention and the Montreal Agreement. Survivors of the passengers killed on the flight brought various suits against KAL. These suits were consolidated for trial and transferred to the District Court for the District of Columbia. All parties stipulated that the Warsaw Convention controlled the action. Id. at 123-24.
106 Id. at 124.
107 Id.
108 Id. at 125-26.
In an opinion written by Justice Scalia, the Court ruled in favor of the defendant Korean Air Lines, finding that the Convention, either read alone or in conjunction with the other agreement, contained no sanction for printing the required notice in undersized type. The Court's reasoning was two-fold. First, the Chan opinion stated that the plain language of Article 3, which limits an air carrier's liability for personal injuries to passengers, did not contain any penalty for non-compliance. Stressing that the literal language of the Treaty dictated its decision, the Court wrote: "[W]here the text is clear . . . we have no power to insert an amendment."

Second, the Court compared the limited liability provisions of Article 3 to the liability protections offered by Articles 4, 8, and 9, which limit a carrier's liability for lost cargo and baggage. The Court first acknowledged the similarity between the provisions, noting that all the Articles refused to impose a limit on recovery when a carrier failed to deliver the relevant document (a ticket, an air waybill, or a baggage check) to its customer. The Court then distinguished the Convention's treatment of personal injury claims from its treatment of baggage and cargo claims. The Court pointed out that Article 3, unlike the other Articles, did not specifically mandate the removal of an air carrier's limited liability for failing to record on the document all of the particulars required by the text of the Convention. This distinction, the Court deduced, indicated that the Convention's drafters did not intend the delivery of a passenger ticket with undersized typeface to deprive a carrier of limited liability.

C. Post-Chan Decisions

Since the Chan decision, lower courts have generally followed
the Supreme Court's lead and adopted a strict construction of the Warsaw Convention in passenger and baggage cases. In *Buonocore v. Trans World Airlines*, \(^{117}\) for example, the Second Circuit Court of Appeals declined to hold a carrier liable for the death of a passenger in a terrorist attack in the public area of an airport terminal. Despite the fact that the decedent had already checked in at the check-in counter, presented his ticket and luggage, and received his boarding pass, the court ruled that the carrier was not liable because the injury to the passenger did not occur "in the course of any of the operations of embarking," as required by the literal text of the Warsaw Convention.\(^ {118}\) Similarly, in *Arkin v. New York Helicopter Co.*, \(^ {119}\) the Appellate Division of the New York Supreme Court strictly construed the Convention's documentary requirements for checked baggage and held that an air carrier was subject to unlimited liability if it omitted the weight and number of pieces on a passenger's baggage check, as required by the text of the Convention.\(^ {120}\)

The strong language of the *Chan* decision in favor of a strict construction of the Warsaw Convention, coupled with the literal interpretation of the Treaty in subsequent passenger and baggage cases, convinced most aviation law specialists that courts would strictly construe Article 8 and its documentary requirements against air carriers in future cargo cases.\(^ {121}\) Some commentators, however, maintained hope that courts would not apply *Chan* to air cargo claims.\(^ {122}\) The reasoning of several of the post-*Chan* baggage cases buffeted these hopes. The *Arkin* opinion, for example, distinguished between baggage cases and cargo cases and indicated that a continued "purpose-oriented approach" to the interpretation of Article 8 might still be appropriate.\(^ {123}\) Other baggage claim cases hinted that, while a strict construction of the Convention was appropriate in a baggage claim

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\(^{117}\) 900 F.2d 8 (2d Cir. 1990).

\(^{118}\) Id. at 9-10 (citing Warsaw Convention, *supra* note 2, art. 17).


\(^{120}\) Id. at 344-45 (citing Warsaw Convention, *supra* note 2, art. 4). Other post-*Chan* baggage cases that have strictly construed the Convention include *D'Arco v. Tap Air Portugal*, 796 F. Supp. 1508 (S.D. Fla. 1992); *Hill v. American Airlines*, Inc., 570 A.2d 1040 (N.J. Super. 1989). *But see Lourenco v. Trans World Airlines*, 581 A.2d 532 (N.J. Super. Ct. Law Div. 1990) (holding, without any mention of the *Chan* decision, that airline's failure to record required particulars on passenger's baggage claim check was technical and insubstantial and did not deny airline limited liability protection under the Warsaw Convention).

\(^{121}\) See, e.g., Schmid, *supra* note 67, at 24 ("We are convinced that the US Supreme Court would apply a similar plain meaning interpretation or literal approach to Article 8 as in the *Chan* case. Whether or not the requirements are of any 'current practical commercial significance' has to be ignored.").

\(^{122}\) See, e.g., Jonathan Barrett & Robert A. Lewis, *Failure to Comply with Documentary Technicalities of Warsaw Convention Leads to Unlimited Liability in Baggage Cases*, 15 AIR L. 98, 99 (1990) ("It might be hoped that courts in the future will only interpret the convention documentation requirements strictly against carriers in passenger cases.").

\(^{123}\) *Arkin*, 544 N.Y.S.2d at 344. *See also* Barrett & Lewis, *supra* note 122, at 99 (discussing the *Arkin* decision).
brought by a non-commercial plaintiff, a less literal interpretation of the Treaty might be warranted when the complainant is a commercial entity.¹²⁴

The first case to address directly the impact of Chan on air cargo carriage provided both proponents and detractors of the literal interpretative approach with ammunition and encouragement. In Victoria Sales Corporation v. Emery Air Freight,¹²⁵ Victoria Sales sued Emery for the loss of pharmaceuticals that Emery had agreed to ship from Amsterdam to New York.¹²⁶ Victoria Sales argued that it was entitled to recover the full value of the lost goods because the carrier failed to comply with the documentary requirements of Article 8 of the Convention.¹²⁷ In turn, Emery argued, first, that the Warsaw Convention did not govern the case since the goods were not lost during "transportation by air,"¹²⁸ and second, that, even if the Convention did apply, Emery was entitled to limit its liability under the Convention.¹²⁹

The majority of the Victoria Sales court held for Emery, finding that the Warsaw Convention did not govern the case.¹³⁰ Strictly construing the Convention’s definition of "transportation by air," the court reasoned that "[t]he plain language of Article 8 draws the line at the airport’s border . . . [and] excludes any transportation by land outside of the airport."¹³¹ Since both parties agreed that the pharmaceuticals were shipped successfully to New York and then lost at the carrier’s warehouse located just outside the boundaries of Kennedy Airport, the Convention was inapplicable.¹³² Although Victoria Sales argued that "modern commercial realities" should prompt the court to adopt a more expansive definition of what con-

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¹²⁵ 917 F.2d 705 (2d Cir. 1990).
¹²⁶ Id. at 706.
¹²⁷ Id. at 710-11 (Van Graafeiland, J., concurring in part and dissenting in part).
¹²⁸ Warsaw Convention, supra note 2, art. 18(1). Section 1 of Article 18 holds carriers liable for any damage to baggage or goods sustained during "transportation by air." Id. Section 2 of Article 18 define "transportation by air" as the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft . . . . The period of the transportation by air shall not extend to any transportation by land . . . performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.
¹²⁹ Victoria Sales, 917 F.2d at 710-11 (Van Graafeiland, J., concurring in part and dissenting in part).
¹³⁰ Id. at 706-07.
¹³¹ Id. at 707.
¹³² Id.
stipulates an “airport” under Article 18, the court flatly rejected such an interpretation. While acknowledging that a less literal interpretation might be more “sensible,” the court, citing Chan, stated that “to engraft such an interpretation onto the plain language of Article 18 would require an impermissible judicial amendment of the Convention.” Having found that the Convention did not govern the case, the court did not address the second issue involving the interpretation of Article 8 of the Convention.

Judge Van Graafeiland wrote a separate opinion to the Victoria Sales decision. Concurring in part and dissenting in part, his opinion indicated that the “purpose-oriented approach” to the interpretation of Article 8 would withstand the Chan decision. After first resolving that, in his opinion, the Warsaw Convention did govern the case, Judge Van Graafeiland then considered whether the failure of Emery’s waybill to note the markings on the lost package and its volume and dimensions, as literally required by Article 8, precluded the carrier from relying on the limitation of liability provisions of Article 9.

Finding the facts of the case to be virtually identical to those in the Exim decision, Judge Van Graafeiland defined the critical issue to be whether the references to Article 8 in the Supreme Court’s decision in Chan overturned the Second Circuit’s holding in Exim. Under his analysis, he found that Exim was still valid law. Dismissing the discussion of Article 8 in Chan as dictum, Judge Van Graafeiland offered several reasons to support his opinion. Observing that the Chan decision did not address what omissions would constitute a violation of Article 8, Judge Van Graafeiland first stated that Chan “did not attempt to reverse the traditional canon of liberal treaty construction that permits courts to go beyond the written words and look to ‘the history of the treaty, the negotiations, and the practical construction adopted by the parties.’” Second, he noted that the Chan decision “had no occasion to consider the Conven-

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133 Id.
134 Victoria Sales Corp. v. Emery Air Freight, 917 F.2d 705, 708 (2d Cir. 1990).
135 Id. (citing Chan v. Korean Air Lines, 490 U.S. 122, 134 (1989)).
136 Id. at 709 (Van Graafeiland, J., concurring in part and dissenting in part).
137 Id. at 710 (Van Graafeiland, J., concurring in part and dissenting in part). Judge Van Graafeiland found that the damage to the cargo did occur during “transportation of air” because the damage occurred, in his eyes, “in an airport,” as required by Article 18. Id. Noting that the term “airport” is not defined in the Warsaw Convention, he adopted a “functional rather than ‘metes and bounds’” definition of the term so as to “carry out the general intent of the Convention’s framers.” Id.
138 Id. at 711 (Van Graafeiland, J., concurring in part and dissenting in part).
139 Victoria Sales Corp. v. Emery Air Freight, 917 F.2d 705 (2d Cir. 1990) (Van Graafeiland, J., concurring in part and dissenting in part).
140 Id. (Van Graafeiland, J., concurring in part and dissenting in part). Judge Van Graafeiland’s approval of Exim was not surprising, considering his authorship of that decision.
141 Id. (Van Graafeiland, J., concurring in part and dissenting in part) (quoting Air
tion's intended purpose of creating an international uniform law." Generously citing the British court's decision in Corocraft, Judge Van Graafeiland stressed that courts should strive to interpret the Treaty in the same manner as other signatories to the Convention. Finally, the modern conditions of air cargo transportation, which rendered the listing of all the Article 8 particulars impracticable, militated in favor of less literal and more practical reading of subsections (h) and (i).

While Judge Van Graafeiland's interpretation of Article 8 did not command a majority in Victoria Sales, his appeal for the retention of a practical, purpose-oriented interpretation of Article 8 was endorsed in a subsequent Second Circuit decision, Distribuidora Dimsa S.A. v. Linea Aerea Del Cobra S.A. In many respects, Distribuidora Dimsa paralleled the Exim decision. Like Exim, the central issue of Distribuidora Dimsa was whether the defendant air carrier was precluded from asserting the affirmative defense of limited liability under the Warsaw Convention because it failed to record the method of packing, the markings on the packages, the volume, and the dimensions of the goods, in apparent violation of subsections (h) and (i) of Article 8. The court addressed this issue with much the same reasoning as the Exim decision, resolving that the omission of "commercially insubstantial or insignificant and nonprejudicial" particulars on a waybill did not violate Article 8(h) or (i) so as to deny a carrier limited liability. Applying this standard, the Second Circuit found that the omission of the method of packing, the marks on the packages, the volume, and the dimensions of the packages were "commercially insubstantial" and "nonprejudicial." The court accordingly held that the shipper's damages for the lost cargo were limited to those allowed by the Convention.

IV. Analysis

The Second Circuit's decision in Maritime remains true to the Supreme Court's ruling in Chan in two important respects. First, the Maritime court read the Chan decision as a call not only for a strict judicial construction of the Warsaw Convention's provisions pertain-

142 Id. at 711-12 (Van Graafeiland, J., concurring in part and dissenting in part).
143 See supra notes 90-94 and accompanying text.
144 Victoria Sales Corp. v. Emery Air Freight, 917 F.2d 705, 712-13 (2d Cir. 1990) (Van Graafeiland, J., concurring in part and dissenting in part).
145 Id. at 713 (Van Graafeiland, J., concurring in part and dissenting in part).
146 976 F.2d 90 (2d Cir. 1992).
147 Id. at 93.
148 Id. at 97.
149 Id. at 97-98.
150 Id.
ing to passenger claims, but also for a more literal reading of those Articles governing international air cargo transportation. While other courts had tried to restrict Chan’s application only to passenger and baggage claims, the Maritime opinion correctly adhered to Justice Scalia’s admonition that “where the text [of a treaty] is clear . . . [courts] have no power to insert an amendment . . .” Remaining true to the text of the Supreme Court’s decision, the Second Circuit adhered to precedent and followed Chan’s commandment to interpret literally all unambiguous provisions of the Convention, regardless of whether the provisions pertain to passenger, baggage, or cargo claims.

Second, the Maritime opinion properly applied the Chan ruling by adopting a strict and literal construction of subdivisions (a), (c), and (e) of Article 8 of the Warsaw Convention. As the Chan opinion stated, strict construction of a provision of a treaty is mandated only when the text of the provision is clear and unambiguous. Thus, the question that the Maritime bench had to answer was whether subsections (a), (c), and (e) of Article 8 were drafted in a clear and unambiguous manner. The court correctly concluded that these provisions were unambiguous. Although certain provisions of the Convention are riddled with infirmities, the clarity of Articles 8(a), (c), and (e) has never been questioned. Both the original French version and the American translation of these subsections

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We must . . . be governed by the text [of the Treaty]—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history [of the Convention] . . . . The latter may of course be consulted to elucidate a text that is ambiguous [citation omitted]. But where the text is clear . . . we have no power to insert an amendment . . . . "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty."

Id. (quoting The Amiable Isabella, 6 Wheat. 1, 71, 5 L.Ed. 191 (1821)).

153 Id.

154 See, e.g., Müller-Rostin, supra note 68, at 283 (stating that the language of Article 8(c) is “clear and unequivocal”). No cases were found that questioned the clarity of subsections (a) or (e).

155 The original French text of Article 8(a), (c), and (e) reads as follows:

La lettre de transport aérien doit contenir les mentions suivantes:

(a) le lieu où le document a été créé et la date à laquelle il a été établi;

(c) les arrêts prévus, sous réserve de la faculté, pour le transporteur . . . ;
clearly and unambiguously require recordation on the waybill of the place and date of the execution of the waybill, the agreed stopping place for the shipment, and the name of the first carrier. The *Maritime* court's literal interpretation of these unambiguous provisions displayed due respect for the *Chan* decision and the principle of *stare decisis*.

Likewise, the Second Circuit Court of Appeals also merits praise for its distinction of *Maritime* from the decisions in *Exim* and *Distribuidora Dimsa*. Unlike subsections (a), (c), and (e) of Article 8, subsections (h) and (i) of Article 8—the subsections at issue in both *Exim* and *Distribuidora Dimsa*—are notoriously ambiguous. To infer that the *Chan* decision overruled the holding of *Exim*, as the plaintiffs in *Maritime* argued unsuccessfully, would be to ignore the recognized ambiguities of Articles 8(h) and (i). The *Maritime* court, thus, properly affirmed the continuing yet limited validity of the *Exim* and *Distribuidora Dimsa* decisions, acknowledging that courts should look to the purpose underlying the Warsaw Convention's documentary requirements to assist them only when construing provisions of Article 8 that are truly ambiguous.

The strict construction of Article 8's documentary requirements in *Maritime* raises questions about the continuing viability of past decisions that employed a "purpose-oriented" interpretation of the Article. In particular jeopardy are the early cases that liberally construed Article 8(c)'s "agreed stopping places" requirement. In light of the Second Circuit's demand for strict, technical compliance with Article 8, it appears unlikely that any court would excuse, as did the courts in *American & Refining Co. v. Philippine Air Lines* and *Flying Tiger Line v. United States* a carrier's complete failure to make any indication of the agreed stopping places on the air waybill. Such a change would be welcomed by many aviation law specialists, who have long criticized the liberal interpretations of the Convention in these two cases. One must also question whether the decision in...
Kraus v. Koninkhke Luchtaart Maatschappij which held that a waybill's reference to the carrier’s timetable satisfied Article 8(c), could withstand the scrutiny of Maritime's insistence on literal compliance with Article 8.

Such uncertainties created by the Maritime decisions leave air carriers in a precarious position. Cognizant of the dire consequences for omitting any “commercially significant” particular listed in subsections (h) and (i) or any of the other particulars required by Article 8, carriers will be forced either to comply fully with these onerous documentary requirements or to invite unlimited liability for the loss or damage to their cargo. Faced with such a choice, air carriers most likely will choose the risk-averse alternative and comply fully with Article 8, opting to pay the increased administrative costs of compliance rather than run the gauntlet of unlimited liability.

The problem with requiring carriers to jump through the technical hoops of Article 8’s documentary requirements in order to limit their liability for lost or damage cargo is that such compliance is commercially absurd in light of current conditions in the air carriage industry. Judges and commentators alike acknowledge that the Convention’s waybill requirements are outdated and unnecessarily burdensome. Such recognition led to the pared down versions of Article 8 contained in the Hague Protocol and the Montreal Protocols, both of which required only three particulars to be listed on the waybill for a carrier to be entitled to limited liability. Requiring air carriers to comply with documentary requirements that are acknowledged as unduly burdensome and to expend their limited resources on such a fruitless endeavor makes no commercial sense.

Maritime, thus, illustrates that the Warsaw Convention, drafted in a time when airplanes still had propellers, has outlived its purpose. Many critics raise the fundamental question whether air carriers, no longer in their infancy, should still be entitled to avail themselves of the liability limits offered by the Warsaw Convention’s limited liability protections. If not, these scholars believe that the Convention should be scrapped in its entirety since it no longer
serves its original, or any other subsequent, purpose.\textsuperscript{166} Even if one concedes, however, that the Convention’s limited liability scheme should be retained, no sensible rationale explains why carriers must satisfy the overly stringent documentary requirements of the Convention in order to avail themselves of the Treaty’s limitation of liability.

V. Conclusion

The \textit{Maritime} decision displays the irony inherent in many of the recent cases interpreting the Warsaw Convention. While the decision displays sound judicial decisionmaking and respect for fundamental principles of treaty interpretation, its holding creates a commercially nonsensical result by requiring air carriers to abide by rules that are uniformly conceded to be superfluous, outdated, and ambiguously drafted.\textsuperscript{167} This irony is not lost upon the judges who have been called to decide these air cargo cases and who have recognized that the most “sensible” resolution of the case is not always the result dictated by the letter of the Convention.\textsuperscript{168}

One cannot blame the judges who decide cases such as \textit{Maritime} for the absurd consequences of their decisions;\textsuperscript{169} rather, blame should fall upon the United States’ continued adherence to the essentially unamended version of the 1929 Warsaw Convention. Despite previous calls for the United States to repudiate its participation in the Convention, to ratify amendments to the Treaty, or to negotiate a reformed version of the Convention, the United States continues to bind itself to a treaty which has outworn its usefulness. The \textit{Maritime} decision provides yet another illustration of the Warsaw Convention’s inadequacies and should put additional pressure upon Washington to rethink American involvement in the Warsaw Convention.

JAY BENDER

\footnotesize{\textsuperscript{166} See sources cited supra note 75.  
\textsuperscript{167} See supra Part II.  
\textsuperscript{168} See, e.g. Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705, 708 (2d Cir. 1990) (acknowledging that a less literal interpretation of Convention might be more “sensible” than a black letter reading of the Treaty’s text).  
\textsuperscript{169} See Noble, supra note 36, at 608-09.}