

INTERNATIONAL AVIATION DISASTERS:
THE ALTERNATIVE TO FORUM NON
CONVENIENS WITH A GOAL FOR JUST
COMPENSATION

Nancy Nevarez-Myrick[†]

“ . . . The Act of Justice in Relation to its Proper Matter and Object is Indicated in the Words, ‘Render to each One What Is Right,’ . . . ‘A Man is Said to be Just because He Respects The Rights of Others.’ – Thomas Aquinas, Summa Theologica 2.2.58(1).

INTRODUCTION

The most common issue arising from an international aviation disaster in the legal field relates to the forum, or court system, in which victims of these disasters will file their claims against the airline and/or manufacturers of the plane.¹ There is a strong and prevalent tendency in the victims to sue responsible parties to an aviation disaster in U.S. federal courts, regardless of where in the world a disaster took place.² For the most part, this tendency stems from the historically higher jury awards by U.S. jurors, the wider variety of compensatory schemes available in U.S. federal courts, and liberal discovery procedures available to parties in U.S. federal courts; all of which appear to be designed to compensate victims of such disasters.³

Federal courts in the United States have declined on numerous occasions to exercise jurisdiction over parties on the basis of *forum non*

[†] Nancy Nevarez-Myrick is currently pursuing her Juris Doctor degree in Ave Maria School of Law in Naples, Florida. Acknowledgments and gratitudes go to Professor Richard Meyers, currently teaching in Ave Maria School of Law, for his guidance in the production of this article. Also, I would like to thank my husband, John A. Myrick for his support and love.

¹ Don G. Rushing & Ellen Nudelman Adler, *Article: Some Inconvenient Truths About Forum Non Conveniens Law in International Aviation Disasters*, 74 J. AIR. L. & COM. 403, 406 (2009).

² *Id.* at 405.

³ *Id.*

conveniens in favor of a “more appropriate and convenient forum for adjudicating the controversy.”⁴ This usually means that disputes will instead have to be heard in a court of international jurisdiction, in accordance with the Montreal Conventions.⁵ A defendant’s motion for dismissal based on *forum non conveniens* works to their advantage because money awards in an international forum, if awarded at all, will be capped at a much lower amount than amounts awarded in the United States.⁶ For this reason, while a suit is pending, plaintiffs will often file motions to keep cases in U.S. federal courts.⁷

This note proposes that the international political community—especially signatories to the Montreal and Warsaw Conventions—should amend Conventions to include an international, impartial forum that will not only hear these cases, but render compensation aligned with compensation schemes and procedural devices, resembling those available in the U.S. federal courts. Not only would this create a uniform compensation scheme and more uniform method of applying law, but such amendments would also relieve U.S. federal courts from the burden of hearing such cases and applying legal principles, like *forum non conveniens*, which has yielded inconsistent results and fostered a litigious environment in the international aviation disasters area.

An impartial international forum that renders fair compensation to all victims of international flight disasters is important because these victims will not face denials of their claims in American courts and be undercompensated in other forums. In addition, defendants will be less likely to keep a legal battle in the court system when it is not facing an American jury who often grant very generous awards in favor of plaintiffs. The laws and treaties governing aviation disasters limit plaintiffs to bringing suits in jurisdictions based on the accident site, port of departure or arrival, defendant’s principal place of business, and the plaintiff’s residence, resulting in a variation of

⁴ *Id.*

⁵ *Convention for the Unification of Certain Rules for International Carriage by Air*. (May 28, 1999), at A12, http://www.icao.int/secretariat/legal/List%20of%20Parties/Mt199_EN.pdf. The Montreal Conventions, which govern claims for damages in international aviation, mandate that the forum to bring claims are to be brought “at the option of the plaintiff,” in the jurisdiction of one of the parties, carriers’ principal place of business, or the place of business through whom an agreement had been made “or before the court at the place of destinations.” [hereinafter *Montreal Conventions*].

⁶ Rushing and Adler, *supra* note 1, at 406.

⁷ *Id.*

compensation for victims involved in similar circumstances. Sometimes passengers of the same flight will suffer similar injuries but receive very different awards because the laws of a particular forum require filings under international treaties in various jurisdictions with different compensation schemes.⁸

A victim's legal battle in the American court system begins when they file their claims.⁹ State courts and federal courts become the battleground for transnational litigation.¹⁰ As it will be shown below, unfortunately, these courts do not make precedent any more clear in this cases.¹¹ Courts apply different standards and rely on different factors developed under a discretionary doctrine, creating a great degree of confusion.¹² Additionally, international sovereign interests have reacted to American courts' case law decision in aviation disaster cases by prohibiting in their courts any cases previously filed in the U.S.¹³ Thus, victims are tossed back and forth between forums. Centralization of these cases under a convening international forum would prevent this volleying. The creation of such tribunal, which would adopt principles of American jurisprudence observed by the U.S. federal courts, as well as the compensation schemes employed—a reason why foreign plaintiffs are attracted to American forums in the first place¹⁴—is in the best interest of all.

I. HOW DOES AN AVIATION DISASTER START: QUICK OVERVIEW

Indeed, the skies above us are as congested with air plane traffic as are New York City or Los Angeles roads with car and long waits. In aviation, however, air traffic congestion is measured differently.¹⁵

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 407.

¹² *Id.*

¹³ 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 KAN. L. REV. 609, 611 (2008).

¹⁴ Rushing and Adler, *supra* note 1, at 408.

¹⁵ U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION, AIRPLANE FLYING HANDBOOK, 3-1 to 3-20 (Skyhorse Publishing 2007), available at https://www.faa.gov/regulations_policies/handbooks_manuals/aircraft/airplane_handbook/media/FAA-H-8083-3B.pdf.

Airspeed, size of the plane, regulations, and aerodynamics are contributing to the measuring of this airplane traffic.¹⁶ The airspace is divided for private and commercial planes.¹⁷ Airplanes require clearances to enter into different airspace.¹⁸ Indeed, airspace is regulated as much as our ground roads are.¹⁹ As car crash accidents happen on our roads, crash incidents also happen in aviation. A most recent case is that of Asiana Flight 214,²⁰ which crashed in San Francisco.²¹ Flight disasters, like Asiana Flight 214, are common examples that show how the legal process in an aviation disaster starts and ends. It also shows the biggest challenges victims face when suing potential responsible parties: choosing a forum and facing dismissal on *forum non conveniens*.²²

On July 2013, Asiana Airlines Flight 214 crashed upon arrival on the San Francisco International Airport landing strip.²³ The flight had departed from Seoul Incheon Airport and attempted to land in San Francisco in favorable and clear weather conditions.²⁴ The 777-Boeing was under the control of four pilots—including a pilot-in-command.²⁵ The pilot-in-command had little logged training in that type of plane but with an extensive overall 9,684 total flight hours in other types of planes.²⁶ According to the National Transportation Safety Board²⁷, or NTSB, a report released on June 24, 2014 stated that the Korean flight approached

¹⁶ *Id.*

¹⁷ *Airspace*. FAA Aim. Section 3-1-1. July 24, 2014. https://www.faa.gov/air_traffic/publications/atpubs/aim/aim0301.html. (last accessed October 11, 2014).

¹⁸ *Airspace*. FAA Aim. Section 3-1-1. July 24, 2014. https://www.faa.gov/air_traffic/publications/atpubs/aim/aim0301.html. (last accessed October 11, 2014).

¹⁹ *Id.*

²⁰ Jonathan S. Ziss, *Asiana Airlines Flight 214, Malaysia Airline Flight 370 and Flight 17: Strict Liability for International Aviation Disasters*. *The Defense: Aviation Law*. Aug. 2014 at 54, 55.

²¹ *Id.*

²² Rushing and Adler, *supra* note 1, at 406.

²³ NATIONAL TRANSPORTATION SAFETY BOARD, *Crash of Asiana Flight 214 Accident Report Summary*, available at <http://www.ntsb.gov/news/events/2014/asiana214/abstract.html> (last accessed October 11, 2014). [hereinafter *Crash of Asiana*].

²⁴ *Id.*

²⁵ Jonathan S. Ziss, *Asiana Airlines Flight 214, Malaysia Airline Flight 370 and Flight 17: Strict Liability for International Aviation Disasters*. *The Defense: Aviation Law*. Aug. 2014 at 54, 55.

²⁶ *Id.*

²⁷ *Crash of Asiana*, *supra* note 23.

runway 28L, striking a seawall at San Francisco International Airport (SFO), San Francisco, California.²⁸

Additionally, the report concluded that the threshold altitude and speed were slightly above the plane's established speed standard.²⁹ Ultimately, the flight crew had difficulty managing the airplane's descent as the plane approached.³⁰ The plane slowed down and the pilot increased the speed, triggering a stall alarm.³¹ At this time, the flight crew should have determined that the approach was un-stabilized and should have initiated a "go-around," or a maneuver to try to land safely again³², but they did not do so.³³ Later on, the crew found out such go-around was needed.³⁴ At that point, the airplane did not have the performance capability to accomplish that maneuver.³⁵ The flight crew's inability to monitor and achieve a safe airspeed during the approach resulted from increased workload and fatigue on the crew.³⁶ Also, too much reliance on automation contributed to the incident.³⁷ The airplane slid along the runway and impacted the ground on the final approach.³⁸ Three of the 291 passengers were fatally injured; 40 passengers, 8 of the 12 flight attendants, and 1 of the 4 flight crewmembers received serious injuries.³⁹ The other 248 passengers, 4 flight attendants, and 3 flight crewmembers received minor injuries or were not injured.⁴⁰ Unfortunately, the impact

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* A stall warning occurs when the sensors determine that the airflow is becoming interrupted. A stall occurs when the airflow over the wing is interrupted, causing the aircraft to lose lift, which the ability of aircraft to keep flying: it is the aerodynamic force caused by air flowing around the surfaces of the aircraft which allow the aircraft to maintain itself in the air.

³² *Id.* A "go around" is when the pilot decides that conditions are not correct to land, instead chooses to abort the landing and make another attempt. Sometimes the Control Tower can mandate the pilot not to land due to airport traffic, or other airport or landing strip adverse conditions.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* "Final approach," or "final," which is phase of flight immediately before landing. It is when the pilot ensures that the aircraft's configurations, and other conditions, are safe for landing.

³⁹ Jonathan S. Ziss, *Asiana Airlines Flight 214, Malaysia Airline Flight 370 and Flight 17: Strict Liability for International Aviation Disasters*. FOR THE DEFENSE: AVIATION LAW. Aug. 2014, at 54, 55.

⁴⁰ *Id.*

received upon landing destroyed the airplane, resulting in a post-crash fire.⁴¹

On June 24, 2014,⁴² the NTSB had concluded the investigations and reports detailing the probable cause of the accident.⁴³ They did find that the flight crew mismanaged the airplane's descent during approach, flying at an inadequate speed, failing to conduct a go-around.⁴⁴ Once the crew became aware of the troubling speed situation, they would find out it was too late.⁴⁵ The plane would not be able to maintain an acceptable glide path and airspeed.⁴⁶ Furthermore, the NTSB reported the following additional contributors to the accident:

- (1) the complexities of the auto-throttle and autopilot flight director systems that were inadequately described in Boeing's documentation and Asiana's Pilot training, which increased the likelihood of mode error; (2) the flight crew's non-standard communication and coordination regarding the use of the auto-throttle and autopilot flight director systems; (3) the pilot flying's inadequate training on the planning and execution visuals approaches; (4) inadequate supervision of the pilot flying; and (5) flight crew fatigue which likely degraded their performances.⁴⁷

⁴¹ *Id.*

⁴² *Crash of Asiana, supra* note 23.

⁴³ *Id.* Note, however, that NTSB findings of probable cause are not admissible in a civil action suit.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Crash of Asiana Flight 214 Accident Report Summary*. NATIONAL TRANSPORTATION SAFETY BOARD.

II. CLAIMS AND LIABILITY

The lawsuits against responsible parties did not wait long after the incident.⁴⁸ The first lawsuits were initiated on July 15, 2013,⁴⁹ when two Korean passengers filed a lawsuit against Asiana Airlines in a California federal court for "an extensive litany of errors and omissions" and improper crew training and supervision.⁵⁰ Around the same time, several other suits also were filed in federal courts against either Asiana, Boeing, or both.⁵¹ Many have included the San Francisco airport and the city as co-defendants, along with Asiana and Boeing.⁵² Some of these courts have claimed federal jurisdiction over these cases through the Montreal Convention, an international treaty that governs the rights of passengers in international aviation-related injury claims.⁵³

Other passengers in this case filed their claims in state courts.⁵⁴ Those claims were later removed to federal courts.⁵⁵ Nonetheless, the federal courts remanded some of these cases back to state courts despite defendants' motions to reconsider.⁵⁶ Defendant airplane manufacturer Boeing Company argued that federal court had subject matter jurisdiction under federal admiralty⁵⁷ and federal officer jurisdiction⁵⁸ because the

⁴⁸ *More than 45 Days into the Search, Here Come the Lawyers*, CNN, April 22, 2014, available at <http://www.cnn.com/2014/04/22/world/asia/malaysia-airlines-plane/index.html>. (The case of *Siegar v. Boeing Co.* No. 14-L-003408 was filed on behalf of passengers of the Malaysia Flight 370 that disappeared on March 8, 2014 on in the waters of the Indian Ocean. This and other cases related to this flight were dismissed due to improper filing. Seeking legal action at that point was not proper due to the fact that the aircraft had not been found yet to make a determination of the cause of the accident. However, in order to beat the race and be the first to file, lawyers initiate claims, circumventing solicitation rule, which they have been accused to violating. Federal law prohibits attorney (or representative of an attorney) unsolicited communication to potential parties part of a potential lawsuit for personal injury or wrongful death before the 45th day after the incident at issue).

⁴⁹ Jessica Dye, *Passengers Eye Legal Action Against Boeing, Asiana Over Crash*, REUTERS. (July 17, 2013) available at <http://www.reuters.com/article/2013/07/17/us-usa-crash-asiana-lawsuit-idUSBRE96G01V20130717> (last accessed October 12, 2014).

⁵⁰ *Id.*

⁵¹ Ziss, *Asiana Airlines Flight 214, Malaysia Airline Flight 370 and Flight 17: Strict Liability for International Aviation Disasters*, at 54, 56. Suits are currently pending in the United States District Court for the Northern District of California. Additionally, other sixteen suits have been brought over several months in the United States District Court for the Northern District of Illinois.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 28 U.S.C. § 1331(1) (1948)

plane struck a seawall.⁵⁹ Also Boeing argued that its employees were “person[s] acting under” federal directives, which were the Federal Aviation Administration (FAA)⁶⁰ directives. The district court, however, rejected the admiralty jurisdiction argument because “all of the injuries occurred on the ground after the airplane struck the terrain.⁶¹ There is no basis to say that the tort took effect at any point before the plane struck the seawall. Thus, the tort occurred and ‘took effect’ on land. . .”⁶² In this case, the plaintiffs never touched the waters near San Francisco.⁶³ Also, the court rejected Boeing’s assertion of federal officer jurisdiction because FAA controlled Boeing’s day-to-day operations.⁶⁴ It only required, however, Boeing to follow regulations.⁶⁵ Evidently, it was in the best interest of Boeing to have this case in federal court. Boeing would have more chances that the federal courts would dismiss the cases on *forum non conveniens*. The case was remanded to state court where it would use its own state tort law which tends to award plaintiffs generous awards.⁶⁶

In regards to liability determination, investigations are conducted by various parties including airport control investigators, federal aviation agencies, foreign countries, independent investigators, insurance companies, and potential plaintiffs’ and defendants’ counsel.⁶⁷ Before proceeding with filing any lawsuit, plaintiffs’ lawyers identify potential defendants. In the area of commercial aviation litigation, an attorney begins by finding liability within the airlines, including the pilot for a pilot error, and any corporation employing the pilot.⁶⁸ Other individual tortfeasors who may have contributed to the cause of the crash and the plaintiffs’ injuries or death can include companies and/or individuals “that may have been involved in improperly loading cargo, improperly

⁵⁸ 28 U.S.C § 1442 (a)(1) (1958).

⁵⁹ Ziss, *Asiana Airlines Flight 214, Malaysia Airline Flight 370 and Flight 17: Strict Liability for International Aviation Disasters*, at 54, 56.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Jinhua Yang v. Boeing Co.*, No. 13 C 6846, 2013 WL 6633075, 3 (N.D. Ill. Dec. 16, 2013) *reconsideration denied sub nom. Junhong Lu v. Boeing Co.*, No. 13 C 7418, 2014 WL 1409441 (N.D. Ill. Apr. 11, 2014).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Ziss, *Asiana Airlines Flight 214, Malaysia Airline Flight 370 and Flight 17: Strict Liability for International Aviation Disasters*, at 54, 56.

⁶⁷ Mary G. Leary, J.D., *Handling Aviation Disaster Cases*, 82 AM. JUR. TRIALS 243, 250 §2 (2002).

⁶⁸ *Id.*

servicing or maintaining the aircraft, improperly modifying the aircraft, or providing negligent instruction regarding use of any of the airplane's components."⁶⁹ Counsel must determine the scope of employment or relationship between these individuals and the corporate entities involved before assigning liability.⁷⁰

Along with the potential defendant inquiry, causes of action in international aviation disasters are also determined.⁷¹ Some of the applicable legal doctrines pertain to general negligence claims, *res ipsa loquitar*, strict liability, Warsaw and Montreal Conventions,⁷² and the Death on the High Seas Act (DOHSA).⁷³

Typically, in a negligence case some of the basic elements of a prima facie case are the existence and violation of a legal duty to use care. The party violating its duty of care must be the proximate cause of injury to another. Indeed, "the defendant cannot be held liable for an injury on the basis of negligence in operating the airplane unless that negligence was the proximate cause of the injury."⁷⁴ An air carrier's liability for the injury or the death of a passenger exists when a "non-delegable duty of the utmost care and vigilance of a very cautious person" was owed to the passengers, and such duty was violated.⁷⁵ This duty to passengers includes a duty to ensure safe landings and duty to warn of potential dangers from third parties at the point of arrival.⁷⁶ As in any negligence case of this type, the carrier has no duty to warn of unknown dangers.⁷⁷ Also, if the carrier and its employees exercised the required degree of care and skill at the time of the accident, it is not liable unless the situation of danger was brought by the prior negligence of the carrier or its employees.⁷⁸ There is also the possibility that a plaintiff in an aviation disaster can recover under negligence per se where a carrier's violation of federal safety requirements may also constitute evidence of negligence.

⁶⁹ *Id.*

⁷⁰ Eidson, *Techniques of Handling the Aviation Case* at 1655.

⁷¹ Leary, *supra* note 67, § 2.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* § 3.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

A pilot is required to exercise ordinary care under the circumstances during flight operations.⁷⁹ Should the pilot deviate from their duty to familiarize themselves with “all available information concerning the flight, [landing procedures], the terrain [conditions], and the weather conditions, as well as a continuing duty to be aware of danger when they can gather adequate information,” they may be found negligent for errors or omissions when a plane has crashed during landing.⁸⁰

The Control Tower Personnel are also potential defendants in an aviation disaster since they also have a duty to exercise reasonable care in the operation of an air traffic control system by providing significant information to the pilot.⁸¹ This information includes weather conditions or clearance problems.⁸² The Control Tower Personnel are further required to perform their duties in accordance with the limitations on their certificates, and the procedures and practices prescribed in air traffic control manuals of their respective countries’ air control regulations to provide for the safe, orderly, and expeditious flow of air traffic.⁸³ Any negligence of an air traffic controller, resulting in a crash may lead to naming the United States as a defendant under the Federal Tort Claims Act, or a foreign government agency in other countries-- when the disaster is in another country.⁸⁴ A determination must be made to see if the controller was not acting within the scope of employment.⁸⁵

Other potentially liable defendants include the owners and operators of the airport or airfield landing facilities. Those parties have a duty to ensure safety for the aircraft while operating in those facilities.⁸⁶ Also, they must give an appropriate warning of any danger or hazard of which the proprietor or operator knows or should know, and of which the pilot of an aircraft does not know and may not be aware.⁸⁷ Lastly, an owner or operator, or his or her agent, of an airplane who fails to inspect

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Romualdo P. Eclavea, J.D. & Barbara J. Van Arsdale, J.D., *Civil Liability for Injuries from Operation of Aircraft*, 8A AM. JUR. 2D AVIATION § 116 (2001).

⁸⁷ *Id.*

the aircraft to ensure its proper and safe operation may be liable for any damages arising from an accident.⁸⁸ It is also true in this context that if an air carrier has taken all reasonable care, and “ has used the best precautions in known practical use for securing safety, it is not liable for an accident caused by latent defects in its aircraft which would not be discovered by such precautions.”⁸⁹ Finally, general rules of contributory and comparative negligence are applicable to injured parties in an aviation disaster.⁹⁰

Lastly, plaintiffs seek to recover under several legal doctrines in an aviation disaster, including *res ipsa loquitur* and strict liability. The doctrine of *res ipsa loquitur* has been applied in actions related to aviation disasters in order to recover when an aircraft producing the injury or death was under the control and management of the defendant, such occurrence did not happen if the defendant did not exercise due care, and it was in the ordinary course of events.⁹¹ Also, the doctrine of strict liability may be imposed by a special statute or rule, or by an international agreement when an injury or death results out of an airplane operation.⁹² Under this doctrine, the following parties have several duties:

Manufacturers or sellers of
aircraft or aircraft engines or
equipment may thus be held
liable for the injury or death

⁸⁸ *Id.*

⁸⁹ Leary, *supra* note 67, at § 3.

⁹⁰ *Id.* § 4. Assumption of the risk that passengers take on the “usual and ordinary perils incident to airplane travel, as well as the risk of those dangers which cannot be averted by the carrier who has exercised the requisite degree of care.” Such assumption of the risk can be overcome by the fact that no modern aircraft flight is free from mechanical defects that render valid a claim that a plaintiff, or its decedent, is assuming such risk. Also, to claim that a pilot, as an injured or dead party as a result of an aviation disaster, can overcome such a potential pilot error claim by proving, through the sudden emergency doctrine, that he or she acted according to this best judgment but because he or she lacked time to form a judgment, may have failed to act in the most “judicious” manner. But if none of the above can be proven, another party caused the accident, and the air carrier exercised its utmost duty of care, a carrier remains free from any responsibility for the injury or death of a passenger resulting from an unavoidable or inevitable accident, or unforeseen event, such as hijacking or Act of God, not pertaining to the air carriers actions.

⁹¹ *Id.* § 6.

⁹² *Id.* § 7. The doctrine of strict liability is also available to a plaintiff under the Death on the High Seas Act (DOHSA) which relate to maritime lawsuits.

of a passenger for accidents attributable to defects in, or the design of, the airplane, its engines or equipment. A manufacturer has a duty to reasonably and carefully inspect its products and test them for safety. Further, an airplane manufacturer which buys and installs in its aircraft components fabricated by another must exercise reasonable care in the design, construction, testing, and inspection of the component. It must be shown that the airplane was actually defective or improperly designed, or that the defendant manufacturer was at fault in some way, the party sought to be held liable actually manufactured or sold the airplane or its equipment, or installed the engines or equipment, and the act, omission, or defect proximately caused the passenger's injury or death.⁹³

Also, a manufacturer who deviates from his or her additional duty to warn of dangers, may have actual or constructive knowledge of that which is unknown to the operator of the aircraft.⁹⁴ Liability from such deviation is imposed on that manufacturer. The plaintiff, however, must show that defendant-manufacturer knew, or had reason to know, that the

⁹³ *Id.*

⁹⁴ *Id.*

airplane, its equipment or engine was likely to be dangerous for its intended use.⁹⁵ Further, it must be proven that defendant-manufacturer had no reason to believe the operator or passenger would realize the danger represented by the defect defendant-manufacturer failed to inform the operator or passenger about.⁹⁶

Since Asiana Airlines Flight 214 was an international flight, claims arising from the accident have been governed by international treaties.⁹⁷ These treaties state that for an international flight defendant to escape liability, that defendant, airline or manufacturer, must prove that any negligence that contributed to the accident in question was caused by other parties.⁹⁸ Additionally, these airlines and manufacturers must prove that the airline “took all possible measures to avoid the losses.”⁹⁹ In other words, passengers can make a claim for injuries and other losses incurred in an international aviation disaster under strict liability.¹⁰⁰ International treaties allow for compensation under this treaty.¹⁰¹ Compensation will vary depending on where the accident happened.¹⁰² Depending on the forum dictated by these treaties, plaintiffs may be undercompensated—which is very common. Thus, most of these foreign plaintiffs look to American courts to avoid under compensation.

In the case of Asiana, international treaties provisions will allow the case to be adjudicated in American courts. More than likely this may lead to generous jury awards for passengers. It is to a certain extent helpful that some of the victims in this unfortunate accident were American citizens and the defendants were American entities.¹⁰³ If the airlines would have been claimed as the only defendant^[OBJ], there were great chances jurisdiction and venue would have become South Korea.¹⁰⁴ At the very least, the litigation battle to make South Korea an alternative forum, under the doctrine of *forum non conveniens*, would have started.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Ziss, *Asiana Airlines Flight 214, Malaysia Airline Flight 370 and Flight 17: Strict Liability for International Aviation Disasters*. FOR THE DEFENSE: AVIATION LAW. Aug. 2014, at 58.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* Asiana Airlines is a South Korean corporation.

Even though an international treaty may govern international aviation and allow adjudication in the United States, American federal courts still may decide to dismiss the case on *forum non conveniens* to another forum allowed by the Warsaw or Montreal Conventions.

A. Governing Laws

As with Asiana Airlines Flight 214, many international flights involved in air disasters are governed by international treaties. International treaties also govern passenger losses related to injuries and deaths arising out of these international air carrier disasters.¹⁰⁵ These treaties include the Warsaw and Montreal Conventions. Today, the 1999 Montreal Convention¹⁰⁶ is the treaty that governs most international aviation disasters, along with the 1929 Warsaw Conventions.¹⁰⁷ There are still countries, however, that are signatories to the Warsaw Conventions,¹⁰⁸ but who have not signed the Montreal Convention.¹⁰⁹ Nonetheless, the Montreal and the Warsaw Conventions equally govern international air disasters and changes to their jurisdictional provisions can affect the outcome in some cases.¹¹⁰

The Warsaw Convention was created to regulate liability for “international carriage of persons, luggage or goods performed by aircraft for reward.”¹¹¹ It arose from international conferences that established procedures and limitations on carrier liability in international aviation disasters.¹¹² Besides mandating carriers to issue passenger tickets and baggage checks for checked luggage,¹¹³ the Warsaw Convention

¹⁰⁵ *Id.*

¹⁰⁶ *Montreal Convention, supra* note 5.

¹⁰⁶ *Id.*

¹⁰⁷ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 137 U.N.T.S. 11; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371, *available at* http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf. (last accessed Jan. 5, 2015). There are 152 countries presently signatories to the Warsaw Conventions.

¹⁰⁸ *Id.*

¹⁰⁹ *Montreal Convention, supra* note 5.

¹¹⁰ *Id.*

¹¹¹ Convention for the Unification of Certain Rules Relating to Int’l Carriage by Air, Oct. 12, 1929, 137 U.N.T.S. 11, art. I, ¶ 1.

¹¹² Leary, *supra* note 67, at § 12.

¹¹³ *Id.* at Chap. 2: § I- Art.3.1; *See also* §2- Art. 4.1.

created a limitation period of two years to bring claims (Article 29),¹¹⁴ limited carrier's liability to 250,000 Francs or 16,600¹¹⁵ Special Drawing Rights (SDR) for personal injury¹¹⁶ and granted plaintiffs standing to sue in [].¹¹⁷ Under Article 17 of the Warsaw Convention, a carrier will be held liable for damages sustained when a passenger dies or is injured in an aircraft disaster if it "took place on board the aircraft or in the course of any of the operations of embarking or disembarking."¹¹⁸

Article 17 of the Warsaw Convention had been interpreted by the Supreme Court, determining that there is carrier liability.¹¹⁹ When the "passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger," liability against the carrier arises.¹²⁰ Also, such Convention did not give protection to carriers for willful misconduct.¹²¹ Should there be convincing proof of willful misconduct from the carrier, liability limits would be removed.¹²² Lastly, the Warsaw Convention provided jurisdictional provisions.¹²³ A plaintiff can file a lawsuit at his or her discretion in one of the following forums: 1) the carrier's principal place of business; 2) the domicile of the carrier; 3) the carrier's place of business through which the contract was made; and 4) the place of the destination.¹²⁴

The Montreal Convention, signed in 1999,¹²⁵ superseded the Warsaw Convention system.¹²⁶ The new Montreal Liability Convention

¹¹⁴ *Id.* at Chap. 3: Art. 29.1. These figures increased after 1966 in the Agreement Relating to the Liability Limitations of the Warsaw Convention and the Hague Protocol, or Montreal Agreement.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at Chap. 3: Art. 22 ¶ 1-4. The sums limiting liability were originally given in Francs (defined in terms of a particular quantity of gold by art. 22 ¶5 of the convention). Montreal Additional Protocol No. 2 to substitute an expression given in terms of SDR's would be created to replace this. These sums are valid in the absence of a differing agreement (on a higher sum) with the carrier. On June 1, 2009, the exchange rate was 1.00 SDR = 1.088 EUR or 1.00 SDR = 1.548 USD.

¹¹⁷ *Id.*

¹¹⁸ Leary, *Handling Aviation Disaster Cases* at 258 §12.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* The removal of limitations regarding liability and damages did not mean that the plaintiffs can recover for any and all damages nor that the types of damages, from which recovery can be obtained, would be expanded.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Alan H. Collier, *Forum Non Conveniens in Foreign Air Carrier Litigation: A Sustained Response to an Evolving Plaintiff's Strategy* at 8, available at

acts as a revocation of Warsaw Convention that established liability limits.¹²⁷ The limitations on liability made an enormous impact.¹²⁸ Under the Montreal Convention, unlimited damages on defendants' willful conduct are eliminated.¹²⁹ It provides different amounts in damages that passengers traveling in the Warsaw system can obtain should there be an accident.¹³⁰ There were no changes made in the Montreal Conventions on the issues of jurisdiction and statute of limitations to bring claims against international air carriers.¹³¹ Such treaty would come to govern flights like

<http://www.aircraftbuilders.com/UserFiles/File/lr2004b.pdf>. The Warsaw Conventions would apply to accidents occurring prior to November 4, 2003.

¹²⁷ Leary, *supra* note 67, at 259 § 13.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Convention for the Unification of Certain Rules Relating to Int'l Carriage by Air, May 28, 1999, 2145 U.N.T.S. 15 [hereinafter *Montreal Convention*], available at <http://www.state.gov/e/eb/rls/othr/ata/114157.htm>. (last accessed Dec.17, 2014)

Article 33 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in

Asiana Airlines Flight 214 in which passengers from multiple nationalities would be injured in the course of this flight.

Because of the Warsaw and Montreal Conventions, to which the United States is a signatory, several flight accident cases could be file in the American court systems. Case law in the United States, however, may act as an obstacle for some of these cases, hindering them from even reaching an American jury. In this note, decisions granting or denying jurisdiction over cases were holdings decided on a variety of reasons based on our own ambiguous case law. The grounds that American courts have decided such cases have resulted in much confusion and further burden on our court system. American courts have created an enormous degree of inconsistency and confusion in applying our common-law federal *forum non convenience* doctrine.

Indeed, that confusion has led to numerous appeals, and having cases ¹³² return to American federal court dockets after the so called

which that carrier conducts its
business of carriage of passengers
by air from premises leased or
owned by the carrier itself or by
another carrier with which it has a
commercial agreement...

Article 35 - Limitation of
Actions

1. The right to damages shall be
extinguished if an action is not
brought within a period of two
years, reckoned from the date of
arrival at the destination, or from
the date on which the aircraft ought
to have arrived, or from the date on
which the carnage stopped.

2. The method of calculating that
period shall be determined by the
law of the court seised of the case.

¹³² *Gambra v. Int'l Lease Fin. Corp.*, 377 F. Supp. 2d 810 (C.D. Cal. 2005); *see also* *In re Air Crash Disaster near Bombay, India*, 377 F. Supp. 1175 (W.D. Wash. 1982), Court held that the Indian court was inappropriate because of its long duration. In India, (1) it might take ten years for the Indian court to determine whether plaintiffs could bring their claims there, and (2) it was "most improbable" that the Indian court would entertain the claims, and thus the forum was most likely inadequate. Montreal Convention, *supra* note 131, at 1181.

“alternate and adequate” forum declined jurisdiction over them as well.¹³³ Cases on appeals keep clogging the dockets, without a resolution for years. Other nations’ national interests have gotten involved in creating even more tensions and tumultuous situation in American courts, exposing federal and state judges to adjudicate issues based on international law which they might not necessarily have expertise in, or have the authority to adjudicate on. Our judges are often found making discretionary decisions that add to the confusion. Indeed, *forum non conveniens* is ultimately a discretionary procedural tool. Nevertheless, cases dismissed on *forum non conveniens* end up coming back, keeping up the battle in American courts. For that reason, a better option would be to consider the creation of an international tribunal created under the Montreal Convention. This tribunal would be subject of course to changes which the future signatories to the treaty could negotiate. Such proposal would certainly alleviate the current burden imposed on our court system with regards to adjudicating such cases, international interests would be rightfully considered, and, last but not least, provide victims of these unfortunate accidents, regardless of their nationality or place of origin, the justice they deserve in receiving proper compensation for their losses.

B. *Forum Non Conveniens*

As previously mentioned, some of the principal issues related to international aviation disasters are not related to the liability of defendants.¹³⁴ The problem lies more than anything in the forum in which those lawsuits will be brought in. There is a strong tendency to sue in an American forum due to the generous jury damage awards granted to the plaintiffs. Lawsuits that do survive this procedural device of *forum non conveniens* will pass on to the next phase in the litigation. Plaintiffs in these lawsuits will potentially receive substantial jury awards based on American tort law that can include compensatory, general, punitive damages, and other pecuniary damages.¹³⁵ Nonetheless, there are many cases¹³⁶ that do not survive a motion of *forum non conveniens*. This has

¹³³ *Id.*

¹³⁴ See Part I. Introduction, *supra*.

¹³⁵ Collier, *supra* note 126, at 4.

¹³⁶ *In re Air Crash at Madrid, Spain, on August 20, 2008*, 893 F. Supp. 2d 1020 (C.D. Cal. 2011) amended on reconsideration in part sub nom. *In re Air Crash at Madrid, Spain*, 2:10-ML-02135-GAF, 2011 WL

definitely offered American aviation companies protections from lawsuits being litigated before an American jury.¹³⁷ American courts often based the dismissal on factors that include an alternative, available, adequate forum analysis and a determination of the private and public interest in adjudicating the case in an American forum versus the alternative forum.¹³⁸

C. Forums under Montreal/Warsaw Convention

Some of the possible forums in which to bring claims are provided by the Montreal Convention, including residence of the plaintiff, the place of final destination or boarding, and/or the defendant's place of business.¹³⁹ Regardless of whether a flight accident does fall under such international treaty, or if a treaty mandates that a plaintiff must file a claim in country other than the United States because the facts and circumstances favor that other country, a plaintiff will always consider an American court to file a lawsuit, regardless of the accident site.¹⁴⁰ The victims will be often persistent in filing suits in the United States even where American corporate entity involvement in the manufacturing, maintenance, and operation of the aircraft is remote, or where there are no American victims involved.¹⁴¹ Plaintiffs' lawyers' creativity extends to the point of filing "identical claims by identical plaintiffs against identical defendants in several different jurisdictions at the state-level."¹⁴² This

2183972 (C.D. Cal. 2011) and aff'd sub nom. *Fortaner v. Boeing Co.*, 504 Fed. Appx. 573 (9th Cir. 2013); *Piper v. Reyno*, 454 U.S. 235 (1981); *In re Air Crash Near Peixoto De Azeveda, Brazil, on September 29, 2006*, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) aff'd sub nom. *Lleras v. Excelsior Services Inc.*, 354 Fed. Appx. 585 (2d Cir. 2009); *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1163 (11th Cir. 2007); *De Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993). *In re Air Crash Over Taiwan Straits on May 25, 2002*, 331 F. Supp. 2d 1176 (C.D. Cal. 2004).

¹³⁷ Collier, *supra* note 126, at 1.

¹³⁸ *Id.*

¹³⁹ Montreal Convention, *supra* note 131.

¹⁴⁰ Collier, *supra* note 126, at 1

¹⁴¹ *Id.* Foreign plaintiffs asserted claims against U.S. defendants that included marketing-alliances, which have nothing to do with accidents. However, plaintiffs' veracity in maintaining their suits in the U.S., regardless of the place of the accident, used their creativity to maintain U.S. jurisdiction by involving any possible related party regardless of the relationship to the accident. Foreseeing a potential dismissal in a U.S. jurisdiction to another country's jurisdiction, the plaintiffs' attorneys in the case will also name United Airlines and the Star Alliance, as defendants.

¹⁴² *Id.*

strategy is done in order to avoid federal jurisdiction and make the claim “stick” in the state court system.¹⁴³

D. United States Forums

The most popular forum, as previously mentioned, tends to be the United States due to the array of options offered in the American court system that other countries’ legal systems do not offer.¹⁴⁴ Some of those options include generous jury awards from several types of damages including lost wages, medical expenses, past and future pain and suffering, pre-impact and/or post impact terror,¹⁴⁵ and punitive damages.¹⁴⁶ This damage recovery scheme actually surpasses damage recovery under the Montreal Conventions.¹⁴⁷ Also, paying attorneys on a contingency fee basis influences foreign plaintiffs to bring their claims to our courts.¹⁴⁸ Lastly, foreign plaintiffs are more inclined to file in the United States because of the much greater extent of discovery allowed.¹⁴⁹

In seeking adjudication in an American court, international plaintiffs tend to face the issue of *forum non conveniens*. Under the doctrine of *forum non conveniens*, American trial courts dismiss cases where an alternative forum is available.¹⁵⁰ Usually that alternative forum will be another country, whether it be the country where the foreign plaintiff resides, the defendants’ place of business, or the accident site- which is sometimes outside of the United States.¹⁵¹ Each state jurisdiction has

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 3.

¹⁴⁵ Stephen A. Wood. *Damages Issues in Aviation and Catastrophic Accident Cases*. THE BRIEF: TORT TRIAL & INSURANCE SECTION, (2014) at 13-14. Many state courts award damage for pre-impact terror, or pre-impact fear, which falls under the category of pain and suffering. However, it has its own burden of proof that passenger can meet if they were on a plane and were aware of an impending crash from some period of time, however brief, prior to the impact. As for post-impact pain and suffering, almost all jurisdictions allow recovery for this type of damage. In a wrongful death context, the issue become to be “whether the decedent survived and was conscious enough for a period of time after the accident to experience post-impact pain and suffering.” *Id.* The evidence will come from eyewitnesses, testifying that movement or sound emanated from the decedent prior to death, or toxicology testing conducted by an expert witness or having the expert witness testify to it.

¹⁴⁶ Collier, *supra* note 126, at 3.

¹⁴⁷ Leary, *supra* note 67, at 259 § 13.

¹⁴⁸ *Id.*

¹⁴⁹ Collier, *supra* note 126, at 4.

¹⁵⁰ Heiser, *supra* note 13, at 611.

¹⁵¹ *Id.*

adopted such doctrine in its courts with some variations.¹⁵² In the case of transnational tort actions, defendants often file a motion for *forum non conveniens* to obtain dismissal into an alternative forum which tends to be another country.¹⁵³ In this case, the court determines that jurisdiction exists over the case in this alternative forum, which tends to be more financially convenient for defendants.¹⁵⁴

Indeed, such doctrine first came about in the seminal case *Gulf Oil Corp. v. Gilbert*,¹⁵⁵ which was decided in 1947.¹⁵⁶ This case is the “classic case of domestic forum shopping.”¹⁵⁷ The facts of the case involve a plaintiff from the state of Virginia with Virginia property that brought an action in New York, which was defendant’s place in which he was “qualified to do business.”¹⁵⁸ In this case, the doctrine of *forum non conveniens* officially made its appearance and was applied, resulting in dismissal in defendant’s favor.¹⁵⁹ The court confined this category of dismissals within federal jurisdiction in civil cases.¹⁶⁰ According to this court, such dismissal would be granted “to those ‘rare cases’ in which a plaintiff seeks ‘not simply justice but justice blended with some harassment.’”¹⁶¹ Unless there is strong evidence favoring such dismissal in a defendant’s favor, a plaintiff’s forum preference will not be disturbed.¹⁶² In international aviation and other transnational tort actions, plaintiffs’ choice of forum is not given the same deference.¹⁶³ The citizenship status of the plaintiffs contributes to a great extent in dismissal determinations.¹⁶⁴ Particularly, the plaintiffs’ non-American status has been included, along with other factors, to support a dismissal of transnational cases.¹⁶⁵ Besides the citizenship of the plaintiffs, the courts

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 612.

¹⁵⁵ *Gulf Oil Corp. v. Gilbert*, 330 U.S., 501 (1947).

¹⁵⁶ Elizabeth T. Lear. *National Interest, Foreign Injuries, and Federal Forum Non Conveniens*. 41 U.C. DAVIS L. REV. 559, 563 (December 2007).

¹⁵⁷ *Id.* at 564.

¹⁵⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S., 501, 502-503 (1947) (quoted in Elizabeth T. Lear. *National Interest, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. Davis L. Rev. 559, 564 (December 2007).

¹⁵⁹ *Id.* at 505.

¹⁶⁰ Lear. *National Interest, Foreign Injuries, and Federal Forum Non Conveniens*, at 564.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

have included other factors to determine dismissal of international cases in federal courts. Those factors, which were also developed and applied in *Gulf Oil Corp.*, include a balance of private and public interests.¹⁶⁶ After *Gulf Oil Corp.*, a further and far more extensive analysis on the private and public interest, along with the availability and adequate forum factors, would develop and further complicate case law. Such application would, in fact, apply to the area of international aviation disasters.

E. *Piper Aircraft Co. v. Reyno*

Indeed, the most notable case involving the doctrine of *forum non conveniens* is *Piper Aircraft Co. v. Reyno*.¹⁶⁷ This case established the concept of *forums non conveniens* in the context of the international aviation disasters.¹⁶⁸ The plaintiffs in this case were involved in a plane crash in Scotland.¹⁶⁹ The issue in this case was “whether a motion to dismiss on grounds of *forum non conveniens* [should] be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court.”¹⁷⁰ In making its determination, the Supreme Court first began by stating that “because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.”¹⁷¹ The Court engaged in an analysis to decide whether there is an available and adequate alternative forum to justify a dismissal of the case.¹⁷² The Court continued its analyses with the issue of whether private and public interest factors weighted in favor of or against dismissal.¹⁷³

In *Piper*, the Court determined that dismissal was proper because the private interests of the litigants would be adjudicated more conveniently in Scotland.¹⁷⁴ Although adjudication of the case in the United States would not negatively affect the case, because, in applying

¹⁶⁶ *Id.*

¹⁶⁷ *Piper v. Reyno*, 454 U.S. 235 (1981).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 246.

¹⁷¹ *Id.* at 255. However, even U.S. plaintiffs do not have an “indefeasible right of access”

¹⁷² *Id.*

¹⁷³ Don G. Rushing and Ellen Nudelman Adler, *supra* note 1, at 406.

¹⁷⁴ Elizabeth T. Lear, *National Interest, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 566 (December 2007).

Pennsylvania state law, the jury would have interest in a case involving a Pennsylvania corporation.¹⁷⁵ Nevertheless, the Court concluded that Scotland, as the accident site, would have a much compelling interest in deciding a local accident.¹⁷⁶ Though American citizens have an interest deterring American manufacturers, who were also the defendants in case, such interest was not sufficient to keep such case in the American court system.¹⁷⁷ As a matter of fact, the Court argued that maintaining cases such as *Piper* would create an “enormous commitment of judicial time and resources” that would tie up the court with cases that could conveniently be adjudicated somewhere else.¹⁷⁸

Under *Piper*, the following principles in a trial court’s determination to dismiss an international aviation case apply:

1. An Available Alternative Forum

In order to be able to dismiss a case involving foreign plaintiffs on *forum non conveniens*, a court must determine whether there is a forum that is “available.”¹⁷⁹ If there is, then dismissal is more likely to be granted. A foreign forum is considered “available” if the defendant is subject to personal jurisdiction there and no other procedural bar, for instance the statute of limitations, prevents resolution of the merits in the alternative forum.¹⁸⁰ Often, defendants waive any objections to the alternative forum based on personal jurisdictions, service of process, or statute of limitations, rendering these considerations non-factors.¹⁸¹

The problem with the return jurisdiction clauses is that it does not make litigation efficient, nor inexpensive. By dismissing the case to an alternative forum that later becomes unavailable, and then having the case back into our court system, a lengthy legal process results, generating additional delays in the adjudication of these cases. Additionally, foreign forums receiving these dismissed cases, have enacted retaliatory legislation that blocks such case from their

¹⁷⁵ *Id.* at 567.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Heiser, *supra* note 13, at 614.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 615.

jurisdictions.¹⁸² This creates an additional delay and inefficient manner in adjudicating cases, frustrating the purpose of expediency and convenience.

2. Adequate Alternative Forum

A dismissal under *forum non conveniens* must be grounded on the presence of an adequate alternative forum.¹⁸³ There is no deference to a foreign plaintiff's choice of forum.¹⁸⁴ A less favorable substantive law in the alternative forum is not a sufficient basis for defeating a motion for *forum non conveniens*.¹⁸⁵ Underdeveloped and corrupt justice systems in the alternative forum will not render the alternative forum inadequate.¹⁸⁶ Should there be, however, an unfavorable change in the law or a remedy in the alternative forum that is "so clearly inadequate or unsatisfactory that it is no remedy at all," the chances of the case remaining in an American court increase.¹⁸⁷ A foreign forum is considered adequate when plaintiffs will not be deprived of all remedies or treated unfairly. Just because foreign plaintiffs would not receive the same benefits awarded in American courts, does not mean that the alternative forum would be inadequate.¹⁸⁸

Another aspect of adequacy that is analyzed is the foreign plaintiff's ability to enforce a judgment obtained through his/her national courts.¹⁸⁹ The issue then becomes the solvency of an U.S. defendant in that foreign forum. Problems arise when the U.S. defendant does not have assets in the foreign country where the case was adjudicated and judgment was granted for the plaintiffs.¹⁹⁰ Even if the foreign plaintiffs decide to enforce the judgment against the U.S. defendants in the U.S.,—where the defendants' assets are, "... there is no guarantee that judgment will be recognized."¹⁹¹ The inability to enforce a foreign judgment in that

¹⁸² *Id.* at 622.

¹⁸³ *Id.*

¹⁸⁴ Collier, *supra* note 126, at 6.

¹⁸⁵ *Id.*

¹⁸⁶ Heiser, *supra* note 13, at 614.

¹⁸⁷ Collier, *supra* note 126, at 6.

¹⁸⁸ Heiser, *supra* note 13, at 616.

¹⁸⁹ *Id.* at 617.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

alternative forum creates a haven for American corporations to hide from their tortious acts.

3. Public and Private Interests

Per *Gulf Oil Corp.*, private interest factors include the ease of the access to the evidence, availability of a process to compel witnesses to testify, the opportunity to view the premises when it is appropriate to the action, and other matters related to the efficiency, ease, and economical aspects of trial.¹⁹² In considering the public interest factors, the following is taken into account:

The administrative difficulties flowing from court congestion; the unfairness of burdening citizens in an unrelated forum with jury duty; the local interest in having localized controversies decided at home; the interest in having a diversity case tried in a forum familiar with the law that must govern the action; and the avoidance of unnecessary problems in conflicts of law or in application of foreign law.¹⁹³

The public and private interests are factored in a dismissal but they are not consistently applied. Some factors are applied while others are not, or all are applied. For various and discretionary reasons case have been dismissed without establishing much consistent guidance for future cases. Additionally, it does not help that judges open the possibility of case dismissed on *forum non conveniens* to return if the alternative forum is not proper. If the judges were expecting to set precedent and pursue judicial economy with *Piper*, the complete opposite happened. In applying the principles mentioned above, the courts in these international aviation disaster cases have created not only many additional issues but many inconsistent decisions¹⁹⁴ that have frustrated the purpose of judicial

¹⁹² *Id.* at 612.

¹⁹³ *Id.*

¹⁹⁴ *In re Air Crash Disaster Near Palembang, Indonesia*, MDL 1276, 2000 WL 33593202, at *2 (W.D. Wash. 2000); see also *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 546 F. Supp. 2d 1191, 1193 (D. Kan. 2008). In both cases, the courts reasoned to a great extent that when American defendants and

efficiency, increased the burden on our courts in adjudicating these cases, influencing other national interest and reactions to intervene in the cases, and more important deny proper compensation to victims of these disasters in many cases.

4. Inconsistent Outcomes

Inconsistent outcomes from the American judiciary do not provide a sound precedent. State jurisdictions adjudged differently than federal jurisdictions on an international aviation disaster and *forum non conveniens*. Several state courts decided to adopt federal *forum non conveniens* but they applied it differently on a state by state basis.¹⁹⁵ This only encourages more litigation in creative ways. Foreign plaintiffs' attorneys scrap for any argument that will allow them to not only stay in an American court, but in state court system.¹⁹⁶ Given the variation in the application of *forum non conveniens* standards in this court, foreign plaintiffs' attorneys find a possibility to have their cases heard in the United States. Of course, knowing that an international aviation case has a greater chance of being dismissed in a federal jurisdiction under the court's strict application of *forum non conveniens*, filing foreign plaintiffs,

American plaintiff are involved in the litigation, an American forum has an interest in adjudicating the case and is thus the proper forum. However, defendants cite to cases where even if American parties were involved, courts have held there is an alternative forum is proper. See *Piper v. Reyno*, 454 U.S. 235, 246 (1981). Additionally, the court in these case placed the burden on the defendants when *Piper* and other cases have given less deference to foreign plaintiffs' choice of forum.

¹⁹⁵ *Vivas v. Boeing Co.*, 233 Ill. 2d 601, 919 N.E.2d 366 (Ill. 2009). In this case, the Supreme Court of the State of Illinois held that the doctrine of *forum non conveniens* did not require transfer of passengers' products liability action against airplane manufacturer and airplane engine manufacturer from the United States to Peru, where the plane had crashed. The case was removed to federal court. It was remanded, however, to the state court system. See *Kalan-Suna v. Boeing Co.*, 10 C 6639, 2010 WL 4928941, at *1 (N.D. Ill. 2010) *aff'd sub nom.* *Koral v. Boeing Co.*, 628 F.3d 945 (7th Cir. 2011). In November 2009, four plaintiffs filed four separate complaints in the Circuit Court of Cook County based on the February 25, 2009 airplane crash alleging product liability claims against Boeing in regard to the 737-800 aircraft at issue. Boeing removed these lawsuits to the United States District Court for Northern District of Illinois based on diversity jurisdiction after which the plaintiffs moved to remand. The presiding judges in all four federal cases remanded them to state court after which Boeing moved to dismiss the complaints based on preemption and *forum non conveniens*. Court granted plaintiffs' motion to remand, bringing the case back to the state court system. There was no alternative forum for such cases but in Illinois courts. *Jinhua Yang v. Boeing Co.*, 13 C 6846, 2013 WL 6633075, at *6 (N.D. Ill. 2013) *reconsideration denied sub nom.* *Junhong Lu v. Boeing Co.*, 13 C 7418, 2014 WL 1409441 (N.D. Ill. 2014) (Case in state court and rejected alternative forum).

¹⁹⁶ *Id.*

and sometimes domestic, try to get into state courts that will be more plaintiff-friendly in their *forum non conveniens* application.¹⁹⁷

For the most part, federal courts make good use of the doctrine of *forum non conveniens* to dismiss transnational cases. Although the court in *Gambra v. Int'l Lease Fin. Corp.*¹⁹⁸ stated that the application of *forum non conveniens* should rarely be employed in cases before the courts.¹⁹⁹ Nonetheless, at least at the federal courts system level, these aviation disaster cases have been dismissed to a great extent. In *re Air Crash Near Peixoto de Azevedo, Brazil*²⁰⁰, where Gol Linhas Inteligentes S.A. (Gol) Boeing 737-800 Flight 107²⁰¹ collided with an Ebraer Legacy 600²⁰² jet under the operation of Excel Aire, the foreign plaintiffs sued the manufacturer of the avionics and other U.S. defendants.²⁰³ The court dismissed the case on a motion for *forum non conveniens* because it found Brazil to be an available and adequate forum.²⁰⁴ All defendants were subject and consented to jurisdiction in Brazil.

The district court emphasizes the U.S. Treaty with Brazil²⁰⁵ which was signed in 1829,²⁰⁶ allowing equal access to citizens. Although generally courts should weigh against this dismissal in cases where issue of *forum non conveniens* arises, the court here found litigation in Brazil more convenient. The ease of litigation in Brazil was not unduly burdensome and slow to plaintiffs, they argued.²⁰⁷ In regards to the private interest, the court found all defendants were subject to Brazilian jurisdiction.²⁰⁸ It would be unfeasible for Brazilian defendants named in the lawsuit to join their American counterparts, who are also named in the suit, to defend suit in the United States where the courts did not have jurisdiction over them.²⁰⁹ Also, the cost of transporting parties and

¹⁹⁷ Heiser, *supra* note 13, at 611.

¹⁹⁸ *Gambra v. Int'l Lease Fin. Corp.*, 377 F. Supp. 2d 810 (C.D. Cal. 2005).

¹⁹⁹ Don G. Rushing and Ellen Nudelman Adler, *supra* note 1, at 417.

²⁰⁰ *In re Air Crash Near Peixoto De Azevedo, Brazil*, on Sept. 29, 2006, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) *aff'd sub nom. Lleras v. Excelaire Servs. Inc.*, 354 F. App'x 585 (2d Cir. 2009)

²⁰¹ *Id.* at 275.

²⁰² *Id.*

²⁰³ Rushing and Adler, *supra* note 1, at 410.

²⁰⁴ *Id.*

²⁰⁵ *In re Air Crash Near Peixoto De Azevedo, Brazil*, on Sept. 29, 2006, 574 F. Supp. 2d at 280.

²⁰⁶ *Id.*

²⁰⁷ Rushing and Adler, *supra* note 1, at 413

²⁰⁸ *Id.*

²⁰⁹ *Id.*

translating evidence was found prohibitively expensive.²¹⁰ Any judgment enforcement, as the court conditioned, would be honored in the U.S. against U.S. defendants.²¹¹

Lastly, in analyzing the public the court favored dismissal to Brazil because they recognized Brazil's greater local interest in adjudicating suits, arising out of one its largest aviation disasters in that nation's history.²¹² The court did not weigh in so much the fact that New York had significant interests in having this case litigated in its jurisdiction.²¹³ Indeed, the ExcelAire pilots lived and were licensed to fly in New York; ExcelAire²¹⁴ hired and trained the Legacy pilots in the same city, and ExcelAire is incorporated in New York.²¹⁵ This litigation implicated defendant-U.S. corporate entities. As a matter of fact, "the designs of the products manufactured in the U.S. by U.S. companies" made a strong compelling case to keep this suit in the U.S. The court, however, ruled otherwise. The district court's judgment was affirmed by the court of appeals.²¹⁶

The plaintiffs in transnational litigation are often criticized for forum shopping. However, as a Judge Cogan²¹⁷ states regarding entities acting in a global context:

[T]he Court cannot be blind to the practical realities of cross-border litigation. The often pejorative connotation inherent in the label "forum shopping" is general undeserved. It is a fact that plaintiffs will almost always select a forum in which they believe they will maximize their recovery, as long as they have a reasonable chance of remaining in that forum, and that forum is often

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 414

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *In re Air Crash Near Peixoto De Azeveda, Brazil, on September 29, 2006*, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) *aff'd sub nom. Lleras v. Excelaire Services Inc.*, 354 Fed. Appx. 585 (2d Cir. 2009).

²¹⁷ Rushing and Adler, *supra* note 1, at 415 (quoting *In re Air Crash Near Peixoto De Azeveda, Brazil, on September 29, 2006*, 574 F. Supp. 2d 272 (E.D.N.Y. 2008)).

within the U.S. Conversely, defendants will generally seek to relegate actions to the forum in which they believe their exposure is minimized, and that forum is often outside of the U.S...the objective of *forum non conveniens* analysis should not be to determine the 'true' basis for a party's forum position, as that basis will almost always be to maximize or minimize recover, but whether the confluence of private and public interest factors validates that basis in the particular case.²¹⁸

Both parties to the litigation have something at stake; The U.S. has an interest in adjudicating cases where its corporations are involved. Corporations have a great interest in *forum non conveniens* to enter a forum that will reduce their liability in an aviation cases. It is evident that in today's global economy and transport, it would be much easier, and not so much of a burden for a corporation to defend a lawsuit anywhere in the world. If they can conduct business anywhere in the world, they can certainly defend a lawsuit anywhere in the world. This is the reality that several American courts fail to take into consideration when granting a judgment of *forum non conveniens*.

Our courts have further complicated precedent in international aviation cases through their application of *forum non conveniens*. In *re Cessna 208 Series Aircraft Prods. Liab. Litig.*,²¹⁹ Canadian plaintiffs sued Cessna Aircraft and Goodrich Corporation, both U.S. corporations and manufacturer of the aircraft, in the Southern District of New York after a Cessna Model 208 crashed near Winnipeg, Manitoba in Canada.²²⁰ Eventually the case was transferred to the District of Kansas.²²¹ In this case, the district court denied the motion for *forum non conveniens* because the court Cessna's heightened burden in favor of dismissal was not met.²²² Surprisingly, the court found that an adequate and available forum

²¹⁸ *Id.* at 415.

²¹⁹ 546 F. Supp. 2d 1191, 1193 (D. Kan. 2008).

²²⁰ Rushing and Adler, *supra* note 1, at 422.

²²¹ *Id.*

²²² *In re Cessna 208 Series Aircraft Products Liab. Litig.*, 546 F. Supp. 2d at 1197.

existed in Canada. Also, Canada law clearly applied. However, the private and public factors did not favor the U.S. defendants.²²³ Even if Canadian law applied, all plaintiffs were Canadian, and the accident site was in Canada; the court still found that the U.S. had a greater interest than Canada in “regulating the conduct of resident aircraft manufacturers, even where a particular aircraft accident occurs in a foreign country.”²²⁴ The foreign plaintiffs were able to survive dismissal under the same analysis in cases where dismissal was granted.²²⁵ These types of cases contribute to the judicial chaos that lead to appeals that elongate judicial efforts and undermine efficiency. They do not yield to the establishment of sound precedent and lead to a number of arguments that plaintiffs’ lawyers will use to make these international aviation cases aviation stick.

Although the “semi” counter-argument to this would could be, as claimed before, that litigating these cases is burdensome to our court system when other countries, especially the accident site nations and where defendants reside, can properly litigate these cases. This argument is to a certain degree weak. Our American courts, as a matter of facts, have included in judgments of this kind a “conditional dismissal” on the alternative forum’s acceptance of jurisdiction.²²⁶ In *Gambra v. Int’l Lease Fin. Corp.*,²²⁷ the court dismissed case holding that France had greater interest in adjudicating the suit involving 120 French decedents and only four U.S. citizens.²²⁸ The court included a “conditional dismissal” where if France rejected the suit, the plaintiffs could come back to the U.S. to adjudicate the case. Surprisingly, the case returned to the U.S. because France rejected the case claiming that they did not have an available forum, contrary to what the court in the U.S. concluded.²²⁹ Not having met conditions placed by the U.S. court in the original motion dismissing the case from our American court system, the case return to the U.S. federal court system.²³⁰

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Supra* note 165.

²²⁶ *Id.* at 416.

²²⁷ *Gambra*, 377 F. Supp. 2d at 812-814 (C.D. Cal. 2005).

²²⁸ Rushing and Adler, *supra* note 1, at 419.

²²⁹ *Gambra*, 377 F. Supp. 2d at 812-814.

²³⁰ *Id.*

Although the courts have expressed that a plaintiff's deliberate conduct in having their own case dismissed for lack of jurisdiction in to provide grounds to trigger the dismissal conditions to return to the U.S. will incur the risk of having their suit dismissed based on bad faith,²³¹ we are not becoming more efficient as these courts claim. We are having cases return to our courts.²³² Also, the court must employ time and effort in determining whether there was intentional conduct on behalf of the plaintiff or not. If there was, then the case gets dismissed.²³³ If there was no bad faith conduct, then the case gets adjudicated in our courts this time.²³⁴ It is clear that efficiency disappears and we continue to incur a burden even when we dismiss cases based on *forum non conveniens*.

Additionally, in cases as the one mentioned above,²³⁵ judges have engaged in a speculative analysis, concluding a great degree of certainty that the alternative forum is more appropriate, available, and has a greater interest in adjudicating such cases. Even if the defendants, including U.S. defendants, were willing to consent to jurisdiction without raising a challenge in the alternative forum, it is not certain whether that alternative forum will accept the case.

In addition to dismissal conditions, other nations have enacted retaliatory statutes as a result of dismissals from American courts based on *forum non conveniens*.²³⁶ A dismissal based on those grounds not only frustrates the plaintiffs but also their home countries. This has led to many nations, especially Latin American nations, to enact statutes which are designed to counter *forum non conveniens* dismissals of international tort actions brought by their residents against U.S. defendants in U.S. courts.²³⁷ These "safeguards" those countries develop in favor of their

²³¹ *In re Compania Navier Joanna S.A.*, 531 F. Supp. 2d 680 (D.S.C. 2007) The court held that a "party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct." ; See *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 470 F. Supp. 2d 917, 920- 922 n.13 (S.D. Ind. 2006) the U.S. court dismissed plaintiffs' complaint after holding that Mexican court's conclusion that it lacked territorial competency over the defendants; See also *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 707 (7th Cir. 2005) Here, the court held that the plaintiffs did not act in good faith and manipulated the dismissal of their case in Mexico. The district court ultimately dismissed the complaint again.

²³² *Supra* note 172.

²³³ Rushing & Adler, *supra* note 1, at 406.

²³⁴ *Supra* note 168.

²³⁵ *Supra* note 172.

²³⁶ Heiser, *supra* note 13, at 622.

²³⁷ *Id.*

citizens' interests when they begin litigation in the U.S., complicate matters and increase the burden on our court system, forcing our courts to take back cases we initially dismissed.

Indeed, there are two forms of retaliatory legislation: blocking statutes and choice-of-law.²³⁸ Blocking statutes preclude courts from hearing any suit by one of their residents that have been filed in another country and dismissed on *forum non conveniens*.²³⁹ Choice-of-law states allow foreign courts, who receive their residents' suits dismissed on *forum non conveniens*, to apply tort and damages law "similar to that of the country in which the action was originally filed."²⁴⁰ These countries have enacted these forms of statutes to discourage U.S. defendants from coming their jurisdictions by making it less attractive for them to defend suits and incur less liability.²⁴¹ When American judges are granting *forum non conveniens*, not only do they engage in speculation²⁴² regarding the fate of these international aviation disasters in the alternative "available" forums, but they are undermining international reactions to those types of dismissals. The fact that their residents face less deference in American courts easily leads to the inevitable conclusion that the U.S. is engaging in discriminatory practices against its residents. These nations are very aware U.S. defendants' goal: avoid the least amount of liability. In light of that, these nations react with retaliatory legislation, creating a never ending burden on our system to take cases we previously dismissed to a supposedly alternative and available forum. Lastly, a dangerous practice that American judges are potentially engaging in is international interpretation of treaties that may go well beyond their jurisdiction.²⁴³

²³⁸ *Id.* at 622.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See *Gambra*, 377 F. Supp. 2d at 812-14 (C.D. Cal. 2005) (the court engaged in analysis in which they ascertained that French courts would exercise jurisdiction over the case at bar. Eventually, the French court declined such jurisdiction).

²⁴³ In re *Air Crash Near Peixoto de Azevedo*, 574 F. Supp. 2d at 279: the Court interprets a U.S.-Brazil international treaty, contributing to the court's rationale in granting dismissal; *Jennings v. Boeing Co.*, 677 F. Supp. 803 (E.D. Pa. 1987) *aff'd*, 838 F.2d 1206 (3d Cir. 1988): the Court interpreted a U.S.-Ireland treaty providing for "national treatment" of Irish citizens in application of laws within United States establishing right of recovery for injury or death. The court determined that the Irish plaintiff in a helicopter crash did not have a right to recovery in the U.S. because the treaty did not permit Irish citizen to invoke diversity jurisdiction of federal court in district in which she did not reside. It only allowed her to receive treatment of American citizen not residing in district in which action was brought.

5. The Alternative: An International Court or Tribunal

Arguments exist that encourage facilitating adjudication of transnational cases in our courts, and lessening the harsh application of the doctrine of *forum non conveniens* in American courts.²⁴⁴ By allowing Congress to create legislation which would preempt any federal or state court application of *forum non conveniens*, transnational cases would be able to be heard in the U.S., who should have an interest in adjudicating cases where American entities are involved.²⁴⁵ By maintaining, however, these cases in our system, we are exposing our courts to a burdensome and dilatory adjudicatory process. Our court system, especially at the federal level, has applied *forum non conveniens* often but very inconsistently and leaving much room for plaintiffs' lawyers to crowd our litigation system. As a result, the litigation processes for aviation disasters does not end efficiently and effectively.

Although international tribunals have not been viewed well in the eyes of the American court system due to the lack of due process notions and a diminished array of damages for plaintiffs to recover, there are ways to reconcile any differences should the Montreal or Warsaw Conventions²⁴⁶ empower an international court or tribunal to adjudicate claims made by American and non-American plaintiffs involved in an international aviation disaster.

An international tribunal where international aviation litigation would be in the best interest of everyone. No longer will our courts be subjected to the tedious international litigation, taking the court's time and few resources. We can dedicate our dockets to our own domestic cases. U.S. case law and *forum non conveniens* analysis will not be applied because those cases will automatically be governed under an international treaty, i.e., a modified Montreal or Warsaw Convention. The discretion inherent in *forum non conveniens*, as developed in *Piper*, will not create confusing precedent nor encourage judicial speculation regarding the fate of a case in an international forum. Our judicial system will not have to make a distinction between foreign plaintiffs and domestic plaintiffs. And

²⁴⁴ Don G. Rushing and Ellen Nudelman Adler, *supra* note 1, at 406. See also Elizabeth T. Lear, *National Interest, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 566 (December 2007).

²⁴⁵ *Id.*

²⁴⁶ Leary, *supra* note 67, at § 2.

more importantly, plaintiffs from all over the world involved in an aviation disaster anywhere in the world will be able to get compensated property on a neutral standard determined and established under an international agreement.

In order to create such international tribunal, it will be necessary that the current international treaties, Montreal and Warsaw, delegate to an international court the ability to have jurisdiction over these international air disaster cases. The Montreal and Warsaw Conventions would be preferably the governing treaties because their modification would not require but extreme changes. Changes in compensatory schemes have occurred before under these conventions. Most signatories have agreed to changes previously.

Definitely, representatives of nations, especially those possess a share in the aviation industry, can negotiate the provisions governing an international tribunal that will adjudicate these cases. American notions of damages and due process need to be incorporated in these provisions. It is after all these American compensatory schemes, discovery procedures, and due process that attract plaintiffs from all over the world to file suits in American courts. Provisions setting reasonable caps that are aligned with standards of living and project future costs for each victims for the duration of their physical injuries, emotional damages, and other economic damages could be established by representative legal experts, as well as other non-legal experts in the formation of this international tribunal. The only difference would lie in jury composition. Defendants for sure will not need to face a victim friendly and generous American jury. Thus, defendants would be better off in aviation disasters cases under an international treaty that creates an international tribunal.

CONCLUSION

Finally, the adjudication of international aviation disasters has represented a true challenge in our American judicial system. From the moment a plane crashes, whether in the United States or in other parts of the world, litigation rapidly begins with the determination of the responsible parties and the cause of the accident. The most contentious stage, however, lies in within the procedural process of this type of litigation. An American forum is tends to be the first forum in which plaintiffs, especially foreign, file an action arising out an international

aviation disaster. Under the doctrine of *forum non conveniens*, federal courts have dismissed transnational aviation disaster cases to an alternative, available forum: typically the accident site, or in the case where most plaintiffs are foreign, to the plaintiffs' country of residence, or where the defendants' principal place of business. Such dismissals have been grounded on discretionary principles under *forum non conveniens* have resulted in inconsistent outcomes. Such outcomes have in turn resulted in extensive litigation that has run against our principles of judicial economy. Precedent has become ambiguous, giving plaintiff enough arguments to make a good case to appeals dismissal, extending litigation.

In addition to the burden these inconsistent outcomes have created on our dockets and litigating parties, American courts have engaged in speculation regarding the future of these cases in alternative forum that have ignore the alternative forum's choice of accepting a dismissed case on *forum non conveniens*. It does not help that American courts include a "conditional dismissal" that allows these dismissed cases to come back should the alternative forum not be "available." Such condition severely undermines the reasoning behind judicial economy.

In order to alleviate the chaos that *forum non conveniens* has caused, an international tribunal, created under the Montreal, or Warsaw Conventions, would be the most ideal solution. Under theses Conventions, most problems related to litigation in these type of case would be resolved through the agreement of signatories to reasonable provisions. Such provisions would need to include notions of American judicial practices in order to be fair and attractive to plaintiffs and defendants. More importantly, plaintiffs would need to be fully, fairly, and reasonably compensated regardless of where they originate, where the accident happened.