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Notes

Article 28 of the Warsaw Convention: A Suggested Analysis

Article 28 of the Warsaw Convention attempts to provide uniform rules for the situs of suits arising out of international air accidents. The author of this Note, after discussing the four contacts enumerated in article 28(1), concludes that the presence of any contact in the United States should authorize suit in any internal judicial subdivision, while an absence of contacts should remove the subject matter jurisdiction of American courts.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, the Warsaw Convention, is a multilateral treaty applicable to most international air transportation providing uniform rules for the determination of carrier liability in cases arising out of international aviation. Although it has been the law of the land for over thirty years, neither the


2. See Goedhuis, National Airlegislations and the Warsaw Convention 4-6 (1937); Mennell & Simeone, United States Policy and the Warsaw Convention, 2 Washburn L.J. 219, 220-21 (1962).


4. Article 1(2) makes the convention applicable to “any transportation in which according to the contract made by the parties, the place of departure and the place of destination . . . are situated . . . within the territories of two High Contracting Parties,” or the place of departure and the place of destination is “within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to . . . another power even though that power is not a party to this convention.” The convention, therefore, does not apply to all air transportation, nor even to all international transportation. For a good discussion of conditions necessary for application of the convention, see Mennell & Simeone, supra note 2, at 224-28.

5. Adherence advised by U.S. Senate on June 15, 1934; adherence declared on June 27, 1934; proclaimed Oct. 29, 1934, 49 Stat. 3000 (1934); T.S. No. 876. The Warsaw Convention is recognized as self executing. See Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957). Because article 22(1) of the convention limits carrier’s liability to $8,300, the State
courts nor the commentators have been able to agree on interpretations of some of its basic provisions. A major unsettled area involves the construction of article 28 of the Convention which provides:

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

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

This Note will determine the circumstances under which an American court can adjudicate actions governed by the Warsaw Convention, focusing first on the location of the four contacts enumerated in article 28(1). Next, the question of whether these contacts refer to nations or to political subdivisions will be discussed. Finally, this Note will attempt to determine whether article 28 is a jurisdictional or a venue provision.

I. THE CONTACTS SPECIFIED IN ARTICLE 28(1).

Article 28(1) lists four contacts, at least one of which must be found in the jurisdiction where the action is to be heard.

A. DOMICILE

The carrier’s domicile is the place of its incorporation.6

B. PRINCIPAL PLACE OF BUSINESS

This is the place where a carrier’s executive and main administrative functions are located and where most of its business is transacted.7

Department has announced plans for serving notice of the United States’ denunciation of the convention as provided by article 39. The State Department wants the liability limitation raised to $100,000 per passenger. The subsequent resolution of the International Air Transport Association to raise the liability to $50,000 has not changed the State Department’s position. 2 Av. L. Rep., Nov. 8, 1965, No. 376, p. 3 (report letter).


7. See McKenry, supra note 6, at 209. An isolated decision has construed this contact as meaning merely a principal place of business. Winsor v. United Air Lines, Inc., 183 F. Supp. 244 (E.D.N.Y. 1957). However, this decision has been criticized and never followed. Nudo v. Sabena Belgian World Airlines, 207 F. Supp. 191 (E.D. Pa. 1962); McKenry, supra note 6, at 210.
C. Place of Business Through Which the Contract Has Been Made

The third contact may be easily determined if the ticket is sold by an office of the defendant carrier. The determination becomes difficult, however, when the ticket or air waybill is sold either by another airline pursuant to an interagency agreement, or by a travel agent authorized to issue tickets for the carrier. A literal reading of article 28(1) appears to preclude a court from exercising jurisdiction when a litigant claims only the third contact is present and the ticket has not been sold by an office of the defendant carrier. A literal reading of article 28(1) appears to preclude a court from exercising jurisdiction when a litigant claims only the third contact is present and the ticket has not been sold by an office of the defendant carrier. A literal reading of article 28(1) appears to preclude a court from exercising jurisdiction when a litigant claims only the third contact is present and the ticket has not been sold by an office of the defendant carrier. A literal reading of article 28(1) appears to preclude a court from exercising jurisdiction when a litigant claims only the third contact is present and the ticket has not been sold by an office of the defendant carrier. 8 Rotterdamache Bank N.V. v. British Overseas Airways Corp., 9 provides an extreme example of literal interpretation. There the plaintiff attempted to recover from Aden Airways for a shipment of gold lost in Africa. The contract of carriage with Aden was made by British Overseas Airways Corporation (BOAC) in London. BOAC regularly handled the English business of Aden, its foreign, separately incorporated subsidiary. The court dismissed the claim against Aden holding that the purchase of a ticket in London from someone other than the defendant carrier could not sustain the jurisdiction of an English court. There is no evidence, however, that the court considered the possibility of inferring an agency relationship between Aden and BOAC.

A more liberal construction of the third contact enumerated in article 28(1) has been obtained through a limited application of agency principles. The court in Berner v. United Airlines, Inc. 10 refused to dismiss an action against British Commonwealth Airways even though the ticket had been purchased in New York from another airline, BOAC. The appointment of BOAC as British Commonwealth's general sales agent in the United States and the sale of tickets there by BOAC was thought to provide a proper basis of jurisdiction. It would be a mistake to conclude, however, that the result in Berner signals a decided shift to an expanded use of agency concepts to satisfy the requirements of the third contact. Since the destination of the trip was New York, the Berner court clearly had jurisdiction by virtue of the place of business through which the contract has been made.” (Emphasis added.)

8. The article specifies “where he [the defendant carrier] has a place of business through which the contract has been made.” (Emphasis added.)
destination contact; the agency rationale can be viewed as an alternate holding at best. It is also significant to note that the court in Berner stressed that the explicit agency relationship not only imposed mutual affirmative duties in excess of those incident to the usual sales agency agreement, but also covered an extensive and persistent course of business. Arguably, casual sales either by another airline or an authorized ticket agent are beyond the Berner rationale.

The permissible limit to the use of agency theory under the third contact has been further confused by the conflict in results reached by a state and federal court passing on identical facts. Plaintiff in California purchased a ticket for a flight to the Middle East on United Arab Airlines. Although United Arab Airlines maintained a New York ticket office, the ticket was purchased through Scandinavian Airlines System (SAS).

The only possible jurisdictional claim under article 28(1) was the purchase of the ticket in the United States from SAS. The complaint in an action in the New York state court was dismissed. Berner was distinguished because in that case a "continuing agency" between the airlines was found sufficient to characterize the BOAC office in New York as also an office of the British Commonwealth. In the case before it, on the other hand, the court found that the ticket sale arrangements between the SAS office in California and United Arab fell short of providing a persisting agency. Plaintiff then commenced an action in a federal district court of New York. This court agreed with the

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11. 2 Misc. 2d at 268, 149 N.Y.S.2d at 348.
13. The court characterized the SAS-United Arab ticket arrangement as "ad hoc." The BOAC-British Commonwealth arrangement was described as follows:

[T]here was some regularity in the sale of tickets... The agent was required to observe and comply with all reasonable directions and instructions. The Australian airline [British Commonwealth] on its part undertook affirmative obligations to its general sales agent with respect to equipment, personnel and standards of operation. There was even provision made for procedures to be followed in the case of accidents. Thus the finding of the maintenance of a place of business was based on the fact of a continuing agency.

Id. at 464, 247 N.Y.S.2d at 820.
14. Eck v. United Arab Airlines, Inc., 9 Av. Cas. 17,322 (S.D.N.Y. 1964), reconsideration denied, 9 Av. Cas. 17,469 (S.D.N.Y. 1965). The issues of res judicata and full faith and credit were not considered because dismissal was based on other grounds.
prior New York decision and granted defendant’s motion to dismiss. After the federal court’s decision, however, the New York Court of Appeals reversed the earlier determination in *Eck v. United Arab Airlines, Inc.* It held that the ticket sale need not be made in an office of the defendant airline to satisfy the third contact if the defendant maintains an office in the United States. The decision does not appear to be based on the agency principle, *i.e.*, holding the SAS office (the actual seller) to be defendant’s office. Rather it is based upon the fact that United Arab maintained a place of business in New York. While the court admitted that an office in this country alone would not satisfy the contact if the sale had not been made in the United States, it substituted the requirement of a domestic office for the “persisting agency” requirement of *Berner*.

Considering the purpose and overall scheme of article 28(1), the holding of the New York court in *Eck* represents the better view. When the Convention was adopted, all airline bookings were handled through the carrier’s own offices. For all practical purposes the place “through which the contract has been made” was identical to “where he has a place of business through which the contract has been made.” Now, however, methods of booking passage commonly include the purchase of tickets through travel agents and other airlines. It is clear that if in *Eck* all ticket sales had been made through the New York office of United Arab, jurisdiction would be unquestioned. Carriers should not be allowed to deprive purchasers of access to domestic courts by changing their ticket routing methods.

Assuming, arguendo, that the court properly interrupted the

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16. At some point the travel agency or the airline which actually sells the ticket must inform the carrier of the sale and transmit the money received. If this is sent to a regional office, as in this case to United Arab’s New York office, a strong argument could be made that defendant’s office is “his place of business through which the contract was made.” As far as the cases indicate, this analysis has never been urged.

17. The anomalous results which follow from the literal reading of article 28(1) rendered in *Rotterdamsche Bank* and *Eck* are easy to illustrate: two New Yorkers each purchase a one way ticket on the same flight from New York to Paris via Air France. One buys his ticket directly from an Air France office in New York, the other procures his ticket from a New York travel agent. If the two are injured during the flight, the first could bring a suit against Air France in the United States. The second would be forced to sue in France because under a literal construction none of the contacts would be considered present in the United States.
third contact in *Eck*, there appears to be no substantial obstacle to substituting the "material and persistent" agency rationale of *Berner* for the domestic office requirement of *Eck*. Hence, after *Eck*, *Berner* could be read as sustaining jurisdiction under article 28(1) for even casual sales made in the United States by another if the defendant has a "material and persistent" agency here, whether or not the ticket sale was actually made through the "general" agent.

In light of modern ticket selling technique, a definition of the third contact based upon a literal reading of the article is no longer desirable. The "place of contracting" requirement should be satisfied whenever an authorized commercial sale is made on behalf of the defendant carrier in the United States. This result could be obtained without doing violence to the wording of article 28(1) by reading an expanded theory of agency into the third contact. Admittedly, the fairness and desirability of requiring a carrier to defend a suit anywhere in the world because a ticket has been sold on his behalf by a travel agent or another carrier can be questioned. However, all of the American decisions seem to recognize that it is possible to satisfy the place of contracting contact without having the sale actually made from defendant's place of business. Furthermore, the carrier has voluntarily authorized the ticket sale. In view of an airline's financial position, including obvious transportation advantages, a "relative hardship" test for conducting a suit in a foreign jurisdiction favors the passenger, especially since the place of ticket purchase is usually the passenger's home area. The argument that a carrier anticipates it could be amenable to suit only if it opens an office lacks persuasive force. The same could be said of a carrier authorizing another to solicit business and sell its tickets, as in *Berner*.

D. PLACE OF DESTINATION

The location of the fourth contact is controlled by the destination as shown on the contract of carriage. On a round trip flight the place of destination is considered to be the ultimate destination of the trip, the place of origin. The destination of transportation involving several flights is the last point in the contract of

18. Warsaw Convention art. 1(2).
air carriage.\textsuperscript{20} If the transportation is to be performed by several successive air carriers, the last point in the air carriage would be considered the destination as long as the parties regarded the movement as a single operation.\textsuperscript{21} An unscheduled landing prompted by operational difficulties or the place of a crash is not the place of destination for purposes of article 28(1).\textsuperscript{22}

\section*{II. THE DETERMINATION OF THE CONTACTS AS EITHER LOCAL OR NATIONAL IN SCOPE}

There has been disagreement over whether the contacts enumerated in article 28(1) refer to nations or only to the internal judicial subdivisions of each nation. If the provisions refer only to the nation, there is no need to go beyond the location of a contact in the United States. If article 28(1) is deemed to set local requirements, however, the contact would have to be found inside the forum's territory before jurisdiction could be exercised.

Several federal district courts have adopted the local contact approach. In \textit{Dunning v. Pan American World Airways, Inc.},\textsuperscript{23} for example, the case was transferred from the District of Columbia to New York because Pan American's domicile and principal place of business were in New York.\textsuperscript{24} This transfer was made even though Pan American had extensive facilities in the District of Columbia.\textsuperscript{25} On the other hand, one court which adopted the

\begin{thebibliography}{9}
\bibitem{22} \textit{Goedhuis, op. cit. supra} note 2, at 288.
\bibitem{24} The only case cited by either side was Rotterdamsche Bank, N.V. \textit{v.} British Overseas Airways Corp., [1953] 1 All E.R. 675 (Q.B.), a British case which dismissed an action because it held that \textit{none} of the four contacts was in Great Britain.
\bibitem{25} See McKenry, \textit{supra} note 6, at 222. In Scarf \textit{v.} Trans World Airlines, Inc., 4 Av. Cas. 17,795 (S.D.N.Y. 1955), \textit{appeal dismissed}, 233 F.2d 176 (2d Cir. 1956), plaintiff's complaint was dismissed on the basis of article 28(1) although it was obvious that the defendant had its domicile and principal
local contact theory retained jurisdiction by reading, "the principal place of business" contact to mean a principal place of business within the territory of the forum.\textsuperscript{26} This tortured construction would have been unnecessary if the court had simply given article 28(1) a national construction.\textsuperscript{27}

A number of recent decisions have held that the provisions of article 28(1) refer to the nation as a whole rather than to internal judicial subdivisions.\textsuperscript{28} Since the decisions involve similar facts, one illustration will suffice.

In \textit{Mertens v. Flying Tiger Line, Inc.},\textsuperscript{29} the decedent was on a chartered flight from California to South Viet Nam. Flying Tiger is a Delaware corporation with its principal place of business in Burbank, California. It is clear the contract of carriage was not made in New York. Thus, one contact, destination, was in Viet Nam, three contacts were in the United States, none of which were within New York. Nonetheless, suit was permitted in the federal court in New York. The court held:

\begin{quote}
The places specified refer to the High Contracting Parties, not to areas within a particular High Contracting Party. . . . Plaintiff's choice of forum within that country is governed by the internal law, with all its intricacies and complexities, not by the Warsaw Convention.\textsuperscript{30}
\end{quote}

A national construction of article 28(1) is supported by both the legislative history of the Convention and by the desire to eliminate a possible conflict between the Convention and procedural law of the United States. In discussing article 28(1), the delegates focussed on which countries would be acceptable forums. There

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\item place of business in the United States. The plaintiff conceded that none of the contacts were in New York, the forum, but did not argue for a "national" construction of article 28(1).
\item Winsor v. United Air Lines, Inc., 153 F. Supp. 244 (E.D.N.Y. 1957). The defendant's domicile and principal place of business were in the United States but not within the territory of the forum.
\item 29. 841 F.2d 851 (2d Cir.), \textit{cert. denied}, 382 U.S. 816 (1965).
\item 30. Id. at 855. For statements supporting this position, see McKenry, \textit{supra} note 6, at 226; Robbins, \textit{supra} note 23, at 886.
\end{itemize}
is no indication of concern about which jurisdiction or court within the various countries could try the action.\textsuperscript{31} As one federal judge explained:

The Warsaw Convention was drafted in contemplation of adherence by many nations with widely divergent systems of jurisprudence and court structure. While the drafters . . . intended to limit the places where damage suits could be brought, it seems unlikely that they were concerned whether a suit properly brought in the United States was tried in Philadelphia rather than New York.\textsuperscript{32}

Nor is there any indication that the United States Senate understood the Convention would have any impact upon the rules governing the choice of forum within the United States. Since the above interpretation of article 28(1) does not offend the other signatories of the Convention, there appears to be no reason to interpret the article in a manner which would displace internal law governing the place where suit may be brought.\textsuperscript{33} This conclusion is reinforced by the provision of article 28(2): "questions of procedure shall be governed by the law of the court to which the case is submitted." The "national" interpretation of article 28(1) "brings it into harmony with the federal judicial system while giving it the full meaning and effect which must have been intended by the high contracting parties to the convention."\textsuperscript{34}

III. THE DETERMINATION OF THE CONTACTS AS RELATING EITHER TO JURISDICTION OR VENUE

Subject matter jurisdiction may be equated with the competency of a court to adjudicate a case. Venue refers only to


\textsuperscript{33} A probable explanation for the decisions construing the article as "local" can be advanced. Article 28(1) refers to "the Court of the domicile . . . or before the Court at the place of destination." (Emphasis added.) Taken literally and isolated from legislative history, the wording appears to refer to jurisdictional subdivisions not to entire countries. In addition, poor advocacy may have contributed to the situation. None of the decisions indicated that the legislative history had been raised by the plaintiff. In Scarf v. Trans World Airlines, Inc., 4 Av. Cas. 17,795 (S.D.N.Y. 1955), appeal dismissed, 283 F.2d 176 (2d Cir. 1966), the plaintiff apparently never even urged a national construction of article 28(1) but was content to contend that the Convention was inapplicable to the case.

the place of trial designed for the convenience of the litigants. Objections to venue are privileges personal to the defendant and may be waived. However, a judgment rendered by a court without jurisdiction is void.

An examination of the consequences of either characterization reveals that they are very similar in most contexts. The ability of an American court to hear a case governed by the Convention is not expanded by either construction of article 28(1). However, either construction could cause an American court to decline to hear a suit it would otherwise entertain. If the article is a jurisdictional provision, American courts are without power to adjudicate suits involving flights covered by the Convention if none of the four contacts are in the United States. If article 28(1) be construed as a venue provision, the same result would obtain. However the difference between a venue and a jurisdictional characterization is crucial in a case in which none of the contacts are in the United States but the defendant, believing the forum has no jurisdiction, neglects to challenge venue. The court could first hold article 28(1) to be a venue provision and then hold that any objection to venue had been waived. Limiting the examination to this sole crucial area, it is submitted that a jurisdictional con-

35. 28 U.S.C. § 1391 (1964) (general venue provisions for the federal courts), provide:
   (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
   (d) An alien may be sued in any district.
Since most airlines making international flights are corporations, it would be difficult to imagine a situation where one of the contacts of article 28(1) would add a forum not already covered by subdivision (c) or (d) especially when one recalls that the contacts refer to nations and not to political subdivisions.


37. Of course, an opinion dismissing the action because of no United States contacts would do so on the basis of improper venue rather than lack of jurisdiction. As a practical matter the result will be of no help to the plaintiff since the "proper venue" under article 28(1) can only be in the countries where the contacts occurred. See Eck v. United Arab Airlines, Inc., 9 Av. Cas. 17,322 (S.D.N.Y. 1964), reconsideration denied, 9 Av. Cas. 17,469 (S.D.N.Y. 1965).

struction is preferable and reflects most accurately the literal mandate of the article.

Although the decisions determining the issue have split, careful analysis reveals that the cases viewing the article as a venue provision are only weak authority for that position. The first noteworthy case viewing article 28(1) as a venue provision, *Dunning v. Pan American World Airways, Inc.*, involved an international flight with two contacts in the United States—both the defendant's domicile and principal place of business were in New York. Pan American was granted a change in venue from the District of Columbia to New York even though it was amenable to suit and had been properly served in the District of Columbia. On similar facts, another federal court granted a motion to dismiss plaintiff's complaint because of lack of proper venue. As in *Dunning*, two contacts were present in the United States, but neither was in the court's geographical jurisdiction. In both cases the court simply assumed a venue characterization of article 28(1). There is no indication that either party urged jurisdictional construction.

In *Mason v. British Overseas Airways Corp.*, two United States contacts were present but none in the court's geographical jurisdiction. The court, in effect, used a venue construction of article 28(1) to retain the case since only jurisdiction and not venue had been challenged. The court observed:

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

In *Mason*, however, only the form of defendant's motion made the court's venue characterization significant. If the defendant had objected on both venue and jurisdictional grounds, the court, following the local contacts view, would have been compelled to dismiss the suit. Even assuming that a jurisdictional construction would conflict with federal statutes covering jurisdiction of federal

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40. See McKenry, *supra* note 6, at 222.
42. 5 Av. Cas. 17,121 (S.D.N.Y. 1956).
43. *Id.* at 17,121-22.
courts, the court’s venue construction clearly conflicts with the statutory venue provision. 44

Three other decisions are generally cited for the proposition that article 28(1) is a venue provision. In *Spencer v. Northwest Airlines, Inc.*, 45 there were two United States contacts; the defendant’s domicile and principal place of business in Minnesota. Except for alleged Warsaw Convention complications, it was clear that the court had subject matter jurisdiction, personal jurisdiction over the defendant, and proper venue. The court’s denial of the defendant’s motion to dismiss for lack of subject matter jurisdiction under article 28(1) has been interpreted as a determination that it is not a jurisdictional provision. This decision is also entangled with the “national-local” issue. It is submitted that a close examination of the opinion reveals that the court’s position is not really inconsistent with the view of the article as a jurisdictional provision. Citing *Mason*, the court stated that: “There it was squarely held that Article 28 of the Warsaw Convention did not affect the jurisdiction of the United States District Courts over a diversity action by an American citizen against an American air carrier.” 46 This is a curious statement since in *Mason* the defendants were foreign air carriers. 47 However, the statement is correct for if the defendant is an American air carrier, at least two contacts — domicile and principal place of business — will be in the United States. The *Spencer* court went on to make a statement generally cited for the proposition that article 28(1) relates to venue:

In essence, Article 28 imposes a bar to the maintenance of an action for damages against an air carrier covered by the Convention in any court except in one of four places specifically authorized by the Article. But basically this does not relate to the question of subject matter jurisdiction of the federal courts of the United States regulated by Act of Congress. I cannot conceive that it was the design or effect of Article 28, drafted in contemplation of adherence by many nations with widely divergent systems of jurisprudence and court structure, to deal with questions of technical subject matter jurisdiction within the framework of the federal juridical system of the United States or to impinge upon the jurisdiction conferred by Congress upon the federal courts.

In any event in so far as Article 28 would operate as a plea in bar

44. See note 35 *infra*.
46. *Id.* at 506. (Emphasis added.)
47. *Mason v. British Overseas Airways Corp.*, 5 Av. Cas. 17,121 (S.D.N.Y. 1956). There were two defendants in *Mason*, BOAC and British West Indian Airways, Ltd., “a corporation organized pursuant to the laws . . . of Trinidad and Tobago, B. W. I.”
to the maintenance of an action for damages against an air carrier, it seems to me to be concerned only with the question of the circumstances under which resort may be had to the national court system of one of the high contracting parties as a forum available to a claimant in which to pursue his remedies.\footnote{48. 201 F. Supp. at 507. It is unfortunate that the following paragraph was included in the \textit{Spencer} opinion: \textit{The question remains as to whether Article 28 as a practical matter should also be viewed as a special venue provision governing actions coming under the Warsaw Convention and requiring that venue in such actions be laid in the judicial district where one of the four requirements of the Article is complied with. It is unnecessary here to decide that question . . . defendant by serving its answer has waived its right to object to venue . . . .} \textit{Ibid.} As one writer commented, "Much of the force of the opinion, however, is beclouded by [the above] paragraph." Robbins, \textit{supra} note 23, at 358. All that can be added to this statement is that there is no authority for this proposition and it has never been followed.} 

The first sentence of the court's statement indicates rather clearly that there can be no jurisdiction if none of the four contacts are in the United States. It seems reasonable to interpret the remainder of the first paragraph as applying only to the internal operation of federal subject matter jurisdiction. The phrase, \textit{"within the framework of the federal judicial system"} supports this reading. The next paragraph further discusses the possibility that article 28(1) can withdraw jurisdiction from American courts. It is suggested that the statement in \textit{Spencer} should be strictly viewed in the context in which the decision was rendered, \textit{i.e.}, two contacts present in the United States. Thus, the meaning of the court's statement is that if a contact is present in the United States, the Warsaw Convention does not affect the subject matter jurisdiction of the federal courts. It should be noted that the \textit{Spencer} court was the first to consider the "local-national" issue and hold that the contacts of article 28(1) were national in character and did not refer to political subdivisions of a country. Thus, since the contacts were "national," a jurisdictional or a venue construction was not outcome determinative because the court could have retained the case under either construction.

In \textit{Brown v. Compagnie Nationale Air France},\footnote{49. 8 Av. Cas. 17,272 (S.D.N.Y. 1962).} a wrongful death action arising from an international flight, the only arguable United States contact was the ticket sale by TWA for the defendant, Air France, in Washington, D.C. The court, in denying a motion to dismiss for lack of subject matter jurisdiction...
was persuaded by Spencer that, "the authors of Article 28 could not have intended it as a jurisdictional limitation as that term is understood in our courts."\(^{50}\) If the court considered the ticket sale by TWA sufficient for locating the place of contracting contact in the United States, then Brown is consistent with Spencer, in finding subject matter jurisdiction is not affected if there is a United States contact. If not, Brown represents the only decision in which a court has refused to dismiss an action subject to the Warsaw Convention where there were no United States contacts.

Most recently, in the federal district court's decision in Eck v. United Arab Airlines, Inc.,\(^{51}\) the court held that although none of the contacts of article 28(1) were present in the United States, defendant's motion to dismiss for lack of subject matter jurisdiction should be refused. Citing Spencer and Mason, the court said, "The provisions of 28(1) have been held, in this District, not to affect the jurisdiction of the United States District Courts over such an action as this. Article 28(1) is not jurisdictional and its only relation is to venue."\(^{52}\) The court, however, dismissed the action "for in fact no venue exists in this court pursuant to the provisions of Article 28(1) of the Warsaw Convention."\(^{53}\) Eck is the only case clearly holding article 28(1) to be a venue provision when none of the four contacts have been in the United States. The decision is questionable since the court relied upon the venue construction of Spencer and Mason in which United States contacts were present.

Opposed to the above decisions are five cases viewing article 28(1) as a jurisdictional provision.\(^{54}\) These cases may be illustrated by Nudo v. Sabena Belgian World Air Lines.\(^{55}\) None of the four contacts was in the United States; the immediate destination of the flight, the ultimate destination, the place of making the contract, and the defendant's domicile and principal place of business were all in Europe. Plaintiff vainly contended that there was a United States contact because Sabena maintained a principal place

\(^{50}\) Ibid.


\(^{52}\) Id. at 17,324.

\(^{53}\) Ibid.


of business in Philadelphia. The court held there were no contacts in the United States and, therefore, it had no jurisdiction.56

Only six of the decisions which have considered the "jurisdiction-venue" issue fall into the critical area in which the determination could be significant.57 Five of these hold that article 28(1) is a jurisdictional provision.58 It is significant that in the one decision which favored the venue construction,59 the determination was not outcome determinative since venue had not been waived.

It seems to be finally settled that article 28(1) is to be construed as applying nationally, i.e., to countries rather than to their political subdivisions. Under these conditions dismissing a suit for improper venue under the convention as was done by the federal court in Eck is unrealistic. In Eck it made no real difference which way the court decided the issue since the plaintiff could not bring her action anywhere in the United States under the court's reasoning. If a suit is dismissed for improper venue, it is implicit that somewhere in the United States there is a proper forum to adjudicate the plaintiff's claim. When it is clear, as in Eck, that the action could not be heard in any American court, it would appear more accurate and forthright to dismiss the action for lack of subject matter jurisdiction.

It has been suggested that if there is an allegation that the cause of action arises under a treaty of the United States,60 a

56. Id. at 192.


58. One court even dismissed an action for lack of jurisdiction even though the accident occurred in the United States. See Bowen v. Port of New York Authority, supra note 57.


jurisdictional interpretation of article 28(1) would expand the jurisdiction of the federal courts by lowering the 10,000 dollars minimum amount in controversy required by 28 U.S.C. section 1331(19) to the convention's limitation of 8,300 dollars for a passenger's death or injury.\(^6\) The issue probably will seldom arise since plaintiff will usually allege wilful misconduct, in which case the convention's limitation of liability does not apply.\(^6\) In addition, while the Warsaw Convention authorizes suits arising from certain flights to be heard in the United States, there is no indication the provision was thought to guarantee a federal forum. It should be noted that the question will become moot if the convention is amended to provide higher damages, as has been proposed.\(^6\)

It has also been argued that a jurisdictional construction could have the effect of expanding federal diversity jurisdiction to allow suits between two foreign litigants in a federal court.\(^4\) At the present time, the only case of this nature is *Seth v. British Overseas Airways Corp.*\(^5\) Jurisdiction in *Seth*, however, was sustained under 28 U.S.C. section 1331(a)—as it was a civil action arising under a treaty of the United States. Although article 28(1) could authorize the United States as one of the possible forums for two foreign litigants, there is no indication that a plaintiff who bases his jurisdictional claim solely on diversity is guaranteed access to a federal forum.\(^6\) In addition, a foreign

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\(^1\) See 38 Notre Dame Law. 103, 105 (1962).
\(^2\) See 39 Notre Dame Law. 103, 105 (1962).
\(^3\) 39 Notre Dame Law. 103, 105 (1962).
\(^4\) See 38 Notre Dame Law. 103, 105 (1962).
\(^5\) 329 F.2d 303 (1st Cir.), cert. denied, 379 U.S. 858 (1964).
\(^6\) Even if the convention does not create a cause of action, it could be
plaintiff rarely would choose to sue a foreign airline in the United States.

In the absence of a clear answer to the "jurisdiction-venue" question in either the legislative history or decisions it is appropriate to return to the starting point — article 28(1): "An action for damages must be brought . . . ." (Emphasis added.) It is submitted that in the face of this language it would be a violation of our treaty commitment to construe the article to mean: An action for damages may be brought in the United States if the defendant is held to have waived his venue objections. This could be the result of a venue characterization.

IV. CONCLUSION

Based on the "national" interpretation of article 28(1), it would appear more desirable to construe the article as relating to jurisdiction. Under such a construction, an American court faced with an action governed by the convention must first determine whether one of the contacts occurred in the United States. If not, it should recognize the article's jurisdictional limitation and dismiss the suit for lack of subject matter jurisdiction. If one or more contacts can be found in the United States, the court should proceed to adjudicate the action with all procedural matters decided in accordance with local law.

argued that if article 28 is jurisdictional it creates a new base of jurisdiction in addition to diversity jurisdiction. The reasoning would be any time there is a contact in the United States, federal courts have jurisdiction over the action notwithstanding lack of diversity or a cause of action arising from a federal statute or treaty. There is no authority for this argument. Given the complete absence of legislative history indicating Congress intended this result, it is highly unlikely that a court would adopt this approach to expand federal jurisdiction.

This discussion has centered around the federal court system because it is a system of limited jurisdiction — the subject matter must be set out in the Constitution and specifically granted by Congress. See Kline v. Burke Constr. Co., 260 U.S. 226, 238 (1922). The state courts are not so limited but derive their jurisdiction from the traditional power of the courts of a sovereign state.

67. What legislative history there is on this point is ambiguous. In discussing the article, the drafters of the convention frequently referred to "jurisdiction" while the term "venue" was not used at all. Warsaw Conference Documents, pp. 77-79, quoted in Calkins, supra note 31, at 229-30. There is no evidence that the United States Senate considered the question when it advised adherence to the convention. See Spencer v. Northwest Orient Airlines, Inc., 201 F. Supp. 504, 506 (1962). But cf. 49 Stat. 3020 (1934), where the marginal description of the subject matter of article 28(1) is "Venue of Action."