



RECENT DEVELOPMENTS IN THE FORUM NON CONVENIENS DOCTRINE

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If there were ever any doubt about the health and popularity of the doctrine of forum non conveniens (FNC) in the federal courts, that doubt has been put to rest by recent decisions made by federal courts. Nothing can be more certain than the fact that forum non conveniens, as a legal tool, is alive and healthy in the United States.

Even the briefest Lexis search will disclose that, during just the first seven months of 2004, federal courts of appeal issued no fewer than 10 decisions affirming the existence of the doctrine and its increasingly widespread use by district courts throughout the United States:

- the Ninth Circuit Court's decisions dismissing cases in favor of the courts of Egypt,¹ Indonesia,² and Qatar,³
- the Second Circuit Court's decisions dismissing cases in favor of the courts of Russia,⁴ France,⁵ and Germany,⁶
- the Fifth Circuit Court's decisions dismissing cases in favor of the courts of England,⁷ Italy,⁸ and Canada;⁹ and
- a D.C. Circuit Court's decision opting to transfer a case to the courts of South Africa.¹⁰

Even though the ultimate decision in these cases may not

have always turned only or primarily on forum non conveniens considerations, the fact that so many foreign countries are involved seems to show that U.S. courts are growing far less hesitant than they once were about using the FNC doctrine or other approaches to transfer or dismiss cases they once would have more than likely heard.

The purpose of this article, however, is to discuss four separate and emerging areas of forum non conveniens law that are recent and that are of sufficient importance that they ought to be publicized and well known.

- The first deals with the 2003 decision by the Ninth Circuit in *Hosaka v. United Airlines*, 305 F. 3rd 989 (9th Cir. 2002) and its implications for future aviation accident litigation under the 1929 Warsaw Convention.
- The second area deals with the recent ratification by the United States of the Montreal Convention of 1999, which was designed to, and did, replace the Warsaw Convention for all accidents that occurred after Nov. 5, 2003. The specific area of interest here is the impact this new convention should have on the vitality and impact of *Hosaka*.
- The third area is the meaning and impact of the Ninth Circuit's decision in *Coyle v. Garuda Airlines*

for purposes of the forum non conveniens doctrine.¹¹

- The final area seems to be an emerging but unpredictable area generally known as the anti-FNC statutes, such as the legislation in Ecuador that states that once an Ecuadorian national brings a suit in a court in the United States, that suit cannot later be entertained in an Ecuadorian court. In other words, an Ecuadorian court would not be “an available forum” under U.S. forum non conveniens law and practice.

The Impact of Aviation on the FNC Doctrine

It is true that international aviation is not the only area of law where the forum non conveniens doctrine is applied. But the doctrine has drawn much of its strength and popularity from international aviation cases and the unique problems they pose. A recent article I co-authored in the Winter 2003 issue of the *Journal of Air Law and Commerce*¹² discussed the details of the many aviation cases — some under the Warsaw Convention, some not — that have involved the FNC doctrine in recent years. That article also took the controversial position that, contrary to the decision by Judge Sweet in the case of TWA flight 800 in 1996,¹³ the FNC doctrine should be applied to most, if not all, foreign plaintiffs suing in United States courts following international air disasters like the crash of TWA 800. This position is popular with airlines but not at all popular among trial lawyers or certain foreign governments. The article was written, however, not with popularity in mind, but rather because compensation for the deaths of foreigners is far better determined by the courts of their domiciles than by U.S. courts attempting in their own ways to apply foreign law and foreign measures of damages.

This is not to suggest, however, that issues of liability should also be determined by the foreign forum. A sharp distinction should be drawn between issues of liability and damages. To use aviation as an easy example: It would be entirely appropriate for a U.S. court to determine and apportion liability between, for example, the airline and the manufacturer or the federal government if product liability or air traffic control issues are involved. In other words, the courts of developed states — and especially the state where the aircraft was manufactured — are best positioned and best able to determine and apportion liability among joint tortfeasors.

But when it comes to determining the damages that a victim or his or her survivors should receive from those joint tortfeasors, I am convinced those are best determined by the courts of the victim's domicile.¹⁴ This is a position I have more or less held since 1967, when I wrote an article on the subject in the *Journal of Air Law and Commerce*,¹⁵ in which I argued that damages for foreign airline victims of air disasters should always be determined by and under the law of the victim's domicile. These thoughts and ideas predated the Supreme Court's 1981 decision in *Piper v. Reyno*.¹⁶ For all intents and purposes, it was that landmark decision that started the now well-established practice of actually dismissing (or, in ef-

fect, transferring) cases in favor of the courts of the victims' domiciles, rather than trying to apply that domicile's law (or U.S. law) in a U.S. court.

I am of the school that thoroughly believes in the teachings of the *Piper v. Reyno* decision. If effectively and sagely applied, that decision will ultimately lead to national judicial systems around the world that are far more internationally oriented and even integrated than has ever been true in the past or even today, 25 years after *Reyno* was handed down.

Hosaka

No progress seems possible in our profession, however, without some obstacles or forks in the road, as with the 2002 decision by the Ninth Circuit in *Hosaka v. United Airlines*.¹⁷ That decision held that the legislative history of the 1929 Warsaw Convention required the conclusion that, once a foreign plaintiff chooses a U.S. court under Article 28 of the Warsaw Convention, the doctrine of forum non conveniens cannot be used to defeat or thwart that choice — in other words, that forum non conveniens was not available and could not be used as a procedural tool under Article 28(2) of the Warsaw Convention.

In my judgment, *Hosaka* is one of the first major judicial decisions by a U.S. court that places into question the goal of widely applying the FNC doctrine. But I cannot say with any clear certainty that the ruling was incorrect — and this despite the fact that the Fifth Circuit held precisely to the contrary in *In re Air Crash Disaster Near New Orleans*,¹⁸ as did Judge Sweet in his decision in the TWA 800 crash off Long Island.¹⁹ The Supreme Court denied certiorari in *Hosaka*, so the decision cannot now be revisited, except in the law journals and in articles such as this.

In fact, however, *Hosaka* may not be a permanent obstacle, given the recent ratification by the United States of the 1999 Montreal Convention and its entry into force as of Nov. 5, 2003. Article 33 of Montreal-99, as it is known colloquially, is substantively similar to Article 28 of the Warsaw Convention, except for one important difference. In addition to the four forums available under Warsaw's Article 28, Article 33 adds a so-called fifth forum: the forum of the victim's domicile, meaning his or her “principal and permanent residence.” (The appendix sets out the text of both articles.)

Unlike the Warsaw Convention's Article 28, however, the legislative history leading to the adoption of Article 33 of Montreal-99 clearly and categorically demonstrates the intention and expectation of the U.S. government that U.S. courts would apply the forum non conveniens doctrine under Article 33(4) — which in relevant respects is the identical counterpart to Warsaw's Article 28(2).

In short, the dearth of legislative history under the Warsaw Convention, which led the *Hosaka* Court to conclude that FNC was not available under Warsaw's Article 28(2), is corrected by copious legislative history under Montreal-99, showing that forum non conveniens is available and will be employed by U.S. courts under Article 33(4).²⁰ Moreover, the fact that the courts of the victims' domiciles or permanent residences were expressly added

as a fifth forum clearly contributes to the availability of these courts as FNC choices. I think it is thus fair to say that *Hosaka* may be nothing more than a temporary fork in the road — applicable only to cases involving crashes of international flights that occurred prior to the entry into force of Montreal-99 on Nov. 5, 2003.

Coyle v. Garuda: The Passenger's Intent

Article 28 of the Warsaw Convention provides only four forums in which a passenger or his or her survivors can bring suit. Traditionally, if an American in Paris booked a round-trip ticket on Air France between Paris and Geneva (or even between Paris and New York), Warsaw's Article 28 would not allow that passenger to sue Air France in the United States — even though Air France does business in the United States and is subject to suit in this country. The reason is because the United States was not an Article 28 "place of destination" according to the ticket (contract of carriage). This was obviously a highly objectionable aspect of the Warsaw Convention. But this defect has been corrected by the adoption of the fifth forum in Montreal-99. In the 70 or so years that the Warsaw Convention governed accidents in international air transportation, however, it was inevitable that some courts in this country would prove to be reluctant to deprive American citizens of their rights to sue foreign airlines in U.S. courts.

The best and most recent example of this problem was the case of *Coyle v. Garuda Airlines*.²¹ The case involved a Portland, Ore., couple who bought tickets through a Portland travel agency for travel from the United States to Taipei, Jakarta, and Singapore. While in Jakarta, the couple decided to buy a round-trip side trip on Garuda between Jakarta and Medan, an Indonesian city on the island of Sumatra.

The fatal crash occurred when the plane landed in Medan, and the question, of course, was whether the survivors could sue the airline in the United States — the place (that is, country) of destination on the original international ticket, but not the place of destination, that is, Jakarta, on the ticket purchased for the side trip. To shorten what could otherwise be an extended discussion, the lower court concluded that the side trip was nothing more than one leg of an international journey that was intended to end in the United States and, accordingly, held that suit could be brought in the United States, under Article 28 of the Warsaw Convention.

On appeal, however, the Ninth Circuit reversed the lower court and concluded that the passenger's ticket — not the passenger's subjective intent — was the critical and only important factor. According to the passenger's ticket on the fatal flight, the place of destination was Jakarta; therefore, suit could not be brought in the United States under Warsaw's Article 28. In this instance, the Ninth Circuit reached a correct conclusion. In reaching that conclusion, moreover, the court may perhaps have ended an emerging trend among some U.S. courts to look toward a passenger's intent — especially when doing so would allow Americans to bring their Warsaw Convention suits in U.S. courts rather than being forced to sue abroad.²²

The issues in *Coyle*, as in similar cases, all deal with jurisdiction under Article 28(1) of the Warsaw Convention, not venue under Article 28(2). But difficult questions of venue will shortly be faced, now that Montreal-99 is in effect. As discussed earlier, one of the most important contributions of Montreal-99 is its addition of the fifth forum — the victim's domicile or permanent residence. Article 33(3) of Montreal-99 allows a passenger or his or her survivors to bring suit "in his or her principal and permanent residence" if the carrier operates services there, whether with its own aircraft or on the aircraft of another airline via a code-sharing agreement.

Anyone with a client whose case involves these issues is cautioned to read Article 33(2) and (3) of the Montreal Convention carefully, because the language is complicated and so far is not subject to any judicial interpretations. In a case such as *Coyle*, especially where the side trip is considered "international transportation," it is certain that under Article 33 the result would be different, because U.S. courts would have jurisdiction to entertain that suit.

But let us consider the American who has lived in Paris for 10 years and who is fatally injured in a crash on Air France while on a business trip between Paris and Geneva for his Paris law firm. On the argument that the passenger's "principal and permanent residence" was still the United States, Article 33(3) of Montreal-99 should confer jurisdiction on a U.S. court to entertain the suit; but I am by no means sure that the suit would not be subject to a successful forum non motion by Air France under Article 33(4). Or let us take another case of the American who books a round trip to London on United Airlines and then, while in London, decides (as did the couple in *Coyle*) to book a side trip, for example, to Rome — only this time on a European low-fare carrier, Ryan Air — and the accident happens on that side trip.

Even though, under Article 33 of the Montreal Convention, U.S. courts may well have jurisdiction over the cases in these examples, it will be interesting to see whether FNC motions might be successful in any of these contexts. Nor would it be unprecedented for a U.S. court to "transfer" a U.S. citizen's case to a foreign court.²³ The only safe conclusion that follows from all of this is that the broader the potential jurisdictional reach, the more likely we are to see more forum non conveniens efforts — whether or not successful.

Anti-FNC Statutes

The final subject for discussion is what could be a slowly emerging, but important, movement by Latin American and perhaps other countries to enact statutory provisions that serve to inhibit a U.S. court from dismissing or transferring a case to a foreign court on forum non conveniens grounds. This is done in a straightforward but unusual way.

Easily the most important requirement that a U.S. court imposes as a condition for being willing to dismiss a case on FNC grounds is that there must be "an adequate and available" forum abroad in which the law suit can be brought and will be heard. In the past few years, howev-

er, several Latin American countries have adopted statutes providing that, if one of their citizens sues in a court in a third country (obviously meaning the United States), the homeland courts will later be unavailable to that citizen for that case.

Thus, under Ecuador's statutory provision, for example, once an Ecuadorian citizen decides to sue a U.S. company in a U.S. court (obviously because he or she anticipates a higher award for damages), the homeland Ecuadorian courts will automatically be divested of jurisdiction and become unavailable if and when that U.S. court decides it wishes to apply the *forum non conveniens* doctrine and transfer the case to the courts of the plaintiff's domicile, in this case, Ecuador.

These and comparable laws exist not only in Ecuador but also in Panama, Costa Rica, Guatemala, and even the Philippines. The following Web sites are references for readers who may wish to pursue this subject further:

- www.iaba.org/LLinks_forum_non_Panama.htm
- www.iaba.org/LLinks_forum_non_Costa_Rica.htm
- www.iaba.org/LLinks_forum_non_Guatemala.htm
- www.iaba.org/LLinks_forum_non_Phillippines.htm

I believe that these laws have already had some adverse impact on the ability of U.S. courts to grant FNC motions on the condition that an adequate alternative forum is available. In fact, it is my understanding that Latin American legislators have gone so far as to adopt a draft model law that more or less provides as follows:

Article 1: National and International Jurisdiction. The petition that is validly filed, according to both legal systems, in the defendant's domiciliary court, extinguishes national jurisdiction. The latter is only revived if the plaintiff desists of his foreign petition and files a new petition in the country, in a completely free and spontaneous way.

Article 2: International Tort Liability. In cases of international tort liability, the national court may, at the plaintiff's request apply the applicable standards and amounts of the pertinent foreign law for purposes of determining damages and the monetary sanctions related to such damages.

One may readily assume that, when Article 1 speaks of the plaintiff's filing a new petition in his domiciliary courts "in a free and spontaneous way," the step would not include a filing following and mandated by a dismissal in a U.S. court on the grounds of *forum non conveniens*. On the other hand, Article 2 seems to contemplate that some cases will be allowed to be brought in the national courts, although the courts are encouraged to apply the (presumably much higher) U.S. measures of damages.

Most of these laws were presumably adopted so as to make certain that foreign citizens suing U.S. companies in U.S. courts for environmental and other damages could not have their cases dismissed by U.S. courts on FNC

grounds. It is still too early, however, to predict whether such laws will have an impact on cases brought against U.S. airlines in U.S. courts by foreign nationals alleging injury or death under Montreal-99.

A persuasive argument can be made that, on ratifying Montreal-99, the foreign state was, or should have been, aware of the U.S. government's intention and expectation that its courts would apply *forum non conveniens* under Article 33(4). Similarly, given that the United States has *forum non conveniens* as an established part of its procedural rules, any plaintiff bringing his or her Montreal-99 suit in the United States knows or should know — and, in any event, assumes the risk — that the U.S. court may apply FNC and dismiss or "transfer" the case back to the courts of the victim's domicile or permanent residence. Under these circumstances, it may well be a violation of a state's treaty obligations to thwart, or attempt to thwart, the application of the *forum non conveniens* doctrine by U.S. courts.

If anything seems clear from the foregoing discussion, it is that there is a veritable world of recent major developments in the area of *forum non conveniens* law. **TFL**

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Endnotes

¹*Rivera v. Hewlett Packard*, No. 03-16646, 2004 U.S. App. (9th Cir. Apr. 12, 2004) (available at LEXIS 7506).

²*Coyle v. P. T. Garuda Indonesia Airlines*, 363 F.3d 979 (9th Cir. 2004).

³*Kinney v. Occidental Oil & Gas Corp.*, No. 03-11052, 2004 U.S. App. (5th Cir. July 12, 2004) (available at LEXIS 8811).

⁴*Base Metal Training Ltd. v. Russian Aluminum*, No. 03-7466, 2004 U.S. App. (2d Cir. Apr. 30, 2004) (available at LEXIS 8547).

⁵*Dattner v. Con Agra Foods Inc.*, No. 03-7534, 2004 U.S. App. (2d Cir. Feb. 25, 2004) (available at LEXIS 3529).

⁶*Carey v. Beyerische Hypo*, 370 F.3d 234 (2d Cir. 2004).

⁷*Zen Nob Grain Corp. v. Theogennitor M/V*, No. 03-30230, 2004 U.S. App. (5th Cir. Feb. 16, 2004) (available at LEXIS 2518).

⁸*Delta Brands Inc. v. Danieli Corp.*, No. 03-11052, 2004 U.S. App. (5th Cir. May 5, 2004) (available at LEXIS 8811).

⁹*Brokerwood Int'l. v. Cuisine Crotone Inc.*, No. 03-30622 (5th Cir. July 9, 2004) (available at Westlaw 2004 WL 1541314).

¹⁰*In re Telecordia Techs Inc. v. Telkom SA*, No. 03-7099, 2004 U.S. App. (D.C. Cir. Apr. 9, 2004) (available at LEXIS 7081).

