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THE WARSAW CONVENTION ARTICLE 28, THE
DOCTRINE OF FORUM NON CONVENIENS, AND THE
FOREIGN PLAINTIFF

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RENÉE LIEUX**

I. INTRODUCTION

UNDER UNITED STATES statutory and common law, a
court generally has jurisdiction over a cause of action if the
court has jurisdiction over the subject matter, jurisdiction of the
person, and jurisdiction over the particular judgment sought.1
But if the tort in issue occurred when the plaintiff was embark-
ing, disembarking, or during an international flight, then the
traditional notions of jurisdiction are preempted by The Con-
vention for the Unification of Certain Rules Relating to Interna-
tional Transportation by Air (Warsaw Convention or Warsaw),
which provides its own unique cause of action and jurisdictional
rules.2 Under Warsaw, the plaintiff’s choice of forum is no
longer plaintiff-oriented; rather it becomes affiliated with the
defendant’s place of business and is subject to challenge by the
defendant.

This article gives an overview of the Warsaw Convention, with
particular emphasis on Article 28(1), and a brief description of
the subsequent international protocols and conventions amend-
ing Warsaw. It then analyzes the United States doctrine of fo-

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2 Convention for the Unification of Certain Rules Relating to International
Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137
L.N.T.S. 11, reprinted in 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Con-
vention or Warsaw].

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rum non conveniens and the interaction between the doctrine and Warsaw. Next, it briefly focuses on the applicability of Friendship, Commerce and Navigation treaties, which play some role in the application of the forum non conveniens doctrine to foreign plaintiffs. It then critically reviews the important decision in *In re Air Crash off Long Island New York on July 17, 1996.* Finally, this article briefly examines the Ninth Circuit’s recent decision in *Hosaka v. United Airlines* and speculates about its potential impact on the emerging law in this increasingly significant area of international law.

II. ARTICLE 28 OF THE WARSAW CONVENTION

A. INTRODUCTION TO THE WARSAW CONVENTION

In 1925, with the commercial airline industry still in its formative years, delegates from around the world met in Paris to construct the groundwork for international civil aviation law. Those attending the Paris Conference created the *Comité International Technique d’Experts Juridique Aériens*, which continued working on the draft document until the conference held in Warsaw in 1929, at which time the Warsaw Convention was born. It came into force on February 13, 1933, and, without the benefit of Congressional hearings, the United States became a party in 1934 by Proclamation of President Franklin D. Roosevelt. The Warsaw Convention was subsequently amended on numerous occasions, but the United States was not a party to most of these

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4 *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002).


6 See id. at 501-02.

amendments. The one amendment to which the U.S. did become a party (i.e., Montreal Protocol No. 4) did not amend the provisions of Warsaw Article 28, which is of most concern here.  

Before Warsaw standardized industry liability, the nature of international air-travel could expose an airline to widely varying laws, depending upon the country in which the accident occurred and where jurisdiction would be found. The original 1929 multilateral treaty was an effort to establish uniformity in principles of liability and in the laws governing the documents issued to passengers and shippers in international air transportation:  

The Convention had two primary goals: first, to establish uniformity in the aviation industry with regard to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims, as well as with regard to documentation such as tickets and waybills; second—clearly the overriding purpose—to limit air carriers' potential liability in the event of accidents.  

The drafters had a direct interest in limiting air carrier liability. At the time of the Convention, most airlines were owned or heavily subsidized by the nations that were drafting the Convention. Limiting liability would allow airlines to raise necessary capital, to provide a basis for insurance rate determinations, and

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10 In re Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1270 (2d Cir. 1991) (internal quotation omitted).
to reduce inconsistent outcomes. This would in turn limit the financial risks to their governments and lessen litigation.\textsuperscript{11}

The Warsaw Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire."\textsuperscript{12} It applies to three categories of injury or damage: passenger death or bodily injury,\textsuperscript{13} loss or destruction of checked baggage or goods,\textsuperscript{14} and damage resulting from the delay of passengers, baggage, or goods.\textsuperscript{15} In its original form, the Convention limited the airline's liability to approximately $8,300 per passenger, unless the plaintiff could prove willful misconduct.\textsuperscript{16} For most practical purposes, the Warsaw Convention "creates a nearly irrefutable presumption of liability and provides a judicial forum for the insured traveler, but at a cost to the claimant of severely limiting the damages recoverable against the carrier."\textsuperscript{17}

B. Article 28

Article 28 of the Convention provides treaty jurisdiction for claims falling within Warsaw’s liability provisions.\textsuperscript{18} Under United States law, if a court does not have treaty jurisdiction

\textsuperscript{11} Id. at 1271 (citing Sen. Comm. on For. Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934) (Secretary of State Cordell Hull)).

\textsuperscript{12} Warsaw Convention, supra note 2, art. 1, at 3014.

\textsuperscript{13} Article 17 provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

\textit{Id.} art. 17, at 3018. There has been a good deal of recent litigation over the term "bodily injury" and whether it includes mental or emotional injury. \textit{See, e.g.,} Eastern Airlines v. Floyd, 499 U.S. 530 (1991); Carey v. UAL, 255 F.3rd 1044 (9th Cir. 2001); Bobian v. CSA Czech Airlines, Civ. No. 02-1627 (DRD), 2002 U.S. Dist. LEXIS 22065 (D. N.J. Oct. 30, 2002).

\textsuperscript{14} Article 18(1) provides: "The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." Warsaw Convention, supra note 2, art. 18(1), at 3019.

\textsuperscript{15} Article 19 provides: "The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods." \textit{Id.}

\textsuperscript{16} \textit{See id.} arts. 22, 25, at 3019-20.

\textsuperscript{17} Coyle v. P.T. Garuda Indonesia, 180 F. Supp. 2d 1160 (D. Or. 2001).

\textsuperscript{18} \textit{See S. R. Shapiro, Construction and Validity of "Venue" or "Jurisdiction" Provision of Article 28(1) of Warsaw Convention (49 Stat 3000 et. seq.) Relating to International Transportation by Air, 6 A.L.R.3d 1272 (1966).}
under Article 28(1), then federal jurisdiction cannot be estab-
lished under the "arising under" clause of 28 U.S.C. §1331.19 Ar-
ticle 28 provides:

1. An action for damages must be brought, at the option of
the plaintiff, in the territory of one of the High Con-
tracting Parties, either before the court of the domicile of
the carrier or of his principal place of business, or where
he has a place of business through which the contract has
been made, or before the court at the place of the des-
tination.20

2. Questions of procedure shall be governed by the law of
the court to which the case is submitted.

Article 28 limits the fora in which the plaintiff may bring a
cause of action to the territory of one of the High Contracting
Parties. The plaintiff may select the initial forum for the action,
but is limited to the four fora listed. These sites are all carrier-
oriented, rather than plaintiff-oriented. The domicile or prin-
cipal place of business of the carrier, where the carrier has a place
of business at which the contract was made, or the place of des-
tination, all focus primarily upon the convenience of the carrier.

19 It was once thought that Warsaw did not create a cause of action. That has
since changed. See Benjamins v. British European Airways, 572 F.2d 913, 915 (2d
Cir. 1978).

20 Warsaw Convention, supra note 2, art. 28, at 1324. The Convention may well
be the world's most widely ratified private international law treaty, with 150 par-
ties. See ICAO Treaty Collection, at http://www.icao.int/icao/en/leb/wc-
hp.htm, for an up-to-date list of the High Contracting Parties.

The British translation of Article 28 differs from that of the United States. It
provides:

An action for damages must be brought, at the option of the plain-
tiff, in the territory of one of the High Contracting Parties, either
before the court having jurisdiction where the carrier is ordinarily resi-
dent, or has his principal place of business, or has an establishment by
which the contract has been made or before the court having juris-
diction at the place of destination.

language highlights the difference in translation).

The official text of the Warsaw Convention is in French and, accordingly, the
Convention must be interpreted in accordance with the legal meaning of the
Saks, 470 U.S. 392, 399 (1985). The French version is as follows:

(1) L'action en responsabilité devra être portée, au choix du demandeur,
dans le territoire d'une des Hautes Parties Contractantes, soit devant le tri-
bunal du domicile du transporteur, du siège principal de son exploitation
ou du lieu où il possède un établissement par le soin duquel le contrat a été
conçu, soit devant le tribunal du lieu de destination.

(2) La procédure sera régulée par la loi du tribunat saisi.
In reality, there are only three available forum sites, as the domicile of the carrier is almost invariably also its principal place of business (at least under U.S. law).\textsuperscript{21}

Some courts, on the other hand, have intimated that it is implied in the Convention that the plaintiff's domicile is one of the sites listed in the Convention.\textsuperscript{22} The suggestion follows that, because the place of destination is usually the plaintiff's domicile, then the plaintiff is, in fact, allowed to bring an action in his or her domicile.\textsuperscript{23} As we shall see, however, the forum of the passenger's domicile did not become an available forum option, as a matter of right, until the 1999 Montreal Convention.\textsuperscript{24}

Article 28 affords the plaintiff the limited ability of choosing where initially to bring his or her cause of action. Article 28 does not provide the plaintiff the opportunity to bring the cause of action in the place where the negligent act or omission occurred, the site of the accident, wherever the airline conducts commercial activities, or the domicile or residence of the plaintiff, unless that place happens also to be one of the four sites listed in the Convention.

\textbf{C. "AT THE OPTION OF THE PLAINTIFFS"}

To pursue a cause of action under Warsaw, the complaint must be brought in one of the four designated fora "at the option of the plaintiff."\textsuperscript{25} But this clause has never been read to

\textsuperscript{21} Osborne v. British Airways PLC Corp., 198 F. Supp. 2d 901, 905 (S.D. Tex. 2002). In Wyler v. Korean Airlines Company, Ltd., 928 F.2d 1167 (D.C. 1991), the Court of Appeals for the District of Columbia Circuit explained that U.S. courts have interpreted the Article 28(1) phrase du domicile du transporteur as the carrier's place of business. The court noted that: "[T]he French definition of 'domicile' that would encompass any place of significant business is only relevant for questions of personal jurisdiction within France." Id. at 1175. French and British courts differ as to what the principal place of business implies. See Rothmans, supra note 20.

\textsuperscript{22} See Coyle, 180 F. Supp. 2d at 1163, 1169.

\textsuperscript{23} Id. at 1163 ("The Warsaw Convention has been interpreted in a manner that tends to provide an injured traveler (or the survivors) a forum in the traveler's home country."); see also Gasca v. Empresa de Transporte Aero Del Peru, 992 F. Supp. 1377 (S.D. Fla. 1998). Both Coyle and Gasca involved situations where the passengers, holding round trip tickets from/to the United States, died abroad on crashes aboard flights that had been purchased abroad as separate side trips. See James D. MacIntyre, Where Are You Going? Destination, Jurisdiction, and the Warsaw Convention: Does Passenger Intent Enter the Analysis?, 60 J. Air L. & Com. 657 (1995).

\textsuperscript{24} Although the forum of the passenger's domicile was first adopted in the 1991 Guatemala City Protocol, that Protocol has not entered into effect and almost certainly never will. See Guatemala City Protocol, supra note 7.

\textsuperscript{25} Warsaw Convention, supra note 2, art. 28(1), at 3020.
give the plaintiff the absolute right to decide which court will hear the case. The defendant still has the right, to the extent possible under the law of the forum, to challenge jurisdiction and/or venue. The clause only gives the plaintiff the limited ability to determine which court will initially entertain jurisdiction over the case. At first glance, this does not appear significant. It is plaintiff's choice of forum, however, that will determine the procedural law to be applied in determining whether the cause of action will be dismissed, removed, or transferred, as Article 28(2) specifically provides that procedural questions are to be governed by the law of the forum.

The Fifth Circuit Court of Appeals has addressed the proposition that the language of Article 28(1), "at the option of the plaintiff," grants plaintiffs "the absolute and inalterable right to choose the national forum in which their claims will be litigated." The Fifth Circuit disagreed, holding that the Convention is not intended to alter a country's forum selection process:

[A]rticle 28(1) offers an injured passenger or his representative four forums in which a suit for damages may be brought. The party initiating the action enjoys the prerogative of choosing between these possible national forums but that selection is not invidious. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws. As one commentator on the Convention has stated: "No evidence can be found anywhere that the drafters of the Convention intended to alter the judicial system of any country." We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non conveniens.

The court concluded that the plaintiff's construction of the Article would allow American courts to be the forum for litigation with which they have no connection and which would be antithetical to the underlying purpose of the Convention of ensuring that a cause of action is brought in a forum which has an actual interest in the cause of action. Accordingly, so the court ruled, although Article 28 provides that the forum is at the "op-

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27 Id. at 1161 (citing Robbins, Jurisdiction Under Article 28 Of The Warsaw Convention, 9 McGill L.J. 352, 355 (1963)).
tion of the plaintiff," it does not mandate that the action must be heard in the forum first selected by the plaintiff.

III. SUBSEQUENT AMENDMENTS AND THE IATA AGREEMENTS

A. PRE-MONTREAL 1999

As the airline industry matured, the Warsaw Convention showed signs of aging. The first attempt to give Warsaw a face-lift was at the Hague in 1955. The Hague Protocol did not amend Article 28, but it did attempt to raise the limit of liability, though only to $16,600.\textsuperscript{28} The United States did not ratify the Hague Protocol. However, many years later, when the United States ratified Montreal Protocol No. 4, it was thought then that such ratification automatically meant that the United States became a party to the Hague Protocol. That no longer seems to be the case. According to a press release issued by the White House on July 31, 2002, the United States is now moving forward independently to ratify the Hague Protocol.\textsuperscript{29}

The Guadalajara and Guatamala City Protocols and Montreal Protocols Numbers 1, 2, and 3 were all subsequent attempts to modernize Warsaw, but were never ratified by the United States.\textsuperscript{30} The United States, did, however, ratify Montreal Protocol No. 4, which applies only to cargo.\textsuperscript{31}

B. THE FIFTH FORUM

The 1971 Guatemala City Protocol was the first of the Warsaw modifications to adopt the "fifth forum," allowing a plaintiff to bring a cause of action in the domicile or permanent residence of the passenger-victim if the airline has a place of business there.\textsuperscript{32} Article XII of Guatemala was designed to amend Article 28 as follows:

\textsuperscript{28} Hague Protocol, \textit{supra} note 7.


\textsuperscript{30} Montreal Protocols No. 1 and No. 2 have fewer than 50 contracting parties to date. Montreal No. 3 has 23 contracting parties to date. \textit{See} ICAO Treaty Collection, \textit{at} http://www.icao.int/icao/en/leb (last visited Jan. 26, 2003).

\textsuperscript{31} \textit{See supra} note 7 and accompanying text.

\textsuperscript{32} Jukka Heinonen, \textit{The Warsaw Convention Jurisdiction and the Internet}, 65 J. Air L. & Com. 453, 456 (2000). Allowing victims or their survivors to sue in the courts of their domiciles had its genesis in maritime law where it seems first to have appeared in Article 13(c) of the 1967 Brussels Maritime Convention on Lug-
In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article [referring to Article 28(1)], or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.\(^3\)

Only Colombia, Costa Rica, Cyprus, Dominican Republic, Greece, Italy, Netherlands, Nigeria, Seychelles, and Togo have ratified this Protocol. The United States has not. The Protocol has not entered into effect and, in light of Montreal 1999, almost certainly never will.

Because the United States and many other nations had failed to ratify the Guatemala and Montreal Protocols and were also dissatisfied with the liability limits, the International Air Transport Association (IATA) in 1996 sought to obtain agreements from its member carriers to update the limits of IATA’s earlier Intercarrier Agreement of 1966 (which provided for limits of US$75,000) and to allow passenger victims or their survivors to enjoy unlimited recoveries based on and determined by the law of their domiciles.\(^4\) The 1996 IATA Agreements consist of the IATA Intercarrier Agreement on Passenger Liability (IIA) and the IATA Agreement on Measures to Implement the IATA Inter-

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\(^3\) Guatemala City Protocol, *supra* note 6, at 615.

\(^4\) *See* Weigand, *supra* note 9, at 907. In November 1965, the U.S. gave notice of denunciation of the Warsaw Convention in large part because of the low limits of liability for personal injury and death. In response, IATA brought about an agreement among a majority of U.S. and foreign international air carriers flying into the U.S. to increase the limits of liability to $75,000 inclusive of legal fees or $58,000 exclusive of legal fees for death or bodily injuries. The parties also waived their Article 20(1) defense and accepted absolute liability, i.e., liability without proof of fault. *See* 49 U.S.C.A. \$ 40105 Historical and Statutory Notes. The 1996 IATA Agreements had two tiers—the first: absolute liability with the limit capped at approximately $130,000 (i.e., 100,000 SDRs); and the second: unlimited liability but with the carrier’s Article 20(1) defense restored.
carrier Agreement (MIA).\textsuperscript{35} Paragraph 1 of the IIA describes its purpose as replacing the Warsaw Convention's liability cap with the damage model of the passenger's domicile:

To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.\textsuperscript{36}

The Explanatory Note to the Agreement states that: "Such waiver by a carrier may be made conditional on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages under the Intercarrier Agreement. But this is an option."\textsuperscript{37}

The 1996 IATA Agreements thus gave plaintiffs and carriers the ability to reference the law of the victim's domicile, but did not allow plaintiffs to bring their causes of action in their domiciles unless, of course, the domicile happened to be one of the four fora listed in Article 28. Because the 1996 IATA Agreements did not specifically provide for a fifth forum, the U.S. Department of Transportation (DOT) delayed approving them.\textsuperscript{38} In the DOT's Order relating to the Agreements, DOT conditioned its approval upon inclusion of the fifth forum provision for all "operations to, from, or with a connection or stopping place in the United States."\textsuperscript{39}

C. MONTREAL 1999

Although most international carriers were bound by the 1996 IATA Agreements, they were merely intercarrier contractual arrangements and were neither "public law" nor international


\textsuperscript{37} Id.


treaties. As a result, the International Civil Aviation Organization (ICAO) continued to work towards a new Warsaw system and, following many preliminary efforts, submitted a draft convention before a Diplomatic Conference held in Montreal in May 1999.\textsuperscript{40} On May 28, 1999, representatives from over fifty countries, including the United States, approved a new Convention for the Unification of Certain Rules for International Carriage by Air, colloquially known as "Montreal 1999."

During the negotiations, the U.S. Government "insisted upon the addition of the 'fifth forum,"'\textsuperscript{41} allowing a passenger to bring a cause of action in that passenger's principal place of residence if the defendant has a place of business there. On submittal to Congress on September 6, 2000, then President Clinton explained the benefits of adopting the Montreal Convention:

Upon entry into force for the United States, the Convention, where applicable, would supersede the Warsaw Convention, as amended by the Protocol to Amend the Warsaw Convention, done at Montreal September 25, 1975 ("Montreal Protocol No. 4"), which entered into force for the United States on March 4, 1999. The Convention represents a vast improvement over the liability regime established under the Warsaw Convention and its related instruments, relative to passenger rights in the event of an accident. Among other benefits, the Convention eliminates the cap on carrier liability to accident victims; holds carriers strictly liable for proven damages up to 100,000 Special Drawing Rights (approximately $135,000) (Special Drawing Rights represent an artificial "basket" currency developed by the International Monetary Fund for internal accounting purposes to replace gold as a world standard); provides for U.S. jurisdiction for most claims brought on behalf of U.S. passengers; clarifies the duties and obligations of carriers engaged in code-share operations; and, with respect to cargo, preserves all of the significant advances achieved by Montreal Protocol No. 4.\textsuperscript{42}

The United States has not yet ratified Montreal 1999, but is in the process of doing so. It will not come into force until thirty states have ratified; currently 25 have done so.\textsuperscript{43}


\textsuperscript{41}See Rodriguez, \textit{supra} note 38, at 33.


\textsuperscript{43}See ICAO Treaty Collection, \textit{supra} note 30. The 25 nations that have so far ratified Montreal 1999 are: Bahrain, Barbados, Belize, Botswana, Canada, Cyprus,
IV. FORUM NON CONVENIENS

The doctrine of forum non conveniens (FNC) is designed to prevent plaintiffs from choosing an inconvenient forum that may "'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." The doctrine, originally appearing in Scottish law, entered into reasonably common usage in the United States in the 1920s. When the more convenient forum is in another federal jurisdiction, the case may be transferred under 28 U.S.C.A. § 1404, which is in effect the codified version of FNC, allowing the transfer from one federal court to a more convenient federal court. But when the more convenient forum is a foreign jurisdiction, the case is not within the purview of § 1404 (or § 1406), but may still be dismissed under the common law doctrine of forum non conveniens.

The purpose of forum non conveniens is to provide a court with authority to transfer cases to a foreign forum pursuant to "the court’s inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice, or oppression." But although a court has the inherent power to transfer actions under forum non conveniens, "[t]he central purpose of a forum non conveniens inquiry is to determine where trial will be most convenient and will serve the ends of justice."

There are two seminal Supreme Court cases that have shaped the modern analysis of foreign non conveniens: Gulf Oil Corp. v. Gilbert and Piper Aircraft Co. v. Reyno. Gilbert involved a transfer to Czech Republic, Greece, Japan, Jordan, Kenya, Kuwait, Mexico, Namibia, New Zealand, Panama, Paraguay, Peru, Romania, Slovakia, Slovenia, Syrian Arab Republic, United Arab Emirates, and The Former Yugoslav Republic of Macedonia.

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46 WRIGHT, supra note 44, § 3828. Although technically, a case may be dismissed following a successful FNC motion, the case is usually dismissed conditioned upon suit being filed in, and the defendant subjecting itself to, the jurisdiction of the foreign court to which the FNC transfer is requested. See infra note 81. It is thus, in effect, a transfer of the case.
47 Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824 (quoting In re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1161 (5th Cir. 1987) and Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 530 (1947)).
between federal courts while *Reyno* involved a transfer from a federal court to a court abroad.

**A. Gulf Oil Corp. v. Gilbert**

In *Gilbert*, a Virginia resident filed suit in the District Court for the Southern District of New York. As a result of a fire occurring in plaintiff's Virginia warehouse, plaintiff filed suit against a Pennsylvania corporation licensed to do business in Virginia and New York. The defendant filed an FNC motion to dismiss, alleging that the proper venue was Virginia, where the plaintiff and the witnesses reside, where the defendant does business, and where the accident in question occurred. The district Court dismissed the case based upon FNC, but the court of appeals reversed.

Reversing the court of appeals, the Supreme Court held that when an FNC argument is made "it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes the criteria for choice between them."51 In examining the case, the Supreme Court created a multi faceted test—which has since been extensively applied—first addressing whether an adequate alternate forum exists and then balancing or weighing private and public interests to determine whether a transfer is proper. The Court noted, however, that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."52

In examining the private interests of the litigants, the Court considered the following factors:

1. the relative ease of access to sources of proof;
2. the availability of compulsory process for attendance of unwilling witnesses;
3. the costs of obtaining attendance of willing witnesses;
4. the possibility of viewing the premises, if appropriate; and
5. all other factors which would make the trial easy, expeditious, and inexpensive.

The Court next turned to the public interest and considered these additional factors:

1. administrative difficulties with congested dockets;

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51 *Gulf Oil Corp.*, 330 U.S. at 506-07.
52 Id. at 508.
2. jury duty as a burden that should not be imposed upon a community which has no relation to the litigation;
3. local interest in having local controversies decided locally; and
4. conflicts of law questions and foreign law should not be forced upon a non local court where the local court could apply its own laws.\textsuperscript{53}

The Court noted specifically that the plaintiff was not a resident of New York nor was any witness, nor did any event connected with the cause of action occur there. Every person who participated in the allegedly negligent acts and other witnesses, with the exception of potential expert witnesses, resided in Virginia. The Court faulted the plaintiff for arguing that the forum was not inconvenient instead of asserting that it served any convenience.\textsuperscript{54}

In reversing the Second Circuit, the Supreme Court held that the district court did not exceed its powers in dismissing the complaint and “remitting [it] to the courts of [Gilbert’s] own community.”\textsuperscript{55} The central focus of the Court’s analysis was convenience: it was more convenient to hold the trial where the plaintiff’s business was located than in a forum which technically was available but which did not have any significant interest in the litigation—even if it provided to the plaintiff more favorable laws and a more favorable opportunity for an enhanced monetary recovery.

B. \textit{Piper Aircraft Co. v. Reyno}

Thirty-four years later, the Supreme Court reexamined its approach in \textit{Gilbert} and decided to go on to the next logical and very desirable step. In \textit{Piper Aircraft Co. v. Reyno}, after an airplane crashed in Scotland, the estates of the Scottish citizens who died in the accident brought wrongful-death actions against Piper Aircraft Co. (Piper) and Hartzell Propeller, Inc. (Hartzell) in a California state court.\textsuperscript{56} All the deceased victims were Scottish nationals. Piper manufactured the plane in Pennsylvania. Hartzell manufactured the propeller in Ohio. The plane was

\textsuperscript{53} Id. at 509-11.
\textsuperscript{54} Id at 511. The Court rejected the plaintiff’s argument that “an action of this type, involving, as it does, a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury [in Virginia] which is surely unaccustomed to dealing with amounts of such a nature.” \textit{Id.} at 510.
\textsuperscript{55} Id. at 512.
\textsuperscript{56} \textit{Reyno}, 454 U.S. at 235.
owned by Air Navigation and Trading, Co., Ltd, registered in Great Britain, and operated by McDonald Aviation, Ltd., a Scottish air taxi service. The plaintiff acknowledged that the action was filed in the United States because U.S. laws are more favorable on liability, capacity to sue, and damages.

On defendants' motions, the action was first removed to a federal district court in California and then transferred to the United States District Court for the Middle District of Pennsylvania. Defendants next moved to dismiss the action on forum non conveniens grounds. The district court granted their motion, but the Court of Appeals for the Third Circuit reversed, holding that dismissal is barred when the law of the alternative forum is less favorable to the plaintiff than the law of the chosen forum.

Reversing the court of appeals, the Supreme Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."57 The Court further reasoned that "Gilbert implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law."58 Moreover, creating a contrary standard would require courts to apply the law of the alternative forum to determine which law is more favorable. This is antithetical to the purpose of the FNC doctrine, which is designed to "help courts avoid conducting complex exercises in comparative law."59 American courts would then become even more attractive to foreign plaintiffs, so the Court reasoned, as the American court would not dismiss the case unless the foreign jurisdiction's laws were not less favorable to the plaintiff, thus causing even more congestion in U.S. courts.

57 Id. at 247.
58 Id. at 249. The Court further commented on why favorability of the law is not considered:
[1]f conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless ... plaintiffs will select that forum whose choice of law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper.
Id. at 250; see also id. at 255 ("Although the relatives of the decedent may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly [in the Scottish courts].").
59 Id. at 251.
The Court also held that "under Gilbert, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice."\(^{60}\) It discredited the court of appeals' view that more, let alone that decisive, weight should be given to the plaintiff's choice of forum. And perhaps most importantly, it credited the district court's reasoning that the presumption that might normally apply to a plaintiff's choice of forum "applies with less force when the plaintiff or real parties in interest are foreign."\(^{61}\) The Court explained the difference in convenience for domestic and foreign plaintiffs:

The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster v. Lumbermens Mutual Casualty Co.*\(^{62}\), the Court indicates that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.\(^{62}\)

The Court concluded that the district court was not unreasonable in finding that there would be fewer evidentiary problems if the trial were in Scotland. Finally, so the Court held, "[f]inding that trial in the plaintiff's chosen forum would be burdensome . . . is sufficient to support dismissal on the grounds of forum non conveniens."\(^{63}\) The Supreme Court thus reversed the court of appeals, dismissed the action on FNC grounds, and established the relevant and still prevailing principles for applying the FNC doctrine.\(^{64}\)

V. INTERACTION OF FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES

The United States has systematically entered into numerous Friendship, Commerce, and Navigation (FCN) treaties, or their

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\(^{60}\) *Id.* at 249.

\(^{61}\) *Id.* at 255.

\(^{62}\) *Id.* at 255-56 (citing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

\(^{63}\) *Id.* at 268.

\(^{64}\) *Id.* at 259-60.
equivalent, in past years. The standard treaty language provides that:

National and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.

The comparable provision in the U.S.-Belgium treaty states:

To this end they shall in particular have right of access, on the same basis and on the same conditions as nationals of such other Party, to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction and shall have right to the services of competent persons of their choice.

These treaties, in short, accord citizens of the foreign nation signatories national treatment in equal access to American courts. If the Warsaw Convention plaintiff is a citizen of a nation that has an FCN or comparable treaty with the United States providing for equal access to United States courts, then the foreign plaintiff must presumptively be treated in the same manner as the typical United States citizen, including requiring the forum non conveniens standards to be applied under much the same standards as would be applied to American citizens.

One of the first cases presenting such facts was Irish National Insurance Co. v. Aer Lingus Teoranta. In that case, Aer Lingus transported a carton containing integrated circuits from Ireland to New York. On arrival at New York, the container was damaged. Though all parties involved were Irish corporations, the

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68 See Blanco v. Banco Industrial De Venezuela, 997 F.2d 974, 981 (2d Cir. 1993).

plaintiff filed the action in the Eastern District of New York apparently to avail itself of the more favorable United States law. The district court analyzed the facts based upon Gilbert's private and public interest factors and noted that "most of the significant sources of proof in this case are located in Ireland." The plaintiff argued that the court had an interest in protecting those with a property interest in shipments delivered at Kennedy Airport. The district court concluded, however, that plaintiff's real purpose for bringing the action in New York was "to avoid the possibility that application of Irish law will result in a smaller recovery for plaintiff" and dismissed the case on forum non conveniens grounds.

On appeal, the Second Circuit held that under the terms of a treaty between Ireland and the United States, citizens of Ireland were entitled to the same treatment and rights as United States citizens. The court further held that because the "district court should have applied the same forum non conveniens standards that it would have applied to a United States citizen . . . [and] failed to do so, . . . this failure tainted its entire holding." Alternatively, the Second Circuit disagreed with the district court's findings of fact based upon the relevant interest analysis and more (or less) also concluded that a weighing of the public and private interest factors did not favor dismissal to Ireland.

In reaching its conclusion with respect to the impact of the FCN treaty, the Second Circuit arguably failed to appreciate that the specific language of these treaties requires that foreigners enjoy little more than "equal access" to United States courts. The Irish plaintiff was clearly given equal access and was then subject to the same Gilbert factors as would have been applied to a U.S. citizen. Just as the Gilbert plaintiff was sent back to Virginia, so too the Irish plaintiff, under the Gilbert factors, could have been sent back to Ireland. To be sure, the Second Circuit also disagreed with the district court's weighing of the Gilbert factors, which was presumably the principal reason for the reversal.

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71 Id. at *5. The court noted that Aer Lingus indicated that, on transfer to an Irish court, Aer Lingus would not contest personal jurisdiction or assert any statute of limitations defense. The court observed, however, that were Aer Lingus to do so, the court would allow the action to be reinstated in the district court.
Since *Aer Lingus*, there have been other cases involving the issue of the impact of an FNC treaty on the "right" of foreigners to bring suit in a U.S. forum and—as the foreign plaintiffs usually argue—to be free from the possible application of the forum non conveniens doctrine returning them to the forum of their domicile (notwithstanding that most, if not all, of the principal contacts in the case point to that foreign forum). They have generally reached conclusions different than that reached in *Aer Lingus*.

In *Jennings v. Boeing Co.*, the surviving Irish spouse of an Irish victim of a helicopter crash in the North Sea brought suit against the manufacturer in Pennsylvania, seeking punitive damages and arguing that, under the U.S.-Ireland FCN treaty, a foreign plaintiff had as much right as an American to benefit from the more favorable substantive law and damage determinations in U.S. courts. Facing the issues "squarely," the Pennsylvania district court observed that it was not a matter of convenience for the Irish widow to sue in the United States; rather she filed here simply because, given the "availability of [Pennsylvania's] strict liability theories, more liberal measure of damages, and the possible right to punitive damages" the Pennsylvania forum was clearly "a more attractive forum for her." Likewise, as the court added, the defendant invokes FNC because "it believes that any ultimate recovery in these courts [of England or Scotland] is likely to be less than in this court."

Invoking the Reyno principle that an FNC motion may not be denied merely because the law in the transferee forum is "less favorable to the plaintiffs," the district court concluded that: "As an Irish citizen, [the widow] is entitled to the same rights of recovery afforded to any citizen of a State of the Union, other than Pennsylvania, who files [any] action in this federal district

73 See, e.g., *Blanco v. Banco Industrial De Venezuela*, 997 F.2d 974, 981 (2d Cir. 1993) (noting the presence of the U.S.-Venezuela FCN treaty and, accordingly, imposing no "discount" on the Venezuelan plaintiffs' choice of a New York forum, but nonetheless dismissing on FNC grounds based on the *Gilbert* factors); *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978) (upholding an FNC dismissal of a suit by an Iranian national despite an equal access clause in an FCN treaty); see also *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India v. Union Carbide Corp.*, 809 F.2d 195 (2d Cir. 1987).


75 *Id.* at 799.

76 *Id.*
In other words, to the extent that "an American non-resident of Pennsylvania" might be subject to being dismissed or transferred to another court on FNC grounds, so too is an Irish plaintiff or any other foreign plaintiff, whether benefiting or not from an FCN treaty.78

Following a judicious weighing of Gilbert's public and private interest factors, the court found that, because the Gilbert factors "overwhelming favor dismissal," the court need not resolve the issue whether the presumption favoring a plaintiff's choice of forum must, under the applicable FCN treaty, be applied to Irish citizens as if they were U.S. citizens.79 The court then continued its discussion of this issue in a footnote, which observed that:

Where a plaintiff brings suit in a forum far distant from his or her home, be that home in a foreign nation or in a distant state of the United States, it is reasonable to infer that the plaintiff's choice of forum was based on factors other than the plaintiff's own convenience. Thus, as a practical matter, the presumptive appropriateness of a plaintiff's choice should be diminished where the plaintiff brings suit in a distant forum, and in this respect foreign and United States plaintiffs should be treated alike.80

The court thus concluded that dismissal on FNC grounds "is appropriate under conditions that will be imposed."81

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77 Id. at 800. In referring to "rights of recovery," it is likely, given the result of the case, that the court was in fact thinking more in terms of "right to bring suit," i.e., right of access.

78 Id. The court further concluded:

But equally, to the extent that the court may consider and dismiss a case for forum non conveniens as to an American non-resident of Pennsylvania who files an action in Pennsylvania, so may it dismiss an action as to an Irish citizen. The Treaty provides for similar treatment in like situations; clearly it affords Irish citizens no greater rights than those afforded to United States citizens. Therefore, if a diversity action filed by an American citizen may be dismissed even though such a dismissal might result in the loss of a potential punitive damages award, so may such an action be dismissed when filed by an Irish citizen entitled to national treatment under the Treaty.

Id.

79 Id. at 804.

80 Id. at 804 n. 10.

81 Id. at 809. The "conditions" imposed by the court are those normally imposed when, as here, a case is dismissed on FNC grounds with the prospect that it will thereafter be filed in a foreign court. Defendant must:
Moving from foreign plaintiffs to U.S. non-resident plaintiffs, a recent Second Circuit decision, *Iragorri v. Otis Elevator*, held that merely because a U.S. citizen sues in a court (in Connecticut) other than that of his residence (Florida) does not *ipso facto* deprive him of the benefit of the presumption that normally attends a plaintiff's choice of forum.\(^8^2\) While not involving either a foreign plaintiff or an FCN treaty, the court indicated that it was "mindful" of the possible impact of its decision in such a context. The accident giving rise to the complaint occurred in Cali, Colombia, where the victim—though a U.S. citizen—was residing at the time. Were no presumption to attend a plaintiff's choice of forum in a state other than that of his residence, FNC could have been applied in *Iragorri*, leaving plaintiffs to reinstate their suit in Colombia. But the Second Circuit concluded that it would be wrong not to apply the presumption when, as was the fact in that case, the plaintiff was not only a U.S. citizen, but chose the Connecticut forum not for tactical reasons but because he was able to obtain jurisdiction over all three defendants only in Connecticut and could not have done so in Florida. On the other hand, so the court concluded, where a foreign plaintiff chooses a U.S. forum:

[A] plausible likelihood exists that the selection was made for forum shopping reasons, such as the perception that United States courts award higher damages than are common in other countries. Even if the U.S. district was not chosen for such forum-shopping reasons, there is nonetheless little reason to assume that it is convenient for a foreign plaintiff.\(^8^3\)

While the *Gilbert* factors (including the jurisdictional twist of *Iragorri*) will thus apply to both foreigners and U.S. citizens, the

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(1) submit itself to the jurisdiction of the English or Scottish courts for all purposes relevant to this cause of action; (2) waive any statute of limitations defense in any action filed in those courts by the plaintiff within one year from this date; (3) not contest its liability for compensatory damages; (4) provide plaintiff access to all relevant evidence in its custody and control located in the United States or elsewhere regarding issues of liability and/or damages including punitive damages in the event that such issues are appropriately raised in the plaintiff's subsequent action; and (5) pay any final judgment for damages, costs or attorney's fees of any kind awarded in the British or Scottish courts in the plaintiff's subsequent action (subject to any rights of appeal).

*Id.*

\(^8^2\) *Iragorri v. Otis Elevator*, 274 F. 3d 65 (2d Cir. 2001).

\(^8^3\) *Id* at 71.
strength of ties to the U.S. forum will be significantly greater for an American citizen or resident than for a foreigner.\textsuperscript{84}

VI. INTERACTION BETWEEN ARTICLE 28 JURISDICTION AND THE FORUM NON CONVENIENS DOCTRINE

Although Article 28 allows the plaintiff, at his or her option, to choose the initial forum within the realm of the allowable three (or four) Article 28 sites, it does not—or, at least, did not until \textit{Hosaka}—preclude the defendant from then questioning the choice of forum and moving to apply the rules of that forum to dismiss or transfer the action. In short, it was generally assumed, before \textit{Hosaka}, that FNC was available under Article 28(2) as a procedural tool to try to defeat the increasing resort to U.S. courts by foreigners in aviation crash cases.\textsuperscript{85}

In \textit{In re Air Crash off Long Island New York, on July 17, 1996},\textsuperscript{86} the Southern District, while affirming the applicability of the FNC doctrine in a Warsaw Convention context, may well have laid the groundwork for effectively precluding forum non conveniens dismissals even when the plaintiffs are all foreign nationals. On July 17, 1996, TWA Flight 800 took off from John F. Kennedy International Airport in New York destined for Paris. Minutes later, it crashed off the shore of Long Island with no survivors. At least 45 of the plaintiffs were French citizens, who filed an action against Boeing and TWA, seeking punitive, pre-death pain and suffering, and compensatory damages. At a later point in the litigation, the defendants filed a motion to dismiss

\textsuperscript{84} See also WIWA v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (according deference to plaintiffs’ choice where two of the plaintiffs, though not U.S. citizens, were lawful U.S. residents, though not of the southern district of New York. The suit, however, was brought under the Torture Victim Protection Act, which, the court noted, “expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts.”); Wesoke v. Contract Serv. Ltd., No. 00 Civ. 1188 (CBM), 2002 U.S. Dist. LEXIS 12832 (S.D.N.Y. July 15, 2002) (according deference to selection of New York forum by U.S. citizen-resident of Florida where selection was to obtain personal jurisdiction over European defendants).

\textsuperscript{85} See supra note 26; see also Chukwu v. Air France, 218 F. Supp. 2d 979 (N.D. Ill. 2002) (holding that forum non conveniens is available in a Warsaw Convention case, but concluding that there was not sufficient proof that Nigeria was an adequate alternative forum or that the public and private interest factors favor dismissal); \textit{In re Air Crash Disaster of Aviateca Flight 901 Near San Salvador, El Salvador} on August 9, 1995 (29 F. Supp. 2d 1333, 1353 (S.D. Fla. 1997)); \textit{In re Air Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1990}, 540 F. Supp. 1141 (D.D.C. 1982); \textit{infra} note 130 and accompanying text.

\textsuperscript{86} \textit{In re Air Crash off Long Island New York, on July 17, 1996}, 65 F. Supp. 2d 207 (S.D.N.Y. 1999).
the French plaintiffs based on forum non conveniens grounds, arguing that damages should be determined by a French court, and agreeing that if the actions were transferred to a French court, they would consent:

(1) ... to the jurisdiction of the courts of France for trial; (2) not to contest liability for full compensatory damages in the courts of France to any plaintiff or beneficiary who, under the applicable law, suffered a compensable injury as a proximate result of the accident and promptly to try such damages if the claim cannot be settled; (3) to promptly pay any damages awarded by the courts of France, subject to any right to appeal in that forum; and (4) to treat as tolled any statute of limitations under French law for any plaintiff or named beneficiary in a pending U.S. Flight 800 action, provided that the proceedings are commenced in France within 120 days of forum non conveniens dismissal.\(^8\)

\(\text{A. The Gilbert Test: Adequate Alternative Forum}\)

The district court applied the Gilbert test of determining if there is an adequate alternative forum and then balanced the public and private interests. Because the defendants agreed to subject themselves to the jurisdiction of France if the action were transferred there, the defendants would be subject to personal jurisdiction and service of process in the alternative forum. The plaintiffs, however, argued that France was not an adequate forum because: the defendants had not shown that the action could have originally been brought in France (under Warsaw Article 28); forum non conveniens is not available when plaintiffs bring suit under the Warsaw Convention; and the defendants had not shown that France would accept a waiver of the statute of limitations of Article 29.

The court found that France would be a proper and adequate forum.\(^8\) In addressing the plaintiffs’ first contention, i.e., whether the action could have originally been brought in France, the court held that, although Article 28 provides the fora in which a plaintiff may bring a cause of action, it does not limit the fora to which a court may transfer a case. The court then acknowledged that, while the case involves a request for a

\(^8\) Id. at 210; see supra note 81.

\(^8\) In re Air Crash off Long Island, 65 F. Supp. 2d. at 215. Although not specifically addressed by the district court, the Second Circuit has held that “it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.” Chesley v. Union Carbide Corp., 927 F.2d 60, 66 (2nd Cir. 1991).
dismissal, the court has the authority to condition the dismissal on the subsequent acceptance of jurisdiction by the foreign forum. The court also held that Article 28(1) must be read in conjunction with Article 28(2). Because forum non conveniens is a procedural tool available to U.S. courts, and because Article 28(2) provides that questions of procedure are to be governed by the law of the court where the case is brought, forum non conveniens is applicable to Warsaw Convention cases. The court concluded that: the plaintiffs had satisfied the statute of limitations by filing a cause of action in the U.S.; the defendants' waiver of the statute of limitations defense would enable a French court to hear the case; and the court could condition its dismissal on the French court's acceptance of the action. Accordingly, France was an adequate alternative forum.

Nevertheless, in the almost unique fashion in which it then applied and weighed Gilbert's public and private interest factors, the district court denied FNC and held that dismissal was not warranted.

B. THE PRIVATE INTEREST FACTORS

The court determined that the following private interest factors were all a "wash."  

1. The Relative Ease of Access to Sources of Proof

In addressing the relative ease of access to sources of proof, the district court held that there was not "a sufficient basis upon which to determine whether the ease of access to sources of proof in a trial for damages—even one in which Defendants do not contest liability for compensatory damages—favors dismissal." In so holding, however, the district court found "[a]s to damages, it is well-established that ease of access to proof of loss in the jurisdiction where decedent was domiciled weighs heavily in favor of dismissal." The district court further found that "it is likely that most of the evidence as to compensatory damages is located in France." The court also noted that although some of the plaintiffs indicated that some compensatory damages evi-

89 In re Air Crash off Long Island, 65 F. Supp. 2d at 213; see also supra note 81.
90 Id. at 214.
91 Id.
92 Id. at 216.
93 Id.
94 Id. at 215-16.
95 Id.
dence was located in the United States, it would be outweighed by evidence in France.\textsuperscript{96} The court itself thus provided a more than “sufficient basis” upon which to conclude that access to sources of proof definitively favored dismissal.\textsuperscript{97}

The court should also have addressed the fact that, in determining the amount of damages a plaintiff should receive, it is most appropriate—as the 1996 IATA Agreements so provide—to apply the law of the victim’s domicile. Unless the case were transferred, it is entirely possible that laws regarding lost wages, social security, pension benefits, insurance and other damage issues relating to the French plaintiffs would be decided by a United States jury under U.S. law simply because of an inadequate understanding of French law on these arcane issues. Moreover, if the court decided that French law should apply as to these issues, the task of translation and comprehension for the court and jury could be daunting.

The district court determined that “evidence as to punitive damages and pain and suffering before death is far more likely to be located in the United States.”\textsuperscript{98} The court thus addressed the difference in substantive law between the United States and France. Yet, one of the principal purposes of the FNC doctrine is to “help courts avoid conducting complex exercises in comparative law.”\textsuperscript{99} Nonetheless, the Court did so and then acknowledged evidentiary problems with awarding damages in France:

\begin{quote}
[T]here are open questions . . . as to the availability of such damages in the French Actions, whether the Actions are tried in the United States or in France. France, apparently does not allow punitive damages. In certain circumstances, however, France allegedly includes within an award of compensatory damages a component of “moral damages,” for which consideration of the degree of Defendants’ liability or culpability may require evidence likely to exist only in the United States. Moreover, the volume of evidentiary materials generated by an inquiry into
\end{quote}

\textsuperscript{96} Id.

\textsuperscript{97} See Alfadda v. Fenn, 159 F.3d 41 (2d Cir. 1998) (holding that the fact that “nearly all the documentary evidence” was located in France and that “the cost for witnesses to attend trial will be significantly lessened if trial is held in France” are significant factors in granting an FNC dismissal).

\textsuperscript{98} In re Air Crash off Long Island, 65 F. Supp. 2d at 216.

\textsuperscript{99} Piper Aircraft Co v. Reyno, 454 U.S. 235, 251 (1981); see supra note 59 and accompanying text.
moral damages may be quite large—possibly enough to outweigh materials concerning "pure" compensatory damages.\textsuperscript{100}

Even crediting the Court's "guesstimate" that the quantity of evidence regarding "moral damages" might outweigh the evidence regarding compensatory damages, it was, after all, the defendants who had requested the transfer even if the evidence of "moral damages" might prove to be overwhelming. Moreover, other courts have held that it is not the "number of witnesses or quantity of evidence" that necessarily counts, but the "materiality and importance" of evidence plus its "accessibility and convenience to the forum."\textsuperscript{101} If the only issue in a case is that of damages, then the relative ease of access to sources of proof should surely be in the place of the plaintiff's residence. As the Supreme Court explained in \textit{Reyno}, the relative ease of access to sources of proof is in effect a nonissue if the defendant does not contest liability.

2. The Availability of Compulsory Process for Attendance of Unwilling Witnesses and the Costs of Obtaining Attendance of Willing Witnesses

The court did not specifically address the availability of compulsory process for attendance of unwilling witnesses and the costs of obtaining attendance of willing witness. But for the same reasons as those discussed under its relative ease of access to proof analysis, the court held that it was not possible to determine whether the "witness" factor favored dismissal.\textsuperscript{102}

The court clearly erred in this analysis. The testimony of persons who knew the decedents would be highly relevant in determining damages.\textsuperscript{103} Witnesses as well as experts who could best form a basis for determining damages would almost surely all be located in the plaintiff's domicile; and it would obviously be more convenient to effectuate service and obtain evidence there on these issues. Indeed, it is difficult, if not impossible, for a federal court even to serve or compel the attendance or testimony of foreign witnesses "who live and work on another conti-

\textsuperscript{100} \textit{In re Air Crash off Long Island}, 65 F. Supp. 2d at 216.
\textsuperscript{101} \textit{Lueck v. Sundstrand Corp.}, 236 F.3d 1137, 1146 (9th Cir. 2001) (products liability suit by New Zealand victims of air crash in New Zealand dismissed on FNC grounds where New Zealand's administrative remedy was found to be adequate and "evidence relating to Plaintiff's injuries, medical expenses and loss of earnings...are all in New Zealand").
\textsuperscript{102} \textit{In re Air Crash off Long Island New York}, 65 F. Supp. 2d at 216.
\textsuperscript{103} \textit{See Pain v. United Techs. Corp.}, 637 F.2d 775, 777 (D.C. Cir. 1980).
nent." In any event, the costs of obtaining the attendance of such witnesses by any compulsory process would be considerably less in the plaintiff's domicile.

3. The Possibility of Viewing the Premises, If Appropriate

The court acknowledged that given the nature of the accident, viewing the scene of the accident would not add any relevant evidence. Moreover, by the time an aviation crash case reaches the damage determination stage, the area where the accident occurred would most likely have changed considerably from the time of the accident.

4. All Other Factors Which Would Make the Trial Easy, Expeditious, and Inexpensive

The court addressed a potpourri of factors which would make the trial easy, expeditious, and inexpensive. The court acknowledged the possibility of confusion arising from the translation of French documents and the translation of testimony from French to English, in addition to the time and expense involved in doing so. Other courts have held that requiring translation of evidence into English "would result in significant cost to the parties and delay to the court," and should thus be a factor that "militates strongly" in favor of dismissal to the foreign country. The district court did not embrace this approach.

Instead, the court resorted to two novel "factors"—France's lack of contingent fee arrangements, and the amount of money so far invested in the case by the plaintiffs and their U.S. attorneys—to hold that the factors which would make the trial easy, expeditious and inexpensive were also a "wash." The court observed that "the absence of contingent fee arrangements in France may place a considerable burden on the plaintiffs in the French Actions if the cases are dismissed here." While suggesting that the "absence of contingent fee arrangements in France . . . should not be given 'substantial weight,'" the court concluded that "the absence of contingent fee arrangements in

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104 Gonzales v. P.T. Pelange Niagra Mitra Inter'l, 196 F. Supp. 2d 482, 490 (S.D. Tex. 2002); see also Lueck, 236 F.3d at 1146-47.
105 In re Air Crash off Long Island, 65 F. Supp. 2d at 216.
106 Id. at 208.
108 In re Air Crash off Long Island, 65 F. Supp. 2d at 217.
a foreign forum is a permissible factor to weigh in the forum non conveniens analysis." The court reasoned that:

Defendants' willingness not to contest liability as to compensatory damages will not necessarily eliminate the concern that French Action plaintiffs may incur financial hardship in finding and retaining appropriate French counsel to pursue their claims if the claims were to be dismissed from this Court. Plaintiffs and their attorneys here, of course, have already invested time and money on discovery, independent investigations, experts, consultants, and pretrial proceedings.

The court thus seems to rely on the absence of contingency fee arrangements as a major factor to outweigh most or all the inconveniences of having witnesses and evidence transported across the ocean. In so doing, the court may well have set a precedent for preventing any FNC dismissal when a foreign country is involved that, unlike the United States, does not have contingency fee arrangements. And since there are few, if any, foreign countries that have or allow contingency fee arrangements, the district court's rationale, for all practical purposes, could close the door on all future FNC transfers abroad from New York's Southern District.

Moreover, the court's decision in this respect is directly contrary to Magnin v. Teledyne Continental Motors, where the plaintiff similarly argued that his cause of action should not be dismissed on FNC grounds because France does not have contingency fee arrangements. The Eleventh Circuit concluded that the contingency fee arrangements of other countries should not be given significant weight in an FNC analysis:

As cherished as trial by jury is in our law, and as cherished as contingency fee arrangements have become to some plaintiffs and their attorneys, Magnin has not cited us to any Supreme Court or court of appeals decision giving such considerations substantial weight in forum non conveniens analysis. The argument is particularly weak in regard to contingency fees. In Coakes v. Arabian American Oil Co., 831 F.2d 572, 576 (5th Cir. 1987), the Fifth Circuit held that the ban against contingency fees in England should not significantly influence the forum non conveniens determination, and observed that, "[i]f the lack of a

109 Id.
110 Id.
112 Magnin v. Teledyne Cont'l Motors, 91 F.3d 1424 (11 Cir. 1996).
contingent fee system were held determinative, then a case could almost never be dismissed because contingency fees are not allowed in most forums.  

The court noted that there was an advantage to resolving all actions in a single forum and acknowledged that there were other TWA 800 related actions already pending in France. But this factor too was illusory. While using the "weight" of the absence of contingency fee arrangements to conclude that the private interest factors were neutral, the court then weighed the public interest factors and concluded that they "weighed strongly against dismissal."

C. Public Interest Factors

Among the public interest factors that the court found persuasive in retaining jurisdiction was the proximity of the crash to the court:

The catastrophe happened not far from this Courthouse. The investigation into the cause of the catastrophe has been enormously extensive and costly, consuming the energy and resources of multiple administrative agencies of the United States Government and of the State of New York. Congress has held hearings and Vice-President Gore has headed a Presidential Commission on the crash.

Other than evidencing the difficulty encountered by U.S. government authorities in retrieving the wreckage and then ascertaining the cause of the TWA 800 crash, there is no indication how any of this was at all relevant to the issue of an FNC transfer. The fact that the catastrophe happened not far from the courthouse and generated extensive press coverage throughout the country is simply not relevant to the issue of damages, much less to calculating a French victim's damages. There is no logic to the proposition that merely because a crash occurs in or near

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113 Id. The Second Circuit has also held that completing discovery and investing financial resources does not sufficiently "tip the scales of the Gilbert balance especially since plaintiffs are free to use the existing discovery material to whatever a French tribunal will permit." Alfadda v. Fenn, 159 F.3rd 41, 48 (2d Cir. 1998).

114 In re Air Crash off Long Island, 65 F. Supp. 2d at 217. The court noted that the French Department of Treasury had filed actions against TWA in France to recoup payments made to French beneficiaries, two of whom had actions in front of the district court. Also the relevant Caisse Primaire d'Assurances Maladie had filed actions against TWA to recoup social security like benefits paid. Id. at 209.

115 Id. at 217.

116 Id.
the United States, all foreign victims of that crash must have their compensation determined in U.S. courts. The place of accident is invariably fortuitous in aviation disasters and, hence, should be of no weight in deciding a forum non conveniens transfer. Nor should any weight be given to the size, scope or expense of the subsequent investigation the U.S. conducts about the cause of the crash. Neither the place of accident nor the scope and size of an aviation accident investigation has ever been treated as a factor in the Gilbert analysis, and there is no persuasive reason why either should. Indeed, the place of accident was intentionally not included as a forum option in the original Article 28 of the Convention, and it ought not now be imported into Article 28 by way of becoming a new and influential pseudo-Gilbert factor.

1. Administrative Difficulties with Congested Dockets

In weighing the factor of administrative difficulties with congested dockets, the district court noted that dismissal of the French Actions would not cause the entire case to be dismissed. But while it is true that the entire case would not be dismissed, the number of plaintiffs putting forth evidence of damages would be considerably reduced. Also, the issue of damages, absent settlement, would normally be tried separately for each plaintiff, as each plaintiff must individually prove his damages. Accordingly, and again absent settlement, dismissing the foreign plaintiffs' causes of action should very substantially reduce the amount of time the jury is required to be empanelled and would thus substantially ease the congested docket in the Southern District of New York.

2. Jury Duty as a Burden That Should Not Be Imposed upon a Community Which Has No Relation to the Litigation

In analyzing whether jury duty is a burden that should not be imposed upon a community having no relation to the litigation, the court held that it would not be unfair to impose jury duty upon the community, as jury duty would also be imposed as to the non-French plaintiffs. But this totally ignores the additional time the jury would be empanelled (absent settlement) to decide damage issues for each French plaintiff, including the added time and expense required for translation of documents

117 Id. at 218.
118 Id.
and, when necessary, explanations of French law. There is no persuasive reason why such an obligation should be imposed upon a United States jury when, as here, it is more convenient for the damage issues to be tried in the foreign country and where the foreign country has a substantially greater interest in seeing its citizens adequately and fairly compensated. This issue thus also clearly weighs in favor of dismissal.

3. Local Interest in Having Local Controversies Decided Locally

The third public interest factor is whether there is a local interest in having local controversies decided locally. Even though the accident occurred off the coast of New York, New York has virtually no interest, as previously discussed, in hearing or adjudging the French plaintiffs’ demands for damages. The controversy here is not over liability for, or causation of, the accident, but only over the amount of damages foreign victims or their survivors should properly recover.

Courts have generally held that the courts of a plaintiff’s residence or domicile have a strong interest in assuring that its residents are adequately and fairly compensated with damages. In Coyle, a case involving a U.S. citizen injured in an air crash in Indonesia, the court held that Indonesia had less of a local interest than the U.S. If the plaintiff is a foreign plaintiff, the United States community in which the plaintiff files suit will most probably have little, if any, relation to or interest in the suit. Additionally, as there would be no issue of liability, even if the community happened to be the site of the accident, it still would not have any relation to a cause of action brought solely to determine a plaintiff’s damages, unless the plaintiff were a member of that community. If the plaintiff is not a resident or domiciliary of the United States, courts in this country simply do not have a local interest in having the controversy decided here. When the sole issue of litigation is the amount of damages a

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120 Coyle, 180 F. Supp. 2d at 1177.
plaintiff should be awarded, the interest in that award lies with the locality in which the decedent or the plaintiff resides. Ensuring that a cause of action is brought in a forum that has an actual interest in the cause of action is a signal purpose of FNC. France, indeed, has the only actual interest in determining the damages that should be awarded to French plaintiffs and in ensuring that they are adequately and fairly compensated.

4. Conflicts of Law Questions and Foreign Law Should Not Be Forced Upon a Non Local Court Where the Local Court Could Apply Its Own Laws

This last of the Gilbert public interest factors is perhaps the easiest. Even the district court acknowledged that applying foreign law and resolving conflicts of law issues weighed in favor of dismissal. Yet, weighing against dismissal, so the court held, was “the piecemeal litigation that would be created by dismissing the French Actions . . . [t]he prospect of several trials simultaneously taking place in different countries around the world.” But according weight to this additional new “piecemeal litigation” factor will have much the same impact as according weight to the new “contingency fee” factor. Taken either together or alone, these two new factors, when added to any scale, will have the inevitable impact of effectively foreclosing any future FNC transfers to foreign courts.

Whether or not unanimity exists for the view that it is always preferable for foreign plaintiffs to be awarded accident or death compensation by the courts of the countries where they are citizens or domiciliaries, a much more difficult proposition to argue against is that, at the least, their compensation should be determined by the laws and practices of their domicile not by those of the foreign forum where they opt to sue primarily for tactical or monetary advantage. Because of the acknowledged difficulties involved in determining foreign compensation laws and practices, however, the conclusion seems ineluctable that the better approach is to return the plaintiff to his or her domicile forum for a fair and accurate calculation of death and injury damages.

\[\text{121 In re Air Crash off Long Island, 65 F. Supp. 2d at 217-18.}\]

\[\text{122 Allan I. Mendelsohn, Domicile and the Warsaw System, 22-1 ANNALS OF AIR & SPACE L. 137 (1997). For a critical analysis of a contrary conclusion reached by a federal district court in the context of the oil pollution disaster caused by the breakup of the Amoco Cadiz oil tanker off the coast of France, see Nancy Es-}\]
Although never mentioned in the decision, France and the U.S. have an FCN treaty providing for national treatment in and equal access to courts. But for the same reasons as were discussed earlier,\textsuperscript{123} this should not affect the foregoing analysis. The French plaintiffs will be receiving the same access and have much the same standards applied to them as would be applied to out-of-state residents filing suit in New York. \textit{Reyno} clearly held that less deference should be accorded a foreign plaintiff's choice of forum.\textsuperscript{124} The district court appeared to ignore this teaching. Because the predominant private and public interest factors weigh so clearly in favor of dismissal, the district court erred in not dismissing the French plaintiffs' claims on FNC grounds.\textsuperscript{125}

5. \textit{The District Court's Failure to Follow Established Precedent}

In reaching its decision, the district court also ignored prior FNC precedent in its own district. In \textit{Bouvy-Loggers v. Pan American World Airways, Inc.}, one of the cases resulting from the 1997 Pan Am/KLM crash at Tennerife, the Dutch survivors of a KLM crew member and Dutch citizen brought suit against Pan Am in the Southern District of New York.\textsuperscript{126} The only relevant issue was the amount of damages, and Pan Am moved the court for an FNC dismissal. The plaintiff argued that Pan Am was a New York corporation, their pilots resided in New York, and all of their records were in New York. The court properly noted that these contacts would be relevant only if there were a question regarding defendant's liability.\textsuperscript{127} Pan Am and KLM had agreed

\textsuperscript{123} See supra discussion at V.

\textsuperscript{124} \textit{Reyno}, 102 U.S. at 265.

\textsuperscript{125} One of the factors that supports the court's decision is that the motion to dismiss on FNC grounds was not filed until 2\(\frac{1}{2}\) years after the first case was filed and 2 years after the court held its first hearing. The reported decision discloses no reason for such a delayed filing on such an important issue. \textit{In re Air Crash off Long Island}, 65 F. Supp. 2d at 210-11.

\textsuperscript{126} \textit{Bouvy-Loggers v. Pan Am. World Airways, Inc.}, 1978 U.S. Dist. LEXIS 18792 (S.D.N.Y. Mar. 27, 1978). The plaintiff did not join KLM as an additional defendant, and Pan Am argued that the district court would not have had jurisdiction over KLM under Article 28 of the Warsaw Convention. Pan Am then argued that Holland was the proper forum, as both defendants could be sued there together. \textit{Id.} at *1-2, n.1.

\textsuperscript{127} \textit{Id.} at *4. Among other contacts cited by the plaintiff were that the Pan Am pilot and First Officer both resided in New York, that other Pan Am crew members who would be witnesses resided in New York and could therefore be subpoe-
not to contest liability for the crash and the plaintiff agreed not to seek punitive damages. Liability therefore was no longer at issue, and the only remaining issue was the amount of damages. As all the witnesses and documents relevant to this issue were located in Holland, the court held that "bring[ing] these witnesses and documents to New York for trial as opposed to conducting the trial in The Netherlands would clearly be inconsistent with the goal of making the disposition of the cases 'easy, expeditious and inexpensive.'" The court held further that: "The Netherlands has a strong interest in ensuring that this Dutch decedent's heirs are adequately compensated, for if they are not, it is The Netherlands and its citizens who will bear the financial responsibility for supporting them."

A very similar forum non conveniens analysis and dismissal occurred in In re Disaster at Riyadh Airport. A fire broke out on board a regularly scheduled Saudi Arabian Airline (SAA) flight from Riyadh to Jeddah, Saudi Arabia. The pilot was able to return the plane to Riyadh, but all the occupants had perished from smoke and poison gas inhalation caused in part by the failure of the doors and emergency exits to open. Suits were brought—in various U.S. courts and then consolidated—in Washington, D.C. by the survivors of the victims (who had multiple citizenships, including Algeria, China, Egypt, Ireland, Italy, Japan, Germany, the U.K. and Saudi Arabia) against SAA, TWA (which trained the SAA employees), and Lockheed (which manufactured the plane). The defendants filed a joint motion to dismiss based on FNC grounds, and specifically agreed to submit themselves, at plaintiffs' option, to the jurisdiction of the national courts in Saudi Arabia, or the courts in each plaintiffs' domicile, or the courts in any other country with jurisdiction under Warsaw Article 28.

In examining Gilbert's public interest factors, the court noted that the only contacts between the U.S. and the accident were that Lockheed manufactured the aircraft involved and that years

128 Id. at *5 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
129 Id. at *6.
131 Id. at 1145 n. 9 and accompanying text.
earlier TWA had trained the personnel using the aircraft. Because these contacts were so tenuous, the court found no sufficient reason to burden the citizens of the United States by imposing jury duty on them or clogging the courts.\textsuperscript{132}

For their part, the plaintiffs argued that the defendants cannot create an alternative forum under Warsaw simply by consenting to jurisdiction. But the court disagreed, holding that, although the defendants' consents did indeed create alternative fora, the Supreme Court's \textit{Reyno} analysis must still be applied and, despite differences between the legal systems—e.g., "smaller damage awards" and "the inability to utilize a contingent fee arrangement"—the alternative fora were not inadequate.\textsuperscript{133} In applying the private interest factors, the court noted that the first factor (i.e., the relative ease of access to sources of proof) would be a nonissue, as the defendants would not contest liability except as to proof of damages. In applying the second private interest factor (i.e., the availability of compulsory process for attendance of unwilling witnesses), the court held that:

Since the damages evidence is within the compulsory reach of the courts in the plaintiff's decedent's domiciles, and apparently not within the compulsory reach of the United States, analysis of this compulsory process factor in light of the defendants' concession likewise argues strongly in favor of using the foreign forums in each plaintiff's domicile.\textsuperscript{134}

Finding that "the courts in each decedent's domicile also have a stronger interest in trying these cases, and thereby protecting their own citizens' rights than the United States does," the court concluded that it "must recognize both the important legitimate interests of the foreign forums in these cases. . . and 'the ability of foreign courts to perform their adjudicatory functions fully as well as do the courts of the United States.'"\textsuperscript{135}

\textbf{VII. CONCLUSION}

The progress made by national and international law over the past 25 years in aviation accident litigation, the Warsaw Convention, and forum non conveniens has been nothing short of re-
markable. In the case of Warsaw, liability limits have increased from the 1929 treaty limit of $8,300, to the 1966 adoption of absolute liability with an increased limit of $75,000 (by a private intercarrier agreement). Now, the United States is about to ratify the 1999 Montreal Convention that preserves absolute liability and adopts a limit of $130,000, thus assuring some compensation in all international air crash cases, even those caused by acts of terrorism. In addition, and for the first time in air law, Montreal 1999 allows proven compensatory damages without limit and under a rebuttable presumption of negligence.

In contrast to the 1950s, when air crash cases were tried individually, we now have increasingly sophisticated multidistrict litigation arrangements that accommodate the escalating size and passenger capacity of aircraft and expedite the progress of litigation from almost the moment the first case is filed to the day when the last case is settled. In the judicial administration of these cases, the courts have become skilled and uniformly adept in applying the teachings of Gilbert and Reyno and, where appropriate, transferring back to their domicile courts foreign plaintiffs who opt to sue in this country. These foreign plaintiffs choose U.S. courts not because of any direct connection between this country and the accident, but rather because of the advantages of contingency fee arrangements readily available in U.S. practice, or because they hope to benefit by the higher and more generous recoveries that are usually available in U.S. courts and from U.S. juries. What is perhaps most significant is that the district courts and courts of appeals that have entertained these cases have faced the issues, as did the district court in Jennings v. Boeing Co., "squarely" and without trying to paper over what some might otherwise view as "crass" motives for judicial and forum choices.

There has truly been a pervasive intellectual activism in this field both within the courts and on the part of the plaintiffs’ and defendants’ bars. One can appreciate this activism simply by reviewing the many recent decisions of courts faced with the issues we have been discussing in this paper and realizing how the often criticized adversarial system works so reasonably well in the continuing search for the best result.

To be sure, there are always detours on the path of progress, and we would be less than frank if we did not include the TWA 800 decision in this category. Especially when the only issue is that of the damages that should be awarded to foreign plaintiffs or their survivors, we believe it is inappropriate to include the
place of accident, let alone the availability of contingency fee arrangements, as factors of any real significance in the *Gilbert/Reyno* balancing of interests. Doing so will inevitably skew the balance and make it virtually impossible for forum non conveniens ever to be granted by a U.S. court in an aviation accident case.

Perhaps the single most important factor that will influence decisions in this area of the law in the future is the adoption in the 1999 Montreal Convention of the forum of the victim's "principal and permanent residence" as a "fifth forum" under what is now Article 28 of Warsaw, but will shortly become (on U.S. ratification and entry into force) Article 33(2) of the 1999 Montreal Convention. Once the U.S. ratifies that Convention, it is a certainty that it will enter into force and become effective very shortly thereafter (i.e., 60 days after the 30th country ratifies). It is equally certain that Article 33(2) should and will become a major factor in the *Gilbert/Reyno* balance. For, in addition to providing a U.S. forum for almost all U.S. citizens and permanent residents injured or killed while abroad on an international air trip, the provision and the history that led up to its adoption expresses a distinct preference within the international community for allowing, indeed encouraging, foreign victims of international air crashes to sue in the fora of their own "principal and permanent residence[s]." To that extent, the balancing of interests in *Gilbert* and *Reyno* should have a new, and in this instance, we hope, critically heavy factor.

VIII. EPILOGUE

As this paper was en route to publication, the Ninth Circuit Court of Appeals issued its decision in *Hosaka v. United Airlines*.¹³⁶ That case involved Japanese tourists, flying on a round-trip between Tokyo and Hawaii, who were injured (including one fatality) when the flight encountered severe and unanticipated turbulence three hours outside of Tokyo. The flight returned to Tokyo, the injured passengers were presumably treated, and some time later 46 of the passengers or their family members brought suit in the U.S. District Court for the Northern District of California. On a motion by United, the district court granted a forum non conveniens dismissal to the courts of Japan. On appeal, a panel of the Ninth Circuit examined the legislative history of both Warsaw Article 28 and Montreal 1999

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¹³⁶ *Hosaka v. United Airlines*, 305 F. 3d 989 (9th Cir. 2002).
Article 33 and concluded—despite substantial and acknowledged federal court precedent to the contrary—that the procedural tool of forum non conveniens was not available under Warsaw Article 28(2).\(^{137}\)

It is not for these authors at this time to analyze the bases for the court's decision—perhaps only another detour on the path of progress—other than to say that at least to our knowledge, and despite the consistent arguments to the contrary by plaintiffs' counsel in many prior Warsaw cases, there is no comparable decision in any federal court. One might quibble, as we have in the context of the TWA 800 decision, with what weight should be accorded to particular \textit{Gilbert} or other factors. But there always seemed to be general agreement, until the \textit{Hosaka} decision, not only that FNC was a procedural tool available to federal courts under Warsaw Article 28(2), but that it would be equally available under Article 33(4) of Montreal 1999, when that Convention is ratified by, and becomes effective for, the United States. That the impact of the \textit{Hosaka} decision, if not overturned, would be to render largely irrelevant much of the Warsaw-related discussion in the prior pages of this article (at least for Ninth Circuit purposes) is clear. It seems equally clear that, to the extent the \textit{Hosaka} decision remains viable, the remarkable progress that has been made under \textit{Gilbert}, \textit{Reyno} and Warsaw Article 28 over the past two decades may well be endangered. As of the time of this writing, a petition for certiorari has been filed, and the U.S. Air Transport Association has filed an \textit{amicus} brief in support of the petition.

Perhaps the most intriguing aspect of the Ninth Circuit's decision in \textit{Hosaka} is that it seems not to acknowledge that the Executive Branch of the U.S. Government has given extensive thought and consideration to the question of forum non conveniens in the international aviation context. In the negotiation of Article 33 of Montreal 1999, the United States not only insisted on the inclusion of the "fifth forum" but justified its inclusion in part on the fact that a "fifth forum" provision would work to reduce the extent to which American courts become the courts of first resort for aviation accident victims of all nationalities. There is concern in some parts of the world that the American trend toward escalating damage awards could be exported abroad. To the extent that victims of aviation mishaps will be able to bring their damage suits initially in the courts of their

\(^{137}\) \textit{Id.} at 1004.
permanent residences, and to the extent that U.S. courts under Article 33(4) will thus be able more readily to transfer such cases to those courts, it was hoped that America's penchant for generous death and accident compensation awards might not be so readily exportable.

To that end, the United States during the 1999 Montreal conference prepared and submitted to the conference a paper that addressed the critical importance of the "fifth forum." That paper spoke about the added protection that the "fifth forum" would provide for U.S. citizens who are traveling abroad—with so much greater frequency than was true years ago. It spoke equally about the desirability of reducing the growing popularity of foreign plaintiffs' "forum shopping" in U.S. courts. As the U.S. Government stated in that paper:

[T]he presence of a fifth jurisdiction could well result in fewer "forum shoppers" winding up in U.S. courts. With a convenient "homeland" court available to them, more non-U.S. residents will choose to sue in their "home court," rather than to bring suit in the U.S. Furthermore, U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of forum non conveniens if a convenient homeland court is available to the plaintiff because of the fifth jurisdiction.\textsuperscript{138}

The international aviation community is waiting anxiously to see the weight that will be accorded to these considered and expressed intentions of the U.S. Executive Branch in negotiating a critically important provision of the 1999 Montreal Convention.\textsuperscript{139}

\textsuperscript{138} See Legal Considerations Relating to the Fifth Jurisdiction, \textit{The Fifth Jurisdiction} \textsuperscript{1} 3, in \textit{II ICAO, International Conference on Air Law} 101 (1999).

\textsuperscript{139} On February 21, 2003, the Supreme Court denied certiorari in \textit{Hosaka}. The search for a uniform approach to this issue remains elusive.