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## Forfeiting the Home-Court Advantage: The Federal Doctrine of Forum Non Convenien

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## FORFEITING THE HOME-COURT ADVANTAGE: THE FEDERAL DOCTRINE OF FORUM NON CONVENIENS

### I. INTRODUCTION

American multinational corporations benefit from international demand for their products. The United States has attained leadership and preeminence in international markets and is a major contributor to the global economy.<sup>1</sup> However, placing products in the global market exposes American manufacturers to liability beyond traditional geographic limits. A foreign citizen injured by a product manufactured in the United States may seek recovery for injuries in an American court.<sup>2</sup> Even so, a court may invoke the doctrine of forum non conveniens to decline jurisdiction.<sup>3</sup> By filing a motion to dismiss based on forum non conveniens, an American defendant argues that the chosen forum is unjust and inconvenient, and that an alternative forum is more appropriate.<sup>4</sup> Today, the doctrine of forum non conveniens is primarily applied in international cases<sup>5</sup> and requires the availability of an adequate, alternative forum.<sup>6</sup> Once a court confirms the existence of an

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1. Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us At Our Own Game?*, 9 J.L. & COM. 167, 167 (1989).

2. U.S. CONST. art. III; 28 U.S.C. § 1332(a)(2) (1994) (giving district courts jurisdiction in actions between "citizens of a State and citizens or subjects of a foreign state"); 28 U.S.C. § 1350 (1994) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

The Supreme Court recognizes that foreign plaintiffs deserve the attention of American courts to resolve certain conflicts. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (recognizing that a court may retain jurisdiction of foreign plaintiff's claim if no alternative forum exists or the convenience factors weigh in favor of the American forum).

3. *See Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 423 (1932) (finding courts can "decline, in the interest of justice, to exercise jurisdiction, . . . where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal").

4. *See Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir. 1993).

5. *See, e.g.*, *American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (recognizing the continuing application of the doctrine when the alternative forum is abroad).

6. *See, e.g.*, *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 821 F.2d 1147, 1164 (5th Cir. 1987) (requiring defendant to establish the existence of alternate forums in which all defendants were amenable to process for forum non conveniens analysis), *judgment vacated sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989).

alternate forum, it must analyze convenience factors to decide if the chosen forum serves justice<sup>7</sup> and protects the litigants' rights to a fair trial.<sup>8</sup> On the surface the analysis seems quite simple. A foreign plaintiff's action remains in the chosen forum when no alternative forum exists.<sup>9</sup> When an alternative forum does exist, a court may dismiss the action only if a defendant proves that the chosen forum is unnecessarily burdensome<sup>10</sup> or unreasonably inconvenient<sup>11</sup> and that the alternate forum is more convenient.<sup>12</sup> Therefore, courts must compare the convenience of the respective forums.

This Comment examines the application of the doctrine of forum non conveniens to foreign plaintiffs in federal court. The discussion focuses primarily on lower court decisions, which are guided by the Supreme Court's 1981 decision in *Piper Aircraft Co. v. Reyno*.<sup>13</sup> The *Piper* Court did not lay down a rigid rule governing application of the doctrine because it recognized that different facts would guide each case.<sup>14</sup> However, the discretionary nature of the doctrine provides a perplexing assortment of decisions.<sup>15</sup> This Comment distills from federal court opinions the determinative factors that influence a court's decision to retain or reject jurisdiction and suggests that even if a viable alternative forum exists, a court should uphold a foreign plaintiff's choice of an American forum if a significant

7. See *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527-28 (1947).

8. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

9. See *In re Air Crash Disaster*, 821 F.2d at 1164.

10. See *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 904 (S.D.N.Y. 1986), *appeal dismissed*, 819 F.2d 33 (2d Cir. 1987).

11. *Id.*

12. *Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 743 F.2d 48, 50 (1st Cir. 1984); see also *In re Air Crash Disaster*, 821 F.2d at 1159 n.15 (requiring a more convenient forum for a suit to be dismissed on grounds of forum non conveniens).

13. 454 U.S. 235 (1981).

14. *Id.* at 249.

15. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting) (arguing that the Court's new rule of declining jurisdiction for the convenience of the defendant will clutter the "courts with a preliminary trial of fact concerning the relative convenience of forums"). Justice Black stated:

The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.

*Id.* at 516; see also *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) ("The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible."); Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 461 (1995) ("The doctrine of international forum non conveniens has been criticized as 'a crazy quilt of ad hoc, capricious, and inconsistent decisions.'" (quoting Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985))); David W. Robertson, Note, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 399 (1987) (criticizing the doctrine as currently applied because of "too much discretion and too little clarity in its application").

nexus exists between the litigation and the chosen forum.

Courts are inclined to look favorably on foreign plaintiffs suing in a jurisdiction with a significant nexus to the litigation. A court is likely to look at the facts carefully before dismissing a case brought by plaintiffs in the defendant's forum. The determinative factors relate to the center of liability issues, the influences an American company exerts over foreign activities giving rise to the injury from the chosen forum, the relative convenience of the competing forums, and the justification of burdening the chosen forum's resources.

Part II of this Comment discusses the development and adoption of the doctrine of forum non conveniens. Part III analyzes the application of the doctrine by lower federal courts, and Part IV reveals the determinative factors in its application. This Comment concludes with the circumstances in which a foreign plaintiff should remain in the chosen American forum.

## II. BACKGROUND

### *A. State Court Development of Forum Non Conveniens*

Forum non conveniens is a common-law doctrine that originated in Scottish common law and was first introduced into American law through state courts in the early 1900s.<sup>16</sup> The doctrine allows a court to decline exercising its jurisdiction even when the case is properly before the court.<sup>17</sup> Originally concerned with an abuse of process, courts were unwilling to allow a plaintiff to choose an inconvenient forum to "vex," "harass," or "oppress" the defendant.<sup>18</sup> Early cases typically involved foreign corporations as defendants "sued in a jurisdiction which is alien alike to its domicile, to the plaintiff's residence and to the place where the cause of action

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16. See, e.g., Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 23 (1929) (stating that the doctrine was applied earlier, although not by name, to consider the appropriateness of forums for trial).

17. See, e.g., *Gilbert*, 330 U.S. at 504, 507 (finding forum non conveniens does not apply until jurisdiction and venue are satisfied). But see *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 516 (6th Cir. 1986) (finding that an initial determination of personal jurisdiction would have amounted to "an exercise in futility"); *Calavo Growers v. Belgium*, 632 F.2d 963, 968 (2d Cir. 1980) (finding it unnecessary to reach personal jurisdiction issue after affirming forum non conveniens dismissal); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1351 n.57 (S.D. Tex. 1995) (finding it proper in rare cases to proceed in forum non conveniens before deciding jurisdiction when arguments for dismissal are strong).

Asserting personal jurisdiction over a defendant requires the court to find "minimum contacts" and not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This Comment suggests that although a minimum contacts analysis may be satisfied, the forum non conveniens analysis requires a heightened standard of contacts to retain the action and overcome a defendant's claim of an inconvenient forum.

18. *Gilbert*, 330 U.S. at 508.

arose.”<sup>19</sup> When a plaintiff’s choice of forum was unnecessary to pursue the requested remedy and caused undue hardship on a defendant, a court’s discretionary authority allowed dismissal of the action.<sup>20</sup>

## *B. Federal Courts’ Adoption of the Doctrine of Forum Non Conveniens*

### *1. Canada Malting Co. v. Paterson Steamships, Ltd.*

In *Canada Malting v. Paterson Steamships, Ltd.*<sup>21</sup> the Supreme Court affirmed the lower court’s application of the doctrine to decline jurisdiction in litigation between foreign parties.<sup>22</sup> The litigation arose from a collision occurring on Lake Superior between Canadian citizens.<sup>23</sup> United States law applied because the cause of action arose in the territorial waters of the United States.<sup>24</sup> The district court, having discretion to decline jurisdiction in admiralty suits between foreigners, expanded the doctrine’s applicability to courts of equity and law.<sup>25</sup> The Supreme Court’s decision means that a court could decline jurisdiction when “‘justice would be as well done by remitting the parties to their home forum.’”<sup>26</sup> The plaintiff argued for the court to retain jurisdiction because the alternative forum, Canada, would apply less favorable substantive law.<sup>27</sup> However, the Court refused to reverse the decision because it found a Canadian forum could serve justice.<sup>28</sup>

### *2. Gulf Oil Corp. v. Gilbert*

Fifteen years after declining jurisdiction in *Canada Malting*, the Court revisited the doctrine in *Gulf Oil Corp. v. Gilbert*<sup>29</sup> and articulated a balancing test to guide courts in its application.<sup>30</sup> The Court stressed application of the doctrine only in “rare cases.”<sup>31</sup> The case involved a suit by a Virginia citizen against a Pennsylvania

19. See Blair, *supra* note 16, at 34.

20. Cf. *Gilbert*, 330 U.S. at 507.

21. 285 U.S. 413 (1932).

22. *Id.* at 424.

23. *Id.* at 417.

24. *Id.* at 418.

25. *Id.* at 417, 422-23.

26. *Id.* at 420 (quoting *Langnes v. Green*, 282 U.S. 531, 544 (1931) (quoting *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 457 (1869))).

27. *Canada Malting*, 285 U.S. at 418.

28. *Id.* at 423-24.

29. 330 U.S. 501 (1947).

30. *Id.* at 509.

31. *Id.* Today, the doctrine is still only applied in rare cases. See *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1723-24 (1996) (recognizing “that federal courts have discretion to dismiss damages actions, in certain narrow circumstances, under the common-law doctrine of *forum non conveniens*” and restating that “[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum”).

corporation in the Southern District of New York for destruction of a warehouse in Virginia.<sup>32</sup> The corporation was doing business in both Virginia and New York.<sup>33</sup> Most of the witnesses resided in Virginia and the state and federal courts were available to the plaintiff in Virginia.<sup>34</sup> After determining that both the New York and federal rule for forum non conveniens analysis were the same—avoiding the decision of which law to apply—the Court concluded that the Virginia courts should try the case.<sup>35</sup> The *Gilbert* Court was concerned that the plaintiff's choice of forum was a deliberate attempt to cause inconvenience and undue hardship to the defendant.<sup>36</sup>

In *Gilbert* the Court identified certain private and public interest factors for a court to consider when deciding whether to retain or reject jurisdiction.<sup>37</sup> The Court identified the private interests of the litigant as

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of unwilling, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.<sup>38</sup>

The Court noted that public interest factors were also important. These factors include the following:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. . . . There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.<sup>39</sup>

Although a presumption exists that a plaintiff's choice of forum should prevail,<sup>40</sup> after weighing the factors, the Court ruled to uphold the district court's decision in

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32. *Gilbert*, 330 U.S. at 502-03.

33. *Id.* at 503.

34. *Id.* at 511.

35. *Id.* at 509, 511-12.

36. *Id.* at 509-10.

37. *Id.* at 508.

38. *Gilbert*, 330 U.S. at 508.

39. *Id.* at 508-09.

40. *Id.* at 508. ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

the case because the plaintiff was not a resident of New York, no event took place in New York, and the forum was chosen solely because the plaintiff believed that a New York jury would award more money.<sup>41</sup>

### 3. *Congress's Response to Gilbert: 28 U.S.C. § 1404(a)*

Shortly after the Court rendered its decision in *Gilbert*, Congress partially superseded the forum non conveniens doctrine applied in federal domestic cases with 28 U.S.C. § 1404(a).<sup>42</sup> Section 1404(a) permits a federal court to transfer a civil action to another federal district court or division "[f]or the convenience of parties and witnesses, [and] in the interest of justice."<sup>43</sup> The statute applies only when the alternative forum is in another district court.<sup>44</sup> If the alternative forum is a jurisdiction outside the United States, *Gilbert* still governs and the case must be stayed or dismissed rather than transferred.

### C. *Federal Courts' Expansion of the Doctrine Involving Foreign Plaintiffs*

#### 1. *Piper Aircraft Co. v. Reyno*

In 1981 the Supreme Court attempted to clarify the doctrine of forum non conveniens. Unlike *Canada Malting*, in which both parties were foreign, or *Gilbert*, which involved only domestic parties, *Piper Aircraft Co. v. Reyno*<sup>45</sup> involved a domestic defendant and a foreign plaintiff.<sup>46</sup> The case involved a products liability action that resulted from an airplane crash in Scotland.<sup>47</sup> Scottish plaintiffs sued the plane's manufacturer, a Pennsylvania corporation, and an Ohio propeller manufacturer.<sup>48</sup> The plaintiffs originally filed the case in California state court, but the defendants removed it to California federal district court.<sup>49</sup> The federal district court transferred the case pursuant to § 1404(a) to the Middle District of Pennsylvania where the court dismissed on forum non conveniens grounds.<sup>50</sup>

The Third Circuit Court of Appeals reversed and remanded the case because Scottish law was less favorable to the plaintiff who would bear the burden of proving negligence, instead of being able to rely on strict liability.<sup>51</sup> The Supreme

41. *Id.* at 509-12.

42. See 28 U.S.C. § 1404(a) (1994); see also *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1724 (1996) (finding the transfer of venue function of the doctrine superseded by § 1404(a)).

43. 28 U.S.C. § 1404(a) (1994).

44. *Id.*

45. 454 U.S. 235 (1981).

46. *Id.* at 238-39.

47. *Id.*

48. *Id.* at 239-40.

49. *Id.* at 240.

50. *Id.* at 241.

51. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 163-64 (3d Cir. 1980), *rev'd*, 454 U.S. 235 <https://scholarcommons.sc.edu/sclr/vol49/iss5/17>

Court disagreed with this reasoning. According to the Court, dismissal is not automatically barred when the law of the alternate forum is less favorable to a plaintiff.<sup>52</sup>

The *Piper Aircraft* Court introduced a two-step approach to analyze a motion to dismiss on forum non conveniens grounds. The Court downplayed the abuse of process approach (vexation or harassment) and concentrated solely on the convenience of the litigation.<sup>53</sup> In doing so, the Court expanded the *Gilbert* factors, but it still required the existence of an alternative forum.<sup>54</sup> This threshold requirement is two-pronged: the defendant must be amenable to process in another jurisdiction *and* that jurisdiction must be an adequate forum.<sup>55</sup>

After addressing the existence of an adequate alternative forum, the Court memorialized the *Gilbert* private and public interest factors.<sup>56</sup> Reviewing the lower court's weighing of the factors, the Supreme Court found that the court of appeals weighed too heavily that Scottish law was unfavorable to the plaintiff.<sup>57</sup> If an unfavorable change of law is over-emphasized, dismissal may be barred even though the chosen forum is plainly inconvenient. Such a result would render the doctrine "virtually useless" and obliterate the original intent of the doctrine.<sup>58</sup> Fearing a flood of foreign litigants into the United States, the Court held that a foreign plaintiff's choice of forum is entitled less deference than that of a domestic plaintiff.<sup>59</sup>

#### D. *Why Foreign Plaintiffs Seek Justice in American Courts*

Foreign litigants are attracted to the courts of the United States. The availability of favorable tort law such as strict liability, choice of law rules, jury trials, contingent attorneys' fees, and extensive discovery draw foreign litigants to courts in the United States.<sup>60</sup> However, forum shopping is not always what initially lures foreign plaintiffs to American courts. Some foreign plaintiffs may have to sue in an

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(1981).

52. *Piper Aircraft*, 454 U.S. at 249.

53. *Id.*

54. *Id.* at 254 n.22.

55. *Id.*

56. *Id.* at 255-61.

57. *Id.* at 250-51.

58. *Piper Aircraft*, 454 U.S. at 250.

59. *Id.* at 256; see also Robertson, *supra* note 15, at 405 (finding that *Piper Aircraft* expressly stated the "defendant's being a resident of the forum does not weigh significantly in favour of retaining jurisdiction").

60. *Id.* at 252 n.18. Some plaintiffs are unavailing in their attempts to have their case tried in the United States. See *De Aguilar v. Boeing Co.*, 11 F.3d 55, 56 (5th Cir. 1993) (finding plaintiffs, victims of a Mexicana Airline plane crash in Mexico, "doggedly determined to find some court in the United States—any court—in which to try their foreign-based claims"); see also Cortese & Blaner, *supra* note 1, at 180 ("U.S. business is always subject to U.S. product liability laws, even when doing business in a foreign country with foreign citizens.")



American court because an American defendant is not amenable to service in the foreign tribunal.<sup>61</sup> Likewise, a statute of limitations may prevent a plaintiff from suing in the plaintiff's home forum. Once sued in an American forum, a defendant may agree to submit to process in a foreign forum or to waive defenses.<sup>62</sup> A court may then find the foreign forum adequate and, after balancing the factors, dismiss a case on this conditional basis.<sup>63</sup>

### III. TODAY'S FEDERAL DOCTRINE OF FORUM NON CONVENIENS AND THE FOREIGN PLAINTIFF

Over fifty years have passed since the Supreme Court's *Gilbert* decision. Today the federal doctrine of forum non conveniens is primarily applied in international litigation.<sup>64</sup> Even then, a court should rarely invoke the doctrine and only in narrow circumstances.<sup>65</sup> American defendants often move for dismissal on forum non conveniens grounds when foreign plaintiffs sue in an American forum, even when they sue in the defendant's resident forum.<sup>66</sup> A defendant is in an "unusual" position when it asserts that the forum in which it is headquartered is inconvenient.<sup>67</sup> "In this unusual situation, where the forum resident seeks dismissal, this fact should weigh strongly against dismissal."<sup>68</sup> The Third Circuit in *Lony v. E.I. Du Pont de Nemours & Co.*<sup>69</sup> found it "puzzling" when Du Pont sought to give up its home-court advantage.<sup>70</sup> Historically, a defendant raised the forum non conveniens issue when the defendant was sued outside its home jurisdiction and was seeking to return to

61. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 198 (2d Cir. 1987) ("[The] decision to bring suit in the United States was attributed to the fact that . . . Indian courts did not have jurisdiction over UCC, the parent company . . .").

62. The *Piper Aircraft* Court approved these "conditional dismissals." *Piper Aircraft*, 454 U.S. at 257 n.25 (approving use of conditional dismissal for personal jurisdiction and to ensure plaintiff access to sources of proof); *Proyectos Orchimex de Costa Rica, S.A. v. E.I. Du Pont de Nemours & Co.*, 896 F. Supp. 1197 (M.D. Fla. 1995) ("In weighing these factors, the court may consider any concessions made by the moving defendant such as waiving statutes of limitations, objections to process, personal jurisdiction or other similar concessions.").

63. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996).

64. See, e.g., *American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) ("[T]he federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad."); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 423 n.4 (1st Cir. 1991) ("With the enactment of § 1404(a), the common law doctrine of *forum non conveniens* has lost some of its scope; its primary significance today is its application in cases where it is alleged that another country is a more convenient forum.").

65. See *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1723-24 (1996).

66. See, e.g., *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993) (upholding grant of defendant's motion to dismiss when German citizens sued in the United States where defendant's employees were responsible for design and testing alleged defective aircraft).

67. *Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 592 (S.D.N.Y. 1996).

68. *Reid-Whalen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991).

69. 935 F.2d 604 (3d Cir. 1991).

70. *Id.* at 608.

its home jurisdiction to defend the suit.<sup>71</sup> In *Lony* the Court commented that “Du Pont . . . seeks to move the action against it to a forum more than 3,000 miles away. It is, as Alice said, ‘curiouser and curiouser.’”<sup>72</sup>

When a defendant in its home forum moves to dismiss on the grounds of forum non conveniens, it may be simply trying to evade responsibility rather than promote the convenience of the parties.<sup>73</sup> A forum non conveniens motion has been described as “a procedural ploy designed to discomfit rather than an instrument for the furtherance of justice.”<sup>74</sup> But, as the *Piper Aircraft* Court informed lower courts, although a defendant may be engaged in reverse forum shopping, this should not affect the district court’s analysis as long as convenience is at issue.<sup>75</sup> Nevertheless, a court may grant a motion to dismiss when a defendant is subject to jurisdiction but lacks sufficient contacts for the court to exercise jurisdiction under the forum non conveniens analysis.<sup>76</sup> A court may also allow discovery limited to the forum non conveniens issue before ruling on a motion.<sup>77</sup>

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71. See Blair, *supra* note 16, at 34.

72. *Lony*, 935 F.2d at 608.

73. See Carney, *supra* note 15, at 421 (finding dismissal “often is tantamount to finding for the” Multinational Corporation); Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U. L. REV. 1, 52 (1991) (arguing the doctrine is now “an automatic defense response to transnational liability actions” and may be the “most significant obstacle faced by foreign plaintiffs because it has become so pervasive in the international products liability landscape”). Professor Johnson further finds the “doctrine is favored by multinational corporations because a forum non conveniens dismissal is often outcome determinative, effectively defeating the claim and denying the plaintiff recovery.” *Id.* at 55; see also Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 651 (1992) (claiming multinational corporations invoke the doctrine because it “allows [them] to evade responsibility for serious harms they cause, and leaves the foreign plaintiffs with limited recourse in a foreign forum due to the outcome determinative effect of dismissal”).

74. *Manu Int’l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981) (Van Graafeiland, J., concurring).

75. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253-254 n.19 (1981) (“If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.”).

76. See, e.g., *Potomac Capital Invest. Corp. v. KLM*, No. 97Civ.8141(AJP)(RLC), 1998 WL 92416, at \*1 (S.D.N.Y. Mar. 4, 1998) (dismissing case on forum non conveniens grounds because the action had “no connection to New York, except that KLM was amenable to suit here”).

77. See, e.g., *Lony*, 935 F.2d at 607 (noting that lower court granted dismissal after allowing discovery limited to the forum non conveniens issue); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 198 & n.1 (2d Cir. 1987) (allowing several months of discovery related to forum non conveniens).

### A. Preliminary Considerations

#### 1. Applying Federal or State Forum Non Conveniens Analysis

The *Piper Aircraft* Court did not decide whether, under *Erie Railroad Co. v. Tompkins*,<sup>78</sup> state or federal law controlled a forum non conveniens analysis when a court is sitting in diversity jurisdiction.<sup>79</sup> When state and federal forum non conveniens laws are the same, courts avoid answering the question.<sup>80</sup> When state and federal forum non conveniens analyses differ, however, courts grapple with deciding whether state or federal law governs—whether the doctrine is a substantive rule, establishing rights of a party and outcome determinative, or procedural in nature.<sup>81</sup>

In *American Dredging Co. v. Miller*,<sup>82</sup> the Supreme Court found forum non conveniens to be a procedural rule of the forum and not a substantive right of the parties.<sup>83</sup> The Court considered whether federal law preempted a state law forum non conveniens in an admiralty case filed in state court.<sup>84</sup> Although the Court did not specify that federal forum non conveniens always applies in federal diversity cases, the Court's finding that the doctrine is procedural in nature likely promotes this conclusion.<sup>85</sup>

#### 2. Establishing the Burden

A defendant moving for dismissal on grounds of forum non conveniens "must provide enough information to enable the District Court to balance the parties'

78. 304 U.S. 64 (1938). Under *Erie*, federal courts sitting in diversity apply state substantive law and federal procedural law. *Id.* at 78.

79. See *Piper Aircraft*, 454 U.S. at 246-47 n.12.

80. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

81. See *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 821 F.2d 1147, 1156-59 (5th Cir. 1987) (applying *Erie* and its "twin aims" and finding that federal law applies), *judgment vacated sub nom.* *Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985) (finding federal law of forum non conveniens applies in diversity cases).

82. 510 U.S. 443 (1994).

83. *Id.* at 454.

84. *Id.* at 447.

85. *Id.* at 469 (Kennedy, J., dissenting). In *American Dredging* Justice Kennedy stated:

The Court does seem to leave open the possibility for a different result if those who raise the *forum non conveniens* objection are of foreign nationality. The Court is entitled, I suppose, to so confine its holding, but no part in its reasoning gives hope for a different result in a case involving foreign parties. The Court's substance-procedure distinction takes no account of the identity of the litigants, nor does the statement that *forum non conveniens* remains "nothing more or less than a supervening venue provision." The Court ought to face up to the consequences of its rule in this regard.

*Id.* (citation omitted) (quoting *id.* at 453).

interests.”<sup>86</sup> In addition, a defendant has the heavy burden of proving all elements of the analysis<sup>87</sup> and must establish that the chosen forum is unnecessarily burdensome<sup>88</sup> or unreasonably inconvenient,<sup>89</sup> and the alternate forum is more convenient.<sup>90</sup> Indeed, if the defendant resides in the forum, then this “weighs heavily against dismissal.”<sup>91</sup> When the inconveniences between the forums are equal, the case should remain in the chosen forum.<sup>92</sup> Even if the private and public interest factors “lean only slightly toward dismissal, the motion to dismiss must be denied.”<sup>93</sup>

### 3. Deference to Plaintiffs’ Forum Choice

Before *Piper Aircraft*, lower federal courts relied on *Gilbert* for the proposition that a court should rarely disturb a plaintiff’s choice of forum.<sup>94</sup> In *Piper Aircraft* the Court approved the trial court’s distinction between a resident or citizen plaintiff and a foreign plaintiff, noting that a citizen plaintiff’s home forum is assumed convenient and given greater deference.<sup>95</sup> The Court reasoned that “this assumption is much less reasonable” in the case of a foreign plaintiff.<sup>96</sup> However, although diminished, a presumption in favor of plaintiff’s forum choice still exists.<sup>97</sup> A strong

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86. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981).

87. *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-44 (3d Cir. 1988); see also 15 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3828, at 291 (2d ed. 1986) (“The burden on a defendant moving to dismiss in favor of a foreign court . . . is a strong one.”).

88. *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 904 (S.D.N.Y. 1986), *appeal dismissed*, 819 F.2d 33 (2d Cir. 1987).

89. *Id.*

90. See, e.g., *Scott v. Jones II*, 984 F. Supp. 37, 48 (D. Maine 1997) (retaining jurisdiction because defendant did “not offer evidence indicating that Singapore would be a substantially more convenient forum for the litigation”).

91. *Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 592 (S.D.N.Y. 1996) (quoting *Schertenleib v. Traum*, 589 F.2d 1156, 1164 (2d Cir. 1981)); see also *Chan Tse Ming v. Cordis Corp.*, 704 F. Supp. 217, 220 (S.D. Fla. 1989) (“Common sense dictates that it is illogical for Defendant to succeed in avoiding suit in its own home forum.”).

92. For example, when translation and travel expenses in the chosen forum are similar to those the plaintiff faces when proceeding in the foreign forum, the presumption favors retention of the case in the chosen jurisdiction. See *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3d Cir. 1991) (finding when private and public interest factors are “in equipoise,” the motion to dismiss must be denied).

93. *Id.*

94. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

95. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). But see *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991) (discounting the plaintiff’s U.S. citizenship in suit for injuries occurring in a foreign country).

96. *Piper Aircraft*, 454 U.S. at 256.

97. See, e.g., *Lacey*, 932 F.2d at 175 (finding foreign plaintiff’s choice entitled to “at least some weight”); *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 904 (S.D.N.Y. 1986) (“[D]efendant still has the burden to demonstrate why the presumption in favor of plaintiff’s choice, weakened though it may be, should be disturbed.”), *appeal dismissed*, 819 F.2d 33 (2d Cir. 1987); *Ayers v. Arabian American Oil Co.*, 571 F. Supp. 707, 709 (S.D.N.Y. 1983) (stating that foreign plaintiff’s choice of forum “is still entitled to some deference”).

showing of convenience in the chosen forum<sup>98</sup> or terms of a treaty<sup>99</sup> entitles a foreign plaintiff to the same degree of deference as a domestic plaintiff.

### *B. The Threshold Requirements of Alternative Forum*

A forum non conveniens analysis requires the court to determine first whether an adequate alternative forum exists before weighing the factors.<sup>100</sup> The moving party has the burden of establishing the availability and adequacy of the alternate forum.<sup>101</sup> Only when a defendant satisfies this burden should the court analyze and weigh the convenience factors.<sup>102</sup> A district court that does not expressly determine that an adequate alternate forum exists is subject to review for an abuse of discretion.<sup>103</sup>

#### *1. Amenability*

An alternative forum is available if the defendant is ““amenable to process”” in the other forum.<sup>104</sup> Under 28 U.S.C. § 1404 a court can transfer a case to another district only when “it might have been brought” there originally.<sup>105</sup> Under the doctrine of forum non conveniens, a court can dismiss a case even if a plaintiff could not originally have brought the case in the alternative forum. To do this, a court conditions the dismissal on an agreement by the defendant to submit to the

98. *Lacey*, 932 F.2d at 179.

99. *See Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 778 (D. Kan. 1981) (treaty between U.S. and France entitled French plaintiffs to same deference as American citizens); *see also* Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267, 267 (1990) (“Many . . . treaties have equal access clauses that guarantee foreign plaintiffs the same access to the United States courts as United States citizens possess.”); Molly M. White, Comment, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 LOY. L.A. L. REV. 491, 510 (1993) (finding foreign plaintiffs have avoided dismissal under treaties giving them the same status as a U.S. citizen in U.S. courts).

100. *Piper Aircraft*, 454 U.S. at 255 n.22.

101. *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 821 F.2d 1147, 1164-65 (5th Cir. 1987), *judgment vacated by sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); *see also Lacey*, 932 F.2d at 190 (understanding “the importance of getting all concerned parties under one judicial roof” but finding “where the roof is so leaky that the plaintiff cannot get secure footing and is thereby deprived of the ability to marshal evidence in support of his or her case, that supplies the exception that proves the rule”).

102. *In re Air Crash Disaster*, 821 F.2d at 1165.

103. *See Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 743 F.2d 48, 52 (1st Cir. 1984) (“In the absence of a supported finding that [plaintiff] had available another adequate forum within which to assert a similar cause of action . . . , it was an abuse of discretion for the district court to have dismissed the action on the grounds of *forum non conveniens*.”).

104. *Piper Aircraft*, 454 U.S. at 254 n.22 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947)).

105. 28 U.S.C. § 1404 (1994).

jurisdiction of the foreign tribunal.<sup>106</sup>

## 2. Adequacy

When differences in applicable law make the available remedy “so clearly inadequate or unsatisfactory that it is *no remedy at all*,”<sup>107</sup> the alternative forum is inadequate. In this circumstance, a court may give the unfavorable change in law substantial weight and “conclude that dismissal would not be in the interests of justice.”<sup>108</sup> Furthermore, dismissal may be inappropriate when the alternative forum does not permit litigation of the subject matter in dispute.<sup>109</sup> For example, other countries do not recognize antitrust principles, making the doctrine inapplicable because “the language and legislative purpose of [the] statute are inconsistent with *forum non conveniens* dismissal.”<sup>110</sup> If the adequacy exception is construed narrowly, a court may require that the alternative forum’s substantive law must be both different and unjust.<sup>111</sup>

However, courts are split over what constitutes an adequate forum. While courts in the Third Circuit define an alternate forum as one having “comparable procedural protections,”<sup>112</sup> courts in the Second Circuit find that different procedural rules may not render the forum inadequate.<sup>113</sup> Similarly, while the Third and Seventh Circuits require lower courts to consider the need for discovery,<sup>114</sup> the Second and Eleventh Circuits find it unnecessary for the alternative forum to have extensive and comparable pre-trial discovery procedure.<sup>115</sup> However, the First,

106. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 203 (2d Cir. 1987); *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 615 (6th Cir. 1984).

107. *Piper Aircraft*, 454 U.S. at 254 (emphasis added).

108. *Id.*

109. *Id.* at 254 n.22; see also *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1469, 1475 (N.D. Ala. 1995) (holding Australia, England, and Canada adequate forums but New Zealand not adequate for injuries from 1974-1992 because the injuries were not compensable through New Zealand’s judicial system).

110. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 829 (5th Cir. 1993).

111. *Ahmed v. Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983).

112. *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 455 (D. Del. 1978).

113. See *Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891, 895 (S.D.N.Y. 1981) (finding Saudi Arabia an adequate forum because “some inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate”).

114. See *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 182 (3d Cir. 1991) (noting the importance of “the barriers to obtaining access to essential sources of proof in the foreign forum” and that they may be “so severe as to render that forum . . . an inadequate alternative”); *Macedo v. Boeing Co.*, 693 F.2d 683, 690 (7th Cir. 1982) (finding need for discovery not dealt with by the lower court).

115. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 205-06 (2d Cir. 1987) (finding forum adequate even though discovery limited to admissible evidence); see *Proyectos Orchimex de Costa Rica, S.A. v. E.I. Du Pont de Nemours & Co.*, 896 F. Supp. 1197, 1201 (M.D. Fla. 1995) (“The concerns about the scope of pre-trial discovery are . . . unavailing because it is not necessary that the alternative forum have extensive pre-trial discovery

Second, Seventh, and Eighth Circuits require lower courts to consider a plaintiff's financial hardships and the effect of bringing the action in the alternative forum.<sup>116</sup> Furthermore, although the Second Circuit finds dismissal appropriate even though there are delays in an alternate forum's judicial system,<sup>117</sup> the Third, Tenth, and Eleventh Circuits require proof that a court will administer justice more expeditiously in the foreign forum before favoring dismissal.<sup>118</sup>

Courts have found an adequate forum exists when the alternate forum is a common-law jurisdiction.<sup>119</sup> A common-law forum may include a forum whose law provides a remedy for damages resulting from defective products, recognizes claims of negligence and warranty, and allows for the recovery of compensatory damages.<sup>120</sup> A forum may be adequate although it fails to provide contingency fees,<sup>121</sup> recovery of punitive damages,<sup>122</sup> and trial by jury.<sup>123</sup> The selection and location of American counsel may be a relevant consideration, but the court may determine that it is possible to find competent counsel in a foreign forum.<sup>124</sup>

Only in rare circumstances do courts find an alternative forum completely inadequate. Alternate forums have been found inadequate when a country denies

procedures comparable to those found in the United States.”).

116. *Murray v. BBC*, 81 F.3d 287, 292 (2d Cir. 1996) (stating plaintiff's burden is “one of several relevant factors”); *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 720 (1st Cir. 1996) (retaining jurisdiction and finding plaintiffs would face financial obstacles); *Reid-Whalen v. Hansen*, 933 F.2d 1390, 1398 (8th Cir. 1991) (“The district court ‘must be alert to the realities of the plaintiff's position, financial and otherwise, and his or her ability as a practical matter to bring suit in the alternate forum.’” (quoting *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 346 (8th Cir. 1983))); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1246-47 (7th Cir. 1990).

117. *Broadcasting Rights Int'l Corp. v. Societe du Tour de France, S.A.R.L.*, 708 F. Supp. 83, 85 (S.D.N.Y. 1989).

118. *See Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991) (holding the trial court should have compared the relative congestion of German and Delaware courts); *Grimandi v. Beech Aircraft Corp.*, 521 F. Supp. 764, 780 (D. Kan. 1981) (“[T]here has been no showing that the case could be processed any more expeditiously in France.”); *Chan Tse Ming v. Cordis Corp.*, 704 F. Supp. 217, 220 (S.D. Fla. 1989) (recognizing congestion in Florida courts, but stating that movant failed to demonstrate that the Hong Kong forum “would administer justice in a swifter fashion”).

119. *See Carney, supra* note 15, at 437 n.130. Carney cites numerous cases in which courts have found adequate forums in Bermuda, Brazil, India, Indonesia, Japan, Puerto Rico, Philippines, Republic of Guinea, Scotland, Switzerland, and West Germany. *Id.*

120. *Proyectos Orchimex*, 896 F. Supp. at 1201.

121. *See, e.g., Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996) (“If the lack of a contingent fee system were held determinative, then a case could almost never be dismissed because contingency fees are not allowed in most forums.” (quoting *Coakes v. Arabian American Oil Co.*, 831 F.2d 572, 576 (5th Cir. 1987))). *But see Hodson v. A.H. Robins Co.*, 528 F. Supp. 809, 818 (E.D. Va. 1981) (“The absence of a contingent fee system in England is a factor which favors this Court's retention of jurisdiction, though it is not determinative.”), *aff'd*, 715 F.2d 142 (4th Cir. 1983).

122. *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1986).

123. *Magnin*, 91 F.3d at 1430 (referring to many cases dismissing actions in favor of forums where civil actions are not tried by a jury); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991) (finding complete lack of jury trial did not render Japan an inadequate forum).

124. *Proyectos Orchimex*, 896 F. Supp. at 1203.

the plaintiff re-entry into the home forum to bring an action.<sup>125</sup> When a country is in a civil war, courts have determined the alternate forum is unavailable.<sup>126</sup> A forum may also be inadequate because the alternate forum's statute of limitations bars the plaintiff's claim.<sup>127</sup> If a defendant waives a defense to create an adequate forum, the court should condition a dismissal on the assurance the alternate forum will accept the waivers<sup>128</sup> or else the suit will be reinstated in the original forum if the alternative forum does not satisfy specified conditions.<sup>129</sup>

### C. Analyzing the Public and Private Interest Factors

Once a court establishes that an adequate alternative forum exists, the court weighs both private and public interest factors in deciding whether the motion should be granted.<sup>130</sup> Balancing these factors "reflects the central purpose of the *forum non conveniens* inquiry: to ensure that the trial is held at a convenient situs."<sup>131</sup> The doctrine should not, however, be used "simply to shift the inconvenience from one party to another."<sup>132</sup>

#### 1. Private Interest Factors

The private interest factors focus on the fairness and convenience of trial. As laid down in *Gilbert* and reiterated in *Piper Aircraft*, the private interest factors focus on the relative ability of litigants to gather and present evidence.<sup>133</sup> Courts also consider a defendant's ability to implead third parties.<sup>134</sup> Since *Piper*, courts

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125. See *Fiorenza v. United States Steel Int'l, Ltd.*, 311 F. Supp. 117, 120 (S.D.N.Y. 1969) (finding Bahamas an inadequate forum because plaintiff's entry permit was soon to expire).

126. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (finding neither Serbia nor war-torn Bosnia an available forum).

127. *Mowrey v. Johnson & Johnson*, 524 F. Supp. 771 (W.D. Pa. 1981).

128. See, e.g., *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 426 (1st Cir. 1991) (finding lower court erred in not giving plaintiffs the "opportunity to address the question whether Turkish courts would accept" a waiver of the statute of limitations).

129. See *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1137 (S.D. Ohio 1982). Some courts explicitly state the plaintiff can reinstate its action if the defendant does not comply with the condition. See *Carney*, *supra* note 15, at 477-78. However, a court ceases to have jurisdiction over a matter once it is dismissed. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 205 (2d Cir. 1987). In *In re Union Carbide* the Second Circuit cautioned against "[t]he concept of shared jurisdictions [because it] is both illusory and unrealistic." *Id.* A court cannot retain supervisory jurisdiction and impose United States due process rights upon a foreign court. *Id.*

130. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

131. *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1062 (8th Cir. 1986).

132. *Sangeorzan v. Yangming Marine Transp. Corp.*, 951 F. Supp. 650, 656 (S.D. Tex. 1997).

133. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). These factors may also be relevant in determining the adequacy of the alternative forum. See *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 190 (3d Cir. 1991) (Pollak, J., concurring). For a list of these factors, see *supra* text accompanying notes 38-39.

134. *Piper Aircraft*, 454 U.S. at 259.



have expanded the factors to include consideration of a court's familiarity with the litigation and length of time the case has been filed.<sup>135</sup> When discovery has progressed and the parties have invested time and resources in the litigation, the presumption against dismissal increases.<sup>136</sup>

*a. Factors Relating to the Ability to Gather and Present Evidence*

Most of the convenience factors relate to the location of evidence and witnesses. The "access of proof" factor requires a court to examine the litigant's access to witnesses, documents, and evidence relevant to the issues in the case.<sup>137</sup> For example, in a products liability case, issues center on liability, causation, and damages. A party's financial resources may lessen the burden of accessing evidence.<sup>138</sup> If a case is filed in a foreign country, courts in those countries cannot compel American third-party witnesses to testify if they are not subject to the court's jurisdiction.<sup>139</sup> Likewise, a United States court may be unable to compel attendance of foreign third-party witnesses outside its jurisdiction.<sup>140</sup> But, "[d]efendants bear the burden on their motion to dismiss . . . that [witnesses] would be unwilling to testify in [plaintiff's chosen forum]."<sup>141</sup>

The "costs for attendance of witnesses" factor may also exist to some extent regardless of where the case is filed. But, if a great number of witnesses reside in the chosen forum, it may be costly to fly them to the foreign forum. A defendant may agree to conditions to render the alternative forum convenient. For example,

135. See *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991) (finding that the trial court abused its discretion by failing to consider the length of time the suit had been pending and "the parties' investment in time and money in discovery"); see also *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 781 (D. Kan. 1981) (denying motion to dismiss on grounds of forum non conveniens when plaintiffs had already invested a substantial amount of time and money regarding the litigation in the forum state).

For these reasons, some courts find the moving defendant should submit its motion in a timely fashion, *In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 821 F.2d 1147, 1165 (5th Cir. 1987), judgment vacated by sub nom. *Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), but others do not. *Gramandi*, 512 F. Supp. at 781 (finding no time limit exists on a motion to dismiss for forum non conveniens).

136. See *Gramandi*, 764 F. Supp. at 781.

137. See *supra* text accompanying note 38.

138. *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 66 (2d Cir. 1981).

139. Cf. *Lacy v. Cessna Aircraft Co.*, 932 F.2d 170, 184-85 (3d Cir. 1991) (discussing Canada's inability to compel non-party witnesses in the United States).

140. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996) (finding the "unavailability of compulsory process to secure attendance of French witnesses in a court in this country" a factor weighing in favor of dismissal).

141. *Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 592 (S.D.N.Y. 1996). Testimony or documents may, however, be compelled from parties that cannot be compelled to appear at trial in the United States by various international agreements such as the Hague Convention or under 28 U.S.C. § 1781, which provides for letters of rogatory between domestic and foreign tribunals. See Gary Knapp, Annotation, *Forum Non Conveniens in Products Liability Cases*, 76 A.L.R.4th 22 (1990).

a defendant may be willing to make available discovery of all relevant witnesses and documents within the defendant's control and at the defendant's expense,<sup>142</sup> including paying for airfare for witnesses to go to the alternate forum.<sup>143</sup> A defendant may even concede liability to make the alternate forum more convenient.<sup>144</sup> If viewing a site is necessary, this factor may also weigh in favor of the foreign forum.<sup>145</sup> However, the use of photographs, audio-visual aids, or other demonstrative evidence may deem a view of the product or site "largely immaterial."<sup>146</sup>

If a forum is home to many witnesses and much evidence, a significant nexus exists between the litigation and the forum; therefore, a court is more likely to find the forum convenient.<sup>147</sup> Likewise, a court is more likely to dismiss an action when a plaintiff sues the defendant in a forum where, although jurisdiction is satisfied, issues surrounding the litigation have no nexus with the location.<sup>148</sup> Liability issues centered in the United States often outweigh the damages and causation issues centered in the alternative forum.<sup>149</sup> For example, because evidence in product liability actions is usually in the manufacturer's possession, the private factors may weigh in favor of a United States forum. A significant nexus exists when a plaintiff sues in a forum where the manufacturer developed, produced, and tested the product causing the injury because the dispute over liability will center within or around that chosen forum.<sup>150</sup>

A significant nexus can also be present even when the foreign forum is involved in regulating and manufacturing a product. An American manufacturer's influence over foreign regulations and manufacturer may center the crucial liability

142. *Lacey*, 932 F.2d at 183.

143. *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 92 (2d Cir. 1984); *Hodson v. A.H. Robins Co.*, 715 F.2d 142, 143-44 (4th Cir. 1983).

144. *See, e.g., Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 612 (3d Cir. 1991) ("[H]ad Du Pont stipulated to liability . . . Germany would likely be the more convenient forum on the remaining issues.").

145. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 201 (2d Cir. 1987) (considering the possibility of viewing the plant in India as a factor weighing in favor of dismissal).

146. *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 905-06 (S.D.N.Y. 1986), *appeal dismissed*, 819 F.2d 33 (2d Cir. 1987); *see also Slight v. E.I. Du Pont de Nemours & Co.*, 979 F. Supp. 433, 440 (S.D. W. Va. 1997) (finding jury view unnecessary).

147. *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158 (N.D. Ohio 1984).

148. *See, e.g., De Melo v. Lederle Labs.*, 801 F.2d 1058, 1064 (8th Cir. 1986) (dismissing the action because of the "striking fact that this litigation lacks any significant contact with the particular forum chosen by" the plaintiff).

149. *See Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609 (D.C. Cir. 1983) (stating that the location of evidence on key liability issues weighed in favor of United States forum).

150. *See, e.g., Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 906 (S.D.N.Y. 1986) (upholding a denial of a motion to dismiss in a products liability suit brought by a Swedish citizen in the forum where the drug was developed, produced, and tested), *appeal dismissed*, 819 F.2d 33 (2d Cir. 1987).

issues in the American forum.<sup>151</sup> However, as the Second Circuit distinguishes, when negligence occurs in a foreign forum and not during a manufacturing process, the location of witnesses and evidence will likely weigh in favor of the alternate forum.<sup>152</sup> If both negligence occurring overseas and negligence surrounding the manufacture and testing of the product in the American forum are at issue, the factors are more evenly balanced and the case should remain in the chosen forum.<sup>153</sup> When a products liability claim involves property damage, the factors may weigh more heavily in favor of the foreign forum if testing of the property will be conducted in the alternate forum.<sup>154</sup>

*b. Ability for the Defendant to Implead*

Before *Piper Aircraft*, courts recognized the ability to implead third parties was "highly relevant," but the inability to implead did not mandate dismissal of the action.<sup>155</sup> The *Piper Aircraft* Court established that a defendant's inability to implead crucial third-party defendants could support dismissal.<sup>156</sup> Because the negligence of the pilot and the owners of the plane was at issue in the case, joinder

151. *Id.* at 905-08. In *Carlenstolpe* the plaintiff sued in a forum where the drug was developed, produced and tested. The plaintiff, a Swedish citizen, was injected with two doses of a hepatitis vaccine, HB-Vax, and suffered disabling arthritis. *Id.* at 903. Proof regarding possible design or manufacturing defect centered around events occurring in or nearby the chosen forum. *Id.* at 906. The Court held any involvement of Swedish agencies in approving the vaccine was "essentially ministerial" because they relied almost entirely on information supplied by the American drug company. *Id.* The drug was administered in Sweden pursuant to the defendant's marketing recommendations. *Id.* The plaintiff was able to establish sufficient contacts within the chosen forum to justify the forum as a convenient location for trial. *Id.*

Compare *Dowling v. Richardson-Merrell, Inc.* 727 F.2d 608 (6th Cir. 1984) (dismissing action by Scottish and English citizens in a United States court for birth defects resulting from the mothers' ingestion of Debendox, a drug identical to Bendectine, manufactured and marketed in the United States), with *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158 (N.D. Ohio 1984) (retaining jurisdiction in an action by Canadian mothers for birth defects resulting from ingestion of an identical drug, Kevadon). In both cases Richardson-Merrell manufactured and marketed the identical drug, Bendectine, in the United States and the alternate forums were adequate. The *Haddad* Court distinguished *Dowling* stating that "the contacts between Richardson-Merrell, Inc. (USA) and Debendox were not elucidated in either the district or appeals court opinions, other than the fact that [Debendox] was manufactured in England." *Haddad*, 588 F. Supp. at 1161.

152. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195 (2d Cir. 1987) (dismissing action because negligence likely occurred in India during design, start-up, safety training, or on the part of management or employees in the operation of the plant).

153. See *supra* notes 91-92 and accompanying text.

154. *Proyectos Orchimex de Costa Rica, S.A. v. E.I. Du Pont de Nemours & Co.*, 896 F. Supp. 1197, 1202 (M.D. Fla. 1995) (dismissing action brought by commercial nurseries located in Jamaica and Costa Rica for products liability claim for property damage after finding real property to be the central piece of evidence and the case would involve extensive sampling, testing, and analysis of the property located in the alternate forum).

155. *Mowrey v. Johnson & Johnson*, 524 F. Supp. 771, 776 (W.D. Pa. 1981).

156. *Piper v. Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50, 259 (1981) (finding the ability to implead is only one factor and courts cannot place central emphasis on it).

of the pilot's estate, Air Navigation, and McDonald Aviation was "crucial to the presentation" of the defense.<sup>157</sup> Courts must look at the "facts of the individual case" to see if the inability to implead "so prejudice[s] the defendants that dismissal of the action is proper."<sup>158</sup>

## 2. *Public Interests Factors*

The public interest factors help the court analyze the burden the litigation will put on the judicial system or on a community. The factors show a concern for a foreign court's interest in adjudicating the case.<sup>159</sup> A district "court must consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum."<sup>160</sup>

### a. *Court Congestion and Burdening a Local Jury*

The concern over congested dockets has been a focus of the forum non conveniens doctrine since its early development.<sup>161</sup> Concern over the flood of litigation was apparent in the *Piper Aircraft* Court's rejection of a complete bar to dismissal because of less favorable law in the foreign forum.<sup>162</sup> Since *Piper Aircraft*, courts have remained concerned about the time and expense of trials, especially when the community does not have a great interest in the litigation.<sup>163</sup> The doctrine gives the court the inherent power to find the chosen forum inappropriate because of the court's own considerations.<sup>164</sup> Similarly, the doctrine also gives the court the inherent power to dismiss a case because the burden is too great to impose on a jury that has little interest in the litigation.<sup>165</sup> Some courts require the moving party to offer comparative data or analysis so the court can compare the relative congestion

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157. *Id.*, at 259. Alternatively, a court may find a third party not crucial to a defense. For example, when an accident report concludes a product defect caused the accident, a court may find a third-party defendant not crucial to the defense.

158. *Mowrey*, 524 F. Supp. at 776.

159. See *supra* note 39 and accompanying text.

160. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988).

161. In 1929 Paxton Blair wrote about the foremost problem "engrossing the attention of the Bar in the larger centers of population in the United States." Blair, *supra* note 16, at 1. The problem was the "relief of calendar congestion in the trial courts." *Id.* Calling for wider use of the doctrine, Blair was concerned about increased litigation and addressed the "possibility of relieving calendar congestion by partially diverting at its source the flood of litigation by which our courts are being overwhelmed." *Id.*

162. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981) (expressing concern over the attractiveness of American courts and that such attraction would create a "flow of litigation into the United States [that would] increase and further congest already crowded courts").

163. See, e.g., *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir. 1993) (recognizing the increase in administrative difficulties when litigation is concentrated in particular areas instead of being handled where the claims originated).

164. *Piper Aircraft*, 454 U.S. at 241 & n.6.

165. *Id.* at 260-61; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

of both forums to decide if a foreign forum will administer justice more efficiently than the chosen forum.<sup>166</sup>

The private interest factors and the public's local interest play significant roles in determining the extent of the court's interest in the matter. If the forum is not the home to any party or witness and evidence is not located in the forum, a court is less likely to tie up its court system and burden members of the community with the costs of the litigation.<sup>167</sup> Conversely, if the private factors show the chosen forum is convenient and the forum has local public interest, a court is likely to find a burden on the local judicial resources justified. A court also has the option of retaining a case and implementing various procedural tools to alleviate the burden and promote efficiency. For example, if numerous foreign plaintiffs allege injuries from a single nucleus of facts, a court can designate a representative case to try certain issues in the American forum.<sup>168</sup>

### *b. Comparing the Local Interests*

Each forum may have "similar interests[] in enforcing the law and guarding against wrongful business practices."<sup>169</sup> A foreign forum may have a great interest in protecting its citizens from unsafe products.<sup>170</sup> Likewise, the chosen forum has a great interest in deterring its corporate citizens from exporting unsafe products.<sup>171</sup>

The greater the nexus between the litigation and the forum, the greater the chance a court will find the existence of sufficient local interest. If planning, testing, manufacturing, and marketing emanated from a defendant in the chosen forum, the chosen forum may have an interest in the allegations made against one of its citizens. Although the *Piper Aircraft* Court characterized the forum's interest in deterring American manufacturers from producing defective products as insignificant,<sup>172</sup> other courts have found that a United States forum has a significant

166. See *Lony v. E.I. Du Pont de Nemours & Co.* 935 F.2d 604, 613 (3d Cir. 1991) (holding that lower court should have compared "the relative congestion of German and Delaware courts"); *Chan Tse Ming v. Cordis Corp.*, 704 F. Supp. 217 (S.D. Fla. 1989) (recognizing congestion in Florida courts, but emphasizing that movant "failed to demonstrate the [alternate] forum would administer justice in a swifter fashion").

167. See, e.g., *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1064 (8th Cir. 1986) ("[T]he striking fact that this litigation lacks any significant contact with the particular forum chosen by [the plaintiff] suggests that it is inappropriate to burden that community with the 'enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried there.'" (quoting *Piper Aircraft*, 454 U.S. at 261)).

168. Cf. *Hodson v. A.H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983) (hearing the appeal of a representative case involving foreign plaintiffs arising from common questions of fact).

169. See *Lony*, 935 F.2d at 612.

170. *Id.*; *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 201 (2d Cir. 1987) (finding that Union of India had a greater interest than "the United States in facilitating the trial and adjudication of the victims' claims").

171. See *infra* notes 177-78 and accompanying text.

172. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260-61 (1981).

interest in deciding issues concerning possible tortious conduct that originated in this country.<sup>173</sup> Economic burdens on a forum may be justified “because the defendant has undertaken both the benefits and burdens of citizenship and of the forum’s laws.”<sup>174</sup> Additionally, a court may find that an American company’s influence over the sale of drugs or products in a foreign country may provide a sufficiently great interest for a court in the United States to adjudicate the issue.<sup>175</sup> Furthermore, a forum may have a local interest to assure its corporate citizens do not exploit underdeveloped nations and unregulated forums for the sole purpose of creating corporate profits.<sup>176</sup> Leaving our doors open to foreign plaintiffs may serve as a deterrent to this behavior<sup>177</sup> and promote safety in foreign countries.<sup>178</sup>

173. See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1400 (8th Cir. 1991) (“The defendant’s home forum always has a strong interest in providing a forum for redress of injuries caused by its citizens.”); *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 908 (S.D.N.Y. 1986) (involving a defective hepatitis vaccine), *appeal dismissed*, 819 F.2d 33 (2d Cir. 1987).

174. *Reid-Walen*, 933 F.2d at 1400.

175. See, e.g., *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158, 1161 (N.D. Ohio 1984) (finding numerous contacts between the domestic forum and the controversy regarding the manufacture, testing, sale, and promotion of a product sold in Canada).

176. See, e.g., *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring) (finding that the United States has important public policy in regulating American multinational corporations); see also James H. Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States*, 13 UCLA J. ENVTL. L. & POL’Y 167, 168-73 (1994/1995) (discussing the exposure of workers in developing countries to pesticides unregistered or banned in the United States, which has led to developing nations experiencing “over one-half of the world’s acute poisoning cases and three-fourths of the pesticide-related deaths”).

177. See Thomas O. McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 TEX. INT’L L.J. 333, 339 (1985) (“[T]he most effective thing that the United States can do to prevent future Bhopals is simply to open our courts to the Third World victims of hazardous technologies that our companies export.”); Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT’L & COMP. L.J. 455, 475 (1994) (criticizing the *Union Carbide* decision as an abuse of process and as motivated to protect corporate interests); Francine Schulberg, Comment, *United States Export of Products Banned for Domestic Use*, 20 HARV. INT’L L.J. 331, 332 (1979) (“As domestic regulation increased . . . sales [of hazardous products] abroad multiplied as United States producers looked to the third world as a less restrictive market.”).

178. Johnson, *supra* note 73, at 78. Professor Johnson states “compelling reasons to apply” U.S. products liability “laws against American multinational corporations in United States Courts.” *Id.* Professor Johnson quoted from a magazine for trial lawyers:

“[A]vailable compensatory damages and access to U.S. courts will still promote safety. As one executive of a major chemical company explains—“Bhopal’s greatest impact, it seems, has been on the multinationals. The realization at corporate headquarters that liability for any Bhopal-like disaster would be decided in the U.S. courts, more than pressure from Third World governments, has forced companies to tighten safety procedures, upgrade plants, supervise maintenance more closely and educate workers and communities.””

*Id.* (quoting Catherine A. Boehringer, *Exporting or Importing Justice?*, TRIAL, Mar. 1987, at 65, 68 (quoting *Foreign Firms Feel the Impact of Bhopal Most*, WALL ST. J., Nov. 26, 1985, at 22 (quoting Harold Corbett, Senior Vice-President for environmental affairs at Monsanto Co.))). *But see* Robertson,

Sovereignty and comity issues may push a court toward dismissal because of a concern that the United States was engaging in judicial imperialism by imposing its laws on a foreign sovereign nation.<sup>179</sup> If a court in the United States decides foreign claims, defendants may argue that a foreign country will be disinclined to strengthen its legal system or regulatory process. Although a company may relocate manufacturing processes in a foreign country with less restrictive regulations and sophisticated safety procedures, a manufacturer should not be able to sell defective or banned products to a foreign country and then argue that these practices will aid in the development of the law in the foreign nation.

### c. Choice of Law

The *Piper Aircraft* Court made it clear that lower courts can decide forum non conveniens issues without determining the applicable substantive law.<sup>180</sup> Although choice of law may be accorded substantial weight, it does not mandate dismissal if other factors weigh in favor of plaintiff's chosen forum.<sup>181</sup> Some courts hold that *Piper Aircraft* does not require a court to predict what law the foreign court would apply when deciding whether or not to retain jurisdiction.<sup>182</sup> Substantial questions of foreign law may be present no matter where a plaintiff tries the case.<sup>183</sup>

A court's conflict of laws analysis will determine what law applies to the litigation. For example, in a diversity action, the court will look to the forum state for conflict of laws analysis.<sup>184</sup> A court's determination that foreign law will apply may be a factor weighing towards dismissal.<sup>185</sup> Even if a court has to "untangle problems . . . in law foreign to itself,"<sup>186</sup> the significant contacts between the jurisdiction and the events underlying the litigation may outweigh dismissal.<sup>187</sup> A

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*supra* note 15 at 405 ("The prevailing judicial attitude is that the injuries done by American businesses to foreign nationals abroad are not America's problem.").

179. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 201 (2d Cir. 1987) ("India has a stronger countervailing interest in adjudicating the claims in its courts according to its standards rather than having American values and standards of care imposed upon it."); *Harrison v. Wyeth Labs.*, 510 F. Supp. 1, 4 (E.D. Pa. 1980) (finding the United States should not put its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country), *aff'd*, 676 F.2d 685 (3d Cir. 1982).

180. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). But see *id.* at 254 (finding substantial weight is given to choice of law when the alternative forum's law is so unfavorable that it is no remedy at all).

181. *Id.* at 260.

182. *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 188 & n.19 (3d Cir. 1991).

183. *Panama Processes, S.A. v. Cities Serv. Co.*, 650 F.2d 408, 414 (2d Cir. 1981).

184. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

185. *Piper Aircraft*, 454 U.S. at 260.

186. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

187. See, e.g., *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158, 1161-62 (N.D. Ohio 1984) (recognizing choice of law as one factor to consider but the "myriad of contacts" between the jurisdiction and underlying events and facts outweighed this factor).

court may follow “the traditional *lex loci delicti* conflicts rule under which the substantive rights of the parties [is] governed by the law of the place of the wrong.”<sup>188</sup> Alternatively, a court may follow “a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.”<sup>189</sup> The Second Restatement of Conflict of Laws presumes the law of the place of injury will govern unless the forum state or another state has an overriding interest.<sup>190</sup> A case filed in a defendant’s home forum with a significant nexus to the litigation may satisfy this rebuttable presumption. A foreign plaintiff will argue that the place where the defendant’s culpable conduct occurred governs the choice of law question.<sup>191</sup> Courts may already be involved in choice of law issues when American citizens, injured in a foreign place, bring their action in the United States.

#### IV. CONCLUSION

The discretionary nature of the doctrine of forum non conveniens means that the analysis is fact sensitive. However, by examining the application of the doctrine by lower federal courts, predictable and determinative factors emerge. In summary, a foreign plaintiff maintains a presumption favoring its choice of forum even though a court may give that choice less weight than a domestic plaintiff. Because of a treaty or a strong showing of convenience, a foreign plaintiff’s choice may be entitled to as much deference as a domestic plaintiff’s choice.

A court should rarely invoke the doctrine of forum non conveniens. Some inconveniences are inevitable no matter where the case is tried. When deciding to retain or reject jurisdiction, a court should focus on the nexus between the chosen forum and the litigation. A foreign plaintiff should remain in a United States federal court in the following circumstances:

- (1) when the defendant fails to show the chosen forum is unnecessarily or unreasonably inconvenient and that the alternate forum is more convenient;
- (2) when the plaintiff sues in a forum with a significant nexus to the litigation. Suing in defendants’ domicile often satisfies this nexus. For example, a forum where a manufacturer developed, manufactured, and tested the product has a significant nexus with the litigation;
- (3) when liability issues center in the United States and particularly in the chosen forum—outweighing causation and damages issues centered in the alternate forum. For example, a court should retain a case when witnesses and

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188. *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 187 (3d Cir. 1991).

189. *Id.* (quoting *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 805 (Pa. 1964)).

190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-46 (1971).

191. *See, e.g., Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 12 (D.D.C. 1995) (“‘The state where the defendant’s conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character.’”) (quoting *Biscoe v. Arlington County*, 738 F.2d 1352, 1361 (D.C. Cir. 1984) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. d (1971))).



documents, both within and outside the defendant's control, are centered in a forum in the United States;

(4) when the defendant's conduct and decisions in the forum state influenced foreign activities and the foreign forum's use, manufacture, marketing and regulation of a product;

(5) when discovery is underway and the court is already familiar with the litigation;

(6) when preventing a defendant from impleading is not detrimental to a fair trial in the United States, and significant nexus factors with the chosen forum outweigh defendant's inability to implead; and

(7) when the court can justify its resources in adjudicating the litigation because of the number of contacts with the forum, the nexus with the litigation, and the interest the community has in resolving the issue.

Additionally, the more egregious the conduct, the more likely a court will find a deterrent effect or sufficient cause to have a corporate citizen tried in this country.

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