Conflicts of Laws in International Aviation

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Lex loci delecti

The *lex loci delicti* rule (the place of the accident) was the universal standard in all U.S. courts until…

*Babcock v. Jackson* (NY 1963) which involved an automobile accident in Ontario, Canada. Were *lex loci* to be applied, Ontario’s guest statute would bar recovery by the passenger.

The court concluded that it would be unjust to apply *lex loci*, and that it should instead apply “the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.”

Canada, however, continues to follow lex loci, on grounds of “certainty, ease of application and predictability.”
Lex loci delecti

Where does the “wrong” occur?
Is it at the place of injury, or the place of wrongful conduct (e.g., place of design or manufacture of the aircraft)?

Traditional tort law provides that the wrong occurs at the place of the “last event necessary” to establish liability – the place of injury.

But courts are inconsistent, for the site of a plane crash may be wholly “fortuitous”
The Restatement 2nd Test

The factors relevant to the choice of the applicable rule of law include:
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.
Today, there is little uniformity in the United States

Strict *lex loci delicti* – 10 states
Significant contacts – 2 states
Interest analysis – 2 states
Second Restatement test – 23 states
Better law – 5 states
Combined modern – 6 states
*Lex fori* – 2 states
**Venue**

The four *fora* of the Warsaw Convention are:

1. the domicile of the actual carrier;
2. the principal place of business of the actual carrier;
3. a place of the carrier's business through which the contract was made; or
4. the place of destination.

To these four, three additional *fora* have been added by the Montreal Convention (the latter two of these were also included in the Guadalajara Convention):

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 and in which that carrier conducts its business of carriage from premises leased or owned by it or by another carrier with which it has a commercial agreement;
6. the domicile of the contracting carrier; or
7. the principal place of business of the contracting carrier.
Why Litigate in the United States?

the ability to litigate on behalf of plaintiffs by experienced litigators on a contingent fee basis;
liberal discovery rules;
relatively prompt trials;
the availability of strict liability in products liability law;
the possibility of receiving higher damages from plaintiff-sympathetic juries;
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
Average Compensation by Nationality

- Victims are “worth” different amounts in different countries.
- Passengers sitting side by side on your Boeing/Airbus/Embraer/Bombardier can be “worth” very different amounts.
- The figures below are “average” figures for a 45 year old wage earner [clerical position] leaving behind a partner and one teenage child.

<table>
<thead>
<tr>
<th>Country</th>
<th>Average Compensation (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>$1,250,000</td>
</tr>
<tr>
<td>France</td>
<td>$1,400,000</td>
</tr>
<tr>
<td>Australia</td>
<td>$1,400,000</td>
</tr>
<tr>
<td>New EU</td>
<td>$450,000</td>
</tr>
<tr>
<td>Asia</td>
<td>$250,000 - $650,000</td>
</tr>
<tr>
<td>Brazil</td>
<td>$2,500,000</td>
</tr>
<tr>
<td>Canada</td>
<td>$1,700,000</td>
</tr>
<tr>
<td>USA</td>
<td>$4,500,000</td>
</tr>
</tbody>
</table>
Forum non conveniens

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 four specified fora.

Article 28(2) of Warsaw 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”.

Forum non conveniens

Is there an adequate alternative forum?
What deference is due the plaintiff’s choice of forum?
What is the balance between the party’s private interests in the choice of forum with the public interest of proceeding in the foreign jurisdiction?
Private Interest Factors

The private interest factors are:
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;
The possibility of viewing the premises;
Other practical problems that impact the efficiency and cost of the trial; and
The enforceability of the judgment if one is obtained.

See e.g., Liquidation Comm’n of Banco Intercontinental v. Renta, 530 F.3rd 1339, 1356-57 (11th Cir. 2008); King v. Cessna Aircraft Co., 562 F.3rd 1374, 1383-84 (11th Cir. 2009).
Public Interest Factors

The relevant public interest factors are:
The administrative difficulties flowing from court congestion;
Local interests in having localized controversies decided at home;
The avoidance of unnecessary choice of law problems; and
The unfairness of burdening citizens in an unrelated forum with jury
duty. These include the ability to implead other entities, efficiency
and translation.

*In re Air Crash Near Athens, Greece on August 14, 2008, 2007 U.S. Dist. Lexis 20761 (N.D. Ill. 2007).*
Conditions on FNC Dismissal

The Defendant(s) 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.
Most passengers were French
The aircraft was manufactured in France
Most of the evidence was in France
French courts could order BEA to produce evidence
- 111 of 115 passengers were Greek or Cypriot; no US citizens aboard
- Maintenance evidence was in Cyprus
- Crash site was in Greece
- Helios refused to submit to process in US
- Boeing conceded liability; only issue remaining was damages
SEQUENCE OF EVENTS LEADING TO FLASH AIRLINES 737 CRASH

02:43:30 Aircraft is slightly banked left

02:43:35 First officer says: "Flaps up no light". No.1 leading edge slat stays deployed at mid-position

02:43:55 Aircraft is slightly banked right. Captain says: "Autopilot"

02:44:02 Autopilot disengage warning

02:44:06 First officer says: "No autopilot, commander!" Bank angle 102°, 37° nose down, altitude 5,460ft

02:44:56 First officer says: "Overbank" Bank angle 50°, altitude 5,460ft

Impact 02:45:06. Bank angle 24.6° right, 42° nosedown

Elapsed time from 02:44:00 to 02:45:10 GMT (seconds)

- Controlled flight
- Uncontrolled flight
• Suit brought against lessor ILFC
• Jurisdiction against Flash Airlines was not available under Warsaw
• 122 of the 124 decedents’ estates that brought suit in the US were French citizens
• They were not third-party beneficiaries to the lease.
Questions?