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### WINTER 2008

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#### **ATTEMPTS BY PLAINTIFFS TO DEFEAT FORUM NON CONVENIENS MOTIONS BY ALLEGING AIRCRAFT OWNER OR LESSOR LIABILITY**

As the frequency of major commercial aircraft accidents in the United States has decreased, U.S. plaintiffs' counsel have increasingly commenced actions relating to foreign accidents that bear little or no connection to the U.S. While defense counsel generally have been successful in obtaining forum non conveniens dismissals of these actions, plaintiffs are increasingly naming as defendants the U.S.-based owners or lessors of accident aircraft, including financial lessors, arguing a U.S. connection sufficient to defeat forum non conveniens motions. Although plaintiffs have had mixed results with this approach, in light of plaintiff-friendly rulings such as that of the Illinois State appellate court in *Ellis v. AAR Parts Trading*,<sup>1</sup> it is likely that plaintiffs will continue to raise lessor liability issues in an effort to keep foreign accident cases in U.S. courts.

In this first of two Newsletters addressing this issue, we examine three significant decisions which address allegations of liability against U.S.-based aircraft owners or lessors in the context of forum non conveniens motions. We also discuss 49 U.S.C. Section 44112(b), a federal statute that limits, among other things, owner and lessor liability and provides a potentially potent weapon against foreign accident cases in the U.S. Our Spring Newsletter will be devoted to a close examination of case law addressing whether Section 44112(b) preempts state common law causes of action (*e.g.*, vicarious liability, bailment, *etc.*).

#### *Ellis v. AAR Parts Trading*

In *Ellis v. AAR Parts Trading*, the Illinois State appellate court concluded that Illinois-based current and former aircraft owner/lessors defendants, among other things, established a connection to Illinois sufficient to defeat a forum non conveniens motion in litigation arising out of the crash of Air Philippines Flight 541 on April 19, 2000, in the Philippines. Significantly, prior to the filing of this action, an Illinois appellate court found that Section 44112(b) did not preempt state common law causes of action relating to lessor liability.<sup>2</sup>

*Ellis* involved a consolidated appeal arising out of two lawsuits in Cook County (Chicago) state court on behalf of relatives of 113 Philippine passengers who died in the crash of Flight 541. The accident aircraft, a Boeing 737, was purchased by defendant AAR Parts Trading, Inc. ("AAR"), a parts company incorporated and with its principal place of business in Illinois. AAR leased the aircraft to the Air Philippines Corporation. It then sold the aircraft and assigned its rights, title and interests, to defendant Fleet Business Credit, LLP ("Fleet"), a financing company incorporated in Delaware with its principal place of business in Illinois. Plaintiffs alleged causes of action against both defendants for, among other things, strict products liability, negligent entrustment and common law bailment.

Defendants AAR and Fleet filed forum non conveniens motions to dismiss plaintiffs' consolidated cases to the Philippines. The trial court denied the motions and the consolidated appeal followed. As a preliminary matter, the

appellate court noted that plaintiffs' choice of forum was entitled to "somewhat" reduced deference, even though one of the plaintiffs, plaintiff Layug, was a resident of Cook County, because the site of decedent's accident was in the Philippines. With respect to the private interest (convenience of the parties) factors to be considered, defendants argued that the Philippines was a more convenient forum because at least thirty-one witnesses "with information critical to the central issues in the case," six members of a technical working group responsible for the "technical aspects of the crash investigation" and other potential witnesses were located in the Philippines.<sup>3</sup> Although the appellate court acknowledged that these were "valid points," it did not agree that these factors strongly favored dismissal of the action. Instead, it noted with approval the trial court's reasoning in denying the motions to dismiss:

[I]t is incredulous for two Illinois resident corporations to argue that their home state is inconvenient to them to litigate this matter. It is also incredulous to observe that the defendants thoroughly ignore the fact that the theories of liability pled against them concern the alleged defective condition of the aircraft prior to its transfer to Air Philippines, and there has been no assertion by the defendants that the sources of proof, records, and witnesses on these issues are not located in Illinois.<sup>4</sup>

The court pointed out that because plaintiffs alleged both negligence and defective design theories, relevant sources of proof were located in the Philippines and in Illinois.

The appellate court went on to consider, and reject, the defense argument that their inability to pursue a third-party action against the Philippines Air Transportation Office in Illinois favored dismissal. While acknowledging that a third-party action might be unavailable because of the Foreign Sovereign Immunities Act, the court noted that the lease agreement permits AAR to seek indemnification from Air Philippines in Illinois and specifically provides that any causes of action arising under the terms of the lease are subject to Illinois law. Thus, the court concluded that "[i]f, in

fact, such a claim is barred by the Foreign Sovereign Immunities Act, this should not weigh in favor of dismissal of the action, as the defendants agreed to the terms of the lease agreement presumably in full awareness of all of its implications and ramifications. It would be disingenuous for them to now argue that they would prefer to litigate the indemnification action against Air Philippines in the Philippines."<sup>5</sup>

The court also disagreed with the defendants' contention that public interest (court administrative) factors weighed strongly in favor of dismissal, noting that residents of Illinois would certainly be interested in the case "because the aircraft was owned and/or operated by corporations that do business in the state of Illinois and take advantage of Illinois law."<sup>6</sup> Further, Illinois residents "are interested in, and may be affected by, Illinois corporations that . . . engage in financial transactions in the state of Illinois."<sup>7</sup>

Significantly, although the appellate court found that the trial court could have decided that either Illinois or the Philippines were appropriate forums, it did not find an abuse of discretion by the trial court because the private and public interest factors did not strongly favor dismissal. As a result, it affirmed the trial court's denial of the motions to dismiss. The Illinois Supreme Court has denied a petition for leave to appeal.<sup>8</sup>

#### ***Gambra v. International Lease Finance Corp.***

The U.S. District Court for the Central District of California came to the opposite conclusion in *Gambra v. International Lease Finance Corp.*,<sup>9</sup> a well-reasoned opinion issued shortly after *Ellis*. In *Gambra*, the federal district court rejected plaintiffs' attempt to defeat a forum non conveniens motion in litigation arising out of the Flash Airlines Flight 604 crash by naming a California-based aircraft lessor as a defendant and arguing that California was an appropriate forum for the case under the forum selection clause in the aircraft lease. This case provides valuable guidance to counsel on how to draft aircraft financial documents (e.g., an aircraft lease) to minimize the risk that their terms could be used to help defeat a forum non conveniens motion.

All 148 on board Flight 604 from Sharm el-Sheikh, Egypt to Paris, France, were killed in the crash in the Red Sea off the coast of Egypt on January 3, 2004. Plaintiffs, the heirs and beneficiaries of the estates of the decedent passengers, are citizens or residents of France. All but two of the 122 decedent who are the subject of the litigation were citizens or residents of France.

Plaintiffs alleged strict liability, negligence and breach of warranty against defendants International Lease Finance Corporation (“ILFC”), which owned the Boeing 737-300 aircraft and leased it to Flash Airlines; The Boeing Company; Honeywell International, which manufactured certain component parts of the flight management system; and Parker Hannifin Corporation, which manufactured other component parts of the aircraft. Flash Airlines was not subject to jurisdiction in the United States under the Warsaw Convention.

Defendants moved for forum non conveniens dismissal on the grounds that France was the most appropriate forum. They pointed out that the only connection to California was that the aircraft had been leased to Flash Airlines, a private charter airline operating out of Egypt, approximately two years prior to the accident by ILFC, which is headquartered in California. ILFC had no involvement in the day-to-day operation and no operational oversight of Flash Airlines. Further, during the entire period the accident aircraft had been owned by ILFC, it had been leased only to foreign carriers operating the aircraft outside of the U.S. In opposing the motion, plaintiffs pointed to the fact that all defendants were U.S. companies and that the aircraft lease between ILFC and Flash Airlines contained a forum selection clause designating the Central District of California as an appropriate forum for litigating disputes between the lessor IFLC and the lessee Flash Airlines and waiving inconvenient forum arguments.

At the outset of its analysis, the district court found France to be an adequate alternative forum conditioned on the French court’s assumption of jurisdiction over plaintiffs’ claims after noting, among other things, defendants’ agreement to submit to the jurisdiction of French courts.

Plaintiffs argued that the expectation of the parties to the lease agreement (ILFC and Flash Airlines) was that litigation would proceed in California and, according to plaintiffs, this favored denial of defendants’ motion. Specifically, plaintiffs contended that ILFC and Flash Airlines had agreed that California law governed their lease agreement and that the parties had “‘selected ILFC’s home district as the proper forum for disputes involving the leased aircraft, and clearly agreed that neither would challenge the contractually selected forum as inconvenient.’”<sup>10</sup> The forum selection clause in the ILFC/Flash lease provided as follows:

Waiver: Lessee and Lessor hereby waive the right to trial by jury. Lessee and Lessor hereby irrevocably waive any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or related to the lease brought in any of the courts . . . and hereby further irrevocably waive any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.<sup>11</sup>

Plaintiffs argued that they were entitled to rely on the forum selection clause because they were intended third-party beneficiaries of the agreement. Defendants countered that the lease provisions were not intended to be invoked by plaintiffs or other third parties. Relying on Article 8.5 of the lease, defendants pointed out that the lease was simply not intended to apply to claims involving the condition of the subject aircraft:

LESSEE agrees that LESSOR will not be liable to LESSEE, any sublessee or any Person, whether in contract or tort and however arising, for any cost, loss or damage (consequential or otherwise) arising out of the condition of the Aircraft, whether or not due in whole or in part to an act or omission or the active or passive negligence of LESSOR.<sup>12</sup>

The district court agreed that plaintiffs were not third-party beneficiaries of the aircraft lease and

were not entitled to enforce its forum selection clause, stating that:

First, the forum selection clause does not govern the claims of plaintiffs against the defendants in these cases. The lease governs the obligations of ILFC and Flash with respect to the subject aircraft, not the liability of either of them to those passengers and crew aboard the subject aircraft. In fact, Article 8.5 of the lease explicitly provides that . . . it does not cover losses to anyone arising out of the condition of the aircraft. Accordingly, the Court finds that the claims asserted in these cases are not governed by the express terms of the forum selection clause . . . . Second, even if the Court were to conclude that these actions arise out of or are related to the lease, plaintiffs are not third-party beneficiaries who are entitled to enforce all provisions of the lease, including the forum selection clause . . . . Because there currently is no pending dispute regarding the terms of the lease or the relationship between Flash and ILFC . . . , the Court concludes that plaintiffs are not entitled to enforce the forum selection clause of the lease.<sup>13</sup>

The district court also rejected plaintiffs' argument that their tort claims were subject to the forum selection clause because they require interpretation of the maintenance requirements and Article 8.5 of the lease. The court pointed out that there was no need to interpret the lease to decide plaintiffs' product liability claims and hence the forum selection clause did not apply to the tort claims. It should be noted, however, that in so holding, the district court commented on the fact that Flash Airlines was "sufficiently insured," implying that there was at least a possibility that it would need to interpret the lease if Flash Airlines had failed to procure the insurance required under the lease.<sup>14</sup>

The *Gambra* court went on to find that the evidence located outside the U.S. was more easily accessible in France, agreeing with defendants that most of the documents and witnesses relating to damages were "overwhelmingly located in France."<sup>15</sup> It noted that any evidence provided by the California-based

ILFC appeared "minimal and easily transportable to France."<sup>16</sup> The court also noted that it likely would be easier for the parties to obtain evidence from Flash Airlines in France than in California because it was not subject to the district court's subpoena power.

Notably, in evaluating the public interest factors, the district court commented that California's interest in enforcing the terms of the subject lease was "minimal in light of the Court's rejection of plaintiffs' argument that they are third-party beneficiaries of the lease."<sup>17</sup> The court dismissed all of the cases with the usual conditions, including a French court's acceptance of jurisdiction over all of the claims presently before the district court.

### *Esheva v. Siberia Airlines*

In *Esheva v. Siberia Airlines*,<sup>18</sup> the U.S. District Court for the Southern District of New York also rejected plaintiffs' attempt to defeat a forum non conveniens motion by establishing a connection to the U.S. through a U.S.-based aircraft lessor. The court commented that there was a "compelling argument" that the U.S.-based lessor was only named as a defendant to attempt to establish a connection to the U.S. and found that the lessor was "absolutely immune" from liability pursuant to 49 U.S.C. Section 44112(b).<sup>19</sup>

*Esheva* involved the crash of a Siberian Airlines ("Sibir") flight from Moscow to Irkusk on July 9, 2006. 124 of the 203 passengers and crew members onboard the flight died when the aircraft overran a runway in Irkusk. None of the passengers were U.S. residents or scheduled to continue to travel to the U.S. The accident aircraft was designed and manufactured in France by Airbus, S.A.S., owned by Wilmington Trust Company, and leased to defendant Airbus Leasing II, Inc. ("Airbus Leasing"), a Delaware corporation with its principal place of business in Virginia. Airbus Leasing subleased the aircraft to Sibir, a Russia-based airline. The aircraft was registered in France and maintained in Russia and Germany.

A complaint was filed in the Southern District of New York on behalf of 158 passengers and crew members, alleging negligence and vicarious liability

against Sibir and vicarious liability against Airbus Leasing. In their complaint, plaintiffs alleged that defendants were subject to the jurisdiction of the Southern District pursuant to a non-exclusive forum selection clause in the lease agreement between Sibir and Airbus Leasing. A separate complaint was subsequently filed on behalf of an additional twenty-six passengers and crew members alleging similar causes of action against the same defendants.

Anticipating a forum non conveniens motion to dismiss, Airbus Leasing and certain of the plaintiffs entered into an agreement intended to maximize the likelihood that the litigation would remain in the U.S. Under the agreement, plaintiffs agreed to waive punitive damages claims against Airbus Leasing, not to sue any other Airbus entity, not to sue Airbus Leasing outside the Southern District except in France, and to dismiss all claims against Airbus Leasing if their claims against Sibir were dismissed. In turn, Airbus Leasing agreed to file a cross claim against Sibir, to refrain from moving to dismiss on forum non conveniens grounds, and to oppose efforts to sever or dismiss the New York action. In addition, plaintiffs and Airbus Leasing agreed that French law governed the claims amongst them. In accordance with this agreement, Airbus Leasing filed a cross-claim against Sibir in both of the actions pending before the district court.

As expected, defendant Sibir moved to dismiss both actions on forum non conveniens grounds. As part of its motion, Sibir agreed “not to contest liability in Russia, to pay full compensatory damages to all plaintiffs as determined by a Russian court, and to waive any statute of limitations for actions filed in Russia within six months of dismissal here.”<sup>20</sup> Sibir argued that the sole contact with the U.S. was the aircraft lease agreement and that Airbus Leasing was only named as a defendant to attempt to provide a connection to the U.S. in the litigation. Sibir further argued that Airbus Leasing, as lessor, was absolutely immune from any liability in the United States to plaintiffs pursuant to 49 U.S.C. Section 44112(b).

Section 44112(b), originally enacted to facilitate financing for aircraft purchases, provides that “[a] lessor, owner, or secured party is liable for the

personal injury, death, or property loss or damage on land or water *only* when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death or property loss or damage occurs because of the aircraft, engine, or propeller, or [from] the flight of, or an object falling from, the aircraft, engine, or propeller.”<sup>21</sup>

Sibir argued that Airbus Leasing’s immunity from liability under the statute negated plaintiffs’ allegation of a U.S. connection. Similarly, because of the immunity, Sibir argued that the agreement between plaintiffs and Airbus Leasing requiring that Airbus Leasing assert cross-claims against Sibir was a “contrived obligation.”<sup>22</sup>

Plaintiffs responded that, among other things, it was “astounding” that Sibir moved for dismissal in view of the fact that under the subject lease agreement, according to plaintiffs, Sibir had consented to jurisdiction and had waived its right to forum non conveniens dismissal for claims arising out of the lease agreement. Plaintiffs also noted that Airbus Leasing had contracted for the right to litigate any claims arising from the lease agreement in New York and, further, pursuant to its agreement with plaintiffs, had contracted “for the assurance that litigation against it would not proceed in Russia.”<sup>23</sup>

In its opposition, Airbus Leasing agreed that Section 44112(b) may offer protection against plaintiffs’ claims for vicarious liability, but argued that the statute did not render moot the plaintiffs’ claims for other legal liability. It also contended that the forum selection clause governed its cross-claims against Sibir.

In evaluating the motions to dismiss both actions, the district court concluded that plaintiffs’ choice of forum in this case was entitled to “substantially reduced deference.”<sup>24</sup> Most of the surviving plaintiffs and representatives of decedents were Russian residents and the witnesses and most of the evidence also was in Russia. The court criticized plaintiffs’ counsel, stating that it appeared that they had filed lawsuits on behalf of foreign plaintiffs who were injured abroad “to gain advantage in settlement discussion from the substantial damage awards that may be obtained from American juries

and to inconvenience the principal defendant, a Russian corporation.”<sup>25</sup> Indeed, the court stated that there was a “compelling argument that Airbus [Leasing] was added to this litigation solely to provide some American nexus to the litigation, albeit not a New York nexus. To the extent that it is facing a claim of derivative liability, Airbus [Leasing] is absolutely immune for such liability in the United States” pursuant to Section 44112(b).<sup>26</sup> Further, the court found that the cross-claims had been resolved because Sibir agreed to indemnify Airbus Leasing and, thus, the cross-claims and the contractual relationship between defendants had “no remaining relevance to the motion.”<sup>27</sup>

Finally, the district court rejected plaintiffs’ arguments alleging that Russia’s courts operated “under a cloud of corruption,” finding that the alternative forum was adequate.<sup>28</sup> It therefore concluded that the private and public interest factors weighed strongly in favor of transfer because, among other things, Russia had a stronger interest in responding to an accident that occurred in its territory, that resulted in injuries to its citizens, and that involved a Russian airline. As a result, the district court granted Sibir’s motion to dismiss conditioned upon Sibir conceding liability if sued in Russian courts by plaintiffs within six months of entry of the district court’s order; waiving any applicable statute of limitations defense; and paying full compensatory damages as determined by a Russian court to plaintiffs.

## Conclusion

The *Ellis* case is troublesome as it indicates that the Illinois forum is one where plaintiffs can increase the likelihood of litigating foreign air disasters by naming U.S.-based aircraft or engine lessors or owners as defendants. When considering the implications of *Ellis*, however, it is important to note that it is a state court case in Cook County involving an Illinois resident plaintiff and Illinois-based defendants. Moreover, the Illinois appellate court reviewed for an abuse of discretion (*i.e.*, reversal only if “no reasonable person could take the view adopted by the trial court”) and found that either Illinois or the Philippines were appropriate forums. As such, insurers and counsel should not assume that a forum non conveniens motion is a

non-starter in Illinois actions. For example, although admittedly not involving U.S.-based aircraft or engine lessors, the decision of the U.S. District Court for the Northern District of Illinois in *In re Air Crash Near Athens, Greece on August 14, 2005*,<sup>29</sup> which granted a forum non conveniens motion even though some of plaintiffs were U.S. residents (or were entitled to status equal to U.S. residents) and defendant Boeing is an Illinois-based company, confirms this.

The *Gambra* and *Esheva* cases demonstrate that plaintiffs still face hurdles when attempting to defeat forum non conveniens motions by naming U.S.-based lessors or owners as defendants. *Esheva* highlights the potential implications of 49 U.S.C. Section 44112(b). While this provision has been interpreted in a number of ways,<sup>30</sup> it provides a potent weapon capable of minimizing the impact of naming U.S.-based lessors as defendants in jurisdictions where courts have interpreted it as preempting state law (*e.g.*, Connecticut). Our Spring Newsletter will examine the implications of Section 44112(b) in greater detail.

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<sup>1</sup> 357 Ill. App. 3d 723, 828 N.E.2d 726, 293 (Ill. App. Ct. 2005).

<sup>2</sup> *Retzler v. Pratt & Whitney Co.*, 309 Ill. App. 3d 906, 915, 723 N.E.2d 345, 353 (Ill. App. Ct. 1999).

<sup>3</sup> *Ellis*, 357 Ill. App. 3d at 742-43.

<sup>4</sup> *Id.* at 743 - 44.

<sup>5</sup> *Id.* at 746.

<sup>6</sup> *Id.* at 747.

<sup>7</sup> *Id.*

<sup>8</sup> *Layug v. AAR Parts Trading, Inc.*, 216 Ill. 2d 290 (Ill. 2005).

<sup>9</sup> 377 F. Supp. 2d 810 (C.D. Cal. 2005).

<sup>10</sup> *Id.* at 821 (quoting Plaintiffs' Opposition).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (citing Lease Agreement).

<sup>13</sup> *Id.* at 822-23.

<sup>14</sup> Aircraft lessors are usually covered by the aircraft hull and liability insurance policy as additional insureds pursuant to endorsement AVN 67B. *See generally* Rod D. Margo, *Aviation Insurance* (3d ed. 2000) ¶¶ 28.61-28.76.

<sup>15</sup> *Id.* at 819.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 825.

<sup>18</sup> *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493 (S.D.N.Y. 2007).

<sup>19</sup> *Id.* at 499 n.4.

<sup>20</sup> *Id.* n.5.

<sup>21</sup> 49 U.S.C. § 44112 (b) (emphasis added). Under the statute, a lessor is defined as "a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller." An owner is defined as "a person that owns a civil aircraft, aircraft engine, or propeller." A secured party is defined as "a person having a security interest in, or security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument."

<sup>22</sup> Sibir Memorandum of Law in Support of Its Motion to Dismiss, 2007 WL 1833440.

<sup>23</sup> *Id.*

<sup>24</sup> *Esheva*, 499 F. Supp. 2d at 498.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 499 n.4.

<sup>27</sup> *Id.* at 496-97, 497 n.2.

<sup>28</sup> *Id.* at 499-500.

<sup>29</sup> 479 F. Supp. 2d 792 (N.D. Ill. 2007).

<sup>30</sup> *See Mangini v. Cessna Aircraft Co.*, Nos. X07CV044001467S, X07CV0440034186, 2005 WL 3624483, at \*2-\*6 (Conn. Super. Dec. 7, 2005) (rejecting the argument that Section 44112 only applies to those holding a security interest in an aircraft or long-term lessors and not aircraft owners and finding that the Section preempts state law); *Coleman v. Windham Aviation Inc.*, No. Civ. A. K.C. 2004-0985, 2005 WL 1793907, at \*6-\*7 (R.I. Super. July 18, 2005) (finding that Section 44112 did not preempt state law cause of action for vicarious liability against an "outright" aircraft owner, but rather was limited to owners and lessors holding only a security interest); *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830, 2001 WL 331625, at \*2 (S.D. Ind. Feb. 7, 2001) (finding that Section 44112 preempts state common law claims against lessor of aircraft); *Retzler v. Pratt & Whitney Co.*, 309 Ill. App. 3d 906, 915, 723 N.E.2d 345, 353 (Ill. App. Ct. 1999) (holding that Section 44112 did not preempt a state common law personal injury action against an aircraft lessor); *see also Storie v. Southfield Leasing, Inc.*, 282 N.W.2d 417, 421 (Mich. App. Ct. 1979) (finding that successor statute to Section 44112 only preempted state law claims against aircraft lessor for injury or loss sustained "on the surface of the earth" and not inside the aircraft); *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142, 1142-46 (7th Cir. 1994) (examining both Section 44112 predecessor statute and common law bailment before affirming summary judgment dismissal of action against aircraft lessor).