JURISDICTION UNDER ARTICLE 28 OF THE WARSAW CONVENTION

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> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.[1]

In *Spencer v. Northwest Orient Airlines, Inc.*,[2] the plaintiff, a citizen of the United States, was injured on a flight from Okinawa to Manila via defendant's airline. Suit was commenced in the United States District Court for the Southern District of New York. The Court had *in personam* jurisdiction over the parties and subject matter jurisdiction was expressly conferred on the Court by 28 United States Code s.1332. Defendant, after filing an answer to the complaint, maintained that since it is domiciled and has its principal place of business in Minnesota, and since Hong Kong was the destination of the flight and the place where the contract of carriage was made, the Federal Court in New York is not one of the courts before which the action for damages could be brought against the carrier nnder the terms of Article 28(1) of the Warsaw Convention and that, consequently, the Court was without jurisdiction over the subject matter of the suit.

The Court noted that "Much of the case law on this subject is confused and not well reasoned . . . there appears to be no consistent or logical pattern of decisional law."[3] The conflict in the decisions has centered on whether Article 28(1) is to be regarded as jurisdictional or as relating merely to venue.[4]

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[1]Article 28(1), Warsaw Convention, 49 Stat. 3000, 3020. The Convention, governing the treatment of cases arising out of accidents occurring in international air transportation was drawn up in Warsaw, Poland, in 1929, and was adhered to by the United States by presidential proclamation dated October 29, 1934. A protocol to the Convention which was opened for signature at The Hague on September 28, 1955, leaves the language of Article 28(1) unchanged. *Aeronautical Statutes and Related Material*, U.S. Government Printing Office, p. 312. The United States has not, as yet, ratified the protocol.

[2](1962) 201 F. Supp. 504 (S.D.N.Y.).

[3]*Ibid.*, at p. 506.

[4]The following cases have referred to Article 28(1) as "jurisdictional": *Berner v. United Airlines Inc.* (1956) 5 Avi. 17, 169 (Sup. Ct., N.Y. County); aff'd, 3 App. Div. 2d 9, (1956) 157 N.Y.S. 2d 884 3 N.Y.S. 2d 1003, 147 N.E. 2d 732, (1957) 170 N.Y.S. 2d 340; *Nudo v. Sabena Belgian World Airlines* (1962) 207 F. Supp. 191 (E.D. Pa.); *Winsor v. United Airlines Inc.* (1957) 153 F. Supp. 244 (E.D.N.Y.); *Galli v. Re-al Brazilian International Airlines* (1961) 7 Avi. 17,614 (N.Y. Sup. Ct., Queens County); *In the Matter of the Estate of Waldrep* (1957) 5 Avi. 17,267 (Sup. Ct. Wash.); *Tumarkin v. Pan American World Airways Inc.* (1956) 4 Avi. 18,152 (N.J. Super.); *Rotterdamsche Bank v. British Overseas Airways Corp. and Aden Airways Ltd.* [1953] U.S. and Can. Av. R. 163 (Q.B.); *Woolf v. Aerovias Guest* [1954] U.S. and Can. Av. R. 399 (N.Y. Mun. Ct.,); *Martino v. Trans World Airlines Inc.* [1961] U.S. and Can. Av. R. 651 (D.C.N.D. Ill.). Other cases have referred to Article 28(1) as relating to "venue": *Mason v. British Overseas Airways Corp.* (1956) 5 Avi. 17,121 (S.D.N.Y.); *Dunning v. Pan American World Airways, Inc.* (1954) 4 Avi. 17,394 (D.C. Dist. Col.); *Scarf v. Trans World Airlines Inc.* (1955) 4 Avi. 17,795 (S.D.N.Y.).

This distinction has proved important mainly in the respect that objections to venue, the place of the trial designated for the convenience of the litigants,[5] are personal to the defendant and are waived if not timely raised,[6] whereas lack of jurisdiction over the subject matter, relating to the competency or power of the court, may be raised at any time.[7]

In retaining the case, the Court used some strong language:

> In any event, in so far as Article 28 would operate as a plea in bar to the maintenance of an action for damages against an air carrier, it seems to me to be concerned only with the question of the circumstances under which resort may be had to the national court system of one of the high contracting parties as a forum available to a claimant in which to pursue his remedies. Viewed in this light, once one of the requirements of Article 28 is met, *e.g.*, that the domicile or place of business of the carrier is in the territory of one of the high contracting parties, then a plaintiff seeking damages against a carrier may bring an action in the courts of that high contracting party as permitted by its laws. Since the defendant carrier here has both its domicile and principal place of business in the United States, the action may be brought in the district courts of the United States upon which jurisdiction has been conferred by Congress to hear and determine actions of this nature, *i.e.*, actions for more than $10,000 between citizens of different states. This view of Article 28 brings it into harmony with the federal judicial system while giving it the full meaning and effect which must have been intended by the high contracting parties to the Convention. *Cf.* Art. 32.[8]

Much of the force of the opinion, however, is beclouded by a final paragraph:

> The question remains as to whether Article 28 as a practical matter should also be viewed as a special venue provision governing actions coming under the Warsaw Convention and requiring that venue in such actions be laid in the judicial district where one of the four requirements of the Article is complied with. It is unnecessary here to decide that question . . . defendant by serving its answer has waived its right to object to venue. . .[9]

Previously, two other courts have had analogous factual situations before them and arrived at conflicting conclusions. In *Dunning v. Pan American World Airways Inc.*,[10] the routing of the ticket issued to plaintiff was from Lisbon, Portugal, and return with various stopping places in Africa. The ticket was issued by Pan American in Paris. Suit was commenced in federal court in the District of Columbia where Pan American maintained offices. It was held, without opinion: venue had been improperly laid in the District of Columbia under Article 28; the case was ordered transferred[11] to the United States District Court for the Southern District of New York where Pan American alleged it was domiciled and had its principal place of business. Plaintiff had argued that the terms "domicile" and "principal place of business," as used in Article 28 of the Convention, must be construed "in the international sense to mean the

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[5]*Olberding v. Illinois Cent. Ry.* (1953) 346 U.S. 338.

[6]Rule 12(b) Federal Rules of Civil Procedure.

[7]Rule 12(h) Federal Rules of Civil Procedure. This discussion deals with the federal court system; however, it is clear that state courts may take jurisdiction of Warsaw cases since Article 28 does not grant exclusive jurisdiction to federal courts. *Cf. Freeman v. Bee Machine Co. Inc.* (1942) 319 U.S. 448.

[8]*Supra*, note 2, at p. 507.

[9]*Ibid.*, at p. 507.

[10]*Supra*, note 4.

[11]Pursuant to 28 U.S.C. s.1406 (a).

nation of domicile or principal place business."[12] In *Winsor v. United Airlines Inc.*,[13] plaintiff's intestate had purchased air transportation from Gander, Newfoundland, to Seattle, Washington, and return. The accident occurred in Colorado. Suit was commenced in the United States District Court for the Eastern District of New York. It appeared that the defendant was a Delaware corporation and that its principal executive offices were located in Chicago. The question of "jurisdiction," the Court said, was whether defendant maintains "a principal place of business" in New York. The Court, citing *Berner v. United Airlines, Inc.*,[14] concluded that "not too fine a distinction" should be drawn between the New York and Chicago offices, since defendant did a large volume of business in New York.

The problem under discussion was recognized as early as 1937 by Professor D. Goedhuis and the paucity of authority on the subject at this much later time is somewhat surprising. Professor Goedhuis then stated:[15]

> Whereas in the official British translation the words "tribunal du domicile du transporteur" have been translated by "Court having jurisdiction where the carrier is ordinarily resident," the translation given by the U.S.A. Department of State used the words: "Court of the domicile of the carrier."
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> M. Sullivan observes that in any High Contracting Party which is composed of federated States the question must arise whether the domicile referred to in art. 28 extends to the whole territory of the contracting party, or means the component state in which the carrier has his residence, if an individual, or is incorporated if a corporation. This difficulty could be solved if in the American translation the same wording was used as that of the British translation.

The French writer, de Villeneuve,[16] has also noted that differences between the English and American translations[17] of Article 28 have posed difficulties. He states (this writer's translation): "Actually, the concept of domicile in Anglo-Saxon Law is different from the French concept. The closest—but not exact—translation of the French *domicile* is *ordinary residence* which is the expression used in the English text. The term *domicile* is much stricter in the United States." That author concludes, by reference to English and French law, that, while fuzzy, it would seem that under Article 28 the idea of the court of the domicile of the carrier, or of the main office of its business, is a divisible notion which recurs in each country where the enterprise has important business,

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[12]See "Statement Prepared by Counsel" 4 Avi. 17,395.

[13]*Supra*, note 4.

[14]*Supra*, note 4.

[15]D. Goedhuis, *National Airlegislations and the Warsaw Convention*, The Hague, 1937, p. 292-293. The text of the British translation of Article 28 is as follows: "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." Goedhuis, p. 286.

[16]de Villeneuve, Jacques G., "Compétence Juridictionnelle et *Lex Fori* dans la Convention de Varsovie" (1961-62) 8 McGill L. J. 285 *et seq.*

[17]The Convention is drawn up in French. No provision is made for any other language. Article 36, 49 Stat. 3022. The French text of Article 28 appears at 49 Stat. 3007.

a concept going far beyond any interpretation given Article 28 by an American court. However that may be, it is submitted that the result in *Dunning v. Pan American World Airways Inc.*,[18] is incorrect and unjustified by any "practical considerations."

Firstly, where the text of a treaty is in one language only, that text is controlling.[19] If we are to assume that the French—and English—concept of domicile is much broader than the American concept, as de Villeneuve suggests it is, it may be argued that the American courts are obliged to accord their interpretation of the term "domicile" as closely as possible to the French concept.

Secondly, the Supreme Court has said that the courts, in construing treaties, should ascertain and give effect to the intention of the parties and that a treaty should be construed in the light of circumstances existing at the time it was made.[20] Viewed from this requirement, it would seem that American courts have not accorded proper weight to the discussion of the delegates to the Warsaw Convention on Article 28.[21] No evidence can be found anywhere that the drafters of the Convention intended to alter the judicial system of any country. The British delegate had fears that carriers might be subjected to the courts of Persia or Mesopotamia and other "far off" countries where courts "really are not well organized." There are frequent references to "jurisdiction" in the discussion of the delegates, but the term "venue" is used not at all.

Thirdly, there is no evidence that, by advising adherence, the Senate had any intention of circumscribing the jurisdiction of the Federal courts.[22]

Finally, in construing words used in a treaty, too great weight should not be given to the local definition and use of particular words,[23] as seems to be the case in the interpretation of "domicile" and "principal place of business" in *Dunning*. Treaties should be construed to tend toward placing contracting parties on an equality.[24] And where a treaty admits to two constructions, one restrictive as to the rights which may be claimed under it, and the other favorable to such rights, the latter is preferred.[25]

Admittedly difficult to resolve, it is suggested that the question of whether Warsaw actions must be laid in the judicial district (or some other subdivision?) where one of the four requirements of Article 28(1) is met deserves more atten-

[18] *Supra*, note 4.

[19] *Todok v. Union State Bank* (1929) 281 U.S. 449.

[20] *United States v. Texas* (1895) 162 U.S. 1; *Goefroy v. Riggs* (1899) 133 U.S. 258.

[21] *II Conférence Internationale de Droit Privé Aérien*, 4-12 Octobre 1929, Varsovie, ICAO Doc. 7838, pp. 77-79; translated (1959) 26 J. Air Law and Commerce, pp. 229-230. The United States did not send a delegate to the Convention, but had an observer there.

[22] (1934) 78 Cong. Rec., p. 11,577 *et seq.*

[23] *Wyers v. Arnold* 147 S.W. 2d 644, *cert. denied*, (1941) 313 U.S. 589; *In re Zalewski's Estate* (1944) 55 N.E. 2d 184.

[24] *Factor v. Laubenheimer* (1933) 290 U.S. 276.

[25] *Baccardi Corporation v. Domenech* (1940) 311 U.S. 150, 163.

tion than it has received in the courts. It is submitted that there is no justification for the result in *Dunning* when we consider that it is at odds with the general jurisdiction[26] and venue[27] provisions of the United States Code and with the apparent intentions of the drafters of the Warsaw Convention.

It is suggested that Article 28(1) should, in minimum terms of liberality, be construed to mean that where the domicile or an important place of business of the carrier is within the territory of one of the high contracting parties, then suit may be brought by a plaintiff in that country as permitted by its laws. This rule is subject to uniform application and is logical in all respects. And Federal courts in the United States would not be burdened with suits brought in inappropriate districts if this construction is followed. Provision is made in the Code that, for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought,[28] and defendant carrier is entitled to such transfer upon a proper showing.

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[26]28 U.S.C. s.1332.

[27]28 U.S.C. s.1391(c) provides: "A corporation may be sued in any district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporations for venue purposes."

[28]28 U.S.C. s.1404(a).

CASE and COMMENT