

# FORUM SHOPPING AND FNC IN INTERNATIONAL AVIATION DISPUTES

Certain countries offer more favourable conditions to plaintiffs than others, whether because they offer greater prospects of success or because of the possibility of increased awards. This has led to the common practice of “forum shopping”, where plaintiffs attempt to “cherry pick” the best jurisdiction to maximise their recovery.

## NIGHTMARE JURISDICTIONS

Ask any international business where they would least like to face a claim, and the likely answer will be the USA. Such recognition is not undeserved – the USA remains the most litigious global jurisdiction by some distance and generally offers plaintiffs the best recovery prospects for a number of reasons, including the wide availability of punitive (non-compensatory) damages, the use of juries to assess damages and a large and experienced group of plaintiff lawyers.

Within the US, a select group of state jurisdictions stand out as particular favourites for “forum shopping”, of which Cook County, Illinois has become the venue of choice for plaintiffs in international aviation disputes. This is perhaps unsurprising given that Illinois is the home of a notable aerospace corporation and therefore is a convenient venue for almost any dispute involving their aircraft or components. Its judiciary is also widely regarded as being plaintiff-friendly and has earned a reputation for rejecting defendants’ attempts to remove litigation from Cook County to more appropriate jurisdictions on “forum non conveniens” (FNC) grounds.

## FNC TRENDS IN THE USA

A product of the decrease in airline accidents in the USA in recent years (and the corresponding decrease in litigation) has been an increase in claims in the US arising from foreign aviation accidents. This, in turn, has led to an increase in the number of defendants seeking to deploy FNC arguments to remove litigation from the US to foreign jurisdictions.

In considering FNC arguments, US courts must balance a number of competing private and public interests, including the adequacy of an alternative forum, the convenience of basing the litigation in the USA and the public interest in such proceedings.

Unsurprisingly, US plaintiff attorneys have been ingenious in finding ways to weight this balancing act in their clients’ favour. They might, for example, attempt to name as many US-based defendants as possible in order to strengthen the ties between proceedings and the USA. There is also a clear trend of plaintiff lawyers specifically targeting those state jurisdictions where defendants have little chance of succeeding with FNC arguments (Cook County being a good example, where 90% of FNC motions in the last 10 years have been denied).

## RECENT FNC SUCCESSES

Despite the tactics of plaintiff lawyers, defendants have had some success in running FNC arguments, particularly in the less plaintiff-friendly federal courts. The Air France 447 litigation is a notable example.

On 1 June 2009, Air France Flight 447 tragically crashed into the Atlantic Ocean whilst on route from Brazil to France. 228 passengers and crew perished, the majority being French citizens and residents. Two of the victims were US citizens.

72 plaintiffs, including the families of the two US victims, commenced over 30 separate lawsuits in multiple US jurisdictions, including Cook County, against numerous defendants including the airframe manufacturer, various US manufacturers and Air France. The proceedings were subsequently consolidated into one set of proceedings before a federal court in California.

Air France and the various manufacturers issued an FNC motion seeking to move the proceedings to France. In considering this motion, whilst the court recognised that the representatives of the two US victims were, in principle, entitled to US jurisdiction under the Montreal Convention and their choice of court ought to be accorded “considerable deference”, such factors were outweighed by the court’s findings (which are currently subject to appeal) that:

- the application of the Montreal Convention did not preclude FNC arguments
- France was an adequate alternative forum for the dispute and
- the private and public interest factors pointed heavily towards France being a more appropriate forum.

A similar decision was also reached in litigation arising out of the loss of TAM Flight 3054 in São Paulo in July 2007, with a federal court again ruling, on the FNC motion of the defendants, that US proceedings arising from this loss (which involved 199 fatalities, only one of which was a US citizen) should be moved to South America.

## REDUCING EXPOSURES

Against this background, it is essential that businesses in the aviation sector have a clear understanding of the exposures they may face in the US courts and how such exposures might be reduced.

The FNC arguments above are one (albeit very important) tool available to defendants wishing to avoid US litigation, but what else can businesses do to avoid such exposures?

### REDUCTION OF CONNECTIONS TO USA

In order for US courts to accept jurisdiction over a dispute, it is typically necessary for a plaintiff to show some connection between the defendants and the USA. By reducing such connections through careful corporate/business structuring and planning, businesses can potentially reduce their exposures to US litigation. This is an area where legal advice can be helpful.

### CONTRACTUAL PROTECTION

Contract terms may also provide opportunities to reduce exposures to US litigation. For example, contracting parties can often specify the court which shall have exclusive jurisdiction over disputes arising under the contract, as well as the choice of law which shall apply to such a dispute. In this way, parties can restrict the ability of those they contract with to bring proceedings in other jurisdictions, although it should always be borne in mind that such clauses may not necessarily be upheld in certain jurisdictions and, moreover, will not prevent claims being brought in the US by claimants who are not party to the contract.

Businesses may also be able to protect themselves through effective indemnity wording in their contracts with suppliers and customers. Such indemnities, where available, can potentially protect a contracting party against liabilities arising under the contract as well as liabilities to third parties.

## CHOICE OF VENUE

US federal courts have demonstrated a greater willingness to accept FNC arguments in recent years than US state courts, as can be seen from the recent Air France and TAM decisions noted above. Indeed, over the past 10 years, whilst US state courts have rejected 80% of FNC motions, US Federal Courts have accepted 75%.

Defendants facing US state court proceedings should therefore attempt, where possible, to move such proceedings to a federal court. Federal court jurisdiction can be established on a number of grounds, including by applying “diversity rules” (which involves examining the citizenship of the parties) or where there is a question of law arising under federal (rather than state) law. Federal courts would, for example, generally have jurisdiction over claims arising under the Montreal Convention 1999.

## THE HAGUE CONVENTION

Whilst a successful FNC motion will mean the end of the US Courts’ active involvement in a claim, there might remain a residual risk of US law applying to the dispute by virtue of the Hague Convention on the law applicable to products liability.

Where a product liability claim (e.g. a claim against the manufacturer or supplier of a product/component) is brought in a country which has ratified the Convention (which include France, Spain and the Netherlands), the provisions of the Convention determine the law which shall govern the dispute. A court in a Convention country may therefore be required to apply the law of another country (which need not necessarily be a Convention country) to such a dispute.

It is therefore possible that a product liability claim could be brought, for example, in a Spanish court which, as a result of the Convention, is in fact subject to US law. This might, in turn, potentially allow the claimants in the Spanish courts to seek US-level damages.

This very situation arose out of a mid-air collision between Bashkirian Airlines Flight 2937 and DHL Airways Flight 611 on 1 July 2002 in which 71 people died. Proceedings were brought in the US on behalf of a number of Russian victims against the manufacturers of the collision avoidance system.

For various reasons, the claims were dismissed on FNC grounds only to be re-filed in Spain. The Spanish court accepted that the Hague Convention required it to apply the law of the principal place of business of the defendants, including the relevant laws on damages. Unsurprisingly, the resultant awards made were considerably in excess of those which would ordinarily be expected under Spanish law.

The Bashkirian case is an example of a potential weakness in FNC arguments, namely that defendants who succeed in removing proceedings from the US may end up on less certain territory than they had expected.

## SUMMARY

Whilst there have been some recent success stories, international aviation incidents will doubtless continue to be the subject of forum shopping in the USA and defendants will continue to call upon FNC arguments.

It is essential that businesses in the aviation sector fully understand their potential exposures to US claims and take all possible steps to minimise such exposures (including through careful corporate structuring or contractual protection). Where claims do materialise, steps should be taken to maximise FNC arguments, albeit always bearing in mind the potential pitfalls that may exist in other jurisdictions.

Article by Barlow Lyde & Gilbert Aerospace team,  
with thanks to Associate Mark Waters.

## **CONTACTS**

### **London**

Giles Kavanagh

Email: [gkavanagh@blg.co.uk](mailto:gkavanagh@blg.co.uk)

### **Asia, including Singapore, Hong Kong and Shanghai**

Mert Hifzi

Email: [mhifzi@blg.co.uk](mailto:mhifzi@blg.co.uk)

### **Latin America, including Sao Paulo**

Jeremy Shebson

Email: [jshebson@blg.co.uk](mailto:jshebson@blg.co.uk)