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“Doing Business” in Montreal: The Effects of the Addition of “Fifth Forum” Jurisdiction under the Montreal Convention

Gregory C. Walker*

Introduction

The 1999 Convention for the Unification of Certain Rules for International Carriage by Air¹ [hereinafter Montreal Convention] went into effect on November 4, 2003. It completely replaces the 1929 Convention of the Unification of Certain Rules Relating to International Transportation by Air² [hereinafter Warsaw Convention] and its subsequent amendments.³ The Montreal Convention’s ratification serves as a much-needed and long-awaited response to the tremendous changes in international air travel since 1929, and its adoption reflects substantial progress in bringing the liability of carriers in line with today’s aviation industry.⁴

A significant effect of the Montreal Convention lies in its extension of jurisdiction to plaintiffs who sustain injury during international travel by air, enabling them to file suit in their home state provided that the carrier operates service for international carriage by air either to or from

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1. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention], available at <http://www.jus.uio.no/lm/air.carriage.unification.conventionmontreal.1999/>.

2. 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].

3. See Montreal Convention, *supra* note 1, at art. 55.

4. See generally Gillian Flener, Comments, *The Effects of the Amendments to the Baggage Check Provisions of the Warsaw Convention—Clearing the Way For More Effective Check-in Procedures*, 28 TRANSP. L.J. 295 (2001).

the plaintiff's home state. Furthermore, the Convention supports jurisdiction regardless of whether the cause of action stems from the carrier's activities in that state. In this regard, the treaty's provision on jurisdiction bears a striking resemblance to what United States courts recognize as general "doing business" jurisdiction—the same form of general jurisdiction that has prompted substantial debate and significantly frustrated the efforts of the Hague Conference on Private International Law to draft a global treaty on international jurisdiction and foreign judgments.⁵ The adoption of this jurisdictional principle under the Montreal Convention and concurrent scrutiny of this doctrine at the Hague Conference on Private International Law suggests an inconsistency in the international community's position on "doing business" jurisdiction, and it is that discrepancy that provides the inspiration for this paper.

In recognition of the voluminous literature charting the genesis of general jurisdiction in the United States,⁶ this commentary commences with a brief, if not cursory, review of the development of "doing business" jurisdiction in the U.S. Supreme Court and the criticism it has prompted. Part II highlights two cases from outside the United States that display similar approaches to general jurisdiction and illustrate that the adoption of a "doing business" type of jurisdiction is not unique to the United States. Part III opens with a discussion of the 1929 Warsaw Convention, primarily discussing its purpose and the jurisdictional principles established under the treaty. Additionally, the third section considers the factors that prompted the drafting and subsequent adoption of the Montreal Convention in 1999 and concludes with an examination of its fora for jurisdiction under Article 33—principally its "fifth forum" rule of general jurisdiction.

Part IV builds on the previous three by comparing the boundaries of

5. *Report on the Work of the Informal Working Group on the Judgments Project, In Particular on the Preliminary Text Achieved at its Third Meeting—25-28 March 2003*, Hague Conference on Private International Law, Prel. Doc. No. 22 (June 2003) [hereinafter Preliminary Draft Convention]. A copy of the Preliminary Draft Convention is available on The Hague Conference website at <http://www.hcch.net/e/workprog/jdgm.html>.

6. See, e.g., Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (examining recent cases on general jurisdiction and proposing specific restrictions when foreign defendants are involved); Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (regarding necessity of general jurisdiction to fill the gaps created by limited constitutional use of specific jurisdiction); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141 (looking at origin and scope of general "doing business" jurisdiction). These articles provide an ample starting point from which to begin an investigation into the concept of general jurisdiction.

the United States’ “doing business” jurisdiction with those of the “fifth forum” jurisdiction under the Montreal Convention. Finally, Part V considers the adoption of the Montreal Convention as evidence of gradually growing acceptance of “doing business” jurisdiction in the international community as well as its implications for a global understanding of jurisdiction in light of the efforts of the Special Commission of the Hague Conference on Private International Law to draft a global treaty on jurisdiction.

I. The Development of “Doing Business” Jurisdiction in the Supreme Court

Until well into the nineteenth century, U.S. courts maintained that a corporation had “no legal existence outside of the boundaries of the sovereignty by which it [was] created.”⁷ Yet as corporations and commerce continued to expand beyond state borders, courts were forced to reconsider the territorial concepts of jurisdiction laid down in *Pennoyer v. Neff*.⁸ In doing so, they slowly abandoned theories based on “consent” and “implied consent” in favor of a “presence” theory premised on the notion that “[a] foreign corporation is amenable to process . . . if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.”⁹ This transition heralded today’s well-established tradition of determining “presence,” for jurisdictional purposes, by assessing a defendant’s contacts with, and activities in, a given forum.

In 1945, the Supreme Court seized its opportunity to develop such an analysis in the case of *International Shoe Co. v. Washington*.¹⁰ Borrowing the “minimum contacts” language from *Milliken v. Meyer*,¹¹ the Court focused on the significance of establishing a nexus between the defendant’s activities and the forum state and elaborated that such contacts must be “systematic and continuous” to satisfy jurisdiction.¹² However, the Court also noted the possibility that “single or isolated” contacts may suffice for jurisdiction provided the cause of action stemmed from the defendant’s contacts in the forum.¹³ Yet in stressing the importance of both the nature and number of contacts without

7. See, e.g., *Bank of Augusta v. Earle*, 38 U.S. 519, 588 (1839).

8. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

9. *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917). Also cited in JOHN C. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER, & JOHN E. SEXTON, *CIVIL PROCEDURE: CASES AND MATERIALS* 74 (West Group 2001) (1968).

10. *Int’l Shoe Co. v. Wash.*, 326 U.S. 310 (1945).

11. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

12. See *Int’l Shoe*, 326 U.S. at 317, 320.

13. *Id.* at 317, 318.

providing concrete guidelines, *International Shoe* left considerable room for lower courts, as well as later Supreme Courts, to interpret what constituted sufficient "business" by a defendant to justify jurisdiction.

If the *International Shoe* opinion succeeded in aligning the United States with the then prevailing principles of jurisdictional jurisprudence abroad,¹⁴ the Court made a rather abrupt retreat from those standards several years later in *Perkins v. Benguet Consolidated Mining Co.*¹⁵ In *Perkins*, the Court was asked to determine whether a Philippine corporation, whose operations were halted during the Japanese occupation of the Philippine islands during World War II and whose president managed the business from his home in Ohio during those years, could be forced to defend in Ohio state courts against a nonresident of Ohio where the cause of action arose from "activities entirely distinct" from its activities in Ohio.¹⁶ Noting that Benguet's president "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company,"¹⁷ the Court concluded that the defendant's conduct in the forum was sufficiently substantial to permit jurisdiction. In other words, the Court acknowledged in *Perkins* that doing business in the forum state, and that alone, can constitute enough of a presence to permit jurisdiction.

Although no other cases involving general jurisdiction would come before the Supreme Court until *Helicopteros Nacionales de Columbia, S.A. v. Hall*,¹⁸ decided in 1984, the Supreme Court did hear several specific jurisdiction cases during the 1980s that provide relevant and instructive language. Writing for the Court in *World-Wide Volkswagen Corp. v. Woodson*,¹⁹ Justice White weighed the "minimum contacts" test established in *International Shoe* against the reasonableness and fairness of the burden cast upon the defendant and found the requisite support for jurisdiction to be lacking.²⁰ He described the "foreseeability" element of due process analysis as one that is "not the mere likelihood that a product

14. Juenger, Friedrich K., *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 9 (1993).

15. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

16. *Id.* at 446-47.

17. *Id.* at 448. The case reveals that Benguet's president maintained an office in Ohio from which he conducted business on behalf of the company. Furthermore, defendant's files and employee records were located in the forum. He carried on correspondence, drew and distributed paychecks, and maintained two active bank accounts carrying substantial balances with company funds. These were the more significant connections the Court found to exist between the defendant and the forum state.

18. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

19. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

20. *Id.* at 292.

will find its way into the forum State."²¹ Rather, it is one in which "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."²² Holding foreseeability to be a distinguishing factor between products which find their way into the forum via commerce and those which make their way there via the consumer, Justice White carved out of *Gray's*²³ "course of commerce" language a metaphorical "stream of commerce" to support his conclusion that there was a lack of purposeful availment.²⁴

The Court was later split on its interpretations of this "stream of commerce" language in *Asahi Metal Industry Co. v. Superior Court*.²⁵ In *Asahi*, Justice O'Connor wrote for a plurality which agreed that simply placing a product into the "stream of commerce," as opposed to actually directing it towards the forum, was not enough to constitute availing oneself to a lawsuit.²⁶ And though one might contend that *Asahi's* peculiar facts qualify its relevance,²⁷ it is important to note how the Court fractured on whether there is a predictable current to the "stream of commerce" that justifies the reasonable "foreseeability" of a suit.

When the Court analyzed due process in *Helicopteros*, it finally distinguished general jurisdiction from specific jurisdiction,²⁸ noting that the latter required a direct connection between the cause of action and the defendant's activities.²⁹ Despite the defendant's various activities in the forum in *Helicopteros*—negotiations, the purchase of helicopters, training for defendant's pilots, and acceptance of payments in bank accounts—the aggregate of these contacts proved insufficient to establish general jurisdiction.³⁰ Justice Blackmun, by means of differentiating

21. *Id.* at 297.

22. *Id.*

23. *Gray v. Am. Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432 (Ill. 1961).

24. *World-Wide Volkswagen Corp.*, 444 U.S. at 298.

25. *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987).

26. *Id.* at 111-12.

27. Stephen B. Burbank, *Practice And Procedure: The World in Our Courts*, 89 MICH. L. REV. 1456, 1468 (1999). "The holding in *Asahi*, where the Court denied California's power to adjudicate an indemnity claim by a defendant against one of its component part manufacturers, will probably have limited significance because of its unusual facts, in particular the facts that the party invoking the court's jurisdiction was a Taiwanese corporation, that the claim involved was probably governed by foreign law, and that the putative party resisting jurisdiction was also a foreign corporation."

28. See Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966) for the origins of this distinction.

29. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. CT. REV. 77, 80-81; see also Von Mehren & Trautman, *supra* note 28, at 1136-1144.

30. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 418-19 (1984).

Helicopteros from *Perkins*, provided a litany of precedential contacts that were not present in the case:

Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there. Helicol has maintained no record in Texas and has no shareholders in the State.³¹

Though the Court ultimately failed to delineate a clear threshold for the level of activity required to support general jurisdiction, the Justices did not alter the "continuous and systematic" level of business activities that satisfied the Court in *Perkins*. In the end, the Court maintained that general jurisdiction exacts a higher level of activity than specific jurisdiction, where the presence of a direct connection between the defendant's contacts and the cause of action effectively lowers the bar of activity required to justify jurisdiction.³²

The lack of a clear and concrete threshold of activity for the assertion of "doing business" jurisdiction has caused some confusion in the lower courts³³ and resulted in inconsistent applications of what constitutes "substantial" or "continuous and systematic" activity.³⁴ Not surprisingly, this inconsistency has prompted significant criticism from legal scholars.³⁵ Though much of the lower courts' lack of uniformity in interpreting and assessing sufficiency may be attributed to the Supreme Court's failure to delineate clearly the boundaries of the general jurisdiction doctrine, some of the criticism focuses on the wisdom of the

31. *Id.* at 411.

32. Despite *Helicopteros*' shortcoming in not providing a clear threshold for activity, the case stands for two important principles—that the "doing business" jurisdiction in *Perkins* is alive and well and that general jurisdiction serves to limit rather than broaden courts' jurisdictional reach. See, e.g., Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 689 (1999).

33. See Twitchell, *The Myth of General Jurisdiction*, *supra* note 6, at 633-36.

34. See, e.g., *Cowan v. Ford Motor Co.*, 694 F.2d 104, 107 (5th Cir. 1982) (applying Mississippi law); *Catalana v. Carnival Cruise Lines, Inc.*, 618 F. Supp. 18, 22 (D. Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986).

35. See Linda Silberman, *Symposium: Export/Import: American Civil Justice in a Global Context: Eighth Annual Clifford Symposium on Tort Law and Social Policy, Article: Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319 (2002) (suggesting modifications to Article 18 that might resolve the impasse on "doing business" jurisdiction). See also Twitchell, *supra* note 6; Borchers, *supra* note 6; Juenger, *supra* note 6.

doctrine itself. In fact, the spectrum of scholarship extends from those who merely question the appropriateness of holding systematic and continuous activity of foreign defendants sufficient to constitute jurisdiction³⁶ to those who advocate the complete elimination of general “doing business” jurisdiction altogether.³⁷ Those who fall in the middle often assert general, albeit qualified, support for the basic premise of general jurisdiction but propose restrictions like limiting the exercise of such jurisdiction to the home state³⁸ or modifications such as a broader test for specific jurisdiction that would mitigate the need to employ general jurisdiction.³⁹

Commentary from the Special Commission of the Hague Conference on Private International Law provides a broader and more global perspective on the matter. In a 2000 Report of the Special Commission, better known as the Nygh-Pocar Report, the salient criticism emerging out of the international dialogue on general “doing business” jurisdiction was the “uncertainty” that courts would face in the interpretation and application of the doctrine, namely “determining the quality and quantity of activity which is needed in order to establish jurisdiction.”⁴⁰ The Commission’s comments reveal a collective apprehension to the assertion of jurisdiction based solely on a defendant’s regular activity in the forum and without regard to the existence of other, less attenuated links when the dispute is unrelated to a defendant’s course of conduct in the state. An interesting irony emerges in this argument when viewed in the context of the Montreal Convention. However, before embarking on an examination of the Montreal Convention and its provisions on jurisdiction, it is instructive to look at

36. See, e.g., Twitchell, *supra* note 33.

37. See, e.g., Harold G. Maier and Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction of Choice of Law*, 39 AM. J. COMP. L. 249, 271-280 (1991) (proposing that jurisdiction premised on general jurisdiction, and that alone, actually violates the Due Process Clause of the United States Constitution).

38. See Von Mehren & Trautman, *supra* note 28, at 1141-44.

39. See Twitchell, *supra* note 33 (arguing that such a test would make general jurisdiction dispensable while cautioning against its abolishment).

40. See Peter Nygh and Fausto Pocar, *Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (2000) [hereinafter Report of the Special Commission], available at www.hcch.net/e/workprog/jdgm.html. It is worth noting that the express criticism of the Nygh-Pocar Report aligns itself closely, if not exactly, with the criticism of American scholars regarding the lower courts’ treatment of “doing business” jurisdiction. The authors, writing on behalf of the Special Commission, justify the exclusion of the doctrine from the Convention’s Preliminary Draft Convention by highlighting the constituents’ aversion to the “risk of encouraging a dispute between the parties at the stage when the jurisdiction of the court seised is being determined.” *Id.* Such a concern, however, seems wholly unfounded because it is left to the court to decide whether jurisdiction exists.

two cases that illustrate variations on "doing business" jurisdiction outside of the United States.

II. "Doing Business" Approaches Beyond the United States

Notwithstanding the fact that a defendant corporation may be incorporated and maintain its principal place of business outside of the United States, it is clear from *Perkins* that courts of the United States can assert jurisdiction if the corporate entity has established a presence in the forum State by conducting business of a "systematic and continuous" nature. This jurisdictional concept is not, however, unique to United States jurisprudence.⁴¹

In the case of *Goto v. Malaysian Airline System*,⁴² the widow of a Japanese businessman filed suit in Japan against Malaysian Airlines after the plane on which her husband was traveling crashed in the vicinity of Johore Bahru, Malaysia.⁴³ In December 1977, Tomio Goto booked a ticket in Kuala Lumpur for round-trip domestic passage to Penang on Malaysian Airlines.⁴⁴ The return flight to Kuala Lumpur crashed, killing all of the passengers on board.⁴⁵ On the question of whether the defendant airline was subject to jurisdiction in Japan, the Supreme Court of Japan ruled:

... [I]f a defendant is a foreign corporation with a main office abroad, it is ordinarily beyond the adjudicatory jurisdiction of Japan, unless it is willing to subject itself to Japanese jurisdiction. Nevertheless, as an exception, a defendant can be subjected to the adjudicatory jurisdiction of Japan, whatever its nationality may be or wherever it may be located, if the case relates to Japan or if the defendant has some legal nexus with Japan.... The appellant [Malaysian Airlines] has appointed Gyokusho Cho as its representative in Japan and has established a place of business in Tokyo. On these premises, the appellant shall be reasonably subjected to the jurisdiction of Japan, even though it is a foreign corporation that has its head office abroad.⁴⁶

Despite the carrier's argument that the ticket purchased in Kuala Lumpur

41. See Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 404 (1995).

42. *Goto v. Malaysian Airline Sys.*, 35 Minsh_ (No. 7) 1224 (Sup. Ct., October 16, 1981); 26 JAP. ANN. INT'L L. 122 (1983) (reprinted) (Copy of case on file with author).

43. See ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* 48-49 (Clarendon Press 1996). The widow and heir of Mr. Goto brought suit against Malaysian Airlines for damages arising from non-performance of the contract of carriage.

44. See *Goto*, *supra* note 42.

45. *Id.*

46. *Id.*

for domestic travel in Malaysia had nothing to do with the Tokyo office or the airline's operations in Japan, the Court sustained jurisdiction based on the airline's maintenance of a branch office in Tokyo.⁴⁷ There is little doubt, as one scholar has suggested, that the facts of *Goto* would be sufficient for American “doing business” general jurisdiction.⁴⁸ Indeed, one must simply consider the business in which airline carriers engage—the regular operation of flights to and from the destinations they serve. Such conduct would very likely be viewed as commensurate with the continuous and systematic activity found to satisfy general jurisdiction in *Perkins*.

Additionally, if Mr. Goto and his family had lived in the United Kingdom at the time of the accident and Malaysian Airlines maintained a branch office and operated flights from London, his widow could have secured jurisdiction there. In England, no connection must exist between the cause of action and the foreign defendant's activities within the forum, so long as the defendant is considered to be “present” in the country.⁴⁹ In *South India Shipping Corp. Ltd. v. Export-Import Bank of Korea*,⁵⁰ the defendant bank, based in Korea, was deemed to be “present” and have an “established place of business” in England.⁵¹ Despite the defendant's contention that notice was improperly served and consequently invalid, the bank was forced to defend in English courts even though it merely conducted “external relations with other banks” and “carried out preliminary work in relation to granting or obtaining loans.”⁵² The court summarized Bank of Korea's contacts and activities in its opinion as follows:

The defendant bank is an import-export bank, not a high street bank. It has both premises and staff within the Jurisdiction. It conducts external relations with other banks and financial institutions. It

47. *Id.*

48. See LOWENFELD, *supra* note 43, at 49. If the passenger lived in New York and Malaysian Airlines maintained an office branch that conducted “continuous and systematic” business similar to that in *Perkins*, she would very likely secure jurisdiction in the New York state courts. This is the identical situation cited in the hypothetical earlier in the text.

49. See DICEY AND MORRIS, *THE CONFLICT OF LAWS* (13th ed., 2000), at 297-298.

50. *S. India Shipping Corp Ltd. v. Export-Import Bank of Korea* [1985] 1 W.L.R. 585 (C.A.) (Copy on file with author).

51. “The plaintiff's claim is, in round figures, for U.S. \$13 million together with interest alleged to be due and owing to the plaintiffs under two letters of guarantee whereby, in consideration of the plaintiffs entering into certain shipbuilding contracts, the defendants irrevocably guaranteed to the plaintiffs the repayment to them of certain advance payments made by them to a company incorporated in Korea and in connection with certain shipbuilding contracts entered into between that company and the plaintiffs, a corporation incorporated under the laws of India.” *Id.* at 587.

52. See DICEY AND MORRIS, *supra* note 49, at 298-9.

carries out preliminary work in relation to granting or obtaining loans. It seeks to give publicity to the foreign bank and encourage trade between Korea and the United Kingdom, and it consults with other banks or financial institutions on the usual operating matters. It has therefore established a place of business within Great Britain and it matters not that it does not conclude within the Jurisdiction any banking transactions or have banking dealings with the general public as opposed to other banks or financial institutions.⁵³

Much like U.S. "doing business" jurisdiction and the Japanese court's holding in *Goto*, the English court treated the foreign bank like a domestic corporation because of its regular activities in the forum. It was apparently unimportant that the activities of the branch office in London were "incidental" and did not comprise a "substantial part of the business" of the company.⁵⁴ Rather, the court concluded that the activities conducted by the bank were sufficient to determine that they had established a presence there.⁵⁵

The *Goto* and *South India Shipping Co.* cases demonstrate approaches to general jurisdiction similar to the U.S. doctrine of "doing business" and illustrate quite clearly that the United States is not alone in its adoption of a "doing business" type of jurisdiction. More importantly, they bolster the notion that it is not patently unreasonable to require a defendant who carries on substantial activity in the forum state to litigate there—even when the cause of action arises in another forum.

III. The Warsaw Convention and the Montreal Convention

The Warsaw Convention⁵⁶ emerged as the first international treaty establishing the principles of liability related to international travel by air. It was drafted at international conferences in Paris and Warsaw, in 1925 and 1929 respectively, and was opened for signature on October 12, 1929.⁵⁷ The United States joined the treaty in 1934.⁵⁸ At the time of

53. See *S. India Shipping*, [1985] 1 W.L.R. at 592.

54. *Id.* at 591.

55. *Id.* at 587. The specific issue of the case, on appeal, centered on whether service of process was properly effected under section 412 of the Companies Act of 1948 when served at an office, or establishment, of an overseas company where activities incidental to its main business are conducted. The defendants urged that the plaintiffs failed to show that their office in London constituted a "place of business" within the meaning of section 406 of the Companies Act of 1948. It was their contention that a place of business within section 406 was "a place where dealings with the public (as opposed to other banks, financial institutions and businesses) were conducted" as well as a "place at which business constituting part of the ordinary business of the company in questions was being conducted." *Id.*

56. See Warsaw Convention, *supra* note 2.

57. See Flener, *supra* note 4, at 296-97.

58. *Id.* See also *Spanner v. United Airlines, Inc.*, 177 F.3d 1173, 1175 (9th Cir.

its adoption, international carriage by air was "still relatively new, and negotiators feared that liability for catastrophic accidents could hinder the industry's development."⁵⁹ This concern was reflected in the primary goals of the treaty, which included unifying the rules concerning liability of carriers transporting passengers, baggage and cargo and providing for limitations on the liability of carriers.⁶⁰

As evidenced by its provision on jurisdiction, the drafters of the Warsaw Convention also recognized the importance of establishing means by which passengers could seek damages in the event of accidents. Article 28 delineated the jurisdictional boundaries within which liability claims could be brought against carriers. Under Article 28, "[A]n 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."⁶¹

The first provision of Article 28 permitted an action to be brought under the Convention in a court of a High Contracting Party. A court not situated in the state of a High Contracting Party could still "entertain suit[,] but any judgment need not be enforced by courts in other countries on the grounds that the original forum had no jurisdiction to decide the case."⁶²

The second part of Article 28 provided the plaintiff with the choice of four fora. The first forum mentioned is "before the Court of the domicile of the carrier."⁶³ While French and English courts may interpret this language to mean the location of the corporation's headquarters, the place where a carrier is managed and controlled by its officers and directors, U.S. courts understand "domicile" as the carrier's place of incorporation.⁶⁴ Likewise, the "principal place of business" language, the second forum listed, may vary slightly in its interpretation

1999).

59. *Id.* at 297. The Montreal Convention reacted to the concerns of the fledgling airline industry by its very language. It was a document intended to protect carriers more than consumers.

60. *Id.* See also *Onyeausi v. PAN AM*, 952 F.2d 788, 792 (3d Cir. 1992).

61. See Warsaw Convention, *supra* note 2, at art. 28.

62. LAWRENCE B. GOLDBIRSH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 141 (1992).

63. See Flener, *supra* note 4, at 296-97, for the different translations of the treaty. In the original French text, the drafters used "domicile," which was translated into the cognate "domicile" in the American version, but "where the carrier is ordinarily present" is in the British version.

64. See, e.g., *Smith v. Canadian Pacific Airways Ltd.* 452 F.2d 798 (2d. Cir. 1971). It is interesting to note that, in this context, a corporation is not considered to be "domiciled" in a state where it does continuous and substantial business.

from country to country.⁶⁵ The third forum requires consideration of both what constitutes a "place of business" and whether or not the contract has to be formed at this location.⁶⁶ The final option for the plaintiff, the "court at the place of destination," comports with the definition of "destination" under Article 1(3),⁶⁷ thereby granting jurisdiction to the court of the final destination if a passenger's trip includes several legs or layovers.⁶⁸

Article 28's broad scope illustrates the extent to which the Warsaw Convention was a treaty ahead of its time. Although it was enacted in 1929, primarily to insulate carriers from liability and safeguard the fledgling international aviation industry as a whole, the Warsaw Convention was able to provide passengers with multiple convenient fora in which to seek recovery of damages.⁶⁹ And though its wide acceptance and long endurance speak to the treaty's overwhelming success, the Warsaw Convention's most impressive aspect may lie in the relevance its provisions for jurisdiction retain today.

Yet, in spite of its myriad strengths and accomplishments, the Warsaw Convention was not without its shortcomings. Its overall relevance waned in light of the exponential growth of international air travel since the treaty's inception almost seventy-five years ago. "The Warsaw [Convention] has been altered through no less than six official amendments, protocols, one supplementary treaty and numerous unofficial modifications."⁷⁰ These amendments focused largely on

65. See GOLDBIRSCH, *supra* note 62, at 145. England and the United States would both likely find this to be the home office of the carrier. In France, however, it may be one of two places—where the carrier is statutorily "domiciled" or where it has its "siege social."

66. See *id.* for a discussion on the various ways in which courts have answered these questions.

67. See Warsaw Convention, *supra* note 2, at art. 1(3).

68. See GOLDBIRSCH, *supra* note 62, at 147.

69. When placed against the backdrop of American jurisdictional jurisprudence, it is interesting to note that the United States' adoption of the treaty in 1934 was more than a decade before the U.S. Supreme Court would establish its "minimum contacts" test in *International Shoe*.

70. See Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Sept. 28, 1955 (signed at The Hague) (known as The Hague Protocol); Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Sept. 18, 1961 (signed at Guadalajara) (known as the Guadalajara Convention); Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Mar. 8, 1971 (signed at Guatemala City) (known as the Guatemala City Protocol); Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol, Sept. 25, 1975 (signed at Montreal) (known as the Montreal Protocols).

attempts to modernize the document by assessing liability issues and, especially, limits on liability damages.⁷¹ Nevertheless, these changes failed to go far enough and left some signatories regarding the Warsaw Convention as long “outdated and unjust.”⁷² In response to a growing desire for an updated treaty that addressed the contemporary issues and legal concerns of international travel by air, the international community convened in 1999 to rewrite the rules.

In May of 1999, over 500 representatives from 121 different contracting states and 11 international organizations participated in a three-week conference that culminated in the production of the Montreal Convention.⁷³ The Montreal Convention effectively consolidated the provisions of the Warsaw Convention and its six subsequent amendments while preserving the original treaty’s structure.⁷⁴ It replaced seven different treaties, protocols, and amendments collectively known as the so-called Warsaw System,⁷⁵ while relaxing some prior requirements regarding documentation,⁷⁶ increasing the limit for liability,⁷⁷ and providing for a review of liability limits every five years.⁷⁸ More important for the purposes of this paper, the Montreal Convention added a fifth forum of jurisdiction to the four established under the Warsaw Convention.⁷⁹

Article 33(2) defines the so-called “fifth forum” as:

... 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.⁸⁰

More simply, the Montreal Convention permits the assertion of

71. Mercy Awori, *Montreal Convention 1999: An Overview*, AST Legal Consultancy (Jan. 19, 2000), available at <http://astlaw.com/Awori/Awori.pdf>.

72. Press Release, U.S. Department of Transportation, United States Ratifies 1999 Montreal Convention, Putting Treaty Into Effect (Sept. 5, 2003), available at <http://www.dot.gov/affairs/dot10303.html>.

73. See Awori, *supra* note 71.

74. See Montreal Convention, *supra* note 1, at art. 55.

75. *Id.*

76. *Id.* at art. 3-11.

77. *Id.* at art. 21.

78. *Id.* at art. 24.

79. *Id.* at art. 33(2).

80. *Id.* at art. 33(3)(a). The term “commercial agreement,” as defined by the convention, means “an agreement, other than an agency agreement, between carriers and relating to the provisions of their joint services for carriage of passengers by air.”

jurisdiction in a passenger's "principal and permanent" residence as long as the "carrier operates service for the carriage of passengers by air" within that state.⁸¹ One commentator has noted that while the European Union focused its energies on securing the most strategic unlimited liability provision at the convention, the United States, supported by Latin America, directed its efforts toward building a consensus on the widest possible fifth jurisdiction.⁸² What emerged from the negotiations in Montreal is a treaty that appears to tip the scales from largely insulating carriers to focusing more on protecting passengers. In other words, the Montreal Convention reveals itself as a passenger-oriented convention that recognizes the importance of ensuring the protection and interest of consumers as well as carriers.

The Montreal Convention, which superseded the Warsaw Convention of 1929, took effect on November 4, 2003. Article 55(1) "establishes the supremacy of this Convention, as between States commonly party to this Convention, over the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and Montreal Protocols Nos. 1, 2, 3 and 4."⁸³ Articles 53(1) and 53(6) of the Convention set forth the provisions regarding signature, ratification, and entry into force of the Convention. The United States' ratification of the Montreal Convention on September 5, 2003 brought the number of ratifying countries to thirty, the minimum number required to bring the Convention into force.⁸⁴ Its entry into force reflects an international desire to align the principles and provisions established in the Warsaw Convention with a global political economy increasingly dependent on international travel by air.

IV. Comparing "Doing Business" Jurisdiction and the Montreal Convention's "Fifth Forum"

Despite the Supreme Court's failure to prescribe an explicit test for the assertion of general jurisdiction, the Court has, nevertheless, established a settled and widely accepted two-pronged analysis for jurisdiction focused on (1) whether a defendant has purposefully availed itself to suit through contacts with the forum state and (2) whether a court's authority to adjudicate comports with the "traditional notions of fair play and substantial justice."⁸⁵

81. *Id.* at art. 33(3)(b). "Principal and permanent residence" is determined to be the "one fixed and permanent abode of the passenger at the time of the accident." The passenger's nationality does not determine her principal and permanent residence.

82. See Awori, *supra* note 71, at 19.

83. See Montreal Convention, *supra* note 1, at art. 55(1).

84. See Department of Transportation Press Release, *supra* note 72.

85. See, e.g., *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316-17 (1945).

The first prong requires courts to assess the quality, nature and extent of the defendant's contacts in the forum, whether these contacts and activities closely relate to the cause of action,⁸⁶ and the extent to which it was foreseeable that the defendant's activities would have an effect in the forum.⁸⁷ Together these factors comprise the basis for a court's determination of a defendant's purposeful availment. The second prong requires an assessment of the reasonableness and fairness of asserting jurisdiction.⁸⁸ Here the court must weigh the contacts revealed in the first prong against the following factors: the defendant's burden, the forum state's interest, the plaintiff's interest in convenient and effective relief, the judicial system's interest in efficient resolution of the controversy, and the state's shared interest in furthering fundamental social policies.⁸⁹

Despite the substantial guidance this litany of considerations offers, uncertainty nevertheless arises in distinguishing between what is sufficient for specific jurisdiction and what will satisfy for general jurisdiction. The Court in *Perkins* embraced the "systematic and continuous" language drafted in *International Shoe* for cases when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State.⁹⁰ That was the case in *Helicopteros*, and once again the Court invoked the language from *International Shoe*, implying by virtue of its holding that general jurisdiction requires a higher threshold without elaborating on where that threshold lies. The Court did not find the defendant's contacts to be sufficient for general jurisdiction in *Helicopteros*, and thus the court did not address the reasonableness factors in the second prong of its two-pronged due process analysis. This left unclear whether the assertion of general "doing business" jurisdiction requires both prongs of the analysis to be satisfied in order for a court to assert general jurisdiction.

Although the U.S. Supreme Court has not explicitly stated that reasonableness must be considered when asserting general jurisdiction, at least one lower court has held analysis of this second prong to be inherent in the test for jurisdiction, whether specific or general.⁹¹ In *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, the Second Circuit Court of Appeals protected a U.S. corporation from suit in another U.S.

86. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984).

87. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

88. See, e.g., *id.* at 292 (citing *Int'l Shoe*, 326 U.S. at 316-17).

89. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

90. See *Int'l Shoe*, *supra* note 85.

91. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996).

state by applying the reasonableness standard from *Asahi*.⁹² The court's analysis might be considered dicta because regular activity by the defendant that would satisfy general jurisdiction under *Perkins* arguably mitigates the necessity of assessing fairness and reasonableness; continuous and systematic conduct would substantially bolster the forum state's interest and create a greater presumption that the defendant would be minimally burdened by litigating there. Nevertheless, strong arguments exist for the imposition of a reasonableness test when the defendant is a foreign corporation, given that all assertions of jurisdiction—as the Court has regularly espoused of its touchstone restraint—must comport with the “traditional notions of fair play and substantial justice.”⁹³

In turning to an examination of the Montreal Convention's “fifth forum” jurisdiction, the absence of case law on the matter precludes assistance from the courts on whether a similar threshold for activity exists and consequently confines one to the language of the treaty itself. As noted above, the acceptable fora for jurisdiction under the Warsaw Convention were the court of the domicile of the airline carrier, the court at its principal place of business, the court at its place of business where the contract was made, and the court at the place of destination of the passenger.⁹⁴ The Montreal Convention's fifth forum added to these jurisdictional bases the plaintiff's place of permanent residence as long as the defendant “carrier operates services for the carriage of passengers by air” to or from that State.⁹⁵

First and foremost, the language of the provision establishing a “fifth forum” under the Montreal Convention does not require that the cause of action relate specifically to the defendant's activities in the plaintiff's forum state. For example, if a New York resident, while vacationing in the United Kingdom, books roundtrip passage on British Airways from London to Paris, under Article 33(2), the passenger can, hypothetically, bring suit against the carrier in New York by virtue of British Airways' operation of international flights to and from New York. It is somewhat hard to imagine that a United States court would not find general “doing business” jurisdiction in this situation. Despite the fact that the cause of action did not arise from the defendant's activities in the forum, as the Court found to be the case in *Helicopteros*,

92. *Id.* The court applied a standard developed in *Asahi*, a specific jurisdiction case, to a general jurisdiction case. The dissenting opinion preferred to confine such a test to cases of specific jurisdiction, noting that the Supreme Court had not instructed or suggested the permissibility of such an application.

93. See *Int'l Shoe*, 326 U.S. at 320.

94. See Warsaw Convention, *supra* note 2, at art. 28.

95. See Montreal Convention, *supra* note 1, at art. 33(2).

the carrier's operation of international flights in and out of the country would certainly be considered commensurate with the "continuous and systematic" conduct principle established in *Perkins*. The very nature of providing air travel relies on the regular operation of services.⁹⁶ This hypothetical scenario illustrates that Article 33(2) does not require the cause of action to arise from the defendant's activities in the forum. It is in this regard that the Montreal Convention's fifth-forum jurisdiction bears a striking resemblance to general "doing business" jurisdiction and, moreover, represents a currently permissible form of "doing business" jurisdiction for a large segment of the international aviation industry.

There are, however, important distinctions to be drawn between Montreal's "fifth forum" and "doing business" jurisdiction. First, the fifth forum under Article 33(2) limits jurisdiction to the plaintiff's habitual residence and thus, unlike general "doing business" jurisdiction, precludes a foreign plaintiff from bringing suit in that state. Second, the Montreal Convention places no limitation on the authority to adjudicate by assessing the reasonableness or fairness of the defendant litigating in the plaintiff's forum.⁹⁷ It seems to be implicitly assumed that international carriers who operate services to or from that State possess the resources to mount a defense and, in general, to defend suit anywhere they operate. A third potential distinction arises from the ambiguity of the language defining the "fifth forum." The Montreal Convention specifies that the carrier must provide service either directly or via a code share or other similar arrangement with another carrier and that the carrier must be conducting its business from premises leased or owned

96. *Id.* at art. 39. Article 39 reads, "The provisions of the Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary." *Id.* It is interesting to note in regard to this language that a carrier might be liable even if does not "operate services" in a "continuous and systematic" manner.

Even more enlightening is the respective liability for contracting and actual carriers as described in Article 40. Article 40 reads, "If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

97. This is not necessarily distinct from "doing business" jurisdiction in United States courts, as it was mentioned earlier that the U.S. Supreme Court has failed to apply the reasonableness and fairness prong of its due process analysis when asserting general jurisdiction. In the context of the Montreal Convention, though, there is no such paradigm to which the question of jurisdiction must be submitted.

by it or by a carrier with which it has a commercial arrangement.⁹⁸ It does not, however, provide a definition of “operates services” beyond the requirement that the carrier must provide for carriage either to or from the state in question.⁹⁹

For instance, does the carrier have to maintain a branch office in the plaintiff’s home state, or can it simply operate a ticket counter that allows for the purchase of tickets by passengers? Perhaps the carrier does not even need that. What if one purchases a ticket online for Carrier A and checks in at Carrier B’s ticket counter because the two carriers have a commercial arrangement? Or what if a passenger purchases a ticket through Carrier A, but Carrier B provides all of the services—Carrier B’s check-in counter, Carrier B’s plane, pilots, flight attendants, and ground crew? Can Carrier A be sued in the plaintiff’s home forum based simply on its commercial arrangement with Carrier B? In that scenario, Carrier A does not, literally, provide for carriage of the passenger; it merely provides for the purchase of a ticket for the services of Carrier B.¹⁰⁰ One could conjure up myriad scenarios through different permutations of the elements that constitute what one generally considers to comprise a carrier’s operation of services. In short, the Montreal Convention’s lack of explicit language defining “operates services” could prove problematic when plaintiffs elect to bring suit in its fifth jurisdiction.

If and when courts are forced to interpret the “fifth forum” established by the Montreal Convention, they may likely look to the *Goto* and *South India Shipping Co.* cases as well as the United States’ approach to “doing business” jurisdiction set forth in *Perkins* and *Helicopteros*. The language the courts use in each of these cases bears a striking resemblance to that found in Article 33(2) of the Montreal

98. See Montreal Convention, *supra* note 1, at art. 33(3)(a). That article defines “commercial agreement” as an “agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air.” *Id.*

99. *Id.*

100. *Id.* at art. 39-41. See also GOLDBIRSCH, *supra* note 62, at 158-170 for the respective liabilities of contracting carriers and actual carriers under the Warsaw Convention. The Montreal Conventions simplifies liability under these situations considerably. In the second hypothetical outlined above, where one purchases a contract through Carrier A but Carrier B provides all of the services, it appears that both Carrier A and Carrier B will be liable under Art. 40 and Art. 41. Article 40 suggests that the carrier with whom the passenger contracts for passage by air can be held liable for the “whole of the carriage contemplated in the contract.” *Id.* The actual carrier in the hypothetical would only be liable for that part of the carriage that it performs. In other words, under the language of Article 41(1), “the acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.” *Id.*

Convention. In light of this similarity, the "fifth forum" begs the question to what extent the ratification of the Montreal Convention might be understood to represent an adoption of "doing business" jurisdiction on a global basis—albeit an industry specific one. At the very least, the number of signatories to the 1999 treaty suggests a gradual, but nevertheless growing, acceptance of general "doing business" jurisdiction, one that considerably undercuts the arguments for its exclusion from future multilateral treaties.

V. The Implications of the Montreal Convention's "Fifth Forum" Jurisdiction

At this point, the implications of the Montreal Convention remain the work of soothsayers.¹⁰¹ If the "doing business" principles embodied in the "fifth forum" provision remain confined to the scope of the treaty, it will likely have little to no effect beyond the airline industry. On the other hand, if one recognizes the adoption of the "fifth forum" as reflecting a global trend toward the acceptance of "doing business jurisdiction," the Montreal Convention may impact the international understanding of jurisdiction in significant ways. In light of the Montreal Convention's recent entry into force, it seems appropriate to explore its potential to influence a unified global approach to jurisdiction.

The ramifications of "fifth forum" jurisdiction may be negligible if the language carries no weight beyond the document itself and the industry it serves. As a treaty limited to the rules governing a carrier's conduct and liability, its jurisdictional principles apply strictly to airline carriers providing international transportation by air. Although it must be conceded that the adoption of the "fifth forum" in the Montreal Convention by nearly seventy-five Contracting States may imply nothing about extending the "fifth forum" jurisdictional principle beyond the aviation industry, its inclusion in the treaty and the treaty's widespread ratification reflect agreement among the contracting parties that this extension of jurisdiction makes sense for airline liability specifically.

Why should it be limited to the airline industry? Is there something unique to providing international carriage by air that should preclude offering plaintiffs the same forum for jurisdiction in other cases where defendants are conducting business in the state? Or, more pointedly, if "doing business" jurisdiction makes sense under the Montreal

101. The obvious exception to that statement is the plaintiff who asserts "fifth forum" jurisdiction after sustaining injuries during an international flight between two contracting states. In that case, the implication is self-evident; the plaintiff may file suit in his own state provided the carrier operates international services from that forum.

Convention, why does it not make sense generally? One could argue that "doing business" makes sense under the Montreal Convention's fifth jurisdiction, because the defendant's activities in the forum bear a close relationship to the defendant's activities that give rise to the claim—namely the operation of international flights in and out of the state.¹⁰² This argument, however, seems to hide behind the industry-specific nature of the treaty and overlooks the more important fact that, under the Montreal Convention, the defendant's actual activities in the plaintiff's forum do not need to have any connection to those activities that give rise to the suit.

Moreover, such an argument misses the point of "doing business" jurisdiction altogether. It overlooks the purposeful availment rationale of "doing business" jurisdiction and the fact that a corporation that conducts business in the forum state is provided the protection of the laws and regulations in that state, regardless of whether the activities are of the same nature as the primary operations of the defendant corporation. In short, it hardly seems unreasonable to permit a plaintiff to seek redress for injuries sustained by a defendant's activities when the defendant conducts substantial business in the state of the plaintiff's habitual residence. Furthermore, the adoption of the "fifth forum" in the Montreal Convention underscores this assertion by not requiring the operation of services in the plaintiff's forum to have any relation to the purchase of the ticket or the activities of the defendant that directly gave rise to the cause of action.¹⁰³

A long-standing debate over the appropriateness of "doing business" jurisdiction lies at the heart of the breakdown in negotiations at The Hague Conference on Private International Law and its attempts to draft a worldwide treaty on jurisdiction.¹⁰⁴ Article 18 of the Preliminary Draft Convention identifies as a prohibited base of jurisdiction the "carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities."¹⁰⁵ This has been a great source of contention for the United States

102. See L.J. Silberman, *Can the Hague Judgments Project be Saved?: A Perspective from the United States*, A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 158, 177 n.103 (John J. Barcelo III et al. eds., 2002). Others have suggested to the author that cases like *Goto* and those arising under the Warsaw Convention are "one-sided" in the sense that the "defendants engage in the same business in the plaintiff's home state as they do in . . . the place where the event [sic] occurred." *Id.*

103. See Montreal Convention, *supra* note 80, and accompanying text.

104. See, e.g., Ronald Brand, *Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 101 (John J. Barcelo III et al. eds., 2002).

105. See Preliminary Draft Convention, *supra* note 5, at art. 18(2)(e).

delegation and, understandably, made the U.S. reluctant to express approval for a convention with such language. Becoming a party to a treaty that proscribes general "doing business" jurisdiction abridges jurisdictional precepts the U.S. Supreme Court has ruled as constitutional under the Due Process clause of the U.S. Constitution.¹⁰⁶ In essence, the U.S. delegates' hands are more or less tied unless a compromise can be reached.

The language of Article 18 in the Preliminary Draft Convention requires that a plaintiff's cause of action be "directly related" to the defendant's activities in the forum in which a suit is filed in order to assert jurisdiction. Under the Montreal Convention, however, there is no such requirement. Article 33(2) allows for jurisdiction in the plaintiff's state of permanent residence so long as the carrier operates flights to or from there. It does not specify that a direct link must exist between the carrier's activities in the plaintiff's home state and the activities that caused the plaintiff's harm. In fact, under the Montreal Convention the defendant carrier could be forced to litigate against a claim for which the activities that caused the harm have nothing to do with its business activities or operations in the forum where the suit is filed.

It is this distinction that aligns the Montreal Convention's "fifth forum" jurisdiction with that of general "doing business" jurisdiction. And it is this small, albeit significant, linguistic disparity that makes the argument against the inclusion of "doing business" jurisdiction in the Preliminary Draft Convention somewhat puzzling and ironic. Several modifications to the language of Article 18 regarding general "doing business" jurisdiction have been proposed and each one seems to generally follow the "fifth forum" provision of the Montreal Convention. This suggests that substantial presence by the defendant through continuous activity in the forum state, coupled with the plaintiff's habitual residence there, should support the assertion of general jurisdiction.¹⁰⁷

106. Several scholars have remarked that in order for the United States to sign a treaty prohibiting "doing business" general jurisdiction it would have to abandon nearly fifty years of jurisdictional due process jurisprudence. See, e.g., Silberman, *supra* note 41 at 406. Though such a course of action seems highly unlikely to me, Juenger expresses doubt that given the "Justices' increasing deference to Congress and the Executive" and the Court's "ever [greater awareness] of the deficiencies of its own jurisprudence" the Court would declare such a treaty unconstitutional. Of course such a suggestion flies in the face of the fact that the string of cases developing due process jurisdiction are, in fact, constitutional precedents and relies on the fact that "learned law" is not always "hard law." See Juenger, *supra* note 14 at 22-23.

107. See Silberman, *supra* note 102, at 177. Professor Silberman suggests that jurisdiction could be prohibited where the commercial activity of the defendant does not induce the cause of action, "except where the defendant has a branch office or where the defendant's activity in the forum is evidence of a substantial presence there, and the

In the end, the Montreal Convention offers hope that the roadblock thwarting negotiations at The Hague can be overcome. The ratification of the Montreal Convention, with its "fifth forum" of jurisdiction, reflects both a global recognition of and an international consensus on the matter of "doing business" jurisdiction—at least in regard to the international carriage of passengers by air. Yet what is troubling about that is the concurrent adoption of "doing business" jurisdiction in the Montreal Convention and strong objections to it at The Hague Conference on Private International Law. In this sense, the adoption of the Montreal Convention creates an irony, if not inconsistency, in this continued aversion to "doing business" jurisdiction. At the very least, though, the Montreal Convention's "fifth forum" bolsters the argument for including general "doing business" jurisdiction as a permissible and discretionary form of jurisdiction in future multilateral conventions, whereby jurisdiction would be permitted in the state of a contracting party but would not be required to be recognized in other convention states.

plaintiff is habitually resident in the forum state." Prof. Silberman endorses an almost identical modification in her article co-authored with Professor Lowenfeld, where they together propose that the provision in Article 18 should read:

Jurisdiction shall not be exercised . . . on the basis of . . . the carrying on of commercial activity or other activities by the defendant in the forum state except

where the claim arises out of such activities; or
where the defendant maintains a substantial presence in the forum state
and the plaintiff habitually resides in that state.