Some Inconvenient Truths about Forum Non Conveniens Law in International Aviation Disasters

Don G. Rushing
Ellen Nudelman Alder

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SOME INCONVENIENT TRUTHS ABOUT FORUM NON CONVENIENS LAW IN INTERNATIONAL AVIATION DISASTERS

DON G. RUSHING*
ELLEN NUDELMAN ADLER**

TABLE OF CONTENTS

I. INTRODUCTION .................................. 405
II. A PRIMER ON FORUM NON CONVENIENS .... 406
   A. DEGREE OF DEFERENCE TO PLAINTIFFS' CHOICE OF FORUM ...................................... 406
   B. AVAILABLE AND ADEQUATE ALTERNATIVE FORUM ........................................ 407
   C. WEIGHING THE PUBLIC AND PRIVATE INTEREST FACTORS ........................................ 408
   D. CONDITIONAL DISMISSELS ....................... 409
III. RECENT FORUM NON CONVENIENS AVIATION CASE LAW ........................................ 409
   A. GOL 1907: PEIXOTO DE AZEVEDA, BRAZIL ........ 410
      1. Factual Background ................................ 410
      2. Forum Non Conveniens Dismissal Granted .... 411
      3. Lessons Learned .................................. 415
         a. The Term “Forum-Shopping” Is Losing Its Negative Connotation .............. 415
         b. Refusal by a Defendant to Stipulate to Foreign Jurisdiction Is Not Fatal ...... 415

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B. Flash 604: Sharm el Sheikh, Egypt .......... 416
   1. Factual Background ....................... 416
   2. Forum Non Conveniens Dismissal Granted .... 417
   3. Lessons Learned .......................... 420
      a. Forum Non Conveniens Dismissals
         Don’t Always Stick—The French Court’s Refusal to Exercise
         Jurisdiction ................................ 420
      b. Plaintiffs that Play Games in Foreign
         Jurisdictions May Pay the Price When
         They Try to Return .......................... 421

C. Cessna Caravan 208B: Winnipeg, Canada ..... 422
   1. Factual Background ........................ 422
   2. Forum Non Conveniens Dismissal Denied ..... 422
   3. Lessons Learned ............................ 424
      a. A Forum Non Conveniens Dismissal of
         an Aircraft Accident Occurring Abroad
         Is Hardly Guaranteed ...................... 424
      b. Detail Carries the Day in Private
         Interest Factor Balancing .................. 424

D. Helios 522: Athens, Greece .................. 425
   1. Factual Background ........................ 425
   2. Forum Non Conveniens Dismissal Granted .... 425
   3. Lessons Learned From Helios ............... 427
      a. Courts May Not Credit Unfair
         Limitations on the Evidence at Issue .. 427
      b. Courts Take Notice of U.S. Plaintiffs’
         Attorneys Blaming Discovery Delay on
         Difficulty Dealing with Foreign Plaintiffs ..... 428
      c. Not All Private or Public Interest
         Factors Need Favor the Successful Party
         in a Forum Non Conveniens Debate .. 428
      d. Not All of the United States Plaintiffs
         Must Be Eliminated from the Case .... 428

E. Cessna Citation: Milan, Italy ............... 429
   1. Factual Background ........................ 429
   2. Forum Non Conveniens Dismissal Granted .... 429
   3. Lessons Learned ............................ 432
      a. As the Case Develops, the Trial Court
         May Reconsider Its Previous Denial of a
         Forum Non Conveniens Motion ............... 432

IV. CONCLUSION .................................... 433
I. INTRODUCTION

AVIATION ACCIDENTS, big and small, occur all over the world—in countries with widely varying compensation schemes for the victims of such accidents. So it is a tool in every plaintiff aviation lawyer’s tool kit to bring suits arising out of aviation crashes, regardless of where in the world they take place, in the United States, where juries routinely grant awards many times greater than the awards granted by their foreign counterparts. Likewise, it is a tool in every defense aviation lawyer’s tool kit to bring motions to dismiss on forum non conveniens grounds whenever a client is sued in the United States over an aviation crash that occurred abroad.

Under the doctrine of forum non conveniens, a federal district court may dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy. This is often the first issue decided in a case. Indeed, as the Supreme Court recently decided, the district court has discretion to respond to a defendant’s forum non conveniens plea before any other threshold objection, including whether the district court even has jurisdiction over the suit.

The guiding principles of forum non conveniens are set forth in the landmark Supreme Court case of Piper Aircraft Co. v. Reyno, opportunely set—at least for aviation lawyers—in the aviation context. The forum non conveniens inquiry, described in detail in Section II, is in three parts, requiring the court to analyze: (1) the degree of deference due to the plaintiff’s choice of forum, (2) whether the proposed alternative forum is an available and adequate one, and (3) whether various private and public interest factors weigh in favor of or against dismissal. The application of these principles in suits arising from airplane crashes across the world raises a myriad of interesting and nuanced issues. The balancing of these multiple factors involves the exercise of broad discretion by the trial court; not surprisingly, appellate courts review trial courts’ rulings only for abuses of discretion.

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2 Id. at 433, 435.
4 Id. at 257–61.
5 Id. at 257.
This article will examine how United States federal district courts and federal courts of appeal have utilized and interpreted this discretion in deciding forum non conveniens issues in recent aviation cases involving international accidents. It will also examine how some foreign countries have responded to these courts' rulings dismissing cases on forum non conveniens grounds—for example, by refusing to exercise jurisdiction.

II. A PRIMER ON FORUM NON CONVENIENS

When foreign plaintiffs sue in the United States for damages sustained in foreign aviation accidents, their claims are often dismissed on forum non conveniens grounds. The seminal Supreme Court forum non conveniens decision, *Piper Aircraft*, does just that. The federal district courts have regularly applied this doctrine to dismiss foreign plaintiffs' claims arising from foreign aviation accidents, and the federal circuit courts have routinely affirmed such dismissals.

In conducting a forum non conveniens analysis, courts initially determine what deference, if any, is due to the plaintiff's choice of forum, and whether an adequate alternative forum exists. These inquiries are discussed in more detail below.

A. DEGREE OF DEFERENCE TO PLAINTIFF'S CHOICE OF FORUM

The first level of inquiry in the forum non conveniens analysis is the deference to be given to plaintiff's choice of forum. "[T]here is ordinarily a strong presumption in favor of the

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6 See, e.g., id. at 261.
7 Id.
9 *Piper Aircraft*, 454 U.S. at 254 & n.22.
plaintiff's choice of forum."

However, a foreign plaintiff's decision to file suit far from his home forum receives less deference. As the Supreme Court explained, giving less deference to a foreign plaintiff is not done to give the plaintiff a disadvantage, but is instead based on the realistic prediction that a trial in a plaintiff's home forum proves to be most convenient. And convenience, after all, is the cornerstone of forum non conveniens law.

B. AVAILABLE AND ADEQUATE ALTERNATIVE FORUM

The requirement of an "available" alternative forum is generally satisfied if the parties are "amenable to process" and within the alternative forum's jurisdiction. The inquiry here is usually whether the foreign court can assert jurisdiction for the claims arising out of the accident over all of the defendants. A defendant's consent to the jurisdiction of another forum typically satisfies this requirement.

With respect to the adequacy of the forum, a foreign forum is inadequate only in those rare circumstances when "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." This would be true, for example, "where the alternative forum does not permit litigation of the subject matter of the dispute." The inquiry here is whether the foreign jurisdiction provides plaintiffs with similar remedies to those available in the United States, and not whether the remedies are identical.

In answering the adequacy inquiry in aviation cases, experts usually provide declarations on the following issues: does the foreign jurisdiction provide a remedy for negligence and product liability claims? May actions be brought to recover the typical elements of damages found in U.S. actions—for example, economic damages associated with loss of financial support and non-economic damages associated with loss of care, comfort,

11 Piper Aircraft, 454 U.S. at 255.
12 Id. at 255-56.
13 See id.
14 Id. at 254 n.22.
16 See, e.g., id. at 984 (citing Constructora Spilimerg, C.A. v. Mitsubishi Aircraft Co., 700 F.2d 225, 226 (5th Cir. 1983)).
17 Piper Aircraft, 454 U.S. at 254.
18 Id. at 254 n.22.
19 See id. at 254-55.
and society for wrongful death cases? Does the foreign country’s justice system provide litigants with due process, including the right to notice of proceedings, the right to be heard, the right to present evidence and to examine witnesses, and the right to counsel? In short, do the fundamental principles of civil proceedings in the foreign forum ensure the fairness, honesty, and thoroughness of the legal debate?

The fact that a foreign forum will apply different discovery and trial procedures, or even different substantive law, than a U.S. court does not preclude a forum non conveniens dismissal.20 For example, in Piper Aircraft, the foreign forum was adequate despite a smaller potential damages award and the absence of strict liability claims.21

C. Weighing the Public and Private Interest Factors

The next step in the forum non conveniens analysis requires the court to balance both the private interests of the litigants and the public interests of the forum.22 A trial court must be accorded great latitude in weighing the factors set forth in Gulf Oil v. Gilbert.23 “[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.”24

The private interest factors to be considered relate primarily to the convenience of the litigants and include: (1) the ease of access to evidence, (2) the cost for witnesses to attend trial, (3) the availability of compulsory process, and (4) other factors that might shorten the trial or make it less expensive.25

The public interest factors to be considered include: (1) the administrative difficulties flowing from court congestion, (2) the unfairness of burdening citizens in an unrelated forum with jury duty, (3) the local interest in having localized controversies de-

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20 See id.
21 Id.; see also Capital Currency Exch., N.V. v. Nat’l Westminster Bank PLC, 155 F.3d 603, 611 (2d Cir. 1998) (lack of causes of action identical to those that plaintiff alleged in an American court does not render forum inadequate); Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1352-53 (1st Cir. 1992) (lack of discovery procedures in foreign forum identical to U.S. procedures does not render forum inadequate); Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991) (lack of jury trial does not render forum inadequate).
22 Piper Aircraft, 454 U.S. at 257-61.
23 Id. at 257.
24 Id.
25 Id. at 241 n.6 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
cided at home, (4) the interest in having a diversity case tried in a forum familiar with the law that must govern the action, and (5) the avoidance of unnecessary problems in conflicts of law or in application of foreign law.26

D. CONDITIONAL DISMISSELS

Many dismissals on forum non conveniens grounds are conditional.27 The following conditions are common: (1) defendants conceding to service of process and to jurisdiction in actions refiled in the foreign forum;28 (2) defendants waiving “any statute of limitations defense to any currently pending action that is refiled” in the foreign forum;29 (3) defendants agreeing to “provide plaintiffs with access, in [the foreign forum,] to all evidence and witnesses in their custody or control that are relevant to any issue raised” in actions refiled in the foreign forum;30 (4) defendants bearing “the cost of translating English-language documents in [their] custody or control” into the language of the foreign forum as necessary;31 and (5) defendants agreeing to pay “any damages awarded by the [foreign court] in the refiled actions, subject to any right of appeal.”32

The imposition of these typical dismissal conditions does not abate or stay the action unless the court specifically so orders.33 Instead, the failure of a condition of dismissal simply permits plaintiffs to reinstitute the dismissed action.34

III. RECENT FORUM NON CONVENIENS AVIATION CASE LAW

In the last few years, there have been several forum non conveniens decisions in foreign aviation accident cases that present important lessons in how and why these motions are won and lost.

26 Gulf, 330 U.S. at 508–09.
29 Id.
30 Id.
31 Id.
32 Id.
A. **GOL 1907: PEIXOTO DE AZEVEDA, BRAZIL**

1. **Factual Background**

On September 29, 2006, Gol Linhas Inteligentes S.A. (Gol) Boeing 737-800 Flight 1907 collided with an Embraer Legacy 600 jet operated by ExcelAire.\(^{35}\) Gol 1907, scheduled to fly between Manaus, Brazil, and Rio de Janeiro, Brazil, crashed into the Amazon rainforest, killing all 154 passengers and crew on board.\(^{36}\) The ExcelAire Legacy safely made an emergency landing in Brazil, with no injuries to its two pilots or five passengers on board.\(^{37}\) The crash of Gol 1907 was the deadliest air disaster in Brazilian history at the time.\(^{38}\)

The accident was investigated by Brazil’s Centro de Investigação e Prevenção de Acidentes Aeronáuticos (CENIPA) with the assistance of the U.S. NTSB, technical advisors from the FAA, and the Canadian TSB.\(^{39}\) Thus far, the investigations have found the ExcelAire pilots and Brazilian ATC at fault for the mid-air collision.\(^{40}\)

In Brazil, numerous plaintiffs brought civil actions against Gol, which is held statutorily liable for any aircraft disaster under Brazilian law.\(^{41}\) A criminal proceeding against the ExcelAire pilots and certain Brazilian air traffic controllers is also pending in Brazil.\(^{42}\) In the United States, plaintiffs filed dozens of lawsuits in numerous district courts against various defendants: Honeywell International, the manufacturer of avionics equipment on both of the accident aircraft; ExcelAire and its pilots Joseph Lepore and Jan Paladino; Raytheon, Lockheed Martin, and Amazon Tech, radar system manufacturers; and ACSS, the manufacturer of the Traffic Alert and Collision Avoidance System (TCAS) on board the Legacy jet.\(^{43}\)

The U.S. cases were consolidated in the Eastern District of New York.\(^{44}\) “Plaintiffs are all Brazilian citizens and residents,”

\(^{35}\) *In re Air Crash Near Peixoto de Azeveda, Brazil, on Sept. 29, 2006, 574 F. Supp. 2d 272, 275 (E.D.N.Y. 2008).*

\(^{36}\) *Id.*

\(^{37}\) *See id.*

\(^{38}\) *Id. at 277.*

\(^{39}\) *Id.*

\(^{40}\) *Jim Swickard, Brazil Air Force, NTSB Spar on Midair Causes, Aviation Wk., Dec. 11, 2008.*

\(^{41}\) *In re Air Crash Near Peixoto de Azeveda, 574 F. Supp. 2d at 277.*

\(^{42}\) *Id.*

\(^{43}\) *Id. at 276.*

\(^{44}\) *Id. at 275.*
as were the Gol 1907 decedents they represent.\textsuperscript{45} All of the named defendants are U.S. citizens.\textsuperscript{46} Defendants unnamed in the U.S. actions include Gol; Embraer, the manufacturer of the Legacy jet; A-Tech, the parent company of Amazon Tech; and the Centro Integrado de Defesa Aérea e Controle de Tráfego Aéreo (CINDACTA), Brazil’s equivalent of Air Traffic Control.\textsuperscript{47}

2. Forum Non Conveniens Dismissal Granted

Honeywell moved for a forum non conveniens dismissal to Brazil, which Judge Cogan of the Eastern District of New York granted.\textsuperscript{48} The briefing process took more than a year, as the court accepted supplemental briefing due to both the addition of other cases through a multidistrict litigation (MDL) consolidation order and the developments in the Brazilian investigation of the accident.

The court began its analysis by determining that the Brazilian plaintiffs were entitled to a "lesser degree" of deference than U.S. plaintiffs.\textsuperscript{49} Interestingly, under Second Circuit law, the factors in determining deference preview much of the forum non conveniens analysis with respect to adequacy of the forum and the private and public interest factors.\textsuperscript{50} The court may consider:

(1) "the convenience of the plaintiff’s residence in relation to the chosen forum," (2) "the availability of witnesses or evidence to the forum district," (3) "the defendant’s amenability to suit in the forum district," (4) "the availability of appropriate legal assistance," and (5) "other reasons related to convenience or expense."\textsuperscript{51}

One novel issue the court had to address in deciding the degree of deference to which plaintiffs were entitled was the impact of the U.S. Treaty with Brazil of March 18, 1829.\textsuperscript{52} "Article XII of the treaty confers such equality of access to the courts upon citizens of each signatory country who are 'transient or

\textsuperscript{45} Id. at 275–76.
\textsuperscript{46} Id. at 276.
\textsuperscript{47} Id. at 276–77.
\textsuperscript{48} Id. at 289–90.
\textsuperscript{49} In re Air Crash Near Peixoto de Azevedo, 574 F. Supp. 2d at 282.
\textsuperscript{50} See id. at 279–80.
\textsuperscript{51} Id. at 279–80 (citing Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001)).
\textsuperscript{52} Id. at 280.
dwellings' in the territory of the other." The court interpreted the treaty to apply to Brazilians present in the United States and U.S. citizens present in Brazil, and determined that the treaty did not endow more deference to the Gol plaintiffs, none of whom resided in the United States. This treatment was consistent with treatment in earlier case law interpreting similar treaty provisions.

Next, the court found that Brazil was an available forum. The court could only dismiss if the litigation could be conducted elsewhere against all defendants. The main jurisdictional issue revolved around the ExcelAire pilots, both U.S. citizens, who would not consent to Brazilian jurisdiction and refused to travel to Brazil for trial. However, the parties' experts agreed that the U.S. pilots were subject to the subject matter and personal jurisdiction of Brazilian courts, and a Brazilian federal court had already ruled that it had jurisdiction over the pilots in criminal proceedings. Thus, the court concluded it was a "near certainty" that Brazil would exercise jurisdiction over the pilots. The rest of the defendants consented to submit to Brazilian jurisdiction.

The court also found Brazil to be an adequate forum. Plaintiffs made two principle arguments against Brazil being an adequate forum. First, they argued that the litigation would be highly "fragmented" in Brazil, as cases brought there are rarely consolidated. However, the court found that consolidation was possible, and in any event, the unavailability of consolidation was an inconvenience that would not make a forum inadequate. Second, plaintiffs contended that the litigation would be unduly protracted in Brazil because of the lengthy appeals process. The parties' experts disagreed considerably over how

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53 Id.
54 Id. at 281.
56 In re Air Crash Near Peixoto de Azeveda, 574 F. Supp. 2d at 284–85.
57 Id. at 282–83.
58 Id. at 283.
59 Id.
60 Id.
61 Id.
62 Id. at 283–85.
63 Id. at 283.
64 Id. at 284.
65 Id. at 283.
long it would take to resolve the cases in Brazil. The court found that, "[t]hus far, the actions against Gol [had] moved at the pace predicted by defendants' expert[,]" and regardless, "'delay alone is rarely considered sufficient to deprive a plaintiff of an adequate forum.'"

Next, the court found that the private interest factors weighed in favor of dismissal to Brazil. First, the court appeared most concerned that numerous Brazilian entities centrally involved in the accident were not subject to personal jurisdiction in the United States, including Gol, Brazilian ATC, A-Tech, and possibly Embraer. Thus, the named defendants would be unable to join these entities in defending the suit if the actions remained in New York. In contrast, all of the current defendants, as well as the Brazilian entities not subject to jurisdiction in the United States, were either subject to Brazilian jurisdiction or consented to suit there. Second, the court found that the parties may be unable to compel testimony and evidence in the United States from the Brazilian entities—especially given that some were under criminal investigation and some had sovereignty grounds for not responding. If the case proceeded in Brazil, the only unwilling witnesses would likely be the U.S. pilots, who had agreed to testify by letters rogatory or by deposition pursuant to 28 U.S.C. § 1782. Third, the court found that the factor of ease of access to sources of proof was a “wash,” as “litigation in either forum [would] require significant costs associated with transporting and translating available evidence not located in the forum.” Fourth, the court found that plaintiffs' concerns about enforcing a Brazilian judgment would be addressed by conditioning dismissal on “defendants' agreement to recognize such a judgment.” Finally, the court found that while fragmentation of the suits in Brazil generally weighed against dismissal, this was tempered by litigation against Gol already underway

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66 Id. at 284.
67 Id.
68 Id. (quoting Bank of Credit and Commerce Int'l Ltd. v. State Bank of Pak., 273 F.3d 241, 248 (2d Cir. 2001)).
69 Id. at 286.
70 Id. at 281–82.
71 See id.
72 Id. at 282–83.
73 Id. at 282, 286.
74 Id. at 286.
75 Id. at 287.
76 Id.
in Brazil, and the possibility of the named defendants later bringing contribution suits in Brazil against non-joinable Brazilian entities should the litigation proceed in New York.\textsuperscript{77}

The court also found that the public interest factors weighed in favor of dismissal to Brazil.\textsuperscript{78} Although the court recognized the New York forum's significant interest in the litigation—for example, the ExcelAire pilots "live in and are licensed to fly in New York; ExcelAire hired and trained the Legacy pilots in New York[,]" ExcelAire is incorporated in New York, "and the litigation implicates the design of products manufactured in the U.S., by U.S. companies"—Brazil had a greater local interest in adjudicating suits arising out of one of the largest aviation accidents in the country's history.\textsuperscript{79} The court also took into account that choice of law issues could get complicated—another public interest factor that weighs in favor of dismissal.\textsuperscript{80}

Overall, the court found that although the private and public interest factors fell

on both sides of the aisle, and down the middle, . . . 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, together with other considerations, swing the balance sufficiently to make this forum "genuinely inconvenient" and a Brazilian forum "significantly preferable."\textsuperscript{81}

Thus, the court dismissed the cases to Brazil, subject to four conditions: (1) Brazil's exercise of jurisdiction, uncontested by defendants; (2) defendants' waiver of certain statute of limitations defenses; (3) defendants' cooperation to produce witnesses and documents in Brazil, including live testimony ("with the exception of the [ExcelAire] pilots who may appear by videotaped or transcribed deposition, or letters rogatory"); and (4) defendants' agreement to pay any post-appeal Brazilian judgment.\textsuperscript{82} Plaintiffs are now appealing the district court's ruling to the Second Circuit.

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 287–89.
\textsuperscript{79} Id. at 288.
\textsuperscript{80} Id. at 288–89.
\textsuperscript{81} Id. at 289.
\textsuperscript{82} See id. at 290.
3. Lessons Learned

a. The Term "Forum Shopping" Is Losing Its Negative Connotation

Forum non conveniens case law is replete with criticisms of plaintiff forum shopping. However, that trend may change, as courts consider the pragmatic concerns motivating both forum selection and motions for forum non conveniens dismissals. As Judge Cogan put it:

the Court cannot be blind to the practical realities of cross-border litigation. 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, as 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 of the U.S. Thus, Judge Cogan opined that "the objective of forum non conveniens analysis should not be to determine the 'true' basis for a party's forum position, as that basis will almost always be to maximize or minimize recovery, but whether the confluence of private and public interest factors validates that basis in the particular case." Thus, Judge Cogan did not put much stock in plaintiffs' attorneys' press statements openly acknowledging that they brought suit in the United States to receive larger verdicts—indeed, up to six times greater than that which they could expect in Brazil.

b. Refusal by a Defendant to Stipulate to Foreign Jurisdiction Is Not Fatal

Because the American pilots involved in the accident were the subject of criminal prosecution in Brazil, they declined to formally stipulate to the jurisdiction of the Brazilian courts. However, the Brazilian High Court of Justice concluded that the courts of Brazil have jurisdiction over the pilots relating to the accident and that this fact was not seriously contested by the

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83 In re Air Crash Near Peixoto de Azeveda, 574 F. Supp. 2d at 279.
84 Id.
85 Id. at 279 n.2.
86 Id. at 283.
87 Id. at 285.
Brazilian foreign law experts.\textsuperscript{88} The issue in determining whether an alternative available forum exists is not whether a party would stipulate to jurisdiction, but whether a party is “amenable to process” in another jurisdiction.\textsuperscript{89} Judge Cogan had no trouble determining that the pilots’ stipulation to jurisdiction was unnecessary.\textsuperscript{90}

B. Flash 604: Sharm El Sheikh, Egypt

1. Factual Background

On January 3, 2004, Flash Airlines Flight 604 (Flash 604) crashed into the Red Sea off the coast of Egypt while en route from Sharm el-Sheikh, Egypt, to Paris, France.\textsuperscript{91} “All 148 aboard Flight 604 were killed . . . .”\textsuperscript{92} “Pursuant to Annex 13 to the Convention on International Civil Aviation, the Egyptian Ministry of Civil Aviation (MCA) [conducted an] official investigation of the crash . . . .”\textsuperscript{93} France’s Bureau d’Enquete et d’Analyses (BEA) and the United States’ NTSB also participated in the MCA’s investigation.\textsuperscript{94}

In the Central District of California, plaintiffs, nearly all French citizens, sued International Lease Finance Corporation (ILFC), who leased the accident aircraft to Egyptian airline Flash; the Boeing Company, the U.S. manufacturer of the Flash 605 Boeing 737-300; and Parker Hannifin and Honeywell International, the U.S. manufacturers of certain component parts of the aircraft.\textsuperscript{95} In the Western District of Arkansas, French plaintiffs sued ILFC, Ozark Aircraft Systems (who had previously repaired the accident aircraft), and certain employees of these two defendants.\textsuperscript{96} Many of these same French plaintiffs also sued Flash and its insurer Al Chark Insurance Company in French courts, mainly the Tribunal de Grande Instance (TGI) of

\textsuperscript{88} Id. at 283.
\textsuperscript{90} In re Air Crash Near Peixoto de Azeveda, 574 F. Supp. 2d at 283.
\textsuperscript{92} Gambra, 377 F. Supp. 2d at 812.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Siddi, No. 05-5170, 2006 U.S. Dist. LEXIS 84882, at *3-*4.
Bobigny, France. Under the Warsaw Convention, claims against Flash could only be brought in Egypt or France.

2. Forum Non Conveniens Dismissal Granted

The Central District of California and the Western District of Arkansas dismissed the consolidated cases before them that arose from the Flash 604 crash en route to France. This article will summarize the Gambra court’s decision, since it was published and dismissed the fifty-six consolidated suits of 150 plaintiffs, whereas the Siddi court’s decision was unpublished and dismissed the two consolidated suits of only four plaintiffs.

In Gambra, the court noted that the French plaintiffs’ choice of a U.S. forum was entitled to less deference than the choice of a local plaintiff, but cautioned that forum non conveniens “is ‘an exceptional tool to be employed sparingly . . . .’”

The Gambra court found that France was an available alternative forum. First, the court found that defendants were amenable to service in France because defendants consented to the jurisdiction of the French court. Second, the court addressed the more complicated issue of whether the French court would accept jurisdiction over all parties. Defendants argued that the French court would accept jurisdiction because no other country's court had exclusive jurisdiction over the case. Plaintiffs disagreed, arguing the French courts would not have jurisdiction over the five, non-French plaintiffs, and that the French court could sua sponte determine that the French plaintiffs waived their privilege to sue in France by first filing in the United States. The court found that there appeared to be a reasonable basis for the French courts to accept jurisdiction over all the parties. Recognizing the possibility that the

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97 Gambra, 377 F. Supp. 2d at 812.
98 Id.
99 Id. at 827–28; Siddi, No. 05-5170, 2006 U.S. Dist. LEXIS 84882, at *22.
100 Eighty additional plaintiffs filed suit in the Central District of California after the Gambra decision. The court approved a stipulated dismissal of the additional plaintiffs, subject to the same conditions as those in the Gambra decision.
101 Gambra, 377 F. Supp. 2d at 813 (quoting Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002)).
102 Gambra, 377 F. Supp. 2d at 817.
103 Id. at 816.
104 Id. at 816–17.
105 Id. at 814.
106 Id. at 815–16.
107 Id. at 816–17.
French courts would not accept jurisdiction, the court made dismissal conditional on France's acceptance of jurisdiction.\textsuperscript{108}

The \textit{Gambra} court also found France to be an adequate alternative forum.\textsuperscript{109} Plaintiffs did not dispute that France would be an adequate forum once all necessary parties were subject to its jurisdiction.\textsuperscript{110} Indeed, many of them had brought suit against Flash in France (though that action was involuntarily dismissed in 2005).\textsuperscript{111}

The court next found that the private interest factors favored dismissal to France.\textsuperscript{112} With respect to ease of access to sources of proof, the court determined that the evidence within the United States was minimal and, for the most part, could be produced in France by defendants' agreement, whereas the evidence located outside the United States was more substantial and more easily accessible in France.\textsuperscript{113} In particular, most of the documents concerning damages were located in France, where the majority of decedents resided, and evidence from Flash would be easier to obtain in France, as Flash was beyond California's subpoena power.\textsuperscript{114} Although the parties disagreed about the extent of Egypt's cooperation in producing evidence to France, the court still found that overall evidence would be more easily obtained in France than in the United States.\textsuperscript{115} Similarly, the court found that its inability to compel the French damages witnesses to testify, as well as the great expense associated with witnesses voluntarily traveling to testify in the United States, favored dismissal.\textsuperscript{116} The court rejected plaintiffs' argument that the case should stay in the United States because of a forum selection clause in the ILFC-Flash lease because that clause did not govern plaintiffs' claims against defendants and because plaintiffs were not third-party beneficiaries of that lease.\textsuperscript{117} Finally, the court concluded that its inability to compel Flash to appear as a defendant was a substantial consideration

\textsuperscript{108} Id. at 817.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 818–24.
\textsuperscript{113} Id. at 819–20.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 820.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 821–23.
weighing in favor of dismissal—it would be more convenient to resolve all claims involving defendants in litigation in France.\textsuperscript{118}

The court found that the public interest factors also favored dismissal to France.\textsuperscript{119} Although the factor of court congestion in the two fora was neutral, the court found that France had a far greater local interest in hearing the case.\textsuperscript{120} The court reasoned that in this litigation, 120 of 122 decedents were French; only four U.S. citizens total perished in the crash.\textsuperscript{121} France had a “great” interest in ensuring that its citizens were compensated and treated fairly.\textsuperscript{122} Although the court acknowledged that the United States had an interest in ensuring that products produced in the United States are safe, the court pointed out that California’s interest in the action was minimal, considering that the majority of the evidence was located outside California.\textsuperscript{123} Finally, citing \textit{Piper Aircraft} for the proposition that the need to apply foreign law generally favors dismissal,\textsuperscript{124} the court declined to undertake a lengthy choice of law analysis—which indicated that either the Death on the High Seas Act (DOHSA), French law, or Egyptian law could apply to various issues in the case.\textsuperscript{125}

Thus, the \textit{Gambra} court dismissed the cases to France, conditioned on: (1) Defendants’ agreement to (a) submit to the French court’s jurisdiction, (b) toll applicable statute of limitations for a certain period, (c) make available in France the evidence and witnesses in their possession, custody, or control, and (d) pay any post-appeal damages awarded by the French courts in the refiled actions; and (2) the French court’s assumption of jurisdiction.\textsuperscript{126} The order of dismissal was not appealed by plaintiffs.

\textsuperscript{118} \textit{Id.} at 823–24.
\textsuperscript{119} \textit{Id.} at 824–27.
\textsuperscript{120} \textit{Id.} at 824.
\textsuperscript{121} \textit{Id.} at 824.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} (citing \textit{Piper Aircraft Co. v. Reyno}, 454 U.S. 235, 260 (1981)).
\textsuperscript{125} \textit{Id.} at 825–27.
\textsuperscript{126} \textit{Id.} at 827–28.
a. Forum Non Conveniens Dismissals Don’t Always Stick—The French Court’s Refusal to Exercise Jurisdiction

Most conditional forum non conveniens dismissals stick—that is, the case either settles, or the foreign court accepts jurisdiction over the refiled cases. That may not be so with Flash 604. The plaintiffs returned to France and filed actions on behalf of the so-called Group 1 Plaintiffs against the operators and the so-called Group 2 Plaintiffs (a subset of the larger plaintiff group) against the U.S. manufacturers. The Group 2 Plaintiffs challenged the jurisdiction of the very court whose jurisdiction they invoked by the filing of the suit, arguing that the U.S. district court’s dismissal conditions amounted to an invitation for the French court to dismiss the case in favor of the U.S. trial court. The French trial court found it had jurisdiction and pressed ahead with the actions. The Group 2 Plaintiffs appealed.

On March 6, 2008, the Paris Court of Appeal ruled that the French courts do not have jurisdiction over the cases dismissed by Gambra. The Paris Court of Appeal found that French civil procedure did not allow for French jurisdiction over defendants not domiciled in France or over events that did not occur in France, as was the instant case against the four U.S. defendants. The court further found that although French civil procedure allowed for French jurisdiction over disputes involving French plaintiffs, this privilege had been waived by the French plaintiffs’ pursuit of their claims in the United States.

On April 30, 2009, the French Supreme Court, the Cour de Cassation, reversed the judgment of the Paris Court of Appeal. It held that Plaintiffs’ jurisdictional challenge was premature—under French civil procedure, no such appeal could

128 Id. at 45-48.
129 Id. at 45-46.
130 Id. at 46.
131 Id. at 45.
132 Id. at 54-58.
133 Id. at 57-58.
immediately be filed from the French trial court.\textsuperscript{135} Thus, Plaintiff must argue the merits of the case before the French trial court.\textsuperscript{136} Then, and only then, will they be able to appeal the trial court's decision that the French courts do indeed have jurisdiction over the case.\textsuperscript{137}

As unsettling as the French court's refusal to assert jurisdiction in the Flash 604 cases against the U.S. defendants was to these defendants, there have been worse upsets of forum non conveniens law. Perhaps the worst was a Nicaragua court's 2001 judgment ordering defendants Shell Oil Company, Dole Food Company, and Dow Chemical to pay $489 million to more than 400 banana workers for damages allegedly caused by exposure to the pesticide DBCP.\textsuperscript{138} Although defendants disputed the enforceability of the Nicaraguan judgment, it made a dismissal of similar DBCP suits to Nicaragua a non-option.\textsuperscript{139} It is hard to tell what is in store for other countries' responses to U.S. forum non conveniens law.

b. Plaintiffs that Play Games in Foreign Jurisdictions May Pay the Price When They Try to Return

Plaintiffs who deliberately have their own case dismissed for lack of jurisdiction in order to provide a basis under the dismissal conditions for a return to the United States run the risk that the court will view their actions as a bad faith manipulation of the justice system.\textsuperscript{140} Likewise, attempts to thwart a forum non conveniens dismissal by filing suit in the foreign forum and indicating an unwillingness to pursue claims held by the plaintiffs has resulted in dismissal.\textsuperscript{141} If a plaintiff intentionally squanders the most suitable forum for the resolution of a dispute, a U.S.

\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{139} Id.
\textsuperscript{140} See In re Compania Naviera Joanna S.A., 531 F. Supp. 2d 680, 686 (D.S.C. 2007) ("A party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct.").
court may be unwilling to allow the action to be returned for trial here.\textsuperscript{142}

C. CESSNA CARAVAN 208B: WINNipeg, CANADA

1. Factual Background

"On October 6, 2005, Nancy Chase-Allan, the pilot of a Cessna Model 208B airplane, died when the plane crashed near Winnipeg, Manitoba in Canada."\textsuperscript{143} Chase-Allan worked as a pilot for Morning Star, a Canadian air cargo company with headquarters in Edmonton, Alberta.\textsuperscript{144} Before her death, Chase-Allan resided in Moncton, New Brunswick.\textsuperscript{145}

The Transportation Safety Board of Canada conducted an official investigation of the accident.\textsuperscript{146} The U.S. NTSB and FAA assisted in the Canadian investigation.\textsuperscript{147} The Canadian investigation found that at the time, the weight of the aircraft "exceeded the maximum take-off weight and the maximum weight for operation in icing conditions."\textsuperscript{148}

Chase-Allan’s family filed suit against Cessna Aircraft and Goodrich Corporation in the Southern District of New York.\textsuperscript{149} The Judicial Panel on Multidistrict Litigation (MDL Panel) later transferred the action to the District of Kansas.\textsuperscript{150}

2. Forum Non Conveniens Dismissal Denied

The district court denied Cessna’s motion to dismiss to Canada on forum non conveniens grounds.\textsuperscript{151} At the outset, the

\textsuperscript{142} See In re Bridgestone/Firestone, Inc., 420 F.3d 702, 707 (7th Cir. 2005) ("If, however, the court concludes that . . . the plaintiffs did not act in good faith and manipulated the dismissal of their case in Mexico, the district court should regard itself as free once again to dismiss this complaint."); In re Bridgestone/Firestone, Inc., 470 F. Supp. 2d at 920 (dismissing complaint after holding that "the [Mexican] court’s conclusion that it lacked territorial competency over the defendants and therefore could not try the matter pending before it was obtained in bad faith and therefore is not subject to recognition by courts in the United States.").


\textsuperscript{144} Id.

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 1193.

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 1194.

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 1197.
court noted that Cessna's burden to obtain dismissal was higher because Tenth Circuit law provided that "[e]ven though defendant's burden is somewhat relaxed in the case of foreign plaintiffs, a defendant who is a forum resident, like Cessna, must make a stronger case than others for dismissal based on forum non conveniens."152

"[T]he parties [did] not dispute that Cessna [was] amenable to process in an adequate alternative forum in Canada and that Canadian law [applied]."153 Nevertheless, the court found that most of the public and private interest factors did not favor dismissal.154

With respect to the private interest factors, the court first found that most of the liability evidence against Cessna was located in Kansas, and that what evidence was located in Canada was not centrally located.155 The court agreed that compelling testimony from Canadian authorities and witnesses would be easier in a Canadian court, but found this factor to only "slightly favor" Cessna because the record did not reflect that a "significant number" of witnesses would be unwilling to cooperate or that cost to obtain compliance would be substantial.156 The court found the cost of obtaining evidence in either forum was a neutral factor, as was the possibility of viewing the accident scene, which was 1,500 miles from any courtroom in New Brunswick.157

With respect to the public interest factors, the court found that Canada did not have a greater local interest than the United States in the accident and that Canadian law, which would likely apply to plaintiffs' claims, would not be difficult for the court to apply in the United States.158 In particular, the court emphasized the significant interest of the United States in regulating the conduct of resident aircraft manufacturers, even where a particular aircraft accident occurs in a foreign country.159 Thus, even though the plaintiffs were Canadian citizens,
the court found that the private and public interest factors did not favor a Canadian forum.\textsuperscript{160}

3. Lessons Learned

a. A Forum Non Conveniens Dismissal of an Aircraft Accident Occurring Abroad is Hardly Guaranteed

The Chase-Allan case is a prime example of a forum non conveniens dismissal not being a foregone conclusion just because the accident occurred outside the United States. The case also shows the importance of considering the differences in forum non conveniens law in different jurisdictions. While all circuit court case law is the progeny of \textit{Piper Aircraft}, there are differences from circuit to circuit in the way the forum non conveniens test is described and applied. In the Chase-Allan case, it likely made a difference that the Tenth Circuit requires a defendant who is a forum resident to make a "stronger case" for forum non conveniens dismissal\textsuperscript{161} and considers the fact that a product happens to be made in the United States an important factor to consider in determining the public interest of the forum in a dispute arising out of a foreign accident.\textsuperscript{162}

b. Detail Carries the Day in Private Interest Factor Balancing

The court in the Chase-Allan case appeared unconvinced that the evidence available in Canada was more vital to the presentation of the case and more difficult to obtain and preserve than evidence available in the United States.\textsuperscript{163} Because convenience to the court and the parties is the touchstone of forum non conveniens analysis, a detailed description of the types of evidence necessary to try the case; the importance of those pieces of evidence to the trial, location, condition, and availability of that evidence; and the procedural hurdles to be confronted in obtaining the evidence are vital parts of the private interest factor briefing by both parties. Offers by U.S. manufacturers to make documents and witnesses available in a foreign forum, of course, go a long way to allaying judicial concerns that a transfer will disadvantage plaintiffs.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.} at 1197.

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{See id.} at 1196.
D. Helios 522: Athens, Greece

1. Factual Background

On August 14, 2005, Helios Airways Flight 522 was scheduled to fly from Larnaca, Cyprus to Athens, Greece. The flight crashed near Athens after the aircraft failed to properly pressurize and the crew and the passengers lost consciousness and asphyxiated. The plane crashed near Athens when it ran out of fuel. All 121 crew members and passengers were killed.

Ninety plaintiffs in seven different actions brought suit against Boeing in the United States, alleging wrongful death claims based on strict product liability, negligence, and breach of warranty. The cases were consolidated for pretrial proceedings in the Northern District of Illinois. The Greek investigation into the crash faulted both the airline crew and Boeing.

2. Forum Non Conveniens Dismissal Granted

In the multidistrict litigation, Boeing moved to dismiss on forum non conveniens grounds, arguing that either Cyprus or Greece would provide a more convenient forum for the case than an American court. The Northern District of Illinois granted Boeing's motion; one foreign plaintiff appealed the dismissal, but the Seventh Circuit affirmed.

The plaintiffs' choice of forum was given less deference because only two of the ninety plaintiffs were U.S. residents. Moreover, on appeal, the sole plaintiff was a foreign citizen and resident.

Interestingly, there was no dispute at the district court or the appellate court level that Cyprus and Greece were available and adequate fora. These fora were clearly available because Boe-
ing had consented to jurisdiction there.\textsuperscript{176} These fora were adequate because, while their procedures differed from those of U.S. courts, they provided adequate procedural safeguards such as adversarial proceedings before a judge or a multi-member court, presentation of evidence and cross-examination or rebuttal of the opposing side, and a right to appeal.\textsuperscript{177}

The district court found, and the Seventh Circuit agreed, that the private interest factors favored dismissal to Cyprus or Greece, especially the ease of access to proof and availability of compulsory process for obtaining unwilling witnesses.\textsuperscript{178} Although the sources of proof relevant to the product liability claim included evidence and witnesses located in the United States and primarily in Boeing's control, Boeing agreed to make all evidence and witnesses in its possession available in Greece and Cyprus.\textsuperscript{179} The remainder of the relevant proof was located primarily in Greece and Cyprus.\textsuperscript{180} Compulsory process for witnesses related to Helios was available in Greece and Cyprus, and not in the United States.\textsuperscript{181} If the cases were to proceed in the United States, the parties would need to proceed through the Hague Convention to obtain Helios witness testimony through letters rogatory.\textsuperscript{182}

Similarly, the public interest factors favored dismissal.\textsuperscript{183} While the district court had insufficient evidence before it on the congestion of the courts in Greece or Cyprus, or on what the ultimate governing law would be, the court decided that Greece and Cyprus had a "much stronger" local interest in the cases than the United States.\textsuperscript{184} With respect to Cyprus, nearly all of the decedents were residents of Cyprus; Helios is a Cypriot airline; and Cyprus had instituted a criminal investigation into the crash.\textsuperscript{185} With respect to Greece, "[t]he crash occurred on Greek soil while the airplane was en route to Athens, and killed several Greek residents[;]" a Greek agency conducted an official investigation; and Greece also instituted a criminal investiga-

\textsuperscript{176} Id.
\textsuperscript{177} In re Air Crash Near Athens, 479 F. Supp. 2d at 797.
\textsuperscript{178} Clerides, 534 F.3d at 629.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 630.
\textsuperscript{184} In re Air Crash Near Athens, Greece on Aug. 14, 2005, 479 F. Supp. 2d 792, 803–04 (N.D. Ill. 2007).
\textsuperscript{185} Id. at 804.
By contrast, the United States had a lesser interest because only one of the decedents was an American citizen, and while the United States had some interest in deterring the production of defective products in the United States, the amount of deterrence that would have resulted from proceeding with the litigation in the United States was "likely to be insignificant." Moreover, "the mere fact that Boeing 737 airplanes regularly fly in American airspace [was not] enough to outweigh the interests of Cyprus and Greece."

3. Lessons Learned From Helios

a. Courts May Not Credit Unfair Limitations on the Evidence at Issue

The district court chided both the plaintiffs and defendants for arguments attempting to limit the relevant evidence at issue. Of course, this is a common tactic to tip the scales in a party's favor on the private interest factor of ease of access to evidence. The defendants argued that since Helios conceded liability in Cyprus or Greece, the only issue remaining in the case was damages. Plaintiffs argued that there was no dispute about Helios's conduct, and that the product liability claim against Boeing was the main focus of the case. The district court found "[n]either argument . . . persuasive. Although Helios may have agreed not to contest liability, Boeing—the defendant here—has not. Plaintiffs are entitled to pursue their claims against Boeing instead of settling with Helios. At the same time, defendant is entitled to pursue its defense." The district court concluded that at such an early stage in the litigation, it could not determine what the ultimate focus of the litigation would be.

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186 Id.
187 Id. (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260–61 (1981)).
188 Id. (citing Nai-Chao v. Boeing Co., 555 F. Supp. 9, 20 (N.D. Cal. 1982), aff'd Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir. 1983)).
189 Id. at 799.
190 Id.
191 Id.
192 Id.
193 Id.
b. Courts Take Notice of U.S. Plaintiffs' Attorneys Blaming Discovery Delay on Difficulty Dealing with Foreign Plaintiffs

Defendants do well to point out to the court when plaintiffs have difficulty producing discovery in the United States. In this case, plaintiffs moved for additional time to respond to Boeing's interrogatories and requests for admission, "in part due to the language and time difference between the plaintiff's [sic] and their counsel."194 The district court duly noted this fact in support of its finding that ease of access to proof favored dismissal to Cyprus or Greece.195

c. Not All Private or Public Interest Factors Need Favor the Successful Party in a Forum Non Conveniens Debate

The Helios case is but one example of a case where the district court did not find all the private and public interest factors favored one side in granting a forum non conveniens dismissal. In granting dismissal, the district court found that most of the private interest factors were neutral or did not favor dismissal, such as the cost of obtaining attendance of willing witnesses, the possibility of viewing the crash site, the ability to implead Helios, the efficiency of the litigation, and translation costs, and that at least one of the public interest factors (court congestion in the respective fora) was neutral.196 Thus, there is often no need for a party to over stretch any one sub factor in the private or public interest analysis.

d. Not All of the U.S. Plaintiffs Must Be Eliminated from the Case

Finally, defendants in the Helios case were able to obtain dismissal, despite the fact that two U.S. plaintiffs remained in the case at the time the motion was heard.197 Typically, defendants will attempt to resolve cases with plaintiffs with a U.S. nexus (victims who were citizens or residents, or family members with U.S. citizenship). The Helios case demonstrates that a clean sweep of U.S. plaintiffs—at least in the Seventh Circuit—is not necessary for a successful forum non conveniens motion.

194 Id. at 800 n.6.
195 Id. at 800.
196 Id. at 798–805.
197 Id. at 798.
E. Cessna Citation: Milan, Italy

1. Factual Background

[O]ne foggy morning in October of 2001 at the Linate airport in Milan, Italy, a private Cessna jet operated by Air Evex, a German charter company, made a wrong turn, taxiing toward an active runway. After air traffic controllers apparently failed to make the problem clear to the plane’s pilots, the Air Evex jet collided with a Scandinavian Air Systems jet that was just taking flight. One hundred and eighteen people died, including everyone on board both planes and four people on the ground. Another person was seriously injured. It was the deadliest aviation disaster in Italian history.198

Lawsuits arising out of the accident were filed in the Italian courts, as well as

in the Southern District of Florida against Cessna Aircraft Company, an American corporation, by the estates of seventy victims and one personal injury claimant. The decedents in sixty-nine of the estates were European citizens, as was the personal injury claimant. The remaining plaintiff [was] Jack King, the personal representative of the estate of his daughter, Jessica King, an American citizen.199

2. Forum Non Conveniens Dismissal Granted

Cessna moved several times for forum non conveniens dismissal to Italy.200 Finally, the district court granted the dismissal as to all the foreign plaintiffs and stayed the action as to the domestic plaintiff in King v. Cessna Aircraft Co.201

Two levels of deference to the chosen U.S. forum applied, according to the district court.202 The members of the King family, the only U.S. citizen-plaintiffs, were entitled to “a high level of deference and a presumption of convenience.”203 However, all the foreign plaintiffs were to receive “less deference because it is likely that their choice was made for some reason other than convenience.”204

Italy was an adequate and available forum because defendant Cessna was willing to submit to jurisdiction and amenable to

198 King v. Cessna Aircraft Co., 505 F.3d 1160, 1163 (11th Cir. 2007).
199 Id.
201 Id. at 1381.
202 Id. at 1377.
203 Id.
204 Id.
process in Italy. Even though plaintiffs argued that Italian law would provide no relief to plaintiffs (and indeed Cessna so argued), the court found that such issue was best decided by an Italian court. The court noted that "Italian courts have many times addressed tort liability and damages in airplane crash cases and many times produced satisfactory remedies." The private factors tipped in favor of dismissal of the foreign plaintiffs to Italy. The evidence was mostly located in Italy. Although much of that evidence had already been gathered, depositions taken, and the Italian crash reports translated, the court focused on Cessna's need to gather evidence on causation, which could only come from Italian witnesses, such as individuals working with air traffic control at the Linate airport. The court also noted the many practical problems of proceeding with the foreign plaintiffs' varying claims in the United States. One particular complication in determining liability was the fact that plaintiffs had not all signed identical release forms in settling with other potentially liable parties in Italy. Damages would also differ for each plaintiff because Italian law only provided compensation for the support previously received from the decedent. Moreover, the court was concerned about the foreign plaintiffs' parallel lawsuits in Italy. Because Cessna was willing to submit to jurisdiction in Italy, the Court of Milan was the only forum where the foreign plaintiffs would be able to resolve all of their claims in a single proceeding.

The public interest factors also favored dismissal of the foreign plaintiffs to Italy. Italy's interest in the litigation was strong, especially because the accident occurred there and related claims were still ongoing in its courts. Given the individual liability issues for the foreign plaintiffs, the district court was

205 Id. at 1378.
206 Id.
207 Id.
208 Id. at 1378–79. In contrast, the private and public interest factors did not favor dismissal of the U.S. plaintiff King. Id. at 1379–80. The court noted that most of the evidence in the King case had already been gathered and that the King evidence on damages was likely located in the United States. Id. at 1379.
209 Id. at 1378.
210 Id.
211 Id. at 1378–79.
212 Id. at 1378.
213 Id.
214 Id. at 1379.
215 Id. at 1379–81.
216 Id. at 1379.
unsure that the litigation would be resolved more quickly in the United States, and also concerned with the "heavy burden on the Court's limited resources and use[ ] of United States tax dollars and juries" to resolve the foreign plaintiffs' disputes.\footnote{Id.} Finally, the district court was concerned with applying Italian law to potentially nine separate issues in the case and with dueling expert opinions, the Italian legal issues no longer appeared so simple.\footnote{Id. at 1379-80.}

The district court dismissed the foreign plaintiffs to Italy, and stayed the King plaintiffs' case pending resolution of this case in Italian courts.\footnote{Id. at 1381.} The court reasoned that, due to the conflict in the experts' testimony regarding application of Italian law, it made sense for the court to benefit from actual Italian court decisions related to this case.\footnote{Id.}

Plaintiffs appealed the district court's dismissal.\footnote{Id.} The Eleventh Circuit did not address the merits of the forum non conveniens dismissal, but rather focused on the stay of the King plaintiffs' case.\footnote{King v. Cessna Aircraft Co., 505 F.3d 1160, 1163 (11th Cir. 2007).} The Eleventh Circuit ruled that the stay was improper, because it involved a "protracted and indefinite period" waiting for the Italian courts to rule.\footnote{Id. at 1173.} Thus, it vacated the stay and remanded the case for further proceedings.\footnote{Id. at 1172.}

On remand, the district court found that it would have reached the same conclusion in its forum non conveniens analysis had it known that it could not stay the proceedings in King.\footnote{Id. at 1173.} Therefore, for the reasons stated in its previous order, the court dismissed the foreign plaintiffs and found that the King case would proceed before it.\footnote{Brega v. Cessna Aircraft Co., No. 03-22669-CIV, 2008 U.S. Dist. LEXIS 7148, at *2 (S.D. Fla. Jan. 31, 2008); King v. Cessna Aircraft Co., No. 03-20482-CIV, 2008 U.S. Dist. LEXIS 7215, at *17-*18 (S.D. Fla. Jan. 31, 2008).}

\footnote{Brega, 2008 U.S. Dist. LEXIS 7148, at *2; King, 2008 U.S. Dist. LEXIS 7215, at *18.}
3. Lessons Learned

a. As the Case Develops, the Trial Court May Reconsider Its Previous Denial of a Forum Non Conveniens Motion

A defendant that loses on a first motion to dismiss on forum non conveniens grounds should keep close track of how companion litigation progresses in the foreign forum. As facts develop tying the case more closely to the foreign forum, the defendant may consider moving for reconsideration of the initial denial of the forum non conveniens motion—indeed, as described below, the district court itself may request such additional briefing. A plaintiff's attorney must be wary of this possibility of the district court reversing itself due to case developments, as this may prolong a plaintiff's mission to recover damages for several additional years.

In *King*, the district court initially denied Cessna's motions to dismiss on forum non conveniens grounds primarily because it concluded that plaintiff Jack King, a citizen of the United States, deserved deference to his choice of forum. Although the foreign plaintiffs were not entitled to that same deference, the district court reasoned that it made little sense to dismiss the foreign plaintiffs' suits while retaining King's lawsuit, thus allowing two sets of lawsuits to proceed in different jurisdictions. In finding that the balance of private and public interest factors did not favor dismissal, the district court focused on the fact that plaintiffs' theory of liability at the time turned on acts at Cessna's corporate headquarters in the United States, and that it believed that the Italian law issues, which would govern the dispute, were "fairly simple."

As the litigation progressed, the district court found that the cases had changed in at least two significant ways. First, plaintiffs' claims had evolved from focusing on acts and omissions by Cessna at its United States corporate headquarters to focusing on acts by Cessna's agents at the Linate airport in Milan. This shift in the factual focus of liability, combined with changes in Cessna's defense strategy, complicated the Italian law issues. Second, Cessna presented the district court with new evidence

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227 See *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1164 (11th Cir. 2007).
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.*
that some plaintiffs, including Jack King, were litigating a civil action in Italy against Air Evex and various Italian governmental entities.\footnote{Id.}

Due to these changed circumstances, the district court requested the parties to rebrief the forum non conveniens issue.\footnote{Id.} After reweighing the public and private interest factors, the court concluded that a dismissal based on forum non conveniens was warranted as to the actions of all of the foreign plaintiffs.\footnote{Id.}

Interestingly, the court appeared apologetic for not reaching the result earlier, as plaintiffs' counsel was "understandably disturbed that they have relied on this Court's initial denial of Defendant's motion to dismiss."\footnote{King v. Cessna Aircraft Co., 405 F. Supp. 2d 1374, 1380 (S.D. Fla. 2005).} Nevertheless, the district court was intent on making the right call on the law, "irrespective of any emotional pleas," and "despite [its] prior rulings to the contrary."\footnote{Id.}

IV. CONCLUSION

The forum non conveniens doctrine remains a useful tool in the defendant's litigation tool kit for dismissing cases brought in an inconvenient forum in favor of the "natural" forum for resolution of the dispute. In the last several years, expanded use of the U.S. court system for the litigation of fundamentally foreign aviation accident cases has led to a concomitant increase in the use of the forum non conveniens motion. This type of motion practice is complex, time consuming, and expensive for the parties. For these reasons, a plaintiff's lawyer intent on maximizing his or her client's recovery should carefully consider whether he can make a filing in the United States stick. Likewise, a defense lawyer should think long and hard whether his or her client really is better off in another forum before filing a forum non conveniens motion seeking greener pastures.

\footnote{Id.}
Comments