International litigation and *forum non conveniens*: Strategies and lessons from the aviation context

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International litigation is now a fact of life for most corporations. They may find themselves hauled into court in unexpected places and, perhaps more often than anywhere but their home jurisdictions, in the United States. In some respects, this trend is simply a legal manifestation of economic globalization and is the price of doing business on the world stage. Shouldn’t the company that is based in the European Union and operates around the world expect that it may face legal action wherever it does business?

But a different trend has been afoot in recent years. Plaintiffs, often from outside the United States, are increasingly asking courts in the United States to resolve claims against defendants, who may themselves be based outside of the United States, and that have to do with activities that occurred abroad. Whether relating to torts\(^2\) or contracts,\(^3\) these cases are only tenuously and often artificially connected to the United States.

These trends are particularly evident in the aviation industry. Destined to be a transnational endeavor from the start, aviation is, from a practical perspective, very much at the forefront of the process of globalization. It is little wonder then that aviation litigation implicates many of the most difficult questions relating to forum selection. Drawing on the experience of the aviation industry, the purpose of this article is to briefly discuss the factors that help draw so many disputes to the United States and how corporate counsel, not just those in the aviation sector, should think about forum issues and susceptibility to suit in the United States. Particularly close attention will be given to *forum non conveniens*—a doctrine that allows a court to dismiss a case that is brought in an inconvenient forum—which has become a staple among aviation litigators in recent years.\(^4\)

Focusing on the *forum non conveniens* doctrine offers some insight into the principles that counsel should consider when they attempt to identify the appropriate legal forum for resolving all manner of claims against them and what obstacles they may face in trying to achieve their objectives.

Why the United States?

Plaintiffs and defendants are destined to disagree on why cases implicating forum issues find their way to the United States. In the first instance, there is a certain “build it and

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4 See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 n.4 (1947)
they will come" phenomenon at work. Federal and state governments—aided in no small measure by the courts—have created novel causes of action and even literally invited foreign plaintiffs to bring claims in the United States that, for practical reasons, may not be cognizable elsewhere. For example, the Alien Tort Claims Act grants jurisdiction to federal courts over "any action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," and in the securities context, to take another example, one court has even gone so far on unique facts as to recognize claims by "f-cubed" plaintiffs—foreign purchasers who purchased a foreign issuer's securities on a foreign exchange. These are cases that have no clear relationship with the United States and, in years past, would have been quickly dismissed.

Substantive legal doctrines that are relevant to aviation liability lawsuits demonstrate the perceived attractiveness of the United States to plaintiffs. Plaintiffs in these cases can draw on a wide range of tort doctrines in any one of the fifty states to pursue their claims. Among other things, the wrongful death cause of action available in most states permits the personal representative of a decedent’s estate to obtain a wide range of damages on behalf of the decedent’s survivors. Beyond the issue of damages, liability is generally premised on the foundations of the strict product liability doctrine that permits claims based on allegations of (1) design defects; (2) manufacturing defects; or (3) failure to warn. Theories based on failure to warn are alluring for many plaintiffs because they invite plaintiffs to build their cases on top of disparate incidents that they may try and paint into a narrative. Defenses to this tactic are now well-developed—among other things, they include limiting the admissibility of evidence relating to other products or accidents and showing that a warning is not required if the end user is particularly knowledgeable or sophisticated—but strict liability claims are still ubiquitous and just one example of a substantive legal doctrine that clearly encourages foreign plaintiffs to bring their claims in the United States.

Putting substantive legal doctrine aside, it is also clear that federal and state court procedures are an important draw that help lure cases from foreign shores into the United States. In stark contrast to civil law jurisdictions where lawyers are generally not even permitted to question witnesses, initial pleading standards in the United States are very permissive and civil discovery is lawyer-driven and quite liberal—the federal standard permits discovery regarding “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Forms of discovery in the United States are


6 See In re Nortel Networks Corp., No. 01-1855, 2003 WL 22077464 (S.D.N.Y. Sept. 8, 2003). In Morrison v. National Australia Bank Ltd., 547 F.3d 167 (2d Cir. 2008), the U.S. Court of Appeals for the Second Circuit upheld the District Court’s dismissal of an f-cubed securities complaint on the ground that the activity that occurred outside the United States was “significantly more central” to the alleged fraud than conduct occurring in the United States. The Court of Appeals declined to adopt a per se rule that federal courts lack subject matter jurisdiction in all f-cubed cases but its reasoning is likely to make it more difficult for foreign plaintiffs to maintain f-cubed suits in the United States.

7 See, e.g., N.Y. Est. Powers & Trusts § 5-4.3 (damages in wrongful death action available to provide “fair and just compensation for the pecuniary injuries resulting from the decedent’s death to the persons for whose benefit the action is brought”).

8 See Restatement (Second) of Torts § 402A.

9 See Barker v. Deere & Co., 60 F.3d 158, 162 (3d Cir. 1995) (“[E]very court of appeals to have considered this issue agrees that when a plaintiff attempts to introduce evidence of other accidents as direct proof of a design defect, the evidence is admissible only if the proponent demonstrates that the accidents occurred under circumstances substantially similar to those at issue in the case at bar.”).

10 See Ritchie v. Glidden Co., 242 F.3d 713, 724 (7th Cir. 2001) (“The ‘sophisticated intermediary’ defense provides that there is no duty to warn ‘when the product is sold to a ‘knowledgeable or sophisticated intermediary whom the manufacturer has adequately warned.’”).

also diverse and encompass document requests,\textsuperscript{12} interrogatories,\textsuperscript{13} and depositions.\textsuperscript{14} Parties can even notice the deposition of a corporation, a procedure that requires the corporate party to identify an employee to testify on its behalf.\textsuperscript{15} These discovery procedures permit plaintiffs, in the case of meritorious claims, to build a case for trial and, in the case of less meritorious claims, to harass a defendant. Either way, a case successfully anchored in the United States drives higher (and generally unrecoverable) defense costs.\textsuperscript{16}

Jury trials are another staple feature of the litigation system in the United States that most plaintiffs, foreign and domestic, view as being favorable to their claims. Available in almost all cases for money damages, jury trials are perceived to provide opportunities for large damages awards and, given the deferential standard of appellate review, they can be very difficult to challenge on appeal unless the trial court committed challengeable legal error.\textsuperscript{17} Additionally, while they generally require evidence of gross negligence or misconduct, and are now subject to more rigorous judicial oversight based on fears that excessive damages violate the Due Process Clause of the United States Constitution, punitive damages are available in most jurisdictions and they can add considerably to the cost of defending, and settling cases in the United States.\textsuperscript{18} In fact, fearful of juries feeling sympathy for injured plaintiffs, or their survivors, many corporate defendants conclude that they are better off settling rather than risk allowing a jury to decide their fate, and whether they are subject to punitive damages.\textsuperscript{19}

Finally, the procedural rules also encourage foreign plaintiffs to pursue litigation in the United States by promoting joinder of claims, parties, and remedies and encouraging courts to "entertain[] the broadest possible scope of action."\textsuperscript{20} Joinder enables plaintiffs to band their claims together and achieve a certain economy of scale that creates leverage for settlement and at trial. Indeed, defendants may become uneasy at the prospect of facing hundreds of claims and become tempted to settle such claims rather than risk crippling trials. The federal multi-district litigation ("MDL") statute also achieves a similar result by allowing civil actions with common questions of fact to be transferred to a district court for consolidated pretrial proceedings.\textsuperscript{21} While MDL cases are almost never tried, they can still be used by plaintiffs to build massive cases for settlement. And,

\textsuperscript{12} See Fed. R. Civ. P. 34.
\textsuperscript{13} See Fed. R. Civ. P. 33.
\textsuperscript{14} See Fed. R. Civ. P. 30.
\textsuperscript{15} See Fed. R. Civ. P. 30(b)(6).
\textsuperscript{17} See U.S. Const. amend. VII (guaranteeing the right to trial by jury in suits arising under common law).
\textsuperscript{21} See 28 U.S.C. § 1407(a). The transferee court in an MDL proceeding is not permitted to try a case after consolidated pre-trial proceedings and must instead remand the cases back to the transferor courts. See Lexexcon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). In practice, MDL cases almost never result in trials on the merits but are instead resolved through large settlements before the end of consolidated MDL proceedings.
of course, class action rules also make it possible for plaintiffs to bring together thousands of parties in cases that defendants have almost no choice but to settle.\textsuperscript{22}

These substantive and procedural aspects of U.S. law help begin to explain the popularity of U.S. courts for foreign plaintiffs. But a plaintiff’s decision to sue in the United States is really just the start and defense counsel have a number of important decisions to make that relate to forum selection, especially in cases with significant foreign connections. The next sections will explore some of these decisions, including the role of the \textit{forum non conveniens} doctrine, and will discuss how counsel should go about deciding whether litigation in the United States is appropriate or whether he or she should press to have the case dismissed to a more suitable forum.

The \textbf{Forum Non Conveniens Doctrine}

The recent history of aviation litigation shows that the \textit{forum non conveniens} doctrine is an important option for defendants who have been sued in the United States in connection with events that occurred abroad. The doctrine is often (falsely) thought of as being related to the basic Constitutional “fairness” analysis that governs \textit{in personam} jurisdiction. Instead, it is really a doctrine of judicial efficiency and public policy enforcement. The \textit{forum non conveniens} doctrine gives courts discretion to dismiss a case if it could be tried more conveniently in another country.\textsuperscript{23} The U.S. Supreme Court has explained the \textit{forum non conveniens} doctrine in the following terms: “A federal court has discretion to dismiss a case . . . when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.”\textsuperscript{24} While dismissal for \textit{forum non conveniens} generally reflects a “range of considerations,” courts usually follow the same basic framework when deciding whether to grant a motion to dismiss based on the \textit{forum non conveniens}.\textsuperscript{25}

The first step in the \textit{forum non conveniens} analysis is to determine if “an adequate alternative forum is available.”\textsuperscript{26} There are two parts to this inquiry: an alternative forum must be “available” and it must also be “adequate.” The availability requirement focuses solely on whether “the defendant is ‘amenable to process’ in [the other forum].”\textsuperscript{27} The defendant must either be subject to the foreign court’s jurisdiction or agree to consent to the jurisdiction of the foreign court upon dismissal. Either way, the \textit{forum non conveniens} doctrine does not permit dismissal of a lawsuit unless the court is certain that it can be refiled against the same defendants in the alternative forum. The purpose of the adequacy inquiry is to determine if the substantive law of the foreign jurisdiction is suitable and provides remedies equivalent to those available in the United States. This does not mean that the remedies must be the same. Rather, an alternative forum is only inadequate if the remedy it offers “is clearly unsatisfactory” or if the alternative forum “does not permit litigation of the subject matter of the dispute.”\textsuperscript{28}

\textsuperscript{22} See Fed. R. Civ. P. 23. As one academic commentator recently observed, “most other countries do not have procedural devices that are even remotely similar to the U.S. class action.” David A. Skeel, Jr., \textit{Can Majority Voting Provisions Do it All?}, 52 Emory L.J. 417, 423 (2003).

\textsuperscript{23} A different doctrine, change of venue, is used to address cases that could be litigated at greater convenience in another judicial district within the United States. See 28 U.S.C. § 1404.

\textsuperscript{24} \textit{Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.}, __ U.S. __, 127 S. Ct. 1184, 1190 (2007). Versions of the \textit{forum non conveniens} doctrine apply in most state courts and are virtually identical to the federal \textit{forum non conveniens} doctrine.


\textsuperscript{26} \textit{Gilbert}, 330 U.S. at 506-07.

\textsuperscript{27} \textit{Piper Aircraft}, 454 U.S. at 265 n.22 (quoting \textit{Gilbert}, 330 U.S. at 506-07).

\textsuperscript{28} \textit{Id.}
To the extent that the court finds that an alternative forum is available then it weighs the private and public interest factors to determine whether dismissal is appropriate. The private interest factors include ease of access to evidence; ability to obtain compulsory process over witnesses; the cost of obtaining attendance in the United States over willing witnesses; examination of physical evidence; cost of translation; and other factors that may make litigation in the United States difficult, including inability to implead defendants.29

These factors are geared toward evaluating whether litigation in the United States would be inconvenient for the parties—would they have access to the evidence they need, will accessing the relevant evidence be too expensive, and will the potentially liable parties be subject to suit here? The evaluation of the public interest factors has a different purpose, to determine if litigation in the United States would impose a burden that is out of proportion in light of the lawsuit’s connection to the forum. The relevant public interest factors include the sovereigns’ respective interests in the lawsuit, administrative burdens associated with trying the case, and the need to apply foreign law.

Importantly, courts do not weigh the private and public interest factors in a vacuum. Courts instead presumptively defer to the plaintiff’s choice of forum and the general rule is that an individual who sues in his home forum is presumed to have done so for reasons that have to do with convenience.30 A different rule prevails when the plaintiff is a foreigner and he sues in the United States: “[T]he presumption that a plaintiff has chosen a sufficient convenient forum ‘weakens’ when the plaintiff is a foreigner litigating far from home, and in such cases plaintiff’s forum choice is accorded ‘less deference.’”31 Of course, the U.S. Supreme Court has emphasized that the heightened deference that a U.S. plaintiff receives when he sues in the United States only creates a presumption that the forum is convenient but that presumption can be overcome depending on the circumstances.32

**Forum Non Conveniens In Practice**

Consideration of one recent case in which the court applied the *forum non conveniens* doctrine, *In re Air Crash Near Athens, Greece*, is the best way to understand how it works in practice.33 On August 14, 2005, Helios Airways (“Helios”) Flight 522 was on route from Cyprus to Prague, Czech Republic, with a planned stop in Athens, Greece. During the flight to Athens, the airplane, a Boeing 737-300, failed to pressurize and the pilots were either rendered unconscious or killed. The airplane crashed near Athens and all 121 passengers and crew were killed.

Following the Helios accident, the representatives of ninety-two of the individuals killed in the accident filed lawsuits alleging wrongful death claims in several federal district courts across the United States based on strict product liability, negligence, and breach of warranty. The cases were consolidated for pretrial proceedings in the U.S. District Court for the Northern District of Illinois through the MDL statute. While the Greek technical investigation (supported by technical expertise from the United States’ NTSB and elsewhere) identified pilot error as the accident’s primary cause,34 plaintiffs sued Boeing,

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29 See id. at 257-58.
30 See id. at 255-56.
31 Leon, 251 F.3d at 1315. (internal citations omitted).
32 See Piper Aircraft, 454 U.S. at 324.
33 479 F. Supp. 2d 792 (N.D. Ill. 2007).
the airplane’s manufacturer, but not Helios, the Cypriot airline. Boeing moved to dismiss the lawsuits to Cyprus or Greece based on the forum non conveniens doctrine.

At the outset, the court agreed that Cyprus and Greece were adequate available fora. Plaintiffs did not dispute that Boeing was subject to jurisdiction in Cyprus and Greece but attempted to argue that the remedies that those fora provided rendered them inadequate. In particular, plaintiffs maintained that they could not bring strict product liability claims, as they could in the United States, but the court agreed with Boeing that the remedies available in Cyprus and Greece were more than sufficient to satisfy the adequacy requirement, any differences with strict liability in the United States notwithstanding.35

The court next addressed the level of deference that should be given to plaintiffs’ choice of forum and observed that only two of the ninety plaintiffs in the case were U.S. residents; approximately five plaintiffs were thought to be Greek and the rest were Cypriots. The court therefore found that litigating in the United States was likely to be less convenient for most plaintiffs.36

Turning to the private interest factors, the court first concluded that the relative ease of access to proof favored litigation in Cyprus and Greece over the United States because almost all of the damages evidence was located in Cyprus—86 of the 92 decedents were residents of Cyprus and 211 of the decedents’ beneficiaries identified by plaintiffs during discovery were residents of Cyprus—and the liability evidence was in Cyprus or Greece, including all of the evidence under the control of Helios, evidence relating to the investigation of the crash, the crash site, and Boeing’s witnesses and records, which were in the United States but Boeing had agreed to make them available to courts in Cyprus or Greece. With respect to the availability of compulsory process for the attendance of unwilling witnesses, the court explained that Helios had refused to make its witnesses and evidence available in the United States and that the parties would instead have to use the time-consuming procedures prescribed in the Hague Convention to obtain their testimony for trial and that, importantly in a US context, such testimony would not be live. Thus, the availability of compulsory process, the court explained, “slightly favor[ed] dismissal.”37

Access for contribution claims to liable parties is traditionally an important consideration and was raised here as well. Reasoning that the cost of obtaining attendance of willing witnesses and the possibility of view of premises were both neutral, the court focused on Boeing’s claim that it could not implead Helios into the U.S. litigation because no court would have personal jurisdiction. The district court raised substantial doubts about whether Helios had the necessary minimum contacts to support jurisdiction, but concluded that the limited record suggested that personal jurisdiction would be possible. The court treated this factor as a neutral one; however, the court found that litigation in the United States would be less efficient because Helios had sued Boeing in Greece. On balance, the court found that the private interest factors favored dismissal.

The court next addressed the public interest factors and focused on the sovereigns’ interests, familiarity with governing law, and avoidance of unnecessary problems in conflicts of law. First, the court reasoned that Cyprus and Greece both had substantial interests in the litigation: nearly all the decedents were residents of Cyprus, Helios is a Cypriot airline, and the crash occurred on Greek soil while the airplane was en route to

35 Helios, 479 F. Supp. 2d at 797.
36 See id. at 798.
37 Id. at 801.
Athens and resulted in the deaths of several Greek citizens and investigations by the Greek government. By contrast, the interests of the United States and its courts were far less robust. One decedent was an American citizen but “the vast majority of decedents were not.” Furthermore, while the United States has “some interest in deterring the production of defective products . . . , the amount of deterrence that would result from proceeding with the litigation in the United States is ‘likely to be insignificant.’” Finally, the court found that the case presented “complex choice of law issues,” but the parties had not offered a “thorough analysis of the question.” Nonetheless, the court agreed with Boeing that the public interest factors, like the private interest factors, weighed in favor of dismissal.

Concluding, the court explained that the deference due plaintiffs’ choice of forum was “greatly outweighed by other relevant factors.” Cyprus was a far more convenient forum than the United State due to ease of access to sources of proof and the strong public interest in the cases there. Greece was similarly convenient based on the ease of access to sources of proof, the pendency of litigation between Helios and Boeing, and Greece’s strong public interest in the Helios accident. The court therefore granted the motion to dismiss subject to Boeing’s agreement to submit to service of process and jurisdiction in the refiled actions in Cyprus or Greece, waive any statute of limitations defense to any then pending action that was refiled in Cyprus or Greece within 120 days, provide plaintiffs with access to all evidence and witnesses under their custody or control that are relevant to any issue raised in actions refiled in Cyprus or Greece, bear the cost of translating English-language documents in its custody or control into Greek, and pay any damages awarded by the Cyprus and/or Greek courts in the refiled actions, subject to any right of appeal.

Helios demonstrates the important role that the *forum non conveniens* doctrine can play in regulating the use of U.S. courts in cases that have a strong foreign component. The case had few connections to the United States and those connections were far outweighed by those of Cyprus and Greece. Further, Helios also shows that the *forum non conveniens* doctrine is even available in cases that involve defendants based in the United States—as long as the balance of private and public interest factors is weighted sufficiently in favor of litigation outside of the United States, as was the case in Helios, then the presence of domestic defendants in the lawsuit may not necessarily matter and the case still may be dismissed.

**What to Consider When Deciding Whether to Seek Dismissal**

The court’s analysis in the Helios case echoes dozens of others in the aviation context in which foreign plaintiffs’ lawsuits relating to foreign accidents are dismissed based on the *forum non conveniens* doctrine. Though it is, by its nature a discretionary doctrine, in every one of these cases federal courts have recognized that the United States is not the appropriate forum for every dispute, even for cases that are capable of being filed there. Notably, the *forum non conveniens* doctrine is not limited to tort cases. In fact, federal courts apply the doctrine with equal vigor to contract disputes if they can be tried more

38 Id. at 804.
39 Id. (quoting Piper Aircraft, 454 U.S. at 260-61).
40 Id. at 805.
41 Id.
42 The U.S. Court of Appeals for the Seventh Circuit ultimately upheld dismissal based on the *forum non conveniens* doctrine. See Clerides v. Boeing Co., 534 F.3d 623 (7th Cir. 2008).
conveniently abroad. The same analysis applies in these cases with courts always seeking to determine whether litigation in another forum would be more convenient than in the chosen forum. This is particularly true in commercial disputes that are filed in the United States for the purpose of trying to avoid the effect of a forum selection clause that requires the case to be brought in a jurisdiction now deemed by the plaintiff to be unfavorable. At the same time, forum non conveniens may even be available in commercial disputes that involve a permissive, as opposed to mandatory, forum selection clause that allows litigation of disputes in the United States.

It is clear, however, that defendants must carefully assess a range of factors before they decide that forum non conveniens is the proper response to litigation in the United States. Perhaps the most important question that the defendant must ask before settling on filing a forum non conveniens motion is what will happen after dismissal. Many defendants take for granted that plaintiffs will simply decide against refiling their lawsuits in their home forum and, in fact, that is frequently what happens. But some plaintiffs do refile their claims abroad and defendants must consider the possibility that they will face litigation abroad. Litigation surrounding the October 31, 1996 crash of a Brazilian TAM Transportes Aéreos Regionais Flight 402 flight in São Paulo, Brazil, demonstrates what can happen after dismissal. In that case, several dozen Brazilian citizens, and one California citizen, filed lawsuits in federal court in California against various defendants. The court granted dismissal under the forum non conveniens doctrine and several plaintiffs refiled their lawsuits in Brazil and were ultimately awarded substantial damages against one defendant. Plaintiffs’ damages were ultimately reduced on appeal; however, damages were still substantial and it is unclear whether the defendant realized significant savings by securing dismissal to Brazil.

The TAM case shows that foreign courts sometimes impose serious damages awards and that litigation abroad can be a risky endeavor. Indeed, while lay juries in the United States may be unpredictable, particularly with respect to the size of damages awards, it is rare for a jury to return a verdict that could not have been anticipated in advance or that does not bear a reasonable relationship to the facts. The same cannot always be said of local courts in distant fora. For example, in the Helios litigation, would Greek and Cypriot courts feel overwhelming pressure to impose excessive fines on U.S.-based Boeing in order to compensate local residents? This may have been a particular concern after Helios went out of business in late 2006, leaving Boeing as the lone defendant. Similar analysis must be taken into account in commercial contract cases with the prudent defendant focusing on the predictability of contract enforcement by foreign courts.

A related consideration is the extent to which local passions may influence judicial proceedings. In aviation accident cases, for example, the results of local investigations

47 One non-scientific study found that approximately fifty percent of the cases involving personal injury claims that were dismissed on forum non conveniens grounds were either abandoned or settled for less than ten percent of the case’s value. See David W. Robertson, Forum Non Conveniens in America and England: A Rather Fantastic Fiction, 103 L.Q.R. 398, 419-20 (1987).
may be admissible at trial and may deflect liability from local parties at the expense of
foreign defendants.49

A final important factor that the defendant must take into account is whether the foreign
forum will actually allow the adjudication of an action upon its dismissal from the United
States. Most federal courts make dismissal conditional on the foreign court’s willingness
to actually assume jurisdiction of plaintiffs’ claims. But experience demonstrates that
foreign courts will not always exercise jurisdiction, even though the forum non
conveniens analysis is not supposed to proceed unless the U.S. court finds jurisdiction
would exist in the foreign forum. In Gambra v. International Lease Finance Corp., for
example, the district court dismissed wrongful death claims brought by foreign (French)
plaintiffs against U.S. manufacturers in connection with the crash of a Flash Airlines
flight in the Red Sea while en route from Sharm el-Sheikh, Egypt to Paris, France.50

Notwithstanding the determination of an American court that the cases should be
dismissed to France, and that France was an “available” forum, a court in Paris ruled
otherwise and held that it lacked jurisdiction over claims filed by the plaintiffs because
the basic jurisdictional threshold had not been satisfied.51 Thus, some three years after
their claims were originally (though conditionally) dismissed from the United States, the
forum to which the federal court ceded deference refused to take on the cases, and
depending on what happens on the appeal, they may return to the United States for
further proceedings. This is a notable setback for defendants who worked hard to position
the case into what appeared to be a more appropriate and convenient forum than the
United States. It also nicely illustrates the independent importance of jurisdiction, venue,
policy and judicial economy in the ultimate place where a lawsuit is to be tried.

Forum Non Conveniens In Context – What Other Options Are There?

It is clear that there are some cases with a strong international nexus where forum non
conveniens will not be the right response to litigation in the United States, even if it is
more likely than not that the court would grant a motion to dismiss. In these cases,
defendants still have a wide variety of substantive and procedural tools that they can draw
on to help leverage their position. Cases that involve foreign defendants are likely to
involve difficult service of process and personal jurisdiction issues. Most foreign
defendants must be served according to the procedures set forth in the Hague Convention
on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial
Matters (“the Convention”).52 The Convention generally requires service on a foreign
defendant through a designated Central Authority or diplomatic channels. These
procedures are perceived by some to be onerous and costly, but they serve critical roles in
ensuring appropriate notification on foreign defendants and upholding international
comity.53

49 See 49 U.S.C. § 1154(b) (“No part of a report of the Board, related to an accident or an investigation of an accident may be
admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.”).
50 Gambra, 377 F. Supp. 2d 810 (C.D. Cal. 2005). Plaintiffs did not sue Flash Airlines because it was not
subject to personal jurisdiction in the United States.
51 See Decision of the Appellate Court of Paris (CA Paris, March 6, 2008) (holding that ordinary rules of
jurisdiction provided by article 42 and 46 of the Code of Civil Procedure do not empower French Court since
no defendants are French residents, and the event causing liability did not take place in France).
Convention was to “assure that defendants sued in foreign jurisdictions would receive actual and timely
notice of suit”).
Foreign defendants may also wish to consider whether to make an appearance in U.S. judicial proceedings if they are not subject to personal jurisdiction here. The Fifth Amendment’s Due Process Clause precludes plaintiffs from suing a defendant in a particular forum unless the defendant “could reasonably expect to be haled into court” in that forum. Generally speaking, a defendant may only be sued in jurisdictions in which it has purposefully availed itself of the benefits of that jurisdiction. Thus, for example, doing business in a jurisdiction is generally thought sufficient to establish personal jurisdiction; however, “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” Personal jurisdiction may be particularly difficult to establish in commercial disputes that involve foreign parties.

Service of process and personal jurisdiction aside, defendants should also consider the choice of law implications associated with litigating cases in the United States that have links to foreign activity or parties. It is possible that these cases will be governed by the substantive law of another jurisdiction and that law may be more favorable to one party or the other. In the tort context, most jurisdictions in the United States apply the most significant relationship test to choice of law issues. That test, as its name applies, provides that “the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.” In several recent aviation accident cases, application of the most significant relationship test has led courts to apply the law of a jurisdiction that narrows the range of available damages or limits the scope of the defendant’s liability. Choice of law issues are equally relevant in commercial disputes and may also substantially alter a party’s perception of the desirability of litigating in a particular forum.

CONCLUSION

It is clear that plaintiffs have a variety of reasons for wanting to litigate disputes in the United States, even when those disputes have a stronger connection to another forum. But it is also clear that defendants have a range of options open to them to challenge the choice of plaintiffs to litigate before courts that are inappropriate or even judicially inconvenient. Deciding whether the United States is an appropriate forum is not a simple task, but defense counsel must weigh a variety of considerations before they decide to push for dismissal through the forum non conveniens doctrine or stay in the United States and take advantage of the procedural and substantive opportunities that are available.

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The views expressed here are those of the authors only and not necessarily those of Airbus or Hogan & Hartson or its clients.

55 See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-75 (1985).
56 See id.
58 See Piper Aircraft, 454 U.S. at 260 (noting likely applicability of Scottish law).
59 See Restatement (Second) Conflict of Laws § 145.
61 See Restatement (Second) Conflict of Laws § 188 (choice of law analysis for breach of contract claims considers place of contracting; place of negotiation of the contract; place of performance; location of the subject matter of the contract; and domicile, residence, nationality, place of incorporation, and place of business of the parties).
**Airbus** is one of the world's leading aircraft manufacturers, and it consistently captures approximately half or more of all orders for airliners with more than 100 seats.

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Airbus' delivery of 453 jetliners in 2007 surpassed its previous year's total by 19, and were made at the highest ever on-time rate and quality level. Its total fleet of delivered aircraft exceeded the 5,400 milestone as of 31 October 2008, with total sales surpassing the 9,100 mark.

Airbus also has expanded into the military transport aircraft sector. The A400M multi-role military airlifter - being produced under management of the Airbus Military company - will replace ageing fleets of C-130 Hercules and C-160 Transalls. In addition, aerial tankers for in-flight refueling and transport missions are available in aircraft variants derived from the A310 and A330.