ARTICLE 28(1) OF THE WARSAW CONVENTION

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ABSTRACT

One of the aims of the "Convention for the Unification of Certain Rules Relating to International Carriage by Air" - commonly known as the Warsaw Convention of 1929 - was to unify rules relating to international transportation by air.

One way to effect uniformity was by limiting the places in which suit might be brought. This has been done through Article 28(1) of the Convention.

An attempt has been made to analyse this Article and to elaborate on each of the four contacts where the plaintiff may bring his action.

In a separate chapter - Chapter IV - an attempt has been made to deal with the question that this Article has aroused in a Federal country, i.e., should one regard this Article as a jurisdictional provision or merely venue?

A few conclusions and recommendations will be found in the last chapter.

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by

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LIST OF ABBREVIATIONS

Air L. Rev.	-	Air Law Review
All E.R.	-	All England Report
Am. J. Int'l. L.	-	American Journal of International Law
AVI Case	-	Aviation Case
Col. L. Rev.	-	Columbia Law Review
J. Air L.	-	Journal of Air Law
J.A.L.C.	-	The Journal of Air Law and Commerce
Lloyd's L.L.R.	-	Lloyd's List Law Report
McGill L.J.	-	McGill Law Journal
Mich. L. Rev.	-	Michigan Law Review
Min. L. Rev.	-	Minnesota Law Review
Va. L. Rev.	-	Virginia Law Review
U.S. AVI. Re.	-	United States Aviation Report

INTRODUCTION

"The Convention for the Unification of Certain Rules Relating to International Carriage by Air", now commonly known as the Warsaw Convention of 1929, was the first International Convention on private air law.

The purpose of the Convention was to:

(a) limit the potential liability of the carrier in case of an accident, and

(b) establish a uniform system of regulation governing private air law.

One way in which the drafters of the Convention chose to effect such uniformity was by limiting the places in which suit might be brought.

The first two chapters of this thesis deal with the historical background of the Warsaw Convention and the lengthy discussions which took place in regard to Article 28(1). This specific Article provides uniform rules for the situs of suits arising out of international journey.

An attempt has been made in Chapter III to analyse the following four contacts, where the plaintiff may bring his action:

(a) the domicile of the carrier;

(b) his principal place of business;

(c) place of business through which the contact was made;

(d) the place of destination.

The Convention was adopted in the French language and this is still the only official text. There are two different English translations of this Article - the British and that of the United States. There are differences between the two which are dealt with in Chapter III.

Another problem that arises in a Federal country is the question whether this Article is a jurisdictional provision or merely one of venue. An analysis of cases in the United States has been made in Chapter IV which reveals that this is a jurisdictional provision.

Recommendations are submitted in Chapter V.

CHAPTER I

WARSAW CONVENTION - HISTORICAL BACKGROUND[1]

The Warsaw Convention of 1929 was the first International Convention on private air law. It was the first fruit of a movement which commenced as early as 1910 when a group of jurists of various nations organized, in Europe, the Comité Juridique Internationale de l'Aviation to draft a code of air law. Their efforts were terminated by the First World War, but shortly after this a number of aeronautical organizations, for example, expressed concern at the lack of uniform regulations governing private air law and the multiplicity and diversity of a private law of state governing aviation - a situation which was then recognized as undesirable. A uniform system of regulation was felt to be necessary. The French Government, in 1923, recognized the importance of uniformity in certain branches of law affecting private interests applicable to air transportation, and the need for a uniform body of rules for these branches. Consequently, it submitted to the National Assembly a bill concerning the liability of the carrier in air transportation. Realizing that this matter could only be dealt with satisfactorily on an international basis, on August 17, 1923 the French Government addressed a letter to the diplomatic representatives accredited in France, stating that its government had been studying the question of the liability of the air carrier.

However, seeing that this important question could only be solved by an international convention, the French Government invited them to take part in a conference to be held in November, whose main aim would be to prepare a convention on the liability of the aerial carrier and to decide whether it was desirable to pursue the study of the international unification of private air law with regard to aeronautics. The majority of the governments desired that the project to be discussed should be communicated to them several months before the conference. For this reason, the Conference was adjourned on two occasions. On June 30, 1925, the French Government addressed another letter to the diplomatic representatives, submitting a draft International Convention relating to the liability of the air carrier. In this letter, the date of the first International Conference on Private Air Law was fixed for October 26, 1925, to be held in Paris. The Conference, at which forty-three nations were represented, lasted until November 6, 1925. The Conference decided to submit, for the approval of the governments represented at the Conference, a draft Convention relating to the liability of the carrier in international carriage by aircraft. The Conference expressed the wish to set up a committee of experts who would continue the work of the Conference. This committee met in Paris in May 1926 and constituted the Comité Internationale Technique d'Experts Jurisdique Aériens (CITEJA). This was an independent international organization, of an advisory character, with a secretariat in Paris. At its sessions in 1927

and 1928, the committee prepared a draft for the unification of certain rules relating to international carriage by air. This draft was circulated by the intermediary of the French Government to all the governments who took part in the 1925 Conference, before being submitted to the second International Conference on Private Air Law. This Conference, which took place in Warsaw from October 4-12, 1929, prepared and opened for signature a convention entitled "The Convention For The Unification of Certain Rules Relating to International Carriage by Air", now commonly known as the Warsaw Convention of 1929.

The purpose of the Convention is set out succinctly in the text opened for signature:

> "Ayant reconnu l'utilité de régler d'une manière uniforme les conditions du transport aérien internationale en ce qui concerne les documents utilisés pour ce transport et la responsibilité du transport."(2)

According to this, the aim of the Convention was twofold:

(a) to establish a certain degree of uniformity;

(b) to limit the potential liability of the carrier in case of accidents.

One way in which the drafters chose to effect uniformity was by limiting the places in which suit might be brought.

Prior to the Warsaw Convention there were no uniform rules of law governing the right of a passenger or of the owner of the goods in aerial transport. Therefore, in cases of international carriage, those rights depended upon the laws of the countries between which the carriage was performed. The

laws differed and the result was uncertainty and confusion. The following example shows the conflict of laws as would often have occurred in practice:

A German travelling in an English aeroplane is killed in an accident in Belgium. The ticket under which he was travelling was purchased in Poland for a journey from there to Scotland via Germany. His widow brings action in the English court against the owners of the aircraft, claiming damages for his death. Without the rules of the Warsaw Convention, there might be a conflict between the different laws of the countries mentioned above.

In such a case, the English court will have jurisdiction according to the principle rules of Common Law in regard to torts and contracts. For example, an English court will have jurisdiction and will hear an action in respect of torts:

(i) in all cases in which the defendant is amenable to the process of the court by being present within the jurisdiction at the time when the writ is served on him, or

(ii) where he voluntarily submits to the jurisdiction, or

(iii) where leave for service of process out of the jurisdiction has been given on the grounds laid down in Order 11 of the Rules of the Supreme Court, 1883.(3)

In the case of contracts, the corresponding act giving rise to the question of liability is a breach of the contract. In a case of a breach of contract, the jurisdiction of an English court depends upon whether the parties have submitted

to the jurisdiction; or are within England; or the defendant being abroad, if the contract was either made within the jurisdiction or intended to be governed by English law.(4)

It must be noted that locality as regards contract sometimes presents a somewhat different problem from locality as regards torts. In torts cases, the question is: within what jurisdiction was the tortious act done and what law determines the ensuing liability? In the case of contract, the corresponding act giving rise to the question of liability is the breach of contract, it may become necessary to decide the question within what national jurisdiction the breach has occurred. The Warsaw Convention put an end to this conflict of law.

CHAPTER II

ARTICLE 28(1)

Article 28(1) of the Warsaw Convention deals with the question of judicial jurisdiction: it establishes the norms for selecting jurisdiction within which actions for damages must be brought. The article attempts to provide uniform rules for the situs of suits arising out of international journey.

The article gives the plaintiff the option of bringing his action in the court of any one of four possible places, provided it is within the territory of one of the signatories to the Convention:

(a) the domicile of the carrier;

(b) his principal place of business;

(c) place of business through which the contract was made;

(d) the place of destination.

In the preliminary draft prepared by CITEJA, a further choice was existed:

> "And where the aircraft fails to arrive, the place of the accident..."(5)

The drafters had recognized this forum as a possible jurisdiction

> "... by reason of the ease with which one might there establish the circumstances of the accident."(6)

The British delegate proposed to delete this forum for two reasons:

(a) "... the place of accident has absolutely no connection with the contract or with the place of which the parties are considered to have given jurisdiction. Ordinary contract law assigns jurisdiction to the place where the contract was made, but the place where the accident occurs may have absolutely no relation to the contract, and (b) in the course of long journey, such as a trip from London to India, you pass through countries where courts are not well organized. There would be very great difficulties, for example, in bringing suit before the courts of Persia or Mesopotamia. The carrier also would have enormous trouble in defending a case which might be brought in these far-off countries, where the courts really are not well organized."(7)

The Polish delegate preferred to retain this forum. He pointed out that:

> "... it would be quite difficult to eliminate the forum loci which appears to be an altogether natural one from the point of view of procedure in which to bring an action."(8)

He claimed that:

> "... if we consider the material elements of the accident which produce the liability action, we think at once of the place of the accident so that from the legal point of view it would be difficult not to include that place."(9)

He observed that

> "... the convention does not deal with matters of execution. He who would bring an action will have to assure himself whether the foreign forum gives him a means of levying execution. He will naturally choose a tribunal of a country where the judgment may be thereafter enforced in the defendant's country."(10)

For these reasons and for reasons "of general policy", the Polish delegate, Mr. Babinski, preferred to retain this forum.(11) His points were supported by Mr. Youpis, the delegate from Greece, who claimed that:

> "... the person suffering damage, as well as the carrier himself has a very special interest in having easy proof, and certainly proof cannot be easier than on the very spot where the accident occurred. Against this are raised objections that there are countries where justice is badly organised and the injured person might take advantage of this fact as a sort of blackmail. This is true, but if it is difficult for air navigation enterprises to appear in a far-off country where justice works poorly, the same difficulty confronts the injured person with even greater force. Moreover, the limitation which we have fixed for liability would not allow a person to run the risk of going to a far-off country if he knew that justice was not certain there."(12)

He added that the place of destination listed as a jurisdiction in which the injured person may bring an action "can also be in Mesopotamia - a country where the courts don't work very well,"(13) and for this reason the Convention should maintain this forum. The British amendment to omit the forum where the accident occurred was supported by the delegates from France and Switzerland. The French delegate, Mr. Ripert, pointed out that

> "... jurisdiction in courts of the place where the accident occurred is justified when the victim is a third person, a stranger to any contract of carriage, and who has the right to be protected against the carrier. But when there is involved a shipper of goods or a traveler who has entered into a contract and who by that fact alone has placed himself under the governing rules of the convention and the law of the contract, there is no reason at all for that person to go trying his case before any old court which happens, by change, to be the court of the place of the accident. Not only is there no reason for it, but it is extremely dangerous because if in the convention we say that the court of the place of accident has jurisdiction, it will not have jurisdiction unless the state where one wants

> "to begin action has ratified the convention. Consequently, we would find ourselves in the presence of a very complicated rule. It would be necessary for the victim to know whether the state at the place of accident has ratified the convention."(14)

The delegate from Switzerland felt that

> "... if an accident occurs, without any invitation being issued, the police of the place of accident will turn up on the spot. They will be concerned not with matters relating to the transportation but with those relating to the accident. With respect to the accident, the question will be brought to light immediately on the very spot by the authorities of the country if it is well organized. And if it is a non-organized country all the objections of the forum loci are presented."(15)

He continued, saying that;

> "... every time an accident occurs there is an immediate police intervention. If there are no police what kind of courts would you have? On the other hand, if there are police the facts observed by them will be carried before the courts selected by the parties in the contract. That is to say, the court of the place of departure or of arrival."(16)

This argument - of police investigation - is of no value today since investigations of air accidents are done, not by police, but by experts. Finally the British proposal was adopted and this forum was deleted from Article 28.

There are different opinions as to whether or not this decision - to omit the place of accident as a jurisdictional forum - was a reasonable one. Those who think that this decision was a reasonable one claim, as the French delegate said, that whenever there is an accident, the police immediately intervene; if there are no police, not much can be expected

from the courts; on the other hand, if there are police, the facts discovered by them will be brought before the courts chosen by the parties.(17) Others think that this argument is a weak one, as

(a) "... even with the inclusion of the court having jurisdiction at the place where the accident occurred, the over-all limitation on jurisdiction would have little effect since with the possible exception of certain British and French colonies and protectorates, the High Contracting Parties are for the most part countries with satisfactory judicial systems;"

and (b) "... the same argument might equally apply to the place of destination or the carrier's place of business through which the contract of carriage was made. Furthermore, the plaintiff cannot be expected to select such a remote forum because of the difficulty which is likely to result in enforcing any judgments obtained there in other jurisdiction."(18)

An unsuccessful attempt to include this forum was made at the Hague Conference in 1955. At this Conference, the delegate from Greece stated that the reason of non-acceptance of this forum at the Warsaw Convention was not justified. His delegation considered that a court being closer to the place of the accident was in a better position to collect evidence in order to ascertain the conditions under which the damage was caused.

He understood that by increasing the number of competent courts, the danger of conflicting judgments became greater, but one could not disregard the advantage of bringing the action before the court of the place of the accident and, for that

reason, he wished to present his proposal in case the Conference showed any interest in it. The Conference decided not to discuss this proposal at that time.(19)

Goedhuis, one of the leading commentators on the Warsaw Convention and the Chairman of the Hague Conference, criticized the outcome of the Warsaw Convention as having too many places of jurisdiction. He was convinced that

> "... in view of the special character of aviation it will be felt in practice that too many courts have been declared competent in Article 28. It would, in our opinion, be of much importance if at the next revision it could be stipulated in Article 28 that all actions must be brought before the court of principal place of business of the carrier."(20)

The problem of jurisdiction was raised again by the delegate from the United States at the Seventeen Session of the Legal Committee of the International Civil Aviation Organization (ICAO) which met in Montreal, February 9 to March 2, 1970.

The delegate from the United States proposed to amend Article 28 and to permit suit to be brought:

> "... in the State of domicile or permanent residence of the claimant, if the defendant carrier has a place of business in that State and is subject to its jurisdiction."

He felt that it was of prime importance that an American citizen should not be unnecessarily denied the right, which he would otherwise enjoy under U.S. law, to sue the carrier in the court of his own country. He claimed that with the existing wording of Article 28 of the Warsaw Convention, an American claimant ran the risk in certain cases of being

unable to take advantage of this right.

In support of his proposal, he cited two cases:

> "(a) Side trip - A U.S. citizen travels to Italy on vacation and, during his stay in that country, purchases a Rome-Paris ticket and sustains bodily injury during this side trip. Under the present Article 28 of the Warsaw Convention he would not be able to bring an action in liability against the carrier in a U.S. court. However, in the absence of the Warsaw Convention, if the same U.S. citizen were to travel in an aircraft of the carrier and if the latter had a real presence in the United States, an action could be brought against this carrier in the American courts.
>
> "(b) Residence abroad (Burdell case) - An American family is residing abroad because the husband works for a U.S. firm located overseas. He purchases a flight ticket in the foreign country in which he and his family reside in order to travel to another foreign country. On the return flight the aircraft crashes and the husband is killed. As is natural, the widow then returns with her children to the home country, i.e., the U.S. In these circumstances she would not be able to bring suit in the U.S. courts under the present Article 28 of the Warsaw Convention."(21)

The delegate from Belgium raised the following question:

> "What would be the law or legislation applicable in the American Court if the need arose? Would the American Court, if it had jurisdiction under the American proposal, apply its own law to the carriage concerned?"(22)

He was of the opinion that this issue involved the whole scope of applicability of the new Convention.

The delegate from Bulgaria considered this proposal unacceptable because (a) the American delegate "had not invoked any valid or introvertible legal argument or justification to demonstrate the necessity of the amendment in

question"; (b) this proposal "aimed at keeping all USA citizens under the jurisdiction of the United States of America in law suits for damages. In other words, the USA wished their citizens to enjoy a privileged position in international air transport, while the nationals of other countries would not be so privileged"; (c) "The Committee was not called upon to develop a convention concerning the privileges of USA citizens in international air transport."(23)

The delegate from the United States answered that to add the proposed forum is not a political question, as was mentioned by the delegate from Bulgaria. He thought that this was a matter of substantial justice that a claimant be allowed to bring suit in a court of his own country.(24)

The New Zealand delegate thought that the U.S. proposal was, in principle, logical. The public interest in his country required that "New Zealand citizens injured overseas be permitted to prosecute their claim under New Zealand law, provided that the carrier was also subject to New Zealand jurisdiction."(25) He felt that nationals of other countries should have the same privileges. This, of course, raised the question of forum-shopping. In order to avoid this question, he suggested that the committee "would establish an international convention which provided a system of automatic compensation with a limit of liability that was unbreakable in all circumstances."(26)

The French delegate was of the opinion that such individual jurisdiction could be a "retrograde step", as

being contrary to any international agreement. His colleague drew the attention of the committee to the fact that

> "...Article 28 of the Warsaw Convention referred to the contractual situation and ties it to the place which the contract had been signed or had come into force, as well as the claimant's place of domicile."(27)

He emphasized the fact that "where uniform rules are being established there can be no question of consecrating national jurisdiction in an international context."(28) In his view, to accept the American proposal "would be tantamount to reverting to State egoism, which aimed at protecting national jurisdiction in opposition to every international rule." Rather than this, it would be better to delete Article 28.(29)

The Italian delegate could not accept the U.S. proposal which, in his opinion, went back to the Middle Ages concept of jurisdiction. He agreed with the arguments of the Belgian delegate. The American proposal would inevitably increase awards and premiums. It also invited forum-shopping. He claimed that

> "If the same case were brought before the courts in his own country, a certain defence, namely lis pendens, could be invoked and this would prevent the two courts from taking a decision on that case at the same time. But if the same case were brought before the courts of two different countries, this defence would not necessarily be admitted."(30)

The Spanish delegate hoped that a formula could be found which would fit in with the U.S. system. He personally could not accept the amendment of Article 28, as this would

mean "departing from a fundamental rule - the rule of unification - which was at the very root of the Warsaw Convention."(31)

The U.S. proposal required jurisdiction of an American State court, that a victim should not be subject to jurisdiction other than his own. However, this did not imply that no foreign jurisdiction should be applicable. He would like to know what the United States understood by "place of business". Does it mean advertising service of airline, the branches, offices, agencies or representatives which, in many cases, they maintain throughout the world?

> "If so, the airlines could be said to have 'places of business' everywhere. This would mean that there would be as many competent courts and national jurisdiction as business in the different countries."(32)

The delegate from Czechoslovakia said that the U.S.A. was interested only in its own citizens. Most of the U.S.A. people would be subject to Article 28 because they would start their journey or purchase their ticket in the U.S.A. and, according to Article 28, could bring suit in U.S. courts. He thought that if an American citizen bought a ticket outside the U.S.A., in such a case the foreign jurisdiction - where he bought the ticket - should apply.(33)

The Brazilian delegate saw no need to amend this article. To accept the American proposal meant to have an entirely new Convention. "Any amendment to specific points which were not clearly essential, such as jurisdiction, would have only the result of aggravating the difficulty of obtaining ratification."(34)

The Canadian delegate associated himself with the delegate from New Zealand. He suggested the phrase "permanent residence of the claimant" for the reason that such a phrase would avoid lengthy litigation to determine the domicile. Finally, he preferred to speak of "permanent residence of the victim" because "in every case there was only one victim, but there might be many claimants."(35)

The Tunisian delegate favoured retention of Article 28 as is. He claimed that "to add a fifth .... would be excessive and run the risk of being considered an unjustified extension."(36)

The Colombian delegate agreed with the views of the French, Spanish and Italian delegates. He agreed to review Article 28 only if all jurisdictions were eliminated.(37)

The Australian delegate considered the U.S. proposal a "relatively minor extension" of Article 28. He felt that it should not be taken as conferring advantages on the U.S. citizens only. He was of the opinion that

> "The amendment would apply, for instance, to a Bulgarian national living in London who purchased a ticket in that city and took a Swissair flight to Brussels. In this case he could bring suit either in London or in Belgium which was the place of destination. This was the situation under Article 28 in its present form. It might well be that none of those jurisdictions was convenient to him and all the amendment did, as he understood it, was to enable this Bulgarian national or his dependents to sue in the Bulgarian courts if Swissair had a place of business in Bulgaria and was subject to the jurisdiction of Bulgarian courts."(38)

He felt that the proposal was simply a practical extension of the four other jurisdictions already provided in Article 28.(39)

The United Kingdom delegate supported the Canadian view of changing the word "domicile" to "residence". He also agreed that reference should be to the "residence of the victim", since there was only one victim.(40) He could see why other delegations were afraid of the U.S. proposal, because of "long arm activities of the United States' courts."(41) The amendment would have been improved if it had said that jurisdiction should take effect if the airline had an office in the U.S.A. He believed that the Americans were really worried about the possibilities facing their citizens who resided abroad, and the consequences which might follow in certain cases.(42)

The delegate from Tanzania repeated his objection to the proposal but favoured the expression "permanent residence", since the "concept of 'domicile' was rather nebulous."(43)

The Netherlands delegate was against the proposal. He would have preferred to limit the jurisdiction rather than extend it. The Burdell case, quoted by the U.S. delegate, did not convince him. He supported the idea of replacing the phrase "place of permanent residence of the plaintiff" with "the place of permanent residence of the victim." He also preferred the expression "office" or "business establishment", as suggested by the representative of the United Kingdom.(44)

The German delegate was also against the proposal, but he was of the opinion that

> "... if concessions were necessary in order to reach a compromise, his delegation would be

> "ready to live with the United States proposal, subject to certain modifications suggested by the delegates of Canada and the United Kingdom."(45)

The U.S. delegate, replying to certain comments on his proposal, indicated that this proposal

> "... would avoid adopting a convention which would restrict the right of an American citizen to bring an action in an American court against an airline located in the United States of America."(46)

The observer from IATA did not believe that the American proposal in regard to Article 28 of the Warsaw Convention was a discriminatory element. In his opinion "... it could not be said that an American judge would do a different justice from that of a Peruvian judge or from another judge."(47)

The Committee agreed, by twenty-one votes to fourteen, that in a case of death, injury or delay suffered by a passenger, the plaintiff shall have the option of suing either in one of the courts described in Article 28 of the Warsaw Convention, or in a court within the territory of one of the contracting parties where the carrier has an establishment if the passenger has his domicile or permanent residence in that territory.(48)

The drafting Committee adopted the following text:

> "In respect of damage resulting from the death or injury (or delay) of a passenger, the action may also be brought in the territory of a High Contracting Party before the Court where the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party."(49)

At the last revision of the Warsaw Convention which took place at Guatemala City in March 1971, the following forum was added:

> "In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in Paragraph I of this Article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party."(50)

The Warsaw Convention was adopted in the French language and this is still the only official text.(51) At the Hague Convention for the amendment of the Warsaw Convention in 1955, there was strong support for a trilingual text with equal authenticity for each language, but finally a clause was inserted in Article XXVIII of the Hague Protocol, reading: "In the case of any inconsistency, the text in the French language in which the Convention was drawn up, shall prevail." Thus, the primacy of the French language was confirmed and the explicit reference to this language remains unchanged.

There are two different English translations of Article 28 - the British translation and the United States one. The British version is the official text as accepted by the British Parliament, rather than the original French.(52) Commenting on the British text, the court in the Corocraft Case(53) stated that by passing the Carriage Act, 1932, the English Parliament intended to give effect to the French text

by making an exact translation of it into English. But

> "... the English Parliament failed in their object... The translation produced certainty where there was obscurity... In order to produce an exact translation, the translator should reproduce the French text faithfully, with all its defects, deficiencies, ambiguities and uncertainties."(54)

In the United States the French text prevails. The translation provided by the United States Department of State, while not officially accepted, accompanied the original French version at the time of ratification by the United States Senate(55) and has been used in a semi-official manner in all proceedings involving the Warsaw Convention before the United States courts.(56) The U.S. Court of Appeals for the Fifth Circuit has held that the binding meaning of the terms in the Warsaw Convention is the French legal meaning.(57)

The British text provides:

> "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination."(58)

The American text reads as follows:

> "An action for damage must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business through which the contract has been made or before the Court at the place of destination."(59)

The differences between the two English translations will be discussed in proper places.

CHAPTER III

THE FOUR CONTACTS OF ARTICLE 28(1) OF THE WARSAW CONVENTION

(A) CONTACT ONE - DOMICILE

This area of jurisdiction did not exist in the CITEJA Draft of the Warsaw Convention. It was only during the proceedings of the Warsaw Conference, and almost incidentally, that one delegate noticed that the principal place of business was mainly related to companies, and that it was necessary to provide a more adequate place in relation to individual air carriers.(60) There is a difference between the British and the American translations as to this contact of domicile. Whereas in the official British translation the words "Court having jurisdiction where the carrier is ordinarily resident", the translation given by the U.S. Department of State uses the words "Court of the domicile of the carrier" (emphasis supplied).

Residence is not synonymous with domicile. Residence is "a factual place of abode; living in a particular locality. It requires only bodily presence as an inhabitant of a place."(61)

Domicile is the relation which the law creates between an individual and a particular locality or country.(62) In many instances domicile will determine which legal system governs the personal relations of an individual whose rights are at issue in the courts. It is "that place where a man has his true, fixed, and permanent home and principal establishment,

and to which whenever he is absent he has intention of returning."(63) In a number of countries, like Canada, domicile is thought of as a place of principal establishment, the permanent home. This is either the place in which an individual's habitation is voluntarily fixed without any intention on his part of removing there-from, or the place assigned to him by law.

The British and the American view of domicile is that every person must have a domicile and only one at a particular time, but may have more than one residence.(64) The same applies to corporations, Jurist defining the domicile of a corporation as the country where "central control and management abide",(65) "place where control over the whole of the transactions of the corporation was actively exercised."(66)

In a Canadian case, it was stated that the domicile of a corporation is the country in which it was incorporated and clings to it throughout its existence.(67)

In another Canadian case,(68) where a company was incorporated in Nova Scotia and had its registered office there, it was held that the principal or chief place of business was to be its domicile, irrespective of the place of incorporation. The court also recognized that a foreign or domestic corporation may have more than one residence.

The theory of English law of the residence of a corporation is purely a Common Law theory.(69) The term residence does not necessarily involve the element of a home,

permanent or otherwise, and may best be defined as "habitual physical presence."(70) "A company resides.....where its real business is carried on .... and the real business is carried on where the central control and management actually abides."(71)

In England, a company is regarded as "residing" in that country if it does business at some fixed place of business, even though temporarily.(72) It seems that the word "ordinarily" in the British translation of Article 28(1) of the Warsaw Convention, is used to indicate that more than mere temporary presence of casual or occasional visits to the country are required to bring the carrier within the jurisdiction on this ground.(73)

"Residence", in the British translation of Article 28(1), has a wider range than "domicile" in the American translation. A person may have two places of residence, as in the city and in the country, but only one domicile. Residence means living in a particular locality, but domicile denotes living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

In the United States, a corporation may be incorporated in another state; in that respect, it would seem that the corporation possesses more than one domicile.(74) The same tendency toward plurality of domicile exists for individuals. This trend is evidenced by the fact that the American Law

Institute is now preparing to abandon its previous unilateral definition.(75)

The differences between the British and American translations of Article 28(1) of the Warsaw Convention in regard to Contact One have posed difficulties.

The French writer, de Villeneuve(76) states that

> "... actually, the concept of domicile in Anglo-Saxon Law is different from the French concept. The closest - but not exact - translation of the French domicile is ordinary resident which is the expression used in the English text. The term domicile is much stricter in the United States."

The author concludes, with reference to English and French law, that

> "... while fuzzy, it would seem that under Article 28 the idea of the court of the domicile of the carrier, or of the main office of its business, is a divisable notion which recurs in each country where the enterprise has important business, a concept going far beyond any interpretation given to Article 28 by an American court."(77)

Others claim that the American translation provides that action may be brought "either before the court of the domicile of the carrier or his principal place of business." Therefore, the American translation uses disjunctive terms twice, namely, "either" and secondly "or". It has never been held by any court that registration of an airline in a foreign state, or the fact of its doing business there would confer domicile in that foreign country. It has been suggested that this language indicates that the term "domicile" is not to be equated with "principal place of business." The term

"domicile" in its ordinary context should be distinguished from "principal place of business", and be some other place or places. Otherwise the language would be redundant and superfluous. The term "domicile" should include places where a carrier goes to carry on business.(78) This opinion has been criticized by another writer as going far beyond any American interpretation of Article 28.(79)

In the official British translation it states "the Court having jurisdiction where the carrier is ordinarily resident." If the drafter of the Convention intended to limit the place of suit to only the principal place of business of the carrier, this could have simply been stated.(80)

In the High Contracting Party which is composed of federated states, such as the United States, the use of the term "domicile" creates a question as to whether the domicile referred to in this Article extends to the whole territory of a contracting country, or whether it denotes the component state in which the carrier has its residence, if an individual, or is incorporated, if a corporation.(81) For example, a carrier operating across the border between Mexico and the United States may be incorporated in Delaware. Does domicile mean any state in the Union, or Delaware? If it is restricted to the latter state, is there any hardship on the plaintiff, in view of the other choices which he may make in selecting a forum?(82)

This problem was dealt with in Dunning v. Pan American World Airlines Inc.(83) where the defendant argued that the

term "domicile" of the carrier in Article 28 was applicable only in the case of non-corporate carriers. This case will be discussed in a later chapter. (84)

There are various opinions on how to solve this problem. One opinion is is that this difficulty could be solved if the American translation used the same wording as was used in the British translation.(85) Those who object to this view claim that it is not apparent how the use of the British text would simplify matters. They claim that even if we were to use the British translation, the same question of applicability to the uniform territorial sovereignty vis-a-vis the component state is present with regard to the other three jurisdictional contacts as well. For example, if the place of destination is New York City, New York, will the State of Massachusetts be able to hear the case in the absence of one of the other three contacts being in that state? On the other hand, if the Federal courts were chosen, would the United States District Court, in some district outside of New York, have jurisdiction of the case, assuming that other contacts were lacking? These are questions which, though jurisdictional in nature, are most closely related to venue when considered on the level of international agreement, and will be treated at a later point in this study.(86)

Regardless of the impact of the British translation before the courts of the United Kingdom and Commonwealth nations, it would appear safe to assume, before any court of the United

States, that the place of incorporation of a carrier corporation has jurisdiction under Contact Number One: "the carrier's place of domicile."(87)

Based on the British translation, Contact One, "where ordinarily resident" and Contact Two, "principal place of business" are at best difficult to distinguish in practice. On the other hand, the difference between "domicile" and "principal place of business" is readily apparent in theory and in practice. For example, an air carrier might incorporate in country X for tax and/or other purposes, but maintain its executive offices and conduct its principal business activities from country Y. Conceivably, all of the corporate officers and directors could be in country Y with only a designated agent for legal purposes in country X. Under this situation, could country X be considered the place where the carrier is ordinarily resident? Certainly a serious factual question is raised. On the other hand, country X is without question the place of domicile of the carrier corporation, regardless of other contacts which might be available.

It appears that, for the purpose of Article 28, "the domicile of the carrier" still refers to the country where the carrier, if a company, is incorporated.

In order to avoid lengthy litigation to determine the domicile of a carrier, it is suggested to replace the term "domicile" by "permanent residence."

(B) CONTACT TWO - PRINCIPAL PLACE OF BUSINESS

The British and United States texts are identical as to this contact.

As previously stated,(88) "principal place of business" is not synonymous with, or test for "resident" or "domicile", either for a corporation or as to a natural person.

Many factors may enter the picture regarding whether or not a corporation does business in a particular state. Such factors are: maintaining a representative in the state, solicitation of business in the state, use of advertising or public relations agency within the state, maintenance of a bank account in the state, presence of associated companies which may or may not have similar names, and presence in the state of a subsidiary corporation which acts as a managing agent of the corporation. All these factors may contribute to the conclusion that the corporation is doing business and is legally present in the state, so that it may be served with process.(89)

The "doing business test" is so flexible that it is almost impossible to circumscribe.

In Berner et al v. United Airlines, Inc.,(90) the Appellate Division of the New York Supreme Court held that British Overseas Airways Corporation was an agent in New York of British Commonwealth Pacific Airways, so that the latter was doing business in New York and was adequately served through service of process on the former.

In Bryant v. Finnish National Airline,(91) the New York Court of Appeals stated:

> "The New York office is one of many directly maintained by defendant in various parts of the world, it has a lease on a New York office, it employs several people and it has a bank account here, it does public relations and publicity work for defendant here including maintaining contacts with other airlines and travel agencies and, while it does not make reservations or sell tickets, it transmits requests for space to defendant in Europe and helps to generate business. These things should be enough."(92)

In Ciprari v. Servicos Aeroes Cruzeiro,(93) it was decided that a U.S. citizen, resident of New York, injured on a flight of Cruzeiro de Sul, between Rio de Janeiro and Sao Paulo, may sue the airline in the Federal Court in New York, where the Brazilian airline, although operating no aircraft in New York, maintained a permanent New York office for the purpose of purchasing spare parts and supplies for its fleet of forty-six American manufactured aircraft. Under New York State law, such activity constitutes "doing business" so as to subject the Brazilian airline to in personam jurisdiction in New York.

In Lake-Land Amphibians, Inc. Sofair Flying Services, Inc.,(94) it was held that a New Jersey corporation engaged in selling aircraft and having its sole place of business in New Jersey, is not doing business in New York because it maintains listing in the classified sections of New York's telephone directories. Suit by a New York resident against defendant in New York State court would be dismissed, even if it be assumed that the plaintiff looked up the defendant's telephone number in the New York telephone directory and direct-dialed his order to the New Jersey office for the purchase of a new airplane for delivery to plaintiff in New York.

An aircraft manufacturer who maintained an office in Washington, D.C. and had its name in the telephone directory under "airplane" was held to have submitted itself to the jurisdiction of the District of Columbia Courts. The court stated:

> "However, when a corporation maintains an office and otherwise, as here, holds itself out to the public generally as being present in the District of Columbia, for the purpose of doing business, it surely cannot be said that it does not submit itself to the jurisdiction or the processes of the courts in the District of Columbia."(95)

In another American case,(96) the court stated that:

> "...where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective."(97)

Unlike the comparatively simple establishment of domicile under Contact One as the jurisdiction wherein the carrier is incorporated, Contact Two, depending on the circumstances of the particular case, may require the presentation of convincing evidence that the carrier actually has its principal place of business within the jurisdiction of the forum.

In Kelly v. U.S. Steel Corp.,(98) the question presented was whether the United States Steel Corporation, which held regular meetings of its Board of Directors, made final decisions through its Board of Directors and top executive officers, maintained offices for its secretary, treasurer, comptroller

and general counsel, declared dividends, and conducted its major banking activities in the State of New York, had its principal place of business in New York or whether it was not in Pennsylvania, where it held meetings of its operations and policy committee, which conducted the business of the corporation relating to mining, manufacturing, transporation and general operation, maintained offices for seven executive vice-presidents, sixteen out of seventeen administrative vice-presidents, and twenty-two out of twenty-five vice-presidents, and employed about fourteen times as many people as it employed in New York. The court found that:

> "All this points to us the conclusion that business by way of activities is centered in Pennsylvania, and we think it is the activities rather than the occasional meeting of policy-making directors which indicate the principal place of business."

In this regard, it is conceivable that an international carrier, with two or more operating divisions or with a separation of its various executive functions into two or more geographic locations, would require extensive hearing and submission of evidence to determine the jurisdiction of the forum before even considering the merits of the case itself.

There is a serious and extreme possibility that, under the situation set forth above, several forums might hold simultaneously that the carrier's principal place of business is located within their jurisdiction and, as a result, assume jurisdiction in more than the original four contacts contemplated in Article 28(1) of the Convention.

In an isolated decision - Winsor v. American Airlines Inc.[99] - a United States District Court interpreted this provision to mean in effect "A principal place of business" rather than "The principal place of business" (emphasis supplied). In this case, plaintiff's intestate had purchased air transportation ticket from Gander, Newfoundland, to Seattle, Washington and return. The accident occurred in Colorado. Suit was commenced in the United States District Court for the Eastern District of New York. It appeared that its principal executive offices were located in Chicago. The question of "jurisdiction", the court said, was whether the defendant maintains "a principal place of business" in New York. The court concluded that a distinction should be drawn between the New York and Chicago offices, since defendant did a large volume of business in New York. The court concluded that United Airlines could have a principal place of business in both New York and Chicago, for the purpose of the Warsaw Convention. This decision has never been followed.

In a later case, Nudo v. Sabena Belgian World Airlines,[100] the court emphatically denounced the interpretation of the Winsor case. In the Nudo case, the plaintiff cited the Winsor case as support for jurisdiction with the only local contact being a sales office which, the plaintiff urged, constituted a principal place of business. The court in its decision stated that: "... under this language (Article 28), there can be only one principal place of business."[101] (The judge

found this buttressed by the original French text: "du siège principal de son exploitation", which he translated literally as "of the principal seat of its business".) Obviously, this interpretation gives effect to the literal meaning of Article 28(1).

In Clothier v. United Airlines Inc.,(102) the court stated that:

> "there is no set standard to be used in deciding where a corporation's principal place of business is located. Each case must be decided upon its own peculiar set of facts."(103)

In this case, which arose out of a mid-air collision over Brooklyn and Staten Island in 1961, TWA moved for an order dismissing the action on the grounds of lack of jurisdiction, contending that its principal place of business was in New York. In listing its corporate setup, TWA named nine of its officers who performed their duties in New York - its President and eight vice-presidents in charge of various functions or departments. Clothier, in opposing TWA's motion, listed various facts including that the Civil Aeronautic Board regulating and licensing TWA, stated that TWA's principal officers were in Missouri; that its Chairman of the Board was elected in Missouri; that they employed over 18,000 employees, thirty-five per cent of whom were in Missouri and only nineteen per cent in New York; that although nine officers performed their duties in New York, five headed departments that possessed minor responsibilities, an extremely limited number of personnel and, in addition, three

of these vice-presidents spent half or more of their time in New York; that executives and their departments, technical services and transportation are centered in Missouri and form the hub of TWA's activities around which everything else revolves; and that these two departments employ seventy-five per cent of all its executives in Missouri; and that the Finance department has ninety-one per cent of its employees and the overwhelming number of its executives in Missouri. Despite the fact that its highest executive offices were in New York, the Court found that its principal place of business was Missouri, where thirty-five per cent of the employees worked and where its most important divisions were centered. The Court, after balancing all the activities performed in both states, held that:

> "... it is obvious that the center of activity is in Missouri. The corporate life of TWA as a carrier depends on those activities performed in Missouri. The inescapable conclusion from all these facts is that the principal place of business of TWA is in Missouri."(104)

On the other hand, in Shackten v. Eastern Air Lines,(105) an unreported case in the Eastern District of Pennsylvania, Eastern Air Lines was forced to concede that its principal place of business was New York, the place of its executive offices, notwithstanding the fact that it employed more people in Florida. Eastern Air Lines had always listed its principal office as New York and the control of activities was largely there. In Wood v. United Air Lines Inc. and Trans World Airlines, Inc.,(106) the action arose out of a mid-air collision

of two airplanes owned by the defendant, UAL and TWA, over Staten Island, New York (the Clothier case arose out of this same air collision). The plaintiff alleged that they are citizens of the State of New York and the defendant, UAL and TWA, are citizens of the State of Delaware, doing business within the State of New York and that the Eastern District Court of New York has jurisdiction. In answer to this complaint, UAL admitted that it is a corporation duly organized and existing under the law of the State of Delaware, and both admitted that they are doing business in the State of New York. Notwithstanding Clothier, plaintiffs contended that additional information set forth in a stipulation of facts should cause the Court to find that TWA's place of business is New York. The plaintiffs claimed that in Clothier no reference was made to the fact that the World Aviation Directory listed TWA executive and sales offices in New York; the cable address was also listed as New York, N.Y.; that out of thirty-seven principal officers listed, twenty-three are in New York, N.Y., ten in Kansas City, Missouri and four in Washington, D.C.; that the Assistant Treasurer and five Assistant Vice-presidents are all located in New York, that three additional departments are located in New York, and that with this addition of these three departments, TWA employs approximately twenty-three per cent of its personnel in New York and approximately thirty-seven per cent in Missouri.

TWA contended that its principal place of business is

in the State of Missouri. It contended that none of the new facts could alter the court's decision in Clothier. TWA claimed that its Federal Income Tax return is in Missouri, according to the requirements of the International Revenue Code which requires a corporation to file in the district where it located its principal place of business. The court decided that:

> "The fixed tangible personal property in Missouri is four times larger than in New York and is a necessary adjunct to the operation of TWA. TWA, by filing its Federal Income Tax Return in Missouri, emphasized that its principal place of business is in Missouri and it similarly stresses this fact by listing Kansas City, Missouri, as its home office or general office in its Annual Statements .... The location of its Transportation and Technical Service Departments employing 78% of its employees in these two departments in Missouri points to the conclusion that TWA's business by way of its activities is centered in Missouri and not in New York. The balance of activity clearly points to Missouri .... TWA does not deny that the bulk of its senior executive officers have their offices in New York but that is not the touchstone or criterion. The locality where the greatest amount of its activities are performed is the criterion."(107)

In Dunning v. Pan American World Airways, Inc.,(108) the routing of the ticket issued to plaintiff was from Lisbon, Portugal, and return with various stopping places in Africa. The ticket was issued by Pan American in Paris. Suit was commenced in the Federal Court in the District of Columbia where Pan American maintained offices. The case was transferred from the District of Columbia to New York because Pan American's domicile and

principal place of business were in New York. This transfer was made even though Pan American had extensive facilities in the District of Columbia.

Conclusion

No Warsaw Convention case has given a specific definition to this contact. It is submitted that as a practical matter there can be, under this provision, only one principal place of business, as the framers of the Convention probably intended. The criterion of the principal place of business depends on the circumstances of the particular case which may influence the court. Such a criterion depends on the locality where the greatest amount of its activities is performed, which in most cases, will be the place where the executive and main administrative functions of the carrier are located.

(C) CONTACT THREE - PLACE OF BUSINESS THROUGH WHICH THE CONTACT HAS BEEN MADE

It should be noted that there is a variance under this contact between the British and United States translation from the French translation. The British translation uses the word "establishment", while the United States translation uses the words "place of business". The exact effect of this difference, if any, has never been specifically determined.

This contact may be easily determined if the ticket is sold by an office of the defendant carrier. The determination becomes difficult, however, when the office is staffed by personnel supplied by another airline or when the ticket or air waybill is sold either by another airline pursuant to an inter-agency agreement or by an independent travel agent who is authorized to maintain the carrier's ticket stock and issue such contracts of carriage on behalf of the carrier. A literal reading of Article 28(1) appears to preclude a court from exercising jurisdiction when a litigant claims only that the third contact is present and the ticket has not been sold by an office of the defendant carrier. (The article specifies "when he - the defendant carrier - has a place of business through which the contract has been made").

The case of Rotterdamsche Bank and Banque de l'Indochine v. British Overseas Airways Corp.,(109) provides an extreme example of literal interpretation of this article. In this case, the Queen's Bench declined to accept jurisdiction in

London over Aden Airways, a wholly owned subsidiary of BOAC, though the place of contracting had been in London, on the ground that Aden Airways did not have an "establishment" in England within the meaning of Article 28. The plaintiff, in this case, had delivered a shipment of gold coins to K.L.M. in the Netherlands for delivery to Banque de l'Indochine at Djibouti, French Somaliland. The contract of carriage for the entire trip was based on an agreement between the bank and BOAC in London. K.L.M., the first carrier, took the freight from Rotterdam to Cairo where it was turned over to Aden Airways, a BOAC subsidiary, for the remaining portion of the journey. Aden Airways carried it to Asmara where it was to be trans-shipped to another Aden Airways aircraft headed to Djibouti. Instead of going to its intended designation, the shipment was sent to Aden, whereupon it vanished. Suit was brought in London by the bank against BOAC and Aden Airways. The principal issue centered around the applicability of the Warsaw Convention. After it was determined that the Warsaw Convention was applicable to the flight, the jurisdictional problem immediately came to the foreground. The contract of carriage being with BOAC and entered into in London along with other obvious jurisdictional contacts, such as England being the principal place of business as well as the domicile of BOAC, left no doubt as to the court's jurisdiction. However, the court held that it lacked jurisdiction over the second defendant, Aden Airways. In delivering the opinion of the Court, the judge stated:

> "... Article 28(1) of the Convention which deals with jurisdiction was intended to be applied strictly, and I accordingly conclude that the effect of Article 28(1) is to oust the jurisdiction of the courts of this country to entertain a claim by the plaintiffs against the second defendant (Aden Airways)."(110)

The court's position is based on the absence of Convention Article 28(1) jurisdictional contacts as to Aden Airways inasmuch as its principal place of business and ordinary residence were Aden, and the place of destination was Djibouti. While the remaining contact, namely, the place where the contract was made, was not specifically mentioned, it is clearly implied that the BOAC office in London, where the contract was made, could not be treated as an "establishment" of Aden Airways. There is no evidence that the court considered the possibility of inferring an agency relationship between Aden and BOAC, and the decision has not escaped criticism. Giuseppe Guerri of the Institute of International Air Law of Rome University(111) claims that the interpretation of the Convention, though strictly related to Article 28(1), appears debatable. He is of the opinion that it is not unusual case for a subsidiary of an airline to be represented in different countries by another airline through internal agreements and for the purpose of reducing costs and expenses in operations. In such a case, one company would contract on behalf of the other, assuming direct obligations and liabilities toward passengers and other persons. The decision in this case, according to Guerri, does not discuss the connection between

BOAC and Aden Airways. If BOAC had authority as an agent to make the contract in London on behalf of Aden, the lack of jurisdiction found by the British Court might be challenged.

The facts in this case showed that the establishment where the contract was made between BOAC and the bank was London, but it should also be noted that BOAC undertook the carriage between Cairo and Djibouti, perhaps contracting on behalf of the other defendants and certainly intending that the transportation was to be performed by another carrier. Guerri concludes:

> "It would not be wise to go further and to draw conclusions which would be based on pure hypothesis. But we would point out that the hypothesis, if well grounded, could have brought a different decision."(112)

Another opinion is that it would appear proper, for the purpose of classification, to place this case under Contact One.(113) Others(114) think that there is no evidence that the court considered the possibility of inferring an agency relationship between Aden Airways and BOAC.

A more liberal construction of this contact has been obtained through a limited application of agency principles. The court, in Berner v. United Airlines,(115) found that the contract of carriage made in New York conferred jurisdiction because the airline maintained a place of business in New York City, and the ticket was purchased through that office.

In this case, an Australian airline had entered a formal contract whereby British Overseas Airways Corporation was to act

as its general sales ticket. The BOAC-British Commonwealth arrangement was described by the court as follows:

> "There was some regularity in the sale of tickets...The agent was required to observe and comply with all reasonable directions and instructions. The Australian airline on its part undertook affirmative obligation to its general sales agents with respect to equipment, personnel and standards of operation. There was even provision made for procedures to be followed in the case of accidents. Thus the finding of the maintenance of a place of business was based on the fact of a continuing agency."(116)

The court, in reading Article 28, recognized that the contract must have been made through the office relied upon to support jurisdiction. The Convention language, the court said, is as noted: "...where he (the airline) has a place of business through which the contract has been made." The court left no likelihood of misunderstanding the applicable reasoning and said:

> "This language includes places maintained by the carrier itself or through agents at which the ticket is sold. The language describes a 'place of business' not necessarily in the broad or general connotation of the term but one closely related to the sales of tickets, i.e., 'where the contract has been made'."(117)

The Rotterdamsche Bank case had two basic distinguished characteristics which helped to solve what might otherwise be a conflict in the holdings of the New York Courts and the English Courts. They are (a) that the agency relationship between BOAC and Aden Airways was not specifically named in the contract of carriage made with BOAC in London, and (b) that the agency

relationship between BOAC and Aden Airways was not specifically considered by the English courts in Rotterdamsche Bank. However, Aden Airways, a wholly owned subsidiary of BOAC, was clearly shown in the BOAC system timetable as being a carrier operating between Cairo and Djibouti.

In Berner, "a continuing agency" between the airlines was found sufficient to characterize the BOAC office in New York also as an office of the British Commonwealth.

One is of the opinion that it would be a mistake to conclude that the result in Berner signals a decided shift to an expanded use of agency concepts to satisfy the requirements of the third contact. Since the destination of the trip was New York, the Berner court clearly had jurisdiction by virtue of the place of destination; the agency rationale can be viewed as an alternate holding at best. It is also significant to note that the court in Berner stressed the explicit agency relationship and not only imposed mutual affirmative duties in excess of those incident to the unusual sales agency agreement, but also covered an extensive and persistent course of business. Actually, casual sales either by another airline or by an authorized ticket agent are beyond the Berner rationale.(118) The permissible limit to the use of agency theory under this contact has been further confused by the conflict in results reached by a State and a Federal court in the United States on identical facts, as in Berner.

In Eck v. United Arab Airlines, Inc.(119) the plaintiff, a

California resident, was a member of the Far West Ski Association which contracted with Scandinavian Airlines Systems (SAS) on her behalf for passage by air from Los Angeles to several countries in Europe, finally returning to Los Angeles. Plaintiff also arranged with the Oakland, California office of SAS for the purchase of tickets for a side air trip, while she was abroad, between several cities in Europe and the Middle East. One of the flights listed in the ticket SAS obtained for the plaintiff was to be on defendant United Arab Airlines from Jerusalem to Cairo. Subsequently, the plaintiff was injured when the plane, in flight from Jerusalem to Cairo, crashed in Wedi Halfa, Sudan, a place not scheduled as a stop on the flight but where the pilot was diverted in an attempt to avoid bad weather at Cairo.

The defendant carrier, UAA, an Egyptian airline who operates an office in New York City and, as an Egyptian airline has its principal place of business in Egypt. Two Federal courts in the State courts of New York and two lower courts in the District courts of New York were involved.(120) Both the Court of Appeals, Second Circuit, and the New York Court of Appeals reversed the decisions of the lower courts and held that the requirements of the third ground of jurisdiction were satisfied. In other words, the American courts had jurisdiction despite the fact that the ticket had been purchased in Oakland, California, from a Scandinavian Airlines System office, and that the carrier's office, located in New York, did not participate in the sale of the ticket.

Both decisions condemn "the literal translation of a phrase without an analysis of the treaty"(121) or "a mechanical interpretation of the third provision's language."(122) This liberal approach was justified by the change in booking and ticket sales procedures which had occurred since 1929. Both courts held that the interpretation of the Convention should accord with the present factual situation.(123)

The recognition of the courts' jurisdiction was reached by slightly different reasoning in the two courts. The New York Court of Appeals considered that the establishment of a place of business in the United States was evidence of the carrier's anticipation of defending possible suits there, on jurisdiction by consent, and refused to give effect to the chance circumstances of where the plaintiff made her purchase of the ticket within the territory of the High Contracting Party.(124)

> "The defendant carrier maintains a place of business, a ticket office, in New York City. This office would have sold the plaintiff passage on the same United Arab Airlines flight that SAS ticketed her on. When the defendant opened its United States office in New York it anticipated that it would be amenable to suits there for claims arising out of any carriage sold by that office, and the defendant would have to concede jurisdiction to our courts. But by happenstance the plaintiff made her purchase of a seat...in the SAS office which for our purposes could have been right next door."(125)

An analysis of the purpose of Article 28 led the court to hold that no relationship is required between the carrier's office and the sale of the ticket, provided that both are within the

territory of the same contracting party. The court stated that:

> "Throughout subdivision (1) of Article 28 the emphasis is on the distinction between absence or presence of the carrier in a territory...The treaty when interpreted so as to effectuate the obvious purpose of the contracting powers does not go as far as to exclude a suit in a particular area if the carrier has an office there and the ticket had been purchased in that particular area, or in another part of the territory of a high contracting party. An authorized venue is provided when there is a place of business in the territory and the sale of the ticket is closed within the territory."(126)

By contrast, the Court of Appeals, Second Circuit, apparently stayed closer to the text of the Convention, since the court's conclusion was that:

> "The Oakland, California office of SAS was a UAA 'place of business' within the territory of the United States 'through which the contract has been made'."(127)

To arrive at this result the court held that there was an agency relationship between SAS and the carrier. Such a relationship, however, was far less strong than the one recognized by the courts in Berner,(128) since the Court of Appeals stated:

> "Undeniably the Oakland, California SAS office acted as UAA's agent for purposes of issuing UAA's ticket and collecting UAA's fare. Even if this ticket sale to appellant was the only instance in which an SAS office has issued a ticket for transportation on a UAA flight, there would still be an agency relationship of sorts between UAA and SAS. However, in the absence to the contrary, this single instance of an agency relationship between SAS and UAA tends to establish that when this ticket was sold at least a tacit arrangement existed between SAS and UAA whereby each would issue tickets and collect fares for air transportation to be performed by the other."(129)

This is hardly an extension of the notion of place of business on pure agency principles. The Court of Appeals decided that the existing agency relationship was not sufficient to confer jurisdiction over United Arab Airlines. For that, the court considered that it was necessary to add to the agency relationship "the existence of a UAA booking office" in the United States.(130) It was only because of the union of those two elements that "the conclusion that the Oakland SAS office was a UAA 'place of business'...'through which the contract had been made' " was justified.(131)

The court summarized its holding as follows:

> "In short, we hold that venue is proper under Article 28(1)'s third provision in the courts of a High Contracting Party when the defendant has a place of business in that country at which it regularly issues tickets even though the injured passenger's ticket is purchased at the office of another airline and confirmed abroad on the ground that the office that issued the ticket to the passenger should be regarded as 'a place of business' of the defendant airline 'through which the contract has been made'."(132)

There are scholars(133) who think that in light of modern ticket-selling technique, a definition of this contact based upon a literal reading of the article is no longer desirable. The "place of contracting" requirement should be satisfied whenever an authorized commercial sale is made on behalf of the defendant carrier in the United States. This result could be obtained doing violence to the wording of Article 28(1) by reading an expanded theory of agency into the third contact. Admittedly, the fairness and desirability

of requiring a carrier to defend a suit anywhere in the world because a ticket has been sold on his behalf by a travel agent or another carrier can be questioned.

However, all of the American decisions seem to recognize that it is possible to satisfy the place of contracting contact without having the sale actually made from defendant's place of business. Furthermore, the carrier has voluntarily authorized the ticket sale. In the view of an airline's financial position, including obvious transportation advantages, a "relative hardship" test of conducting a suit in a foreign jurisdiction favours the passenger's home area. The argument that a carrier anticipates it could be amenable to suit only if it opens an office, lacks persuasive force. The same could be said of a carrier authorizing another to solicit business and sell its ticket, as in Berner.

The amendment to Article 28 made at Guatemala in 1971 will cover, after its enforcement, cases similar to the Eck situation. This amendment requires that the carrier's establishment and the domicile or permanent residence of the passenger be located in the same territory. In fact, this will very often coincide with the place where the ticket has been sold.

Thus, it is possible to say that the Guatemala amendment has adopted the very liberal position of the New York Court of Appeals and the Court of Appeals, Second Circuit, in the Eck case.

(D) CONTACT FOUR - BEFORE THE COURT AT THE PLACE OF DESTINATION

Since it was the desire of the framers of the Convention to limit jurisdiction in any action under the Convention to the court of a High Contracting Party, it follows that the only certain jurisdiction is at the place of destination. This is so since it is not necessary that the carrier be a national of a High Contracting Party in order for the Convention to apply.(134) Therefore it is not only conceivable but quite possible for a situation to arise when all three of the jurisdictional contacts under Article 28 involving the carrier would be forums in other than High Contracting Parties. In such a case all forums would be denied jurisdiction by the terms of Article 28. For example, a passenger purchases a ticket in country A for carriage on carrier X from a point in country B to a point in country X and return to country B. If country A and country X are both non-Warsaw Convention countries and carrier X is a national of country X, which is also its principal place of business, none of the carrier contacts (One through Three) for jurisdiction would be in a High Contracting Party. Therefore, all contacts except "place of destination" would not be available under Article 28, which limits the action to the courts of High Contracting Parties.

The place of destination, within the meaning of the Warsaw Convention, is determined by the terms of the contract of carriage between the parties. The ticket will be utilized as a prima facie evidence of the intent of the parties to the

contract of carriage. This contact is controlled by the destination as shown on the contract of carriage, as mentioned in Article 1(2). In order for the Convention to apply under Article 1, it is only necessary that the place of destination be within the territory of a High Contracting Party, the particular place within High Contracting Party not being in question.

In every situation coming under the Convention rules, the place of destination provides an available forum since any carriage which does not have its agreed destination within a Warsaw Convention country will never be subject to Convention applicability.

Perhaps the most difficult question presented by this contact is to determine exactly what is the place of destination. The courts, in considering this point, have thus far treated the place of destination as establishing jurisdiction under Article 28 in an identical manner with the place of destination for applicability of the Convention under Article 1. Destination is defined as "a place set for a journey's end; the terminal point to which one directs his course."(135) This contact is controlled absolutely by the destination as shown on the contract of carriage. On a round trip flight, the ultimate place of destination is considered to be the same point as the place of origin.

If an American resident purchases a ticket in Paris from Air France for a round trip flight Paris-New York-Paris, Article 28 bars suit in New York because Paris is deemed to be

the place of destination according to the ticket, even if the accident occurred on the Paris-New York leg and even if the accident occurred while landing in New York.

In Galli v. Re Al Brazilian International Airlines,(136) the plaintiff sought to bring an action in New York, having purchased a round trip ticket which definitely stated "from Sao Paulo to Miami to N.Y.C. to Miami to Sao Paulo." The accident occurred on a flight from Sao Paulo to Miami. Although the plaintiff contended that he was going to remain in New York and actually not use the return trip to Sao Paulo, the court held that the plaintiff's destination was the return to Sao Paulo and he could not sue in New York, and that his undisclosed intentions could not modify the contract. The court held that the place of destination is that stated in the ticket and is not subject to oral contradiction by the plaintiff. Consequently it was of no importance that the undisclosed intent of the passenger was not to return to Brazil, Furthermore, the court decided that the plaintiff's rights are determined "... not by the flight which makes up part of the trip, but by the entire contract of carriage."(137) Therefore the New York courts were without jurisdiction.

In Burdell et al. v. Canadian Pacific Airlines, Ltd.,(138) the ticket disclosed that the transportation was from Singapore to Bangkok to Hong Kong on Cathay, and from Hong Kong to Tokyo on Canadian Pacific Airlines. The date for a return flight on Cathay Pacific Airways from Tokyo and thence back to Singapore

was left open. The court decided that the place of destination was Singapore.

In Bowen v. Port of New York Authority,(139) a complaint was brought by plaintiffs who were British subjects, against Royal Dutch Airlines (KLM). The plaintiff's wife purchased a round trip ticket, London to New York to London. She was injured during the landing in New York. The court was urged by the plaintiffs to adopt the view that New York was a place of destination, though intermediate. The court decided that "the plaintiff bought a round trip ticket in London, which is her place of destination under her contract which governs the relations of the parties thereto."(140) The destination of transportation by several successive air carriers, whether covered by a single contract or a series of contracts, would have as its ultimate destination the last and final point in the air carriage, so long as the parties regarded the movement as a single operation as stated in Article 1(3) of the Warsaw Convention.

In Felsenfeld v. Société Anonyme Belge d'Exploitation de la Navigation Aerlenne,(141) the plaintiffs sought to recover damages arising out of personal injuries which they sustained while passengers on defendant's aircraft. The complaint alleged that the plaintiffs engaged passage from Tel Aviv, Israel to New York and that they paid for the entire trip in Tel Aviv, at which time they received tickets for a flight from Tel Aviv to Brussels, Belgium. Without leaving

the airport at Brussels, they received tickets providing for transportation from Brussels to New York. While in flight from Tel Aviv to Brussels, they claimed to have been injured. They contended that in Tel Aviv they paid for the entire trip from Tel Aviv to New York and that they had but one destination which was New York, and thus the court of New York had jurisdiction.

The defendant argued that there were two separate flights,with two separate destinations, one being in Brussels and the other in New York, and inasmuch as the alleged incident to the plaintiffs occurred on the flight from Tel Aviv to Brussels, they could not institute action in New York.

The plaintiffs affirmed that they not only disclosed their destination to be New York, but that the defendant agreed to transport them there. The court, while denying the motion to dismiss the complaint, stated that "plaintiffs' rights under the Warsaw Convention are determined not by the flight which makes part of the trip but by the entire contract of carriage. If it is the policy or practice of the defendant airline to break the passage up into two or more phases or flights, it cannot thereby unilaterally determine that the plaintiff engaged several flights. Neither can the defendant profit by its failure to clearly set forth the true destination of the plaintiffs on one of their passage tickets."(142) Under these circumstances, the court denied dismissal of the complaint.

In Berner v. United Air Lines,[143] the plaintiff contended that jurisdiction existed by virtue of Article 28(1) of the Warsaw Convention, since the destination was New York. The plaintiff's intestate had purchased, in New York at the office of the defendant, a round trip ticket from New York to Sydney, Australia by way of San Francisco, California. Thus there were several intermediate breaks in travel en route, with the final destination at New York. "Such final destination", the court concluded, "falls clearly within the phrase 'place of destination' of subdivision (1) of Article 28 of the Warsaw Convention."[144] The court supported its holding by referring to Wyman v. Pan American Airways, Inc.,[145] which defined "place of destination" contained in Article 1 of the Convention.

In Northwest Airlines v. Gorter Admx,[146] the deceased, Waldrop, was a Northwest Airlines passenger en route from Japan to McChord Air Force Base in the State of Washington. The aircraft crashed in the waters off the coast of British Columbia, killing Waldrop. Northwest Airlines was a Minnesota corporation, qualified to do business in the State of Washington. The deceased was a resident of the State of Habana, leaving as his sole heir a minor daughter residing in the State of New Mexico. The only asset in Waldrop's estate was the right of action for wrongful death against the carrier Northwest. The administratrix received letters of administration from the trial court as the personal representative and was appointed as such. In the lower court, Northwest moved to dismiss the

complaint on the ground that the Washington State court had no jurisdiction over the asset, i.e., the wrongful death action. From a judgment dismissing the petition, Northwest appealed. The Supreme Court for the State of Washington, in affirming the decision of the trial court, pointed out that the destination of the plane in which the deceased was killed was McChord Field in the State of Washington. Citing Article 28 of the Warsaw Convention, the court stated that inasmuch as the destination was in the State of Washington, the court of that State, being "court at the place of destination", would have jurisdiction of the action.

In Parkinson v. Canadian Pacific Air Lines Ltd.,(147) the ticket was issued in the United States and place of destination or re-validated ticket listed Buffalo as the place of destination; action may be maintained until defendant can prove that the ticket governing change of flight between Hong Kong and Tokyo was a separate contract and not merely a substitution of carriers through an interline arrangement.

In brief, it appears that the courts determine the place of destination by interpreting the entire contract of carriage. The ticket is used as prima facie evidence of the intent of the parties (Berner, Galli, Bowen, Burdell). It is possible to bring further evidence, contrary to the ticket (Felsenfeld), in order to establish the true content of the contract. This applies to all transportation, including round trips or succesive carriages (Berner, Burdell), so long as the parties regard the

whole carriage as a single operation. There is no single operation when the carrier and the passenger have not agreed on that point (Galli). However, the importance of Article 28 for jurisdictional purposes, as contrasted with Article 1 for defining the applicability of the Convention, does have one vital point of destination. In order for the Convention to apply under Article 1, it is only necessary that the place of destination be within that High Contracting Party not being in question. But when Article 28 is considered as a High Contracting Party having distinct internal sub-divisions for jurisdiction, such as in the United States, it becomes necessary to consider whether federal or state courts or both have jurisdiction, and if state courts, which state or states? This matter will be treated in greater detail in the following chapter.

CHAPTER IV

IS ARTICLE 28(1) A VENUE OR JURISDICTIONAL PROVISION?

There is a conflict in the United States in the decision whether Article 28(1) is to be regarded as jurisdiction or merely as venue. The questiom of jurisdiction of a particular court over the defendant is a question of power. It is the question of whether or not a court has the power to entertain and decide disputes involving this particular defendant. It is a question of whether or not a court may impose its jurisdiction or authority over a particular person or corporation.

The question of venue, on the other hand, does not affect the court's power to bring this particular defendant in and impose its will upon it. Venue assumes that the court has the power to exercise its authority over the defendant. The question is whether, assuming the court's jurisdiction, it is in the proper court or the proper place in which to maintain the lawsuit.(148)

Black, in his Law Dictionary,(149) defines "venue" as follows:

> "The country (or geographical division) in which an action or prosecution is brought for trial, and which is to furnish the panel of jurors. It relates only to place where or territory within which either party may require a case to be tried. It has relations to convenience of litigants and may be waived or laid by consent of parties. 'Venue' as a matter of procedure, does not arise until an action is

> "started. It does not refer to jurisdiction at all. 'Jurisdiction' of the court means the inherent power to decide a case, whereas 'venue' designates the particular country or city in which a court with jurisdiction may hear and determine the case."

A court's jurisdiction is its power to hear and adjudicate the controversy between the parties, whereas venue is merely a limitation designed for the convenience of the litigant.

The rules relating to venue prescribe the proper place of trial within the state. In the various American States, the most common provision, and the basic one, appears to be venue based upon the residence of the defendant.(150)

Objections to venue and jurisdiction are under a very similar régime. If a court does not have jurisdiction over the parties, or over the subject matter, or if the venue requirements have not been respected, it must dismiss the claim or transfer the action in case of improper venue in a federal court.(151)

A court must dismiss an action, at any stage of the proceedings, "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."(152) Under the practice prevailing in most states, "objections to venue are waived unless they are reasonably made and the time for making them is often at an early stage in the action."(153) In Rosen v. Lufthansa German Airlines,(154) the court stated that "while 'venue' and 'jurisdiction' are not synonymous, for procedural purposes objections to venue are treated as raising a question of jurisdiction."

If Article 28(1) of the Warsaw Convention is a jurisdictional provision, then, in Federal countries like the United States, courts are without power to adjudicate suits involving flights covered by the Convention, if none of the four contacts are in the United States.

> "Much of the case law on the subject is confused and not well reasoned. And so frequently happens, the term 'jurisdiction' has been loosely used in many cases and there appears to be no consistent or logical pattern of decisional law."(155)

U.S. courts have been split on this question but a careful analysis reveals that the cases viewing the Article as a venue provision are only weak authority for that position. The courts in the following cases have referred to Article 28 of the Warsaw Convention as a venue provision only.

(A) Dunning v. Pan American World Airways(156)

In this case, Richard True Dunning and Esters Clower Mott were passengers on Pan American World Airways from Johannesburg to Lisbon which crashed in Liberia, causing the deaths of all on board.

The complete routing of the ticket issued to Dunning was from Lisbon, Portugal and return, with agreed stopping places. The ticket was issued to him by Pan American in Paris.

The complete routing of the ticket issued to Mr. Mott in Lisbon, Portugal was also from Lisbon and return with agreed stopping.

The two administratrices instituted suit against the carrier in the United States District Court for the District of Columbia.

In the Dunning case, the carrier pleaded that the District of Columbia is not the proper venue in which to bring this action and, therefore, this court is without jurisdiction.

In the Mott case, the carrier pleaded, among other defenses, lack of jurisdiction over the subject matter of the action.

Thereafter the defendant moved for a dismissal of both actions, or a change of venue, upon the ground that both actions were subject to the provisions of the Warsaw Convention and that this court is not one of the jurisdiction which the plaintiffs' claims may be brought under the provisions of Article 28(1) of the Warsaw Convention.

The defendant was a New York corporation, with its principal executive and administrative offices in New York City. It operated no scheduled flights into or out of the District of Columbia or the Washington National Airport.

Defendant argued that under the provisions of Article 28 of the Warsaw Convention, the action could be brought only before the court at the carrier's "principal place of business", which, in this instance, was the Southern District of New York. It argued that the term "domicile of the carrier", as used in the Article, was applicable only in the case of non-corporate carriers and the carrier's "domicile" was the place of its incorporation.

Plaintiffs argued that the term "domicile" and "principal place of business", as used in Article 28(1) of the

Convention, must be construed "in the international sense to mean the nation of domicile or principal place of business." Since the carrier's domicile and the principal place of business were concededly within the United States and service of process in the District of Columbia had not been contested, the actions were properly before the District of Columbia. The court, construing Article 28(1) of the Convention, held that "domicile" of the airline was the place of its incorporation (New York) and not any office in the United States and ordered to change venue and transferred the case to the Southern District of New York.

(B) Scarf v. Trans World Airlines, Inc.(157)

In this case the United States District Court Southern District of New York held that the Warsaw Convention limits the venue to certain courts and that this court was not one of them.

The plaintiff in this case was injured while boarding a TWA plane at Gander, Newfoundland. He was in transit from Sydney, Australia to Madrid, Spain. As he was boarding his plane, another plane of TWA passed close by and its propeller blast moved the ramp which the plaintiff was mounting, causing his injury.

TWA moved to dismiss the complaint because of lack of proper venue. Its motion was granted. The court stated: "The Warsaw Convention permits an action for damages against a carrier to be brought only in one of four places ... It is conceded that this district is not one of the places specified."(158)

(C) Mason v. British Overseas Airways Corp.(159)

In this case two United States contacts were present but none in the court's geographic jurisdiction. The court, in effect, used a venue construction of Article 28(1) to retain the case since only jurisdiction and not venue had been challenged.

Mason, a United States citizen, purchased a ticket from a travel agent in Brattelboro, Vermont for a round trip from Boston to Barbados, British West Indies. The portion of the transportation as agreed upon between San Juan, Puerto Rico and Barbados was by British West Indian Airlines, Ltd. The plaintiff brought an action for injuries in the Southern District of New York, injuries which were alleged to have occurred while he was a BWIA passenger between San Juan and Barbados.

BWIA Ltd., a corporation organized under the laws of Trinidad and Tobago, moved to dismiss the action on the ground that the court lacked jurisdiction of the subject matter by virtue of Article 28. BWIA argued that under Article 28 of the Convention, the action could be brought in the court of only one of three possible places: (a) Trinidad, which is the defendant's place of domicile and principal place of business; (b) Vermont, the defendant's place of business (through an agent) where the contract with the plaintiff was made; or (c) Massachusetts, the place of destination.

The defendant claimed that the New York court was

improper. The court, however, held that Article 28 of the Convention relates only to venue which was not challenged by the motion.(160)

(D) Spencer v. Northwest Orient Airlines Inc.(161)

In this case the plaintiff, a resident of Hong Kong and a citizen of the United States, was injured on a flight from Okinawa to Manila via defendant's airline. Suit was commenced in the United States District Court for the Southern District of New York. Defendant maintained that since it is domiciled and has its principal place of business in Minnesota, and since Hong Kong was the destination of the flight and the place where the contract of carriage was made, the Federal Court in New York is not one of the courts before which the action for damages could be brought against the carrier under the terms of Article 28(1) of the Warsaw Convention and that, consequently, the court was without jurisdiction over the subject matter of the suit.

The court made the following statement, generally cited for the proposition that Article 28(1) relates to venue:

> "... in so far as Article 28 would operate as a plea in a bar to maintenance of an action for damages against an air carrier covered by the Convention in any court except in one of the four places specifically authorized by this article."(162)

This statement indicates rather clearly that there can be no jurisdiction if none of the four contacts are in the United States. It was suggested that this statement should be strictly viewed in the context in which the decision was rendered, i.e.,

two contacts present in the United States. Thus the meaning of the Court's statement is that if a contact is present in the United States, the Warsaw Convention does not affect the subject matter jurisdiction of the Federal Court.(163)

(E) Brown v. Compagnie Nationale Air France(164)

The action in this case was for wrongful death arising out of a plane crash near Rabat, Morocco. The plane was bound from Paris, France to Rabat, Morocco. The ticket was issued in Washington, D.C. by TWA pursuant to that airline's authorization to issue tickets for passage on Air France flights.

The court, in denying a motion to dismiss for the lack of subject matter jurisdiction, was pursuaded by the Spencer case and held that ".... the authors of Article 28 could not have intended it as a jurisdictional limitation as that term is understood in our court."(165) The court held that the provision of Article 28 related to venue and not jurisdiction.

There are a number of court decisions that have referred to Article 28 as a "jurisdictional" provision:

(1) Woolf v. Aerovias Guest, S.A.(166)

In this case a resident of Massachusetts sued the airline for personal injuries sustained while a passenger aboard its aircraft in flight between Mexico City and Miami, Florida. The plaintiff bought his ticket in Hollywood, Florida for a round trip: Miami-Mexico City-Miami. The defendant was a Mexican corporation with principal offices in Mexico City. The plaintiff brought action in New York City Municipal Court.

The defendant moved to dismiss the motion on the theory that under the venue provisions of the Warsaw Convention such a case could not be brought in the State of New York. The court, while granting the motion, held:

> "Upon the foregoing papers this motion is granted without prejudice to have the commencement of any other action in a court having jurisdiction of this claim in accordance with the terms of the conditions of the so-called 'Warsaw Convention'."(167)

(2) Galli v. Re-Al Brazilian International Airlines(168)

The plaintiff in this case brought an action in New York against a Brazilian air carrier. Although the plaintiff alleged that his destination was New York, his ticket provided for round trip transportation from Brazil to New York and return. Accordingly, the court held that the fact that the plaintiff alleged his destination as New York is not controlling since the contract of carriage governs the rights of the parties.

> "The place of destination is that stated in the ticket and is not subject to contradiction by the plaintiff .... plaintiff may bring this action only in Brazil and the courts of this state are without jurisdiction."(169)

(3) Tumarkin v. Pan American Airways, Inc.(170)

The defendant, Pan American World Airways, Inc., was a New York corporation with its principal place of business in the State of New York. The contract was made in the State of Florida.

The court was called upon to make an interpretation of Article 28, section 1, as to what is intended by the clause

that an action for damages must be brought either in Florida, where the contract was made, or in New York, the domicile and principal place of business of the defendant corporation. The court held that

> ".... it would appear .... that this provision, namely, Article 28, section 1, of the Warsaw Convention Treaty is jurisdictional and that perhaps there is a lack of jurisdiction over the subject matter on the part of this court."(171)

(4) Berner v. United Airlines, Inc.(172)

This case involved the death of Mr. W. Kappel and British Commonwealth Pacific Airlines in California, while on a Warsaw Convention flight from Sydney, Australia. Mr. Kappel's ticket showed New York as the ultimate destination. The ticket had been bought in New York City from British Overseas Airways Corporation (BOAC) acting as a ticket agent for BCPA, the carrier whose plane actually crashed. Jurisdiction was challenged before the New York Supreme Court by the defendant, BCPA, alleging that it was a foreign corporation doing business within the State of New York. The court established that there were two clear jurisdictional contacts: (a) the place of destination - New York City; and (b) New York was also the place of business through which the contract had been made.

The Court formed the jurisdictional element by holding that since the Warsaw Convention was a part of the contract of carriage, it constituted an acceptance by the foreign carrier of jurisdiction over it in any of the forums where, under the provisions of Article 28 of the Convention, the passenger or

his executors might elect to sue. The court held that under the Warsaw Convention there was jurisdiction by virtue of implied consent. Article 28, said the court,

> ".... does more than merely indicate the venue in which an action must be brought. I read and construe the Article as bringing to airline passengers on flights subject to the rules of the Warsaw Convention an assurance that the carrier has consented to be sued in those forums specifically enumerated and set forth in Article 28."(173)

In other words, the court found that this consent to jurisdiction was one of the factors balancing the limitation of liability granted to the carrier. This decision was affirmed by the Appellate Division.(174)

(5) Mertens v. Flying Tiger Line, Inc.(175)

An action was brought in a New York District Court to recover damages for death caused by an airplane accident in Japan. The air carrier was a Delaware corporation doing business in California. The alleged contract of transportation was made in California, the place of destination being a point in Japan. It was contended that the New York District Court lacked subject matter jurisdiction because it was not one of four places within the territory of a High Contracting Party where an action can be brought. Judge Marshall made it clear that Article 28(1) was written with reference to nation states, not to political subdivision of nation states. The court held:

> "The 'places' specified refer to the High Contracting Parties, not to areas within a particular High Contracting Party .... The basic unit of international law is the nation-state and it is fair to assume,

> "absent clear indications to the contrary, that Article 28(1) was written with reference to nation-states, not to areas and subdivisions of a nation-state."(176)

(6) Martino v. Trans World Airlines, Inc.(177)

This action arose out of a death of the plaintiff's decedents who were killed in a crash of Trans World Airlines' airplane shortly after it left Milan, Italy.

The defendant, Trans World Airlines, Inc., moved to dismiss the action for lack of jurisdiction, claiming that the action was not brought in the proper forum under the terms of the Warsaw Convention.

In support of its action to dismiss the action, Trans World Airlines, Inc. alleged that none of the permissible alternative situs of jurisdiction under Article 28(1) of the Warsaw Convention exists. The defendant was a Delaware corporation with its principal place of business in Kansas City, Missouri. The contract for the round trip from New York was entered into in Washington, D.C.

The plaintiffs contended that Article 28 refers only to venue.

The court held that Article 28 of the Warsaw Convention refers to jurisdiction and not to venue. The court stated that

> "If the clearly definitive word 'must' in Article 28 is to be given efficacy, it would seem to limit strictly the plaintiffs' choice of forum to the enumerated places. Illinois is none of the named places where suit might be brought."(178)

(7) Nudo v. Sabena Belgian World Airlines(179)

In this case none of the contacts were in the United States. The plaintiffs were United States citizens. The aircraft accident took place in Belgium. The immediate destination of the flight was Brussels, the ultimate destination was Munich, the place of making the contract was also Munich, and the defendant's domicile and principal place of business were all in Belgium. Plaintiffs contended that there was a United States contact because Sabena maintained its own sales office in Philadelphia, thereby constituting a principal place of business there. The court held that none of the conditions of Article 28 was met and that the court had no jurisdiction.

(8) Pitman v. Pan American World Airways, Inc.(180)

The plaintiffs, citizens and residents of Arkansas, were passengers in an airplane which left Frankfurt, Germany destined for New York, with an agreed stopover in Amsterdam, Holland where they were injured. The action was brought before the United States District Court, Eastern District of Pennsylvania. The defendant was incorporated in the State of New York. It was conceded, however, that the defendant did business in this District and was served properly.

None of the four locations provided by Article 28(1) of the Warsaw Convention were in this District:

(a) the domicile, the state of incorporation, of the carrier was New York;

(b) the principal place of business of the carrier was New York;

(c) the tickets were purchased in Frankfurt, Germany;

(d) the places of destination were Amsterdam, Holland and New York.

Defendant contended that since none of these four locations were in the District of the court, venue is improper and consequently the action cannot be litigated in this court.

The plaintiff contended that while the Warsaw Convention determines where damage suits resulting from accidents during international airplane flights should be litigated, it refers only to national boundaries and not to places within the boundaries of countries: thus there is nothing in the Warsaw Convention to prevent the litigation of the present case in this District.

The court agreed with the plaintiffs' contention, and stated that

> "Article 28 refers to national entities and not geographical places within the nation. This construction of the treaty not only is most logical but comports with a sense of fairness to the parties and convenience of the courts and, most important, renders unnecessary any finding of a conflict with congressionally established venue policies for suits brought in United States Courts."(181)

(9) Winsor v. United Air Lines, Inc.(182)

The plaintiff was the administrator of his decedent wife's estate and a resident of Newfoundland. The deceased wife purchased a ticket from TWA at Gander, Newfoundland for

a trip to Seattle, Washington, with a stop in New York and a return trip to Gander, with another stop in New York. The accident occurred in Colorado. The action was brought before the United States District Court, Eastern District of New York, whereupon the defendant carrier filed a motion to dismiss the action because there was no jurisdiction under the Warsaw Convention in the New York District Court.

The defendant was a Delaware corporation and its principal executive offices were located in Chicago. The court stated that

> "Jurisdiction under Article 28 of the Warsaw Convention is not free from doubt, the narrow issue being whether the defendant maintains 'a principal place of business' in New York City. Since it is clear that the decedent did not there enter into contractual relations with this defendant..."(183)

The court went on at great length to find the principal place of business in New York. It was held that although the defendant's principal executive office was in Chicago and principal operating office was in Delaware, New York City was a proper place where much of the booking of flights took place. The court decided to deny the motion to dismiss the case "for the reason that apparent compliance with the jurisdictional requirements of Article 28 of the Warsaw Convention has been shown."(184)

(10) Khan v. Compagnie Nationale Air France(185)

Suit was brought in New York for loss of baggage while on a flight from Paris to London, on board one of defendant's aircraft. In granting the defendant motion to dismiss the

action for lack of jurisdiction under Article 28 of the Warsaw Convention, the court said:

> "While it is true that Article 28 cannot dictate where, within the territory of one of the parties, suit must be brought, it does direct that one of the specified contacts must be the territory where the action is sought to be maintained.... Here, the domicile and principal place of business of defendant were in France, the ticket was purchased there, and the destination was London, England. The fact that plaintiff continued on to Newfoundland via a different carrier cannot change this result. It was defendant's privilege to refuse to honor another carrier's ticket and insist upon issuing its own."(186)

Accordingly the motion was granted.

In Eck v. United Arab Airlines,(187) the action was brought in the State Court of New York and also in the Federal Court of the Southern District of New York. The question was to know whether or not these courts could hear the case.

According to the answer given by the New York Court of Appeals(188) and the United States Court of Appeals (2nd Circuit),(189) the possibility of hearing the case was admitted. But the New York Court speaks in terms of jurisdiction and the Federal Court in terms of venue. A previous decision of the Appellate Division of New York Supreme Court(190) seems to have adopted the right attitude towards the problem of characterization of Article 28 as a venue or jurisdictional provision:

> "The dispute over the terminology is not fruitful in this case.... There is no difficulty here, unless one insists upon stirring up a sterile logomacy, is simply looking upon the issue as one to determine whether an action may be brought in New York's courts."

It seems that when an American state has power over a person, the courts of that state will usually also have jurisdiction over that person. A state court's jurisdiction is defined by reference to that particular state and its power, whereas a federal court's jurisdiction is defined by reference to the United States and its powers. Within a state, the courts have a general power which can be restricted by special statutes. The practical aspect of a problem of jurisdiction is often to determine whether the power has been taken away from the court, for instance, by a special venue provision. If not, the court keeps its jurisdiction.

There are a few indications that the delegates at the Warsaw Convention, in adopting Article 28, were thinking in terms of countries and not geographical points within national boundaries.

(a) Article 32 of the Warsaw Convention indicates that Article 28 of the Convention refers to jurisdiction rather than venue. The Article states:

> "Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clause shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdiction referred to in the first paragraph of Article 28." (Emphasis supplied).

(b) In the original drafts of the Convention, there was a fifth possible forum for suit, namely, the place of accident. At the Warsaw Convention a British proposal to eliminate this forum was debated and eventually adopted.(191) In speaking for the proposal, the British delegate noted

> ".... that in the course of a long journey, such as a trip from London to India, you pass through countries where courts are not at all well organized. You will have very great difficulty for example in bringing suit before the court of Persia or Mesopotamia. The carrier also would have enormous trouble in defending a case which might be brought in these far-off countries, where the courts really are not well organized." (Emphasis supplied).

The Greek delegate, speaking against the elimination of the place of the accident, said:

> "Against this are raised objections that there are countries where justice is badly organized and the injured person might take advantage of this fact as a sort of blackmail. This is true, but it is difficult for air navigation enterprises to appear in a far-off country where justice works poorly, the same difficulty confronts the injured person with even greater force...." (Emphasis supplied).

According to these indications it would appear more desirable to construe the Article as relating to jurisdiction. Under such construction, an American court faced with an action governed by the Convention must first determine whether one of the contacts occurred in the United States. If not, it should recognize the Article's jurisdictional limitation and dismiss the suit for lack of subject matter jurisdiction. If one or more contacts can be found in the United States, the court should proceed to adjudicate the action.

The presence of any contact in the United States should authorize suit in any internal judicial subdivision, while an absence of contacts should remove the subject matter jurisdiction of American courts. One may agree with the opinion that:

> "Article 28(1) should, in minimum terms of liability, be construed to mean that where the domicile or an important place of business of the carrier is within the territory of one of the High Contracting Parties, then suit may be brought by a plaintiff in that country as permitted by its law. This rule is subject to uniform application and it is logical in all respects. And Federal courts in the United States would not be burdened with suits brought in inappropriate districts if this construction is followed."(192)

CHAPTER V

SUMMARY AND CONCLUSIONS

(A) The aim of the "Convention for the Unification of Certain Rules Relating to International Carriage by Air", commonly known as the Warsaw Convention of 1929, was to ".... integrate the rights and liability of the passengers and carrier in connection with 'international transportation' .... and 'unify rules relating to international transportation by air'."[193] One way to effect uniformity was by limiting the places in which suit might be brought.

(B) Article 28(1) of the Warsaw Convention establishes the various courts in which the plaintiff may take action. It permits an action for damages against a carrier to be brought only in one of four places:

(a) the domicile of the carrier;

(b) its principal place of business;

(c) its place of business through which the contract was made;

(d) the place of destination.

An additional forum was amended at the Guatemala Conference. The forum established by this Conference is

> ".... in the territory of one of the High Contracting Parties before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party."

(C) By its terms the Article merely limits, for the convenience of litigants (particularly, it would seem, the airline companies), the places where action for damages may be brought. The Article refers to "the option of the plaintiff", which means that he must exercise an option to choose only one of the various courts specified. He must bring the action in the territory of one of the High Contracting Parties.

(D) The limitation of the Convention must be considered as to absolute and mandatory, and has been generally regarded as exclusive.(194)

The mandatory effect is further strengthened by reading Article 28(1) together with Article 32. Thus read, Article 28 will have to be construed strictly, as Article 32 renders void any clause in the contract of carriage that purports to infringe the rules laid down by the Convention, either by deciding the law to be applied or by altering the rule as to jurisdiction.

(E) The Warsaw Convention was adopted in the French language and gives authority to the French text, and the French text alone. It is submitted that:

(1) legislation of countries who ratified the Convention should give priority to the French text over another version;

(2) if there is any inconsistency between the English text and the French text, the text in French should prevail.

(F) There are two different English translations of Article 28, the British translation and the United States one, and there are differences between them.

Whereas in the official British translation there is the use of the words "ordinarily resident", the translation by the United States uses the word "domicile", and the word "establishment" in the British translation was translated in the U.S. as "place of business". The exact effect of the difference between "establishment" and "place of business" has never been specifically determined, but there is a difference between the words "ordinarily resident" and "domicile". "Residence" in the English translation of this Article has a wider range than "domicile".(195)

It is submitted that in order to avoid lengthy litigation to determine the domicile of the carrier, it would be advisable to replace the term "domicile" with "permanent residence".

(G) It seems that there can only be one principal place of business. There is no precise formula to be used in deciding where a corporation's principal place of business is located. The location of a corporation's principal place of business is, to a certain degree, a question of fact, because facts about an individual corporation have a great deal to do with determining whether that corporation has its principal place of business in a given state.

Each case must be decided upon its own particular set of facts, as the court in an American case stated:

> "The question essentially is one of fact to be determined in each particular case by taking into consideration such factors as the corporation, its purposes, the kind of business in which it is engaged and the situs of its operation.... The issue must be resolved on an overall basis."(196)

(H) The third contact of Article 28(1) may be easily determined if the ticket is sold by an office of the defendant carrier. There is a problem, however, when the office is staffed by personnel supplied by another airline or when the ticket or air waybill is sold either by another airline pursuant to an interagency agreement or by an independent travel agent, authorized to maintain the carrier's ticket stock and issue such contracts of carriage on behalf of the carrier.

It is submitted that when a defendant airline has at least one regular ticketing and booking office in a High Contracting Party, venue or jurisdiction should be proper in that country on an agency rationale under this contact, even though the passenger purchased his ticket for travel on a flight of the defendant at the office of another airline or travel agency. The place of contracting requirement should be satisfied whenever an authorized commercial sale is made on behalf of the defendant carrier in a High Contracting Party.

(I) Destination is defined as "a place set for a journey's end; the terminal point to which one directs his course."(197)

The place of destination is defined in Article 28 as that indicated by the contract of the parties. This contract is controlled absolutely by the destination as shown on the contract of carriage, and is not subject to oral contradiction by the plaintiff.(198) On a round trip flight the ultimate place of destination is considered to be the same

point as the place of origin. Plaintiff's rights under this contact are determined not by the flight which makes part of the trip, but by the entire contract of carriage.(199)

(J) There is a conflict in the decisions in the United States whether Article 28(1) is to be regarded as jurisdiction or merely venue.

U.S. courts have been split on this question, but a careful analysis reveals that the cases viewing the Article as a venue provision are weak authority for that position.

It seems that Article 28(1) refers to the national boundaries of countries and not to regions, provinces or federated states into which they are divisible.

There are no indications that the drafters of the Warsaw Convention were concerned with areas and subdivisions of nation-states. On the other hand, there are indications that the drafters of this Convention were thinking in terms of countries and not geographical points within national boundaries. These indications are:

(a) Article 32 of this Convention, as explained above;(200)

(b) the discussion at the Warsaw Convention on the British proposal to eliminate the forum of the place of accident reveals that the delegates used the term "country",(201) which means the nation-state.

Under such a structure the presence of any contact in the United States should authorize suit in any internal judicial subdivision, while an absence of contacts should remove the subject matter jurisdiction of American courts.

FOOTNOTES

1. For the historical background of the Warsaw Convention, see:

   (a) F. Billou, Air Law, 1963;

   (b) K.M. Beaumont, "The Proposed Protocol to the Warsaw Convention 1929", 20 J.A.L.C. (1953), page 264;

   (c) L.H. Cha, "The Air Carrier's Liability to Passengers in International Law", 7 Air L. Rev. (1936), page 25;

   (d) Dr. D. Goedhuis, "National Airlegislations and the Warsaw Convention" (1937);

   (e) A.K. Kuhn, "The Warsaw Convention on International Transportation by Air", 24 Am. J. Int'l. L. (1930), page 746;

   (f) G. Orr, "The Warsaw Convention", 31 Va. L. Rev. (1945), page 423;

   (g) J.B. Rook and B. Parker, "The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929", 14 J. Air L. (1947), page 37.

   (h) A.N. Sack, "International Unification of Private Law Rules on Air Transportation and the Warsaw Convention", 4 Air L. Rev. (1933), page 345;

   (i) G.R. Sullivan, "The Codification of Air Carrier Liability by International Convention", 7 J. Am. L. (1936), page 1.

2. See Shawcross and Beaumont on Air Law, 3rd edition, Vol. 2, page 49.

3. See McNair "The Law of the Air", 2nd edition (1953) page 122.

4. Ibid, cited supra, page 135 et seq.

5. See Minutes and Documents, Third Session in Madrid, (1928) ICAO, Doc 7838 at 77-79, 172, 193. For an English translation see N. Calkins, "The Warsaw Convention", 26 J.A.L.C. (1959), pages 229-230.

6. Ibid, cited supra, at 227.

7. Ibid, cited supra.

8. Ibid, cited supra.

9. Ibid, cited supra.

10. Ibid, cited supra.

11. Ibid, cited supra.

12. Ibid, cited supra, at 230.

13. Ibid, cited supra.

14. Ibid, cited supra.

15. Ibid, cited supra.

16. Ibid, cited supra.

17. Dr. D. Goedhuis "National Airlegislation and the Warsaw Convention", (1937), page 287.

18. B. McKennry "Judicial Jurisdiction Under the Warsaw Convention", 29 J.A.L.C. (1962), page 219.

19. See Minutes and Documents, ICAO Doc 7686-LC/140, Vol. I, page 263, Vol. II, page 227.

20. See note 17, at page 288.

21. See Minutes and Documents, ICAO Doc 8878-LC/162, pages 101-102.

22. Ibid, cited supra, at page 102, para. 6.

23. Ibid, cited supra, at pages 102-103, para. 7.

24. Ibid, cited supra, at page 103, para. 8.

25. Ibid, cited supra, at page 103, para. 9.

26. Ibid, cited supra, at page 103, para. 9.

27. Ibid, cited supra, at page 104, para.10.

28. Ibid, cited supra.

29. Ibid, cited supra.

30. Ibid, cited supra, at pages 104-105, para. 12.

31. Ibid, cited supra, at page 105, para. 13.

32. Ibid, cited supra, at page 105.

33. Ibid, cited supra, at page 105, para. 14.

34. Ibid, cited supra, at page 105, para. 15.

35. Ibid, cited supra, at page 106, para. 16.

36. Ibid, cited supra, at page 106, para. 17.

37. Ibid, cited supra, at page 106, para. 18.

38. Ibid, cited supra, at page 106, para. 19.

39. Ibid, cited supra, at page 106, para. 19.

40. Ibid, cited supra, at pages 106-107, para. 20.

41. Ibid, cited supra, at page 107.

42. Ibid, cited supra, at page 107.

43. Ibid, cited supra, at page 109, para. 1.

44. Ibid, cited supra, at page 109, para. 2.

45. Ibid, cited supra, at page 109, para. 3.

46. Ibid, cited supra, at page 110, para. 5.

47. Ibid, cited supra, at page 111, para. 8.

48. Ibid, cited supra, at page 25.

49. Ibid, cited supra, at page 375.

50. Article XII Guatemala Protocol, 8 March 1971
(The minutes of this convention are not released as yet).

51. See Article 36, Warsaw Convention.

52. Carriage by Air Act (1932).

53. Corocraft Ltd. and Another v. Pan American Airways, Inc. (1969) All. E.R. page 82.

54. Ibid, at 86.

55. G. Orr, "The Warsaw Convention", 31 Va. L. Rev. (1944-45), page 426.

56. American Airlines v. Ulen, 174 F 2d 931 (D.C. Cir. 1949).

57. Black v. Compagnie Nationale Air France (1967), 386 Fed. Rep (2nd) 323.

58. See note 52.

59. Air Law and Treaties of the World, Vol. III dated July 1, 1965 issued by the 89th U.S. Congress.

60. This aspect of the drafting history of Article 28 was used in Dunning v. Pan American World Airways, 4 AVI Case 17394.

61. Black, Law Dictionary, 4th ed. 1951, page 1473.

62. J.G. Castel, "Domicile", 5 McGill L.J. (1958-59), page 179.

63. See note 61, at page 572.

64. For more on this subject, please see: A. Farnsworth, "The Residence and Domicile of Corporations" (1939); W.L.M. Reeso, "Does Domicile Bear a Single Meaning?" Col. L. Rev., Vol. 55, page 589; Dicey, "Conflict of Law", 7th ed., Chapter 6, page 85.

65. A. Farnsworth, "The Residence and Domicile of Corporations" (1939), page xxxvi.

66. Ibid, cited supra, at page 199.

67. National Trust Co. Ltd. v. Ebro Irrigation and Power Ltd. et al., and National Trust Co. Ltd. v. Catalonian Land et al. (1954) O.R. 463 (1954) 3 D.L.R. 326.

68. John S. Darrel and Co. v. The Ship American 1925 Ex. C.R.2.

69. See note 65.

70. Ibid, cited supra, at page 196.

71. Ibid, cited supra, at page 76, note 3.

72. Ibid, note 3, page xxxv note (g), and pages 76-77 note (h).

73. Shawcross and Beaumont "Air Law", 1966, Vol. 1, page 436.

74. Dicey's "Conflict of Law", 7th ed., page 477.

75. Ehrenzweig "Private International Law", page 139.

76. J.G. de Villeneuve, "Compétence jurisdiction et Lex Fori dans la convention de Varsovie", 8 McGill L.J. (1961-62), page 286.

77. As translated by C.E. Robbins in his article "Jurisdiction under Article 28 of the Warsaw Convention", 9 McGill L.J. (1963), page 354.

78. J.J. Kennely, "The Warsaw Convention Treaty", 13 Trial Lawyer's Guide, Vol. 13, No. 1 (1969), page 80.

79. C.E. Robbins, "Jurisdiction under Article 28 of the Warsaw Convention", 9 McGill L.J. (1963), at pages 354-355.

80. See note 78, page 81.

81. G.R. Sullivan, "The Codification of Air Carrier Liability by International Convention", 7 J. Air L. (1936), page 46; D. Goedhuis, "National Airlegislations and the Warsaw Convention", (1937), page 208.

82. Ibid, G.R. Sullivan's article, at pages 47-48.

83. 4 AVI Case 17,394.

84. See pages 36 and 59 of this thesis.

85. D. Goedhuis, "National Airlegislations and the Warsaw Convention" (1937), at page 293.

86. See pages 57 and 75 of this thesis.

87. See note 17, pages 208-209.

88. See page 28 of this thesis.

89. L.S. Kreindler, "Aviation Accident Law", (1963), Vol. I, pages 542-543.

90. 5 AVI Case 17169; 8 AVI 17781.

91. 9 AVI 17709.

92. Ibid at 17711.

93. 1965 U.S. AVI Re. page 171.

94. 10 AVI Case 17217.

95. State of Maryland for the use of Chrysler v. Eastern Airlines, Inc. 84 F. Supp. 345 D. Dc. 1948.

96. Scott Typewriter Co. v. Underwood Corp. 170 F. Supp. 862, 865 S.D.N.Y.

97. Ibid, cited supra.

98. 284 F. 2d. 850 3rd cir. (1960).

99. 5 AVI Case 17509.

100. 7 AVI Case 17295.

101. Ibid, cited supra.

102. 7 AVI Case 17537.

103. Ibid, cited supra, at 17538.

104. Ibid, cited supra.

105. See note 89, page 531.

106. 8 AVI Case 17500.

107. Ibid, cited supra, at 17503.

108. 4 AVI 17394.

109. Lloyd's L.L.R. Vol. I (1953), page 157.

110. Ibid, cited supra, at page 160.

111. Giuseppe Guerri, "American Jurisprudence of the Warsaw Convention", Publication No. 6. Institute of Air and Space Law, McGill University (1960), pages 40-41.

112. Ibid, cited supra.

113. See note 18, pages 212-213.

114. "Article 28 of the Warsaw Convention: A Suggested Analysis", Min. L. Rev. Vol. 50, page 699.

115. 4 AVI Case 17924; 5 AVI 17169.

116. 5 AVI Case 17169.

117. 5 AVI Case 17170.

118. See note 114, at page 700.

119. For background of this case, see 8 AVI Case 18180 and 9 AVI Case 17365.

120. On the Federal side, see 9 AVI Case 18146; 9 AVI 17469; 9 AVI 17322; on the Lower courts: 8 AVI 18180; 9 AVI 17364.

121. 9 AVI Case 17365.

122. 9 AVI Case 18151.

123. 9 AVI Case 18151-152; 9 AVI 17365-366.

124. 9 AVI Case 17365.

125. Ibid, cited supra.

126. Ibid, cited supra, at 17366-17367.

127. 9 AVI Case 18154.

128. 4 AVI Case 17924; 5 AVI Case 17169.

129. 9 AVI Case 18153.

130. Ibid, cited supra.

131. Ibid, cited supra, at 18154.

132. Ibid, cited supra, at 18153.

133. See note 114, at page 702.

134. Glenn v. Compagnia Cubana de Aviacion, 102 F Supp 631 (S.D. Fla. 1952).

135. Funk, Standard Dictionary, as cited at Felsenfeld v. Société Navigation Aerlenne, 8 AVI Case 17199.

136. 7 AVI Case 17614.

137. Ibid, cited supra.

138. 11 AVI Case 17351.

139. 8 AVI Case 18043.

140. Ibid, cited supra.

141. 8 AVI Case 17199.

142. Ibid, cited supra, at 17200.

143. 4 AVI Case 17924.

144. Ibid, cited supra.

145. 1 AVI Case 1093.

146. 49 Wash. 2d. 711, 306 p. 2d. 213 (1957).

147. 10 AVI Case 17967.

148. Desing v. Turner Aviation Corp. 166 F. Supp. 3790 (N.D. 111 1958).

149. Black, Law Dictionary 1968, pages 1727-1728.

150. G.N. Stevens, "Venue Statutes: Diagnosis and Proposed Cure", 49 Mich. L. Rev. (1950-1951), at page 315.

151. Title 28 USCA 1404(a).

152. Rule 12 (h) (3) the Federal Rules of Civil Procedure.

153. James, Civil Procedure, 618.

154. 10 AVI Case 17314.

155. Spencer v. Northwest Orient Airlines, Inc. 7 AVI Case 17822.

156. 4 AVI Case 17394.

157. 4 AVI Case 17795.

158. Ibid, cited supra.

159. 5 AVI Case 17121.

160. Ibid, cited supra, at 17121-17122.

161. 7 AVI Case 17820.

162. 7 AVI Case 17822.

163. Ibid, cited supra.

164. 8 AVI Case 17272.

165. Ibid, cited supra, at 17272.

166. 1954 U.S. Av. Re. page 399.

167. Ibid, cited supra.

168. 7 AVI Case 17614.

169. Ibid, cited supra, at 17614-17615.

170. 4 AVI Case 18152.

171. 4 AVI Case 18153.

172. 4 AVI Case 17924.

173. Ibid, cited supra, at 17930-17931.

174. 1964 U.S. Av. Re. page 594.

175. 8 AVI Case 18023; 9 AVI Case 17187; 9 AVI Case 17475.

176. 9 AVI Case 17477.

177. 1961 U.S. Av. Re. page 651.

178. Ibid, cited supra, at page 652.

179. 7 AVI Case 18295.

180. 8 AVI Case 18031.

181. Ibid, cited supra, at 18032.

182. 5 AVI Case 17509.

183. Ibid, cited supra, at 17510-17511.

184. Ibid, cited supra, at 17511.

185. 9 AVI Case 17107.

186. Ibid, cited supra.

187. See note 120.

188. 9 AVI Case 17364.

189. 9 AVI Case 18146.

190. 8 AVI Case 18180.

191. See note 5.

192. See note 79, at page 352.

193. Gracia v. Pan American World Airways, 1 AVI 1280.

194. See note 136 and also Gordon v. Sabena Air Lines, N.Y. Supp. C.N.Y. C.F.Y.

195. See pages 21-27 of this thesis.

196. See note 96, at page 864.

197. Funk and Wagnall's Standard Dictionary.

198. See note 136.

199. See note 141.

200. See pages 73 and 77 of this thesis.

201. See pages 6-9 of this thesis.

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