

French, U.S. Courts Battle Over Rules Governing International Air Crash Cases

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The litigation involving the August 2005 crash of West Caribbean Airways flight 708 has led to an extraordinary legal conflict between the highest court of France and the U.S. Court of Appeals for the Eleventh Circuit. In 2009, the Eleventh Circuit affirmed the forum non conveniens dismissal of 152 passenger death cases commenced in Miami federal court, and directed the plaintiffs to refile their cases in the French department of Martinique.¹ While a large number of the plaintiffs reached settlements of their claims in Martinique, one group continued to fight that venue. Following two years of litigation in Martinique and French courts, this past December the French high court ruled that Martinique was not an available forum.²



Rejecting the Eleventh Circuit opinion, the Cour de Cassation held that the 1999 Montreal Convention treaty³ precluded forum non conveniens dismissal and directed that the claims be heard in the U.S. forum originally chosen by the plaintiffs. Last month, the remaining plaintiffs filed a motion before the Miami federal court seeking to vacate the judgment of dismissal and reopen the case. If the court refuses to reinstate the case, the legal stalemate will continue.

Flight 708 was en route from Panama to Martinique when it crashed in Venezuela. Everyone aboard the airliner 152 passengers and eight crew was killed. All of the passengers were Martinique residents. The resulting death actions were subject to the 1999 Montreal Convention treaty, which governs most international flights. Article 33 of that treaty provides a choice of five forums to bring suit "at the option of the plaintiff." Because flight 708 was chartered by a Miami-based company, an action under the treaty could be brought not only in Martinique, as the final destination of the passengers' trip, but in the United States.

Eleventh Circuit's Decision

The passengers' surviving family members filed treaty actions in Miami federal court against the airline and the charter company. The defendants moved for forum non conveniens dismissal, claiming that the most convenient place to hear the case was Martinique, the plaintiffs' home and the destination of flight 708, rather than Miami, whose only link to the disaster was as the location of the charter company. The plaintiffs, however, contended that the treaty precluded forum non conveniens and gave them the absolute choice to litigate in any one of the limited number of forums designated by the treaty. The U.S. Department of Justice submitted a Statement of Interest that outlined the history of the Montreal treaty negotiations and argued that forum non conveniens was available.

The Eleventh Circuit affirmed the district court's grant of forum non conveniens dismissal.⁴ The appellate court concluded that the treaty was unambiguous: Forum non conveniens was allowed because Article 33(4) provided that "[q]uestions of procedure shall be governed by the law of the court seized of the case." According to the court, the treaty clearly authorized the application of the longstanding procedural remedy in U.S. courts. The court directed the plaintiffs to pursue their claims in Martinique.

Decision of French High Court

The plaintiffs, who had already brought a protective suit against the airline in Martinique, filed another action there against the charter operator after the Eleventh Circuit's ruling. In the latter case, the plaintiffs argued against the Eleventh Circuit's decision and urged the Martinique court to dismiss their own claims on the basis that the filing of the original suit in the United States was entitled to absolute deference.

The trial and intermediate appellate courts rejected the plaintiffs' arguments, ruling that the case should proceed in Martinique, but the Cour de Cassation found otherwise. The French high court declared "the present lack of availability of the French venue," because the plaintiffs had already made their choice of a U.S. forum.⁵ The court reasoned that

in order to satisfy the objectives of predictability, safety and uniformity, as pursued by the Montreal Convention, that the claimant, and he alone, disposes of the choice to decide which jurisdiction shall indeed rule on the litigation, without being objected to by a rule of national procedure that would result in a contradiction of the necessary choice thereof

The French high court also ruled that it could not be forced to accept the case contrary to the treaty's terms but "retains its power to judge from a strict application of the rules of competence of the Montreal Convention" and that the court's decision "cannot be questioned under the pretense of a lack of jurisdictional competence."

Unsettled History

The same diametrically opposed views of the treaty's terms advanced by the French high court and the Eleventh Circuit are reflected in both the treaty's drafting history and the case law under Montreal's predecessor treaty, the 1929 Warsaw Convention.⁶

The Montreal Convention minutes show that the United States and Britain took completely different positions on the availability of forum non conveniens. The U.S. delegate proposed that the treaty include explicit language approving the application of forum non conveniens in treaty cases. While that language was not adopted, the U.S. delegate expressed his opinion "that the doctrine of forum non conveniens would be applied in his country whether the [treaty] prescribed that or not."⁷ By contrast, the British delegate, citing to his understanding of the Warsaw Convention, stated that the treaty gave plaintiffs an absolute choice among a limited number of forums, thereby precluding forum non conveniens.⁸

Despite the extensive discussions regarding the subject of forum non conveniens during the treaty's drafting, no agreement was reached among Montreal's drafters regarding the availability of the doctrine. Instead, it appears that the parties simply "agreed to disagree" and left the issue undecided.

The Montreal Convention copied the identical language from the Warsaw Convention that gave plaintiffs a choice of forums (with a fifth forum added in the Montreal Agreement) and left questions of procedure to forum law. In its 2002 decision, *Hosaka v. United Airlines*,⁹ the U.S. Court of Appeals for the Ninth Circuit held that under the Warsaw Convention the plaintiff had the absolute right to choose the forum and there was no option for forum non conveniens dismissal. The court concluded that while

the text of the Warsaw Convention is ambiguous, the purposes and drafting history of the treaty, as well as evidence of the parties' post-ratification understanding and treatment of the issue in other treaties and by other courts, persuade us that the contracting parties did not intend to permit the plaintiff's choice of national forum to be negated by the doctrine of forum non conveniens.

The Ninth Circuit declined to follow the 1987 U.S. Court of Appeals for the Fifth Circuit decision in *In re Air Crash Disaster Near New Orleans*,¹⁰ which held that forum non conveniens was available in a Warsaw Convention action:

The party initiating the action enjoys the prerogative of choosing between these possible national forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws. 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.

Likewise, in a 1999 decision in the TWA crash litigation in the Southern District, Judge Robert W. Sweet found that Warsaw's preservation of procedural issues for the forum court contemplated the use of forum non conveniens, "a procedural tool available to U.S. courts [that] squarely falls within the literal language of Article 28(2)."¹¹ But Judge Sweet concluded that the TWA cases involving French decedents should be retained in the United States and not dismissed to a French forum.

By contrast, the British Court of Appeal in *Milor v. British Airways, Plc.*,¹² held that the Warsaw Convention

precluded forum non conveniens, finding that the doctrine was "inconsistent with the right conferred on the plaintiff to choose in which of the competent jurisdictions his action will be tried ."

Outlook for Future Cases

The resolution of the *West Caribbean* litigation is uncertain. The plaintiffs have urged the district court to exercise its discretion to reopen the case because France has now declared that Martinique is not an alternative forum and the merits of the case have yet to be addressed. But the defendants, whose responsive papers have not yet been filed, will undoubtedly claim that the unavailability of the forum is the result of tactical choices made by the plaintiffs, and that they acted in bad faith by seeking reargument of the treaty issues in Martinique and France after losing before the Eleventh Circuit (and on their petition for certiorari to the Supreme Court).

The situation raises serious issues regarding whether a judgment of forum non conveniens dismissal under the treaty requires the plaintiff to act before the foreign court in conformity with the court's order. In a product liability case dismissed to Panama, a Florida state appellate court recently concluded that "if our courts determine that a foreign forum is available and adequate, it is the obligation of the plaintiff to assent to jurisdiction there and to *support* that court's exercise of jurisdiction over the matter and the parties."¹³

While the French high court found a "present lack of availability" of the forum, it is hard to believe that conclusion would have been the same had the plaintiffs acquiesced to venue in Martinique. Yet, unlike other forum non conveniens cases, *West Caribbean* is governed by a treaty that embodies a uniform international rule, one that France and other member nations believe does not permit forum non conveniens. There is no final arbiter of a disagreement regarding the interpretation of the treaty among the member states, and France is not bound by the Eleventh Circuit's view.

In future cases, the availability of forum non conveniens under the treaty is still an open issue in most U.S. courts. Although recent U.S. cases favor use of the doctrine, the French high court's decision could lead to a reassessment of that viewpoint, particularly in light of treaty's goal to promote uniformity. The decision could also undermine the dismissal of cases to France and other civil law countries that generally do not recognize forum non conveniens. Obviously, our courts cannot force a foreign tribunal to accept jurisdiction over a case, and the fundamental prerequisite for the application of the doctrine is the availability of an alternate forum to hear the lawsuit. Plaintiffs can now argue that France is not an available alternative forum because its courts do not accept jurisdiction over treaty cases dismissed on forum non conveniens grounds.

Yet, despite the French high court's decision, there remains some doubt whether the Martinique court is actually unavailable. At the end of the day, if the Miami federal court refuses to reopen the case, will Martinique and France still keep the courthouse doors locked to their own citizens?

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Endnotes:

1. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), cert. denied, 130 S. Ct. 3387 (2010).
2. *Jacques v. Societe Newvac Corp.*, Cour de cassation Civ. 1re, No. 1201 (Dec. 7, 2011).
3. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (2000).
4. *In re West Caribbean Airways, S.A.*, 619 F.Supp.2d 1299 (S.D.Fla. 2007), aff'd sub nom., *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009).
5. The English language quotations of the Court de cassation opinion are from the translation attached as Exhibit B to the plaintiffs' motion papers. Rule 60(b)(6) Motion to Vacate Judgment, *In re: West Caribbean Airways, et al.*, Case No. 06-22748-CIV-UNGARO (S.D.Fla. filed Feb. 27, 2012).
6. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934).
7. 1 International Civil Aviation Organization, International Conference on Air Law, Montreal 10-28 May 1999, at 159 (2001) (Minutes).
8. *Id.* at 162.

9. 305 F.3d 989??(9th Cir. 2002).

10. *In re Air Crash Disaster near New Orleans*, 821 F.2d 1147, 1161-62 (5th Cir. 1987)(en banc), vacated on other grounds sub nom. *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), reinstated except as to damages by *In re Air Crash Disaster Near New Orleans, La.*, 883 F.2d 17 (5th Cir. 1989) (en banc).

11. *In re Air Crash Off Long Island*, 65 F.Supp.2d 207, 213 (S.D.N.Y. 1999).

12. [1996] Q.B. 702, 706 (Eng. C.A.).

13. *Scotts Co. v. Hacienda Loma Linda*, 2 So. 3d 1013, 1018 (Fla. Dist. Ct. App. 2008)(emphasis in original).
