Book Note

WARSAW CONVENTION: GIEMULLA, SCHMID AND EHLERS. KLUWER LAW AND TAXATION PUBLISHERS, 1992.

by THOMAS J. WHALEN*

When difficult legal issues have arisen in the United States about the Warsaw Convention[1], practitioners in the field have generally rounded up the usual texts: Goedhuis,[2] Drion,[3] Shawcross & Beaumont,[4] the Warsaw Minutes[5] and more recently Mankiewicz.[6] Now there will be another text practitioners will want to consult: Giemulla/Schmid/Ehlers, WARSAW CONVENTION, published by Kluwer Law and Taxation Publishers in 1992.

The book is a thoughtful and thought-provoking, up-to-date exposition of the Warsaw Convention articles and a worthy addition to Warsaw Convention scholarship.

The Warsaw Convention is a multilateral treaty governing the liability of air carriers for damages sustained by passengers and shippers during the course of international air transportation. One of the purposes of the Convention is to establish uniform rules of airline liability applicable throughout the world. As most nations of the world are parties to the Convention or the Convention amended by the Hague Protocol,[7] decisional law of foreign courts on Warsaw Convention issues should be useful precedent for practitioners in the United States. This new Kluwer WARSAW

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1. 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 App. U.S.C. § 1502.

2. D. Goedhuis, National Airlegislations and the Warsaw Convention (1937).

3. Huibert Drion, THE LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW (1954).

4. Christopher N. Shawcross and Kenneth M. Beaumont, AIR LAW, (Peter Martin ed, 4th ed. 1977).

5. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES (R. Horner and D. Legrez, trans. 1975).

6. Rene H. Mankiewicz, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER DISTRIBUTION IN U.S.A. AND CANADA, Kluwer Law & Taxation Publishers (1981).

7. The Hague Protocol (1955): Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1989, Done at the Hague on 28 September 1955, 478 U.N.T.S. 371 (entered into force 1 August 1963).

CONVENTION text offers references to hundreds of foreign cases on Warsaw Convention issues, as no other text has done.

The authors' plan is to treat each of the Convention's articles separately. In this first edition, the authors treat Articles 1 through 3, Articles 5 and 8, and Articles 17 through 23. The treatment of other Articles will follow in the future.

As the authors state up-front, this text is not simply a compilation of cases. The authors offer their own commentary on the Convention and provide a different, European point of view. For example, the authors take on one of the most disputed areas of Warsaw Convention law in this country: the role of national law in cases governed by the Convention.

Most American courts have taken the position that the Warsaw Convention exclusively governs the carrier's liability, if the claim is one which falls within the scope of the carrier's liability covered by the Convention.[8] Proponents of this view argue that if the Warsaw Convention applies to the transportation and does not afford a remedy to the passenger, the passenger has no remedy. Others have taken the position that the Convention is preemptive. If the Warsaw Convention covers the claim, it preempts national law. If it does not, national law can fill the gap, since the Convention is not exclusive. The authors take the latter position, that "[n]ational law is only substituted by the Convention and its supplements where claims relate to damages resulting from the specific dangers of air transportation." WARSAW CONVENTION, Introduction, p. 17.

The authors write, for example:

> One who carefully follows the development in the case law concerning Articles 17-19 will see that particularly U.S. courts tend to construe the individual prerequisite for liability (e.g., accident, embarking, disembarking) quite liberally, thereby trying to protect the passenger as best as possible. However honorable this consumer-friendly intention may be, it is faced with strong opposition. The authors of the Convention left open many questions, which now call for an answer. These *loopholes* in the Convention are to be closed, as far as they were left open on purpose, by the relevant applicable *national law*. Chapter III, p. 2.

The issue of the role of national law in adjudicating a Warsaw claim may be illustrated by a claim of injury sustained in an aircraft hijacking. This issue arose in *Husserl v. Swiss Air Transport Co. Ltd.*,[9] which the authors often cite. As one of the attorneys representing Swiss Air in the case, I had argued that hijacking is not an "accident" covered by the Convention. Accordingly, the carrier is not liable for injuries sustained in a hijacking that occurs in the course of Convention transportation. Be-

8. *See In re Air Disaster at Lockerbie, Scotland, December 21, 1988*, 928 F.2d 1267 (2nd Cir. 1991).

9. 351 F. Supp. 702 (S.D. N.Y. 1972), *aff'd* 485 F.2d 1240 (2d. Cir. 1973).

cause the Warsaw Convention exclusively covers the liability of the carrier, we argued that the passenger had no other remedy against the carrier. The Court rejected our argument and ruled that a hijacking was an "accident" covered by the Convention.

The authors disagree with the Court's opinion in *Husserl* that hijacking is an "accident." Based upon their view of the role of national law, the authors would no doubt take the position that the carrier's liability, if any, would be outside the Convention and governed by the national law. If liability were found, the damages would be unlimited in amount. The authors also discuss several other events which they say are not "accidents," for example, consuming spoiled food. Some of these events have been held to be "accidents" by U.S. courts. The authors reach this conclusion on the premise that the liability rules of the Convention "were intended to cover solely the *inherent risks of air traffic* but not such damage occurring by mere coincidence during air transportation, i.e., damage which could also happen in any other sphere of life." Chapter III, p. 10. However, by narrowing claims within the purview of the Convention, the authors necessarily expand the role of national law in adjudicating claims arising in the course of international transportation. This European view, as the authors acknowledge, is contrary to the developing case law in the United States.

The authors address a number of interesting questions which have arisen recently, simply because a 1929 Convention is being applied to 1992 airline and airport operations. In their discussions of "accidents" in the course of "embarking" and "disembarking," the authors take a pragmatic approach and generally include forced stopovers and feeder services within Convention coverage. Their views are buttressed by European decisions on certain questions which as yet have not been addressed by American courts. The authors address the interesting question whether a private jet for hire (not an airline) could be covered by the Convention (yes) and whether freight forwarders, tour operators and others may, under certain factual circumstances, could be covered by the Convention as carriers or agents (yes). This latter view is consistent with the trend in this country that all "agents" and "independent contractors" which perform services in furtherance of the contract of carriage are covered by the Convention as carriers or agents.[10] The authors also deal with the recurring issue whether denied boarding is covered by the Convention under Article 19. No, say the authors.

For those who have studied in some depth the Convention, or who are active practitioners in the field, the text offers a new and interesting study of the Convention, from a different, decidedly European view point.

10. *See In re Air Disaster at Lockerbie*, 776 F. Supp. 710 (E.D.N.Y. 1991).

The text's coverage of decisions worldwide is impressive and should make the volume a valuable research tool.