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## Still Far From Home – How Personal Jurisdiction Doctrine Undercuts The Montreal Convention’s “Fifth Jurisdiction” For “Wandering Americans”

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**STILL FAR FROM HOME – HOW PERSONAL  
JURISDICTION DOCTRINE UNDERCUTS THE  
MONTREAL CONVENTION’S “FIFTH JURISDICTION”  
FOR “WANDERING AMERICANS”**

HANS HUGGLER\*

ABSTRACT

The rapid growth of global air travel in the mid-20th century gave rise to the problem of the “wandering American”—American residents whose air travel injury claims could not be heard in United States courts under the Warsaw Convention’s Article 28. Prominent cases prompted adoption of a “fifth jurisdiction” in the Montreal Convention’s Article 33, allowing injury suits in the Contracting State where an injured passenger had her “principal and permanent residence” so long as the international carrier served the forum. U.S. officials toasted their success in providing Americans with a domestic forum, but the adoption of the fifth jurisdiction did not finish the job. Even if an American plaintiff meets Article 33’s requirements, personal jurisdiction problems can bar the courthouse door.

This article re-examines the problem of the “wandering American” and the fierce debates over the fifth jurisdiction at the 1999 International Conference on Air Law in Montreal through the lens of personal jurisdiction. It argues that the Montreal Convention would likely not have changed the results of prominent “wandering American” cases such as the shoot-down of Korean Air 007 or the hijacking of Air France 139. It comments on how the law is rapidly evolving as federal courts wrestle with whether Federal Rule of Civil Procedure 4(k)(2) can better address the lack of “minimum contacts” carriers have with most U.S. states and the lack of causal connections between forum and claims. Finally, it considers how Congress or American aviation authorities

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can better align Montreal’s promise of a “fifth jurisdiction” with American jurisdictional law.

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## I. INTRODUCTION

In 1999, the International Civil Aviation Organization (ICAO) adopted the Convention for the Unification of Certain Rules for International Carriage by Air, otherwise known as the Montreal Convention.<sup>1</sup> Article 33 of the Montreal Convention established the fora in which claims under the Convention could be brought.<sup>2</sup> The four fora long available under the Warsaw Convention's Article 28—the carrier's corporate and actual headquarters states, the place of destination, and where it physically sold a ticket (if applicable)—remained available.<sup>3</sup> Alongside those came a new "fifth jurisdiction."<sup>4</sup> Article 33(2) states:

In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and 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.<sup>5</sup>

Creating a fifth jurisdiction was a longtime American air law priority.<sup>6</sup> Policymakers were under pressure from the families of Americans killed in crashes or terrorist incidents on foreign carriers who discovered their cases could only be heard in foreign courts that would apply damages regimes much more limited than were available in the United States.<sup>7</sup> The United States therefore came into the Montreal Conference pushing hard for

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<sup>1</sup> International Civil Aviation Organization, Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

<sup>2</sup> *Id.* at 11.

<sup>3</sup> See Devendra Pradhan, *The Fifth Jurisdiction Under the Montreal Liability Convention: Wandering American or Wandering Everybody*, 68 J. AIR L. & COM. 717, 719–20 (2003) (citing 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., *reprinted in* 49 U.S.C. § 40105 (West 2001)).

<sup>4</sup> *Id.* at 720.

<sup>5</sup> Montreal Convention, *supra* note 1, at 11.

<sup>6</sup> Pradhan, *supra* note 3, at 721.

<sup>7</sup> *See id.*

a fifth jurisdiction intended to open U.S. courts to the so-called “wandering Americans.”<sup>8</sup>

The United States left the jurisdictional job unfinished. The Montreal Convention did expand the subject matter jurisdiction of its federal courts so more cases qualified to be heard domestically.<sup>9</sup> But that expansion pushed well past the boundaries of American constitutional law, which examines different criteria to determine whether a court may exercise “personal jurisdiction” over a defendant (here, a foreign air carrier).<sup>10</sup> A wandering American whose journey does not touch the United States can find themselves inside the jurisdiction of the Montreal Convention but potentially outside the constitutional authority of any U.S. court to hear their case, leaving them with no U.S. forum.

The article proceeds in six parts. Part II is a brief primer on personal jurisdiction law and how personal jurisdiction played out in Warsaw cases. The key takeaway is that by the time the Montreal Conference convened in 1999, the law reflected a general consensus that a court’s personal jurisdiction over a foreign air carrier on Warsaw claims depended on the carrier’s identifiable “contacts” with the particular U.S. state<sup>11</sup> in which suit was brought, and courts were developing law on how carrier agreements and ticket sales arrangements met that test.

Part III discusses the problem of the “wandering American”—the injured or killed passenger without a home forum in the U.S.—that drove the advocacy for a fifth jurisdiction.<sup>12</sup> Part IV examines the debates over the fifth jurisdiction in Montreal. References to personal jurisdiction were limited, but they suggest the American delegation assumed carriers that met the fifth jurisdiction’s commercial presence requirements would be subject to jurisdiction in the United States. Part V looks at Congress’s consideration of the Montreal Convention and provides further evidence that personal jurisdiction was presumed. Officials celebrated that

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<sup>8</sup> *See id.*

<sup>9</sup> *See* Montreal Convention, *supra* note 1, at 11.

<sup>10</sup> *See* Royal & Sun All. Ins. PLC v. UPS Supply Chain Sols., Inc., No. 16 CIV. 9791(NRB), 2018 WL 1888483, at \*3 (S.D.N.Y. Apr. 5, 2018) (“[C]ourts have consistently concluded that the Montreal Convention affords subject matter jurisdiction, not personal jurisdiction.”).

<sup>11</sup> The countries party to the Montreal Convention are properly called “Contracting States,” and the United States is composed of fifty states and various territories. Pradhan, *supra* note 3, at 717. When discussing nations party to Warsaw and Montreal I will use “States.” I will use “states” to indicate U.S. jurisdictions, and will refer to the United States or the U.S. when referring to the country.

<sup>12</sup> *Id.* at 727.

American plaintiffs would find an open courthouse door even where the facts of the accident had no U.S. connection.

Part VI examines how personal jurisdiction law has developed in opposition to fifth jurisdiction principles and has kept the courthouse doors closed to a foreseeable group of American passengers even when Montreal's criteria are met. And Part VII examines how Montreal cases could be (and have been) decided against wandering Americans despite meeting fifth jurisdiction criteria and brief thoughts on how the American government could act to ease the problem and more fully implement the fifth jurisdiction in the United States.

## II. PERSONAL JURISDICTION OVER FOREIGN CARRIES UNDER WARSAW

### A. A U.S. COURT MUST HAVE "PERSONAL JURISDICTION" OVER A DEFENDANT TO HEAR CLAIMS AGAINST IT

Each U.S. state operates a court system of general jurisdiction over any claims brought before it.<sup>13</sup> U.S. federal trial courts have more limited statutory jurisdiction that overlaps significantly with their state court counterparts.<sup>14</sup> The bulk of federal civil cases fall into one of two jurisdictional buckets—"federal question" jurisdiction (jurisdiction over claims arising under federal law or ratified treaties, including the Warsaw and Montreal Conventions),<sup>15</sup> and "diversity jurisdiction" (claims between citizens of different states or Americans and foreigners).<sup>16</sup> Inquiries into what type of claims a particular court may hear fall under the analytical category of "subject matter jurisdiction."<sup>17</sup> Warsaw or Montreal cases are federal questions because they arise from a treaty and often meet diversity jurisdictional requirements as well.<sup>18</sup> Accordingly,

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<sup>13</sup> The United States has invested exclusive jurisdiction over certain matters (such as maritime claims or patent law) on the federal courts, limiting the jurisdiction of state courts by exclusion. *See* 28 U.S.C. §§ 1333 (maritime), 1338(a) (patent).

<sup>14</sup> *Limited Jurisdiction*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/limited\\_jurisdiction](https://www.law.cornell.edu/wex/limited_jurisdiction) [<https://perma.cc/BZ8L-CBBD>] (June 2020).

<sup>15</sup> U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331.

<sup>16</sup> U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1332.

<sup>17</sup> *See Subject Matter Jurisdiction*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/subject\\_matter\\_jurisdiction](https://www.law.cornell.edu/wex/subject_matter_jurisdiction) [<https://perma.cc/WUW7-WTZP>] (June 2017).

<sup>18</sup> Fifty years of Warsaw jurisprudence saw disputes over whether that treaty created an independent cause of action or was merely a procedural mechanism to bring claims under domestic law. The case law resolved to the latter before Montreal. *See, e.g., In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 416

air crash cases are generally filed in (or subsequently transferred to) federal courts.<sup>19</sup>

But even if a court has the requisite subject matter jurisdiction, it lacks the power to issue a binding judgment on a defendant unless it also possesses “personal jurisdiction” over that party.<sup>20</sup> A plaintiff consents to personal jurisdiction by filing suit in a forum.<sup>21</sup> Defendants, on the other hand, might be located anywhere in the world. They may or may not have any connection to the state in which a case is brought. This is significant not just to foreigners sued in the United States but also to Americans sued outside their home states. As the United States Supreme Court put it:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.<sup>22</sup>

Under these principles, persons and companies located outside a state are, for jurisdictional purposes, “foreigners” over whom personal jurisdiction must be established. And the Warsaw and Montreal Conventions do not vest federal courts with automatic personal jurisdiction over foreign carriers.<sup>23</sup> Rather, establishing personal jurisdiction requires three things: (1) proper service of process on a carrier defendant pursuant to the particular court’s procedural rules, (2) appropriate statutory jurisdiction,<sup>24</sup> and (3)

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(9th Cir. 1983) (“[W]e interpret the Convention to create any necessary cause of action for wrongful death.”); *Bobian v. CSA Czech Airlines*, 222 F. Supp. 2d 598, 603 (D.N.J. 2002) (“The Warsaw Convention, by virtue of its status as a treaty made under the authority of the United States, is the supreme law of the land, equal in stature and force to the domestic laws of the United States.”).

<sup>19</sup> Federal law allows for “removal” of cases from state to federal court under certain jurisdictional conditions. See 28 U.S.C. § 1441.

<sup>20</sup> See CORNELL L. SCH., *supra* note 17.

<sup>21</sup> See Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1465 (2019).

<sup>22</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

<sup>23</sup> *Bobian v. CSA Czech Airlines*, 222 F. Supp. 2d 598, 603 (D.N.J. 2002). (“The Warsaw Convention . . . does not determine the existence of personal jurisdiction or venue; instead these are determined under domestic law.”).

<sup>24</sup> Each state has enacted a “long-arm” statute establishing the jurisdiction of its courts. See, e.g., ALASKA STAT. ANN. § 09.05.015 (West 1998) (Alaska long-arm statute). Federal law limits a federal court’s exercise of personal jurisdiction to

alleging, and ultimately proving, facts that show that the court's exercise of jurisdiction conforms with constitutional due process requirements. The third aspect is the focus of this article—how evolving personal jurisdiction doctrine has kept closed the doors the United States considered opened by the Montreal Convention.

B. PRE-MONTREAL PERSONAL JURISDICTION PRINCIPLES—THE TERRITORIAL APPROACH AND THE CONSTITUTIONALIZING OF PERSONAL JURISDICTION

In the early United States, the judicial determination of personal (or *in personam*) jurisdiction was essentially geographic. State courts could exercise jurisdiction and bind persons physically within the borders of the state or bind persons outside the state on matters related to property found within it.<sup>25</sup> The primary constitutional directive was that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>26</sup> Circumstances would arise where a plaintiff might obtain a judgment in one state and seek to enforce it in another, only to have the judgment debtor attack the judgment as invalid in enforcement proceedings because the issuing court purportedly lacked authority over her. Such a “collateral attack” prompted the United States Supreme Court's decision in *Pennoyer v. Neff*, which, for the first time, constitutionalized the personal jurisdiction inquiry.<sup>27</sup>

*Pennoyer* arose from unpaid legal fees.<sup>28</sup> Marcus Neff hired a lawyer, Mitchell, to apply for a federal land grant in Oregon. The lawyer was successful, but Neff didn't pay his bill and left the state for California.<sup>29</sup> While he was gone, Mitchell sued him over the fees in Oregon court and “served” Neff by way of publication of the suit in

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that of the state courts in the state where it sits. Fed. R. Civ. P. 4(k)(1)(A). Generally speaking, these statutes have been interpreted to “establish jurisdiction to the maximum extent permitted by due process.” *Jonz v. Garrett/Airesearch Corp.*, 490 P.2d 1197, 1199 (Alaska 1971).

<sup>25</sup> See *Boswell's Lessee v. Otis*, 50 U.S. 336, 348 (1850) (“Jurisdiction is acquired in one of two modes;—first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be, substantially, a proceeding *in rem*.”).

<sup>26</sup> U.S. CONST. art. IV, § 1.

<sup>27</sup> See 95 U.S. 714, 729 (1877), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>28</sup> See *id.* at 719.

<sup>29</sup> *Id.*



the Pacific Christian Advocate, an Oregon newspaper.<sup>30</sup> The lawyer obtained a default judgment, executed the judgment against Neff's land, and purchased the land himself at a sheriff's auction.<sup>31</sup> He, in turn, conveyed it to another attorney, Sylvester Pennoyer.<sup>32</sup> Learning of all this, Neff sued Pennoyer in Oregon's federal court, challenging the Oregon court's jurisdiction over him in the original suit by Mitchell and, in turn, Pennoyer's claim to the title.<sup>33</sup>

A then-recent change in the Constitution had reframed the issue in dispute. State courts had struggled to adjudicate collateral attacks, although they understood that judgments in cases where a court lacked jurisdiction were "contrary to the first principles of justice" and, therefore, a nullity.<sup>34</sup> The Fourteenth Amendment—ratified a few years before Neff's suit in the aftermath of the Civil War—for the first time barred states from depriving persons of "due process of law" as a federal edict.<sup>35</sup> With that change, "the validity of such judgments [could] be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court ha[d] no jurisdiction d[id] not constitute due process of law."<sup>36</sup> Viewing the problem through that lens, the Court ruled for Neff and held that the publication service had been inadequate, stating that "due process of law would require appearance or personal service [in the state] before the defendant could be personally bound by any judgment rendered."<sup>37</sup>

*Pennoyer's* privileging of personal service held fast for almost seventy years.<sup>38</sup> However, the Supreme Court began to consider

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<sup>30</sup> *Id.* at 717.

<sup>31</sup> *See id.* at 719–20.

<sup>32</sup> *See id.* at 719.

<sup>33</sup> *See* 95 U.S. 714, 729 (1877), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>34</sup> *Id.* at 732 (quoting *Kilbourn v. Woodworth*, 1809 WL 1234 (N.Y. Sup. Ct. 1809)).

<sup>35</sup> U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>36</sup> *Pennoyer*, 95 U.S. at 733.

<sup>37</sup> *Id.* at 734 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 405 (Little, Brown, & Co., 2d. ed. 1871)).

<sup>38</sup> *Pennoyer's* fundamental premise—that in-state personal service is the jurisdictional gold standard—remains good (if questioned) law. *See generally* *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990) (affirming California's exercise of jurisdiction over husband in divorce proceeding where he was served with process while temporarily in the state).

acceptable alternatives.<sup>39</sup> In 1917, it held that substitute service by publication to a person who had left the state without intent to return was insufficient but suggested there was some path forward, noting that “[t]o dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.”<sup>40</sup> In 1940, the Court upheld “substitute service” by publication on a Wyoming resident who was concealing himself to avoid suit, holding that:

[A]dequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied.<sup>41</sup>

These decisions presaged the next significant shift in jurisdictional analysis: implied consent to jurisdiction through “minimum contacts” with a forum state first acknowledged in the foundational case *International Shoe v. Washington*.<sup>42</sup>

The International Shoe Company, based in Missouri, had no presence in Washington state in the 1940s except for traveling salesmen compensated on a commission basis whose contracts were formed in Missouri.<sup>43</sup> Washington asserted that International Shoe owed unemployment taxes on commissions for sales in the state and served a notice of assessment on one of the salesmen.<sup>44</sup> The company challenged the jurisdiction of Washington’s courts to enforce the tax assessment.<sup>45</sup>

The United States Supreme Court held that a corporation’s presence within a state could be “manifested only by activities carried on in its behalf by those who are authorized to act for it.”<sup>46</sup> Accordingly:

Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against

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<sup>39</sup> See *McDonald v. Mabee*, 243 U.S. 90, 90 (1917).

<sup>40</sup> *Id.* at 92.

<sup>41</sup> *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

<sup>42</sup> See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>43</sup> See *id.* at 313.

<sup>44</sup> See *id.* at 312.

<sup>45</sup> See *id.* at 313.

<sup>46</sup> *Id.* at 316.

an individual or corporate defendant with which the state has no contacts, ties, or relations.

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.<sup>47</sup>

The Court concluded that International Shoe had “rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington . . . .”<sup>48</sup> In doing so, it set forth the jurisdictional principle still being debated today—that a defendant’s purposeful contacts with a state define the existence and extent of the jurisdiction of that state’s courts over that defendant.<sup>49</sup>

The law quickly developed to differentiate between two flavors of personal jurisdiction.<sup>50</sup> One was “general jurisdiction,” which addressed whether a court had jurisdiction over a person or corporation that allowed it to hear claims on facts arising anywhere.<sup>51</sup> There, an uncompromising rule consistent with a territorial view of jurisdiction prevails; a state has general jurisdiction to hear any claim against a corporation formed under its laws or if the company’s headquarters were located in that state.<sup>52</sup> Beyond that, general jurisdiction only applies where a corporation is “essentially at home”<sup>53</sup> in a state, and the Supreme Court has aggressively policed that boundary to disfavor general jurisdiction.<sup>54</sup>

The second flavor, relevant to foreign carriers, is “specific jurisdiction”—jurisdiction to hear claims where there is no general jurisdiction but where a connection exists between the claim, defendant, and forum. In 1980, the Supreme Court held that specific personal jurisdiction only exists if a “defendant’s conduct and connection with the forum State are such that he should

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<sup>47</sup> *Id.* at 319.

<sup>48</sup> *Id.* at 321.

<sup>49</sup> *Id.* at 320.

<sup>50</sup> See Howard M. Wasserman, *Case Preview: Defining “Relatedness” in Personal Jurisdiction*, SCOTUSBLOG (Oct. 6, 2020, 11:20 AM), <https://www.scotusblog.com/2020/10/case-preview-defining-relatedness-in-personal-jurisdiction/#:~:text=This%20is%20the%20essential%20distinction,corporation's%20in%2Dstate%20business%20activities> [<https://perma.cc/A8G5-3YTK>].

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> *BNSF Ry. Co. v. Tyrell*, 581 U.S. 402, 413 (2017).

<sup>54</sup> *Id.* at 414–15 (railroad not subject to general jurisdiction in Montana despite more than 2,000 miles of track and more than 2,000 employees in the state).

reasonably anticipate being haled into court there.”<sup>55</sup> A corporation had “fair warning” of that possibility if it had “‘purposefully directed [its]’ activities at residents of the forum [state]” and the litigation at issue “‘ar[o]se out of or relate[d]’ to those activities.”<sup>56</sup> The case law interpreting those concepts has grown increasingly hostile to claims that lack a clear forum connection, a significant barrier to jurisdiction over wandering American cases that the United States has failed to address.

### C. PERSONAL JURISDICTION AND THE WARSAW CONVENTION

Perhaps because of the lack of the “fifth jurisdiction,” personal jurisdiction was not heavily litigated under Warsaw. The sole federal appellate decision on the issue was *Eck v. United Arab Airlines, Inc.*, which arose out of the 1962 crash of a Jerusalem–Cairo flight.<sup>57</sup> Plaintiff, a Californian, brought her injury claims in New York.<sup>58</sup> She had purchased her ticket through a U.S.-based Scandinavian Airlines System office, which confirmed the booking directly with United Arab Airline’s Cairo office.<sup>59</sup> However, the airline also maintained marketing offices in New York and Los Angeles and generated more than \$1 million in overall bookings in the United States in 1963.<sup>60</sup> The Southern District of New York had held that the carrier’s presence in New York satisfied the “minimal contacts” required by *International Shoe*.<sup>61</sup>

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<sup>55</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>56</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985) (citing *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984)); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). How to square modern supply chains with those jurisdictional principles has led to a long-running and still unresolved “stream of commerce” debate at the Supreme Court. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 111–12, 120 n.3 (1987) (Brennan, J., dissenting) (plurality opinions disagreeing as to whether the foreseeability of a product entering a forum was sufficient for jurisdiction, or whether “something more” in the way of affirmative conduct was necessary). The issue remains formally unresolved, although the “something more” view predominates. *See J. McIntyre Mach. v. Nicastro*, 564 U.S. 873, 889 (2011) (plurality opinion favoring the “something more” approach); *see generally* Greg Saetrum, *Righting the Ship: Implications of J. McIntyre v. Nicastro and How to Navigate the Stream of Commerce in Its Wake*, 55 ARIZ. L. REV. 499, 524–31 (2013) (analyzing the divergent viewpoints expressed in *Nicastro* and arguing for the establishment of a “reasonable commercial expectations test” to govern stream of commerce jurisdiction).

<sup>57</sup> *See* 360 F.2d 804, 806 (2d Cir. 1966).

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* at 807.

<sup>60</sup> *See id.*

<sup>61</sup> *Eck v. United Arab Airlines, S.A.A.*, 241 F.Supp. 804, 806 (S.D.N.Y. 1964), *rev’d sub nom. Eck v. United Arab Airlines*, 360 F.2d 804 (2d Cir. 1966).

On appeal, the Second Circuit held that “[i]n *International Shoe* the [Supreme] Court announced a new jurisdictional standard: whether the foreign corporation had certain ‘minimum contacts’ with the state such that the maintenance of the suit would not offend traditional notions of fair play and substantial justice.”<sup>62</sup> It looked to a recent decision by the New York Court of Appeals (that state’s highest court), which had held that foreign carrier Finnair’s maintenance of a small New York office used “to receive reservations for European travel on Finnair from other airlines or travel agencies, which the office forwarded to Helsinki” constituted a “sufficient continuous and systematic course of doing business in New York so that Finnair could be said to be ‘present’ in New York” under state law.<sup>63</sup> The court held that United Arab Airlines had a similar “presence” in New York, enhanced by the fact that it sold tickets directly from its New York office.<sup>64</sup> The court sidestepped the constitutional question by asserting that its exercise of jurisdiction was sound because New York courts would exercise jurisdiction, asserting it was bound by state law precedent to defer to that jurisdictional position.<sup>65</sup> The court was aware that it might be out of sync with development in the law, stating in a footnote:

Some commentators have suggested that the Court’s opinion in *International Shoe* implicitly rejected the “presence” theory of jurisdiction. Nevertheless . . . state courts have continued to rely on quantitative assessments of a defendant corporation’s activities within the forum state to sustain jurisdiction in cases like the one before us.<sup>66</sup>

It could well be that *Eck* had an outsized influence on international aviation’s view of personal jurisdiction as a limitation on suits in the United States. By taking a conservative, presence-based position on jurisdiction early in the development of the law, the Second Circuit could well have influenced the legal analyses of the outsized number of international carriers operating flights to the U.S. who maintained ticket offices in New York City. International carriers had traditionally resisted the U.S. forum with arguments for dismissal forum non conveniens, as U.S. courts

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<sup>62</sup> *Eck*, 360 F.2d at 810 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>63</sup> *Id.* at 811 (citing *Bryant v. Finnish Nat’l Airline*, 208 N.E.2d 439 (1965)).

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* (citing *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 231 (2d Cir. 1963)).

<sup>66</sup> *Id.* at 811 n.16.

may decline to exercise jurisdiction in favor of a more “convenient” forum.<sup>67</sup> Would personal jurisdiction have been a livelier issue in international aviation if the Second Circuit had taken a more aggressive view of due process requirements?

The district courts also decided a handful of cases. In 1972, a Puerto Rico federal district court held Puerto Rico International Airlines (“PRINAIR”) was not subject to personal jurisdiction in Pennsylvania over a Caribbean air crash.<sup>68</sup> Plaintiffs argued that although they had not personally purchased tickets on PRINAIR in Pennsylvania, tickets could be purchased in that state through the ticket offices of airlines with interline agreements with PRINAIR.<sup>69</sup> Looking to Pennsylvania principles of independent contractor law and citing *International Shoe* and *Hanson*, the court held that:

To require PRINAIR to respond to suit, and upon such ephemeral contact, would raise substantial constitutional questions, not only of due process, but also under the commerce clause. To permit Pennsylvania, upon the fact of the interline arrangement, to exert its judicial power and subject PRINAIR to its jurisdiction, in effect means that it is subject to jurisdiction in every state of the Union where similar interline arrangements exist.<sup>70</sup>

The matter was less clear when tickets were sold in the forum state. A federal court in Nebraska held that purchasing tickets from an Omaha travel agent authorized to issue tickets for a consortium of world carriers, including Aeroflot, was a sufficient contact with Nebraska to subject Aeroflot to personal jurisdiction there on claims it had caused passengers to be forcibly detained by Pakistani authorities.<sup>71</sup> But months later, a Puerto Rico federal court held that the in-forum purchase of a ticket on Japan Airlines sold by American Airlines was insufficient to establish “minimum contacts” with Puerto Rico, where the accident at

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<sup>67</sup> See generally *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (articulating the “public” and “private” factors federal courts should consider on motions for dismissal in favor of a more convenient forum).

<sup>68</sup> See *In re Puerto Rico Air Disaster Litigation*, 340 F. Supp. 492, 500–01 (D.P.R. 1972).

<sup>69</sup> See *id.* at 497; Interline agreements are carrier-to-carrier arrangements that allow passengers to book through travel on multiple carriers on a single itinerary. See IATA, *THE FUTURE OF INTERLINE: A NEW MODEL FOR SEAMLESS CUSTOMER JOURNEYS* 3 (2019), <https://www.iata.org/contentassets/23426d4b09a0446dbe831601869098a1/future-of-interline-wp.pdf> [<https://perma.cc/VCN6-GAJA>]. It contrasts with “codeshare” arrangements, where an airline books passengers on a companion carriers service but markets the flight under its own carrier code. See *Code Sharing*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/policy/aviation-policy/licensing/code-sharing> [<https://perma.cc/M3E9-S7LX>] (Mar. 23, 2023).

<sup>70</sup> *In re Puerto Rico Air Disaster Litigation*, 340 F. Supp. 492, 501.

<sup>71</sup> See *Vergara v. Aeroflot “Soviet Airlines,”* 390 F.Supp. 1266 (D. Neb. 1975).

issue had occurred in New York.<sup>72</sup> That court found that the sale of the ticket by a connecting carrier in Puerto Rico could not be characterized as a “purposeful act” on the part of Japan Airlines.<sup>73</sup> It cited New York cases, including *Eck*, to contrast its facts with circumstances where a carrier had other operations in the forum.<sup>74</sup> To the Puerto Rico court, actions such as maintaining a bank account or employees in the forum were “examples of purposeful and assertive acts beyond the mere sale of tickets which gave grounds to find the required minimum contacts to exercise *in personam* jurisdiction over nonresident defendants.”<sup>75</sup>

In *Luna v. Compania Panamena De Aviacion, S.A.*, a remote foreign carrier did achieve dismissal from the United States for lack of personal jurisdiction.<sup>76</sup> Luna purchased a ticket from Continental Airlines to fly roundtrip from her home in Houston, Texas to Cali, Colombia.<sup>77</sup> Continental sold her an interline ticket on COPA for the Panama City–Cali leg of the journey.<sup>78</sup> The COPA flight crashed, killing all aboard.<sup>79</sup> The court held that it lacked specific personal jurisdiction over COPA because COPA’s limited contacts to Texas were unrelated to the claim, and her purchase of a ticket from Continental through an interline agreement was not jurisdictionally sufficient where her claims did not arise from the act of purchasing the tickets themselves.<sup>80</sup> *Luna* is an example of how personal jurisdiction could serve as an additional layer of protection between foreign carriers without substantial contact with the United States and American lawsuits but does not appear to have been recognized as a significant bulwark at the time it was decided.<sup>81</sup>

State courts also saw Warsaw cases. The Utah Supreme Court efficiently dismissed a luggage-loss case against Pakistan Airlines:

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<sup>72</sup> See *Albandoz de Reyes v. Japan Air Lines*, 70 F.R.D. 64, 70 (D.P.R. 1975).

<sup>73</sup> *Id.* at 69–70 (quoting *Hanson v. Denckla*, 357 U.S. 235 (1958)).

<sup>74</sup> See *id.* at 70.

<sup>75</sup> *Id.*; see also *Romero v. Argentinas*, 834 F. Supp. 673, 682 (D.N.J. 1993) (New Jersey federal court had no specific personal jurisdiction over airline with offices in New York where New York office issued tickets to New Jersey travel agent at New Jersey’s agent’s request).

<sup>76</sup> See 851 F. Supp. 826, 835 (S.D. Tex. 1994).

<sup>77</sup> See *id.* at 828.

<sup>78</sup> See *id.* at 832.

<sup>79</sup> See *id.* at 828.

<sup>80</sup> See *id.* at 832–33.

<sup>81</sup> See, e.g., Jennifer McKay, *The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity*, 34 CASE W. RESV. J. INT’L L. 73, 80–81 (2002) (appearing to mistake *Luna* for a Warsaw forum decision, rather than turning on personal jurisdiction).

We must therefore consider whether Utah may assert personal jurisdiction over PIA. A nonresident defendant is subject to personal jurisdiction in this state where it is “doing business” in Utah or, alternatively, it has “minimum contacts” with the plaintiff in Utah . . . . In the instant case, it is uncontested that PIA has no personnel, funds, equipment, or operations in Utah. Plaintiff purchased his ticket by mail from an Illinois travel agency, left Salt Lake City on [United Airlines], and boarded PIA’s aircraft in New York City. On those facts, to assert personal jurisdiction over PIA would offend “traditional notions of fair play and substantial justice.”<sup>82</sup>

As the courts worked through the jurisdictional implications of *International Shoe* in Warsaw cases, a different problem was causing distress to American Warsaw plaintiffs—U.S. courts’ lack of subject matter jurisdiction over Warsaw claims.

### III. GROWTH IN AIR TRAVEL CREATES THE “WANDERING AMERICAN”

Article 28 of the Warsaw Convention established four fora in which claims could be brought in cases of death or personal injury:

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.<sup>83</sup>

States of incorporation, headquarters, or where a carrier maintained physical ticket offices were relatively straightforward and corresponded with the carrier’s substantial business operations. The fourth forum, the place of destination, reflected that in 1929:

[M]ost international travel was purchased locally for round-trip travel, and/or travel provided by the flag-carrier of the passenger’s domicile. Hence, the passenger could bring suit in his home jurisdiction because the place of purchase, the place of destination, and/or the place of the domicile or its principal place of business coincided with the passenger’s domicile.<sup>84</sup>

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<sup>82</sup> *Mabud v. Pakistan Int’l Airlines*, 717 P.2d 1350, 1352 (Utah 1986) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>83</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

<sup>84</sup> PAUL STEPHEN & MICHAEL MILDE DEMPSEY, INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999 221 (2005).



But Americans who bought tickets while already abroad could find themselves without a U.S. forum. For example, Jackie Pflug was a passenger on EgyptAir Flight 648 who survived being shot in the head by hijackers on a tarmac in Malta.<sup>85</sup> She sued EgyptAir for her injuries in the United States District Court for the Eastern District of New York.<sup>86</sup> It was undisputed that Egypt was the principal place of business of EgyptAir, and that Pflug purchased round-trip tickets from Cairo to Athens in Cairo, making Egypt both the place of contracting and place of destination.<sup>87</sup> What remained in dispute was whether EgyptAir was “domiciled” in the United States as used, under Warsaw, by way of its New York subsidiary.<sup>88</sup> Following its own recent decisions that carriers were domiciled solely in their country of incorporation for Warsaw purposes, the court held that EgyptAir was domiciled in Egypt and that it lacked jurisdiction under Article 28.<sup>89</sup> The Second Circuit agreed, rejecting Pflug’s arguments that Warsaw did not apply,<sup>90</sup> and affirming the principle that Warsaw’s use of “carrier” referred to “the airline that actually transports the injured passenger.”<sup>91</sup>

Dismissed cases arose from high-profile international events. George and Renee Karfunkel purchased tickets from New York to Tel Aviv and from Paris to New York from an American travel agent but did not book the connecting Israel–Paris leg of their journey until after arriving in Israel.<sup>92</sup> En route to Paris on Air

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<sup>85</sup> See *Pflug v. Egyptair Corp.*, 788 F.Supp 698, 699 (E.D.N.Y. 1991).

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* at 700.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.* (citing *In re Air Disaster Near Cove Neck, N.Y.*, On January 25, 1990, 774 F. Supp. 725 (E.D.N.Y. 1991) (*Ochoa v. Aerovias Nacionales De Colombia, S.A.*, 774 F. Supp. 725 (E.D.N.Y. 1991); *De Londono v. Aerovias Nacionales De Colombia*, 774 F. Supp. 718 (E.D.N.Y. 1991))). The issue arose because federal courts had developed an “alter ego” doctrine that imputed subsidiary domicile to parent companies in order to fend off lawsuits strategically filed to invoke diversity jurisdiction. See, e.g., *Freeman v. N.W. Acceptance Corp.*, 754 F.2d 553, 556–559 (5th Cir. 1985) (vacating judgment for lack of subject matter jurisdiction because plaintiffs were domiciled in Colorado, not Texas, and filed suit against Oregon parent company rather than Colorado subsidiary to avoid state court); 28 U.S.C. § 1332(a) (requiring complete diversity of citizenship as between plaintiffs and defendants for court to exercise subject matter jurisdiction).

<sup>90</sup> Pflug argued that having been shot on the tarmac, she was outside of the scope of Warsaw. The court held otherwise, finding that the “accident” at issue for purposes of Article 17 was the hijacking that had occurred mid-air. *Pflug v. EgyptAir Corp.*, 961 F.2d 26, 29–30 (2d Cir. 1992).

<sup>91</sup> *Id.* at 31.

<sup>92</sup> See *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 973–74 (S.D.N.Y. 1977).

France, their aircraft was hijacked, and they were held hostage for a week at Entebbe, Uganda, before being rescued by Israeli commandos.<sup>93</sup> The Second Circuit found that U.S. courts lacked jurisdiction under Warsaw, stating that “[t]he only possible basis for jurisdiction here in New York is that New York was ‘the place of destination. Not even plaintiffs seriously contend for this, nor could they.’”<sup>94</sup> And the case of Stanley Dorman was a particularly harsh example. A New Yorker, his Canadian employer made a practice of purchasing his round-trip tickets to Asia from a Montreal travel agent with an origin and final destination in Montreal, to take advantage of reduced air fares.<sup>95</sup> The Montreal agent would mail the tickets to Dorman in New York, and Dorman would start and end his trips in New York (leaving the New York–Montreal seat empty).<sup>96</sup> Dorman was aboard Korean Airlines Flight 007 en route to Seoul via Anchorage when it was shot down by the Soviet Union after a navigational error brought the flight into prohibited airspace.<sup>97</sup> He was one of the dozens of plaintiffs whose suits were dismissed by the District Court of D.C. due to lack of subject matter jurisdiction.<sup>98</sup>

Of course, the “wandering” problem was not unique to Americans. The 1998 crash of a Swissair New York–Geneva flight revealed that many French residents availed themselves of the easily accessible Swiss route and thereby lacked a right to sue in France.<sup>99</sup> In the debate over whether to expand jurisdiction beyond Warsaw’s limits, advocates underlined the diversity of the problem. Allan Mendelsohn, a prominent American aviation lawyer and member of the United States’ delegation to ICAO, asserted in 1997:

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<sup>93</sup> See *id.* at 973.

<sup>94</sup> *Id.* at 974.

<sup>95</sup> *In re Korean Air Lines Disaster* of Sept. 1, 1983, 664 F. Supp. 1478, 1479 (D.D.C. 1986). Because of modern boarding practices such a maneuver is no longer possible, although the modern practice of “skiplagging” reverses this approach, capitalizing on “hidden city” fares at intermediate destinations. See Elaine Glusac, *Airline Bookings Hacks: ‘What Works, and What Might Get You in Trouble*, N.Y. TIMES (Mar. 29, 2019), <https://nytimes.com/2019/03/29/travel/airline-booking-strategies.html> [<https://perma.cc/NN9R-TZJ8>].

<sup>96</sup> See *In re Korean Air Lines Disaster*, 664 F. Supp. at 1479.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 1479, 1481; see also *Wylar v. Korean Air Lines Co., Ltd.*, 928 F.2d 1167, 1175 (D.C. Cir. 1991) (rejecting argument that French legal concept of “*domicile*” should apply to term as used in Warsaw Convention and meant any place of “substantial business”).

<sup>99</sup> See STEPHEN & DEMPSEY, *supra* note 84, at 221 n.489.

[T]he “wandering American” is in fact a shibboleth. One would think that Americans are the only ones who wander and who might not be able to sue in their home country under Article 28. This is patently wrong.

There are wandering Germans, wandering Swiss, wandering British, and wanderers of every nationality. There are no greater number of Americans who live in Hong Kong and fly Hong Kong-Moscow-Hong Kong than there are Germans or Frenchmen or British. These same foreigners probably also fly Hong Kong-United States as often as Americans. If they fly on a third country airline, are we going to say that none of these foreigners will be able to sue in their home countries? Are the governments of Germany and France really going to say that they do not want their citizens to be able to sue at home? Are they going to say that their citizens should be able to sue only in one of the often very fortuitous and faraway Article 28 forums? I believe they will not and that it would be a great mistake if they did.<sup>100</sup>

The need to file suit in a foreign jurisdiction was more than just inconvenient to injured passengers. In Warsaw cases, forum law set the availability of pain and suffering damages, damages for loss of consortium, and whether collateral sources of payment (such as other insurance) offset damages awards.<sup>101</sup> Systemic factors such as the availability of contingent fee arrangements, whether damages are determined by judge or jury, and the community’s view on the value of a human life could also have great influence.<sup>102</sup> Contemporary air law commentators observed that these factors “are practically more important than the law according to which the damages are determined.”<sup>103</sup> American policymakers took note of the issue under focused lobbying efforts by victims’ family associations.<sup>104</sup> Efforts at reform without a wholesale reconsideration of Warsaw were unsuccessful, and the American delegation prioritized the creation of a “Fifth Jurisdiction” as the world’s aviating countries gathered to consider a new legal regime for air carrier liability.<sup>105</sup>

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<sup>100</sup> Allan I. Mendelsohn, *The Warsaw Convention and Where We Are Today*, 62 J. AIR L. & COM. 1071, 1078 (1997).

<sup>101</sup> See Federico Ortino & Gideon R.E. Jurgens, *The IATA Agreements and the European. Regulations: The Latest Attempts in the Pursuit of A Fair and Uniform Liability Regime for Intl Air Transp.*, 64 J. AIR L. & COM. 377, 390 (1999).

<sup>102</sup> See *id.*

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

<sup>104</sup> See Andrea L. Buff, *Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Intercarrier Agreement Eliminate the Need to Amend the Convention?*, 20 FORDHAM INT’L L.J. 1768, 1820 (1997).

<sup>105</sup> See Pradhan, *supra* note 3.

IV. DEBATES IN MONTREAL ASSUMED PERSONAL JURISDICTION AND FOCUSED ON COMMERCIAL PRESENCE AND FORUM NON CONVENIENS

A. EARLY FIFTH JURISDICTION DEBATES ESTABLISH THE LINES BETWEEN MAJOR AIR POWERS AND DEVELOPING COUNTRIES

On May 10, 1999, delegates from the Warsaw Convention States (States) gathered in Montreal for the International Conference on Air Law (the Conference).<sup>106</sup> The fifth jurisdiction was a point of discussion from the outset.<sup>107</sup> Greeting delegates, ICAO Council President Dr. Assad Kotaite noted that ICAO had been developing draft language for a new convention since 1995 and that provisions “relating to the liability regime and the availability of the so-called fifth jurisdiction” had received considerable attention by ICAO’s Legal Committee and by an ad hoc committee called the “Special Group on the Modernization and Consolidation of the Warsaw System.”<sup>108</sup> That group had refined language for a new Article 27, including the original four Warsaw fora along with the proposed fifth jurisdiction. Proposed paragraphs 2 through 3 *bis* read:

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:
  - (a) in which at the time of the accident the passenger has his or her principal and permanent residence; and
  - (b) to or from which the carrier actually or contractually operates services for the carriage by air; and
  - (c) in which that carrier conducts its business of carriage by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.
3. In this Article, “commercial agreement” means an agreement, other than an agency agreement, made between carriers and relating to the provision or marketing of their joint services for carriage by air.

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<sup>106</sup> See ICAO Int’l Conference on Air Law, *Convention for the Unification of Certain Rules for Int’l Carriage by Air*, ICAO Doc. 9775-DC/2 (Vol. 1) (May 10–28, 1999) (the Montreal Convention) [hereinafter Int’l Conference on Air Law Vol. 1].

<sup>107</sup> See *id.* at 38.

<sup>108</sup> *Id.* at 36–38.

[3 *bis*. At the time of ratification, adherence or accession, each State Party shall declare whether the preceding paragraph 2 shall be applicable to it and its carriers. All declarations made under this paragraph shall be binding on all other States Parties and the depositary shall notify all States Parties of such declarations.]<sup>109</sup>

Bracketed language indicated areas where the Special Group had not resolved on a firm proposal. Here, the 3 *bis* language reflected hesitancy among smaller States about exposing their carriers to liability in high-damages jurisdictions.

Remarks at the opening of the Convention quickly established the opposing viewpoints. A string of States expressed general concern over proposals they perceived as threatening to carriers in developing countries.<sup>110</sup> The French delegation told delegates that:

The only approach to obtaining as many ratifications as possible was to arrive at a balanced text reflecting the interests of different parties. The different States represented at this Conference had varying levels of wealth; whereas some had large, highly respected international carriers representing a large percentage of air commerce, other countries had small carriers who were still developing and who should not be handicapped by the adoption of solutions which were too stringent for them.<sup>111</sup>

The United States responded by framing the Conference as an opportunity for continuity, consolidation, and modernization.<sup>112</sup> It advocated for:

[A]n expansion of the four bases of jurisdiction to allow claimants to sue in a fifth jurisdiction; i.e. the State of the passenger's principal and permanent residence. The United States believed this change was a matter of fundamental fairness, ensuring that two victims, similarly situated, had similar access to justice. Work thus far had produced a clear and reasonable standard which, as a number of countries had stated, protected small domestic carriers from additional litigation when the test of sufficient contacts with the jurisdiction were not met. The United States also believed that

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<sup>109</sup> ICAO Int'l Conference on Air Law, *Convention for the Unification of Certain Rules for Int'l Carriage by Air*, ICAO Doc. 9775-DC/2 (Vol. 2) (May 10–28, 1999) (the Montreal Convention) [hereinafter Int'l Conference on Air Law Vol. 2].

<sup>110</sup> See Int'l Conference on Air Law Vol. 1, *supra* note 106, at 40–41 (delegates of Cote d'Ivoire and Cameroon), 42 (delegate of Mauritius), 47 (delegate of Guinea), 48 (delegate of Madagascar).

<sup>111</sup> *Id.* at 42.

<sup>112</sup> See *id.* at 43–44. The other major policy initiative of the United States was the adoption of unlimited liability in death or injury cases, which it had advanced as a goal across various Protocols and private inter-carrier initiatives. See *id.* at 190.

the doctrine of forum [non conveniens] would provide discipline against unwarranted forum shopping.<sup>113</sup>

Prior to the Conference, the United States had circulated a memorandum explaining its jurisdictional proposal.<sup>114</sup> In its view, jurisdiction required “an airline to have a significant presence in the particular State.”<sup>115</sup> It noted that:

Since 1929, the air transport industry has progressed from small, independent airlines offering limited point-to-point service, to large, integrated global networks. Modern air transport operations and ticketing practices pose significant challenges under the existing Warsaw jurisdictions. Inter-carrier alliances, code sharing, electronic ticketing, Internet booking, etc., all complicate the task of determining applicable jurisdictions. Addition of the fifth jurisdiction would make this task much simpler.<sup>116</sup>

The United States emphasized that “lack of a fifth jurisdiction has harmed our citizens.”<sup>117</sup> Specifically, it noted that:

Following the shutdown of Korean Airlines (KAL) Flight 007 (New York to Seoul) in 1983, killing all 269 people aboard, 108 decedents’ cases were litigated in U.S. courts. However, cases brought on behalf of several U.S. citizens had to be litigated in foreign jurisdictions, including Korea, Japan, and the Philippines. While a U.S. court subsequently found that KAL’s actions constituted “willful misconduct,” [which would permit recovery beyond Warsaw’s strict liability cap] the Korean courts refused even to entertain argument on the issue of “willful misconduct,” and the Japanese and Philippine courts never ruled on the question. The results for claimants in a multitude of court systems were widely disparate; inequitable recoveries even existed among citizens of the same country.<sup>118</sup>

The United States argued that the fifth jurisdiction would balance the four existing Warsaw jurisdictions.<sup>119</sup> It asserted that the addition of a fifth jurisdiction would dissuade “forum shoppers” by making foreigners’ suits more feasible in their home countries, thereby enhancing American courts’ willingness to dismiss

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<sup>113</sup> *Id.* at 44.

<sup>114</sup> *See* Int’l Conference on Air Law Vol. 2, *supra* note 109, at 101 (DCW Doc No. 12).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 102.

<sup>117</sup> *Id.* at 104.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 107.

claims for forum non conveniens.<sup>120</sup> The principles of forum non conveniens would become a significant point of debate over the subsequent weeks.<sup>121</sup>

Numerous other States and participants circulated position memoranda.<sup>122</sup> India asserted that “the acceptance of the fifth jurisdiction as an additional forum has far-reaching implications for small and medium-sized airlines, especially, of the developing world, which would be extremely serious both from the point of view of logistics as well as financial costs.”<sup>123</sup> India, along with Vietnam, supported a proposal reflected in paragraph 3 *bis* to allow States to “opt-in” to the fifth jurisdiction.<sup>124</sup>

France was fiercely opposed to a fifth jurisdiction.<sup>125</sup> It asserted that the existing Warsaw jurisdictional framework, in combination with liability enhancements, had yielded “very satisfactory” compensation amounts.<sup>126</sup> France warned of forum shopping, unequal burden arising from passengers in less-developed countries subsidizing higher awards, and French hostility to the doctrine of forum non conveniens.<sup>127</sup>

Fifty-three “African Contracting States” declared Warsaw’s jurisdictional language was adequate and that a fifth jurisdiction “would bring more complications than benefits and would not promote the necessary consensus.”<sup>128</sup> They pointed out that inclusion of the fifth jurisdiction in prior protocols had been in the context of unbreakable liability limits, and that when considered in tandem with the unlimited liability also being proposed at the Conference, “inclusion of a fifth jurisdiction in the [previous draft] is not a convincing argument for its incorporation in the new Draft.”<sup>129</sup> The African Contracting States expressed concern over insurance costs<sup>130</sup> and noted that forum courts often

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<sup>120</sup> *Id.* at 108; *see also id.* at 151–54 (synopses of American forum non conveniens rulings submitted by the United States).

<sup>121</sup> *See* Int’l Conference on Air Law Vol. 2, *supra* note 109, at 136 (DCW Doc No. 12).

<sup>122</sup> *See, e.g., id.* at 135 (presented by India).

<sup>123</sup> *Id.* at 136.

<sup>124</sup> *See id.* at 136, 149.

<sup>125</sup> *See id.* at 195.

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 196.

<sup>128</sup> *See* Int’l Conference on Air Law Vol. 2, *supra* note 109, at 143 (DCW Doc No. 12).

<sup>129</sup> *Id.*

<sup>130</sup> *See id.* at 144. On this, the International Union of Aviation Insurers, “a small group representing insurance underwriting interests in the French, German, Italian, Swiss, UK and US markets,” agreed. *Id.* at 155. It declared with portent that:

A fifth jurisdiction will drive up - quite significantly - the exposures of air carriers, especially in those parts of the world which do not engage in carriage to high compensation States. This exposure will lead directly to an increase

imposed local substantive law on “issues related to assessment of fault, contributory negligence and other matters related to Article 20 [regarding liability].”<sup>131</sup> The Arab Member States likewise objected.<sup>132</sup>

The United States was not alone in supporting adoption of the fifth jurisdiction. The Latin American Civil Aviation Commission (LACAC), made up of 21 States, supported adoption without article 3 *bis*.<sup>133</sup> In its view, the passenger’s place of residence was normally “the most appropriate for determining the victim’s compensation,” and the “current options of the System already provide, in most cases, the possibility of a passenger starting legal proceedings in his own State.”<sup>134</sup> Colombia separately supported the proposal, stating that it was appropriate to avoid passengers being burdened with “the high costs involved in travel, accommodation, etc., if the trial is held outside the place where they have their permanent residence.”<sup>135</sup>

The only explicit reference to personal jurisdiction in these early positions was by the United States. It argued that:

Were it not for the existing Warsaw Convention limitations, the laws of many States (including the United States) would permit a claimant to bring a legal action in the passenger’s home State, *provided only that the air carrier has a commercial presence in that State*. There is no justification for a new convention that continues to deny passengers a right which, in the absence of an international convention, many would otherwise have under the laws of their home States.<sup>136</sup>

Later in its memorandum, it added that:

[S]ome States provide to their citizens the right to bring suits locally on any contract to which the citizen is a party, regardless of where the contract was made or performed. Consequently, a foreigner, even if not residing or otherwise doing business in that State, may be subject to the jurisdiction of the courts of that State

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in insurance charges. It is difficult to justify inviting airlines in the developing world to, in effect, subsidise the domestic compensation regime in high compensation States. It is suggested that many States are unlikely to ratify the new instrument with Article 27(2) included. The Warsaw Convention would, should this happen, lose its global reach and become a regional instrument. *Id.* at 158.

<sup>131</sup> *Id.* at 144.

<sup>132</sup> *See id.* at 161–62.

<sup>133</sup> *See id.* at 115–16.

<sup>134</sup> *Id.* at 116.

<sup>135</sup> *Id.* at 192.

<sup>136</sup> *Id.* at 102 (emphasis added).



relative to contracts made with its citizens. Such laws are much broader than the fifth jurisdiction . . . .<sup>137</sup>

The implication of the American argument was clear—in its view, the proposed fifth jurisdiction incorporated the same “commercial presence” test that would support the exercise of personal jurisdiction over a corporate entity. It was the lack of a treaty forum in the passenger’s home jurisdiction that was the cause of the wandering American problem, and the solution was to expand the fora available under the new convention.

#### B. EARLY CONFERENCE DEBATE REINFORCES THE DISPUTE OVER THE REACH OF THE FIFTH JURISDICTION

The fifth jurisdiction draft article was considered by the Conference on May 17, 1999.<sup>138</sup> France opened the debate, strongly opposing adoption and asserting it was “not a requirement of world air transport.”<sup>139</sup> France also asserted that the fifth jurisdiction could create a passenger paradox wherein non-U.S. passengers would pay higher ticket prices to cover increased insurance costs but would themselves have less access to a U.S. forum due to the supposed improved environment for forum non conveniens.<sup>140</sup> France, therefore, advocated for the adoption of 3 *bis* to allow States to “opt out” of the fifth jurisdiction to their carriers.<sup>141</sup> The African Contracting States, India, Colombia, and the Arab States all emphasized the points made in their position memoranda.<sup>142</sup>

A few additional States entered the fray. Japan expressed support for a fifth jurisdiction as favoring consumers, a position consistent with its historically passenger-friendly approach to liability issues.<sup>143</sup> Norway announced its conversion to the Fifth Jurisdiction position, having initially shared the concerns of the opposing groups.<sup>144</sup> South Korea opposed, expressing a fear of a “large number of legal actions . . . with the strong possibility of protective awards in favour of the national concerned.”<sup>145</sup> Singapore addressed its comments to the “Friends of the Chairman” group.<sup>146</sup>

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<sup>137</sup> *Id.* at 105.

<sup>138</sup> *See* Int’l Conference on Air Law Vol. 1, *supra* note 106, at 98.

<sup>139</sup> *Id.* at 103–04.

<sup>140</sup> *See id.* at 104.

<sup>141</sup> *Id.* at 105.

<sup>142</sup> *See id.* at 105–06.

<sup>143</sup> *See id.* at 106.

<sup>144</sup> *See id.* at 107.

<sup>145</sup> *Id.*

<sup>146</sup> *See id.*

This group was formed by Conference President Kenneth Rat-tray to achieve progress on a “package” of policy items, including the fifth jurisdiction, after early deliberations revealed that many States were avoiding taking positions on pivotal issues.<sup>147</sup> Singapore advocated that the group should look for solutions that balanced “consensus” and the “interests of the passenger” and suggested that concerns over the migration of litigation to high-damages jurisdictions was overblown.<sup>148</sup>

The United States mounted a defense of the proposal. To address the concerns of developing countries, the United States told the delegates that:

[A] number of protections for small air carriers had been built in the provision for that jurisdiction—a matter which seemed to have been overlooked in the present debate. Much progress had been made since the adoption of earlier Protocols *regarding the minimum contacts which would be required for a small carrier to be compelled to defend a lawsuit in another State*. Paragraph 2, sub-paragraph (c), represented a carefully negotiated compromise on that issue and reflected the fundamental fairness which the United States considered was required to address the concerns of small air carriers. *The Delegate of the United States noted that if a small air carrier did not conduct its business in his State—and many did not—, if they did not operate an aircraft to his State or have their code carried on an aircraft which touched his State, the fifth jurisdiction provision would not bring them into a US court even if they were carrying a passenger whose ticket bore the code of a US air carrier and crashed*. This constituted substantial protection for small carriers. Not only did air carriers have to have either their code or their aircraft touch his State, they also had to have a place of business in his State, either through which they conducted their business directly or through which their codeshared partner conducted its business. That was significant protection for small carriers who had nothing to do with operations to a State involved with a fifth jurisdiction determination.<sup>149</sup>

The invocation of “minimum contacts,” a concept in personal jurisdiction analysis, leaps from the page.<sup>150</sup> The American delegation sought to reassure foreign carriers that it would be *their* affirmative decision to “touch” the United States and thereby be exposed to suits in U.S. courts.<sup>151</sup> The American description of

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<sup>147</sup> See CHARLES F. KRAUSE & KENT C. KRAUSE, AVIATION TORT AND REGUL. L. § 12:14 (Thomson West, 2nd ed. 2023).

<sup>148</sup> See Int’l Conference on Air Law Vol. 1, *supra* note 106, at 107.

<sup>149</sup> *Id.* at 108–09 (emphasis added).

<sup>150</sup> *Id.* at 108.

<sup>151</sup> See *id.* at 108–09.

a non-jurisdictional scenario mirrors the facts in *Luna* and might well have been informed by that case.<sup>152</sup> But if the United States agreed that jurisdiction over such a remote carrier was not fair, it also made a converse point—it was consistent with “fundamental fairness” to allow a U.S. forum where carriers met the fifth jurisdiction criteria.<sup>153</sup> That again suggests that the American delegation saw personal jurisdiction as a side issue that would be resolved in tandem with a carrier’s satisfaction of fifth jurisdiction requirements.

C. DEBATE IN THE “FRIENDS OF THE CHAIRMAN” GROUP  
FOCUSES ON FORUM NON CONVENIENS AS THE  
PROTECTION FOR REMOTE CARRIER CASES

The Friends of the Chairman group met on May 19, 1999, to consider the draft jurisdictional article.<sup>154</sup> The primary antagonist of the proposed article was France.<sup>155</sup> It offered its hypothetical, in which an African carrier transported an American on an itinerary that did not include the United States but was subject to jurisdiction there by dint of “commercial agreements” with Air France that brought it within the fifth jurisdiction.<sup>156</sup> France proposed collapsing Paragraphs 2a through c into a single provision that allowed jurisdiction in a forum “in which at the time of the accident, the passenger has his or her principal and permanent residence and to which or from which the carrier operates air transport services and in which it conducts its business from premises which it leases or owns,” removing the “contractually operates” and “commercial agreement” aspects of the draft language that allowed jurisdiction through a partner carrier’s activities.<sup>157</sup>

The United States criticized France for taking an unnecessarily dismal view of the existing draft.<sup>158</sup> It noted that “sub-paragraphs (b) and (c) had also been the subject of lengthy consideration in the Secretariat Study Group and in the Special Group,” and that “those bodies had started with the notion that it was not fair to capture a carrier which did not have a ‘suitable presence’ in the

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<sup>152</sup> See *Luna v. Compania Panamena De Aviacion, S.A.*, 851 F. Supp. 826 (S.D. Tex. 1994).

<sup>153</sup> See Int’l Conference on Air Law Vol. 1, *supra* note 106, at 109.

<sup>154</sup> See *id.* at 147.

<sup>155</sup> See *id.* at 149–151.

<sup>156</sup> See *id.* at 150.

<sup>157</sup> *Id.*; Int’l Conference on Air Law Vol. 2, *supra* note 109, at 24.

<sup>158</sup> See Int’l Conference on Air Law Vol. 1, *supra* note 106, at 153–54.

country in which it had been captured and brought to Court.”<sup>159</sup> That broad concept had been accepted by all members of those groups, and all agreed that “if the carrier flew an aircraft to a certain location and had a serious office there, then that was a sufficiently ‘suitable presence’ in the country for it to be fair for that carrier to be sued there.”<sup>160</sup> The trouble was that the invention of code-sharing alliances had created a “rather large loophole” through which carriers were carrying on business in various countries through alliance affiliates rather than opening their own offices.<sup>161</sup> As a result, “if one were to say that the carrier had to actually operate its aircraft to the country in question, and conduct its business out of offices in that country,” then under alliance arrangements, carriers could “have substantial flight operations in and out of . . . the United States but would not be captured by a fifth jurisdiction . . .”<sup>162</sup> In the United States’s view, the French proposal would “reopen the loophole” closed by the proposed language.<sup>163</sup>

The group also debated an Australian suggestion that the fifth jurisdiction incorporate a forum non conveniens condition precedent, for which there was some support, but objections from civil law countries who debated whether their law recognized the concept at all.<sup>164</sup> The United States objected, stating that forum non conveniens already applied to Warsaw claims and expressed concern that including its express use in the treaty might alter established U.S. law.<sup>165</sup> There was extensive debate on the need for a standard forum non conveniens formulation, and States with small carriers continued to push for measures to ensure they would not be haled into U.S. courts.<sup>166</sup> The related question of how to define the concept of a passenger’s “principal and permanent residence” was also debated at length.<sup>167</sup>

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<sup>159</sup> *Id.* at 154.

<sup>160</sup> *Id.*

<sup>161</sup> *See id.*

<sup>162</sup> *Id.* at 155.

<sup>163</sup> *Id.*

<sup>164</sup> *See id.* at 158–59.

<sup>165</sup> *See id.* at 159.

<sup>166</sup> *See id.* at 159–63.

<sup>167</sup> *See id.* at 170–89. The debate resulted from legal distinctions between the American concept of “domicile” (understood as a person’s principal place of residence with intent to remain indefinitely) and the same term in civil law, which could include more than one country. *See id.* at 153, 190–89. Civil law States were concerned that jurisdiction would turn on the nationality of the claimant, and Article 33(3)(b) expressly excludes nationality from consideration as a result. *See id.* at 173. For their parts, American courts have applied a more-or-less domestic

When the Group reconvened, the Chairman distributed draft language, including a forum non conveniens provision.<sup>168</sup> His intent was to provide a uniform standard that safeguarded “against the excessive exercise of that jurisdiction in circumstances which could pose an intolerable burden and therefore would defeat the interest of justice.”<sup>169</sup> But at the next meeting the United States objected, asserting the proposal implied that forum non conveniens principles would not apply to the four traditional fora, limiting the use of the device to combat perceived forum shopping.<sup>170</sup> The United States proposed the jurisdictional article to incorporate Warsaw’s language that “[q]uestions of procedure shall be governed by the law of the court seised of the case,” with the intent that subsequent forum non conveniens criteria would not impact national procedural law.<sup>171</sup> The Swedish and Swiss delegations forcefully argued that uniformity was not advanced by optional provisions and that whether to decline jurisdiction over a case should be seen as a matter of national procedure.<sup>172</sup> The Chairman encouraged the group to have bilateral discussions on the issues raised.<sup>173</sup>

The Chairman told the Convention that his group was grappling with “[a] number of concerns [that] had been expressed related to ensuring that there was indeed a sufficient connecting link between the passenger and the jurisdiction, as well as in relation to the carrier,” and that the group had debated whether the Fifth Jurisdiction should “be subject to fences or circumscribed in a way which would prevent abuse.”<sup>174</sup>

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domiciliary analysis, which includes an “intent” factor to the question of “principal and permanent residence.” See *In re Air Crash at San Francisco, California*, on July 6, 2013, No. 14-cv-02038, 2017 WL 3484643, at \*7 (N.D. Cal. Aug. 14, 2017) (rejecting that the U.S. was a principal and permanent residence of a Chinese national receiving prolonged medical care); *Choi v. Asiana Airlines, Inc.*, No. 14-cv-03738-JST, 2015 WL 394198, at \*4 (N.D. Cal. Jan. 29, 2015) (holding that the U.S. was never the “principal and permanent residence” of a Korean national living primarily in Korea with U.S. permanent residency status); *Hornsby v. Lufthansa German Airlines*, 593 F. Supp. 2d 1132, 1139 (C.D. Cal. 2009) (finding that the plaintiff could bring a Montreal claim in the U.S as her “principal and permanent residence” notwithstanding living in Germany for the majority of the two years prior to her injury on temporary permits).

<sup>168</sup> See Int’l Conference on Air Law Vol. 1, *supra* note 106, at 170–71.

<sup>169</sup> *Id.* at 171.

<sup>170</sup> See *id.* at 180.

<sup>171</sup> *Id.* at 181; see also Warsaw Convention, *supra* note 83, art. 28.

<sup>172</sup> See Int’l Conference on Air Law Vol. 1, *supra* note 106, at 181–82.

<sup>173</sup> See *id.* at 183–84.

<sup>174</sup> *Id.* at 186.

D. A “CONSENSUS PACKAGE” DEVELOPS OUTSIDE OF  
CONFERENCE MEETINGS AND IS ADOPTED

On May 25, 1999, the Chairman presented the Conference with a “Consensus Package” of agreements on liability articles, which contained the final fifth jurisdiction language.<sup>175</sup> The Chairman told the Convention that agreement on the fifth jurisdiction and the other liability reforms (particularly allowance of unlimited liability in death and personal injury cases subject to a carrier defense):

[R]epresented a very, very fine balance of the sometimes conflicting, sometimes competing, but certainly varied interests in which the Friends of the Chairman’s Group had sought to accommodate the interests of passengers, of the victims’ families, of the air carriers, including in particular those of many small air carriers which would, in fact, be faced with the liability system, and the overall public interest . . . . [T]he Chairman underscored that it represented a very fragile balance . . . .<sup>176</sup>

The Chairman described the group’s understanding of the practical jurisdictional requirements:

[T]he nexus between the principal and permanent residence must clearly relate to a place to or from which the air carrier operated services for the carriage of passengers by air. Those services might be rendered by its own aircraft or by another aircraft pursuant to a commercial agreement. The air carrier must have some presence in that jurisdiction, either in the form of premises which were leased or owned by the air carrier itself or by another air carrier with which it had a commercial agreement.<sup>177</sup>

The Chairman emphasized the “restricted scope” of the fifth jurisdiction:

It would not simply apply because there was an interline agreement between air carriers or because there was some marketing arrangement between them. For the Article to apply, the air carrier would have to be operating services to or from the territory where the passenger had his principal and permanent residence, either on its own aircraft or on an aircraft of another air carrier pursuant to a commercial agreement.<sup>178</sup>

The Chairman gave the Consensus Package a hard sell, imploring the Convention that “it be accepted as all possible means had

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<sup>175</sup> *Id.* at 199.

<sup>176</sup> *Id.* at 199–200.

<sup>177</sup> *Id.* at 204.

<sup>178</sup> *See Int’l Conference on Air Law Vol. 1, supra* note 106, at 204.

been exhausted” and affirming that “history would not forgive the Conference if it lost this opportunity.”<sup>179</sup> The minutes recount these remarks being met with “sustained applause,” and “the Chairman declared the consensus package . . . adopted.”<sup>180</sup> With that, the matter was subject to no further debate, and whatever assurances passed between delegates to achieve the necessary consensus on the final form of the fifth jurisdiction are not part of the record.

#### V. THE UNITED STATES CELEBRATES A SOLUTION TO THE WANDERING AMERICAN

The United States Senate ratified the Montreal Convention in July 2003.<sup>181</sup> When transmitting the treaty to Congress in September 2000, President Clinton made clear his administration’s expectation that the new treaty was an answer to the “Wandering American” problem.<sup>182</sup> He noted that Montreal would be a “vast improvement over the liability regime established under the Warsaw Convention” in part because it would “provide[] for U.S. jurisdiction for most claims brought on behalf of U.S. passengers”<sup>183</sup> His message was accompanied by a Letter of Submittal from the State Department, which explained:

The Convention’s provision on jurisdiction, Article 33, reflects the U.S. success in achieving a key U.S. objective with regard to the Convention—the creation of a “fifth jurisdiction” to supplement the four bases of jurisdiction provided under the Warsaw Convention . . . . Article 33(2) of the new Convention allows cases involving the death or injury of a passenger to be brought in the country of the passenger’s principal and permanent residence, so long as the carrier provides service to that country, either directly or via a code share or other similar arrangement with another carrier, and the carrier conducts business there from premises leased or owned by it or by a carrier with which it has a commercial arrangement, for example, a code-share arrangement. *Given the number of carriers whose operations in the United States satisfy these criteria, this fifth jurisdiction provision should ensure that nearly all U.S.*

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<sup>179</sup> *Id.* at 205.

<sup>180</sup> *Id.* at 205–06.

<sup>181</sup> Press Release, U.S. Dep’t of State, Ratification of the 1999 Montreal Convention (Sept. 5, 2003).

<sup>182</sup> See MESSAGE FROM THE PRESIDENT OF THE U.S.: TRANSMITTING, THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INT’L CARRIAGE BY AIR, DONE AT MONTREAL, MAY 28, 1999, S. TREATY DOC. NO. 106-45, at III (2000).

<sup>183</sup> *Id.*

*citizens and other permanent residents of the United States have access to U.S. courts to pursue claims under the Convention.*<sup>184</sup>

The State Department was even more explicit in its detailed treaty analyses materials. It anticipated that it had removed the obstacle to American suits against foreign carrier crashes, asserting that “this basis for jurisdiction is available *even if the accident occurs on a passenger journey and air service that did not include a point in the country of the passenger’s principal and permanent residence, provided that the carrier had the contacts with that country required by this paragraph.*”<sup>185</sup> This unmistakably assumes that a carrier would be subject to suit in the United States on the basis of its presence in the country, notwithstanding the facts of the case arising wholly overseas.

The United States Senate ratified the Montreal Convention in 2003. In a committee report recommending ratification, the Senate Committee on Foreign Relations had optimistic expectations for the fifth jurisdiction:

Under Article 33 . . . U.S. courts will have jurisdiction in nearly all cases involving death or personal injury to passengers who[m] reside in the United States, thus eliminating the need for such passengers or their heirs to bring suit in foreign courts in order to obtain jurisdiction over air carriers.<sup>186</sup>

Deputy Assistant Secretary of State John R. Byerly testified to the Committee that:

[[T]he Montreal Convention, if ratified, will make a true difference in the lives of American citizens. It will facilitate prompt assistance to survivors and to the relatives of victims. It will bypass time-consuming litigation over the myriad complexities of the Warsaw legal patchwork, and it will also end the burden imposed on so many American families of having to pursue legal redress far from home, in foreign legal systems, at great expense, and with huge uncertainty.<sup>187</sup>

He told the Committee that the Convention would allow jurisdiction:

[[W]here the carrier serves the United States, with its own aircraft or through a commercial agreement such as code-sharing, and that carrier has a presence here. It can have that presence either itself, in its own name, or through a code-share partner. Given the

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<sup>184</sup> *Id.* at XI–XII (emphasis added).

<sup>185</sup> *Id.* at 18 (emphasis added).

<sup>186</sup> S. REP. NO. 108–8, at 4 (2003).

<sup>187</sup> *Id.* at 12.



vastness of the United States' aviation relations with countries and carriers around the world, virtually all American citizens who are injured or killed in airline accidents should be able to obtain access to U.S. courts through this fifth basis of jurisdiction.<sup>188</sup>

Under personal jurisdiction law in 2003, this statement was dubious, and developments in the law strongly contradict this conclusion.

## VI. SPECIFIC PERSONAL JURISDICTION LAW DEVELOPS UNFAVORABLY TO THE WANDERING AMERICAN

In 1984, the Supreme Court established that specific jurisdiction required a defendant to have "purposefully directed" her activities at residents of a forum state and that the claims to be heard "ar[o]se out of or relate[d] to" those activities.<sup>189</sup> The Supreme Court declined to answer the questions of:

- (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and
- (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.<sup>190</sup>

Nor did it address how to proceed where an action "relates to," but does not 'arise out of,' the defendant's contacts with the forum."<sup>191</sup> The work of developing that law was left to state and lower federal courts. They divided into four groups requiring progressively more stringent causal connections between a claim and a defendant's forum contacts.

The least restrictive group held that jurisdiction is proper where a defendant's forum contacts "relate to" the claim.<sup>192</sup> This "standard does not require proof that the plaintiff would have no claim 'but for' the contacts, or that the contacts were a 'proximate cause' of the liability."<sup>193</sup> Rather, these courts looked only to

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<sup>188</sup> *Id.* at 16.

<sup>189</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

<sup>190</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984).

<sup>191</sup> *Id.*

<sup>192</sup> *See TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016).

<sup>193</sup> *See id.* at 53–54 (citing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 584 (Tex. 2007)).

whether there was a “discernible relationship” between the plaintiff’s claim and the defendant’s conduct.<sup>194</sup>

Where the first group set the jurisdictional floor at a minimal interpretation of “related to,” the others all required some causal connection between a defendant’s contact with the forum state and the claim to be heard under the “arising out of” prong.<sup>195</sup> The second group adopted a “but-for” causal standard familiar to tort law.<sup>196</sup> For example, the Supreme Court of Washington held its court could exercise jurisdiction over claims arising out of injuries that occurred on a cruise ship in international waters.<sup>197</sup> Carnival Cruise Lines had “purposefully directed [advertising] at Washington residents,” and the claimants would not have taken the cruise “but for” that advertising, allowing for jurisdiction.<sup>198</sup> So long as a causal chain of events led from contact to claim, jurisdiction was proper.<sup>199</sup>

The third group has imposed requirements beyond simple causation, borrowing from tort principles to consider whether the asserted jurisdictional contact was a “proximate cause” of the alleged harm.<sup>200</sup> This group expressed concern that a “‘but for’ requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.”<sup>201</sup> For example, the Oregon Supreme Court considered whether an Idaho motorcycle dealership was subject to suit in Oregon on claims that it made faulty repairs that led to injuries in Wyoming.<sup>202</sup> The dealership had “advertise[d] the sale of Harley–Davidson motorcycles, the sale of motorcycle parts and accessories, repair services it offered, and promotional events on a website accessible to Oregon customers and customers worldwide,” but the website had played no part in the facts of the repair and constituted only generalized contact with Oregon.<sup>203</sup> The court held it need not determine whether the plaintiff had first

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<sup>194</sup> *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 333, 336 (D.C. 2000) (en banc) (citation omitted).

<sup>195</sup> *See Shute v. Carnival Cruise Lines*, 783 P.2d 78, 81–82 (Wash. 1989).

<sup>196</sup> *See id.* at 82.

<sup>197</sup> *See id.*

<sup>198</sup> *Id.* at 80, 82.

<sup>199</sup> *See, e.g., Williams v. Lakeview Co.*, 13 P.3d 280, 284–85 (Ariz. 2000) (en banc) (holding due process requires “a causal nexus between the defendant’s . . . activities and the plaintiff’s claims”); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev’d on other grounds*, 499 U.S. 585 (1991).

<sup>200</sup> *See Harlow v. Children’s Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005).

<sup>201</sup> *Id.* (quoting *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996)).

<sup>202</sup> *See Robinson v. Harley-Davidson Motor Co.*, 316 P.3d 287, 289–90 (Or. 2013).

<sup>203</sup> *Id.* at 300.

learned of the dealership while in Oregon through its website because even if she had, “defendant’s contacts in Oregon were not such that it was reasonably foreseeable that defendant would be sued in Oregon for repairs it provided to plaintiff in Idaho.”<sup>204</sup> A fourth group of courts acknowledged the split in authorities and declined to resolve it for themselves.<sup>205</sup>

A series of United States Supreme Court decisions has since pushed doctrine toward at least a but-for view without affirmatively resolving the question.<sup>206</sup> The Court has framed the issue as one of protection and the limitations of sovereign power.<sup>207</sup> In cases where jurisdiction is proper, “circumstances, or a course of conduct” allow an inference of a defendant’s “intention to benefit from and thus an intention to submit to the laws of the forum State.”<sup>208</sup> The analysis was not to turn on the convenience of plaintiffs or third parties, but rather on protecting the “liberty” of the non-resident.<sup>209</sup> A defendant must have contacts with the “[s]tate itself” and not simply “with persons who reside there” such that a defendant’s “relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.”<sup>210</sup> “Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated with the State.”<sup>211</sup>

In 2017, the Supreme Court overturned a California decision applying a “sliding scale” approach under which “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.”<sup>212</sup> There, in-state and out-of-state plaintiffs sued Bristol-Myers over the drug Plavix.<sup>213</sup> Bristol-Myers did not develop, manufacture,

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<sup>204</sup> *Id.* at 301.

<sup>205</sup> *See* *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912 (8th Cir. 2012) (noting its cases had “not restricted the relationship between a defendant’s contacts and the cause of action to a proximate cause standard.”); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1079 (10th Cir. 2008) (declining to “pick sides” on the matter).

<sup>206</sup> *See* *J. McIntyre Mach. v. Nicastro*, 564 U.S. 873, 880–84 (2011); *Walden v. Fiore*, 571 U.S. 277, 286 (2014).

<sup>207</sup> *See* *J. McIntyre Mach.*, 564 U.S. at 881.

<sup>208</sup> *Id.*

<sup>209</sup> *Walden*, 571 U.S. at 284.

<sup>210</sup> *Id.* at 285–86.

<sup>211</sup> *Id.* at 286 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

<sup>212</sup> *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 889 (Cal. 2016) (citation omitted), *rev’d* 582 U.S. 255 (2017).

<sup>213</sup> *See id.* at 878.

label, or package Plavix in California—that all took place in New York or New Jersey.<sup>214</sup> Bristol-Myers did sell Plavix in California, generating \$900 million in sales annually, and Bristol-Myers had five research laboratories and 160 employees (unrelated to Plavix) in the state.<sup>215</sup> The controversy was California’s jurisdiction over claims brought by plaintiffs who had not purchased Plavix in California.<sup>216</sup> The California Supreme Court had held that jurisdiction was proper and the “extensive contacts with California” permitted the exercise of specific jurisdiction “based on a less direct connection between [Bristol-Myers’s] forum activities and plaintiffs’ claims than might otherwise be required.”<sup>217</sup> But the United States Supreme Court held that “[o]ur cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant’s general connections with the forum are not enough.”<sup>218</sup> It explained:

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims. As we have explained, “a defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.” . . . This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that [Bristol-Myers] conducted research in California on matters unrelated to Plavix. *What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.*<sup>219</sup>

For the first time, the Supreme Court appeared to require a “but-for” causal relationship between forum and claim.<sup>220</sup> Defendants took immediate notice and began raising the issue. For example, looking to *Bristol-Myers*, the Supreme Court of Oklahoma

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<sup>214</sup> *See id.* at 879.

<sup>215</sup> *See* Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 259–60 (2017).

<sup>216</sup> *See id.* at 260–61.

<sup>217</sup> Bristol-Myers, 377 P.3d at 889.

<sup>218</sup> Bristol-Myers, 582 U.S. at 264.

<sup>219</sup> *Id.* at 264–65 (emphasis added).

<sup>220</sup> *See id.*

jettisoned its own sliding scale in favor of a but-for requirement.<sup>221</sup> It held that a Texas-based helicopter manufacturer was not subject to suit in Oklahoma, where it had sold a helicopter to a Kansas company that operated and crashed the aircraft in Oklahoma.<sup>222</sup> In the Oklahoma court's view, without "direct and specific" contact with Oklahoma "directly related to the incident giving rise to the injuries," there was no jurisdiction, and the "'totality of the contacts' or 'stream of commerce' [tests are] no longer the analysis [the] Court will use to determine specific personal jurisdiction."<sup>223</sup>

Most recently, the Supreme Court decided *Ford Motor Company v. Montana Eighth Judicial District Court*.<sup>224</sup> There, car crash plaintiffs purchased their vehicles outside their home states but were injured and sued in their home states.<sup>225</sup> Ford challenged personal jurisdiction, asserting that specific personal jurisdiction was lacking because although it had dealerships in each state and had sold the same types of vehicles there, it had no forum-specific contacts as to the specific vehicles the plaintiffs had purchased, and therefore had no "but-for" connection to support jurisdiction.<sup>226</sup> That argument was rejected by the Montana and Minnesota Supreme Courts, both of which adhered to the looser "relatedness" standard in finding jurisdiction proper.<sup>227</sup> The Court agreed with the state tribunals, holding that while "but for" causation supports personal jurisdiction, personal jurisdiction is not "exclusively causal." Rather, where a defendant had "systematically served a market" with the precise type of product at issue, the claims must be sufficiently "related to" the in-forum activity to support jurisdiction.<sup>228</sup> This revival of "related to" jurisdiction is potentially significant for domestic air accident litigation in the United States, but is unlikely to impact foreign carriers whose contacts with the United States are limited to interline agreements or small offices.

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<sup>221</sup> See *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824, 825–34 (Okla. 2018).

<sup>222</sup> See *id.* at 834.

<sup>223</sup> *Id.*

<sup>224</sup> 592 U.S. 351 (2021).

<sup>225</sup> See *id.* at 356–57.

<sup>226</sup> See *id.*

<sup>227</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 443 P.3d 407, 484, 493–94 (Mont. 2019), *aff'd*, 592 U.S. 351 (2021); *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744, 755, 762 (Minn. 2019), *aff'd sub nom.*, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351 (2021).

<sup>228</sup> *Ford*, 592 U.S. at 365.

## VII. THE WANDERING AMERICAN AFTER MONTREAL

A. MONTREAL'S TREATY JURISDICTION HITS THE MARK ON  
"COMMERCIAL PRESENCE"

Only one reported case has substantively examined the "commercial presence" requirements of the fifth jurisdiction: *Erwin-Simpson v. AirAsia Berhad* in the United States District Court for the District of Columbia.<sup>229</sup> That court's careful analysis suggests remote foreign carriers face little risk of finding themselves subject to the fifth jurisdiction in the United States when their connections to the country are tenuous.

Erwin-Simpson alleged she was injured on an AirAsia flight from Kuala Lumpur, Malaysia to Phnom Penh, Cambodia after a flight attendant spilled boiling water on her.<sup>230</sup> AirAsia did not operate any flights to the United States when the accident occurred but its affiliate airline, AirAsia X, operated a long-haul flight to Honolulu, Hawai'i at the time the suit was filed.<sup>231</sup> Defendants challenged both subject matter and personal jurisdiction.<sup>232</sup>

Erwin-Simpson's residence in the United States was not in dispute, leaving the defendants' commercial presence in the United States at issue.<sup>233</sup> The court held that "[t]he text plainly requires that the airline engage in some aspect of its business in the forum State . . . through a physical presence there, either directly or through an agreement with another carrier."<sup>234</sup> And that presence required the sued carrier to operate "some aspect of its business from those premises," even if it is another carrier who owned or leased them.<sup>235</sup> The court discussed the drafting history and commentary of the fifth jurisdiction, concluding that "Article 33(2) . . . reflects a carefully negotiated balance in which signatories agreed that the fifth jurisdiction would only cover 'those carriers who "operate services" within a jurisdiction."<sup>236</sup> That meant "that

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<sup>229</sup> See 375 F. Supp.3d 8, 14–19 (D.D.C. 2019), *aff'd* 985 F.3d 883 (D.C. Cir. 2021); see B. Soyer & G. Leloudas, *Carriage of Passengers by Sea: A Critical Analysis of the Int'l Regime*, 26 MICH. ST. INT'L L. REV. 483, 524 (2018) (noting that "[c]ourts have not examined the 'commercial presence' requirements" of Article 33(2) of the Montreal Convention).

<sup>230</sup> See Erwin-Simpson, 375 F. Supp. at 11.

<sup>231</sup> See *id.*

<sup>232</sup> See *id.*

<sup>233</sup> See *id.* at 14.

<sup>234</sup> *Id.* at 14–15.

<sup>235</sup> *Id.* at 15.

<sup>236</sup> See Erwin-Simpson, 375 F. Supp. at 16 (quoting *Hornsby v. Lufthansa German Airlines*, 593 F. Supp. 2d 1132, 1138 (C.D. Cal. 2009)).

an airline must conduct business from some physical location in the U.S. before a court here can hear a personal injury claim stemming from international travel on that airline.”<sup>237</sup>

Plaintiff’s jurisdictional theory was that AirAsia and AirAsia X had a codeshare agreement, and therefore, AirAsia X’s physical presence in the United States permitted the exercise of jurisdiction over AirAsia.<sup>238</sup> However, there was no evidence that AirAsia operated to Hawai’i by codeshare nor any evidence that AirAsia operated from commercial premises in the United States.<sup>239</sup> Without those facts to satisfy Article 33(2)’s requirements, the court lacked subject matter jurisdiction.<sup>240</sup> It also rejected an argument that a foreign carrier’s website could constitute a “virtual premises” in the United States.<sup>241</sup> Such a holding would “stretch the fifth jurisdiction too far . . . . [It] would disregard the most natural understanding of Article 33(2) and upset the careful political balance it strikes.”<sup>242</sup> It concluded:

The Convention does not allow the Court to hear personal injury claims against a foreign airline that does not operate any physical aspect of its business, directly or indirectly, in the United States. The Court recognizes that the United States sought to ensure that Americans injured on airlines could bring suit here, even if the airlines do not fly here directly. But to sustain such a suit, a plaintiff must show that the carrier itself is somehow connected to the United States. This is not necessarily a high bar, and reasonable minds can disagree about the precise level of contacts that a carrier must have—and how direct they must be—for the Convention to confer subject matter jurisdiction. But it is clear to the Court that the bar is not so low as to permit jurisdiction based solely on *another* carrier’s activities in the United States. In this case, beyond a terse reference to AirAsia’s website, Plaintiffs rely exclusively on AirAsia X’s presence in the United States. Because Plaintiffs have neither alleged nor provided evidence that AirAsia operates any aspect of its business from premises in the United States, they have not met their burden to establish subject matter jurisdiction.<sup>243</sup>

As a secondary matter, the court determined it lacked personal jurisdiction as Erwin-Simpson did not allege that any events

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<sup>237</sup> *Id.* at 17.

<sup>238</sup> *See id.*

<sup>239</sup> *See id.*

<sup>240</sup> *See id.* at 19.

<sup>241</sup> *Id.* at 18.

<sup>242</sup> *Id.* at 19.

<sup>243</sup> *Id.*

relevant to her claim occurred in the District of Columbia or basis for general jurisdiction there.<sup>244</sup> The Court of Appeals for the District of Columbia Circuit upheld the decision on personal jurisdictional grounds, holding there was no general jurisdiction over AirAsia in the District of Columbia and denying a request to transfer the case to the District of Hawai'i for the same reason.<sup>245</sup>

*Erwin-Simpson*, decided twenty years after the signing of the Montreal Convention, is a reassurance to foreign carriers concerned about U.S. judgments.<sup>246</sup> It rejects a nightmare scenario for carriers with no links to the United States—jurisdiction by way of codeshare agreement generally without actually operating a codeshare flight to the United States.<sup>247</sup> And it underlines that plaintiffs should not presume that a codeshare operation to the United States is enough—the defendant carrier must conduct *its own* business from premises in the United States.<sup>248</sup> *Erwin-Simpson* was an important judicial adoption of the work done by delegates in Montreal to limit carrier exposure where they lack a legitimate commercial presence.<sup>249</sup>

#### B. STRINGENT SPECIFIC PERSONAL JURISDICTION KEEPS THE COURTHOUSE DOOR SHUT TO MANY WANDERING AMERICANS

The fifth jurisdiction unquestionably expanded the availability of an American forum to more U.S. passengers. The clear beneficiaries are one-way passengers leaving the United States on foreign carriers. A one-way passenger from New York to Toronto on Air Canada might have no Warsaw forum except in Canada, but under the Montreal Convention, the fifth jurisdiction would allow for a U.S. forum, and the departure from New York would meet the contacts threshold for personal jurisdiction.<sup>250</sup>

But in cases where the point of departure is not the United States, the situation is different because Article 33(2) and contemporary personal jurisdictional law examine different criteria. Article 33(2) *requires* that a passenger have “his or her principal and permanent residence” in the forum State; the personal

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<sup>244</sup> *See id.* at 20–21.

<sup>245</sup> *See Erwin-Simpson v. AirAsia Berhad*, 985 F.3d 883, 892–93 (D.C. Cir. 2021).

<sup>246</sup> *See Erwin-Simpson v. AirAsia Berhad*, 375 F. Supp. 3d 8, 13–19 (D.D.C. 2019).

<sup>247</sup> *See id.* at 18.

<sup>248</sup> *See id.* at 17–18.

<sup>249</sup> *See id.* at 17.

<sup>250</sup> *See Kim v. Korean Air Lines*, 513 F. Supp. 3d 462, (D.N.J. 2021) (“There is at the very least a but-for causal connection between Korean Air’s New York contacts and the claims here: If Korean Air did not operate KE086 flight out of JFK, then Kim could not have taken that flight and been injured while on board.”).



jurisdiction analysis excludes the residence of a plaintiff as a stand-alone factor.<sup>251</sup> And while Article 33(2) examines a carrier's commercial presence in a forum State generally, personal jurisdiction requires that the foreign carrier has engaged in some "affirmative conduct" relevant to the claim itself.

If the passenger purchased her ticket in the United States, the details of ticketing may solve the problem. In *Selke v. Germanwings GmbH*, the Eastern District of Virginia held it had personal jurisdiction over Germanwings related to the deaths of two passengers from Virginia killed during the flight when its pilot intentionally crashed an airliner.<sup>252</sup> There, the passengers had purchased tickets through United Airlines, and the court held that United's sale as agent for Germanwings was a sufficient contact to assert personal jurisdiction.<sup>253</sup>

Of the pre-Montreal wandering American examples discussed, the fifth jurisdiction would likely only allow one of them to proceed given the limits of personal jurisdiction. Stanley Dorman's employer may have purchased his tickets in Montreal, but presuming Korean Air had some commercial presence in the United States, his estate could have proceeded in New York based on his residence.<sup>254</sup> Pflug and the Karfunkles, by contrast, would be no better off under Montreal than under Warsaw even if the carriers that transported them had some commercial presence in the United States.<sup>255</sup> Their tickets were purchased outside the United States, their flights were entirely outside the United States, and the defendant carriers likely had no claim-related contact with any U.S. state.<sup>256</sup> Regardless of the carriers' baseline commercial presence in the United States, personal jurisdiction would be lacking, and those suits would likely be dismissed.

The December 2020 decision in *Burton v. Air France – KLM* serves as an example.<sup>257</sup> Burton was injured by falling luggage on an Air France flight from Montreal to Paris.<sup>258</sup> She purchased her ticket through cheapflightfares.com using her computer in

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<sup>251</sup> Montreal Convention, *supra* note 1, at 11; *Walden v. Fiore*, 571 U.S. 277, 286 (2014).

<sup>252</sup> See 261 F. Supp. 3d 645 (E.D.Va. 2017).

<sup>253</sup> See *id.* at 655.

<sup>254</sup> See generally *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1478, 1479 (D.D.C. 1986).

<sup>255</sup> See *Pflug v. EgyptAir Corp.*, 961 F.2d 26 (2d Cir. 1992); *Karfunkle v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977).

<sup>256</sup> *Id.*

<sup>257</sup> No. 3:20-CV-01085-IM, 2020 WL 7212566 (D. Or. Dec. 7, 2020).

<sup>258</sup> *Id.* at 1.

Oregon, where she lived.<sup>259</sup> Air France did not contest the court's subject matter jurisdiction because all Article 33(2) requirements were met—plaintiff was a U.S. resident, Air France carries passengers to the U.S., and Air France maintains corporate offices in New York. What was at issue was Oregon's specific jurisdiction to hear the claim.<sup>260</sup>

Burton argued that (1) Air France “target[ed]” Oregonians through web advertising; (2) the fares website was an “agent” of Air France; and (3) Air France was subject to jurisdiction through Delta Airline's connections to Oregon.<sup>261</sup> The court rejected each in turn, as unsupported by the facts.<sup>262</sup> Burton also asserted the Montreal Convention itself created jurisdiction, arguing the treaty was intended to expand access to home courts and that Air France's admission of subject matter jurisdiction constituted an admission that Air France conducted business in *Oregon*.<sup>263</sup> The court flatly rejected that argument, noting, “[i]t is well settled that Article 33 of the Montreal Convention and Article 28 of the Warsaw Convention refer to ‘[j]urisdiction in the treaty sense,’ meaning ‘whether any court in this country has jurisdiction’ over the case.”<sup>264</sup>

*Burton* was an easy case in that Oregon was not the state in which the carrier had an admitted commercial presence.<sup>265</sup> What if *Burton* had sued in New York? Air France has significant commercial operations in the forum, and its aircraft serve the state directly. It is plausible that Air France's New York office authorized or facilitated the sale of Air France fares, which might satisfy a “but-for” test. But absent facts not in evidence, *Burton* could not proceed there either.

Air France is no developing-country carrier—it is a sophisticated first-world carrier that directly serves the U.S. air market and has a clear commercial presence in the United States. But despite the implementation of a fifth jurisdiction through Montreal after significant American efforts, *Burton* might well lack a forum anywhere in the United States to pursue her claim. This is a domestic policy failure—it is U.S. law that bars these suits.

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at \*2.

<sup>261</sup> *Id.* at \*4–\*6.

<sup>262</sup> *See id.*

<sup>263</sup> No. 3:20-CV-01085-IM, 2020 WL 7212566 at \*6 (D. Or. Dec. 7, 2020).

<sup>264</sup> *Id.* at \* 7 (quoting *Benjamins v. Brit. Eur. Airways*, 572 F.2d 913, 915 (2d Cir. 1978)).

<sup>265</sup> *See id.* at \*6.

C. NATIONAL CONTACTS, NATIONWIDE SERVICE, & JURISDICTIONAL WAIVERS – CALLING THE WANDERING AMERICAN HOME?

The United States came home from Montreal, asserting success.<sup>266</sup> Its citizens could hope to find redress in the vast bulk of international crash cases in U.S. courts by dint of its central position in the global air market. The few cases raising personal jurisdiction as a barrier to Montreal claims could indicate that the treaty has largely been a success in providing a U.S. forum for American travelers. But the lack of cases may just as easily be a matter of circumstance. International aviation has grown safer for decades, while security measures and social changes have dramatically reduced organized criminal attacks on aircraft.<sup>267</sup> How carriers and insurers have resolved Americans' pre-litigation claims (and the jurisdictional and practical considerations they have made in doing so) could also be significant given the limited number of death claims that arise each year. But a prominent case will inevitably arise where deficient personal jurisdiction, not subject matter jurisdiction, will deprive an American plaintiff of a U.S. forum.

That result, however, makes a substantial presumption—that the Fifth Amendment's Due Process Clause requires the same causal limits as the Fourteenth Amendment. Federal courts determine their personal jurisdiction in line with the jurisdiction of state courts because federal statute requires it in the first instance.<sup>268</sup> Federal courts have an alternate option—they may exercise personal jurisdiction over a defendant where “the defendant is not subject to jurisdiction in any state's courts of general jurisdiction,” and “[e]xercising jurisdiction is consistent with the United States Constitution and laws.”<sup>269</sup> In *Bristol-Myers*, the Supreme Court noted that “since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”<sup>270</sup> At least one federal court has asserted

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<sup>266</sup> See John R. Byerly, *U.S. Aviation Policy: The Montreal Convention and the Hague Protocol*, U.S. DEP'T OF STATE (June 17, 2003), <https://2001-2009.state.gov/e/eeb/rls/rm/2003/21869.htm> [<https://perma.cc/5AJ3-LKL9>].

<sup>267</sup> See, e.g., David Koenig, *How 9/11 Changed Air Travel: More Security, Less Privacy*, AP (Sept. 6, 2021, 6:17 AM), <https://apnews.com/article/how-sept-11-changed-flying-1ce4dc4282fb47a34c0b61ae09a024f4> [<https://perma.cc/9D9L-FCCJ>].

<sup>268</sup> See Fed. R. Civ. P. 4(k) (1) (A).

<sup>269</sup> Fed. R. Civ. P. 4(k) (2) (A)-(B).

<sup>270</sup> *Bristol-Myers Squibb Co. v. Super. Ct.*, 582 U.S. 255, 268–69 (2017).

that Fifth Amendment due process requires meeting *Burger King's* “arising out of” requirement in an air injury case, albeit with limited analysis and no evidence that the case would meet treaty requirements.<sup>271</sup> If given a relatively blank slate, could the Supreme Court conclude it fair to exercise jurisdiction over foreign carriers who choose to serve the United States in this limited class of international cases, particularly where a foreign court would take jurisdiction over a U.S. carrier in equivalent circumstances?

That exact question is the subject of the unpublished *Lensky v. Yollari* opinion in the Second Circuit.<sup>272</sup> There, New Yorkers purchased tickets from Turkish carrier THY and alleged injuries by Turkish police acting at the direction of THY employees.<sup>273</sup> The Southern District of New York dismissed the suit for lack of personal jurisdiction, finding THY lacked “minimum contacts” with New York to maintain the suit.<sup>274</sup> But the Second Circuit remanded for the trial court to determine whether the injuries “arise out of or relate to” THY’s contacts with the United States as a whole.<sup>275</sup> This case may be the leading edge of a new era in foreign carrier injury litigation, although the factual burden on plaintiffs is not a mere formality, and other claimants have failed to meet it.<sup>276</sup>

Accessing the alternative long-arm statute and the Fifth Amendment analysis can be procedurally burdensome to plaintiffs, who bear the burden of proving that no state can exercise personal jurisdiction over a defendant.<sup>277</sup> Congress could ease that problem

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<sup>271</sup> See *Cordice v. LIAT Airlines*, No. 14-cv-2924 RRM LB, 2015 WL 5579868, at \*2–6 (E.D.N.Y. Sept. 22, 2015).

<sup>272</sup> See No. 21-2567-cv, 2023 WL 6173334 (2d Cir. Sept. 23, 2023).

<sup>273</sup> See *id.* at \*1.

<sup>274</sup> See *id.*

<sup>275</sup> See *id.* at \*3–4.

<sup>276</sup> See, e.g., *Hardy v. Scandinavian Airlines Sys.*, No. n21-1591, 2023 WL 5173793, at \*15 (E.D. La. Aug. 11, 2023).

<sup>277</sup> See *Kim v. Korean Air Lines*, 513 F. Supp. 3d 462, 468, 471–77 (D.N.J. 2021) (analyzing prima facie specific jurisdiction of New York over Korean Air Lines and Delta Air Lines and transferring case to the Eastern District of New York for lack of jurisdiction in New Jersey); *Selke v. Germanwings GmbH*, 261 F. Supp. 3d 645, 663–64 (E.D. Va. 2017) (rejecting Rule 4(k)(2) jurisdiction where the subject airline served U.S. destinations in other states and personal jurisdiction could “conceivably exist” there); *Cordice v. LIAT Airlines*, No. 14-cv-2924 (RRM) (LB), 2015 WL 5579868, at \*5 n.5 (E.D.N.Y. Sept. 22, 2015) (discussing how courts in the Second Circuit addressed the burdens of proof to establish lack of jurisdiction in any U.S. jurisdiction). One federal court has held that Rule 4(k)(2) cannot be used in Montreal Convention cases because such claims “arise under [a treaty], rather than federal law.” *Fisher v. Qantas Airways*, 521 F. Supp. 3d 847, 861 (D. Ariz. 2021).

and encourage the development of the Fifth Amendment of the Montreal Convention by authorizing “nationwide” service of process in fifth jurisdiction cases.<sup>278</sup> This would shift the analytical question away from a carrier’s contacts with a particular forum state and instead consider the carrier’s contacts with the United States as a whole.<sup>279</sup> For a plaintiff like Burton, this would mean she could sue in her home state so long as she could prove Air France had sufficient specific jurisdictional contacts with the United States as a whole.

Alternatively, because personal jurisdiction can be established by consent, it is waivable by a defendant.<sup>280</sup> The United States could require airlines serving the United States to waive personal jurisdiction defenses to the extent they conflict with jurisdiction under Article 33. A state-level version of this approach allowed for jurisdiction in *Diab v. British Airways, PLC*, where the Eastern District of Pennsylvania held that under state law, registering to do business in Pennsylvania waived jurisdictional objections.<sup>281</sup> And there is precedent for an aggressive move by the United States—in 1966, all international airlines performing air services to, from, or through the United States agreed to strict liability in crash cases and higher damages caps through filings with the Civil Aeronautics Board.<sup>282</sup> Of course, to achieve this result, the United States denounced the Warsaw Convention and was a day away from withdrawing from it.<sup>283</sup> That level of brinkmanship is probably unwarranted, but American policymakers might be able

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<sup>278</sup> See *Laurel Gardens, LLC v. Mckenna*, 948 F.3d 105, 122 (3d Cir. 2020).

<sup>279</sup> See *id.* (“Where Congress has statutorily authorized nationwide service of process, such service establishes personal jurisdiction, provided that the federal court’s exercise of jurisdiction comports with Fifth Amendment due process.”) (quoting *Cory v. Aztec Steel Bldg.*, 468 F.3d 1226, 1229 (10th Cir. 2006)); see *J. McIntyre Mach. v. Nicastro*, 564 U.S. 873, 884 (2011) (“Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”).

<sup>280</sup> See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”); Fed. R. Civ. P. 12(h)(1)(ii) (providing for waiver of personal jurisdiction defense if not raised in first pleadings).

<sup>281</sup> See No. 20-3744, 2020 U.S. Dist. LEXIS 218765, at \*14–16 (E.D. Pa. Nov. 23, 2020).

<sup>282</sup> See *Liability Limitations of Warsaw Convention and Hague Protocol*, 31 Fed. Reg. 7302 (May 13, 1966).

<sup>283</sup> Norberto E. Luongo, *The Fifth Jurisdiction: The American Dream*, 34 ANNALS AIR & SPACE L. 437, 447 (2009); Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and The Warsaw Convention*, 80 HARV. L. REV. 497, 590 (1967).

to address the issue through regulation or when renegotiating Air Services Agreements between States.

Montreal's drafters achieved the goal of limiting the fifth jurisdiction to States where a carrier can properly be said to be "present." But the American effort to achieve the fifth jurisdiction is incomplete, with domestic personal jurisdiction law now the barrier to accessing a U.S. forum. Wandering Americans seeking a forum today may yet find themselves far from home.