

Litigating Australian Aviation Disaster Cases in the United States

by

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Litigating a case in the United States that arises from an aviation disaster is difficult. Putting aside the complications arising from the vast distance between the U.S. and Australia, which makes any transnational litigation expensive, convincing a U.S. court to hear the action is challenging.

There is a saying (somewhat of a cliché) that you need to “be in it to win it.” When you bring an action in the U.S. that arises from a foreign crash you need to “stay in it to win it.” This is because the major challenge that you will face is an early motion to dismiss the action based on the *forum non conveniens* doctrine.

A company that designs, manufactures and sells aviation products in the U.S. may be sued in the U.S. when a defect in its product causes an aviation disaster in Australia. A U.S. court would have jurisdiction to hear a claim against the defendant. The court, however, retains discretion to dismiss the claim if it finds that the U.S. is an inconvenient forum for the litigation.

This paper will address U.S. *forum non conveniens* jurisprudence and will provide practical advice on how to survive a *forum non conveniens* challenge.

1. Introduction.

A defendant will invariably file a motion to dismiss based on the *forum non conveniens* doctrine when litigation is filed in the United States arising out of a crash in Australia. The

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defendant will be able to cite to many court decisions that dismiss similar “foreign” aviation crash litigations. But there are many decisions, including cases involving Australian accidents, that U.S. courts have refused to dismiss. *See, e.g., McCafferty v. Raytheon*, 2004 WL 1858080, at *3 (E.D.Pa. August 19, 2004) (denying FNC motion to dismiss in case involving Indonesian victims of plane crash in Indonesia); *In re Air Crash Near Nantucket Island, Massachusetts*, 2004 WL 1824385 (E.D.N.Y. Aug. 16, 2004) (denying FNC motion to dismiss in Egypt Air crash involving Egyptian and Canadian plaintiffs); *In re Air Crash Disaster Near Palembang, Indonesia*, 2000 WL 33593202 (W.D.Wash. Jan. 14, 2000) (denying FNC motion to dismiss in Indonesian plane crash involving Indonesian plaintiffs); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38 (3d Cir. 1988) (denying FNC motion to dismiss in Canadian plane crash involving Australian plaintiff); *Macedo v. Boeing Co.*, 693 F.2d 683 (7th Cir. 1982) (denying FNC motion to dismiss in Portuguese crash in Portugal involving Portuguese plaintiffs). Each *forum non conveniens* analysis is highly fact-specific and it is important to identify the relevant facts so that the U.S. Court will make an informed decision. *See, e.g., DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 33 (2d Cir.) cert. denied 537 U.S. 1028 (2002).

A plaintiff’s attorney must properly prepare for a *forum non conveniens* challenge before bringing any U.S. litigation arising from an Australian crash. This may include moving the wreckage to the U.S. and making arrangements so that witnesses will be available in the U.S. litigation. The key to win the challenge is to show the court that the case involves U.S. interests and, as such, that it is really a “U.S. case.”

2. The Defendant Bears the Burden.

The defendant bears the burden of proving that U.S. is an inconvenient forum. *Ford*

Motor Co. v. Ins. Co. of North America 35 Cal.App.4th 604, 610 (1995) (reversing *forum non conveniens* dismissal and citing *Stangvik v. Shiley Inc.* 54 Cal.3d 744, 751 (1991). “There . . . must be *evidence* – not merely bald assertions – to support the trial court’s determination.” *Id.* (emphasis in original). “Under *Gilbert*, [the seminal *forum non conveniens* case,] dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.” *Piper Aircraft Co. v. Reyno* 454 U.S. 235, 239 (1981). Dismissal is only appropriate when litigation in the United States poses a “heavy burden” on the defendant or the court.

A defendant must show that the public and private factors strongly support the foreign jurisdiction. *Gates Learjet Corp. v. Jansen*, 743 F.2d 1325, 1334 (9th Cir. 1984). The defendant must make “a clear showing of facts...which establish such oppression and vexation of a defendant as to be out of proportion to plaintiffs’ convenience, which may be shown to be slight or nonexistent” *Sarei v. Rio Tinto P.L.C.*, 221 F.Supp.2d 1116, 1164 (C.D. Cal. 2002), quoting *Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983).

The defendant has the burden of persuasion on all elements of an FNC analysis. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002). “[U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” *Norex*, 416 F.3d at 154 (quoting *Gilbert v. Gulf Oil*, 330 U.S. 501, 508 [1947]).

3. The Forum Non Conveniens Test.

In considering a motion to dismiss on the ground of *forum non conveniens*, the U.S. Second Circuit Court of Appeals has adopted a three-step test.

At step one, a court determines the degree of deference properly accorded the

plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum.

Norex Petroleum, 416 F.3d 146, 153 (2d Cir. 2005) (citing *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 74 [2d Cir. 2001] [*en banc*]). The Second Circuit's formulation of the test is consistent with the Supreme Court's *forum non conveniens* jurisprudence and the tests applied by most courts in the United States.

4. **Plaintiff's Choice of Forum Should be Granted Substantial Deference.**

U.S. courts have held that a foreign plaintiff's choice of forum, especially where the claim arose overseas, is not entitled to the same level of deference as would be offered to a U.S. plaintiff. But the emerging law demonstrates that even where a plaintiff is not a United States citizen, his or her choice should still be granted some deference. In *Iragorri*, the Second Circuit emphasized that the overriding consideration is not whether the plaintiff is a foreigner, but rather whether the plaintiff's choice of a United States forum was motivated by legitimate reasons. 274 F.3d at 73. "*Iragorri* instructs courts to consider the totality of circumstances supporting a plaintiff's choice of forum: 'The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice.'" *Norex*, 416 F.3d at 154 (quoting *Iragorri*, 274 F.3d at 71-72) (emphasis added). "[E]ven when the degree of deference is reduced, [t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable." *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006).

Deference to a plaintiff's forum choice is further enhanced when the defendant resides or

maintains a presence in the chosen forum. *See Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996). An important factor cited by the *Iragorri* court militating against FNC dismissal is the defendant's amenability to suit in the forum district. *See Iragorri*, 274 F.3d at 72-73. In *Norex*, the Second Circuit found that the defendants' presence in New York demonstrated "that genuine convenience did inform [plaintiff's] choice of a New York forum" over the plaintiff's home forum, and concluded that "[plaintiff's] decision to litigate in New York, where all defendants were amenable to suit (and where some reside or are incorporated) is properly viewed as a strong indication that convenience and not tactical harassment of an adversary, informed its decision to sue outside its home forum." *Norex*, 416 F.3d at 155.

Where an Australian is injured by a product designed, manufactured and put into the stream of commerce by a U.S. corporation, his or her decision to sue in the United States is reasonable and deserving of deference. Furthermore, as the Second Circuit has pointed out, plaintiffs are not the only parties that might be engaged in forum shopping:

Courts should be mindful that . . . defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience but because of similar forum shopping reasons. District courts should therefore arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum.

Iragorri, 274 F.3d at 75.

5. The Alternative Forum.

The moving party must establish that an adequate alternative forum exists. *Piper*, 454 U.S. at 254 n. 22; *see also Bank of Credit and Commerce International (OVERSEAS) v. State Bank of Pakistan*, 273 F.3d 241, 246, 248 (2d Cir. 2001); *Cheng v. Boeing*, 708 F.2d 1406, 1411 (9th Cir. 1983). If an appropriate alternate forum does not exist, the court does not have

discretion to dismiss the action. *American Cemwood Corp v. American Home Assurance Co.*, 87 Cal.App.4th 431, 436 (2001) (citing *Chong v. Superior Court* 58 Cal.App.4th 1032, 1036) (1997). “A rule permitting a stay or dismissal of an action over which no single alternative court could exercise jurisdiction would force the plaintiff to pursue separate actions in multiple states or countries to obtain complete relief.” *Id.* at 438-39.

Accordingly, the defendant must prove that Australia is an available forum. To do so, the defendant would have to establish that it is amenable to jurisdiction in Australia. This is traditionally done by filing an affidavit stating that the defendant will voluntarily subject itself to jurisdiction in Australia. Furthermore, the defendant may offer, or the court may require, that defense witnesses will be produced in Australia and/or that evidence located in the United States will be made available in Australia.

Courts frequently deny defendant’s *forum non conveniens* motions because the defendant fails to demonstrate that all named defendants are subject to jurisdiction anywhere other than U.S. A plaintiff will want to show that none of the U.S. defendants have operations in Australia and that the action is really a “U.S.” action in that it involves a U.S. product and U.S. defendants. Where a defendant fails to show that all parties to the action would be subject to jurisdiction in Australia, the court should find that Australia is not a suitable alternative forum and the court should refuse to dismiss the action. *See, e.g., American Cemwood*, 87 Cal.App.4th at 440.

6. The Balancing of Private & Public Interest Factors.

Even where an alternative forum exists, dismissal based on *forum non conveniens* is proper only where the plaintiff’s chosen forum imposes a “heavy burden on defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting

his choice.” *Piper*, 454 U.S. at 249.

In *Gulf Oil v. Gilbert* 330 U.S. 501 (1947), the Supreme Court articulated private interest factors affecting the convenience of the litigants and public interest factors affecting the convenience of the forum. The private interest factors are those that make trial and the enforcement of judgments expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of means to compel the attendance of unwilling witnesses. *Id.* at 508. The public interest factors include the administrative difficulties flowing from court congestion, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing competing interests of the chosen forum and the alternative jurisdiction. *Id.* at 508-09.

In *Gilbert* the court made clear the plaintiff’s forum choice should not be disturbed “unless the balance is *strongly* in favor of the defendant.” *Id.* at 508 (emphasis added); *see also Ford Motor Co.* 35 Cal. App. 4th at 611 (“the inquiry is not whether [the foreign forum] provides a better forum than does California, but whether California is a *seriously inconvenient forum*”) (emphasis in original)). Other courts applying the factors identified by the *Gilbert* court have held that “the standard to be applied is whether, in light of these factors, defendants have made a clear showing of facts that either (1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff’s convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court’s own administrative and legal problems.” *Cheng*, 708 F.2d at 1410.

a. The Private Interest Factors

In a U.S. case arising from an Australian aviation disaster, it is likely that important evidence will be located in both the U.S. and Australia. Where the case involves a U.S.-produced airplane, virtually all of the material evidence and witnesses bearing on the airplane's design and manufacture will be located in the U.S. Liability witnesses and evidence involving the aircraft's operation and maintenance on the other hand are likely to be located in Australia, allow with all damages evidence.

The factors addressed in the Supreme Court's decision in *Piper* are instructive. In *Piper*, the Supreme Court upheld the dismissal on *forum non conveniens* grounds where the following facts were present:

1. The aircraft at issue was registered and maintained in the Great Britain.
1. The aircraft was operated by a Scottish air service.
2. All six decedents were Scottish and their surviving family members were in Scotland.
3. The wreckage was located in a hanger in Scotland.

See Piper, 454 U.S. at 239. In *Piper*, the only connection with the United States was that it was where the aircraft was designed and manufactured.

In order to avoid a *forum non conveniens* dismissal, an Australian plaintiff needs to distinguish the facts of his or her case from those of *Piper*. For example, demonstrating, if possible, the following:

1. The aircraft had been flown and maintained in the U.S. before being shipped to Australia. This will increase the number of potential U.S. witnesses.
2. One or more decedents, plaintiffs or beneficiaries are U.S. citizens, or are located in the U.S.

3. U.S. witnesses, such as the National Transportation Safety Board investigators and defendant representatives to any Australian investigation are located in the U.S.

4. The wreckage, or at least components of the wreckage, has been moved to the U.S.

5. All potential Australian defendants agree to subject themselves to U.S. jurisdiction.

6. All potential damages witnesses will agree to appear in the U.S. for depositions and trial.

In a complex product liability case centered on an airplane or helicopter designed, tested, approved and manufactured in U.S. the plaintiff has a good chance of demonstrating that the overwhelming amount of evidentiary material and critical witnesses is here in the U.S., and not in Australia. It is one thing for a defendant to provide an affidavit that it will subject to Australian jurisdiction, but quite another thing to agree to produce the following evidence half-way around the world:

1. The defendant's witnesses involved in any relevant testing or investigation performed in the U.S. (Of course, NTSB and FAA witnesses will not be available in Australia.)
2. The design documents of the airplane or helicopter and relevant components, and witnesses relating to the relevant design issues in the case.
3. The airplane's U.S. certification documents and witnesses relating to the helicopter's certification.
4. Documents and witnesses regarding any training the pilot received in the U.S., possibly "factory" flight training.
5. The subject aircraft's manufacturing documents and witnesses regarding the relevant manufacturing issues in the case.

a. Public Interest Factors

Public interest factors include court congestion, use of time of the local jurors to decide foreign issues, and weighing the local interest in having the case decided at home against the interest of the alternate jurisdiction. A plaintiff will try to show that the U.S. has an interest in the litigation and that the litigation will not create undue court congestion. A defendant's argument that the U.S. little interest in a litigation that centers on a U.S. designed and manufactured, is without merit because U.S. courts have an interest in ensuring that U.S. corporations act to properly design, manufacture, test and distribute products.

8. Conclusion.

No matter what steps you take to properly prepare for the prosecution of an Australian aviation accident case in the U.S., you will not know whether it will stay in the U.S. until the court rules. A *forum non conveniens* dismissal is discretionary and the judge has tremendous authority to keep or dismiss the case. Most courts will carefully consider the *forum non conveniens* factors and render a fair decision. The key is to make sure that you do everything possible to help the court see that the case centers on U.S. evidence, rather than being simply an Australian case that plaintiffs filed in the U.S. in order to obtain a better recovery. If the court believes the plaintiff is "forum shopping" it will almost certainly dismiss the case.