SUPREME COURT OF THE UNITED STATES

No. 97–475

EL AL ISRAEL AIRLINES, LTD., PETITIONER *v.*
TSUI YUAN TSENG

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

[January 12, 1999]

JUSTICE STEVENS, dissenting.

My disagreement with the Court's holding today has limited practical significance, not just because the issue has been conclusively determined for future cases by the recent amendment to the Warsaw Convention, see *ante,* at 2, 16–17, but also because it affects only a narrow category of past cases. The decision is nevertheless significant because, in the end, it rests on the novel premise that preemption analysis should be applied differently to treaties than to other kinds of federal law, see *ante,* at 17. Because I disagree with that premise, I shall briefly explain why I believe the Court has erred.

I agree with the Court that the drafters of the Convention intended that the treaty largely supplant local law. Article 24 preempts local law in three major categories: (1) personal injury claims arising out of an accident;[1] (2)

[1]As we have already held, Article 17 only covers accidents, which we defined as "an unexpected or unusual event or happening that is external to the passenger." *Air France* v. *Saks,* 470 U. S. 392, 405 (1985). Thus, I believe Article 24(2)'s reference to Article 17 does not include nonaccidents.

As a leading treatise states with regard to Article 17: "If the passenger's lawyer does not want the Convention's limits to be applicable, he must either: a) prove the Convention does not apply because his client was not a passenger in international transportation as defined in

claims for lost or damaged baggage; and (3) damage occasioned by transportation delays.[2] Those categories surely comprise the bulk of potential disputes between international air carriers and their passengers.

The Convention, however, does not preempt local law in cases arising out of "wilful misconduct." Article 25 expressly provides that a carrier shall not be entitled to avail itself of the provisions of the Convention that "exclude or limit" its liability if its misconduct is willful.[3] Moreover, the question whether the carrier's wrongful act "is considered to be equivalent to wilful misconduct" is determined by "the law of the court to which the case is submitted." *Ibid.* Accordingly, the vast majority of the potential claims by passengers against international air carriers are either preempted by Article 24 or unequivocally governed by local law under Article 25.

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Article 1; or b) if the Convention is applicable, that the limits are unavailable because the carrier failed to deliver a ticket as provided by Article 3; or c) the carrier was guilty of wilful misconduct (Article 25) or d) *there was no 'accident'*.)" L. Goldhirsch, The Warsaw Convention Annotated: A Legal Handbook 55 (1988) (emphasis added).

[2] Article 24 provides:

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

"(2) In the cases covered by article 17 the provisions of the preceeding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

[3] Article 25 provides:

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

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

Putting these cases aside, we are left with a narrow sliver of incidents involving personal injury that arise neither from an accident nor willful misconduct.[4] Although the drafters of the Treaty may not have realized that any such cases might arise, our construction of the term "accident" in *Air France* v. *Saks*, 470 U. S. 392, 405 (1985), had the effect of either recognizing or creating this narrow band of cases. Frankly, I am not persuaded that this case belongs in this interstitial niche because I believe it should have been resolved by determining that petitioner's alleged misconduct was either an accident within the meaning of Article 17, or involved willfulness as a matter of local law. Be that is it may, the parties have insisted that we decide the case on the assumption that it belongs in the sliver about which the treaty is silent.

This case and *Saks* therefore differ from each of the cases that the Court has cited in footnote 16 of its opinion to emphasize the importance of respecting "the treaty's preemptive effect," as none of those cases involved personal injury resulting from a nonaccident. *Ante*, at 18.[5]

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[4]Article 18 (damage to goods) and Article 19 (damage occasioned by delay) are not limited to accidents; any liability under local law for damages to goods or for delay is therefore explicitly preempted by Article 24(1). See *Saks*, 470 U. S., at 398.

[5]See *Gal* v. *Northern Mountain Helicopters Inc.*, Dkt. No. 3491834918, 1998 B. C. T. C. Lexis 1351, *2–*3 (July 22, 1998) (involving a helicopter crash and noting "the plaintiff invoked the Warsaw Convention claiming for injuries and loss arising from the accident"); *Naval-Torres* v. *Northwest Airlines Inc.*, 159 D. L. R. (4th) 67, 74, 76 (1998) (stating that injury resulting from second-hand smoke constitutes an accident and expressly noting but declining to resolve the preemption issue decided today by this Court); *Emery Air Freight Corp.* v. *Nerine Nurseries Ltd.*, [1997] 3 N. Z. L. R. 723, 727, 728 (involving damage to cargo, therefore covered under Article 18, and thus explicitly preempted under Article 24(1)); *Seagate Technology Int'l* v. *Changi Int'l Airport Servs. Pte Ltd.*, [1997] 3 S. L. R. 1, 2 (same).

While the Court is correct in its assertion that the British House of

Given the unique character of this and the few other cases in the sliver, it is clear to me that the central purposes of the Convention will not be affected, whether we treat them like accident cases, which preempt local law, or like willful cases, which do not.

The overriding interest in achieving "'uniformity of rules governing claims arising from international air transportation,'" *ante*, at 11, will be accommodated in the situations explicitly covered by Article 24, regardless of how the Court decides this case. In those circumstances, the Convention's basic tradeoff between the carriers' interest in avoiding unlimited liability and the passengers' interest in obtaining compensation without proving fault will be fully achieved.

On the other hand, the interest in uniformity is disregarded in the category of cases that involve willful misconduct. Under the treaty, a reckless act or omission may constitute willful misconduct. See *Koirala* v. *Thai Airways Int'l, Ltd*, 126 F. 3d 1205, 1209–1210 (CA9 1997); Goldhirsch, *supra* n.1 at 121 (stating that most civil law jurisdictions have found that gross negligence satisfies Article 25). This broad definition increases the number of cases not preempted by the Convention. In these circumstances, the delegates at Warsaw did decide "to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations." *Ante*, at 11.

Thus, the interest in uniformity would not be signifi-

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Lords assumed the terrorist attack in *Sidhu* v. *British Airways plc*, [1997] 1 All E.R. 193, was not an accident, see *ante*, at 17, I am puzzled why the Lords came to this conclusion. Courts both in this country and in our sister signatories have frequently found a hijacking to be an accident within the meaning of Article 17. See *Saks*, 470 U. S., at 405; *Ayache* v. *Air-France*, 38 Rev. franç. dr. aérien 450, 451 [1984] (T.G.I. Paris, 1st ch.,) (France); *Air-France* v. *Consorts Telchner*, 39 Rev. franç. dr. aérien 232, 240 [1984] (S. Ct. Israel).

cantly impaired if the number of cases not preempted, like those involving willful misconduct, was slightly enlarged to encompass those relatively rare cases in which the injury resulted from neither an accident nor a willful wrong. That the interest in uniformity is accommodated in one category of cases but not the other simply raises, without resolving, the question whether the drafters of the treaty intended to treat personal injury nonaccident cases as though they involved accidents. A plaintiff in such a case, unlike those injured by an accident, receives no benefit from the treaty, and normally should not have a claim that is valid under local law preempted, unless the treaty expressly requires that result.[6]

Everyone agrees that the literal text of the treaty does not preempt claims of personal injury that do not arise out of an accident. It is equally clear that nothing in the drafting history requires that result. On the contrary, the amendment to the title of the Convention made in response to the proposal advanced by the Czechoslovak delegation, see *ante*, at 15, suggests that the parties assumed that local law would apply to all nonaccident cases. I agree with the Court that that inference is not strong enough, in itself, to require that the ambiguity be resolved in the plaintiff's favor. It suffices for me, however, that the history is just as ambiguous as the text. I firmly believe that a treaty, like an Act of Congress, should not be construed to preempt state law unless its intent to do so

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[6]The Convention does require such a result, for example, in the case of accidents resulting in no physical injury. I agree with the Court that, in that case, the victim's remedies under local law are preempted by Article 24. See *Eastern Airlines, Inc.* v. *Floyd*, 499 U. S. 530, 552 (1991). My interpretation does not, therefore, produce the anomaly identified *ante*, at 13. Since I believe that all personal injuries (whether physical or psychological) arising from accidents are covered by Article 17 and therefore preempted by Article 24(2), the "merely traumatized" plaintiff would not be free to sue outside the Convention.

is clear. See *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996); *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 351 (1994); *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). For this reason, I respectfully dissent.