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Second Circuit upholds *forum non conveniens* dismissal of Brazilians' lawsuits brought in United States arising from 2006 midair collision in Brazil

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On December 2, 2009, the U.S. Second Circuit Court of Appeals upheld a lower court's decision to dismiss lawsuits filed by more than 100 Brazilian citizens arising from the 2006 crash in Brazil of Gol Airlines Flight 1907 based on *forum non conveniens* grounds. *Lleras v. Excelaire Services, Inc.*, 08-3823-cv (2d Cir. Dec. 2, 2009). The doctrine of *forum non conveniens* empowers courts, at their discretion, to decline to exercise jurisdiction when the convenience of the parties and the public interest would be better served if the lawsuit proceeded in another forum. In this case, the plaintiffs had clearly sought to benefit from the United States' favorable civil judicial system and generous juries. The dismissal of their cases, in which Nixon Peabody represented one of the defendants, provides defendants with additional precedent to resist the efforts of future forum-shopping foreign aviation accident claimants who try to take advantage of U.S. courts for claims having little connection with the United States.

Background

On September 29, 2006, a Gol Airlines Boeing 737-800 and an Embraer Legacy 600 business jet collided in midair, 37,000 feet above a remote part of Brazil's Amazon jungle region. While the Legacy was able to make a successful emergency landing at a nearby Brazilian air force base, the Boeing airliner crashed, killing all 154 people aboard.

Investigations by Brazilian and U.S. authorities determined that neither aircraft's Traffic Alert and Collision Avoidance System (TCAS) had alerted its pilots of the impending collision. The U.S. National Transportation Safety Board (NTSB) concluded that, for undetermined reasons, the Legacy's TCAS was not functioning at the time of the accident, thereby disabling the system's ability to detect and be detected by other aircraft. Neither country's investigation faulted ground-based radar equipment, its software, or the ground-based air surveillance system as a whole.

Lawsuits brought by more than 100 Brazilian claimants in seven U.S. jurisdictions were consolidated in the U.S. District Court for the Eastern District of New York. In addition to naming the Legacy pilots, who were U.S. citizens residing in New York, the lawsuits named as defendants various U.S. companies involved with manufacturing the Legacy's transponder and TCAS, and six ground-based air surveillance radars. They also named the contractor that integrated the radars into Brazil's Amazon region air surveillance system and the provider of software for that system. These

defendants' places of business were scattered in various U.S. states. The plaintiffs did not name Brazilian air traffic controllers or Brazilian companies, which may otherwise have been implicated in the crash. The plaintiffs' focus on these U.S. defendants only was clearly a calculated effort to try to prevent a dismissal of the cases from the U.S. forum.

The District Court's Decision

As reported in Nixon Peabody's July 22, 2008, *Aviation Alert*, Judge Cogan of the Eastern District of New York granted the defendants' motion to dismiss the litigation on *forum non conveniens* grounds. See *In re Air Crash Near Peixoto de Azevedo, Brazil*, on September 29, 2006, 574 F. Supp. 2d 272 (E.D.N.Y. 2008). Following a leading Second Circuit *forum non conveniens* decision, *Iragorri v. United Tech Corp.*, 274 F.3d 65 (2d Cir. 2001), Judge Cogan concluded that circumstances did not justify affording the foreign-citizen plaintiffs' choice of a U.S. forum equal deference to that of U.S. citizens, and that Brazil was an available alternative forum—notwithstanding the refusal of the U.S. pilots to submit to its jurisdiction. He further concluded that, because of Brazil's interest in investigating the causes of the then-largest aviation disaster in its history, the public interest factors favored placing its citizens' lawsuits in Brazil. Additional discussion of Judge Cogan's thorough decision, including its "take-away" lessons, can be found in the aforementioned alert at http://www.nixonpeabody.com/publications_detail3.asp?ID=2361.

The Second Circuit Decision

The Second Circuit's decision affirming Judge Cogan's dismissal emphasized the substantial discretion afforded a district court judge on *forum non conveniens* issues. It also specifically emphasized the difficulty in this case of obtaining jurisdiction in the United States over potentially liable parties in Brazil. A number of potentially culpable Brazilian entities, including Embraer, Gol, and individual air traffic controllers, were not sued by these plaintiffs in the United States. Moreover, Brazil's air traffic control system is an arm of the Brazilian government and, citing sovereignty, may not have complied with letters *rogatory*. For these reasons, the United States was deemed "genuinely inconvenient," and Brazil was seen as "significantly preferable." Additionally, the Second Circuit reaffirmed the finding of the District Court and other courts that Brazil is generally an "available and adequate" forum.

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