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### FORUM NON CONVENIENS

#### **District Court Grants *Forum Non Conveniens* Dismissal Of Wrongful Death Claims In *In Re: Air Crash Over The Taiwan Strait On May 25, 2002*, 331 F. Supp. 2d 1176 (C.D. Cal. 2004)**

The Central District of California granted the *forum non conveniens* motion filed by defendants China Airlines and Boeing in the wrongful death lawsuits resulting from the crash of CAL flight CI611 in Taiwanese waters. The decision provides for dismissal of 48 cases seeking recovery for the deaths of 128 decedents, in favor of further proceedings in Taiwan or other jurisdictions.

The court issued a thorough opinion. The conditions to dismissal require that both defendants not contest liability for compensatory damages in any action re-filed in Taiwan or the respective decedent's domicile, submit to the jurisdiction of the Taiwanese or other appropriate courts, waive any applicable statute of limitations defense, make relevant witnesses and documents available in the alternative fora, and pay the costs of translating any English-language documents into Mandarin Chinese.

The decision is noteworthy because the court granted the motion even though under Ninth Circuit case law it could not dismiss three of the lawsuits where treaty jurisdiction existed under Article 28 of the Warsaw Convention.<sup>1</sup> In these

cases, China Airlines agreed to waive the Warsaw Convention limits of liability. By so doing, it eliminated the liability issues which might have anchored the rest of the cases in the United States. Both defendants also agreed to exclude those three cases from their *forum non conveniens* motion, which will remain pending in the United States with only the quantum of damages to be decided.

The decision also is significant because the court dismissed the cases even though several of the plaintiffs and several of the decedents had direct contacts with the United States. At least five of the lawsuits involved one or more alleged California plaintiffs. Several plaintiffs and decedents held "green cards" entitling them to permanent non-resident alien status in the United States, and a few of the decedents maintained homes in the United States and in Taiwan. Nevertheless, the court concluded that the vast majority of the plaintiffs were not United States residents and, therefore, their choice of forum was entitled to less deference.

The private and public interest factors set forth in *Gulf Oil Corp. v. Gilbert*,<sup>2</sup> and *Piper Aircraft Co. v. Reyno*,<sup>3</sup> were found compelling and strongly favored dismissal. The accident occurred during a regularly scheduled flight from Taiwan to Hong Kong. The aircraft crashed in the territorial waters of Taiwan. The Taiwan Aviation Safety Council led the accident investigation, with some participation by the NTSB and Boeing. Physical wreckage of the aircraft was examined in Taiwan

and at Boeing's facilities in the United States, but the majority of flight data and cockpit recorder tests were analyzed in Taiwan. The maintenance, inspection and repair records for the aircraft also were located in Taiwan.

Most witnesses were located in Taiwan, with the exception of Boeing and federal employees. However, as part of the conditions of dismissal, Boeing had agreed to make available all witnesses and documents deemed relevant by the Taiwanese courts regarding liability and/or damage issues, although the court recognized that there was "no question that damages proof is overwhelmingly located in Taiwan." All but three of the decedents purchased their tickets in Taiwan for transportation terminating outside of the United States. Taiwanese law would most likely govern actions and Taiwan clearly had the more significant connection to this "localized controversy."

The district court determined that Taiwan was an available and adequate alternative forum for the cases. China Airlines is amenable to process in Taiwan and Boeing had agreed to submit to jurisdiction in Taiwan. Plaintiffs' own experts on Taiwanese law confirmed that Taiwanese courts would accept a defendant's consent to jurisdiction. While strict products liability theories against Boeing may not be available under Taiwanese law, plaintiffs still would be able to assert negligence and wrongful conduct claims and, therefore, would not be deprived of a remedy.

Moreover, pecuniary and non-pecuniary damages could be recovered in Taiwan. Taiwan has sufficient procedural safeguards in place to ensure plaintiffs' recovery of damages, including the power to compel witnesses to testify and give evidence, to take evidence from expert witnesses and to compel production of documents. Plaintiffs' concerns regarding lack of contingency fee arrangements, prohibitive filing fees and limitations on pretrial discovery did not render Taiwan an inadequate forum.

Plaintiffs recently appealed the decision, contending that the district court abused its discretion in granting the motion, and that the effect

of the decision is to discriminate against foreign plaintiffs by denying them equal access to the United States courts, an argument repeatedly rejected by the courts.

***In In re Air Crash at Taipei, Taiwan, on Oct. 31, 2000, 2004 WL 1234131 (C.D. Cal. Feb. 6, 2004), MDL Court Grants Defendants' Motion for Reconsideration of Decision Denying Forum Non Conveniens Dismissal***

In multi-district litigation proceedings arising from the crash of Singapore Airlines flight SQ006 on October 31, 2000, the district court initially denied Boeing's motion for *forum non conveniens* dismissal in 13 of the consolidated lawsuits where Boeing and Goodrich Corporation (jointly "Boeing") were named as defendants. In those 13 cases, the courts in the United States lacked treaty jurisdiction under Article 28 of the Warsaw Convention and plaintiffs filed actions against the carrier in other appropriate fora.

Subsequent to the court's denial of Boeing's motion, Singapore Airlines waived its Article 20 defense in the six cases where Article 28 jurisdiction was proper, leaving only the issue of damages in those cases. Boeing thereafter moved for reconsideration of the court's prior *forum non conveniens* ruling on the ground that Singapore's waiver of its rights under Article 20 constituted a material change in the facts relevant to the motion, and, if considered, would alter the court's analysis of the issue.

Boeing further argued that the pending cases with Article 28 jurisdiction in the United States could not be tried against Boeing with Singapore because, while Singapore had conceded liability, Boeing had not and was considered a "superfluous defendant" in those actions. Boeing contended, therefore, that it would be more convenient for the parties and more expeditious for the court to have the case against all defendants tried in one lawsuit.

Plaintiffs opposed reconsideration of the *forum non conveniens* motion even though Singapore did not contest liability, so that they could opt to settle with Singapore and then pursue

additional recovery against Boeing. Under these circumstances, the court would be required to decide Boeing's liability in the properly filed Article 28 cases.

The court, noting that both arguments were based to a degree on hypotheticals, held that, in light of the Article 20 waiver, the likelihood that any case would proceed to trial against Boeing was "remote." And, if the 13 "non-Article 28" cases should proceed to trial, they should be tried against all defendants in one proceeding. The court rejected the argument that the surviving heirs would pursue piecemeal settlements, stating that it could not "conceive of a scenario where plaintiffs, having one fully liable defendant in their sights, would agree to take less money to avoid releasing Boeing so that they could preserve their right to pursue a marginal product liability claim against the aircraft manufacturer."<sup>4</sup>

The court further held that its decision did not promote litigation and distinguished those aviation cases where plaintiffs had agreed to piecemeal settlements. For example, in *In re Aircrash Disaster Near Palembang, Indonesia*,<sup>5</sup> plaintiffs settled with Silk Air for claims arising from a Silk Air crash in Indonesia, but preserved their rights against Boeing. Plaintiffs did so because there was no jurisdiction against the carrier in the United States and there were questions regarding airworthiness of the aircraft based on alleged defects in the design of the rudder. In addition, nothing in that decision indicated that Silk Air waived its Article 20 defense.

The denial of a *forum non conveniens* motion in *In re Air Crash Off Long Island, N.Y. on July 17, 1996*,<sup>6</sup> also was distinguishable. The crash of TWA flight 800 occurred in United States waters, was heavily investigated by federal authorities and involved a large number of American plaintiffs. Moreover, Boeing participated in the settlements, apparently agreeing that it had at least partial liability.

Thus, Boeing's participation in settlements in the foregoing cases "provide[d] little persuasive support for [plaintiffs'] contention that piecemeal settlements are a realistic possibility in this case."

The district court further held that because most plaintiffs had filed suit against Singapore Airlines in Singapore and Canada, these alternative fora appeared to be available and adequate. Plaintiffs' argument that Taiwan was inadequate because of its prohibitive filing fees was considered weak since the Ninth Circuit Court of Appeals already affirmed Taiwan as an adequate alternative forum in *Cheng v. Boeing Co.*,<sup>7</sup> and the only plaintiffs in this litigation who would re-file in Taiwan are Taiwanese citizens.

The private and public interest factors also favored dismissal. The accident occurred in Taiwan during a flight operated by a foreign carrier, brought by mainly foreign plaintiffs, all of whom have filed suit against the airline in alternative fora; numerous parties and witnesses reside outside the United States, namely in Taiwan and Singapore; physical evidence of the crash is warehoused outside the United States; and there are limitations on the ability to compel attendance of foreign witnesses in a trial here.

While access to Boeing documents and witnesses may be easier in the United States, the court noted that only one deposition of a Boeing employee had been scheduled. Boeing also agreed to make all evidence available in the alternative fora. Importantly, all plaintiffs (including four U.S. citizens) sued Singapore in the alternative fora. This was considered a "compelling reason not to put Boeing in a position of having to defend itself against claims where the principally liable defendants are not present."

The court considered it persuasive that liability issues most likely would not be litigated in any of the remaining Article 28 cases. Indeed, to try the non-Article 28 cases without the carrier would be a "great drain on resources considering these cases all involve a difficult and passenger-specific theory of liability" and involve at least 49 different passengers.

Although issues of crashworthiness of an American-manufactured aircraft are of great interest to California citizens, the court found such issues not as central to this case as in those cases where an

aircraft falls from the sky. In fact, plaintiffs presented no evidence that the foreign courts would not fully consider the aircraft's integrity.

Based on the foregoing, the court granted the motion for reconsideration, subject to defendants' agreement (1) to consent to jurisdiction in Singapore, Canada, and/or Taiwan; (2) to toll any applicable statute of limitations for a 60-day period following dismissal; (3) to make relevant evidence available in the foreign courts; and (4) to pay any damages awarded in the foreign courts.

**Illinois State Court Grants *Forum Non Conveniens* Motion of Singapore Airlines In *Sun v. Singapore Airlines, Ltd.*, No. 02 L13640 (Ill. Cir. Ct., Cook Cty. Mar. 19, 2004)**

In *Sun v. Singapore Airlines*, the Illinois state court dismissed an action by all Taiwanese citizens and/or residents against Singapore Airlines in litigation arising from the crash of Singapore Airlines flight SQ006.

Like the California district court, the Illinois court concluded that the Taiwanese courts provide a sufficient alternative forum for plaintiffs' actions. Plaintiffs' argument regarding the high cost of filing fees did not render the forum inadequate, particularly since plaintiffs could recover such fees as a prevailing party at the close of the litigation. In addition, the private and public interest factors overwhelmingly favored dismissal.

Although Boeing was named as a defendant in the action, the court found that there was no evidence that Boeing had ever been served in the case. In any event, Boeing's principal place of business in Cook County was considered irrelevant since any evidence pertaining to design and assembly of the subject aircraft would be found in Seattle, Washington. Boeing also had indicated its agreement to submit to the jurisdiction of the courts in Taiwan, treat as tolled any statute of limitations, make available for trial in Taiwan any evidence in its possession or control that the Taiwanese court may deem relevant; and pay any damages awarded by the Taiwanese courts, subject to any right of appeal. Plaintiffs did not appeal this decision.

**California Court of Appeal Reverses *Forum Non Conveniens* Dismissal, Finding El Salvador Not An Adequate Alternative Forum In *Portillo v. Robinson Helicopter Co., Inc.*, 2004 WL 530745 (Cal. Ct. App. 2d Dist. Mar. 18, 2004)**

On October 26, 2001, a helicopter manufactured by Robinson Helicopter Company crashed in El Salvador, killing its two passengers. The personal representative and family members of the passengers commenced a wrongful death action against Robinson in California Superior Court on theories of product/strict liability, negligence, fraud and a survival cause of action.

Robinson moved to dismiss or stay the action on the ground of *forum non conveniens*.<sup>8</sup> Robinson contended that the case should be tried in El Salvador because the accident occurred in EL Salvador, all aspects of the flight were subject to Salvadoran air regulations, decedents were citizens and residents of El Salvador, nearly all potential codefendants including those who maintained, serviced, repaired, operated and piloted the helicopter were in El Salvador, and nearly all witnesses resided there.

Plaintiffs contended that California is more convenient because Robinson is a California corporation with its principal place of business in California, and the helicopter was designed and manufactured in California. Local Salvadoran factors such as weather, piloting skills, air traffic control or compliance with Salvadoran regulations are irrelevant since the crash resulted from a broken main rotor blade.

The trial court dismissed the action, finding that El Salvador provided a proper alternative forum and all of the evidence appears to be located in El Salvador. In an unpublished decision, the appellate court reversed, finding that "it appears the courts of El Salvador do not present a suitable forum for trial of the action."

Specifically, the appellate court noted that both parties had submitted competing declarations from attorneys licensed in El Salvador concerning the suitability of that forum. Plaintiffs' expert

stated that there are no rules in El Salvador's judicial system to determine the rights of the decedents' relatives and that Salvadoran law provides that the only judge competent to hear any claim is the judge from *defendant's* domicile (here, California would be Robinson's domicile). Plaintiffs also presented a declaration from a Salvadoran judge who concurred with this code provision and, thus, cast doubt on whether the courts in El Salvador could exercise jurisdiction over Robinson.

Although Robinson agreed to submit to jurisdiction in El Salvador, there was no written stipulation to that effect and the trial court ruling was not conditioned upon Robinson submitting to, and El Salvador accepting, personal jurisdiction over Robinson. Similarly, there was no reference to waiver by Robinson of the applicable statute of limitations in El Salvador. The court, therefore, reversed and remanded the case for further proceedings. Robinson's petition for review to the California Supreme Court was denied.

**In *Zermeno v. McDonnell Douglas Corp.*, 2004 WL 1146192 (S.D. Tex. May 10, 2004), District Court Denies Motion To Vacate Order Of Dismissal On *Forum Non Conveniens* Grounds**

In October 2000, an Aeromexico flight from Mexico City to Reynosa, Mexico overran the runway on landing in severe weather conditions and crashed into a home located nearby. The crash killed the wife and children of plaintiff, a Mexican citizen and resident, who filed suit in Texas state court on behalf of himself and his surviving minor son.

Plaintiff sued Aeromexico, The Boeing Company, McDonnell Douglas, the Crane Corporation and Hydro-Aire, Inc. (companies allegedly involved in the design of the braking system), and First Security Bank of Utah and Wells Fargo Bank Northwest N.A. (the owner of the aircraft). Defendants removed the case to federal court and moved for dismissal on the ground of *forum non conveniens*, which the court granted in March 14, 2003.

The district court held that Mexico was an available and adequate alternative forum, favored by a balancing of the *Gulf Oil* private and public interest factors. Critical maintenance records of Aeromexico, physical evidence and witnesses were in Mexico. Other practical factors, such as the language barrier and translation issues, did not favor either forum. Differences in American and Mexican substantive and procedural law were not so great as to deprive plaintiffs of a remedy in a Mexican court.

All defendants agreed to submit to the jurisdiction of the courts in Mexico, waive limitations defenses that may have accrued after the suit was filed and agreed to satisfy any judgments rendered by courts in that forum.

On February 18, 2004 (one year after the *forum non conveniens* motion was granted), plaintiffs moved to vacate the order claiming that in July 2003 they obtained documents from the FAA reflecting inspections of Aeromexico aircraft from 1990 to the present.<sup>9</sup> According to plaintiffs, this newly discovered evidence shows that because the federal government inspected and oversaw Aeromexico aircraft, United States law rather than Mexican law should apply to the case and trial should take place in an American court.

Allegations of new evidence require that the evidence be discovered after trial and that the movant exercise due diligence to discover it, and that it not simply be cumulative or impeaching. The evidence also must be material, such that a new trial would probably alter the result.

Here, plaintiffs failed to exercise any diligence since they only requested the new evidence *after* briefing on the *forum non conveniens* motion. The FAA records also were cumulative of other evidence already submitted showing that the aircraft was designed, manufactured and registered in the United States, was maintained according to FAA guidelines and had been inspected by the FAA. Defendants did not impede plaintiffs' access to these publicly accessible FAA documents, nor were the records material or likely to change the outcome of the court's *forum non conveniens*

analysis.<sup>10</sup> Accordingly, the court denied plaintiffs' motion to vacate the order granting dismissal on *forum non conveniens* grounds.

**In *Lie v. The Boeing Co.*, 2004 WL 1462451 (N.D. Ill. June 29, 2004), Court Grants *Forum Non Conveniens* Dismissal of Manufacturers' Third-Party Claims Against The Carrier**

In *Lie v. The Boeing Co.*, a host of non-United States plaintiffs commenced actions in the Illinois state court advancing claims arising from the January 16, 2002 emergency landing in the Bengawan Solo River, Indonesia of an aircraft owned and operated by P.T. Garuda Indonesia.

Plaintiffs sued only Boeing, the manufacturer of the aircraft, and CFM International, Inc., the seller of the aircraft engine, asserting mainly product liability claims. The carrier, Garuda, was noticeably absent from the caption. Boeing and CFM, unable to remove the action to federal court because of Boeing's Illinois citizenship, commenced a third-party complaint against Garuda, which as a government owned carrier, removed the entire action pursuant to the Foreign Sovereign Immunities Act. The court *sua sponte* remanded the action, mistakenly on the ground that only a defendant could remove the case. In anticipation of Garuda's second removal of the action, the court issued a memorandum stating that it would remand the principal plaintiffs' claims against Boeing and CFM to state court (plaintiffs' choice of forum), and retain jurisdiction solely over the third-party action by Boeing and CFM against Garuda.<sup>11</sup>

Garuda removed the action (again) to federal court and filed a motion to dismiss the third-party claims on *forum non conveniens* grounds. The court granted Garuda's motion with little analysis, primarily relying on Garuda's arguments on the balancing of the private and public interest factors, and refused to delay its ruling pending the outcome of Boeing and CFM's *forum non conveniens* motion in state court. The court conditioned dismissal on Garuda's acceptance of service of process in any action brought by Boeing and CFM against Garuda in Indonesia, submission to the Indonesian courts,

waiver of any applicable statutes of limitations, and making witnesses with relevant knowledge and within Garuda's control available for pre-trial and trial purposes in Indonesia. The court further advised Garuda to cooperate with Boeing and CFM to avoid resort to the cumbersome procedures involving letters rogatory.

The *forum non conveniens* decision and the remand of the passenger cases are currently on appeal to the Seventh Circuit Court of Appeals.

**Court Denies *Forum Non Conveniens* Dismissal In *In re Air Crash Near Nantucket Island, Mass.* On Oct. 31, 1999, 2004 WL 1824385 (E.D.N.Y. Aug. 16, 2004)**

In litigation arising from the crash of EgyptAir flight 990, the district court denied EgyptAir's motion to dismiss actions arising from the deaths of passengers who were domiciliaries of Egypt and Canada on the ground of *forum non conveniens*. Although EgyptAir agreed not to contest liability, codefendants Boeing and Parker-Hannifin did not, and also refused to consent to jurisdiction in the alternative fora.

The court held that EgyptAir failed to prove that Egypt provided an adequate alternative forum since it was questionable whether co-defendant Boeing would be subject to jurisdiction in Egypt, or that Canada is an alternative forum since a Canadian court only exercises jurisdiction if it has a "real and substantial connection" with the subject matter of the litigation. Although Canada may have a significant connection with the compensatory damages awarded to families of Canadian residents, Boeing and Parker-Hannifin's liability remained at issue and was unrelated to any event or conduct in Canada.

The court further held that dismissal was not warranted after an examination of the private and public interest factors. Boeing and Parker Hannifin contested liability, and would not consent to jurisdiction in the alternative fora or to waive any statute of limitations defenses. Piecemeal litigation would result as several cases would require litigation in the United States.

The United States also had a substantial interest in the action as the aircraft was designed, manufactured and certified here; there were many Americans passengers on board the aircraft, which crashed shortly after take-off from JFK International Airport; and the accident was investigated by the NTSB. While foreign law may apply to certain damages issues, the court did not afford this public interest factor much weight as it held that American law would be applied to the third-party claims between the defendants.

### Endnotes

<sup>1</sup> See *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1004 (9<sup>th</sup> Cir. 2002) (holding that when Article 28 jurisdiction is proper in the United States, federal court precluded from dismissing on *forum non conveniens* grounds).

<sup>2</sup> 330 U.S. 501, 508 (1947). The private interest factors include: (1) the relative ease of access to sources of proof; (2) availability of compulsory process for attendance of witnesses; (3) costs of bringing witnesses to place of trial; (4) access to physical evidence; (5) enforceability of judgments and (6) all other practical problems making trial of the case easy and expeditious. The public interest factors involve: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having the matter decided locally; (3) familiarity with governing law and avoidance of problems in conflicts of law or application of foreign law; and (4) the unfairness of burdening citizens in an unrelated forum with jury duty.

<sup>3</sup> 454 U.S. 235, 254 (1981).

<sup>4</sup> Plaintiffs' theory of product liability against Boeing related to the crashworthiness of the aircraft, *i.e.*, that a 747 aircraft moving down a runway at take-off speed should have been able to withstand a "collision with construction cranes, bulldozers and the like."

<sup>5</sup> 2000 WL 3359 3202, at \*2 (W.D. Wash. 2002).

<sup>6</sup> 65 F. Supp. 2d 207 (S.D.N.Y. 1999).

<sup>7</sup> 708 F. 2d 1406, 1410 (9th Cir. 1983).

<sup>8</sup> See Cal. Code of Civ. Proc. § 418.10(a)(2).

<sup>9</sup> Rule 60(b) permits vacating of an order where there has been a mistake, inadvertence, excusable neglect, newly discovered evidence which could not have been discovered prior to trial, fraud, misrepresentation, where the judgment is void or a prior judgment upon which it has been based was voided, or any other reason justifying relief from the judgment.

<sup>10</sup> Citing, *e.g.*, *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5<sup>th</sup> Cir. 1993) (court rejected plaintiffs' argument that

connections to U.S., including engineers involved in designing relevant system of aircraft in U.S. along with FAA personnel who certified it, made it more convenient forum).

<sup>11</sup> The court acknowledged that its remand decision conflicted with the Eleventh Circuit in *In re Surinam Airways Holdings Co.*, 974 F.2d 1255, 1260 (11th Cir. 1992), which held that a district court could not opt to remand the main action when the third-party foreign state had removed the action under 28 U.S.C. § 1441(d). It also distinguished the facts from those in *In re Air Crash Near Roselawn, Ind.*, 96 F.3d 932, 943 (7th Cir. 1996), which affirmed the district court's exercise of jurisdiction over the main action after removal by a third-party FSIA defendant.

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