Forum Non Conveniens and Treaty Rights: King v. Cessna

On Monday, the Eleventh Circuit rendered an interesting opinion in the case of *King v. Cessna Aircraft* . The case concerned several interesting points on the doctrine of*forum non conveniens*, the most interesting of which is the competing rights guaranteed to foreign plaintiffs under bilateral treaties.

As a bit of background, the case arose out of wrongful death actions by one American, and numerous European plaintiffs, against Cessna Aircraft arising from a plane crash in Italy. Because, under *Piper*, foreign plaintiffs deserve less deference in their choice of forum, the district court dismissed the claims of all the European plaintiffs on the basis of forum non conveniens but stayed the action concerning the American plaintiff pending resolution of the foreign claims in Italy. The question presented is whether bilateral FCN treaties between the United States and Denmark, Finland, Italy, Norway, and Romania–all of which guarantee the foreign nationals "no less favorable" access to U.S. courts–should impact the private interest analysis under *forum non conveniens*. Here is how the Eleventh Circuit ruled on the question:

> *In the forum non conveniens analysis, "[a] foreign plaintiff's choice of forum . . . is a weaker presumption that receives less deference. The European Plaintiffs point out a majority of them are from countries having bilateral treaties with the United States that accord them "no less favorable" access to U.S. courts to redress injuries caused by American actors. Thus, they argue, the district court erred in giving their choice less deference. We disagree. . . . Even assuming that, by treaty, plaintiffs were entitled to access American courts on the same terms as American citizens …, our case law does not support plaintiffs' assertion that such a treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience. . . . A court considering a motion for dismissal on the grounds of forum non conveniens does not assign "talismanic significance to the citizenship or residence of the parties," . . . and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for forum non conveniens. . . . [A]ppellants cannot successfully lay claim to the*

> *deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum. This analysis makes clear that although citizenship often acts as a proxy for convenience in the forum non conveniens analysis, the appropriate inquiry is indeed convenience. In this case, then, the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the United States. Just as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience.*

Roger Alford at Opinio Juris sums up that, "based on this logic, foreign plaintiffs stand in the shoes of ex pat Americans living abroad." If that is right, then, "one should find case law in which Americans living abroad enjoy this lesser presumption." He correctly notes, however, that there is "no such case law and the court provides none." And, the more fundamental problem with the opinion is that all the convenience factors they discuss on the defendant side are identical as between the European and American plaintiffs. The location of much of the evidence is in Italy, including evidence from Italian witnesses, that is true for *both* the American and European plaintiffs. Unless the claims of the Americans and the Europeans are different, and require differing use of the evidence (which is not the case here), then shouldn't the convenience factors that the court touts so headily apply evenly to both sets of plaintiffs? I'm not suggesting that *forum non* dismissal was an inappropriate decision in the balance of factors–indeed, the place of the tort, the applicable law and the evidence is all in Italy–but I would think that the American plaintiffs should be equally vulnerable to dismissal on that grounds as well.