DAY, EVANGELINOS, AND *MARTINEZ HERNANDEZ*: EMBARKING ON AN INTERPRETATION OF ARTICLE 17 OF THE WARSAW CONVENTION

On August 5, 1973, at the Hellenikon Airport in Athens, Greece, two armed Arab terrorists commenced a violent attack upon passengers awaiting a weapons search before boarding Trans World Airlines (TWA) flight 881 bound for New York. The terrorists threw three hand grenades and randomly fired gunshots into the vicinity of the passengers. The attackers then took thirty-two people as hostages. After two hours of tense negotiations with officials, the terrorists surrendered and were arrested. As a result of the attack, five people were killed and more than forty others were injured.[1]

Several of the injured passengers brought suit against TWA in Pennsylvania and New York federal courts to recover damages for personal injuries sustained during the attack.[2] Plaintiffs alleged liability without fault, under the Warsaw Convention[3] as supplemented by the Montreal Agreement.[4] These cases of first impression involved the

1. The two terrorists arrested in connection with the attack, Shafik Ed Arid and Talaat Khantouran, both twenty-one years of age and born in Jordan, were convicted of murder and sentenced to death in the Greek Criminal Court on January 24, 1974. The death sentence of the two terrorists was commuted by the Greek Supreme Court, and they were deported to Libya on May 7, 1974. Brief for Appellants (Appendix) at 123a-24a, Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977).

2. In *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890, *reh. denied*, 429 U.S. 1124 (1976), plaintiff Kersen sought recovery for her personal injuries, mental anguish and for the wrongful death of her husband which occurred as a result of the attack. In *Day*, three actions were consolidated with a total of ten plaintiffs seeking recovery. In *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975), *rev'd*, No. 75-1990 (3d Cir., filed May 4, 1976), *aff'd on rehearing en banc*, 550 F.2d 152 (3d Cir. 1977), the plaintiffs were a mother and her four children.

Other actions arising out of the same incident include: *Arapogiannis v. TWA*, Civil No. 716 (S.D.N.Y. 1974); *Hadzis v. TWA*, Civil No. 4010 (S.D.N.Y. 1973); *Koutsovitis v. TWA*, Civil No. 612 (S.D.N.Y. 1974); *Leppo v. Trans World Airlines, Inc.*, No. 21770-1973 (N.Y. Sup. Ct., March 10, 1976); *Linardos v. TWA*, No. C 78565 (Super. Ct. Cal. 1974); *Maropis v. TWA*, Civil No. 4297 (S.D.N.Y. 1973). Several cases were settled out of court. Several other cases in the Supreme Court of New York County resulted in summary judgment for the plaintiffs on the issue of absolute liability under the Warsaw Convention and Montreal Agreement.

3. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereinafter cited as Warsaw Convention].

4. The Montreal Agreement is composed of four documents: 1) an agreement, C.A.B. Agreement No. 18900 (signed by each airline, including Trans World Airlines,

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crucial question of whether the plaintiffs were "in the course of any of the operations of embarking" as delineated in article 17 of the Warsaw Convention.[5] Two circuit courts recently concluded, as a matter of law, that the plaintiffs were in the course of "operations of embarking." In the first decision, *Day v. Trans World Airlines, Inc.*,[6] the Second Circuit Court of Appeals unanimously affirmed a decision of the Southern District Court of New York. In the second decision, *Evangelinos v. Trans World Airlines, Inc.*,[7] a six to three majority of the Third Circuit Court of Appeals sitting *en banc*, with a vigorous dissent by Chief Judge Seitz, reversed the holding of the Western District Court of Pennsylvania.

After the *Day* and *Evangelinos* cases were decided, the First Circuit Court of Appeals decided *Martinez Hernandez v. Air France*,[8] a case arising out of a terrorist attack which occurred on May 20, 1972, in the baggage retrieval area of the Lod International Airport located near Tel Aviv, Israel. In *Martinez Hernandez*, the plaintiffs claimed that they were "disembarking" within the meaning of article 17 of the Warsaw Convention as supplemented by the Montreal Agreement, and therefore sought to hold Air France absolutely liable for personal injuries and deaths caused by the terrorist attack. In affirming the Puerto Rican District Court's dismissal of the complaint, the First Circuit Court found that the plaintiffs were not in the course of disembarking. In so finding, the court reached a decision that is at variance with the fundamental premises of the *Day* and *Evangelinos* rulings.

This note will analyze the interpretations of article 17 given by the courts in *Day, Evangelinos*, and *Martinez Hernandez*. This analysis will include a brief discussion of the Warsaw Convention and the Montreal Agreement, and an examination of the three cases followed by a critical evaluation of the elements used by the courts to construe the meaning of the phrase "in the course of any operations of embark-

Inc.); 2) a tariff; 3) a Notice to Passengers; and 4) the order of the C.A.B. approving the tariffs, C.A.B. Order No. E 23680, 31 Fed. Reg. 7302 (1966) [hereinafter cited as Montreal Agreement]. Although the agreement does not have the effect of a treaty, it "impose[s] upon international aviation a quasi-legal and largely experimental system of liability, that is essentially contractual in nature." For the texts and a list of signatories, see 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12 A.03-.06 (1971 ed.).

5. 49 Stat. 3018. *See* note 14 *infra* and accompanying text.

6. 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890, *reh. denied*, 429 U.S. 1124 (1976), *aff'g* 393 F. Supp. 217 (S.D.N.Y. 1975).

7. 550 F.2d 152 (3d Cir. 1977), *rev'g* 396 F. Supp. 95 (W.D. Pa. 1975).

8. 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 45 U.S.L.W. 3652 (Mar. 29, 1977), *aff'g* In re Tel Aviv, 405 F. Supp. 154 (D.P.R. 1975).

ing or disembarking." In concluding, this note will propose a suggested approach for judicial analysis of the scope of article 17.

I. THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT

In *Day, Evangelinos*, and *Martinez Hernandez*, the plaintiffs based their claims for recovery upon the theory that the defendant airline was absolutely liable under the Warsaw Convention as supplemented by the Montreal Agreement.[9] The Warsaw Convention, promulgated in 1929, is an international treaty that governs the substantive rights and obligations of passengers and airlines in international air travel.[10] It is by far the most widely adopted treaty concerning private international law, and one of the most widely adopted of all treaties.[11]

The primary objectives of the Warsaw Convention were to provide a regime of law which would give stability and uniformity to an infant international air transport industry.[12] To this end, the Conven-

9. In both *Day* and *Evangelinos*, plaintiffs also based their suit on negligence. Since the Athens airport was controlled and owned by the Greek government, and not by TWA, there appears little factual basis for such theories. *See* Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 218 n.1 (S.D.N.Y. 1975). Although the plaintiffs procedurally could have sued the terrorists, in all likelihood, they would have been "judgment proof" defendants. See Ambrahmovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339, 342 (1972).

10. The Warsaw Convention applies to "all international transportation of persons . . . performed by aircraft for hire." Warsaw Convention, *supra* note 3, art. 1(1). Article 1(2) defines international transportation as:

> [A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination . . . 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 . . . of another Power, even though that Power is not a party to this Convention.

In *Day* and *Evangelinos*, the subject flight was international transportation within the purview of the Treaty because the plaintiffs were passengers scheduled to board the aircraft departing from Athens and arriving in New York City.

11. A. LOWENFELD, AVIATION LAW, Ch. VI § 4.1 at 88 (1972). For a list of parties to the Warsaw Convention see TREATIES IN FORCE 302 (1974). Debated and drafted in the French language, the Warsaw Convention was signed by the representatives of twenty-three countries at Warsaw, Poland, on October 12, 1929. Adherence was advised by the United States Senate on June 15, 1934, and proclaimed by President Roosevelt on October 29, 1934. Greece ratified the Convention on January 11, 1938. D. BILLYOU, AIR LAW 592 (2d ed. 1964). For a discussion of the legality of the United States ratification and the constitutionality of the Convention's venue and damage limitations, *see* Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483 (1973).

12. Boyle, *The Guatemala Protocol*, 6 CALIF. W. INT'L L.J. 41, 41 (1976). The preamble of the Warsaw Convention states that its purpose is to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents

tion established uniform rules regulating air transportation documents, procedural rules governing the time and place for filing damage claims, and the basis for and limits of air carriers' liability.[13] Article 17 of the Treaty 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*.[14]

The liability imposed upon the carrier by article 17 is excused under article 20(1) of the Convention if the airline were to prove that it had taken "all necessary measures to avoid the damage or that it was impossible for [it] to take such measures."[15]

Article 22 of the Convention provides that the carrier's liability for death or injury to passengers is limited to approximately $8,300 per passenger.[16] After many years of dissatisfaction with this low limit of liability,[17] the United States filed formal notice of denunciation[18] of the Warsaw Convention on November 15, 1965, to take effect six months later.[19] One day prior to the effective date of termination, the United

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used for such transportation and of the liability of the carrier." Warsaw Convention, *supra* note 3. *See* Block v. Compagnie Nationale Air France, 387 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); A. LOWENFELD, AVIATION LAW Ch. VI § 2.1 at 27 (1972).

13. Boyle, *The Guatemala Protocol*, 6 CALIF. W. INT'L L.J. 41, 41 (1976).

14. Warsaw Convention, *supra* note 3, at 3018 (emphasis added). The official version, which was in French, of article 17 reads as follows:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit á bord de l'aéronef ou *au cours de toutes opérations d'embarquement et de débarquement*.

Id. at 3005 (emphasis added).

15. *Id.* at 3019.

16. *Id.* Liability was limited to 125,000 Poincaré gold francs. Recent devaluations have increased the limit to $10,000. See Comment, *Legal Problems in Compensation Under the Gold Clauses of Private International Law Agreements*, 63 GEO. L.J. 817 (1975). The Warsaw Convention and Montreal Agreement liability limitations apply only to airlines. Manufacturers, airports, and other potential defendants are not similarly insulated.

17. For a discussion of the history leading up to and the reasons for the Montreal Agreement, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967) [hereinafter cited as Lowenfeld & Mendelsohn]; *Symposium on the Warsaw Convention*, 33 J. AIR L. & COM. 519 (1967); Comment, *The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. AIR L. & COM. 243 (1966).

18. Any party may withdraw under article 39. Warsaw Convention, *supra* note 3, at 3022.

19. 53 DEP'T STATE BULL. 924 (1965); *see* N.Y. Times, Nov. 16, 1965, at 82, col. 1 (city ed.).

States withdrew[20] its notice of denunciation as a result of numerous meetings with the air carriers of the International Air Transport Association and with various governments. Those meetings resulted in the Montreal Agreement which raised the limitation of liability to $75,000, including legal fees, or $58,000, exclusive of legal fees.[21] In addition, under the Montreal Agreement, the airlines waived any defense it might have had under article 20(1) of the Convention.[22] As a result, the air carriers are now exposed to liability without fault, provided the flight be international in scope and include a stop within the United States.[23] The Montreal Agreement, however, did not change in any way the text of article 17 of the Warsaw Convention.[24]

II. THE DECISIONS IN *DAY* AND *EVANGELINOS*

A. Boarding Procedure in Athens

When determining the scope of article 17, courts have placed great emphasis upon the activities and location of the passengers when injured, as well as the airline's control of the passengers. In the incident at Hellenikon Airport on August 5, 1973, the passengers for flight 881, upon entering the terminal, proceeded to the check-in counter where they presented their tickets,[25] deposited their luggage, and paid the departure tax. After being given a boarding pass and

20. 54 DEP'T STATE BULL. 955 (1966).

21. C.A.B. Order No. E 23680, 31 Fed. Reg. 7302 (1966). The Warsaw Convention was earlier amended by the Protocol signed at the Hague in 1955. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *done at the Hague* Sept. 28, 1955, 478 U.N.T.S. 371. Subject to certain provisions, the Protocol provides for liability limitations of approximately $16,600 per passenger. Although the Hague Protocol is in effect in over forty-five nations, it has never been ratified by the United States. For information about the Hague Protocol, see Beaumont, *The Warsaw Convention of 1929, as Amended by the Protocol Signed at the Hague, on September 28, 1955*, 22 J. AIR L. & COM. 414 (1955); Calkins, *Grand Canyon, Warsaw and the Hague Protocol*, 23 J. AIR L. & COM. 253 (1956).

22. Although the airlines cannot defend by a showing of their own due care, a passenger's contributory negligence may be raised as a defense under article 21. Warsaw Convention, *supra* note 3, at 3019.

23. The "stop" within the United States includes a ticketed "point of origin, point of destination, or agreed stopping place." C.A.B. Order No. E 23680, 31 Fed. Reg. 7302 (1966).

24. Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975).

25. The tickets contained the "Advice to International Passengers on Limitation of Liability" and the "Notice" which read in pertinent part as follows:

> If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury . . . .

Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95, 97 n.6 (W.D. Pa. 1975).

baggage check, the passengers walked through Greek passport and currency control and descended a flight of stairs into the transit lounge. The lounge was restricted to airline personnel and passengers waiting to depart on international flights. After securing a seat assignment at the transfer desk located inside the lounge, the travelers waited for their flight to be called. When the flight was announced, they proceeded to the designated departure gate where the Greek police conducted a search of hand luggage and passengers. Had the terrorist attack not occurred, the passengers then would have walked through the doors of the terminal building and boarded a bus which would have transported them approximately 250 meters to the airplane.

The passengers of TWA flight 881 were attacked while standing in line at the departure gate to which they had been summoned by a TWA representative. After seven of the eighty-nine scheduled passengers had been searched, the terrorists began their assault.[26]

B. The Day v. Trans World Airlines, Inc., Decision

In *Day*[27] the Second Circuit Court of Appeals affirmed the holding of District Court Judge Brieant who granted to the plaintiffs a summary judgment on the issue of absolute liability. In its defense, TWA contended that the application of article 17 should be determined only by reference to the particular location of the accident. Basing its argument upon the legislative history of the Warsaw Convention, subsequent statements by delegates to the Convention, writings of air scholars, and foreign and United States judicial decisions, TWA asserted that the carrier's liability under the Convention should not attach while the passenger is inside the terminal building. The Circuit Court rejected this contention and agreed with the analysis of Judge Brieant, who had stated that "the issue . . . is not where [the plaintiff's] feet were planted when the killing began, but rather, in what *activity* was he engaged."[28] The Second Circuit Court was of the opinion that:

26. In statements made to the police, the terrorists admitted that they had planned to attack Israel bound immigrant passengers on TWA flights going to Tel Aviv, but mistakenly struck the passengers boarding the New York bound flight. They acknowledged membership in the Black September terrorist organization and that they were seeking international publicity.

Flight 881 eventually departed for New York carrying only the seven passengers who had actually completed clearance before the attack. Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 219 (S.D.N.Y. 1975).

27. 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 1124 (1976), *aff'g* 393 F. Supp. 217 (S.D.N.Y. 1975).

28. 393 F. Supp. 217, 220 (S.D.N.Y. 1975) (emphasis added).

> [T]he words "in the course of any of the operations of embarking" do not exclude events transpiring within a terminal building. Nor, do these words set forth any strictures on location. Rather, the drafters of the Convention look to whether the passenger's *actions* were a part of the operation or process of embarkation, as did Judge Brieant.[29]

The court summed up its position by concluding:

> Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that the plaintiffs were "in the course of embarking."[30]

In support of its conclusion, the Second Circuit Court advanced three policy arguments in favor of extending protection to the victims of the Athens attack. The court indicated that a broad construction of article 17 would be in harmony with modern theories of accident cost allocation.[31] It reasoned that the airlines were in a better position than passengers to bear the costs of accidents by distributing such costs among all passengers.[32] The court further considered that its interpretation would encourage "the goal of accident prevention" because the airlines are best able to persuade, pressure or compensate airport managers to adopt more stringent security measures to guard against terrorist attacks.[33] If necessary, the airlines could hire more of their own security guards. Finally, the court stated that the administrative costs of allowing recovery under the absolute liability system embodied in the Warsaw Convention and the Montreal Agreement were significantly lower than available alternatives.[34] It reasoned that if article 17 were not applicable, the passengers' only possibility of recovery would be to maintain a complex, costly and time consuming suit in a foreign forum against the operator of the airport.[35]

Although the defendants asserted that the minutes of the Warsaw Convention indicate a desire by the delegates to implement a rule

29. 529 F.2d 31, 33 (2d Cir. 1975) (footnote omitted, emphasis in original).

30. *Id.* at 33-34 (footnote omitted).

31. *Id. See* G. CALABRESI, THE COSTS OF ACCIDENTS 34-45 (1970) [hereinafter cited as CALABRESI].

32. *Id. See* Lowenfeld & Mendelsohn, *supra* note 17, at 599-600. See text accompanying notes 136-38 *infra*.

33. *Id.*

34. *Id. See* CALABRESI, *supra* note 31, at 150-52.

35. *Id. See* Lowenfeld & Mendelsohn, *supra* note 17, at 600; Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959).

based solely on location, the *Day* court believed the delegates preferred to "provide latitude for the courts to consider the factual setting of each case."[36] The court noted that while courts should "strive to 'give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties,'" those expectations can change over a period of time.[37] With the observation that the Montreal Agreement provides "decisive evidence of the goals and expectations currently shared by the parties to the Warsaw Convention,"[38] the court determined that "protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve."[39]

Finally, the *Day* court reasoned that the drafters of the Warsaw Convention "wished to create a system of liability rules that would cover all the hazards of air travel."[40] The court believed that while risks once were limited to aerial disasters, they now include such perils as a terrorist attack inside an airline terminal. Therefore, the court concluded that the rigid location-based rule espoused by TWA would "ill serve" the goal of the Warsaw delegates since it would exclude "many claims relating to liability for the hazards of flying."[41]

C. *The Evangelinos v. Trans World Airlines, Inc., Decision*

Several months after the Southern District Court of New York in *Day* ruled that the Athens passengers were embarking, Judge Snyder of the Western District Court of Pennsylvania reached an opposite conclusion in *Evangelinos*,[42] a virtually identical case arising from the same event. Relying upon the legislative history of article 17, subsequent commentary on the Convention and cases involving disembarking, the district court in *Evangelinos* believed that "the delegates were defining geographical limits rather than an activity when they used the words, 'any operations of embarkation'."[43] Opting for a location-based test, the court found that accidents that occur within the air terminal are beyond the scope of article 17.[44] The *Evangelinos* district

36. 528 F.2d 31, 35 (2d Cir. 1975).

37. *Id. quoting* Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963).

38. *Id.* at 36.

39. *Id.* at 37 (footnote omitted).

40. *Id.* at 38.

41. *Id.*

42. 396 F. Supp. 95 (W.D. Pa. 1975).

43. *Id.* at 101. For a discussion concurring with the *Evangelinos* lower court, see Comment, *Embarking and Disembarking: The Parameters of the Warsaw Convention*, 9 CORNELL INT'L L.J. 251, 268-69 (1976).

44. 396 F. Supp. 95, 102 (W.D. Pa. 1975).

court believed that the court in *Day* had extended the liability of the signatories to the Warsaw Convention "far beyond anything that was within the contemplation of the parties."[45]

After the Second Circuit Court affirmed the lower court in *Day*, the majority of the Third Circuit Court of Appeals, sitting *en banc*, reversed[46] the decision of the district court in *Evangelinos* and, for "substantially the same reasons as expressed in *Day*,"[47] found the plaintiffs to be in the course of the operations of embarking. Chief Judge Seitz, however, in a lengthy and vigorous dissenting opinion, stated that he would have affirmed the lower court's ruling and granted TWA's motion to dismiss the claim.

Giving article 17 a "common sense construction,"[48] the *Evangelinos* majority, in an opinion authored by Judge Van Dusen, examined the nature of the activity in which the plaintiffs were engaged to determine if such activity could fairly be considered part of "the operations of embarking." With particular emphasis on the activity in which the plaintiffs were involved, the control by TWA over the plaintiffs at the time of the accident and the relation of the terrorist attack to air travel, the court believed it was "appropriate under all the facts and circumstances of this case to view the activity of undergoing pre-boarding searches as part of the 'operations of embarking'."[49]

The majority observed that the plaintiffs' injuries were sustained "while they were acting at the explicit direction of TWA and while they were performing the final act required as a prerequisite to boarding busses"[50] employed by TWA to take the plaintiffs to the aircraft. The court placed significance on the fact that at the time these operations had commenced, the flight had already been called for final boarding. Therefore, the passengers were "no longer mingling over a broad area with passengers of other airlines," but were "congregated in a specific geographical area designated by TWA and were identifiable as a group associated with TWA's Flight 881."[51] The court found that:

> By announcing the flight, forming the group and directing the passengers as a group to stand near the departure gate, TWA

45. *Id.*
46. 550 F.2d 152 (3d Cir. 1977), *rev'g* 396 F. Supp. 95 (W.D. Pa. 1975).
47. 550 F.2d 152, 156 (3d Cir. 1977).
48. *Id.* at 155.
49. *Id.* at 156 (footnote omitted).
50. *Id.*
51. *Id.*

> had assumed control over the group . . . . Under these circumstances, it is reasonable to conclude that TWA had begun to perform its obligation as air carrier under the contract of carriage and that TWA . . . had assumed responsibility for the plaintiffs' protection. Thus, for all practical purposes, "the operations of embarking" had begun.[52]

Refusing to "freeze the Warsaw Convention in its 1929 mold," the *Evangelinos* court believed that the danger of violence, "whether in the form of terrorism, hijacking or sabotage," is today so closely associated with air transportation as to be considered an "inherent" risk of air travel.[53] On this basis, the court considered its conclusion consistent with the Convention's original goal of governing the risks then thought to be inherent in air carriage.[54]

In contrast to the majority's analysis, Chief Judge Seitz argued that a terrorist attack which takes place within the confines of an airport terminal is "no more likely than the bombing of a restaurant, bank or other public place,"[55] and for that reason cannot be considered a risk inherent in air transportation.

Unlike the majority of the court, which regarded a passenger's activities as primarily determinative of whether the passenger was engaged in the operations of embarking, Chief Judge Seitz adopted a two step approach that would examine both location and activity. Under this approach, the threshold determination would be "whether a passenger's injuries were sustained in an area exposed to the particular risks of air navigation."[56] Based on his interpretation of the Convention Minutes and subsequent commentary, Chief Judge Seitz concluded that "[u]nder no circumstances were accidents inside the airport terminal regarded [by the delegates] as within the scope of the treaty."[57] The dissent reasoned that an examination of the passenger's activities is necessary only after it has been determined that an individual was situated "in the immediate vicinity of an airplane where the risks of air travel are logically encountered."[58]

The second step of this approach involved scrutinizing a passenger's conduct to determine whether, objectively viewed, his activities are within the scope of article 17. Applying this approach, Chief Judge Seitz maintained that:

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52. *Id.*
53. *Id.* at 157.
54. *Id.*
55. *Id.* at 159.
56. *Id.* at 160.
57. *Id.*
58. *Id.* at 163.

> Only those passengers who have departed from the safety of the terminal and are engaged in the activity of boarding or any of the steps which immediately precede boarding should be granted recovery.[59]

The dissent further asserted that the majority's analysis of the element of airline control over passengers was "at best imprecise,"[60] since passengers are at many locations within the terminal under the control of the airlines. In addition, the dissent noted that the majority apparently required that a person entitled to recover under article 17 be a member of an identifiable group associated with a particular flight and located with a specific geographical area designated by the airline.[61] This, the dissent argued, turns "control" into a "mere artifice to permit recovery within the terminal, yet under limited circumstances."[62]

III. *MARTINEZ HERNANDEZ V. AIR FRANCE*

Subsequent to the *Day* and *Evangelinos* decisions, the First Circuit Court of Appeals was presented in *Martinez Hernandez v. Air France*[63] with the problem of determining whether passengers were "disembarking" within the meaning of article 17 when they were injured during a terrorist attack at Lod International Airport near Tel Aviv, Israel.

A. The Attack at Lod Airport

The *Martinez Hernandez* plaintiffs and their decedents were passengers on Air France flight 132 from New York through Paris and Rome to Tel Aviv, Israel. Three Japanese, in the service of a Palestinian terrorist organization, boarded the plane at Rome. On arrival at Lod Airport, the passengers descended the stairs to the ground and walked or rode on a bus about one-third mile to the terminal building. There they presented their passports for inspection by Israeli immigration officials and then passed into the main baggage area of the terminal. While the passengers were awaiting the arrival of the baggage from the plane, the three Japanese terrorists removed their luggage from the conveyor belt, produced submachine guns and hand

59. *Id.*
60. *Id.* at 164.
61. *Id.*
62. *Id.*
63. 545 F.2d 279 (1st Cir. 1976), *aff'g* In re Tel Aviv, 405 F. Supp. 154 (D.P.R. 1975).

grenades, and opened fire upon persons in the baggage area, killing and wounding many.

B. *The Hernandez Decision*

In *Martinez Hernandez*, the First Circuit Court affirmed the decision of the lower court granting a dismissal of the complaint. The lower court had held that the attack did not occur during disembarkation. It based its decision[64] upon the First Circuit Court's opinion in *MacDonald v. Air France*,[65] in which the plaintiff left the airplane, cleared customs, and arrived in the common terminal baggage area. There the plaintiff, a seventy-four year old woman, was found on the floor, but no testimony was presented to describe the cause of her fall. The First Circuit Court of Appeals, presuming that some internal condition was the cause of the fall, held that the airline was not liable under article 17 of the Warsaw Convention both because the plaintiff had not proved that an "accident"[66] within the meaning of article 17 had occurred and because the injury did not occur during disembarkation. The *MacDonald* court stated:

> [I]t would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane . . . and has reached a safe point inside the terminal, even though he may remain in the status of a passenger of the carrier while inside the building . . . . Neither the economic rationale for liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of aircraft.[67]

In affirming the *Martinez Hernandez* lower court, the First Circuit, in an opinion written by Chief Judge Coffin, was of the view that its holding in *MacDonald* did not foreclose necessarily the adoption of *Day-Evangelinos* tripartite test which focuses on the activity in which the passengers were engaged, their location and the extent to which they were under the control of the carrier.[68] Applying this test, the court first observed that some passengers have no need to retrieve

64. 405 F. Supp. 154, 155-56 (D.P.R. 1975).

65. 439 F.2d 1402 (1st Cir. 1971).

66. 439 F.2d 1402, 1404-05 (1st Cir. 1971). It was undisputed in *Day* and *Evangelinos* that the attack constituted an "accident" within the purview of article 17. Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95, 99 (W.D. Pa. 1975). *See also* Husserl v. Swiss Air Transport. Co., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd mem.*, 485 F.2d 1240 (2d Cir. 1973); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322, 1323 (C.D. Cal. 1975).

67. 439 F.2d 1402, 1405 (1st Cir. 1971).

68. 545 F.2d 279, 282 (1st Cir. 1976).

baggage.[69] Therefore, the court believed that picking up baggage is not an activity that is necessary to effect a passenger's separation from the plane. The court further found that the long distance from the passenger's location within the terminal building to the aircraft, militated against finding the passengers in the course of disembarking.[70] Finally, the court observed that unlike the embarking passengers in *Day* and *Evangelinos*, who were segregated into a group at the direction of airline employees, the passengers in *Martinez Hernandez* were apparently "free agents roaming at will."[71] The court asserted that:

> [I]nasmuch as the carrier's duty to protect passengers from the acts of third parties arises not from the carrier's ability to control the third party but from the relationship between carrier and passenger, *the scope of article 17 should be limited to those situations either where the carrier has taken charge of the passengers, or possibly where it customarily would have done so*.[72]

The court's decision differed from *Day* and *Evangelinos* in its refusal to hold the carrier liable because of considerations of cost allocation. Although not unsympathetic to these considerations, the court believed that "if its application is not to do violence to the history and language of the Warsaw Convention, there should . . . be a close logical nexus between the injury and air travel per se."[73] This reflects the court's opinion that the delegates to the Warsaw Convention intended a restrictive definition of embarking and disembarking. The *Martinez Hernandez* court, in agreement with Chief Judge Seitz's dissenting opinion in *Evangelinos*,[74] emphasized that a terrorist attack, unlike a hijacking, is "not a risk characteristic of travel by aircraft, but rather is a risk of living in a world such as ours."[75] By maintaining this position, the court disagreed with a fundamental premise of the *Day* and *Evangelinos* opinions.

IV. ANALYSIS OF THE ELEMENTS IN THE COURTS' DECISIONS

It is a general rule of treaty interpretation to give effect to the "ordinary meaning" of the terms of the treaty in their context and in

69. *Id.*

70. *Id.*

71. *Id.* at 283 (footnote omitted).

72. *Id.* at n.4 (emphasis added), *citing* RESTATEMENT (SECOND) OF TORTS § 314A (1965); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

73. 545 F.2d 279, 284 (1st Cir. 1976).

74. 550 F.2d 152, 159 (3d Cir. 1977) (dissenting opinion). *See* text accompanying note 55 *supra*.

75. 545 F.2d 279, 284 (1st Cir. 1976).

light of its object and purpose.[76] It is readily apparent, however, that the phrase "in the course of any of the operations of embarking or disembarking" is not susceptible to a clear "ordinary meaning". Indeed, air law scholars have long been cognizant of the varying interpretations applicable to the phrase and the need for further definition.[77] Consequently, rather than relying upon a mere textual interpretation of article 17, the *Day*, *Evangelinos* and *Martinez Hernandez* courts considered other elements of interpretation to support their holdings. The disparate conclusions reached in those cases are primarily a result of the courts' divergent analyses of several important interpretive elements: the legislative history of article 17, subsequent commentary thereon, the use of policy considerations and the applicability of disembarking cases. In order to determine the proper interpretation of the scope of article 17 of the Warsaw Convention, these elements will be examined more closely.

A. The Legislative History of Article 17

Following the well established practice of looking at the legislative history of a treaty to aid in the interpretation of its provisions,[78] the courts in *Day, Evangelinos*, and *Martinez Hernandez* examined the minutes of the Warsaw Convention. Of special pertinence was the discussion of draft Convention article 20, from which the present article 17 was derived. Drafted by the Comité Internationale Technique d'Experts Juridique Aeriens (CITEJA)[79], article 20 provided that:

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76. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 147(1)(a) (1965); Vienna Convention on the Law of Treaties, art. 31, para. 1, *opened for signature* May 23, 1969, 63 AM. J. INT'L L. 875, 885 (1969). For an analysis of the two main schools of treaty interpretation, see Merrills, *Two Approaches to Treaty Interpretations*, 1968-1969 AUSTR. Y.B. INT'L L. 55 (1969); see also Comment, *Air Law—Foreign Language Treaty Interpretation—Recovery of Damages for Mental Injuries in Airplane Hijackings*, 8 N.Y.U.J. INT'L L. & POL. 55 (1975).

77. *See, e.g.*, Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J. AIR L. & COM. 395, 401 (1949).

78. Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943), wherein the Court stated in reference to treaties:

> To ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Accord, Factor v. Laubenheimer, 290 U.S. 276, 294 (1933); Cook v. United States, 288 U.S. 102, 112 (1933). *See also* Block v. Compagnie Nationale Air France, 386 F.2d 323, 336-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), wherein the court stated with regard to the Warsaw Convention: "[T]he determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention." *Id.* at 336; MCNAIR, LAW OF TREATIES 411-23 (1961).

79. International Technical Committee of Aerial Legal Experts. The preparatory

> The period of carriage [liability] shall extend *from the moment when the travelers, goods, or baggage enter the aerodrome of departure up to the moment when they leave from the aerodrome of destination*; it does not cover any carriage whatsoever outside the limits of an airport, other than by aircraft.[80]

Although most delegates agreed on the period of liability with respect to goods and baggage, the Warsaw minutes indicate that there was extensive controversy as to when liability for passengers should attach.[81]

Urging rejection of draft article 20, the delegate from Brazil, Alcibiades Peçanha, asked his fellow delegates, "Can one make the carrier liable for the life of a passenger before he has boarded the aircraft? How many accidents can occur within the boundaries of the aerodrome before departure takes place?"[82] He proposed that the language of article 20 be amended:

> To replace "from the moment when travelers, goods and baggage enter the aerodrome of departure up to the moment when they leave the aerodrome of destination" by "*from the moment when the travelers have boarded* and the goods or baggage have been delivered to the forwarder."[83]

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work for the Warsaw Convention, including the formulation of draft articles, was begun at the First Conference Internationale de Droit Privé Aérien, held in Paris in October and November, 1925. The Paris Conference appointed a commission of experts in international air law, CITEJA, which was charged with studying and suggesting changes in the draft articles presented at the Paris Conference. At the Third Session of the CITEJA, in Madrid, in May of 1928, a final version of a draft convention was adopted. It was this draft that was before the delegates as they met in Warsaw, Poland, in October of 1929, to draw up the final Convention. For full details of the CITEJA in connection with the preparation of the Warsaw Convention, see Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts C.I.T.E.J.A.*, 3 J. AIR L. & COM. 27 (1932); Latchford, *The Warsaw Convention and the C.I.T.E.J.A.*, 6 J. AIR L. & COM. 79 (1935).

80. II CONFERENCE INTERNATIONALE DE DROIT PRIVÉ AÉRIEN, 4-12 OCT. 1929, at 171 (1930) [hereinafter cited as WARSAW MINUTES] (emphasis added). Translation from French by Professor Michael Riffaterre, Columbia University.

81. Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95, 100 (W.D. Pa. 1975). In *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 395 n.10, 314 N.E.2d 848, 854 n.10, 358 N.Y.S.2d 97, 105 n.10 (1974), the Court of Appeals for the State of New York noted that:

> [T]he debate over this article [17] centered around the issue of when the air carrier's liability for damage to passengers should begin and end rather than the scope of compensable injuries.

82. WARSAW MINUTES, *supra* note 80, at 49. Translation from SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW OCTOBER 4-12, 1929 WARSAW MINUTES 71 (R. Horner & D. Legrez transl. 1975) [hereinafter cited as Horner & Legrez].

83. Horner & Legrez, *supra* note 82, at 71; translation of WARSAW MINUTES, *supra* note 80, at 49 (emphasis added).

Professor George Ripert, the French delegate, argued that article 20 should be referred to the drafting committee to create a new text that would clearly distinguish between travelers and goods.[84] Because Ripert believed that the delegates would "never arrive at finding a formula indicating when the contract of carriage begins and ends,"[85] he suggested that the delegates be "content to employ a general formula—'during air carriage'—[and leave] to the courts the duty of deciding in each case if one is within the contract of carriage."[86] During the discussions which followed the various proposals, the delegates voiced considerable dissatisfaction with the expansive provision for passenger liability embodied in article 20. They also expressed a widespread belief that the article should be submitted to the drafting committee for revision.[87]

Several delegates recognized that more than a mere rewording of the CITEJA draft was involved; in addition, important questions of substance were being raised by the various proposed amendments.[88] The British delegate summarized the dispute as follows:

> It seems to me that here there are questions of principle upon which one can pass before the referral to the drafting commitee.
>
> For example, as regards travelers, does liability begin, as it is said in the draft [article 20], upon the entrance into the aerodrome of departure, or does it begin when the traveler is on board the aircraft? Here is the divergence as it exists as regards the travelers: When must liability begin? Following the principle established in the draft of the Convention, or simply when the traveler is on board?
>
> It's a question upon which I ask that one pass before the referral to the drafting committee.[89]

The Reporter then stated:

> We should make a decision first of all on the carriage of travelers and then on the carriage of goods. The situation, in effect, can be different.

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84. Horner & Legrez, *supra* note 82, at 73, 78; translation of WARSAW MINUTES, *supra* note 80, at 50, 54.

85. Horner & Legrez, *supra* note 82, at 73; translation of WARSAW MINUTES, *supra* note 80, at 50.

86. *Id.*

87. 550 F.2d 152, 161 (3d Cir. 1977) (Chief Judge Seitz, dissenting).

88. Horner & Legrez, *supra* note 82, at 80-82; translation of WARSAW MINUTES, *supra* note 80, at 55-56.

89. Horner & Legrez, *supra* note 82, at 80-81; translation of WARSAW MINUTES, *supra* note 80, at 55.

> In the carriage of travelers, there is a double solution possible: either maintaining the text which would consist in engaging the liability of the carrier as soon as the passenger enters the aerodrome, or accepting the suggestion which was made which consists in saying that the liability is engaged as soon as the traveler has embarked on the aircraft.
>
> I point out again that this last solution, practically, is not one at all, and facilitates nothing at all, because the judge will always have to specify the moment when the liability of the carrier begins. In effect, the passenger can have steped [*sic*] on the step-up of the aircraft, the step-up which is not an actual part of the aircraft, and be injured by another aircraft.
>
> Be that as it may, the proposal is very clear.[90]

After Professor Ripert reiterated his proposal of referring to the drafting committee a text based "on the distinction to be established between travelers and goods,"[91] the delegate from Luxemborg responded:

> It seems indispensible to me to indicate first of all to the drafting committee the directives which it will have to follow to prepare its text; if not, the drafting committee will work in a void, it will perform a work which will be admitted or rejected. So that, before deciding to refer to the drafting committee, it is indispensible to vote in the sense of the proposals made by the British Delegation, which discriminated very well between the various cases. When the conference will have made a decision on these points which will be submitted to a vote, then the drafting committee will be able to work in a useful manner.[92]

Peçanha, the Brazilian delegate, then agreed with Ripert and the French delegation on the subject of goods, but cautioned his fellow delegates as to the choice they were making with respect to passengers:

> I draw the attention of the Assembly to that upon which we are going to vote. It's a question of saying, whether the liability of the carrier begins as soon as the traveler enters into the aerodrome, which is a public place, or when he embarks on the aircraft.[93]

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90. Horner & Legrez, *supra* note 82, at 81; translation of WARSAW MINUTES, *supra* note 80, at 55-56.

91. Horner & Legrez, *supra* note 82, at 81-82; translation of WARSAW MINUTES, *supra* note 80, at 56.

92. Horner & Legrez, *supra* note 82, at 82; translation of WARSAW MINUTES, *supra* note 80, at 56.

93. *Id.*

Thereafter, a vote was taken which rejected the proposed draft of article 20.[94] Perhaps the most problematic discussion of the debates then took place:

> THE PRESIDENT: We are now going to vote on the other proposal concerning the carriage of passengers that we have not decided. It's a question of saying that the liability of the carrier begins at the moment when the passenger embarks on the aircraft. Now, I don't know if perhaps we shouldn't consider the rejection of the text proposed by the draft of the Convention as the acceptance of the other proposal?
> MR GIANNINI (Italy): I understood . . . that if one voted against the text of the draft of the Convention, that meant that one accepted the other proposal, that is to say, referral to the drafting committee.
> (General agreement).
> THE PRESIDENT: There is not opposition to this point of view? . . . Then, it is thus so decided. We refer to the drafting committee.[95]

Shortly thereafter, when the Soviet delegate inquired of the situation regarding carriage of passengers, the President replied, "We have said that the rejection of the present article [20] led to the acceptance of the *opposite principle*."[96] Following revision, the current article 17 emerged from the drafting committee and was adopted without further debate.[97]

The question as to what the "other proposal" agreed upon actually has never been firmly resolved. During the Convention debates, Mr. Giannini, the Italian delegate, stated that with respect to passengers, "it is necessary to ally oneself with the Delegation of Brazil."[98] Moreover, in 1932, Giannini wrote concerning the effect of the change from the draft to the final text of article 17:

> In this way the grave and unjustifiable rule proposed by CITEJA to have liability commence at the moment of entry into or exit from, respectively, the airport of departure or arrival, is eliminated.[99]

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94. Horner & Legrez, *supra* note 82, at 83; translation of WARSAW MINUTES, *supra* note 80, at 57.

95. *Id.*

96. Horner & Legrez, *supra* note 82, at 84; translation of WARSAW MINUTES, *supra* note 80, at 57 (emphasis added).

97. Horner & Legrez, *supra* note 82, at 205-06; translation of WARSAW MINUTES, *supra* note 80, at 135-36.

98. Horner & Legrez, *supra* note 82, at 74; translation of WARSAW MINUTES, *supra* note 80, at 50-51.

99. A. GIANNINI, SAGGI DI DIRITTO AERONAUTICO 223 (1932). It is noteworthy that Mr. Giannini refers only to the "airport of departure or arrival" which encompasses the

This would tend to indicate that the proposal which Giannini believed[100] to have been accepted by the rejection of the CITEJA draft was that of the Brazilian delegation.

Consistent with this position, TWA argued that the rejection of the CITEJA draft manifested an intent to exclude from Warsaw coverage all accidents occurring within a terminal building.[101] Rejecting TWA's argument, the Second Circuit Court in *Day* was of the opinion that the delegates' action "constituted a rejection of a rigid location-based test in favor of the more flexible approach espoused by Professor Ripert."[102] The majority opinion of the Third Circuit in *Evangelinos* concluded that "the debates indicate confusion among the delegates themselves as to the meaning of the rejection of the CITEJA draft."[103] The dissent of Chief Judge Seitz, however, believed there was "overwhelming evidence" to support the view that:

> [I]n rejecting the CITEJA draft of Article 20, the delegates intended to signify their approval of a proposal which would limit an airline's liability for personal injuries to those injuries which occurred during flight or while the passenger was boarding. Their subsequent adoption of Article 17 must be viewed as an affirmance of this more restrictive concept of liability. It appears likely that the phrase "during the course of any of the operations of embarking" was inserted in order to make explicit that the Article covered the passenger who was on the stairway preparing to enter the airplane in addition to passengers who had already boarded.[104]

Reaching a conclusion similar to that of Chief Judge Seitz, the First Circuit Court believed that "the CITEJA draft was rejected in favor of the more restrictive view"[105] of Mr. Peçanha of Brazil. The court stated that "the delegates understood embarkation and disembarkation as essentially the physical activity of entering or exiting from an aircraft, rather than as a broader notion of initiating or ending a trip."[106] Similarly, the District Court of Puerto Rico in *Martinez Hernandez* found that:

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entire airfield and not merely the airport terminal building. See Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 158 n.11 (3d Cir. 1977).

100. *See* text accompanying note 95 *supra*.

101. Brief for Appellee at 18-19, Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977).

102. 525 F.2d 31, 35 n.12 (2d Cir. 1975).

103. 550 F.2d 152, 158 (3d Cir. 1977).

104. *Id.* at 162 (dissenting opinion).

105. 545 F.2d 279, 283 (1st Cir. 1976).

106. *Id.* at 283-84. The *Martinez Hernandez* court noted that:

> The legislative history . . . makes clear that in drafting Article 17 the delegates to the Convention specifically intended to exclude from coverage accidents occuring to passengers inside an airport terminal building.[107]

The position of the *Day* court is not supported by the delegates' remarks surrounding the rejection of the CITEJA draft. Although the final text did distinguish between passengers and goods,[108] it would be incorrect to suggest, on the basis of this difference, that Professor Ripert's proposal be considered "opposite" in principle to draft article 20. Rather, the commentary recorded in the minutes virtually compels the conclusion that the "opposite principle" refers to that of the Brazilian proposal. It is evident that the text of article 17 is not precisely that of the Brazilian proposal. Nevertheless, the analysis of the minutes by Chief Judge Seitz and the *Martinez Hernandez* courts is

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> [T]he hypothetical cases which the delegates posed as problems concerned such cases as accidents occurring as one stepped onto the stairs leading to the aircraft, . . . or after boarding but before takeoff . . . . By contrast there was no doubt that injuries sustained, for example, while eating in an airport restaurant, . . . walking through the airport, . . . or while walking through town during a stopover, . . . would not be covered.

Id. at 284 n.7.

In his memorandum for the United States as *amicus curiae*, Solicitor General Robert Bork states, "The delegates then voted to reject the CITEJA proposal and to refer to the drafting committee the alternate proposal 'that the liability of the carrier begins at the moment when the passenger embarks on the aircraft.' " Memorandum for the United Staes as Amicus Curiae at 8, Trans World Airlines, Inc., v. Day, 429 U.S. 890 (1976) *denying cert.*, 528 F.2d 31 (2d Cir. 1975). The Solicitor General further states that, "It may well be that the delegates, or a majority of them, did not envision that 'any of the operations of embarking' could take place within an air terminal." *Id.* at 9. Although the Solicitor General was "uncertain what conclusion we would reach if the facts of this case were presented to us as a completely original matter," he could not say that the result reached by the *Day* courts was clearly wrong, and thus recommended that the writ of certiorari be denied. *Id.* at 12, 14.

107. 405 F. Supp. 154, 157 (D.P.R. 1975).

108. WARSAW CONVENTION, *supra* note 3, at 3019. Article 18 maintained the basic system originally provided for in draft article 20, providing for liability "if the occurrence which caused the damage so sustained took place during the transportation by air." "Transportation by air" was defined as comprising "the period during which the baggage and goods are in charge of the carrier, *whether in the airport or on board an aircraft*, or, in the case of a landing outside an airport, in any place whatsoever." (emphasis added).

The distinction between passengers and property recognized that passengers might expose themselves of their own volition to situations of peril which inanimate articles such as goods and baggage cannot do. In addition, once a consignor delivers goods to the carrier, the former has no means of establishing the moment when any damages occur, since the carrier is in complete control of the goods. These considerations dictate that liability is to attach upon delivery of the goods to the carrier. *See* D. GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 189 (1937) [hereinafter cited as GOEDHUIS]; Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1, 23 (1936) [hereinafter cited as Sullivan].

clearly the more accurate, and the one supported by the debates and subsequent commentary by air law scholars.

B. Subsequent Commentary on Article 17

Prior to the recent trio of cases, discussion by air law experts on the scope of the terms "embarking" and "disembarking" focused on whether these terms embrace only a passenger's actual climbing into and out of the aircraft, or whether they also extend to the period when a passenger is on the traffic apron. At the Fifth International Congress on Air Navigation held in 1930, only one year after the Warsaw Convention, a leading air law expert, Dr. Goedhuis, presented a paper in which he summarized the prevailing interpretations of article 17 as follows:

> [A]rt. 17 mentions 'embarquement' and 'debarquement'. The question is how to explain these words? There are two views *viz: a)* in a broad sense: i.e. the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building *b)* in a narrow sense, i.e.: the getting on board and the alightment only comprise the actual getting in and out of the aeroplane.[109]

Although Dr. Goedhuis favored the broad interpretation,[110] as have most subsequent air law text writers,[111] others present, including Dr. Wolterbeek-Müller, president of the Congress' legal section and the Dutch delegate to the Warsaw Convention, claimed the proper interpretation was the "narrow" view.[112] Under either view, however, passengers injured inside of the air terminal would not be within the ambit of article 17.

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109. Goedhuis, *Observations Concerning Chapter 3 of the Convention of Warschau 1929*, in CINQUIEME CONGRES INTERNATIONAL DE LA NAVIGATION AERIENNE, 1-6 SEPT., 1930, 1163-64 (1931) [hereinafter cited as FIFTH CONGRESS].

110. *Id.* at 1173.

111. *See, e.g.*, H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 83 (1954); M. LEMOINE, TRAITÉ DE DROIT AÉRIEN 539-40 (1947) [hereinafter cited as LEMOINE]; D. LUREAU, LA RESPONSABILITÉ DU TRANSPORTEUR AÉRIEN 90 (1961); O. RIESE & J. LACOUR, PRÉCIS DE DROIT AÉRIEN 265 (1951) (Otto Riese, German delegate to the Warsaw Convention, states that the Convention excluded those accidents having taken place while the passenger "is in the airport terminal buildings."); J. VAN HOUTTE, LA RESPONSIBILITÉ CIVILE DANS LES TRANSPORTS AÉRIENS, INTÉRIERS ET INTERNATIONAUX 80 (1940); Chauveau, Note, [1968] D.S. JUR. 517 [hereinafter cited as Chauveau].

112. FIFTH CONGRESS, *supra* note 109, at 1173.

Dr. Goedhuis, however, has written also that there is no way of knowing what the delegates actually meant:

> It is to be regretted that the solution proposed by the committee was adopted without any discussion. [T]he interpretation of the term . . . gives rise to divergent opinions and since the expression was not discussed, the minutes cannot therefore give any explanations on this subject.[113]

As previously noted,[114] the courts in *Day*, *Evangelinos*, and *Martinez Hernandez* sought to define "embarkation" or "disembarkation" partially in terms of hazards associated with air transportation. A similar approach has been taken by several air law scholars.[115] As early as 1936, one American writer, Mr. Sullivan, recommended the following definition:

> These operations commence, where embarkation takes place at an airport operated with a restraining barrier for passengers about to go aboard, when passage is made through such gate, and vice versa, on disembarking, and that in other situations, such operations shall be deemed to have commenced when the passenger is exposed to the particular hazards of transportation by air.[116]

He posed the hypothetical situation of a passenger, present in the airport waiting room for the purpose of embarkation, being injured. He wrote that

> no hazard peculiar to air navigation has been encountered. To permit the air carrier to limit his liability as a waiting-room [*sic*] operator would be a discrimination against every operator of railway or bus passenger stations.[117]

Further, he noted that "an international convention is not necessary to govern the liability of an air line company in its capacity as waiting room proprietor."[118]

Similarly, in 1947, French air law scholar Maurice Lemoine[119] pointed out that since the Warsaw Convention had been intended to apply to the risks inherent in air exploitation and transportation, the

113. GOEDHUIS, *supra* note 108, at 192.

114. *See* text accompanying notes 40-41, 53-55, 74-75, *supra*.

115. *See* GOEDHUIS, *supra* note 108, at 195; W. GULDIMANN, INTERNATIONALES LUFTTRANSPORTRECHT 100 n.4 (1965); LEMOINE, *supra* note 111, at 539; R. RODIERE, DROIT DES TRANSPORTS 366 (1973); R. ST.-ALARY, LE DROIT AÉRIEN 177 (1955); Sullivan, *supra* note 108, at 22.

116. Sullivan, *supra* note 108, at 22.

117. *Id.* at 20, 21.

118. *Id.* at 20.

119. LEMOINE, *supra* note 111, at § 811.

regime becomes operative only when the passenger finds himself exposed to these risks. He observed that "the passenger, when he goes freely in the building of the airport, goes to the cafeteria, to the waiting room, to the newstand [for example], has not yet started to undergo the air risks."[120] Therefore, in a hypothetical situation, Lemoine would not have allowed an injury caused by a broken stairway inside the air port to engage the provisions of the Convention.[121] He writes that "from the moment the passenger leaves the building of the airport to get on the departure area, the passenger is in the field of *aérien* risks"[122] and the carrier's liability commences.

Taking a contrary view, French air law scholar Dean Paul Chauveau argues that courts should not be encumbered with disputes in which the parties argue whether the accident is a risk specifically related to the *aérien* mode of transportation so as to justify recourse to the Convention.[123] He points out that "since the Warsaw Convention constitutes one uniform law for air carriers, it applies for everything or nothing at all."[124] He further states:

> [I]f the air risks explain and justify the particular regime which rules air transportation, the application of the Warsaw Convention has never been dependent upon the effective realization of a risk of that nature. It rules all transportation . . . without distinction or condition from the beginning to end.[125]

Similar reasoning was adopted by Judge McEntee in his concurring opinion in *Martinez Hernandez*. It was his view that "a terrorist attack should be subjected to the same analysis for Article 17 purposes as any other tortious act."[126] This position seems consistent with article 17, which does not differentiate between the various possible causes of an injury. Certainly a test based upon which hazards are inherent in air travel would be open to endless debate, and such an approach would provide little guidance in construing the meaning of article 17.[127] If the Convention, as modified by the Montreal Agreement, is to be regarded as truly providing for liability without fault, no distinction can be

120. *Id.*
121. *Id.*
122. *Id.*
123. Chauveau, *supra* note 111, at 517. (Transl. by Michele Margin, graduate student and instructor of French at University of California at San Diego).
124. *Id.*
125. *Id.*
126. 545 F.2d 279, 285 n.2 (1st Cir. 1976) (concurring opinion).
127. *See* Chauveau, note 111 *supra*.

reasonably drawn between an airline's responsibility to a person injured as a result of a terrorist attack and one injured by slipping on a banana peel in the air terminal while standing in line for a security inspection.

C. *Policy Considerations*

As previously noted,[128] the *Day* court relied in part on policy considerations to support its broad interpretation of article 17. In so doing, the court followed a trend, especially promoted by the New York courts,[129] which interprets the various articles of the Convention in a manner that will afford recovery to injured passengers. The apparent basis for allowing recovery when it might be denied under a different interpretation of the Convention is the courts' recognition that the airline industry no longer needs the extensive protection it once did, and that emphasis today should be on the protection of passengers rather than airlines.[130] Consequently, courts which consider compensation to be a societal responsibility[131] have been willing to go to great lengths to construe the relevant articles in a way that enables them to find the carrier liable for passenger injuries.[132]

Although cost allocation theories such as those adopted by the *Day* court have been used to extend a defendant's liability in domestic tort cases,[133] they bear little relation to the proper interpretation of the

128. See text accompanying notes 31-35 *supra*.

129. *See, e.g.*, Lisi v. Alitalia-Linee Aeree Italiane, S.p.A., 253 F.Supp. 237 (S.D.N.Y. 1966) (divided court), *aff'd*, 170 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968), *reh. denied*, 391 U.S. 929 (1968) (inadequate notice of articles 3 and 4 in passenger ticket); Eck v. United Arab Air Lines, Inc., 360 F.2d 804 (2d Cir. 1966) (liberal interpretation of "place of business" in article 28(1)); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) (liberal interpretation of "delivery" in article 3(2)); Reed v. Wiser, 414 F. Supp. 863 (S.D.N.Y. 1976) (finding that the Warsaw Convention does not limit the liability of carrier's corporate officers); Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973) (construing "accident" of article 17 as including hijacking); Boryk v. Aerolineas Argentina, 332 F. Supp. 405 (S.D.N.Y. 1971) (size of type and form of notice in ticket not adequate).

130. Reed v. Wiser, 414 F.Supp. 863, 865 (S.D.N.Y. 1976); See Note, *Warsaw Convention—Carrier Liability—Mental Anguish and Distress are not Encompassed as a Matter of Law by the Clause "any Other Bodily Injury" Under Article 17 of the Warsaw Convention*, 39 J. AIR L. & COM. 433, 438 (1973).

131. *See* Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 525, 531 (1963).

132. Mankiewicz, *Judicial Diversification of Uniform Private Law Convention: The Warsaw Convention's Days in Court*, 21 INT'L & COMP. L.Q. 718, 725-26 (1972) [hereinafter cited to as Mankiewicz].

133. *See* Union Oil Co. v. Oppen, 501 F.2d 558, 569-70 (9th Cir.1974), wherein similar policy arguments as those advanced by the *Day* court were used to establish a

provisions of an international treaty. New developments in the tort law of one signatory nation should not be permitted to change the interpretation of a treaty. Any application of domestic law must be in accordance with the express terms of the treaty itself.[134] This is particularly true with respect to a treaty such as the Convention which has been reexamined without a change to the pertinent language as recently as 1971, when the Guatemala Protocol[135] was drafted.

The *Day* court, however, stated that in light of the Montreal Agreement, the Warsaw Convention "now functions to protect the passenger from the many contemporary hazards of air travel and also spreads the accident cost of air transportation among all passengers."[136] For this proposition the court relied on *Husserl v. Swiss Air Transport Co.*[137] The *Husserl* court, however, did not cite any authority in support of this theory,[138] nor is there any indication in the history of the Convention or elsewhere that the Convention intended to distribute the costs of accidents in this manner. The *Day*[139] court also found the 1971 Guatemala Protocol significant in assessing the current goals of the Convention. The Protocol, adopted by a diplomatic conference at which fifty-five countries were represented, has been signed by more than twenty states. It will formally amend the Warsaw Convention in a manner similar to the Montreal Agreement to provide for absolute liability up to $100,000.[140]

However, the Montreal Agreement and Guatemala Protocol clearly do not support the *Day* court's position on passenger protection. While it is true that the increase of liability limits and the establishment

duty of due care on the part of an oil company to avoid oil spills in the Santa Barbara Channel of California. *See also* CALABRESI, *supra* note 31, at 69-73, 140-52.

134. American Trust Co. v. Smyth, 247 F.2d 149, 153 (9th Cir. 1957).

135. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as amended by the Protocol Done at the Hague on 28 September 1955, *done at Guatemala City* March 8, 1971, International Civil Aviation Doc. No. 8932. [reproduced in 64 DEP'T STATE BULL. 555 (1971)] [hereinafter cited as Guatemala Protocol]. See Boyle, *The Guatemala Protocol to the Warsaw Convention*, 6 CALIF. W. INT'L L.J. 41 (1976) for a thorough analysis of the Protocol. *See* notes 140-41 *infra*.

136. 528 F.2d 31, 33 (2d Cir. 1975).

137. 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 486 F.2d 1240 (2d Cir. 1973).

138. 351 F. Supp. 702, 707 (S.D.N.Y. 1972).

139. 528 F.2d 31, 36 (2d Cir. 1975).

140. Guatemala Protocol, *supra* note 135, at art. VIII. Because of fluctuations in the value of gold, the limit is now equivalent to $120,000. Additionally, United States citizens will have the benefit of a compensation fund which will provide up to $200,000 more to a passenger whose damages exceed the $100,000 limit. *See* Boyle, *The Guatemala Protocol to the Warsaw Convention*, 6 CALIF. W. INT'L L.J. 41, 80 (1976).

of a system of liability without fault indicate a greater sensitivity to the need for providing for adequate passenger recovery, neither the Montreal Agreement nor the Guatemala Protocol altered the language of article 17 defining the *scope* of liability under the Convention.[141] The class of passengers entitled to recover under the Convention's provisions remains the same. As stated by Judge Seitz in his dissenting opinion in *Evangelinos*, "the Convention's original policy of limiting an airline's liability of personal injuries caused by the unique perils of air navigation retains its vitality, notwithstanding the adoption of the Montreal Agreement."[142] Judge Seitz addressed the *Day* court's reliance on modern theories of accident cost allocation as follows:

> While I do not question the soundness of these principles in appropriate contexts, I believe that the explicit goals and policies which were voiced by the delegates to the Warsaw Convention and reaffirmed by the signing of the Montreal Agreement in 1966 foreclose reference to them in defining the scope of Article 17. Had the signatories to the Convention wished to amend it in order to reflect modern developments in American tort law, they could have affirmatively acted in 1966 when the monetary damage limitation was increased and the airline's due care defense was eliminated. Their failure to do so should not be disregarded, particularly if we keep in mind that this is an international agreement.[143]

Even if policy considerations are to be considered in the interpretation of the Convention's articles, it is arguable that with respect to

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141. Article IV of the Guatemala Protocol provides:

> The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or *in the course of any of the operations of embarking or disembarking.* However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

Guatemala Protocol, *supra* note 135 (emphasis added).

During the discussion on article IV, the French delegation proposed that the phrase "in the course of any of the operations of embarking or disembarking" be replaced by "in the movement area", and noted that the latter expression was defined in the Annexes to the Convention on International Civil Aviation. The expression "movement area" is there defined as "that part of a manoeuvering area and aprons." The intention of the French delegation was to limit the scope of the rule of absolute liability strictly to the risks of air carriage. That delegation sought to avoid the possibility that the original phrase might be construed broadly by some courts. The proposal was rejected. Some delegates considered that passengers who, for example, went directly from the aircraft into a tunnel would not touch the movement area at all, and that the reference to embarkation and disembarkation had been relatively well interpreted. See FitzGerald, *The Revision of the Warsaw Convention*, 8 CAN. Y.B. INT'L L. 239, 293 (1970).

142. 550 F.2d 152, 159 (3d Cir. 1977) (dissenting opinion).

143. *Id.* at 163.

passenger recovery, a narrow construction is preferable. In this regard, it is important to note that in many situations involving injury to a passenger, it is the airline seeking the benefit of the liability limitations which argues for the application of the Warsaw Convention and Montreal Agreement.[144] A restrictive view of "embarking" or "disembarking", that is, one which extends only to those cases where the treaty clearly applies, would leave to passengers their remedies under local law.

In most cases, those remedies would not be illusory. As the *Martinez Hernandez* court pointed out, "contemporary theories of cost allocation may well be reflected in the provisions of local law."[145] Moreover, under the local law of many jurisdictions, passengers may be able to recover to the full extent of their injuries by establishing a breach of the carrier's duty to exercise a "high degree of care" for the safety of its passengers.[146] This high standard of care applies throughout the passenger-carrier relationships, including the time during which the passenger is in the carrier terminal.[147] Furthermore, the high standard of care may extend to the protection of passengers from the "vicious acts of third parties",[148] which presumably would include terrorist attacks.

D. Disembarking Cases

Prior to cases of *Day* and *Evangelinos*, United States courts had not confronted the problem of determining precisely when the "operations of embarking" commence.[149] The period of "disembarking",

144. *See, e.g.*, Felismina v. Trans World Airlines, Inc., 13 Av. Cas. ¶ 17,145 (S.D.N.Y. 1974). *See also* note 153 *infra*.

145. 545 F.2d 279, 284 (1st Cir. 1976). The *Martinez Hernandez* court observed further that expansion of carrier liability under article 17 to include all terrorist attacks at airports would produce anomalous results. Under article 17, passengers would have a strict liability remedy against the carrier, whereas nonpassengers injured by the same attack would be limited to domestic remedies. The court believed that when dealing with the "grey area" of cases not clearly involving disembarking, it would be more rational to treat passengers and nonpassengers alike, leaving to all of them the remedies available under local law. *Id.*

146. *See, e.g.*, Day v. Trans World Airlines, Inc., 293 F. Supp. 217, 223 (S.D.N.Y. 1975); Comment, *Embarking and Disembarking: the Parameters of the Warsaw Convention*, 9 CORNELL INT'L L.J. 251, 266 & n.89 (1976).

147. *Id.*

148. *Id.*

149. For a case involving article 17, where "embarking" was partially in issue, see *Chutter v. KLM Royal Dutch Airlines*, 4 Av. Cas. ¶ 17,733 (S.D.N.Y. 1955), where plaintiff, who had boarded the aircraft, got up from her seat and proceeded toward an open door of the aircraft in order to wave farewell to her daughter. Plaintiff stepped from the plane into a space between it and a loading ramp, falling to the ground. The court

however, had been construed by courts in the United States[150] and France.[151] The decisions in these disembarking cases tended to support TWA's claim that passengers injured inside an air teminal are not within the ambit of article 17 of the Warsaw Convention. Thus, the *Day* and *Evangelinos* courts were faced with the question of whether the logic and rationale of cases involving disembarking should be equally applicable to cases where embarking is alleged.

On the one hand, district court Judge Brieant in Day, "distinguished readily"[152] the case of *Felismina v. Trans World Airlines, Inc.*,[153] on the basis that it involved a claimed *dis*embarking under article 17. The *Day* court observed that the disembarking passenger "is not herded in lines, and has few activities, if any, which the air

stated that, "[W]ithout embarking upon a detailed analysis of the plaintiff's physical position at the time of her fall," it was satisfied that the accident was within the scope of article 17. "To hold otherwise," said the court, "would be an unwarranted dissection of minute and almost indefinable areas from the coverage of the Convention." *Id.* at 17,734. *See also* Scarf v. Trans World Airlines, Inc., 4 Av. Cas. ¶ 17,795 (S.D.N.Y. 1955) (Action subject to Warsaw Convention found where plaintiff was injured while boarding the aircraft when a plane from the same carrier passed close by and moved the ramp which plaintiff was mounting).

150. MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971); *see* text accompanying notes 66-67 *supra*; Felismina v. Trans World Airlines, Inc., 13 Av. Cas. ¶ 17,145 (S.D.N.Y. 1975), *see* note 153 *infra*; Klein v. KLM Royal Dutch Airlines, 46 App. Div. 2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974). In *Klein*, the plaintiffs were injured inside Lod Airport, Israel. The court, citing to *MacDonald*, held that the plaintiffs "having gotten off the aircraft and arrived safely within the terminal, had disembarked within the meaning of article 17 of the Warsaw Convention." 46 App. Div. 2d at 679, 360 N.Y.S.2d at 62.

151. Maché v. Air France, [1967] REV. FR. DROIT AÉRIEN 343 (Cour d' appel Rouen), aff'd, [1970] REV. FR. DROIT AÉRIEN 311 (Cour de Cassation); Forsius v. Air France, [1973] REV. FR. DROIT AERIEN 216 (Trib. gr.inst. de Paris).

152. 393 F. Supp. 217, 222-23 (S.D.N.Y. 1975).

153. 13 Av. Cas. ¶ 17,145 (S.D.N.Y. 1974). Felismina was a passenger aboard a TWA flight from Lisbon, Portugal to New York. Upon arrival in New York, she left the aircraft and walked through an expandable horizontal jetway which led from the airplane door to the terminal proper. She continued across the upper floor of the terminal building and boarded an escalator leading to a lower level of the terminal where Health and Immigration, baggage claim and Customs were situated. While on the escalator she was allegedly pushed, and fell, fracturing her knee. TWA, seeking to apply article 29 of the Warsaw Convention, which contains a two year period of limitations, moved for summary judgment dismissing the suit as barred by that statute of limitations. TWA argued that since the plaintiff had not yet traversed the "exit-gate" which leads to an area open to the general public, the plaintiff was still in the operations of disembarking, and therefore the Convention continued to apply. These arguments are clearly in conflict with TWA's assertions in *Day* and *Evangelinos*. Brief for Appellant at 28, Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977). Judge Ward of the Southern District Court of New York, in a brief memorandum citing no cases or authority, found that the Warsaw Convention was not applicable because "by the time plaintiff boarded the down escalator, she had disembarked from defendant's aircraft and that the two-year period of limitations . . . is inapplicable." 13 Av. Cas. ¶ 17,145 (S.D.N.Y. 1974).

carrier *requires* him to perform at all, or in any specific sequence as a condition of completing his journey."[154]

On the other hand, district court Judge Snyder in *Evangelinos*, believed that "many of the steps involved in embarkation, as outlined by Judge Brieant in *Day*, are just as essential, although in reverse, to the steps one must take in disembarking."[155] The *Evangelinos* lower court thus found support in the logic and reasoning of cases involving disembarking[156] for its conclusion that the plaintiffs were not within the "operations of embarking."

In reversing the district court in *Evangelinos*, the majority of the Third Circuit Court distinguished the disembarking cases of *MacDonald v. Air Canada*[157] and *Maché v. Air France*[158] because they "involved disembarking, where the nature and extent of the carrier's control over the passenger and the type of activity in which [the] plaintiff was engaged differed significantly from [*Evangelinos*]."[159]

In the French case of *Maché v. Air France*,[160] the plaintiff was escorted by a stewardess from the plane toward the terminal building. Because of construction, a detour was taken through the "customs garden" which was not on the traffic apron. The plaintiff accidentally stepped on a broken manhole cover and fell into a well, seriously injuring himself. The trial court stated that one could not restrict the operations of disembarkment to the crossing of the aircraft gangway, and gave judgment for the plaintiff. However, the court allowed the carrier to take advantage of the limitation on liability prescribed by article 22, the accident having happened in the course of disembarkation. The trial court defined the scope of article 17 as starting at the moment the passengers are taken into charge by the representative of

154. Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 223 (S.D.N.Y. 1975).

155. Evangelinos v. Trans World Airlines, Inc., 396 F. Supp. 95,102 (W.D. Pa. 1975). The steps outlined by Judge Brieant in *Day* are as follows:

> These passengers could not board the aircraft unless they:
> 1. presented their tickets to TWA at the checking desk on the upper level; 2. obtained boarding passes from TWA; 3. obtained baggage checks from TWA; 4. obtained an assigned seat number from TWA; 5. passed through passport and currency control imposed by the Greek Government; 6. submitted to a search of their persons for explosives and weapons by Greek police; 7. submitted their carry-on baggage for similar inspection by Greek police; 8. walked through Gate 4 to Olympic's bus; 9. boarded the bus; 10. rode in the bus a distance of 100 yards; and 11. walked off the bus and onto the aircraft. There is simply no other way to "embark", except by these eleven steps.

Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 221 (S.D.N.Y. 1975).

156. *See* note 149 *supra*.

157. 439 F.2d 1402 (1st Cir. 1971).

158. [1967] REV. FR. DROIT AÉRIEN 343 (Court d'appel, Rouen), *aff'd*, [1970] REV. FR. DROIT AÉRIEN 311 (Cour de Cassation).

159. 550 F.2d 152, 156 (3d Cir. 1977).

160. [1963] REV. FR. DROIT AÉRIEN 353 (Cour d'appel, Paris).

the air carrier and are led to the aircraft under the direction of this agent, or from the aircraft to the passengers' destination.[161]

The Court of Appeals of Rouen,[162] while agreeing with the trial court that the accident happened in the course of disembarking, stated that there must also be a risk incident to air transportation at a point in a passenger's activity before the Warsaw Convention applies.[163] The court reasoned that since the *raison d'etre* for the limitation of the carrier's liability was the particular nature of air risks, "it is only to the extent that these operations are taking place on the traffic apron" that the Convention could apply.[164] The appeals court in *Maché* believed that the "custom garden" was not an area exposed to the risks of air navigation. Accordingly, it held that the Warsaw Convention was inapplicable and did not restrict the passenger's potential recovery.[165] This decision was affirmed by the *Cour de Cassation*, France's highest appellate court.[166]

The majority in *Evangelinos* considered neither *MacDonald* nor *Maché* as inconsistent with its conclusion.[167] The court observed that both the *MacDonald* and the *Maché* courts believed the Convention's original goal to be the development of rules to govern liability for the "risks then thought to be inherent in air carriage, and concluded, on that basis, that the Convention did not apply because the plaintiffs had reached 'safe' points, distant from such risks."[168] Since the *Evangelinos* court was of the opinion that terrorism was inherent in air transportation, it concluded that the plaintiffs were not located in such a "safe place".[169] The *Evangelinos* court further distinguished *Maché* by noting that it was the plaintiff who was arguing against the applicability of the Warsaw Convention.[170]

The *Evangelinos* court's attempt to reconcile its decision with the holdings in *MacDonald* and *Maché* seems strained. Air risks have not become significantly more closely associated with terminals in the few years since *MacDonald* and *Maché* to warrant broadening the scope of article 17. Furthermore, a rule of treaty interpretation should not change with the identity of the party advocating it. Also, it is clear that

161. *Id.*
162. [1967] REV. FR. DROIT AÉRIEN 343, 345 (Cour d'appel, Rouen).
163. *Id.*
164. *Id.*
165. *Id.*
166. [1970] REV. FR. DROIT AÉRIEN 311 (Cour de Cassation).
167. Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 156 (3d Cir. 1977).
168. *Id.* at 157.
169. *Id.*
170. *Id.* at 156-57 n.10.

the passenger in *Maché*, who was injured while being escorted across the runway by the employees of the carrier, was as much under the control of the carrier as were the *Evangelinos* passengers. With regard to these incongruities at least, there is an inescapable conflict between *Evangelinos* and *Maché*.

It is noteworthy that in agreeing with the *Day* court, the *Evangelinos* majority indicated that "there is substantial interest in uniformity of decision in this area."[171] Chief Judge Seitz, however, argued that the interest is in "uniform *international* interpretation of the treaty."[172] Asserting that *Day* was "inconsistant with prior decisions of the United States courts and, more importantly with the highest court in France," Judge Seitz maintained that "[i]f deference is due in order to achieve international uniformity, I believe we should respect the French interpretation of a treaty which was written and negotiated in the French language."[173]

The *Maché* case has been severely criticized by Dean Paul Chauveau.[174] Chauveau observes that in an effort to find Air France liable, the appellate court stated that during the crossing of the customs area, a contract of land transportation was substituted for the air contract, and thus the carrier was liable according to common law.[175] Chauveau calls such sectioning a "specious argument" and "contrary to the unity of contract that has been expressed numerous times by the *Cour de Cassation*, as to the Warsaw Convention."[176] Significantly, Chauveau points out that the word "toutes" [177] as found in article 17, is not found in the court's decision.

171. *Id.* at 155.

172. *Id.* at 160 n.2 (dissenting opinion) (emphasis in original).

173. Evangelinos v. Trans World Airlines, Inc., No. 75-1990, slip op. at 13 n.2 (3d Cir. May 4, 1976) *Compare* Block v. Compagnie Nationale Air France, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) (wherein the court stated in *dicta* that, "[t]he binding meaning of the terms [of the Warsaw Convention] is the French legal meaning.") *and* Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1155 (D.N.M. 1973), *with* Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 393-94, 314 N.E.2d 848, 853-54, 358 N.Y.S.2d 97, 104-05 (1974) (limiting the application of the official French text to a determination of the accuracy of the English translation.), *and* Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238, 1248 (S.D.N.Y. 1975).

174. Chauveau, *supra* note 111.

175. *Id.* at 518.

176. *Id.*

177. The official English version of article 17 translates "toutes" as "any". See note 14 *supra* for French version of article 17. The use of the word "any" has been open to various interpretations. Dr. Goedhuis writes:

> The minutes of the meetings of the C.I.T.E.J.A. bring out that one did not want to consider only embarking or disembarking at the aerodrome of departure and of destination, but also the operation during a stop *en cours de route.* For that reason "during *any* operations" was used in article 17.

> It is conveniently forgotten, probably to make the violation of the law less apparent. But it is in the text of the Convention. . . . To forget the word any may be very clever, but it is not applying the law; it is deforming or reforming.[178]

Because the foremost interest of the Warsaw Convention was the attainment of uniformity in international air law, the importation of foreign case law has been considered desirable.[179] Although uniformity is a desirous end, deference to foreign courts is not justified if it would achieve uniformity only at the cost of misconstruction of the Convention. Failure to follow the *Maché* precedent would not be sufficient by itself to adjudge the *Day* and *Evangelinos* decisions as being in error.

Moreover, foreign case law itself is not unfiorm. In the German case of *Blumenfeld v. BEA*, [180] the plaintiff was scheduled to fly from Berlin through Frankfurt to Athens. Shortly before departure, the door of the waiting room was opened to allow the passengers to walk across the runway to the airplane. The plaintiff fell on a ramp that led from the waiting room to the runway. The Court of Appeals of Berlin held that the plaintiff had embarked in accordance with the meaning of article 17:

> It is questionable that the Warsaw Convention . . . strictly formed the liability of the carrier solely with regard to the typical dangers that are directly connected with the use of an airplane. This interpretation, however, would overlook the fact that *the air carrier has assumed control of the passengers whenever it invites them to proceed from the waiting room to the aircraft*. Just at this moment, the carrier begins with the performance of the transport contract . . . to provide for the safety of the passenger and guarantee the begun commerce.[181]

GOEDHUIS, *supra* note 104, at 196 (emphasis in original). *Contra*, BLANC-DANNERY, LA CONVENTION DE VARSOVIE 64 (1934).

178. Chauveau, *supra* note 111, at 518.

179. *See*, Mankiewicz, *supra* note 132, at 750. One commentator, however, has criticized resort to foreign case law on the grounds that it "inevitably seems to favor the strongest party, the air carrier," who can present to the courts "selected foreign precedents." He points out that the existing compilations of air law cases are either incomplete or highly selective such as the Air Carriers' Liability Reports (formerly IATA Law Reporter) circulated by International Air Transport Association to its member airlines. Sand, *The International Unification of Air Law*, 30 L. & CONTEMP. PROB. 400, 411 & n.99,412 (1965).

180. 11 Z. LUFT. R. 78 (Court of Appeal of Berlin 1962).

181. *Id.* at 79-80. (Translation by Paulette Rodgers Leahy, and Richard Schwering, Esq., instructor in German at San Diego State University (emphasis added).

The *Day* and *Evangelinos* courts' emphasis on control is in harmony with the *Blumenfeld* decision and several authors on air law.[182]

V. CONCLUSION

The inconsistency of the decisions in *Day*, *Evangelinos* and *Martinez Hernandez* points out the necessity for a uniform standard by which courts can determine if a passenger is "embarking or disembarking" within the meaning of article 17 of the Warsaw Convention. This need becomes more acute when it is realized that the same expression has been retained in the Guatemala Protocol.[183]

Unfortunately, the absence of debate or clarification at the adoption of the final text of article 17 leaves confusion as to which passenger activities fall within the Convention's absolute liability provision. However, the Warsaw delegates' rejection of the CITEJA draft makes it clear that the carrier is not to be held liable for *all* passenger injuries which take place while a passenger goes about various activities in the airport before and after his flight.

It is likely that a majority of the delegates did not envision any of the "operations of embarking or disembarking" could take place within an air terminal building. In using that phrase, the delegates probably had in mind the procedures that prevailed at that time, that is, walking across a traffic apron and mounting a ladder for embarking and *vice versa* for disembarking. Nevertheless, the words chosen did not freeze the then existing techniques of embarking or disembarking into the language of the Convention. Today, many of the operations of embarking and disembarking have been moved inside the air terminal. With the increasing use of an enclosed jet way ramp or mobile lounge, a passenger typically moves to and from the aircraft without ever being on the traffic apron or outdoors. In such circumstances, passage beyond the structural confines of an air terminal building would have

182. *See, e.g.*, I P. KEENAN, A. LESTER & P. MARTIN, SHAWCROSS AND BEAUMONT ON AIR LAW 441-42 (3d ed. 1966), wherein it is stated:

> "In the course of *any* of the operations" of embarking or disembarking appear to envisage a wider period of liability and probably include the time during which the passenger's movements are under the control of the carrier for the purposes of embarking and disembarking.

(emphasis in original).

N. MATEESCO MATTE, TRAITÉ DE AÉRIEN-AÉRONAUTIQUE 405 (2d ed. 1964) where, citing *Blumenfeld* and the 1961 trial court decision in *Maché*, [1961] REV. FR. DROIT AÉRIEN 283 (Trib. gr. inst. de la Seine), Matte states the view that, "the responsibility of the air company is engaged from the moment the passengers are taken under the guard of the employees of the airline to be taken to the airplane and until the moment they have been deposited at the air station of destination."; Wessels, Z. LUFT. R. 216 (1958).

183. *See* note 141 *supra*.

but illusory significance. Exclusion of the operations of "embarking or disembarking" from airport terminals would render the terms meaningless because a passenger could go directly from the terminal to "on board the aircraft", and *vice versa*. Accordingly, it must be concluded that under some circumstances, the airlines' limited liability under the Warsaw Convention can attach within the air terminal. Furthermore, each international airport has its own rules and requirements for embarking and departing the plane, which are promulgated and enforced to satisfy the particular needs of that airport. Consequently, a test based solely on physical location would be unworkable and unrealistic in modern air travel.

At present there is no absolute test for reasonable determination whether an accident occurred "in the course any of the operations of embarking or disembarking". The First, Second, and Third Circuit Courts all found guidance by examining the actions and location of a passenger and the degree of control by the airline at the time of injury. Although this approach is helpful, it leaves to the individual court to choose the elements for greatest emphasis. Such an unstructured test will inevitably lead to inconsistent and unequal treatment of passengers and airlines. With respect to the totality of the circumstances, the Second and Third Circuit Court opinions reached the correct result, but on less than wholly sound reasoning, especially with regard to their analysis of the Warsaw Convention Minutes. On the other hand, the First Circuit Court decision in *Martinez Hernandez* appears to be based on surer footing.

It is suggested herein that courts adopt the following rule to be used in conjunction with a close analysis of the particular facts in each case: If a carrier has requested a passenger to board an airplane, and a passenger acts pursuant to such request, he is embarking within the meaning of article 17 of the Warsaw Convention. At this point, the air carrier's limited liability commences. If a passenger has arrived at his destination and has completed all airline required activities, he has completed disembarking. At this point, the Convention is no longer applicable, and a passenger must resort to local law for remedies.

Implementation of this approach would avoid holding the air carrier liable during that period when a passenger has retained his freedom of movement. It is further suggested that courts should not concern themselves with determining whether the cause of an accident is an "inherent risk" of air transportation. Rather, all injuries, regardless of cause, should be similarly analyzed.

Until the international legal community clarifies the scope of article 17, courts may well indulge in judicial treaty making if they do not approve of the original terms. If the Warsaw Convention is to maintain its continuing validity in international air travel, passengers and airlines must be given the assurance that courts will apply one uniform law.*

Richard David Hendlin

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* As this Note goes to press, recent developments include the case of *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir. 1977), *cert. denied*, 45 U.S.L.W. 3807 (Jun. 14, 1977). In *Maugnie* the plaintiff contracted with Air France for flight from Los Angeles, California, to Paris, France, where she was to transfer to Swiss Air for flight to Geneva, Switzerland. When the plaintiff reached Paris, she exited from the Air France plane and entered Orly Airport terminal to make her Swiss Air connection. She proceeded from the Air France gate to the main terminal area. In a hallway between the terminal gate and the center of the terminal, the plaintiff slipped and fell, incurring injury.

Holding that the plaintiff's injury did not occur in the course of disembarking within the meaning of article 17 of the Warsaw Convention, the Ninth Circuit Court of Appeals affirmed the holding of the District Court for the Central District of California which dismissed, with prejudice to plaintiffs complaint.

The Ninth Circuit Court observed that the courts

> have not been uniform in construing 'in the course of . . . embarking or disembarking, as used in article 17, due perhaps to the ambiguous history of the Convention and the changes in air transportation technology since the original drafting.

549 F.2d at 1259.

The *Maugnie* court found that

> a rule based solely on location of passengers is not in keeping with modern air transportation technology and ignores the advent of the mobile boarding corridors utilized by many modern air terminals.

Id. at 1261.

Therefore, the court preferred a more flexible approach, similar to that taken by *Day* and *Evangelinos* courts, which required "an assessment of the total circumstances surrounding a passenger's injuries, viewed against the background of the intended meaning of Article 17." *Id.* at 1262. The court believed that the *Day* and *Evangelinos* decisions were reasonable, based on the facts involved in those cases. Nevertheless, it found that the plaintiff's claim did not come within the scope of the Warsaw Convention because of her location when injured and because "she was acting at her own direction and was no longer under the 'control' of Air France." *Id.*

Judge Wallace, however, concurring only in the result, believes that the "location-of-the-passenger test" of *MacDonald v. Air Canada*, 439 F.2d, 1402 (1st Cir. 1971), was "more in keeping with both a fair reading of the language of Article 17 and the Article's historical derivation." *Id.* Judge Wallace found "serious flaws" with the tripartite test adopted in *Day v. Trans World Airlines, Inc.* He stated that *Day* rests upon a "somewhat selective reading" of the Warsaw minutes, which disregards "substantial portions of the legislative history favoring the location test." *Id.* at 1263. Further, Judge Wallace believes that the *Day* court, by relying on a social theory of compensation designed to spread the burden of damages to all travelers, injects "policy arguments alien to the spirit of the Warsaw Convention." He accuses the *Day* court of "forming the language" of the Convention such as to constitute a redrafting. Finally, he observes that in light of the "two-edged sword" nature of the Warsaw Convention, the *Day* test may have "perverse and unintended consequences." *Id.*