THE AMERICANIZATION OF AVIATION CLAIMS:

LITIGATING EXTRATERRITORIAL AIR CRASHES IN THE U.S. COURTS AND THE IMPACT ON AVIATION AND AIRLINES

by John D. Goetz and Dana Baiocco

"As a moth is drawn to the light, so is a litigant drawn to the United States."

— *Smith Kline & French Lab. Ltd. v. Bloch*, 1 W.L.R. 730 (1983).

In recent years, the plaintiffs' bar increasingly has used U.S. courts to adjudicate aviation claims, no matter where in the world the cause of action may have arisen. Indeed, plaintiffs have become more aggressive in seeking recovery in U.S. courts, especially for extraterritorial air crashes, and without regard to whether the accident has any meaningful contacts with the U.S. forum.[1]

In our opinion, plaintiffs seek refuge in American courts because they believe an air-crash case will have substantially greater value if litigated in the U.S. rather than in the forum of the accident or in a decedent's residence abroad. The availability of punitive damages, trial by jury, the size of verdicts, publicity, lack of consistent damage caps for noneconomic damages, and the difficulty of obtaining summary judgment in some U.S. state courts all add to the benefits of filing in an American forum.

This article highlights the potential exposure for airlines and aviation defendants sued in American courts, and it provides examples of the "Americanization" of aviation cases arising out of non-U.S. incidents. We discuss the recent development of "blocking statutes," which make *forum non conveniens* transfers of U.S. litigation to another forum more difficult. We also offer strategies to return aviation cases to more appropriate forums for resolution.

WHAT U.S. LITIGATION MEANS FOR AVIATION DEFENDANTS

U.S. courts offer procedural and substantive advantages to plaintiffs that are not available in other jurisdictions around the world. The procedural advantages weigh heavily in favor of a U.S. litigant:

- Loose standards for *in personam* jurisdiction give plaintiffs several possible venues in the U.S.
- Liberal pleading rules allow plaintiffs to sue multiple defendants and enter courts with vague claims.
- "Mass actions" and multidistrict litigation, where the claims of groups of plaintiffs are lumped together in one action for joint disposition, are available.
- Broad pretrial discovery increases a defendant's litigation costs and improves plaintiffs' bargaining position in settlement negotiations.
- Publicity from an unfettered press and strategies employed by media-savvy plaintiffs' counsel enhance the emotional components of a case.
- Availability of jury trials adds the emotions and sympathies of laypersons in evaluating the evidence.

Litigating an aviation claim in U.S. courts offers various substantive advantages as well to a plaintiff:

- Expanded statutes of limitations for filing claims, including federal limitations periods under the Death on the High Seas Act ("DOHSA").[2]
- Differences in privilege law applicable to internal communications.
- Relaxed evidentiary standards for the admission of key evidence, which may allow non-U.S. documents such as investigative reports to be admitted in evidence.
- Availability of punitive damages and the prospect of most state courts allowing such claims to be submitted to the jury.
- Lack of consistent damage caps for noneconomic damages, allowing juries to make untethered awards for claims of lost care, comfort, and companionship.

In addition, the "American System," whereby the losing party does not pay the expenses of the winner, reduces a plaintiff's risk in filing suits and encourages risk-averse plaintiffs to sue in the U.S. At least one study has indicated that non-U.S. residents are more successful, in terms of recovery, in bringing claims in U.S. courts than are U.S. plaintiffs. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 Harv. L. Rev. 1120, 1122 (1996). Contingent-fee agreements, which are not available in most countries, further add to the zeal of the U.S. plaintiffs' bar to retain claimants abroad to file suit in the U.S.

All of these factors can make the allure of U.S. courts irresistible. And the increased risk to a defendant in litigating an aviation case in the U.S. is measurable.

EXAMPLES OF "AMERICANIZED" AVIATION CLAIMS

There are many examples of aviation cases being litigated in U.S. courts despite few meaningful contacts. A classic example involves the crash of a 737-300 commercial airliner near Palembang, Indonesia: The claims of numerous non-U.S. residents were litigated in Los Angeles County and in federal court for years despite few meaningful contacts with the U.S. Specifically, in *Junitha Bee, et al. v. Kavlico Corp., et al.*, Case No. BC 202587 (Superior Court, Los Angeles County), 32 non-U.S. plaintiffs filed claims arising out of the crash of SilkAir Flight 185. The state judge promptly denied the international airline's motion to dismiss for lack of personal jurisdiction. The court then proceeded to litigate the merits of the case, including the cause of the crash, over a six-year period.

The first claims tried to verdict were those of family members related to three passengers—two who had resided in Singapore and one who had resided in New Zealand. Incredibly, the trial court adjudicated the claims under *California* law, despite the fact that plaintiffs (and the passengers) lacked any connection whatsoever to California. (Defendants filed choice-of-law motions before trial.) The jury applied California's open-ended standards for assessing noneconomic damages and returned a verdict in these three cases (only) in the amount of $43.6 million. Special Verdict, *Bee v. Kavlico*, No. BC 202587 (July 6, 2004). The trial judge denied post-trial motions and eventually entered judgment on the verdict. The court next scheduled five additional

passenger-case suits for a damages trial. The verdict was on appeal when the litigation was resolved.

More recently, in *Esheva, et al. v. Siberia Airlines, et al.*, Civil Action No. 06-cv-11347, 161 plaintiffs filed suit in October 2006 in federal district court in the Southern District of New York pertaining to the crash of Siberia Airlines Flight 778 in Irkutsk, Russia. All plaintiffs reside in Russia, the airline is located outside the U.S., and the flight originated and took place entirely in Russia. The evidence pertaining to the crash was recovered, and is located, in Russia. Yet plaintiffs have sought refuge in the U.S. courts to adjudicate their claims. Personal jurisdiction was based on a boilerplate contractual dispute resolution procedure requiring that controversies between codefendants (*i.e.*, the international airlines and the leasing company) be adjudicated in New York.[3] Plaintiffs are *not* parties to the contract and have no connection whatsoever with the contract or the forum chosen by their counsel. Nevertheless, the case remains pending in the U.S.

General aviation cases having minimal or no meaningful contacts with the U.S. also are routinely filed in U.S. courts. For example, in *DiBacco, et al. v. Parker Hannifin, et al.*, plaintiffs—residents of Argentina—filed suit in Broward County, Florida, asserting claims based on the crash of a Cessna T210J in Rosario, Argentina. Case No. 06-007037-CIV-05 (Broward County, Florida). The pilot and occupants of the plane were citizens of Argentina; the plane was registered, maintained, and operated in Argentina; the crash occurred in Argentina; most of the wreckage is stored there; and Argentinean authorities investigated the incident. Yet numerous defendants were sued in Florida, only some of whom are located in the state. Motions to transfer were filed, but the case remains pending in Florida.

There are ways to avoid cases like these that are filed in American courts. Traditionally, a motion to dismiss or transfer based on the doctrine of *forum non conveniens* is filed at the *early stage* of a case to move the matter back to a forum more appropriately connected with the accident. In addition, early settlements of U.S. claims that may adversely affect a defendant's *forum non conveniens* motion often are effectuated to improve the chances that the motion will be granted. However, the trend now is for non-U.S. countries to enact statutes designed to "block" cases from being returned from the U.S. to a more appropriate forum, so that litigants can benefit from American-style litigation.

BLOCKING STATUTES

Several Latin American countries have passed or are considering "blocking statutes," which divest their civil courts of jurisdiction when their residents' claims are filed in the U.S. These statutes attempt to preempt or "block" adjudication of claims in the resident's own courts, and they are asserted by a plaintiff to defeat a defendant's motion to transfer a U.S.-filed case under the doctrine of *forum non conveniens*. Because the U.S. court is blocked from transferring the case to another forum for resolution, the plaintiff argues that no "feasible, alternative forum" exists under the factors courts must consider when deciding a motion to transfer. Accordingly, the plaintiff contends that the suit must remain in the U.S.[4]

Various countries have either passed or are considering blocking statutes: Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Nicaragua, and Venezuela. These statutes are based on the Latin American Parliament "Model" Statute,[5] which provides:

> **Model Law on International Jurisdiction and Applicable Law to Tort Liability**
>
> * * *
>
> **Art. 1 National and international jurisdiction.** The petition that is validly filed, according to both legal systems, in the defendant's domiciliary court, extinguishes national jurisdiction. The latter is only reborn if the plaintiff desists of his foreign petition and files a new petition in the country, in a completely free and spontaneous way.
>
> **Art. 2 International tort liability. Damages.** In cases of international tort liability, the national court may, at the plaintiff's request, apply to damages and to the pecuniary sanctions related to such damages, the relevant standards and amounts of the pertinent foreign law.

U.S. courts have struggled to interpret and apply these blocking statutes in determining whether a U.S.-filed aviation case is more appropriately adjudicated elsewhere. Courts also may

face challenges in determining whether a statute remains in effect, because obtaining up-to-date materials on the current status of non-U.S. legislative acts may be difficult.[6]

Other complications may prevent transfer of an aviation case that is inappropriately filed in the U.S. For example, non-U.S. plaintiffs have argued that treaties between the U.S. and their forum countries, along with international conventions, give them the right to litigate in U.S. courts *on equal footing* with American citizens.[7] U.S. plaintiffs further argue that multiple alternative forums *support* litigation in their chosen forum, *i.e.*, a U.S. court, because the court cannot hold that a specific, alternative forum is the *most* convenient alternative under a *forum non conveniens* analysis.[8] Finally, plaintiffs are quick to argue that a U.S. judge should adjudicate a case and deny transfer, despite minimal contacts, because it is interesting, challenging, or unique to a particular locale.

STRATEGIES TO ENHANCE TRANSFER OF LITIGATION INAPPROPRIATELY FILED IN U.S. COURTS

The trend of "Americanizing" aviation claims has real significance for the aviation industry. Litigating an aviation mishap in a U.S. court can significantly affect costs, legal fees, insurance rates and, eventually (depending on the outcome), overall competitiveness. Airlines and aviation defendants that believe litigation has been inappropriately filed in U.S. courts can pursue strategies to maximize the chances that such suits will be transferred to another venue for adjudication.

First, a well-written motion to transfer or dismiss based on the doctrine of *forum non conveniens* at the *early stage* of a case is a must. If the conditions are ripe, U.S. courts are much more apt to transfer (or dismiss) a case at an early stage than they would be if the case was permitted to move forward into merits discovery. The motion should persuasively argue that a weighing of private and public interest factors supports transfer of the action to a forum outside the U.S.[9] The motion should be supported by public documents to support factual statements about why the case should be transferred. In addition, statements about another country's laws or procedure should be supported by an affidavit from an expert witness and copies of relevant statutes or rules.

If record evidence is needed to support a motion to transfer, the aviation defendant should file a motion requesting bifurcated, limited discovery on the relevant factors underlying a *forum non conveniens* analysis. The motion should demonstrate to the court that a valid issue exists as to whether the case should proceed in the U.S. It also should outline *specific*, targeted discovery that needs to be completed on the relevant factors. The motion should further propose a limited time frame of 30 or 60 days for completion of the discovery.

Second, a defendant should consider entering into early-settlement negotiations to resolve all U.S.-based claims in a case involving a "mass action," or multidistrict litigation. Resolving limited U.S. claims from an otherwise non-U.S. mishap will enhance the chances that a court will dismiss or transfer the action based on *forum non conveniens*, because few or no meaningful contacts with the U.S. will remain.

Third, an airline or aviation defendant should consider a stipulation that would permit the refiling of claims in the U.S., if a blocking statute is applied by a non-U.S. resident's court. This stipulation would allow a defendant to demonstrate to the U.S. court that the plaintiff will not be left without a remedy, in the event the transferee court will not allow the case to be refiled because of a blocking statute.

Finally, where a *forum non conveniens* transfer may not be advisable, a defendant should file a choice-of-law motion early in the proceeding. Even if the case will be litigated in a U.S. court, the defendant should closely examine whether another country's laws are more advantageous with regard to liability and/or damages. Often they are. If this indeed is the case, the issue must be raised promptly with the trial court.

CONCLUSION

Jones Day has effectively used many of these strategies in the aviation cases it has defended and in other multijurisdictional and multidistrict litigation. In combating the trend of using U.S. courts to litigate aviation claims, one maxim especially applies: "Chance favors the prepared." ■

JOHN D. GOETZ
1.412.394.7911
jdgoetz@jonesday.com

DANA BAIOCCO
1.412.394.7229
dbaiocco@jonesday.com

continued on page 40

THE AMERICANIZATION OF AVIATION CLAIMS
continued from page 23

[1] Earlier this year, we attended the International Air Transport Association's Legal Symposium and reported on this trend to general counsels of several of the world's international airlines.

[2] *See* 46 U.S.C. § 761 *et seq.* DOHSA offers plaintiffs a three-year statute of limitations. *Id*. § 763a.

[3] The complaint in the action alleges: "Defendants are further subject to the jurisdiction of this court pursuant to the forum selection clause included in the lease agreement entered into between SIBERIA and AIRBUS LEASING, which governs the aircraft involved in the accident, and which provides that each party irrevocably 'submits to the non-exclusive jurisdiction of the … United States District Court for the Southern District of New York.' " Compl. ¶ 10, *Esheva, et al. v. Siberia Airlines, et al.*; No. 06-cv-11347 (DC) (S.D.N.Y.).

[4] *See, e.g., Martinez v. Dow Chemical Co.*, 219 F. Supp. 2d 719 (E.D. La. 2002) (refusing to grant FNC motion because Costa Rica, Honduras, and the Philippines were not available alternative forums); *In re Bridgestone/Firestone, Inc. Tires Product Liability Litigation*, 190 F. Supp. 2d 1125 (S.D. Ind.) (2002) (same result; applying Venezuela blocking statute).

[5] http://www.iaba.org/LLinks__forum__non__Parlatino.htm; *see also* Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, U. Miami Inter-Am. L. Rev. 21, 47 (2004) (providing translation of PARLATINO model statute).

[6] *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 546 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1525 (D. Minn. 1996).

[7] *Da Rocha v. Bell Helicopter Textron, Inc.*, No. 05-2277-CIV-UNGARO-BENAGES/O'Sullivan et al., 451 F. Supp. 2d 1318 (S.D. Fla. 2006) (plaintiff claimed Brazil-U.S. treaty gave Brazilian citizens same access to U.S. courts as U.S. citizens).

[8] *See In re Air Crash at Taipei, Taiwan Multidistrict Litig.*, 153 Fed. Appx. 993, 2005 U.S. App. LEXIS 24800 (9th Cir. 2005). *But see Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766 (C.D. Cal. 2006) (on remand from 9th Circuit, district court again dismissed case, narrowing alternative forum to Singapore).

[9] *Forum non conveniens* issues involve a weighing of various private and public interests. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (outlining factors); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).