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CONTENTS

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Foreign Plaintiffs, Forum Non Conveniens, and the 1999 Montreal Convention

by Allan I. Mendelsohn*

Introduction

The purpose of this article is not so much to focus on the multitude of successful forum non conveniens motions that have been granted in recent years by U.S. courts, but rather to focus on the increasing frequency of foreigners (i.e., non-citizens and non-residents) opting to sue in the United States. They do this because in many instances they are aggressively solicited by U.S.-employed so-called "consultants" who tell them that they can not only enjoy contingency fee arrangements in retaining their U.S. lawyers, but that they can also enjoy the likelihood of much larger financial recoveries than could be expected from the courts in their own countries. Even if these representations are in fact true, the issue I wish to address is the propriety of foreigners seeking access to U.S. courts for these purposes.

I shall then briefly examine the decisions in several of the more recent aviation accident cases. A disproportionate number of them, as can be seen, involve accidents that occurred abroad, on foreign airlines – many of which do no business in the United States and, hence, are not subject to U.S. jurisdiction – and with victims that are mostly or all citizens of foreign countries. Finally, I shall propose an approach that I believe would help to eliminate or, at the least, lessen the frequency with which foreign

* Allan Mendelsohn is a former Deputy Assistant Secretary of State (Transportation Affairs) for the U.S. State Department, an Adjunct Professor at the Georgetown Law Center, and currently Of Counsel in the Washington, D.C. offices of Cozen O'Connor. He presented this paper originally as a speech at a panel discussion on forum non conveniens that was part of the annual IATA Legal Symposium held in February, 2011 in Vancouver, British Columbia, Canada. The text has since been revised, updated, and appropriately edited so as to permit publication in this journal.

citizens resort to U.S. courts following aviation accidents abroad while, at the same time, providing foreign plaintiffs who are victims of international air mishaps with faster and more certain resolution of their claims. I shall also propose what I believe is a much better and more efficient system for determining whether courts abroad are available and adequate for purposes of allowing a U.S. court to grant a forum non conveniens dismissal.

The Contingency Fee System

This discussion should begin with a few observations about the system of jurisprudence that exists in the United States of allowing persons who wish to retain lawyers to represent them in certain types of cases to be able to retain those lawyers on contingency fees. This means, as most everyone today knows, that the lawyer who is retained is not fully, or even sometimes partially, paid until and unless s/he succeeds in obtaining a recovery on behalf of the client. And the greater the recovery, the higher the total legal fee for the lawyer – in other words, there is an incentive for the lawyer to obtain the highest possible recovery for his or her client. The contingency fee is a very regularly used system in personal injury cases such as those that follow auto accidents, airline accidents, or medical malpractice.

I have no hesitation admitting that, just as there are always occasional instances of abuse in any system of law, abuses are present in the contingency fee system. Likewise, I readily acknowledge the fact that the American system of contingency fees has very often been roundly and severely criticized by our European and some of our Asian colleagues in the legal profession. The fact of the matter is, however, that the contingency fee system has allowed middle class and less wealthy American citizens to obtain much the same access to justice following accidental death or injury as can be obtained by Americans who have sufficient means to retain lawyers without contingency fee agreements. In other words, it is a democratizing feature of American governance. This fact has substantially contributed to making the contingency fee system an integral part of American law that, despite occasional abuses and despite the level of criticism from abroad (and sometimes also from within the United States), is not about to be changed in the United States in any major way.

But the fact that we have such a well-established contingency fee system in the U.S. does not mean that we should necessarily make it available, or that we should be required to make it available, to foreigners who do not have a similar contingency fee system in their own countries and who, therefore, are tempted to "forum shop" in the courts of the United States.[1] For it is no secret that, in suing in the U.S., they can not only take advantage of the contingency fee system, but they can also enjoy the usually much higher damage awards that are available in the courts of this country compared to their own.

I do not at all mind if the contingency fee system is adopted by other countries and if, in time, we begin to witness a growing number of countries other than the United States that allow or encourage the members of their legal profession to provide their services on contingency fees.[2] But I am not a fan of the current system where American lawyers manage to get themselves retained on contingency fee arrangements by foreign citizens or their survivors following air crashes or other similar types of disasters that occur abroad. As a matter of fact, I am also no fan of a system that allows American lawyers to get themselves retained by foreigners on such contingency fee arrangements even when the air crash occurs in the United States or when the airline on which the accident occurred was a U.S. flag airline. I, of course, believe that a foreigner living in the United States should have the same access to contingency fee arrangements as do U.S. citizens. But, as we all appreciate, these international aviation disaster cases present totally different circumstances.

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1 *See, e.g.*, Paolicelli v. Ford Motor Co., 289 Fed. Appx. 387 (11th Cir. 2008).

2 Recent reports suggest that differing forms of the U.S. contingency fee system may well be emerging today in the United Kingdom, Germany, and Canada. *See, e.g.*, Mark A. Behrens, et al., *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165 (2008); Richard Moorhead, *An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals*, 73 MOD. L. REV. 752 (2010); Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259 (2002); Danny Strassman, *Contingency Fees in Europe Examined: Germany*, LEGAL FIN. J., Jan. 5, 2011, http://www.legalfinancejournal.com/contingency-fees-in-europe-examined-germany/.

The Increasing Use of the Doctrine of Forum Non Conveniens

As is well known within the aviation bar on both the plaintiffs' and defendants' sides, there is now a rapidly evolving and relatively efficient means that American courts have been adopting, with increasing frequency over the past decade, to avoid such forum shopping and misuse of the contingency fee system. It is what has by now become the well-known doctrine of forum non conveniens – where American courts, as a matter of discretion, will dismiss a case and more or less require that the foreign plaintiffs sue either in the courts of their own country or, in the case of a foreign airline defendant, to sue where that airline is headquartered and can readily be sued. The usual manner in which the American court will reach this result in an aviation context is by requiring that the defendant airline waive any statute of limitations defense and, in addition, voluntarily submit itself to the jurisdiction of the foreign court. I believe it has also become not at all uncommon for the airline (or its underwriter), when sued by its passenger victims following an aviation disaster in international air transportation, likewise to agree to waive whatever potential defenses it might have under Article 21(2) of the Montreal Convention.[3] The plaintiff's case is then dismissed by the U.S. court, and the plaintiff is free to bring suit against the airline in that foreign court.

Depending upon the facts of a particular case, the difficulty of selecting an alternative court to hear the case and determine the appropriate amount of a victim's compensation can vary. For example, in a case that I handled very recently, involving a foreign airline and some 152 passenger-victims – all domiciled or resident in the French jurisdiction of Martinique – it was relatively easy for the Court to "forum non" all the plaintiffs to the courts in Martinique. As the country of the victims' domicile or their "principal and permanent residence" under Article 33(2) of the Montreal Convention, the courts in Martinique were viewed by the U.S. court as "an adequate alternative forum" as well as the most acceptable forum to determine how, and the extent to which, their own citizens (or their survivors) should be compensated. After all, there certainly can be no question about the fact

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3 Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 24 U.S.T. 565, 974 U.N.T.S. 178 [hereinafter Montreal Convention].

that the courts of a victim's domicile or permanent residence are best equipped and best able to determine the amount of compensation that individual (or his/her survivors) should receive following an air disaster. Moreover, as the Colombian airline defendant in that case did no business in the United States and, hence, was not subject to U.S. jurisdiction, the fact that the airline's underwriter readily agreed that their insured airline would submit to the jurisdiction of the courts in Martinique made the decision that much easier for the U.S. court.[4]

In other cases, and especially those involving one or more U.S. citizen plaintiffs, a decision on forum non is not always reached so easily. For example, in the recent California litigation involving the crash of an Air France A-330 aircraft operating from Brazil to Paris on June 1, 2009, some 72 plaintiffs sued Airbus and various component parts manufacturers in a U.S. District Court in California. Of the 72, two were U.S. citizens who were living, as the Court found, only temporarily in Brazil and, hence, could properly bring suit against Air France in the U.S. under Article 33 of the Montreal Convention.

Nonetheless, and after examining all the public and private interest factors discussed by the U.S. Supreme Court in its landmark decision in *Piper Aircraft Co. v. Reyno*,[5] the District Court granted forum non conveniens and dismissed all the lawsuits – including those of the two Americans – in favor of litigation in France.[6] The case has reportedly since been refiled with the District Court, dropping all European and other plaintiffs while leaving only the two American and the several Brazilian plaintiff/victims. It will be interesting to see whether, on reconsideration and with the plaintiffs so limited, the District Court may decide to revisit its earlier decision and, instead, hear the cases involving the two Americans (who were able properly to sue Air France under the fifth forum created by the 1999 Mon-

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4 *See In re* West Caribbean Airways, S.A., 32 Av. Cas. (CCH) 15,764, 619 F. Supp. 2d 1299 (S.D. Fla. 2007), *aff'd sub nom.* Pierre-Louis v. Newvac Corp., 33 Av. Cas. (CCH) 18,186, 584 F.3d 1051 (11th Cir. 2009). This is also one of those cases where the airline opted to file a waiver of its potential defenses under Article 21(2) of the Montreal Convention, thus leaving outstanding only the issue of the amount of damages to be determined under Martinique law.

5 454 U.S. 235 (1981).

6 *See In re* Air Crash Over the Mid-Atlantic on June 1, 2009, 2010 WL 3910354 (N.D. Cal. Oct. 4, 2010).

treal Convention) while again granting a forum non conveniens dismissal for the others, but to the courts in Brazil rather than to the courts in France. A similar decision, dismissing the suits of some 17 individuals, including one U.S. citizen, in favor of litigation in New Zealand against a New Zealand airline stemming from the crash of a domestic flight in New Zealand, was reached some years ago by the U.S. Court of Appeals for the Ninth Circuit.[7]

It is by no means an easy decision for a U.S. court to grant forum non dismissals in cases brought by American citizens. After all, the adoption of the so-called "fifth forum" in Article 33(2) of the Montreal Convention was designed specifically to allow victims of international air disasters, and especially U.S. victims, to sue in their home countries.[8] Nonetheless, depending on the circumstances involved in a particular case, and even if the U.S. citizen plaintiff may have his or her "principal and permanent residence" in the United States, a forum non dismissal in favor of a foreign court may occasionally not be inappropriate.[9]

When it comes to forum non dismissals involving only foreign citizens, as was the case in the *West Caribbean Airways* litigation, *supra*, the issues become much easier; and there has, indeed, been almost a profusion of such cases recently. In a decision only this past September, a U.S. District Court in Illinois dismissed a case in favor of the courts of Cameroon in a fact situation involving a crash in Cameroon of a Kenya Airlines flight in which 85 dece-

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7 Lueck v. Sundstrand Corp., 236 F.3d 1137 (9th Cir. 2001). In *Tazoe v. TAM Linhas Aereas, S.A.*, 34 Av. Cas. (CCH) 15,778 (11th Cir. Feb. 1, 2011), the Court of Appeals affirmed a district court decision granting a forum non dismissal in a case involving one U.S. and 76 Brazilian plaintiffs all killed in the crash of a Brazilian airliner on a domestic flight between two points in Brazil. *See also* Delta Airlines, Inc. v. Chimet, S.P.A., 34 Av. Cas. (CCH) 15,428 (3rd Cir. Aug. 30, 2010), where the Court of Appeals affirmed a District Court order granting a forum non dismissal of Delta's declaratory judgment action, thus requiring Delta to litigate a cargo damage claim in Italy. *See also In re* Air Crash at Madrid, Spain, on Aug. 20, 2008, 2011 U.S. Dist. LEXIS 29841 (C.D. Cal. Mar. 22, 2011), where the court forum non'd to Spain a case involving a Spanish airliner that crashed on a domestic flight, leaving 154 dead and 18 injured victims. Suits were brought in the U.S. on behalf of 100 of the victims, including 92 Spaniards, three Germans, one Brazilian, one Gambian, one Indonesian, one Swede, and one Turk.

8 Montreal Convention, *supra* note 3, art. 33(2).

9 *See* Allan I. Mendelsohn, *Recent Developments in the Forum Non Conveniens Doctrine*, FED. LAW., Feb. 2005, at 45.

dents were citizens of African nations including 37 Cameroon citizens.[10] Similarly, in another case brought in Illinois, the U.S. District Court granted forum non and dismissed in favor of the courts of Indonesia in a fact situation involving a crash over Indonesian waters of an Indonesian air carrier, in which the victims were all Indonesian.[11]

The most recent case I have been able to find involving exclusively foreign plaintiffs was filed in the Los Angeles Superior Court on January 10, 2011.[12] The plaintiffs in the case were the six heirs of one Mohamed Abdou Said who was a passenger aboard an A-310 Yemenia Airlines flight and was killed when the aircraft crashed off the Comoros Islands on June 30, 2009 on a flight from Sana'a, Yemen via Djibouti to Moroni, Comoros.[13] The suit was brought against ILFC, the U.S. company that leased the aircraft to Yemenia Airlines in 1999.[14] Why such a lawsuit should ever be allowed to be brought in a U.S. court is an interesting question.

Finally, in one of the early and landmark forum non conveniens cases, involving victims of multiple nationalities who died in a crash of a Saudi Arabian Airlines flight in Saudi Arabia, a U.S. District Court in Washington, D.C. granted a forum non dismissal allowing the cases to be filed, at plaintiffs' option and with defendants' consent, in the courts of each plaintiff's domicile or the courts in any other country with jurisdiction under then-Warsaw Article 28.[15] In reaching this decision, the Court specifically concluded that despite differences between the legal systems, including "smaller damage awards" and "the inability to use a contingency fee arrangement," all of these foreign courts were adequate alternative fora in which the foreign plaintiffs could bring their suits.[16]

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10 Claisse v. Boeing Co., 34 Av. Cas. (CCH) 15,541 (N.D. Ill. Sept. 28, 2010).

11 *In re* Air Crash Disaster Over Makassar Strait, Sulawesi, 2011 U.S. Dist. LEXIS 2647 (N.D. Ill. Jan. 11, 2011).

12 Complaint, Mmadi Mlatamou Hassanati v. ILFC, No. BC452279 (Cal. Super. Ct. Jan. 10, 2011).

13 *Id.*

14 *Id.*

15 Convention for the Unification of Certain Rules Relating to International Transportation by Air art. 28, Oct. 12, 1929, 49 Stat. 3000 [hereinafter Warsaw Convention].

16 *In re* Disaster at Riyadh Airport, 540 F. Supp. 1141 (D.D.C. 1982).

A Modest Proposal for Change

1. *The History of the Adoption of Absolute Liability Under the Warsaw Convention*

It is with this precedent in mind that I thought it would be appropriate to propose a modest change in the system. The change I propose would not necessarily be a substitute for use of the forum non doctrine but it would, I believe, work to avoid many of the problems and difficulties of applying the forum non doctrine in the particular circumstances of each individual case. And it would also be totally consistent with the purposes and objectives of the Montreal Convention of 1999 and its predecessors. A brief review of recent history is now in order.

A part of the history of international aviation that may no longer be well known is that in November, 1965, the United States found itself unable and unwilling to ratify the 1955 Hague Protocol[17] and, as a result, decided to denounce the Warsaw Convention.[18] In accordance with the terms of the Warsaw Convention, a notice of denunciation was filed to take effect in six months, or on May 15, 1966.[19] The U.S. Government, working primarily for the purpose of increasing recoveries for victims and their survivors, was insisting on an increase in the limits of liability to no less than US$100,000. The International Air Transport Association (IATA) and the world's airlines were taking the position that $75,000 was the maximum possible limit given the capacity of the world's insurance marketplace at the time.

In the face of this stalemate, the United States developed a very unusual compromise approach that was based on the expressed desire and intention of the U.S. to have a limit that not only provided the maximum possible compensation to American victims but did so as quickly as possible. The method developed to achieve this goal was the adoption of the doctrine of absolute liability – in other words, no matter the cause of the accident, victims (or their survivors) would be entitled to receive from the carrier on which the accident occurred provable damages of up to

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17 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.

18 *See* Kelly Compton Grems, *Punitive Damages Under the Warsaw Convention; Revisiting the Drafters' Intent*, 41 AM. U. L. REV. 141, 152 (1991).

19 *Id.*

$75,000, without any requirement as to proof of the airline's negligence. The rationale that allowed the United States to develop and propose this compromise was that by coupling absolute liability with the $75,000 limit, victims would be able to recover up to $75,000 quickly and without being bogged down in lengthy trials involving the resolution of negligence claims. Moreover, by avoiding so much of the lawyers' work, legal fees would be significantly lower and, as a consequence, victims would receive net recoveries almost as much as they would if the limit were $100,000 but without absolute liability. The U.S. Government's compromise proposal of a limit of $75,000 under terms of absolute liability was ultimately accepted by most of the world's airlines in what became colloquially known as the 1966 IATA Interim Agreement on Airline Liability.[20]

The adoption of absolute liability in air law in 1966 was the first time the concept had been adopted in any major international convention or, so far as I am aware, in any other international context involving claims of individual passengers. It is fair to say, moreover, that absolute liability has remained an essential cornerstone of international air law since 1966 and continuing down to the 1999 Montreal Convention. As is well known, under the dual limit system of Article 21 of the Montreal Convention, the first limit of approximately $150,000 is under terms of absolute liability; the second and unlimited liability system is available with the burden of proof reversed, i.e., the passenger is entitled to recover all provable damages and subject to no limits except in the unusual situations where the carrier can prove either that the damage was not due to its negligence or that it was due solely to the negligence of a third party. In short, in the great

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20 This history appears in more extensive detail in Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States And the Warsaw Convention*, 80 HARV. L. REV. 497 (1967). It should be especially noted that IATA's then Director General, Sir William Hildred, and its then General Counsel, Julian Gazdik, were of instrumental importance in securing the adoption by most of the major international air carriers of the era of the U.S. government's compromise proposal. In many of the cases that were filed in the U.S. after the 1966 IATA Interim Agreement, however, the purpose for adopting absolute liability was not generally realized, as suits filed after international air crashes usually, if not always, alleged "willful misconduct" under Warsaw Article 25. The purpose of doing so understandably was to avoid the $75,000 limit of liability, which became increasingly obsolete as the years passed. At the same time, however, resolution of the litigation and payment of damages were inevitably and indeterminately delayed.

majority of airline accident cases today, extensive and prolonged litigation over issues of negligence is, or should be, totally avoided; and the passenger is, or should be, able to recover proper and appropriate damages very promptly and, hopefully, with the payment of only modest legal fees.

That was the objective of the United States Government in 1966; and that was equally the objective of the drafters of the Montreal Convention in 1999. But it is an unfortunate fact that this objective is totally frustrated when, as is beginning to occur so regularly in the U.S., lawyers or their agents or "consultants" seek out foreign clients who, following an air crash, bring their lawsuits not under the 1999 Montreal Convention against the carrier on which the accident occurred, but rather on products liability principles against the manufacturers of the aircraft and/or its component parts. Suits against the manufacturers are subject to no limits of liability and some U.S. states permit the award of punitive damages. But such suits necessarily require prolonged and protracted discovery and litigation to resolve ever increasingly complicated issues of negligence in a products liability context.

On the other hand, bringing such suits in the United States serves three major plaintiff-oriented purposes: first, it permits the foreign victims to enjoy America's contingency fee system of retaining lawyers; second, it permits lawyers to charge contingency fees anywhere between 20 percent and 33 percent; and third, by suing the manufacturers rather than the airline, the suit can be brought in the courts of this country – even if, in most instances, the accident not only occurred abroad but the carrier itself does not operate in, and, hence, is not subject to the jurisdiction of, the United States. Examples of several such foreign-plaintiff cases have been discussed *supra*.

2. *The Proposal(s)*

While it is true that almost all of these foreign-plaintiff cases are today being "forum non'd" to courts abroad, there would appear to be a much easier method to accomplish much the same result, but with far less lawyering, litigating, forum shopping, and conflict resolution. The approach I am suggesting is little more than an off-shoot of the Supreme Court's decision in *El Al Israel*

Airlines, Ltd. v. Tseng,[21] where the Court held that the Warsaw Convention created an exclusive cause of action and, as a consequence, plaintiffs suing on behalf of air crash victims in international air transportation could no longer also sue under state or other local causes of action. In short, if there was not a claim under and pursuant to the Warsaw Convention, plaintiffs could not bootstrap a claim against an airline by relying on, or resorting alternatively to, a cause of action under state or other local law.

I am proposing that U.S. courts in future cases should extend the *Tseng* doctrine one step further: not only must the victim of an air crash disaster in international air transportation bring his or her claim exclusively under the provisions of the 1999 Montreal Convention, but, more importantly, that claim must be brought exclusively and only against the airline on which the death or injury occurred. It would seem to me that, if the U.S. Supreme Court in *Tseng* could interpret the terms of the Warsaw Convention so as to preclude passenger-victims from suing air carriers under any law other than the Convention itself, it is not a major jump for U.S. courts equally to preclude passenger-victims from suing any defendant other than the airline on which the passenger's injury or death occurred. In short, if the passenger or his survivors wish to recover damages for a death or injury aboard an airliner, they can sue only the airline on which that death or injury occurred. They cannot sue the manufacturer, any of the component parts manufacturers, the lessors of the aircraft or, in a word, anyone but the airline itself.

The Supreme Court in *Tseng* based its decision on the language of Article 24 of the Warsaw Convention, which provides as follows:

> 1. In the cases covered by Article 18 and 19 [damage to baggage and cargo/goods] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
> 2. In the cases covered by Article 17 [death or bodily injury] the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who

21 525 U.S. 155 (1999).

> have the right to bring suit and what are their respective rights.[22]

It was on the basis of this language that the Court adopted the two principal arguments that were advanced by El Al and the United States as *amicus curiae* in the case. These were: (1) that Article 24 of the Warsaw Convention creates an exclusive cause of action for "all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking"; and (2) that Article 24 "precludes a passenger from asserting any air transit personal injury claims under local law." Resort to local law, it was argued, "would undermine the uniform regulation of international air carrier liability that the Convention was designed to foster."[23]

If, in interpreting Warsaw Article 24, the Supreme Court could adopt such an approach, then one has to ask what comparable approach the Court could reach with the newly adopted language of Article 29 of the 1999 Montreal Convention. Article 29, which was largely adopted from Warsaw Article 24 as amended by the 1975 Montreal Protocol No. 4 (which entered into effect for the United States on March 4, 1999),[24] provides as follows:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.[25]

Would it not be entirely possible in the face of this language – and consistent with the objective of establishing uniform regulation of international air carrier liability – for a court to conclude that,

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22 Warsaw Convention, *supra* note 15, art. 24.

23 *Tseng*, 525 U.S. at 156.

24 Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague of 28 September 1955, Sept. 25, 1975, 2145 U.N.T.S. 36.

25 Montreal Convention, *supra* note 3, art. 29.

following any international air crash involving death or bodily injury, the passenger has only one cause of action to recover compensation, and that cause of action is exclusively against the carrier on which the death or bodily injury occurred?

The consequence of adopting such an approach would be to assure that, because of the presence of the absolute liability standard under Montreal 1999, all the victims or their survivors will be compensated promptly and directly by the airline on which the death or injury occurred. This would work to fully carry out the intent and purpose of those that, like the U.S. Government, proposed and adopted the absolute liability standard because they believed that it would avoid needless litigation, reduce legal fees, and provide all passengers or their survivors with prompt, proper, and adequate compensation without the need, especially in such circumstances, of awaiting the outcome of litigation that could continue for years.

Moreover, once all the compensation is paid by the airline or its underwriters to all the victims of the disaster, those underwriters will be fully aware of the total damages that were paid and will then be able to decide whether the facts and circumstances warrant bringing a suit against the manufacturer of the aircraft or any of the component part manufacturers or anyone else that may have been responsible in whole or part for the disaster. In short, victims enjoy full recoveries quickly and under the absolute liability standards of Montreal 1999. And afterwards, the professionals can litigate for as long as they wish over the issue of who was partially, mostly, or completely at fault.

Not only do I believe that reaching such a conclusion would involve no different analysis or application of the Convention's provisions than faced the Supreme Court in *Tseng* but, more importantly, it would be very consistent with, indeed would further, the fundamental objective of the United States and other nations in adopting absolute liability in the IATA Interim Agreement of 1966 and in the 1999 Montreal Convention.

Even if this approach were to be adopted, however, there may still be the question of the court or courts where suits can be brought. For instance, let us take an example where, say, eight American resident-citizens, together with 47 Sudanese resident-citizens and 34 Egyptian resident-citizens, are passengers on an Egypt Air flight that crashes in Egypt leaving no survivors. Under the terms of Article 33 of Montreal 1999, the U.S. citizens

would have a right to sue in their home country, as would the Sudanese and, of course, the Egyptians. But let us suppose that, instead, all or most of the foreign plaintiff-survivors opt to sue, together with the eight Americans, in the United States; and the suit is brought against the manufacturer, the component parts manufacturers, and, because it does business in the United States, also against Egypt Air – so that all parties are before the court.

Faced with this situation, it would be my recommendation that, rather than trying to decide – through the presentation of inevitably conflicting expert or other testimony – whether the foreign courts are "adequate and available," the U.S. court should instead seek out the insurer/underwriter of the airline and ask whether, in its view, it is prepared and willing to litigate: in a Sudanese court with the 47 Sudanese citizens, and in an Egyptian court with the 34 Egyptian citizens. Surely there was an underwriter-insurer of Egypt Air – if for no other reason than that Article 50 of the Montreal Convention specifically mandates that every contracting state must require that its airline or airlines "maintain adequate insurance coverage." And equally as surely, that insurer-underwriter should be in the best position to know, and to advise the court, whether it is willing to appear and litigate – i.e., pay damages to the victims – in the courts of Sudan and Egypt.

If the insurer-underwriter agrees that it is willing to do so, there would then be no need for the U.S. court to engage in the contentious and inevitably disputed determination as to whether either the Egyptian or Sudanese court was an adequate alternative forum. Indeed, were the insurer-underwriter to advise the court that both courts were acceptable, it would mean that the 47 Sudanese and 34 Egyptians could all be compensated under their own laws and in the courts of their own countries – which is the precise reason for the adoption of the fifth forum in Article 33(2) of the Montreal Convention.[26]

On the other hand, should the insurer-underwriter express misgivings about litigating in one or the other of the national courts, the U.S. court would then be justified in allowing the citizens of that jurisdiction to remain with the eight U.S. citizens to continue the litigation in the U.S. court. It would seem to me that this is a much easier and more efficient method of forum selection than

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26 *Id.* art. 33(2).

the overly complex method that U.S. courts employ today. Moreover, the results may be no different than what was achieved in the Saudi Arabian crash that was litigated in *In re Disaster at Riyadh Airport, supra.*

Conclusion

While I have characterized my proposal as "modest," I have no doubt, especially in these contentious times, that there will surely be some – and I suspect quite vocal – disagreement. But there can be little disagreement over the proposition that the courts of a victim's domicile or permanent residence are very clearly best suited and best able to determine the proper amount of damage compensation that should be awarded to that victim or his/her survivors. Likewise, the underwriters who insured the airline are equally best suited and best able to decide whether they are willing and able to litigate the issue of compensation in these courts and to expect a just and fair decision. Finally, both propositions not only reflect, but advance, the progress of international law under the 1999 Montreal Convention.