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# THE FIFTH JURISDICTION UNDER THE MONTREAL LIABILITY CONVENTION: WANDERING AMERICAN OR WANDERING EVERYBODY?

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## I. INTRODUCTION AND HISTORICAL DEVELOPMENT OF THE MONTREAL CONVENTION

**T**HE 31ST SESSION of the International Civil Aviation Organization (ICAO) Assembly in 1995 issued a mandate to the ICAO Council requiring them to revise the Warsaw System.<sup>1</sup> The ICAO prepared a draft Convention and presented it to the International Conference on Air Law (“Conference”), held in Montreal from May 10-28, 1999. The draft was a product of intensive consultations by the Legal Committee, Secretarial Study Group, and Special Group on the Modernization and Consolidation of the Warsaw System. One-hundred twenty-one Contracting States attended the Conference. On May 28, 1999, 105 Contracting States, one non-Contracting State, and one regional organization signed the Convention for the Unification of Certain Rules for International Carriage by Air in Montreal (“Montreal Convention”).<sup>2</sup>

The Montreal Convention is regarded as a fair and reasonable compromise between countries to improve the international re-

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† This article is based on a research paper I prepared under the supervision of Professor James L. Devall during my LL.M. program at the American University, Washington College of Law, Washington, D.C.

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<sup>1</sup> The “Warsaw System” comprises the Warsaw Convention 1929, the Hague Protocol 1955, the Guadalajara Convention 1961, the Guatemala City Protocol 1971, the 1975 Additional Protocols No. 1, 2, and 3, and the 1975 Montreal Protocol No. 4.

<sup>2</sup> Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, ICAO Doc. 9740 [hereinafter Montreal Convention].

gime for air carriers' liability and was designed to replace the Warsaw System. President Bill Clinton, in his message to the Senate of the United States regarding the Montreal Convention, remarked that "[T]he Convention represents a vast improvement over the liability regime established under the Warsaw Convention and its related instruments, relative to passenger rights in the event of an accident."<sup>3</sup>

Dr. Kenneth Rattray, the President of the Conference, remarked:

[T]he Montreal Convention, in a sense, represents a watershed in the life of international civil aviation, because air transportation is no longer something reserved for few, but is a common means by which the frontiers have been bridged and in which we have sought to promote the interests of all humanity. It is therefore right that as we seek to modernize and consolidate those rules, we should do so within the context of accommodating the interests of all, so that all humanity will share in this common heritage.<sup>4</sup>

One of the key reforms presented in the Montreal Convention is that it gives a complete package that States must either accept or reject. Unlike previous conventions, States will no longer be able to ratify some Protocols but not others.<sup>5</sup> The final draft of the Convention represents a balance of the variety of interests and compromises between countries with disparate views on the nature of the aviation industry, which produced a universally acceptable Convention.

The Montreal Convention is an entirely new treaty and not another amendment to the 1929 Warsaw Convention.<sup>6</sup> Article 55 specifically states that the Montreal Convention supercedes the Warsaw Convention,<sup>7</sup> its protocols, and special inter-carrier

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<sup>3</sup> President's Message to the Senate Transmitting the Convention for the Unification of Certain Rules for International Carriage by Air with Documentation, 36 WEEKLY COMP. PRES. DOC. 2013 (Sept. 6, 2000).

<sup>4</sup> ICAO, International Conference on Air Law, Vol. I, Minutes, 1999, Doc. 9775-DC/2, at 245 [hereinafter ICAO Minutes].

<sup>5</sup> Commonwealth of Australia, Department of Transport and Regional Services, *Consideration of the Ratification by Australia of the Convention of the Unification of Certain Rules for International Carriage by Air and Related Aviation Insurance Matters (Discussion Paper)* (Jan. 2001) at 4.

<sup>6</sup> Blanca I. Rodriguez, *Recent Developments in Aviation Liability Law*, 66 J. AIR L. & COM. 21, 24 (2000).

<sup>7</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Convention].

agreements.<sup>8</sup> The Montreal Convention requires 30 signatures for ratification and will come into force on the sixtieth day following the date of the thirtieth instrument of ratification, acceptance, approval, or accession.<sup>9</sup> On September 5, 2003, the United States of America deposited the instrument of ratification to the Montreal Convention with the ICAO and became the thirtieth Contracting State to ratify the Montreal Convention. The Convention entered into force on November 4, 2003. The Montreal Convention applies only to international carriage where the place of departure and the place of destination are situated within the territories of two States, or within the territory of a single State if there is an agreed stopping place within the territory of another State. It is not a Convention for the airlines.<sup>10</sup> It is said that the Montreal Convention has now become a consumer driven treaty.<sup>11</sup>

## II. THE FIFTH JURISDICTION

One of the main features of the Montreal Convention is its inclusion of the "fifth jurisdiction." The decision to include the fifth jurisdiction was initiated early in 1971 in the Guatemala City Protocol, but the Protocol became inoperative because of the U.S. Senate's refusal to ratify it. In the absence of the fifth jurisdiction, it was suggested that the airlines could, by special agreement, include the domicile of the passenger as a fifth basis of jurisdiction in their conditions of carriage.<sup>12</sup> The fifth jurisdiction, however, was strongly opposed by the majority of non-U.S. airlines, due to the fear of high damage awards by U.S. juries.

Article 28 of the Warsaw Convention provides four forums for the plaintiff to choose from when bringing an action against a carrier for damages resulting in the death or injury of passengers. These four forums are:

- 1) The carrier's domicile;
- 2) The carrier's principal place of business;
- 3) The place of business where the contract was made; and

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<sup>8</sup> See Montreal Convention, *supra* note 2, at art. 55.

<sup>9</sup> See Montreal Convention, *supra* note 2, at art. 53.

<sup>10</sup> Condon & Forsyth, LLP, *The 1999 Montreal Convention* (Aug. 1999).

<sup>11</sup> *The Montreal Convention*, AVIATION UPDATE (Deney's Reitz Attorneys), Nov. 2000, at 1.

<sup>12</sup> Federico Ortino & Gideon R.E. Jurgens, *The IATA Agreements and the European Regulation: The Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air Transportation*, 64 J. AIR L. & COM. 377 (1999).

4) The passenger's place of destination.<sup>13</sup>

Article 33 of the Montreal Convention provides an additional forum—the fifth jurisdiction. The fifth jurisdiction is the territory of the State in which a passenger has his or her principal and permanent residence at the time of the accident, if certain conditions are fulfilled. A perceived injustice in the Warsaw Convention was that a passenger could not sue in his or her own domicile unless that domicile coincided with one of the four places in Article 28, even if the carrier had a substantial business presence in the passenger's domicile. This problem has now been corrected by Article 33 of the Montreal Convention.<sup>14</sup>

### III. APPLICATION OF THE FIFTH JURISDICTION

In order to invoke a State as the fifth jurisdiction with respect to damages resulting from the death or injury of a passenger, the following criteria must be met: (1) the State must be the principal and permanent residence of the passenger at the time of the accident; (2) the State must be one which the carrier operates services to or from, either on its own aircraft or on another carrier's aircraft on the basis of a commercial agreement such as code share arrangements; and (3) the State must be one in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself, or by another carrier with which it has a commercial agreement, has leased or owned premises from which it conducts its business.<sup>15</sup>

The drafters' rationale behind the creation of the fifth jurisdiction was to ensure that all code-sharing agreements between airlines were embodied in the definition. This is now becoming a common way of doing business.<sup>16</sup>

The Montreal Convention allows a plaintiff to choose the most advantageous jurisdiction in which to bring a suit following an aviation accident. The fifth jurisdiction provision is the outcome of a long and continuous effort by the United States. The United States was not happy with the provisions for jurisdiction contained in the Warsaw Convention and, argued for jurisdiction based on the place of accident and nationality, neither of

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<sup>13</sup> See Warsaw Convention, *supra* note 7, at art. 28.

<sup>14</sup> See *supra* note 6, at 33.

<sup>15</sup> See *supra* note 5, at 22.

<sup>16</sup> See *supra* note 11, at 3.

which was approved in the final product.<sup>17</sup> The United States Department of Transportation (DOT) and Department of States (DOS) insisted upon the addition of the fifth jurisdiction. As discussed in the United States Congress, inclusion of the fifth jurisdiction was thought to be “an essential element of any new international agreement on passenger liability.”<sup>18</sup>

The United States is a target jurisdiction for all claimants in search of the highest possible damages.<sup>19</sup> The fifth jurisdiction leads to greater exposure of the U.S. courts and ensures that nearly all U.S. citizens and permanent residents have access to the U.S. courts to pursue claims.<sup>20</sup> This provision also protects U.S. citizens and permanent residents from being forced to seek compensation in a foreign court. Awards for damages are considerably higher in the U.S. than in other countries, and a U.S. passenger and his family will rarely be denied the higher American damage awards.<sup>21</sup> This provision is better known as the “wandering American.”

#### A. DAMAGES RESULTING FROM THE DEATH OR INJURY OF A PASSENGER

The first prerequisite for the application of the fifth jurisdiction is that damages must result from the death or injury of a passenger, not from damages to cargo.<sup>22</sup> This is a common condition which not only applies to the fifth jurisdiction, but also applies to the other four jurisdictions. Where there is no death or injury of a passenger, Article 33 paragraph 2, and the fifth jurisdiction are not applicable.

#### B. PASSENGER'S PRINCIPAL AND PERMANENT RESIDENCE

The second prerequisite for the application of the fifth jurisdiction is that the passenger must have his or her principal and permanent residence in such jurisdiction at the time of the acci-

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<sup>17</sup> James D. Macintyre, *Where are You Going? Destination, Jurisdiction, and the Warsaw Convention: Does Passenger Intent Enter the Analysis?*, 60 J. AIR L. & COM. 657, 696 (1994-95).

<sup>18</sup> CONG. REC. S11059-02, S11060 (1998).

<sup>19</sup> Bruno Bertucci, *A European Perspective on Global Claims Management*, AVIATION TODAY SPECIAL REPORTS (Jan. 2000).

<sup>20</sup> Strobe Talbott, Letter to the President for Transmittal of Montreal Convention to Senate (June 23, 2000), available at [http://www.cargolaw.com/presentations\\_montreal\\_cli.html#index](http://www.cargolaw.com/presentations_montreal_cli.html#index).

<sup>21</sup> See *supra* note 18, at S11061.

<sup>22</sup> See ICAO Minutes, *supra* note 4, at 204.

dent.<sup>23</sup> The term "principal and permanent residence" was highly debated and heavily discussed during the drafting of the Montreal Convention. There was great debate between the United States and France over the American notion of "domicile" versus the French concept of "*domicile*." The Special Group suggested the idea of "principal and permanent residence" in order to reach a reasonable compromise among the parties.<sup>24</sup>

The term "principal and permanent residence" has been defined as the one fixed and permanent abode of a passenger at the time of the accident.<sup>25</sup> The nationality of the passenger should not be considered to be the determining factor in this regard.<sup>26</sup> This definition ensures that it is not possible to have several principal and permanent residences from among which to choose the most convenient one in which to bring an action. The last sentence of the requirement was added in light of the considerable concerns expressed regarding some jurisdictions, which would view nationality as being equivalent to "principal and permanent residence."<sup>27</sup>

The President of the Conference, Dr. Kenneth Rattray remarked:

We looked at it in light of the contemporary developments in civil aviation and we did so in ensuring that there was an appropriate nexus which would enable, in an appropriate case, for the action to be brought in the principal and permanent residence of the passenger. We circumscribed Article 33 in order to ensure that there would be that nexus and to ensure that it would be brought in the territory in which, at the time of the accident, the passenger has the principal place of residence.<sup>28</sup>

### C. THE STATE TO OR FROM WHICH THE CARRIER OPERATES SERVICES

The third prerequisite for the application of the fifth jurisdiction is that the air carrier must operate services for the carriage of passengers by air to or from that State.<sup>29</sup> The nexus between the principal and permanent residence must clearly relate to a place to or from which the air carrier operates services for the

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<sup>23</sup> See *supra* note 6, at 33.

<sup>24</sup> See ICAO Minutes, *supra* note 4, at 153.

<sup>25</sup> *Id.* at 205.

<sup>26</sup> *Id.* at 246.

<sup>27</sup> *Id.* at 205.

<sup>28</sup> *Id.* at 246.

<sup>29</sup> See Montreal Convention, *supra* note 2, at art. 33 para. 2.

carriage of passengers by air. Those services might be rendered either by its own aircraft or by another carrier's aircraft pursuant to a commercial agreement.<sup>30</sup> The term "commercial agreement" as defined in Article 33 means an agreement relating to joint air services for the carriage of passengers other than an agency agreement.<sup>31</sup> It would not simply apply because there was an interline agreement between air carriers or because there was some marketing arrangement between them.<sup>32</sup> It was quite clear, therefore, that in circumstances in which a person happened to be on a flight between two jurisdictions, and the flight had not been operated pursuant to a commercial agreement that did not qualify under the various provisions under this Article, the fifth jurisdiction could not be invoked.<sup>33</sup>

The expression "provision or marketing of their joint services" in Article 33 paragraph 3(a) has been designed to deal with the code-sharing alliance situation, as well as to recognize that the aviation industry was rapidly moving, globalizing, and evolving. Thus, it had been drafted in such a way as to capture code-sharing alliances, while retaining a sufficient degree of flexibility to capture whatever joint business operations might evolve.<sup>34</sup>

#### D. PREMISES LEASED OR OWNED BY THE CARRIER ITSELF OR BY ANOTHER CARRIER

The last prerequisite for the application of the fifth jurisdiction is that the air carrier must have some presence in that jurisdiction. It requires that the air carrier must have a "suitable presence" in that country for that carrier to be sued there.<sup>35</sup> This prerequisite will be fulfilled if the air carrier conducts its business either from premises leased or owned by itself or by another carrier with which it has a commercial agreement.<sup>36</sup> During the discussion of the draft of the Convention, it was suggested that a carrier should have "a place of business," i.e., at least a sales or ticketing office in that jurisdiction.<sup>37</sup> Later, the Legal Committee amended its text to allow for a carrier to oper-

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<sup>30</sup> See ICAO Minutes, *supra* note 4, at 204.

<sup>31</sup> *Id.* at 205.

<sup>32</sup> *Id.* at 204.

<sup>33</sup> *Id.* at 205.

<sup>34</sup> *Id.* at 155.

<sup>35</sup> *Id.* at 154.

<sup>36</sup> See Montreal Convention, *supra* note 2, at art. 33 para. 2.

<sup>37</sup> ICAO, International Conference on Air Law, Vol. III, Preparatory Material, 1999, Doc. 9775-DC/2, at 71 [hereinafter Preparatory Material].

ate an "establishment" in that jurisdiction, which means premises leased or owned by the carrier from which it conducts its business of carriage by air.<sup>38</sup> The present text of paragraph 2 was submitted to the Conference on the text approved by the Special Group that envisioned a significant presence in that particular State.<sup>39</sup>

#### IV. THE MOST DEBATED ISSUE

The fifth jurisdiction was the most debated issue during the drafting of the Montreal Convention. The United States, as the proponent of the notion of the fifth jurisdiction, was supported by Brazil, Japan, and Columbia. On the other hand, the European countries, mainly France, were strongly opposed to the fifth jurisdiction. India and the Arab countries were also opposed to the fifth jurisdiction. Other countries such as the United Kingdom, the Netherlands, New Zealand, and the African countries sought a suitable compromise on this issue.

The United States, in its working paper presented to the Conference regarding the fifth jurisdiction, reiterated that the inclusion of an acceptable fifth jurisdiction provision is essential for U.S. ratification of any new convention.<sup>40</sup> The U.S. strongly supported the inclusion of the fifth jurisdiction for the following reasons: (1) It is based on legal precedent as it has already been incorporated in previous Protocols;<sup>41</sup> (2) It gives the passengers and claimants fundamental fairness, and is consistent with international law and principles of jurisdiction of three other existing jurisdictions;<sup>42</sup> (3) It is consistent with domestic law in many countries as it permits the claimant to bring suit in the most convenient forum, eliminating long and fruitless litigation in multiple jurisdictions;<sup>43</sup> and (4) It discourages "forum shopping" in the U.S. by providing access to the convenient homeland court.<sup>44</sup>

On the other hand, France, the main opponent, expressed strong objections to the creation of the fifth jurisdiction for the following reasons: (1) The creation of the fifth jurisdiction is

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<sup>38</sup> *Id.* at 99.

<sup>39</sup> *Id.* at 124.

<sup>40</sup> ICAO, International Conference on Air Law, Vol. II, Documents, 1999, Doc. 9775-DC/2, at 102 [hereinafter ICAO Documents].

<sup>41</sup> *Id.* at 103.

<sup>42</sup> *Id.* at 104.

<sup>43</sup> *Id.* at 105.

<sup>44</sup> *Id.* at 108.

not necessary to protect passengers, as the four existing jurisdictional possibilities are satisfactory; thus, it is not a requirement of world air transport;<sup>45</sup> (2) The fifth jurisdiction increases insurance premiums and ticket prices, which is contrary to the ICAO's fundamental objective of promoting the participation of all in the development of world air transportation; therefore, it will have unfortunate consequences for the development of international air transport;<sup>46</sup> (3) The notion incorporated by the fifth jurisdiction is a new category in international law, and the expressions are very vague and very broad in application. It contradicts other conventions, and, therefore, its adoption would create a regrettable precedent in the development of contemporary law;<sup>47</sup> and (4) The fifth jurisdiction has nothing to do with air law and its special characteristics; therefore, instead of making progress toward unification and internationalization of law, it would result in further fragmentation of international law.<sup>48</sup>

The countries, which presented objections to the inclusion of the fifth jurisdiction, proposed that the States should have been given the option at the time of ratification and accession to the Convention.

## V. CRITICISM OF THE FIFTH JURISDICTION

There has been strong opposition to the fifth jurisdiction by small and medium sized airlines and developing countries. It has been argued that the acceptance of the fifth jurisdiction as an additional forum has far-reaching implications for the small and medium sized airlines, especially those in developing countries, from a logistical and financial standpoint. In its working paper, the International Union of Aviation Insurers (IUAI) questions why aviation should be singled out for creating a fifth jurisdiction. Why is the victim of a rail crash not entitled to the option of a fifth jurisdiction?<sup>49</sup>

Some critics of the fifth jurisdiction say that the creation of the fifth jurisdiction is not desired by air transport professionals and has less favorable value than expected for passengers. The fifth jurisdiction has no significance because the four jurisdictions provided by the Warsaw Convention are sufficient to settle

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<sup>45</sup> *Id.* at 195-96.

<sup>46</sup> *Id.* at 196.

<sup>47</sup> *Id.* at 197.

<sup>48</sup> *Id.* at 198.

<sup>49</sup> *Id.* at 158.

the vast majority of cases. The fifth jurisdiction will come into play in a very limited number of cases, and it is not necessary to introduce an additional forum when the four existing ones are sufficient. Further, though the notion of the fifth jurisdiction departed from the Guatemala City Protocol of 1971, it should not be regarded as a convincing argument for the inclusion of the additional jurisdiction in the Montreal Convention.<sup>50</sup> During the drafting of the Montreal Convention, there was serious debate over whether the proposed inclusion of the fifth jurisdiction went beyond the modernization of the Warsaw System and changed some fundamental rules.<sup>51</sup> Therefore, the concentration of efforts on a fifth jurisdiction might delay or stop progress of the main purpose of the modernization process.<sup>52</sup>

The fifth jurisdiction will bar foreign claimants on the ground of forum non conveniens, from bringing a suit for compensation in the most generous jurisdiction and from receiving more compensation, which is contrary to the standpoint of passengers and claimants. The fifth jurisdiction will lead to discrimination among passengers on the basis of their home jurisdiction. For example, in a single accident case, passengers from a country which has a generous legal system, such as the United States, will receive more compensation while passengers on the same flight from developing countries will be forced to receive less compensation.

Critics also argue that the addition of the fifth jurisdiction will expose air carriers to high compensation, which will lead to increased insurance premiums and consequently, to increased ticket prices. On the whole, it would create an additional undue burden on foreign air carriers and ultimately, would increase the level of risk for air carriers. This would be unfavorable to the growth of international air transport, and therefore, would run counter to one of the ICAO's fundamental objectives: promoting the participation of all in the development of world air transport.<sup>53</sup> Some critics are concerned that many States are unlikely to ratify the Montreal Convention due to the inclusion of the fifth jurisdiction, and should that happen, it would lose its global reach and become a regional instrument.<sup>54</sup> It is also said that the fifth jurisdiction is contrary to the usual procedural law

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<sup>50</sup> See ICAO Preparatory Material, *supra* note 37, at 243.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 15.

<sup>53</sup> See ICAO Documents, *supra* note 40, at 196.

<sup>54</sup> *Id.* at 158.

in determining the jurisdiction of a court in a compensation case.<sup>55</sup>

Critics have also said that the fifth jurisdiction would bring more complications than benefits to passengers.<sup>56</sup> The fifth jurisdiction provision is unduly complicated and, in some cases, may fail to serve its intended purpose.<sup>57</sup> A critic of the fifth forum stated:

[T]his additional forum may prove a gold mine for lawyers rather than for the claimants, because a court that is the least concerned with the cause of action, or even where no evidence, witness, or record relating the passenger's transportation, accidental injury, or death etc., is available in that forum, may ultimately decline to entertain the clauses as forum non-convenience.<sup>58</sup>

The core criticism of the fifth jurisdiction is that its only purpose is to protect the interests of American citizens and permanent residents of the United States—the “wandering American.” It enables them to bring suit in the United States where the potential damage awards are considerably higher than the rest of the world, which will benefit them exclusively, and, on the other hand, it creates an undue hardship for foreign air carriers.

## VI. CONCLUSION

There is no doubt that the place of domicile is of greatest interest for passengers and claimants, especially in terms of damages. The site of the accident bears no significance in aviation accident cases and the notion of the fifth jurisdiction is not a new concept in aviation history. As stated earlier, it has already been included in the Guatemala City Protocol 1971 and the 1975 Montreal Protocol No. 3. It is a subject that has been extensively discussed in the drafting history of the Montreal Convention. The inclusion of the fifth jurisdiction in the Montreal Convention provides ratification of prior development, and to do otherwise would be a significant step backward in aviation history. There is no doubt that the fifth jurisdiction, being the homeland of passengers and claimants, is likely the most convenient forum. The fifth jurisdiction provides fairness to

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<sup>55</sup> J.C. Batra, *Modernization of the Warsaw System-Montreal 1999*, 65 J. Air L. & Com. 429, 440 (2000).

<sup>56</sup> See ICAO Preparatory Material, *supra* note 37, at 242.

<sup>57</sup> See *supra* note 10.

<sup>58</sup> See *supra* note 55.

passengers and claimants by allowing them to bring suit in their home State where they are most familiar, and where they will be fairly treated and adequately compensated.<sup>59</sup>

In most cases, however, the fifth jurisdiction is covered by one of the four jurisdictions provided for in the Warsaw Convention. Those four jurisdictions indirectly permit the passengers and claimants to bring a suit in the home State of the passengers and claimants, as one of the jurisdictions is generally related to the home State of the passengers. Therefore, the fifth jurisdiction will lead to only a marginal increase of an additional forum, which is not already available under the Warsaw Convention.

Further, the fifth jurisdiction will not increase litigation for airlines dramatically. Due to the complexity of air transportation that has evolved in the recent times (i.e., airline alliances and code-sharing) the passenger's homeland is not available as a jurisdiction under the Warsaw Convention. There will be only a small number of people who will benefit from the inclusion of the fifth jurisdiction. Nevertheless, it would be unfair and unjust to deprive that small group of people from bringing suit in their homeland.

The fifth jurisdiction can be a tool for mitigating the high cost to passengers or claimants, as they can avoid the cost of travel, accommodation, and high legal cost, if they are given the opportunity to bring suit in their homeland. Moreover, from a legal and a practical standpoint, no other place could be better than the court of the State in which the passengers live to determine the outcome of their dispute. The fifth jurisdiction is the most fair and convenient place to bring an action for passengers and claimants. Similarly, courts of the passengers' home jurisdiction would be the most appropriate and convenient court to decide the compensation pursuant to domestic law.

Another significant aspect of the fifth jurisdiction is that it discourages forum shopping in the U.S. courts. Though the creation of the fifth jurisdiction slightly increases the discretion of the claimants in choosing the forum, it will close the door on forum shopping for the non-U.S. residents in the U.S. courts, because their own homeland is readily available and convenient. The creation of the fifth jurisdiction will lead to the U.S. courts dismissing non-residents' lawsuits on the ground of forum non conveniens, therefore, the U.S. courts will no longer be a mecca for non-U.S. residents in aviation accident lawsuits.

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<sup>59</sup> See ICAO Documents, *supra* note 40, at 102.

The notion of *forum non conveniens* has already been applied by the U.S. courts in *Piper Aircraft v. Reyno*<sup>60</sup> and *Nolan v. Boeing Company*<sup>61</sup> for dismissing lawsuits initiated by foreign nationals in the United States. The U.S. courts would be more reluctant to entertain lawsuits brought by non-U.S. residents after the inclusion of the fifth jurisdiction in the Montreal Convention. As Mr. Mendelsohn remarked, “the best and most effective way to deter forum shopping in the United States—and thereby avoiding American lawyers and American juries—is by adopting *lex domicilii* and the fifth forum.”<sup>62</sup>

The critics who argue that the fifth jurisdiction is incorporated only to protect the “wandering American” are wrong. The fifth jurisdiction provides that every passenger has a right to sue in his or her own home State. There is no doubt that American damage standards are considerably higher, and that the U.S. has a more generous legal system than those of other countries. But some States have higher compensation standards than those imposed by the Warsaw or Montreal Conventions. Australia has a liability limit of 260,000 Special Drawing Rights (SDR) for Australian international carriers, which is far beyond the Montreal Convention’s 100,000 SDR.<sup>63</sup> In today’s global travel market, it is not just an American problem. U.S. plaintiffs have always had the right to sue an aviation manufacturer in the United States even though barred from suing the airlines under the Warsaw scheme.<sup>64</sup> As Mr. Mendelsohn pointed out, the argument that the fifth forum benefits only wandering Americans is patently wrong. There are wandering Germans, wandering Swiss, wandering British, and wanderers of every nationality.<sup>65</sup> All people, wandering Americans as well as the wandering citizens of any other nationality, can benefit from the fifth jurisdiction by bringing suit in their home jurisdiction which is the most convenient forum for them.

Contrary to the argument of critics that the fifth jurisdiction will significantly increase the cost of insurance premiums and

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<sup>60</sup> See generally *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

<sup>61</sup> See generally *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990).

<sup>62</sup> Allan I. Mendelsohn, *The Warsaw Convention and Where We Are Today*, 62 J. AIR L. & COM. 1071, 1080 (1997).

<sup>63</sup> See *supra* note 5, at 18.

<sup>64</sup> Alan H. Collier, *The Road to Montreal: Developments in Airline Liability for International Flights & the Impact on Aviation Manufacturers in the U.S.*, Aircraft Builders Council, Law Report (1999).

<sup>65</sup> See Mendelsohn, *supra* note 62, at 1078.

ticket prices, the reality is that the increase in cost is *de minimis*. As stated earlier, the fifth jurisdiction will only lead to a marginal increase of an additional forum, which is not available under the Warsaw Convention. Only a very small group of people who do not buy their tickets from their homeland, but from other countries, would be included by the fifth jurisdiction. There will simply be very few cases where people buy their tickets from other countries only to seek the fifth jurisdiction. Therefore, the fifth jurisdiction would not significantly increase the cost of insurance premiums and ticket prices.

There is no doubt that the fifth jurisdiction not only discourages the initiation of long and fruitless litigation in multiple jurisdictions, but it also provides the most appropriate and convenient forum for passengers and claimants, allowing them to bring suit in their home State under its domestic law where they are familiar with the legal system, therefore it can be expected that they will be fairly treated in their home jurisdiction.