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**AIRLINE LIABILITY—THE WARSAW CONVENTION—
UNITED STATES DISTRICT COURT OF THE SOUTHERN
DISTRICT OF CALIFORNIA HOLDS THAT THE PASSENGER
MAY BRING SUIT IN THE UNITED STATES BECAUSE
IT IS KLM'S "PLACE OF BUSINESS THROUGH WHICH
THE CONTRACT WAS MADE": *POLANSKI V. KLM ROYAL
DUTCH AIRLINES***

REBECCA TILLERY*

THE WARSAW CONVENTION¹ is an international treaty that affords protection to airline passengers who are injured by an accident while in flight.² Article 28 of the Warsaw Convention identifies four places where a plaintiff can bring suit: 1) the domicile of the carrier, 2) the carrier's principal place of business, 3) the carrier's place of business through which the contract was made, or 4) the place of destination.³ The third provision is increasingly difficult to interpret as the aviation industry adapts to the explosive growth of online ticketing. In the recent case of *Polanski v. KLM Royal Dutch Airlines*, the United States District Court for the Southern District of California correctly concluded that the United States is KLM's place of business through which the contract was made, but drastically oversimplified the analysis by examining only one factor: where the ticket was purchased. The court should have examined many other aspects of the transaction, especially since it involved an online ticket purchase.⁴

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¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, reprinted in 49 U.S.C. § 40105 (1994) [hereinafter Warsaw Convention].

² *Id.* art 17.

³ *Id.* art. 28.

⁴ *See Polanski v. KLM Royal Dutch Airlines*, 378 F. Supp. 2d 1222, 1231 (S.D. Cal. 2005).

Andre Polanski ("Polanski") purchased an airline ticket from his home computer in Escondido, California for a one-way KLM flight from Los Angeles, California to Warsaw, Poland.⁵ Factual discrepancies exist as to whether the ticket was issued from KLM Airlines or their alliance partner, Northwest Airlines.⁶ After boarding the flight on October 30, 2003, Polanski began to experience excruciating pain in his stomach.⁷ He claims he was made to lie down in the baggage area for twelve hours until the plane could land in Amsterdam, The Netherlands, for a scheduled layover.⁸ In Amsterdam he had emergency surgery for a perforated duodenal ulcer, along with a follow-up surgery a week later.⁹

Polanski filed a claim in the United States against KLM for treaty liability, under the Warsaw Convention, for his injuries.¹⁰ Since both the United States and Poland are members of the Warsaw Convention, it provides Polanski his exclusive remedy.¹¹ KLM moved for dismissal based on lack of subject matter jurisdiction claiming that the United States is not one of the four places authorized by Article 28 of the Warsaw Convention.¹²

Neither party disputed that The Netherlands would be a proper jurisdiction because KLM is domiciled and maintains its principal place of business in The Netherlands.¹³ Additionally, neither party disagreed that Poland would be a proper jurisdiction since the final place of destination was Poland.¹⁴ The issue in the case was whether the United States is a proper jurisdiction under the third provision of Article 28 and the court ultimately found that KLM has a place of business in the United States through which the contract with Polanski was made.¹⁵ First, the court looked to the KLM-Northwest Airlines alliance in finding that KLM has a place of business in the United States through which a contract could be formed.¹⁶ The court then rejected KLM's claim that the contract was made in Poland because the

⁵ *Id.* at 1224-25.

⁶ *Id.* at 1225.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1224.

¹¹ *Id.* at 1227-28.

¹² *Id.* at 1225.

¹³ *Id.* at 1228.

¹⁴ *Id.*

¹⁵ *Id.* at 1231.

¹⁶ *Id.* at 1230.

ticket was allegedly issued in Poland.¹⁷ Rather, the court held that the contract was made in the United States because that is where the ticket was purchased.¹⁸

The court had to initially decide that KLM has a place of business in the United States. Relying on another district court decision, the court first identified the KLM-Northwest Airlines alliance as one that involves code-sharing and integration of frequent flyer programs.¹⁹ The court then used *Eck v. United Arab Airlines, Inc.*²⁰ and the KLM-Northwest alliance to prove that, even if the ticket was issued by Northwest, printed on Northwest paper, and picked up from a Northwest ticketing agent, KLM still has a place of business through which the contract could have been formed.²¹ *Eck v. United Arab Airlines, Inc.* upheld a suit against the foreign airline in the United States because the *Eck* court found that the scope of Article 28 was not meant to vary based on ticketing practices of the airline.²² The Polanski court extended this idea and held that KLM has a place of business in the United States because, as an alliance partner with Northwest, anywhere Northwest does business is a place of business through which KLM can make contracts.²³ KLM did not appear to disagree with this contention.²⁴

After holding that KLM has a place of business wherever Northwest does business, the district court then decided that the contract was made in the United States because that is where the ticket was purchased.²⁵ The court used general contract principles and held that since a contract is created where the acceptor completes his manifestation of assent, the contract was formed in California because that is where Polanski, as the acceptor of KLM's offer, performed the final act of paying for the ticket.²⁶

Although the district court came to the correct conclusion, its analysis is much too narrow and does not consider many other relevant factors that should be examined, especially when dealing in the uncertain realm of online ticketing. Modern trans-

¹⁷ *Id.* at 1229.

¹⁸ *Id.* at 1231.

¹⁹ *Orova v. Nw. Airlines, Inc.*, No. 03-4296, 2005 WL 281197, *1 n.2 (E.D. Pa. 2005).

²⁰ *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966).

²¹ *Polanski*, 378 F. Supp. 2d at 1230.

²² *Eck*, 360 F.2d at 813-14.

²³ *Polanski*, 378 F. Supp. 2d at 1230.

²⁴ *See id.* at 1231.

²⁵ *Id.* at 1231.

²⁶ *Id.*

portation contracts, especially those entered into on the Internet, are not always formed at one point in time such as when the ticket is issued or when the ticket is purchased.²⁷ With the rise of alliance partnerships like KLM and Northwest's there are often complex contractual relationships to take into account. Furthermore, cyberspace law is still in its infancy, leading to more confusion as to when a contract is formed on the Internet.²⁸ A much broader interpretation of the provision—one that takes into account all aspects of the contract formation—must be used to determine whether a jurisdiction contains an airline's place of business through which the contract was formed.

The overriding, original purpose of the Warsaw Convention was "to limit air carriers' potential liability in the event of an accident."²⁹ Another goal was to establish uniformity in the airline industry with regard to procedures and documentation.³⁰ So although at the time the Convention was drafted the policy behind it was pro-carrier, the modern trend has been to adopt instruments to give passengers more protection.³¹ Therefore, courts have followed suit in interpreting the Convention's provisions to slant more pro-passenger as well.³²

Courts generally interpret the "place of business through which the contract was made" to mean either where the ticket was issued, or where the ticket was purchased.³³ However, neither of these factors is dispositive when dealing with a situation of an online ticket purchase. After all, the Warsaw Convention was drafted "when the airline industry was in its infancy."³⁴ Therefore, the provisions must be interpreted in relation to the

²⁷ See *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Buenavista Esmeralda Co. v. Aerovias Nacionales de Colombia*, 951 F.2d 358 (9th Cir. 1991) (No. 90-56062).

²⁸ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997).

²⁹ *In re Air Disaster at Lockerbie*, Scot. on Dec. 21, 1988, 928 F.2d 1267, 1270 (2d Cir. 1991).

³⁰ *Id.*

³¹ See International Civil Aviation Organization: Convention to Discourage Acts of Violence Against Civil Aviation, Sept. 23, 1971, 10 I.L.M. 1156. The Montreal Convention, effective after the date of Polanski's injuries, is a new treaty that unifies and replaces the system of liability from the Warsaw Convention while recognizing the importance of ensuring consumer protection.

³² See Jukka Heinonen, *The Warsaw Convention Jurisdiction and the Internet*, 65 J. AIR L. & COM. 453, 486 (2000).

³³ *Shen v. Japan Airlines*, 918 F. Supp. 686, 689 (S.D.N.Y. 1994).

³⁴ *In re Air Disaster at Lockerbie*, 928 F.2d at 1270.

current state of the airline industry and its transformation due to advancing technology.

If the court had used the sole factor of where the ticket is issued to make its determination, it would essentially be arguing that the ticket itself is the contract. However, courts have routinely rejected this argument as inconsistent with the text of the Warsaw Convention because Article 3(2) states that “[t]he absence, irregularity, or loss of the passenger ticket shall not affect the existence or validity of the contract of transportation.”³⁵ Moreover, in order to ascertain where a ticket is issued online, the inquiry would almost certainly focus on complex technical details such as the location of the airline’s Internet server, or possibly the passenger’s host Internet server. In fact, the Polanski court specifically rejected KLM’s complex arguments that the ticket was issued in Poland because Polanski used his frequent flyer miles, which have his registered address as Poland, to purchase the ticket.³⁶ Instead, the court recognized the problem of making these complex technical determinations without hard evidence or clear reasoning supporting it. It is clear that using just one factor—where the ticket was issued—is not a logical query in today’s complex Internet world and results in determinations that are inconsistent with the Warsaw Convention itself.

However, deciding that the contract is concluded where the ticket is purchased online, as this court did, is no more logical. The court, by making this interpretative decision, is essentially arguing that the passenger’s computer desk is the place of business through which the contract has been made.³⁷ Furthermore, with the increased mobility of individuals around the globe, combined with the growth of Internet access in a variety of areas intended for public use, passengers can purchase airline tickets in every conceivable place and jurisdiction, regardless of any ties that the passenger or the airline has to the jurisdiction. Any allegation that a person is most likely buying airline tickets online from their principal residence is simply not realistic in today’s world.³⁸ Although this pro-passenger argument may have been more realistic even five years ago, in this

³⁵ Warsaw Convention, *supra* note 1, art. 3(2); *see, e.g.*, *Stud v. Trans Int’l Airlines*, 727 F.2d 880, 882 (9th Cir. 1984).

³⁶ *Polanski v. KLM Royal Dutch Airlines*, 378 F. Supp. 2d 1222, 1230 (S.D. Cal. 2005).

³⁷ *Heinonen*, *supra* note 32.

³⁸ *See id.* at 488.

mobile age, a court cannot assume that the place where the ticket was purchased online is actually the passenger's home residence.

Instead, the court could have made the same ultimate conclusion by examining a number of factors borrowed from Internet jurisdiction cases and "reasonableness" elements of personal jurisdiction. A broad balancing of these factors would result in a determination that makes logical sense in relation to our technological world.³⁹ One of the more recent cases analyzing Internet jurisdiction articulates a sliding scale standard based on the commercial activity that an entity conducts over the Internet.⁴⁰ Most international airlines' websites would fall under the far end of the spectrum where a company clearly does business over the Internet since they involve a high "level of interactivity and commercial nature of the exchange of information."⁴¹ When websites fall under this side of the spectrum, courts have found that personal jurisdiction is proper in the jurisdiction where the website was accessed.⁴² Applying the same ideas to the present situation, once a court determines that an airline's website is sufficiently interactive and commercial, it could be determined that the airline has a place of business wherever its website can be accessed.

Then, the court should determine where the contract was formed in an online airline ticket purchase. As articulated above, simply examining where the ticket was issued or purchased is much too narrow and inapplicable in the online arena. Rather, the court should look at several factors to determine how connected both the passenger and the airline are to a specific jurisdiction, along with how difficult it would be for each party to litigate in that jurisdiction, in order to come to a conclusion that provides a fair outcome for all involved. The seven "reasonableness" factors related to personal jurisdiction, and first articulated in *Burger King v. Rudzewicz*,⁴³ are examples of the type of factors that a court should examine when determining whether the airline has a place of business through which the contract was formed in a certain jurisdiction. The factors are: (1) the extent of a defendant's purposeful interjection; (2) the

³⁹ *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 810-11 (2d Cir. 1966).

⁴⁰ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.⁴⁴ No one factor is dispositive; a court must balance all seven.⁴⁵ The third factor would rarely make a difference in cases arising under the Warsaw Convention since both countries adhere to the Warsaw Convention and its laws.

If the court had used these factors it would have still concluded that the United States is KLM's place of business through which the contract was formed, but it could have taken into account many other relevant considerations. First, the court would have determined that KLM's website is certainly interactive and commercial so as to satisfy the requirement that KLM have a place of business in the jurisdiction.⁴⁶

Next, the court would have balanced the factors set out in *Burger King* to conclude that KLM has a place of business in the United States through which the contract was formed. It is clear that KLM purposefully interjected itself into the United States, as evidenced by its alliance with Northwest Airlines and website that is geared towards a global audience.⁴⁷ Also, the burden on KLM to defend itself in the United States would not be very great.⁴⁸ As a large international air carrier, it is undoubtedly suited to conduct all forms of its business in the United States. Applying the fourth factor, it is clear that while the United States has an interest in adjudicating the dispute of one of its citizens within its borders, The Netherlands also has an interest since KLM's principal place of business is in The Netherlands, making this factor fairly neutral as applied to the case.⁴⁹ The fifth factor is certainly malleable to the type of airline and type of flight involved.⁵⁰ Since KLM is part of an alliance with United States-based airlines, and it has such a global presence, it would be realistic for a court to hold that KLM could easily transport

⁴⁴ See *id.* at 476-77.

⁴⁵ *Id.*

⁴⁶ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

⁴⁷ See *Burger King Corp.*, 471 U.S. at 476-77.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

any evidence and witnesses to the United States. However, the court could also consider the one-way nature of the flight in question. This could indicate to the court that the airline staff and passengers are mostly Dutch or Polish citizens. In that case, the burden could be quite high on KLM to get its staff and passengers back to the United States to defend this litigation. Since Polanski has a home in Warsaw and spends a good deal of time in Poland, the sixth factor favors KLM since Polanski could effectively litigate in Poland without too much of a burden.⁵¹ Lastly, Polanski has at least two alternate forums in which he could bring suit: Poland and The Netherlands.⁵² Although these two locations could be very burdensome for some American citizens with little or no ties to the foreign countries to litigate in, as stated above, neither location would be a tremendous burden on Polanski since he has a home in Warsaw and is accustomed to international travel. After balancing the factors against each other, the court could conclude that the contract was formed in KLM's place of business in the United States.

By using factors that balance the needs and abilities of the passenger against the airline, the court would be able to further both the original purpose of the Warsaw Convention, providing protection to air carriers, while also considering the modern concern of passenger protection. This would result in a fair and balanced analysis that deems appropriate jurisdictions as "the place of business through which the contract was formed." It would also produce a more fair interpretation that would fulfill the purposes and goals of the Warsaw Convention while adapting to today's technology.

With the increase in e-commerce over the Internet, and specifically in relation to online airline ticket purchases, the analysis in *Polanski* is unsupportable. The reality of our interconnected world requires that courts interpret provisions like the one in question in a more flexible and multi-faceted way. The *Polanski* court, through its oversimplified analysis, has clung to antiquated versions of past analyses while ignoring modern technological advances that necessitate casting a broader net of connectedness.

⁵¹ *Id.*

⁵² *Id.*

Articles

