ALL ALONG THE WATCHTOWER:
FORUM NON CONVENIENS IN INTERNATIONAL AVIATION♣

by

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"There must be some kinda way out of here,"

said the Joker to the Thief.

"There's too much confusion. I can't get no relief."

INTRODUCTION
"*BUSINESSMEN THEY DRINK MY WINE, PLOUGHMEN PLOUGH MY EARTH*"

Before filing suit, plaintiffs' attorneys engage in a Conflicts of Laws analysis to find the jurisdiction with the most sympathetic law, and most likely to result in the largest possible judgment for their clients. Juries in the United States are perceived to be the most generous in awarding judgments; hence, aviation suits often are filed in U.S. courts, even when they involve injuries and death of foreign citizens on an

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The title of this article is presented with apologies to Bob Dylan (Robert Zimmerman), who wrote "All Along the Watchtower", superbly performed by Jimi Hendrix:

> There must be some way out of here," said the joker to the thief,
> "There's too much confusion, I can't get no relief.
> Businessmen, they drink my wine, plowmen dig my earth,
> None of them along the line know what any of it is worth."
>
> "No reason to get excited," the thief, he kindly spoke,
> "There are many here among us who feel that life is but a joke.
> But you and I, we've been through that, and this is not our fate,
> So let us not talk falsely now, the hour is getting late."
>
> All along the watchtower, princes kept the view
> While all the women came and went, barefoot servants, too.
>
> Outside in the distance a wildcat did growl,
> Two riders were approaching, the wind began to howl

These lyrics are chillingly similar to the *Book of Isaiah* Chapter 21, verses 5-9:

> Prepare the table, watch in the watchtower, eat, drink: arise ye princes, and prepare the shield. For thus hath the Lord said unto me, Go set a watchman, let him declare what he seeth. And he saw a chariot with a couple of horsemen, a chariot of asses, and a chariot of camels; and he hearkened diligently with much heed. . . . And, behold, here cometh a chariot of men, with a couple of horsemen. And he answered and said, Babylon is fallen, is fallen, and all the graven images of her gods he hath broken unto the ground.

See Paul Stephen Dempsey, "Air Cargo Liability and Baggage Liability and the Tower of Babel", 36 George Washington International Law Review 239-308 (2004).

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aircraft flown by a foreign air carrier and crew that crashed into foreign soil.[1] Among the benefits of suing in U.S. courts are:

- the ability to litigate on behalf of poor plaintiffs by experienced litigators on a contingent fee basis;
- liberal discovery rules;
- relatively prompt trials;
- the possibility of receiving higher damages from plaintiff-sympathetic juries;
- the availability of strict liability in products liability law;
- recovery of non-economic damages;
- the possibility of recovering punitive damages (except against air carriers in cases arising under the Warsaw or Montreal Conventions); and
- the relative efficiency of judgment enforcement.[2]

Additionally, as explained below, plaintiffs who file in U.S. court often enjoy defendants' concessions and the court's conditional judgment on the foreign venue's willingness to accept the case, and the defendants' willingness to subject itself to the jurisdiction of the foreign court, to provide witnesses, translate documents, waive the statute of limitations defense, and honour any judgment that has exhausted its appeals. Hence, plaintiffs often engage in "forum shopping", [3] and as a consequence, the United States has become a magnet for litigation.[4]

So long as there is jurisdiction, an American plaintiff suing and American defendant in a U.S. court will be heard in the United States. But when foreign parties are involved in the litigation – either as plaintiffs or defendants – the U.S. court may refuse to hear the case, even where it has personal jurisdiction over the defendant(s) and subject matter jurisdiction over the question(s).[5] In aviation litigation, clever plaintiffs' lawyers typically seek to include an American plaintiff and, usually, an American defendant (e.g., an airline, airframe or engine manufacturer, component parts manufacturer, service provider, and sometimes even an aircraft lessor) in the suit in an effort to persuade a U.S. court to accept jurisdiction.

Sometimes plaintiffs file in a particular jurisdiction with the motivation of making it inconvenient for the defendant to defend itself, so as to procure a generous settlement.[6] Some cases have focused on the

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[1] "More and more aviation claims are being brought in the United States, especially for extraterritorial air crashes, regardless of whether the accident has any meaningful contact with the United States forum." Andrew Harakas & Barry Alexander, *Forum Non Conveniens and the Montreal Convention,* For the Defense (June 2008), at 46.

[2] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 618 (2008); Thad Dameris, David Weiner & Aaron Crane, *The United States is No Longer Courthouse for the World,* 22 Air & Space Lawyer 9 (Nov. 1, 2008). As one court observed, "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd. v. Block,* [1982] 1 W.L.R. 730 C.A. *See* Allan Memdelsohn, *International Litigation: The U.S. Jurisdiction to Prescribe and the Doctrine of Forum Non Conveniens,* 73 J. Air L. & Com. 17, 26 (2008).

[3] But as one court noted:

> The often pejorative connotation inherent in the label "forum shopping" is generally undeserved. It is a fact that plaintiffs will almost always select a forum in which they believe they will maximize their recovery, so long as they have a reasonable chance of remaining in that forum, and that forum is often within the U.S. Conversely, defendants will generally seek to relegate actions to the forum in which they believe their exposure is minimized, and that forum is often outside the U.S.

In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006, 574 F. Supp 2nd 272, 279 (E.D.N.Y. 2008), aff'd 354 Fed. Appx. 585 (2nd Cir. 2009). Another court noted: "Forum non conveniens presupposes the existence of two judicial forums each possessing jurisdiction and venue over the action, but posits that one forum may resist invocation of its jurisdiction when trial of the action would more appropriately proceed in the other forum. Courts know from experience that selection of a forum is sometimes dictated not only by the search for justice but the temptation of the plaintiff 'to resort to a strategy of forcing the trial at a most inconvenient place of an adversary, even at some inconvenience to itself.'" *Dahl v. United Technologies Corp.,* 632 F.2nd 1027, 1029 (3rd Cir. 1980), citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507 (1947). Another observed that, "trial judges applying the doctrine of forum non conveniens must walk a delicate line avoid implicitly sanctioning forum-shopping by either litigant at the expense of the other." *Pain v. United Technologies,* 637 F.2nd 775, 784 (D.C. Cir. 1980).

[4] Russell Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum,* 52 Ark. L. Rev. 157, 162 (1999).

[5] Joel Sammuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis,* 85 Ind. L.J. 1059 (2010).

[6] "It would appear that American counsel have filed lawsuits on behalf of foreign plaintiffs who were injured abroad to gain advantage in settlement discussions from the substantial damage awards that may be obtained from American juries and to inconvenience the principal defendant . . . ." *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493, 501 (S.D.N.Y. 2007). "Here, plaintiffs . . . unabashedly acknowledge that this judicial district was chosen as part of a 'litigation strategy' to keep their claims in the United States." *Can v. Goodrich Pump & Engine Control Sys.,* 711 F.Supp.2nd 241, 259 (D. Conn. 2010).

inconvenience of the local forum to the defendant;[7] yet it seems facially odd for a defendant to assert inconvenience when facing suit in the local courthouse.[8] Some courts have held that a "defendant's home forum always has a strong interest in providing a forum for redress of injuries caused by its citizens."[9] Yet other courts have found this principle unpersuasive in the context of crashes of U.S. manufactured aircraft and component parts crashing in foreign jurisdictions, particularly when most of the injured parties are foreign citizens.[10] However, it must be admitted that, "convenience has little to do with why a defendant seeks a forum non conveniens dismissal. The real reason is to force the plaintiff to re-file in another country, one whose substantive laws, and litigation culture, are more favourable to the defendant."[11] More recent cases look beyond the convenience of the defendant to the convenience of the parties, the witnesses, and the court itself. As one court noted, "compelling local jurors to sit on what undoubtedly will be lengthy trials to resolve these cases that have no connection whatsoever to this community (other than the Plaintiff's counsel) would impose an unfair burden."[12]

The concept of *forum non conveniens* remains among the most useful tools for defendants seeking to remove the case to a less generous jurisdiction.[13] Though the U.S. Supreme Court repeatedly has noted that *forum non conveniens* is to be used to dismiss cases only in "rare cases," in fact defendants have a respectable success ratio in U.S. federal courts in their motions for dismissal of complaints filed by foreign plaintiffs, particularly where the events giving rise to the claim occurred off shore, and plaintiffs and decedents are overwhelmingly foreign.[14] So well have these motions fared that they have "become the primary response of domestic defendants to tort actions brought by foreign plaintiffs in U.S. courts."[15]

Once *in personem* and subject matter jurisdiction is facially established, the issue of *forum non conveniens* often becomes the next issue addressed. Yet the criteria for application of the doctrine "creates confusion and uncertainty in application," according to Professor Samuels. "That confusion, which results from an unclear test that is unevenly enforced, undermines the legitimacy and accountability of the federal courts."[16]

ORIGINS OF THE DOCTRINE

"NONE OF THEM ALONG THE LINE, KNOW WHAT ANY OF IT IS WORTH"

The doctrine of *forum non conveniens* is of Scottish descent,[17] embraced by the U.S. Supreme Court in the 1930s.[18] The doctrine was first addressed by the U.S. Supreme Court in a foreign aviation accident context

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[7] *Tuazon v. R.J. Reynolds Tobacco Co.,* 473 F.3rd 1137, 1180 (9th Cir. 2006) ("A plaintiff need not select the optimal forum for his claim, but only a forum that is not so oppressive and vexatious to the defendant 'as to be out of proportion to plaintiff's convenience'"); *Vorbiev v. McDonnell Douglas Helicopters,* 2009 WL 1765675 (N.D. Cal. 2009).

[8] Professor Heiser notes, "[C]onvenience has little to do with why a defendant seeks a forum non conveniens dismissal. The real reason is to force the plaintiff to re-file the lawsuit in another country, one whose substantive and procedural laws, and litigation culture, are more favorable to the defendant." Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Desirability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 613 (2008). Attorney Michael Verna makes a similar argument: "Most FNC motions are not grounded in legitimate concerns of convenience, prejudice, and fairness to litigants. Instead, FNC has evolved into a tool of defense forum shopping that seeks to avoid having serious accident cases heard and decided on the merits of convenient American courts. A cynic might well conclude that for aviation defendants, it really should be renamed the 'foreign most convenient' doctrine." Michael P. Verna, *Convenience Has Nothing to Do with FNC Motions,* 22 Air & Space Lawyer 9 (Nov. 1, 2008).

[9] *Reid-Walen v. Hansen,* 933 F.2nd 1390, 1400 (8th Cir. 1991).

[10] *See e.g., Clerides v. Boeing Co.,* 534 F.3rd 623, 630 (7th Cir. 2008); *Piper Aircraft v. Reyno,* 454 U.S. 235, 268 (1981); *In re Air Crash Disaster over Makassar Strait, Sulawesi,* 2011 WL 91037 (N.D. Ill. 2011), at *8 (*forum non conveniens* dismissal motion granted where the crash involved an Indonesian domestic flight operated by an Indonesian air carrier and crew, carrying predominantly Indonesian citizens, and the cause of the crash appeared to be pilot error, and inadequate pilot training and maintenance).

[11] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 613 (2008) [footnotes omitted]. "Most courts do not question the propriety of this reverse forum shopping." Id.

[12] *Da Rocha v. Bell Helicopter Textron,* 431 F. Supp. 2nd 1318, 1325 (S.D. Fla. 2006).

[13] See Don Rushing & Ellen Nudelman Adler, "Some Inconvenient Truths About *Forum Non Conveniens* Law in International Aviation Disasters" (2009) 74 J. Air L. & Com. 403 at 433.

[14] *See* Joel Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis,* 85 Ind. L.J. 1059, 1077 (2010). "[A]lthough the plaintiff may have the initial choice of forum selection, express statutory provisions and common law doctrines can quickly work to dislodge that choice." James Baudino, *Venue Issues Against Negligent Carriers – International and Domestic Travel: The Plaintiff's Choice?,* 62 J. Air L. & Com. 163, 202 (1996).

[15] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609 (2008).

[16] Joel Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis,* 85 Ind. L.J. 1059, 1060 (2010).

[17] Anne Kearse, "Forfeiting the Home Court Advantage" (1998) 40 S.C. L. Rev. 1303 at 1305.

[18] *Canada Malting v. Paterson Steamships*, 285 U.S. 413 (1932). See Andrew Harakas *et al*., "*Forum Non Conveniens* in Aviation Cases" (address before the ABA Section of Litigation, June 1, 2007) [unpublished]. An American court first used the "forum non conveniens" doctrine in respect of a claim that was (only) based on the Warsaw Convention in *In Re Air Crash Disaster near New*

in *Piper Aircraft v. Reyno*.[19] This wrongful death action was brought in California against U.S. aircraft and component parts manufacturers by the estates of Scottish citizens killed when their plane crashed into the Scottish Highlands flying from Blackpool, England, to Perth, Scotland. The aircraft was manufactured in Pennslyvania, and the propeller was manufactured in Ohio. Plaintiff chose to file his action in a California state court, believing that optimal recovery for his clients would be had there. Defense lawyers convinced the judge to remove the case to federal court in Piper's home state of Pennsylvania. The Pennsylvania court granted defendants' motion for dismissal on grounds of *forum non conveniens,* finding that Scotland would be a more appropriate venue for trial — the accident occurred there, its citizens were killed in the crash, and most of the evidence was there. The U.S. Court of Appeals for the Third Circuit reversed the lower court on grounds that dismissal is inappropriate where the alternative forum is less favourable to the plaintiff.

On appeal, the U.S. Supreme Court held that the discretion to apply *forum non conveniens* rests with the trial court, and may be reversed only upon a finding of a clear abuse of discretion;[20] moreover, the Court of Appeals erroneously concluded that a case could never be transferred to a jurisdiction less favourable to the plaintiff.[21] The Supreme Court then went on to attempt to craft criteria to guide lower courts in application of the doctrine.[22] We now turn to the doctrine.

THE ANALYTICAL CRITERIA
"*NO REASON TO GET EXCITED," THE THIEF HE KINDLY SPOKE.*

After the court concludes that it has subject matter jurisdiction over the question presented, and personal jurisdiction over the defendant, it turns to the issue of *forum non conveniens.* Usually, it does so on the basis of a motion for dismissal filed by the defendant; however, sometimes it takes up the matter *sua sponte*.[23] Application of the doctrine of *forum non conveniens* involves the consideration of several issues:

1. is there an available and adequate alternative forum;
2. what deference is due the plaintiff's choice of forum; and
3. what is the balance in the party's private interests in the choice of the forum with the public interests of proceeding in the foreign jurisdiction?[24]

If the court deems the doctrine of *forum non conveniens* potentially applicable, it first asks whether an adequate alternative forum is available in which the defendant would be amenable to process.[25] To allay any concerns about this issue, sometimes the defendant will stipulate,[26] or the court will require, that the defendant will make itself subject to process in the other jurisdiction, and waive the statute of limitations defence for late-filed complaints.[27]

A foreign forum must be *both* available and adequate. A foreign forum is *available* "when the entire case and all parties can come within the jurisdiction of that forum."[28] A forum is not available if the subject

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Orleans, 821 F.2d 1147, 20 Avi. 18,179 (5th Cir. 1987), and *AL* 1988, p. 44. See Elmar Maria Giemulla, Ronald Schmid *et al.*, eds., *Montreal Convention*, looseleaf (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2006) (Suppl. 2, September 2007), Article 33 at 24.

[19] 454 U.S. 235 (1981).

[20] *Lleras v. Excelaire Services,* 354 Fed. Appx. 585, 587 (2nd Cir. 2009).

[21] See the discussion in Deborah Elsasser, "The Doctrine of *Forum Non Conveniens* in the Context of Litigation Arising out of Aviation Accidents" in Andrew J. Harakas, *Litigating the Aviation Case: From Pre-trial to Closing Argument*, 3d ed. (Chicago: Tort Trial & Insurance Practice Session, ABA, 2008) 289 at 292.

[22] According to Professor Samuels, "Despite the Supreme Court's efforts in Piper to craft one, no single coherent test exists for forum non conveniens." Joel Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis,* 85 Ind. L.J. 1059, 1060 (2010).

[23] *See Khan v. Delta Airlines,* 2010 WL 3210707 (E.D.N.Y. 2010), at *1.

[24] Thad Dameris, David Weiner & Aaron Crane, *The United States is No Longer Courthouse for the World,* 22 Air & Space Lawyer 9, 13 (Nov. 1, 2008). There is little consistency among U.S. Courts of Appeals on the definition and application of the *Piper* test on the availability and adequacy of the foreign forum. Joel Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis,* 85 Ind. L.J. 1059, 1077 (2010). The burden of proving the existence of an adequate alternative forum is on the defendant, as are each of these factors. See *Piper Aircraft v. Reyno*, 454 U.S. 235 at 255 (1981).

[25] *Seevarkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig)*, 239 N.E.2d 542 (N.Y. 1968) (the doctrine of *forum non conveniens* presupposes the existence of a second, more convenient, forum).

[26] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 614-15 (2008).

[27] See, *e.g.*, *Alam v. Pakistan Int'l Airlines*, 324 N.Y.S.2d 757 (1971).

[28] *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 at 1165 (5th Cir. 1987), vacated on other grounds sub nom *Pan American World Airways v. Lopez,* 490 U.S. 1032 (1989), vacated in part and aff'd in part on remand, 883 F.2nd 17 (5th Cir. 1989).

matter of the litigation is not cognizable there, or the defendant is not subject to its jurisdiction.[29] But if defendants are amenable to service of process in the foreign jurisdiction, are willing to submit to personal jurisdiction there, and waive any jurisdictional objections, the foreign jurisdiction is ordinarily deemed available.[30]

A foreign forum is *adequate* if the parties will not be deprived of remedies or treated unfairly, although they may not enjoy all the benefits of a local court.[31] Neither discovery limitations, nor the absence of a jury trial, nor the presence of "burdensome" filing fees suffice to make a foreign forum inadequate.[32] In one case, a Saudi Arabian forum was deemed adequate despite the fact that it did "not give full weight to testimony given by women and non-Muslims, and considers testimony of Saudi nationals to be more credible than non-nationals."[33] Neither does the inability to obtain counsel through a contingent fee arrangement,[34] nor the likelihood that the alternative forum may grant a less generous recovery in damages than the local forum[35] make the forum inadequate. Generalized allegations of corruption are insufficient to make the foreign forum inadequate.[36] Conversely, an alternative forum might be deemed inadequate if it does not permit litigation on the subject matter of the dispute,[37] or if it offers a clearly unsatisfactory or inadequate remedy.[38]

Though the plaintiff's choice of forum is given considerable deference (particularly a domestically domiciled plaintiff), that choice is not always dispositive.[39] Most courts have embraced a presumption that the plaintiff's choice of forum is convenient, though a foreign plaintiff's choice is given less deference.[40] The enhanced deference given American plaintiffs' choice of forum in U.S. courts is "because the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction." According to the U.S. Court of Appeals for the Second Circuit, "while our courts are of course required to offer equal justice to all litigants, a neutral rule that compares the convenience of the parties should properly consider each parties' residence as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation."[41] Hence, the forum choice of a foreign plaintiff is entitled to less weight than the same

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[29] *Piper Aircraft v. Reyno,* 454 U.S. 235, 254 n. 22 (1981); *Anovich v. Honeywell Int'l.,* 2005 U.S. Dist. Lexis 23414 (D. N.J. 2005), at *4.

[30] *Piper Aircraft v. Reyno,* 454 U.S. 235, 254 n. 22 (1981); *Gambra v. The Boeing Co.,* 377 F. Supp. 2nd 810 , 814 (C.D. Cal. 2005).

[31] *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 at 1164 (5th Cir. 1987), vacated on other grounds sub nom *Pan American World Airways v. Lopez,* 490 U.S. 1032 (1989), vacated in part and aff'd in part on remand, 883 F.2nd 17 (5th Cir. 1989).

[32] *Zermeno v. McDonnell Douglas Corp.,* 246 F. Supp. 2nd 646, 659 (S.D. Tex. 2003); *Cheng v. The Boeing Co.,* 708 F.2nd 1406, 1410 (9th Cir. 1983).

[33] *Unclear Services v. Kingdom of Saudi Arabia,* 581 F.3rd 210, 220 (5th Cir. 2009).

[34] *Magnin v. Teledyne Continental Motors,* 91 F.3rd 1424, 1430 (11th Cir. 1990); *Coakes v. Arabian American Oil Co.,* 831 F.2nd 572, 576 (5th Cir. 1987); *Piper Aircraft v. Reyno,* 454 U.S. 235, 252 n. 18 (1981); *Boskoff v. Transportes Aeroes Portugueses,* 1983 U.S. Dist. Lexis 16547 (N.D. Ill. 1983), at *16. *But see, In re Air Crash off Long Island New York, on July 17, 1996,* 65 F. Supp. 2nd 207 (S.D.N.Y. 1999), which gave the absence of contingent fee opportunities in France weight in assessing the "private interest" factors. Mendelsohn and Lieux were highly critical of this decision which relied "on the absence of contingent fee arrangements as a major factor to outweigh most or all the inconveniences of having witnesses and evidence transported across the ocean." Allan Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Foreign Non Conveniens, and the Foreign Plaintiff,* 68 J. Air L. & Com. 75, 102 (2003). "Especially when the only issue is that of the damages that should be awarded to foreign plaintiffs or their survivors, we believe it is inappropriate to include the place of accident, let alone the availability of contingency fee arrangements, as factors of any real significance in the Gilbert/Renyo balancing of interests." Id. at 110-11.

[35] *Piper Aircraft v. Reyno,* 454 U.S. 235, 254-55 (1981); *Lu v. Air China Int'l Corp.,* 1992 U.S. Dist. Lexis 20972 (E.D.N.Y. 1992), at *5.

[36] *Stroietelstvo Bulgaria Ltd. v. Bulgarian-American Enter. Fund,* 589 F.3rd 417, 421 (7th Cir. 2009); *In re Air Crash Disaster over Makassar Strait, Sulawesi,* 2011 WL 91037 (N.D. Ill. 2011); *Vorbiev v. McDonnell Douglas Helicopters,* 2009 WL 1765675 (N.D. Cal. 2009), at *2.

[37] *Piper Aircraft v. Reyno,* 454 U.S. 235, 254-55 n. 22 (1981); *Nai-Chao v. The Boeing Co.,* 555 F. Supp. 9, 17 (N.D. Cal. 1982).

[38] *Stroietelstvo Bulgaria Ltd. v. Bulgarian-American Enter. Fund,* 589 F.3rd 417, 421 (7th Cir. 2009); *Francois v. Hartford Holding Co.,* 2010 WL 1816758 (D. V.I. 2010), at *2; *da Rocha v. Bell Helicopter Textron*, 451 F. Supp. 2nd 1318, 1322 (S.D. Fla. 2006). The formulation of this test in *Piper Aircraft* has been criticized as turning the presumption that *forum non conveniens* will be applied only in "rare cases" on its head. "Instead of articulating a doctrine that should be invoked to dismiss cases in federal courts only in 'rare cases,' the *Piper* [alternative adequate forum] creates the opposite presumption (amenability to service of process is sufficient): an alternative forum is presumed to be available, except in rare circumstances. Second, the exception to the presumption of availability involves a single inquiry into whether 'the remedy offered by the other forum is clearly unsatisfactory.' Courts have been left wide ambit to interpret the condition narrowly or broadly as they see fit." Joel Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis,* 85 Ind. L.J. 1059, 1071 (2010)[footnotes omitted].

[39] *Delta Airlines v. Chimet*, No. 07-2898, 2008 U.S. Dist. LEXIS 103268 at *8 (E.D. Pa. Dec. 19, 2008); *Scottish Air Int'l v. British Caledonian Group*, 81 F.3d 1224 at 1232 (2d Cir. 1996).

[40] *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.,* 549 U.S. 422, 127 S. Ct. 1184, 1191 (2007); *Clerides v. Boeing Co.,* 534 F.3rd 623, 628 (7th Cir. 2008); *Leon v. Miller Air*, 251 F.3d 1305 at 1311 (11th Cir. 2001).

[41] *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3rd 88, 102 (2nd Cir. 2000); *Zermeno v. McDonnell Douglas Corp.,* 246 F. Supp. 2nd 646, 662 (S.D. Tex. 2003). The Second Cirtuit considers the following factors in determining the deference to be given to the plaintiff's choise of forum:

1. Whether the plaintiff is a U.S. citizen;

choice made by a domestic plaintiff.[42] But even the presence of American plaintiffs locking arms in litigation with foreign plaintiffs is insufficient in and of itself to prohibit a trial court from dismissing a claim on *forum non conveniens* grounds.[43]

Giving lesser deference to the forum selection of the foreign national arguably runs afoul of the Treaty of Friendship, Commerce and Navigation [FCN] the U.S. may have concluded with the government of the foreign plaintiff. The relevant language typically provides: "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice . . . within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights."[44] Plaintiffs sometimes argue that the FCN Treaty accords them not only the right to bring suit in a U.S. forum, but also the right to be free from the application of the *forum non conveniens* doctrine returning them to the forum of their domicile.[45]

The U.S. Court of Appeals for the Second Circuit has held that where the United States has concluded an FCN Treaty with the foreign State which allows nationals of both countries access to the courts no less favorable than that accorded nationals of the court's country, "identical forum non conveniens standards must be applied to such nationals by American courts."[46] Most U.S. courts concur that the same standards should be applied where a FCN Treaty applies, but that nonetheless, just as a domestic plaintiff's choice of forum may be disregarded in favour of a more convenient forum, so too may a foreign plaintiff's choice be trumped in favour of a more convenient foreign forum.[47] Hence, the foreign plaintiff has a right to file suit in a U.S. court just as a domestic plaintiff may, and either may have its case dismissed so that it can be re-filed in a more convenient forum. Domestic plaintiffs too sometimes find themselves in a court not of their choosing.

For example, *In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006,*[48] involved a collision between Gol 1907 and a business jet flown by U.S-domiciled pilots – the worst air disaster in Brazilian history. In reviewing a similar FCN treaty between the U.S. and Brazil, the court conceded that the treaty explicitly required that local courts be available to foreign nationals who happen to be in the territory of the other, but concluded, "Nothing within this provision suggests that Brazilian plaintiffs, like plaintiffs here, not located in the territory of the U.S., may bring suit within the latter's courts for events that took place abroad on equal footing with citizens of the U.S., or vice versa."[49] The court approved the defendants' motion to dismiss the case brought by Brazilian citizens on *forum non conveniens* grounds. The court found that the private and public interest factors were split down the middle. However, "the important factors of lack of jurisdiction in this forum over potentially liable parties and the lack of compulsory process over witnesses and evidence in Brazil . . . swing the balance to make this forum 'genuinely inconvenient' and a Brazilian forum 'significantly preferable.'"[50]

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2. The convenience to the plaintiff of the chosen forum as compared to its home forum;
3. The availability of witnesses in the forum;
4. The Defendant's amenability to suit in the forum;
5. The availability of appropriate legal assistance; and
6. The evidence of forum shopping to be subject to favorable law;
7. The habitual generosity of U.S. juries; and
8. The plaintiff's popularity and defendant's unpopularity in the region.

Iragorri v. United Techs. Corp., 274 F.3rd 65, 72 (2nd Cir. 2005); *Fredriksson v. Sikorsky Aircraft Corp,* 2009 WL 2952225 (D. Conn. 2009), at *5; *Kopperi v. Sikorsky Aircraft Corp.,* 2009 WL 6919972 (D. Conn. 2009), at *5.

[42] *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.,* 549 U.S. 422, 430, 127 S. Ct. 1184, 1191 (2007) ("when the plaintiff's choice is not its home forum, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable."); *Can v. Goodrich Pump & Engine Control Sys.,* 711 F.Supp.2nd 241, 258 (D. Conn. 2010).

[43] *Cheng v. The Boeing Co.,* 708 F.2nd 1406, 1411 (9th Cir. 1983); *Tazoe v. Tam Linhas Aereas,* 2009 WL 3232908 (S.D. Fla. 2009), aff'd *Tazoe v. Airbus,* 2011 WL 294044 (11th Cir. 2011), at *9; *Lueck v. Sundstrand Corp.,* 236 F.3rd 1137 (9th Cir. 2001).

[44] Federal Republic of Germany Treaty and Protocol, signed at Washington, D.C., Oct. 29, 1954, entered into force July 14, 1956, 7 U.S.T. 1839, T.I.A.S. no. 3593.

[45] Allan Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Foreign Non Conveniens, and the Foreign Plaintiff,* 68 J. Air L. & Com. 75, 93 (2003).

[46] *Farmanfarmaian v. Gulf Oil Corp.* 588 F.2nd 880, 882 (2nd Cir. 1978); *Irish National Insurance Co. v. Aer Lingus Teoranta,* 739 F.2nd 90 (2nd Cir. 1993). *See also, Grimandi v. Beech Aircraft Corp.,* 512 F. Supp. 764, 777-78 (D. Kan. 1981); and *Jennings v. Boeing Co.* 660 F. Supp. 796, 800 (E.D. Pa. 1987, aff'd 838 F.2nd 1206 (3rd Cir. 1988).

[47] *See* Allan Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Foreign Non Conveniens, and the Foreign Plaintiff,* 68 J. Air L. & Com. 75, 92-96 (2003) ("[T]he presumptive appropriateness of a plaintiff's choice should be diminished where the plaintiff brings suit in a distant forum, and in this respect foreign and United States plaintiffs should be treated alike.").

[48] 574 F. Supp. 2nd 272 (E.D.N.Y. 2008), aff'd *Lleras v. Excelaire Services,* 354 Fed. Appx. 585 (2nd Cir. 2009).

[49] 574 F. Supp. 2nd 272, 281 (E.D.N.Y. 2008), aff'd 354 Fed. Appx. 585 (2nd Cir. 2009).

[50] 574 F. Supp. 2nd 272, 289 (E.D.N.Y. 2008), aff'd 354 Fed. Appx. 585 (2nd Cir. 2009).

Similarly, in *da Rocha v. Bell Helicopter Textron*,[51] involving the crash of a helicopter in the Amazon rain forest flown by Brazilian nationals employed by a Brazilian air taxi operator, the plaintiffs argued "they should receive the full benefit of the presumption in foaor of their chosen forum because Brazil and the United States have a treaty guaranteeing Brazilian citizens access to the United States courts equal to that of United States citizens."[52] The court responded that, "Since the Plaintiffs are not 'transient or dwelling' in the United States, the treaty does not bolster their argument that their choice of forum is entitled to deference."[53]

In light of the deference to be given the choice made by a domestic or foreign plaintiff, if the question of whether an adequate alternative forum exists is answered affirmatively, the court moves to a consideration of the relevant private, and public, interest factors, to determine whether the venue chosen by the plaintiff "would result in oppression or vexation to the defendant out of proportion to the plaintiff's convenience . . .".[54]

Trial courts tend to give the private interest factors greater deference than the public interest factors.[55] The *private interest factors* are:

1. the relative ease of access to sources of proof;
2. the availability of compulsory process to assure the attendance of unwilling witnesses;
3. the costs of obtaining attendance of willing witnesses;
4. the possibility of viewing the premises;
5. other practical problems that impact the efficiency and cost of the trial; and
6. the enforceability of the judgment if one is obtained.[56]

The relevant *public interest factors* are:

1. the administrative difficulties flowing from court congestion;
2. local interests in having localized controversies decided at home;
3. the avoidance of unnecessary choice of law problems;[57] and
4. the unfairness of burdening citizens in an unrelated forum with jury duty.[58]

If, as a result of that analysis, the court concludes that an alternative forum is better suited to hear the case, the court asks "whether the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice".[59]

The burden of proof on all the elements of *forum non conveniens* rests with the defendant.[60] Yet appellate courts often defer to the judgment of the lower courts on this issue, reversing them only if it is determined that they abused their discretion.[61] Moreover, the public interest and private interest factors listed above are so general, so highly factually based,[62] not prioritized, and review is so deferential, the trial judges have enormous discretion to hear a case that interests them, or to dismiss a case that does not,

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[51] *da Rocha v. Bell Helicopter Textron*, 451 F. Supp. 2nd 1318 (S.D. Fla. 2006).
[52] 451 F. Supp. 2nd at 1323.
[53] 451 F. Supp. 2nd at 1323.
[54] *Windt v. Qwest Communications Int'l*, 529 F.3d 183 at 190 (3d Cir. 2008).
[55] Thad Dameris, David Weiner & Aaron Crane, *The United States is No Longer Courthouse for the World,* 22 Air & Space Lawyer 9, 13 (Nov. 1, 2008).
[56] See, *e.g.*, *Liquidation Comm'n of Banco Intercontinental v. Renta*, 530 F.3d 1339 at 1356-57 (11th Cir. 2008); *King v. Cessna Aircraft Co.*, 562 F.3d 1374 at 1383-84 (11th Cir. 2009).
[57] These include the ability to implead other entities, efficiency and translation. See *In re Air Crash Near Athens, Greece on August 14, 2005*, No. 06 C 3439, 2007 U.S. Dist. LEXIS 20761 (N.D. Ill. Feb. 28, 2007).
[58] See *American Dredging Co. v. Miller*, 510 U.S. 443 at 448 (1994), and *Gulf Oil v. Gilbert*, 330 U.S. 501 at 509-11 (1947). In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the U.S. Supreme Court held that the analysis begins with the question of whether there exists an alternative forum, one where the defendant is amenable to process, and the forum provides an adequate remedy. If so, the private and public interest factors set forth in *Gilbert* are weighed. See *Sinochem International Co. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184 (2007). *See also* Paul Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* 222 (McGill 2005).
[59] *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied sub nom., Bapte v. West Caribbean Airways*, 130 S. Ct. 3387 (June 7, 2010).
[60] *Delta Airlines v. Chimet*, No. 07-2898, 2008 U.S. Dist. LEXIS 103268 at *4 (E.D. Pa. Dec. 19, 2008).
[61] *Gulf Oil v. Gilbert*, 330 U.S. 501 at 509-11 (1947).
[62] *Khan v. Delta Airlines,* 2010 WL 3210707 (E.D.N.Y. 2010), at *4.

at least where the events giving rise to the complaint occurred offshore. As one court observed, "Unlike issues of jurisdiction, determinations of forum non conveniens are not pure questions of law; rather they represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another."[63] However, that discretion occasionally is circumscribed by appellate courts, as for example, where the lower court abused its discretion by failing to explain how much deference should be accorded the plaintiff's choice of forum,[64] or its reliance on an erroneous view of the law or assessment of the evidence, or engaged in an unreasonable balance of the relevant factors.[65]

CONDITIONAL GRANTS OF FORUM NON CONVENIENS MOTIONS
"*THERE ARE MANY HERE AMONG US, WHO FEEL THAT LIFE IS BUT A JOKE*"

Sometimes, defendants offer to stipulate that they will subject themselves to jurisdiction in the foreign venue, provide all witnesses and relevant documents, toll the statute of limitations for a specified period, submit to "American style" discovery,[66] translate documents into the foreign language, and honour any post-appeal judgment rendered.[67] The requirement that the foreign venue be "available and adequate" and several of the private interest factors can be conquered if the defendant will consent to fulfilling them. Specifically, these private interest factors become less troublesome if the defendant will submit to these conditions:

- the relative ease of access to sources of proof;
- the availability of compulsory process to assure the attendance of unwilling witnesses;
- the costs of obtaining attendance of willing witnesses;
- other practical problems that impact the efficiency and cost of the trial; and
- the enforceability of the judgment if one is obtained.

The only remaining private interest factor – "the possibility of viewing the premises" – can be satisfied if the trial is transferred to the venue of the accident.

If a court dismisses a suit on *forum non conveniens* grounds, it often will impose a variety of conditions upon the dismissal, including a requirement that the defendant stipulate that it will:

- not contest jurisdiction in the foreign court;
- waive the statute of limitations defence;
- respond to discovery requests;
- provide witnesses and evidence;
- translate documents into the foreign language;
- not argue for a stay;
- abide by all stipulations made in their motions and oral argument; and
- agree to satisfy any final judgment rendered against them in the foreign jurisdiction after appeals are exhausted.[68]

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[63] *Pain v. United Technologies,* 637 F.2nd 775, 781 (D.C. Cir. 1980).
[64] *See e.g., Lony v. E.I. DuPont de Nemours,* 886 F.2nd 628, 634 (3rd Cir. 1989); *Delta Air Lines v. Chimet,* 2010 WL 3385537 (3rd Cir. 2010), at *5.
[65] *Ravelo Monegro v. Rosa,* 211 F.3rd 509, 511 (9th Cir. 2000); *Van Schijndel v. The Boeing Co.,* 434 F.Supp.2nd 766, 769-70 (C.D. Cal. 2006).
[66] *Boskoff v. Transportes Aeroes Portugueses,* 1983 U.S. Dist. Lexis 16547 (N.D. Ill. 1983), at *13.
[67] See e.g., *In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006,* 574 F. Supp 2nd 272 277-78 (E.D.N.Y. 2008), aff'd 354 Fed. Appx. 585 (2nd Cir. 2009).
[68] See *Alam v. Pakistan Int'l Airlines Corp.*, 324 N.Y.S.2d 757 (1st Dept. 1971). In *In re Air Crash Near Athens, Greece on August 14, 2005*, 479 F. Supp. 2d 792, 2007 WL 840300 (N.D. Ill. 2007), the motion for *forum non conveniens* was granted, subject to the following conditions: (1) the defendant must submit to jurisdiction in these actions as filed in Cyprus or Greece; (2) the defendant must waive any statutes of limitations defence to any action that is refiled in Cyprus or Greece within 120 days; (3) the defendant must provide the plaintiffs with access to all relevant evidence and witnesses in their custody or control; (4) the defendant must bear the cost of translating English-language documents in its custody or control into Greek; and (5) the defendant must pay damages awarded by the Cyprus and or Greek courts in the refiled actions, subject to appeal. In *Lleras v. Excelaire Services,* 354 Fed. Appx. 585 (2nd Cir. 2009), the Second Circuit noted with approval that the defendants agreed that the oilot defendants would submit to video-taped depositions in the U.S., and that they would not object to their admissibility in Brazilian courts on the grounds that the depositions

Often too, a court will transfer a case to a foreign venue conditional on the foreign court accepting jurisdiction.[69] Thus, if the foreign court refuses to accept the case, it bounces like a ping pong back to the U.S. court that dismissed it.

Though these conditions help satisfy the *Gilbert/Renyo* criteria, their imposition creates perverse incentives. The potential ability to harvest these concessions may itself motivate a foreign plaintiff to file suit against a U.S. domiciled defendant so as to ease the litigation burden in a foreign venue. Thus, even if U.S. courts dismiss the case, the plaintiff often walks into the foreign court with a package of goodies he could not have obtained absent the initial filing in the U.S. court. Thus, U.S. courts are incentivizing foreign plaintiffs to file first in the U.S. by conditioning the transfer in these generous ways. One could imagine, for example, that fewer cases would initially be filed in United States courts if they did not require a waiver of the foreign statute of limitations, or require the foreign court to accept jurisdiction over the claim.

Sometimes the principal facts are abroad, and the defendant is without compulsory process to require foreign witnesses to appear in domestic courts.[70] In response, plaintiffs sometimes stipulate to conditions that will alleviate problems defendants may encounter in the chosen forum. For example, in *Thach v. China Airlines,*[71] plaintiff brought suit against a Taiwanese airline for refusing to board him in Taiwan on the return leg of a connecting round-trip itinerary New York-Vietnam-New York under the mistaken belief that his passport was fraudulent. After ten hours of police interrogation, Thach was forced to fly back to Vietnam on a ticket purchased by China Airlines with Thach's credit card. The defendant airline sought removal of the case to Taiwan, arguing that many important witnesses were there. To avoid that problem, the plaintiff stipulated to the admissibility of "100% of the testimony" of any foreign-based witnesses in affidavit or deposition form. The court found that this stipulation obviated the primary objection to hearing the case in New York, and accordingly, denied the *foreign non conveniens* motion.[72]

WARSAW AND MONTREAL CONVENTION CASES
"BUT YOU AND I HAVE BEEN THROUGH THAT, AND THAT IS NOT OUR FATE"

Where an airline is a defendant in a case involving international carriage, the Warsaw Convention or the Montreal Convention may apply.[73] Both Article 28(1) of the Warsaw Convention[74] and Article 33(1) of the Montreal Convention[75] provide, *inter alia*, that "[a]n action for damages must be brought, at the option of the plaintiff", in one of the specified *fora.* The Warsaw Convention specifies four *fora:*

(1) the domicile of the carrier;

(2) the carrier's principal place of business;

(3) a place of the carrier's business through which the contract was made; or

(4) the place of destination.[76]

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were conducted in the U.S., or of the format of the testimony. *See also*, *Zermeno v. McDonnell Douglas Corp.,* 246 F. Supp. 2nd 646, 661 (S.D. Tex. 2003); *Nai-Chao v. The Boeing Co.,* 555 F. Supp. 9, 22 (N.D. Cal. 1982); *Anovich v. Honeywell Int'l.,* 2005 U.S. Dist. Lexis 23414 (D. N.J. 2005), at *23 – 24; *Grodinsky v. Fairchild Industries,* 507 F. Supp. 1245, 1253 (D. Md. 1981), and *Magnin v. Teledyne Continental Motors,* 91 F.3rd 1424, 1430 (11th Cir. 1990); *Zermeno v. McDonnell Douglas Corp.,* 246 F. Supp. 2nd 646, 658 (S.D. Tex. 2003); *In re Air Crash over the Mid-Atlantic on June 1, 2009,* 2010 WL 3910354 (N.D. Cal. 2010), at *11; *Can v. Goodrich Pump & Engine Control Sys.,* 711 F.Supp.2nd 241, 258 (D. Conn. 2010); *Francois v. Hartford Holding Co.,* 2010 WL 1816758 (D. V.I. 2010).

[69] *Gambra v. The Boeing Co.,* 377 F. Supp. 2nd 810, 828 (C.D. Cal. 2005).

[70] See e.g., *Khan v. Delta Airlines,* 2010 WL 3210707 (E.D.N.Y. 2010), at *5 ("Although plaintiff is arguably correct that the first domino dropped in New York, it is how the rest of the dominoes fell [in Canada] that is the crux of this case.").

[71] 1997 U.S. Dist. Lexis 7384 (S.D.N.Y. 1997).

[72] 1997 U.S. Dist. Lexis 7384 (S.D.N.Y. 1997), at 6-7.

[73] However, the Conventions do not apply to contribution and indemnity claims brought by manufacturers against air carriers. *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999,* 340 F. Supp. 2nd 240, 244 (E.D.N.Y. 2004).

[74] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw, on 12 October 1929, 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838.

[75] Convention for the Unification of Certain Rules for International Carriage by Air, Signed at Montreal, on 28 May 1999, ICAO Doc. 9740.

[76] Article 28(1) of the Warsaw Convention provides: "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." *See also* Paul Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* 217-19 (McGill 2005); Laurence Gesell & Paul Dempsey, *Aviation and the Law* 846 (Coast Aire 4th ed. 2005); Paul Larsen, Joseph Sweeney & John Gillick, *Aviation Law* 294-304 (Transnational 2006); Shawcross & Beaumont, *Air Law* §§ 420-442 (Butterworthss Lexis Nexis 2010).

To these four, three additional *fora* have been added by the Montreal Convention[77] (the latter two below also were included in earlier the Guadalajara Convention):[78]

(5) in death and personal injury litigation, the place in which the passenger has his principal and permanent residence if the carrier operates passenger services there either on its own aircraft or through another carrier's aircraft through a commercial agreement;[79]

(6) the domicile of the actual carrier; or

(7) the actual carrier's principal place of business.[80]

The only *fora* for litigation under the surface damage Conventions (the Rome Convention of 1952 or the Montreal Conventions of 1999)[81] are the courts of the State where the damage occurred.

If none of these jurisdictions fit the case, the court is without personal jurisdiction over the carrier (in the case of the Warsaw Convention of 1929 and Montreal Convention of 1999), or of the aircraft operator (in the case of the Rome Convention of 1952 or the Montreal Conventions of 2009). But even if one of these alternatives venues for suit is appropriate, the court may still have the power to dismiss the suit on grounds that there is a more appropriate forum on grounds of *foreign non conveniens*. Article 28(2) of the Warsaw Convention provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted", while Article 33(4) of the Montreal Convention provides that "[q]uestions of procedure shall be governed by the law of the court seized of the case".[82] Though the Warsaw and Montreal Conventions were treaties for the unification of certain laws, there were several areas in which *lex fori* would be applied, and these are among them.[83]

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[77] The Montreal Convention of 1999 adds a fifth jurisdiction (the "principal and permanent residence" of the passenger), and a sixth (or seventh) forum (the domicile and principal place of business of the actual and the "contracting carrier"). The legislative history of that provision reveals that the U.S. government interprets the Montreal Convention with the expectation that *forum non conveniens* would apply. Allan Mendelsohn, "Recent Developments in the *Forum Non Conveniens* Doctrine", CCH Avi. ¶ 35461 (2004).

[78] *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed in Guadalajara, on 18 September 1961*, ICAO Doc. 8181.

[79] Montreal Convention, Art. 33(2). During the diplomatic conference in which the Montreal Convention of 1999 was drafted, the United States submitted a paper commenting on the "fifth jurisdiction" as follows:

> The presence of a fifth jurisdiction could well result in fewer "forum shoppers" winding up in U.S. courts. With a convenient "homeland" court available to them, more non-U.S. residents will choose to sue in their "home court," rather than to bring suit in the U.S. Furthermore, U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on grounds of forum non conveniens if a convenient homeland court is available to the plaintiff because of the fifth jurisdiction.

Legal Considerations Relating to the Fifth Jurisdiction, The Fifth Jurisdiction 3, in II ICAO, International Conference on Air Law 101 (1999). *See also* Paul Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* 220-21 (McGill 2005), and Shawcross & Beaumont, *Air Law* § 441.1 (Butterworths Lexis Nexis 2010).

[80] Montreal Convention, Art. 46. See Regula Dettling-Ott, *Article 46 – Additional Jurisdiction* in Elmar Maria Giemulla, Ronald Schmid *et al*., eds., *Montreal Convention*, looseleaf (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2006) (Suppl. 3, April 2008), Article 46 at 2. *See also* Paul Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* 237 (McGill 2005).

[81] The Montreal Conventions of 2009 have not entered into force, and may never.

[82] The Warsaw Convention did not alter the basic principles of the domestic procedural systems of the State parties. See *La Meridional Cía. Argentina de Seguros c. Iberia Líneas Aéreas de España y otros,* Supreme Court of Argentina, October 15, 1998, T. 321, p. 2764. However, it must be noted that references to domestic law conspire against legal uniformity (one of the goals of the international air carrier liability system) and, therefore, some of those references originally contained in the Warsaw Convention have been refined or directly removed, such as happened with the mention of "the law of the Court seised of the case" in Article 25(1), which is not reproduced either in the complementary Article 25A inserted by Article XIV of the Hague Protocol (*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague, on 28 September 1955*, ICAO Doc. 7632) or in Article 22(5) of the Montreal Convention. Similarly, the reference to "the provisions of its [the court's] own law" in Article 21 of the Warsaw Convention was eliminated in Article 20 of the Montreal Convention.

[83] The Montreal Convention is the "Convention for the Unification of *Certain* Rules for International Carriage by Air" [emphasis supplied], the same title as its predecessor, the Warsaw Convention. The treaty explicitly identifies which rules are not unified, and are left to *lex fori*. Though harmonization and unification of aviation liability law remains an important (perhaps central) purpose of the Montreal Convention of 1999, local law is allowed in certain limited areas:

- Articles 6 and 16 — the consignor must furnish information and documents, including a document indicating the nature of the cargo, as required by local "customs, police and any other public authorities";
- Article 22(6) — in addition to the liability caps for delay, baggage and cargo, the court also may award court costs and other litigation expenses "in accordance with its own law";
- Article 28 — advance payments must be made in death or personal injury actions "if required by its national law";
- Article 29 — an action for damages can only be brought subject to the terms of the Convention "without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights";
- *Article 33(4) — procedural questions "shall be governed by the law of the court seized of the case";*
- Article 35(2) — "The method of calculating" the two-year period of limitations "shall be determined by the law of the court seized of the case";

How does one reconcile the discretion "at the option of the plaintiff" to select the venue in which to file his suit as set forth in the first sentence of Articles 28 and 33 of the Warsaw and Montreal Conventions, respectively, with the deference to local law of the procedural rules governing the case in the last sentence of those Articles. Does such procedural discretion include the right to dismiss the claim on grounds that an alternative venue is more convenient if such a procedural alternative exists under local law? One reading is that the first sentence gives the plaintiff the absolute discretion to choose which of the listed fora will hear his case, and that courts may not trump that decision. Another reading is that although plaintiff has discretion to choose where to file his case, that forum's procedural law will determine whether the suit will be heard, dismissed, removed or transferred to a more appropriate jurisdiction.[84] While the former view prevails in United Kingdom jurisprudence,[85] the latter view prevails in United States jurisprudence, though there have been some interesting detours along the route.[86]

The issue of a more convenient forum may arise under a Warsaw or Montreal Convention suit against an air carrier, or in a negligence or products liability suit against a manufacturer of the air frame or its component parts, or against the air navigation or maintenance provider. Thus, the existence of an air carrier among the defendants for death or personal injury (or delay, or loss and damage of air freight) may call for the application of the Warsaw or Montreal Conventions. But often plaintiffs will also sue other parties, for whom these Conventions are irrelevant.

The U.K. House of Lords generally has expressed favour with the concept of *forum non conveniens:* "The principle is now so widespread that it may come to be accepted throughout the common law world; indeed, since it is founded upon the exercise of self restraint by independent jurisdictions, it can be regarded as one of the most civilised of legal principles. Whether it will become acceptable in civil law jurisdictions remains however to be seen."[87]

Yet in *Milor SRL v. British Airways Plc.*,[88] the English Court of Appeal rejected transferring the case to another court, on grounds that it would deny the claimant the discretion to which he was entitled pursuant to Article 28 of the Warsaw Convention.[89] Thus, although U.K. courts apply the doctrine of *forum non conveniens,* they feel the Warsaw Convention venue selection provisions prohibit them from doing so in a suit against an air carrier falling under that Convention. Whether they will reach the same conclusion under the Montreal Convention of 1999 is as yet unclear.

The U.S. Appellate Courts have split on the issue of whether the phrase "at the option of the plaintiff" in Warsaw Article 28 paragraph 1 vests total discretion in the party filing suit as to which court shall hear it, or

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- Article 45 — if an action is brought against only the actual carrier or the contracting carrier, that carrier may require the other carrier to be joined in the action, "the procedure and effects being governed by the law of the court seized of the case;" and
- Article 56 — if a State has more than a single territorial unit in which different systems of law are applicable (such as the Peoples Republic of China *vis-à-vis* Macau and Hong Kong, for example), that State may declare the Convention applicable to all or only some of its territorial units.

[84] Allan Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Foreign Non Conveniens, and the Foreign Plaintiff,* 68 J. Air L. & Com. 75, 81 (2003).

[85] At least, this is true under the Warsaw Convention; no U.K. decision could be found addressing this issue under the Montreal Convention.

[86] "The party initiating the action enjoys the prerogative of choosing between these possible national forums but that selection is not inviolate. The choice is then subject to the procedural requirements and devices that are part of that forum's internal laws." Allan Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Foreign Non Conveniens, and the Foreign Plaintiff,* 68 J. Air L. & Com. 75, 81(2003).

[87] *Airbus Industrie v. Patel and Others,* [1999] 1 A.C. 119. In *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625, [1978] AC 795, the House of Lords adopted a principle indistinguishable from the principle of *forum non conveniens* as accepted in Scottish law. See *The Abidin Daver,* [1984] 1 All Er 470, [1984] AC 398. U.K. courts also sometimes authorize an anti-suit injunction to restrain a person from filing suit in a foreign jurisction when it deems that "foreign proceedings are vexatious or oppressive." *Airbus Industrie v. Patel and Others,* [1999] 1 A.C. 119, [1999] I.L.Pr. 238, 247. Those courts are less likely to do so where the foreign jurisdiction has available to it the doctrine of *forum non conveniens*. Id. at 256. *See also Re the Lockerbie Air Disaster: Pan American World Airways v. Andrews,* [1993] I.L.Pr. 41 (Scotland Ct. of Session).

[88] [1966] Q.B. 702 (C.A.).

[89] Siding with this view, Professor Malcolm Clarke argues that "any debate over *forum non conveniens* is ruled out by the wording of the article: the choice of jurisdiction among the specified *fora* is to be 'at the option of the plaintiff.'" Malcolm Clarke, *Contracts of Carriage by Air* 177 (Lloyd's List 2010). Nowhere does Clarke discuss the last sentence of Article 33 that provides: "Questions of procedure shall be governed by the law of the court seized of the case." Both Article 28(1) of the Warsaw Convention and Article 33(1) of the Montreal Convention provide, *inter alia*, that "[a]n action for damages must be brought, at the option of the plaintiff", in one of the specified *fora.* However, Article 28(2) provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted", while Article 33(4) of the Montreal Convention provides that "[q]uestions of procedure shall be governed by the law of the court seized of the case". The Warsaw and Montreal Conventions provide for unification of certain laws, with many procedural issues left to the *lex fori.* Many U.S. courts have found *forum non convneniens* to be a question of procedure. Nor does Professor Clarke discuss the U.S. jurisprudence that examined the *travaux preparatiores* of the Montreal Convention of 1999 and found an intent not to restrict those States that chose to apply the *forum non conveniens* doctrine, nor to force States that did not recognize the doctrine to apply it.

whether instead the last paragraph incorporates all the procedural rules of the court where it is filed, including the doctrine of *forum non conveniens.* Like the English Court of Appeals,[90] the Ninth Circuit U.S. Court of Appeals held that the first paragraph precludes the ability of the court in which it is filed to dismiss a suit on *forum non conveniens* grounds.[91] Yet the U.S. Court of Appeals for the Fifth Circuit has held that *forum non conveniens* is a procedural rule falling within the second paragraph of Warsaw Article 28 (identical to the last paragraph of Montreal Article 33), and therefore can be applied despite the plaintiff's choice of forum.[92]

In *Hosaka v. United Airlines*,[93] Japanese citizens were injured and one was killed when United Airlines flight 826 encountered severe turbulence flying from Tokyo to Honolulu flight Eighteen Japanese plaintiffs brought suit in U.S. courts. Venue was appropriate under the Warsaw Convention as the United States is the domicile and principal place of business of the defendant, United Airlines. The federal district court granted defendant's motion for dismissal on grounds of *forum non conveniens.*

On appeal, the U.S. Court of Appeals for the Ninth Circuit noted that when the Warsaw Convention was drafted in the 1920s, and when the U.S. Senate ratified the treaty in 1934, it was not then the "'valuable procedural tool' it might be considered today."[94] The court found the text of the Convention ambiguous. But the purposes of the Convention (in particular, uniformity of law), the drafting history, as well as the postratification of the parties (including the U.K. decision in *Milor,* discussed above) led it to conclude that the contracting parties did not intend to preclude the plaintiff's forum choice on grounds of *forum non conveniens.*[95]

A few years prior to *Hosaka,* the International Civil Aviation Organization had drafted the Montreal Convention of 1999, which had not yet entered into force. The Ninth Circuit in *Hosaka* reviewed the *travaux preparatiores* of the Montreal Convention, observing that the U.S. delegate failed in his attempt to amend Article 33(4) to explicitly recognize the doctrine of *forum non conveniens* as a question of procedure to be decided by the court seized of the case. The court, however, acknowledged that it was unclear from the drafting history whether the delegates understood the proposal as a change in the Warsaw regime, or that its failure dealt a blow to the doctrine. According to the court, "the drafting history of the Montreal treaty reflects a lack of shared understanding on the issue that occupies us here: whether the Warsaw Convention language, standing alone, permits or precludes application of *forum non conveniens*. Every side of this issue found a voice at the Montreal conference."[96] Nevertheless, the court concluded that as a common law doctrine, *forum non conveniens* would have been a concept alien and unwelcome to the drafters of the Warsaw Convention, a group largely comprised of civil law jurists.[97] It therefore found that the Warsaw Convention "precludes a federal court from dismissing an action on the ground of forum non conveniens".[98] The court emphasized that its decision was limited to the Warsaw Convention, and not the Montreal Convention of 1999, which was then not in force.[99]

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[90] *Milor SLR v. British Airways Plc.,* [1996] Q.B. 702 (Eng. C.A.). The British Court of Appeal concluded that *forum non conveniens* was inconsistent with the right conferred to the plaintiff under Article 28(1) of the Warsaw Convention to select which forum in which to file suit. It held that "the forum state's procedural law incorporated by Article 28(2) is subject to Article 28(1), which grants to the plaintiff an absolute right of choice between four presumptively convenient jurisdictions." Id. at 706. *See* Malcolm Clarke, *Contracts of Carriage by Air* 176 (Lloyd's List 2010); Shawcross & Beaumont, *Air Law* § 418 (Butterworths Lexis Nexis 2010).

[91] See *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002); and *Milor SRL v. British Airways Plc.*, [1996] Q.B. 702 at 706 (C.A.).

[92] *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 at 1153-54 (5th Cir. 1987), was the first appellate court decision to address this issue; the Fifth Circuit held that *forum non conveniens* is available in Warsaw Convention cases (*In re Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 at 1161 (5th Cir. 1987) (*en banc*)). See also Allan Mendelsohn & Renee Lieux, "The Warsaw Convention Article 28, the Doctrine of *Forum Non Conveniens*, and the Foreign Plaintiff" (2003) 68 J. Air L. & Com. 75.

[93] 305 F.3d 989 (9th Cir. 2002), cert. denied 537 U.S. 1227 (2003).

[94] 305 F.3rd at 1002.

[95] 305 F.3rd at 1003.

[96] *Hosaka v. United Airlines*, 305 F.3d 989 at 1001 (9th Cir. 2002). *See* Shawcross & Beaumont, *Air Law* § 418 (Butterworths Lexis Nexis 2010).

[97] *Hosaka v. United Airlines*, 305 F.3d 989 at 999 (9th Cir. 2002), cert. denied 537 U.S. 1227 (2003).

[98] *Hosaka v. United Airlines*, 305 F.3d 989 at 1004 (9th Cir. 2002), cert. denied 537 U.S. 1227 (2003).

[99] The court wrote, "We offer no opinion as to whether the text and drafting history of the Montreal Convention demonstrates whether *forum non conveniens* would be available in an action brought under that as-yet-unratified treaty." 305 F.3rd at 1001 n. 17. The Montreal Convention entered into force in 2003, the year following the *Hosaka* decision in the 9th Circuit. The *Hosaka* decision is criticized in Andrew Harakas & Barry Alexander, *Forum Non Conveniens and the Montreal Convention,* For the Defense (June 2008), at 46.

But this is not the universal view, as many more courts have refused jurisdiction on *forum non conveniens* grounds.[100] These courts embrace the view that the doctrine is a part of the procedural law of the State, and falls within the last sentence of Article 28 of the Warsaw Convention, or the virtually identical last sentence of Article 33 of the Montreal Convention.

The Fifth Circuit in *In re Air Crash Disaster on July 9, 1982,*[101] addressed the crash of Pan American World Airways flight 759 in Kenner, Louisiana, in which 52 suits were filed on behalf of 42 foreign passengers who perished in the crash. With respect to the issue of whether the Warsaw Convention precluded the application of *forum non conveniens,* the court concluded:

> [A]rticle 28(1) [of the Warsaw Convention] offers an injured passenger or his representative four forums in which a suit for damages may be brought. The party initiating the action enjoys the prerogative of choosing between these possible national forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are a part of the forum's internal laws. . . . We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non conveniens.
>
> If we were to adopt the plaintiff's construction of Article 28(1) and ignore the language of article 28(2), American courts could become the forums for litigation that has little or no relationship with this country.[102]

To date, no U.S. court has refused to apply the doctrine under the view that the Montreal Convention of 1999 gives the plaintiff absolute discretion on the choice of forum.

Some courts have held that since the co-defendant airline could not be brought into U.S. jurisdiction under the Warsaw or Montreal Convention venue requirements, that all co-defendants should be dismissed to a trial in a country where venue for the airline was appropriate. In *Gambra v. International Lease Finance Corp.*,[103] *forum non conveniens* was used to dismiss a case pending the assumption of jurisdiction over it by French courts. The case involved the flight of Flash Airlines flight 604 which crashed into the Red Sea while en route from Sharm el-Sheikh, Egypt, to Paris. All but two of the 122 decedents represented by the estates that brought suit in the United States were citizens of France. There were only four Americans aboard the aircraft. Some 139 plaintiffs also brought suit against Flash Airlines and its insurer in French courts (under the Convention, venue would be appropriate in Egypt or France, but not in the United States). But in this case, suit was brought against ILFC, which leased the aircraft to Flash Airways, and the Boeing Company, which manufactured it. Plaintiffs pointed to the lease between ILFC and Flash to show that suit in U.S. courts would not be inconvenient (which included the following clause: "Lessee and lessor hereby irrevocably waive any objection . . . to the laying of the venue of any suit, action or proceeding arising out of or related to the lease . . . 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.")[104] The court concluded that the lease did not address either party's liability to the passengers, nor were passengers third party beneficiaries to the contract. The fact that Flash Airlines could not be sued in the United States (because venue in the U.S. was not appropriate under the Warsaw Convention) was deemed by the court "a substantial consideration" militating in favor of France as having a greater interest in the litigation than the United States, and therefore, dismissal from U.S. courts.[105]

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[100] See, e.g., *In re Air Crash Off Long Island, New York, on July 17, 1996*, 65 F. Supp. 2d 207 at 214 (S.D.N.Y. 1999) (denying motion to dismiss after applying forum non conveniens criteria); *In re Disaster at Riyadh Airport Saudi Arabia on Aug. 19, 1980,* 540 F. Supp. 1141 (D.C. Cir. 1982) (granting forum non conveniens motion to dismiss). *See also,* Shawcross & Beaumont, *Air Law* § 418 (Butterworths Lexis Nexis 2010).

[101] 821 F.2nd 1127 (5th Cir. 1987).

[102] 821 F.2nd 1127, 1162 (5th Cir. 1987) [citations omitted].

[103] Case No: CV-04-10129 CAS; Tentative Minute Order; 377 F. Supp. 2d 810 (C.D. Cal. 2005).

[104] However, had the forum selection clause been applicable to the parties in the suit, it likely would have prevailed unless the court could have been convinced that "there is a good reason or 'strong cause' why it should not be bound by the forum selection clsuse." *C.S.A.E. v. Air Services,* 2006 CarswellOnt 9896 (Ontario Superior Ct. 2006).

[105] *Gambra v. The Boeing Co.,* 377 F. Supp. 2nd 810, 823-24 (C.D. Cal. 2005) ("[N]ot only would an inability to compel Flash to appear hinder defendants' ability to present a complete case, but it would also be more convenient to resolve all claims involving defendants in litigation in France.") Another court addressing the Flash Airlines disaster reached essentially the same result. *Siddi v. Ozark Aircraft Systems LLC,* 2006 U.S. Dist. Lexis 84882 (W.D. Ark. 2006). However, this argument – that since the carrier could not be joined in the suit against manufacturers,– did not carry weight with the federal district court in *In re West Caribbean Crew Members,* 632 F. Supp. 2nd 1193 (S.D. Fla. 2009).

However, in the Flash Air litigation, involving the crash of an Egyptian charter Boeing 737 aircraft into the Red Sea, the

The decision applying the Montreal Convention of 1999 (which entered into force in 2003) to this issue was *In re West Caribbean Airways*.[106] The suit was brought by the estates of passengers resident of Martinique who were killed when a Colombian aircraft crashed en route flying from Panama to Martinique. The only link with the United States was that the defendant, incorporated in Florida, contracted for the aircraft used for the foreign operations and the accompanying tour packages for the passengers. Though the defendant had not sold tickets directly to the passengers, the court found that it was the "contracting carrier" under Article 39 of the Montreal Convention.

In this case, United States attorneys from the Departments of Justice, State and Transportation took the unusual step of filing an Official Statement of Interest clarifying the position of the government:

> The Statement makes clear that the United States did not relinquish the ability of its courts to apply *forum non conveniens* in Montreal Convention cases because it and its component agencies are often named in suits arising under the Convention and because the United States has a significant interest in avoiding forum shopping and congestion in its courts when a foreign forum provides a more just, convenient and suitable alternative. Accordingly, the United States understands the text of Article 33(4) to mean that the Montreal Convention 'defers to the forum's law on all questions of procedure and manifests an intent by the drafters not to alter the judicial system of any country on questions of procedure."[107]

The court in *West Caribbean Airways* concluded that a *forum non conveniens* motion is procedural in nature, and that the Montreal Convention explicitly contemplates that the forum in which a suit has been brought may apply its own procedural rules. The court held that "since the doctrine of *forum non conveniens* was firmly entrenched in the procedural law of the United States by the time the Montreal Convention was drafted, the text by implication clearly permits the application of the doctrine in domestic litigation".[108] The court summarized the *travaux préparatoires* of the 1999 ICAO Diplomatic Conference that drafted the Montreal Convention on the issue of *forum non conveniens*, finding that it:

> [S]hows that the doctrine was extensively discussed, mainly with respect to the creation of the fifth jurisdiction, that proposals addressing the doctrine were advanced, including proposals which would have made *forum non conveniens* applicable only to the fifth jurisdiction or clarified its applicability to all jurisdictions, and that the United States actively and persistently opposed the inclusion of any *forum non conveniens* language except to clarify its general applicability, all the while making it abundantly clear that United States courts would continue to employ the doctrine in Montreal Convention and other international cases. In the end, the consensus among the delegates was to omit imposing any language respecting the applicability of *forum non conveniens* to avoid imposing the doctrine on States that do not employ it and distorting its application in States where it is commonly employed. In other words, the delegates determined to maintain the *status quo:* signatory countries employing the doctrine would continue to do so . . . and signatory countries that do not employ the doctrine would not be required to adjust their legal systems to accommodate the doctrine in cases arising under the Convention.[109]

This decision was affirmed by the U.S. Court of Appeals for the 11th Circuit in *Pierre-Louis v. Newvac Corp.*.[110] Plaintiffs asserted that because the Montreal Convention does not explicitly allow the availability

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Appellate Court of Paris dismissed the case because no defendants were French, and the event causing liability did not take place in France. Karl Hennessee, "All Around the World: A Global View of Legal and Policy Principles of the *Forum Non Conveniens* Doctrine" (Address before the Peopil Aviation Seminar, Toulouse, France, November 11, 2008) [unpublished]. This decision was reversed on appeal.

[106] No. 06-22748-civ-Ungaro, CCH 32 Avi. 15,595, 619 F. Supp. 2nd 1299 (S.D. Fla. 2007), aff'd *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied sub nom., Bapte v. West Caribbean Airways*, 130 S. Ct. 3387 (June 7, 2010). The federal district court held that the Montreal Convention allows dismissal of a suit in circumstances where it is argued that the United States is not the most convenient forum in which to bring suit.

[107] 619 F. Supp. 2nd at 1328.

[108] 619 F. Supp. 2nd at 1310.

[109] 619 F. Supp. 2nd at 1326.

[110] *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied sub nom., Bapte v. West Caribbean Airways*, 130 S. Ct. 3387 (June 7, 2010).

of *forum non conveniens,* the doctrine should not be introduced into Montreal Convention litigation. The court disagreed:

> We find this argument untenable for two reasons. First, there is no dispute that forum non conveniens is a "question of procedure" under U.S. law and thus it clearly falls within the ambit of Article 33(4). Second, under Plaintiffs' theory, all state procedural rules would have to be specifically enumerated in order to be applicable under the Convention, and we do not believe the Convention's drafters intended such an absurd result. . . . [F]orum non conveniens would permit dismissal under the Convention only if the alternative forum was authorized to hear the case under Article 33(1) or (2) and was "demonstrably the more appropriate venue."[111]

More recent jurisprudence emerging from lower courts in the Ninth Circuit has limited *Hosaka's* holding to the Warsaw Convention, refusing to extend it to the Montreal Convention. *In re Air Crash over the Mid-Atlantic on June 1, 2009,*[112] involved the disappearance of an Air France aircraft over the Atlantic. There, a U.S. District Court in California (subject to the Ninth Circuit's precedent) held that the two of the decedents' "principal and permanent residence" was the United States at the time of the Air France crash into the Atlantic Ocean, and not Brazil, where they temporarily resided. Therefore, venue in the United States was appropriate under the "fifth jurisdiction" of Article 33(2) of the Montreal Convention. Reviewing *Hosaka*, the court held that although *forum non conveniens* might be inappropriate under the Warsaw Convention given that the doctrine was not widely used in 1929, by the time the Montreal Convention of 1999 was drafted, the doctrine was well established. The court therefore concluded that the Montreal Convention does not preclude application of the *forum non conveniens* doctrine. Moreover, Montreal's addition of a fifth jurisdiction and its deference to local law on procedural issues "shows an intent to give plaintiffs a choice among different fora but also to constrain that choice to allow courts where *forum non conveniens* is available to assess whether a different forum is more appropriate."[113]

The federal district court in *Mid-Atlantic* found that several defendants and most of the evidence was in France, most decedents were French, that France was conducting a criminal investigation, that French courts could order BEA (the French aviation safety investigatory agency)[114] to disclose evidence in its possession, and that under a conflicts of law analysis, French law might apply to the non-airline defendants. Many courts are loathe to translate and apply unfamiliar foreign law, or to enter into complex conflicts of laws analysis to determine which nation's laws apply to which issues.[115] Two plaintiffs' estates represented decedent U.S. citizens; nevertheless, the court concluded, "Although it is true that the domestic Plaintiffs' forum choice is entitled to considerably more deference, and the Court is sensitive to the importance of making courts in this country available to American citizens, that deference does not and cannot prevent this Court from dismissing on *forum non conveniens* grounds where, as here, an adequate and alternative forum is available and superior."[116]

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[111] 584 F.3rd at 1058. The "history of the Convention is clear that it was the shared intent of the states party that each state could continue to apply its procedural rules, including *forum non conveniens.*" 584 F.3rd at 1058, n. 8. In *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), the U.S. Court of Appeals for the Eleventh Circuit held that Montreal Convention Article 33(4) clearly provides "that questions of procedure—which can only reasonably be read to include all questions of procedure—are governed by the rules of the forum state." Id. at 1058. In *Pierre-Louis,* the 11th Circuit affirmed the district court's conclusion that "the shared expectation of the states party to the Convention was that those states which recognized the doctrine could continue to apply it." 584 F.3d at 1057-58. *See also, Khan v. Delta Airlines, Inc.*, 2010 WL 3210717 (E.D.N.Y. 2010).

[112] 2010 WL 3910354 (N.D. Cal. 2010).

[113] 2010 WL 3910354 at 6 (N.D. Cal. 2010).

[114] *See* Paul Stephen Dempsey, "Independence of Aviation Safety Investigation Authorities: Keeping the Foxes from the Henhouse", 75 Journal of Air Law & Commerce 223 (2010).

[115] For example, in *In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006,* 574 F. Supp 2nd 272, 289 (E.D.N.Y. 2008), aff'd 354 Fed. Appx. 585 (2nd Cir. 2009), the court noted that "the avoidance of 'unnecessary problems in conflict of laws' supports forum non conveniens dismissal." *Overseas National Airways v. Cargolux Airlines Int'l,* 712 F.2nd 11, 14 (2nd Cir. 1983) ("[A]n action should be dismissed where the court may be required to 'untangle problems in conflict in law foreign to itself.'"). Similarly, the Third Circuit in *Dahl v. United Technologies Corp.,* 632 F.2nd 1027, 1032 (3rd Cir. 1980), noted that "We believe that Norwegian substantive law will predominate the trial of this case and that the mere presence of a count pleaded under Connecticut law but which may have little chance of success does not warrant a different conclusion." See also *Grodinsky v. Fairchild Industries,* 507 F. Supp. 1245, 1252 (D. Md. 1981) ("Canadian law will likely apply to most, if not all of, the issues in this case. Although the fact that this court might be called upon to apply the law of a foreign country does not alone compel dismissal, it is nevertheless an important consideration.") [citations omitted]; *Da Rocha v. Bell Helicopter Textron,* 431 F. Supp. 2nd 1318, 1325 (S.D. Fla. 2006) ("The final relevant factor, and it is an important factor, is the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law."). *See also, Tazoe v. Airbus,* 2011 WL 294044 (11th Cir. 2011), at *8.

[116] 2010 WL 3910354 at 11 (N.D. Cal. 2010).

One additional issue in *Air Crash over the Mid-Atlantic* warrants attention. Though the estates of the two deceased Americans could bring suit against Air France before U.S. courts, the foreign plaintiffs, who made up the overwhelming majority of claimants, could not, for as for them, Article 33 of the Montreal Convention could not be satisfied. However, Article 33 would be satisfied if their suits were brought in France. If the litigation were heard in the United States, then the manufacturing defendants likely would sue Air France as a third-party defendant. That would create tension with the Montreal Convention in two ways. First, since the Convention would not apply, Air France would not be presumptively liable to the plaintiffs as contemplated by the Montreal Convention. Second, Air France's presence in the suit would contravene the Convention's jurisdictional restrictions as the carrier would effectively litigate the passengers' claims outside the fora enumerated therein. Moreover, if Air France could not be sued as a third-party defendant, the manufacturer defendants could not seek indemnification in the same suit in which they were defending against the estates of the deceased passengers. According to the court, "That would result in exactly the type of oppressive and vexatious outcome that *forum non conveniens* dismissal is designed to avoid."[117] Hence, the motion to dismiss was granted.

Of course, not all jurisdictions embrace the doctrine of *forum non conveniens.* For example, the doctrine is not recognized in Argentina, Belgium, France, Germany or Greece.[118] Under Articles 14 and 15 of the French Civil Code, a French party may sue or be sued in France even when the case has no other link to France other than the defendant's nationality.[119] Article 42 of the French Code of Civil Procedure provides that venue is appropriate in the court of the place where the defendant lives, and if there are several defendants, the plaintiff may, at his discretion, bring his case before the court where any one of the defendants live. Article 46 provides that in a tort case, the plaintiff may alternatively bring his action in the place of the event causing liability, or the place where the damage was suffered. Hence, the plaintiff has wide discretion in France in his choice of legal venues, and French courts may not dismiss an action on *forum non conveniens* grounds.[120]

The French Cour de Cassation hit an evolutionary dead end in 1997 when it "shoehorned" Pakistan International Airlines (PIA) into a case brought against Airbus and PIA involving a crash in Katmandu, Nepal, in 1992. There was no jurisdiction in France against the airline under the Warsaw Convention. The court held that since the Convention provided no guidance as to what jurisdictional rules applied when there were multiple defendants, local French municipal law would apply. Applying French law, PIA was allowed to be joined as a co-defendant. The court reached this decision despite the fact that the Convention expressly specified the fora in which a plaintiff could bring suit, and despite the fact that the Convention explicitly provides that its provisions are exclusive.[121] The result was that air carriers were joined as defendants in many suits against aircraft manufacturers and overhaulers before French courts, no matter how remote the airline's involvement was in the death or personal injury.

In 2006, the Cour de Cassation revisited the issue and concluded that the Warsaw Convention should be strictly and literally applied, reversing the decisions issued in first and second instances which had granted jurisdiction in two cases in which claims were allowed against both the manufacturer of the crashed aircraft (GIE Airbus Industrie) and the air carrier at the domicile of the manufacturer, despite the fact that no local jurisdiction was appropriate under Article 28 of the Warsaw Convention.[122] Thereafter, in France, no jurisdiction against air carriers operating in international aviation could be exerted absent fulfillment of the Convention's venue requirements.[123]

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[117] 2010 WL 3910354 (N.D. Cal 2010), at *10.

[118] James Baudino, *Venue Issues Against Negligent Carriers – International and Domestic Travel: The Plaintiff's Choice?,* 62 J. Air L. & Com. 163, 192 (1996).

[119] Alain Cornec & Julie Losson, *French Supreme Court Restates Rules on Jurisdiction, Recognition and Enforcement of Foreign Decisions,* 11 Fam. L.Q. 83 (Spring 2010).

[120] Alain Cornec & Julie Losson, *French Supreme Court Restates Rules on Jurisdiction, Recognition and Enforcement of Foreign Decisions,* 11 Fam. L.Q. 83, 91 (Spring 2010).

[121] *Pakistan International Airlines v. Bejon* (France, Cour de Cassation 25 Nov. 1997), discussed in Rod Margo, *IATA International Liability Reporter* (2007) at 27-28. In a previous decision, a French court had held that the court that had jurisdiction in respect of the insurer also had jurisdiction in respect of the air carrier, despite the fact that it did not have jurisdiction under Article 28. See *Dame Teste v. Assurance Mutuelle Generale Francaise Accidents et Swissair*, [1985] RFDA 348 (Tribunal de Commerce de Cannes), and AL 1986, p. 101; see also Elmar Maria Giemulla, Ronald Schmid *et al*., eds., *Montreal Convention*, looseleaf (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2006) (Suppl. 3, April 2008), Article 33 at 27, and Malcolm Clarke, *Contracts of Carriage by Air* 174-75 (Lloyd's List 2010).

[122] *Gulf Air Company v. GIE Airbus, M. El D. et autres*, Cour de Casation, RFDA 2006, 319; *Kenya Airways v. GIE Airbus, Epoux B. et autres*, Cour de Casation, RFDA 2006, 321.

[123] Discussed in Rod Margo, *IATA International Liability Reporter* (2007) at 27-28, along with *The owners of the cargo lately laden on board the ship Tairy v. The owners of the ship Macief Rataj,* [1994] EU C-406/92.

BEYOND WARSAW AND MONTREAL: MOTIONS FOR DISMISSAL GRANTED
"SO LET US NOT TALK FALSELY NOW, THE HOUR IS GETTING LATE."

Let us now turn to several instances in which dismissal motions were granted. Where the plaintiffs and decedents are predominantly foreign and the event that caused damage was foreign, U.S. federal courts, more often than not, grant these motions to dismiss even when at least one of the defendants is domestic.[124]

In re Air Crash Near Athens, Greece on Aug. 14, 2005[125] involved Helios Airways Flight 522, which took off from Cyprus and crashed near Athens, Greece. Shortly after take-off, the aircraft slowly depressurized, leaving the cockpit crew disoriented, and eventually unconscious. Flying on autopilot, the aircraft eventually ran out of fuel and crashed, killing all 121 people on board. The air carrier was a Cypriot airline that never had flown to the United States. Nearly all of the passengers were residents of Cyprus or Greece; none were U.S. citizens. The defendant Boeing conceded liability, agreed to make all evidence and witnesses on the products liability issues available in Greece and, and insisted that the only remaining issue was one of damages; the wreckage and the accident investigation were in Greece; most of the witnesses related to the air carrier, aircraft maintenance, the flight crew, and family pain and suffering were in Cyprus. Moreover, the carrier refused to submit to compulsory process in the United States. The U.S. federal district court concluded that the private interest factors warranted forwarding the case to the courts of Cyprus. As to the public interest factors, the court found that although the United States has an interest in regulating domestic companies, Greece and Cyprus have an interest in protecting the safety and health of their residents; the carrier was a Cyprus-based company; 111 of the 115 decedents were Greek or Cypriot; none was a U.S. citizen; Greece and Cyprus had launched criminal investigations, and Greece had concluded an accident investigation. On balance, the public interest factors also warranted dismissal.[126]

The Helios decision has been vigorously criticized by aviation attorney Michael Verna:

> The plaintiffs will now face prohibitive difficulties pursuing their claims in their own country's courts, including a 10-plus-year backlog of cases, lack of access to qualified aviation attorneys in their home jurisdiction, inadequacies in their justice system, and the high costs of prosecuting such claims in a jurisdiction that

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[124] Motions for dismissal were granted on *forum non conveniens* grounds in *Paun v. United Tech. Corp.*, 637 F.2nd 775 (D.C. Cir. 1980); *Byrne v. Japan Airlines, Inc.*, No. 83 Civ 9162 (JFK), 1984 WL 1343 (S.D.N.Y. Dec. 18, 1984); *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 at 1153-54 (5th Cir. 1987), vacated on other grounds sub nom *Pan American World Airways v. Lopez*, 490 U.S. 1032 (1989), vacated in part and aff'd in part on remand, 883 F.2nd 17 (5th Cir. 1989); *Thach v. China Airlines, Ltd.*, No. 95 Civ 8468 (JSR), 1997 WL 282254 (S.D.N.Y. May 27, 1997), 1997 WL 282254 (S.D.N.Y. 1997); *In re Air Crash off Long Island New York, on July 17, 1996*, 65 F. Supp. 2d 207 (S.D.N.Y. 1999); *Cheng v. Boeing Co.*, 708 F.2nd 1406 (9th Cir. 1983); *Satz v. McDonnell Douglas Corp.*, 244 F.3rd 1279 (11th Cir. 2001); *Chukwu v. Air France*, 218 F. Supp. 2d 979 at 987-89 (N.D. Ill. 2002); *Mutambara v. Lufthansa German Airlines*, Civ. Action No. 02-0827, 2003 WL 1846083 (D.D.C. Mar. 24, 2003); *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*, No. 00-MDL-1344, 2004 WL 1824385 (E.D.N.Y. Aug. 16, 2004); *In re Air Crash over the Taiwan Straits on May 25, 2002*, 331 F. Supp. 2d 1176 (C.D. Cal. 2004); *Gambra v. Int'l Lease Finance Corp.*, 377 F. Supp. 2d 810 (C.D. Cal. 2005); *Faat v. Honeywell Int'l Inc.*, No. Civ. A. 04-0433 2005 WL 2475701 (D.N.J. Oct. 5, 2005); *King v. Cessna Aircraft Co.*, 405 F. Supp. 2d 1374 (S.D. Fla. 2005), vacated, 505 F.3d 1160 (11th Cir. 2007) aff'd in part, dismissed in part, 562 F.3rd 1374 (11th Cir. 2009), cert. denied sub nom 130 S.Ct. 324 (2009); *DaRocha v. Bell Helicopter Texton*, 451 F. Supp. 2d 1318 (S.D. Fla. 2006);*Van Schijndel v. Boeing*, 434 F. Supp. 2d 766 (C.D. Cal. 2006), aff'd 263 Fed. Appx. 555 (9th Cir. 2008); *Siddi v. Ozark Aircraft Sys.*, Nos. 05-5170 and 05-5206, 2006 U.S. Dist. LEXIS 84882 (W.D. Ark. Nov. 21, 2006); *In re Air Crash Near Athens, Greece on Aug. 14, 2005*, 479 F. Supp. 2d 792 (N.D. Ill. 2007); *In re Air Crash Near Athens, Greece on Aug. 14, 2005*, 479 F. Supp. 2d 792, 2007 WL 840300 (N.D. Ill. 2007); aff'd *Clerides v. Boeing Co.*, 534 F.3rd 623 (7th Cir. 2008); *Van Schijndel v. Boeing*, 434 F. Supp. 2nd 766 (C.D. Cal. 2006), aff'd 263 Fed. Appx. 555 (9th Cir. 2008); *Clerides v. Boeing Co.*, 534 F.3d 623 (7th Cir. 2008); *Delta Airlines v. Chimet*, No. 07-2898, 2008 U.S. Dist. LEXIS 103268 (E.D. Pa. Dec. 19, 2008); *Seales v. Panamanian Aviation Co. Ltd.*, No. 07-CV-2901(CPS)(CLP), 2009 U.S. Dist. LEXIS 11855 (E.D.N.Y. Feb. 17, 2009), aff'd 356 Fed. Appx. 461 (2nd Cir. 2009); *Navarrete de Pedrero v. Schwiezer Aircraft Corp.*, 635 F. Supp. 2nd 251 (W.D.N.Y. 2009); *Melgares v. Sikorsky Aircraft Corp.*, 613 F. Supp. 2nd 231 (D. Conn. 2009); *Guimei v. General Elec. Co.*, 91 Cal. Rptr. 3rd 178 (Cal. Ct. App. 2009); *Khan v. Delta Airlines*, 2010 WL 3210717 (E.D.N.Y. 2010); *Francios v. Hartford Holding Co.*, 2010 WL 1816758 D.V.I. 2010); *In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006*, 574 F. Supp 2nd 272 (E.D.N.Y. 2008), aff'd 354 Fed. Appx. 585 (2nd Cir. 2009); *Delta Airlines v. Chimet*, 2010 WL 3385537 (3rd Cir. 2010); *Lleras v. Excelaire Servs.*, 2009 WL 4282112 (2d Cir. Dec. 2, 2009), aff'g, *In re Air Crash Near Peixoto De Azeveda, Brazil*, on Sept. 29, 2006, 574 F. Supp. 2d 272 (E.D.N.Y. 2008); *Van Schijndel v. Boeing Co.*, 263 F. App'x, 555 (9th Cir. 2008), aff'g, *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766 (C.D. Cal. 2006); *Can v. Goodrich Pump & Engine Control Sys.*, 2010 WL 1961021 (D. Conn. 2010); *Francois v. Hartford Holding Co.*, 2010 WL 1816758 (D.V.I. 2010); *Fredriksson v. Sikorsky Aircraft Corp.*, 2009 WL 2952225 (D. Conn. 2009); *Tazoe v. Tam Linhas Aereas*, 2009 WL 3232908 (S.D. Fla. 2009), aff'd *Tazoe v. Airbus*, 2011 WL 294044 (11th Cir. 2011); *Vorbiev v. McDonnell Douglas Helicopters*, 2009 WL 1765675 (N.D. Cal. 2009); and *Da Rocha v. Bell Helicopter Textron*, 451 F. Supp. 2d 1318 (S.D. Fla. 2006).
Note that not all these cases involve Warsaw or Montreal Convention claims.

[125] 479 F. Supp. 2d 792, 2007 U.S. Dist. LEXIS 20761 (N.D. Ill. 2007).

[126] *In re Air Crash Near Athens, Greece on Aug. 14, 2005*, 479 F. Supp. 2d 792, 2007 WL 840300 (N.D. Ill. 2007); aff'd *Clerides v. Boeing Co.*, 534 F.3rd 623 (7th Cir. 2008).

> disallows contingency fees. Thus, the dismissal from the U.S. court is the death knell for the foreign plaintiffs' case. They settle for pennies on the dollar, and the American manufacturer is never held to account for the design of its cabin pressurization system.[127]

Professor Heiser has pointed out that "after a foreign non conveniens dismissal, a foreign plaintiff often settles for a small amount or simply foregoes his claim altogether."[128]

Forum non conveniens also was applied in *Esheva v. Siberian Airlines*[129] to dismiss a suit involving the death of 124 passengers on a domestic flight from Moscow to Irkutsk by an Airbus aircraft designed, manufactured and registered in France and flown and maintained by a Russian carrier with Russian crew. Of the 203 passengers and crew members aboard the flight, 187 were Russian residents, 16 were residents of other countries, and none were residents of the United States. The only U.S. ties were that the aircraft was leased by a Virginia corporation.[130] Since all the witnesses and evidence were in Russia, the court concluded, "Litigation in the United States will burden everyone. . . . It would appear that American counsel have filed lawsuits on behalf of foreign plaintiffs who were injured abroad to gain advantage in settlement discussions from the substantial damage awards that may be obtained from American juries and to inconvenience the principal defendant, a Russian corporation."[131]

U.S. courts are not alone in applying *forum non conveniens* in international aviation litigation. In *Ang v. Singapore Airlines*,[132] the Singapore High Court reviewed common law jurisprudence in Canada and the United Kingdom, and concluded that a suit brought against Singapore Airlines for an accident occurring in Taiwan would best be litigated there.[133] *Forum non conveniens* or similar doctrines also exist as procedural alternatives in Canada, Israel, New Zealand and the United Kingdom.[134] It is unusual for a civil law jurisdiction to embrace the doctrine, yet the Civil Code of the Province of Quebec, Canada, allows dismissal if "authorities are in a better position to decide" the case.[135]

Some foreign States – including Costa Rica, Guatemala, Honduras and Venezuela – have enacted legislation that preclude their courts from accepting jurisdiction over any tort action by one of their residents that was earlier commenced in another State, and dismissed therefrom on *foreign non conveniens* grounds.[136] This directly confronts U.S. jurisprudence, discussed above, permitting dismissal only to an available and adequate alternative forum. Other States – including Nicaragua and the Commonwealth of Dominica[137] – have enacted laws that authorize their courts to apply the tort liability laws and damages in the States in which actions were commenced by their residents, but subsequently dismissed on *foreign non conveniens* grounds.[138] These laws may disincentivize a defendant from seeking dismissal, since in the former case, the court likely will conclude there is no available alternative forum, and in the latter case, the result in the foreign jurisdiction may be no less favourable than in the United States.[139]

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[127] Michael P. Verna, *Convenience Has Nothing to Do with FNC Motions,* 22 Air & Space Lawyer 9 (Nov. 1, 2008).

[128] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 610 (2008).

[129] *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493 (S.D.N.Y. 2007).

[130] Andrew Harakas & Barry Alexander, *Forum Non Conveniens and the Montreal Convention,* For the Defense (June 2008), at 46.

[131] *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493 at 498 (S.D.N.Y. 2007). "The S.D.N.Y. District Court rejected the claim, reasoning that there was a sufficient legal system available in Russia in order to assess the claims of the claimants, that the facts and bases that were relevant for the legal dispute were in Russia, and that legal proceedings in the United States would massively increase the costs for all involved parties. The court could not find any public or private interest that would justify a place of jurisdiction in the USA." Elmar Maria Giemulla, Ronald Schmid *et al*., eds., *Montreal Convention*, looseleaf (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2006) (Suppl. 2, September 2007), Article 33 at 26.

[132] 1 SLR 409 (2005).

[133] This case could not arise under the Warsaw Convention, as Taiwan is not a State party thereto.

[134] James Baudino, *Venue Issues Against Negligent Carriers – International and Domestic Travel: The Plaintiff's Choice?,* 62 J. Air L. & Com. 163, 194-95 (1996). *See e.g., Borgstrom v. Korean Air Lines Co.,* 2007 Carswell BC 1544 (B.C. Sup. Ct. 2007) (airline employment contract made in Korea for performance of services abroad led the British Columbia Supreme Court to conclude that "the comparative convenience and expense to the parties and their witnesses favours proceeding there.")

[135] Quebec Civil Code § 3135.

[136] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 623 (2008).

[137] "To remedy the harsh consequences of a dismissal of a foreign case on the grounds of *forum non conveniens,* Dominica established the Transnational Causes of Action (Products Liability) Act of 1997 . . . [which] applies to any product liability action that originated in a foreign forum, was brought against at least one foreign citizen, and was dismissed by the foreign forum on the basis of *forum non conveniens*." *Francois v. Hartford Holding Co.,* 2010 WL 1816758 (D. V.I. 2010), at *3.

[138] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 610, 628 (2008).

[139] Walter Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Availability Alternative Forum Inquiry and on the Deisrability of Foreign Non Conveniens as a Defense Tactic,* 56 U. Kan. L. Rev. 609, 658-62 (2008).

BEYOND WARSAW AND MONTREAL: MOTIONS FOR DISMISSAL DENIED
ALL ALONG THE WATCHTOWER, PRINCES KEPT THEIR VIEW
WHILE ALL THE WOMEN CAME AND WENT, BAREFOOT SERVANTS TOO

As we have seen, many courts have held that dismissal of an aviation case is appropriate on *forum non conveniens* grounds.[140] Dismissal on these grounds is not as prevalent, however, in some state courts. Let us examine several cases in which a dismissal motion was denied.

In *Varkonyi v. Varig*,[141] the leading New York case on the subject, dismissal on *forum non conveniens* grounds was deemed inappropriate. This was a case brought by non-U.S. citizens against a Brazilian carrier, and a manufacturer doing business in New York but incorporated in Delaware. Because there was no alternative forum in which both defendants could be sued, the court refused to dismiss the case. The doctrine presupposes the existence of another, more convenient forum.[142]

The most plaintiff-friendly jurisdiction on aviation litigation in this area appears to be the state courts in Cook County, Illinois, which often refuse to dismiss a case on such grounds.[143] Cook County is on the short list of the American Tort Reform Association's Judicial Hell Hole List.[144] In retrospect, one wonders whether the Boeing Company consulted its defense lawyers before moving its corporate headquarters from Seattle to Chicago.

In Illinois, a "plaintiff's right to select the forum is substantial. Unless the factors weigh strongly in favour of transfer, the plaintiff's choice of forum should rarely be disturbed."[145] Where the decedent's residence and the scene of the accident are not the same as the plaintiff's chosen venue, the plaintiff's choice of venue is given less deference.[146] "The defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another venue is more convenient to all parties. The defendant cannot assert that the plaintiff's chosen forum is inconvenient to the plaintiff."[147] In Illinois, lower court decisions on *forum non conveniens* are reversed only if it is proven that the lower court abused its discretion in balancing the relevant factors. "An abuse of discretion will be found where no reasonable person would take the view adopted by the trial court."[148]

In *Ellis v. AAR Parts Trading*,[149] a wrongful death suit was brought in Cook County, Illinois, by representatives of 113 Philippine decedents against two Illinois corporations (a parts supplier and an aircraft lessor financing company) for a crash of an Air Philippines Boeing 737 on a domestic flight from Manila to Davao City, both in the Philippines. The independent investigation commission appointed by the President concluded the crash was caused by pilot error, and not by structural or mechanical failure.[150] Nonetheless, the trial court reasoned that "it 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,

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[140] See *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied sub nom., Bapte v. West Caribbean Airways*, 130 S. Ct. 3387 (June 7, 2010).
[141] 239 N.E.2d 542 (N.Y. 1968).
[142] Charles Krause & Kent Krause, *Aviation Tort and Regulatory Law*, 2d ed. (St. Paul, Minn.: West Group, 2002) at § 3:23.
[143] *See e.g., Sabatino v. The Boeing Co.,* No. 90 L 1056 (Ill. Cir. Ct., Cook Cty, May 3, 2010); *Arik v. The Boeing Co.* No. 08 L 012539 (Ill. Cir. Ct., Cook Cty., Feb. 18, 2010); *Vivas v. The Boeing Co.,* 911 N.E.2nd 1057 (Ill. App. Ct. 2009); *Ellis v. AAR Parts Trading,* 828 N.E. 2nd 726 (Ill. App. Ct. 2005). Motions for dismissal also were denied in *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002); *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078, at 1084-85 (N.D. Ill. 2002); and *In re Cessna Series Aircraft Prods. Liab. Litig,* 546 F. Supp. 2d 1191 (D. Kan. 2008).
[144] http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf (visited February 7, 2011). According to the American Tort Reform Association, the top Judicial Hell Holes are:
1. Philadelphia, Pennsylvania
2. California, Particularly Los Angeles and Humboldt Counties
3. West Virginia
4. South Florida
5. Cook County, Illinois
6. Clark County, Nevada

[145] *Ellis v. AAR Parts Trading,* 828 N.E.2nd 726 (Ill. App. 2005).
[146] *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2nd 646, 661 (S.D. Tex. 2003).
[147] 828 N.E.2nd at 741-42 [citation omitted].
[148] 989 N.E.2nd at 743.
[149] *Ellis v. AAR Parts Trading,* 828 N.E.2nd 726 (Ill. App. 2005).
[150] Geoff Kass & Violet O'Brien, *Aircraft Crashes: Should Aircraft Lessors Be Held Liable?,* 74 J. Air L. & Com. 845, 848 (2009); Roger Clark & Thomas Richardson, *Is Lessor More?,* 75 J. Air L. & Com. 69 (2010).

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."[151]

Section 44112 (Limitations of Liability) of the Federal Aviation Act provides that, "A lessor, owner, or secured party is liable for 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 . . . ."[152] Facially, this suggests that federal law pre-empts tort law actions against a lessor not in possession or control of the aircraft.[153] But in *Ellis*, although the aircraft was not in the "actual possession or control of the lessor", the Illinois state court held that the statute did not preclude the application of Illinois law, which allows suit against aircraft lessors on grounds of negligent entrustment[154] or products liability.[155] Further, it concluded that, "Defendants' argument with regard to the issue of control of the aircraft is without merit as that was a distinction that had no bearing on the issue of pre-emption in the applicable case law."[156]

On the private interest factors, the appellate court concurred with the lower court, stating, "the plaintiff in this case has alleged *both* negligence *and* defective design theories. These theories will require sources of proof not only from the Philippines, but also from the defendants' corporations located here in Illinois."[157] Similarly, on the public interest factors, the appellate court found that both Cook County and the Philippines "have an equal interest" in deciding the controversy. The crash occurred in the Philippines, and thus residents of the Philippines have an interest in the possibility of negligence that may have occurred by the pilot or air navigation controller; the residents of Illinois have an interest in the conduct of corporations that do business in Illinois and the quality of their products; moreover, one of the administrators of the plaintiff's case is an Illinois resident related to a decedent.[158]

Failing in their motion for dismissal, and believing that the Cook County Court would be heavily biased in favor of the plaintiffs, the defendants settled the case for approximately $165 million.[159] Reviewing this decision, one source observed that, "Naming American lessors as defendants has . . . come to be seen by the plaintiffs' aviation bar in the post-Air Philippines world as the magic bullet that slays the specter of a forum non conveniens dismissal, particularly in wrongful death lawsuits arising from foreign air disasters which have no American decedents."[160]

Similarly, *Vivas v. The Boeing Co.*[161] involved the crash of a Boeing aircraft leased by a South African company to a Peruvian airline on a domestic flight between Lima and Pucalpa, Peru. Of the 49 personal injury plaintiffs, 42 were Peruvian citizens and residents. However six were U.S. citizens and residents, and one was a resident of Illinois. Despite the fact that Boeing was willing to consent to jurisdiction in and Peru, and agreed to waive any statute of limitations, the court denied defendants' motion to dismiss on *forum non conveniens.* The Cook County, Illinois, trial court found that although Peruvian courts did not allow pre-trial discovery or jury trials, nonetheless Peru was an adequate available forum. However, the private interest factors did not warrant dismissal because: (1) defendants could not claim that Peru was a more convenient forum since they were U.S. corporations, and Boeing was headquartered in Cook County,

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[151] *Ellis v. AAR Parts Trading,* 828 N.E.2nd 726, 743 (Ill. App. 2005).
[152] 49 U.S.C. § 44112.
[153] Geoff Kass & Violet O'Brien, *Aircraft Crashes: Should Aircraft Lessors Be Held Liable?,* 74 J. Air L. & Com. 845 (2009).
[154] Not to be confused with a claim for vicarious liability, the tort of negligent entrustment may lie where "the owner or lessor knew or should have known that the bailee was incompetent, inexperienced, reckless, or had dangerous propensities." Though federal courts have been reluctant to allow recovery for the vicarious liability of aircraft owner for the negligence of the operator, negligent entrustment actions have not been so handicapped. Roger Clark & Thomas Richardson, *Is Lessor More?,* 75 J. Air L. & Com. 69, 89-90 (2010). *See e.g., Sanz v. Renton Aviation,* 511 F.2nd 1027, 1029 (9th Cir. 1975).
[155] *Layug v. AAR Parts Trading,* 2003 WL 25744436 (Ill. Cir. Ct. 2003). A lessor may be liable under a theory of strict products liability depending upon whether the lease is an operating lease, or a capital lease. If the lessor only provided financing and did not possess the aircraft, it is unlikely that a products liability action will prevail; but if it had possession of the aircraft, such an action might succeed, depending upon the facts. Roger Clark & Thomas Richardson, *Is Lessor More?,* 75 J. Air L. & Com. 69, 71-72, 97 (2010). An earlier Illinois appellate court decision had held that, "we hold that section 44112 does not preempt a personal injury action under state law against . . . the aircraft lessors in the instant case."*Retzler v. The Pratt & Whitney Co.,* 723 N.E 2nd 345 (Ill. App. 1999).
[156] Quoted in Geoff Kass & Violet O'Brien, *Aircraft Crashes: Should Aircraft Lessors Be Held Liable?,* 74 J. Air L. & Com. 845, 850 (2009).
[157] *Ellis v. AAR Parts Trading,* 828 N.E.2nd 726, 745 (Ill. App. 2005).
[158] *Ellis v. AAR Parts Trading,* 828 N.E.2nd 726, 747 (Ill. App. 2005).
[159] Roger Clark & Thomas Richardson, *Is Lessor More?,* 75 J. Air L. & Com. 69 (2010).
[160] Roger Clark & Thomas Richardson, *Is Lessor More?,* 75 J. Air L. & Com. 69, 75 (2010). "The presence of an American aircraft lessor as a defendant may be a 'jurisdictional hook' for the foreign plaintiff that avoids a forum non conveniens dismissal." Id. at 125. "Rightly or wrongly, naming the American aircraft lessor as a defendant in foreign aircraft disaster litigation has come to be seen as an effective device to avoid dismissal under the foreign non conveniens doctrine, particularly if the litigation remains in state court." Id. at 135.
[161] 911 N.E.2nd 1057 (Ill. App. 2009).

Illinois; (2) Peru did not provide greater ease of access to witnesses and evidence since they were spread across various states and countries; and (3) viewing the accident site is not as important in a products liability case in order to resolve whether the aircraft or its engines were defective. As to the public interest factors, they also did not warrant dismissal because: (1) defendant had not shown that the Cook County courts were more congested than those in Peru; (2) Illinois residents have an interest in resolving products liability claims against locally headquartered companies; and (3) though there is an interest in having local controversies decided locally, that is less so in a products liability case.[162] On appeal, the court noted that, with respect to the location of the evidence, "this is a product liability case; and all the evidence relevant to the design, manufacture and assembly of the aircraft and its engines is in the United States. . . . Also, a significant portion of the evidence regarding the crash is not in Peru, but in the United States, as a result of the defendants' efforts to participate in the Peruvian crash investigation, with assistance from American authorities."[163]

Plaintiffs sometimes can enhance their chances of surviving a *forum non conveniens* motion for an aviation crash on foreign soil where they craft their complaint in products liability rather than negligence. For example, in *McCafferty v. Raytheon,*[164] the accident occurred in Indonesia, the aircraft wreckage and accident investigation were in Indonesia, the decedents and the beneficiaries of the estates were Indonesian, and the aircraft was owned by Indonesians. Nevertheless the court concluded: "Plaintiffs claim that Defendants were involved in both the manufacture and sale of the allegedly defective aircraft and defective engine. Plaintiffs' theory of liability is not premised on pilot or other human error. Consequently, the operative facts upon which liability are premised for the instant matters occurred in the United States."[165]

Congress has not reserved to federal courts aviation accident cases.[166] But as revealed above, in general, U.S. federal courts appear to be more sympathetic to defendants' motions for dismissal on *foreign non conveniens* grounds than many state courts. One means of removing a case from state to federal court where the action involves 75 or more deaths in a "discrete location" is via the Multiparty, Multiforum Trial Jurisdiction Act [MMTJA].[167] Though this legislation does not apply exclusively to airlines, it was passed in the wake of the 9/11 tragedy when aviation disasters were much on the mind of Congress.[168] Of course, commercial aviation crashes often involve 75 or more deaths occurring in a single location. Another means of getting the case moved from state to federal court is for the defendant to cross-claim a Federal Aviation Administration [FAA] employee. The FAA cannot be sued in state courts, and will enter the case to defend its employees, which mandates a transfer to federal court.

But a few U.S. federal courts have denied *forum non conveniens* motions. For example, *In re Cessna 208 Series Aircraft Products Liability Litigation*[169] involved a suit brought by Canadians for a crash in Canada of an aircraft designed and manufactured in the United States. Although a Conflicts of Law analysis concluded that Canadian law would apply, the court was convinced it would have no difficulty applying Canadian law. It concluded, "Several factors slightly favour the Canadian forum, but those factors are outweighed by the ease of access to sources of proof as part of this consolidated proceeding and the interest of the United States in regulating the conduct of a resident aircraft manufacturer."[170]

In re West Caribbean Crew Members, [171] involved eight wrongful death claims based in products liability against U.S. defendants by the estates of Colombian citizens against who died aboard an MD-82 aircraft that had flown for 19 years in the United States before the plane crashed in Venezuela on a flight from Panama City, Panama, to Fort de France, Martinique. Since the focus was on products liability, the court

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[162] 911 N.E.2nd at 1066-67.
[163] 911 N.E.2nd at 1069.
[164] 2004 U.S. Dist. Lexis 16686 (E.D. Pa. 2004).
[165] 2004 U.S. Dist. Lexis 16686 (E.D. Pa. 2004), at *9-*10.
[166] *Bennett v. Southwest Airlines Co.,* 484 F.2nd 907, 911 (7th Cir. 2007); *Sakar v. Hageland Aviation Services,* 2008 U.S. Dist. Lexis 109058 (D. Alaska 2008).
[167] 28 U.S.C. § 1369. *See Pettitt v. The Boeing Co.,* 606 F.3rd 340 (7th Cir. 2010); *Sakar v. Hageland Aviation Services,* 2008 U.S. Dist. Lexis 109058 (D. Alaska 2008). Roger Clark & Thomas Richardson, *Is Lessor More?,* 75 J. Air L. & Com. 69, 74, 131 (2010).
[168] *Passa v. McLaughlin & Moran,* 308 F. Supp. 2d 43; 2004 U.S. Dist. LEXIS 5039 (D.R.I. 2004) ("Opponents have argued that the MMTJA was intended only to apply to cases arising from airline disasters, citing as evidence repeated references to airline disasters in the legislative history and testimony before Congress from representatives of the airline industry concerning the effects of multidistrict airline litigation. It is true that Congress' enactment of the MMTJA occurred only months after the tragic events of September 11, 2001, a disaster involving terrorist attacks on American cities utilizing hi-jacked commercial airplanes. However, while it is certainly correct that major airline disasters were contemplated when this act was formulated by Congress, neither the language of the bill itself nor the legislative history limit the application of § 1369 to airline tragedies.")
[169] 546 F. Supp. 2nd 1191 (D. Kan. 2008).
[170] 546 F. Supp. 2nd at 1197.
[171] 632 F. Supp. 2nd 1193 (S.D. Fla. 2009).

believed most of the evidence would be in the United States. The defendants argued that the absence of West Caribbean Airways [WCA] might prejudice their defense at trial or create incomplete or fragmented adjudication. The court was unsympathetic, saying, "Florida law permits Defendants, as an affirmative defense, to attribute tort liability to a party who is absent from the litigation. Due to the availability of the affirmative defense, Defendants actually may enjoy an advantage from WCA's absence during a jury's determination of liability."[172]

King v. Cessna Aircraft[173] involved a runway collision on a foggy morning at Linate Airport in Milan, Italy, between a Cessna aircraft operated by a German charter company, and Scandinavian Airlines flight 686, killing 118 people, including four on the ground. All but one of the 70 plaintiffs filing suit in the U.S. Federal District Court for the Southern District of Florida were Europeans. The federal district court dismissed the claims of the European plaintiffs on *forum non conveniens* grounds, but denied dismissal of the estate of Jessika King estate, a U.S. resident, staying that claim only pending resolution of the case in Italy. The court reasoned that the American plaintiff was entitled to "a higher level of deference" than the foreign plaintiffs "because it is likely that their choice was made 'for some other reason than convenience.'"[174] The court felt that staying the complains brought by the American plaintiffs until the Italian courts have resolved the dispute for the other 69 plaintiffs would enable the U.S. court to benefit from the foreign decision avoiding any conflict in following Italian law.

However, the U.S. Court of Appeals for the Eleventh Circuit vacated both the dismissal and stay orders, reasoning that an indefinite stay with no clear end in sight was impermissible.[175] The case was remanded so that the District Court could evaluate what it might have done differently had it known that it could not stay the American plaintiff's case.[176] The Eleventh Circuit subsequently affirmed dismissal of the European plaintiffs on *forum non conveniens* grounds.[177] Ultimately, the Court of Milan concluded that the monies already received by the King estate (EUR 333,628.97 and USD 73,026.50 from settlements with various parties) were "amply satisfactory" under Italian law to compensate the estate fully for its damages.[178]

Some courts deny motions to dismiss on *forum non conveniens* grounds discovery if a case has proceeded so far that the parties have expended much of the time and resources that they will spend in gathering evidence before trial.[179] This jurisprudence places the defendant in a lose-lose position as it is ordered to undertake substantial discovery to determine whether dismissal is appropriate, only to learn that extensive discovery makes dismissal inappropriate.[180]

CONCLUSION

OUTSIDE IN THE COLD DISTANCE, A WILDCAT DID GROWL
TWO RIDERS WERE APPROACHING, AND THE WIND BEGAN TO HOWL

The United States has become the forum of choice in international aviation mass disaster litigation. The preference of plaintiffs for a U.S. forum is inspired by a number of factors, including the generosity of American juries. Defendants' motions for *forum non conveniens* grounds have become a major shield lifted against suits by foreign plaintiffs for injuries occurring on foreign soil.

It is as difficult to argue that the local courthouse is inconvenient for the defendant as it is to argue that a U.S. courthouse is convenient for a foreign plaintiff. But if we peel back the curtain, we see that these battles often really aren't about convenience at all. Each side engages in "forum shopping", and that the convenience of the parties is a secondary consideration to the preferred result. The foreign plaintiff seeks a more generous result before a U.S. jury. The domestic defendant seeks a less generous result before a foreign judge. Each constructs and articulates an argument based on "convenience"; yet the true focus is recoverable damages . . . or in simpler terms, money.

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[172] 632 F. Supp. 2nd 1193, 1203 (S.D. Fla. 2009).
[173] *King v. Cessna Aircraft Co.*, 405 F. Supp. 2d 1374 (S.D. Fla. 2005), vacated, 505 F.3d 1160 (11th Cir. 2007), aff'd in part, dismissed in part, 562 F.3rd 1374 (11th Cir. 2009), cert. denied sub nom 130 S.Ct. 324 (2009).
[174] 405 F. Supp. at 1377.
[175] *King v. Cessna Aircraft Co.,* 505 F.3rd 1160 (11th Cir. 2007).
[176] 505 F.3rd at 1173.
[177] *King v. Cessna Aircraft Co.,* 562 F.3rd 1374 (11th Cir. 2009).
[178] *King v. Air Evex GmbH,* Milan Trib. N. 59356/2003 at 27; *King v. Cessna Aircraft Co.,* 2010 U.S. Dist. Lexis 131899 (S.D. Fla. 2010).
[179] *Lony v. E.I. DuPont de Nemours,* 935 F.2nd 604, 614 (3rd Cir. 1991); *Lacey v. Cessna Aircraft Co.,* 849 F. Supp. 394 (W.D. Pa. 1994).
[180] Robert Jarvis, James Crouse, James Fox & Gregory Walden, *Aviation Law* 214 (Carolina Academic Press 2006).

It is difficult to synthesize *forum non conveniens* jurisprudence in claims brought by predominantly foreign plaintiffs for aircraft accidents on foreign soil. Though the plaintiff has discretion as to where to file his claim, the courts often exercise discretion not to hear it. The analytical criteria (in particular, the private and public interest factors required to be weighed) are numerous and without prioritization, highly factual based, and their application is largely left to the discretion of the trial courts. So long as the trial courts appear fairly to address each of the designated criteria, it is highly likely they will not be deemed to have abused their discretion in either granting or denying a motion to dismiss. Typically, trial courts list the criteria one-by-one and give each at least a paragraph or two of analysis, and are almost always upheld on appeal. Generalizations about jurisprudence in this procedural corner of the world are therefore hazardous. If we peel back the curtain again, we see that trial judges have enormous discretion to hear cases that interest them, and to dismiss cases that do not, in the former case denying the *foreign non conveniens* motion, and in the latter case granting it.

Plaintiffs stand a better chance of prevailing if they have U.S. citizens among their plaintiffs and defendants, but even the presence of U.S. plaintiffs may not be enough to avoid dismissal on *forum non conveniens* grounds. Despite federal legislation which facially pre-empts suits against lessors not in possession or operation of aircraft, some state courts are allowing suit against them. Sometimes plaintiffs enhance their position by captioning their claim against manufacturers in products liability rather than negligence, as the evidence on a products liability claim usually resides in the venue of the manufacturer, whereas evidence of negligence and damages often is on foreign soil. Moreover, certain Latin American jurisdictions have passed legislation forbidding their courts from hearing cases dismissed from other jurisdictions on *forum non conveniens* grounds, thereby eliminating the adequacy and availability of the foreign jurisdiction.

Defendants stand a better chance of prevailing on the *forum non conveniens* motion when are in federal rather than state court. The Multiparty, Multiforum Trial Jurisdiction Act,[181] offers them an opportunity to extricate cases involving 75 or more deaths arising from a single disaster from state courts and consolidate them in a single proceeding in federal court. Defendants also can subdue the "available and adequate" foreign jurisdictional requirement of *forum non conveniens*, and several of the private interest factors if they offer concessions such as a willingness to submit to process in the foreign jurisdiction, waive the statute of limitations, provide witnesses and translation at their own expense, and to honour the foreign judgment when appeals have run their course. Even when not offered, some courts will impose such conditions. The generosity of U.S. courts in allowing foreign plaintiffs to collect this bag of goodies in itself, creates a perverse incentive to file first in U.S. courts. U.S. courts should reconsider their generosity in this arena, perhaps denying waiver of the statute of limitations in the foreign venue so as to incentivize plaintiffs to file abroad before it has passed. If the plaintiffs themselves have made the foreign forum unavailable because of missing the filing deadline, they should not be allowed to complain in U.S. courts. Sometimes too, defendants will enhance their position if they concede liability, and move to trial in a foreign jurisdiction solely on the issue of damages, evidentiary issues usually locally based in the venue of the decedent. Further, if the Conflicts of Laws analysis is complex or results in the application of foreign law, the U.S. court may be more inclined than not to send the case abroad.

Several wrinkles arise in the context of aviation disaster litigation against air carriers. The first is that venue under the applicable convention (Warsaw or Montreal) must exist as a threshold determination. Without it, the court lacks jurisdiction over the airline. Once venue is deemed appropriate, a secondary consideration is whether the plaintiff's choice is inviolate, or tempered by *forum non conveniens.* With regard to suits for damages caused by airlines operating in international aviation, no court as yet has followed the Warsaw precedence of a *Milor*[182] and *Hosaka*[183] in concluding that the similar provisions in the Montreal Convention in any way restrict the application of the *forum non conveniens* doctrine. The *travaux preparatoires* of the diplomatic conference that drafted the Montreal Convention of 1999 made it clear that jurisdictions that embrace the doctrine would be free to apply it under the venue provisions of Montreal. Hence, *forum non conveniens* remains a part of the procedural law that the Convention leaves to *lex fori.* Moreover, Warsaw and Montreal Convention restrictions in venue may make the U.S. forum unavailable for suits brought by foreign plaintiffs against airlines whose aircraft have crashed on foreign soil. In complex litigation involving airlines and manufacturers, and sometimes lessors as defendants, the court may be persuaded to punt the case to a foreign venue where all defendants can be joined in a single, more efficient, trial, without the need for subsequent litigation on the issue of indemnification between tortfeasors. Although the Warsaw and Montreal Convention have no direct application to non-

[181] 28 U.S.C. § 1369. Roger Clark & Thomas Richardson, *Is Lessor More?,* 75 J. Air L. & Com. 69, 74, 131 (2010).
[182] *Milor SLR v. British Airways Plc.*, [1996] Q.B. 702 (Eng. C.A.).
[183] *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002). These, of course, were minority views even as to Warsaw.

airline defendants, they may be indirectly affected by the court's inability to secure jurisdiction over airline co-defendants.

This becomes a bit more difficult when a U.S. domiciled person is embedded in among the plaintiffs like a planter's wart, for the Montreal Convention included the fifth jurisdiction to allow a person to bring suit in his home jurisdiction. Yet when the class of plaintiffs is overwhelmingly foreign, courts have had little difficulty in sweeping the few Americans abroad with their foreign classmates.

The existence of *forum non conveniens* as a means of dismissing suits with predominantly foreign plaintiffs seeking damages from American defendants for an accident occurring on foreign soil is a useful procedural mechanism to send the case to a more appropriate forum. But the sheer volume of these cases filed in U.S. courts is consuming judicial and litigation resources wastefully, and the willingness of state courts to hear such cases subjects American defendants to arguably excessive judgments. Congress could help remedy the problem in one important way: amend the Multiparty, Multiforum Trial Jurisdiction Act to subject all claims for damages involving aviation accidents occurring outside the United States to exclusive federal jurisdiction, allow consolidation of all such claims involving a single event into a single Article III federal court, and require that any motion for *forum non conveniens* be ruled on expeditiously. State courts could be statutorily pre-empted from hearing these cases. These reforms, coupled with the changes in the jurisprudence suggested above (for example, refusing to condition dismissal on the defendant's waiver of the statute of limitation in the foreign jurisdiction), would further streamline the process and eventually reduce the volume of foreign aviation accident litigation filed by foreign plaintiffs in U.S. courts.

APPENDIX
Federal *Forum Non Conveniens* Decisions in Aviation Accident Cases (2005-2010)[184]

CASE	RESULT	ACCIDENT LOCATION	FOREIGN FORUM	PLAINTIFF'S CITIZEN-SHIP	DECEDENT'S CITIZEN-SHIP	DEFENDANT'S CITIZENSHIP
Lleras v. Excelaire Servs., Inc., 2009 WL 4282112 (2d Cir. Dec. 2, 2009), aff'g, In re Air Crash Near Peixoto De Azeveda, Brazil, on Sept. 29, 2006, 574 F. Supp. 2d 272 (E.D.N.Y. July 2, 2008)	**Dismissal**	Brazil	Brazil	Brazilian	Brazilian	• U.S. • Brazilian
Pierre-Louis v. Newvac Corp., 584 F.3d 1052 (11th Cir. 2009), aff'g, In re W. Caribbean Airways, 619 F. Supp. 2d 1299 (S.D. Fla. 2007)	**Dismissal**	Venezuela	France (Martinique)	French (Martinique)	French (Martinique)	• U.S. • Columbian
King v. Cessna Aircraft Co., 562 F.3d 1374 (11th Cir. March 27, 2009), aff'g, King v. Cessna Aircraft Co., 2008 WL 276015 (S.D. Fla. Jan. 31, 2008)	**Dismissal** (denied as to U.S. plaintiff)	Italy	Italy	• Multiple European • 1 U.S.	• Multiple European • 1 U.S.	U.S.
Clerides v. Boeing Co., 534 F.3d 623 (7th Cir. 2008), aff'g, In re Air Crash Near Athens, Greece on August 14, 2007, 479 F. Supp. 2d 792 (N.D. Ill. 2007)	**Dismissal**	Greece	Greece or Cyprus	• 2 U.S. • 5 Greek • 83 Cypriot	• 1 U.S. • 5 Greek • 84 Cypriot	U.S.
Van Schijndel v. Boeing Co., 263 F. App'x 555 (9th Cir. 2008), aff'g, Van Schijndel v. Boeing Co., 434 F. Supp. 2d 766 (C.D. Cal. 2006)	**Dismissal**	Taiwan	Singapore	Dutch	Dutch	U.S.
Can v. Goodrich Pump & Engine Control Sys., 2010 WL 1961021 (D. Conn. May 17, 2010)	**Dismissal**	Turkey	Turkey	Turkish	Turkish	U.S.
Francois v. Hartford Holding Co., 2010 WL 1816758 (D.V.I. May 5, 2010)	**Dismissal**	Dominica	Dominica	Dominican	• Dominican • Dutch	• U.S. • Dominican
Fredriksson v. Sikorsky Aircraft Corp., Inc., 2009 WL 2952225 (D. Conn. Sept. 2, 2009)	**Dismissal**	Estonia	Finland	Finnish	Finnish	U.S.

[184] Prepared by attorneys as Exhibit A in Case 2:10-ml-02135-GAF-RZ Document 200-1 Filed 08/02/10 Page ID #:2547. This Appendix was not prepared by Paul Stephen Dempsey.

CASE	RESULT	ACCIDENT LOCATION	FOREIGN FORUM	PLAINTIFF'S CITIZEN-SHIP	DECEDENT'S CITIZENSHIP	DEFENDANT'S CITIZENSHIP
Tazoe v. Tam Linhas Aereas, 2009 WL 3232908 (S.D. Fla. Aug. 24, 2009)	**Dismissal**	Brazil	Brazil	Brazilian	Brazilian	• France • U.S.
Vorbiev v. McDonnell Douglas Helicopters, Inc., 2009 WL 1765675 (N.D. Cal. June 18, 2009)	**Dismissal**	Russia	Russia	No deaths	Russian	U.S.
In re West Caribbean Crew Members, 632 F. Supp. 2d 1193 (S.D. Fla. May 14, 2009)	**Denied** (private and public interest factors favored U.S. forum)	Venezuela	Colombia	Colombian	Colombian	• U.S. • Canada
Navarrete De Pedrero v. Schweizer Aircraft Corp., 635 F. Supp. 2d 251 (W.D.N.Y. 2009)	**Dismissal**	Mexico	Mexico	Mexican	Mexican	U.S.
Melgares v. Sikorsky Aircraft Corp., 613 F. Supp. 2d 231 (D. Conn. 2009)	**Dismissal**	Spain	Spain	Spanish	Spanish	U.S.
In re Air Crash Near Peixoto De Azeveda, Brazil, on Sept. 29, 2006, 574 F. Supp. 2d 272 (E.D.N.Y. 2008)	**Dismissal**	Brazil	Brazil	Brazilian	Brazilian	• U.S. • Brazilian
In re Cessna 208 Series Aircraft Prods. Liab. Litig., 546 F. Supp. 2d 1191 (D. Kan. April 23, 2008)	**Denied** (balance of factors did not favor dismissal)	Canada	Canada	Canadian	Canadian	U.S.
King v. Cessna Aircraft Co., 2008 WL 276015 (S.D. Fla. Jan. 31, 2008)	**Dismissal** (denied as to U.S. plaintiff)	Italy	Italy	• Multiple European • 1 U.S.	• Multiple European • 1 U.S.	U.S.
In re W. Caribbean Airways, 619 F. Supp. 2d 1299 (S.D. Fla. 2007)	**Dismissal**	Venezuela	France (Martinique)	French (Martinique)	French (Martinique)	• U.S. • Columbian

CASE	RESULT	ACCIDENT LOCATION	FOREIGN FORUM	PLAINTIFF'S CITIZENSHIP	DECEDENT'S CITIZENSHIP	DEFENDANT'S CITIZENSHIP
Esheva v. Siberia Airlines, 499 F. Supp. 2d 493 (S.D.N.Y. 2007)	**Dismissal**	Russia	Russia	Russian	Russian	• U.S. • Russian
In re Air Crash Near Athens, Greece on August 14, 2007, 479 F. Supp. 2d 792 (N.D. Ill. 2007)	**Dismissal**	Greece	Greece or Cyprus	• 2 U.S. • 5 Greek • 83 Cypriot	• 1 U.S. • 5 Greek • 84 Cypriot	U.S.
Da Rocha v. Bell Helicopter Textron, Inc., 451 F. Supp. 2d 1318 (S.D. Fla. 2006)	**Dismissal**	Brazil	Brazil	Brazilian	Brazilian	U.S.
Van Schijndel v. Boeing Co., 434 F. Supp. 2d 766 (C.D. Cal. 2006)	**Dismissal**	Taiwan	Singapore	Dutch	Dutch	U.S.
Faat v. Honeywell Int'l, Inc., 2005 WL 2475701 (D.N.J. 2005)	**Dismissal**	Germany	Spain	Russian Others	• Russian • Others	• U.S. • France
Gambra v. Int'l Lease Fin. Corp., 377 F. Supp. 2d 810 (C.D. Cal. 2005)	**Dismissal**	Red Sea	France	145 French citizens or residents	French	U.S.