

Comments on the Fifth Jurisdiction under the Montreal Convention 1999

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I . Introduction

The Montreal Convention ("MC")¹⁾ is an important document of International Law on international air carriage. After taken into effect on November 4, 2003, it would replace the Warsaw Convention Agreement which was in effect for more than 70 years and it would also replace a series of adapted conventions and protocols following Warsaw Convention Agreement, which would impact international air carriage deeply.

When the main international air law is changing from Warsaw Convention ("WC")²⁾ to Montreal Convention, the rules on court jurisdiction to international air tort cases are varying and developing continuously. This is not only related to the development of international air industry, to the competition for interest, but also related to economic and social circumstances which liabilities of tort and damages are based on. After long terms of negotiation, countries who signed the convention formed Montreal Convention included much restriction on the final the fifth jurisdiction. In China, there are some biases on impacts brought by the fifth jurisdiction of the Convention. After Montreal Convention came into force to China in 2005, our air industry would face these claims about the fifth jurisdiction in the possible litigations. So, the legislature should do something to benefit our passengers and improve our air industry.

In this thesis I want to discuss impacts brought by the fifth jurisdiction by going through the developing history of rules on the fifth jurisdiction, comparing the related court jurisdictions in international private law. And I also want to give a break to the research methods on the fifth jurisdiction.

1) Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature May 28, 1999, ICAO Doc. 9740 [hereinafter Montreal Convention].
2) Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929 [hereinafter Warsaw Convention].

The Montreal Convention is an important document of International Law as to international air carriage. China acceded on May 31, 2005 to this convention. The major innovation of Montreal Convention, compared to Warsaw Convention, is the creation of the fifth jurisdiction in the legislation at international levels. China is confronted by the application of Montreal Convention since its entry into force. And this will exert a strong influence on the relevant legislative and judicial practice in China.

II. The origin and development of the fifth jurisdiction

The fifth jurisdiction has obtained varying degrees of confirmation in different international treaties, through intensive negotiation and balancing of the variety of interests, ever since it was put forward. The contents of the fifth jurisdiction and restrictions on its exercise are different in various treaties, which eventually evolve into the version as provided in the Montreal Convention, after undergoing the test of the judicial practice and the analysis of jurists.

1. The creation of the fifth jurisdiction in Montreal Convention

With respect to civil jurisdiction in international air law, it's mainly about where the claimant (victim) may bring an action, in case death or injury of passengers, or destruction or loss of, or damage to baggage or cargo, or delay in the carriage of passengers, baggage or cargo takes place in the

course of carriage by air.³⁾ Jurisdiction is not only closely related to the restrictions on the plaintiff's litigation rights, to the outcome of the judgment, but also related to a sensitive issue—sovereignty. Article 33 of the Montreal Convention provides for a fifth basis of jurisdiction, which is added to the four existing jurisdictions included in Warsaw Convention. The fifth jurisdiction is the territory of the State in which a passenger has his or her principal and permanent residence at the time of the accident, if certain conditions are fulfilled.

(1) The four jurisdictions provided for in Warsaw Convention

For a better understanding of the fifth jurisdiction, it is essential to begin with the comparison between it and the four existing forums. The Warsaw Convention 1929 was the first to lay down rules on court jurisdiction concerning international carriage by air. Article 28 of Warsaw Convention provides, an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.⁴⁾

A perceived injustice in the Warsaw Convention was that a passenger could not sue in his or her own domicile unless that domicile coincided with one of the four places in Article 28. Lawsuits shall be brought, in case of death or bodily injury of passengers, in accordance with uniform international jurisdiction rules, or it may lead to difficulty in enforcement.

3) Dong Nianqing, *China's aviation law: study on cases and relevant problems* Law Press, 2007, p. 261.

4) See Warsaw Convention; *supra* note 3, at art. 28.

Nevertheless, since the passenger typically buys a round trip ticket at his domicile, Warsaw Convention remains applicable in most cases.

(2) The provisions of the Guatemala City Protocol
1971 on the fifth jurisdiction

With the development of international air industry and the increase of the civil aviation lawsuit, there are more and more debates on whether or not to include the domicile of passengers as an additional basis of jurisdiction. The 1971 Guatemala City Protocol was the first of the Warsaw modifications to adopt the fifth jurisdiction; Article XII of Guatemala was designed to amend Article 28 as follows:

In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.⁵⁾

As a result, the fifth jurisdiction was officially put forward in Guatemala City Protocol 1971 for the first time. More specifically, an additional forum, where the passenger has his domicile or permanent residence, was added to the four jurisdictions already available under Article 28 WC. And, this additional jurisdiction is only applicable on the condition that the carrier has an establishment there. This is deemed to be a major innovation of Guatemala City Protocol.⁶⁾

Although the fifth jurisdiction has been provided for in Guatemala City

5) See 1971 Guatemala City Protocol, at art. 12.

6) See supra note 4, at 265.

Protocol, it failed to enter into force due to the U.S. senate's refusal of ratification, ever since it's signed on March 8, 1971. Consequently, the rules on court jurisdiction in Guatemala City Protocol don't have much practical influence. However, it does pave the way for the inclusion of the fifth jurisdiction in the Montreal Convention.

(3) "Fifth Jurisdiction" confirmed by IIA⁷⁾ and MIA

Before the explicit establishment of the notion of the fifth jurisdiction, the airlines introduce the law of the passenger's domicile through "special contract", which has the indirect effect of confirming the fifth jurisdiction. MIA was concluded in 1996, referred to as Agreement on Measures to Implement the IATA Inter-carrier Agreement. MIA provides that the law of the domicile or permanent residence of the passenger can be chosen to be applied in contract of carriage. Section II of the MIA states: At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions: (Carrier) agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.⁸⁾

Accordingly, MIA, not specifically providing for the fifth jurisdiction, is only an indirect confirmation of it. As a contractual agreement between airlines, it's impossible to supersede the jurisdictional provisions of the states.

From my point of view, the option of applying the law of the passenger's domicile is an attempt aiming at providing convenience to litigation and protecting passengers' rights to the maximum. In a sense, the addition of the law of the passenger's domicile can produce a desired legal effect on the

7) IATA(International Air Transport Association), IIA, referred to as IATA Inter-carrier Agreement.

8) Tang Mingyi, Chen Yu, private law of international aviation, Law Press, 2004, p.54.

promotion of the acceptance of the fifth jurisdiction in international aviation practices.

(4) The fifth jurisdiction under the Montreal
Convention 1999

Montreal Convention, referred to as Convention for the Unification of Certain Rules for International Carriage by Air, was adopted during the diplomatic conference in Montreal, Canada, in 1999. One of the major innovations of the Montreal Convention is the creation of the so-called fifth jurisdiction, provided for in Article 33, which was added to the four jurisdictions already available under Article 28 of Warsaw Convention.

During the drafting of the Montreal Convention, there was a heated debate on whether or not to incorporate the fifth jurisdiction into the convention. Countries with a generous legal system, led by the U.S., strongly advocated the inclusion of the fifth jurisdiction, while developing countries represented by China and Egypt raised objection to it. The debate is not only concerned about whether or not to create such a jurisdiction, but also about the methods of and conditions for the inclusion of the fifth jurisdiction. The U.S., as a proponent of the notion of the fifth jurisdiction, was supported by Brazil, Japan, and Columbia. On the other hand, the European countries, mainly France, were strongly opposed to the fifth jurisdiction. India and the Arab countries shared the same view. Other countries, like British, Netherlands, and New Zealand sought an appropriate compromise on this issue.

The United States, in its working paper presented to the Conference regarding the fifth jurisdiction, reiterated that the incorporation of an acceptable provision on the fifth jurisdiction is essential for it to ratify any new convention. The U.S. strongly supported the inclusion of the fifth

jurisdiction for the following reasons: 9)

First, it is the passenger's legitimate right to bring lawsuit before the court of his or her residence. It's unreasonable to deny such a right in Montreal Convention. Secondly, passengers' residences are usually where they settle. That is to say, the fifth jurisdiction enables the claimant to bring suit in forum where they're most familiar with, where the claimant's expectation of the applicable law and compensation standard will be met, and where they will be fairly treated and adequately compensated. Thirdly, Jurisdiction rules established in 1929 Warsaw Convention have been under severe challenges, due to the change of way of doing business, such as the prevalence of inter-carrier alliance, code sharing, computer reservation and electronic ticketing in the present day. The determination of a proper jurisdiction has been complicated, accordingly. However, it can be simplified, by the incorporation of the fifth jurisdiction. Fourthly, nowadays, the amount of international air travel increases massively everyday, and the airline alliances become more complex. As a result, more and more passengers can not bring suit in their home state under the Warsaw system. These changes in the conditions of carriage, urged the revisal of jurisdiction rules in the Warsaw Convention. Last but not the least; it discourages forum shopping in the U.S. by providing access to the convenient homeland court.

During the negotiation of the Montreal Convention, in the report of the second meeting on modernization of the Warsaw system, the ICAO Secretariat Study Group states that, the fifth jurisdiction provided in Guatemala City Protocol may reduce the uncertainty to a reasonable level, because it's closed related to the passenger. Also, progress is likely to be made in this area because it meets the needs of protecting the interests of consumers.¹⁰⁾ Thus, it's clear that the report was supportive of the inclusion

9) Department of Policies, Laws and Regulations, CAAC, Analysis of Convention for the Unification of Certain Rules for International Carriage by Air, 1999, p.211.

of the fifth jurisdiction in the Convention.

As far as I am concerned, I'm a proponent of the addition of the fifth jurisdiction. The application of the fifth jurisdiction doesn't necessarily lead to an increase in the amount of compensation, the applicable law also matters. And it's wrong to take the position that the addition of the fifth jurisdiction will make America a target jurisdiction for all claimants in aviation accident lawsuits due to forum shopping.¹¹⁾

The fifth jurisdiction, however, was strongly opposed by the majority of non-U.S. airlines, due to the fear of high damage awards by U.S. juries. Delegates from developing countries argue that the four jurisdictions provided by the Warsaw Convention are sufficient to settle the vast majority of cases. The inclusion of the fifth jurisdiction will lead to an increase in the cost of international transport by air, which is detrimental to the airlines from developing countries. In addition, from the viewpoint of most developing countries, the fifth jurisdiction is generally perceived as a provision involving sovereignty.¹²⁾

During the drafting of the Montreal Convention, France, the main opponent, expressed strong objections to the inclusion of the fifth jurisdiction for the following reasons:¹³⁾ (1) The creation of the fifth jurisdiction is not necessary to protect passengers, as the four existing jurisdictional possibilities are satisfactory. (2) The fifth jurisdiction increase the insurance premiums and ticket prices, which is contrary to the ICAO's fundamental objective of promoting the participation of all in the development of world air transportation, therefore, it will have unfortunate consequences for the development of international air transport. (3) The notion incorporated by the fifth jurisdiction

10) LC / 30 - IP / 1. CAO.

11) Devendra Pradhan, *The Fifth Jurisdiction under the Montreal Liability Convention: Wandering American or Wandering Everybody*, 68 J. Air L. & Com. 717 (2003).

12) *New regime, new methods for claim*, CAAC Journal, 2001.

13) See Devendra Pradhan, *supra* note 12.

is a new category in international law, and the expressions are very vague and very broad in application. It contradicts other conventions; therefore, its adoption would create a regrettable precedent in the development of contemporary law. (4) The fifth jurisdiction has nothing to do with air law and its special characteristics, therefore, instead of making progress towards the unification and internalization of law, it would result in further fragmentations of international law. The countries, which presented objections to the inclusion of the fifth jurisdiction, proposed that they should have been given the option at the time of ratification and accession to the convention.

Furthermore, there has been strong opposition to the fifth jurisdiction by small and medium sized airlines.¹⁴⁾ It has been argued that the acceptance of the fifth jurisdiction as an additional forum has far-reaching implications for the small and medium sized airlines, especially those in developing countries, from a logistical and financial standpoint. In its working paper, the International Union of Aviation Insurers (IUAI) questioned why aviation should be singled out for creating a fifth jurisdiction, why is the victim of a rail crash not entitled to such an option?

Moreover, there are several scholars opposing to the incorporation of the fifth jurisdiction.¹⁵⁾ They believed that the fifth jurisdiction will lead to discrimination among passengers on the basis of their home jurisdiction. For example, in a single aviation accident case, passengers from countries with a generous legal system like America will receive more compensation than those on the same flight from developing countries, which is quite unfair. Critics also argue that,¹⁶⁾ the addition of the fifth jurisdiction will expose air carrier to high compensation, which would create an additional undue burden on foreign air carriers and ultimately, would increase the level of risk for

14) See *supra* note 12.

15) See *supra* note 4, at 266.

16) See Devendra Pradhan, *supra* note 12.

them. This would be unfavorable to the growth of international air transport, and therefore, would run counter to the ICAO's fundamental objectives of promoting the participation of all in the development of world air transportation.

Due to the significant position of America in international aviation industry, many countries are forced to adopt the compromised draft, based on the consideration of wide gap in aviation industry's strength and market share between them and the U.S. Eventually, the fifth jurisdiction is incorporated into the Montreal Convention conditionally. And its application is complicated due to its definition, scope of and condition for application, and etc.

2. The application of the fifth jurisdiction

Article 33 of the Montreal Convention states:¹⁷⁾

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in

17) See Montreal Convention; supra note 2, at art. 33.

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.

3. For the purposes of paragraph 2, (a) 'commercial agreement' means an agreement, other than an agency agreement, made between carriers and relating to the provisions of their joint services for carriage of passengers by air; (b) 'principal and permanent residence' means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.
4. Questions of procedure shall be governed by the law of the court seised of the case.

This provision indicates that the fifth jurisdiction has been effectively confirmed in international treaties.

Article 34 of the Montreal Convention also makes relevant provisions regarding arbitration, which stipulates: Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.¹⁸⁾ Therefore, it is true that the Convention doesn't exclude the parties from resorting to arbitration, but the parties' choice of the place of arbitration is confined to one of the places in article 33, and the provisions of Montreal Convention must be applied in the arbitration. According to the Convention, the application of the fifth jurisdiction shall take the following elements into account:

18) See Montreal Convention; supra note 2, at art. 34.

(1) Only death and bodily injury claims

The first prerequisite for the application of the fifth jurisdiction is that damages must result from the death or injury of a passenger, while the four jurisdictions provided in paragraph 1 of article 33 could apply extensively to any claim resulting from the carriage of passengers or cargo. Consequently, the fifth jurisdiction of Article 33(2) MC does not apply to baggage claims. In the event of a claim for death or injury where baggage is also lost or destroyed (e.g., in an air crash), the baggage claim must be brought before one of the four jurisdictions in Article 33(1) MC, and cannot be presented before a court in the passenger's principal and permanent residence.

(2) Right of the passenger to choose a jurisdiction

With respect to the litigation governed by the Montreal Convention, the plaintiff has the option to choose one of the forums to bring suit in. However, actions for damages in the four jurisdictions in Article 33(1) MC "must be brought, at the option of the plaintiff" before one of the four indicated jurisdictions, whereas actions for damages "may be brought" in the "fifth jurisdiction."

According to the MC, the plaintiff is entitled to choose any forum from the mentioned jurisdictions. Nonetheless, U.S. scholars and judges stated:¹⁹⁾ "We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of *forum non conveniens*." Thereby, it's reasonable to have such doubts whether the option of the claimant will be restricted or excluded by the procedural rules of the forum, which will be expounded later.

19) See Devendra Pradhan, *supra* note 12.

(3) Passenger's Principal and Permanent Residence

The purpose of establishing the fifth jurisdiction is to permit the passenger to sue the carrier in his or her own principal and permanent residence. However, the prerequisite is that the principal and permanent residence of the passenger must be situated in the territory of one of the state parties at the time of the accident.

The term "principal and permanent residence" has been defined as the one fixed and permanent abode of a passenger at the time of the accident. The nationality of the passenger should not be considered to be the determining factor in this regard. This definition ensures that it is not possible to have several principal and permanent residences from among which to choose the most convenient one in which to bring an action.

(4) The carrier must operate in the "fifth jurisdiction"

For the purpose of the Convention, air transport refers to the circumstance whereby the carrier operates services for carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement. The term "commercial agreement" as defined in Article 33MC means an agreement, other than an agency agreement, made between carriers and relating to the provisions of their joint services for carriage of passengers by air. "Commercial agreement" usually includes inter-carrier alliance and code sharing, but not restricted to these two.²⁰⁾

As a result, these are prerequisites for the application of the fifth jurisdiction in international aviation cases. Suits may be brought in any one of the five jurisdictions provided in Article 33MC within the territory of a state party if the foregoing conditions are met. And the determination of the forum is always relevant to domestic procedural law.

20) See *supra* note 9, at 54.

3. Analysis of the impact of the fifth jurisdiction

Although the delegates and scholars couldn't reach a consensus on whether or not to include the fifth jurisdiction in international air convention, the fifth jurisdiction was ultimately incorporated into the Montreal Convention, and was legally binding on the contracting parties. Upon entry into force, it's of much significance to analyze legal effects the fifth jurisdiction will have on the parties to international aviation cases.

From a procedural point of view, the fifth jurisdiction allows passengers and claimants to bring suit in their home state, which would mitigate high legal cost and reduce the time needed. Provided that passengers and claimants are given the opportunity to bring suit in their homeland, the cost of travel, accommodation and high legal cost can be avoided. What's more, from a legal and a practical viewpoint, the fifth jurisdiction is the most fair and convenient place for passengers and claimants to bring an action, and there is no other place which could be better than the state where the passengers live to determine the outcome of the dispute. It's wrong to argue that the only purpose of the fifth jurisdiction is to protect the "wandering American". Besides wandering Americans, there are wandering German, wandering French, wandering Chinese, and wanderers of every nationality. All people, wandering Americans as well as the wandering citizens of any other nationality, can benefit from the fifth jurisdiction by bringing suit in their home jurisdiction which is the most convenient forum for them.

From an economic perspective, it remains to be seen whether the fifth jurisdiction would definitely expand the scope or increase the amount of damages. First of all, the fifth jurisdiction is only applicable to international air transport under the Convention. And the limit of liability is subject to the two-tier liability system of the carrier's liability for passenger's death and

injury provided by the Montreal Convention. To be more specific, the first tier is based on strict liability up to SDR 100,000, irrespective of the carrier's fault. The second tier is based on presumed fault of the carrier, without any numerical limitation of liability, but allowing for certain defenses of the carrier. Furthermore, Punitive damages and non-compensatory damages are not permitted in the Convention. The compulsory provisions shall have priority over domestic law and contracts between the parties. As to those litigations not governed by the Convention, the fifth jurisdiction doesn't apply. Therefore, obtaining a high damage award is attributed to the conflict rules of the forum, rather than the fifth jurisdiction. What's more, in regard to cases brought under the Convention, the objective of the fifth jurisdiction to increase compensation cannot be realized, until the facts are characterized according to *lex fori* and the conflict rules of the forum. This is one of the reasons why the plaintiff seeks the application of the fifth jurisdiction, which is not explicitly stated in the Montreal Convention.

III. The fifth jurisdiction and other related court jurisdictions in international private law

The fifth jurisdiction and other four jurisdictions provided in the Montreal Convention are equal in application. The plaintiff is entitled to choose the forum according to the provisions of the convention. However, the discretion of the plaintiff in choosing the jurisdiction is always restricted by the relevant procedural rules of the court seized of the case. According to Article 33(4) MC, questions of procedure shall be governed by the law of the court

seized of the case. In common law system, the English and American courts would, to some extent, apply its domestic procedural rules including “territorial jurisdiction” to determine the forum of international aviation cases.

1. “long-arm jurisdiction” and the “fifth jurisdiction”

(1) The notion of long-arm jurisdiction

Judicial jurisdiction of U.S. courts is noted for extensiveness and flexibility. The Supreme Court’s decision in *International Shoe Co. v. Washington* heralded the age of long-arm jurisdiction. In the 1950s and 1960s, all states in the U.S. have established the so called “long-arm jurisdiction”, permitting the state courts to exercise jurisdiction through servicing outside the state. There are two kinds of long-arm statutes.²¹⁾ One is directly providing that long-arm jurisdiction is only applicable to specific substantive law areas or specific lawsuits. The other one is providing that long-arm jurisdiction can be applied in all litigations as long as it’s in conformity with U.S. constitution and state constitution, indirectly. Either one has expanded the basis of the state courts’ jurisdiction tremendously.

A broad discretion is conferred to the judges by the doctrine of long-arm jurisdiction. It is conducive to the protection of the interests and public policies of the forum, which has provided this doctrine a basis for the determination of jurisdiction.

21) Xu Weigong, Two valves of international civil jurisdiction of USA—Forum non conveniens doctrine and anti-suit injunction, *Journal of Gansu Political Science and Law Institute*, March, 2006.

- (2) Analysis of the relationship between the fifth jurisdiction and long-arm jurisdiction, in the perspective of Jinan air crash

Jinan air crash lawsuit is a wrongful death action brought against the carrier by U.S. resident, which have the effect of exercising the fifth jurisdiction. The court pointed out: with respect to choice of law, the appellate refers to the second rule for choice of law analysis set forth in *Neumeier*, which is: When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. In this case, the carrier's conduct occurred within its domicile, and the law of that domicile serves to limit the carrier's liability. Eventually, Chinese law is applied by the district court.

As to the application of the Warsaw Convention, the court opined that, while certain courts may have criticized the limitations of the Warsaw Convention, however, the fact remains that the Convention is a treaty to which the United States is bound, and the federal courts regularly enforce its damage limitations.²²⁾

This case is a reflection of U.S. courts' practices in determining the jurisdiction. Although the accident occurred in China, the court found that a significant nexus existed between CAAC's²³⁾ commercial activities in the United States and the accident. Firstly, where tickets involved were bought and paid for in United States from Chinese airline's agents, secondly, there is a sales agency contract between CAAC and Pan American. Consequently, the court held that it had subject matter jurisdiction, based on the long-arm

22) Dong Nianqing, Relatives of U.S. victims brought suit against CAAC for damage, at <http://news.carnoc.com/list/113/113699.html>

23) General Administration of Civil Aviation of the People's Republic of China.

jurisdiction rule.

According to the Warsaw Convention, it applies to all international carriage of persons, luggage or goods performed by aircraft for reward.²⁴⁾ In this case, the carriage is from Nanjing to Beijing, China, and the accident occurred in China, therefore it doesn't fall with the definition of "international carriage" as provided in the Warsaw Convention. Therefore, we can conclude that: firstly, since the Convention is not applicable to this case, neither do its provisions on compulsory jurisdiction; secondly, in litigation not governed by the Convention, the U.S court may exercise jurisdiction according to long-arm jurisdiction rule to protect the country's public interest, or it may refuse to hear the case on the ground of forum non conveniens to prevent forum shopping. The court's discretion, U.S. foreign policy and public interest are important factors in the decision-making process; thirdly, if this is the case brought under the Convention, and Washington is where the contract was concluded, then U.S will acquire the jurisdiction under the Convention. As a result, whether or not to entertain the case shouldn't be determined pursuant to domestic "long-arm jurisdiction" rules or forum non conveniens doctrine, due to their violation of the relevant compulsory provisions on jurisdiction under the Convention.

2. The fifth jurisdiction and the Doctrine of Forum Non Conveniens

(1) The notion of Forum Non Conveniens

It is generally thought that the doctrine of forum non conveniens have arisen in Scotland, and become acceptable to common law countries later. American scholars usually regard forum non conveniens as a discretionary

24) See Warsaw Convention; supra note 3, at art. 1.

principle, aimed to balance the interests among the plaintiff, the defendant and the court.²⁵⁾ Under the doctrine of *forum non conveniens*, a court which has jurisdiction of a case, may decline to exercise it, where presentation of the case in that court will bring inconvenience to the parties and the court, which is against the interest of judicial justice and the speedy settlement of disputes. The court will not dismiss the case under the doctrine unless there is an alternative forum available to the parties.²⁶⁾

The core of the establishment of *forum non conveniens* doctrine is to prevent the plaintiff from choosing the jurisdiction which would vex, harass, or oppress the defendant. Consequently, the interests of the plaintiff and the defendant are balanced.

There are huge differences in the application of *forum non conveniens* between the common law and civil law countries. In most civil law countries, a court with jurisdiction must hear the case, reflecting the preference for certainty and predictability in jurisdictional matters. On the contrary, many common law countries allow courts the discretion of dismissing cases to more convenient forums. Take Baotou air crash as an example, the California high court issued an order staying the consolidated actions on the ground of *forum non conveniens*, and the judge perceived the Chinese court as the most suitable forum to exercise jurisdiction.

(2) Restrictions on “fifth jurisdiction” imposed by
forum non conveniens

After the 1999 Montreal Convention came into force, which has replaced the Warsaw Convention, a main issue of concern is which one U.S. courts shall adopt when handling the lawsuits brought under the Convention, the

25) See *supra* note 22.

26) Zhang Mao, *International civil procedure law of U.S.*, China University of Political Science and Law Press, 1999, p.94.

five jurisdictions provided in the convention, or the doctrine of forum non conveniens. In other words, the question of whether or not forum non conveniens is applicable under the 1999 Montreal Convention has yet to be answered. And judges and scholars have divergent views on this issue. The U.S. Supreme Court expressly approved forum non conveniens in two 1947 cases, *Gulf Oil Corp. v. Gilbert*²⁷ and *Koster v. (American) Lumbermens Mutual Casualty Co.*²⁷ And the U.S. Supreme Court endorsed the new doctrine of forum non conveniens in *Piper Aircraft Co. v. Reyno* in 1981. As noted earlier, five jurisdictions are established in the Montreal Convention, which are: the domicile of the carrier, its principle place of business, a place of business through which the contract had been made, the place of destination, and the passenger's principal and permanent domicile. In *Piper V. Reyno* and *Nolan V. Boeing*,²⁸ U.S. courts dismissed the lawsuits initiated by foreign nationals in the United States on the ground of forum non conveniens.

The fifth jurisdiction enables all U.S. citizens and permanent residents to have access to the U.S. courts to pursue claims and acquire high damage awards. At the same time, it also closes the door on forum shopping for the non-U.S. residents in the U.S. courts, because their own homeland is readily available and convenient. In other words, the creation of the fifth jurisdiction will lead to the U.S. courts dismissing non-residents' lawsuits on the ground of forum non conveniens.

The United States stated unequivocally that the forum non conveniens doctrine remains available as a procedural tool for federal courts to use in their discretion in litigation governed by the Warsaw Convention. As to cases not governed by the Convention, they are not subject to the

27) R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 Ohio. St. L. J. 659 (2004).

28) See R. Wilson, *supra* note 27.

compulsory provisions on jurisdiction under the Convention. Therefore, the court has the discretion to apply the doctrine of *forum conveniens*, there is no need to consider its relationship with the fifth jurisdiction. In this way, its function as a useful procedural tool to protect public policy and the interests of U.S. citizens can be adequately fulfilled.

(3) Attitudes towards the fifth jurisdiction: from restriction to respect

In cases brought under the Convention, U.S. courts' determination of the jurisdiction has undergone a gradual change, from simply applying national procedural law to complying with the jurisdiction rules provided in the Warsaw Convention and emphasizing international cooperation. This transition can be seen in *Hosaka. V. United Airlines*.

In *Hosaka. V. United Airlines*,²⁹⁾ the District Court granted United's motions to dismiss for *forum non conveniens*, holding that Article 28(1) of the Warsaw Convention grants the plaintiff the option of choosing among four jurisdictions, but that it does not preclude a court's entertaining an *forum non conveniens* motion. Plaintiffs appealed, arguing that any application of *forum non conveniens* was contrary to the plain meaning of Warsaw, and thus an unauthorized qualification of the treaty. The Ninth Circuit, for its part, found the text of Warsaw to be ambiguous, rather than plain. Nevertheless, the court deemed the purposes, the drafting history of the treaty, and the evidence of the parties' understanding and treatment of *forum non conveniens* in other treaties and courts post-ratification as not supporting the contention that the contracting parties intended to permit "the plaintiff's choice of national forum to be negated" by the use of *forum non conveniens*. Finding *forum non conveniens* inapplicable in Warsaw cases where the

29) Katherine R. Oirterich, *Forum Non Conveniens and the Warsaw Convention: Leaving the Turbulence Behind*, 33 Hofstra L. Rev. 1507 (2005).

alternative forum is in another country, the court reversed the district court's dismissal.³⁰⁾

Therefore, U.S. courts' position has changed from "provincialism" to "internationalism", as to the question of whether or not courts can apply the doctrine of forum non conveniens in a case governed by the Montreal Convention. In other words, forum non conveniens is not permitted to restrict the plaintiff's right to choose the forum in litigation governed by the Convention. The practice provides guidance to similar cases afterwards, and is conducive to achieving harmonization of international air law desired by adhering states.

3. The fifth jurisdiction and forum shopping

(1) The phenomenon of forum shopping and analysis of its causes

Forum shopping has been defined as a litigant's attempt to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.³¹⁾ Black's Law Dictionary defines it as the practice of choosing the most favorable jurisdiction or court in which a claim might be heard.³²⁾

Although scholars have different attitudes towards forum shopping, it's true that the phenomenon of forum shopping is abundant in the U.S., even a judge from United States court of appeals regards forum shopping as a national legal pastime.³³⁾ Lex fori and characterization attribute to the phenomenon

30) See Katherine R. Oirerich, *supra* note 29.

31) Friedrich K. Juenger, *Forum Shopping, Domestic and International*, [J] .63Tu1. L. Rev, 1989.

32) Bryan Camer, *Black's Law Dictionary* 8th ed, 2004, p.681.

33) Wright J. S, *The Federal Court and Nature and Quality of State Law*, [J] .13Wayne L.R, 1967.

of forum shopping. Courts usually prefer to apply domestic substantial rules to protect public interest. To some extent, the party's choice of forum determines the applicable law.

There are divergent views about forum shopping between American scholars. Most scholars tend to treat forum shopping as unethical and inefficient; parties who forum shop are accused of abusing the adversary system and squandering judicial resources.³⁴⁾ On the other hand, some scholars are in favor of forum shopping, arguing that the parties shall have the right to choose jurisdiction. As Justice Jackson's words suggest,³⁵⁾ "forum shopping" is not an activity that should be associated with questionable ethics or doubtful legality. It is part of a lawyer's job to bring suit in the forum that is best for the client's interests. Such factors as highest possible damages, advantageous measure of damages, litigation convenience and reduction of the litigation burden, are given much thought to by the parties, when choosing the forum. Forum shopping is conducive to the pursuit of efficiency and fairness.

With respect to the phenomenon of forum shopping, courts in various countries have also correspondingly set up several restriction regimes, such as anti-suit injunction,³⁶⁾ forum non conveniens, and case transfer system.³⁷⁾ These restrictions on the party's flexibility of forum shopping have regulated the litigation order and saved the judicial resources.

34) Notes Forum Shopping Reconsidered, 103 Harv. L. Rev. 1677 (1990).

35) See supra note 34.

36) Anti-suit injunction is an order issued by a court that prevents an opposing party from commencing or continuing the same or similar proceeding in another jurisdiction or forum.

37) It is provided in paragraph a of Article 1404, Section 28 of United States Code, which means, for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(2) The relationship between the fifth jurisdiction and forum shopping

Montreal Convention's jurisdiction rules on international aviation cases are compulsory, which is set as the prerequisite to the prescriptions of the five jurisdictions. As mentioned before, the claimant's right to choose the jurisdiction is an important achievement of the Montreal Convention negotiation. It's the plaintiff's right to choose the forum most advantageous to himself or herself. The court seized of the case shall abide by the convention and show respect to the plaintiff's right to choose, even the forum chosen by the plaintiff may not be the most convenient one from the aspect of cost and expenses of litigation.

In cases properly brought under the Montreal Convention, it remains to be seen whether the plaintiff's option to choose from the five jurisdictions will be restricted by *lex fori* to avoid the abuse of forum shopping, and whether the adoption of the fifth jurisdiction will deter forum shopping. As to litigation not governed by the Convention, the phenomenon of forum shopping is likely to be limited by *lex fori*.

VI. The impact on China of the application of the fifth jurisdiction under the Montreal Convention

1. General provisions on jurisdiction of foreign-related aviation cases in China

Article 240 to 245 of · Civil Procedure Law of the People's Republic of

China, and Rules of the Supreme People's Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters,³⁸⁾ set out the principle and basis for the determination of jurisdiction of civil litigations involving foreign elements. According to these provisions mentioned above, when it comes to contract involving foreign elements or disputes over property rights and interests involving foreign elements, contacts shall exist between the forum and the dispute in determining the jurisdiction. The people's court shall have jurisdiction when the litigation has actual connections with it. Secondly, respect for party autonomy is emphasized, the parties to a disputed contract involving foreign elements or the parties having disputes over property rights and interests involving foreign elements may reach a written agreement to choose the people's court located in the place that has actual connections with their disputes as the court to adjudicate their disputes, as long as such a jurisdiction does not contravene with the stipulations on the jurisdictions by level or the exclusive jurisdiction. Thirdly, Article 243 provides that if the defendant in a civil litigation involving foreign elements raises no objection to the jurisdiction of a people's court and files his defense with the court; he shall be deemed to have accepted that this people's court has jurisdiction over the case. Exclusive jurisdiction is stipulated in Article 244. These provisions are conducive to protect China's public interest and safeguard its national sovereign rights.

In the judicial practice, the first step is to analyze whether the air transport falls with the scope of "international carriage" subject to international convention, if it is, the Montreal Convention shall be applied to determine the jurisdiction. Jurisdiction rules provided in the convention take precedence

38) It is adopted at the 1,429th Meeting of the Judicial Committee of the Supreme People's Court on June 11, 2007, is hereby issued, and shall be effective as of August 8, 2007.

over the relevant domestic law, because China is a state party to the Convention. If not, rules of foreign-related jurisdiction in China, especially those determining the jurisdiction of tort or contract involving foreign elements, shall be applied. People's court will take into account the application of *lex fori* when handling relevant international aviation cases. Also, China's public interest is an important factor to be considered when it comes to the procedural issues.

2. Impact of the fifth jurisdiction on China's civil aviation law

(1) Incorporation of the fifth jurisdiction into China's civil aviation law

Montreal Convention has become effective to China on July 31, 2005. Consequently, relevant measures shall be taken to include the "fifth jurisdiction" in domestic law to protect the interest of "wandering Chinese". The corresponding provision may be stated as:³⁹⁾ an action may be brought before the people's court 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.

Corresponding legislations should be made to support the application of the fifth jurisdiction. As to the confirmation of the doctrine of *forum non conveniens*, further study remains to be done. The principle of reciprocity is

39) Zhang Xiaoming, Pei Min, Zhao Hong, *Revise China's Civil Aviation Law Based on the New Convention*, China Civil Aviation, October, 2004.

provided in Article 5 of China's civil procedural law, that is to say, should the courts of a foreign country impose restrictions on the civil litigation rights of the citizens, legal persons, or other organizations of the People's Republic of China, the people's courts of the People's Republic of China shall follow the principle of reciprocity regarding the civil litigation rights of the citizens, enterprises, or organizations of that foreign country. However, the principle is to abstract to meet the contemporary needs, with the increase of lawsuits brought before the people's court by foreign plaintiffs. As a result, the task of improving relevant jurisdiction rules is pressing.

(2) Improvement of relevant legislation on damage claims

The confirmation of the fifth jurisdiction is the premise for people's court to hear international aviation cases subject to the Convention. Meanwhile, it's crucial that the liability limits stipulated in the civil aviation law be raised to genuinely realize the objective of the fifth jurisdiction. Otherwise, relatively low compensation would frustrate the intention of our citizens in applying the fifth jurisdiction. Baotou air crash serves as a good example, in which the relatives of victims bring suit in the U.S. to pursue higher damage awards. As a state party, the standards of compensation for damage set up in Montreal Convention is legally binding upon China. As a result, it's China's obligation to raise its domestic standard.

In addition, it's necessary to improve the regime of compensation for damages in civil aviation law by taking the following measures: Firstly, introduce a two-tier liability system, and raise the limit of liability. Secondly, the standing committee of NPC shall abolish the Interim Provisions, withdraw the authorization conferred on General Administration of Civil Aviation and formulate a new limit of liability on its own. In the judicial

practice, the provisions on compensation for personal injury of General Principles of the Civil Law of the People's Republic, Law of the People's Republic of China on Protection of Consumer Rights, and Interests and Interpretation of the Supreme People's Court of Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury, shall be applied. After these foregoing measures being carried out effectively, we may expect that the "wandering Chinese" will truly benefit from the inclusion of the fifth jurisdiction.

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Abstract

One of the most significant additions to the Warsaw Convention liability system, brought about by the coming into force of the Montreal Convention 1999(MC 99), was the creation of the new so-called fifth jurisdiction, whereby an Article 17 action for damages for passenger bodily injury or death only, may be brought at the option of the claimant/plaintiff. The fifth jurisdiction—the permanent residence of the passenger at the time of the accident, provided that the carrier has a specified business presence in that jurisdiction—was one of the provisions of MC99 that provoked the most debate at the Montreal Conference leading to the adoption of MC99.

Some scholars in China fear that the fifth jurisdiction will be abused after the MC99 came into force to China in 2005. The present article argues that the fifth jurisdiction would not be abused as long as such international private doctrines as *forum non-conveniens* are applied by the trial court appropriately. The article also points out that the challenge before the legislative body of China is to amend the civil aviation law and other related laws so that to solve the conflicts among the laws and meet the obligations provided by the MC99.

Key Words : Montreal Convention of 1999, the fifth jurisdiction, *forum non-conveniens*