

With Compliments of

CONDON & FORSYTH LLP

1901 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067
TEL: 310.557.2030
FAX: 310.557.1299

7 TIMES SQUARE
NEW YORK, NEW YORK 10036
TEL: 212.490.9100
FAX: 212.370.4453

1016 SIXTEENTH ST., N.W.
WASHINGTON, D.C. 20036
TEL: 202.289.0500
FAX: 202.289.4524

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INTERNATIONAL AIR TRANSPORTATION

Two recent decisions, one from the District Court in New Jersey and one from the Southern District in New York, are sufficiently important to warrant a discussion in this bimonthly edition of the Newsletter. The *Eli Lilly v. Federal Express* case discusses an interesting choice of law issue in a cargo case. The *Faat* decision discusses the dismissal of litigation in the United States arising from the midair accident between a Russian passenger aircraft and a DHL cargo aircraft over Switzerland four years ago.

DEFENDANTS VICTORIOUS IN DISMISSING SWISS MIDAIR AIRCRAFT ACCIDENT CASE FROM THE UNITED STATES ON *FORUM NON CONVENIENS* in *Faat v. Honeywell Int'l*, 2005 WL 2475701 (D.N.J. Oct. 5, 2005)

On July 1, 2002, a Bashkirian Airlines aircraft with 69 passengers and crewmembers departed Moscow's Domodedovo Airport on a charter flight to Barcelona, Spain. The passengers consisted mainly of young Russian children who were going on a summer camp excursion to Spain. That same evening a DHL aircraft departed Bergamo, Italy, and was on route to Brussels, Belgium.

During both flights, the aircraft were simultaneously alerted by their respective airborne traffic collision avoidance systems (TCAS) that they were flying at the same altitude on intersecting

flight paths. The airborne TCAS instructed the crew of the Bashkirian aircraft to climb and instructed the DHL aircraft to descend. However, the only air traffic controller on duty in the Swiss facility instructed the crew of the Bashkirian Airlines aircraft to "expedite descent". Faced with the conflicting information, the crew of the Russian aircraft followed the instructions of the controller, rather than the mechanical voice of the computer system, with tragic consequences. The aircraft collided in midair, crashing into Lake Constance on the German-Swiss border, with no survivors. The single air traffic controller on duty at the time of the accident subsequently was murdered by the distraught father of one of the young Russian victims.

Actions were brought by parents of the deceased children against various defendants in the United States District Court for the District of New Jersey. Named as defendants were Thales Avionics, Inc., Thales North America, Inc., Honeywell International Inc., Honeywell TCAS, Inc. and L-3 Communications Corporation and Aviation Communications & Surveillance Systems, all of whom participated in the manufacture of the TCAS systems aboard both aircraft. All defendants moved to dismiss on the grounds of *forum non conveniens*, arguing that Spain, the destination of the Bashkirian Airlines flight, was the most convenient forum for the litigation of claims arising from this tragic accident, particularly because lawsuits against the airline and others already were pending in the courts of Spain.¹

The District Court agreed and dismissed the action, without prejudice. In considering the

motion to dismiss, the court found that defendants must satisfy a two part test: first, that an adequate alternative forum exists as to all defendants; and, second, that the private and public interest factors weighed “heavily” in favor of a dismissal.

The court agreed with Thales that its agreement to condition dismissal on Thales’ voluntary submission to the jurisdiction of the Court of First Instance in Barcelona, Spain, satisfied the requirement of the existence of an adequate alternative forum in that country. The court found that less deference was due to plaintiffs’ choice of forum since none were residents or citizens of the United States. Because, however, there was some evidence crucial to plaintiffs’ claim which was likely to be found in the United States, the court concluded that the plaintiffs’ choice of forum should be accorded a small amount of deference. This factor, however, did not tip the scales in favor of retention of jurisdiction in the courts of the United States.

Finding that the first prerequisite for *forum non conveniens* dismissal had been satisfied, the court went on to consider the private interest and public interest factors enumerated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 507 (1947).

Finding that the sources of proof needed by plaintiffs to prove their case, and by Thales to prove its defenses, were located both in the United States and Europe, the court accepted the argument that all of the necessary evidence was currently located in Europe. Spain, where actions already were pending against the airline, as a member of the European Union, would be able to compel production of documents from other European Union countries. The court further found that the evidence outside of the United States was more easily accessible in Spain, because the evidence necessary for plaintiffs to prosecute their case was presently assembled there. All of the damage data with respect to the Russian decedents was located either in Russia or Spain, where those plaintiffs had already sued the airline; none was located in New Jersey.

As to the second private interest factor, the availability of compulsory process for the attendance of unwilling witnesses, the court agreed

that the majority of witnesses who were most knowledgeable about European aviation procedures were located in Europe. The court considered the other private interest factors such as the possibility of a view of the premises, translation of documents and miscellaneous issues such as impleader and safety concerns and found all of these factors to be neutral in evaluating the convenience of litigating in the United States or in Spain.

The court then turned its attention to the public interest factors. The court noted that because litigation in Spain had already begun, it was unlikely that resolution of plaintiffs’ claims would be any less speedy in Spain than in New Jersey. The court also found that the burden of jury duty was a factor weighing in favor of dismissal since, of the forty parties, only two were residents of New Jersey. Finally, with respect to the local interest and the controversy, the court found that Spain’s interest in the litigation far outweighed the interests of the citizens in New Jersey. The aircraft had been bound for Spain when it collided with the DHL aircraft, and litigation regarding the accident already had commenced in Spain. While the court agreed that the United States had an interest in insuring that products manufactured in the United States by domestic companies were safe, New Jersey’s interests were minimal since all of Thales’ conduct related to liability occurred outside the state of New Jersey.

The final public interest factor, familiarity with governing law, also favored dismissal. While it was not clear which forum’s law would apply given all the interests of the various European countries involved in the litigation, the court found it likely that the law of a jurisdiction other than New Jersey would apply to this case. Since Russia, Germany and Spain all had a great interest in protecting their citizens, the “familiarity with governing law” factor militated in favor of dismissal.

Accordingly, weighing all of the private and public interest factors, the court found that forcing Thales to litigate this case in the United States would be oppressive and vexatious out of all proportion to the plaintiffs’ convenience. The

Complaint therefore was dismissed, subject to the following *forum non conveniens* conditions:

1. Plaintiffs were ordered to refile their claims in the Court of First Instance in Barcelona, Spain within 121 days from the date of the order;

2. All defendants must submit voluntarily to the Court of First Instance in Barcelona, Spain, and were ordered to furnish plaintiffs' counsel with a name and address of an agent in Spain upon whom service of process could be made;

3. All defendants agreed voluntarily to waive any statute of limitations or personal jurisdiction defenses in Spain;

4. All defendants agreed to satisfy any final judgment rendered against them by the court in Spain; and

5. All defendants agreed to be bound by their responses to discovery requests which already had been served on them in the New Jersey litigation.

Should the defendants materially breach any of these conditions, said the court, plaintiffs would be permitted to refile their action before the District Court in New Jersey.

THEFT OF PHARMACEUTICALS IN BRAZIL GOVERNED BY AMERICAN LAW

In the international transportation of goods by air, it is commonly recognized that, until the Montreal Convention came into effect in the United States in November of 2003, the Warsaw Convention was the exclusive remedy for shippers or consignees suing for the value of lost, damaged or delayed goods. The Montreal Convention is a replacement for the Warsaw Convention, although some of the substantive law provisions relating to cargo in the Warsaw Convention and Montreal Convention are similar. One well known exception to the application of the Warsaw Convention is when the loss, damage or delay to the goods occurs outside the premises of an airport. In *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705 (2d

Cir. 1990), the Second Circuit Court of Appeals held that an air carrier could not limit its liability when the theft of the goods occurred outside the airport premises. The same theme of non-applicability of the Warsaw Convention to international transportation was discussed in a recent decision from the United States District Court for the Southern District of New York in *Eli Lilly v. Federal Express Corporation*, Docket 04 Civ. 5285 (S.D.N.Y. Sept. 21, 2005).

Eli Lilly sued FedEx when a shipment of its pharmaceuticals was stolen en route to a customer in Japan from Eli Lilly's factory in Sao Paulo, Brazil. The truck containing the cargo was hijacked while en route to Sao Paulo airport. The District Court found that, based on *Victoria Sales*, the Warsaw Convention was inapplicable since the loss occurred outside the airport premises. The issue then became what law was applicable, with FedEx arguing that federal common law should apply and Eli Lilly arguing that Brazilian law was applicable. The answer to that question determined the liability of FedEx for the lost shipment: if federal common law applied, the carrier's liability was limited to \$20.00 per kilo pursuant to the conditions of contract printed on the reverse side of the air waybill. The FedEx air waybill provided that if the Warsaw Convention was not applicable, then the airline's liability was limited to \$20.00 per kilo for goods lost, damaged or delayed unless a higher value had been declared. All parties conceded that the limitation provision of the air waybill was enforceable, thus making Eli Lilly's liability limit \$28,863. If Brazilian law, which prohibited a limitation of liability in a case where the carrier was found liable for gross negligence, was applicable, FedEx faced potential responsibility for approximately \$800,000 in damages.

In examining both Brazilian and United States law, the court found that the policies of both the United States and Brazil would be furthered by the application of their respective rules on liability. The interest of the United States in permitting federally certified air carriers like FedEx to limit their liability for lost goods is a strong one, but it was equally evident that Brazil had an interest in regulating the liability of the carriers transporting goods within the borders of Brazil. Applying

federal common law would cut directly against that Brazilian interest. Adding credence to the belief that Brazilian law was applicable were the facts of the case: the contract was executed in Brazil and the critical portion of FedEx's performance giving rise to the dispute, *i.e.*, the land transportation between Eli Lilly's factory and the airport, took place entirely within Brazil, where the loss occurred.

However, weighing the interest of these two jurisdictions, the court found that the overall principles of Section 6 of the Restatement (2d) of the Conflict of Laws (1971) mandated application of United States federal common law. In cases where there is a conflict between the laws of two countries in determining which law should be applied, the courts looked at several factors in determining what law was applicable. These included: the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied. Weighing these factors, the court found that the Section 6 principles favored application of United States law because that law vindicated the parties' expectation as expressed in the contract of carriage entered into between the parties, *i.e.*, the air waybill, that federal common law would be applicable to claims against air carriers for lost or damaged goods transported internationally. The court found that the application of United States law would enforce the contract between the parties as written and this in turn vindicated the other Section 6 principles, such as certainty, predictability, uniformity of result and ease in determining the law to be applied. Accordingly, the court held that federal common law was applicable and limited FedEx's liability pursuant to the terms of the air waybill.

In short, one more attempt to avoid an application of the limit of the carrier's liability was rebuffed by the court's application of federal common law. These legal issues, while interesting, largely will be eliminated for all claims arising after

November 4, 2003, the effective date of the Montreal Convention in the United States. The Montreal Convention provides that the airline's liability is limited to 17 SDRs per kilo for lost, damaged or delayed cargo (approximately \$25.00 per kilogram at today's conversion rates). Since this liability limitation is unbreakable, it is anticipated that there will be less, rather than more, litigation given the adaptation of the Montreal Convention by some sixty-seven countries throughout the world.

Endnote

¹ Skyguide, a privatized Swiss company charged with operating the Air Traffic Control Center at Zurich, which was responsible for air traffic control over the two flights, successfully challenged jurisdiction over it in Spain.

EDITORS

MICHAEL J. HOLLAND
KATHERINE B. POSNER
PARTNERS, NEW YORK OFFICE
mholland@condonlaw.com
kposner@condonlaw.com

CONTRIBUTOR TO NOVEMBER/DECEMBER 2005
ISSUE

STEPHEN R. STEGICH
PARTNER, NEW YORK OFFICE

<http://www.condonlaw.com>

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