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## Forum Non Conveniens: Standards for the Dismissal of Actions from United States Federal Courts to Foreign Tribunals

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# Forum Non Conveniens: Standards for the Dismissal of Actions from United States Federal Courts to Foreign Tribunals

James D. Yellen

## **Abstract**

Part I of this Note will develop and summarize the historical backdrop of the doctrine of forum non conveniens. Part II will analyze the legislative and judicial development of the doctrine during the last fifty years. Part II will discuss the *Reyno* decision and the proper weight to be accorded the citizenship and the forum choice of the plaintiff. Included in the latter inquiry is a discussion of the extent to which the plaintiff's prospects of recovery in a particular case should control the outcome of the defendant's motion to dismiss. In conclusion, Part IV will evaluate the impact of *Reyno* and speculate on future developments in the area of forum non conveniens.

FORUM NON CONVENIENS: STANDARDS FOR  
THE DISMISSAL OF ACTIONS FROM  
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INTRODUCTION

*The doctrine of forum non conveniens is not a neat divider, like a fence, which separates the cases where jurisdiction should be retained from those where it should not. Instead, it meanders, like a river; and as a river with time may change its course by the erosion and build-up of its banks, so too the judge-made doctrine of forum non conveniens develops new twists and bends, shrinking and growing as it confronts novel factual situations.<sup>1</sup>*

As these words of Judge Timbers of the Second Circuit suggest, *forum non conveniens* is a doctrine in flux.<sup>2</sup> As such, it has recently

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1. *Alcoa S.S. Co. v. M/V NORDIC REGENT*, 654 F.2d 147, 173 (2d Cir. 1980) (Timbers, J., dissenting) (emphasis added).

2. The confusing and changing nature of the doctrine is perhaps best illustrated by contrasting the various opinions rendered in the *Alcoa* case. The district court first dismissed a United States corporate plaintiff's action to the courts of Trinidad on the grounds of *forum non conveniens*. On appeal, the Second Circuit affirmed the district court's decision. The same panel then reversed its decision on rehearing. An *en banc* rehearing followed, and the court of appeals again reversed itself, reaffirming the district court's original decision. See *infra* notes 87-100 and accompanying text. The divergence among the *Alcoa* decisions, as well as the varied pronouncements of other federal courts, further indicates the confusion that accompanies *forum non conveniens* considerations. See *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 434-36 (D.C. Cir. 1976).

Similar disagreement and confusion exists among commentators. One commentator has suggested that *forum non conveniens* should be inapplicable whenever any defendant in an action is a United States corporation. See Kennelly, *Transitory Tort Litigation—The Need for Uniform Rules Pertaining to In Personam Jurisdiction, Forum Non Conveniens, Choice of Laws, and Comparative Negligence*, 22 TRIAL LAW. GUIDE 422, 465 (1978). Another commentator argues that residence in the United States is only one of the factors to be weighed in the consideration of the doctrine. See Morley, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 Nw. U.L. REV. 24, 42 (1973). A third commentator implies that no deference is due the United States citizenship of a defendant corporation. See *Recent Decision*, 7 TEX. INT'L L.J. 513, 515 (1972). A final commentator concludes that it may be appropriate to grant a United States defendant's motion to dismiss where the plaintiff is an alien. See Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 778 (1977).

sparked much debate in international litigation, particularly in the field of admiralty law.<sup>3</sup> The Supreme Court's December 8, 1981 decision in the case of *Piper Aircraft Co. v. Reyno*<sup>4</sup> raises further questions regarding the proper application and scope of the doctrine.<sup>5</sup>

In *Reyno*, the Supreme Court presented its first decision on the doctrine of *forum non conveniens* in nearly thirty-five years.<sup>6</sup> The Court held that dismissal<sup>7</sup> of a suit on *forum non conveniens* grounds is not automatically precluded where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff.<sup>8</sup>

It is the purpose of this Note to analyze the *Reyno* decision and its consequences, investigate the doctrine of *forum non conveniens* in United States law, comment on the "new twists and bends"<sup>9</sup> in the doctrine which the Supreme Court has addressed in *Reyno*, and explore those questions which remain unresolved.

Part I of this Note will develop and summarize the historical backdrop of the doctrine of *forum non conveniens*. Part II will analyze the legislative and judicial development of the doctrine during the last fifty years. Part III will discuss the *Reyno* decision and the proper weight to be accorded the citizenship and the forum choice of the plaintiff. Included in the latter inquiry is a discussion of the extent to which the plaintiff's prospects of recovery in a

3. See generally Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949); *Forum Non Conveniens: Two Views on the Decision of the Court of Appeals for the Second Circuit in Alcoa Steamship Co., Inc. v. M/V NORDIC REGENT*, 12 J. MAR. L. & COM. 123 (1980).

4. 102 S. Ct. 252 (1981).

5. See *infra* notes 198-201 and accompanying text.

6. The doctrine itself, although the product of a long and varied history, see *infra* notes 10-29 and accompanying text, was not crystallized in United States law until the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). See *infra* notes 24-37 and accompanying text. From 1947 until the *Reyno* decision in late 1981, the Supreme Court heard no cases squarely on the issue of *forum non conveniens*.

7. When a court invokes the doctrine of *forum non conveniens*, it asserts the "discretionary power . . . to decline to exercise a possessed jurisdiction whenever it appears that the case before it may be more appropriately tried elsewhere." F. JAMES, *CIVIL PROCEDURE* 661 (1965). Therefore, "dismissal" on the grounds of *forum non conveniens* does not mean that a case will not be heard, but only that it will be heard by a court other than that initially chosen by the plaintiff.

8. *Reyno*, 102 S. Ct. 252 (1981).

9. See *supra* note 1 and accompanying text.

particular case should control the outcome of the defendant's motion to dismiss. In conclusion, Part IV will evaluate the impact of *Reyno* and speculate on future developments in the area of *forum non conveniens*.

## I. THE FOUNDATIONS OF THE DOCTRINE OF FORUM NON CONVENIENS

### A. *The Early Development of the Doctrine*

The origins of the doctrine of *forum non conveniens*<sup>10</sup> are somewhat hazy.<sup>11</sup> Most authorities, however, point to Scotland as the birthplace of the doctrine.<sup>12</sup> The term *forum non conveniens* appears to have been first used in the late 1800's, in a line of Scottish cases which described an established Scottish principle of allowing trial courts to refrain from hearing disputes when the ends of justice could be better served by trial in another forum.<sup>13</sup>

10. The rule that a court "will not exercise jurisdiction if it is a seriously inconvenient forum," RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 84 (1971), has ancient roots. The doctrine reflects the need of any judicial system to protect both its machinery and its defendants from abuse by plaintiffs searching for the most attractive forum. See Judgment of Jan. 16, 1845, Sess., Scot., 7 Session Cases, Second Series [D. Sess. Cas.] 270; Judgment of Feb. 28, 1884, Sess., Scot., 11 Sess. Cas., Fourth Series [R.] 596.

11. Despite its Latin name, the doctrine apparently does not stem from either Roman or Continental practice. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386-87 n.34 (1947); Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 193, 195 (1913); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 881 n.58 (1935); Lorenzen, *The French Rules of the Conflict of Laws*, 36 YALE L.J. 731, 744 (1927); Pillet, *Jurisdiction in Actions Between Foreigners*, 18 HARV. L. REV. 325 (1905).

12. See Barrett, *supra* note 11, at 386-87. See also Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947).

13. Barrett, *supra* note 11, at 386-87 & nn. 34, 35. Barrett notes that in several early Scottish cases, a plea of *forum non competens*, normally directed to a lack of jurisdiction, was upheld where jurisdiction was proper but the parties were non-residents and trial in Scotland would have been inconvenient. In later cases, courts expressly recognized that the plea of *forum non competens* was available both where the court lacked jurisdiction and where it was not convenient to hear the case. *Id.* at n.35 (citing Judgment of Mar. 16, 1866, Sess., Scot., 4 Sess. Cas., Third Series [M.] 583 (Clements v. Macaulay); Judgment of Jan. 13, 1846, Sess., Scot., 8 D. Sess. Cas. 365 (Parker v. Royal Exchange Assurance Co.)).

Later, the courts apparently began to apply the term *forum non conveniens* instead of *forum non competens* when only a question of judicial discretion was involved and not a question of actual jurisdiction. Barrett, *supra* note 11, at 387 n.35 (citing Judgment of Dec. 3, 1925, Sess., Scot., 1926 Sess. Cas. 13 ("Les Armateurs Français"); Judgment of July 17, 1883, Sess., Scot., 10 R. Sess. Cas. 1237 (Brown v. Cartwright)). The Scottish cases are fully discussed and analyzed in A. GIBB, INTERNATIONAL LAW OF JURISDICTION, c.16 (1926); W. GLOAG & R. HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND c.II, § 17 (3d ed. 1939).

In *MacMaster v. MacMaster*,<sup>14</sup> the Court of Session held that the presence of assets of the estate in the forum did not provide an appropriate ground on which to bring the absent foreign executor of the will before the court.<sup>15</sup> In *M'Morine v. Cowie*,<sup>16</sup> another estate case decided shortly after *MacMaster*, Lord Fullerton stated, "[i]t cannot be said that we have no jurisdiction, though, when we examine the case, we may say that it is not the proper forum . . . ." <sup>17</sup>

It is noteworthy that these original Scottish decisions were worded primarily in the negative, emphasizing that the question was not simply one of jurisdiction.<sup>18</sup> It is logical that these decisions are expressed in such manner, for the doctrine of *forum non conveniens* is a subtle and often confusing balance between criteria for retention of jurisdiction and dismissal to another tribunal.

From their inception, courts in the United States also confronted questions of discretion in the exercise of jurisdiction.<sup>19</sup> In

14. Judgment of June 7, 1833, Sess., Scot., 11 Sess. Cas., First Series [S. Sess. Cas.] 685.

15. 11 S. Sess. Cas. at 687.

16. Judgment of Jan. 16, 1845, Sess., Scot., 7 D. Sess. Cas. 270.

17. *Id.* at 272. In yet another estate case, *Macadam v. Macadam*, Judgment of July 3, 1873, Sess., Scot., 11 M. Sess. Cas. 860, Lord Mure stated: "This case might certainly, and as far as I see conveniently, have been tried in England in the *forum* of the alleged debtor [the executor]; but it does not follow that this Court has not jurisdiction to entertain it." *Id.* at 862. He concluded, "I must fairly say that my impression is that this Court is not the appropriate *forum* to try this case." *Id.* at 863.

18. Such emphasis was strikingly illustrated in Judgment of Feb. 28, 1884, Sess., Scot., 11 R. Sess. Cas. 596, involving an action brought by a Scottish widow for the wrongful death of her English husband in England. Suit was filed in Scotland on the grounds that the defendant had assets there. In dismissing the case, the Court of Session noted that although jurisdiction did exist, the courts should not accept cases where it is "*not convenient nor fitting for the interests of the parties to entertain any individual case.*" *Id.* at 599 (emphasis added).

19. In the earliest United States cases, the discretion to dismiss was applied in suits between aliens on foreign causes of action in the federal admiralty courts. Barrett, *supra* note 11, at 387 n.36. It was used to decline jurisdiction over disputes between foreigners. *E.g.* *Mason v. Ship BLAIREAU*, 6 U.S. (2 Cranch) 240 (1804); *The MAGGIE HAMMOND* 76 U.S. (9 Wall) 435, 450, 457 (1869); *The BELGENLAND*, 114 U.S. 355 (1885). See generally Bickel, *supra* note 3. It was also applied in matters such as foreign real estate, mining law and supervision of the internal affairs of foreign corporations. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 22 (1929). These individual dismissals were in time generalized into the doctrine of *forum non conveniens*. Thus Blair was to note in his 1929 article that "the courts of this country have been for years applying the doctrine with such little consciousness of what they were doing as to remind one of Molière's M. Jourdain, who found he had been speaking prose all his life without knowing it." *Id.* at 21-22.

*Willendson v. Forsoket*,<sup>20</sup> decided over twenty-five years before the first Scottish case cited above, a district court judge declined to exercise jurisdiction, stating:

It has been my general rule not to take cognizance of disputes between the masters and crews of foreign ships. I have commonly referred them to their own courts. In some very peculiar cases, I have afforded the seamen assistance, to protect them against oppression and injustice . . . .<sup>21</sup>

*Willendson* involved a Danish seaman's wage claim against his Danish captain who had discharged him while their vessel was docked in Philadelphia.<sup>22</sup> The basis for the court's declination to hear the dispute is analogous to principles of the modern *forum non conveniens* doctrine. The court relied on fundamental notions of "justice" and "reciprocal policy" as factors supporting dismissal of the action to a Danish tribunal.<sup>23</sup> Additionally, the court indicated its reluctance to use a United States court to resolve a dispute between foreign parties.<sup>24</sup>

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20. 29 F. Cas. 1283 (D.C. Pa. 1801) (No. 17,682).

21. *Id.* at 1284.

22. *Id.* at 1283.

23. *Id.* at 1284. The district judge summarized his reasoning as follows:

Reciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country. Whatever ill-humours or misconduct may have prevailed between the parties in this suit, the master now places the matter on a reasonable ground. He must give the sailor a certificate of forgiveness of past offenses, to avail him in his own country. If he takes the seaman on board, and there shall appear no deception in the present offer, I shall not further interfere, but dismiss the suit. If any difference should hereafter arise, it must be settled by a Danish tribunal.

*Id.*

24. *Id.* Although not cited by the court, the earlier Supreme Court decision of *Mason v. Ship BLAIREAU*, 6 U.S. (2 Cranch) 240 (1804), clearly provided the backdrop for the *Willendson* analysis. *BLAIREAU* involved a salvage claim filed in a Maryland district court by the master of a British merchant ship against a French ship and its owners. *Id.* The Court decided to hear the case, but was careful to note that certain "public convenience" factors weighed strongly in its decision. Chief Justice Marshall stated:

[U]pon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, [rather] than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none, where the parties assent to it.

*Id.* at 264.

Thus, by the early 1900's, both the United States<sup>25</sup> and European<sup>26</sup> courts had begun to dismiss actions before them to other forums having jurisdiction over the dispute in question. In 1929, Professor Blair's classic treatment of the topic finally brought the term *forum non conveniens* fully into American legal parlance,<sup>27</sup> asserting that all United States courts had inherent power to decline jurisdiction under this principle.<sup>28</sup> The term itself then became so widely recognized that only twelve years later Mr. Justice Frankfurter referred to the "familiar doctrine of *forum non conveniens*"

25. The earliest United States cases were suits between aliens on foreign causes of action. See, e.g., *Rea v. Hayden* (1807) 3 Mass. 24, 25. A similar result was reached in suits between aliens in the federal admiralty courts. *The BELGENLAND*, 114 U.S. 355 (1885). *Barrett*, *supra* note 11, at 387 n.36. See generally, *supra* note 19 and accompanying text.

26. See, e.g., *Logan v. Bank of Scotland*, [1906] 1 K.B. 141, which established a principle akin to that relied on later in *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947). See *infra* note 46 and accompanying text. In *Logan*, Lord Barnes noted:

The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere wherever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought . . . .

1 K.B. at 150. See also, Judgment of Mar. 6, 1846, Sess., Scot., 8 D. Sess. Cas. 657; Judgment of Feb. 29, 1884, Sess., Scot., 11 R. Sess. Cas. 600.

Prior to *Logan*, English law in this area had been controlled by the then well-known case of *Moystyn v. Fabrigas* [1875] 1 C.P.D. 161. In upholding the jurisdiction of the English courts over an action between residents of the Island of Minorca, Lord Mansfield stated: "[F]or it is impossible there could ever exist a doubt, but that a subject born in Minorca has as good a right to appeal to the King's Courts of Justice, as one who is born within the sound of Bow Bell . . . ." *Id.* at 171, quoted in *Barrett*, *supra* note 11, at 388 n.37.

The English courts never adopted the actual phrase *forum non conveniens*. See *The ATLANTIC STAR*, [1973] 2 W.L.R. 795, 810. But the courts have, since the early 1900's, developed a "stay practice" which achieves the same results. In recent years the stay has been allowed where necessary to avoid injustice by maintaining suit outside of the "natural forum." *Id.* at 801. As the House of Lords stated in *MacShannon v. Rockware Glass, Ltd.*, [1978] 2 W.L.R. 362, 377, the English and Scottish tests "differ more in theoretical approach than in practical substance."

For a modern statutory example in the United States where the courts may elect to "stay" the local proceedings in order to permit the parties to go forward in another forum, see *Wis. STAT. ANN.*, § 262.19 (West 1971).

27. Blair, *supra* note 19. See also *Barrett*, *supra* note 11, at 388. Only a few cases have been found where United States courts had used the term. Blair, *supra* note 19, at 2 n.4.

28. Blair, *supra* note 19, at 1. For subsequent discussion, see Dainow, *supra* note 8, at 869-70; Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1248 (1930); Foster, *Place of Trial—Intrastate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 50 (1930); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 9, 30-31 (1945).



as a manifestation of a civilized judicial system which was "firmly imbedded in our law."<sup>29</sup>

## II. THE DEVELOPMENT OF THE UNITED STATES DOCTRINE OF FORUM NON CONVENIENS

### A. *Gulf Oil Corp. v. Gilbert* and *Koster v. Lumbermens Mutual Casualty Company*

The adjudication of modern *forum non conveniens* motions in the United States requires a careful assessment of both private and public interest considerations.<sup>30</sup> A *forum non conveniens* motion must be considered in the context of established guidelines set out in the seminal companion cases of *Gulf Oil Corp. v. Gilbert*<sup>31</sup> and *Koster v. Lumbermens Mutual Casualty Co.*<sup>32</sup> In *Gilbert* and *Koster*, the Supreme Court first defined the factors to be considered by a district court in exercising its discretion to dismiss an action on *forum non conveniens* grounds.<sup>33</sup>

*Gilbert* involved a negligence action brought in the Southern District of New York by a Virginia resident against a Pennsylvania corporation to recover for a tort committed in Virginia.<sup>34</sup> The plaintiff was a Virginian, the defendant was doing business in Virginia, the tort occurred in Virginia, and almost all the witnesses lived in Virginia. The defendant also attempted to interplead a third party from Virginia.<sup>35</sup> The plaintiff nonetheless brought suit in New York, apparently as an effort to receive more generous damage awards from a New York jury.<sup>36</sup> The district court dismissed the action to Virginia on the grounds of *forum non conveniens*.<sup>37</sup> The Court of Appeals for the Second Circuit reversed,<sup>38</sup>

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29. *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 55-56 (1941) (Frankfurter, J., dissenting).

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

31. *Id.*

32. 330 U.S. 518 (1947).

33. *Gilbert*, 330 U.S. at 508; *Koster*, 330 U.S. at 527.

34. *Gilbert*, 330 U.S. at 502-03, 509-11.

35. *Id.* at 511.

36. *See id.* at 510.

37. *Gilbert v. Gulf Oil Corp.*, 62 F. Supp. 291 (S.D.N.Y. 1945), *rev'd*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947).

38. *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947).

and the Supreme Court reversed again, upholding the district court's original dismissal.<sup>39</sup>

The Court eschewed reliance on a hard and fast formula for deciding *forum non conveniens* motions.<sup>40</sup> Instead, in a passage that has since become the touchstone for deciding all modern *forum non conveniens* motions, the Court enumerated the relevant criteria to be considered when deciding such motions. These factors have been used consistently in both federal<sup>41</sup> and state<sup>42</sup> courts. To be considered are the private interests of the parties, which include:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, 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.<sup>43</sup>

The Court then identified significant public interest factors that should be taken into account. These include the administrative difficulties of the court, the burden of jury duty, local interest in the action, and the court's familiarity with the law to be applied.<sup>44</sup>

39. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512 (1947) (5-4 decision).

40. *Id.* at 508. To the contrary, the Court found that courts "[w]isely . . . [had not] attempted to catalogue the circumstances which will justify or require either grant or denial of remedy," and emphasized that the weighing of these factors is left to the sound discretion of the court in which the plaintiff brought suit. *Id.*

41. *See supra* note 6, and cases cited *infra* note 57.

42. On several occasions, the Court had found it unnecessary to decide whether federal courts were obligated under the *Erie* doctrine, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to follow the federal or state law of *forum non conveniens* in diversity cases. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 509; *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. at 529 (1947); *Williams v. Green Bay & W.R.R.*, 326 U.S. 549, 551, 558-59 (1946). The Court found it unnecessary to resolve the question because the result would have been the same in each case under federal or state law. *But see Braucher, supra* note 12 at 927-28. Similarly, the Court in *Reyno* decided that it need not resolve the *Erie* question because the state law of *forum non conveniens* was virtually identical to the federal law. *See Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252, 262 n.13 (1981). *See also Founding Church of Scientology v. Verlag*, 536 F.2d 429, 434-35 n.13 (D.C. Cir. 1976) (in accord with *Reyno*, noting that the law of *forum non conveniens* in the District of Columbia was identical to the federal law).

43. 330 U.S. at 508.

44. *Id.* at 508-09, where the Court stated:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its 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. In cases which touch the affairs of many persons, there is reason for holding the trial

In *Koster v. Lumbermens Mutual Casualty Co.*,<sup>45</sup> the companion case of *Gilbert*,<sup>46</sup> the action below had also been dismissed on the ground of *forum non conveniens*.<sup>47</sup> The suit involved a derivative action brought in the Eastern District of New York by a New York resident shareholder against several officers and directors of an Illinois corporation.<sup>48</sup> Due to the "complexities and unique features" of derivative suits,<sup>49</sup> the Supreme Court affirmed the dismissal of the New York action. The Court reasoned that the plaintiff was only one of "hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts . . . ." <sup>50</sup> The Court clearly noted in *Koster*, however, that a plaintiff's action brought in his home forum should rarely be dismissed on *forum non conveniens* grounds:

[The plaintiff] should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.<sup>51</sup>

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in their view and reach rather than in remote parts of the country where they can learn of it by report only. 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.

*Id.*

45. 330 U.S. 518 (1947).

46. 330 U.S. 501 (1947). As the Court of Appeals for the District of Columbia Circuit recently explained: "Although *Gilbert* and *Koster* were decided together and authored by the same Justice, in each case the Supreme Court used slightly different language, and at least arguably different approaches, in applying the doctrine of *forum non conveniens*." *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980).

47. 330 U.S. at 519.

48. *Id.*

49. *Id.* at 522.

50. *Id.* at 524.

51. *Id.*

Thus the traditional standard for *forum non conveniens* dismissal is primarily a balance of the interests of the plaintiff, the defendant and the forum.<sup>52</sup> In a proper balancing of these factors, the plaintiff's choice of forum is normally given great deference.<sup>53</sup> Furthermore, a motion to dismiss for *forum non conveniens* would normally be granted only when a plaintiff intends to "vex, harass or oppress" his opponent with unnecessary expense or trouble.<sup>54</sup>

### B. Judicial and Legislative Developments After *Gilbert* and *Koster*

*Gilbert* and *Koster* thus supported the transfer of judicial actions to other federal courts connected more closely to the original dispute when the balance of "private interest" and "public interest" factors weighed strongly in favor of such transfer.<sup>55</sup> A year after *Gilbert* and *Koster* were decided, Congress attempted to codify those holdings by enacting a statute providing for transfer, or change of venue, between federal courts.<sup>56</sup> Section 1404(a) of the Judicial Code states: "For the convenience of parties and witnesses,

52. Most federal courts consider the private interests of the defendant and the public interests of the court as part of the same calculation in deciding a motion to dismiss on grounds of *forum non conveniens*. See, e.g., *Alcoa S.S. Co. v. M/V NORDIC REGENT*, 654 F.2d 147 (2d Cir. 1980) (en banc). But see *Hoffman v. Goberman*, 420 F.2d 423, 426-27 (3d Cir. 1970) (where the court treated the two considerations as separate grounds for dismissal).

53. As the Supreme Court was careful to note in *Gilbert*: "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 508.

54. *Id.*

55. *Id.* at 508-09; *Koster*, 330 U.S. at 524.

Closely related to the doctrine of *forum non conveniens* are situations in which the parties to a contract stipulate in advance to a designated forum for the resolution of disputes on the contract. The landmark case in this area in admiralty is *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In *Zapata*, the M/S BREMEN was en route from Louisiana to the Adriatic when she damaged an off-shore drilling rig owned by the plaintiff. The owner of the rig brought an *in rem* action against the BREMEN in Florida, but the towage contract had provided that all disputes would be heard before the London Court of Justice. *Id.* at 2-3. The Supreme Court upheld the contract clause and vacated the lower court's decision. *Id.* at 2. The Court established in *Zapata* that the party objecting to the contractually designated forum would have to demonstrate that trial there would be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. See also *Union Ins. Soc'y of Canton, Ltd. v. S.S. ELIKON*, 642 F.2d 721 (4th Cir. 1981); *Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrows, S.A.*, 493 F. Supp. 626 (S.D.N.Y. 1980).

56. Act of June 25, 1948, Pub. L. No. 773, § 1404(a), 62 Stat. 937 (current version at 28 U.S.C. § 1404(a) (1976)).

in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”<sup>57</sup>

Neither the Supreme Court nor Congress, however, had yet been presented with the type of *forum non conveniens* situation which would allow dismissal of a United States action to the courts of a foreign country. A survey of the case law which followed *Gilbert* illustrates that only under extreme circumstances would federal courts<sup>58</sup> dismiss a suit brought by a United States plaintiff

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57. 28 U.S.C. § 1404(a) (1976). The statute, which “permit[s] courts to grant transfers upon a lesser showing of inconvenience,” *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955), has displaced the doctrine of *forum non conveniens* when the choice is between two federal courts. *See, e.g., Levin v. Miss. River Corp.*, 289 F. Supp. 353, 362-63 (S.D.N.Y. 1968). “The enactment of § 1404(a) has not, however, terminated the federal courts’ power to dismiss a case on *forum non conveniens* grounds, especially where no alternative federal forum is available and the more convenient forum is located in a foreign country.” Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 57 n.2 (1967).

In such cases, which typically arise out of accidents occurring abroad, the federal courts continue to be guided by the standards set forth in *Gilbert*. *See, e.g., Alcoa S.S. Co. v. M/V NORDIC REGENT*, 654 F.2d 147 (2d Cir. 1980) (en banc); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980); *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977); *Paper Operations Consultants Int’l, Ltd. v. S.S. HONG KONG AMBER*, 513 F.2d 667 (9th Cir. 1975); *J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd.*, 462 F.2d 998 (8th Cir. 1972).

While § 1404(a) entirely occupies the field in cases where the alternative forum is another federal court, the common law doctrine of *forum non conveniens* applies when the alternative forum is a state or foreign court. *See, e.g., DeMateos v. Texaco, Inc.* 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *Yerostathis v. A. Luisi, Ltd.*, 380 F.2d 377 (9th Cir. 1967); *Levin v. Miss. River Corp.*, 289 F. Supp. 353, 362-63 (S.D.N.Y. 1968), and cases cited therein; *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469, 471 (S.D.N.Y. 1950); *DeSairigne v. Gould*, 83 F. Supp. 270 (S.D.N.Y.), *aff’d*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950).

58. At the state court level, the doctrine of *forum non conveniens* has taken significant steps in recent years. In New York, for example, the doctrine assumes there is jurisdiction but dismisses upon a finding “that in the interest of substantial justice the action should be heard in another forum . . . .” N.Y. Civ. Prac. R. § 327 (McKinney Supp. 1981). This 1972 enactment of the C.P.L.R. codifies the doctrine, which previously had been a case law product. *See Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972). In *Silver*, the court of appeals abandoned the prior New York rule that there could be no dismissal if any party to the action were a New York resident. *See D. SIEGEL, NEW YORK PRACTICE*, § 28 (1978). As a result of *Silver*, the New York residence of a party would be no barrier to a dismissal if an accessible court in some other jurisdiction were clearly more convenient.

In a short memorandum opinion dated March 24, 1981, the New York Court of Appeals upheld an Appellate Division *forum non conveniens* dismissal despite the fact “[t]hat all of the parties to the action may have been New York residents.” *Westwood Assocs. v. DeLuxe Gen., Inc.*, 53 N.Y.2d 618, 420 N.E.2d 966, 438 N.Y.S.2d 774, *aff’g* 73 A.D.2d 572, 422 N.Y.S.2d 1014 (1979). The residence factors are not stated in either courts’ decision, or in the

when doing so would relegate him to litigation in the courts of a foreign country.<sup>59</sup>

In *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika OG Australie Line*,<sup>60</sup> Judge Learned Hand emphatically expressed his concern for the protection of a citizen's rights of judicial access. In dictum, he stated that a United States citizen suing *pro se*<sup>61</sup> had a conclusive right to be heard in the federal courts, without remission to a foreign tribunal.<sup>62</sup>

In *Swift & Co. Packers v. Compania Colombiana del Caribe*,<sup>63</sup> the Supreme Court further distinguished *Gilbert* and *Koster* from the situation in which a United States plaintiff would be relegated to a foreign court. *Swift* involved an action brought in admiralty by a United States corporation against a Colombian corporation.<sup>64</sup> The Court noted in *Swift* that the "[a]pplication of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners."<sup>65</sup> The Court held

unreported decision of the Special Term, No. 19367/78 (Sup. Ct. March 8, 1979). The Appellate Division did note, however, that the transaction occurred in California, which was the place of performance and the situs of the witnesses and pertinent documents. 73 A.D.2d at 572-73.

Although these opinions appear somewhat incomplete, the court of appeals' statement that dismissal is appropriate despite the New York residency of the parties is significant. *A fortiori*, the contacts of the forum to which the parties are being remitted would have to be overwhelming to justify such a dismissal.

59. See *infra* notes 60-85 and accompanying text. Even in cases where dismissal would not deprive the plaintiff of a United States forum, it was generally assumed that a plaintiff had a near-absolute right of access to the courts of his place of residence. See Barrett, *supra* note 11, at 413.

60. 65 F.2d 392 (2d Cir. 1933).

61. If a United States plaintiff is suing as the subrogee, *e.g.*, *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika OG Australie Line*, 65 F.2d 392, 394 (2d Cir. 1933), the assignee, *e.g.*, *Del Monte Corp. v. Everett S.S. Corp.*, 402 F. Supp. 237, 243 (N.D. Cal. 1973), or the representative, *e.g.*, *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 500 (2d Cir. 1966), of an alien, no special deference is shown.

62. *United States Merchants' & Shippers'*, 65 F.2d at 392-93.

63. 339 U.S. 684 (1950).

64. *Id.* at 685.

65. *Id.* at 697 (footnote omitted). Similarly, the federal courts have often distinguished the United States plaintiff from the foreign plaintiff for purposes of *forum non conveniens*. See *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 435 (D.C. Cir. 1976); *Paper Operations Consultants Int'l, Ltd. v. S.S. HONG KONG AMBER*, 513 F.2d 667, 672 (9th Cir. 1975); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 502 (2d Cir. 1966); *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966);

that discretion of the trial court was abused in the original dismissal and remanded the action for adjudication on the merits.<sup>66</sup>

The *Swift* decision is a recognition by the Supreme Court of the lesser weight accorded to the foreign plaintiff's choice of forum.<sup>67</sup> Likewise, the decision supports the proposition that a United States plaintiff was seldom, if ever, deprived of the opportunity to seek justice in his own courts.<sup>68</sup> The plaintiff's choice of forum, clearly enough, had traditionally carried more weight when the plaintiff was a citizen or resident and less when he was a foreigner.<sup>69</sup>

The Fifth Circuit held similarly in *Burt v. Isthmus Development Co.*<sup>70</sup> There, the district court had dismissed a New York plaintiff's contract action on *forum non conveniens* grounds.<sup>71</sup> The action was brought in Texas, but Mexican law governed since all the negotiations had taken place in Mexico and all the defendant's witnesses were there. The court of appeals reversed the dismissal, holding "that Courts . . . should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising . . . discretion to deny a citizen access to the courts of this country."<sup>72</sup>

This approach had been followed until recently by the Second Circuit. In *Leasco Data Processing Equipment Corp. v. Maxwell*,<sup>73</sup> a New York resident brought suit against a British corporation in

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Ionescu v. E.F. Hutton & Co. (France) S.A., 465 F. Supp. 139 (S.D.N.Y. 1979); Abouchalache v. Hilton Int'l Co., 464 F. Supp. 94 (S.D.N.Y. 1978), *aff'd mem. sub nom.* Collins v. Hilton Int'l Co. 628 F.2d 1344 (2d Cir. 1980); Top Form Mills, Inc. v. Sociedad Nazionale Industria Applicazioni Viscosa, 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977); Michell v. General Motors Corp., 439 F. Supp. 24, 28 (N.D. Ohio 1977).

66. 339 U.S. at 697-98.

67. See *infra* note 79.

68. 339 U.S. at 697 (citing cases).

69. See *supra* note 65 and accompanying text.

70. 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955).

71. 218 F.2d at 355.

72. *Id.* at 357. The Fifth Circuit further noted that it would be "inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong." *Id.*

The Court of Appeals for the Eighth Circuit concurred with the *Burt* holding in *J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd.*, 462 F.2d 998 (8th Cir. 1972). The court in *Pritchard* emphasized plaintiff's status as assignee of a foreign corporation in affirming a dismissal on *forum non conveniens* grounds. *Id.* at 1002.

73. 468 F.2d 1326 (2d Cir. 1972), *rev'g*, 319 F. Supp. 1256 (S.D.N.Y. 1970).

the District Court for the Southern District of New York. Although a balance of convenience factors favored England as the appropriate situs of trial, the Second Circuit nonetheless rejected the district court's dismissal of the action on *forum non conveniens* grounds.<sup>74</sup> In brief, the court of appeals found that the convenience factors favoring dismissal were not sufficient to meet the standard of "positive evidence of unusually extreme circumstances . . . that material injustice is manifest . . . ." <sup>75</sup>

The Southern District of New York reasoned similarly in *Top Form Mills, Inc. v. Sociedad Nazionale Industria Applicazioni Viscosa*.<sup>76</sup> There, a New York corporation brought an action against foreign defendants for damages resulting from a defective shipment of fabric.<sup>77</sup> The court denied defendant's motion to dismiss for *forum non conveniens*, holding that defendant's inconvenience in litigating in New York presented insufficient grounds for dismissal.<sup>78</sup>

Although a United States plaintiff's right of access to his home courts is not absolute,<sup>79</sup> the standards traditionally used for dismissal on *forum non conveniens* grounds of a citizen's claim are

74. 468 F.2d at 1344.

75. *Id.*, quoting *Burt v. Isthmus Dev. Co.*, 218 F.2d at 357.

76. 428 F. Supp. 1237 (S.D.N.Y. 1977).

77. *Id.* at 1240-41.

78. *Id.* at 1253. The court in *Top Form* thus upheld the strict guidelines applied for dismissal of the plaintiff's claim, stating:

The right of Top Form, a New York corporation doing business here, to choose this court as the forum in which to sue . . . a foreign partnership also doing business here, must be considered in light of this Circuit's recognition that "courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country."

*Id.* at 1252-53, quoting *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d at 1344 (quoting *Burt v. Isthmus Dev. Co.*, 218 F.2d at 357).

79. There is some authority (four cases decided in the same district court, and three by the same judge) holding that a citizen has an absolute constitutional right of access to United States admiralty courts. *The EPSOM*, 227 F. 158 (W.D. Wash. 1915); *The NECK*, 138 F. 144 (W.D. Wash. 1905) (Hanford, J.); *The FALLS OF KELTIE*, 114 F. 357 (D. Wash. 1902) (Hanford, J.); *Bolden v. Jensen*, 70 F. 505, 510 (D. Wash. 1895) (Hanford, J.). *But see Bickel*, *supra* note 3, at 43-44.

The historic deference accorded to a citizen plaintiff's choice of a United States forum, however, may now be on the wane. *See Alcoa S.S. Co. v. M/V NORDIC REGENT*, 654 F.2d 147, 153-56. But even today there are few instances in which a citizen's suit against a foreign defendant has been dismissed for *forum non conveniens*. In contrast, the cases are legion in which the suits of non-resident aliens, including suits brought by nominal United States plaintiffs, have been dismissed. *See id.* at 152-56.



quite strict.<sup>80</sup> Such access to United States courts has usually been denied only in situations where there is no real contact with the forum chosen<sup>81</sup> or where the key issues must be resolved by application of foreign law.<sup>82</sup> Inconvenience to the defendant will not satisfy the criteria absent a further showing of intent by the plaintiff to vex or harass.<sup>83</sup> Thus, the Second Circuit noted in *Olympic Corporation v. Société Générale*<sup>84</sup> that:

In any situation, the balance must be very strongly in favor of the defendant, before the plaintiff's choice of forum should be disturbed . . . and the balance must be even stronger when the plaintiff is an American citizen and the alternative forum is a foreign one, *Thomson v. Palmieri*, 355 F.2d 64 (2d Cir. 1966).<sup>85</sup>

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80. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972); *Mobil Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966).

81. See, e.g., *Mizokami Bros. of Ariz., Inc. v. Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978), where the Ninth Circuit concluded that the United States citizenship of the plaintiff, standing alone, was not sufficient ground for opposition to a motion to dismiss for *forum non conveniens*. *Id.* at 978. The following statement of the court indicates the plaintiff's failure to demonstrate any real contact with his chosen forum:

The plaintiff falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.

*Id.*

82. See, e.g., *Dahl v. United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980), where the court, in affirming a dismissal to Norway of a United States plaintiff's wrongful death action, stated: "We believe that Norwegian substantive law will predominate the trial of this case and that the mere presence of a court pleaded under Connecticut law . . . does not warrant a different conclusion." *Id.* at 1032.

83. *Hoffman v. Goberman*, 420 F.2d 423, 426 (3d Cir. 1970). See also, *Thomson v. Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966).

84. 462 F.2d 376 (2d Cir. 1972).

85. *Id.* at 378. The *Thomson* decision cited by the court in *Olympic* was an earlier Second Circuit case which involved a writ of mandamus sought against Judge Palmieri because of his denial of a motion to dismiss an action on *forum non conveniens* grounds. The action was brought against a United Kingdom corporation by a New York corporation. *Thomson v. Palmieri*, 355 F.2d 64 (2d Cir. 1966). The Second Circuit held that the plaintiff's choice of forum should be upheld as long as no harassment was intended. *Id.* at 66. Despite the strong arguments of convenience for trial in the United Kingdom, the court noted that it was reasonable for a New York corporation to choose its home forum, stating: "New York will decline jurisdiction over imported tort suits, where all parties are non-resident, but the New York court cannot decline jurisdiction when one party is a New York resident." *Id.*

Despite this judicial background and precedent, federal courts have recently begun to invoke the doctrine of *forum non conveniens* when the alternative forum to the United States is abroad.<sup>86</sup> The Second Circuit stands at the forefront of this judicial development by virtue of its recent *forum non conveniens* decision in *Alcoa Steamship Co. v. M/V Nordic Regent*.<sup>87</sup> There, the court of appeals held that the plaintiff's citizenship is not a proper factor in the determination of *forum non conveniens* motions.<sup>88</sup> The case is particularly significant because the Second Circuit for the first time squarely confronted the question of whether a United States plaintiff had a near absolute right to federal admiralty jurisdiction despite a *forum non conveniens* challenge.<sup>89</sup>

In *Alcoa*, the plaintiff had brought suit against the *NORDIC REGENT* for damages sustained in a collision with Alcoa's transfer station pier in Trinidad, West Indies.<sup>90</sup> Alcoa was a United States resident, incorporated and doing business in New York.<sup>91</sup> The *NORDIC REGENT* was owned by a Liberian corporation, with a general agent in New York on whom process was served.<sup>92</sup> Although

86. *E.g.*, *Alcoa S.S. Co. v. M/V NORDIC REGENT*, 654 F.2d 147 (2d Cir. 1980) (en banc); *Mizokami Bros. of Ariz., Inc., v. Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Texaco Trinidad, Inc. v. Astro Exitto Navegacion S.A., Pan.*, 437 F. Supp. 331 (S.D.N.Y. 1977); *Bernuth Lembecke Co. v. Siemens Aktiengesellschaft*, 1976 Am. Mar. Cas. 2175 (S.D.N.Y. 1976) (not officially reported); *Mohr v. Allen*, 407 F. Supp. 483 (S.D.N.Y. 1976).

87. 654 F.2d 147 (2d Cir.) (en banc), *cert. denied*, 449 U.S. 890 (1980), *reh'g denied*, 450 U.S. 1050 (1981).

88. *Id.* at 154. Additionally, the court noted that this was a trend in the state courts. *Id.* at 155 (citing cases).

This is clearly a departure from prior law, wherein citizenship or residency was likely to weigh heavily in the balance of private interest and convenience. It was normally easier for a plaintiff to proceed in his home forum. Citizenship or residence was also relevant to the public interests identified in *Gilbert*. "[A]n American [plaintiff] after all pays taxes toward the support of the Federal courts and is therefore somewhat entitled, where a foreigner has no claim at all, to burden them with a not excessive measure of inconvenience." Bickel, *supra* note 3, at 44-45. In addition, the government may have a special duty to its citizens and residents that outweighs monetary considerations. The Supreme Court suggested as much when it held in *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684 (1950), that "it was improper under the circumstances here shown to remit a *United States citizen* to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court." *Id.* at 697-98 (emphasis added).

89. See 12 J. Mar. L. & Com., *supra* note 3, at 127 (K. Volk, in support of the decision).

90. 654 F.2d at 149.

91. *Id.*

92. *Id.*

Alcoa had United States citizenship status, the district court nonetheless dismissed the action to the courts of Trinidad on the ground of *forum non conveniens*.<sup>93</sup> The district court further held that Alcoa's interest in avoiding the significant effect of Trinidad's limitation of liability laws<sup>94</sup> was insufficient to offset the convenience factors favoring the defendant.<sup>95</sup>

On appeal, the Second Circuit affirmed the district court's decision.<sup>96</sup> The same panel then reversed its decision on rehearing.<sup>97</sup> On subsequent *en banc* rehearing, the court of appeals again reversed itself and reaffirmed the district court's original decision.<sup>98</sup> By its *en banc* opinion, the Second Circuit significantly decreased the importance of two grounds upon which prior *forum non conveniens* actions had been adjudicated. First, the court clearly imparted no advantage to the United States citizenship and residence of plaintiffs as a factor in determining whether to dismiss an action against an alien defendant on the ground of *forum non conveniens*.<sup>99</sup> Secondly, the court considered the likelihood that the plaintiff's recovery would be defeated in the foreign forum, or at best severely limited, immaterial as a matter of law.<sup>100</sup>

In *Alcoa*, the court relied heavily on an earlier Second Circuit case, *Farmanfarmaian v. Gulf Oil Corp.*<sup>101</sup> *Farmanfarmaian* in-

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93. *Alcoa S.S. Co. v. M/V NORDIC REGENT*, 453 F. Supp. 10, 13 (S.D.N.Y. 1978).

94. Adjudication in a Trinidadian court would limit the recovery in this case to about \$570,000, while a United States court would grant recovery up to \$8,000,000. 654 F.2d at 159.

The United States limitation of liability statute, 46 U.S.C. § 183 *et seq.*, if applied, would result in limitation to the value of the vessel, roughly \$3.5 million. However, to limit liability, defendant owner would first have to prove that the casualty occurred without his "privity or knowledge," a burden increasingly difficult to sustain. See 12 J. MAR. L. & COM., *supra* note 3, at 126 n.16 (K. Volk, in support of the decision).

95. 453 F. Supp. at 12. The district court reasoned in *Alcoa*:

This Court is persuaded that the lack of a substantial nexus between this controversy and the Southern District of New York combined with the inconvenience and possible prejudice to the defendant resulting from retention of jurisdiction here—which substantially outweigh any inconvenience plaintiff may suffer—renders this an inappropriate forum; an evaluation of the contentions of the parties compels the conclusion that the litigation of this case can be conducted most expeditiously and inexpensively in Trinidad.

*Id.*

96. 654 F.2d 165 (2d Cir. 1979).

97. 654 F.2d 169 (2d Cir. 1979) (petition for reh'g).

98. 654 F.2d 147 (2d Cir. 1980) (*en banc*).

99. 654 F.2d at 154. See *supra* note 88.

100. 654 F.2d at 159.

101. 588 F.2d 880 (2d Cir. 1978).

volved an action brought by an Iranian citizen in the Southern District of New York against an Iranian subsidiary of a United States oil company for tortious interference with contract rights.<sup>102</sup> Because of a bilateral treaty between the United States and Iran,<sup>103</sup> the court of appeals applied the same *forum non conveniens* standards it would have applied had the plaintiff been a United States citizen, and dismissed the action to Iran.<sup>104</sup> As the *Alcoa* panel stated, *Farmanfarmaian* stood for the proposition that "American citizenship is *not* an impenetrable shield against dismissal on the ground of *forum non conveniens*."<sup>105</sup>

The Second Circuit has underscored this new trend by affirming its *Alcoa* holding in the recent case of *Calavo Growers of California v. Generali Belgium*.<sup>106</sup> In *Calavo*, a United States cooperative had contracted to import figs from Turkey to New York. Upon entry to United States ports, the figs failed to pass government inspection, and the Belgian underwriter denied payment on the claim for reimbursement.<sup>107</sup> The Second Circuit, citing *Alcoa*, upheld the dismissal of the action on the ground of *forum non conveniens* despite the fact that the principle witnesses and the plaintiff resided in the United States.<sup>108</sup>

In the recent District of Columbia Circuit Court of Appeals decision of *Pain v. United Technologies Corp.*,<sup>109</sup> *Alcoa* was again cited as support for dismissal of a suit brought by a plaintiff<sup>110</sup> who was a resident of the United States. *Pain* involved a derivative action brought by a United States representative and certain alien plaintiffs<sup>111</sup> for wrongful death resulting from the crash off the

102. *Id.* at 880.

103. The treaty provided that the plaintiff would have "access to [this country's] courts . . . upon terms no less favorable than those applicable to nationals and companies of [this country] or of any third country." Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, June 16, 1957, 8 U.S.T. 900, 902-03.

104. 588 F.2d at 881-82.

105. 654 F.2d at 152 (emphasis in original).

106. 632 F.2d 963 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981), *reh'g denied*, 451 U.S. 934 (1981).

107. 632 F.2d at 965.

108. *Id.* at 966.

109. 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 102 S. Ct. 980 (1981).

110. *Id.* at 783 n.32.

111. The plaintiffs included representatives of the estates of a French citizen, a Norwegian citizen, a British citizen, a Norwegian resident holding dual Norwegian-Canadian citizenship, and a United States citizen residing in Norway. *Id.* at 779.

coast of Norway of a Connecticut-manufactured helicopter.<sup>112</sup> The court of appeals affirmed the dismissal of the action to the courts of Norway on *forum non conveniens* grounds,<sup>113</sup> concluding that virtually all of the significant contacts linked the case with Norway and not the United States.<sup>114</sup>

Petitions for certiorari were submitted to the Supreme Court in *Alcoa*, *Calavo* and *Pain*. The Court denied review in each case.<sup>115</sup> In this light, it is even more significant that the Court did agree to review the Third Circuit's decision in *Reyno v. Piper Aircraft Company*.<sup>116</sup>

### III. THE SUPREME COURT'S RECENT DEVELOPMENT OF FORUM NON CONVENIENS: PIPER AIRCRAFT CO. v. REYNO

#### A. *The Facts of Reyno*

On July 27, 1976, a small commercial aircraft on a charter flight from Blackpool to Perth crashed in the Scottish highlands.<sup>117</sup> The pilot and all five passengers were killed. The pilot and passengers were Scottish subjects and left Scottish survivors.<sup>118</sup> The aircraft involved was a seven-year-old twin engine Piper Aztec, manu-

112. *Id.* The helicopter was designed and manufactured by the Sikorsky division of defendant United Technologies Corp. It was owned and operated by Helikopter Service, a Norwegian corporation. The helicopter crashed while en route from Norway to an offshore oil drilling platform in the North Sea. *Id.* at 779-80.

113. *Id.* at 799.

114. *Id.* at 792.

115. *Alcoa S.S. Co. v. M/V NORDIC REGENT*, *cert. denied*, 449 U.S. 890 (1980); *Calavo Growers of California v. Generali Belgium*, *cert. denied*, 449 U.S. 1084 (1981); *Pain v. United Technologies*, *cert. denied*, 102 S. Ct. 980 (1981).

116. 639 F.2d 149 (3d Cir. 1980), *rev'd*, 102 S. Ct. 252 (1981).

117. 102 S. Ct. 252, 257 (1981). The crash occurred near the town of Talla, a mountainous area of Scotland. The pilot was flying in an area noted for "mountain waves." Mountain waves are pockets of severe turbulence caused by winds crossing the mountains. Shortly after the accident occurred, the British Department of Trade conducted an investigation. A preliminary report found that the plane crashed after developing a spin, and proposed that mechanical failure in the plane or the propeller was responsible. This report was reviewed by a three-member Review Board. The Board found no evidence of defective equipment and indicated that pilot error may have contributed to the accident. The Review Board found that the pilot was flying in violation of his company's regulations respecting altitude of flight in such "mountain wave" areas. *Id.* See also R. 179-81. "R" refers to the Record Appendix filed in the Court of Appeals for the Third Circuit. See Appendices to Appellants' Opening Brief, *Reyno v. Piper Aircraft Co.*, No. 79-2747 (3d Cir. filed July 24, 1980).

118. 102 S. Ct. at 257.

factured in Pennsylvania by Piper Aircraft Company ("Piper"), a Pennsylvania corporation. The propellers were manufactured by Hartzell Propeller, Inc. ("Hartzell"), an Ohio corporation. The aircraft was operated by McDonald Aviation, Ltd., a Scottish air taxi service.<sup>119</sup>

Plaintiff, Gaynell Reyno ("Reyno") of California was appointed administratrix of the estates of the deceased passengers by a California probate court in July, 1977. Reyno brought wrongful death and survival actions in the Superior Court of California, pleading negligence and strict liability.<sup>120</sup> On defendant's motion, the case was removed to the District Court for the Central District of California.<sup>121</sup> Pursuant to 28 U.S.C. § 1404(a),<sup>122</sup> the suit was transferred to the District Court for the Middle District of Pennsylvania.<sup>123</sup> Defendant Piper then moved for dismissal of the action to the courts of Scotland.<sup>124</sup>

### B. *The Decision of the District Court*

The District Court for the Middle District of Pennsylvania began its analysis of the case by noting that an alternative forum existed in Scotland.<sup>125</sup> The court proceeded to cite and assess the

119. *Id.* McDonald Aviation was a named defendant in suits filed in the United Kingdom. *Id.* at 257 n.2. It was not a party, however, in the suits filed in the United States. *Id.* at 257.

120. *Id.* Plaintiff Reyno admitted that the actions against Piper and Hartzell were filed in the United States because its laws on liability, capacity to sue, and damages were more favorable to the plaintiff than those of Scotland. Scottish law does not recognize strict tort liability, nor does it allow wrongful death actions when brought by one other than a decedent's relative. The relative can only sue for loss of support and society. *Id.* Suits for damages are governed by The Damages (Scotland) Act 1976. *Id.* at 257-58 n.3.

121. *Id.* at 258. Subject to statutory exception, 28 U.S.C. § 1441(a) (1970) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court . . ." For an insightful analysis of removal and remand principles within the federal courts, see Comment, *Federal Courts: Review of the Remand Order*, 9 ST. MARY'S L.J. 274 (1977).

122. (1976). For full citation and discussion of the federal transfer statutes, see *supra* notes 56, 57 and accompanying text.

123. 102 S. Ct. at 258.

124. *Id.*

125. 479 F. Supp. 727, 731 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 102 S. Ct. 252 (1981).

Defendants Piper and Hartzell had agreed to submit to the jurisdiction of the Scottish courts and to waive any statute of limitation defense that might be available. 479 F. Supp. at 731.

traditional public and private interest factors enumerated in *Gilbert*.<sup>126</sup> The court stated that the plaintiff's choice of forum, although normally given substantial deference,<sup>127</sup> was here entitled to little weight.<sup>128</sup> The plaintiff was merely a representative of foreign residents who sought a United States forum because of its more liberal products liability laws.<sup>129</sup> The district court justified its action by stating: "[T]he courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States."<sup>130</sup>

In assessing the private interest factors of the litigants, the district court determined that these factors strongly favored Scotland as the appropriate forum.<sup>131</sup> The court reasoned that because important witnesses and evidence could not be reached by compulsory process, and because the defendants would not be able to implead Scottish third-party defendants,<sup>132</sup> it would be unjust to force the defendants to try the action in the Pennsylvania forum.<sup>133</sup>

The district court further held that the relevant public interest considerations weighed strongly on the side of dismissal.<sup>134</sup> As a result of its determination that Pennsylvania law would apply to Piper and Scottish law to Hartzell if the case were tried in the Middle District of Pennsylvania,<sup>135</sup> the court concluded that "trial

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126. *Id.* at 730, citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See also supra* notes 43, 44 and accompanying text.

127. *Id.* at 731, citing *Gilbert*, 330 U.S. at 508.

128. 479 F. Supp. at 731-32.

129. *Id.* at 731.

130. *Id.*, citing *Farmanfarmaian*, 437 F. Supp. 910, 927 (S.D.N.Y. 1977). *See also supra* note 69 and accompanying text.

131. 479 F. Supp. at 732. The court recognized that although the evidence of design, manufacture and testing of the plane was located in the United States, the connections with Scotland were otherwise "overwhelming." *Id.* The real parties in interest were Scottish, and witnesses, training data, investigative reports and topographical information were all located in Great Britain. *Id.*

132. *See supra* note 119.

133. 479 F. Supp. at 733.

134. *Id.* at 734.

135. Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), a court must normally apply the choice of law rules of its own state. When a case is transferred pursuant to 28 U.S.C. 1404(a), however, the court must apply the choice of law rules of the state from which the case was transferred. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964). Thus the district court decided that California choice of law rules would apply to Piper, and Pennsylvania choice of law rules would apply to Hartzell. 479 F. Supp. at 734-36.

in this forum would be hopelessly complex and confusing for a jury . . . ."<sup>136</sup> The court also noted that the cost and time factors of the action would be substantial, and it would be unfair to burden the Middle District of Pennsylvania with the trial of the case because that forum had little connection with the controversy.<sup>137</sup> In short, Scotland had the most substantial interest in the outcome of the litigation.<sup>138</sup> Finally, the district court rejected the plaintiff's assertion that dismissal was unfair because Scottish law was unfavorable to her position.<sup>139</sup> The court held that any deficiency in the foreign law was a "matter to be dealt with in the foreign forum,"<sup>140</sup> and dismissed the action.<sup>141</sup>

### C. *The Decision of the Court of Appeals for the Third Circuit*

The United States Court of Appeals for the Third Circuit reversed the decision of the district court and remanded the case for trial.<sup>142</sup> The Third Circuit based its decision on two alternative grounds: (1) that the district court abused its discretion in its application of the *Gilbert* analysis,<sup>143</sup> and (2) that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.<sup>144</sup>

The court of appeals began its review of the *Gilbert* analysis by noting that the plaintiff's choice of forum deserves substantial weight, even if the real parties in interest are non-residents.<sup>145</sup> The court then noted that the district court's balancing of the private interests was in error.<sup>146</sup> It found no support for the assertion that key witnesses would be unavailable in the United States,<sup>147</sup> and

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136. *Id.* at 734.

137. *Id.* at 737.

138. *Id.*

139. *Id.* at 738.

140. *Id.*

141. *Id.*

142. 630 F.2d 149 (3d Cir. 1980), *rev'd.*, 102 S. Ct. 252 (1981).

143. 630 F.2d at 160.

144. *Id.* at 164.

145. *Id.* at 159. The court of appeals cited the Second Circuit's *en banc* decision of *Alcoa S.S. Co. v. M/V NORDIC REGENT*, 654 F.2d 147 (1980), as support for the holding that the citizenship of the plaintiff does not effect the defendant's burden in a *forum non conveniens* motion for dismissal. The court in a footnote stated: "The court of appeals *en banc* [in *Alcoa*] thus seems to have overturned without specific mention the panel holding in *Olympic Corp. v. Société Générale* . . . that the defendant's burden is greater if an American plaintiff is to be relegated to a foreign forum." *Id.* at 159 n.26 (citation omitted).

146. *Id.* at 160-63.

147. *Id.* at 161.



placed little significance on the fact that the defendants would not be able to implead potential Scottish third-party defendants.<sup>148</sup>

The court of appeals was also troubled by the district court's treatment of the public interest factors.<sup>149</sup> The appellate court found that the district court's choice-of-law analysis was incorrect, and that United States law would govern the actions against both Piper and Hartzell.<sup>150</sup> Hence, the necessity of applying unfamiliar foreign law would not pose any problem.<sup>151</sup> Under the same analysis, the court also found that Pennsylvania and Ohio held the greatest policy interest in the dispute,<sup>152</sup> and that other public interest factors favored trial in the United States.<sup>153</sup>

Finally, the court of appeals would have reversed the decision below even if the district court had properly balanced the *Gilbert* public and private interest factors.<sup>154</sup> Since a dismissal would result in a change in the applicable law, the plaintiff's strict liability claim would be eliminated.<sup>155</sup> The court of appeals thus concluded that:

[A] dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.<sup>156</sup>

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148. *Id.* at 161-62. The court felt that if defendants Hartzell and Piper were found liable after a trial in the United States, they could institute an indemnity or contribution action against Scottish defendants Air Navigation and McDonald. Forcing the defendants to rely on the indemnity or contribution actions would be "burdensome" but not "unfair." *Id.* at 162.

149. *Id.* at 163-71.

150. *Id.* at 164, 168.

151. Many courts have held the need to apply foreign law favors dismissal of an action on *forum non conveniens* grounds. *See, e.g.,* Calavo Growers of California v. Generali Belgium, 632 F.2d 963, 967 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981). This factor alone, however, does not warrant dismissal when a balancing of all factors favors the plaintiff's chosen forum. *See, e.g.,* Founding Church of Scientology v. Verlag, 536 F.2d 429, 436 (D.C. Cir. 1976); Burt v. Isthmus Dev. Co., 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955).

152. 630 F.2d at 171.

153. *Id.*

154. *Id.* at 163-64.

155. *Id.*

156. *Id.* at 164 (footnote omitted), quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), in support of the principle that a § 1404(a) transfer, which does not result in a change of law, is equally applicable to dismissal on grounds of *forum non conveniens*. *But see supra* notes 56, 57 and accompanying text. *See also Hoffman v. Goberman*, 420 F.2d 423, 427 (3d Cir. 1970).

Thus, the court of appeals held that dismissal of an action for *forum non conveniens* was automatically barred if it would result in a change in the applicable law which was unfavorable to the plaintiff.

#### D. Third Circuit Law Prior to *Reyno*

The decision of the Court of Appeals for the Third Circuit in *Reyno* conflicted in principle with the Third Circuit's prior, albeit limited, examination of *forum non conveniens* principles.<sup>157</sup> Prior to *Reyno*, the Third Circuit had applied a favorable rule for United States plaintiffs in international litigation, holding that the United States citizenship of a party was a strong factor in the determination of a *forum non conveniens* motion to dismiss.<sup>158</sup> In *Mobil Tankers Co. v. Mene Grande Oil Co.*,<sup>159</sup> the Third Circuit instructed: "[The plaintiff's] election . . . should not be disregarded

157. See *Hoffman v. Goberman*, 420 F.2d 423 (3d Cir. 1970); *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611 (3d Cir.), cert. denied, 385 U.S. 945 (1966). See also *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666, 670 (D. Del. 1980), citing *Swift & Co. Packers*, 339 U.S. 684 (1950); *Xerakis v. Greek Line Inc.*, 382 F. Supp. 774 (E.D. Pa. 1974).

158. In *Hoffman v. Goberman*, 420 F.2d 423 (3d Cir. 1970), the district court granted a *forum non conveniens* motion for dismissal of a suit brought by a United States citizen shareholder of a Netherlands Antilles corporation against another United States citizen shareholder. The dismissal was based on the court's conclusion that retention of the case would require the court to interfere with the internal affairs of a foreign corporation. Additionally, the location of the corporate law books and records, the necessity of interpreting foreign law, and the fact that both parties had chosen to conduct business abroad weighed strongly in favor of dismissal. *Id.* at 425-26.

The Third Circuit reversed, holding that the defendant had a greater burden to sustain in a *forum non conveniens* motion than in a motion to transfer to another district court. The court decided that the necessity of applying foreign law was not a ground for dismissal, and stated further that "there is no absolute rule of law which requires dismissal of an action on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor to be considered . . ." *Id.* at 427.

The appellate court in *Hoffman* was also influenced by the plaintiff's assertion that there might not be an alternative forum. The court stated that the mere doubt resulting from the assertion supported the plaintiff's claim for retention. *Id.* at 428. The reasoning is tenuous, however, since the district court's dismissal was conditioned upon the availability of the Netherlands Antilles forum. *Id.* at 426.

The weight given to this factor by the circuit court underscores its adherence to the traditional reluctance to dismiss a United States plaintiff's suit on *forum non conveniens* grounds. The court stated it would require "persuasive evidence" that the defendant would suffer "manifest injustice" if the motion were denied. *Id.* at 428.

159. 363 F.2d 611 (3d Cir.), cert. denied, 385 U.S. 945 (1966).

in the absence of persuasive evidence that the retention of jurisdiction will result in manifest injustice to the respondent.”<sup>160</sup>

### E. *The Decision of the Supreme Court*

The Supreme Court granted certiorari in *Reyno* on the limited issue of whether, in an action brought by foreign plaintiffs against United States defendants, the plaintiffs may defeat a *forum non conveniens* motion merely by showing that the substantive law of the chosen forum is more favorable than the law that would be applied by the courts of their own nation.<sup>161</sup> The Court held that an unfavorable change in the law could not automatically bar dismissal of the action.<sup>162</sup>

The Court began its analysis of the case by showing that the court of appeals had erred in holding that the possibility of an unfavorable change in law automatically precluded dismissal.<sup>163</sup> The Court expressly noted that the possibility of change in substantive law should not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.<sup>164</sup> Since the central focus of

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160. *Id.* at 614. *Mobil* is not directly on point with the *Alcoa* decision. Although *Mobil* was an admiralty case involving a tort occurring in the Caribbean, both the plaintiff and the defendant corporations were ostensibly United States concerns.

For a further discussion of foreign corporations referred to by the author as the “essentially American” plaintiff, see Yukins, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 71-74 (1967). For a case often cited by the Third Circuit concerning a United States citizen suing in his own right, and where the suit was retained, see *The SAUDADES*, 67 F. Supp. 820 (E.D. Pa. 1946).

161. 102 S. Ct. 261 n.12.

162. *Id.* at 268.

163. *Id.* at 261.

164. *Id.* The Court further noted that it had previously rejected the position adopted by the court of appeals below in the earlier Supreme Court decision of *Canada Malting Co. v. Paterson S.S. Co.*, 285 U.S. 413 (1932). *Canada Malting* involved a Canadian cargo damage claim against a Canadian vessel owner as result of a collision in United States waters. The Supreme Court affirmed the trial court’s dismissal on *forum non conveniens* grounds, despite Canadian laws being less favorable to plaintiff cargo owners. *Id.* at 419-20.

The court of appeals’ choice of law analysis in *Reyno* thus marked a significant departure from the law of *forum non conveniens* established by the Supreme Court and other federal courts. The *Canada Malting* Court, in affirming its dismissal, held that the difference in applicable substantive law, and in fact the entire question of which substantive law would apply, was irrelevant to the doctrine of *forum non conveniens*: “We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy.” *Id.* See also Bickel, *supra* note 3, at 37.

such an inquiry is convenience,<sup>165</sup> dismissal cannot be barred solely by the possibility of an unfavorable change in the law.<sup>166</sup> To hold otherwise would mean that "dismissal might be barred even where trial in the chosen forum was plainly inconvenient."<sup>167</sup>

The Supreme Court also criticized the court of appeals for its failure to recognize the need to retain flexibility in *forum non*

The principle established in *Canada Malting* was given effect in *Gilbert*, where it was apparent that dismissal for *forum non conveniens* could result in the application of different substantive law by the alternative forum. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511-12. Yet, in upholding dismissal and discussing the appropriate factors, the *Gilbert* Court pointedly ignored any possible differences in substantive law. *Gilbert* thus confirms that it is not pertinent to the doctrine of *forum non conveniens* that plaintiff's home forum may apply substantive rules different from those which would govern in the inconvenient forum where the plaintiff initially chose to bring suit.

Apart from the Third Circuit in *Reyno*, other federal courts have consistently followed the analysis provided by *Canada Malting* and *Gilbert* on this question. As the District of Columbia Court of Appeals recently summarized:

[T]he comparative amount of recovery obtainable in the two alternative forums has never been considered a factor relevant to the *forum non conveniens* inquiry. In almost every *forum non conveniens* decision the substantive law of one forum potentially favors one litigant over the other. Choice of the applicable substantive law will almost inevitably affect the amount of recovery; thus, an entire body of conflicts-of-law principles has evolved to aid courts making such choices. When a court engages in a *forum non conveniens* analysis, however, its central concern is furthering the just, speedy and inexpensive determination of the action. The *Gilbert* factors are intended to reflect those "practical problems that make trial of a case easy, expeditious and inexpensive," not the factors such as choice of governing law which affect the substantive disposition of the case.

*Pain v. United Technologies Corp.*, 637 F.2d 775, 794-95 (D.C. Cir. 1980) (footnote omitted) (emphasis in original). See also, *Alcoa S.S. Co. v. M/V NORDIC REGENT*, 654 F.2d at 161 (Van Graafeiland, J., dissenting); *Anastasiadis v. S.S. LITTLE JOHNS*, 346 F.2d 281, 283 (5th Cir. 1965), cert. denied, 384 U.S. 920 (1966). Such unanimity has led the commentators to treat the question as settled:

[D]ifferences in applicable law will not be considered in a decision on a forum non conveniens motion. Thus the usual forum non conveniens criteria . . . must be considered by the district court without a weighing of the substantive legal effects that the jurisdictional decision may have on the ultimate recovery . . . [I]f the court does find that a more convenient forum exists abroad, it will not choose to retain the action simply because a foreign court would award smaller damages to the libellant.

Yukins, *supra* note 160, at 64-65 (footnotes omitted). See also Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 773 (1977).

165. 102 S. Ct. at 262, citing *Gilbert*, 330 U.S. 501 (1947).

166. 102 S. Ct. at 262 & n.14, citing *Williams v. Green Bay & W.R.R.*, 326 U.S. 549, 555 n.4 (1946) (which cited in turn a Scottish case that dismissed an action on the ground of *forum non conveniens* despite the possibility of an unfavorable change in law).

167. 102 S. Ct. at 262.

*conveniens* situations.<sup>168</sup> If any one factor were given dispositive status, the *forum non conveniens* doctrine would lose much of its flexibility and, hence, much of its value.<sup>169</sup> Additionally, plaintiffs will normally select the forum with the most advantageous choice of law rules.<sup>170</sup> Thus, the Court reasoned, if an unfavorable change in substantive law were given substantial weight in a *forum non conveniens* determination, dismissal would rarely be granted.<sup>171</sup>

The Court also noted that the position adopted by the court of appeals posed significant practical problems.<sup>172</sup> A choice of law analysis at the trial court level would always be necessary, and the courts would frequently be required to interpret foreign law.<sup>173</sup> Dismissal would only be granted if the court, after comparing the remedies available under the law in each forum, decided that the law to be used in the foreign forum would be as beneficial to the plaintiff as that of the chosen forum.<sup>174</sup> Since the doctrine of *forum non conveniens* was designed, however, to obviate the need to conduct "complex exercises in comparative law,"<sup>175</sup> the court of appeals' decision was inconsistent with such intent.<sup>176</sup>

The final practical problem which troubled the Court was the presumed increase in litigation that would stem from an affirmance of the court of appeals' decision.<sup>177</sup> If a trial court could not dismiss an action on *forum non conveniens* grounds where it might

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168. *Id.* The Court relied here on *Gilbert*, which declined to identify circumstances "which will justify or require either grant or denial of remedy," 330 U.S. at 508, and *Williams*, where the Court stated it would "not lay down a rigid rule to govern discretion." 326 U.S. at 557.

169. 102 S. Ct. at 262.

170. *Id.* at 263.

171. *Id.* See also *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), where the plaintiffs argued that these actions should not be dismissed on *forum non conveniens* grounds because the law in the foreign forum was less attractive to recovery. The Second Circuit affirmed the dismissal, concluding that: "A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover." *Id.* at 453.

172. 102 S. Ct. at 263.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* The Court cited *Gilbert* in explaining that the public interest factors favor dismissal where it would be necessary for the court to "untangle problems in conflict of laws, and in law foreign to itself." 330 U.S. at 509.

177. 102 S. Ct. at 263-64.

result in an unfavorable change in law, the already congested courts would become even more attractive to foreign plaintiffs.<sup>178</sup>

The Supreme Court also rejected the court of appeals' analogy between dismissal on *forum non conveniens* grounds and statutory transfers pursuant to § 1404(a).<sup>179</sup> The Court noted that, although

178. *Id.* The Court listed five factors making United States courts particularly attractive to foreign plaintiffs: (1) all but six of the fifty American states offer strict liability theories in tort law; (2) the tort plaintiff may choose from among fifty jurisdictions if he files suit in the United States; (3) jury trials are readily available in the United States; (4) United States courts allow contingent attorneys' fees and do not tax losing parties with their opponents attorneys' fees; and (5) discovery is more extensive in United States than in foreign courts. *Id.* at 264 n.18.

179. The court of appeals in *Reyno* had concluded that the standards for *transfer* under 28 U.S.C. § 1404(a) and *dismissal* under *forum non conveniens* were the same. 630 F.2d at 157. The court of appeals reached this novel result by believing it was required to do so by the Supreme Court's decision in *Van Dusen v. Barrack*, 376 U.S. 612 (1964). See *DeMateos v. Texaco, Ind.*, 562 F.2d 895 (3d Cir. 1977) (holding that "the principle [of § 1404(a)] if no less applicable to a dismissal on *forum non conveniens* grounds." *Id.* at 899). The Third Circuit is apparently unique in giving that reading to *Barrack*. The Court in *Barrack* held that, upon a statutory transfer from one federal district court to another under § 1404(a), the transferee forum "generally" should apply the substantive law of the transferor forum. 376 U.S. at 639. That holding, however, plainly does not necessitate the result reached by the appellate court in *Reyno*.

The Supreme Court had noted in *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) that transfers are available under 28 U.S.C. § 1404(a) "whether dismissal under the doctrine of *forum non conveniens* would have been appropriate or not." *Id.* citing *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.2d 360 (4th Cir. 1947). The *Barrack* Court concluded that in transfer situations "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." 376 U.S. at 639. The Court recognized that this result was different from that which would obtain upon dismissal for *forum non conveniens*. Thus the Court specifically left open the question of whether the transferee federal court would be required to apply the law of the transferor forum in those cases where it could be contended that a court of the transferor state "would simply have dismissed the action on the ground of *forum non conveniens*." *Id.* at 640 (footnotes omitted).

Nothing in *Barrack* indicated an intent to work any change in the law of *forum non conveniens*. To the contrary, the *Barrack* Court was solely concerned with the consequences of "a change of venue within the federal system," 376 U.S. at 625, and not with the different considerations involved when the more convenient forum is abroad. See also *Schertenlieb v. Traum*, 589 F.2d 1156 (2d Cir. 1978), where the Second Circuit expressly rejected the contention that rules governing transfers pursuant to § 1404(a) also govern *forum non conveniens* dismissals.

Additionally, the court of appeals in *Reyno* seemingly implied that the choice of substantive law was too important to be left to the Scottish courts. But the Supreme Court has never suggested, in *Barrack* or elsewhere, that the federal courts may refuse to dismiss for *forum non conveniens* merely out of the concern that the more convenient foreign forum, in implementing its own view of the interests of justice, would choose substantive rules different from those that would apply here. In fact, the Supreme Court has instructed that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

§ 1404(a) was drafted in accordance with the *forum non conveniens* doctrine, it was intended as a revision and not a codification of the common law.<sup>180</sup> The Court concluded that rules governing transfers pursuant to 28 U.S.C. § 1404(a) do not govern *forum non conveniens* dismissals.<sup>181</sup>

The second ground on which the Supreme Court based its reversal was the court of appeals' rejection of the district court's *Gilbert* analysis.<sup>182</sup> The Supreme Court held that the district court had properly recognized that the plaintiff's choice of forum is ordinarily accorded deference which is only overcome when the private and public interest factors clearly support dismissal of the action.<sup>183</sup> The Court agreed that this presumption applied with less than maximum force when the plaintiff or real parties in interest were foreign,<sup>184</sup> and held that the district court's distinction between resident plaintiffs and foreign plaintiffs was correct.<sup>185</sup> When the plaintiff is foreign, it does not clearly follow that a United States forum is convenient.<sup>186</sup> Therefore, the Court reasoned, a foreign plaintiff's choice of forum deserves much less deference than a resident plaintiff's choice of forum.<sup>187</sup>

Concerning the *Gilbert* analysis of public and private interest factors,<sup>188</sup> the Court found that the original district court's analysis was not an abuse of discretion.<sup>189</sup> Although the district court's statement that the case's connections with Scotland were "overwhelming"<sup>190</sup> was not substantiated, the Supreme Court agreed that fewer evidentiary problems would arise were trial to be held in Scotland.<sup>191</sup> The Court further supported the district court's con-

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180. 102 S. Ct. at 264, citing *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955) for the principle that district courts had more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*.

181. 102 S. Ct. at 264. The Court also noted that the Second Circuit had recently held the same in *Schertenlieb v. Traum*, 589 F.2d 1156 (2d Cir. 1978). 102 S. Ct. at 265 n.21.

182. *Id.* at 265.

183. *Id.*

184. *Id.* at 265-66, citing *Koster*, 330 U.S. at 524. See cases reviewed at 102 S. Ct. at 266 n.23. See also *supra* text accompanying note 69.

185. 102 S. Ct. at 265.

186. *Id.* at 266.

187. *Id.* at 266 & n.24.

188. See also *supra* notes 43, 44 and accompanying text.

189. 102 S. Ct. at 268.

190. 479 F. Supp. at 732.

191. 102 S. Ct. at 267.

clusion that the inability to implead potential third-party defendants in the United States strongly favored trial in Scotland,<sup>192</sup> since it would be more convenient to adjudicate all claims in one proceeding.<sup>193</sup>

The Supreme Court concluded its analysis by finding that the district court's review of the public interest factors was also reasonable.<sup>194</sup> The Court conceded that, even if the court of appeals' choice of law analysis were correct, and United States law would apply to the defendants,<sup>195</sup> nonetheless, all other public interest factors favored dismissal to the courts of Scotland.<sup>196</sup> The Court thus summarized: "The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here."<sup>197</sup>

#### IV. ANALYSIS OF THE REYNO DECISION

In *Reyno*, the Supreme Court presented its most significant and encompassing discussion of *forum non conveniens* principles since *Gilbert* and *Koster* were decided three-and-a-half decades ago. Unfortunately, however, the Court limited its review in *Reyno* solely to the question of whether a *forum non conveniens* motion to dismiss can be defeated by a plaintiff's showing that the law to be applied in the alternative forum is less favorable to his claims than that of the chosen forum. The Court unanimously<sup>198</sup> held in the negative, in effect a reaffirmation of its prior holding in *Canada Malting v. Paterson Steamship Co.*<sup>199</sup>

192. *Id.*

193. *Id.* The Court also noted that a finding that trial in the plaintiff's chosen forum would be "burdensome" because of the indemnity or contribution actions was in itself sufficient for dismissal on *forum non conveniens* grounds. *Id.* at 267-68 & n.28.

194. *Id.* at 268.

195. *Id.* See also *supra* note 164 and accompanying text.

196. 102 S. Ct. at 268. See also *supra* note 44 and accompanying text.

197. *Id.*

198. 102 S. Ct. at 252-53. Justice Marshall delivered the Court's opinion. The seven justices who heard the case concurred on the principle holding that a motion to dismiss on *forum non conveniens* grounds need not be denied whenever the law of the alternative forum is less favorable to recovery than that to be applied by the district court. *Id.* at 268-69. Justices Brennan, Stevens and White, concurring in dissent, felt that after deciding the principle issue, the case should simply have been remanded to the court of appeals for consideration of whether Pennsylvania was a convenient forum. *Id.* at 269.

199. 285 U.S. 413 (1932). For further discussion of the *Canada Malting* decision and its subsequent affirmation, see *supra* note 164. Although the *Reyno* decision indeed merely reaffirms the Supreme Court's holding in *Canada Malting*, it must be noted that the two



It appears, then, that criticism of the Court's discussion in *Reyno* must not be directed at the decision itself, but more appropriately at its scope. As set forth at the outset of this Note, *forum non conveniens* remains a doctrine in flux. The conflict among the circuit courts is evidenced by their varied opinions discussed above. The *Reyno* decision clarifies but one limited area of this conflict—an area, moreover, in which there was never much controversy. The decision, because of its narrow scope, sheds little light on situations in which the plaintiff as a United States citizen brings suit on his own behalf in the courts of this country against a foreign citizen or corporation. With *Reyno* limited to its facts, the district courts, in deciding cases similar to *Alcoa* or *Calavo*, will continue to produce varied results.

It is peculiar that, in light of this ongoing controversy, the Supreme Court declined to comment on the *Alcoa* decision and the serious ramifications of forcing United States plaintiffs to bring their claims in a foreign court. Clearly, a simultaneous decision of the *Alcoa*, *Calavo* or *Pain* cases with the *Reyno* case would have been comparable to the Court's actions in the cases of *Gilbert* and *Koster*. It would have been a logical step from those companion cases for the Court to delineate a rule for dismissal which applied to the facts of *Alcoa* and *Pain* as well as to those of *Reyno*. The question of United States citizenship in *forum non conveniens* inquiries is one which deserves the Supreme Court's attention. Resolution of its impact on such inquiries requires a judgment concerning the role of the federal courts which only the Supreme Court can conclusively provide.

The *Reyno* decision, at minimum, establishes that there is no substantial reason for paying special deference to a foreign plaintiff's desire to litigate in the United States rather than in his home forum. A non-resident is rightfully presumed to be as knowledgeable of his own country's law as with United States law. Trial here

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cases are distinguishable. First, *Canada Malting* was decided fifteen years before *Gilbert* and *Koster*, when the doctrine of *forum non conveniens* in the United States had not yet been fully developed. See *Reyno*, 102 S. Ct. at 262. Second, *Canada Malting* concerned a suit between two foreign parties, a situation in which United States courts traditionally found the action easier to dismiss to the home forum. See *supra* note 19.

In light of these two distinctions, the present value of the *Canada Malting* decision stemmed more from its dicta than from its holding. Thus, it was appropriate for the Supreme Court in *Reyno* to consider anew the question of whether an unfavorable change in law posed an automatic bar to dismissal of a plaintiff's cause of action. With the *Reyno* decision, the issue can now be considered as settled.

will usually be less convenient for the foreign plaintiff; where it is not, that fact can be weighed in the balancing of private interests. Furthermore, there is little practical basis or jurisprudential rationale for a preoccupation with the ability of the foreign plaintiff's home jurisdiction to do justice to his claims. A foreign plaintiff's choice of United States forum, therefore, should be accorded little if any weight, other than to shift the onus of persuasion onto the defendant who desires dismissal.

Additionally, the Court's opinion in *Reyno* is sound when viewed from the overall perspective of national interest and public policy. In effect, the decision discourages the manipulation of our judicial system through clever forum shopping by foreign plaintiffs. There appears little reason to enhance the advantages which the foreign plaintiff already finds from proceeding in a United States forum instead of his own. As Justice Holmes aptly observed, "[t]he extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."<sup>200</sup>

### CONCLUSION

It has recently been suggested that the entire rationale of the *forum non conveniens* doctrine be reexamined in light of the growth of international trade and multinational corporations.<sup>201</sup> The trend in the federal courts, however, is to dismiss actions that can be tried more conveniently in foreign tribunals. This is particularly so as United States courts become more congested. On the other hand, certain courts of appeals have been more protective of a United States plaintiff's claim, and have recognized the factor of United States citizenship as weighing heavily against dismissal.

In short, the *Reyno* decision clarifies certain aspects of the *forum non conveniens* controversy, and provides some long-needed guidelines in this area. The decision also leaves other significant questions either undiscussed or unresolved. It is hoped that the Supreme Court will continue to offer guidance and assistance to federal courts struggling to resolve this developing area of the law.

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200. *Cuba R.R. Co. v. Crosby*, 222 U.S. 473, 479 (1912).

201. *See Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 & nn.2, 3 (2d Cir. 1975) (Oakes, J., concurring), *cert. denied*, 423 U.S. 1052 (1976).