The United States and the European Union in International Aviation

By Allan I. Mendelsohn

This article will focus on two major topics that are of very current interest in both the European Union (EU) and the United States. I have been deeply involved in both of these issues for many years.

The first topic is the "open skies" Air Transport Agreement that was signed in March 2007 by the European Commission (EC) and the U.S. government. That agreement replaced some 16 individual bilateral agreements that the United States had negotiated with various European countries since the end of World War II. Most of these bilateral agreements were already of the "open skies" type. All of them exchanged air rights between the two countries so that, for example, U.S. airlines could operate to Italy and Italian airlines could operate to points in the United States. Open skies agreements also allowed the airlines of each country to operate from and to points behind its country and beyond the other country so that, for example, an Italian airline could operate from Athens to Rome and thence to New York and beyond to Mexico City, while a U.S. airline could operate exactly the reverse.

Despite all the recent press hype and hoopla, and as will be explained later in this article, I do not believe that the new agreement accomplishes very much that is new. But it does manage, for the first time in the history of air law, to acknowledge Europe more or less as a single and unified entity—at least for aviation negotiating purposes and for the multilateral exchange of air rights. Just as the U.S. government always bargained on behalf of all of its airlines and for all points in and beyond the United States, the European Commission is now bargaining on behalf of all EU airlines and for all points within and beyond the EU.[1]

But just as the EU has now been recognized as a single entity, the new agreement raises serious and potentially divisive problems between the United States and Europe, both on the subject of opening up the ownership and control of airlines (mostly U.S. airlines) and on the subject of cabotage. For those who have not studied aviation or maritime law, cabotage is a transportation word of art that refers to the carriage of passengers between two places or two cities in a given country. For example, for Europeans it would mean the right to carry passengers between two cities in the United States, such as between New York and Los Angeles. One of the issues that have been raised in the negotiation of the new EC/U.S. agreement is the definition of cabotage within the EU. Is it carrying passengers between Paris and Rome? Or is it carrying passengers only between two domestic points within a European country, for example, between Rome and Milan? We will be focusing on this issue in greater detail later in this article.

The second major topic to be discussed is the new treaty known as the Montreal Convention of 1999, which came into effect for the initial 30 ratifying countries, including the United States, in November 2003 and has since come into effect for the 27 member states of the EU. This multilateral treaty, now ratified by some 84 countries, replaces the 1929 Warsaw Convention which, for the past 75-plus years, spelled out the rules of law and the limits of liability for the amount of compensation that victims of an international air crash receive. The limit of liability in the Warsaw Convention when it was adopted in 1929 was equivalent to approximately $8,300 per victim (the original limit was expressed in terms of the French Poincare franc and is now expressed in terms of the World Bank's Special Drawing Rights). In other words, the surviving family of a victim of an international airline disaster could recover only $8,300. That limit remained in place from 1929 until 1966 when, despite objections from almost every European country (with the exception perhaps only of Sweden), the United States succeeded in raising the limit, through an inter-carrier agreement, sponsored by the International Air Transport Association (IATA), from $8,300 to $75,000.[2]

Under the new 1999 Montreal Convention, the limit is now approximately $150,000 even if the airline is in no way negligent. Moreover, unless the airline can prove that it was not negligent or that the accident resulted from the sole fault of a third party, then the survivors can recover damages without limit—in other words, whatever the victim is or was worth. This alone provides a very good idea of the progress that aviation tort law has made during the past 75-plus years. But the aspect of the system that I will focus on in this article is what happens after the crash, that is, the place where, or the court in which, victims or their survivors, whatever their nationalities, can bring their lawsuits to get compensation for whatever amount of money they deserve. This happens to be one of the more controversial issues in air law today.

But let me focus now on the first subject, namely, the new "open skies" Air Transport Agreement between the EU and the United States.

The New Open Skies Agreement

In March 2007, the United States and the EU agreed on the terms of an "open skies" air transport agreement. This came about only after years of less-than-fruitful negotia-

tions that were always accompanied by loud and repeated threats by various EC officials that the commission was going to order that all member states should denounce or repudiate the bilateral aviation agreements they had with the United States unless, in the vernacular, the United States "shaped up."[3] Even in the face of this history, I cannot say that the agreement that was finally reached accomplishes all that much of practical importance. But if and when it enters into full force and effect, at least one longstanding objective of each of the sides will have been met.

For the EU, the United States has agreed to accept all carriers owned by any EU member states or any of their nationals, thus ending the half-century-old requirement that a German carrier be owned and effectively controlled by the German government or German citizens, a French carrier by the French government or French citizens, etc. These national ownership clauses date back to World War II, if not earlier, as every nation has always viewed its airlines as instruments of its national policy and essential for its national defense. But these nationality clauses, as well as the nationally oriented policies they all represented, were held to be illegal within the EU in a 2002 decision by the European Court of Justice (ECJ).[4] The new "open skies" agreement meets the requirements of that decision and ends the nationality requirement for carriers within the EU.

Although the ECJ has so ruled, and the new agreement follows the ECJ decision, I personally am not at all sure whether we will see anytime soon a national carrier like Air France or Air France-KLM owned and controlled by German or Greek citizens. Much the same is true for a national carrier like Lufthansa. Whatever the ECJ may say in its decisions, I do not believe it is likely that Lufthansa's ownership and control will slip from German hands in the near future. Whether the German government continues to hold actual shares or simply a "golden share" in Lufthansa, one may legitimately doubt if a bid for control of Lufthansa by an oil-rich Russian company would gain much if any traction.

Even in the case of Alitalia, which at this writing seems to be nearing bankruptcy following a so-far unsuccessful takeover effort by Air France-KLM,[5] I do not believe that the government of Italy, which currently owns a 49.9 percent interest in Alitalia, is at all anxious to see Alitalia's ownership and control pass totally into non-Italian hands. The future of Alitalia may well be the test of whether my views are or are not correct. The *New York Times* reported earlier this year that, while Alitalia's Board of Directors had accepted an Air France-KLM "deeply discounted" takeover offer of only $1.17 billion (thus valuing Alitalia's shares as worth only about $0.15 each), the deal is still subject to the approval of the Italian government and Alitalia's unions. Meanwhile, Silvio Berlusconi, Italy's center-right leader who prevailed in Italy's elections in mid-April, was reported as being more or less open to the AF-KLM bailout but only "so long as Alitalia remained a national company with the flag on the planes." All of this surely evidences, or at least hints at, the continuing resistance of the EU's larger member states to witness the disappearance of their still state symbolic national airlines. Since then, the Italian

government has made an "emergency bridge loan" to Alitalia in the amount of 300 million euros (U.S.$465 million). When the EC then promptly announced it was launching an "in-depth investigation" to determine if was loan amounted to unlawful state aid, Berlusconi publicly replied that "if they continue whining, we could take a decision in which Alitalia could be bought by the state, by the state railway."[6]

In addition to the ownership and control changes, the new agreement allows a system of operation by EU carriers that was never previously possible. It permits all EU member state carriers, no matter who their EU owners may be, to operate out of any city within the EU to any city within the United States. In other words, a Greek-owned airline can, at least theoretically, operate turnaround flights between Paris and New York, in direct competition with Air France. Similarly, an airline owned by Belgian or Estonian citizens, again at least theoretically, can operate turnaround flights between Frankfurt and New York in direct competition with Lufthansa. I use the word "theoretically" because I have yet to learn whether, for example, Air France or the French government will be willing to open up Charles de Gaulle (CDG) Airport for a regular daily Paris-New York turnaround service by an EU member state carrier like Olympic Airlines—not to mention a European low-cost carrier like EasyJet or RyanAir. Also in doubt is whether an EC member state airline seeking to open up such a turnaround CDG-JFK service will be required to comply with any "right of establishment" requirements that the French government might wish to impose as a condition for that airline to be able to operate such a turnaround service.

It is true that the EU has made great strides toward unification. But I am not at all sure whether its strides have gone so far as to move France or Germany to allow smaller EU member state airlines to compete head-on in transatlantic services with what seem still to be the two very dominant national carriers. We will all have to wait to see whether this turns out to be a real or only a theoretical achievement of the new agreement.[7]

Other than these two changes, there is not much more that the EU has achieved with the new agreement.

For the United States, I think the achievements are equally modest. Easily the most important, however, is the hoped-for opening of London's Heathrow Airport once the agreement enters into effect. It is scheduled to enter into effect provisionally—and I emphasize the word "provisionally"—on March 30, 2008; and it has in fact so entered into effect. I understand that the delayed date of March 30, 2008, was agreed on in order to provide the United Kingdom with sufficient time to complete the construction work on its new terminal at Heathrow. I know of very few instances in international law, however, where the effectiveness of an international agreement has been delayed by almost one year from its date of signature. And I do not know of any case in aviation history where, in addition to a delay of almost one year, the agreement enters into effect only provisionally on that delayed date.

In any event, and putting aside for the time being what these delays and provisional effectiveness clauses may mean, Heathrow Airport is easily Europe's most well-known and popular airport. But in the 1977 bilateral air agreement between the United States and the United Kingdom (colloquially known as "Bermuda II"), the use of Heathrow was limited to only two U.S. airlines. Back in 1977, those two were Pan American and TWA. Today, they are American and United. It is no secret, however, that all the other U.S. international airlines—Delta, Continental, Northwest, and U.S. Airways—have been extremely anxious to start services from various points in the United States to Heathrow. They will be able to do this only if the new agreement enters into effect and there are "open skies" over and into the U.K. and especially Heathrow Airport.

For their part, the U.K. government and British Airways (which has far more slots at Heathrow than any other airline) are not at all anxious to see the competition that will result if Heathrow is opened up.[8] They have therefore devised two demands that they seem to insist the EU extract from the United States in the so-called second stage of the negotiation—before the agreement becomes fully and finally effective. I personally believe that neither of these demands can be satisfied by the United States anytime soon, if ever. I also believe that British Airways and the U.K. government are both well aware that these demands will not be satisfied during the "second stage" and that they have advanced both of them, therefore, only with the hope that the agreement may never enter fully into effect and/or the U.K. may not be forced to open up Heathrow for service by four new U.S. airlines; or, alternatively, may be allowed to withdraw such rights even after being opened up. I shall discuss both of these demands later. They are both extremely important in air law today and will remain so, I believe, for many years to come. Before getting to them, however, I would like to say another few words about Heathrow and why I think that opening it up is far less valuable to the United States than the British think.

Heathrow Airport

The reason Heathrow is less valuable than is generally believed is very simple—the cost of a "slot" or "slot pair" at Heathrow today is escalating beyond any price ever anticipated.[9] A "slot" or "slot pair" in aviation lingo is the right to fly into and fly out of the airport on a daily basis. Heathrow is what is known as a "slot-deprived" airport, which means that there are no slots available and that, to get one, an airline has to buy one on the "black" or "grey" market in London. No one in Europe likes to talk about or even mention this "dark" market. Moreover, adept though the EC may be at investigating and regulating all sorts of aspects of international aviation, it seems uniquely uninterested in even acknowledging the existence of this, as it is officially known, "secondary market" for Heathrow slots. Yet everyone in aviation circles knows about and discusses it quite openly. Indeed, a current joke around air law circles is that British Airways and British Midlands, both of which have an abundance of slots at Heathrow, may be worth more for the value of their Heathrow slots than they are as going airline businesses.[10]

In any event, with Heathrow slots costing as much as they do, one cannot help but wonder how cash-strapped U.S. airlines like Continental, Delta, Northwest, and U.S. Airways can easily buy them on what seems to have become a very inflated but largely opaque black market.[11] Of course, there is always the possibility, often mentioned in press reports, that alliance partner airlines like Delta will be able to get Heathrow slots from their Skyteam alliance partners like Air France, or Northwest from its alliance partner, KLM. But it will be interesting to learn whether, given the values reported on Heathrow's black market, Air France will be all that generous about giving away or selling any of its Heathrow slots to any other carrier, even a Skyteam Alliance partner like Delta. But this too awaits future developments.[12] At the present time, however, the highly inflated slot prices at Heathrow suggest why neither the U.S. government nor its airlines have gained all that much from the new agreement.

The Two Demands

Now that we are aware of all the political and economic intrigue surrounding the agreement, let me discuss the two demands. I am not sure whether these two demands are being made only by the United Kingdom or whether they have also become an integral part of the EC's negotiation position. In any case:

- Demand 1 is to require that the United States amend and open up its ownership and control laws so that foreign interests (including foreign airlines) can form new U.S. flag airlines or buy controlling interests in existing ones.
- Demand 2 is to require that the United States either open up for EU carriers what the United States has always viewed as its own cabotage—for example, domestic services between New York and Los Angeles—or, in the alternative, surrender the right to operate between two points within the EU, for example, between Paris and Rome or between Amsterdam and Prague.

Demand 1

With respect to the first demand, I have written extensively on the issue and have consistently supported the idea of opening up the ownership and control requirements for U.S. airlines.[13] U.S. law currently requires that at least 75 percent of the voting interests in a U.S. airline must be owned by U.S. citizens and that its president and two-thirds of its board of directors and other managing officers must also be U.S. citizens. In addition, the airline must be under the "actual control" of U.S. citizens.[14] I would like to see all of these requirements largely lifted so that foreign interests can in the future fully own and control U.S. airlines.

But it will not be an easy task to accomplish this goal in the United States. At least three very serious obstacles immediately come to mind. First, the U.S. government is extremely concerned about the national defense aspects of foreign ownership of U.S. airlines—a concern that I suspect is nowhere near as important in any other country as it is in and to the United States. Second, we are equally concerned about reciprocity and whether, if we open up our laws, will the laws of other countries likewise be opened up. This especially concerns the laws of those countries where, as is believed to be so widespread in Europe and elsewhere, the national governments own either substantial portions of their national carriers or even just the famous "golden share."

The United States certainly will not open up its airline ownership laws for any foreign national, much less any foreign airline, whose country of citizenship insists on retaining some—or any—element of control over its national airline. There is simply no persuasive reason why the German government should be allowed to own or otherwise control a portion of Lufthansa or why the French government should own or otherwise control a portion of Air France, or even a golden share in those airlines, at the same time as demands are being made by those very governments for the United States to open its laws to allow foreign ownership and control. Indeed, one is left to ask why no question was raised about Lufthansa's recent $300 million investment in, for a 19 percent share of, Jet Blue. This is not simply a purchase by foreign citizens; this may well be a purchase by an airline that is at least to some extent believed to be owned and/or controlled by a foreign government. And while one may properly point out that Germany and France are traditional and reliable allies, one cannot ignore that national governments often act as they wish and as they view to be in their own best interests—perhaps best evidenced in the 1973 decision by most European governments (with the exception of Portugal) to deny the use of their airfields and airspace in support of the U.S. airlift to Israel during the 1973 war or, more recently, the French and Spanish governments' denial of overflight permission for the U.S. air strikes on Libya in 1986.

To be sure, Lufthansa and Air France and other similarly situated European airlines may well argue that they have disposed of all their share holdings in their respective airlines and that they do not even retain a golden share. The fact of the matter is, however, that European government "privatization" of their airlines in the past has not been at all total—as the word "privatization" would otherwise suggest. Government stock ownership or control of some form in most European airlines is a fact, though one that is perhaps even more opaque and less publicized than the cost of slots at Heathrow.

In any event, until all the facts of European government ownership vel non are widely publicized, and until it can be confirmed and mutually agreed that European airlines are as freely and reciprocally available for purchase and full control by U.S. interests as U.S. airlines are by European interests, it is not a useful governmental or political effort for the EC or the United Kingdom to demand that the United States unilaterally open its ownership and control laws in any substantial manner beyond, for example, purely passive investments with no representation on boards of directors—much like many (though not all) of the investments recently made by sovereign wealth funds in U.S. financial institutions.

Whatever might be the conditions under which these sovereign wealth funds have recently been allowed or invited to invest in U.S. financial institutions (like Citigroup,

Merrill Lynch, Morgan Stanley, and others), it can safely be said that, because most if not all of them seem to be totally controlled by their government authorities, they are not and may never be likely candidates for investments in U.S. airlines. The effort only some two years ago by DP World, a port operator owned by the government of Dubai, to take over ownership of certain U.S. ports (from P & O, a British owner), and the controversy that was engendered then, and the amendments of the U.S. Committee on Foreign Investment in the United States (CFIUS) laws and procedures that then ensued suggest that sovereign wealth fund investments in U.S. airlines are not likely to occur very soon, if at all.[15] Nor need one consider the comparison between the total combined market capitalization of the "big six" U.S. airlines, which was roughly $13 to 14 billion as of April 7, 2008, and the assets in Abu Dhabi's Investment Authority, which are currently estimated at approximately $875 billion.[16]

Finally, the U.S. government is equally concerned about making sure that foreign owners do not discriminate in any way in favor of their own national employees and against U.S. employees. We must remember that airlines fly all over the world and can hire employees all over the world. They are not like the Nissan automobile plant that sets up in Alabama and hires its employees almost exclusively from the local community. All of these concerns are also accentuated when one euro is worth $1.55 and the price of U.S. airlines, therefore, seems so attractive for prospective European purchasers.

In any event, it will be a difficult and time-consuming task in the United States to repeal the existing law and adopt a new law that incorporates all the elements that are probably essential for the United States to allow foreign ownership and control of its airlines. That is why I believe that it would be extremely unwise for either the United Kingdom or the EC to insist on such legislative changes in the United States as a condition for the effectiveness of the new "open skies" agreement. Put in other terms, if that becomes an absolute condition, I believe the final effectiveness of the new agreement may not occur for many years.[17]

Demand 2

The second demand is that the United States allow EC carriers to operate U.S. cabotage (for example, New York–Los Angeles) or, in the alternative, surrender the authority U.S. airlines have enjoyed for some 50 years to operate between, for example, London and Rome. There are several easy answers to this demand that, at least so far, most EC officials either ignore or wish not to acknowledge. First, despite its efforts toward unification, the EC is not a single unified country as is the United States. Thus, each EC member nation votes individually in the United Nations and on the Council of the International Civil Aviation Organization (ICAO). By contrast, the United States has only one vote in both. When the EC reaches the point of real unity and one vote status comparable to that of the United States, mutual exchanges of—or restrictions against—cabotage might become possible.

Second, the rights that U.S. carriers enjoy to operate between different EC capitals are in fact rights that the U.S. government bargained for and secured by treaty from each European government during protracted individual negotiations over the past 50 years. They cannot now and suddenly be so easily terminated as the EC and so many of its spokespersons seem to suggest. Third, everyone knowledgeable in aviation today appreciates that rights to operate passenger services between different European capital cities are no longer nearly as important nor nearly as commercially valuable for U.S. airlines as would be the right for EC carriers to operate passenger services, for example, between New York and Los Angeles. As a matter of fact, it is only U.S. cargo carriers that operate services today between EC capital cities.

Finally, and perhaps most important, most everyone involved in aviation knows—even if no EC official seems willing to acknowledge it publicly—that the only possible way for EC carriers to operate routes between two U.S. points is to change the ownership and control laws of the United States so that foreign citizens or airlines can buy existing, or form their own new, U.S. flag airlines—along the lines I discussed above in the context of demand 1.[18]

So we are left with exactly the same conclusion for demand 2 as for demand 1. Both are demands that the United States simply is unable to meet at all or, at least, any time soon. For either the United Kingdom or the EC to continue to require that either be a condition for the full effectiveness of the new agreement is, for all practical purposes, a guarantee that the new agreement will not become fully effective.

The 1999 Montreal Convention and the Doctrine of Forum Non Conveniens

No article on current major issues in international aviation can be complete without some mention of the new 1999 Montreal Convention. At the outset of this article, I mentioned the new convention and described a little about its new limits of liability in the event of an air crash. I also mentioned the issue of where the survivors of the victims of air crashes can bring their lawsuits to recover compensation. The 1929 Warsaw Convention, in Article 28(1), named four jurisdictions where suits could be brought "at the option of the plaintiff." These four jurisdictions were: the court of the domicile of the carrier, the court of the principal place of business of the carrier; the court where the contract of carriage was made (that is, where the ticket was booked); and, finally, the court at the place of destination. The 1999 Convention, in Article 33(2), adds a very important "fifth jurisdiction"—the court where the passenger/victim lived if the carrier does business there. It is colloquially referred to as the victim's "domicile jurisdiction."

This fifth jurisdiction was proposed and supported very enthusiastically by the United States at the 1999 Montreal Convention for two reasons. First, to assure that the survivors of victims of all nationalities, including Americans, could bring their lawsuits at home, rather than being forced to sue abroad. The second and equally important reason was to enable U.S. courts, when faced with plaintiffs of foreign nationalities, to dismiss or to, in effect, allow the cases to be transferred or moved to the courts where the victims lived so that those courts could more easily and fairly make

the determination as to the proper amount of compensation the survivors should receive.[19]

Let me give a little background. International air crashes often make headlines when they occur. What we rarely if ever focus on, however, is the litigation that is brought after the tragedy by the survivors of the victims of these crashes. What we do not know or do not fully appreciate is that in a very large number of these cases, the plaintiffs bring their suits in the United States. For example, I am involved right now in a case that was brought in the U.S. federal district court in Miami by the families of the 160 victims of a crash that occurred in Venezuela in August 2005. All 160 victims were foreign citizens; the airline was one of foreign (Colombian) registry that did not operate to or do any business in the United States; and the accident occurred on a trip between two foreign points. In other words, there was almost no connection between any aspect of the accident and the United States—except for my client who lived in Miami and who arranged for the airline to provide the charter flights between the two foreign points.

I shall not spend time on the role that my client played in the case except to say that it was very minor. Even if it had been major, I would have promptly filed—as I in fact did in the case—what we call in the United States a "motion for a dismissal" based on the doctrine of forum non conveniens. This is a common law doctrine that has been developing very rapidly in the United States for at least the past 50 years since the Supreme Court's 1947 decision in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, and its more recent 1981 decision in *Piper Aircraft Co. v. Reyno*. 454 U.S. 235. The doctrine permits a U.S. court to dismiss a case and, for all intents and purposes, to allow the suit to be moved or transferred abroad to a foreign court when the U.S. court finds and concludes that certain public and private interest factors weigh in favor of such an approach.

I personally believe that the doctrine of forum non conveniens should be used in every aviation crash case when foreign victims or their survivors sue in U.S. courts.[20] The case I am handling in Miami involves only foreign victims, but there are few aviation crashes today that do not involve victims of multiple nationalities, including U.S. nationals. Under my theory, the issue of liability—that is, who was responsible for the crash: the airline, its pilots, air traffic control, the aircraft manufacturer, subcontractor, etc.—would be determined by the U.S. court. This is especially appropriate when two or more third-party corporate defendants (for example, Boeing or a subcontractor like Honeywell) are being sued. But even before any finding or apportionment of liability is determined, and especially in actions brought under the new Montreal Convention—with its more or less strict standard of liability—there is no reason why a U.S. court should not immediately dismiss the foreign plaintiff's suits to their home or domicile courts for a prompt determination by that court of the damages each victim deserves or is entitled to receive. The same process should ensue when, as is usually what happens in actual practice, liability is voluntarily admitted or an apportionment voluntarily stipulated by and among the participating defendants and their insurance underwriters in the case. Such an approach allows not only an opportunity for a fair and considered determination or apportionment of liability but, more importantly, it assures a prompt and adequate recovery by all the victims under the laws and in the courts of their domiciles.[21]

It is no secret why foreign plaintiffs prefer to sue in the United States. There are basically two reasons:

- First, they can find excellent lawyers, highly experienced in aviation tort law, who will handle their cases on contingency fees. This means that the lawyers will charge nothing (or only a modest up-front amount to cover out-of-pocket expenses) to take and handle the case and will receive their fees at the conclusion of the litigation and only on the basis of an agreed percentage of whatever they recover. This is a common and accepted system of retaining skilled lawyers in many types of cases in the United States, though it is virtually unknown or even prohibited elsewhere in the world, even in common law countries such as the United Kingdom and Canada.[22]
- And second, it is well known that recoveries in the United States, for any number of reasons, are much more generous than they are anywhere else in the world. At least a portion of this "generosity" is because U.S. courts, in awarding damages, do not take into account "collateral source" recoveries. In other words, while some foreign courts would reduce a victim's death damages by the amount his or her survivors recovered, for example, in insurance, or from a pension plan, a U.S. court would not do the same. In any event, it is now fair to suggest that most U.S. courts handling aviation disaster cases today more than likely share the view that foreigners should more properly be compensated under the laws and by the courts of their domiciles rather than under the laws and in the courts of the United States. If under the laws of their domiciles, they receive only, say, 25 percent of what they would receive in the United States, or if they are required to pay a lawyer even to take a case because no contingency fee system exists in their domiciles, the United States should not try to substitute or impose or export its legal system. To do otherwise would be to countenance and tacitly engage in the very type of "legal imperialism" that the U.S. Supreme Court so prudently eschewed in *F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*[23]

It is generally believed that foreign plaintiffs assisted by their very knowledgeable U.S. lawyers are trying to use—some would say "game"—the U.S. system and U.S. approaches to litigation. It is highly doubtful whether U.S. courts should allow this to be done. It would be better if foreign plaintiffs, as citizens of foreign countries, work to prevail on their governments to pass laws and adopt approaches to litigation that are more similar to those of the United States or, in any event, more consistent with the interests of plaintiffs in those countries and in these types of cases.

Having made this relatively long introduction to the doctrine of forum non conveniens, now let me explain its relationship to the 1999 Montreal Convention. During the Montreal conference leading to the adoption of the convention, it is fair to say that the United States met very

strong opposition to its proposal to create a fifth jurisdiction. Led by the French delegation, the fifth jurisdiction was attacked as being a proposal mainly to allow rich U.S. citizens to sue in their own courts while forcing poorer citizens of other countries to sue only in their courts. In addition, most of Europe operates under the civil law where the common law doctrine of forum non conveniens is almost never used and is not widely known. As a consequence, most European delegations to the conference opposed a proposal to formally adopt the doctrine in the new convention. Nor were they enthusiastic about adopting the fifth forum which would, as they well understood, better enable use by U.S. courts of the doctrine in transferring foreign plaintiffs to the courts of their domiciles.

I will not go into greater detail about the extensive debates that were held on these two issues. In the convention as finally adopted, there is a fifth jurisdiction in Article 33(2), but there is no specific mention of the doctrine of forum non conveniens. On the other hand, there seemed to be a general acknowledgment among the delegates that, despite the absence of a formal provision on the availability of forum non conveniens, U.S. courts would be able to continue applying the doctrine as a procedural tool as they had done under Warsaw.[24]

The case I am handling in Florida right now is the first case to raise the issue—whether under the new convention a U.S. court can apply the doctrine of forum non conveniens to dismiss and to transfer cases to the courts where the foreign victims lived. I am pleased to be able to report that, after an exhaustive discussion of all the issues, including a full and perceptive examination of the legislative history (travaux preparatoire) of the Montreal Convention, Judge Ursula Ungaro of the U.S. District Court for the Southern District of Florida handed down a 50-page decision, holding that the 1999 Montreal Convention allows U.S. courts to apply the doctrine and to dismiss or transfer foreign plaintiffs to the courts of their domiciles.[25]

Conclusion

I do not know of any more recent international aviation legal developments that I can tell you about. The 50-page decision has since been widely distributed and has been reprinted in *CCH Aviation Cases*. It is a landmark decision which, though now under appeal to the U.S. Court of Appeals for the Eleventh Circuit, is certain to be widely discussed in the literature and widely relied upon in future court decisions.

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Endnotes

[1]Significantly, however, each of the 27 EU member states signed the agreement individually and as individual state parties, as did the EC.

[2]For the history of the Warsaw Convention through 1966, *see* Lowenfeld and Mendelsohn, *The U.S. and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

[3]This author has previously addressed the issue of the EC's repeated and largely unnecessary calls for denunciation. *See The U.S.A. and the EU—Aviation Relations: An Impasse or an Opportunity?*, 29 J. Air & Space Law 263 (2004). What is not generally known is that, had the EC not actively, on threat of litigation, prohibited several of its member states from concluding bilateral open skies agreements with the United States throughout the late 1990s until the recent negotiations, the United States during that almost decade-long period would have concluded several more of such "open skies" agreements with the newer EC member states and those agreements would have entered into effect years ago.

[4]*See* Case C 466/98, *Commission v. United Kingdom, et al.*, (Nov. 5, 2002). For a thoughtful European aviation-oriented perspective on the decision, *see* Rene Fenes, *The European Court of Justice Decision on Bilateral Agreements—The Future of Relations*, 17 Air & Space Lawyer No. 3 (Winter 2003).

[5]Reuters, Press Release Sept. 26, 2007; ATWOnline, Feb. 20, 2008. This same ATWOnline report also noted that the AF-KLM group is likewise interested in acquiring a stake up to as much as $1 billion euros (approximately U.S.$1.5 billion) in any merged Delta-Northwest Airline entity. There have been no recent reports, however, confirming such an interest by the AF-KLM group.

[6]N.Y. Times, March 17, 2008; Dow Jones Newswires, March 5, 2008. An AFP Internet report of March 20, 2008, suggests that the AF-KLM offer values Alitalia "at 140 million euros" or only some $218 million. *See also* ATWOnline, April 30 and June 13, 2008.

[7]Since the time when these observations were made, two important events have occurred that challenge the validity of the author's views on this subject. On Oct. 18, 2007, Delta Airlines and Air France announced that they had agreed on the terms of a joint venture agreement under which, inter alia, the two airlines would share costs and revenues on their transatlantic services between the two countries. In addition, they announced not only that Air France would be giving three of its slot pairs at London's Heathrow Airport (LHR) to Delta (allowing Delta to operate daily flights between LHR and both New York and Atlanta), but that Air France would be using one of its own LHR slot pairs to inaugurate a service between LHR and Los Angeles. International Herald Tribune, Oct. 18, 2007, at 10. Shortly thereafter, British Airways (BA) announced that it planned to launch a new carrier, Open Skies, to open a service between Paris' Orly Airport (as well as perhaps other major gateways in the EU) and New York. Aviation Daily, Jan. 10, 2008, at 2. Since March 30, 2008, the date of the provisional entry into effect of the U.S./EU agreement, Air France has in fact opened its service between Heathrow and Los Angeles, and BA has opened its service by Open Skies to the United States. from Paris-Orly. Meanwhile, Luf-

thansa has stated that it "will wait and see how competitors like British Airways and Air France fare on their new transatlantic services." ATW DAILY NEWS, April 3, 2008. If Air France and BA continue to operate their flights from LHR and Orly over the longer term (and there is still some lingering doubt whether or not they will—in light of the escalating price of jet fuel and the substantial costs involved in setting up a service in the hub of a competing carrier), it will represent at least the beginning of another notable step forward by the EU toward aviation unity and the goal of a single European sky. That goal will, of course, come much closer to realization if and when a smaller EU member state carrier or a European low-cost carrier is allowed to open a similar service to the United States from a major European hub like LHR, CDG, or Frankfurt. It is perhaps no coincidence that there is some degree of apparent reciprocity with BA's Open Skies operating to JFK out of Paris-Orly and Air France operating to JFK out of London-Heathrow.

[8]British Airways and British Midland Airways have for several years been the largest and second largest slot holders at LHR.

[9]The author was among the first to disclose the then very modest price of approximately $10 million per slot pair in an article the author published in 2004. *See The U.S.A and the EU*, *supra*, n.4 at 275. Since then, however, more recent disclosures in the trade press (TRAVEL WEEKLY, Oct. 29, 2007, at 30) suggest that the cost of a single LHR slot pair has catapulted to approximately $40 million and even more than $50 million. This was more or less confirmed in a speech given by British Airways' CEO, Willie Walsh, before the International Aviation Club in Washington, D.C., on Nov. 7, 2007, when he said that the price was perhaps "a little more or a little less" than $40 million. Since that speech, Continental Airlines appears to have confirmed in its annual report to shareholders that it paid some $209 million for four LHR slot pairs. Assuming this is accurate, then given Continental's market capitalization of $1.88 billion as of March 28, 2008, Continental has expended an almost unimaginable 2.78 percent of its total market cap to operate only one flight into and out of LHR. No one is prepared to predict what will happen with these slot purchases if the U.K./BA demands are not met by the United States during the second stage of the negotiations (or indeed, if fuel costs continue to escalate, passenger traffic drops, and international air services face sharp cutbacks). In any event, the second stage can continue (at least according to the United States) until early 2012, by which time fuel costs and air travel may stabilize and the eggs of the new U.S. carriers at Heathrow may just be so ensconced as to be unscrambleable. AVIATION DAILY, April 1, 2008, at 2. Other press reports have disclosed that U.S. Airways and Northwest have likewise purchased or otherwise acquired LHR slot pairs—though all parties seem uniquely reluctant to disclose the amounts or other consideration involved in the transfers from other, presumably EU, member state carriers. Indeed, the details of these sales and purchases have become anything but transparent. Whatever the exact amounts or other consideration involved, the continuing sharp escalation in the cost of LHR slot pairs tends, if anything, only to confirm the validity of the author's argument made above as to the absence of benefits in the new agreement either for the United States or its carriers. But the sales prices of LHR slots also raise the equally interesting question of what, if anything, the EC is doing about this once-unlawful secondary market. Certainly, an EC reaction could be anticipated were slot pairs at JFK to be offered for sale "on the secondary market" to EU carriers reciprocally for $40 to $50 million. In May, the EC finally acknowledged that "secondary trading is an acceptable way of swapping slots among airlines." ATWOnline, May 5, 2008.

[10]It has also been recently reported (*see* TRAVEL WEEKLY, *id.*) that BA bought 51 slot pairs (translating to about 7 slot pairs per week) from British Midlands for about $60 million, translating to approximately $9 million per slot pair. The price of slot pairs is believed to vary depending upon its time of arrival and departure, with the prime transatlantic timing being the most costly at $40 million and up. BA's purchase from British Midlands leaves BA with about 41 percent of the slot allocations at LHR (a large percentage of which are at prime time) and British Midlands with about 12 percent. Interestingly, the *Wall Street Journal* reported on May 16, 2008, at B2, that "British airlines may look to strengthen their financial position by valuing all of their airport slots as assets on their balance sheets, accounting firm Deloitte Touche LLP said Thursday."

[11]Yet, and since the date this lecture was delivered, they have obviously done so, whether or not such huge investments will prove worthwhile in the longer term, especially in light of the current economic slowdown worldwide and the surfeit of U.S. carriers now using Heathrow. *See* n.9, *supra*. It is generally believed that Alitalia, in an effort to cover its continuing mounting deficits, has been a source of several of the LHR slot sales.

[12]*See* n.7, *supra*, for an up-to-date summary of the LHR slot transfer agreement between Air France and Delta Airlines, the two principal carriers in the Skyteam Alliance. It is not known whether Delta paid Air France anything more for the three LHR slot pairs than Air France would normally receive as part of the cost and revenue sharing arrangement that the two carriers agreed on for transatlantic services in their recently announced joint venture.

[13]*See*, e.g., Allan I. Mendelsohn, *The European Court of Justice Decision on Bilateral Agreements—Ownership and Control*, 17 AIR & SPACE LAWYER No. 3 (Winter 2003), and Allan I. Mendelsohn, *The U.S., the European Union, and the Ownership and Control of Airlines*, ISSUES IN AVIATION LAW AND POLICY (CCH) at 25, 151 (2003).

[14]The U.S. statutory limitations on foreign ownership and control of U.S. airlines appear in §§ 41102 and 40102(15) of U.S. Code Title 49. In 2004, Congress added the term "actual control" as part of the statutory requirement.

[15]In a March 18, 2008, editorial, the NEW YORK TIMES stated that many of these sovereign wealth funds "are secretive about their holdings, their objectives and the strategies by which their portfolios are managed" adding that it is "a big mistake to do such serious business with an opaque counterparty." On the other hand, in a *Wall Street Journal* Op-Ed article on March 19, 2008, Yousef al Otaiba, the director

of international affairs for the government of Abu Dhabi, discussed Abu Dhabi's sovereign fund and stated that the "overwhelming share of its portfolio" consists of "minority stakes in companies that have included no control rights, no board seats, and no involvement in the management or direction of the receiving companies." Otaiba added that the Abu Dhabi government will never use its investment organizations or individual investments as a foreign-policy tool. However, a *Wall Street Journal* article of June 6, 2008, (page C–2) stated that "[d]espite their reputation as passive investors who buy small stakes, sovereign wealth funds generally buy controlling interests in the companies they target, according to a study by Monitor Group, a Cambridge, Mass., company." The issue obviously warrants further scrutiny.

[16]The Economist, Jan. 19, 2008, at 78.

[17]In November 2005, the U.S. Department of Transportation issued a Notice of Proposed Rulemaking proposing administratively to change and liberalize its policies for ruling on future DOT cases involving foreign ownership and control issues. *See* Allan I. Mendelsohn, *U.S. Aviation Policy—A Critique*, 31 J. Air & Space Law 309 (September 2006). The DOT's proposal met very strong congressional opposition and was ultimately withdrawn. If any future changes are to be made in this very sensitive area of U.S. law and policy, it appears they will have to be achieved through congressional legislation. I would like to list at least some of the requirements that I am certain the U.S. Congress would insist upon as conditions for liberalizing current U.S. ownership and control laws: (1) that all U.S. flag airlines, no matter their ownership, be incorporated in the United States and comply with all applicable U.S. law; (2) that the aircraft fleets of all U.S. flag airlines, no matter their ownership, be made immediately available under a program acceptable to the Department of Defense whenever that department makes a demand for aircraft (failing which the airline may automatically lose its U.S. operating authority); (3) that, absent stringent conditions mandating near-total passivity, no portion of a U.S. airline can be owned by any foreign government whether directly or indirectly through a government-controlled sovereign wealth fund, or otherwise (4) that labor protective provisions be adopted to assure that future foreign owners do not in any way discriminate against U.S. employees or in favor of their own employees; and, finally, (5) that no individual or entity of foreign nationality can own a controlling interest in a U.S. airline unless the country of which the foreigner is a national not only has an "open skies" agreement with the United States but also clearly and reciprocally allows U.S. citizens to own controlling interests in their airlines.

[18]*See* Allan I. Mendelsohn, *Myths of International Aviation*, 68 J. Air Law And Commerce 519, 520–523 (2003).

[19]U.S. courts granting forum non conveniens motions routinely condition their dismissals of the lawsuits with various requirements on the moving defendants, including, for example, that they agree to submit to the jurisdiction of the foreign court, to waive any applicable statute of limitation defenses, to make witnesses and documents available to the foreign court, etc. With such conditions, the dismissals are virtually tantamount to transfers, assuming plaintiffs file or refile their lawsuits in the foreign court. For recent examples of two such decisions (not involving the Warsaw or Montreal Conventions), *see In re Air Crash Near Peixoto de Azeveda, Brazil on Sept. 29, 2006*, Case No. 07 MS 1844 (BMC) (JO) (E.D. N.Y., July 2, 2008), and *Clerides v. Boeing Co.*, 2008 WL 2746499 (C.A. 7, July 16, 2008). Of the multitude of cases dismissed by U.S. courts on forum non conveniens grounds, there is only one instance of a foreign court rejecting jurisdiction and directing the case back to the United States. A French appeals court ruled, on March 6, 2008, that the litigation against Boeing and three other U.S. defendants brought by the 134 French victims of the 2004 crash of Egyptian Flash Airlines, en route to Paris from Sharm el Sheikh, Egypt, should take place in the U.S. and not in France. *Sersiron et al. v. Boeing, et al.*, Cour D'Appel de Paris, 1st Chamber—Section C. This decision is reportedly under appeal to the French High Court.

[20]*See* Allan I. Mendelsohn and Renee Lieux, *The Warsaw Convention, Article 28, the Doctrine of* Forum Non Conveniens, *and the Foreign Plaintiff*, 68 J. Air Law And Commerce 75 (2003); Allan I. Mendelsohn, *Recent Developments in the* Forum Non Conveniens *Doctrine*, 52 The Federal Lawyer 45 (2005).

[21]*See*, e.g., *In re Disaster at Riyadh Airport*, 540 F. Supp. 1141 (D.D.C. 1982), involving victims who were of multiple nationalities.

[22]It has been reported recently that French President Sarkozy recommended that the EC adopt a class-action-type approach that would allow groups of plaintiffs injured or damaged by antitrust or other EC-proscribed activity to sue together for private damages. If this approach were combined with some type of contingency fee system, it is more than likely that EC courts might well entertain a fair portion, if not all, of the lawsuits otherwise brought by EC member state nationals in U.S. courts following air disasters. On April 3, 2008, the EC issued a white paper suggesting that steps should be taken to encourage the adoption of judicial methods to provide private compensation for victims of competition law infringement within the EU. 95 Antitrust Trade Regulation Report 353, April 4, 2008.

[23]542 U.S. 155, 169 (2004).

[24]*See* 52 The Federal Lawyer *supra* n.20 and accompanying text (2005).

[25]*See* Preliminary Order by Federal District Court Judge Ungaro in *In re West Caribbean Airways, S.A.*, 32 Av. Cas. (CCH) 15,595 (Sept. 26, 2007). In this decision, Judge Ungaro concluded that the legislative history of the 1999 Montreal Convention established that forum non conveniens was available as a procedural tool for use by U.S. courts. She then ordered the parties to brief the issue whether, in the particular circumstances of the case, forum non conveniens should be granted and the 160 plaintiffs directed to their domicile courts in Martinique. Following the submission of briefs on this issue, Judge Ungaro, on Nov. 9, 2007, issued an order dismissing the case on forum non conveniens grounds and directing the plaintiffs to the courts in Martinique. *See In re West Caribbean Airways, S.A.*, 32 Av. Cas. (CCH) 15,764 (Nov. 9, 2007).

vate claims of federal securities fraud. Obviously, these requirements will also apply to subprime securities class actions. In addition to the particularity requirement for fraud claims under Rule 9 of the Federal Rules of Civil Procedure, a plaintiff in a securities fraud suit must satisfy the requirements of the Private Securities Litigation Reform Act (PSLRA). Congress enacted the PSLRA in 1995 in an effort to reduce baseless securities fraud strike actions. A number of procedural and substantive limitations under the PSLRA apply when a plaintiff seeks to bring securities fraud actions. Among other requirements of the act, a plaintiff in a securities fraud case alleging material misstatements or omissions must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[5] In other words, securities fraud plaintiffs must allege facts that give rise to a "strong inference" of scienter. Congress, however, did not define what qualified as a "strong inference" and in subsequent years it became a hotly contested issue. Over time, a clear split among the circuit courts of appeals developed regarding what plaintiffs needed to plead and prove to satisfy the PSLRA standard. Ultimately, in 2007, the U.S. Supreme Court clarified what constitutes a strong inference of scienter in *Tellabs Inc. v. Makor Issues & Rights Ltd.*, 127 S. Ct. 2499 (2007).

In *Tellabs*, the U.S. Supreme Court made it clear that plaintiffs must "plead facts rendering an inference of scienter at least as likely as any plausible opposing inference." Following the *Tellabs* ruling, district courts are now required to conduct a comparative inquiry regarding whether the plaintiff has sufficiently alleged scienter. Courts must review the plaintiffs' factual allegations and weigh them against plausible innocent explanations for the defendant's conduct. According to the Supreme Court, a complaint will survive "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[6]

Given this recent pronouncement, what will plaintiffs set forth to show that the allegation meets the requirement of a strong inference of scienter in subprime securities class actions, and will this be enough? To attempt to meet the strong inference standard, plaintiffs are likely to offer factual allegations based on (1) statements from confidential witnesses, (2) the defendant's awareness of the deterioration of origination standards in subprime lending, (3) corporate executives' stock transactions, (4) the fact that a corporation was heavily invested in mortgage-backed securities, (5) a lack of sufficient loan-loss reserves, (6) improper accounting regarding subprime losses, and (7) purposeful delays in disclosing the drop in portfolio values. Plaintiffs are likely to point to a combination of these and other factual allegations in their attempts to plead a strong inference of scienter. Defendants, on the other hand, are likely to dispute outright some of the factual allegations and argue that a variety of plausible innocent explanations for the alleged conduct exists. In particular, in the subprime context, defendants are likely to argue that the market collapse was unforeseeable and that their conduct was consistent with business standards.

It remains to be seen what type of allegations will be sufficient for subprime securities class actions that arise from the subprime mortgage meltdown. Many subprime securities class action complaints are voluminous. But one thing is already clear: length is no guarantee that a court will be persuaded that plaintiffs' inference of scienter is at least as compelling as any opposing inference is. One court has already remarked that "one might be tempted to think that a complaint spanning more than 100 pages and consisting of more than 200 paragraphs could not fail to be specific. The temptation is dangerous and must be resisted."[7] After making that assessment, the court reviewed the plaintiffs' allegations, considered the requirements of the PSLRA and the *Tellabs* decision, and dismissed the case with prejudice.

Notwithstanding the U.S. Supreme Court's decision in *Tellabs*, one must wonder whether the crisis atmosphere surrounding the subprime lending market may result in district courts' attempts to loosen the pleading requirements as a way to ensure that subprime plaintiffs have an opportunity to seek redress. It seems much more likely that subprime securities class actions will be resolved on the very specific factual allegations asserted by plaintiffs, the innocent explanations proffered by defendants, and the comparative strength of each of those positions. Over the coming years, the impact of the collapse in the subprime mortgage market will undoubtedly continue to generate significant levels of litigation and is likely to result in further elaboration by the courts about what parties must plead in order to allege securities fraud sufficiently. **TFL**

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Endnotes

[1]*See*, generally, Dr. Faten Sabry and Dr. Thomas Schopflocher, *The Subprime Meltdown: A Primer*, NERA Economic Consulting, June 21, 2007.

[2]*Id.*

[3]*See*, generally, Jeff Nielsen, *Subprime Mortgage and Related Litigation: First Quarter 2008 Update*, Navigant Consulting, April 2008.

[4]*Id.*

[5]15 U.S.C. § 78u-4(b)(2).

[6]*Tellabs Inc. v. Makor Issues & Rights Ltd.*, 127 S. Ct. 2499, 2506–2513 (2007).

[7]*In re 2007 Novastar Financial Inc., Securities Litig.*, 2008 WL 2354367, *2 (W.D. Mo. June 4, 2008).