

Client Bulletin

July 2008

Forum Non Conveniens Dismissal of Actions Arising out of Brazilian Mid-Air Collision

The litigation in U.S. courts arising out of the September 29, 2006 mid-air collision in Brazil between a Boeing 737-800 operating as Gol Linhas Inteligentes S.A. (“Gol”) Flight 1907 and an Embraer Legacy 600 (business jet) operated by ExcelAire, Inc. (“ExcelAire”), a New York aircraft charter company, has been dismissed to Brazil on the grounds of *forum non conveniens* (“FNC”). In *In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006*, 07 MD 1844 (E.D.N.Y. July 2, 2008), the U.S. District Court for the Eastern District of New York (“EDNY”) ruled that Brazil was a “significantly preferable” forum to the U.S. for this litigation.

Gol Flight 1907 was en route to Rio de Janeiro from Manaus, Brazil, when it collided with the ExcelAire Legacy, which was headed to Manaus as part of a two-day route to the U.S. ExcelAire had just taken delivery of the Legacy in São José dos Campos, Brazil, the headquarters of Embraer, which manufactured the aircraft. Upon collision, the Gol aircraft suffered major structural damage, leading to an in-flight breakup and crash in the Brazilian rain forest. All 154 passengers and crew members aboard the Gol aircraft were killed. The Legacy sustained damage to its left horizontal stabilizer and left winglet, but the crew was able to make an emergency landing at nearby Cachimbo Air Force Base. The five passengers and two crewmembers aboard the Legacy all survived.

The EDNY action, commenced in November 2006, was the first lawsuit arising out of the crash filed in the U.S. Thereafter, various actions were filed throughout the U.S. Plaintiffs, none of whom were U.S. residents, named U.S. entities as defendants, including Honeywell, Raytheon, Lockheed Martin, ExcelAire and the two American pilots from ExcelAire. In June 2007, all actions were

consolidated in the EDNY Court for pre-trial purposes. Defendants’ Motion to Dismiss the U.S. litigation on FNC grounds had been pending in the EDNY Court since early 2007.

Defendants generally agreed as part of the motion to: (1) consent to jurisdiction in Brazil if the litigation was dismissed in the U.S.; (2) waive any statute of limitations defenses in Brazil for 120 days after dismissal in the U.S.; (3) make evidence and witnesses available to Brazilian courts; and (4) pay any judgment entered against them in Brazil.

The EDNY Court relied upon the three-step balancing test previously established by decisions from the U.S. Supreme Court and outlined by the Second Circuit Court of Appeals in *Iragorri v. United Tech. Corp.*, 274 F.3d 65 (2d Cir. 2001), to determine:

- a. what degree of deference to be accorded to the plaintiffs’ choice of forum (the U.S.);
- b. whether the defendants’ proposed alternative forum (Brazil) is available and adequate to adjudicate the parties’ dispute; and
- c. whether the private and public interests would be better served by dismissing the case to another jurisdiction.

As to the first prong of the test regarding deference to plaintiffs’ choice of forum, the Court rejected defendants’ argument that foreign plaintiffs are entitled to no deference in their choice of a U.S. forum and pointed out that it is sometimes necessary for foreign plaintiffs to file an action in the U.S. to obtain jurisdiction over U.S. citizens or entities. Nevertheless, the Court said plaintiffs’ choice of a U.S. forum here should be granted a reduced degree of deference because all the plaintiffs and decedents were foreign and defendants had already agreed to submit to jurisdiction in Brazilian courts. In addition, although the costs associated with transportation of evidence and translations did

not favor either forum, testimony from the Brazilian ATC likely could only be obtained in Brazil and would not be available if the actions were to be tried in the U.S.

For the second prong of the analysis, the Court concluded that Brazil is an adequate and available forum for litigating the actions because Brazilian law provides grounds for adjudicating the matter and, coupled with the U.S. defendants agreeing to submit to Brazilian courts, jurisdiction could be obtained over the parties involved. Acknowledging plaintiffs' arguments that litigation in Brazil could be fragmented, the Court concluded that plaintiffs had the ability to consolidate the actions and any inability to do so should not trump other factors in favor of Brazil. With regard to plaintiffs' assertion that litigation in Brazil would drag on for years, the Court stated that the current actions against Gol in Brazil have moved at the pace predicted by defendants' experts (one to two years) and that 41 cases had already been resolved.

For the final prong of the analysis, the Court considered the following private interest factors:

- a. the relative ease of access to evidence;
- b. the ability of the courts to compel attendance of unwilling witnesses;
- c. the cost of obtaining willing witnesses;
- d. issues concerning the enforceability of a judgment; and
- e. all other practical problems that make trial of a case economical or not.

Noting that the American defendants not subject to jurisdiction in Brazil had agreed to submit to such jurisdiction and had agreed to produce documents and witnesses there, whereas Gol, the Brazilian ATC, A-Tech (the Brazilian parent company of named U.S. defendant Amazon Tech), and possibly even Embraer, the Brazilian manufacturer of the Legacy, would not be subject to a U.S. court's jurisdiction and might resist producing documents or witnesses in the U.S., the Court found that the first two factors weighed in favor of dismissal to Brazil. As to the third factor, the Court held that it favored neither forum as the costs would be significant wherever the litigation took place.

While plaintiffs argued that it would be difficult to enforce any judgment against U.S. defendants in Brazil, the Court noted that the U.S. defendants had already agreed to pay any final post-appeal judgment awarded against them by a Brazilian court. As to general economics of litigation in Brazil vs. the U.S., the Court recognized that the possibility of fragmented litigation in Brazil with resulting duplication, expense and delay weighed against dismissal to Brazil. However, the Court concluded that this was tempered by the possibility of consolidation of the actions in Brazil and also by the brisk pace of the actions against Gol currently underway in Brazil. The Court also considered the fact that a finding of liability against the named defendants in the U.S. would lead the defendants to file suit in Brazil anyway to seek contribution from those entities not amenable to jurisdiction in the U.S., thus resulting in more litigation and not avoiding fragmented litigation.

Turning to the public interest factors, the Court found that both Brazil and the U.S. had an interest in resolving the litigation. Because the accident took place in Brazil with resulting governmental inquiries, mass media coverage and the ATC strike, Brazil's interest, according to the Court, is "obvious."

Brazil's interest was weighed against that of the U.S. (and New York) where the Legacy pilots reside and were licensed to fly. In addition, ExcelAire hired and trained the Legacy pilots in New York where ExcelAire is located. Moreover, the litigation implicates the design of products manufactured in the U.S. by U.S. companies and installed in U.S. aircraft flying in U.S. airspace. The U.S. interest in this matter was further exhibited by the FAA and NTSB participation in the official accident investigation and the agencies' safety warnings regarding the avionics systems designed by defendants Honeywell and ACSS.

However, the Court noted that courts have frequently exercised discretion and held that a defendant's manufacturing activities within the U.S. do not necessarily tilt the public interest in favor of retaining jurisdiction. Given the facts of the case, the Court held that the U.S. interest in adjudicating the case "paled" in comparison to Brazil's interest. The Court also concluded that the public interest factors weighed in favor of dismissal to Brazil because, if the consolidated case remained in the U.S., it was

likely that the Court would have to apply Brazilian law to some or all of the case. If the cases were dismissed to Brazil, no complicated choice of law analysis would be required and, as the U.S. Supreme Court has stated, avoidance of “unnecessary problems in conflict of law” supports FNC dismissal.

In conclusion, the Court held that while the private and public factors fell on both sides, important factors including the lack of jurisdiction over potentially liable parties in Brazil and lack of compulsory process over witnesses and other evidence in Brazil, tilted the balance sufficiently to make the U.S. forum “genuinely inconvenient” and Brazil “significantly preferable.”

Finally, the Court conditioned dismissal on those concessions which had already been agreed to by the defendants (submission to Brazilian jurisdiction, waiver of statute of limitations defenses for 120 days, production of documents and witnesses in Brazil, and payment of any final judgment obtained in Brazilian courts), as well as the actual exercise of jurisdiction by Brazilian courts over the cases.



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