UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re AIR CRASH DISASTER NEAR PALEMBANG, INDONESIA ON DECEMBER 19, 1997

MDL No. 1276

THIS DOCUMENT RELATES TO ALL ACTIONS

ORDER

I. INTRODUCTION

This group of cases derives from the crash of SilkAir Flight 185 on December 19, 1997. The Boeing Company, a defendant in each case, has filed a motion to have the cases dismissed on the ground of forum non conveniens. Having reviewed the papers filed by the parties and determined that oral argument on this motion is not necessary, the Court now denies the motion for the following reasons.

II. ANALYSIS

Courts will rarely disturb the presumption in favor of a plaintiff's chosen forum, and a defendant moving for forum non conveniens dismissal has a substantial burden to meet. The defendant must provide clear evidence that either (i) this forum is vexatious or oppressive for the defendant to a degree that is out of proportion to its convenience for the plaintiffs, or (ii) this forum is inappropriate because of administrative or legal problems created for the Court. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981).

39.

A. IDENTIFICATION OF AN ALTERNATE FORUM.

Forum non conveniens analysis must begin with the identification of an adequate alternate forum to hear the case. Creative Technologies, Ltd. v. Aztech System PTE, Ltd., 61 F.3d 696, 701 (9th Cir. 1995). Here, Boeing offers both Indonesia and Singapore as alternatives. Both countries recognize causes of action for the decedents of the passengers in an air crash, and Boeing would waive any possible jurisdictional or statute of limitations defenses. Courts, including the Ninth Circuit in a case involving a plane crash, have previously found both countries to be adequate alternatives. Zipfel v. Halliburton Company, 832 F.2d 1477, 1483-84 (9th Cir. 1987). The Court therefore finds that Singapore and Indonesia are adequate alternatives, and turns to the second stage of the analysis.

B. WEIGHING OF PUBLIC AND PRIVATE INTERESTS.

At this stage the Court must determine whether Boeing has succeeded in showing that the balance of public and private factors at work in this case tips strongly in favor of dismissal. Piper Aircraft, 454 U.S. at 257 . The Supreme Court has identified a list of public and private interests for the Court to consider when ruling on a motion for forum non conveniens dismissal. The private interest factors include access to sources of proof; the availability of compulsory process and cost of obtaining attendance from unwilling witnesses; the possibility of viewing the site of the accident, if appropriate; and any other relevant private interests. The public factors include administrative difficulties created by court congestion; the local interest in having local controversies decided at home; the forum that is home with the law that governs the action; the avoidance of conflict of law and application of foreign law difficulties; and the unfairness of burdening citizens in an unrelated forum with jury duty. See Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 508 (1947); Zipfel v. Halliburton Company, 832 F.2d 1477, 1485 (9th Cir. 1987).

1. Access to Evidence.

The access to evidence factor is central to Boeing's argument in this motion. The crash occurred in Indonesia and therefore, in Boeing's estimation, much of the physical evidence and many of the

witnesses are found there. In addition, the investigation into the crash is being conducted by authorities in these countries. SilkAir and its parent corporation Singapore Airlines are not amenable to suit for these claims in the United States under restrictions imposed by the Warsaw Convention.[1] And damages evidence for many of the decedents is primarily found overseas because most of them were citizens of other countries.

It is true that the wreckage of the plane remains overseas. The plaintiffs' theory in this case, however, is not based on manufacturing defects or on maintenance problems particular to this aircraft. Rather they allege that the crash was caused by a design defect in the Boeing 737 rudder control mechanism. This defect has already been extensively investigated by Boeing, the plaintiffs allege, because it is allegedly the cause of other air crashes and near crashes, including at least one crash in the United States. Many of the witnesses and much of the tangible evidence related to this alleged design defect theory is located in Washington State or elsewhere in the United States. Of course, the plaintiffs will need to establish that the alleged design defect was, in fact, the cause of the SilkAir crash. But it is clear that a significant portion of the evidence related to this theory of liability is to be found at the place where the plane was designed, not the place where it crashed.

Boeing's explanation for the SilkAir crash is that the pilot committed suicide by deliberately flying the plane into the ground. Several news stories have reported this theory, and the Singapore government has recently opened an investigation into the case, indicating that they are treating it as a potential homicide and suicide. Boeing argues that conducting discovery and trial in a jurisdiction apart from this investigation may unreasonably limit the parties' access to important evidence about the crash.

Although it is clear that Boeing's ability to make its defense may be somewhat hampered in these circumstances, the level of prejudice appears far from overwhelming. Boeing emphasizes that the authorities conducting official investigations into the crash are in Indonesia and Singapore, but it admits

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[1]The plaintiffs dispute this claim, at least as it applies to a potential third-party claim by Boeing against the carriers, but, for purposes of this motion, the Court assumes that it is accurate.

that these authorities have not issued a final report and have been unwilling to release much of any information from the investigation. Boeing does not indicate that they would be any more forthcoming if these lawsuits were moved to Indonesia or Singapore. In addition, at least some of the investigators working on the crash are from the United States and would therefore be available to testify here. Finally, a substantial portion of the overseas evidence appears to have only a tenuous connection to the issues in this case, even under Boeing's theory of the accident. It is not clear, for example, what the maintenance records of the airplane would contribute.

Boeing insists that the Court should grant more credence to the defendants' suicide theory than to the plaintiffs' design flaw theory because the plaintiffs' theory lacks evidentiary support. The Court notes the inconsistency between this position and Boeing's insistence at two earlier discovery conferences that materials related to liability are irrelevant to the forum non conveniens issues. More to the point, the contention that the plaintiffs' claims are not supportable on the evidence should be raised in a motion for summary judgment rather than a motion to dismiss for forum non conveniens. Given the forum non conveniens presumption in favor of plaintiffs, the Court must assume that the plaintiffs' theory is viable. Although Boeing has made some showing that evidence supporting its defenses is more accessible to litigants in Singapore or Indonesia than to litigants here, this showing, on its own, hardly amounts to clear evidence that the burden Boeing faces is out of proportion to the benefit afforded to the plaintiffs by litigating in this forum.

2. Other Private Factors.

Boeing's argument does not receive any significant support from a consideration of the other private factors at stake, which either echo the issue of access to evidence or are not important. Although the availability of compulsory process to secure evidence in Singapore and Indonesia would presumably assist Boeing in making its case, Boeing has not identified any specific witness who refuses to submit to discovery here but who would be amenable to compulsory process overseas. Also neither party has provided any reason that viewing the crash site itself would be important for the Court or the jury. Thus,

the Court concludes that the private factors do not support Boeing's motion for forum non conveniens dismissal.

3. Public Factors.

The public factors also fail to persuade the Court that this case should be dismissed. At least three of the crash victims whose relatives have brought claims were United States citizens. Granting Boeing's motion, then, would deny United States citizens access to United States courts for wrongful death claims brought on behalf of United States decedents against a United States manufacturer. Although Boeing has cited some cases in which courts found the presence of United States plaintiffs insufficient to overcome other factors supporting forum non conveniens dismissal, there is no doubt that this Court must be particularly deferential to the plaintiff's choice of forum when that plaintiff is a United States citizen. See Piper Aircraft Company v. Reyno, 454 U.S. 235, 255-56 (1981).

The Court also notes that there is a substantial local connection to this controversy. Boeing is among the biggest corporations and the largest employers in Western Washington. The 737 aircraft that the plaintiffs allege was defectively designed is a very popular plane which carries a great number of passengers into and out of this district every day. Although the relationship to Indonesia and Singapore is arguably stronger, the connections to this district are significant and certainly justify the expenditure of public resources on resolution of the dispute.

Analysis of the choice of law issues is difficult because the Court has not yet determined the substantive law governing these claims. Boeing argues that any air crash occurring on navigable waters more than three miles beyond the territorial limits of the United States is governed by the Death on the High Seas Act. The plaintiffs respond that at least some parts of the aircraft fell to the ground, not into navigable water, and therefore that application of DOHSA is far from certain. They argue instead that the claims are governed by product liability and other United States state tort law principles. Assuming that Boeing is correct and DOHSA governs, the Court would then conduct a second layer of choice of law analysis. The Court looks to principles set forth in admiralty cases to identify which jurisdiction's

tort law applies to the claims. The Court must consider (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant; (5) the place where the contract of carriage was made; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the carrier's base of operations. See In re Air Crash Near Bombay, 531 F.Supp. 1175, 1189 (W.D. Wash. 1982).

Boeing addresses these factors only briefly, and the plaintiffs not at all. The Court is not prepared to decide the question at this point. A cursory consideration suggests that a majority of the factors favor application of the law of Indonesia or Singapore, but it is not clear that this simple tally directs application of foreign law without a more searching inquiry into significance of these factors as they relate to this case and as they have been applied in other air crash cases.[2] Thus, even under the assumption that the Death on the High Seas Act governs these claims, the Court is unable to conclude with certainty that foreign law governs the liability issues in the case.

III. CONCLUSION

In sum, neither the private nor the public factors at issue here, nor the aggregate of all of these, clearly demonstrate that this trial would be more fairly or more efficiently conducted in a different forum. The Court finds that Boeing has failed to show that these factors strongly favor dismissal on the ground of forum non conveniens, and denies the motion to dismiss.

DATED this 12 day of January, 2000.

Chief U.S. District Judge

[2]For example, the plaintiffs might challenge the unmodified application of the "law of the flag" and "domicile of the carrier" factors when the defendant in the suit is the manufacturer.