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JUDICIAL JURISDICTION UNDER THE WARSAW CONVENTION

BY CARL E. B. McKENRY, JR.†

I. INTRODUCTION

There is, perhaps, no subject in reference to which it is more difficult to lay down precise rules by which every case can be clearly and certainly determined than the subject of the jurisdiction of courts. It is a subject, too, about which much has been loosely said. Only occasionally, have superior minds closely considered the principles involved and undertaken to define, with care, the boundaries of the jurisdiction of courts and the circumstances under which their jurisdiction will and will not attach.

If the foregoing applies to general problems of judicial jurisdiction, it has even greater applicability to those international aviation cases subject to the terms and conditions of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, which in common usage is known as the Warsaw Convention of 1929.

As one federal jurist recently put it: “Much of the case law on the subject is confused and not well-reasoned. As 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.”

Another federal judge conceded in a Warsaw case: “The question of jurisdiction under Article 28 of the Warsaw Convention is not free from doubt...”

With an ever increasing number of international flights which transit United States territory, involve U.S. carriers or citizens, and/or have the contract of carriage made in the United States, the topic considered herein may soon be transformed from a highly specialized and perhaps academic area to one of practical application and use to more and more general practitioners. Under such circumstances it would appear desirable to alleviate as many “doubts” and “confusions” as possible in regard to judicial jurisdiction under the Warsaw Convention.

II. WARSAW CONVENTION APPLICABILITY

Before judicial jurisdiction under Article 28 of the Warsaw Convention can be ascertained, applicability under Article 1 must first be considered. This is necessary in every case, since Article 28 may have an absolute con-
control over the jurisdiction of a court within the United States, and may well have the unique effect of preventing jurisdiction of the court rather than invoking it in spite of every other accepted jurisdictional contact or standard being to the contrary.

United States cases involving the question of Convention applicability can be divided into two major classes:

1. Those situations coming under Article 1, wherein the basic question is whether or not the Convention has any applicability whatsoever. If a contract of carriage does not bring the flight during which the accident occurred under the Warsaw Convention, the jurisdictional elements of the Convention are without effect.

2. Those cases wherein the Convention does apply but a particular set of facts is presented which without destroying its over-all applicability renders specific portions of the Convention unenforceable. The situations coming under this second class are generally of two types:

(a) Those wherein the carrier has failed to deliver a properly executed passenger ticket (Chapter 2, Section 1, Article 3 of the Convention), baggage check (Chapter 2, Section 1, Article 4) or airway bill (Article 9), thereby removing the effect of Article 22 which normally limits the amount which can be recovered by a claimant from the responsible carrier.

(b) A second situation also involves the removal of the protective limits of liability under Article 22, however, from another direction. In this area, a set of facts which show the carrier has been guilty of willful misconduct will serve to void the effect of Article 22. However, neither of these two latter situations have any direct effect upon judicial jurisdiction under Article 28, which remains in force.

III. THE JURISDICTIONAL PROVISION: ARTICLE 28

The question of Convention applicability has been considered recognizing that the question of jurisdiction does not become relevant and cannot be determined until the forum has found that the Warsaw Convention rules apply to the contract of carriage in question. Until such a determination is made, the courts would, no doubt, proceed under their own appropriate and applicable rules as to substance and jurisdiction as well as procedure. The application of the Warsaw Convention rules in


5 The most extreme situation being a case wherein the forum at the locus delicti is deprived of jurisdiction even though its own citizens may be involved.


all probability, would have to be raised affirmatively by the defendant in order to gain recognition and become operative although it would be quite proper, correct and desirable for the alert jurist to take judicial notice of the Warsaw Convention as a treaty obligation of the United States and enforce its rules even in the absence of specific pleading in this regard by either of the parties to the action.

A. Text

Article 28 of the Warsaw Convention deals specifically with the question of judicial jurisdiction. The text of this Article is quoted below in the three versions which are of consequence to this study:

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

2) La procédure sera réglée par la loi du tribunal saisi. (Official French text)

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 having jurisdiction where the carrier is ordinarily resident, or has his 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.

2) Questions of procedure shall be governed by the law of the Court seised of the case. (Official British text)

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, through which the contract has been made, or before the Court at the place of destination.

2) Questions of procedure shall be governed by the law of the Court to which the case is submitted. (Translation by U.S. Department of State)

The French version is the official text of the Convention and the version officially accepted by the Senate of the United States. The translation provided by the United States Department of State, while not officially accepted, accompanied the original French at the time of acceptance by the United States Senate, and has been used in a quasi-official manner in all considerations of the Warsaw Convention before United States Courts. The British version is the official text as accepted by the British Parliament rather than the original French.

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The claim of the plaintiff here against the defendant carrier is not based on The Warsaw Convention but on the tort arising from the defendant carrier's alleged negligence. This court, having in personam jurisdiction over the parties, has jurisdiction over the subject matter of the claim under 28 U.S.C. § 1332(1) by reason of alleged diversity of citizenship coupled with jurisdictional amount. The complaint does not refer to the Warsaw Convention, nor are any such allegations required. It is quite sufficient to make out a claim as it stands.

10 49 Stat. 3007.
11 Carriage by Air Act (1932), 22 and 23 Geo. 5, c. 36. First Schedule, Article 28.
12 49 Stat. 3020.
14 Carriage by Air Act (1932), 22 and 23 Geo. 5, c. 36.
Certain differences between the British and the United States translations are readily apparent, the impact of which will be considered at the propitious place.

B. Specific Jurisdictions Under Article 28

The main intent of this Article is to set forth the courts which are competent forums for actions under the Warsaw Convention. Four specific jurisdictional contacts are provided, three relating to the carrier, and the last based on place of destination. Each of these contacts is deserving of specific and individual consideration.

1. Contact One—"Court of the Domicile of the Carrier"

The United States translation of the original French text of the Convention reading, "court of the domicile of the carrier," is probably more literal than the British text which provides, "court having jurisdiction where the carrier is ordinarily resident."

While perhaps more accurate, the use of the term "domicile" in countries such as the United States creates a question as to whether the domicile referred to in this Article extends to the whole territory of the contracting country, or means the component state in which the carrier has its residence if an individual, or is incorporated, if a corporation.

Goedhuis states that this difficulty could be solved if the American translation used the same wording that was used in the British translation. It is not apparent how the use of the British text would simplify matters.

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, would the state courts 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 more closely related to venue when considered on the level of international agreement and will be treated at a later point in this study.

The British translation itself is not invulnerable to criticism. Based on that version, 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 Y with only a designated agent for legal purposes in X. Under this situation could X be considered the place where the carrier is ordinarily resident? Certainly a serious factual

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12 Sullivan, Codification of Air Carrier Liability by International Convention, 7 J. Air L. & Cont. 47 (1916).
16 Goedhuis, National Airlegislations and the Warsaw Convention (1937), at p. 293.
question is raised. On the other hand X is without question the place of domicile of the carrier corporation regardless of other contacts which might be available.

Earlier drafts of what eventually became Article 28 of the Warsaw Convention did not make any provision for either “domicile” or “place where ordinarily resident.” The only contact in this regard was “le siège principal de son exploitation,” which the United States State Department originally translated to mean, “a registered office of the concern.” However, at the Warsaw conference, the delegation of Czechoslovakia proposed to add to the list of courts suggested the court of the domicile of the carrier.

The Czech proposal was accepted, creating a problem as to the United States translation of what is now officially the second contact under the final form of the convention. Thereafter, the second contact was translated as “principal place of business.”

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 of the United States courts that the place of incorporation of a carrier corporation has jurisdiction, under contact number one, “the carrier’s place of domicile.”

2. Contact Two—“Carrier’s Principal Place of Business”

The British and the United States translations are identical as to this contact. As previously considered, the original United States translation was apparently modified after the carrier’s “domicile” was added as contact one in the final text of the Convention and this contact now under study became contact two.

Actually, the translation of “le siège principal de son exploitation” to mean “principal place of business” as reflected in the approved text is more accurate than the earlier draft of “registered office of the concern.”

In United States courts the principal place of business will normally be construed as the jurisdiction in which the executive and main administrative functions of the carrier are located, or as stated in one federal case:

the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and co-ordinate all activities without regard to locale, in the furtherance of the corporate objective.

It is clear as previously stated that “principal place of business” is not synonymous with nor a test for “residence” or “domicile” either for a corporation or as to a natural person. Therefore, those authorities suggesting that contact one and contact two are identical in actual operation:

17 Cha, Air Carriers’ Liability to Passengers in International Law, 7 Air L. Rev. 60 (1936).
18 Ibid.
19 However, note Winsor, Admr. v. United Airlines, Inc., Delaware Superior Court, New Castle County, Sept. 12, 1958, 5 Av. Cas. 18,170 wherein the defendant carrier was incorporated in the State of Delaware, but the accident took place in Colorado. Although transportation covered by the Warsaw Convention rules was involved, the Court dismissed the action concluding —“that the doctrine of forum non conveniens should be applied in this case and that this Court is free in its discretion to apply such doctrine.”
may not be giving the United States point of view appropriate consideration. 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 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 hearings and submission of evidence to determine the jurisdiction of the forum before even considering the merits of the case itself.

The most serious, albeit remote and extreme, possibility is 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 of the Convention.

A United States District Court saw fit to treat this provision as requiring "a principal place of business" rather than "the principal place of business." The result of opening such a "Pandora's Box" was illustrated in a later case wherein the plaintiff cited the first 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 the second case stopped such thinking with the statement: "Under this language [Article 28], there can be only principal place of business." As a practical matter there can be only one principal place of business under this provision and there is little room for doubt but that the framers of the Convention so intended.

3. Contact Three—"Where Carrier Has a Place of Business Through Which the Contract Has Been Made"

It should be noted that there is a variance under this contact between the British and the United States translations from the French. The British use 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.

If the carrier has an office of its own through which the ticket or air waybill is issued, then the forum having jurisdiction over the place where said office is located clearly qualifies under contact three as a forum having jurisdiction under the Warsaw Convention. So far, no difficulty is presented, but what if the office is staffed by personnel supplied by another airline? Or what if the ticket is sold by another carrier through an interagency agreement? As a third possibility, what if the ticket is sold through an independent travel agency authorized to maintain the carrier’s ticket stock and issue such contracts of carriage on behalf of the carrier? At


25 Id. at 192.
what point does the term "establishment" or "place of business" cease? To what extent the framers of the Convention intended the agency relationship to apply is not clear from the available minutes of the conference.

While Goedhuis in his pioneering volume on the Warsaw Convention does not specifically consider the extent to which the agency relationship should apply under this contact, he does shed some light on the matter by way of comment on the British text of the convention:

It should, however, be pointed out that the difficulties which lead the court having jurisdiction at the place of the accident to be omitted, also prevail with regard to the competence of the court having jurisdiction at the place where the carrier "has an establishment by which the contract has been made."

It must be admitted that the word "establishment" ("place of business" in U.S. translation) also includes agencies of the carrier, for the latter expression was used originally and was replaced by the word "establishment" in order to include the branch offices of the carrier.

The several situations which may result from this question can best be illustrated by example:

First, as to the issuance of the ticket or air waybill through another carrier which handles the first part of the carriage. The passenger embarks on a journey involving the services of several successive carriers in going from origin to destination. He purchases his ticket from the first of these carriers (carrier No. 1). If the injury occurs while on an aircraft belonging to carrier No. 1 there is no question as to the third jurisdictional contact under Article 28. However, if the mishap takes place while being transported by carrier No. 2, or carrier No. 3, etc., jurisdiction becomes more complex since Article 30 (2) of the Convention limits the passenger's right of action to "the carrier who performed the transportation during which the accident or delay occurred."77

Second, as to the issuance of a ticket or air waybill through another carrier not involved in the transportation. The passenger purchases a ticket through a carrier issuing the ticket on behalf of another carrier which is usually, but not always, a subsidiary or affiliate of the first carrier and does not maintain its own offices at that particular location.

Third, as to the issuance of a ticket through a travel agent. The passenger purchases the ticket through a local travel agent who is authorized (and usually through IATA, International Air Transport Association) to issue tickets for the carrier.

As to the three situations outlined above there are several possibilities. One is to simply ignore the question of any agency relationship between the carrier liable and carrier number one or the travel agent, as the case may be, thereby eliminating the application of contact three. Another is to establish a legal presumption of agency between carrier number one

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26 Ibid.
77 Warsaw Convention, Article 30. See also Orlove v. Philippine Air Lines, 257 F.2d 384 (2nd Cir. 1958); cert. denied 358 U.S. 909 (1958).
or the travel agent and all succeeding carriers so as to assure the jurisdiction of the court at the place where the contract was made in all situations.\footnote{9}

The third is to consider the factual situation in each individual case and determine the existence or nonexistence of an agency relationship in each instance based upon generally established principles of law for the determination of such legal relationship. Finally, to hold that the intent and meaning of the Convention in this regard is to require the carrier to have an establishment of its own at the location where the contract was made.

There have been two leading cases considering contact three, one before the United States courts and the other in the British courts. In point of time, Rotterdamsche Bank, N.V. v. British Overseas Airways Corp. was the first case to consider the problem,\footnote{10} because in previous Warsaw cases both in the United States and in the United Kingdom, the test of jurisdiction under Article 28 was neither relevant nor required since the courts involved were of competent jurisdiction whether the Warsaw Convention and Article 28 applied or not. However, Rotterdamsche Bank presented a slightly different situation. On March 22, 1950, the plaintiff had delivered a shipment of gold coins to KLM in the Netherlands for delivery to Banque de L'Indochina at Djibouti, French Somaliland. The contract of carriage for the entire trip was based on an agreement between the banks and BOAC in London. KLM, 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 transshipped to another Aden Airways aircraft headed for 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 Warsaw Convention applicability. 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 at 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, Mr. Justice Pilcher stated:

Article 32 of the Convention, provides in terms that any clause in the contract of carriage which purports to infringe the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void. This Article appears to reinforce the view that 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 defendants (Aden Airways).\footnote{11}

The Court's position is, of course, based on the absence of Convention

\footnotesize{\footnote{9}Berner v. United Airlines, 2 Misc.2d 260; 149 N.Y.S.2d 335 (Sup. Ct. 1956); 3 App. Div. 2d 9, 157 N.Y.S.2d 884 (1956).\footnote{10}Lloyd's List L.R. 154 (Q.B. 1953).\footnote{11}Ibid.}
Article 28 (1) jurisdictional contacts as to Aden Airways inasmuch as its principle 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.

The Court's position in completely ignoring the possibility of an agency relationship between BOAC and Aden Airways at London has not escaped criticism by legal scholars in the field.\(^2\) It would appear proper for purposes of classification to place this case under possibility number one of the four possible approaches previously considered.

Treatment of this same question in the courts within the United States cannot be characterized as uniform. In one of the first United States cases to specifically consider the problems presented by Article 28, the New York Supreme Court made certain determinations worthy of careful study in *Berner v. United Airlines*.\(^3\) The plaintiff's intestate purchased a ticket in New York City for Sydney, Australia and return via San Francisco. The transportation between New York and San Francisco was by United Airlines and the transportation between San Francisco and Australia was by British Commonwealth Airlines. During the return portion of the trip the British Commonwealth aircraft in which the decedent was flying, crashed, killing all on board. The purchase of the ticket in New York City had been through British Overseas Airways Corp. Action was brought in the New York Supreme Court. Service of process on British Commonwealth was achieved through service on BOAC executive personnel in New York.

Jurisdiction was challenged by the defendant, British Commonwealth, alleging that it was a foreign corporation not doing business within the state of New York. The court had no difficulty in establishing that the Warsaw Convention applied to the transportation and then proceeded to the questions of Article 28 (1) as to its jurisdiction under the Convention. The Court established that there were two clear jurisdictional contacts:

1. New York City was the "place of business through which the contract had been made."
2. New York City is "the place of destination."

However, making the British Commonwealth Airlines fit into these contacts presented somewhat of a problem. The fact that it was an Australian carrier with no place of business of its own in New York, and no flight operation of any kind into or out of New York State, were clearly obstacles in the path toward jurisdiction. The Court found 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 contract of carriage entered into in New York by BOAC was held binding on British Commonwealth Airlines since BOAC had entered into the agreement on its behalf as British Commonwealth's general agent in New York. Then to settle the matter, the court

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\(^3\) 2 Misc.2d 260; 149 N.Y.S.2d 335 (Sup. Ct. 1956); 3 App. Div.2d 9, 157 N.Y.S.2d 884 (1956).
held that because of the consent to jurisdiction, service of process, the only remaining requirement under New York Civil procedure, was waived.

On review, the appellate division of the New York Supreme Court affirmed the lower court's ruling. The appellate court did, however, go to greater lengths to establish that service of process through BOAC as general agent was good service on British Commonwealth Airlines. The *Rotterdamsche Bank* case had two basic distinguishing 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:

1. That the agency relationship between BOAC and Aden Airways was not specifically considered by the English courts in *Rotterdamsche Bank* and,

2. That in *Rotterdamsche Bank*, Aden Airways was not specifically named in the contract of carriage made with BOAC in London.

However, Aden Airways, a wholly owned subsidiary of BOAC, was clearly shown in the BOAC system timetable as being the carrier operating between Cairo and Djibouti.

While the New York State courts are in no way bound by the findings of the British courts and the silence on the part of the British courts as to any agency relationship between the carriers keeps their holding from being directly on point or, for that matter, in conflict, the implications raised by the silence of the British courts in the *Rotterdamsche Bank* case and by the United States courts in the *Berner* case speak out eloquently that in the interest of uniformity of interpretation of the Convention some comment by the court in these precedent cases might have been desirable. The fact that both the basic opinion presented by Judge Markowitz and the appellate opinion of Judge Bergan do not even mention, cite, or refer to the *Rotterdamsche* case of some three years earlier leaves one with some speculation.

The proper answer to the question of how far the agency relationship should go under this contact three of Article 28, is debatable. The idea of requiring a carrier to defend a case anywhere in the world because a ticket has been sold on its behalf by a travel agent or an originating carrier while at the same time the courts of the carrier's domicile or principle place of business (if not in a high contracting party) do not have jurisdiction under the Convention, and further, that under no circumstances (in the absence of an Article 28 contact) does the place of the accident have jurisdiction, results in what is perhaps an extreme situation. In fact, this position could quite easily result in granting jurisdiction to a forum where advanced judicial practices and procedures, rules of evidence, and the like, are not used. It was this type of situation which the framers of the Warsaw Convention hoped to avoid when they excluded the place where the accident occurs from jurisdictions available under Article 28.⁴

On the other hand, it might be argued that the place where the contract of carriage was entered into should certainly be an acceptable forum in all cases in that the carrier knowingly and voluntarily had allowed and probably desired, an agent (either a travel agent or another carrier) to enter into the contract of carriage on its behalf.

In conclusion, it must be observed that in actual application, as the

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foregoing cases so well illustrate, particular factual settings permeate the purely legal questions presented to such an extent that no definite conclusions as to the position of the courts on this point of law can be predicted at this time.

4. 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 courts 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. Therefore, it is not only conceivable but quite possible for a situation to arise where 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: The 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.

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.

The obvious and perhaps most difficult question presented by this contact is to determine exactly what is the place of destination. The courts 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. For purposes of uniformity and consistency, both recognized as virtues under any form of jurisprudence, such treatment is above reproach or criticism. It follows, that this contact is controlled absolutely by the destination as shown on the contract of carriage. A round trip ticket for example, would have as its ultimate destination the same point as the place or origin. Also, an alternative destination for operational reasons would not give the court jurisdiction at the alternate destination any more than the place of air crash which thereby becomes in a physical sense the place of final termination of the flight, is considered by the courts as the point of destination for Convention purposes. Likewise, transportation to be performed 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.

However, the import of Article 28 for jurisdictional purposes as con-

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55 Warsaw Convention, Article 1(3).
trasted with Article 1 for defining the applicability of the Convention does have one vital point of distinction. 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 that High Contracting Party not being in question. But when Article 28 is considered as to High Contracting Parties having distinct internal sub-divisions for jurisdiction such as in the United States, it becomes necessary to consider whether federal or state courts have jurisdiction, or both, and if state courts, which state or states? This matter will be treated in more detail in the following section.\(^8\)

A somewhat unique application of this fourth and final jurisdictional contact is illustrated by the case of *Northwest Airlines v. Gorter Admx.*\(^9\) In that case decided by the Supreme Court of the State of Washington, the deceased, Waldrep, 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 Waldrep. Northwest Airlines is a Minnesota corporation qualified to do business in the state of Washington. The deceased was a resident of the state of Alabama, leaving as his sole heir a minor daughter residing in the state of New Mexico. The only asset in Waldrep’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 on the ground that the Washington state courts 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 courts of that state being the “courts at the place of destination” would have jurisdiction of the action.\(^{40}\)

C. Actions Outside The Four Jurisdictional Contacts

Writers as well as the courts are in agreement that the plaintiff is limited in his choice of courts to those of the High Contracting Parties identified by the specific jurisdictional contacts of Article 28. However, as to the courts not defined by these contacts, two basic situations are presented, i.e., (1) other Warsaw Convention countries, and (2) non-Warsaw Convention countries.

1. *Other Warsaw Convention Countries*

If a case controlled by the Warsaw Convention were presented to a Warsaw Convention forum not falling within the contacts of Article 28,
it appears that such court would refuse to consider the action because of a lack of jurisdiction. The effect of Article 28 limiting the jurisdiction to four specific jurisdictional contacts, all of them within the territories of High Contracting Parties, has been generally regarded as exclusive. The language of the official British text and the United States Department of State translation are uniform: "An action for damages must be brought, etc. . . ." (italics supplied)

This is based upon the official French: "L'action en responsabilité devra être portée etc. . . ." (italics supplied)

The word "devra" is the third person singular, future tense, of the irregular verb "devoir." "Etre" is the infinite "to be." "Portée," from the verb "porter" meaning "to bring within the range of reach." In this instance, the past participle form is used and is translated "brought." The verb "devoir" has various meanings, e.g., "to owe, to have to, to be obliged to, should, must, ought." However, when followed by the infinite "être" it usually indicates an obligation. The strength or force of the obligation may vary from a mild or almost suggestive one (ought or should) to a strong obligation (must or have to). Used in the future tense, there is little doubt that the limiting of the jurisdictions is intended to be exclusive and not optional. Any doubt as to the strength of the original language is dispelled by two factors within the Convention itself.

First, the use of the proper form of the verb "devoir" is provided to mean "must" or "shall" in other articles of the Convention, e.g., in Articles 3 (1), 4 (3) and 8, "doit contenir" is translated "shall contain." In Article 13, "doit aviser" is translated to mean "it shall be the duty (of the carrier) to give notice,"—United States version, "it is the duty (of the carrier) to give notice"—English text, Article 26, "doit adresser au transporteur une protestation," translated "must complain to the carrier." Article 26 (3) "doit être faite" translated "must be made." While there are also a number of instances both in the British text and in the United States translation where the words "must" and "shall" have been used without the verb "devoir" appearing in the corresponding French text, this does not weaken or lessen the use of the word together with its meaning and purposes in Article 28 (1).

Second, when Article 28 (1) is considered in the light of Article 32, the mandatory effect of the former is further strengthened. Article 32 provides:

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 clauses shall be allowed, subject to Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.

It is readily apparent that any alteration of the rules as to jurisdiction

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41 Supra note 4.
42 Although the translation of the passages in question are based upon the official United States State Department translation, 49 Stat. 3020, the following French dictionaries were consulted by the author: Passy, New International French-English Dictionary (1945); Jéavre, Vocabulaire Français-Anglais de Termes et Locutions Juridiques (1953); Dalrymple, French-English Dictionary of Legal Words and Phrases (2d ed. 1948).
under Article 28 even by mutual consent is strictly prohibited and any such agreement is null and void.

However, in spite of this apparently mandatory nature, certain questions have been raised by court rulings. In *Berner v. United Airlines, Inc.* the court seems to imply that the four contacts named are merely those forums in which "the carrier has consented to be sued . . . and that the passenger may rely on this consent in booking passage."

In other words, it does not limit the plaintiff but merely guarantees four places where the action can be brought without incurring objection by the carrier on jurisdictional grounds. Does it then follow that, assuming some other basis for jurisdiction over the defendant carrier, the plaintiff may bring an action in a court outside these identified by the four jurisdictional contacts of Article 28? To give the Warsaw Convention full force and effect, this question must be answered in the negative.

From the foregoing language of the Convention, it would appear safe to conclude that if the question of lack of jurisdiction under Article 28 is properly raised by the defendant, and the forum in question is within a Warsaw Convention country, then the Court will or should dismiss the action for lack of jurisdiction. As a practical matter, the only situations where such a forum would be selected by the plaintiff would be that it was at the *lex loci delicti* or that it was the forum of the plaintiff’s place of residence or domicile. In almost all cases of this type the selection of a forum other than one provided in Article 28 would be based on one or two primary considerations or both. First, ease of litigation. Since the plaintiff would usually consult, at least initially, a local attorney, if at all possible, the local forum which is more familiar to the attorney and client would be preferred. Also, as a general rule the cost of suit in the local forum would be less to the plaintiff since the necessity for journeying to another country would not be present.

Second, the application of the law of the *lex loci delicti*. The vast majority of cases have held that the Warsaw Convention does not create a cause of action by its own terms. Following this majority opinion to its logical conclusion, a cause of action must therefore be based upon such action for damages as is provided by the *lex loci delicti* or be based upon an action for breach of contract governed generally by the law of the place where the contract was made.

The latter of these two possibilities, *i.e.*, an action based on breach of contract, although vigorously supported by several writers in the field, has not received any substantial recognition by the courts to date. *A priori*, if the action were instituted at the place where the accident occurred, the problem of proving foreign law would be eliminated.

It is interesting to note that the original draft of the Convention in-

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43 Venue as distinguished from jurisdiction will be considered in this study, infra.


cluded as the court having jurisdiction the one at the place of the accident as a fifth available forum under Article 28. However, at the Warsaw conference, the representatives of the United Kingdom objected to the inclusion of this jurisdictional contact on the ground that on long distance international flights an accident could occur at a place having a poorly organized or underdeveloped judicial system, or none at all, e.g., the high seas. Supported by the French delegation, the British proposal was accepted by the Conference and jurisdiction at the place of the accident was deleted from Article 28.

The weaknesses in the argument advanced above are: First, 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. Second, the same argument might equally apply to the place of destination or to 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 jurisdictions. However, the value of the foregoing observation is probably moot as a practical matter since there has been no trend toward enlarging the jurisdictional contacts under Article 28.

2. Non-Warsaw Convention Countries

The jurisdictional problem presented by the filing of a case controlled by the Warsaw Convention in a non-Warsaw Convention forum is somewhat different. This difference is due to the fact that the non-Warsaw forum is not bound by an international agreement to recognize the Warsaw Convention, its applicability, operation, or terms and conditions. Therefore, several alternatives are available to the non-Warsaw court if an action is brought there: First, the court could accept jurisdiction and proceed with the case, ignoring the Warsaw Convention to which its government is not a party. Second, the court may accept jurisdiction and proceed with the case, but recognize the terms and conditions of the Convention as being applicable under the conflicts law of the forum (except Article 28, of course, which would deprive the forum of jurisdiction) as to the substance of the action. Third, the court could refuse jurisdiction on the grounds that all terms and conditions of the Warsaw Convention are applicable including Article 28 which thereby ousts the judicial jurisdiction from that forum as not being in the territory of a High Contracting Party.

Each of the three courses of action assumes that the forum would

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48 Minutes of II Conférence Internationale de Droit Privé Aérien (Warsaw, Oct. 4-12, 1929), at p. 78.

49 No change as to jurisdictional aspects is provided in the Hague Protocol to the Warsaw Convention. The Protocol is drafted in the English, French and Spanish languages. However, in cases of doubt, the French text is official. Proper title is: "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October, 1929." Although opened for signature at The Hague on September 28, 1955, it is not as yet in force at the time of this writing. The United States sent a delegation to the conference at The Hague, 33 Dept. State Bull. 440 (1955), but has not ratified the Protocol to date. See also, de Villeneuve Compétence Jurisdictionnelle et Lex Fort Dans La Convention de Varsovie, 8 McGill L.J. 284 (1962).
ordinarily have jurisdiction under its own *lex fori* aside from the Warsaw Convention question through normal standards of establishing judicial jurisdiction as have been previously considered herein. Which path the court will follow depends to a great extent on the specific relationship between the forum and the cause of action. For example, the forum at the place where the accident occurred has by usual standards of international law jurisdiction of the matter and would, in most instances, follow the first or second procedure enumerated above. Since the *lex loci delicti* would apply to the case, the Court could feel free to proceed. However, if the action is brought before some other court such as at the carrier’s domicile or principal place of business, the court will probably look to its own conflict law and decide whether it will grant a motion to dismiss for lack of jurisdiction.\(^{50}\)

Some writers have taken the position that the non-Warsaw forum should apply the jurisdictional provisions as part of the contract between the parties.\(^{61}\) This would result in the utilization of our third possibility, *i.e.*, the ousting of jurisdiction from a non-Warsaw forum that would otherwise have jurisdiction. Such an approach would be perhaps commendable, but it is difficult to visualize this action being taken by courts unless urged to do so by other difficulties of a practical vein or an unusual factual situation. Therefore, no definite conclusions can be reached as to which approach will be taken since it is entirely discretionary with the court. There are several cases, however, that reflect what might happen.

In an early Warsaw Convention case, *F. A. v. Hungarian Airlines*,\(^{53}\) the plaintiff had filed an action against the carrier for the loss of a coat which had fallen through an open window over Prague, Czechoslovakia, during a flight from Budapest to London. Hungary was not a party to the Warsaw Convention at the time. The court admitted its jurisdiction in accordance with the Hungarian rules of civil procedure, but proceeded to apply the Convention as the law applicable in Czechoslovakia, the *loci delicti*, which was party to the Convention.

Another case,\(^{52}\) while not specifically compatible since the destination was in a non-Warsaw country (Turkey), is nonetheless a worthwhile example of judicial thinking on this point. Goods were being transported from Geneva to Rome by Alitalia and from Rome to Istanbul by L.A.I. Although L.A.I. had a ticket office (quichet) in Zürich, the court held that such an office was not an establishment within the meaning of the Warsaw Convention and further that there were no contacts whatsoever with Geneva, and thereby rendered that forum without jurisdiction.\(^{54}\) As stated above, this is not specifically on point since the requirements under Article 1 to subject the carriage to the Warsaw Convention are lacking. However, plaintiff then brought action in the courts of Zürich on the basis of Article 12 of the Swiss Air Transport Regulations of 1952 which provides:

\(^{50}\) Romero, *op. cit. supra* note 40, at 61.


\(^{53}\) (Hungary) April 2, 1936, Royal Court of Appeals of Budapest.

\(^{52}\) M.D. v. L.A.I (Swiss), March 26, 1937, Court of First Instance of Geneva.

\(^{54}\) Based upon Article 12(1) of the Swiss Air Transport Regulations of 1932 which provides that the proper forum shall be determined in accordance with the provisions of the Warsaw Convention.
1) Le for de l'action en dommages et intérêts, se détermine selon les dispositions de la Convention de Varsovie.

2) Si un transporteur étranger a désigné à l'Office Fédéral de l'Air, un domicile juridique en Suisse, il peut, en outre, être actionné devant le juge de ce domicile.

Translation:

1) The forum for actions in damages and interest shall be determined in accordance with the provisions of the Warsaw Convention.

2) If a foreign carrier designates to the Federal Aviation Office, a domicile within Swiss jurisdiction, it may, in addition, be subject to an action by the court of that domicile.\textsuperscript{55}

The court accepted the argument that under paragraph 2, the defendant had by choice accepted a domicile in Zürich thereby giving the Zürich court jurisdiction according to Swiss law.\textsuperscript{56}

IV. PROBLEMS OF POLITICAL SUB-DIVISIONS AND VENUE

Until this point, we have limited our consideration of jurisdiction to the national level since breakdowns into political sub-divisions below that level do not affect international aspects of a treaty. In the United States, we are faced with a different situation. With the additional factor of jurisdiction on the state level and the venue question as between federal district courts, the provisions of Article 28 (2) take on added significance.

If venue on the Federal District Court level or jurisdiction on the state level are properly "questions of procedure to be governed by the law of the court to which the case is submitted,"\textsuperscript{57} a superstructure of local law becomes firmly implanted on the foundation of jurisdiction under the Convention.

A. State Courts

In the state courts the question of national as distinguished from state jurisdiction in relation to Article 28 has not been raised in any case of record in the United States.\textsuperscript{58} In every instance, the state court has taken the position that if one of the four contacts is present within the state, the state courts then have jurisdiction. Likewise if none of the four contacts are within the state, then the state courts lack jurisdiction without regard to whether any of the contacts are present in any other part of the United States or not.

On the other hand, the Superior Court of Delaware has denied jurisdiction on the grounds of forum non conveniens in a case where contact one, \textit{i.e.}, domicile of the carrier, was clearly in the State of Delaware.\textsuperscript{59}

No state court ruling involving Article 28 has made direct reference to problems of jurisdiction or venue within the particular state court

\textsuperscript{55} Approximate translation by author.


\textsuperscript{57} Warsaw Convention, Article 28 (2).

\textsuperscript{58} State court cases where the question of jurisdiction have been raised are: Berner v. United Airlines, 2 Misc.2d 260; 149 N.Y.S.2d 335 (Sup. Ct. 1956); 3 App. Div.2d 9, 157 N.Y.S.2d 884 (1956). Galli v. Re-Al Brazilian International Airline, 29 Misc.2d 449, 211 N.Y.S.2d 208 (Sup. Ct. 1961).

\textsuperscript{59} Winsor, Admr. v. United Airlines, Inc., Superior Court of Delaware, New Castle County, Sept. 12, 1958, 5 Av. Cas. 18,170.
system. This writer assumes that should such a question be raised, it is one of procedure to be governed by the law of the forum under Article 28(2).

**B. Federal Courts**

It is in the area of subject matter jurisdiction and venue that the federal courts have had their greatest difficulties.

The first test of Article 28, in this regard, came in the case of *Dunning v. Pan American World Airways* wherein the plaintiffs' intestates, Dunning and Mott, were killed aboard a Pan American aircraft which crashed in Liberia enroute from Johannesburg to Lisbon. Dunning's ticket was issued by Pan American in Paris, Mott's ticket was issued in Lisbon. Action was brought in the United States District Court for the District of Columbia against the carrier by the two administratrices. Thereafter, the defendant moved for a dismissal of both actions, or for a change of venue, upon the ground that both actions were subject to the provisions of Article 28(1) of the Warsaw Convention, "and the District of Columbia is not one of the jurisdictions in which plaintiff's claim may be brought." The carrier had no scheduled flights into or out of the District of Columbia or the Washington National Airport. It was a New York corporation with its principal executive and administrative offices in New York City.

Plaintiffs argued that the term "domicile" and "principal place of business" as used in Article 28 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 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 Court. The Court without written opinion issued an order changing venue and transferring the case to the Southern District of New York. Certain conclusions can be reached, however, from the court's ruling. Pan American used Washington as an alternate airport for flights diverted from their scheduled destination because of weather or other emergency conditions. Its employees stationed at the Washington airport were engaged in servicing such diverted flights, and cargo shipments originating in Washington which were to be carried on other flights out of other airports, to which the shipments were forwarded by other means of transportation. Pan American had other employees stationed in Washington concerned with the sale of transportation on defendant's flights originating in other cities. There can be no question but that Pan American was doing business in the District of Columbia. It did not contest the service of process in the District and under normal circumstances in the absence of hardship or inconvenience which were not alleged would not be entitled to a change in venue. It follows that the district court must have recognized the provisions of Article 28(1) as superceding local law even as to venue in spite of the flexibility offered by Article 28(2).

This position is hard to reconcile with a later ruling of the United States District Court for the Southern District of New York in *Mason v.*

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B.O.A.C.61 Mason, a United States citizen, purchased a ticket from a travel agent in Brattleboro, 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 alleged to have occurred while a BWIA passenger between San Juan and Barbados. BWIA, Ltd., a corporation organized under the laws of Trinidad and Tobago, B.W.I., moved to dismiss the action for lack of jurisdiction, arguing that under Article 28 of the Convention, the action could be brought in the courts of only one of three possible places: (1) Trinidad, B.W.I., which is the place of the defendant's domicile and principal place of business, (2) Vermont, the defendant's place of business (through a travel agent) where the contract with the plaintiff was made, or (3) Massachusetts, the place of destination. The court bluntly stated its disagreement and submitted:

This court's jurisdiction, that is its power to hear and adjudicate the controversy between these parties, is found either in 28 U.S.C.A. § 1332 (a) (2), or if it be contended that the action is one arising under a treaty of the United States in 28 U.S.C.A. § 1331. Article 28 of the Convention seems to me clearly to relate only to venue which is merely a limitation designed for the convenience of litigants and which is not challenged by this motion. The Convention does not purport to take away from the courts of any adhering nation the "power to adjudicate" which the latter has granted them, or to grant such power to any court not otherwise possessed of it. By its terms, Article 28 merely limits, for the convenience of litigants (particularly, it would seem, the airline companies), the "places" where actions for damages may be brought.

This case apparently stands for the proposition that Article 28 of the Convention applies on the national level only, and that jurisdiction of the courts internally is determined by local law.

A more recent case involved the crash of a United Airlines aircraft in Colorado on November 1, 1955, in which all lives were lost as the result of an explosion of a bomb placed in the luggage of one of the passengers.62 The plaintiff, a resident of Newfoundland, individually and as administrator of his deceased wife, sued to recover damages for her death. Plaintiff's intestate, also a resident of Newfoundland, had purchased air transportation from Gander to Seattle, Washington, and return. The ticket was issued by Trans World Airlines, Inc., at Gander for the round trip with intermediate stops at New York both ways. The travel was therefore subject to the Warsaw Convention.

The action was brought before the United States District Court, Eastern District of New York, whereupon the defendant carrier filed a motion to dismiss or, in the alternative, to transfer the action to the United States District Court for the District of Colorado. The Court stated:

The question of 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.

61 Nov. 15, 1956 (S.D.N.Y.), 5 Av. Cas. 17,121.
The plaintiff relies upon *Berner v. United Air Lines, Inc.* In that case the ticket was purchased in the New York office of the airline sought to be held responsible for an airplane crash. The decision was that British Commonwealth Pacific Air Lines sold the ticket in question through British Overseas which maintained an office in New York, namely, it was doing business there through the activities of British Overseas.

The case is parallel to this only with reference to the nature of the business being conducted by this defendant in the City of New York in view of the assertion made in the affidavits submitted on behalf of this motion. From that of its said Vice-President Petty, it appears that this defendant is a Delaware corporation and that its principal executive offices are located in Chicago, Illinois, and its main Operating Base is located in Denver, Colorado.

There is a paucity of factual showing concerning the nature of the business done in the New York office of the defendant, but sufficient evidence has been shown to support the inference hereby drawn, that the New York office is the place where much of the booking, for air flights over the defendant’s line is done; and it is thought that not too fine a distinction should be drawn, at least for the purposes of this motion, between the New York office and the Chicago office.

Thus, the motion to dismiss will be denied, for the reason that apparent compliance with the jurisdictional requirements of Article 28 of the Warsaw Convention has been shown.\(^6^3\)

The court thereupon granted the alternative motion to transfer the action to the United States District Court for the District of Colorado.

From the foregoing, no definite conclusions can be reached as to whether the court was following the *Dunning* case, the *Mason* case, or somewhere in between. Neither of these two precedent cases was cited in the *Winsor* case. Under the *Mason* theory, the court’s ruling that Warsaw Convention jurisdiction was proper in New York is consistent since the action could be brought in any United States court so long as federal rules were fulfilled. However, the court went to great length to find the “principal place of business” in New York (in spite of evidence that the principal place of business was Chicago) apparently to fulfill Article 28 requirements and justify federal court jurisdiction in the Eastern District of New York. If the court intended to hold that Article 28 applied on the national level only, then it would not have been necessary to establish the principal place of business in New York since it would simply be a matter of venue subject to the rules of the forum. It might appear that the *Winsor* case was therefore in accord with the *Dunning* case, but even this is doubtful in view of the ultimate ruling of the court.

In *Berner v. United Air Lines*, the only case referred to by the court, New York was also the destination of the contract of carriage and jurisdiction was achieved under Article 28 on that basis. Also, in the *Berner* case, the ticket was issued in New York. Neither of these conditions was present in the *Winsor* case. If the *Dunning* theory were followed in the *Winsor* case, the only courts with jurisdiction under Article 28 would probably be at Gander, Newfoundland, as the place of destination and the place where ticket was issued; or in Delaware, legal domicile of the carrier; or, at Chicago, Illinois, the carrier’s principal place of business. It can only be concluded, therefore, that in spite of lip service to the

\(^{63}\) *Id.* at 247.
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jurisdictional question, the court was actually leaning toward the position that below the national level the question becomes one of local law.

The second part of the court's ruling in transferring the cause to the United States District Court for the District of Colorado can be supported on the basis of the second part of Article 28 which allows questions of procedure to be governed by local law. 66

C. Recent Cases

1962 federal decisions offer no hope that the uncertainty in regard to Article 28 will soon be eliminated. 66 In Spencer v. Northwest Orient Airlines, 67 the court not only praises and supports the decision in the Mason case, but goes on to interpret that case as holding: "that Article 28 of the Warsaw Convention did not affect the jurisdiction of the United States District Courts over a diversity action by an American citizen against an American air carrier." 67

Both the Mason case and the Spencer case contained at least one of the four jurisdictional contacts within the United States on the national level so that neither case required a ruling as to the effect of Article 28 on a federal court where all four of the jurisdictional contacts are missing. As a practical matter, whenever a domestic corporation is the defendant, contact number one, i.e., court of the domicile of the carrier, will always give judicial jurisdiction to the United States, at least on the national level.

As to what the federal courts will do when confronted with a Warsaw Convention case involving a United States citizen as plaintiff in an accident occurring within the United States where all four jurisdictional contacts are missing, one can only speculate. 68

In the other recent case, Nudo v. Sabena Air Lines, 68 the court was not confronted with a domestic carrier as a defendant nor with an accident occurring within the United States. Although not specifically stated, it would appear that the plaintiffs were United States citizens. The aircraft accident took place in Belgium; the ultimate destination was Munich; the contract of carriage was made in Munich; and the domicile and principal place of business of the carrier is Belgium. In moving to dismiss the action, the defendant carrier argued that the court lacked jurisdiction under Article 28. The plaintiff replied that Sabena, the defendant carrier, maintains its own sales office in Philadelphia, thereby constituting "a principal place

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66 It should be noted that the effect of the transfer to Colorado is that the action reaches a court prohibited from jurisdiction under Article 28(1) of the Convention, i.e., the lex loci delicti. However, the result can be justified on the basis of venue rather than jurisdiction under Article 28(2) which leaves matters of procedure (including venue) to the lex fori.
67 One state court decision, in 1962, involved Article 28, Gordon v. Sabena Air Lines, N.Y. Sup. Ct., N.Y. Cty., April 25, 1962, wherein none of the four contacts were within the United States and the case was dismissed for lack of jurisdiction under Warsaw Convention rules.
68 201 F. Supp. 504 (S.D.N.Y. 1962). The plaintiff was injured in an aircraft crash in the Philippine Islands. The defendant is a Minnesota corporation; the plaintiff is a resident of the British Crown Colony of Hong Kong and a citizen of the United States. Defendant has its principal office and place of business in St. Paul, Minnesota with substantial operations in New York. Ticket purchased from Cathay Pacific Airways at Kowloon, Hong Kong, for transportation: Hong Kong-Osaka-Tokyo-Seoul-Tokyo-Okinawa-Manilla-Hong Kong.
67 E.g., if a foreign air carrier carrying a United States citizen should crash within the United States wherein the passenger's origin and destination are in Warsaw Convention countries other than the United States and the ticket was purchased at a point outside the United States.
of business" under Article 28, and cited the Winsor case for authority. Senior District Judge Grim, by way of reply, stated in his order:

Under this (Article 28) language, there can be only one principal place of business, and the defendant's unrefuted affidavits show that defendant's principal place of business is not in this District, or even in the United States. Since none of the four contacts under Article 28 were present, the court thereupon disposed of the action by ruling: "I find, therefore, that none of the conditions of Article 28 is met and that this court has no jurisdiction of the action." In this case, the court was not required to make a determination as to the Warsaw Convention's effect upon venue, there being no jurisdictional contact under Article 28 present in any part of the United States. However, the significance of this decision lies in the acceptance, by a federal court, of the absolute applicability of Article 28 as to judicial jurisdiction in a direct and succinct fashion without apology, criticism or forced interpretation.

D. Need For Uniform Interpretation

Uniform interpretation of Article 28 by the federal courts is imperative. Actually, it is not the ultimate ruling in any of the federal cases which creates an impression of doubt and uncertainty, but rather the obiter dictum which some jurists have felt compelled to include in handing down opinions on this subject. This superfluous material reveals two areas of difficulty regarding basic concepts. First, as to the difference between subject matter jurisdiction of the federal court system within the United States and national jurisdiction in the absolute sense used in the Warsaw Convention. The subject matter jurisdiction of the federal courts as provided in the United States Constitution and by statute are basically internal in nature and are not directly involved in Article 28. Subject matter jurisdiction is neither given nor taken away by the Convention which has been held not to be self-executing.

In order to afford full effect to local law as the Convention intended, Article 28 must be administered only on the national level as well as in all internal matters following local rules under Article 28(2). At the same time, the limitations of the Convention must be considered as absolute and mandatory on the national level, in the jurisdictional sense, and be given their proper status as a treaty obligation of our nation without equivocation. Second, as to venue among the federal courts it may be said that Article 28(1) when limited to the national level, is of no consequence in regard to venue within the federal judicial system. All questions of venue would follow local law under Article 28(2) which in this case would be federal statutes and federal rules of civil procedure. Following such reasoning, it is not necessary for the federal courts to determine the existence of one or more of the four contacts of Article 28(1) within a particular district to establish jurisdiction therein.

The remaining question is what effect upon jurisdiction is present in a

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70 Id. at 192.
71 Ibid.
72 U.S. Const. art. III, § 2.
case lodged in a court of one state when one or more of the Article 28 (1) jurisdictional contacts are present in another state or territory of the United States, but none within the state in which the action is pending. Assuming that other grounds for jurisdiction over the parties or subject matter are present, would the requirements of Article 28 (1) be fulfilled? Using the above indicated national level approach, the answer will be yes.

V. SPECIAL AGREEMENTS AND ARBITRATION

Thus far, the question of jurisdiction in cases controlled by the Warsaw Convention has been considered under the light of a motion to dismiss for lack of jurisdiction or equivalent procedure, but what result can be expected if no such objection is raised?

The lack of objection could be due to a special agreement between the parties, a disregarding of the Warsaw Convention, or simply because both parties were satisfied with the forum in question. As previously set forth, Article 32 of the Convention prohibits special agreements which, among other things, alter the rules as to jurisdiction. It would follow that in Warsaw Convention countries not coming under the four jurisdictional contacts of Article 28, the forum should dismiss the action sua sponte for lack of jurisdiction. In non-Warsaw Convention countries, the court would have no such obligation.

However, Article 32 is limited by the phrase “entered into before the damage occurred.” (Italics supplied). Does it follow that the parties could agree to a particular jurisdiction not provided under Article 28, if the agreement was made after the damage or injury had occurred? Usually, a lack of judicial jurisdiction cannot be cured by an agreement of the parties; however, if the forum agreed upon would normally have jurisdiction by traditional contacts were it not for the restrictions of Article 28, and by agreement neither party invoked the applicability of the Warsaw Convention, it is doubtful that the action would be dismissed by the court sua sponte. Such a conclusion is not intended to be a acquiescence but rather a practical solution. In practice the likelihood of the defendant carrier and the plaintiff agreeing upon a jurisdiction outside the scope of Article 28 is remote due to the usual advantage to the carrier in limiting the amount which can be recovered under Warsaw Convention rules. This advantage will diminish greatly under the provisions of the Hague Protocol to the Convention when and if the Protocol goes into effect.

An agreement as to jurisdiction as considered above should not be confused with an out-of-court settlement of the claim. Unless accompanied by fraud or duress, such settlements are welcomed by all forums and certainly were not intended to be prohibited by the Convention. Perhaps it is for this reason that the language of Article 32 so carefully excludes agreements after the damage has occurred.

While no case law is available directly on this point, it is difficult to visualize a situation where one of the parties could repudiate a voluntary settlement agreement reached out-of-court solely on the basis that it did not conform to the rules of the Warsaw Convention. A recent French
case, *Della Roma v. Air France,* does bear some relationship to this aspect of Article 32. The case was an appeal by the French Social Security Fund from a decision by the Commercial Tribunal of Marseille denying the appellant the reimbursement of the amount it paid to the heirs of a Mr. Della Roma, who died in a plane crash in 1951. The passenger had held a round trip ticket, Marseille (France)—Brazzaville (French territory in Central Africa)—Marseille, with a stop in Kano, territory under British jurisdiction, on the outgoing portion of the trip. The Court properly affirmed the lower court’s finding that the transportation was international in nature and thereby within the rules of the Warsaw Convention. The Social Security Fund claimed, in any event, that they were entitled to recourse against the settlement offer of 2,220,000 francs which had been accepted by the widow, Mrs. Della Roma. The carrier, Air France, made the payment on the basis of so-called “individual automatic” insurance giving to the heirs, in case of death, a sum of 2,220,000 francs, provided that they (the heirs) waive all claims or their right of action against the company, its employees or its insurers. The Social Security Fund took the position that recovery would have to be for damages under the Warsaw Convention rules and as such they were entitled to subrogation for sums already paid. However, the Court pointed out:

But although Article 32 declares null any clause of the contract of carriage and all private agreements entered into prior to damages, by which the parties seek to depart from the rules set out therein, the carrier is not precluded from offering to the victim (or heirs) after the damage has occurred a settlement other than the one provided by Article 22.  

Article 32, in addition to its treatment of special agreements, specifically allows arbitration clauses in contracts for the transportation of goods; however, such clauses are subject to the Convention and the arbitration must take place within one of the four jurisdictions provided under the first paragraph of Article 28. What is left unsaid as to arbitration is probably more important than that which the Article actually provides. It appears that an agreement to arbitrate included in a contract of passenger carriage could not be enforced and in fact would probably be held invalid under Warsaw rules. The question of agreements to arbitrate made after the damage or injury occurred has not been answered in case law. Based on considerations of public policy and the universal desire of jurists to reduce litigation, it seems likely that post-injury arbitration agreements would be treated by the courts in the same manner as an out-of-court settlement. Therefore, in the absence of fraud, duress, or violation of the terms of the arbitration agreement (such as an award going beyond the authorized scope of the agreement to arbitrate), it would not be invalidated by the courts.

However, whether or not a Warsaw Convention court would actually enforce an arbitration award in the same manner as a direct out-of-court settlement is subject to some speculation. Probably there would be no difficulty in this regard if the board of arbitration and the court asked to enforce the award are located in a country having judicial jurisdiction under Article 28 or before a non-Warsaw Convention court. On the other

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77 (Fr.) March 13, 1959, Ct. of Appeals, Aix en Provence, 7th Civil Chamber.
hand, a Warsaw Convention court outside the four jurisdiction contacts might not be quite so willing.

It is most unfortunate that these questions as to arbitration were not resolved in the 1955 Hague Protocol to the Warsaw Convention.

VI. Conclusion

Accidents involving international air carriers, both United States flag companies and foreign, have presented new problems in the area of judicial jurisdiction. Applying domestic standards for the determination of judicial jurisdiction will not always suffice. Of course, as a point of beginning, jurisdiction must be based upon local law. However, the principles of general international law and the specific provisions of applicable treaties to which the United States is party must also be considered. The acceptable standards or contacts of general international law are equally applicable to situations involving international air carriers as they are to other international situations requiring a determination of jurisdiction.

In most cases involving an international air carrier there is superimposed upon the framework of local and general international law, the specific jurisdictional limitations of Article 28 of the Warsaw Convention. It would appear from the records of the deliberations of the delegates at the Warsaw Conference giving birth to the Convention in 1929, that the four jurisdictions set forth in Article 28 were intended to be absolute and not merely suggestive, permissive, or in the nature of venue. The courts of the United States, particularly the federal area, have been reluctant to recognize the mandatory effect of this treaty provision. However, in no case have the federal or state courts failed to recognize the provision on the national level. The state courts, particularly New York, where many international cases are originally filed, have on several occasions dismissed cases for lack of jurisdiction based on Article 28 of the Warsaw Convention. On the other hand, the federal courts have not been faced with this problem as yet. The Hague Protocol to the Warsaw Convention contains no revision of Article 28, and it may be assumed that when and if this amendment goes into effect, it will not alter the material considered in this study.

See supra note 49.