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THE UNITED STATES VS. FRANCE: ARTICLE 33 OF THE MONTREAL CONVENTION AND THE DOCTRINE OF FORUM NON CONVENIENS*

ALLAN I. MENDELSOHN**
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TABLE OF CONTENTS

I. INTRODUCTION .................................. 468
II. DETAILED HISTORY OF IN RE WEST CARIBBEAN AIRWAYS ........................................... 470
III. THE ISSUES AND THE RELEVANT TREATY PROVISIONS ...................................... 471
IV. ANALYSIS .......................................... 472
V. COURT DECISIONS DISMISSING ON FORUM NON CONVENIENS GROUNDS .................. 474

* This is a revised and updated version of an article that first appeared in *Air and Space Law* in August/September 2012. See Allan I. Mendelsohn & Carlos J. Ruiz, *U.S. Court Rebuffs French High Court's Attack on Forum Non-Conveniens Doctrine*, 37 AIR & SPACE L. 325 (2012).

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THE FORUM NON CONVENIENS doctrine, as applied to aviation litigation under the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention),¹ seemed to be very seriously endangered by a decision issued by the Cour de Cassation, France’s highest court, on December 7, 2011.² That decision held that a U.S. court could not use the doctrine of forum non conveniens under Article 33(4) of the Montreal Convention to dismiss and transfer to Martinique (a French possession in the Caribbean) suits brought in the United States by the heirs of the 152 victims of the crash of a Colombian flag air carrier (West Caribbean Airways) over Venezuela in August 2005. Despite the fact that West Caribbean Airways did no business in the United States, that not one of the victims was a U.S. citizen, and that the trip on which the accident occurred was between Martinique and Panama City, and thus had no relationship to the United States, the Cour de Cassation nonetheless concluded that the plaintiffs’ choice of one of the competent jurisdictions enumerated in Article 33 of the Montreal Convention (Article 33) has an imperative and exclusive character such that it deprives all other competent jurisdictions of their authority to hear or rule on the plaintiffs’ claims.³ The Cour de Cassation thus declared that because the plaintiff, and only the plaintiff, has the choice of de-

³ Cass., Bull. civ. I, No. Q-10-30.919, supra note 2; Motion and Supporting Memorandum of Law of Defendants Jacques Cimetier, Newvac Corp. and GO2 Galaxy, Inc. to Dismiss on Grounds of Forum Non Conveniens at 5, 8 n.1, In re W.
ciding which jurisdiction will rule on the dispute, that choice cannot be changed or defeated by use of an internal rule of procedure of another state—in this instance the use of the forum non conveniens doctrine by a U.S. court.\(^4\) In short, because the plaintiff's choice is inviolate, French jurisdiction was simply not available.

The original case was filed on November 8, 2006, in the U.S. District Court for the Southern District of Florida\(^5\) and was dismissed by Judge Ursula Ungaro in a lengthy and detailed decision in which the judge concluded that forum non conveniens was in fact an available procedural tool under Article 33(4), that the doctrine favored litigation in Martinique where all of the 152 crash victims resided or were citizens, and that the French courts in Martinique were both adequate and available.\(^6\) That decision was affirmed by the U.S. Court of Appeals for the Eleventh Circuit,\(^7\) and certiorari was later denied by the U.S. Supreme Court.\(^8\)

Plaintiffs' counsel filed their cases in the three-judge trial court in Martinique but argued to that court that it had no jurisdiction under Article 33.\(^9\) That argument was specifically rejected by the trial court;\(^10\) and that decision was subsequently affirmed by the French Cour d'Appel.\(^11\) But following the ruling of the Cour de Cassation, the plaintiffs filed a motion with the U.S. district court asking that, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, the court vacate its earlier order dismissing the case.\(^12\) The plaintiffs' motion was timely

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\(^6\) Id. at *2; In re W. Caribbean Airways, 619 F. Supp. 2d 1299, 1302, 1305, 1328 (S.D. Fla. 2007); Order Granting Defendants' Motion to Dismiss on Grounds of Forum Non Conveniens at 3, 6–7, 9–10, 15, In re W. Caribbean Airways, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (No. 184) [hereinafter Order to Dismiss].

\(^7\) Pierre-Louis v. Newvac Corp., 584 F.3d 1052, 1061-62 (11th Cir. 2009).


\(^10\) Id.

\(^11\) Id.

\(^12\) The "Bapte" Plaintiffs' Rule 60(b)(6) Motion to Vacate Judgment Because Martinique is Not an Available Forum and Incorporated Memorandum of Law at
opposed by the defendants on March 30, 2012. On May 16, 2012, Judge Ungaro denied the plaintiffs’ motion to vacate, issuing what may well become one of the most important decisions in the history of forum non conveniens as it pertains to international aviation litigation: In re West Caribbean Airways.

II. DETAILED HISTORY OF IN RE WEST CARIBBEAN AIRWAYS

On August 16, 2005, West Caribbean Airways, a Colombian flag carrier that did not fly to, or otherwise do business in, the United States, crashed over Venezuela during a charter flight returning to Martinique from Panama City, Panama. All on board the aircraft were killed. Within weeks, suit was brought on behalf of all the passenger victims in Miami, in the U.S. District Court for the Southern District of Florida. West Caribbean Airways and Jacques Cimetier, doing business as Newvac Corporation (Newvac), a Florida corporation, were named as defendants. Newvac was named and sued as a “contracting carrier” under new Article 39 of the Montreal Convention, because Newvac (and its owner, Jacques Cimetier) had entered a charter contract with West Caribbean Airways to provide the

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15 Id. at *1; Defendants’ Initial Motion to Dismiss, supra note 3, at 8 n.1.
18 Id. at 1302–03.
19 Id. at 1302–03.
20 Montreal Convention, supra note 1, ¶¶ 159–60. Article 39, entitled “Contracting carrier—actual carrier,” provides the following:

The provisions of this Chapter apply when a person (hereinafter referred to as “the contracting carrier”) as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as “the actual character”) performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.
aircraft and crew to carry the Martinique passengers on the charter trip.\textsuperscript{21}

West Caribbean Airways, for its part, moved to dismiss, arguing that the court had no jurisdiction over it because it did no business in, and was not licensed to operate to or from, the United States.\textsuperscript{22} The court deferred ruling on that motion, mainly because Cimetier and Newvac moved to dismiss the case on the grounds of forum non conveniens.\textsuperscript{23} The two defendants argued that the plaintiffs should be required to file suit in Martinique because it was an available and adequate forum and West Caribbean Airways was subject to, and would consent to, jurisdiction in Martinique.\textsuperscript{24}

\textbf{III. THE ISSUES AND THE RELEVANT TREATY PROVISIONS}

The two main issues faced by the district court were as follows: (1) whether forum non conveniens was an available procedural tool under Article 33(4) and, if so, (2) whether it was appropriate to dismiss the suit on that basis.\textsuperscript{25} Because the issue of whether forum non conveniens could be used as a procedural tool under Article 33(4) was one of first impression in any U.S. court, defense counsel asked the court to invite the U.S. government to participate in the case and present its views on that critically important issue.\textsuperscript{26} The court did so, and the U.S. Department of Justice submitted to the court a statement of interest that outlined in detail the legislative history (\textit{travaux préparatoires}) of the negotiations at Montreal and concluded that forum non conveniens was clearly intended to be available for courts as a procedural tool under Article 33(4).\textsuperscript{27} The Depart-

\textsuperscript{22} West Caribbean Airways Consolidated Federal Rule 12(b) Motion to Dismiss for Lack of Jurisdiction Over the Person, Insufficiency of Service of Process, Insufficiency of Process and Improper Venue with Incorporated Memorandum of Law at 1, In re W. Caribbean Airways, No. 06-22748-CIV, 2012 WL 1884684 (S.D. Fla. May 16, 2012) (No. 129).
\textsuperscript{23} In re W. Caribbean Airways, 619 F. Supp. 2d at 1301–02, 1328.
\textsuperscript{24} Defendants' Initial Motion to Dismiss, supra note 3, at 4, 12, 14.
\textsuperscript{25} In re W. Caribbean Airways, 619 F. Supp. 2d at 1301–02, 1328.
\textsuperscript{26} Id. at 1301, 1309, 1328; Order Pursuant to 28 U.S.C. § 517 Requesting a Statement of Interest from the United States at 1, In re W. Caribbean Airways, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (No. 95).
\textsuperscript{27} Statement of Interest of the United States at 1, 4–5, In re W. Caribbean Airways, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (No. 116).
ment of Justice later submitted an equally detailed amicus curiae brief to the U.S. Court of Appeals for the Eleventh Circuit, reviewing again the legislative history of Article 33(4) and reiterating the same conclusion.\(^{28}\)

In relevant part for the issues at hand, Article 33 provides as follows:

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. Questions of procedure shall be governed by the law of the court seized of the case.\(^{29}\)

IV. ANALYSIS

According to the foregoing text, the United States is an available forum for the plaintiffs under Article 33(1) because Newvac, as a “contracting carrier” under Article 39, was domiciled and had its principal place of business in the state of Florida.\(^{30}\) However, Martinique, France, was also an available forum under Article 33(1)—because Martinique was the place of destination—and under Article 33(2)—because Martinique was likewise the state where all the passengers had their “principal and perma-

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\(^{28}\) Brief of the United States as Amicus Curiae in Support of Defendants-Appellees at 7, 9–22, Pierre-Louis v. Newvac Corp., 584 F.3d 1052 (11th Cir. 2009) (No. 07-15828) [hereinafter Brief of the United States as Amicus Curiae].

\(^{29}\) Montreal Convention, supra note 1, ¶ 134–35, 139.

\(^{30}\) See id. ¶¶ 134–35; In re W. Caribbean Airways, 619 F. Supp. 2d at 1302–03.
nent residence[s]" at the time of the accident.\textsuperscript{31} In other words, both the United States and France were very clearly available forums under Articles 33(1) and 33(2) of the Montreal Convention. Once the plaintiffs opted to sue in the United States, however, the defendants, Newvac and Cimetier, moved for dismissal on the grounds of forum non conveniens under Article 33(4).\textsuperscript{32} They did so for at least two significant reasons: first, neither Newvac nor Cimetier carried insurance to cover such a tragedy, while West Caribbean Airways did and had voluntarily consented to subject itself to jurisdiction in Martinique; and second, because it is always far easier and more just for a domiciliary forum to determine proper and appropriate damage compensation for its domiciliaries than for a foreign court (such as a U.S. court would be in these circumstances) to do so.\textsuperscript{33}

Under the well-established Supreme Court precedent in \textit{Piper Aircraft Co. v. Reyno},\textsuperscript{34} a party seeking dismissal on forum non conveniens grounds must demonstrate the following: “(1) that an adequate alternative forum is available”; “(2) that relevant public and private interests weigh in favor of dismissal”; and “(3) that the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice.”\textsuperscript{35} The defendants in this instance further argued that, because forum non conveniens is a question of procedure, it was in fact an available procedural tool under Article 33(4) and was specifically intended by the framers of the Montreal Convention to be available as such a tool in U.S. and other courts that employed the forum non conveniens doctrine.\textsuperscript{36} On the other hand, the plaintiffs argued that the court could not defeat the plaintiffs’ choice of forum, as afforded by Article 33(1), through the application of a procedural rule of domestic law and, accordingly,

\footnotesize{
\begin{itemize}
    \item \textsuperscript{31} See Montreal Convention, \textit{supra} note 1, ¶¶ 133–35; Order to Dismiss, \textit{supra} note 6, at 1.
    \item \textsuperscript{32} \textit{In re W. Caribbean Airways}, 619 F. Supp. 2d at 1301 n.1.
    \item \textsuperscript{33} Defendants Jacques Cimetier, Newvac Corp. and GO2 Galaxy, Inc.’s Motion to Dismiss on Grounds of Forum Non Conveniens at 23–24, \textit{In re W. Caribbean Airways}, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (No. 159) [hereinafter Defendants’ Second Motion to Dismiss]; Defendants’ Initial Motion to Dismiss, \textit{supra} note 3, at 4, 14–15.
    \item \textsuperscript{34} 454 U.S. 235 (1981).
    \item \textsuperscript{35} \textit{Id.} at 241, 254–55, nn.22–23; Pierre-Louis v. Newvac Corp., 584 F.3d 1052, 1059 (11th Cir. 2009).
    \item \textsuperscript{36} \textit{In re W. Caribbean Airways}, 619 F. Supp. 2d at 1308, 1311.
\end{itemize}
}
forum non conveniens should not be deemed an available tool under Article 33(4).  

V. COURT DECISIONS DISMISSING ON FORUM NON CONVENIENS GROUNDS

In an extensive Preliminary Order that analyzed in detail the legislative history of the 1999 Montreal Convention, U.S. District Judge Ursula Ungaro concluded, as had the U.S. Department of Justice in its statement of interest, that forum non conveniens was, and was intended by the drafters of the Montreal Convention to be, an available procedural tool under Article 33(4). Two months later, the court granted the defendants' motion to dismiss on the grounds of forum non conveniens because the balance of interests favored litigation in Martinique, and the Martinique courts were adequate and available. Judge Ungaro first determined that Martinique was a competent forum under the Montreal Convention where the plaintiffs could have originally brought suit and could still initiate their action without inconvenience or prejudice. Particularly, Judge Ungaro noted that the defendants' liability was not an issue, and that West Caribbean Airways had waived jurisdictional objections and the statute of limitations under the Montreal Convention in the Martinique court. Because all of the passengers were residents of Martinique, all but one of the passengers were French citizens, none of the passengers were U.S. citizens or residents, and only damages would be at issue, all the relevant evidence would be located in Martinique, not in the United States. These circumstances, plus the public interest factors weighing in favor of Martinique's superior interest in redressing injuries to its own residents, whose damages would be determined under French law, moved Judge Ungaro to find that Martinique was the more convenient forum to resolve the plaintiffs' claims, and she accordingly dismissed the case. Following the plaintiffs' appeal of this decision, the U.S. Court of Appeals for the Eleventh Cir-

37 Id.
38 Id. at 1301, 1317, 1328.
39 Order to Dismiss, supra note 6, at 1, 6-7, 12, 14.
40 Id. at 7, 15.
41 Id. at 9, 15. West Caribbean Airways also waived the damages cap under the Montreal Convention. Pierre-Louis v. Newvac Corp., 584 F.3d 1052, 1059–60 (11th Cir. 2009).
42 Order to Dismiss, supra note 6, at 1, 8–9.
43 Id. at 12–15.
cuit affirmed the decision, and the U.S. Supreme Court later denied the plaintiffs’ petition for certiorari.

Meanwhile, the plaintiffs brought an action before the lower court in Martinique seeking a decision that the court would not defer to the U.S. district court’s forum non conveniens dismissal, and that it would, accordingly, neither accept nor allow the settlement of the cases in the Martinique courts. It is important to note at this point that the plaintiffs’ action in the French lower court did not in fact seek compensation as Judge Ungaro and the U.S. court of appeals had contemplated they would; rather, the plaintiffs, or rather, their counsel, sought primarily to defeat French jurisdiction and thus, in fact and in effect, avoid French jurisdiction over their cases. The grounds in support of the plaintiffs’ argument were that, as the 152 plaintiffs had chosen to sue in a U.S. court, that choice, under and in accordance with Article 33(1), must be treated for all practical purposes as inviolate and could not be defeated by a defendant’s motion to dismiss based on forum non conveniens. Alternatively, the plaintiffs argued that, as they had initially chosen to file suit in the United States pursuant to Article 33(1), the French court simply lacked jurisdiction.

In a lengthy and detailed decision, a three-judge lower court in Martinique rejected all of these arguments, ruling, as did Judge Ungaro, that under Article 33(4), forum non conveniens was in fact an available tool for use by and in U.S. courts, and that the U.S. district court’s dismissal was a proper and legitimate exercise of its authority. This ruling was subsequently affirmed by a French Cour d’Appel. But following a later appeal by the plaintiffs to France’s highest court, the Cour de Cassation, that court—failing even to cite, much less discuss, Judge Ungaro’s decision or that of the U.S. court of appeals, or any aspect of the relevant travaux préparatoires of the Montreal Convention, or even the decision of the three-judge lower court in

44 Pierre-Louis, 584 F.3d at 1055, 1061–62.
47 Pierre-Louis, 584 F.3d at 1060; Order to Dismiss, supra note 6, at 14–15; see CA, No. 09/00663, supra note 9.
48 See CA, No. 09/00663, supra note 9.
49 Id.
50 Id.
51 Id.
Martinique and the Cour d'Appel affirmance of that decision—
held simply that U.S. courts could not properly employ the doc-
trine of forum non conveniens under Article 33(4) in that
case.52 The Cour de Cassation ruled that the U.S. courts could
not use a domestic rule of procedure to defeat plaintiffs' choice
of a forum under Article 33(1) and, because the plaintiffs chose
the United States as their forum, that choice must remain invio-
late, and the French courts lacked jurisdiction over the matter.53
Accordingly, the court ruled that France was not an available
forum and the case must be returned to the U.S. court where
suit should once again proceed against the "contracting car-
rier"—Newvac Corporation.54 Significantly, there was no men-
tion by the Cour de Cassation how the case could proceed when,
as was well-known to all the participants, neither Newvac nor
Cimetier carried any insurance covering aviation crashes.55

VI. THE CONFLICT BETWEEN THE DECISIONS OF THE
U.S. COURTS AND THE DECISION OF
THE COUR DE CASSATION

In this posture, there was a very clear conflict between the
decisions of the French high court and those of the U.S. district
court and Eleventh Circuit Court of Appeals.56 One might sug-
gest that the results of both courts—individually considered—
are not necessarily wrong or in conflict, considering that the
U.S. courts applied U.S. law (including the forum non con-
vieniens doctrine), while the Cour de Cassation applied French
law that neither incorporates nor acknowledges the forum non con-
vieniens doctrine.57 But such an explanation would require
two serious analytical stretches.

First, for the Cour de Cassation to have simply looked to
French law alone—as it apparently did—would mean that it had
little or no knowledge about, let alone appreciation for, the
long-established, highly-regarded, and internationally well-

53 Id.
54 Id.
55 See id.; Defendants' Second Motion to Dismiss, supra note 33, at 14.
56 See In re W. Caribbean Airways, No. 06-22748-CIV, 2012 WL 1884684, at *1
57 See Pierre-Louis v. Newvac Corp., 584 F.3d 1052, 1056, 1061 (11th Cir. 2009);
In re W. Caribbean Airways, 619 F. Supp. 2d 1299, 1328 (S.D. Fla. 2007); Cass.,
known doctrine of comity.\textsuperscript{58} This principle, known even to first-year law students, requires a foreign court faced with an issue like the one that faced the Cour de Cassation to carefully examine U.S. law and cases to determine whether a similar issue has been decided in accordance with U.S. law.\textsuperscript{59} This analysis would have been particularly appropriate given that the Cour de Cassation knew that this case originated in the U.S. courts and a foreign court could thus have had no doubt that U.S. precedent potentially controlled.\textsuperscript{60} Had the Cour de Cassation done that here, it would have discovered not only the decision of its own lower three-judge court in Martinique, but also, and more importantly, the decisions of Judge Ungaro and the U.S. court of appeals.\textsuperscript{61} The question that would have then confronted the Cour de Cassation (had it made such a customary, if not mandatory, review of applicable international legal precedent) would be whether to apply the doctrine of comity, accept the decisions of two U.S. courts concerning the same issue, and move forward to deny the relief requested by the plaintiffs.\textsuperscript{62} Instead, the Cour de Cassation seems inexplicably to have ignored—or even worse, lacked awareness of—both U.S. decisions in reaching its equally inexplicable decision.\textsuperscript{63}

Second, and equally important, the Cour de Cassation would have had to ignore the fact that whatever conflict potentially existed was one that stemmed not from an interpretation of only French or U.S. domestic law, but rather from the interpretation of an international treaty.\textsuperscript{64} To look only to French law on a question of this type and to totally ignore the fact that the issue was one that arose under an international treaty seems incomprehensible.\textsuperscript{65} Indeed, the failure of the Cour de Cassation to mention, much less carefully examine, the \textit{travaux préparatoires} of the Montreal Convention in such a highly litigated and controversial case cannot but be viewed as an example of judicial irresponsibility.\textsuperscript{66} For if the Cour de Cassation had examined the \textit{travaux préparatoires}, it would have understood that the dele-

\textsuperscript{59} \textit{See generally} \textit{Black's Law Dictionary}, \textit{supra} note 58, at 303–04.
\textsuperscript{60} \textit{See In re W. Caribbean Airways}, 2012 WL 1884684, at *1.
\textsuperscript{61} \textit{See id.; see also} Pierre-Louis, 584 F.3d at 1061–62.
\textsuperscript{63} \textit{See id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.; see} \textit{Montreal Convention,} \textit{supra} note 1, ¶ 133–39.
gates to the Montreal Convention, in adopting Article 33(4) as they did, knew and fully understood that U.S. courts would use the forum non conveniens doctrine under, and in accordance with, Article 33 to do precisely what the U.S. district court and the U.S. court of appeals did in the West Caribbean case.\textsuperscript{67}

VII. PLAINTIFFS' MOTION TO VACATE—SECOND ROUND

Prompted by the plaintiffs' repeated attempts to subvert the forum non conveniens dismissal, and this time buttressed by the decision of the French Cour de Cassation, a case of highest importance for the future of the forum non conveniens doctrine was now once again in the hands of Judge Ungaro in the U.S. District Court for the Southern District of Florida.\textsuperscript{68} In the plaintiffs' motion to vacate Judge Ungaro's earlier order dismissing the case on forum non conveniens grounds, the plaintiffs argued that extraordinary circumstances warranted vacating that order, namely: (1) because the French high court ruled that Martinique, France, was not an available forum, the threshold requirement for any forum non conveniens dismissal—the availability of an adequate alternative forum—was not met; and (2) the U.S. court must now reopen the proceedings and go forward with the case, because otherwise the plaintiffs would be left without any remedy.\textsuperscript{69}

In response to plaintiffs' motion to vacate, the defendants argued that "[a] party cannot purposefully defeat the availability of a foreign forum and then assert the unavailability as a basis to vacate" the order, dismissing the case on forum non conveniens grounds.\textsuperscript{70} Rather, the party "must litigate in the foreign forum in good faith."\textsuperscript{71} The defendants pointed out that, but for the plaintiffs' own actions seeking to avoid jurisdiction, France would have been an available forum under Article 33 and, therefore, any harm suffered now by the plaintiffs was self-inflicted.\textsuperscript{72}

The defendants further pointed out that the plaintiffs did not seek redress for their injuries in the French courts; rather, the

\textsuperscript{67} Id.


\textsuperscript{69} See Motion to Vacate Judgment, supra note 12, at 1.

\textsuperscript{70} Response in Opposition to Motion to Vacate Judgment, supra note 13, at 1, 9.

\textsuperscript{71} Id.

\textsuperscript{72} Id.
plaintiffs devoted their principal resources to making France an unavailable forum, thus leaving the French court with little choice. In other words, so defendants argued, the dismissal on forum non conveniens grounds could and should still be sustained because France could still be considered an available forum, if the plaintiffs reversed course and agreed to allow it.

The defendants' argument found solid support in a recent decision in the well-known Air France Flight 447 disaster over the Mid-Atlantic, which also dealt with a case dismissed on forum non conveniens grounds to be heard in France. After Judge Breyer, a U.S. district court judge, dismissed the case on forum non conveniens grounds, the plaintiffs, instead of pursuing their claim in good faith in the French forum, dropped all the French defendants and re-filed suit in the United States. The plaintiffs then argued that the absence of French defendants made dismissal on forum non conveniens grounds impossible because France was now an unavailable forum. The defendants, in turn, made the exact same arguments now being made by the defendants in the West Caribbean case, namely: "(1) a party cannot purposefully defeat the availability of a foreign forum and then assert unavailability as a basis to defeat a forum non conveniens dismissal; and (2) a party subject to a forum non conveniens dismissal order . . . must litigate in the foreign forum in good faith and cannot contrive to defeat the foreign court's jurisdiction." Judge Breyer concurred with the defendants' arguments and, again, granted the motion to dismiss on forum non conveniens grounds.

Finding support mainly in the decisions issued in In re Compañía Naviera Joanna SA v. Koninklijke Boskalis Westminster NV and Castillo v. Shipping Corp. of India, Judge Breyer found the plaintiffs' conduct to be improper. He noted that the plaintiffs had "purposefully opted" not to re-file their dismissed pleadings in France; instead, they opted to re-file the actions in the United

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73 Id.
74 Id.
75 See In re Air Crash Over the Mid-Atlantic on June 1, 2009, 792 F. Supp. 2d 1090 (N.D. Cal. 2011).
76 Id. at 1093.
77 Id.
78 Id. at 1094.
79 Id. at 1103.
80 569 F.3d 189 (4th Cir. 2009).
82 In re Air Crash Over the Mid-Atlantic, 792 F. Supp. 2d at 1094.
States after having deliberately taken steps to defeat jurisdiction in France and thus circumvent the forum non conveniens dismissal order. 83 Although (and unlike what the plaintiffs’ counsel did in West Caribbean) the plaintiffs in the Air France Flight 447 case did not file their actions in France, Judge Breyer hypothesized that had the plaintiffs “gone to France and filed actions deliberately omitting the parties necessary to establish jurisdiction, the U.S. court of appeals would have been justified in not accepting them back.” 84 Further, in denying a request from the plaintiffs to include a condition allowing them to return to the United States should the French court dismiss their actions on jurisdictional grounds, Judge Breyer stated that the plaintiffs cannot defeat a forum non conveniens dismissal by “filing complaints that a French court would not hear,” and that (subject to the forum non conveniens order) they “could have re-filed those actions in France without any jurisdictional barrier.” 85 This reasoning was certainly of critical importance in the circumstances faced by Judge Ungaro in the “second round” of the West Caribbean litigation. 86

VIII. JUDGE UNGARO’S DECISION ON THE PLAINTIFFS’ MOTION TO VACATE

On May 16, 2012, Judge Ungaro issued a decision denying the plaintiffs’ motion to vacate and making clear her sharp disagreement with the Cour de Cassation’s unsupported and, indeed, unsupportable conclusion that, under the Montreal Convention, the plaintiffs’ choice of forum in the United States ipso facto deprives Martinique of jurisdiction. 87 Judge Ungaro first discussed the effect of the Cour de Cassation’s decision on the U.S. district court, then turned to applicable precedent in the United States, and finally addressed the plaintiffs’ claims of “extreme and undue hardship” if their cases were not reinstated in the district court. 88

Addressing the effect of the Cour de Cassation’s decision on U.S. courts, Judge Ungaro concluded simply and correctly that while the doctrine of comity might require a U.S. court to ac-

83 Id. at 1095.
84 Id. at 1096.
85 Id. at 1103.
87 Id. at *7.
88 Id. at *6–11.
cept a foreign court’s interpretation of one of its own statutes, that doctrine could not be expanded to require the acceptance of a foreign court’s interpretation of an international treaty—in this instance, Article 33.\textsuperscript{89} This is especially true where, as discussed above, the decision of the Cour de Cassation itself did not consider, much less even allude to, the comity doctrine, but instead totally ignored both the directly contrary decisions of two U.S. federal courts as well as the clear and well-documented \textit{travaux préparatoires} of Article 33.\textsuperscript{90} That \textit{travaux} demonstrates conclusively that Article 33, as adopted, was in no way intended to deprive states that used and recognized the doctrine of forum non conveniens from applying that doctrine as a procedural tool in future Montreal Convention cases.\textsuperscript{91} If the Cour de Cassation wished to ignore all of this precedent, it could do so, but a U.S. court, as Judge Ungaro so properly concluded, “is not obligated to accept [the Cour de Cassation’s] interpretation.”\textsuperscript{92} Nor is a U.S. court required to “blindly accept the jurisdictional rulings or laws of foreign jurisdictions that purport to render their forum unavailable.”\textsuperscript{93}

Judge Ungaro next referred to and discussed in some detail the holdings of two well-known cases, \textit{Scotts Co. v. Hacienda Linda}\textsuperscript{94} and \textit{Morales v. Ford Motor Co.}\textsuperscript{95} Both cases involved the application by foreign courts of the so-called blocking statutes that preclude assertions of jurisdiction by the courts in those countries over cases that had first been filed elsewhere (i.e., in the United States).\textsuperscript{96} These types of statutes had been adopted in Panama, Venezuela, and other Latin American countries, in an attempt to make their own courts not “available” and thereby defeat forum non conveniens dismissals of suits brought by their nationals in U.S. courts.\textsuperscript{97} In both cases, when the suits were rejected by the foreign courts and brought back by the foreign plaintiffs to be reinstated in the U.S. courts, the U.S. courts refused to do so and concluded that the rejection of jurisdiction by the foreign court under its blocking statute “will not necessa-

\textsuperscript{89} \textit{Id.} at \textsuperscript{*8}.


\textsuperscript{91} Brief of the United States as Amicus Curiae, \textit{supra} note 28, at 9.

\textsuperscript{92} \textit{In re W. Caribbean Airways}, 2012 WL 1884684, at \textsuperscript{*7}.

\textsuperscript{93} \textit{Id.} at \textsuperscript{*8}.

\textsuperscript{94} 2 So. 3d 1013 (Fla. Dist. Ct. App. 2008).

\textsuperscript{95} 313 F. Supp. 2d 672 (S.D. Tex. 2004).

\textsuperscript{96} \textit{Id.} at 675; \textit{Scotts}, 2 So. 3d at 1015–16.

rily warrant reinstatement of the action" in the United States, "particularly where plaintiffs themselves have advocated against jurisdiction in the foreign forum."^98

Focusing then on the obligations of plaintiffs once a U.S. court dismisses a case on forum non conveniens grounds, Judge Ungaro specifically cited the holding by the Florida appellate court in *Scotts* that:

> [I]f our courts determine that a foreign forum is available and adequate, it is the obligation of the plaintiff to assent to jurisdiction there and to support that court's exercise of jurisdiction over the matter and the parties.\(^99\)

Then, focusing on the obligations of foreign judiciaries, Judge Ungaro again cited the decision in *Scotts*:

> If the foreign country chooses to turn away its own citizen's lawsuit for damages . . . and if the other . . . factors warrant dismissal here, it is difficult to understand why Florida courts should devote resources to the matter.\(^100\)

Focusing next on the intentions of plaintiffs, or their counsel, in bringing their suits first in U.S. courts in the face of these blocking statutes or, similarly, in the face of a decision like that of the Cour de Cassation here, Judge Ungaro referred to the holding in *Morales*. Specifically, Judge Ungaro indicated that if

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^98 In re W. Caribbean Airways, No. 06-22748-CIV, 2012 WL 1884684, at *8 (S.D. Fla. May 16, 2012). A very recent decision from the U.S. Court of Appeals for the Second Circuit validates this analysis: *Palacios v. Coca-Cola Co.* No. 11-3818-CV, 2012 WL 4478768, at *1 (2d Cir. Sept. 28, 2012). In *Palacios*, the U.S. District Court for the Southern District of New York dismissed the plaintiffs' claims on forum non conveniens grounds, stating that it would consider reinstating the claims in the event that "the highest court of Guatemala" affirmed a refusal by the Guatemalan courts to exercise jurisdiction over those claims. *Palacios*, 2012 WL 4478768, at *1. In *Palacios*, the plaintiffs filed their claims in a Guatemalan trial court, which dismissed the plaintiffs' claims for want of jurisdiction. *Palacios*, 2012 WL 4478768, at *1. The plaintiffs declined to appeal that decision and, instead, returned immediately to the District Court for the Southern District of New York, requesting that their claims be reinstated and alleging that they did not have a good-faith basis for an appeal in the Guatemalan courts. *Id.* at *2. The district court denied the plaintiffs' request and the Court of Appeals for the Second Circuit affirmed that decision, concluding that the plaintiffs' failure to meet the condition for reinstatement of their claims was entirely of their own making and their claims were therefore ineligible for reinstatement. *Id.* at *2–3; see also *Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399-CIV, 2012 WL 5364241, at *1 (S.D. Fla. Oct. 30, 2012).

^99 *Scotts*, 2 So. 3d at 1017–18.

^100 *Id.*
plaintiffs are allowed to return to U.S. courts after having their cases dismissed on grounds of forum non conveniens, it would amount to an "utter abrogation of the forum non conveniens doctrine [because it would afford foreign plaintiffs] the option of rendering their home courts unavailable simply by [first] bringing suits . . . outside of their own country [i.e., in the United States]."101

Focusing finally on the plaintiffs' argument that they would suffer "extreme and undue hardship" (i.e., may well go without any compensation at all) should the U.S. court not let them reinstate their cases, Judge Ungaro characterized the argument as "more than disingenuous—it is ridiculous."102 For Judge Ungaro, by pursuing their cases to the Cour de Cassation,

[The plaintiffs] ran the risk that [the U.S. district] court would not reconsider its [forum non conveniens] order regardless of the consequences they would incur . . . there is no question that [the plaintiffs] advocated against jurisdiction in Martinique and that jurisdiction would have been proper in Martinique but for their opposition to it and preference for the Southern District. If Martinique is unavailable, it is only because [the] plaintiffs have made it so.103

Marveling at the plaintiffs' "relentless four-year campaign to subvert this [court's] order dismissing their case pursuant to forum non conveniens," Judge Ungaro astutely observed that the plaintiffs, or their counsel, waged this campaign with the apparent hope of "a more financially generous forum."104 Not content to be awarded damages by their own courts and in accordance with their own law, the plaintiffs cannot now use such "transparent avarice" as a basis or grounds for seeking the reinstatement of their cases in a U.S. court.105 To hold otherwise, Judge Ungaro concluded, would be to "sanction . . . disrespect for the lawful order of this United States court and encourage other litigants to engage in similar conduct."106

In sum, and as applicable to the current and comparable future circumstances, if, in the face of a blocking statute or a decision like that of the Cour de Cassation here, foreign plaintiffs or their counsel nevertheless first bring their suits in U.S. courts,
they do so with full knowledge and understanding that their decision: (1) will be viewed as a purposeful attempt to render their own courts unavailable; and (2) will not succeed in making the foreign forum unavailable under the requirements of the forum non conveniens analysis. Moreover, if the plaintiffs' suits are dismissed by U.S. courts on forum non conveniens grounds and their own courts do not accept the dismissal and reject jurisdiction (as did the Cour de Cassation), those plaintiffs will not be permitted to return to courts in the United States because there is simply no persuasive reason why U.S. courts should be forced to devote the time, energy, and resources that are required to entertain and resolve their cases.

IX. CONCLUSION

The importance of this conflict is plainly obvious and cannot be underestimated. There seem to be two alternative solutions, as discussed in the following paragraphs.

A. FIRST SOLUTION: REVISIT AND REVISE THE COUR DE CASSATION'S DECISION

The first and preferable resolution is for the Cour de Cassation's decision to be revisited and revised so as to bring it into conformity with the interpretation of Article 33(4) that prevailed when the Montreal conferees adopted that provision, namely, that countries that used and applied the forum non conveniens doctrine as a procedural tool in their courts could continue to use it in future Montreal Convention cases. Given that the French Delegation to the 1999 Montreal Conference was not favorably disposed either to this interpretation or to the forum non conveniens doctrine generally, there can be no question that they knew and fully understood that it was the U.S. position on the issue that ultimately prevailed. In fact, the U.S. delegation to the conference espoused two positions that it represented as being more or less essential in any new convention for the United States to ratify the convention.

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107 See id.
108 See id. at *8 (quoting Scotts Co. v. Hacienda Loma Linda, 2 So. 3d 1013, 1018 (Fla. Dist. Ct. App. 2008)).
109 Brief of the United States as Amicus Curiae, supra note 28, at 28.
110 Id. at 13-14.
111 Id. at 17.
These positions were: (1) the adoption of a new clause allowing for a “fifth jurisdiction” that would permit passengers to bring suits in their domiciles or permanent places of residence (assuming the defendant airline did business and was subject to suit there); and (2) continuation of the ability of U.S. courts to apply the doctrine of forum non conveniens so as to ensure that U.S. courts would not be inundated by foreign plaintiffs seeking the advantages of contingency fee arrangements and generous death or injury awards that are available in the United States but not in many foreign jurisdictions. Both of these positions were fully realized and incorporated into the text of Article 33 as finally adopted.

The U.S. Department of State or the U.S. Attorney General, whether by way of a high-level diplomatic note or some equally pressing démarche, should remind the French government of the foregoing facts and should request that they take whatever action necessary under French law and procedure to bring the Cour de Cassation’s decision into conformity with the agreed-upon requirements of Article 33(4). In addition, it is important that French law conform with U.S. law on the application of the doctrine of forum non conveniens.

There is every reason to believe, moreover, that the U.S. government is, or should be, more than willing to make such a definitive démarche. Indeed, the U.S. government previously demonstrated its very significant interest in this case by filing detailed briefs supporting the grant of forum non conveniens, both when the case was first pending before Judge Ungaro and when it was appealed to the Eleventh Circuit. The importance attached to the forum non conveniens doctrine by the U.S. government was even more forcefully demonstrated when, as very recently occurred, the government filed an amicus curiae brief with the Supreme Court and asserted the position that the forum non conveniens doctrine was not simply appropriate in cases brought under the Alien Tort Statute (ATS), but should be applied “at the outset of the litigation and with special force.”

112 Id.
113 Montreal Convention, supra note 1, ¶¶ 134–39.
114 See generally Brief of the United States as Amicus Curiae, supra note 28, at 1.
115 Id.
116 See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 22, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (No. 10-1491), 2012 WL 2161290. In Kiobel, as in many other cases brought under the ATS (as is true also of many cases brought in U.S. courts
If the U.S. government could take such a direct and definitive position in support of the forum non conveniens doctrine in the context of the ATS—a statute that is the closest thing to a sacred cow in the human rights legal community—it can and should certainly make an equally forceful and definitive request to the French government to correct promptly what could otherwise become not only a very serious international problem but also a very real threat to the continued viability of the forum non conveniens doctrine in the federal courts.

Further, the U.S. government should not hesitate in letting those same views be widely circulated within the international aviation community, the International Civil Aviation Organization, and elsewhere. In particular, the United States should emphasize that if the problem is not promptly corrected and if, as a consequence, foreigners (assisted by their U.S. counsel) continue to flood U.S. courts with their Montreal Convention lawsuits following future international air disasters, the U.S. government might in fact wish to consider if denunciation of the Montreal Convention may be appropriate.

B. SECOND SOLUTION: TREAT JUDGE UNGARO'S DECISION AS GUIDING PRECEDENT

The alternative possible, but less definitive, resolution is for Judge Ungaro's decision not simply to be affirmed (it is right now pending on appeal), but for it to become guiding precedent for all future Montreal Convention cases.117 There is little question that, despite Judge Ungaro's decision and despite the clear legislative history of Article 33(4), other countries that share France's civil law aversion to the forum non conveniens doctrine may well follow France's example and decline to make their courts available to plaintiffs who have opted to file their

under the Montreal Convention), the damage occurred abroad and neither the plaintiffs nor the defendants were U.S. citizens. There are, of course, certain risks in requesting forum non conveniens dismissals to foreign courts. See, e.g., the multi-year saga of the *Chevron Corp. v. Ecuador* litigation, most recently the subject of the decision in *Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2012 WL 3538749, at *1 (S.D.N.Y. July 31, 2012). But, if the foreign court handles the litigation properly and in accordance with its normal and customary laws and procedures, there should be no problems in dismissing cases on forum non conveniens grounds, especially in the aviation context where damages for victims can then be determined and awarded by courts of the victims' domicile or place of permanent residence—in short, *lex domicilii*. See Allan I. Mendelsohn, *Domicile and the Warsaw System*, 22:1 ANNALS AIR & SPACE L. 137 (1997).

suits first in a U.S. court but, as in the *West Caribbean* litigation, were required to transfer their cases to a foreign court.\footnote{See id. at 18.} If, after rejection of their cases by the foreign court, these plaintiffs attempt to reinstate their cases in the U.S. court that had previously dismissed their suits on the basis of forum non conveniens, the preferred solution would be for that court to follow the precedent established by Judge Ungaro and decline reinstatement while recommending to counsel that they return to the foreign court where they should plead with the court to accept jurisdiction, lest the plaintiffs not be compensated at all.\footnote{See *In re W. Caribbean Airways*, No. 06-22748-CIV, 2012 WL 1884684, at *8 (S.D. Fla. May 16, 2012).} Similarly, in the next U.S. case involving French victims where their U.S. counsel points to the Cour de Cassation’s decision and argues that forum non conveniens cannot be granted because French courts are not available, again the preferred solution should be for the court simply to grant a forum non conveniens dismissal, advising counsel that they should have been well aware of applicable precedent and should have known the risks involved in first bringing their suits in the United States. In accordance with that forum non conveniens dismissal, plaintiffs’ counsel can then file in the French judicial system and plead with the court not to follow the Cour de Cassation’s decision in *West Caribbean*, but instead to accept jurisdiction—again, lest their clients not be compensated at all.

U.S. counsel representing plaintiffs in these circumstances should be well aware of the serious risks they are courting by such flagrant forum shopping. Should the plaintiffs in the *West Caribbean* case go back to the French judicial system and it once again declines to exercise jurisdiction, the plaintiffs’ lawyers—who engineered and brought about this most unfortunate conclusion, depriving their own clients of compensation by any court—may well be subject to a malpractice action by those same clients who would be seeking the same compensation they would have received but for their lawyers’ machinations.