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 (5th 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 (9th 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 (9th 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 (9th 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
  • 3rd, 5th & 9th Circuits

• FNC does not address merits and may be decided before Jurisdiction is determined
  • 2nd and D.C. Circuits
Determine Jurisdiction Before FNC?

- *Malaysia Int. Shipping Corp. v. Sinochem Int. Co.*, 436 F.3d 349 (3rd 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 (9th 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
  - 9th 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
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, Philippines

  – Some countries: “International Torts: National Court may apply US damages law” Be Careful What You Ask For!
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

  - Singapore Airlines crash in Taiwan
  - Products cases against Boeing *et. al.* for bad emergency escape equipment
  - PI are citizens of Netherland
  - TC Granted, 9th Reversed, TC Granted Again
Case Law Update

  – 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

  – 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

  – 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