NOT IN MY BACKYARD: FOREIGN AVIATION ACCIDENT PLAINTIFFS AND *FORUM NON CONVENIENS*

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More and more people all over the globe are flying. As the international aviation community grows, so does the number of aviation crashes on foreign soil. Whenever an aviation accident occurs, regardless of locale, flight origin, nationality of the passengers or destination of the flight, the United States is almost always the target forum of plaintiffs' lawyers. In fact, aviation plaintiffs' lawyers in the United States often have worldwide contacts and foreign language web sites to try and steer potential clients to their representation and, ultimately, litigation in the United States.

Why do foreign plaintiffs want to litigate in the United States? The reasons are many. The most compelling is our jury system. A jury can award damages with almost no restraint. Not only does our system of jurisprudence allow the jury to decide the facts, it also allows juries to award damages for past and future economic loss, past and future pain and suffering and, perhaps most alluring to plaintiffs' lawyers, punitive damages designed to punish defendants. Additionally, as air travel is so common in the United States, the likelihood of the jury being members of the flying public is fairly high. Any good plaintiffs' lawyer will convince a jury that they are responsible for keeping society, and air travel, safe by holding culpable defendants accountable. Thus, the generosity of juries and their willingness to punish defendants often comes from their belief, courtesy of plaintiffs' lawyers, that large awards send a message to defendants that will ultimately result in the improved safety of air travel.

There are other reasons plaintiffs choose to litigate in the United States. The availability of contingency fees, where plaintiffs' attorneys are often entitled to at least one-third of any recovery, rather than an hourly rate of compensation for their services, is a

huge motivator, especially when recoveries for aviation crashes can be several millions of dollars. There are also relaxed rules of discovery and freedom of information laws that permit plaintiffs access to a wealth of information that is often unavailable in other countries. Legal theories, such as strict liability and *res ipsa loquitur*, that make it easier for plaintiffs to recover, are an additional incentive for foreign plaintiffs to try and get jurisdiction in the United States. Finally, if a plaintiff loses, there are no repercussions, such as attorney's fees that are commonly awarded to defense counsel in foreign forums upon a plaintiff's loss.

Additionally, from a defense counsel perspective, defending cases involving overseas accidents presents several problems such as obtaining access to documents, translating acquired documents, compelling witnesses to testify, obtaining evidence and choice of law issues. A foreign plaintiff living in the venue where the accident occurred will not be as prejudiced by these issues.

In short, plaintiffs' lawyers across the globe want to litigate aviation cases in the United States because doing so is often easier, essentially risk-free and almost always results in more money for themselves and their clients. One means by which aviation defense lawyers can get these cases out of the United States and curtail this concerted effort is through the doctrine of *forum non conveniens*.

Complaint Received from Foreign Plaintiff for Aviation Accident Outside the United States—Now What?

As soon as the complaint is served, defense counsel must consider moving it overseas via a motion to dismiss on the grounds of *forum non conveniens*. The first consideration is to determine what foreign jurisdiction can hear the case and whether it would be favorable to have the case transferred to that jurisdiction. Despite the numerous advantages of litigating in the United States, as detailed above, there may be potential hazards in the alternative

foreign forum that would actually make the United States a more advantageous forum. With respect to the alternative forum, defense counsel must look at the rules of civil procedure, appeal process, ability to obtain jurisdiction over all potential parties, causes of action available to plaintiffs, ability to enforce judgments, availability of indemnification and contribution, available defenses, time allowed for discovery, availability of witnesses and discovery mechanisms to compel disclosure, the types of damages allowed, the likelihood of recovery by the plaintiffs and the maximum exposure to the defendants. Local counsel in the alternative forum may need to be retained for purposes of investigating the above considerations.

Not surprisingly, plaintiffs' attorneys will name defendants domiciled in the United States, who have little or no connection to the subject accident, simply to try and establish a connection to the United States. Additionally, plaintiffs also file identical suits against identical parties in multiple venues throughout the United States, hoping to have jurisdiction "stick" in at least one locale.

Another tactic employed by plaintiffs' attorneys is to bring suit in a particular state court jurisdiction that has a reputation of denying motions to dismiss based upon *forum non conveniens*. In these cases, defense counsel should try and have the case removed to federal court before seeking a dismissal based upon *forum non conveniens* to avoid an adverse ruling from a plaintiff-friendly state court. Of course, the grounds for removal are generally somewhat limited in that there must be a federal question or diversity of citizenship for there to be removal. Thus, defense counsel must also be wary of plaintiffs who name specific defendants for the sole purpose of defeating diversity of citizenship.

Finally, the aviation defense attorney must consider whether the Warsaw Convention ("Warsaw") and/or the Montreal Convention ("Montreal") are applicable. Generally, these are international treaties that apply to the international carriage of

persons by air. A carrier will be found liable for damages for death or bodily injury where the accident that caused the death or bodily injury occurred either on the aircraft or while the passenger was embarking or disembarking. Warsaw provides four jurisdictional bases where the plaintiff may file suit: 1) where the air carrier has its principal place of business; 2) where the carrier is domiciled; 3) where the contract was made; and 4) the place of destination. Montreal adds a fifth jurisdictional base, the passenger's principal or permanent residence at the time of the accident. If either Montreal or Warsaw is applicable, then the case cannot be dismissed on *forum non conveniens* grounds as the jurisdictional bases identified preempt the federal court's discretionary power to dismiss based upon *forum non conveniens*.[1] In cases where Warsaw is applicable to some of the plaintiffs, but not others, the court will keep the Warsaw plaintiffs and can dismiss the non-Warsaw plaintiffs, if warranted, despite the fact that essentially the same case will be heard in two different forums.

The Alternative Forum Looks Good – Time for a Motion to Dismiss Under *Forum Non Conveniens*

Once defense counsel makes a determination that the alterative forum is more attractive, a motion to dismiss based upon the doctrine of *forum non conveniens* is the next step. Time is of the essence, as the motion generally must be made within a reasonable time after the basis for the motion becomes known, or should have been known, by the defendant seeking to make the motion.

Forum non conveniens literally means "inconvenient forum" or "inappropriate forum". Originating in Scotland in the early 1900's, the doctrine of *forum non conveniens* was first mentioned in this country in 1929 as a weapon to fight calendar congestion in the trial courts of populous cities.[2] The doctrine then

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[1] *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002).

[2] Paxton Blair, The Doctrine of Forum non conveniens in Anglo-American Law, 29 Colum. L. rev. 1, (1929).

grew to prominence when the Supreme Court relied upon it to prevent plaintiffs from choosing an inconvenient state forum for the sole purpose of harassing defendants.[3] Today, *forum non conveniens* primarily applies in cases with an international dimension, such as aviation crashes outside the United States.

The defendant has the very heavy burden of proof with respect to a *forum non conveniens* motion. Courts traditionally give more deference to a domestic plaintiff's choice of forum in contrast to a foreign plaintiff's choice of forum. Being a domestic plaintiff, however, does not guarantee access to the United States' courts. Nonetheless, regardless of whether the plaintiff is foreign or domestic, a defendant must satisfy two factors in order to prevail on a *forum non conveniens* motion: 1) it must establish that there is an available and adequate alternative foreign forum; and 2) it must show that a weighing of both public and private factors favors the available and alternative foreign forum.[4] The use of affidavits to support and oppose *forum non conveniens* motions is permitted.[5] Of course, as discussed above, defense counsel should have already made a determination that this foreign forum is advantageous for his or her client before making the motion.

In the event that the motion is ultimately denied, the decision is not reversible absent a showing of abuse of discretion.

Available and adequate alternative forum

Simply stated, an alternative forum is available if it can be demonstrated that all the parties can be brought before the foreign court and that the foreign court has jurisdiction over the claims asserted in the litigation. If there is a problem in the proposed alternative forum, such as an expired statute of limitations or an inability to get jurisdiction over the moving defendant, the

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3 *Gulf Oil Corp v. Gilbert*, 330 U.S. 501 (1947).
4 *Piper v. Reyno*, 454 U.S. 235 (1981).
5 *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).

defendant will often consent to jurisdiction and waive the statute of limitations defense so the motion will be successful. Additionally, it is not uncommon for the court to condition dismissal on a defendant not asserting jurisdictional or statute of limitations defenses

Additionally, the defendant bears the burden of establishing that the proposed forum is "adequate" in that the plaintiff has an opportunity to make a meaningful recovery. A difference in the substantive law of the proposed forum, such as availability of punitive damages, or damages for pain and suffering, does not automatically result in a finding that the forum is not adequate; rather, it is one factor to be weighed by the court.[6] Moreover, the fact that the recoverable damages in the foreign forum are lower than the recoverable damages in the United States does not make the foreign forum inadequate.[7] For instance, in *Tiwari v. BWIA International*, the United States District Court for the Southern District of New York granted a *forum non conveniens*motion transferring the case to Guyana, despite the fact that no recovery was available for psychological injuries in a false imprisonment case, damages that are available in New York.[8] The Court found that the happening of the occurrence in Guyana, combined with the majority of the witnesses, including the police, residing in Guyana outweighed the fact that the plaintiff's damages were limited. However, if the potential recovery is so low that the plaintiff cannot even afford to pursue the claim in the alternative forum, the court will likely find that forum inadequate.[9]

In order to bolster the adequacy of a proposed alternative foreign forum, defendants can agree to make all of the evidence obtained through discovery available in the foreign forum, thus lessening the impact of the discovery rules of the proposed

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6 *DeMelo v. Lederle Labs.*, 801 F.2d 1058 (8th Cir. 1988).
7 *Borden, Inc. v. Meigi Milk Prods. Co.*, 919 F.2d 822 (2d Cir. 1990).
8 *Tiwari v. BWIA Int'l*, 1997 U.S. Dist. LEXIS 11383 (S.D.N.Y. 1997).
9 *Irish Nat'l Ins. Co. v Aerlingus Teoranta*, 739 F.2d 90 (2d Cir. 1984).

alternative venue that may otherwise inhibit the plaintiff from meeting the requisite burden of proof.[10]

When opposing a *forum non conveniens* motion, plaintiffs frequently argue that significant legal or political obstacles exist making it impossible to litigate in the proposed alternative foreign forum. Two United States District Court, Southern District of New York cases illustrate how political obstacles can affect a *forum non conveniens* motion. In *Chhawchharia v. Boeing Co.,* the Court found that India was an adequate forum despite its inefficient court system and tremendous backlog of cases.[11] However, in *Rasoulzadeh v. Associated Press*, the Court found that, as it was a practical likelihood that the plaintiffs would be shot if they returned to litigate their case in Iran, Iran was not an adequate forum.[12]

Balancing of both public and private interest factors

Once a defendant meets the burden with respect to establishing the existence of an available and adequate alternative forum, the defendant then must show that the balance of the public and private interest factors strongly favors dismissal and transfer to the proposed available and adequate foreign forum.

The private interests include: ease of access to proof; the ability to compel unwilling witnesses to testify and the cost of transporting willing witnesses to trial; the ability to view the accident location; practical issues that make the trial of a case easy, expeditious and inexpensive; and the ultimate enforceability of a judgment.

The public interest factors considered by the court are: court congestion; the local interest in the outcome of the litigation;

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10 *Air Crash Over Taiwan Strait on May 25, 2002*, 331 F. Supp. 2d 1176 (C.D. Cal. 2004).

11 *Chhawchharia v. Boeing Co.*, 657 F. Supp 1157 (S.D.N.Y. 1987).

12 *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854 (S.D.N.Y. 1983).

avoidance of having the court apply foreign law; and the burden of jury duty on citizens who will be forced to hear a case that has no connection to their community.

The court then must weigh the public and private factors as they relate to the advantages and disadvantages of each forum. While the outcome of each case will ultimately depend on the factors deemed most important by the court, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum is rarely disturbed.

Perhaps the one factor that is given the most deference by the courts is the residence of the plaintiff. If the plaintiff is a United States resident or citizen, the defendant's burden to have the case moved to a foreign forum is sufficiently more difficult to meet than if the plaintiff is a foreign citizen. Exceptional circumstances must exist to deprive a United States resident of access to a United States court.[13] At the same time, however, United States citizens are not universally entitled to have their case heard in the United States, especially when they conduct business abroad.

In sum, the private and public factors of each case are almost always unique and every court will weigh the available factors differently. Generally, a citizen of the United States will rarely have a case dismissed on *forum non conveniens* grounds.

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[13] *Rudetsky v. O'Dowd*, 660 F. Supp 341 (E.D.N.Y. 1987).

Conclusion: Tips to Help Win a *Forum Non Conveniens* Motion

The *forum non conveniens* motion to dismiss is not an easy motion for a defendant to win. Defendants must overcome a heavy burden of proof to prevail. Moreover, as the available alternative forum/public factor—private factor analysis is very fact-driven and case specific, every motion is unique and there is no magic formula that will lead to a winning motion. However, the following practice points highlight a few strategies that will hopefully increase the likelihood of a successful *forum non conveniens* motion to dismiss.

1. Use discovery tools, such as interrogatories and requests for production, to assist in formulating and defining the private interest factors that will be relied upon to support the motion for dismissal under *forum non conveniens*.

2. Don't miss the time in which to remove the case to federal court, if necessary, and any jurisdiction specific timeframe for filing a motion to dismiss for *forum non conveniens*.

3. The longer defense counsel waits to make the *forum non conveniens* motion, the more difficult it will be to succeed, as the underlying case will be that much further along in litigation, and the pending forum will thereby have a greater interest in its timely resolution.

4. Defense counsel should work with co-defendants to coordinate efforts and work as a unified front with respect to getting the case transferred to a more defendant-friendly venue and out of the United States. Additionally, by sharing information, defendants may learn if the plaintiff has filed the same action in other courts and whether any *forum non conveniens* motions were filed in those other jurisdictions.

5. Try and settle U.S. plaintiffs' cases. If the only plaintiffs remaining are foreign plaintiffs, there is a much greater likelihood the *forum non conveniens* motion will succeed.

6. Make all witnesses and documents available in the proposed alternative forum, thereby taking away any discovery-related argument that the United States is a more convenient forum.

7. Finally, and most importantly, focus on the big picture. Be open to waiving a statute of limitations defense or consenting to jurisdiction in the alternative forum if it gets the case out of the United States and reduces the overall exposure to your client.