Cause of Action Recognized as Arising Under the Warsaw Convention (Benjamin v. British European Airways)

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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


² 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 This denunciation was withdrawn when the carriers agreed to a higher limitation of liability and waived the defenses available to them under the Convention.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-23690, 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].

³ 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." 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. 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. 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. Wiser, 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 Bloch v. Compagnie Nationale Air France, 386 F.2d 323, 337-38 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).

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).

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.

that Article 17 was an inadequate wrongful death provision and did not create substantive rights. This issue apparently was resolved in 1957 when the Second Circuit, in Noel v. Linea Aeropostal Venezolana, held that a cause of action does not arise under the Convention. Although the Noel holding was followed for more than 20 years, the Second Circuit recently reexamined the question and, in Benjamins v. British European Airways, 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. Shortly after departure the jet crashed and Mrs. Benjamins was killed. 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. 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.

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, 346 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.


247 F.2d at 679-80.


572 F.2d at 919.

Id. at 914-15.

Id. at 914.

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. 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.

On appeal, a divided Second Circuit panel reversed. Writing
for the majority, Judge Lumbard noted that the Noel decision was based largely on a letter by then Secretary of State Cordell Hull to President Franklin Roosevelt. 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. Finding that the Noel rule was the result of a "paucity of analysis," the Benjamin court undertook a reevaluation of the issue.

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. While other
provisions of the Convention were analyzed by the court. 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. It was noted, for example, that the United Kingdom’s original statutory enactment of the Convention indicated that Article 17 was the source of a right of action. 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.

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.


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. 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.


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.

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, § 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 Supplementary 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 & 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.\textsuperscript{31} Noting that the parties to the Convention could have drafted a uniform wrongful-death statute if such was their intent,\textsuperscript{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.\textsuperscript{33}

It is submitted that the conclusion reached by the \textit{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.\textsuperscript{34} The intent of the Convention's drafters\textsuperscript{35} is more readily apparent when the domi-
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.”38 386 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. Accordingly, the Convention cast liability in contract terms and prohibited exoneration clauses. 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. 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.

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.

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).

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.

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. 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. It does not seem unreasonable to conclude, therefore, that if nations or localities were

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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 221. 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.

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 KRENzLER, 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).

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. In this sense, the Convention manifests an intent to provide potential plaintiffs with a vehicle for recovery.

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. 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. The Convention continued this practice, providing that a “carrier shall be liable for damage” due to checked baggage loss, while Article 22(3) merely limits any liability for loss of unchecked baggage that may exist independently of the Convention. 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 interpretation 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. While such legislation was necessary in most
common-law nations, because treaties which will alter general law are ineffective in the absence of enabling legislation, 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.

In conclusion, it appears that the holding in Benjamins is sound and does much to promote the Convention’s goal of uniformity. 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. 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. In any event, the Benjamins court

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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.

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 “our 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.

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

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.

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

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 386-87; 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.

_Frank K. Walsh_