2005

Forum Non Conveniens and the Warsaw Convention: Leaving the Turbulence Behind?

Katherine R. Dieterich

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss4/10

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTE

FORUM NON CONVENIENS AND THE WARSAW CONVENTION: LEAVING THE TURBULENCE BEHIND?

The most difficult category of questions of all those to which human flight has given rise is the complex of problems relating to judicial competence and the law to be applied in the air.\(^1\)

I. INTRODUCTION

The discretionary use of the doctrine of forum non conveniens to dismiss cases which are properly before courts has been justified and advocated as an effective means of relieving "calendar congestion" in this country since 1929.\(^2\) In that same year, a multilateral treaty governing the international carriage of passengers, baggage and cargo was drafted which gave to passengers with claims arising under the treaty the choice of four forums in which actions must be brought.\(^3\) The United States adhered to the treaty, known as the Warsaw Convention, in 1934.\(^4\)

The use of the doctrine of forum non conveniens ("FNC") to dismiss cases brought before U.S. courts by foreign plaintiffs was eventually sanctioned and expanded by the Supreme Court in Piper

\(^1\) J. M. SPAIGHT, AIRCRAFT IN PEACE AND THE LAW 106 (1919).

Men have legislated for travellers by land and sea; travellers by air are unknown to the law. Justinian, as M. Piogey has observed, never foresaw that Icarus would disturb so inconsiderately the Code, the Digest, the Institutes, and even the "Novels."


\(^4\) Id. at 3013.
Aircraft Co. v. Reyno in 1981. Since then, U.S. courts have increasingly applied the doctrine to dismiss cases, including cases properly brought under the Warsaw Convention. In 1987, the Fifth Circuit addressed the question of whether or not a federal court can apply the doctrine of FNC in a case governed by Warsaw. Noting that “American courts could become the forums for litigation that has little or no relationship with this country,” the court concluded: “We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non conveniens.” Subsequently, no federal appellate court refused to apply the doctrine until 2002 when, in Hosaka v. United Airlines, Inc., the Ninth Circuit found it to be in conflict with the precedent law of Warsaw.

In reaching its decision, Hosaka adopted an “internationally oriented” approach to treaty interpretation conducive to achieving harmonization desired by adhering states. “[I]t is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently,” for to do otherwise undermines “the whole object of the treaty.” To allow courts to apply a “national [procedural] law”

---

5. 454 U.S. 235, 241 (1981) (defining forum non conveniens as a doctrine by which a trial court may exercise its discretion to dismiss a case where an “alternative forum has jurisdiction to hear the case and when trial in the chosen forum” would unduly burden the defendant or the court is an otherwise inappropriate forum due to its own legal and administrative concerns).


7. Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. (*In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*), 821 F.2d 1147, 1153 (5th Cir. 1987), vacated and remanded on other grounds, Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989). The court noted that its research did not disclose any other case where the issue was addressed or decided, although some courts did apply the doctrine. Indeed, it found only one case in which the issue was even raised, and in that case the Second Circuit left it unresolved. *Id.* at 1160 n.16 (citing Irish Nat’l Ins. Co. Ltd., v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984)).

8. Trivelloni-Lorenzi, 821 F.2d at 1162.

9. Id. (emphasis added).

10. 305 F.3d 989, 994 (9th Cir. 2002).


14. See Gopalan, supra note 11, at 297.
to dismiss international cases from domestic dockets, risks harming litigants and international law if such use is contrary to signatory expectations. When the conceptual analysis under that national law centers, as it does with FNC today, on relatively subjective and case-specific assessments of what constitutes "inconvenience," the risk of erosion of international understandings by rising "jurisdictional provincialism" is especially grave.

The question of whether or not FNC is applicable under the 1999 Montreal Convention, which entered into force as of November 5, 2003 and replaces Warsaw, has yet to be answered by courts. Because Montreal includes provisions similar to those giving rise to the Warsaw FNC controversy, plaintiffs bringing suit under Montreal can be expected to argue, in opposition to FNC motions to dismiss brought by defendants, that FNC is inapplicable. Critical to formulating arguments for and against FNC applicability under Montreal is an understanding of the evolution of the Warsaw FNC conflict.

This Note will attempt to inform such an understanding by first, in Part II, reviewing the role of courts in implementing international agreements. The development of the doctrine of FNC will be discussed in Part III. The history of the Warsaw Convention and the Montreal modernization will be reviewed in Part IV, including the split of authority on the use of FNC under Warsaw. Part V will demonstrate that both the approach to treaty interpretation used by the Hosaka court and the decision it reached were reasonable and conducive to harmonization. The Note will conclude with observations about the anticipated controversy under Montreal.

II. INTERNATIONAL AGREEMENTS

When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole

16. Alan Reed, Multi-Party Group Actions and Availability of Legal Aid, 151 NEW L.J. 177, (2001) (noting that the Anglo-American trend has been to move from a restrictive test of vexation, harassment or oppression to a much broader discretionary test of inconvenience).
17. McFadden, supra note 15, at 56.
object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.19

A. Treaties as Law

_Pacta sunt servanda_, the “fundamental principle of the law of treaties,”20 is the notion that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”21 Indeed a state otherwise bound to a treaty may not invoke a violation of its own internal law as invalidating its consent unless it “concern[s] a rule of its internal law of fundamental importance.”22 Furthermore, a treaty has a preemptive effect on a state’s national law within its “substantive scope.”23 Treaty law may be transformed into local law by legislative act, and such legislative transformation is required in many countries. In the United States, however, treaties may take effect without implementing legislation.24

The Supremacy Clause of the U.S. Constitution gave treaties the status of law and instructed courts to give them effect.25 “[T]he Framers were concerned about treaty violations in part because such violations could offend other states and perhaps lead to calamity and war.”26 The Supreme Court has affirmed that courts must give effect to individual rights established by self-executing treaties,27 and the United States legal system is now influenced by several hundred such treaties.28 The growth in the number of treaties and concomitant substantive law parallels “the expansion of cross-border legal interaction” necessitating “broad

19. Scalia, supra note 13, at 305.
22. Sinclair, supra note 20, at 54.
26. Vazquez, supra note 25, at 1160. Indeed, Alexander Hamilton argued that the “federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.” _Id._
international solutions.” Not surprisingly, scholarly debate as to the proper role of treaties in domestic law has also grown, one such debate centering on the very constitutionality of self-executing treaties. Nevertheless, the “depth and breadth of the influence of self-executing treaties in the modern U.S. legal system” speaks for their force as federal law.

B. Treaty Interpretation

In applying the law of treaties, courts are active participants in supporting treaty regimes. Although treaties are similar to legislatively-enacted statutes in their effect as domestic law, treaties, unlike statutes, create reciprocal international obligations as well. Thus, the uniform interpretation of treaty provisions across national borders becomes paramount in ensuring the success of treaties requiring judicial implementation. Perhaps because of this difference, and despite the importance of treaty interpretation, “American jurisprudence is remarkably conflicted about the proper method” to apply to treaty construction. For instance, courts may choose either “strict
constructionist” or “purposive” techniques, perhaps depending as much as anything on the substantive result desired. Judges who interpret treaties according to internationally accepted standards may be labeled “internationalist,” while judges who act as “steward[s] of national sovereignty entrusted with the responsibility to safeguard national legal norms and political preferences” are considered “nationalists.” In sum, there is said to be no “core set of domestically derived principles that U.S. courts faithfully employ in interpreting treaties.”

The Vienna Convention on the Law of Treaties (the “Vienna Convention”) was developed “to facilitate transnational legal order.” Entered into force without U.S. ratification in 1980 and recognized at the time by the State Department as being the authority on customary treaty law, the Vienna Convention continues to have international authoritative status. Although the U.S. is not a party, to the extent the Vienna Convention codifies existent laws it is binding on all states. Additionally, the rules the Convention actually generated may in fact now represent customary standards accepted and recognized within the international community. Such standards would thus be applicable today to all treaties, whether entered before or after the Convention, and whether or not the signatories of the treaty being interpreted themselves entered into the Convention. Further, it has been argued that the State Department’s acceptance of the international authoritative status of the Vienna Convention further legitimizes its judicial use in this country.

The Vienna Convention adopted a policy of interpretation reflecting the general rule suggested by its drafting Commission—that treaties “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

36. Weiner, supra note 35, at 297. For example, one commentator has argued, “[T]extual, intentional, or teleological approaches to the interpretation of international agreements can each be employed to justify either an expansive or restrictive reading of the scope of applicability of an agreement.” Martin A. Rogoff, Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court, 11 AM. U. J. INT’L L. & POL’Y 559, 569 (1996); see also SANDRA L. BUNN-LIVINGSTONE, JURICULTURAL PLURALISM VIS-À-VIS TREATY LAW: STATE PRACTICE AND ATTITUDES 85-86 (2002).

37. Criddle, supra note 27, at 449. “Nationalist” as used here does not have the meaning as when used by those discussing treaty power in relation to federalism limitations. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 MICH. L. REV. 390, 394 (1998).


40. Id. at 443.

41. See id. at 443-44, 446.

42. Id. at 443.
object and purpose." The intent of the parties is, therefore, paramount but the text is presumed to be the expression of that intent. Thus the "starting point of interpretation" is the text rather than any external investigation as to intent. Travaux préparatoires are "supplementary means" to be used in confirming the meaning when textual meaning is "ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable." This "inhospitality to travaux" is considered to be inconsistent with the attitude of U.S. courts.

The American Law Institute notes in its Restatement of the Law Third: Foreign Relations Law of the United States, that courts in the U.S. are "generally more willing than those of other states to look outside the instrument to determine its meaning." The United States Supreme Court, as the "primary enforcer[]" of treaties through its appellate jurisdiction, "has never relied upon the Vienna Convention as an authoritative source of law." Instead, the Court interprets treaties by beginning with the text and the context in which it was written. When the text is ambiguous, other rules of construction are used. Specifically, since the Court construes treaties even more liberally than private agreements, when the text is ambiguous, it looks beyond it into the history of the treaty, the negotiations, "and the practical construction adopted by the parties."
Indeed, the Court accords the interpretations of sister signatories "considerable weight."\textsuperscript{54} For example, in \textit{El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng},\textsuperscript{55} although the Court looked at the text, drafting history, and underlying purpose of the Convention, it still looked to the courts of other Warsaw States to determine if its understanding as to the Convention's preemptive effect was one shared by them.\textsuperscript{56}

\textbf{C. The Dangers of Provincialism}

The Supreme Court has cautioned that when interpreting treaties, a "home-centered... analysis, ... should not be applied, mechanically... ."\textsuperscript{57} A "methodological provincialism" has been said to result when courts assume "that international law works on the same principles, and with the same dynamics, as American law."\textsuperscript{58} This form of provincialism might cause U.S. courts to interpret treaties the way they might interpret domestic statutes or contracts.\textsuperscript{59} It has been argued that the assimilation of a "parol evidence rule" into U.S. treaty interpretation has resulted in the institutionalization of a multifactor judicial inquiry contrary to the "holistic textualist approach" of the Vienna Convention.\textsuperscript{60} But the danger of provincialism has more to do with how a court applies a particular method rather than what that method is. An "internationalist-textualist" court may readily identify "latent" textual ambiguities and proceed to the consideration of other evidence to better give effect to the understanding of the parties.\textsuperscript{61} A "nationalist" court, although conducting a free-wheeling inquiry, may


\textsuperscript{55} 525 U.S. 155 (1999).

\textsuperscript{56} \textit{Id.} at 172-77. Although the Court recently rejected analyses of intermediate appellate courts of sister signatories to the extent the reasoning was inconsistent with its own, in doing so it noted that substantial factual distinctions existed and that the "respective courts of last resort... have yet to speak." \textit{Olympic}, 540 U.S. at 655 n.9.

\textsuperscript{57} 525 U.S. at 175.

\textsuperscript{58} McFadden, \textit{supra} note 15, at 14.

\textsuperscript{59} \textit{Id.} (citing United States v. Alvarez-Machain, 504 U.S. 655, 662-63 (1992), in which the Court supported the law of treaty interpretation with domestic citations rather than the Vienna Convention).

\textsuperscript{60} Criddle, \textit{supra} note 27, at 454-55.

\textsuperscript{61} The limitations of language in communicating the intent of parties to an agreement have long been recognized. "[A] literal interpretation of a clause may not be made to defeat the main purpose of the parties as gathered from the entire treaty." SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 224 (2d prtg. 2002).
give much consideration to its own legal norms and less to giving effect to a continuing consensus.\[^{62}\]

The Vienna Convention's reluctance to permit the use of *travaux preparatoires* reflects in part the concern of some states that "wealthy nations capable of maintaining superior archives" would be favored or "privilege[d]."\[^{63}\] But when employed to heighten the sensitivity of domestic interpreters to the international nature of treaties, and to ambiguities otherwise easily overlooked,\[^{64}\] use of *travaux preparatoires* may help guard against provincial perspectives and better promote uniformity.\[^{65}\] A simplistic textual reading is more likely to overlook threats to the ongoing cooperation necessary for the continued effectiveness of an international agreement.\[^{66}\]

It has been argued that the "Achilles heel" of the Vienna Convention's interpretive formulation is "its misconception of the appropriate function of principles of interpretation," and that it fails to recognize that international agreements involve an ongoing process of "communication and collaboration, perhaps even with a moving

\[^{62}\] MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE 262-63 (1994) (noting the importance of "striving to overcome the difficulties connected with attempts to ascertain the contemporary shared expectations of agreement among the parties."). "The most economic method of stabilizing the relevant expectations would be to give effect to the continuing consensus, within the limits established by overriding contemporary community policy." *Id.*

\[^{63}\] Criddle, *supra* note 27, at 441.

\[^{64}\] Michael P. Van Alstine, Dynamic Treaty Interpretation, 146 U. PA. L. REV. 687, 747-48 (1998). The text of an international agreement is an outcome of a process of communication that seldom can be wholly captured in a few words. Appropriate contextuality does not make a text meaningless or contentless. It merely places the text in its proper place as a possible beginning of inquiry and part of a range of indicia of the parties' genuine expectations.


\[^{66}\] Murray, *supra* note 32, at 919. Murray has argued that the authority to engage in this "transnational analysis" is derivative of other rules on treaty interpretation, specifically that of interpreting them in ways that further their "object and purpose." *Id.* at 875.
consensus." Van Alstine has argued that the need for international uniformity compels the federal judiciary to work with courts of other states to develop international common law around international conventions, for to do otherwise risks "a progressive disintegration of whatever international uniformity a convention has achieved in the first place." At the very least, richer interpretative approaches, with a clear focus on effecting harmonization and uniformity, could help improve stability, predictability and efficiency in the international order.

III. FORUM NON CONVENIENS

The appropriateness of the use of FNC in international cases is not a settled issue. The right of a court to use FNC at all differs between common law and civil law countries. In most civil law countries, a court with jurisdiction must hear the case, reflecting a preference for certainty and predictability in jurisdictional matters. Many common law countries, on the other hand, allow courts the flexibility of dismissing cases to more appropriate forums.

67. McDougall, supra note 62, at lxii.
68. Van Alstine, supra note 64, at 693-94.
69. Rogoff, supra note 36, at 684-85.
70. See generally Phillip I. Blumberg, Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems, 50 AM. J. COMP. L. 493, 503 (2002). "[FNC] is no longer a minor procedural doctrine. It is producing intense public controversy, involves an increasing body of litigation, and has led to the emergence of a substantial legal literature." Id.
71. See Martine Stuckelberg, Lis Pendens and Forum Non Conveniens at the Hague Conference, 26 BROOK. J. INT'L L. 949, 950 (2001) (discussing the debate over FNC at the Hague Conference on Private International Law, an international convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters). While the Brussels Convention rejected the inclusion of FNC, the benefit of certainty outweighing the need for flexibility, two other Hague conventions, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children and the Convention on the International Protection of Adults, of 1996 and 1999 respectively, both included FNC-like clauses. See id. at 965. The Preliminary Draft of the Hague Conference of October 30, 1999, included a FNC clause, allowing the suspension of a case only if the court seised is clearly inappropriate and a court of another signatory State with jurisdiction is clearly more appropriate. See id. at 971. See also K. Lee Boyd, Are Human Rights Political Questions?, 53 RUTGERS L. REV. 277, 279 (2001) (observing that forum non conveniens "rais[es] the bar" for meeting the jurisdictional requirements of human rights cases).
72. See Stuckelberg, supra note 71, at 949. See also Alexander Reus, Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany, 16 LOY. L. A. INT'L & COMP. L. J. 455, 490 (noting that FNC is "viewed as a 'curse' to most continental European lawyers").
73. See Stuckelberg, supra note 71, at 949. See also Ronald A. Brand, Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments, 37 TEX. INT'L L. J. 467,
Forum non conveniens is said to have arisen in Scotland in the early 1900s, in a case involving a French plaintiff, a French defendant, and cargo lost en route from Scotland to France. Its use was contrary to the general British rule that "a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent," and it was said as late as 1926 that its use was to be reserved for those cases presenting "such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction."

In this country, if the doctrine existed prior to 1929, rarely did any court refer to it as such, a concession made by the first commentator to advocate its widespread application that same year. In his Columbia Law Review article, Paxton Blair touted FNC as a weapon to combat "calendar congestion in the trial courts" in larger population centers. Courts and commentators in this country and others have, in justifying the use of FNC, often cited Blair's article as support for the proposition that the doctrine enjoys a long-standing history of use in this country, although his "efforts to identify cases that applied a forum non conveniens doctrine sub silentio has been criticized." In his article, Blair proposed a "wider dissemination" of the FNC "doctrine" to check the problem "engrossing the attention of the Bar in the larger centers of population in the United States, the relief of calendar congestion in the trial courts." Blair incited "bench and bar" to take action against the practice of foreign residents suing foreign corporations for actions arising elsewhere, appealing to the understandable desire of courts to clear dockets in a justifiable way.

494 (2002) (stating that neither the civil or common law systems provides a "perfect combination of predictability, efficiency, and equity in all cases").

74. See Blair, supra note 2, at 20. See also Don Mayer & Kyle Sable, Yes! We Have No Bananas: Forum Non Conveniens and Corporate Evasion, 4 INT'L BUS. L. REV. 130, 139-40 (2004) (discussing the history of the doctrine and its defensive use by corporations to have suits brought to U.S. courts by foreign plaintiffs dismissed).
75. See Mayer & Sable supra note 74, at 139-40.
76. See Blair, supra note 2, at 2 (quoting ANDREW DEWAR GIBB, INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 212 (1926)).
77. See id. at 2.
78. Id. at 1.
80. BORN, supra note 79, at 292 n.23.
81. See Blair, supra note 2, at 1.
82. Blair, supra note 2, at 34
Although the Supreme Court cited to Blair's article in 1932, it did not apply the FNC doctrine by name until 1947 in the landmark case of *Gulf Oil Corp. v. Gilbert*. The *Gulf Oil* Court embraced the doctrine, transforming it into a federal procedural rule allowing a court to modify its own jurisdictional parameters. In *Gulf Oil*, Justice Black vigorously dissented, saying "[n]either the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction." Nevertheless, in the companion case decided the same day, *Koster v. Lumbermens Mut. Casualty Co.*, the Court said "jurisdiction will be declined whenever considerations of convenience, efficiency, and justice point to the courts of the [s]tate of the domicile as appropriate tribunals for the determination of the particular case."

In *Gulf Oil*, the Court identified both private and public-interest factors to be considered by courts under FNC analyses. Among the private interest factors to be considered by a court are:

1. relative ease of access to sources of proof; 2. availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; 3. possibility of view of premises, if view would be appropriate to the action; and 4. all other practical problems that make trial of a case easy, expeditious and inexpensive; ... [and 5] the enforcibility of a judgment if one is obtained.

Public interest factors to be considered include: (1) administrative difficulties of court congestion; (2) the burden of jury duty on a community with no relation to the litigation; (3) the need to hold the trial in the area of local interest; and, (4) conducting the trial in a forum at home with governing law, to avoid problems in conflict of laws and foreign law.

---

83. Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413, 423 n.6 (1932) (citing Blair's article for a "collection[] of authorities"); BORN, supra note 79, at 293-94.
85. Id. at 506-08.
86. Id. at 513 (Black, J., dissenting).
88. Id. at 528 (quoting Rogers v. Guaranty Trust Co. of New York, 288 U.S. 123, 131 (1933)).
89. *See Gulf Oil*, 330 U.S. at 508.
90. Id.
91. *See id.*
After *Gulf Oil*, Congress superseded the Court's newly adopted federal common-law procedural rule of FNC as between federal court forums by enacting a federal domestic change-of-venue statute in 1982.92 Statutory FNC under § 1404 results in transfer from one federal court to another,93 which leaves courts free to apply the common-law FNC doctrine only in those international cases where the alternative forum that the defendant favors is in another country.94 The Supreme Court has done little in the years since *Gulf Oil* to change the doctrine as applied to cases involving dismissal to another country, except for modifications made in the 1981 case, *Piper Aircraft Co. v. Reyno.*95

In *Piper*, the Supreme Court allowed the FNC dismissal of a product liability case essentially because the plaintiffs were foreign.96 The Court rejected giving weight to the possibility of a change in substantive law detrimental to the interests of the plaintiff in the alternative forum unless the remedy is essentially "no remedy at all," in which case a dismissal might be "in the interests of justice."97 The Court rejected the argument that a strong presumption in favor of the choice of forum of both home and foreign plaintiffs ensures that defendants will be held to the highest standard of accountability for wrongdoing since plaintiffs will ordinarily choose the forum with the most favorable law, without addressing it. Instead, the Court expressed concern that to preclude FNC dismissals in cases between foreign plaintiffs and "American manufacturer[s]" would make American courts, "already extremely attractive to foreign plaintiffs, ... even more attractive... further congest[ing] already crowded courts."98

While over the years, advocates of the use of FNC have continued to focus on it as a method of reducing court congestion, by protecting U.S. courts from foreign plaintiffs,99 critics have expressed concern

93. *Id.* at § 1404(a).
94. See Davies, *supra* note 6, at 311.
96. *See id.* at 255.
97. *See id.* at 254.
98. *See id.* at 251-52.
99. Jeffrey A. Van Detta, *The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases*, 87 MARQ. L. REV. 425, 437 (2004). Professor Van Detta states that FNC represents an “instrumentalist” approach to jurisprudential needs and, as such, it is “insufficient to meet our long-term... needs.” *Id.* at 427-28. Arguing that FNC is “flatly instrumentalist... justified ... only on... grounds of expediency,” he “reconceptualize[s] the... relationship between substantive and procedural law.” *Id.* at 428, 438. He then applies this reconceptualization to develop a FNC rule harmonizing the principles of

Published by Scholarly Commons at Hofstra Law, 2005
about the soundness of the assumption underlying the use of the doctrine in international cases. At least one commentator has called for the doctrine to be abolished.

In a time of crowded dockets and proliferating application of forum law, the existence of forum non conveniens has undoubtedly provided a welcome discretionary method of ridding courts of at least some controversies better litigated elsewhere. But it has also lengthened litigation, cast yet another doubt upon the validity of a plaintiff's choice of forum, and at times excused sloppy jurisdiction analyses. The factors and policies to which the doctrine calls the court's attention are certainly relevant and important, but they are best considered in the jurisdictional contexts. There is no valid continuing role for forum non conveniens, only a repetitive one. The doctrine should be abolished.

Nevertheless, the perception of a potential influx of cases by foreign plaintiffs engaging in forum shopping to avail themselves of U.S. justice and the absence of treaties allowing for the international transfer of cases leaves FNC as "a way to filter them." But the lack of uniformity in FNC application brings uncertainty and increased transaction costs. Some countries have even responded to FNC use by

"corrective justice and "enterprise regulation" underlying tort law, specifically the subset of multinational corporations ("MNC") and foreign plaintiffs involved in product-injury cases. Id. at 428.

100. See Davies, supra note 6, at 324.


102. "In reality, plaintiffs engage in forum shopping and defendants engage in reverse forum shopping, . . . each seeking to turn to their own advantage the laws and procedures in the respective forums." Linda J. Silberman, Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard, 28 TEX. INT'L L.J. 501, 525 (1993).


104. “[T]he forum non conveniens balancing equation has become so intuitive and subjective that successful prediction is as likely as tattooing soap bubbles.” Reed, supra note 16, at 177 (asserting that “the conceptual analysis of forum non conveniens in England, the United States, and other common law countries such as Australia, has focused upon what constitutes inconvenience in transnational cases”). Adding to the uncertainty in this country is the yet unanswered question of whether or not state or federal FNC doctrine should apply in state courts in international cases. In Am. Dredging Co. v. Miller, the court suggested that FNC is a federal procedural law applicable in federal courts, but not state courts, and its rationale may apply in international cases. 510 U.S. 443, 453 (1994). If FNC is regarded by the Court as a rule of federal procedural law in international cases as “a substantive federal common law rule of [FNC],” it would likely require the Court’s “attributing substantial weight to federal interest in foreign relations and foreign commerce.” BORN, supra note 79, at 359-60. “State courts traditionally have formed their own FNC laws. Absent federal statutory law preempting state FNC standards, many states have deviated from the standard set in Piper Aircraft, which tends significantly to disfavor foreign plaintiffs.” Ison v. E.I. Dupont De Nemours & Co., 729 A.2d 832, 840 (Del. 1999) (footnote omitted) (applying state Cryo-Maid

http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss4/10
U.S. courts by passing so-called "blocking statutes" to remove the jurisdiction of their courts when the case has been first brought to the courts of another country.\textsuperscript{105} One commentator has said that "[t]he issue of FNC is probably the thorniest one dividing the Civil and the Common Law legal systems."\textsuperscript{106}

IV. THE WARSAW CONVENTION

We of this generation were saved, at least, the trouble of learning whether an aircraft is a "place" within the meaning of the Betting Acts, whether a pilot can be guilty of an offence corresponding to "barratry of the master" at sea, and so on. It is an advantage in some ways to be born before some great and beneficent invention or discovery has had time to develop.\textsuperscript{107}

A. The Agreement

The world has grown smaller in the last hundred years thanks to the development of an international system of air travel. Since 1934, the international air transportation of passengers has been governed primarily by the Warsaw Convention, a multilateral treaty governing international aviation, adhered to by the United States\textsuperscript{108} and by most other countries whose airlines have international routes.\textsuperscript{109} The critical importance of this treaty to our enjoyment of an ever shrinking world cannot be overstated.

1. The World's Air Divided

When the international community developed the treaty in the decade following World War I, significant barriers to international

\begin{footnotesize}
\begin{itemize}
\item<1> See Dante Figueroa, Are There Ways Out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?, 1 BUS. L. BRIEF (AM. U.) 42, 45 (2005).
\item<2> Henry Saint Dahl, Forum Non Conveniens, Latin America and Blocking Statutes, 35 U. MIAMI INTER-AM. L. REV. 21, 45 (2003) (claiming that blocking statutes are not indispensable in Latin America because problems of illegality, loss of evidence and impracticality prevent jurisdiction from accruing).
\item<3> SPAIGHT, supra note 1, at 106-107.
\item<4> See Warsaw Convention, supra note 3.
\item<5> See Causey v. Pan Am. World Airways, Inc. (\textit{In re} Aircrash in Bali, Indonesia on Apr. 22, 1974), 684 F.2d 1301, 1304 (9th Cir. 1982).
\end{itemize}
\end{footnotesize}
aviation existed. A fundamental obstacle was the first custom of international air travel, "that States control the atmosphere over their territories." This custom developed during the war and did not allow for the free passage of air craft over and between nations. Out of this custom grew the first principle of international law related to air travel: "Aerial space above territorial land and water included within the boundaries of a State constitute an integral part of the sovereignty of a State." This principle recognized no freedom of passage. In the decade following the war, innocent passage was regarded as a privilege to be enjoyed by nations at the "sufferance of their sister states." Since such a privilege could be granted only "by virtue of treaty provisions to that effect," group action by the international community was quickly undertaken.

The Air Navigation Convention of October 13, 1919, while announcing the fundamental agreement in principle that "every power has complete and exclusive sovereignty over the air space above its territory," set down rules of conduct to allow for innocent passage during times of peace, rules designed to insure the interests of those states "flown over." Other treaties followed as did domestic legislation also contemplating and providing for the innocent passage of foreigners in peace time. Nevertheless, none regulated questions of private international aviation law.

2. A Brave New World

In 1923, the French Government proposed an international conference on the codification of private air law, resulting in the First

111. Id. at 1. The article continues:
   With the acceptance of the principle of air sovereignty born of the World War, it at once became apparent that for nations, as a matter of practice, to insist strictly upon the exercise of the right to exclude foreign aircraft would result in a death-blow to the progress of interstate air navigation.

112. See id. at 1.
113. Id.
114. See id.
115. Id. at 38.
116. Id.
117. Id. at 2.
118. Id. at 2-3.
119. Id. at 4.
International Conference on Private Aerial Law in 1925. The Warsaw Convention was ultimately the result of two international conferences, the one held in Paris in 1925 and one in Warsaw in 1929, and by the interim Comite International Technique d’Experts Juridique Aeriens (CITEJA) created by the Paris Conference. By addressing the “Liability of Carriers” to passengers and shippers, drafters sought to “do for the law” within international civil aviation what the “engineers [were] doing for machines.” The Warsaw Convention did not replace private law rules existing in member states, nor was it meant to be applicable in all cases of international air transport. Rather, it was designed to apply to international transportation when departure and destination are within the territories of two different signatory nations. If departure and destination are within the territory of a signatory, then it is applicable only if there is an agreed stopping place outside of that country, although the stopping place does not have to be within a signatory nation. The character of the transportation contracted for rather than the voyage itself was said to form the basis of the test for applicability of the Convention.

The purpose of Warsaw was, first, to establish a degree of uniformity since aviation was going to link different legal systems and, second, to limit the potential liability of carriers in case of accidents. Toward the first end, Warsaw established uniformity in documentation and procedures and substantive law applicable for dealing with claims

122. See Lowenfeld & Mendelsohn, supra note 121, at 498. The United States did not participate in the work of CITEJA and it only sent an observer to the Conference. See id. at 502. Nevertheless, in 1933 the Commerce Department advised the State Department that all United States operators conducting international air transport services favored adherence, the State Department then sent its approval to the President who submitted the Treaty to the Senate which, without debate, committee hearing or report was approved by voice vote on June 15, 1934. See id. The instrument of adherence was deposited by the United States on July 31, 1934 and the President proclaimed the Treaty ninety days later. See id. (citing Warsaw Convention, supra note 3).
123. See Warsaw Convention, supra note 3, at arts. 17-18, 24; Lowenfeld & Mendelsohn, supra note 121, at 499.
124. Lowenfeld & Mendelsohn, supra note 121, at 498 (citing author’s translation of II Conference International De Droit Prive Aerien, 4-12 Octobre 1929, Varsovie 17 (1930)).
125. See Sack, supra note 120, at 348.
126. See Warsaw Convention, supra note 3, art. 1(2).
127. See id.
128. See id.
129. See Sack, supra note 120, at 350.
130. See Lowenfeld & Mendelsohn, supra note 121, at 498-99.
arising out of international transportation. Toward the second, Warsaw struck a bargain between carriers and passengers, shifting the burden of proof of negligence on to the carrier in return for a limit on liability.

Uniformity was promoted by guaranteeing a cause of action to a passenger in case of injury, a cause of action that might otherwise be difficult to establish or entirely unavailable. Uniformity was also furthered by providing for the four places of jurisdiction in damage accidents: where the carrier is domiciled, where it has its principle place of business, where it has a place of business through which the contract was made, and the place of destination. The place of domicile of the passenger was not included, although since the passenger typically buys a round trip ticket at his domicile, Warsaw was still thought to be helpful in most cases.

The place of accident was not included and this was argued as being advantageous to passengers, protecting them from limits of liability below the Warsaw limits, although the number of countries with lower limits was never great. Furthermore, this conclusion was based on the assumption that the law applicable at the place of injury would govern. Although consistent with the classical rule for tort claims, the doctrine had begun to be eroded in transportation accidents as early as 1935. Therefore, the benefit to passengers of defining the jurisdiction was never fully realized since courts began looking to "the local law of the state where the injury occurred [to] determine[] the ... liability[y] of the parties, unless some other state has a more significant relationship

131. See id.
132. See id. at 500.
133. See id. at 517. Although the creation by Warsaw of a right of action has been said to have been assumed, in the United States at least, some courts assumed or decided that claims must be founded on some law other than the Convention. See id. at 517-18 (citing Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393, 401 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953) and Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679 (2d Cir. 1957)). But the Second Circuit subsequently reversed its holdings in order to be consistent with its view that Warsaw is an "internationally binding body of uniform air law." Benjamins v. British European Airways, 572 F.2d 914, 917, 917-19 (noting that most cases will fall under 28 U.S.C. § 1332 and treaty jurisdiction under § 1331 will only be necessary when plaintiffs and defendants are all aliens). Since then, the Supreme Court has held that Warsaw provides the exclusive cause of action for injuries sustained during international air transportation. See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 160, 176 (1999).
134. See Warsaw Convention, supra note 3, at art. 28(1).
135. See Lowenfeld & Mendelsohn, supra note 121, at 523.
136. See id. at 526.
137. See id. at 527.
138. See id. at 527-28.
with the occurrence and the parties as to the particular issue involved, in
which event the local law of the latter state will govern." 139

Realization of the second goal of the Convention gave carriers the
chief benefit of the bargain between passengers and carriers, with their
potential liability limited to approximately $8,300 dollars—a low
amount even in 1929. 140 That the Convention rejected an “insurance”
rule of carrier liability for passenger injury perhaps was due in part to
the belief that passengers preferring air transportation “knowingly and
voluntarily assum[e] the flying hazard.” 141 Be that as it may, the limit on
liability was designed to facilitate international air transportation
development by lessening litigation and providing a more secure basis
on which to obtain insurance. 142 Without the “fear of a single
catastrophic accident” it was hoped that airlines would be able to more
easily attract capital. 143

Passengers received the benefit of the carrier being presumed liable
unless it could show that it had taken all measures that could be taken or
that taking those measures was impossible, unless the carrier engaged in
willful misconduct. 144 But burden shifting already existed for air travel
in some countries and jurisdictions under doctrines such as res ipsa
loquitur. 145 Thus, the ability to bring suit in one of four forums was the
primary benefit to passengers in exchange for the chief benefit of the
bargain to carriers of a cap on potential liability.

Most subsequent debate about Warsaw centered on the
appropriateness of the cap amount, with the personal injury and death
action awards in the United States and other developed countries
pointing to the need for a higher cap. 146 Even so, the amount was said to
be satisfactory to others and even too high for some, discouraging a
number of countries from adhering. 147 The limit on liability has been

139. See id. at 531 (quoting a 1964 draft of the Restatement (Second) of Conflict of Laws). In
the United States, if Warsaw did not apply, the standard applied in “federal” choice-of-law analysis
and that of most states is the “significant-contacts test” of the Restatement (Second) of Conflicts of
Laws (1971), section 145 for personal injury and section 175 for wrongful death. Joel S. Perwin,
Damage Choice of Law, 2 ATLA Annual Convention Reference Materials, Aviation Law Section
140. See Lowenfeld & Mendelsohn, supra note 121, at 499.
141. Sack, supra note 120, at 362.
142. See Lowenfeld & Mendelsohn, supra note 121, at 499-500.
143. Id. at 499.
144. See Warsaw Convention, supra note 3, at arts. 20, 25; Lowenfeld & Mendelsohn, supra
note 121, at 500.
145. Lowenfeld & Mendelsohn, supra note 121, at 519.
146. See id. at 504.
147. See id.

By June 30, 1999, 147 states were party to the treaty.\footnote{149 See Batra, supra note 148, at 429.} But despite various attempts to modernize the Warsaw system, and in view of “rapid changes in the world’s socio-economic conditions since the [treaty’s enactment], and the unsatisfactory situation that subsisted with regard to liability limits of the air carrier,” the treaty needed “socio-economic analysis.”\footnote{150 Id. at 433.} In 1997, the International Civil Aviation Organization (“ICAO”) initiated such an analysis to provide “a framework for a modernized regime of air carrier liability.”\footnote{151 Id.}

3. The Montreal Modernization

The “modernization and consolidation of the Warsaw System,” undertaken by a ICAO-appointed group, resulted in a Draft Convention.\footnote{152 Id. at 433.} Thus conceived, a new treaty of private international air law—the Montreal Convention—was born on May 28, 1999.\footnote{153 Id.} “[D]esigned to meet the challenges of the advancement of international air law at the dawn of the new millennium,”\footnote{154 Id. at 441.} the Montreal Convention replaces the six legal instruments comprising the Warsaw System.\footnote{155 See id. at 433.} The ICAO study reported, first, that internationally-mandated limits on liability encouraged claimants to use judicial proceedings to avoid them and, second, that Warsaw limits were unacceptably low because of world-wide variations in cost-of-living and other “socio-economic circumstances.”\footnote{156 Id.}

Four methods to alleviate these problems were proposed and ultimately incorporated in the Montreal Convention. First, carriers would
be strictly liable for up to 100,000 Special Drawing Rights ("SDR"), an IMF monetary unit.\textsuperscript{157} Second, baggage and cargo liability would be "per passenger" rather than by weight. Third, a mechanism for updating liability limits would be included. Fourth, a "fifth jurisdiction," based on the passenger's domicile, would be added for claims for damages resulting from passenger death or injury.\textsuperscript{158}

The adopted system of liability was to be two-tiered. In addition to strict liability for 100,000 SDR, full and unlimited compensation would be allowed in cases of negligence or other "wrongful act on omission of the carrier or its servants/agents."\textsuperscript{159} Nevertheless, carriers were to be given protection in at least two ways. First, the carrier could be exonerated, either wholly or in part, from liability for damages contributed to or caused by the claimant. Second, carriers were given the option of opting out of liability altogether by stipulating that "the contract of carriage shall be subject to... no limits of liability whatsoever."\textsuperscript{160}

The Montreal modernization reflected a balancing of interests of the international civil aviation industry, signatory states, and airline passengers.\textsuperscript{161} Just as with the Warsaw Convention, a primary benefit to passengers under the rules of the Montreal Convention is passenger-choice among jurisdictions in which to bring claims. Indeed, the addition of the fifth forum from which to choose, that of "the territory of a state in which at the time of the accident the passenger has his or her principal and permanent residence," being contrary to usual jurisdictional procedural law in compensation cases,\textsuperscript{162} is an especially important benefit received by passengers.\textsuperscript{163} The aim of this addition has been said

\textsuperscript{157} See id. at 435.
\textsuperscript{158} See id. at 440.
\textsuperscript{159} Id. at 438.
\textsuperscript{160} Batra, supra note 148, at 440; Montreal Convention, supra note 153, at art. 20, 25.
\textsuperscript{161} Montreal Convention of 1999 on Compensation for Accident Victims Set to Enter Into Force, Sept. 5, 2003, available at http://www.icao.int/icao/en/nr/2003/pio200314.htm (last visited July 23, 2005) (quoting the President of the Council of the ICAO, Dr. Assad Kotaite, as saying, "In developing this new Montreal Convention, we were able to reach a delicate balance between the needs and interests of all partners in international civil aviation, States, the traveling public, air carriers and the transport industry").
\textsuperscript{162} See Batra supra note 148, at 440; Montreal Convention, supra note 153, at art. 33(1).
\textsuperscript{163} Unlike the other four jurisdictions concerning any passenger or cargo claim, the "fifth jurisdiction" is available only for claims based on death or injury. Pablo Mendes DeLeon & Werner Eyskens, The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System, 66 J. AIR L. & COM. 1155, 1161 (2001). Furthermore, the passenger's principal and permanent residence at the time of the accident must be within a signatory state (a "State") in order for the passenger to bring a claim there. Id. at 1162. That State must also be one to or from which the carrier operates passenger carriage services, using its own aircraft or that
to be "to allow highly mobile individuals, such as temporary expatriates, to sue carriers in their home country." And yet, the value of the passenger choice of forum, part of both Montreal and the initial Warsaw bargain between passengers and carriers as well, is eroded when FNC is applied to revoke that choice.

B. The Plaintiff’s Option—or Not?

In the United States, Article 28 of Warsaw provides treaty jurisdiction for claims falling within its provision and federal jurisdiction is established under the “arising under” clause of 28 U.S.C. § 1331. Indeed courts have determined Article 28(1), designating the four forums in which action must be brought, at the option of the plaintiff, to be “jurisdictional in nature and the points of jurisdiction it specifies are national in scope.” Article 28(2) says that questions of procedure are to be governed by the law of the court to which the case is submitted. Therein lies the rub.

1. The Way We Were

Although the plaintiff has "the option" of bringing his complaint under Warsaw to one of four designated forums, some have contended

of another carrier under a code-share agreement. The State must also be one in which the carrier conducts such passenger carriage services from premises leased or owned by it or by another carrier with which it has a commercial agreement (other than an agency agreement), and this carrier might not be the same one as the code-sharing partner operating the said passenger carriage services. Id. at 1162-63. Although the interpretation of this provision leaves unanswered questions as to the exact relationship between the carrier, any commercial partner, and the accident giving rise to a claim, see id., a finding of U.S. jurisdiction under any interpretation would clearly meet minimum contacts threshold requirements for the exercise of jurisdiction over the defendant airline by a federal court.

164. See id. at 1164. Although proffered as a reason for the addition, in actuality, the number of passengers for whom the home country would become available as a place to bring a claim only because of this provision should be rather limited. See id.

165. See infra.

166. See Mendelsohn & Lieux, supra note 148, at 78-79.


168. The official text of the Warsaw Convention is French and courts must interpret its meaning in accordance with the legal meaning of the French text. See Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 536 (1991). The French version of Article 28 is:

(1) L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'une des Hautes Parties Contractantes, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

(2) La procédure sera régulée par la loi du tribunal saisi.

See Warsaw Convention, supra note 3, at art. 28.
that this does not give the plaintiff an absolute right to decide which
court will hear the case.\textsuperscript{169} In the United States, the Court of Appeals for
the Fifth Circuit appears to have been the first court to specifically
address the question, finding that the "option of Plaintiff" language did
not grant an absolute and inalterable right to choose the national forum
in which their claims would be litigated.\textsuperscript{170} "We simply do not believe
that the United States through adherence to the Convention has meant to
forfeit such a valuable procedural tool as the doctrine of forum non
conveniens."\textsuperscript{171} "If we were to adopt the plaintiffs’ construction of
article 28(1) and ignore the language of article 28(2), American courts
could become the forums for litigation that has little or no relationship
with this country."\textsuperscript{172}

Nine years later, another federal court, albeit a district one, agreed
with the Fifth Circuit and found that Warsaw did not preclude dismissal
under \textit{forum non conveniens}.\textsuperscript{173} The Southern District of New York first
rejected the plaintiff’s claim that \textit{United States v. Nat’l City Lines, Inc.}\textsuperscript{174}
stands for the proposition that FNC is not available when a statute or
treaty creates a right of action establishing special jurisdiction and
dictating venue.\textsuperscript{175} The court read \textit{National City Lines} more narrowly as
applying only to the Clayton Act’s conferral of special jurisdiction in
certain antitrust actions and prohibition on transfer to other federal
district courts.\textsuperscript{176} The court specifically rejected the proposition that any
special venue statute will prohibit FNC dismissal.\textsuperscript{177}

The court also rejected the plaintiff’s argument that the defendant
carrier was precluded from arguing that the plaintiff’s chosen forum was

\begin{itemize}
  \item \textsuperscript{169} See Mendelsohn & Lieux, supra note 148, at 80-81.
  \item \textsuperscript{170} Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. (\textit{In re Air Crash Disaster Near New
Orleans, Louisiana on July 9, 1982}), 821 F.2d 1147, 1168 (5th Cir. 1987), vacated and remanded on
indicates no such cases exist." \textit{Id.} at 1161 n.22.
  \item \textsuperscript{171} \textit{Id.} at 1162.
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{In re Air Crash Off Long Island New York, on July 17, 1996}, 65 F. Supp. 2d 207, 213-15
(S.D.N.Y. 1999). Aviation law commentators have said that it was generally assumed (at least
before Hosaka, to be discussed \textit{infra} Part III.B.2) that FNC was available under Warsaw “as a
procedural tool to try to defeat the increasing resort to U.S. courts by foreigners in aviation crash
cases.” Mendelsohn & Lieux, supra note 148, at 96 (citing Chukwu v. Air France, 218 F. Supp. 2d
979, 987-88 (N.D. Ill. 2002); see also \textit{In re Air Crash Disaster of Aviateca Flight 901 Near San
Salvador, El Salvador on Aug. 9, 1995}, 29 F. Supp. 2d 1333, 1353 (S.D. Fla. 1997); \textit{In re Disaster at
  \item \textsuperscript{174} 334 U.S. 573 (1948).
  \item \textsuperscript{175} \textit{In re Air Crash Off Long Island New York}, 65 F. Supp. 2d at 213.
  \item \textsuperscript{176} See \textit{id.} at 213.
  \item \textsuperscript{177} See \textit{id.}
\end{itemize}
inconvenient, contending that the drafting history of Warsaw demonstrates that the four forums in Article 28 were chosen for their convenience to the carrier. The plaintiffs had pointed to the rejection of the place of accident as a forum to prevent suit in a country with "undeveloped law, no relation to the contract, or far from the carrier's home." The plaintiffs had also relied on Great Britain's submitted, but withdrawn, proposal to allow judicial discretion to decline jurisdiction as evidence that FNC should not be permitted. The court rejected these drafting history arguments, deeming the history inconclusive as to the intent of the drafters with regard to the purpose and meaning of Article 28.

Instead, the court read the treaty as literally allowing "[q]uestions of procedure [to] be governed by the law of the court to which the case is submitted." Concluding that FNC is "a procedural tool available to U.S. courts and thus squarely falls within the literal language of Article 28(2)," the court did not discuss whether or not FNC would have been considered a "procedure" at that time by the drafters.

While the Long Island court affirmed the applicability of the FNC doctrine in Warsaw cases, some commentators considered the Southern District to have "laid the groundwork for effectively precluding forum non conveniens dismissals even when the plaintiffs are all foreign nationals," because of the way it applied and weighed the Gilbert factors. These commentators expressed concern specifically about the court's having considered the lack of contingency fee arrangements in the alternative forum, France, and the investment in the case thus far by the plaintiff's U.S. attorneys in discovery, investigation, experts, consultants, and pretrial proceedings. These commentators predicted that when the foreign country to which FNC dismissal is sought does not allow contingency fee arrangements, the door would "close...on all future FNC transfers abroad from New York's Southern District."

These commentators would instead have plaintiffs returned to their home forums for "fair and accurate calculation[s] of death and injury..."
FORUM NON CONVENIENS

"damages" because of "acknowledged difficulties involved in determining foreign compensation laws and practices."\(^{186}\) Although the authors had earlier criticized the court in *Long Island* for including a comparison of law as between the United States and France in its FNC analysis,\(^{187}\) here they criticized the court for not specifically addressing the availability of compulsory process for unwilling witnesses although such an analysis would also have involved "exercises in comparative law."\(^{188}\) These complaints about the *Long Island* court's analysis help demonstrate the instrumentalist nature of the FNC doctrine. Arguments about the "difficulties" and "complex exercises" of courts, and foreign plaintiffs choos[ing] U.S. courts not because of any direct connection between this country and the accident, but rather because of the advantages of contingency fee arrangements readily available in U.S. practice, or because they hope to benefit by the higher and more generous recoveries that are usually available in U.S. courts and from U.S. juries[,,]\(^{189}\)

reflect concerns about the practical effects on courts of having to hear such cases coupled with what appears to be a bias against foreign plaintiffs. While these arguments are no doubt seductive to busy jurists, they may be entirely unrelated to the objects and purposes underlying the compromises reached in international agreements granting jurisdiction.

2. *Hosaka v. United Airlines*

In *Hosaka v. United Airlines, Inc.*,\(^{190}\) the Ninth Circuit, when asked to hear the consolidated appeals of plaintiffs whose death and injury actions were dismissed by the United States District Court for the Northern District of California on the ground of *forum non conveniens*, became the first circuit court since the Fifth Circuit in *New Orleans* to address directly the issue of FNC use in Warsaw Convention cases.\(^{191}\) *Hosaka* involved Japanese passengers *en route* from Japan to Hawaii on December 29, 1997 on a United Airlines flight. Three hours into the flight and 1,000 miles from Japan in international airspace over the

\(^{186}\) *Id.* at 106.

\(^{187}\) *Id.* at 99 (concluding that because of the way in which France calculates damages, evidence existing only within the U.S. would be needed).

\(^{188}\) *Id.* at 99-100 (quoting the Court in *Piper*, 454 U.S. at 251).

\(^{189}\) *Id.* at 110.

\(^{190}\) 305 F.3d 989 (9th Cir. 2002).

\(^{191}\) *Id.* at 993.
Pacific Ocean, the plane encountered severe turbulence. Plaintiffs, including Mrs. Hosaka, claimed physical and emotional harm, including fractured ribs, broken necks and permanent spinal damage as a result of passengers being "catapulted against the cabin and/or fellow passengers."

The District Court had granted United’s motions to dismiss for FNC, holding that Article 28(1) of the Warsaw Convention grants the plaintiff the option of choosing among four jurisdictions, but that it does not preclude a court’s entertaining an FNC motion. Plaintiffs appealed, arguing that any application of FNC was contrary to the plain meaning of Warsaw, and thus an unauthorized qualification of the treaty. The Ninth Circuit, for its part, found the text of Warsaw to be ambiguous, rather than plain. Nevertheless, the court deemed the purposes, the drafting history of the treaty, and the evidence of the parties’ understanding and treatment of FNC in other treaties and courts post-ratification as not supporting the contention that the contracting parties intended to permit “the plaintiff’s choice of national forum to be negated” by the use of FNC. Finding FNC inapplicable in Warsaw cases where the alternative forum is in another country, the court reversed the district court’s dismissal.

a. The Text—Ambiguous

In finding the treaty ambiguous, the court cited what it labeled “two equally plausible interpretations,” that of the court in Long Island and the British Court of Appeal in Milor S.R.L. v. British Airways PLC. In Milor, the court concluded that the text precluded the use of FNC dismissals, reasoning that the scope of a State’s use of its procedural law under Article 28(2) is limited by the jurisdictional grant of Article 28(1), granting to the plaintiff the absolute right to choose between the four forums.

192. Id.; see also Appellants’ Opening Brief with Addendum at 6, Hosaka v. United Airlines, Inc., 305 F.3d 989 (9th Cir. 2002) (No. 00-15223), available at 2001 WL 30495322.
193. Appellants’ Brief at 6, Hosaka (No. 00-15223). Mr. Hosaka died from his injuries. Id.
194. 305 F. 3d at 993.
195. Appellants’ Brief at 7-8, Hosaka (No. 00-15223).
196. 305 F 3d at 1003-04.
197. Id. at 1004.
199. Id.; see also 305 F.3d at 994-95, 995 n.5 (citing Milor, [1996] Q.B. 702, noting it to be “entitled to considerable weight” under Air France v. Saks, 470 U.S. 392, 404 (1985), as the opinion of a “sister signatory}).
Had the court adopted the Milor court’s textual analysis, interpreting the use of \textit{portee} in the official French version of Article 28(1) as requiring that actions be litigated to conclusion in the plaintiff’s selected forum,\textsuperscript{200} it might have concluded that the text was not ambiguous. Whereas the Milor court had construed the use of the word \textit{“intentee,”} in Article 29 governing the timeliness of the lawsuit and interpreted as meaning that an action must be \textit{“brought”} within two years, as requiring the treaty interpretation that the use of the two different words reflected an intent to have them mean something different,\textsuperscript{201} the Hosaka court looked outside the text of the treaty to understand the meaning.

The Hosaka court looked to the Montreal Convention’s use of the word \textit{portee} in Article 33(1), designed to replace Article 28(1) of Warsaw, wherein “[a]n action for damages must be brought, at the option of the plaintiff.”\textsuperscript{202} In Article 33(2), the French text employs \textit{intentee} rather than \textit{portee} in stating what the English version states as “[i]n respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory. . . .”\textsuperscript{203} Because it found that the Montreal Convention’s usage suggested that any difference in the meanings of the two words was not dispositive, the court found the text of Article 28 to be ambiguous.\textsuperscript{204}

\textbf{b. The Purpose—To Achieve Uniformity and Balance Interests}

Having found the treaty ambiguous, the court then looked to the purposes of the treaty to aid in interpretation.\textsuperscript{205} The court first agreed with the Milor court that one of the purposes was to “harmonise different national views on jurisdiction” by “creat[ing] a self-contained code on jurisdiction.”\textsuperscript{206} The court identified the second purpose of the Convention to be to balance the interests of carriers against those of passengers.\textsuperscript{207} The court concluded that permitting defendants to utilize

\textsuperscript{200}. 305 F.3d at 995.
\textsuperscript{201}. \textit{Milor}, [1996] Q.B. at 702; see also 305 F.3d at 995.
\textsuperscript{202}. 305 F.3d at 994.
\textsuperscript{203}. 305 F.3d at 1000 (quoting Montreal Convention, \textit{supra} note 153, at art. 33(2)).
\textsuperscript{204}. See 305 F.3d at 996.
\textsuperscript{205}. See id.
\textsuperscript{206}. \textit{Id.} at 996 (quoting \textit{Milor}, [1996] Q.B. at 707).
\textsuperscript{207}. See \textit{id.} at 997 (citing \textit{El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng}, 525 U.S. 155, 170 (1998)).
FNC to void the plaintiff’s choice of forum would undermine both objects—uniformity and balance.\footnote{208}

c. The Drafting History—No Minority Rule

The court reviewed the drafting history, specifically the attempt on the part of the British delegation to amend the Convention to expressly preserve a court’s discretionary power to decline jurisdiction when permitted under the procedural rules of the forum state.\footnote{209} The following paragraph would have been added to now Article 28:

None of the stipulations of this Article shall be deemed to bind any court whatsoever to hear a complaint which it would consider, according to the principles of law and procedure in force in the country to which the said court belongs, as contrary to the rules of justice, or as irrelevant to be submitted to it.\footnote{210}

In the end, the amendment was not included.\footnote{211} The Hosaka court considered the failed proposal relevant as “strongly suggest[ing] that the contracting parties were cognizant of the doctrine and did not understand Article 28(2) as silently incorporating, or acquiescing in, its application.”\footnote{212} Concluding that it would be unreasonable to infer that “continental jurists” would have “succumbed to the British, common law point of view,” the court inferred instead that if the delegates had intended to permit FNC application, they would have explicitly so provided.\footnote{213}

d. Postratification Understanding—If They Mean It, They Must Say It

i. The Drafting of the Montreal Convention

The Hosaka plaintiffs had contended that the more recent drafting history of the Montreal Convention supports the view that the language of Article 28(2) does not permit FNC.\footnote{214} Specifically, delegates from

\footnotesize
\begin{itemize}
\item \footnote{208}{See id. at 997.}
\item \footnote{209}{See id.}
\item \footnote{210}{Id. (quoting from the MINUTES OF THE SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, supra note 179, at 298-99).
\item \footnote{211}{Id. at 998.}
\item \footnote{212}{Id.}
\item \footnote{213}{Id. at 999.}
\item \footnote{214}{See id. at 999-1000.}
\end{itemize}
civil law jurisdictions made considerable objection to attempts by common law state delegates to introduce language permitting FNC application. 215 In fact, the United States offered an amendment to Article 33(4) to explicitly include FNC and “similar doctrines” as procedures governed by the law of the Court seised of the case. 216 In the end, the civil law jurisdiction delegates prevailed, and the final version of the Montreal Convention did not include the FNC provision. 217

Nevertheless, the Hosaka court did not find the drafting history to have conclusively established that the U.S. proposal would have been a change to the Warsaw system. What it did find was that the drafting history suggested a lack of shared understanding as to whether the Warsaw Convention language, “standing alone, permits or precludes application of forum non conveniens.” 218 Whereas the U.S. delegate had opined that FNC would apply in the U.S. whether prescribed by treaty or not, the British delegate considered the plaintiff to be entitled to an “absolute choice among four forums, a choice... not [to] be undermined by forum non conveniens. 219

ii. Other Multi-National Treaties

The court reviewed the history of other international agreements, concluding that the Warsaw Convention’s silence on FNC precludes its application. First, the court noted that the Brussels Convention, governing enforcement of judgments among European Union countries, contains no explicit FNC doctrine and has been construed as barring its application. 220 Second, the court cited the failure of the efforts of the United Kingdom and Ireland to negotiate the introduction of FNC into the European Economic Community in conjunction with their joining in 1979. 221 The court recognized that when the intent of a multilateral treaty has been to allow the doctrine, it has explicitly so said, referencing the negotiating history of the Hague Conference on Private International Law. 222 Participants to the Hague Conference were said to have

215. See id. at 1000.
216. Id.
217. Id.
218. Id. at 1001.
219. Id.
220. See id. at 1001 (citing Alan Reed, To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages, 29 GA. J. INT’L & COMP. L. 31, 106-07 (2000)).
221. Id. at 1001 (citing Stuckelberg, supra note 71, at 963).
“vigorously debated the availability of forum non conveniens,” a debate that ultimately led to the explicit adoption of a version of the doctrine balancing common law and civil law interests.223 And, finally, the court cited the Supreme Court in Eastern Airlines, Inc. v. Floyd,224 as reasoning that the absence of any explicit reference to “mental injury” in the Warsaw Convention itself demonstrated a lack of intent on the part of the signatories to include it.225

iii. Other U.S. Courts

The Hosaka court found the Fifth Circuit to be the only other circuit court to have addressed the issue of FNC dismissal of Warsaw Convention cases.226 The Hosaka court disagreed, however, with the Fifth Circuit’s conclusion that the U.S. would not have forfeited FNC.227 Conceding that the doctrine might today be characterized as “a valuable procedural tool,” the Hosaka court did not find it to have necessarily been so in 1929.228

IV. Hosaka: Exemplary of a “Good Faith” Approach to Resolving a Treaty Ambiguity

Flight, of its nature, has been the creator of new difficulties in both public and private international law. It is something so inherently and pre-eminently international itself that it was bound to have this effect. But it is at the same time something so romantic and almost unreal that one finds it hard to conceive its development as involving the development also of law and litigation.229

The rich interpretative approach to treaty interpretation undertaken by the Ninth Circuit is protective of U.S. and international interests in assuring needed uniformity in multi-lateral treaties that rely on judicial implementation. Its thoroughness makes its finding of FNC

223. Id.
225. 305 F.3d at 1002 (citing Floyd, 499 U.S. at 545).
226. Id. at 1001 (citing Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. (In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982), 821 F.2d 1147, 1161-62 (5th Cir. 1987), vacated and remanded on other grounds, Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989)).
227. See id. at 1002.
228. See id.
229. SPAIGHT, supra note 1, at 106.
inapplicability more persuasive than the contrary holding of the Fifth Circuit. 230

What can be done when a textual reading of a treaty reveals an ambiguity? Where the ambiguity lies only in the inherent limitations of language, and resolution of the ambiguity lies merely in ascertaining which textual interpretation comports with the original understanding of the parties, reference to travaux preparatoires and subsequent actions of the parties may uncover the understanding. But what can a court do when that analysis leaves considerable uncertainty as to the understanding? By identifying and applying the interpretation more likely to give effect to the underlying object and purpose of the treaty, a court may uphold its nation’s obligation to perform the treaty in good faith.

The Hosaka court’s analysis best upholds the good faith obligation of the United States as a signatory to Warsaw. Furthermore, the considered approach to treaty interpretation undertaken by the Hosaka court protects U.S. interests in assuring the ongoing vitality of international bargains because such an approach is more likely to result in an interpretation acceptable to sister signatories. The Hosaka court had the benefit of Milor, a decision of a sister signatory, which demonstrated the ambiguity contained within the Warsaw text. The Milor court’s view that the “procedural power” of FNC is “inconsistent with the right conferred on the plaintiff to choose”231 was in contrast to the textual interpretation previously adopted by the Long Island court that Article 28(2) “plainly incorporates the forum state’s procedural law.”232 Since the ambiguity was made apparent by these conflicting interpretations, the Hosaka court rightly engaged in a fuller analysis, appropriate under the U.S. Supreme Court’s jurisprudence.

The intent of the original parties to the Warsaw agreement as to the use of FNC may never be known. Perhaps the parties reached no agreement on the matter, leaving no understanding for courts to ascertain. But given the object and purpose of the treaty, the Hosaka court’s interpretation is a reasonable one. It is one that is also most likely to garner the support of fellow signatories to the Warsaw Convention,

---

230. The Hosaka Court noted that “[t]he persuasiveness of the Fifth Circuit’s decision is limited in several respects. The decision did not consider the purposes, drafting history and postratification understanding of the parties.” 305 F.3d at 1002. For a contrary position, see Alyson R. Martin, Comment, The Warsaw Convention and Forum Non Conveniens: Should Federal Courts Be Allowed to Apply the Doctrine in Damages Actions Brought Under the Treaty?, 1 U. ST. THOMAS L.J. 750, 772 (2003).


232. 305 F.3d at 995.
the majority of whom are civil law countries. As such, they do not have FNC doctrines so their courts lack discretion to decline to hear cases properly brought under Warsaw. Some countries have moved to enact statutory provisions to prevent U.S. courts from dismissing cases under FNC by making their courts unavailable to their citizens who first sue in the court of another country. These actions prevent FNC dismissals in individual cases by removing adequate "alternative forums," and demonstrate international discontent with U.S. FNC use. Because FNC is unavailable to most signatories and countries are acting to prevent its use by the U.S., the Hosaka court’s interpretation supports U.S. interests in international cooperation.

That the Ninth Circuit was willing to concede a discretionary power otherwise available to it is truly remarkable and may speak to the soundness of the Hosaka decision. The court avoided the "methodological provincialism" of applying a home-centered analysis. Indeed, the court’s consideration of discussions related to FNC provisions in other international agreements, including Montreal, evinced a willingness to identify and promote ongoing international consensus. The court’s approach is the kind that may help foster ongoing collaborative processes conducive to upholding international agreements.

As noted in supra Part II.A., the principle of treaty law that a country must comply in good faith to the treaties to which it is a party is so fundamental that a country may not invoke a violation of its own law to avoid compliance. The need for uniformity in treaty implementation necessitates their being preemptive of contra state substantive law, unless the particular internal rule is of fundamental importance. FNC is used to dismiss cases that are more appropriately brought elsewhere. Indeed, the doctrine is inapplicable to cases that are improperly before

233. See Mendelsohn, supra note 6, 47-48. Such laws exist in Ecuador, Panama, Costa Rica, Guatemala, and the Philippines. Id. at 48.

234. This sort of "negative conflicts of jurisdiction" must be avoided for an international system of "dispute resolution" to be effective. Andrew L. Strauss, Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts, 36 HARV. INT'L L.J. 373, 421 (1995).

[D]octrine-makers are confused in believing that [S]tates can self-prescribe their jurisdiction. In fact, it is precisely because jurisdiction is intrinsically international that the paradigm requires it to be prescribed by the international order, and that domestic courts should apply such international law as authoritative in cases involving foreign plaintiffs or defendants. There is no reason why this should be any less the case when it comes to jurisdiction than when it comes to any other area of law appropriately prescribed by the international order.

Id. at 407.
the court. Improperly brought cases are dismissed for lack of subject matter or personal jurisdiction. FNC is applicable only when the court has the case, but decides that another court would be more appropriate. Thus, FNC is clearly not of such fundamental importance as to preempt U.S. interests in international cooperation.

Although it is difficult to imagine a federal court voluntarily ceding a discretionary power when another “reading” of a treaty’s intent could rather easily have been justified, the Ninth Circuit’s willingness to do just that may reflect an assessment of FNC’s true importance similar to the one implied by the Supreme Court in *American Dredging Company*. The Court opined that the doctrine of FNC is “nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.” The Court dismissed the importance of providing for FNC motions in admiralty cases in part because “maritime actors [do not rely on it] in making decisions about primary conduct—how to manage their business and what precautions to take.” The court implied that the primary benefit of the doctrine is to allow a state to avoid “burden[ing] its judiciary with litigation better handled elsewhere.” Importantly, the Court noted that uniformity and predictability of outcome are almost impossible given the discretionary nature of FNC, “combined with the multifariousness of the factors relevant to its application.” If the Supreme Court does not consider FNC important enough to warrant a federal pre-emption of state law proscribing its use in maritime law, it is difficult to imagine that the Court would find the discretionary doctrine important enough to warrant allowing it to disrupt uniformity in the implementation of an international agreement in which jurisdiction is prescribed. The *Milor* court was also skeptical of the overriding importance of FNC.

Where, as so often, substantial costs are incurred in interlocutory battles in relation to jurisdiction, I have a suspicion that the object of the exercise is frequently not to ensure that the trial takes place in the

---

236. *Id.* at 453.
237. *Id.* at 454.
238. *Id.* (“Federal courts will continue to invoke *forum non conveniens* to decline jurisdiction in appropriate cases, whether or not the State in which they sit chooses to burden its judiciary with litigation better handled elsewhere.”)
239. *Id.* at 455.
appropriate forum, but to achieve a better negotiating stance in an action which neither side expects to go to trial. There is something to be said for a regime which restricts the choice of forum in a manner which excludes those which are likely to be inappropriate, but which does not otherwise permit the plaintiff’s choice to be challenged.241

V. CONCLUSION

Whether or not FNC will be available under Montreal remains to be answered.242 An expectation that the use of the discretionary doctrine to dismiss claims for damages resulting from the deaths and injuries of air passengers will continue under a Montreal system is reflected in the statement of one commentator:

[The addition of a fifth forum] may prove a gold mine for the lawyers rather than for the claimants, because a court that is the least concerned with the cause of action, or even where no evidence, witness, or record relating the passenger’s transportation, accidental injury, or death etc., is available in that forum, may ultimately decline to entertain the clauses [sic] as forum non-convenience [sic].243

Yet, when a plaintiff chooses a court in compliance with the jurisdictional provisions of Warsaw or Montreal or, any other international treaty with jurisdictional provisions for that matter, the court so chosen is necessarily one “concerned.”244 The “concern” is that

241. Id.

242. Prof. Mendelsohn has argued that, whether or not Hosaka was correctly decided, the “legislative history leading to the adoption of Article 33 of Montreal-99 clearly and categorically demonstrates the intention and expectation of the U.S. government that U.S. courts would apply the forum non conveniens doctrine under Article 33(4)—which in relevant respects is the identical counterpart of Warsaw’s Article 28(2).” Mendelsohn, supra note 6, at 46. Indeed, Prof. Mendelsohn says that any plaintiff “bringing . . . suit in the United States knows or should know . . . [or at least] assumes the risk[,] that the U.S. court may apply FNC and dismiss or ‘transfer’ the case back to the courts of the victim’s domicile or permanent residence.” Id. at 48. Prof. Mendelsohn also notes that much of the opposition to the use of the FNC doctrine voiced at the Montreal conference was from the French delegation. Id. at 46 n.20. The Hosaka court “offer[ed] no opinion as to whether the text and drafting history of the Montreal Convention demonstrate whether forum non conveniens would be available.” Hosaka v. United Airlines, Inc., 305 F.3d 989, 1001 (concluding that, despite considerable discussion of FNC at Montreal, no “coherent picture of the parties’ understanding” of the availability of the doctrine under Warsaw emerged).


244. One commentator has noted that plaintiffs’ arguments that substantial local interest exists in cases involving air crashes is “more palatable” to courts in part because the U.S. is “part of a global economy and its citizens travel by air all over the world. The fact that an accident happens in a foreign location is merely a fortuity, as is the citizenship of those on board the aircraft.” Stuart R. Fraenkel, Preparing for and Presenting Opposition to Forum Non Conveniens Motions, 2 ATLA Annual Convention Reference Materials, Aviation Law Section (2001).
of its state, a state that expressed its concern by adhering to the treaty that granted jurisdiction to its courts for just such cases under just such circumstances. FNC use by federal courts is neither statutorily nor constitutionally mandated.\textsuperscript{245} Therefore, one might argue that where federal jurisdiction is based on the jurisdictional grant of an international treaty to which the U.S. has adhered, the court may not entertain a motion for dismissal under the FNC doctrine unless the signatories to the treaty granting jurisdiction have clearly, and textually, manifested their agreement that the doctrine be available. It is highly unlikely, however, that any U.S. federal court will be easily convinced to relinquish its discretionary power.\textsuperscript{246}

When asked to address the issue, a court could decide that the text of Montreal is not ambiguous and that matters of procedure are to be decided by the courts to which cases are brought. Given the lack of agreement that now exists under Warsaw, however, such a simplistic, textualist reading is unlikely to be given by other than by the most "nationalist" of courts. The ambiguity that exists in Montreal is now decidedly apparent given the similarity to Warsaw of the relevant provisions. Instead, it is more likely that any court asked to consider the matter will identify the ambiguity early and proceed with a fuller interpretation.

Proponents of the use of the doctrine will need to prove more than just that signatories entered into the agreement cognizant of FNC's healthy existence. Proponents must be prepared to convincingly demonstrate that, in drafting the agreement, signatories shared an expectation that the doctrine would be used under the new Montreal regime. If the court determines that such a shared expectation did not exist, then it should carefully consider whether or not FNC use is consistent with the purpose and object of Montreal. Finally, in order to nurture the long-term vitality of the agreement, the court should ask whether allowing the use of FNC is likely to garner a "moving consensus" among signatories.

The outcome of this controversy may turn on which court is asked to address the issue first. If a court of a sister common-law signatory finds the doctrine to be inapplicable under Montreal, then considerable weight to that opinion can be expected to be given by U.S. courts, especially if the foreign court is the highest one of that country, given Supreme Court precedent. On the other hand, if a U.S. court hears the

\textsuperscript{245} See McFadden, \textit{supra} note 15, at 265.
\textsuperscript{246} \textit{Id.} at 260.
matter first, then the U.S. court will essentially be deciding the matter as one of international first-impression. Of course, the courts of civil law countries will be unable to speak as to their interpretations of the treaty on this point because they do not entertain FNC motions.

[M]an's increasing mastery of the airways is creating day by day such stuff as laws as well as dreams are made of. It will assuredly add new chapters to the legal text-books, to puzzle the heads of our grandchildren whose fate it is to study law.

Katherine R. Dieterich*

247. SPAIGHT, supra note 1, at 106.

* J.D., summa cum laude, Hofstra University School of Law, 2005. Many members of the Hofstra Law School community generously gave of themselves in a variety of helpful ways during the preparation of this Note. Some gave guidance and answered questions; others offered encouragement and friendship; all made the publication of this Note possible. Among the many are: Professors Richard Neumann, James Garland, James Hickey, Mark Movsesian, Robin Charlow, Julian Ku, and Janet Dolgin; fellow Volume 33 law review editors Justin DeCamp, Susann Duffy, and Steve Metzger; and Volume 34 editors Michael Ushkow, Peter Siroka, Adam Wactlar, and Jason Miller. Articles Editor Beverly Reyes provided hours of skilled editing work. I extend my thanks to all of them and to my family.