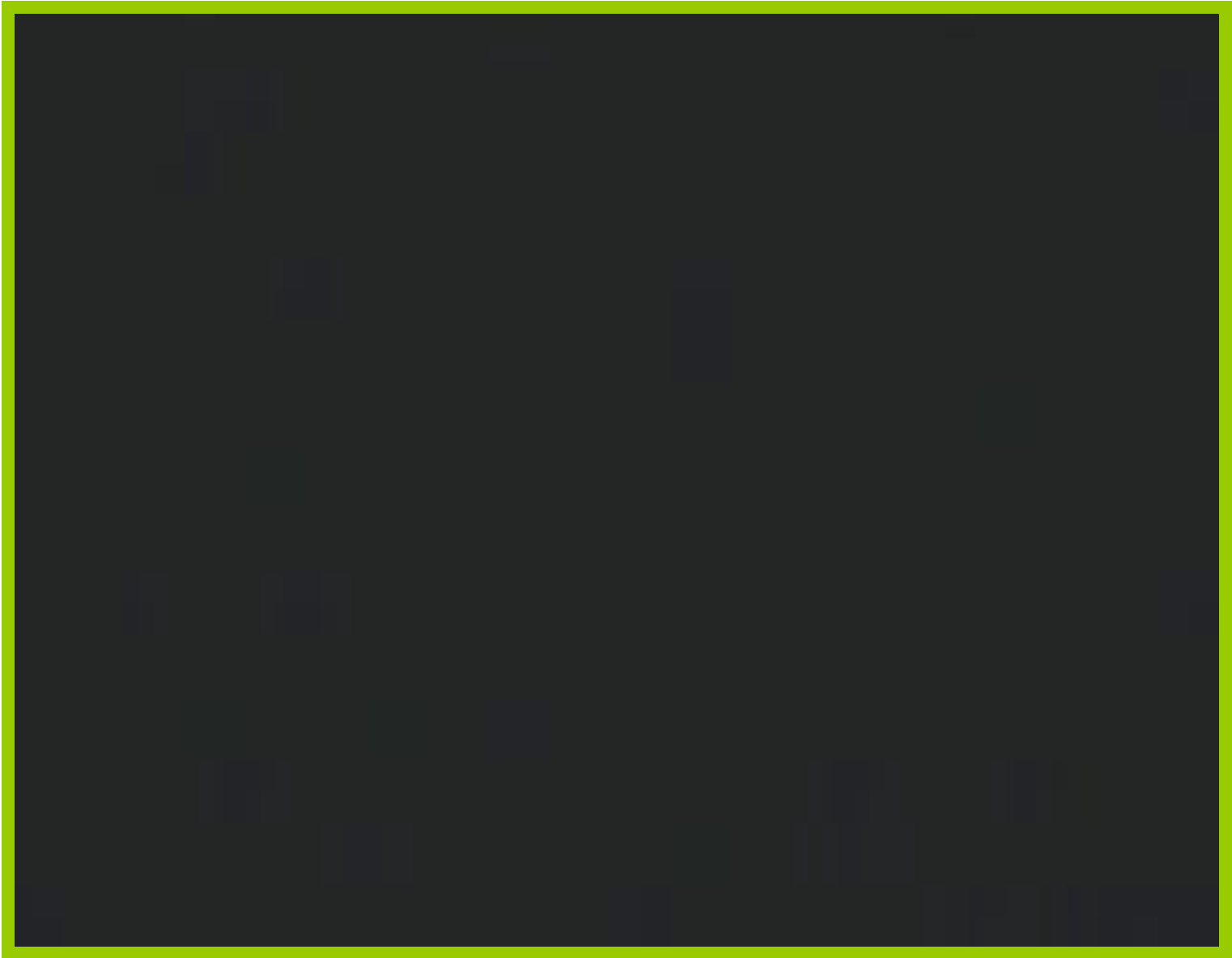




# 2006 FNC Update

By: Andy Payne



# Forum Non Conveniens Update

- FNC Availability under Warsaw Convention
- FNC Availability under Montreal Convention
- Determination of SMJ and FNC
- Side Trips & FNC
- Alternative Forum
- Recent Cases

# FNC Under Warsaw?

- Warsaw Article 28(1) grants signatory countries' courts jurisdiction under certain circumstances
- Warsaw Article 28(2) states:  
“Questions of procedure shall be governed by the law of the court to which the case is submitted.”
- Is FNC a procedural tool that is available under Warsaw

# FNC Is Available Under Warsaw

- *In re: Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5<sup>th</sup> Cir. 1987)

“We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of forum non conveniens.”

- *In re: Air Crash Off Long Island, New York*, 65 F. Supp. 3d 207 (S.D. N.Y. 1999)

# FNC Is NOT Available Under Warsaw

- *Hosaka v. United Airlines*, 305 F.3d 989 (9<sup>th</sup> Cir. 2002)(*cert. denied*)
  - Japanese passengers en route Japan to Hawaii.
  - Injury when passenger thrown into overhead in turbulence.
  - District Court held Article 28 (1) of Warsaw grants plaintiff option of 4 forums, but does not preclude US Courts from exercising FNC as a procedural tool under Article 28 (2).

# FNC Is NOT Available Under Warsaw

- *Hosaka v. United Airlines*, 305 F.3d 989 (9<sup>th</sup> Cir. 2002)(*cert. denied*)
  - Art. 28 ambiguous so look outside the 4 corners.
  - Look to the Intent of the Parties to the Treaty
    - Permitting FNC undermined intent of **Uniformity** Among Nations & **Balance** b/t passenger & carrier
  - British delegation tried to submit:  
“None of the stipulations of this Article shall be deemed to bind court...to hear complaint...which it would consider [contrary to its Rules of Procedure]”

# FNC Is NOT Available Under Warsaw

- *Hosaka v. United Airlines*, 305 F.3d 989 (9<sup>th</sup> Cir. 2002)(*cert. denied*)
  - Rejection of British submission “strongly suggested” they knew about but rejected FNC
  - A FNC provision to Montreal was proposed but rejected.
  - Other treaties
- FNC is not available in Warsaw Cases
- U.S. Supreme Court Denied Cert.

# To Montreal: FNC Available?

- 1999 Montreal Convention
  - Into Full Force Effect November 5, 2003
  - Warsaw --Art 28 (1) Four Forums
  - Montreal –Art 33 Adds Fifth Forum “Pls Domicile”
  - Warsaw Art 28(2) and Montreal 33(4) are near identical counterparts.
  - US tried to explicitly submit a FNC amendment to 33(4), but it was rejected

# To Montreal: FNC Available?

- 1999 Montreal Convention
  - FNC Available
    - Legislative History now may exist that US intends to exercise FNC under Art 33(4)
    - *Recent Developments in the FNC Doctrine*, Federal Bar Ass'n, February 2005, A. Mendelsohn
  - FNC Unavailable
    - Same Text + Same Ambiguities
    - But that US intended to use FNC is not same as a "shared intention" that FNC available
    - FNC not consistent with Balance and Uniformity
    - *FNC and Warsaw: Leaving the Turbulence Behind?*, 33 Hofstra L. Rev. 1507, Summer 2005, K. Dieterich

# Determine Jurisdiction Before FNC?

- Must conclusively establish Jurisdiction before FNC
  - 3<sup>rd</sup> , 5<sup>th</sup> & 9<sup>th</sup> Circuits
- FNC does not address merits and may be decided before Jurisdiction is determined
  - 2<sup>nd</sup> and D.C. Circuits

# Determine Jurisdiction Before FNC?

- *Malaysia Int. Shipping Corp. v. Sinochem Int. Co.*, 436 F.3d 349 (3<sup>rd</sup> Cir. 2006)(*cert. granted*)
  - Admiralty Case
  - Involves two non-U.S. Entities
  - SMJ under 28 U.S.C. 1331 (Admiralty Statute)
  - Did not determine Personal Jurisdiction
  - TC Dismissed FNC
  - 3d Circuit Reversed, Must Determine JD First
  - US Supreme Court has GRANTED CERT.

# Side Trips

- *Coyle v. Garuda Indonesia Airlines*, 363 F.3d 979 (9<sup>th</sup> Cir. 2004)
  - Portland Couple buys ticket in US to fly to Jakarta
  - While in Jakarta, they buy a side trip round ticket between Jakarta and Medan.
  - Plane crashes between Jakarta & Medan
  - Final destination is US on original ticket
  - Final destination is Jakarta on side trip
  - TC says side trip was a leg on a journey that intended on landing in US
  - 9<sup>th</sup> Circuit Reverses says must look at ticket

# Side Trips

- Montreal now allows suit in plaintiffs “domicile or permanent residence”
  - American Couple buy round trip from NY to London
  - While in London, buy a side trip London to Rome on a European Carrier
  - Montreal give US courts jurisdiction
  - But US Plaintiffs Case Could Be Subject to FNC

# Alternative Forum

- Before Dismissal on FNC grounds there must be a determination that alternative forum:
  - Available
  - Adequate

# Alternative Forum

- To thwart U.S. use of FNC, some foreign passing anti-FNC statutes
- It works this way
  - US FNC dismissal requires “available & adequate forum”
  - Foreign Country adopts law that if one of its citizens files suit in another country, then the non-U.S. court loses jurisdiction
  - Defeats the “alternative forum” requirement
  - Ecuador, Panama, Costa Rica, Guatemala, Phillipines
  - Some countries: “International Torts: National Court may apply US damages law” Be Careful What You Ask For!

# Case Law Update



# Case Law Update

- *Sacks v. Four Seasons Hotel Ltd.*, 2006 WL 783441 (E.D. Tex.)
  - Holly & Todd Sacks--Four Season Punta Mita, Mx
  - Todd dies during stay due to Defendant's alleged negligence
  - Plaintiff are all US Citizens
  - Defendant's Move to Dismiss on FNC

# Case Law Update

- *Sacks v. Four Seasons Hotel Ltd.*, 2006 WL 783441 (E.D. Tex.)
  - Court says Mexico Not Alternative Forum
    - Defendant’s waiver cannot overcome expired Mexican SOL
    - “Preemptive Jurisdiction” divests the Mexican Court of Jurisdiction when the case was filed in US
    - Mexican Court does not have jurisdiction over one of the Defendants because it is not domiciled in Mexico
  - Inadequate
    - \$9500 WD statute is not adequate

# Case Law Update

- *Da Rocha v. Bell Helicopter*, 2006 Lexis 67576 (S.D. FL.)
  - Helicopter operated by Brazilian Co crashes
  - Plaintiffs are Brazilian Citizens & Residents
  - Products Case Against Rolls & Bell
  - Alternative Forum
    - SMJ because of consent & crash location
    - Defendant Agree to Accept Service
  - Private Factors
    - Design & Build in US is not enough

# Case Law Update

- *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766 (C.D. Cal. 2006)
  - Singapore Airlines crash in Taiwan
  - Products cases against Boeing *et. al.* for bad emergency escape equipment
  - Pl are citizens of Netherland
  - TC Granted, 9<sup>th</sup> Reversed, TC Granted Again

# Case Law Update

- *King v. Cessna*, 405 F. Supp. 2d 1374 (S.D. Fl. 2005)
  - Plaintiffs died in a Cessna demonstration jet in Italy
  - Plaintiff Allegations
    - Negl hiring and supervision
    - S/L for ultra hazardous activity
    - Bad policies regarding demonstration flights
  - King US Citizen, 69 European citizens
  - TC twice denied FNC, then grants sua sponte as to European Plaintiffs

# Case Law Update

- *Sharifova v. Honeywell*, 2005 Lexis 23414, (N.J. 2005)
  - BA flight for Moscow to Spain
  - Mid-air Collision
  - PI sued Defendants for failure to warn/train regarding TCAS (Traffic Collision Avoidance System)
  - TC granted FNC

# Case Law Update

- *Gambra v. Int. Lease Fina. Corp*, 377 F. Supp. 2d 810 (W.D. Cal. 2005)
  - Flash Air Crashes en route from Egypt to Paris
  - Decedents & Plaintiffs Almost Entirely French
  - All Defendants are US
  - S/L, Negligence, Breach Warranty
  - Alternative Forum
    - Battle of Foreign Law Experts
      - Defendant's Answer: Condition FNC Dismissal of Foreign Court's acceptance of Jurisdiction
  - Public/Private Interest Favors Dismissal
  - Pl. not third party ben. to lease agreement



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