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Using the Forum Non Conveniens Doctrine With Foreign Victims

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The forum non conveniens doctrine provides federal district courts with broad discretion to dismiss otherwise viable actions, in particular those brought by non-U.S. residents.[1] In recent years, judges across the country have used this power to effectively shut many foreign victims of aviation disasters out of U.S. courts. On occasion, even American citizens killed in foreign disasters have been told to pursue their claims against U.S. defendants in other countries far from home. This trend is seen most clearly in the federal courts, with some state courts, most notably those in Illinois, bucking the trend.

The forum non conveniens doctrine calls on courts to conduct a two-part inquiry. The first step is to determine whether an available alternative forum exists for the action. If there is such a forum, the court must weigh various private and public interest factors to determine whether the case should be dismissed.

Courts are loath to find that the legal systems of other countries provide inadequate remedies and to procure dismissals defendants regularly agree to waive jurisdictional defenses and statutes of limitations to make a foreign jurisdiction "available." Defendants often agree to export evidence, including witnesses, to foreign jurisdictions to support forum non conveniens arguments. And courts have increasingly accepted such agreements and ordered dismissals.

While forum non conveniens is about public and private convenience in theory, in practice it is about money damages. A U.S. manufacturer seeks dismissal based on the expectation that the damage recovery in a foreign court will be much less than in the U.S. The manufacturer may even believe that the plaintiffs will abandon their suit if the case cannot be pursued in the U.S.

The success of aviation defendants in recent years in obtaining forum non conveniens dismissals, however, has in turn spurred the development of tort recoveries in foreign countries, which can make a foreign judgment far more costly to defendants than in the past. For example, in a case arising out of the June 2009 Air France Flight 447 disaster, a Brazil court ordered the airline to pay $4.6 million (including legal fees of 10 percent) for the death of a woman survived by her parents and siblings. This damage award exceeds the amount that could be recovered in many American jurisdictions.

TAM Airlines Disaster

In *Tazoe v. Airbus S.A.S.*,[2] the U.S. Court of Appeals for the 11th Circuit affirmed the forum non conveniens

dismissal of claims arising from the worst aviation disaster in Brazil's history.

On July 17, 2007, TAM Airlines Flight 3054 overran a rain-soaked runway as it attempted to land in Sao Paulo and crashed into a warehouse and fueling station, killing 187 people aboard the plane and 12 people on the ground. A U.S. citizen from Florida was among the victims.

The airplane had an inoperative thrust reverser on its right engine. Thrust reversers help slow the airplane upon landing along with the airplane's brakes. TAM knew that the thrust reverser was not working, but decided that the airplane was still safe to fly as long as its pilots followed proper procedures.

When they attempted to land in Sao Paulo, however, the pilots made a mistake: they left the throttle of the number two engine in "climb" mode instead of pulling it back to idle. This meant the right engine produced more thrust and created an asymmetrical condition when the pilots deployed the left engine's thrust reverser. The mistake also caused the airplane's spoilers not to deploy and its auto brakes not to engage. As a result, the pilots could not stop the airplane and it ran off the runway.

Following the disaster, the plaintiffs settled their claims against the airline and filed actions against various manufacturing defendants in the Southern District of Florida. The defendants brought a motion to dismiss under the forum non conveniens doctrine, claiming the suits should be heard in Brazil.

The district court found that Brazil was an available and adequate forum based on the agreement of the manufacturers to submit to Brazil's jurisdiction and to toll the statute of limitations. The court then concluded that the balance of private and public interest factors favored dismissal, even for the death claim brought for the American passenger.

On appeal, the Eleventh Circuit affirmed. The court held that the district court was entitled to substantial deference and found that the "vast majority [of evidence] appears to be in Brazil or France." The wreckage was in Brazil, the "results of five governmental investigations of the accident" were in Brazil, damages information was in Brazil, the court lacked authority to compel certain witnesses to attend proceedings, the manufacturers could not implead certain parties in the U.S. litigation, the accident site was in Brazil, and a trial in Florida would incur significant translation costs.

The court found that while the family of the sole United States victim was entitled to "somewhat more deference" in their choice of a U.S. forum, the district court did not abuse its discretion in dismissing the claim.

Air France Disaster

In *In re Air Crash Over the Mid-Atlantic on June 1, 2009*,[3] a district court recently dismissed claims for the deaths of a large group of passengers, including two U.S. citizens, in the crash of Air France Flight 447, an Airbus A330, which took off from Rio de Janeiro bound for Paris.

The last contact from the crew was a routine message to Brazilian air traffic controllers over the Atlantic Ocean. Forty minutes later, the airplane emitted a four-minute-long series of automatic radio messages that signaled numerous problems before it disappeared from radar. The disaster took the lives of 216 passengers and 12 crew members.

The foreign and U.S. plaintiffs sued the manufacturer Airbus and other component manufacturers. The estate representatives of the two U.S. decedents also sued Air France under the Montreal Convention, which provides for jurisdiction, inter alia, in the place where the plaintiff maintained his or her "principal and

permanent residence." Air France, however, argued that there was no treaty jurisdiction in the U.S. because the decedents had been living in Brazil.

The court rejected Air France's argument, finding that the Montreal Convention's use of the word "permanent" required more than just determining where the victim was living at the time of the accident. The court examined the convention's drafting history and concluded that "principal and permanent residence" was akin to domicile and while the American decedents were residing in Brazil, they had not abandoned their U.S. domicile.

Airbus and Air France also sought forum non conveniens dismissal. The threshold question was whether such dismissal was even available in the two U.S. cases against the airline, because the U.S. Court of Appeals for the Ninth Circuit previously held under the Warsaw Convention (the predecessor to the Montreal Convention) that forum non conveniens was contrary to the treaty's purpose of allowing plaintiffs flexibility in choice of forum.[4]

The district court found, however, that forum non conveniens should be considered in a Montreal Convention case, citing the recognition of the doctrine at the time the treaty was enacted and comments from the drafting history.[5]

In applying the doctrine, the court recognized the trend toward dismissing the claims of foreign plaintiffs: "[c]ourts inside and outside the Ninth Circuit have dismissed on forum non conveniens grounds air crash cases brought by primarily foreign plaintiffs."[6] On private interest factors, the court relied heavily upon defendants' agreement to "provide all of their evidence in France." In contrast, the court found it would be very difficult to get the evidence, including all the physical evidence, located in Europe, into the U.S. litigation.

The court held that the public interest factors heavily favored dismissal, finding that France was more interested than the U.S. in the litigation since the flight was headed for France and had many more French than U.S. citizens on board. In contrast, the court found that the U.S. interests were not sufficient to justify the investment of "judicial time and resources" in the case. The court also noted that the foreign plaintiffs could name Air France as a defendant in France, but not in the U.S.

Following the dismissal, the U.S. plaintiffs filed a motion to reconsider the dismissal of Air France, arguing that the airline was almost certainly liable for unlimited damages under the Montreal Convention and that the central issue in the case against the airline was damages, not liability. Since all of the damages proof was in the U.S. and Brazil, a dismissal to France was contrary to the purpose of forum non conveniens. The court denied the motion, and the U.S. plaintiffs have appealed. The district court has not yet ruled on a separate motion to reconsider filed by the foreign plaintiffs.

The Gol Flight 1907 Disaster

In *In re Air Crash Near Peixoto De Azeveda, Brazil on September 29, 2006*, 574 F.Supp.2d 272 (E.D.N.Y. 2008),[7] wrongful death claims for Brazilian passengers killed in the September 2006 Gol Flight 1907 disaster.

Gol Flight 1907 collided with an Embraer Legacy 600 jet operated by defendant ExcelAire, a New York company, with two pilots from New York. While the Gol jet crashed, killing all aboard, the ExcelAire plane managed to land safely. Most of the plaintiffs settled with Gol in Brazil and brought suit in Brooklyn federal court against ExcelAire and its pilots, and various U.S. manufacturers of radar and collision warning equipment on the aircraft.

The manufacturing defendants agreed to Brazilian jurisdiction, to waive any statute of limitation defense and to

make witnesses and evidence available in Brazil. ExcelAire, however, did not agree to toll the statute of limitation. The pilots refused to return to Brazil for fear of criminal prosecution, but offered to appear for a videotaped deposition in the U.S.

The court rejected plaintiffs' arguments that Brazil was not an available alternate forum. It then found that the private and public interest factors fell "on both sides of the aisle, and down the middle…." The court noted "other [involved] entities" including Gol and Embraer, both headquartered in Brazil, A-Tech, a Brazilian technology company, Brazil's air traffic control agency and Brazil's government agency were charged with investigating accidents.

In the end, the court decided to dismiss the case because of its concern that the court lacked jurisdiction over potentially liable parties and also lacked the power to compel the production of documents and witness testimony in Brazil. The U.S. Court of Appeals for the Second Circuit affirmed the court's ruling in a summary order, stressing the deference owed to the trial court in making forum non conveniens determinations.[8]

Other Recent Decisions

In *Francois v. Hartford Holding Co.*, [9] wrongful death actions were brought in the U.S. Virgin Islands on behalf of four Dominican nationals and a citizen of the Netherlands arising from a crash on Dominica. The flight originated in St. Maarten and its destination was Dominica. Cardinal Airlines, Ltd. (Cardinal), a Dominican airline, sold the tickets to the plaintiffs. Defendant Hartford Holding Company leased the airplane to defendant Air Anguilla, a St. Thomas corporation, which maintained it and operated it for Cardinal pursuant to a lease agreement entered into in Dominica.

The Organization of Eastern Caribbean States Civil Aviation Authority, the United States National Transportation Safety Board and the Federal Aviation Administration investigated the accident.

The court found Dominica was an available forum based on defendants' consent to jurisdiction and that Dominica was an adequate alternative forum, noting that Dominica recognizes a cause of action for personal injury arising from negligence. The court also relied on the defendants' waiver of the statute of limitation, and rejected the affidavit of plaintiffs' expert that the Dominican courts would not recognize a waiver of the statute of limitations.

The plaintiffs, none of whom were United States citizens at the time the action was filed, and only one of whom, Mary Anthony, purportedly became a citizen since then, have given no reason why they chose the District of the Virgin Islands as the forum. None of them resides there. Their attorney has no office here and is appearing pro hac vice. None of the acts regarding liability or damages occurred here. The only connection to the Virgin Islands is that one defendant, Air Anguilla, had an office in St. Thomas. Thus, the plaintiffs' choice of the District of the Virgin Islands is not entitled to a strong presumption of convenience, but will be given some deference.[10]

In re Air Crash Disaster over Makassar Strait, Sulawesi[11] arose from the crash of Adam SkyConnection Airlines Flight 571, a Boeing 737, off the coast of Sulawesi. The crash killed all 102 souls aboard. The investigators found that the crash occurred when the pilots became engrossed with troubleshooting a system malfunction of the airplane's inertial reference system. As a result, the pilots neglected their other flight responsibilities, the airplane's autopilot disengaged and the airplane went out of control. When the pilots attempted to correct the problem, they over-stressed the airplane and caused a structural failure.

Plaintiffs, none of whom are U.S. citizens or residents, brought suit in the Northern District of Illinois against a

number of U.S. manufacturers, including Boeing. Defendants moved to dismiss on forum non conveniens grounds, arguing that the litigation belonged in Indonesia and agreeing to go there to defend themselves.

The court rejected plaintiffs' argument that corruption in Indonesia rendered it an unavailable forum, noting that the argument did not have an impressive track record. The court then quickly decided that the case should be dismissed to Indonesia, finding that it would be easier there to obtain necessary evidence and because defendants could implead the airline there.

Conclusion

Foreign plaintiffs often bring claims in our courts that belong elsewhere, and the forum non conveniens doctrine serves to protect our courts from hearing suits that have little relationship to the U.S. But courts should take special care to protect the rights of American citizens to pursue their claims in U.S. courts. Moreover, product safety will suffer from the routine dismissal of foreign claims involving U.S. made products. Often the key evidence on such claims is located with the designers or makers and not at the accident site. In sum, while it is an important tool, forum non conveniens should never be applied lightly, as it can impair or end viable claims.

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Endnotes:

1. 454 U.S. 235 (1981)

2. 631 F.3d 1321 (11th Cir. 2011)

3. ___ F. Supp. 2d _____, 2010 WL 3910354 (N.D. Cal. Oct. 4, 2010)

4. *In re Air Crash Over the Mid-Atlantic* on June 1, 2009, _____F.Supp.2d _____, 2010 WL 3910354 (N.D. Ca). Oct. 4, 2010) (quoting *Hosaka v. United Airlines, Inc*., 305 F.3d 989, 993 (9th Cir. 2002).

5. Id. at *5 (citing *In re West Caribbean Airways*, S.A., 619 F.Supp.2d at 1326). (The U.S. filed statement of interest in the *West Caribbean Airways* case favoring the availability of forum non conveniens in Montreal Convention cases).

6. Id at *6.

7. 574 F.Supp.2d, 272 Supp.2d 272 (E.D.N.Y. 2008)

8. *Lleras, et al. v. Excelaire Services, Inc. et al.*, 354 Fed.Appx. 585, 2009 WL 4282112 (2d Cir. Dec. 2, 2009).

9. *Francis v. Hartford Holding Co.*, 2010 WL 1816758 (D.V.I. May 5, 2010)

10. Id. at *5

11. 2011 WL 91037 (N.D. Ill. Jan. 11, 2011).