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Attempts to Avoid *Forum Non Conveniens* Rejected

By Mark R. Irvine and Aghavni V. Kasparian

Lawsuits arising from international air disasters are often filed in the United States. As often, defendants rely on the common-law doctrine of *forum non conveniens* (FNC)—“a supervening venue provision”—to dismiss such cases in favor of litigation in a more suitable, foreign forum. Although FNC is an established doctrine, relative advantages of U.S. procedural and substantive law, not to mention the potential for greater recovery, continue to motivate plaintiffs to challenge application of the doctrine. Litigation arising from two recent air-disaster cases—West Caribbean Airways Flight 708 and the Air France crash over the mid-Atlantic—demonstrates the rejection of such challenges in two different circuits.

General FNC Principles

Courts have discretion to dismiss under the doctrine “when trial in the chosen forum would ‘establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,’ or when the ‘chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.’” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (citation omitted). A range of considerations bear on FNC dismissal, “most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996).

To prevail on a motion based on FNC, the defendant must show both that (1) an adequate alternative forum is available to the plaintiffs and (2) the balance of private- and public-interest factors weighs in favor of litigation in the alternative foreign forum.

Typically, an adequate alternative forum exists if the foreign forum has jurisdiction over all of the parties to the action. Merely different, or even less favorable, foreign law does not render a forum inadequate, unless the relief afforded is “so clearly inadequate or unsatisfactory that it [amounts to] no remedy at all.” *Piper*, 545 U.S. at 254. A forum is thus adequate even where (1) it lacks “beneficial litigation procedures similar to those available in the federal district courts . . .,” *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) (citation omitted); (2) strict liability is unavailable, *Piper*, 454 U.S. at 255; (3) damages awards may be smaller, *id.*; (4) punitive damages are not available, *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1986); or (5) there is no right to a jury trial, *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991). Dismissal under the doctrine is often satisfied upon the defendants’ concession to jurisdiction in the foreign forum.

The second step in the analysis requires a balancing of the litigants’ private interests and the public interests of the forum. *Piper*, 454 U.S. at 242–43. The private interests include the (1) relative ease of access to proof; (2) availability of compulsory process to secure the attendance of

unwilling witnesses; (3) the cost of obtaining the attendance of willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive. The public interests include the (1) administrative difficulties flowing from court congestion; (2) local interest in having localized controversies resolved at home; (3) interest in having the trial in a forum that is familiar with the law governing the action; (4) avoidance of unnecessary problems in conflicts of law or in the application of foreign law; and (5) unfairness of burdening citizens in an unrelated forum with jury duty.

The weight afforded to the plaintiffs' choice of forum is also considered, and some courts evaluate it as a separate factor in the analysis. *See, e.g., Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 (3d Cir. 2010); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71–72 (2d Cir. 2001). Considerable deference is usually afforded to an American plaintiff's choice of a U.S. forum, while less deference is afforded to a foreign plaintiff's choice. *Piper*, 545 U.S. at 256.

In the seminal *Piper* case, the Supreme Court affirmed a district-court dismissal of foreign plaintiff claims against U.S. aviation companies based on FNC in favor of litigation in Scotland, where the aircraft crashed. The court determined that Scotland was an available forum and that the difference in substantive law—strict liability not recognized in Scotland—did not render it an inadequate forum. Furthermore, the balance of factors weighed considerably in favor of dismissal, including the defendants' inability to implead the Scottish aircraft operator.

West Caribbean Flight 708

In litigation arising from the 2005 crash of West Caribbean Flight 708, the Eleventh Circuit Court of Appeals rejected the plaintiffs' attempt to circumvent an FNC dismissal by invoking the Convention for the Unification of Certain Rules of International Carriage by Air, May 28, 1999 (the Montreal Convention) and purposefully rendering the alternative forum unavailable. *Galbert v. W. Caribbean Airways*, No. 12-13278, 2013 WL 1866877 (11th Cir. May 6, 2013).

The crash occurred in Venezuela during a flight from Panama to Martinique. The aircraft was owned and operated by West Caribbean Airways, a Colombian corporation, and chartered by Newvac and Go 2 Galaxy, both Florida corporations. There were no U.S. residents or citizens among the passengers or the crew members. All of the passengers were French citizens, with the exception of one Italian.

The plaintiffs sued West Caribbean, Newvac, and Go 2 Galaxy in the Southern District of Florida pursuant to the Montreal Convention. The Montreal Convention governs rights and liabilities between passengers and the carrier in international air travel and limits the jurisdictions where a passenger-plaintiff can bring a suit against a defending carrier to the following forums: (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. The plaintiffs in the case had the choice of filing their action in Martinique (destination) or the Southern District of Florida (contracting carrier's domicile).

The plaintiffs' challenge to the FNC motion was twofold. First, the plaintiffs argued that application of the doctrine was inconsistent with their treaty right to select a forum designated under the Montreal Convention, an argument that relied on cases interpreting the Montreal Convention's predecessor treaty, the Warsaw Convention. The district court rejected this argument, relying on a Montreal Convention provision that procedural matters are governed by the law of the selected convention forum. Because FNC was a procedural rule of the plaintiffs' selected forum, which predated the Montreal Convention, the court dismissed the plaintiffs' claims in favor of litigating in Martinique. The court also based its conclusion on the defendants' concession to Martinique's jurisdiction and the lack of any argument by the plaintiffs that Martinique was not an adequate alternative forum. The Eleventh Circuit affirmed the dismissal. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009).

While the FNC issue was being litigated in Florida, the plaintiffs concurrently filed an action in Martinique, challenging Martinique's jurisdiction under the Montreal Convention. The plaintiffs argued that their election of the Southern District of Florida under the convention precluded alternative forums from exercising jurisdiction over the claims. The French lower courts in Martinique rejected this argument, but the French Supreme Court agreed with the plaintiffs, holding that that French courts lacked jurisdiction.

The plaintiffs then returned to the Southern District of Florida requesting reinstatement of their case, which had been dismissed for FNC five years earlier, arguing that the French Supreme Court's ruling rendered Martinique unavailable as an alternative forum. The district court denied the motion, and the court of appeals affirmed, holding that the circumstances were not "sufficiently extraordinary" to warrant a relief from judgment and that the motion was nothing more than an untimely opposition to the motion to dismiss on FNC grounds. The court criticized the plaintiffs' failure to raise the unavailability of Martinique in the initial suit, noting it was the very same argument the plaintiffs persistently argued in each of the French courts. *Galbert*, 2013 WL 1866877.

Air France Crash

In *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 792 F. Supp. 2d 1090, 1093 (N.D. Cal. 2011), the district court ruled that the plaintiffs could not defeat a prior FNC dismissal by refileing the case and omitting the parties necessary to make the alternative forum available.

The case arose from the fatal crash of Air France Flight 447 over the Atlantic Ocean in June 2009 while en route from Brazil to France. Most of the 216 passengers and 12 crew members were French, a substantial number were Brazilian, and most of the remaining passengers were from European countries other than France. There were only two American passengers. In the initial suit, the representatives of the decedents, including French nationals, brought claims against the French aircraft manufacturer and various component manufacturers—including another French company—and 10 U.S. companies.

The district court initially ruled that the Montreal Convention did not bar the application of the FNC doctrine as to the American passengers' claims, and then dismissed all cases in favor of litigation in France. *In re Air Crash Over Mid-Atl. on June 1, 2009*, 760 F. Supp. 2d 832 (N.D.

Cal. 2010). The court determined that France was an adequate alternative forum. The private and public interests weighed considerably in favor of dismissal, including the fact that all plaintiffs, except the representatives of the two American passengers, were precluded by the Montreal Convention from suing the air carrier in the United States because the United States was not one of the five Montreal Convention forums as to the non-U.S. plaintiffs. In addition, French authorities were conducting the crash investigation and a criminal investigation was proceeding in France. The court directed all of the plaintiffs to file their claims in France.

Instead, several non-French plaintiffs regrouped and refiled their claims in the district court, omitting the French defendants. The plaintiffs argued that dismissal under these circumstances would be improper because the lawsuit as then constituted had no French connection, making France an unavailable forum pursuant to the same French Supreme Court decision relied on by the plaintiffs in the *West Caribbean Airways* case. The plaintiffs also asked the court to reconsider the prior FNC dismissal as to all plaintiffs based on the “new” complaint.

The court rejected the argument, ruling that the plaintiffs could not render France unavailable “through unilateral jurisdiction defeating pleading,” when (1) a fair reading of the pleadings and common sense showed that French entities were proper defendants; and (2) the plaintiffs already sued French parties and dropped them only after an FNC dismissal. Moreover, the court had not been presented with any new facts that plausibly justified omission of the French defendants, other than defeating the original FNC dismissal order. The court reasoned that because filing a suit in France without all the parties necessary for French jurisdiction would be surely improper, skipping that step and refiled the case in an identical manner in the district court warranted the same result.

Conclusion

Given perceived advantages of litigating in the United States, plaintiffs will no doubt continue to devise strategies to avoid FNC dismissals. For now, the defense remains an important tool for defendants, despite recent attempts to circumvent the doctrine.

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[Mark R. Irvine](#) and [Aghavni V. Kasparian](#) are partners with Fitzpatrick & Hunt, Tucker, Collier, Pagano, Aubert, LLP in Los Angeles, California.