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Recommended Citation

Walsh, Frank K. (1979) "Cause of Action Recognized as Arising Under the Warsaw Convention (Benjamin v. British European Airways)," *St. John's Law Review*: Vol. 53 : No. 2 , Article 4.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol53/iss2/4>

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AIR LAW

CAUSE OF ACTION RECOGNIZED AS ARISING UNDER THE WARSAW CONVENTION

Benjamins v. British European Airways

The Warsaw Convention¹ (the Convention) was adopted in 1929 to establish uniformity in the law relating to certain aspects of private international air transportation.² Accordingly, Article 17 states

¹ The formal title of the Warsaw Convention (the Convention) is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3014, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation), *reprinted in* A. LOWENFELD, AVIATION LAW CASES AND MATERIALS DOCUMENTS SUPPLEMENT 412-24 (1972) [hereinafter cited as DOCUMENTS SUPPLEMENT]. The Convention was drafted by the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.), which was established subsequent to the First International Conference on Private Air Law, held in Paris, in 1925. *Ide*, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. 27, 30-37 (1932). *See generally* Latchford, *The Warsaw Convention and the C.I.T.E.J.A.*, 6 J. AIR L. 79 (1935). While the Convention was signed by 23 countries on Oct. 12, 1929, *id.* at 79, it was not until Oct. 29, 1934 that the United States, with reservation, adopted the Convention. 49 Stat. 3013, T.S. No. 876, 137 L.N.T.S. 11, (1934). Currently, more than 100 countries are signatories to the Convention. *See* 2 C. SHAWCROSS & K. BEAUMONT, AIR LAW app. A, at 3-8 (3d ed. 1975).

The first amendment of the Convention was the Hague Protocol, officially known as the 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* Sept. 28, 1955, 478 U.N.T.S. 371 (1955), *reprinted in* DOCUMENTS SUPPLEMENT, *supra*, at 425-33. The major effect of the Hague Protocol was to double the limitation of liability of Article 22(1) of the Convention from \$8,300 to \$16,600. *See* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12.02[1] (1978). The United States viewed this increase as unsatisfactory, however, and served notice of its denunciation of the Convention. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 546-52 (1967). This denunciation was withdrawn when the carriers agreed to a higher limitation of liability and waived the defenses available to them under the Convention. *Id.* at 595-96; *see* Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, *approved by order* E-23680, May 18, 1966 (docket 17325), 31 Fed. Reg. 7302 (1966), *reprinted in* DOCUMENTS SUPPLEMENT, *supra*, at 434-36. Known as the Montreal Agreement, this accord was reached pursuant to Article 22(1) of the Convention, which provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability." 49 Stat. 3019, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation); Lowenfeld & Mendelsohn, *supra*, at 597. Unlike the Convention, the Montreal Agreement is not a treaty, but rather an agreement among the carriers filed with the Civil Aeronautics Board. *See* 1 KREINDLER, *supra* § 12B.02[3]. Under the Montreal Agreement, the carriers have agreed to waive the defense of lack of fault available under Article 20(1) of the Convention, thereby declaring themselves absolutely liable under Article 17 to a limit of \$75,000. *See id.* §§ 12A.02, .04, .08[4], 12B.02[3]. The Montreal Agreement is viewed by the United States to be an interim agreement until another international conference can agree on satisfactory amendments to the Convention. *Id.* § 12B.02[3]; *see* Lowenfeld & Mendelsohn, *supra*, at 596-602.

² Preamble to the Convention, 49 Stat. 3014, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). Since transportation by air would tend to involve parties of diverse legal systems, the International Conference on Private Air Law believed it beneficial to

that "[t]he 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."³ Notwithstanding this unequivocal language, uncertainty has existed in the United States as to whether a plaintiff's cause of action arises under the Convention itself or whether it is necessary to predicate the suit on an independent body of law.⁴ Those courts that recognized a cause of action under Article 17 reasoned that the overall aim of uniformity under the Convention would be effectuated by such a result.⁵ Other courts emphasized

establish an ordered system of rights and liabilities. *Ide, supra* note 1, at 30; Lowenfeld & Mendelsohn, *supra* note 1, at 498. The formal title of the Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, indicates that uniformity was the prime objective. In this regard, the preamble to the Convention states that the signatories have "recognized the advantage of regulating in a uniform manner the conditions of international transportation by air." 49 Stat. 3014, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). That the primary aim of the Convention is to provide uniformity has been generally recognized in the United States. *See, e.g., Reed v. Wisner*, 555 F.2d 1079, 1083 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Mennell & Simeone, United States Policy and the Warsaw Convention*, 2 WASHBURN L.J. 219, 222-24 (1963). *See also Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

³ 49 Stat. 3018, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). Article 17 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.

49 Stat. 3018, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). Since international air transportation would expose potential litigants to the laws of many nations, the framers of the Convention deemed it "necessary to fix rules of liability." SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, WARSAW, OCTOBER 4-12, 1929, MINUTES 13 (R. Horner & D. Legrez trans. 1975) [hereinafter cited as WARSAW MINUTES] (opening address of the President of the Convention).

⁴ Steuben, *Wrongful Death Actions Under the Warsaw Convention*, 11 BUFFALO L. REV. 365, 365 (1962). Generally, if the Convention does not create a cause of action, the substantive law of the place of the accident will determine whether a cause of action of personal injury or wrongful death exists. RESTATEMENT OF CONFLICT OF LAWS § 391 (1934); 2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 13:1 (2d ed. 1975). Consequently, those claiming through a passenger killed in an airplane crash would be deprived of a remedy if the place where the crash occurred did not grant a right of recovery for personal injury or wrongful death. Calkins, *The Cause of Action Under the Warsaw Convention* (pt. 2), 26 J. AIR L. & COM. 323, 325 (1959) [hereinafter cited as Calkins II]. One commentator notes that if a cause of action was intended to be created by the Convention, and has been so recognized by the other signatories, to nonsuit an alien in United States courts would raise the specter of the United States defaulting in its treaty obligations. *See id.* at 325.

⁵ *See Garcia v. Pan Am. Airways, Inc.*, 269 App. Div. 287, 55 N.Y.S.2d 317 (2d Dept 1945), *aff'd mem.*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946); *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768 (Sup. Ct. N.Y. County 1951), *aff'd mem.*, 281 App. Div. 965, 120 N.Y.S.2d 917 (1st Dep't 1953). In *Garcia*, the court stated that the purpose of the Convention was "to unify rules relating to international transportation by air." 269 App. Div. at 292, 55 N.Y.S.2d at 322. Noting that as a treaty the Con-

that Article 17 was an inadequate wrongful death provision and did not create substantive rights.⁶ This issue apparently was resolved in 1957 when the Second Circuit, in *Noel v. Linea Aeropostal Venezolana*,⁷ held that a cause of action does not arise under the Convention.⁸ Although the *Noel* holding was followed for more than 20 years,⁹ the Second Circuit recently reexamined the question and, in *Benjamins v. British European Airways*,¹⁰ held that the Convention creates a cause of action.¹¹

Hilde Benjamins, a Dutch citizen, purchased a ticket in Los Angeles for a seat on a British European Airways (BEA) jet flying from London to Brussels.¹² Shortly after departure the jet crashed and Mrs. Benjamins was killed.¹³ Her husband, Abraham Benjamins, brought suit for wrongful death and baggage loss against BEA in the District Court for the Eastern District of New York.¹⁴ After

vention was supreme to state law, the *Garcia* court stated that "[the Convention's] provisions supersede the usual doctrine that the *right* and measure of recovery are governed by the [law of the place of the wrong] and not by the [law of the forum]." *Id.*, 55 N.Y.S.2d at 321 (emphasis added). In *Salamon*, the court stated that "[t]he provision of Art. 17 that the carrier shall be liable for the wounding or *death* of a passenger clearly purports to create a cause of action." 107 N.Y.S.2d 772 (emphasis in original). The *Salamon* court reasoned that "[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do." *Id.* at 773.

⁶ See *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); *Wyman v. Pan Am. Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. N.Y. County 1943), *aff'd mem.*, 267 App. Div. 947, *aff'd mem.*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945). In *Wyman*, the court stated that an action for wrongful death may be maintained only if the place of the wrong authorized such an action by statute. 181 Misc. at 965-66, 43 N.Y.S.2d at 423. The court found that "[n]o new substantive rights were created by the Warsaw Convention and all the rules there laid down are well within the framework of existing legal rights and remedies." *Id.* at 966, 43 N.Y.S.2d at 423. In *Komlos*, the district court stated that the Convention merely provided conditions which attached to the cause of action supplied by the law of the place of the wrong. 111 F. Supp. at 401. Noting that the wrongful-death action sounded in tort, the *Komlos* district court stated that the Convention "does not change the basic rule that the contract of carriage is not the gravamen of the action for wrongful death." *Id.*

⁷ 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

⁸ 247 F.2d at 679-80.

⁹ *E.g.*, *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 n.2 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977); *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1252 (S.D.N.Y. 1975); *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874, 877 (W.D. Pa. 1965); *Winsor v. United Air Lines, Inc.*, 159 F. Supp. 856, 858 (D. Del. 1958); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 398, 314 N.E.2d 848, 856, 358 N.Y.S.2d 97, 108 (1974).

¹⁰ 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 1016 (Jan. 15, 1979).

¹¹ 572 F.2d at 919.

¹² *Id.* at 914-15.

¹³ *Id.* at 914.

¹⁴ *Id.* at 915. The complaint also named as a defendant the manufacturer and designer of the jet, Hawker Siddeley Aviation, Ltd. and Hawker Siddeley Group, Ltd. *Id.* at 913-14.

his suit was dismissed for lack of diversity,¹⁵ Benjamins amended his complaint to allege federal question jurisdiction.¹⁶ Relying on the Second Circuit's decision in *Noel*, the district court dismissed the amended complaint on the ground that a cause of action does not arise under the Convention.¹⁷

On appeal, a divided Second Circuit panel reversed.¹⁸ Writing

¹⁵ *Id.* at 915. At the time of Benjamins' initial suit, BEA was a British corporation with its principal place of business in England. 572 F.2d at 914. The citizenship of the other named defendants was the same as BEA's. *Id.* Plaintiff and his decedent were Dutch citizens residing in Los Angeles. *Id.* Since all the parties were aliens, there could be no diversity. See *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 47 (1807); *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *Dassigienis v. Cosmos Carriers & Trading Corp.*, 442 F.2d 1016, 1017 (2d Cir. 1971) (per curiam); *Compagnie Nationale Air France v. Castano*, 358 F.2d 203, 206 (1st Cir. 1966).

¹⁶ 572 F.2d at 915. Federal question jurisdiction exists by virtue of 28 U.S.C. § 1331 (1976), which provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and *arises under* the Constitution, laws, or treaties of the United States. . . .

(Emphasis added). The test for determining whether a cause of action arises under the Constitution or laws of the United States was set forth by the Supreme Court in *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936):

How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. To bring a case within the statute, a *right or immunity created by the Constitution or laws of the United States* must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

Id. at 112 (emphasis added) (citations omitted); see *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-28 (1974) (per curiam); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

¹⁷ 572 F.2d at 914, 915. In dismissing Benjamins' amended complaint, the district court indicated that the soundness of the *Noel* holding was questionable and recommended reexamination. *Id.* at 914 n.2.

¹⁸ *Id.* at 914. The Second Circuit initially considered whether it had "[j]urisdiction in the treaty sense." *Id.* at 915. The court quoted from Article 28(1) which states:

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

49 Stat. 3020, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). Article 28(1) does not refer to venue within a country; it determines which countries have jurisdiction to entertain a particular action. 572 F.2d at 915 (citing *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 800-01 (2d Cir. 1971)). In *Benjamins*, the place of destination and the place where the ticket was purchased were within the United States. 572 F.2d at 915. Accordingly, in the "treaty sense," any United States court presented a permissible forum. *Id.*

As the defendants had submitted to the *in personam* jurisdiction of the court, 572 F.2d at 915 n.4, the Second Circuit then addressed whether it had subject matter jurisdiction in the national or federal practice sense. *Id.* at 915-16. The plaintiff alleged federal question jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1976), and under the Conven-

for the majority,¹⁹ Judge Lumbard noted that the *Noel* decision was based largely on a letter by then Secretary of State Cordell Hull to President Franklin Roosevelt.²⁰ While Secretary Hull was of the opinion that Article 17 created only a presumption of liability against the carrier, Judge Lumbard concluded that the letter was not intended by its author to be a complete analysis of Article 17.²¹ Finding that the *Noel* rule was the result of a "paucity of analysis," the *Benjamins* court undertook a reevaluation of the issue.²²

Initially, it was observed that the intent of the parties to the Convention was to create a uniform body of international law that generally would preclude recourse to domestic law.²³ While other

tion as a treaty of the United States. 572 F.2d at 916.

The Second Circuit stated that federal subject matter jurisdiction could not be conferred by the Alien Tort Claims Act, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1976). The *Benjamins* court noted that air accidents *per se* were neither violations of the Convention nor of the law of nations. 572 F.2d at 916. The law of nations, the court reasoned, does not prohibit air crashes since such law speaks only to the "relationship between states or between an individual and a foreign state" where the law is used for "their common good and/or in dealings *inter se*." *Id.* (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)). Likewise, although the Convention requires the airlines to compensate accident victims, it does not *prohibit* air accidents. 572 F.2d at 916.

¹⁹ The *Benjamins* majority consisted of Judges Lumbard and Feinberg. Judge Van Graafeiland authored a dissenting opinion.

²⁰ 572 F.2d at 917 (citing SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR, SEN. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934), reprinted in [1934] U.S. AV. REP. 239, 240-44 [hereinafter cited as Secretary of State Hull's Letter]).

²¹ 572 F.2d at 919.

²² *Id.* at 917-19. Judge Lumbard noted that the view that the Convention does not create a cause of action could be traced to the district court opinion in *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954). 572 F.2d at 916. In *Komlos*, the district court's recognition of a cause of action was greatly influenced by Secretary Hull's letter. *Id.* at 917. On appeal, the Second Circuit reversed on other grounds, making no reference to the Convention. Yet, when the issue arose 4 years later in *Noel*, the Second Circuit stated that it had earlier "impliedly agreed" with the *Komlos* district court in holding that the Convention did not create a cause of action. *Id.* at 917.

²³ 572 F.2d at 917. Most recently, in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), discussed in Note, *Liability Limitations of Warsaw Convention Applicable to Carrier's Employees*, 52 ST. JOHN'S L. REV. 210 (1978), the Second Circuit acknowledged that the Convention was intended to establish rules universally applicable to international air transportation. 555 F.2d at 1083. The *Benjamins* court noted that, although the proceedings leading to the framing and adoption of the Convention were not dispositive of whether or not the Convention created a cause of action, it is clear that the delegates sought to provide for a uniform law respecting air travel. 572 F.2d at 917. Thus, Judge Lumbard reasoned that requiring a cause of action to be found under domestic law was "inconsistent with [the] spirit" of the Convention. *Id.* at 918 (footnote omitted).

provisions of the Convention were analyzed by the court,²⁴ Judge Lumbard believed that the strongest evidence to support the view that the Convention created a cause of action was the interpretation given to Article 17 by other common-law signatories.²⁵ It was noted, for example, that the United Kingdom's original statutory enactment of the Convention²⁶ indicated that Article 17 was the source of a right of action.²⁷ The *Benjamins* court concluded that in light of the questionable validity of the *Noel* holding, the goal of uniformity would be best effectuated by recognizing that the Convention provides for a right of action.²⁸

²⁴ With respect to an airline's liability for baggage loss, Judge Lumbard felt that, when read together, Articles 18 and 30(3) appeared to give rise to a cause of action. 572 F.2d at 918. Article 18(1) of the Convention provides:

The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air. 49 Stat. 3019, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). Article 30(3) of the Convention provides:

As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee. 49 Stat. 3021, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation).

Although Article 30(3) addresses baggage loss where transportation is provided by more than one carrier, the court concluded that "[t]here is no reason to believe that the Convention's effect is any different when only one carrier is involved." 572 F.2d at 918.

The Second Circuit also considered Article 24 which provides that any action must "be brought subject to the conditions and limits" of the Convention and stated that it may not have been accurately translated. *Id.* (citing Calkins, *The Cause of Action Under the Warsaw Convention* (pt. 1), 26 J. AIR L. & COM. 217, 225-26 (1959) [hereinafter cited as Calkins I]). While noting that "conditions" seemed to imply that a cause of action must exist independently of the Convention, Judge Lumbard stated that another translation utilized "terms" rather than "conditions," thereby pointing to the existence of a cause of action under the Convention. 572 F.2d at 918 (citing Calkins I, *supra*, at 225-26). The court ultimately concluded that the effect of Article 24 was unclear. 572 F.2d at 918.

²⁵ 572 F.2d at 918; see notes 55 & 57 and accompanying text *infra*.

²⁶ Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4); see note 55 *infra*.

²⁷ 572 F.2d at 919; see *Grein v. Imperial Airways, Ltd.*, [1937] 1 K.B. 50 (C.A.).

²⁸ 572 F.2d at 919. The Second Circuit noted that its recognition of a cause of action arising under the Convention would not result in increased federal litigation since, in most cases, jurisdiction will be available based on diversity of citizenship. *Id.*; see 28 U.S.C. § 1332 (1976). Judge Lumbard also noted that as a result of the holding in *Benjamins*, all plaintiffs under the Convention could take advantage of the Judicial Panel on Multidistrict Litigation, created by 28 U.S.C. § 1407 (1976). 572 F.2d at 919. Section 1407 provides in pertinent part:

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the Judicial Panel on Multidistrict Litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of

Judge Van Graafeiland considered it inappropriate for the court to reconsider whether Article 17 creates a cause of action.²⁹ In a vigorous dissent, he contended that a cautious approach would have been proper since the United States was in the process of holding hearings on the ratification of amendments to the Convention.³⁰

parties and witnesses and will promote the just and efficient conduct of such actions.

28 U.S.C. § 1407 (1976). As noted by Judge Lumbard, these procedures would be particularly beneficial to Convention plaintiffs, to whom recovery is limited, "by reducing expenses and expediting dispositions." 572 F.2d at 919. For a discussion of multidistrict litigation in aviation litigation, see Martin, *Multidistrict Litigation—A Panacea or a Blight?*, 18 TRIAL LAW GUIDE 409 (1975). See also Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR L. & COM. 159 (1972); McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973).

²⁹ 572 F.2d at 921 (Van Graafeiland, J., dissenting). The dissent asserted that recognition of a cause of action under the Convention was the exclusive task of the executive and legislative branches of the Government. *Id.* at 920-21.

³⁰ *Id.* at 921 (Van Graafeiland, J., dissenting); see 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. INT'L CIV. AV. ORG. Doc. No. 8932 (1971), reprinted in DOCUMENTS SUPPLEMENT, *supra* note 1, at 437-46. Although this proposed amendment, known as the Guatemala City Protocol, was adopted in 1971, no action on it has yet been taken by the United States. See 1 KREINDLER, *supra* note 1, at § 12B.01. Judge Van Graafeiland pointed out that some commentators have indicated that the amended version of Article 17 contained in the Guatemala City Protocol would have the effect of overruling *Noel*. 572 F.2d at 921 (Van Graafeiland, J., dissenting) (citing Boyle, *The Guatemala Protocol to the Warsaw Convention*, 6 CAL. W. INT'L L.J. 41, 74 (1975); Note, *The Guatemala City Protocol to the Warsaw Convention and the Supplemental Plan Under Article 35-A: A Proposal to Increase Liability and Establish a No-Fault System for Personal Injuries and Wrongful Death in International Aviation*, 5 N.Y.U.J. INT'L L. & POL. 313, 324-27 (1972) [hereinafter cited as *Guatemala City Protocol*]). The commentators, however, are in disagreement as to the method in which the Guatemala City Protocol would create a cause of action. Compare *Guatemala City Protocol*, *supra*, at 324-27, with Boyle, *supra*, at 74. Article 24(2) of the Guatemala City Protocol provides in pertinent part:

In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention

DOCUMENTS SUPPLEMENT, *supra* note 1, at 441.

Since the adoption of the Guatemala City Protocol in 1971, four additional protocols have been adopted. Additional Protocols Nos. 1-4, INT'L CIV. AV. ORG. Doc. Nos. 9145-9148 (1975); see Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. AIR L. & COM. 273 (1976). One important aspect of the latter two protocols, known as Montreal Protocols 3 & 4, is the substitution of the Special Drawing Right for the franc. See 1 KREINDLER, *supra* note 1, § 12B.02[10]. This was deemed necessary in view of the fluctuating value of the American dollar as measured against the franc. See *id.* As a result, the expected \$100,000 limitation of liability will be less affected by a fluctuating economy. See *id.*

Ratification of or adherence to the Montreal Protocols is equivalent to ratification of or adherence to the Convention, the Hague Protocol and the Guatemala City Protocol. *Id.* § 12B.03[1]. One authority is pessimistic on the chances of Senate ratification of these pending amendments to the Convention in view of the Senate Foreign Relations Committee's dissatis-

Reaching the merits, Judge Van Graafeiland emphasized that all American states have wrongful-death statutes which deal with the important issues of standing to sue and distribution of damages, questions left untreated in the Convention.³¹ Noting that the parties to the Convention could have drafted a uniform wrongful-death statute if such was their intent,³² Judge Van Graafeiland asserted that the Convention's choice of language indicated that the intent was to provide a uniform system of conditions and limits which would be applicable to causes of action existing independently of the Convention.³³

It is submitted that the conclusion reached by the *Benjamins* majority is consistent with the goal of the Convention to create a body of law that would obviate the need for recourse to national law except in specifically provided-for situations.³⁴ The intent of the Convention's drafters³⁵ is more readily apparent when the domi-

faction with other provisions of the Protocol. *Id.* § 12B.01. It is reasoned that until certain internal inconsistencies are corrected, which is unlikely to occur in the near future, the Committee will not act upon the amendments. *Id.* Since the effectiveness of these amendments is conditioned upon ratification by the United States, *see id.* § 12B.03[2], it is submitted that the effect of the Guatemala City-Montreal Protocols upon the recognition of a cause of action under the Convention is an academic issue.

³¹ 572 F.2d at 921 (Van Graafeiland, J., dissenting). In view of the Convention's failure to specify the parties who may bring a wrongful death action, and the amount of damages recoverable, Judge Van Graafeiland stated that "Article 17 at best goes only half way towards creating a cause of action for wrongful death." *Id.*

³² *Id.* at 922 (Van Graafeiland, J., dissenting).

³³ *Id.* (Van Graafeiland, J., dissenting). Judge Van Graafeiland posited that the drafters of the Convention could have created either a cause of action, or a system of conditions and limits applicable to any independently existing cause of action, in order to attain the goal of uniformity. *Id.* Noting that Article 24 states that "any action for damages, however founded, can only be brought subject to the conditions and limits" of the Convention, 49 Stat. 3020, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation), the dissent concluded that the framers chose the latter alternative. 572 F.2d at 922.

³⁴ *See* note 45 *infra*.

³⁵ The primary objective of treaty interpretation is to determine "the real intention of the contracting parties in using the language employed by them." L. MCNAIR, *THE LAW OF TREATIES* 366 (1961); *accord*, *Factor v. Laubenheimer*, 290 U.S. 276, 293, 294 (1933); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Tucker v. Alexandroff*, 183 U.S. 424, 427 (1902); *see* *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 146 (1965). Numerous factors may be utilized in determining the parties' intent. *See id.* § 147(1). A proposed convention on treaty interpretation provides as follows:

The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty was intended to serve.

Draft Convention on the Law of Treaties, 29 AM. J. INT'L L. SUPP. 657, 937 (1935) (emphasis in original). The Supreme Court has stated that "treaties are construed more liberally than

nance of civil-law countries at the Convention is considered.³⁶ Prior to the Convention, the primary liability of an air carrier to its passengers under civil law was contractual in nature.³⁷ The carrier was absolutely liable for *any* damage resulting from a breach of its promise to carry the passenger "safe and sound" to his destination.³⁸ Since carriers generally were able to insulate themselves from liability by including exoneration clauses in the contract of carriage,³⁹ however, plaintiffs often were forced to seek damages in tort.⁴⁰ Under the civil law, this proved to be an ineffective remedy because there were no permissible presumptions or inferences analogous to *res ipsa loquitur* to aid a plaintiff in establishing a *prima facie*

private agreements, and 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." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) (citations omitted). See also *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929).

³⁶ Of the contracting parties to the Convention, only the Union of South Africa, the United Kingdom and Northern Ireland were common-law nations. See Steuben, *supra* note 4, at 368 n.22. The United Kingdom was the sole common-law representative at the conferences, however, and signed the Convention on behalf of all three nations. See 49 Stat. 3024, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation); *WARSAW MINUTES*, *supra* note 3.

³⁷ Discussing the contractual liability of a carrier under the civil law in *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), the Fifth Circuit stated:

According to the law of France and of many countries negligence in carriage is not tortious harm but a contractual breach. "Contractual liability is founded in the non-performance of the obligations flowing from the contract of air transport in which third persons have or possess the status of simple contracting parties and the carrier undertakes to carry the passengers or merchandise with absolute security throughout the journey. Such obligation even without being specifically stipulated subsists, and in case of non-performance places the carrier in the role of a contractual debtor and the passenger as his creditor."

386 F.2d at 331 n.22 (quoting A. RIGALT, *PRINCIPIOS DE DERECHO AEREO* 124 (1939)). Prior to the Convention, a rule of contractual liability as applied to aerial carriers had been adopted in France, Germany, Italy, Chile, Yugoslavia, Poland, Mexico, Hungary, Switzerland and Czechoslovakia. See Kaftal, *Liability and Insurance—The Relation of Air Carrier and Passenger* (pt. 1), 5 AIR L. REV. 156, 160-66 (1934) [hereinafter cited as Kaftal I].

³⁸ Calkins I, *supra* note 24, at 219 (France); Cha, *The Air Carrier's Liability to Passengers in Anglo-American and French Law*, 7 AIR L. REV. 154, 192 (1936) [hereinafter cited as Cha I] (France); Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 AIR L. REV. 25, 26 (1936) [hereinafter cited as Cha II]; Steuben, *supra* note 4, at 374; see note 37 *supra*.

³⁹ See Kaftal I, *supra* note 37, at 160-66; Knauth, *Air Carriers' Liability in Comparative Law*, 7 AIR L. REV. 259, 265-66 (1936); Sack, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention*, 4 AIR L. REV. 345, 358-59, 360-61, 365 (1933). Fearing that contractual liability could become unduly burdensome to the carrier, France permitted the carrier to contract out of such liability. See Cha I, *supra* note 38, at 198-99, 200. This was perceived to be a middle ground. *Id.* at 200.

⁴⁰ Kaftal I, *supra* note 37, at 161 (Germany); accord, Cha I, *supra* note 38, at 197 (France); Knauth, *supra* note 39, at 261; Sack, *supra* note 39, at 360-61.

case.⁴¹ Accordingly, the Convention cast liability in contract terms⁴² and prohibited exoneration clauses.⁴³ Not surprisingly, the respective rights and liabilities of the parties under the Convention were phrased in a manner similar to existing statutes in civil-law countries.⁴⁴ Viewed in this context, the Convention is a complete system of liability reflecting the legal backgrounds of the participants which, except for specific questions, was intended to supplant the law of the signatory countries.⁴⁵

⁴¹ The doctrine of *res ipsa loquitur* is peculiar to the common law, having first arisen in the case of *Christie v. Griggs*, 170 Eng. Rep. 1088 (1809). Without such an aid, proving fault is difficult for the plaintiff when, as is often the case, nothing remains after an air crash but a "grease spot." Sack, *supra* note 39, at 361; see Kaftal I, *supra* note 37, at 161.

⁴² Calkins I, *supra* note 24, at 218; Kaftal, *Liability and Insurance—The Relations of Air Carrier and Passenger* (pt. 2), 5 AIR L. REV. 267, 271 (1934); Steuben, *supra* note 4, at 371; see Cha I, *supra* note 38, at 34.

⁴³ Article 23 of the Convention provides that "[a]ny provision tending to relieve the carrier of liability . . . shall be null and void." 49 Stat. 3020, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). A provision was also added in Article 20 which allows the carrier to escape liability if it proves lack of fault. 49 Stat. 3019, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). Since absolute liability had never been imposed on a carrier at common law, a compromise was effected at the behest of Great Britain and this defense was included. Cha II, *supra* note 38, at 42. That the adoption of liability based on fault was a concession to the common law is evidenced by the following remarks at the Convention:

It was the British Delegates who asked that one make this addition [of the defense of reasonable measures]. We asked them, in 1925: What does that mean? The English Delegates replied that they knew very well what it was. We accepted this formula in order to allign [*sic*] ourselves with the English Delegation and to attract it to us in the wording of this article.

WARSAW MINUTES, *supra* note 3, at 45 (remarks of Mr. Pittard). Further evidence of this apparent compromise can be seen from the following remark:

It's in the spirit of compromise that one has said: All that can be asked from the air carrier is to take reasonable measures to avoid the damage, to have his aircraft in good flying condition, and to make sure that they are well flown.

Id. at 47-48 (remarks of Mr. Ripert). Although a concession was granted to the British delegation in providing for the defense of lack of fault, the preliminary draft of the Convention would have still held the carrier absolutely liable for damage arising from an inherent defect in the aircraft. See *id.* at 265. As a result of the British delegation's opposition to liability without fault, this portion of then Article 22 (now Article 20(1)) was deleted. See 49 Stat. 3019, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation).

⁴⁴ It has been noted that the language employed in Article 17, "[t]he carrier shall be liable for damage," 49 Stat. 3018, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation), is similar to the language employed in civil-law statutes creating contractual liability. Steuben, *supra* note 4, at 369, 370. See also Cha II, *supra* note 38 (France). Consequently, it has been urged "that the delegations from the various civil-law nations, in helping to draft a provision reminiscent of their own local legislation, intended to achieve a result with which they were familiar." Steuben, *supra* note 4, at 371.

⁴⁵ The Convention specifically requires recourse to national law in some instances. With respect to the effect of the contributory negligence of an injured passenger, Article 21 provides that "the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from liability." 49 Stat. 3019, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation) (emphasis added). Article 24(2) states that the conditions and limits of the

Further support for the Second Circuit's decision may be found in the evolution of Article 22, which limits the carrier's liability.⁴⁶ In considering this provision, the delegates resoundingly defeated a proposal which would have permitted signatory countries to set a lower limitation on liability by local legislation.⁴⁷ It does not seem unreasonable to conclude, therefore, that if nations or localities were

Convention are applicable to every action, "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." *Id.* at 3020. Article 25(1) provides that whether the damage was caused by the carrier's wilful misconduct, which would have the effect of subjecting the carrier to unlimited liability, will be determined "in accordance with the law of the court to which the case is submitted." *Id.* Article 28(2) provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." *Id.* at 3021. Article 29(2) provides that "[t]he method of calculating the [Convention's 2-year statute of limitations] shall be determined by the law of the court to which the case is submitted." *Id.*

Evidence that there was to be no recourse to national law in determining whether a cause of action exists can be found in the debate resulting in the deletion of the place of the wrong as a permissible forum for suit. Article 26 of the preliminary draft of the Convention, corresponding to Article 28 of the Convention, provided that suit could be brought "in the case of the non-arrival of the aircraft, [before the court] of the place of accident." *WARSAW MINUTES*, *supra* note 3, at 266. Remarks at the Convention indicate that the place of the wrong was subsequently deleted because it had no connection with the contract of carriage and would hinder the goal of uniformity. *See id.* at 113-14 (remarks of Mr. Clarke); *id.* at 115 (remarks of Mr. Ripert). At the Convention, one of the French delegates stated that by virtue of the contract of carriage, the parties thereto submitted to contract law as conditioned by the Convention. *Id.* at 115 (remarks of Mr. Ripert). Thus, "there [was] no reason why this person should go to plead before some court which happens to be, by chance, the court of the place of accident." *Id.* The French delegate stated that this practice would be unreasonable and dangerous since there was no way of knowing beforehand whether the place of the wrong had adhered to the Convention. *Id.* As a result, a plaintiff would be faced with complex conflicts of law questions. *Id.* The French delegate concluded that contract law must determine the permissible *fori*. *Id.*; Calkins I, *supra* note 24, at 229-31. *See also* Steuben, *supra* note 4, at 365.

One commentator has observed that if the law of the place of the wrong was to determine the right of action under the Convention, no court would be better suited to determine such law than that of the place of the wrong, yet nowhere in the minutes of the Convention was this argument proffered. *See* Calkins I, *supra* note 24, at 231. This commentator reasons that maintenance of the proposition that the law of the place of the wrong was to provide the cause of action would have rendered the debate concerning the deletion of the place of the wrong as a forum "absolutely incredible." *Id.*

⁴⁶ 49 Stat. 3020, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). Liability for personal injury or death is not to exceed 125,000 francs, an amount generally rounded off to \$8,300. *E.g.*, 1 KREINDLER, *supra* note 1, § 11.03[1]. Liability for checked baggage loss is limited to 250 francs, or approximately \$16.58, per kilogram. *Id.* § 11.03[2]. Due to the devaluation of the American dollar, however, the liability limitation for personal injury or death has been revised to \$10,000. *Id.* § 11.03[1], at n.10.A1 (Supp. 1978). The liability limitation for checked baggage loss is now \$20 per kilogram. *Id.* § 11.03[2], at n.10.2 (Supp. 1978).

⁴⁷ *See* *WARSAW MINUTES*, *supra* note 3, at 35-36 (remarks of Sir Alfred Dennis). One of the British delegates stated that adoption of the proposal of the Japanese delegation, which would have allowed the signatories to subjugate the limitation of liability to national law, would defeat the primary objective of uniformity. *Id.*

to be prevented from unilaterally reducing the limits of recovery, they were likewise to be prevented from eliminating recovery altogether.⁴⁸ In this sense, the Convention manifests an intent to provide potential plaintiffs with a vehicle for recovery.⁴⁹

Additional evidence that Article 17 creates a cause of action can be gleaned from the Convention's provisions on liability for baggage loss. At civil law, a carrier was liable for damages due to death, bodily injury or loss of *checked* baggage by virtue of the contract of carriage.⁵⁰ The loss of *unchecked* baggage, on the other hand, was not considered a loss for which the carrier incurred liability under the contract of carriage and the passenger was forced to seek non-contract remedies.⁵¹ The Convention continued this practice, providing that a "carrier shall be liable for damage" due to checked baggage loss,⁵² while Article 22(3) merely limits any liability for loss of unchecked baggage that may exist independently of the Convention.⁵³ Thus, it would appear that the Convention contemplates resort to domestic law to supply a cause of action only where the resulting damage cannot be traced to a breach of the contract of carriage.

The conduct of the parties to a treaty after its conclusion also is a useful tool in treaty interpretation⁵⁴ and was utilized by the *Benjamins* court. In many common-law jurisdictions statutes were enacted which state that liability is imposed by Article 17 of the Convention.⁵⁵ While such legislation was necessary in most

⁴⁸ See *Calkins I*, *supra* note 24, at 228.

⁴⁹ See notes 37-45 and accompanying text *supra*.

⁵⁰ See *Cha I*, *supra* note 38, at 197; note 51 *infra*.

⁵¹ See *Cha I*, *supra* note 38, at 197. Since there is no contract with respect to unchecked baggage, there can be no contractual liability for unchecked baggage loss.

⁵² 49 Stat. 3019, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation).

⁵³ *Calkins I*, *supra* note 24, at 227, 232-33. Article 22(3) of the Convention provides: "As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger." 49 Stat. 3019, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). As to the limitation of liability for unchecked baggage, the report to the Convention states:

As to the personal effects that the traveler keeps with him, they do not fall under the system of the Convention; the traveler retains the possession and the risk. The system of liability of the Convention is based only on the document of carriage. The baggage check not covering these personal effects, the system provided for does not apply. It is understood, however that the Convention does not prevent the application of common law: If a traveler has his clothes damaged by the fault of the carrier, he can demonstrate the fault of the latter. In this case, a special limitation of liability is provided for as hereafter said.

WARSAW MINUTES, *supra* note 3, at 253 (report on the preliminary draft of the Convention); see *Calkins I*, *supra* note 24, at 232-33.

⁵⁴ 572 F.2d at 918-19; see *McNair*, *supra* note 35, at 424; note 35 *supra*.

⁵⁵ See, e.g., Civil Aviation (Carriers' Liability) Act 1959-1973, ACTS AUSTR. P. pt. II, §

common-law nations, because treaties which will alter general law are ineffective in the absence of enabling legislation,⁵⁶ the clear import is that the Convention was considered a source of rights. Further insight may be gained from the interpretation of Article 17 by the courts of several civil-law countries which have held that the Convention gives rise to a cause of action.⁵⁷

In conclusion, it appears that the holding in *Benjamins* is sound and does much to promote the Convention's goal of uniformity.⁵⁸ For the first time, the United States is in accord with the other signatories of the Convention in recognizing that it is a system of liability complete in itself.⁵⁹ It is unfortunate, however, that the Second Circuit did not address itself to the ingredients of the cause of action not supplied by the Convention.⁶⁰ In any event, the *Benjamins* court

12(2); Carriage by Air Act, CAN. REV. STAT. ch. C-14, § 2(5) (1970); Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4) (Eng.); Carriage by Air Act 1940, REPR. STAT. N.Z. No. 15, § 2(4); Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4) (N. Ire.). Section 1(4) of England's Carriage by Air Act provides:

Any liability imposed by Article seventeen of the [Convention] on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law

Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4) (England). Subsequent to the Hague Protocol, this statute was reenacted. Carriage by Air Act, 1961, 9 & 10 Eliz. 2, c. 27.

⁵⁴ See S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 160 (1904); McNAIR, *supra* note 35, at 81-82; E. WADE & G. PHILLIPS, CONSTITUTIONAL LAW 205 (1931) (England). If the Convention, and specifically Article 17, is viewed as the source of rights, however, its status as a self-executing treaty would make the need for statutory enactment unnecessary in the United States. With regard to self-executing treaties, the Supreme Court has stated that "[o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *accord*, *Indemnity Ins. Co. of North America v. Pan Am. Airways*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944); see McNAIR, *supra* note 35, at 80. In the *Indemnity* case, the court held that, from a reading of the provisions, the Convention was self-executing with respect to the limitations of liability. 58 F. Supp. at 340. The court, however, specifically reserved opinion on the issue of whether the Convention created a cause of action. *Id.* Since Article 17 is couched in terms of a civil-law statute imposing contractual liability, see note 44 *supra*, it is submitted that a determination that Article 17 is self-executing should present no difficulty at all.

⁵⁷ See Steuben, *supra* note 4, at 371-74.

⁵⁸ The Preamble to the Convention states that the signatories have "recognized the advantage of regulating in a uniform manner the conditions of international transportation by air." 49 Stat. 3014, T.S. No. 876, 137 L.N.T.S. 11 (1934) (unofficial translation). For a discussion of the preparatory comments of the Convention as evincing an intent to create a uniform body of law, see Calkins I, *supra* note 24; notes 46-48 and accompanying text *supra*.

⁵⁹ See, e.g., SHAWCROSS & BEAUMONT, *supra* note 1, at 364; Lowenfeld & Mendelsohn, *supra* note 1, at 525.

⁶⁰ It has been argued, for example, that the scheme of the Convention indicates that those entitled to recover should be selected according to the law of the forum. See Calkins II, *supra* note 4, at 338-39; Sack, *supra* note 39, at 386-87.

has taken an important step toward making the Convention the comprehensive body of substantive law that it was intended to be.

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