

**CHOICE OF LAW & CHOICE OF FORUM IN
FOREIGN AIR DISASTER LITIGATION**

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I. INTRODUCTION

Often resembling a philosophical riddle, questions of choice of law and forum continue to generate confusion and uncertainty in foreign air disaster litigation. Due to the largely interdependent relationship between choice of law and choice of forum, these issues cannot be considered separately, but instead must be evaluated as part of one coherent litigation strategy.

There is no better example of the interplay between choice of law and choice of forum than in the recent Bashkirian Airlines Flight 2937-DHL Airways Flight 611 Mid-Air Collision litigation (“Bashkirian”). The Bashkirian litigation arose from a mid-air collision between a Bashkirian Airlines Tupolev TU-154M and a DHL 757-200 that occurred over German air space in 2002. Despite minimal connections to the United States, Plaintiffs nevertheless filed lawsuits against U.S. defendants in the United States.

Following *forum non conveniens* (“FNC”) dismissal in the United States, the Bashkirian plaintiffs refiled in Spain, and ironically, the foreign court applied U.S. law to determine issues of liability and damages. Pursuant to its choice of law analysis under the Hague Convention, the Spanish court applied Arizona law to one defendant and New Jersey law to the other based on their respective principal places of business. Although the awards were significantly less than what a U.S. jury was likely to award if liability were established, the mere possibility that a foreign court would

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apply U.S. damages law is cause for concern for U.S. aviation product manufacturers and warrants careful scrutiny of the perceived value of the FNC dismissal on a case-by-case basis. In light of *Bashkirian*, a manufacturing defendant's decision to seek FNC dismissal must involve a comprehensive case-by-case analysis of whether FNC dismissal is the best litigation strategy—with a particular emphasis on choice of law concerns.

II. THE DOCTRINE OF *Forum Non Conveniens*

In aviation cases, it is no secret that plaintiffs' (and their counsels) preferred choice of forum is the United States due to the comparatively high standards of compensation, absence of the "loser pays" rule, availability of jury trials, advantageous contingency fee arrangements, and the liberal rules of discovery. While some litigants rely upon these procedural incentives offered by U.S. courts, most plaintiffs are simply motivated by the availability of strict liability and the prospect of a substantially higher and more generous recovery under U.S. damages law. Faced with litigation brought by foreign plaintiffs for damages sustained in foreign aviation accidents, U.S. product manufacturers routinely seek relief through the doctrine of *forum non conveniens*, through which federal courts may dismiss a case if it could be more conveniently litigated in another forum. The motivating force behind manufacturing defendants' strategy to seek FNC dismissal is based on the widely recognized assumption that foreign jurisdictions will apply more favorable damages law than U.S. Courts. An analysis of various FNC considerations, coupled with the potential application of U.S. damages law in foreign jurisdictions, reveals that this assumption may not always be accurate, and decisions regarding whether to seek FNC dismissal merit a closer look—in conjunction with a thoughtful choice of law analysis.

As established in *Gulf Oil v. Gilbert*, "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a

general venue statute.”² Under the doctrine, a court is permitted to exercise discretion in deciding whether the circumstances warrant dismissal in favor of a more convenient forum. In evaluating a defendant’s FNC motion, the court conducts a threshold inquiry to determine the degree of deference to be accorded to the plaintiffs’ choice of forum. The court then proceeds with a two-part test—first determining whether the proposed alternative forum is both available and adequate, and then balancing the private and public interests implicated by the litigation.

It is well recognized among aviation attorneys that FNC issues are often the most critical to the outcome of the litigation. As observed by Justice Doggett of the Texas Supreme Court, “a *forum non conveniens* dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery.”³ After dismissal is granted, plaintiffs maintain the option of seeking relief in the alternative forum, yet cases dismissed on FNC grounds rarely reach trial abroad.⁴ Due to foreign forums’ limited discovery procedures, lack of contingency fee arrangements, and likely application of restrictive damages and tort law, plaintiffs often settle for a small sum or forego their claims altogether following FNC dismissal. Although this is common, a defendant must nonetheless be fully informed of the potential consequences of FNC dismissal and prepared to effectively litigate in the foreign forum if forced to do so.

III. CHOICE OF LAW CONSIDERATIONS

As demonstrated in the Bashkirian litigation, a comprehensive understanding regarding the law to be applied in

² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

³ *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 682 (Tex. 1990) (Doggett, J., concurring).

⁴ See Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1388 (1991).

the alternative forum is vital to a defendant's decision to seek FNC dismissal. Choice of law rules, which are unique to each prospective venue, determine what law will govern the litigation. A defendant considering FNC dismissal should, therefore, separately consider (1) the choice of law rules applied in the plaintiffs' chosen forum, and (2) the choice of law rules applied in the proposed alternative forum. After identifying and applying each forum's choice of law rules, the defendant can then effectively compare the rights and remedies available if the case were tried in the plaintiffs' chosen forum with those available if the case were tried in the proposed alternative forum. Because liability standards and available damages may vary widely based on the law applied, this should be a primary consideration in a defendant's analysis of the desirability of FNC dismissal.

Choice of law determinations are not always straightforward and may even require a detailed analysis simply to determine which choice of law rules apply. Consider, for example, the two competing sets of choice of law rules affecting European jurisdictions—the 1973 Hague Convention on the Law Applicable to Products Liability (“Hague”) and Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations (“Rome II”).

The Hague Convention

Hague determines the law applicable to products liability cases brought within the jurisdiction of a signatory state.⁵ Hague's Article 11 compels signatory states to apply Hague's choice of law provisions “even if the applicable law is not that of a Contracting State.” As a result, in foreign air disaster cases, U.S. law may be applied in products liability cases litigated in Hague states—despite the United States' non-signatory status.

⁵ Eleven countries have ratified Hague: Croatia, Finland, France, Luxemburg, Montenegro, the Netherlands, Norway, Serbia, Slovenia, Spain, and the former Yugoslav Republic of Macedonia.

Hague's choice of law provisions are set forth in Articles 4 through 6. Article 4 provides for the application of the law of the place of injury if that state is also the (a) habitual residence of the person directly damaged, (b) defendant's principal place of business, or (c) place where the product was acquired by the person directly damaged. If the Article 4 requirements are not satisfied, Article 5 then provides for the application of the law of the habitual residence of the person directly damaged if that state is also (a) the defendant's principal place of business, or (b) the place where the product was acquired by the person directly damaged. If neither Article 4 nor Article 5 is applicable, Article 6 permits plaintiffs to choose between the law of the defendant's principal place of business and the law of the place of injury.

Rome II

Effective for proceedings commenced after January 11, 2009,⁶ Rome II binds all European Union ("EU") Member States, with the exception of Denmark, in situations in which non-contractual obligations in civil and commercial matters involve a conflict of laws. Under the general rule of Article 4, the law applicable to such litigation is the law of the country in which the damage occurs. If, however, both the defendant and the person sustaining damage principally reside in the same country when the damage occurs, that country's laws will apply.

There are a number of exceptions to this general rule. Article 5 designates, in successive order, three countries whose laws may govern a products liability case, provided that the country coincides with the place of marketing and the defendant cannot prove that the marketing was unforeseeable: (a) the habitual residence of the person sustaining damage; (b) the place where the

⁶ Rome II arguably has a limited retroactive effect. Article 31 provides that Rome II applies "to events giving rise to damage which occur after [Rome II's] entry into force." According to the general rules on the application in time, the date of Rome II's entry into force is the twentieth day following its publication in the *Official Journal of the European Union*—August 19, 2007.

product was acquired; and (c) the place of injury. If all three designated fail both the marketing and foreseeability tests, then the applicable law is that of the defendant's principal residence.

Although Rome II preempts Member States' national choice of law rules, under Article 28, it is unlikely to preempt Hague or other preexisting conventions governing non-contractual obligations where such conventions do not apply exclusively to Rome II signatories.⁷

Hypothetical Examples

Consider the choice of law implications of FNC dismissal to a European jurisdiction in the following hypothetical examples:

Example A:

In 2010, Defendant, a manufacturer with its principal place of business in California, was sued in the U.S. by Norwegian, American, and Spanish Plaintiffs for injuries sustained in connection with the 2008 crash of an aircraft in Norway. Defendant is deciding whether to seek FNC dismissal and is evaluating the choice of law implications of Norway as an alternative forum.

⁷ Rome II signatories include all EU Member States except Denmark. Because Croatia, Montenegro, Norway, Serbia, and the former Yugoslav Republic of Macedonia are signatories to Hague, but are not EU Member States bound by Rome II, Hague does not currently apply exclusively to Rome II signatories. Therefore, Hague is not preempted by Rome II. This produces the illogical result that signatories to both Hague and Rome II (Finland, France, Luxembourg, the Netherlands, Slovenia, and Spain) may continue applying Hague's choice of law rules (until Croatia, Montenegro, Norway, Serbia, and the former Yugoslav Republic of Macedonia all become signatories to Rome II), while other Rome II signatories must apply Rome II's choice of law rules. (Interestingly, Montenegro and Serbia have applied for EU membership, and Croatia and the former Yugoslav Republic of Macedonia are official candidates for EU membership; as such, they may become future signatories to Rome II—and only Norway would prevent Rome II's preemption of Hague.)

Here, the alternative forum (Norway) is a signatory to Hague, but not to Rome II. Consequently, a Norwegian court would apply Hague's choice of law rules. Pursuant to Article 4, Norwegian law would apply to the Norwegian Plaintiffs because the place of injury (Norway) is also the habitual residence of the persons directly damaged. Article 4 would not, however, apply to the American and Spanish Plaintiffs because the place of injury is neither their habitual residence nor Defendant's principal place of business, and the third possibility for applying Article 4—that the place of injury is also the place where the product was acquired by the person directly damaged—is inapplicable to this scenario.

Article 5 will apply to the American Plaintiffs if their habitual residence is also Defendant's principal place of business—that is, California—in which case, California law will govern their claims. If the American Plaintiffs do not reside in California, the choice of law applied to their claims (like that applied to the Spanish Plaintiffs' claims) will be determined under Article 6. Pursuant to Article 6, any non-California resident American Plaintiffs and the Spanish Plaintiffs will be permitted to choose between the law of Defendant's principal place of business (California) and the law of the place of injury (Norway). For the reasons previously cited, these Plaintiffs will undoubtedly choose the law of California.

Example B:

The facts are the same as in Example A, except that the crash occurred in Spain, an EU Member State, and Defendant is deciding whether to seek FNC dismissal and is evaluating the choice of law implications of Spain as an alternative forum.

Here, the alternative forum (Spain) is a signatory to both Hague and Rome II. Because Rome II does not preempt Hague, the Spanish court will apply Hague's choice of law rules. Consistent with the analysis in Example A, Spanish law will apply to the

Spanish Plaintiffs (under Article 4), California law will apply to any American Plaintiffs that habitually reside in California (under Article 5), and any non-California resident American Plaintiffs and the Norwegian Plaintiffs will be permitted to choose between California law and Spanish law (under Article 6).

If Rome II preempted Hague, the Spanish court would instead apply Rome II's choice of law rules, producing a very different result.

Bashkirian Litigation: Analyzing Choice of Law

As demonstrated in the examples above, choice of law analysis is one of the most rigorous and perplexing tasks that attorneys are faced with in modern air disaster litigation. Never has the choice of law task been more unpredictable than in the recent Bashkirian Airlines Flight 2937-DHL Airways Flight 611 Mid-Air Collision litigation. The Bashkirian litigation arose from a mid-air collision between a Bashkirian Airlines Tupolev TU-154M and a DHL 757-200 that occurred over German air space in 2002. Despite minimal connections to the United States, Plaintiffs' nevertheless chose to file the vast majority of the ensuing lawsuits against U.S. based manufacturers of the Traffic Alert and Collision Avoidance Systems ("TCAS") in the United States. Defendants' successfully moved the court to dismiss the case on FNC grounds.

Following FNC dismissal, the Spanish court, applying the Hague Convention's choice of law provisions, concluded that as neither Article 4 nor Article 5 of the Convention applied, Article 6 permitted the plaintiff to proceed under the law of the defendant's principal place of business—New Jersey and Arizona, respectively. Ironically, if the case had remained in the United States, the laws of Russia, Spain or Germany would likely be controlling in accordance with traditional U.S. choice of law analysis. Although the damages ultimately awarded were considerably less than a

comparable U.S. verdict⁸, this does not alter the fact that this decision demonstrates that a defendant's successful FNC dismissal does not guarantee the application of foreign law in the alternative foreign forum.⁹ In some cases, FNC dismissal may even trigger specific statutes that permit the court to apply U.S. law in the foreign jurisdiction.¹⁰ Conversely, U.S. courts may apply foreign law if the litigation remains in the U.S.¹¹ Thus, choice of law analysis must be undertaken at the earliest stage of the litigation in case where a defendant is considering FNC dismissal.

Due to the highly complex nature of choice of law issues, it is often best to consult foreign counsel familiar with the alternative forum to obtain opinions regarding its choice of law rules, what law is likely to be applied, and what damages are available and likely to be awarded. After identifying the law likely to be applied by each forum, the defendant should then consider other factors relevant to the desirability of FNC dismissal.

⁸ For example, a Los Angeles jury awarded \$43.6 million to the survivors of three foreign decedents who perished in the 1997 crash of SilkAir Flight 185 in Indonesia. *Sun v. Parker Hannifin Corp.*, No. BC 202587, 2004 WL 1732063 (Cal. Super. Ct. July 6, 2004).

⁹ See *supra* (discussing the 2002 aircraft collision over Germany and the hypothetical examples).

¹⁰ Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 610 (2008) (noting that Nicaragua and the Commonwealth of Dominica "have adopted statutes that, at a minimum, authorize their courts to apply tort liability and damages law similar to that of the country in which an action was previously commenced by one of their residents, but subsequently dismissed on forum non conveniens.").

¹¹ See, e.g., *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 546 F. Supp. 2d 1191 (D. Kan. 2008) (denying FNC dismissal even though Canadian law applied).

IV. ADDITIONAL *Forum Non conveniens* CONSIDERATIONS

As previously suggested, defendants should not simply assume that international forums are preferable to U.S. courts. They should instead consider various factors in deciding whether to seek FNC dismissal. For instance, if criminal proceedings are pending in the alternative forum, a defendant might be exposed to criminal liability by submitting to jurisdiction in that forum. In such a case, a defendant should consult foreign counsel familiar with the alternative forum to determine whether there is an elevated risk of criminal prosecution if the defendant submits to jurisdiction in the foreign forum.

Although a substantial benefit to FNC dismissal is the likelihood that the plaintiffs will subsequently settle for a small sum or forego their claims altogether, this potential benefit should be weighed against the costs that will be incurred in the event that a plaintiff(s) refiles in the alternative forum. A defendant may incur significant expenses in bringing witnesses and evidence to the foreign forum, as is often required as a condition to dismissal. Additionally, due to unfamiliarity with the foreign law, the defendant will need to retain foreign counsel, resulting in additional costs—and perhaps even a loss of control over the litigation due to the defendant’s reliance on foreign counsel. Although these costs will generally be justified when considered in relation to the risk of a substantial U.S. damages award, they should be considered nonetheless—particularly by a peripheral defendant with a very strong case on the merits.

Depending on the circumstances of the case, foreign pretrial and trial procedures may be either beneficial or detrimental to a defendant. For instance, if the defendant has a strong case on the merits, it may prefer to litigate in the U.S. court, where procedures exist to obtain summary judgment and summary adjudication. Because such dispositive motions are often unavailable in foreign forums, the defendant may prefer to keep the litigation in the U.S. and seek dismissal on the merits. In

contrast, a defendant with a weak liability case may go so far as to stipulate to liability as a condition to FNC and only litigate the damages issues in the alternative forum¹²—provided, of course, that the defendant is confident that the foreign forum will apply preferable damages law.

In further evaluating the effectiveness of expedited foreign pretrial and trial procedures, defendants should consider any potential disadvantages to plaintiffs. Because foreign procedures generally provide only limited time for gathering evidence and proving a liability case, and they often do not allow for liberal pretrial discovery, plaintiffs may have difficulty establishing a case against all defendants. Consequently, plaintiffs may decide to focus on primary defendants, and they may ultimately decide to settle or forego their claims against peripheral defendants.

Defendants should also consider whether the case will be decided by a judge or a jury. In most foreign forums, civil cases are decided by judges. This may significantly impact an award of damages. Consider, for example, the Bashkirian litigation in Spain. Although the Spanish court applied U.S. damages law, the court awarded only approximately \$348,000 per decedent—considerably less than a typical U.S. verdict¹³—presumably due to the judge’s strict application of damages law. Juries, on the other hand, are more often swayed by emotion. Because there is no cap or formula for computing non-economic damages, the unlimited discretion of a sympathetic jury may result in substantial awards even if foreign damages law is applied. If other factors suggest that a defendant should litigate in the U.S., the defendant should seriously consider the possibility that a U.S. jury might award a large judgment despite the application of foreign damages law.

¹² This was done in *In re Air Crash over the Taiwan Strait*, litigation arising out of the 2002 crash of China Air Flight CI611.

¹³ See fn 7.

Defendants should also be aware of the political climate in the alternative forum. In some countries, judges may—like juries—be swayed by emotion, and this may result in unfavorable verdicts and damages awards where the forum provides its judges with wide discretion. For example, in *Ferreira v. Northrop Grumman Corp.*, a Brazilian judge published an opinion stating:

It would appear that for some, it is better to applaud war, because destroyed lives do not matter very much. For them, what is important is to produce weapons, bombs, communications systems for barren places, combat aircraft, etc. **To display consumption and profit.** There is not, with a live heart, the spirit of things, but it is what man sees in society, as we have been taught only in the last fifty (50) years: Hiroshima, Vietnam, Iraq and the Gulf, Palestine, Bosnia, Kosovo and other manufacturers that say so.¹⁴

In light of such an opinion, defendants should thoroughly research the political climate in the alternative forum prior to seeking FNC dismissal.

Finally, defendants should consider whether the U.S. court lacks jurisdiction over other necessary parties. For instance, if there is a possibility that the airline's employees contributed to the crash, it is important that the airline be a party to the litigation. Under the Montreal Convention, however, foreign plaintiffs may

¹⁴ *Ferreira v. Northrop Grumman Corp.*, Case No. 1,509/98 (São Paulo, Brazil, July 30, 2000) (Opinion of Judge Rômulo Russo Júnior, District Court) (emphasis in original).

be unable to establish U.S. jurisdiction over foreign carriers¹⁵—leaving the remaining defendants to point to the liability of an “empty chair.” Under such circumstances, a defendant may be disadvantaged if the litigation remains in the U.S.

Before proceeding with a motion to dismiss on FNC grounds, defendants should weigh the various factors affecting the desirability of FNC dismissal. Depending on the circumstances of each individual case, these factors may weigh in favor of or against FNC dismissal.

¹⁵ The Montreal Convention provides that plaintiffs can only file suit against a carrier for passenger injury or death during international air carriage in one of five specified fora: (1) the carrier’s place of domicile; (2) the carrier’s principal place of business; (3) the place of business through which the contract of carriage was made; (4) the place of destination of the carriage; and (5) the principal and permanent residence of the passenger. Under the Convention, foreign plaintiffs are thus unable to establish U.S. jurisdiction over foreign carriers unless the ticket was purchased in the U.S. or the flight’s destination was in the U.S. Montreal Convention, art. 33 (1999).

V. CONCLUSION

Choice of law rules, which vary by jurisdiction, determine what law will govern the litigation. Because liability standards and available damages may vary widely based on the law applied, defendants considering FNC dismissal should thoroughly evaluate what law is likely to be applied under the alternative forum's choice of law rules. Because of the highly interdependent relationship between choice of law and choice of forum, this should be a primary consideration in a defendant's analysis of the desirability of FNC dismissal.

Defendants can use FNC as a powerful tool against foreign plaintiffs suing for damages sustained in foreign aviation accidents. Despite the potential benefits of a successful FNC motion, however, defendants should consider all of the relevant factors affecting the desirability of FNC dismissal. Foreign air disaster defendants should conduct a case-by-case analysis of the advantages and disadvantages of the foreign forum to ultimately decide whether, on balance, the foreign forum is preferable to the U.S. forum for defending the litigation.