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A CONFLICT OF LAWS APPROACH TO THE WARSAW CONVENTION

BY ALLAN I. MENDELSON†

I. INTRODUCTION

I WOULD LIKE TO congratulate the Law School of Southern Methodist University and the many people who helped to arrange this excellent and valuable symposium. I should also like to thank them for having included me as one of the participants in this group of very distinguished speakers. I believe that it is this kind of public discussion and public disclosure of all the issues and all the many differing points of view that gives us the best prospects for amending and modernizing the Warsaw Convention.

As to the role already played by the United States in this controversy, the past is well known. And as to the role that the United States is yet to play, I think this will depend largely on the actions and reactions of our many partners in IATA, ICAO and in the Warsaw Convention itself. But some general comments might be appropriate at this point.

The interim arrangement has been in effect for just over one year and during this period the world has been fortunate to witness a minimum of serious air disasters. In the only three accidents of which I am aware since May of 1966, two of the air lines, Thai International and Aerocondor, were unfortunately not parties to the arrangement. The third, Varig, was a party but we do not know of any passengers who were on journeys to, from, or with an agreed stopping place in the United States. It may thus be said that we have had no experience in how the interim arrangement works.

At the same time, the dark predictions of the trial lawyers as to absolute liability have not been borne out. Nor have the dire estimates of the air lines as to huge insurance costs proved to be accurate. The *Lisi* decision¹ seems to have stimulated quite a number of equally pessimistic predictions—this time mostly from the insurance industry. I suspect that these predictions will ultimately prove as unwarranted as the others. Some have complained that the interim arrangement discriminates in favor of passengers destined to or from the United States. Of course, the simple way to rectify this is for airlines to follow the farsighted example of British European Airways (BEA) and to implement the agreement on a world wide basis.

In short, the problems seem considerably less pressing and far more

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The views expressed are those of the author and do not necessarily reflect those either of the Department of State or of any persons or groups with whom the author has worked.

¹ *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966) cert. granted, 36 U.S.L.W. 3189 (U.S. 6 Nov. 1967).

susceptible to solution today than they appeared to be eighteen months ago. Meanwhile, the ICAO Panel of Experts has been occupied in playing what looks very much like a numbers game, if only because the airline industry has been able to continue its steady and welcome record of maximizing safety in the air.

This relatively calm atmosphere should provide the international air law community with an unprecedented opportunity to study not just numbers as death limits and figures as insurance costs, but the entire approach of a private law convention limiting liability. To this end, I have decided to avoid discussing limits and costs and to speak more in terms of new approaches that, I believe, could make the Convention a truly viable and effective document—at least until our children or, hopefully, our grandchildren grow up and tell us just how wrong we were.

II. OBJECTIVES OF THE LOW LIMIT PROPONENTS

In order to move forward on any type of new approach—indeed, even to make progress under the old approaches—it is first essential to clarify what many of us consider to be the critical issue in this entire controversy. This is the issue of objectives.

For the United States, our primary objective is to assure adequate recoveries for all American accident victims—if possible in the context of an international convention. To meet this objective, high limits are essential. But our objective is and has always been very clear. On the other hand, what has not been clear at any point in this controversy is the objective of the low limit proponents. Though never articulated, it seems as though they could have only one of two objectives in opposing high limits.

(1) They may well believe that human life simply is not worth as much as Americans are able to recover in verdicts and settlements in the United States. If this is the case, their objective in opposing higher limits would be to pull the American public down to amounts which they consider more appropriate.

From a personal point of view, I frankly doubt that this is their objective. I find it extremely hard to believe that anyone familiar with our standard of living could or would question the appropriateness of any verdict in excess of \$100,000 where minor children are among the survivors.² So to the extent that this objective is—or should certainly be—eliminated, there seems to be only one other.

(2) They may well be apprehensive over the fact that if a high limit is set, it could bring about a situation where either their citizens sue in United States courts and recover higher awards than they would if they sued in their own countries or that awards in their own countries (whether as settlements or verdicts) may begin to increase in view of the high limit. Their objective, therefore, would be both to avoid forum shopping by their citizens in the United States (particularly in claims against non United States airlines) and to prevent escalation of verdicts in their own

² In *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), a trial court, without jury, awarded \$329,956 to a surviving wife and her two minor children, though on appeal the amount was slightly reduced. In *United States v. Becker*, 10 Av. Cas. ¶ 17,242 (9th Cir. 1967), a verdict on behalf of the victim's surviving children of \$322,995 was affirmed on appeal.

countries. This, in turn, would mean minimum cost increases for their airlines.

In any event, as between objectives (1) and (2), I am convinced or at least I would seriously hope that objective (2) plays the dominant, indeed the exclusive role in the thought processes of the low limit proponents. This apparently is why so many of them favor some type of multiple limit system.

III. MULTIPLE LIMIT SYSTEMS

But the multiple limit systems that have been advanced so far pose more problems than they solve. Take, for example, the solution that now seems most popular to our Panel of Experts.³ Basically, it contemplates two limits with a state opting, at the time of its ratification, for either the higher or the lower limit. The latest figures proposed in such a plan are \$100,000 and \$50,000 without absolute liability or \$75,000 and \$43,000 with absolute liability (all figures inclusive of legal costs). Passengers traveling between two states that had opted for the same limit would be subject to that limit. In the event of a difference in the opted limit, passengers would be entitled to the higher limit.

Perhaps the principal disadvantage of this proposal is that, like the Warsaw Convention itself, it rests entirely on the largely fortuitous test of origin and destination. Take the American who begins his holiday by sea and then travels by air between two foreign points; or the Swiss citizen who begins his holiday by auto and then uses the airlines just as did the American. Should they be subject to the lower limit simply because, for convenience and enjoyment on their holidays, they began their air journey in a country other than their own? And they would be subject to this lower limit even if they had booked air passage in their own country which, I am presuming, had opted for the higher limit. Moreover, a simple means to notify passengers of the multiple limits and of the way they work would be practically impossible.

These serious defects indicate to me that in the case of an American passenger flying on Pan American or TWA between two low limit countries, it would be a highly unpopular consequence in the United States if the survivors of that passenger were to be subjected to the lower limits. This being the case, I question whether the United States could or ought to accept a treaty incorporating such a system unless, of course, the lower limits were quite high.

This is not to suggest that no multiple limit system can be worked out. Rather, it is only to say that if such a system is to be worked out, the limits that may be applicable in any particular case should not depend on the largely fortuitous fact of the victim's origin and destination.

IV. PUBLIC POLICY, PREDOMINANCE OF CONTACTS OR DOMICILE?

No one of us is unfamiliar with the extraordinary amount of time and effort directed over the past several years to the question of what law should govern in tort actions involving multi-state or multi-national contacts. Starting with *Kilberg*⁴ in 1961, and continuing up to the moment, we have witnessed a progression of novel and imaginative approaches to

³ ICAO Doc. PE/2, Warsaw Report (1967).

⁴ *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

the resolution of this question. Once emancipated from *lex loci*, judicial ingenuity and the fertility of man's mind seem to have known no bounds.

But the salient though largely overlooked factor in this entire progression has been that whether a court based its choice of law on public policy, substance as against procedure, predominance of contacts or center of gravity, the choice always resolved itself in favor of the law of the victim's domicile or place of residence. In *Kilberg*, New York law applied to a New York resident. In *Pearson*, it was New York law for a New York "citizen and domiciliary."⁵ In *Griffith*, it was a Pennsylvania court applying Pennsylvania law to a "Pennsylvania domiciliary."⁶ In *Long*, it was a New York court applying Pennsylvania law for two passengers who "had resided in Pennsylvania."⁷ In *Gore v. Northeast Airlines, Inc.*,⁸ it was again New York law for a passenger who "resided" and was "domiciled" in New York at the time of the accident even though at the time of the lawsuit his wife and two surviving children were domiciled elsewhere. In *Hopkins v. Lockbeed Aircraft Corp.*,⁹ it was a Florida court applying Florida law to a Florida "resident."

It goes without saying that there were other contacts in these cases which, when added to the domicile or residence factor, gave the court a respectable rationale for being able to weigh *all* the contacts and to reach the conclusion that the law of the domicile or residence was the appropriate choice. Considering the number of airline ticket offices in every American city and the fact that every major city is served by at least one airport, a passenger usually begins his journey in the state where he resides or is domiciled. So to that extent, we can say that most of the cases will have at least three contacts favoring the law of the state of domicile, *i.e.*, place of purchase of ticket, place where the journey originated, and, of course, the domicile or residence itself.

But what about the other cases? Except for domicile and residence, all the other contacts can be and usually are entirely fortuitous. For example, should a different law apply to a New Yorker because he picked up his ticket and began his journey in Newark Airport rather than La Guardia? Or a Washingtonian because, despite his best efforts, he had to use Dulles rather than National? Or the Detroit resident because, for convenience, he originated his voyage from Windsor rather than Detroit, or the Canadian citizen because he did exactly the opposite? Or the many Europeans who would find it more convenient to begin their air journeys from an airport which is closer to them but which is located across the border in a different country? Or, indeed, Mr. Ciprari who originated his journey in New York and who could have flown the tragic leg from Rio

⁵ *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 556 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

⁶ *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796, 797 (1964).

⁷ *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796 (1965).

⁸ 373 F.2d 717, 719, 721 (2d Cir. 1967).

⁹ See 201 So. 2d 743 (Fla. 1967). Shortly after the date of the Symposium, it was officially reported that, on rehearing, the Florida Supreme Court had reversed its earlier decision and reverted to *lex loci*. 201 So. 2d 749 (Fla. 1967). The Florida Supreme Court thus appears to have joined the Oklahoma Supreme Court as the only state courts of last resort to have rejected the *Kilberg* approach and to have revalidated *lex loci*. See *Cherokee Laboratories v. Rogers*, 382 P.2d 520 (Okla. 1965). In two other decisions, the rejection of *Kilberg* appeared more dictated by the *Klaxon* rule than by any reasoned or enthusiastic application of *lex loci*. *Wright v. American Flyers Airline Corp.*, 263 F. Supp. 865 (D.C. S.C. 1967); *Goranson, Adm'r v. Capital Airlines, Inc.*, 345 F.2d 750 (6th Cir. 1965), *cert. denied*, 382 U.S. 984 (1966).

to Sao Paulo on the same common-rated ticket as he used in flying from New York to Rio?¹⁰ To put it another way, should Mr. Ciprari have been held to the seventy dollar recovery under Brazilian law simply because of the entirely accidental fact that he traveled from Rio to Sao Paulo on a separate ticket, when he could have amended his international ticket and, for no additional charge, made the same trip?

The point I am trying to make is that the governing law for determining damages in aviation accident litigation must and properly ought to be the law of the victim's domicile or residence. For it is that law with which the passenger was most familiar and had the greatest connection. It is the law which was developed in the light of and which in so many ways governed the economic conditions that the passenger was accustomed to; it is the law that he no doubt made his plans around before the fatal accident; it is the law under which his estate will be probated and his survivors receive their proper shares. And it is also the law of the state or nation where his survivors will more than likely continue to live. In short, whether we are dealing with interstate or international air transportation, it seems eminently correct to make the choice of law for determining damages in the event of an accident rest entirely on the single factor of where the victim lived.

It might well be said that this conclusion is precisely what the *Kilberg* court had in mind when it spoke in terms of "public policy." But the "public policy" rationale of *Kilberg* could hardly have served a useful purpose in a context such as that of *Long*, where the victim was not a New Yorker. So in time, the contacts or center of gravity rationale proved more useful and more popular, if only because its flexibility permitted application in every type of case. Now it is becoming apparent that all the doctrines and approaches following and including *Kilberg* are probably no more than convenient judicial means to permit application of the law of the victim's domicile or residence. Why then should we not adopt precisely this test both in the Warsaw Convention and also as a conflicts of law rule in domestic air accident litigation?

V. DOMICILE AND THE WARSAW CONVENTION

Whether a domicile test can be worked into the national fabric of our laws in a domestic context depends, it seems to me, largely on a case by case development—just as the *Kilberg* approach developed during the past six years. In the context of the Warsaw Convention, however, this test can be worked in simply by writing into the Convention, a uniform and exclusive choice of law. Through this means, each government would be asserting the rights and interests of its own citizens though not at the expense of the rights and interests of citizens of other states. Of course, there would be some agreed maximum limit. And though I really wish to avoid playing the numbers game, I might mention, just in passing, that this limit could be substantially higher than the present interim limit if only because there would be fewer cases in which the limit would come into play.

¹⁰ *Ciprari v. Servicos Aereos Cruzeiro do sul, S.A.*, 359 F.2d 855 (2d Cir. 1966). *Quaere*: If Mr. Ciprari had taken out an airport accident insurance policy prior to his New York departure, would his beneficiaries, in light of the opinion in *Best v. Continental Cas. Co.*, 272 F. Supp. 252 (N.D. Cal. 1967), have been able to recover under that policy?

In any event, after experimenting with several drafts, I have been able to come up with one which largely accomplishes the purpose. The draft is attached to this paper as an Appendix. But before analyzing it in detail, I should mention that a desirable if not essential consequence of adopting such a test would be to open up Article 28(1) to permit plaintiffs to sue in their domiciles or places of residence. For if damages are to be determined in accordance with the law of the domicile, it would seem both logical and fair to permit a plaintiff to bring his suit in the courts where that law would normally be applied.

It is, as most of us realize, no radical innovation in international law to write a private law limitation convention incorporating the victim's domicile or place of residence as a permissible forum in which to bring suit. And, of course, this type of provision could be adopted whether or not domicile was selected as the exclusive governing law for determining damages. For example, only last May, at the 12th Session of the Brussels' Maritime Law Conference, we drafted—and the United States Government signed—a Convention on Luggage Liability incorporating precisely such a provision. Article 13(1) of that Convention provides that claimants may maintain an action for damages before:

- (a) the Court of the permanent residence or principal place of business of the defendant, or
- (b) the Court of the place of departure or that of destination according to the contract of carriage, or
- (c) the Court of the State of the domicile or permanent place of residence¹¹ of the claimant if the defendant has a place of business and is subject to jurisdiction in that State.

It would seem that these fora worked out at Brussels could easily be substituted for the fora presently in Article 28(1). As another and perhaps even better possibility, we could eliminate place of departure or destination and retain the Warsaw Convention forum of "place of business through which the contract has been made." Or we could simply retain Article 28(1) adding the domicile and eliminating "the court at the place of destination."

But all of these thoughts on permissible fora are simply suggestions to modernize a document which was written during an era when air travel was hardly off the ground. Certainly in 1929, and even in 1955, no one could have contemplated the mass transportation facilities that exist today and that will expand multifold in the years to come.

Appropriate and necessary though a new look at Article 28(1) may be today, I should emphasize that adding the forum of domicile, however desirable, would by no means be an essential condition for adopting domicile as the exclusive choice of law. In short, and at least for purposes of this meeting, we can leave domicile as a forum and direct our attention to the more important issue of domicile as a choice of law.

VI. DOMICILE AS A CHOICE OF LAW IN THE CONVENTION

Looking now to the Appendix, the critical provision is what would be

¹¹ The French text used the expression "la residence habituelle" on the assumption that there was no essential difference between the two expressions.

new numbered paragraph (3) in Article 28. Its purpose is easily understood, though I can admit that not all the problems in this paragraph have been resolved. For example, the parenthetical expression "or habitual place of residence" can be adopted in addition to or in place of domicile. I, for one, prefer only domicile because I believe it is a more certain, internationally recognized, and more easily determined legal relationship. On the other hand, habitual place of residence (which may well be preferable to "permanent" place of residence—particularly in this age of unprecedented mobility) may in some few cases bring about a more just result. In any event, the choice of one or the other or a combination of both could well be left for study and recommendations by our Panel of Experts. The possibility of combining both, with the choice to be in the discretion of the court, seems particularly intriguing. It may well be that post-*Kilberg* courts used precisely this type of combination in relying on either alone or both together. But this problem is not a major one. In the vast majority of cases, domicile and habitual residence will be identical. And the fact that they may differ in, say, five percent of the cases does not mean, if I may use that shop-worn phrase from the Montreal Conference, that we should throw out the baby with the bathwater.

VII. ADVANTAGES OF DOMICILE AS AN EXCLUSIVE CHOICE OF LAW

Whether or not this proposal has any advantages for the low limit proponents depends entirely on what their objectives are in opposing limits acceptable to the United States. And this brings me back to my earlier remarks when I suggested that objectives were the critical issue in this entire controversy. For if the objective of the low limit proponents is to pull down recoveries by Americans, then the domicile proposal, simply because it *would* assure generally higher recoveries for Americans, cannot achieve any popularity. On the other hand, if their objective is to discourage escalation of verdicts in foreign courts and to avoid forum shopping by their citizens in the United States, then the proposal should really be very acceptable. Adoption of the domicile as the exclusive choice of law would eliminate forum shopping to as great an extent as possible. It would assure that no matter where the suit was brought, damages would be calculated and awarded just as though the victim were suing in the courts of the country where he lived.

And this is certainly a major advantage. For as we all know, any substantial increase in limits necessarily disrupts the "uniformity of law" that was achieved as a consequence of the very low limits of Warsaw-Hague. In other words, the task of resolving choice of law questions, involving both public policy and predominance of contacts considerations, will be as essential in any modernized (*i.e.*, high limit) Warsaw-Hague context as it has been in the domestic context of *Kilberg*, *Pearson*, and *Long*. Take, for example, a passenger domiciled in a developing country who is on an international flight aboard Pan American or BOAC. The flight was booked in New York, the accident happened on take-off in New York and the suit is brought in New York. If the New York court applies the contacts or center of gravity doctrine, New York law would probably apply. The recovery would be substantially greater than if the suit were brought in the courts of the country of the passenger's domicile.

To me, it seems fundamentally inequitable that any airline, whether foreign or domestic, should be required to pay more to a plaintiff's heirs because the plaintiff happened to be killed in New York rather than in the country where he lived. If the law and practice of that country required that amounts recovered under insurance or pension plans be considered in arriving at a just award, I would find it basically unjust if an airline could be sued in the United States without this very significant factor being equally considered.¹² If that country has a limitation statute applicable to its domiciliaries, I see no reason why that statute should not be applied no matter where the suit is brought. Certainly, foreign plaintiffs should not be entitled to windfalls or, indeed, to *any* better conditions for recovery simply because some of the fortuitous contacts surrounding the accident point to the application of New York law. In short, there seems no valid reason why airlines should be subject to large verdicts in United States courts in circumstances where these same plaintiffs could not recover half those amounts if the suits were brought in their own countries.

Moreover, if a uniform domicile choice of law were adopted in the Convention, contracting states would be free, if they wished, to enact their own lower limitation statutes, similar to those that exist in a few of the states in this country. These lower limitations would be applicable with respect to recoveries by their own domiciliaries, irrespective of where the suit is brought and where the predominance of contacts, other than domicile, might point. This type of solution would also go far in the direction of avoiding the escalation of verdicts in foreign courts and of settling the problem of predominantly regional traffic carried by smaller airlines between groups of adjacent developing countries.

VIII. CONCLUSION

Again putting this in the context of objectives, if the objective of the low limit proponents is to avoid forum shopping and escalation of verdicts, then adopting the domicile test as the exclusive choice of law in the Convention would meet the problem. It would involve only a very simple amendment to the Convention and one that would preserve the single limit system. At the same time, without any complicated selection or option procedure, it would incorporate as many limits as possible, subject always to the maximum single limit. Finally, a solution along these lines would most advance the cause of uniformity that we all agree is so desirable.

But if the objective of these countries is to minimize recoveries by Americans, then I am afraid the domicile test cannot meet the problem. At the same time, I should add that if this is their objective, then I seriously doubt whether any generally acceptable system can be worked out—notwithstanding the many valuable insights and though provoking analyses contributed by the participants in this meeting.

¹² For Scandinavian practice along these lines, see Sundberg, *Recent Developments in Scandinavian Air Law*, Arkiv for Luftrett, Bind 3 - Hefte 2 Side 97-111. For a recent American case raising similar problems, see *Gatenby v. Altoona Aviation Corp.*, 259 F. Supp. 573 (W.D. Pa. 1966).

APPENDIX

Proposed Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, [or before the court at the place of destination] or *before the court of the domicile (or the habitual place of residence) of the passenger suffering bodily injury or death if the carrier has a place of business and is subject to jurisdiction in that territory.*

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

(3) *Irrespective of the place where the contract of carriage has been made, the places of origin or destination according to the contract of carriage, the place of accident, the place where the action for damages is brought or the law on which the cause of action is founded, damages shall be calculated and awarded in accordance with the law and practice of the domicile (or habitual place of residence) of the passenger who brings an action for bodily injury or on account of whose death an action is brought. In no case, however, may damages be awarded in excess of (e.g., \$100,000 to \$150,000) inclusive of court costs and other expenses of litigation.*