FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS

The Defense of Forum Non Conveniens

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The Historical Development of the Common Law Doctrine

1.1 DEFINITION AND PURPOSES

"Forum non conveniens," or "the forum is not convenient," delineates the power of a court to decline to exercise jurisdiction under certain circumstances. It is a discretionary power that courts may utilize, giving deference to the interests of the parties to the litigation and to the competing demands of justice. Section 84 of Restatement (Second) of Conflict of Laws posits the rule that a court "will not exercise jurisdiction if it is a seriously inconvenient forum." The doctrine is said to reflect the requisite of any judicial system to protect both its legal machinery and court officers as well as the defendant or defendants from abuse or inconvenience or injustice by plaintiff or plaintiffs searching for the most advantageous forum in which to litigate the matter or matters.

Professor Barrett in 35 California Law Review 380 (1947) asserted that the earliest Scottish cases delineating "forum non competens," in contrast to "forum non conveniens," directed the doctrine to the question of jurisdiction or the power of the court to hear the case, even where the parties to the litigation were nonresidents and even where trial in Scotland would have been inconvenient. Later the Scottish decisions embraced both the question of jurisdiction *and* the convenience of the parties to the litigation, and the plea of "forum non competens" was soon replaced by the plea of "forum non conveniens," which centered about the issue of "convenience" *after* the issue of jurisdiction had been settled. According to Professor Braucher in 60 Harvard Law Review 908 (1947), forum non conveniens was a defensive plea in Scottish law to prevent a plaintiff from forcing a defendant to litigate in a forum which technically had

jurisdiction over the parties and over the subject matter, but in which the defense of the suit would be unfairly impractical or expensive.

It should be observed that the congestion of U.S. court dockets today has compelled many U.S. courts to give serious consideration to motions for dismissal based on forum non conveniens. The court must critically evaluate the drain upon U.S. court resources and whether an alternative foreign forum could equally serve the interests of justice. But courts must not overlook the fundamental principles of fairness and comity in ruling for or against motions for dismissal based on forum non conveniens.

1.2 EARLY DEVELOPMENT OF FORUM NON CONVENIENS

The Latin words *forum non conveniens* appear to have no origins in either Roman law or early Continental civil law practice; see 35 California Law Review 380 (1947). Indeed, the earliest appearance of the words and the doctrine was in the late 1800s in a series of Scottish cases which set forth the established Scottish principle of permitting trial courts to refrain from hearing disputes when the purpose of justice would be better served by trial in another forum. See 5 Fordham International Law Journal 533 (1982). In MacMaster v. MacMaster (Judgment of June 7, 1833, Sess., Scot, 11 Sess. Cas., First Series 685) the Scottish court held that the presence of assets of the estate in the forum did not provide an appropriate basis for the suit against the absent foreign executor of the will. A subsequent decision in 1845, M'Morine v. Cowie (Judgment of January 16, 1845, Sess., Scot, & D. Sess., Cas. 270) echoed the view that the forum was not "proper" or "appropriate." An 1884 Scottish decision, described in 5 Fordham International Law Journal (supra, at p. 536), declared that courts should not accept cases where "it is not convenient nor fitting for the interests of the parties to entertain any individual case."

In England it was not until 1875 that the doctrine of forum non conveniens appeared in an important decision; in Mostyn v. Fabrigas (1 C. P. D. 161) the English court upheld its jurisdiction over an action between residents of the Spanish island of Minorca. Lord Mansfield summarily argued that "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." In the year 1906 in Logan v. Bank of Scotland (1 K. B.141) Lord Barnes invoked the doctrine in these terms:

> 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.

The English view is that the plea of forum non conveniens is not simply left to the discretion of the trial court, but must be grounded upon some factor such as "vexation and oppression." In 1978 in MacShannon v. Rockware Glass, Ltd. (2 W. L. R. 362) the House of Lords agreed that the English and the Scottish interpretations of the plea of forum non conveniens "differ more in theoretical approach than in practical substance." England today sanctions a "stay practice" which permits the parties to go forward in perhaps another forum, the English version of forum non conveniens. However, in 1984 the House of Lords in the Abidin Daver (1984, A. C. 398), followed by the English Court of Appeal in Metall und Rohstoff v. ACLI Metals (London), Ltd. (1984, 1 Lloyd's Rep. 598), stated that "judicial chauvinism has been replaced by judicial comity to an extent which . . . the time is now ripe to acknowledge, frankly is . . . indistinguishable from the Scottish legal doctrine of forum non conveniens." The decision of the House of Lords in the Abidin Daver (supra) arose out of an attempt by Cuban shipowners to bring admiralty proceedings in England following a collision between the Cuban vessel and a Turkish ship in Turkish territorial waters. The Turkish shipowners promptly commenced proceedings in the local Turkish court for damages for negligence. Three months later the Cuban shipowners "arrested" a Turkish ship in England and commenced proceedings in England. The Turkish shipowners then applied to have the English court action stayed; the lower court agreed that the Turkish court was more convenient and a natural forum for the proceedings, but the Court of Appeals reversed, holding that no significance should be attached to the pending Turkish proceedings (1983, 1 W. L. R. 884). Lord Diplock, writing for the House of Lords, reversed, taking the view that Turkey clearly had the closest connection to the controversy and that the Turkish local court was the natural forum for trial. He stated that it was not open to the English court to compare the quality of justice in other legal systems, and that where a party felt that he would not receive justice in another forum; it was necessary for him to say so in no uncertain terms, which plaintiff did not do here.

Where a suit about a particular subject-matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it.

1.3 DEVELOPMENT OF THE MODERN DOCTRINE IN THE UNITED STATES

In the United States the doctrine of forum non conveniens was first discussed by a federal district court in Pennsylvania in the year 1801 in Willendson v. Forsoket (29 Fed. Cas. 1283). Here a Danish seaman sued his Danish captain for back wages after the Danish captain discharged him while the Danish vessel was docked in Philadelphia. The court declined to exercise jurisdiction, declaring that

> it has been my general rule not to take cognizance of disputes between 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.— 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 differences should hereafter arise, it must be settled by a Danish tribunal.

On the other hand, the U.S. Supreme Court three years later in 1804 in Mason v. Ship Blaireau (6 U.S. 240) took a more enlightened view by deciding to hear the case of a salvage claim filed in a federal district court in Maryland by the master of a British merchant ship against a French ship. Chief Justice John Marshall stated:

> [U]pon principles of general policy, this court ought not to take cognisance 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.

Undoubtedly, political considerations, called "public convenience," weighed strongly in the court's decision to hear the case against the French ship.

The earliest discretional dismissals by state courts involved suits between aliens for causes of action apparently unrelated to the forum, as illustrated by Gardner v. Thomas (14 Johns [N.Y.] 133, 1817), where the New York court refused to entertain a suit involving torts committed aboard a foreign vessel where both parties were nonresident aliens. A later New York case, Molony v. Does (8 Abb. Pr. [N. Y. C. P.] 316, 1859), even went so far as to refuse to hear tort actions between citizens of another state. Even in 1848 a federal court declined to hear an admiralty suit between British subjects, stating that a U.S.

court should not be compelled to bestow its time and resources on litigation between parties "owing no allegiance to its laws and contributing in no way to its support," and at the same time causing delay in the processing of claims of U.S. citizens (One Hundred and Ninety-Four Shawls, 18 Fed. Cas. 703, S. D. N. Y.). On the other hand, the U.S. Supreme Court in Hyde v. Stone (61 U.S. 170) in 1957 ruled that federal courts "are bound to proceed to judgment and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." And this willingness on the part of U.S. courts to hear suits between aliens on foreign causes of action (see Rea v. Hayden, 3 Mass. 24, 1807) was greatly encouraged by the dictum of Chief Justice Marshall in the 1821 decision of Cohens v. Virginia (19 U.S. 264), when he stated that the judiciary has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Traditionally, the alien, the foreigner, and the stranger were welcome in the United States to seek redress for grievances (see 9 Holdsworth, A History of English Law 97, 7th ed., 1956). Under Article III, Section 2, of the U.S. Constitution "the judicial power shall extend . . . to Controversies . . . between a State or the Citizens thereof . . . and foreign States, Citizens or Subjects." But discretion to refuse jurisdiction of controversies between foreigners was approved in 1885 by the U.S. Supreme Court in the Bergenland (114 U.S. 355), an admiralty case arising from a collision of two foreign ships on the high seas; although it was finally determined that the federal district court here had properly taken jurisdiction, the highest court opined that "circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum." And in 1932 in Canada Malting Co. v. Paterson Steamships, Ltd. (285 U.S. 413) Justice Louis D. Brandeis stated that, as in admiralty, "courts of equity and law [may] also occasionally decline, in the interests of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." Justice Felix Frankfurter's dissenting opinion in Baltimore & Ohio Railroad Co. v. Kepner (314 U.S. 44, 1941) referred to the "familiar doctrine of forum non conveniens" as a manifestation of a civilized judicial system which was "firmly imbedded in our law."

In relatively recent years the federal courts, respecting the independence of the several states, have held that the states may decline jurisdiction in such instances as cases involving state prescription of local utility rates (Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264, 1933), cases dealing with liquidation of a state bank (Gordon v. Washington, 295 U.S. 30, 1935), cases involving interference in the internal affairs of a foreign corporation (Rogers v. Guaranty Trust Co., 288 U.S. 123, 1933), cases dealing with state criminal prosecutions (Douglas v. Jeanette, 319 U.S. 156, 1943), and cases concerned with collection of state taxes (Matthews v. Rodgers, 284

U.S. 521, 1932). In Broderick v. Rosner (294 U.S. 629, 1935) the court ruled that a state court "may in appropriate circumstances apply the doctrine of forum non conveniens." But it was not until the 1945 decision in International Shoe Co. v. Washington (326 U.S. 310), substantially broadening the states' in personam jurisdictional authority, that impetus was given to "long-arm statutes"; frequently defendants were brought before tribunals that were inconvenient and even subjected defendants to harassment and oppression. The landmark case for the doctrine of forum non conveniens was decided two years later in 1947 in Gulf Oil Corp. v. Gilbert (330 U.S. 501), where the highest court recognized the power of courts to decline to exercise jurisdiction. A court may "resist imposition upon its jurisdiction even when jurisdiction is authorized."

The Gilbert case arose from an explosion and fire, allegedly the result of defendant's negligence, which destroyed plaintiff's warehouse in Virginia. Although plaintiff was a citizen of Virginia, he sued the Pennsylvania defendant (doing business in Virginia) in the federal district court in New York. Plaintiff explained his choice of the New York forum on the grounds that the $400,000 sought in damages might "stagger the imagination" of a Virginia jury. The federal district court in New York granted defendant's motion for dismissal on forum non conveniens grounds, pointing out that the events occurred in Virginia, where the witnesses were also residents (62 F. Supp. 291, 1945). But the Second U.S. Court of Appeals reversed (153 F.2d 833, 2nd Cir., 1956), and the U.S. Supreme Court also reversed, reinstating the decision of the New York federal district court dismissing the case on forum non conveniens grounds. The highest court opined that the appropriate standard of review was abuse of discretion (which the trial court had not abused) by failure to consider both "private interests" and "public interests," the former embracing "ease of access to sources of proof," "availability of compulsory process" for unwilling witnesses, "cost of obtaining attendance of witnesses," and "all other practical problems that make trial of a case easy, expeditious and inexpensive," and the latter embracing the local interest in having localized controversies decided at home, avoidance of the burdens of jury duty and court calendar congestion in a community with no relation to the controversy, and the appropriateness of the governing law being interpreted and applied by a court familiar with that law. The court summed it all up in these two paragraphs:

> An interest to be considered, and the only likely to be most pressed, is the private interest of the litigant. Important considerations are the relative case 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. There may also be questions as to the enforceability of a judgment, if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, . . . 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is

strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow the 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. . . . 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.

It should be noted that the court felt that the restrictive view that forum non conveniens applied only in extreme cases of harassment and oppression (as held by the Second U.S. Court of Appeals) was erroneous, although the court did state that "a plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." This restrictive view was but one of the many "private" and "public" factors to be considered by the court alongside of "the enforceability of a judgment" and the "relative advantages and obstacles to fair trial." The court concluded that the doctrine of forum non conveniens should be applied only infrequently, and that unless the balance of factors is "strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." In the companion case of Koster v. Lumbermens Mutual Casualty Co. (330 U.S. 123, 1947) the court described the doctrine as an instrument of justice, and the "ultimate inquiry" is to determine where trial of the case will "best serve the convenience of the parties and the ends of justice."

The Gilbert decision clearly gave the federal courts and the state courts broad discretion in choosing the form that the doctrine of forum non conveniens would take in each jurisdiction. A federal district court or a state may simply have no interest in trying actions that have a minimal relationship to the federal district court or to the state. Note McGee v. International Life Insurance Co. (355 U.S. 220, 1957), in which the court accorded great importance to a state's "manifest interest in providing effective means of redress for its residents." But again the plaintiff's choice of forum rarely should be disturbed "unless the balance is strongly in favor of the defendant." And one factor must exist before a court can dismiss a case, i.e., grant the motion for dismissal based on forum non conveniens, and that factor is the availability of an alternative forum in which the plaintiff is amenable to process. Indeed, the availability and adequacy of the alternative forum is of paramount importance, as delineated at length in §6.3 hereinafter.

It is well to observe that the "interests analysis" described by the U.S. Supreme Court in the Gilbert case (supra) has resulted in a predominance of dismissals over "retentions," as illustrated by Harrison v. Wyeth Laboratories (510 F. Supp. 1, E. D. P. A., 1980), holding that the United Kingdom had the

paramount interest in regulating the distribution and labeling of pharmaceuticals in the United Kingdom; Mitchell v. General Motors Corp. (439 F. Supp. 24, N. D. Ohio, 1977), stating that Canada had the greatest interest in hearing the claim brought by a Canadian resident against a U.S. manufacturer of a defective automobile seat; and Noto v. Cia Secula di Armanento (310 F. Supp. 639, S. D. N. Y. 1970), declaring that New York and the federal courts had no interest in the dispute between Dutch and Italian parties that arose in an Iranian port. In 1983 the New York court in Islamic Republic of Iran v. Pahlavi (464 NYS.2d, 487) simply stated that New York had no interest in adjudicating the dispute between the people of Iran and the former Shah.

Subsequent to the U.S. Supreme Court's 1947 decisions in the Gilbert and Koster cases (supra), the court distinguished these cases from the situation in which a U.S. plaintiff could be relegated to a foreign court. In Swift & Co. Packers v. Compania Colombiana del Caribe (339 U.S. 684, 1950), an admiralty suit by a U.S. corporation against a foreign corporation, the trial court had dismissed the action on forum non conveniens grounds, and the highest court termed such conduct to be an abuse of discretion because a U.S. plaintiff should not be deprived of the opportunity to seek justice in his own courts. Plaintiff's choice of forum carried much weight when the plaintiff was a U.S. citizen or resident. Five years later in Burt v. Isthmus Development Co. (218 F.2d 353, 5th Cir., 1955; cert. den. 349 U.S. 922, 1955) the Fifth U.S. Court of Appeals heeded the counsel and reversed the dismissal on forum non conveniens grounds, 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." Furthermore, 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." Here Mexican law would govern the cause of action, and all defendants' witnesses were residents of Mexico; but the court determined that U.S. courts were the proper forum. The Second U.S. Court of Appeals in Olympic Corp. v. Societe Generale (462 F.2d 376, 2nd Cir., 1972) summarized:

> 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.

But the Ninth U.S. Court of Appeals in Mizokami Brothers of Arizona, Inc. v. Baychem Corp. (556 F.2d 975, 8th Cir., 1977; cert. den. 434 U.S. 1035, 1978) concluded that U.S. citizenship alone was not sufficient ground for opposition to a motion to dismiss for forum non conveniens:

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.

This trend favoring dismissal based upon forum non conveniens was given a great boost by the U.S. Supreme Court in its 1981 landmark decision in Piper Aircraft Co. v. Reyno (445 U.S. 235).

The Reyno case involved an airplane crash in Scotland; the plaintiff was the personal representive of a Scottish resident, and the defendants were the U.S. corporations that had manufactured the aircraft and the propeller and the Scottish airline that owned the aircraft. Suit was brought in the federal district court in Pennsylvania, the situs of the aircraft manufacturer. In upholding dismissal upon forum non conveniens grounds, the court unfortunately went too far with its xenophobia by asserting that a foreign plaintiff's choice of forum away from his or her home is entitled to much less weight by the court than a U.S. plaintiff's choice of forum. The Reyno case has since then been interpreted as a means of excluding foreign plaintiffs from suing U.S. defendants in U.S. forums (see 6 Fordham International Law Journal 577, 1983). The highest U.S. court spelled it out:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

It is well to note that there were no eyewitnesses to the plane crash, but subsequent investigation by Scottish authorities indicated that pilot error and improper maintenance were the probable causes of the crash. These resolved facts were said to justify the hearing in Scotland, although the Scottish airline and the pilot were not named as defendants in the U.S. lawsuit. (A separate action against the pilot and the Scottish airline had been commenced in Scotland.) The initial suit had been brought in a California state court by the secretary of the plaintiffs' counsel as representative of the victims of the crash, all victims being Scottish. The case was immediately removed to the federal court in California, and then transferred to the federal district court in Pennsylvania pursuant to 28 U. S. C. 1404 (a) because the Pennsylvania manufacturer of the propeller was not subject to personal jurisdiction in California. The trial court, whose determination was upheld by the U.S. Supreme Court, had contended that the plaintiffs' choice of forum was not entitled to the normal degree of deference because of the flagrant ''forum-shopping'' by ''forcing citizens seek-