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### **FORUM NON CONVENIENS – THE SWINGING PENDULUM TO DISMISSAL OF FOREIGN AVIATION ACCIDENT CASES IN THE UNITED STATES**

As moths are drawn to the light, cases arising from aircraft accidents outside the United States are invariably drawn here by the hopes of claimants and their counsel in recovering far larger damage awards than would be available in their home fora<sup>1</sup>.

Since the *Reyno* decision in 1981<sup>2</sup>, plaintiffs and defendants have engaged in a seesaw battle over keeping foreign air crash cases in United States courts. While both sides can lay claim to some victories, the pendulum seems to be swinging in the direction of dismissal of foreign air crash cases where there is no sound factual basis for keeping the litigation in the United States. The latest examples are a triumvirate of foreign air crash *forum non conveniens* dismissals from a state appellate court on the west coast (California), a federal appellate court in the southeast (Georgia) and an east coast (Connecticut) federal trial court. While there is nothing immoral or unsavory about a plaintiff choosing to attempt to secure jurisdiction in the United States, or a defendant seeking to undo such a choice<sup>3</sup>, it is a plausible likelihood that the selection of a United States forum is based on the perception that United States courts award higher damages than courts in other jurisdictions.

While the jurisdictional battle goes on, and plaintiffs urge novel arguments to make the United States a convenient forum, *i.e.*, offers to translate documents into English, offers to bring witnesses from

from abroad to the United States for trial, downloading documents from foreign jurisdictions on compact disks and providing them in the United States and urging that United States treaties of friendship guarantee the foreign nationals access to the United States courts, the opinions discussed below carefully analyze these arguments and have concluded that, where the foreign jurisdiction is an available forum, foreign plaintiffs' choice of forum in the United States is not sufficient to justify retention of the cases here where the public and private interest factors of *Gilbert*<sup>4</sup> indicate that a trial in the foreign forum would be more convenient and would best serve the interests of justice.

*Guimei v. General Electric Co.*, 2009 WL 755401 (Cal.App. 2 Dist. Feb. 26, 2009), arose out of the crash of a 2004 China Eastern Airlines domestic flight. The aircraft crashed into a lake shortly after takeoff, resulting in the death of forty-seven passengers, six crewmembers and two ground victims. With the exception of one Indonesian passenger, all of the deceased passengers were Chinese citizens who had purchased their tickets in China. The defendants named in the California action were General Electric Co., the manufacturer of the engines on the subject aircraft; Bombardier, Inc., the manufacturer, designer and assembler of the aircraft; and China Eastern, the operator of the flight. Following the filing of three lawsuits in the California courts, defendants moved for *forum non conveniens* dismissal, agreeing that if the motion were granted and the case dismissed to China, the defendants would: (1) not contest liability in the Chinese courts; (2) compensate the plaintiffs in accordance with Chinese law; (3) not seek to

enforce any limitation of wrongful death damages; (4) waive any applicable statute of limitations so long as the cases were re-filed in China within six months of dismissal; and (5) agree to be bound by and satisfy any judgment in the Chinese courts following appeals.

The trial court in Los Angeles granted the *forum non conveniens* motion but did not dismiss the actions; rather, it stayed them for the purposes of permitting proceedings in China. In granting the motion, the court explained that the issue at the outset was whether there was a suitable alternative forum in which plaintiffs could litigate their case and obtain a judgment against the defendants. Since all defendants had agreed to be subject to the jurisdiction of the Chinese court, the forum in China was “available”. Plaintiffs argued that they could not get a fair trial in China, arguing, *inter alia*, political interference with the judicial process. Finding no evidence of “sinister conduct” on the part of the airline and no reason to suspect any government interference in the litigation against the other defendants, the trial court found China to be an available forum for the litigation.

In balancing the private and public interest factors in determining whether to retain the litigation in California and finding that California had little or no interest in the case since there were no documents or witnesses there, the trial court concluded that the *Gilbert* factors favored dismissal in California and a trial in China.

On review, the Court of Appeal set out a two step process for determining whether a *forum non conveniens* dismissal is merited: first, there must be “substantial evidence” to support the trial court’s finding of a suitable alternative forum; and second, the appellate court must review the trial court’s determination regarding the balancing of the private and public interests for abuse of discretion. Citing other cases in which China has been found to be a suitable alternative forum, the Court of Appeal looked to several expert affidavits submitted by law professors which pointed to the increase in foreign investment in China, which in turn has created a need for a sophisticated, well-functioning legal system. The Court concluded that in Shanghai, where plaintiffs could have brought their actions,

the judges are well educated and sophisticated with experience in complex multiparty aviation litigation. As a result, it rejected the argument that China is not an adequate forum.

The Court of Appeal then considered whether the trial court had abused its discretion in finding that trial of plaintiffs’ claims in California would be so inconvenient as to justify granting the motion for a *forum non conveniens* stay pending resolution of the cases in China. The Court concluded that the trial court had not abused its discretion in determining that California was “seriously inconvenient”. It flatly rejected the contention that the presence of evidence in the United States with respect to the design of the plane and its engines made the United States a convenient forum. “The fact that some evidence concerning the aircraft’s design and manufacture may be located elsewhere in the United States [it was conceded there was no such evidence in California], does not make [California] a convenient forum”. *Guimei*, 2009 WL 755401 at 8. Finding that non-resident plaintiffs’ forum choice was of little consequence, the Court reasoned that it would be burdensome for California residents to serve as jurors in a long and complicated case which had nothing to do with the state. Accordingly, the Court of Appeal affirmed the decision of the trial court and, by staying the cases in California, the trial court retained the power to verify both that the plaintiffs are able to bring their actions in China and that defendants live up to their stipulations. The Court of Appeal further concluded that the trial court’s monitoring of the progress of litigation in China at scheduled intervals provided sufficient protection for plaintiffs in the event that the Chinese courts either do not accept the cases or if defendants fail to comply with their agreements not to contest liability, not to enforce limitations on wrongful death damages and to waive the statute of limitations.

The second *forum non conveniens* decision, *Melgares v. Sikorsky Aircraft Corporation*, 2009 WL 723108 (D. Conn. Mar. 18, 2009), is a product liability action arising out of a July 2006 helicopter crash near Tenerife, Spain which resulted in the death of all aboard a Sikorsky S-61N helicopter. The named defendants in the case were Sikorsky, the manufacturer of the helicopter, and United

Technologies Corporation, Sikorsky's corporate parent.

The *Melgares* plaintiffs were the survivors of two deceased passengers and two deceased crewmembers aboard the helicopter. All the plaintiffs are Spanish citizens, as were their decedents. Significantly, the owner/operator of the helicopter and the entity that maintained it, Helicsa-Helicopteros, S.A., a Spanish corporation, was not named as a defendant. At the time of the accident, the helicopter was chartered to the Government of Spain for use in firefighting duties. It was on a positioning flight between two islands in the Canary Islands and was on its way to have maintenance performed on one of the helicopter's main rotor blades which had been experiencing mechanical difficulties in the days before the crash. The crash was investigated, in accordance with international law, by the Spanish Civil Accident and Incident Investigation Commission (the CIAIAC). The National Transportation Safety Board (NTSB) participated in the crash investigation at the request of CIAIAC. Sikorsky also participated as the NTSB's technical advisor, although the extent of Sikorsky's role in the accident investigation process was disputed by the parties.

In considering the defendants' *forum non conveniens* motion, the federal district court outlined the three step process used by the Court of Appeals for the Second Circuit to guide the exercise of its discretion in applying the doctrine.<sup>5</sup>

The three steps were: (1) the amount of deference to be accorded to the plaintiffs' choice of forum; (2) whether the alternative forum proposed by the defendants is adequate; and (3) whether the balancing of the private and public interest factors implicated the choice of forum.

With respect to the first step, any review of a *forum non conveniens* motion starts with a strong presumption in favor of the plaintiffs' choice of forum. Unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should "rarely" be disturbed. *Sorex, supra*. However, the degree of deference that a court gives to a plaintiff's choice of forum varies with the circumstances and, where the plaintiff has chosen a forum that is not

his/her home forum, the courts generally give less deference to the plaintiff's choice of forum. In *Melgares*, all of the decedents and the plaintiffs were Spanish citizens, as was the subrogated hull insurer for the owner of the helicopter. Nevertheless, plaintiffs claimed that Connecticut was a more convenient forum than Spain because Sikorsky had designed and manufactured the helicopter in Connecticut and thus the records, witnesses and experts on plaintiffs' liability claims were more easily accessible in Connecticut than any other jurisdiction. Moreover, argued plaintiffs, the defendants' records were in English and to require those records to be translated into Spanish for use in a Spanish court would be difficult. Additionally, the NTSB and Sikorsky had already investigated the incident and their factual findings would be material at trial.

The District Court rejected this argument, finding that it was important to keep in mind that: (a) the accident occurred in Spain; (b) involved a Spanish corporation which owned and operated a helicopter which had been serviced and maintained in Spain; (c) the helicopter had been chartered to the Spanish Government; (d) the helicopter had crashed and caused the deaths of six Spanish citizens; and (e) the crash was investigated by the Spanish Accident Investigation authorities, the CIAIAC. While not discounting the fact that there were some helicopter design and maintenance records in Connecticut, the Court found that there were many important sources of evidence in Spain such as Helicsa's maintenance records, the records of any other third-parties who provided maintenance to the aircraft, details of the helicopter's flight time and cycles, evidence relating to prior incidents involving the main rotor blade during the two days before the accident and the maintenance performed on the helicopter shortly before the time of the crash. Thus, while the plaintiffs' suit in Connecticut afforded the plaintiffs substantial convenience in accessing the evidence available to Sikorsky and its involvement in the NTSB investigation, it was severely inconvenient with respect to the location of the evidence relating to the primary investigation of the accident and the evidence leading up to the accident, all of which was in Spain.

The next factor considered by the Court in determining the deference to be accorded to

plaintiffs' choice of forum was the availability of witnesses. While the U.S. witnesses were available in Connecticut, the Spanish witnesses were not and, given the pendency of a criminal investigation in Spain into the cause of the crash, it was not expected that the Spanish witnesses would voluntarily agree to testify in Connecticut. However, under Spanish law, these witnesses could be compelled to testify.

In summary, while plaintiffs were entitled to some deference in their choice to bring their suits in Connecticut, the Court concluded that they were entitled to less deference than had they been U.S. citizens.

With regard to the second step, there was no serious dispute that Spain was an adequate alternative forum for the litigation. Plaintiffs did not contest this issue in their opposition to defendants' *forum non conveniens* motion.

The Court then turned to the third step in the *forum non conveniens* analysis, a weighing of the private and public interest factors. With respect to the private interest factors, the first is the weighing of the relative ease of access to sources of proof. Sikorsky had agreed as a condition of dismissal to make all of its relevant evidence and witnesses under their control available to the plaintiffs in Spain. Defendants had already produced documents concerning the Sikorsky S-61N main rotor blades in electronic format and therefore they would be available for any litigation in Spain. The Court found defendants' offer adequately addressed plaintiffs' concerns that evidence in the United States would not be available in Spain. Moreover, the Court found that the really essential witnesses to the accident were in Spain, *i.e.*, the maintenance personnel who maintained the helicopter in the days before the crash. This factor weighed heavily in favor of adjudication of the case in Spain. More importantly, Helicsa and other third-parties who maintained the helicopter were not subject to personal jurisdiction in Connecticut and could not be joined as defendants if the suit remained in Connecticut. This was a strong factor in the Court's decision in favor of dismissal, as it had been in the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, 44 U.S. 235 (1981), where the Supreme

Court held that dismissal in the United States was proper because it would be unfair to make defendants proceed to trial in the United States when witnesses were beyond the reach of compulsory process and defendants would be unable to implead potential third-party defendants.

With respect to the practical problems of conducting the trial, the District Court accepted the declaration from Spanish counsel that a claim could be brought to trial within nine months from the day that a lawsuit was filed, certainly a time no longer than the time for adjudication in Connecticut. The Court summed up the private interest factors by finding that they were either neutral or weighed in favor of resolving the dispute in Spain.

With respect to public interest factors, the Court found that there was a public interest in having all parties who are potentially at fault for the accident participate in a suit in a court where they could be held accountable. This could only occur if the trial was in Spain. Rejecting the argument that there was a generalized interest in assuring that only safe products were manufactured in the United States, the District Court found that the primary purpose of the litigation was not to determine the general safety of the Sikorsky S-61N model helicopter, but rather to determine whether defendants were liable for the deaths resulting from the Helicsa crash in Spain.

The Court also addressed the maritime choice of law issues raised in the case due to the crash of the helicopter in the Atlantic Ocean. It found it likely, applying the *Lauritzen v. Larsen* factors<sup>6</sup> used to make choice of law determinations in maritime cases, that Spanish law would be applied.

The District Court concluded that litigation in Connecticut was genuinely inconvenient and that Spain was a significantly preferable forum. Accordingly, the Court granted the defendants' motion to dismiss for *forum non conveniens*, sending the Spanish plaintiffs back to Spain, presumably to bring actions against Helicsa, the operator of the aircraft and other third-party maintainer of the aircraft, as well as Sikorsky and United Technologies Corporation, which had agreed to be subject to jurisdiction in Spain.

The third case in the *forum non conveniens* trifecta is *King v. Cessna Aircraft Co.*, 2009 WL 793014 (C.A. 11, Fla. March 27, 2009). *King* arose out of a crash that occurred at Linate Airport in Milan, Italy in 2001 between a private Cessna plane operated by a German charter company and SAS flight 686. The Cessna made a wrong turn and taxied into an active runway, causing its collision with the SAS aircraft and the resulting deaths of 118 people aboard both aircraft and several people on the ground.

There was only one United States citizen aboard the planes and her family filed suit in the U.S. District Court for the Southern District of Florida. Sixty-nine European plaintiffs representing decedents from Sweden, Italy, Denmark, Finland, Norway, Romania and the United Kingdom also commenced suit in Florida and the actions were consolidated. The District Court granted in part Cessna's motion to dismiss with regard to the European plaintiffs, denied in part the motion with regard to the U.S. plaintiffs, and stayed the U.S. plaintiffs' case pending resolution of the Italian proceedings relating to the European plaintiffs. The European plaintiffs appealed to the U.S. Court of Appeals for the 11<sup>th</sup> Circuit.

The Court of Appeals began its discussion with the acknowledgment that a *forum non conveniens* determination by a District Court may be reversed only where there is clear abuse of discretion and, further, where the court's balancing of the private and public interest factors in deciding a *forum non conveniens* motion is reasonable, the District Court's decision deserves substantial deference. There was no dispute among the parties that Italy, to which dismissal was sought, was an adequate alternative forum because Cessna was willing to submit to jurisdiction and process there and Italian courts have addressed similar aviation disaster cases with awards of satisfactory remedies. The parties agreed that choice of law was not an issue: Italian law would be applied regardless of whether the cases were litigated in Milan or Miami.

The Court then looked at the private interest factors, and, while agreeing that a plaintiff's choice of forum should rarely be disturbed, citing *Gilbert v. Gulf Oil Corporation*, the Court recognized that a foreign plaintiff's choice of forum carries a "weaker" presumption of convenience that receives less deference. *King, supra.* at 10.

The Court rejected the argument of the European plaintiffs that they should be entitled to the deference accorded to a U.S. citizen because they were residents of countries which had treaties of friendship, commerce and navigation with the United States. In rejecting that argument (as have other courts), the Eleventh Circuit concluded that the lesser deference given by the District Court was consistent with treaty obligations of the United States. "Just as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience." *King, supra.* at 11. Thus, where the plaintiff's choice is not its home forum, the presumption in plaintiff's favor applies with less force. Weighing the other private interest factors, the Court found that much of the evidence of the case was in Italy, many of the witnesses were there and that some of the plaintiffs were already litigating a similar case in Italy arising out of the crash.

Turning to the public interest factors, the Court found that Italy has a strong interest in resolving the case because the tragic event occurred on Italian soil. This is especially true since Italian law would provide the rule of decision in the case. Accordingly, the public interest factors tipped the balance in favor of a trial in Italy with respect to the European plaintiffs. As a condition of dismissal, the Court required Cessna to submit to the jurisdiction of the Italian courts, to waive the statute of limitations and to provide for reinstatement in the District Court in Florida of any case where jurisdiction was rejected by a final decision of a court in Italy. Thus, plaintiffs were assured of a forum to hear their case, albeit not the forum that was their first choice.

## CONCLUSION

These three recent decisions, all the result of extensive and careful judicial analysis, demonstrate that U.S. courts will give more than lip service to *forum non conveniens* principles and will carefully analyze all of the surrounding facts and circumstances in deciding whether to permit foreign air crash cases to be litigated in the courts of the United States.

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<sup>1</sup> Judge Lord Denning's comment in *Smith Kline & French Lab Ltd. v. Block*, [1983] 1 W.L.R. 730

<sup>2</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)

<sup>3</sup> *In re Air Crash near Peixoto de Azevada*, 574 F.Supp. 2d 272, 279 (E.D.N.Y. 2008)

<sup>4</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)

<sup>5</sup> *Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146 (2d Cir. 2005)

<sup>6</sup> 345 U.S.571 (1953).