

The 1973 Convention on Law Applicable to Products Liability, some minor comments

By Stephan Eriksson¹

1. Introduction

There is an ongoing “war” regarding forum between plaintiffs and defendants in US cases arising from foreign aviation accidents, both sides accusing each other of forum shopping. Whereas plaintiffs usually prefer to bring actions against a US defendant in a US forum due to the comparatively high standards of compensations, lack of the loser pay rule and the effective rules of discovery, US defendants routinely file motions to dismiss based on *Forum Non Conveniens* (FNC). This forum “war” is ongoing and lately the US defendants have been victorious. The 1973 Hague Convention on the Law Applicable to Products Liability² might in these cases, under certain circumstances, have an impact on damages, despite FNC dismissals.

2. Member States and general application

Eleven European countries have today signed and/or ratified the Convention that was concluded on October 2, 1973, and entered into force on October 1, 1977. The signatory countries where the Convention is in force today are Croatia, Finland, France, Luxemburg, Montenegro, The Netherlands, Norway, Serbia, Slovenia, Spain, and the former Yugoslav Republic of Macedonia³⁴. The Convention determines the law applicable to the liability of the manufacturers or suppliers of a finished product or a or of a component part⁵ for damages caused to legal or natural persons, by a product in cases that are brought in one of these countries. Damages are defined as injury to persons or damages to property, (land and chattels) as well as economic loss⁶. The only exceptions are the damage to the product itself or any consequential economic loss unless accompanied by other damage. It requires the State to apply the law made applicable by the Convention without regard to any consideration of reciprocity “even if the applicable law is not that of a Contracting State”.⁷ If the Convention in a specific case therefore points towards US law it could be applied although United States is not a signatory to the Convention. The purpose of the Convention is to establish common provisions on the law applicable in international cases, to product liability.⁸

Article 3 of the Convention lists the categories of persons whose liability for damage caused by a product are covered by the Convention. It basically applies to all manufactures of a

finished product, to all assemblers of a product, and to all suppliers (in a broad sense) of a product.

3. Rules for determining applicable law

Articles 4 -7 are the key provisions of the Convention stating the basic rules for determining the applicable law. Article 4-5 of the Convention will determine the great majority of cases, the State of the place of injury or the State of the habitual residence of the person directly suffering damage. They both require two designated contacts to be located in a State before that State can be selected as the State of applicable law. Article 4 of the Convention states that the applicable law shall be the internal law of the State of the place of the injury, if in addition that State is also the place of the habitual residence of the person directly suffering damages, or the principal place of business of the person claimed to be liable, or the place where the product was acquired by the person directly suffering damage. Article 5 states that notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damages, if that State is also the principal place of business of the person claimed to be liable, or the place where the product was acquired by the person directly suffering damage.

However, aviation accidents in today's time of international traveling regularly occur in a State different from the State of the habitual residence of the victims. If the accident occurs in one of the signatory States, the person directly suffering damage resides in another signatory State, and the person held liable is from the US, the Convention can prove beneficial for the claimant. If neither article 4 nor article 5 of the Convention is applicable because there are not two contacts to the same State, the claimants are given a choice of law. They can according to Article 6 then choose between the internal law of the State of the place of the injury or the internal law of the state of the place of business of the person claimed to be liable.⁹ If an accident would occur on international waters, the internal law of the state of the place of business of the person claimed to be liable is the only law available.

Each State in the US shall be considered as a separate State for the purposes of selecting the applicable law.¹⁰ If the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that other state through commercial channels, liability according to the law of that other State cannot be applied, according to Article 7. In aviation this would not pose a problem

since the US manufacturers probably prefer foreign law to be applied instead of domestic US law. In this day of international travel by aviation and US manufactured aircraft and subcomponents widely used in all parts of the world an argument that an accident in a particular State and thus application of that particular State's law would be unforeseeable would probably not hold water.

4. Elements of law to be determined

Article 8 lists the most important matters that are to be determined by the law made applicable by the Convention, but it is not exclusive. The scope of the Convention is intended to be broad. The article states that, in particular, this Convention shall determine the basis and extent of liability, the grounds for exemption from liability (any limitation of liability and any division of liability)¹¹, the kinds of damage for which compensation may be due, the form of compensation and its extent, the question whether a right to damages may be assigned or inherited, the person who may claim damages in his own right, the liability of a principal for the acts of his agent or of an employer for the acts of his employee, the burden of proof, and rules of prescription and limitation (including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period)¹². Only when such application would be manifestly incompatible with public policy (ordre public) the application may be refused.¹³

5. The Convention in practice

5.1 Previous cases

It has been difficult to find relevant previous cases where the Convention has been applied.

According to an article published 1996¹⁴, three cases have been reported.

In a Supreme Court case from the Netherlands, December 22, 1988, the Court applied Dutch law against a German manufacturer according to Article 4 since the injured person resided in Holland.

In another Supreme Court case from the Netherlands, October 1993, the Court found the Convention to be mandatory and applied Dutch law despite the will of the parties.

In a Supreme Court case in Spain, May 29, 1993, the Convention was applied, but no further information was presented in the article.

5.2 Midair collision over Uberlingen, Germany, July 1, 2002

Bashkirian Airlines flight 2937 (a Tupolev 154) originated in Ufa, Russia and flew to Moscow to pick up passengers. From Moscow the aircraft continued as a charter flight to Barcelona, Spain. Onboard were 60 passengers, mainly children and 9 crew. Over Germany the Bashkirian flight was approaching another flight a DHL Boeing 757 cargo plane, en route from Bergamo, Italy, to Brussels, Belgium, flying at same altitude.

The Tupolev's Honeywell 2000 TCAS (Traffic alert and Collision Avoidance System) gave a Traffic Advisory because of the presence of the DHL 757 in the area. Seven seconds later the radar controller issued descent instructions to the Tupolev.

Minutes later the crews of both aircraft received a Resolution Advisory (RA)-command from their respective TCAS. The DHL crew complied with this and initiated a descent. At the same time the Tupolev crew were trying to deal with the conflicting descent (by ATC) and climb (TCAS) instructions. Seven seconds after the Resolution Advisory-command, the ATC controller repeated the instruction to descend. The Bashkirian crew then decided to follow the ATC controller's instructions. Since both aircraft were descending, the TCAS of the Russian plane warned the crew to "increase climb" to avoid a collision. Just prior to the collision, both crews detected the other aircraft, and reacted to avoid the collision by attempting appropriate flight maneuvers. Nevertheless both aircraft unfortunately collided.

The families of the victims of Bashkirian Airlines flight 2937 sued the manufacturers of the Honeywell 2000 TCAS, Honeywell and ACSS, in District Court of New Jersey 2005. In October 2005 the District Court dismissed the claim on the basis of FNC to the Court of First Instance in Barcelona, Spain¹⁵.

In May 2009 the trial proceedings were held at Court of First Instance and the plaintiffs have argued the application of the Convention claiming damages calculated according to US law. The verdict has not yet been published.

5.3 Recent aviation accidents

Spanair flight JKK5022

On August 20, 2008 a Spanair MD 82 attempted to take off at Madrid-Barajas airport. Due to flaps and slats not set to the take-off position and with the CAWS (Central Aural Warning System) warning system inoperative the aircraft crashed close to runway.

Long before this fatal Spanair crash, Boeing-McDonnell Douglas from earlier accidents was aware of deficiencies in its CAWS system design and the risk posed by single engine taxi operations which could result in a flaps/slats up takeoff without giving the flight crew the proper warning. Given its knowledge and the extreme hazard of takeoff with the system disabled, it could be argued that Boeing-McDonnell Douglas should have utilized an alternative CAWS system design.

In a product liability claim against Boeing-McDonnell in the United States an FNC dismissal to Spain would be plausible. Spain is a signatory to the Convention. In a Spanish proceeding the foreign, non-Spanish victim's families would then be able to use the Convention and argue the application of US law and damages, according to Article 6 of the Convention.

Air France flight AF 447

In the early morning of June 1, 2009, an Air France Airbus A330-203, with 12 crew and 216 passengers onboard on route from Rio de Janeiro to Paris disappeared over international waters over the Atlantic. The aircraft was passing through an area of severe thunderstorms and one theory of the cause of accident is that the aircraft's airspeed indication system may have malfunctioned providing the pilot and the on board flight computer with incorrect data regarding the aircraft's speed causing the aircraft to overspeed. Another possible cause of the accident could be a malfunctioning Air Data Inertial Reference Unit (ADIRU). The ADIRU is manufactured by US based Honeywell. In a possible US proceeding an FNC motion for dismissal can be expected. Since both the carrier Air France and the manufacturer of the aircraft Airbus are domiciled in France and the crash investigation is performed by French Authorities an FNC dismissal would probably be to France. France is a signatory to the

Convention. At least 155 passengers are foreigners. In a French proceeding the foreign victim's families would then be able to use the Convention and argue the application of US law and damages, according to Article 6 of the Convention.

6. Conclusion

The 1973 Convention on Law Applicable to Products Liability might be a useful tool for a claimant seeking damages from US manufacturers, also outside the US court system, at least where a US case based upon FNC could be dismissed to Croatia, Finland, France, Luxemburg, Montenegro, Netherlands, Norway, Serbia, Slovenia, Spain, and the former Yugoslav Republic of Macedonia. A verdict from the Barcelona court of First Instance against Honeywell and ACSS, in a product liability case regarding the 2002 Midair collision over Uberlingen, Germany is expected later this year.

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² http://www.hcch.net/index_en.php?act=conventions.text&cid=84

³ http://www.hcch.net/index_en.php?act=conventions.status&cid=84

⁴ Belgium, Italy and Portugal have signed but not ratified the Convention

⁵ Article 1 and 3

⁶ Article 2 b)

⁷ Article 11.

⁸ Introductory text.

⁹ Article 6.

¹⁰ Article 12.

¹¹ See for example US rules re GARA, Federal Tort claims act and preemption

¹² Norway has reserved herself as far as the application of Article 8, paragraph 9

¹³ Article 10.

¹⁴ Les nouvelles Conventions de La Haye - Products Liability (V) pp. 318-319, Les nouvelles Conventions de La Haye – leur application par les juges nationaux 1996, Dr. Mathilde Sumampouw

¹⁵ *Faat v. Honeywell Int'l* (2005) WL2475701 (D.N.J Oct 2005, 2005)