02-1348

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ETC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER OLYMPIC AIRWAYS

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QUESTION PRESENTED

Whether the court below improperly held that the "accident" condition precedent to air carrier liability for a passenger's death under Article 17 of the Warsaw Convention can be satisfied when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the air carrier's negligent omission may have been in the chain of causation?

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Ninth Circuit:

1. Petitioner OLYMPIC AIRWAYS.

2. Respondents Rubina Husain, Hannah Husain, Sarah Husain, Isaac Husain and the Estate of Abid M. Hanson, M.D.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner OLYMPIC AIRWAYS is a foreign corporation organized and existing under the laws of the Hellenic Republic of Greece with the majority of its shares owned by the government of Greece. No parent or publicly held company owns 10% or more of the stock of petitioner OLYMPIC AIRWAYS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 316 F.3d 829 (9th Cir. Dec. 12, 2002) and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App. _") at 1a-21a.[1]

The initial Findings of Fact and Conclusions of Law of the district court are reported at 110 F. Supp. 2d 1234 (N.D. Cal. Aug. 28, 2000) and reproduced in the Joint Appendix ("J.A.") at JA8-JA56.[2] The Amended Findings of Fact and Conclusions of Law of the district court are reported at 116 F. Supp. 2d 1121 (N.D. Cal. Oct. 3, 2000) and reproduced at Pet. App. at 32a-80a.[3] The Supplemental Findings of Fact and Conclusions of Law of the district court are unofficially reported at 2000 WL 1780264, No. C 99-1400 CRB (N.D. Cal. Nov. 28, 2000) and reproduced at Pet. App. 23a-31a.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 2002. The Petition for Writ of Certiorari was filed within 90 days of that date and was granted by Order dated May 27, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

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[1] References preceded by "Pet. App." refer to pages in the Appendix to Petition for Writ of Certiorari.

[2] References preceded by "J.A." refer to pages in the Joint Appendix.

[3] The Amended Findings of Fact and Conclusions of Law only made technical corrections. All references herein are to the Amended Findings of Fact and Conclusions of Law.

TREATY INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934) *reprinted in* note following 49 U.S.C.A. § 40105 (1997) ("Warsaw Convention"). The complete text of the Warsaw Convention is set forth in the Appendix ("App.") hereto at 1a-20a.[4]

STATEMENT OF THE CASE

A. The Nature of the Case

Respondents Rubina Husain, individually and as personal representative of the estate of the decedent, Hannah Husain, Sarah Husain and Isaac Husain (hereinafter "plaintiffs") brought an action against petitioner OLYMPIC AIRWAYS (hereinafter "OLYMPIC") in the Superior Court for Alameda County, California to recover damages as a result of the death of Abid M. Hanson, M.D. (hereinafter the "decedent" or "Dr. Hanson") on January 4, 1998 while on board OLYMPIC flight 417 from Athens, Greece to New York. Pet. App. at 3a. Plaintiffs alleged that Dr. Hanson died as a result of an asthma attack caused by exposure to ambient cigarette smoke in the passenger cabin of OLYMPIC flight 417. Pet. App. at 3a.

OLYMPIC timely removed the action to the United States District Court for the Northern District of California on March 23, 1999 under 28 U.S.C. § 1441. Pet. App. at 33a; J.A. at JA1. The jurisdiction of the district court was based upon the Foreign Sovereign Immunities

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[4] References preceded by "App." refer to pages in the Appendix hereto.

Act (28 U.S.C. § 1330)[5] and federal question (28 U.S.C. § 1331) under the Warsaw Convention, a treaty of the United States. Pet. App. at 33a.

It is undisputed that the liability of OLYMPIC is governed exclusively by the Warsaw Convention, as supplemented by the Montreal Agreement,[6] because Dr. Hanson's death occurred during the course of "international transportation" by air within the meaning of Article 1 of the Convention. *See* Warsaw Convention, Article 1 (App. at 1a).[7] Article 17 of the Warsaw Convention creates a presumption of air carrier liability for passenger injury or death if caused by an "accident" within the meaning of the Convention. *See Air France v. Saks*, 470 U.S. 392, 405-07 (1985). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's Article 17 liability for a passenger's bodily injury or death to the sum of $75,000, unless the injury or death was proximately caused by the air carrier's "wilful misconduct" within the meaning of Article 25 of

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[5] OLYMPIC is a "foreign state" within the meaning of the 28 U.S.C. § 1603 of the Foreign Sovereign Immunities Act, as the majority of its shares are owned by the government of Greece. Pet. App. at 33a, n.1.

[6] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in note following* 49 U.S.C. § 40105 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) ("Montreal Agreement"). Pursuant to the Montreal Agreement, air carriers, by special contract, voluntarily agreed to increase the Article 22 limit of liability to $75,000 and to waive the defense of all necessary measures for passenger injury or death set forth in Article 20(1) (App. at 12a) of the Warsaw Convention. *See Air France v. Saks*, 470 U.S. 392, 406-07 (1985).

[7] Decedent was traveling pursuant to a ticket that provided for round-trip transportation by air, United States/Greece/Egypt/Greece/United States.

the Convention, in which event the monetary limit on recoverable damages is not available to the carrier.

B. Statement of the Relevant Facts

The following facts are based upon the Findings of Fact of the district court as adopted by the court below. *See* Pet. App. at 3a-9a.

Decedent's Pre-Existing Physical Condition. For more than 20 years prior to his death at age 52, Dr. Hanson suffered from asthma for which he did not receive regular treatment. Pet. App. at 3a-4a. Dr. Hanson also suffered from severe food allergies. Pet. App. at 4a-5a.

At trial, experts for both parties agreed that at least one of Dr. Hanson's medical emergencies in the two years preceding his death was caused by food-related allergies. Pet. App. at 5a. During this incident, paramedics were summoned and CPR performed prior to his hospitalization. *Id.* In light of his existing medical condition, Dr. Hanson carried an emergency kit containing epinephrine in the event of an allergic reaction to food (*id.*) and a Proventil/Albuterol inhaler to aid his breathing. Pet. App. at 4a.

The Trip to Cairo. In December 1997, Dr. Hanson and his family flew from San Francisco to Cairo for vacation. Pet. App. at 5a. The trip involved a stop in New York, where Dr. Hanson learned that OLYMPIC allowed smoking on international flights. *Id.* Dr. Hanson and his family asked for and were assigned seats in the non-smoking section of the aircraft. *Id.* The flight to Cairo was uneventful. Pet. App. at 6a.

The Return Trip to New York. On January 4, 1998, Dr. Hanson and his family began the return trip from Cairo to the United States via Athens. Pet. App. at 6a. During check-in at Cairo, Dr. Hanson, aware that smok-

ing was allowed on OLYMPIC flights, requested and was assigned a non-smoking seat for the entire return journey to the United States. Pet. App. at 6a. Ms. Husain also showed the check-in agent a letter, written by Dr. Hanson's brother, also a doctor, which stated that "Mr. Abid Hanson has history of recurrent anaphylactic reactions. He has been advised to carry oxygen and epinephrine as a precaution." J.A. at JA81.[8] Dr. Hanson was seated in the non-smoking section on the flight from Cairo to Athens and did not experience any breathing problems. Pet. App. at 6a. During a three to four hour layover in Athens, however, Dr. Hanson began experiencing difficulties with his breathing in the airport waiting area, which was very smoky, and had to use his inhaler. *Id.*

Upon boarding OLYMPIC flight 417 from Athens to New York, Dr. Hanson noticed that he was seated in non-smoking row 48 and the smoking section began in row 51.[9] Pet. App. at 6a, n. 3. Ms. Husain, Dr. Hanson's wife, approached OLYMPIC flight attendant Maria Leptourgou, informed her that Dr. Hanson could not be near the smoking section, and asked Ms. Leptourgou to move Dr. Hanson to another non-smoking seat. Pet. App. at 6a. Ms. Leptourgou responded by telling Ms. Husain to "have a seat." *Id.* After all of the passengers were seated, but before take-off, Ms. Husain again approached Ms. Leptourgou and asked that she move Dr. Hanson to a different non-smoking seat, explaining that he was allergic to smoke. Pet. App. at 7a. Ms. Husain testified that Ms. Leptourgou replied that she could not transfer Dr. Han-

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[8] The Court below mistakenly stated that the letter indicated that Dr. Hanson had asthma. Pet. App. at 6a.

[9] The aircraft was a Boeing 747-212 with 426 seats in 56 rows. In economy class, rows 14-50 were in the non-smoking section and rows 51-56 were in the smoking section. Pet. App. at 6a, n. 3.

son to another seat because the plane was "totally full," and that she was too busy at the moment to assist Dr. Hanson. *Id.* Discovery revealed that flight 417 had 11 unoccupied seats: 2 business class; 6 non–smoking economy class; and 3 smoking economy class. Pet. App. at 7a, n. 5.

Shortly after take-off, the passengers in the smoking section began to smoke and Dr. Hanson indicated to his wife that the smoke was bothering him. Pet. App. at 7a. Ms. Husain approached Ms. Leptourgou and told her that she needed to move Dr. Hanson for health reasons. *Id.* Ms. Leptourgou reiterated that the "plane is full," but also invited Ms. Husain to ask other passengers if they would switch seats with Dr. Hanson. *Id.* Ms. Husain never did so, electing to return to her seat. Pet. App. at 40a.

After the meal service (approximately 90 minutes after departure), the smoking increased and Dr. Hanson's breathing problems worsened. Pet. App. at 8a. Dr. Hanson walked to the front of the cabin to get some fresh air. *Id.* Upon reaching the front of the cabin, Dr. Hanson asked for his epinephrine kit. *Id.* Ms. Husain retrieved the kit, administered a shot, and notified Dr. Umesh Sabharwal, an allergist and family friend who was traveling with the Hanson/Husain family. *Id.* Dr. Sabharwal helped Dr. Hanson to the floor, administered another shot of epinephrine, then began performing CPR and also administered a shot of Bricanyl. *Id.* Despite the efforts of Dr. Sabharwal and other passengers who assisted, Dr. Hanson died. *Id.* No autopsy was performed to determine the direct cause of death. *Id.*

C. The Findings of Fact and Conclusions of Law of the District Court

Following the denial of OLYMPIC's motion for summary judgment, which argued that Dr. Hanson's death was not caused by an "accident," a precondition to liability under Article 17 of the Warsaw Convention, the case proceeded to trial.[10] At trial, plaintiffs argued that Dr. Hanson died from a severe asthma attack caused by inhaling second-hand smoke. OLYMPIC argued that Dr. Hanson's death was the result of an allergic reaction to food or some other medical problem unrelated to the smoke and, in any event, was not caused by an Article 17 "accident."

The district court issued its Findings of Fact and Conclusions of Law on August 28, 2000, as amended on October 3, 2000, and although the district court specifically recognized that "the smoke in the cabin was not the 'unusual' or 'unexpected' event which caused Dr. Hanson's death," the district court found that "the smoke undoubtedly had a significant place in the causal chain." Pet. App. at 51a. In a misplaced reliance on *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 142 (2d Cir. 1998), the district court held that that the "negligent failure of a flight crew to appropriately serve the needs of an ailing passenger can be considered an 'accident' under the Convention." Pet. App. at 50a. The district court ultimately held that flight attendant Leptourgou's failure to act upon Ms. Husain's requests to reassign Dr. Hanson to a seat further from the designated smoking area of the aircraft was the "accident" under Article 17 of the Warsaw Convention, and that this negligent omission proximately caused his death. Pet. App. at 59a-60a. The

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[10] The case was tried to the district court in accordance with the Foreign Sovereign Immunities Act, which provides for non-jury civil actions. 28 U.S.C. §§ 1330(a), 1605. Pet. App. at 33a, n. 1.

district court further found that Ms. Leptourgou's refusal to reassign Dr. Hanson to another non-smoking seat constituted "wilful misconduct" under Article 25 of the Warsaw Convention. Pet. App. at 67a.

The district court, however, found Dr. Hanson 50% at fault for his own death because he failed to take any action to change his seat. Pet. App. at 78a. The district court awarded plaintiffs $1,400,000 in pecuniary damages, but reduced the award by 50% due to Dr. Hanson's comparative fault. Pet. App. at 79a-80a.

On November 28, 2000, the district court issued Supplemental Findings of Fact and Conclusions of Law awarding plaintiffs an additional $1,400,000 (reduced to $700,000) in non-pecuniary damages. Pet. App. at 31a. Final judgment in the amount $1,400,000 was entered on November 28, 2000. Pet. App. at 22a. OLYMPIC timely appealed.

D. The Decision of the Court of Appeals

The Court of Appeals affirmed the district court's conclusion of law that Dr. Hanson's death was caused by an Article 17 "accident."

Article 17 Accident. The court below found that the OLYMPIC flight attendant's failure to move Dr. Hanson to a different non-smoking seat violated industry standards and OLYMPIC procedures and was an "accident" under Article 17 of the Warsaw Convention. Pet. App. at 14a. The court below held:

> Ms. Leptourgou's failure to act was more egregious in light of the simple nature of Ms. Husain's request, which could easily have been satisfied without interference with the airplane's normal operation. Combined, these factors bring Ms. Leptourgou's failure to assist Dr. Hanson within the meaning of an "acci-

> dent" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation. **The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.**

Pet. App. at 14a (emphasis added).

Article 17 Causation. Although the court below recognized that for "a carrier to be liable for an injury, the passenger must prove the accident caused the injury," the court nevertheless held that the "accident need not be the sole cause of the injury," and that it is sufficient if it is any "link in the chain." Pet. App. at 16a. The court below combined the factors to find that "the exposure to smoke and failure to move Dr. Hanson is such a link." Pet. App. at 16a-17a.

Article 25 Wilful Misconduct. The court below affirmed the district court finding that the death of Dr. Hanson was proximately caused by the wilful misconduct of OLYMPIC. The court stated: "Ms. Leptourgou's failure to take action, either by moving Dr. Hanson or by notifying the chief cabin attendant of Ms. Husain's request to have her husband moved, was willful misconduct." Pet. App. at 19a.

SUMMARY OF ARGUMENT

The legal question before the Court is whether, as a matter of treaty law, an airline's failure to assist a passenger during the course of a normal flight, resulting in

district court further found that Ms. Leptourgou's refusal to reassign Dr. Hanson to another non-smoking seat constituted "wilful misconduct" under Article 25 of the Warsaw Convention. Pet. App. at 67a.

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SUMMARY OF ARGUMENT

The legal question before the Court is whether, as a matter of treaty law, an airline's failure to assist a passenger during the course of a normal flight, resulting in

an aggravation of the passenger's pre-existing internal condition, can satisfy the "accident" condition precedent to liability under Article 17 of the Warsaw Convention, when considerations of air carrier fault are expressly relegated to Article 20(1) of the Convention. The Ninth Circuit, in affirming the decision of the district court, improperly found that it can.

Only by an incomplete and improper application of the definition of "accident" as set forth by the Court in *Saks* was the court below able to create an "accident" within the meaning of Article 17, which was based upon its combining the flight attendant's "failure to act" with the normal and expected presence of ambient smoke on this flight. Pet. App. at 14a. The Warsaw Convention cannot sensibly or properly be so interpreted.

The Ninth Circuit's interpretation of Article 17 of the Warsaw Convention:

- is contrary to the language, structure and goals of the Warsaw Convention—a primary goal of the Convention was to limit air carrier liability and a carrier's negligent omissions are irrelevant to a determination of what meets the "accident" condition precedent to liability;
- fails to apply the full holding of *Saks*, which made clear that (1) an injury resulting from the passenger's own internal reaction to the normal operation of the aircraft is not caused by an "accident," and (2) "the care taken by the airline to avert the injury" is not relevant to the "accident" inquiry, 470 U.S. at 406-407;
- is contrary to the well-reasoned Third and Eleventh Circuit decisions, which hold that an injury resulting from the passenger's own internal reaction to normal flight operations cannot

be an "accident," even if the carrier's negligent failure to assist aggravated the passenger's pre-existing condition or was a link in the chain of causation;

- is an improper attempt to circumvent the Court's holding in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), in that it engrafts onto the Warsaw Convention irrelevant, pre-empted state law negligence principles; and
- is at odds with the post-ratification understanding of the Contracting States to the Convention that the term "accident" does not impose liability for an injury resulting from the state of the health of the passenger.

Accordingly, the decision of the court below should be reversed in all respects.

ARGUMENT

I

THE "ACCIDENT" STANDARD CREATED BY THE COURT BELOW IS IRRECONCILABLE WITH THE LANGUAGE, STRUCTURE AND NATURE OF AIR CARRIER LIABILITY CREATED BY THE WARSAW CONVENTION

It is undisputed that the rights and liabilities of the parties herein are governed exclusively by the Warsaw Convention. *See Tseng*, 525 U.S. at 171-72. As stated by the Court in *Tseng*, recovery "if not allowed under the Convention, is not available at all." *Id.* at 161. The decision of the court below can only be sensibly read as a reflection of its unwillingness to enforce the Warsaw

Convention, as interpreted by the Court in *Saks* and *Tseng*, because to do so would leave plaintiffs without a remedy. As the Court has recognized, however, it is not within the province of the courts to rewrite this treaty. *Tseng*, 525 U.S. at 673, n. 12.

The relevant provisions of the Warsaw Convention concerning the liability of the air carrier for passenger injury are Articles 17, 20 and 21(1), which set forth the circumstances under which an air carrier may be liable to passengers.

Article 17, which creates a presumption of liability on the part of the air carrier for a passenger injury or death, provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20(1), which enables the air carrier to rebut the presumption of liability based upon the reasonable actions of the carrier, provides:

> The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 21, which enables the air carrier to diminish or exclude liability based upon the actions of the passenger, provides:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the pro-

> visions of its own law, exonerate the carrier wholly or partly from his liability.

The decision of the court below that an air carrier can be absolutely liable under Article 17 for a failure to prevent a passenger from being exposed to the known, normal, expected and usual operation of its flight is wrong and was premised on a fundamental misunderstanding of the nature of the liability created by the Warsaw Convention. A passenger seeking to hold a carrier liable for injury has the burden of establishing that: (1) there has been an "accident," which caused (2) the passenger's death, wounding or bodily injury, and (3) the "accident" took place on board the aircraft or in the course of the operations of embarking or disembarking. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 535-36 (1991). Because the "accident" condition precedent to liability never was established, a basis for Convention liability never arose.

A. The Principles of Treaty Interpretation

Interpretation of the Warsaw Convention begins "with the text of the treaty and the context in which the written words are used." *Saks*, 470 U.S. at 397. Fundamentally, the purposes of a treaty must be upheld and meaningful effect is to be given to the expectations of the contracting parties. *Id.* at 399. As treaties are construed more liberally than private agreements, it also is proper to look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. *Id.* at 396, 400, 403; *see Tseng*, 525 U.S. at 167; *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996); *Floyd*, 499 U.S. at 535, 546.

B. Negligence Is Irrelevant To The Accident Inquiry Because The Treaty's Founders Intended Carrier Liability To Be Presumed If There Was An "Accident"

By focusing the "accident" inquiry on common law notions of negligence (*e.g.*, "failure to act in face of a known, serious risk;" "reasonable alternatives;" "minimize the risk") (Pet. App. at 14a), rather than the precise factual "event" that caused the injury, the court below misapprehended the nature of the liability created by Article 17 and engaged in an analysis that the drafters of the Convention expressly sought to avoid.

The Twin Goals of the Warsaw Convention. The Warsaw Convention was the result of two international conferences, the first held in Paris in 1925, and the second in Warsaw in 1929, and extensive preparatory work by the *Comité International Technique d'Experts Juridiques Aériens* ("CITEJA"), which held meetings between the two conferences and had the primary responsibility for preparing the draft convention and reports. *See Chan v. Korean Air Lines*, 490 U.S. 122, 139 (1989).[11] The Warsaw Convention had two primary goals: first, to create but limit the liability of air carriers; and second, to define and establish uniform rules governing claims arising out of international air transportation. *See Tseng*, 525 U.S. at 169-70; *Zicherman*, 516 U.S. at 230; *Floyd*, 499 U.S. at 546. As the Court in *Floyd* explained, "in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers. . . ." 499 U.S. at 546.

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[11] For a discussion of the goals and drafting history of the Convention, see Andreas F. Lowenfeld & Alan I. Mendelson, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967); John J. Ide, *History and Accomplishments of C.I.T.E. J.A.*, 3 J. Air. L. & Com. 27 (1932).

The Nature of Liability Created by the Warsaw Convention. While the overall liability system created by the Warsaw Convention is fault based, rather than risk based, the liability created by Article 17 is not fault based. *See Second International Conference on Private Aeronautical Law, Oct.* 4-12, 1929, *Minutes* at 21, 252 (R. Horner & D. Legrez transl. 1975) ("*Warsaw Minutes*"). Article 17 creates a presumption of carrier liability triggered by the happening of an "accident." *Id.* This presumption, however, can be rebutted if the carrier proves the absence of fault under Article 20(1) or the comparative negligence of the passenger under Article 21. *Id.; see also* Secretary of State Cordell Hull's transmittal of the Warsaw Convention to the United States Senate, Senate Comm. on Foreign Relations, "*Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*," Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934) (*reprinted in* 1934 U.S. Av. Rep. 240, 243).

The liability created by the Convention's drafters was intended to change the then prevailing practice by carriers in civil law countries (the vast majority of the Contracting States) of contractually disclaiming liability for passenger injury or death. *See Warsaw Minutes* at 47-48; *see also Tseng*, 525 U.S. at 170; *Sidhu v. British Airways* [1997] 2 Lloyd's Rep. 76, 83-84, 87-88, 1996 WL 1092197, at *83-83, *87-88 (House of Lords 1996) (U.K.). Having taken away the carriers' ability to disclaim liability, the drafters limited the nature and scope of the liability that they created. The Convention was drafted as a compromise between those interests (*Tseng*, 525 U.S. at 170) and represents a bargain between air carriers and passengers—the carriers gain from the limitation of liability (Article 22) but the passengers benefit from the "clear presumption of liability, which eliminated the difficult task of proving fault on the part of the

carrier." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1489 (D.C. Cir. 1991); *see In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1271 (2d Cir. 1991); *see also* Secretary of State Cordell Hull's transmittal letter, Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934) (*reprinted in* 1934 U.S. Av. Rep. 240, 243); *Warsaw Minutes* at 252.

The focus of the court below on the "negligence" of OLYMPIC as its justification for concluding that the "accident" condition precedent was met in this case, rather than on the precise factual "event" that was the cause of the injury (*i.e.*, allegedly the ambient cigarette smoke), was contrary to the express language of Article 17 and its interplay with Article 20(1) within the structure of the Convention. The existence of carrier fault simply is not relevant in determining whether the liability presumption in Article 17 applies. The sole proper inquiry envisaged by the drafters is into "the nature of the event which *caused* the injury." *Saks*, 470 U.S. at 407 (emphasis in original). Here, Dr. Hanson's own internal reaction to sitting in a non-smoking seat and being exposed to normal and expected cabin air conditions, *i.e.*, cigarette smoke on a flight where smoking was permitted, was improperly found to be an "accident."

II

THE DECISION OF THE COURT BELOW VIOLATES THE THREE BASIC TENETS OF *SAKS*

The meaning of the term "accident" was addressed by the Court in *Saks*, which involved an action against the carrier by a passenger who suffered an ear injury caused by normal cabin pressurization changes prior to landing.

After reviewing the language, drafting history and structure of the Convention, the Court found that a "passenger's injury must be caused by an accident, and an accident must mean something different than an 'occurrence' on the plane." *Saks*, 470 U.S. at 403. The Court defined an "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. The Court also made clear that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. Although the "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries" (*id.* at 405), it is especially clear that issues of crew negligence are not implicated or relevant to Article 17, but rather are the province of Article 20(1). The "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407 (emphasis in original). Thus, *Saks* stands for the following three tenets:

1. The presumption of liability under Article 17 cannot rest upon a mere "occurrence" of an injury; rather, the passenger's injury must be "caused by" an "accident," defined by the Court as an "unexpected or unusual event or happening that is external to the passenger" (470 U.S. at 405);

2. While the definition should be flexibly applied, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply" (470 U.S. at 406); and

3. The "accident" requirement of Article 17 "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury" (470 U.S. at 407 (emphasis in original)).

The decision of the court below misapplies the first and second tenets of *Saks* and ignores its third tenet.

A. A Failure To Act Is Not An "Event Or Happening"

The court below found that the OLYMPIC flight attendant's "failure to act" on Ms. Husain's request to transfer Dr. Hanson to another non-smoking seat (*i.e.*, an omission), was

> an "accident" for Article 17 purposes. Her conduct was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation.

Pet. App. at 14a.

This omission, however, cannot be considered an "event or happening" because Article 17 requires a discernable event or happening which then causes an injury. Simply stated, while an omission can cause an "accident," it cannot be ***the*** "accident."

Indeed, each of the cases cited by the Court in *Saks* as an example of an "accident" involved an affirmative act, ***not*** a failure to act. *See Saks*, 470 U.S. at 404-05. For example, in the hijacking, terrorist attack and passenger tort cases,[12] the "accident" was not the failure of the air-

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[12] *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc) (terrorist attack); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) (en banc) (terrorist attack); *Krystal*

line to prevent the "event or happening" (*e.g.*, the hijacking, terrorist attack, or tort), but rather the happening of the event itself, which was unusual and unexpected. In contrast, the cases cited by the Court in *Saks* as instances where the accident requirement was not satisfied, either the injury was due to the peculiar internal condition of a passenger and involved a carrier's failure to act,[13] or there was no discernible event or happening.[14]

The court below did not cite to any authority to support its "accident" analysis (other than a partial recitation of the first and second tenets of *Saks*), and the cases relied upon by the district court do not involve a crew's failure to act or an injury due to the peculiar internal condition of the passenger. Pet App. 50a-51a. The district court, primarily relying upon *Fishman v. Delta Air Lines, Inc.*, 938 F. Supp. 228 (S.D.N.Y. 1996), *aff'd*, 132 F.3d 138 (2d Cir. 1998), stated that the "negligent failure of the flight crew to appropriately serve the needs of an ailing passenger can be considered an 'accident' under the Convention." Pet. App. 50a. The district court below overlooked that the air carrier in *Fishman* did not exacerbate a passenger's pre-existing internal ailment. 938 F. Supp. at 230. Rather, the "accident" in *Fishman* was the flight attendant's application of a scalding hot compress to the passenger's ear (an unusual and unexpected "act") resulting in a burn (bodily injury). 132 F.3d at 142. An inquiry into whether the flight attendant

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v. British Overseas Airways Corp., 403 F. Supp. 1322 (C.D. Cal. 1975) (hijacking); *Oliver v. Scandinavian Airlines System*, 17 Av. Cas. (CCH) 18,283 (Md. 1983) (passenger tort).

[13] *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984) (discussed *infra* at 22-23).

[14] *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971); *Scherer v. Pan American World Airways, Inc.*, 54 A.D.2d 636, 387 N.Y.S.2d 580 (N.Y. App. Div. 1976).

had followed or failed to follow proper procedures (*i.e.*, negligence) was irrelevant and unnecessary to the accident inquiry.[15] Such an inquiry would have been relevant only if the carrier had raised the Article 20(1) "all necessary measures" defense, which was not raised in that case or this case.

The other cases relied upon by the district court also did not involve the state of the passenger's health or affirmative acts by the air carrier. Pet. App. at 50a-51a. Properly analyzed, the district court should have recognized that *Schneider v. Swiss Air Transport Co. Ltd.*, 686 F. Supp. 15 (D. Me. 1988), was not an "accident" case; that the possible "accident" in *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 71 (1st Cir. 1999), was the assault by the passenger, and not the over-service of alcohol by the crew which allegedly triggered the assault; and that in *Carey v. United Airlines*, 77 F. Supp. 2d 1165, 1171 (D. Or. 1999), *aff'd*, 255 F.3d 1044 (9th Cir. 2001), the "accident" was the affirmative improper, unusual and unexpected acts of the flight attendant (putting aside the issue of "bodily injury").

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[15] Following its initial finding that the burns were caused by an accident, the *Fishman* court then stated, conforming its decision with the Second Circuit's "accident" analysis in *Tseng*, 122 F.3d 99, 103-04 (2d Cir. 1997), *rev'd in part*, 525 U.S. 155 (1999), that

> a claim *does* allege an "accident" if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or air line can be an "accident" if those procedures or operations are *carried out* in an unreasonable manner.

Fishman, 132 F.3d at 143 (emphasis in original). This statement must be viewed in light of the injury producing "event" in *Fishman* (*i.e.*, applying the scalding compress) and is consistent with the view that the "event" must be an act rather than the failure to act.

The court below failed to recognize that the "accident" condition precedent to liability requires the passenger to establish an event or happening, and when the passenger relies upon the absence of a happening, *i.e.*, an omission, a passenger has not established an "accident" under Article 17.

B. An Injury That Results From The Passenger's Internal Reaction To The Usual And Normal Operation Of The Aircraft Is Not Caused By An "Accident"

Courts that have properly applied the three tenets of *Saks* have concluded that if the cause of a passenger's injury was due to the passenger's own internal reaction to a normal flight, there was no "accident," even if carrier negligence is alleged to have aggravated the passenger's pre-existing condition. *See Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521-22 (11th Cir. 1997); *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984) (pre-*Saks*).[16] The decision of the court below rejected these cases in its misapplication of the Warsaw Convention and the second tenet of *Saks*.

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[16] *See also Hipolito v. Northwest Airlines, Inc.*, 2001 WL 861984, at *2-3 (4th Cir. July 31, 2001) (affirming summary judgment dismissing action because passenger's death on board an aircraft was not an Article 17 "accident," despite allegation of crew negligence); *Rajcoorar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000) (inadequate medical care is not an "accident"); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996) (failure to respond with adequate medical assistance to passenger suffering a heart attack is not an "accident"); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985) (refusal to aid passenger after heart attack is not an "accident"). *Contra Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397 (N.Y. App. Div. 1982), *aff'd* 57 N.Y.2d 767 (N.Y. 1982) (pre-*Saks*).

In the leading pre-*Saks* case of *Abramson*,[17] with facts strikingly similar to the case here, the issue was whether the airline's refusal to aid a passenger, which allegedly aggravated a pre-existing injury during the course of a normal flight was an Article 17 "accident." The Third Circuit held no. Plaintiff in *Abramson* suffered an attack of a pre-existing paraesophageal hiatal hernia while traveling from Anchorage to Tokyo on Japan Airlines ("JAL"). 739 F.2d at 131. When plaintiff's wife asked the flight attendant for a place where plaintiff could lie down and employ a self-help remedy, the attendant responded that there were no empty seats and plaintiff was required to remain in his assigned seat. *Id.* Discovery, however, revealed that there were nine empty seats in first class. *Id.* Plaintiff brought an action against JAL, claiming that JAL's "refusal to aid him" aggravated his injury, was an "unusual and unexpected happening" and, thus, was an Article 17 "accident." *Id.* at 132. Applying its "unusual or unexpected happening" test, the Third Circuit rejected the passenger's arguments and found that JAL's alleged "acts and omissions" did not constitute an "accident":

> In the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an "accident" within the meaning of Article 17.

Id. at 133. Thus, "the occurrence that allegedly aggravated plaintiff's condition was not an 'accident' within

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[17] The *Abramson* case presaged the three tenets of *Saks* and was cited as an example of the category of cases where "routine travel procedures . . . produce an injury due to the peculiar internal condition of a passenger," which the Court found does not fit within the definition of "accident" for purposes of the Convention. *See Saks*, 470 U.S. at 405.

the terms of Article 17 of the Warsaw Convention." *Id.* at 135.

Similarly, in *Krys*, the issue was whether the alleged aggravation of a pre-existing condition due to crew negligence during the course of a normal flight was an Article 17 "accident." The Eleventh Circuit also held no. Plaintiff in *Krys* suffered a heart attack during a transatlantic flight and brought an action against the air carrier claiming that the crew's failure to properly respond to his heart attack symptoms (*i.e.*, make an emergency landing rather than continuing to its destination), aggravated the damage to his heart. 119 F.3d at 1517. The air carrier argued that aggravation of a pre-existing condition due to crew negligence was an "accident" in an effort to limit the carrier's liability to $75,000. *Id.* at 1519. The Eleventh Circuit rejected the airline's argument and found that there was no Article 17 "accident." The *Krys* court found that the only correct approach to analyzing the "accident" requirement, which is consistent with the structure of the Convention and *Saks*, is to look "at the factual events, as opposed to an assertion of 'crew' negligence." *Id.* at 1521-22. The Eleventh Circuit explained:

> [I]f we substitute a purely factual description of the relevant events in place of the legal conclusion represented by "crew negligence," the conclusion that no "accident" occurred is seen as the more reasonable conclusion. If, in *Abramson*, the aggravating event is having to sit upright in an airline seat throughout the duration of the flight, then it seems clear that the aggravation does not arise from an "unexpected or unusual event"—instead, the aggravation injury arises solely from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." By the same

> token, *if, in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, [footnote omitted] then it seems clear that the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."*

119 F.3d at 1521 (emphasis added and citations omitted).

The Court should reject the justification offered by the court below for not following *Krys* and *Abramson*. Pet. App. at 12a-14a. A plain reading of the facts and holdings of each case evinces that they are indistinguishable from this case.

In *Abramson*, the passenger remained in his standard economy class seat rather than being moved to an empty first class seat at the request of the passenger's wife; in *Krys*, the passenger remained on the flight to its normal destination rather than the crew diverting the flight to a different destination; here, the passenger remained in his non-smoking seat rather than being moved to a different non-smoking seat at the request of Ms. Husain. Each case involved a passenger with a pre-existing internal physical ailment; each case involved an injury caused by the passenger being subjected to the normal conditions of the flight, which the passenger alleged resulted in injury; and each case involved allegations of the crew failing to act to prevent the passenger from being exposed to the normal conditions of the flight.

Looking to the purely factual description of relevant events, the aggravating event was Dr. Hanson remaining in his assigned non-smoking seat and being exposed to ambient smoke, which allegedly aggravated his pre-existing asthmatic condition leading to his death. As in

Abramson and *Krys*, the injury arose not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."

C. A Carrier's Failure To Take Action To Avert An Internal Injury That Allegedly Occurred During The Course Of A Normal Flight Is Not An "Accident"

Both the court below and the district court incorrectly shifted the focus of the "accident" requirement from an inquiry into the nature of the event which caused the injury (*i.e.*, the smoke), to the care taken by the airline to avert the injury (*i.e.*, a flight attendant's failure to move Dr. Hanson to another non-smoking seat), thus ignoring the third tenet of *Saks*. In effect, the court below created a new negligence-based "accident" standard, as follows:

> The failure to act in the face of a known, serious risk satisfies the meaning of "accident" within Article 17 so long *as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane*.

Pet. App. at 14a (emphasis added); *see also* Pet. App. at 58a (district court).

The "accident" standard applied by the court below misconstrues the nature of the liability created by the Warsaw Convention by improperly focusing the "accident" inquiry on reasonableness, foreseeability and the carrier's mental state, despite the clear holding of *Saks*. 470 U.S. at 407. Neither the Convention nor *Saks* makes the "accident" inquiry contingent upon the perception of a risk, "reasonable alternatives," "minimiz[ing] the risk"

or whether "these alternatives would not unreasonably interfere with the normal, expected operation of the aircraft." Pet. App. at 14a.

The "accident" analysis fashioned by the court below improperly injects into Article 17 the concepts of "absence of negligence" (Article 20(1)) and "willful misconduct" (Article 25). The structure of the Convention and Article 17 do not permit the courts to relieve the passenger from meeting the conditions precedent to recovery under Article 17 through an analysis of the negligence of a carrier's employee. *See Saks*, 470 U.S. at 401-03; *Krys*, 119 F.3d at 1521; *Abramson*, 739 F.2d at 133-35. This construction is borne out by the treaty's drafting history.

The initial draft of the Convention considered at the international conference in Paris in 1925 combined the concepts of Articles 17 and 20 in then Article 5. The Paris draft Article 5 provided: "The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage . . . ." *Saks*, 470 U.S. at 401. Between 1925 and 1928, the Paris draft was revised several times by CITEJA.

The preliminary draft Convention was finalized at the Third Session of CITEJA in May, 1928, and submitted to the delegates at the 1929 Warsaw conference. *Warsaw Minutes* at 245-46, 257-68. Article 21 of the 1928 preliminary draft (which eventually became Article 17) made the air carrier liable "in the case of death, wounding, or other bodily injury *suffered* by a traveler." *Saks*, 470 U.S. at 401 (emphasis added). The all reasonable measures defense had been removed from the liability provision and placed into a separate article, draft Article 22 (which eventually became Article 20(1)). *Id.*

During the Warsaw conference, the drafting committee further changed the liability provisions of Article 21 by expressly narrowing the liability of the air carrier to encompass only an injury "caused" by an "accident." *Id.* at 402-03; *see Tseng*, 525 U.S. at 173. The court below overlooked that the "accident" requirement of Article 17 is separate and distinct from the due care defense of Article 20(1). *See Saks*, 470 U.S. at 407; *Krys*, 119 F.3d at 1522. The Court in *Saks* recognized this structure in stating:

> The "accident" requirement of Article 17 . . . involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury.

470 U.S. at 407 (emphasis in original). This statement in *Saks* further confirms that under the structure of the Convention the failure to act (*i.e.*, avert) cannot be an "accident."

As explained by the Eleventh Circuit in *Krys*:

> Having provided for a defense turning on the absence of negligence, we think it is unlikely that the drafters intended that the initial "accident" inquiry be resolved by reference to negligence. *Cf. Air France*, 470 U.S. at 407. . . .

119 F.3d at 1522.[18]

The drafting history, as evidenced by the structure of the Convention, demonstrates that the initial "accident" inquiry should not be resolved by reference to negli-

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[18] The fact that negligence is irrelevant to the Article 17 "accident" inquiry is confirmed by the ultimate holding in *Krys*, which after finding that there was no "accident," upheld the lower court's finding that the carrier was negligent under state law. *Krys*, 119 F.3d at 1528.

gence, foreseeability, alternatives or the degree of the carrier's culpability, which were relegated to Article 20(1) and Article 25, respectively. *See Saks*, 470 U.S. at 407; *see also Carey v. United Airlines*, 255 F.3d 1044, 1048 (9th Cir. 2001) (definition of "accident" makes "no mention of the carrier's motive or mental state whatsoever"). Thus, the finding that a flight attendant's failure to act satisfies the "accident" condition precedent in Article 17 cannot be reconciled with the structure of the Convention and the three tenets of *Saks*.

III

THE DECISION OF THE COURT BELOW IMPROPERLY NULLIFIES THE RESULT MANDATED BY *TSENG* AND *SAKS*

Prior to 1999, there was near unanimity among the lower courts that an injury arising out of a passenger's pre-existing medical condition was not an Article 17 "accident," even if there were allegations of crew negligence. *See supra* note 16 and accompanying text. In 1999, the Court in *Tseng* addressed the question of the exclusivity of the Warsaw Convention and held that "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' if not allowed under the Convention, is not available at all." *Id.* at 161 (citation omitted). The effect of *Tseng* was to foreclose all recourse to state negligence law in actions brought in the United States, the same result already recognized in the United Kingdom two years earlier. *See Sidhu v. British Airways* [1997] 2 Lloyd's Rep. 76, 1996 WL 1092197 (House of Lords 1996) (U.K.).

While the Court in *Tseng* addressed the consequence of failing to meet the conditions precedent of Article 17, *Tseng* did not present the issue of when those conditions are satisfied. After *Tseng*, the lower courts began to interpret Article 17 anew, such that the same circumstances would lead to a different result—pre-*Tseng*, an occurrence that was not an "accident" precluded a claim under the Convention but not necessarily under state law; post-*Tseng*, some lower courts have found that a similar occurrence is an "accident" so that a claim can be made under the Convention. *See, e.g., Blansett v. Continental Airlines, Inc.*, 246 F. Supp. 2d 596 (S.D. Tex. 2002), *appeal docketed*, No. 03-40545 (5th Cir. April 24, 2003); *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, 1084 (N.D. Ill. 2002); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 666 (S.D.N.Y. 2001);[19] *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 573 (S.D. Tex. 2001); *Kemelman v. Delta Air Lines, Inc.*, 293 A.D.2d 576, 740 N.Y.S.2d 434 (N.Y. App. Div. 2002).

The courts below opted to embark on the incorrect path taken by these post-*Tseng* cases, rather than adhere to the analysis set forth in *Krys*, *Abramson* and *Saks*. The district court rejected *Krys* and *Abramson* based in part on a perceived dissolution of a carrier's duty of care and what that court saw as the "sudden sea change" as to the meaning of "accident" after *Tseng* (Pet. App. at 58a), leading both of the courts below to improperly define "accident" in terms of negligence principles. Pet. App. at 14a, 58a. No basis in law or fact exists for such a misapplication of the term "accident."

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[19] Following a bench trial on the merits, the court found that there was no deviation from the airline's procedure or industry standards and entered judgment in favor of the airline. *Fulop v. Malev Hungarian Airlines*, 244 F. Supp. 2d 217 (S.D.N.Y. 2003).

"[I]t is the function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence." *Zicherman*, 516 U.S. at 231. "Postratification adjustments," if indeed any are necessary, "are appropriately made by the treaty signatories," not the courts. *Tseng*, 525 U.S. at 673 n12. *Sidhu* and *Tseng*'s holdings that a passenger's exclusive remedy is provided by the Warsaw Convention do not change the Article 17 "accident" analysis, do not render pre-*Tseng* decisions meaningless and do not justify misapplication of a treaty. The passengers in *Saks* and *Tseng* were left without a right of recovery and the treaty language has not changed so as to permit the courts below to deviate from the same result in this case.[20] As the Ninth Circuit held in *Carey*: "To the extent that such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories to the Warsaw Convention." 255 F.3d at 1053. The lower courts must give effect to the drafters' recognition that the Convention does not provide a recovery for every injured passenger. *See Floyd*, 499 U.S. at 546.

These same principles were expressed by the decision of the House of Lords in *Sidhu v. British Airways* [1997] 2 Lloyd's Rep. 76, 83-83, 1996 WL 1092197 (House of Lords 1996) (U.K.), in finding that the Warsaw Convention provides the sole basis for carrier liability:

> An answer to the question which leaves claimants without a remedy is not at first sight attractive. It is tempting to give way to the argument that where there is a wrong there must be a remedy. That

[20] Similarly, a passenger that cannot satisfy the "bodily injury" requirement of Article 17 is not entitled to any recovery. *See Floyd*, 499 U.S. at 552.

> indeed is the foundation upon which much of our own common law has been built up. The broad principles which provide the foundation for the law of delict in Scotland and of torts in the English common law have been developed upon these lines. No system of law can attempt to compensate persons for all losses in whatever circumstances. But the assumption is that, where a breach of duty has caused loss, a remedy in damages ought to be available.
>
> Alongside these principles, however, there lies another great principle, which is that of freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts, and contracts of carriage are no exception. It is against that background, rather than a desire to provide remedies to enable all losses to be compensated, that the Convention must be judged. It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity.

[1997] 2 Lloyd's Rep. at 87, 1996 WL 1092197, at *87.

Accordingly, "[u]ntil Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents." *Saks*, 470 U.S. at 406.

IV

THE CONTRACTING PARTIES' POST-RATIFICATION UNDERSTANDING OF ARTICLE 17 CONFIRMS THAT THE "ACCIDENT" PRECONDITION TO LIABILITY CANNOT BE MET WHERE THE ALLEGED INJURY RESULTS FROM THE PASSENGER'S STATE OF HEALTH

The post-ratification conduct of the contracting parties to the Warsaw Convention from 1949 to as recently as May 1999 further confirms that the Convention does not extend liability to injuries arising out of the passenger's state of health.

1949. Twenty years after its entry into force, consideration was given by the Legal Committee of International Civil Aviation Organization ("ICAO") to replace the treaty's Article 17 term "accident" with "occurrence" (as used in Article 18 which creates liability for baggage and cargo). The ICAO Legal Committee, however, decided to continue the distinction between "accident" in Article 17 and "occurrence" in Article 18, because "occurrence" would be "too broad" if applied to a passenger injury or death. ICAO Legal Committee, *Minutes and Documents of the Fourth Session, Montreal, 7 June–18 June 1949, Report of the Sub-Committee on the Revision of the Warsaw Convention*, ICAO Doc. 6027-LC/124 at 270 (1949). In discussing the distinction, it was noted that "the broader term 'occurrence' should be applied to damage sustained in the case of carriage of cargo or baggage, *since the term would include not only an accident but also cases where nothing of a positive nature had happened. . . .*" *Id.* (emphasis added). The rejection of this proposed change reflected the consensus of opinion that while an omission may be an "occur-

rence" under Article 18, it is not an "accident" under Article 17.

1951-1955. At the ICAO Legal Committee at the Madrid meeting in 1951, the Belgian Delegate proposed to substitute the word "occurrence" to broaden the liability of the air carrier. ICAO Legal Committee, *Minutes and Documents of the Eighth Session, Madrid, 11 September-28 September 1951*, ICAO Doc. 7229-LC/133 at 136-138 (1951). In objecting to this proposed change, Mr. Goodfellow, the Delegate from the International Union of Aviation Insurers, stated:

> [I]t was not logical to extend this system to the case of an occurrence. . . . air sickness would be covered and passengers could bring action for damages if they suffered from air sickness. In such an event, the carrier would have to prove that he had taken all necessary measures to avoid the damage or that he was unable to take such measures. To take necessary measures in the case of air sickness would be not to have the aircraft fly if there were danger that a passenger would be air sick. That would be the result of the Belgian proposal.

Id. at 137-38. Several other delegates, including the Chairman of the U.S. delegation, Mr. Nunneley, joined Mr. Goodfellow in opposing this change. *Id.* This proposal was narrowly[21] and only temporarily adopted; it was rejected at the next ICAO Legal Committee meeting (Rio de Janeiro in 1953), where the Committee voted to retain the term "accident." *See* ICAO Legal Committee,

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[21] *See Report of the U.S. Delegation to the Eighth Session of the Legal Committee of ICAO, Madrid, Spain, September 1951* at § (e)(1) (Emmory T. Nunneley, Jr., Chairman, U.S. Delegation), *excerpts reprinted in* 19 J.A.L.C. 70, 79 (1952) (noting that "the vote by which the Committee approved 'occurrence' was so small . . . that it seems clear that the vote was not representative, and this matter will have to be the subject of further consideration in the Committee.").

Minutes of the Ninth Session, Rio de Janeiro, 25 August–12 September 1953, ICAO Doc. 7450-LC/136-1 at 71 (1954).[22]

No changes were proposed to Article 17 at the diplomatic conference convened in 1955 at The Hague to consider what eventually became the Hague Protocol (1955).[23]

1971. Fifteen years later, the Guatemala City Protocol (1971)[24] (which was rejected by the United States and never has entered into force), included an amendment to Article 17 that would have imposed liability on the carrier for an "event" rather than for an "accident." *See ICAO, Documents of the International Conference on Air Law, Guatemala City*, ICAO Doc. 9040–LC/167-2 at 189 (1972); *see Saks*, 470 U.S. at 403-04. This switch would have created a system of absolute liability (subject to a modest and unbreakable liability limit), but included a specific exception in Article 17: "*However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.*" Guatemala City Protocol, Article IV (amending Article 17) (emphasis added); *see also Saks*, 470 U.S. at 403. Thus, even under

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[22] In fact, the Belgian Delegate reversed his position and advocated retention of the narrower term "accident." *See* ICAO Legal Committee, *Minutes of the Ninth Session, Rio de Janeiro, 25 August–12 September 1953*, ICAO Doc. 7450-LC/136-1 at 71 (1954).

[23] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, 478 U.N.T.S. 371, ICAO Doc. 7686-LC/140 (signed at The Hague, 28 September 1955 and entered into force 1 August 1963).

[24] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, ICAO Doc. No. 8932 (signed at Guatemala City, 8 March 1971) (not in force).

the Guatemala City Protocol's broad expansion of Article 17, the drafters were careful to carve out an exception for injuries arising from the state of a passenger's health.

1999. That the anomalous use of "event" in the Guatemala City Protocol of 1971 will never enter into force was assured by ICAO's recent adoption of the Montreal Convention of 1999,[25] which is intended to modernize and consolidate the Warsaw system of liability.[26] The term "accident" as used in the Warsaw Convention of 1929 has been retained in Article 17 of the Montreal Convention.[27]

Despite this long history confirming that Article 17 was neither originally intended, nor subsequently expanded, to include liability for injuries resulting from the state of a passenger's health, the decision of the court below achieved precisely this result by engrafting onto Article 17 state law-based concepts of negligence. The fundamental principles set forth in the Warsaw Convention and by the Court in *Tseng* and *Saks* require that the decision of the court below be reversed.

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[25] Convention for the Unification of Certain Rules for Carriage by Air, opened for signature on 28 May 1999, DCW Doc. No. 57 (ICAO) (not in force).

[26] While not yet in force, the Montreal Convention has been transmitted to the U.S. Senate for advice and consent to ratification. *Message for the President of the United States Transmitting The Montreal Convention*, Treaty Doc. 106-45 (Sept. 6, 2000).

[27] Article 17.1 of the Montreal Convention provides:

> The carrier is liable for damage sustained in the case of the death or bodily injury of a passenger upon condition only that the accident which caused the death or bodily injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be reversed in all respects.

Dated: July 11, 2003

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APPENDIX

THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR ("WARSAW CONVENTION")

49 Stat. 3000, T.S. No 876 (1934) (*reprinted* in note following 49 U.S.C.A. § 40105 (1997)

(Translation)

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Rumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international trans-

portation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purpose of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation,

whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I.—PASSENGER TICKET

Article 3

(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 none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II.—BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III.—AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the

goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(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 consignor;

(e) The name and address of the first carrier;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with article 22(2);

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition

in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the

carrier the rights which flow from the contract of transportation

Article 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river 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.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prej-

udice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his 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.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each

carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to

other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or

any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

ADDITIONAL PROTOCOL

With Reference to Article 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.