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SYMPOSIUM EDITION: *FORUM NON
CONVENIENS*: DEVELOPMENT AND ISSUES
OVER THE PAST SEVEN YEARS

ARTICLES

***FORUM NON CONVENIENS* AND THE
FOREIGN FORUM: A
DEFENSE PERSPECTIVE**

C. RYAN REETZ
PEDRO J. MARTINEZ-FRAGA

Legal realists have long suggested that there is a divergence between the formal legal standards to be applied by a court and the factors that actually persuade judges to rule for one side or the other.¹ Many practicing trial lawyers treat this proposition as a fundamental postulate.² Under this view of the law, counsel must constantly communicate with the court on two separate levels: making arguments that use the terminology of the applicable legal standards while simultaneously informing the court of the facts and circumstances that counsel believe will actually be persuasive.

The most obvious example of this divergence between theory

1. See, e.g., Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268-69, 275-77 (1997) (discussing “core claim” of the legal realists); Karl N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 584-87, 595-96 (1940); KARL N. LLEWELLYN, *THE BRAMBLE BUSH* at 68-71 (Colum. Univ.) (1930).

2. Cf., e.g., THOMAS A. MAUET, *BENCH TRIALS*, *Litigation* 13, 15, 18 (Summer 2002) (“judges try to achieve justice and can often find ways to get around technical legal requirements to achieve what they feel is a just result”); Victor E. Schwartz & Leah Lorber, *A Letter to the Nation’s Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 249-50, 256-67 (2000) (arguing that “the goal of efficiency has led some judges to trespass on the fuel of law and upon fundamental legal principles” in asbestos cases); Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 AM. J. TRIAL. ADVOC. 571, 584 (1999) (stressing need for equity-based arguments); Thomas C. Grey, *Hear The Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990) (asserting that “pragmatism is the implicit working theory of most good lawyers”).

and practice occurs when a legal doctrine is formulated or applied in a manner that strikes the judge as fundamentally unfair. However, there is also a real likelihood of divergence when dealing with issues for which the legally applicable standards require the courts to balance competing factors, or otherwise to exercise discretion. The open-ended nature of such standards and concomitant freedom of judicial decision-making increases the likelihood that judges may, consciously or subconsciously, base their decisions on matters that are not strictly within the scope of the applicable standard.³ In such cases, the successful advocate must anticipate the considerations that are likely to influence the court's decision, construct an argument that addresses the judge's concern with those matters, and do so while at least paying lip-service to the standards that formally govern the issue.

The doctrine of *forum non conveniens* in U.S. courts illustrates the legal realist's concerns. In applying the doctrine, the courts are asked to make subjective determinations of how much, if any, "deference" to give to a plaintiff's choice of forum, and to engage in "balancing" an only partially-articulated array of so-called "public and private interest factors."⁴ The extreme generality of these concepts and the broad discretion conferred upon trial judges by the appellate courts leave judges with little alternative but to decide what seems "fair" under the circumstances. In cases where dismissal is sought in favor of an unfamiliar foreign forum, trial judges may be further tempted to depart from the analytic framework of the doctrine due to concerns that a hearing in a for-

3. As the seventeenth-century jurist John Selden argued, decisions based on equitable principles are inherently non-uniform and difficult to predict:

Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for measure we call a "foot" a Chancellor's foot; what an uncertain measure this would be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience.

JOHN SELDEN, *TABLE TALK* (Richard Milward ed., A. Constable & Co. 1689), quoted in J. BARTLETT, *FAMILIAR QUOTATIONS* (10th ed., Little, Brown and Company 1919).

4. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-57 (1981). As the U.S. Supreme Court has noted, "[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, . . . make uniformity and predictability of outcome almost impossible." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). Similarly, in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), the Supreme Court acknowledged that "[t]he combination and weight of factors requisite to given results are difficult to forecast or state. . . ."

eign court system might somehow be less fair than one in the United States.

Accordingly, counsel who seek or oppose a dismissal on *forum non conveniens* grounds must be alert to unwritten considerations that may nonetheless be critical to the court's decision. This article examines the practical issues faced by defendants who seek such a dismissal. After providing a brief overview of the doctrine and the context in which courts decide *forum non conveniens* motions, the article focuses on three basic problems that confront the defense: (a) persuading the court of the adequacy of the foreign forum; (b) determining the nature of proof that should be offered in support of the motion; and (c) dispelling the perception that a resident defendant is not inconvenienced by being forced to litigate at home.

I. THE *FORUM NON CONVENIENS* DOCTRINE

A. *Formulation as a Doctrine of Convenience*

The *forum non conveniens* doctrine has both foreign⁵ and domestic⁶ antecedents that predate its adoption by the Supreme Court as a general proposition under U.S. federal law. However, the doctrine became "fully crystallized" as a principle of federal law in *Gulf Oil Corp. v. Gilbert*⁷ and a companion case, *Koster v. Lumbermen's Mutual Casualty Co.*⁸ The doctrine was restated and amplified by the Supreme Court in *Piper Aircraft Co. v. Reyno*,⁹ which specifically considered the application of the doctrine in an international context.¹⁰ Although the lower courts

5. The origin of the doctrine is generally attributed to Scottish law, although there is some controversy on the issue. See *Piper*, 454 U.S. at 248 n. 13 (doctrine "originated in Scotland, and became part of the common law of many States"); *American Dredging Co.*, 510 U.S. at 449 (discussing the attribution and cataloguing cases).

6. See *American Dredging Co.*, 510 U.S. at 449-50; *Gilbert*, 330 U.S. at 504-05 (discussing domestic antecedents).

7. *Gilbert*, 330 U.S. at 501. *Gilbert* concerned the application of the doctrine to dismiss the case in favor of another forum within the United States. The subsequent enactment of 28 U.S.C. § 1404(a), which permits federal district courts to transfer cases (rather than dismissing them) to other federal districts "[f]or the convenience of the parties and witnesses" means that the federal courts now generally give the doctrine "continuing application only in cases where the alternative forum is abroad." *American Dredging Co.*, 510 U.S. at 449 n. 2. In state courts, which lack the ability to "transfer" the case to a court in a different state, the doctrine applies, where available, to alternative fora that are either inside or outside the United States.

8. *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947).

9. *Piper*, 454 U.S. 235.

10. Unlike *Gilbert* and *Koster*, *Piper* involved a plaintiff acting on behalf of foreign

have continued to wrestle with detailed aspects of the doctrine,¹¹ its general parameters remain those articulated by the Supreme Court in *Gilbert*, *Koster*, and *Piper*.

The *Piper* court summarized the doctrine as follows:

. . . a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case. To guide trial court discretion, the [*Gilbert*] Court provided a list of "private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum.¹²

The "private interest factors" include such matters as "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises . . .; and all other practical problems that make trial of a case easy, expeditious and inexpensive", as well as enforceability of judgments and "relative advantages and obstacles to [a] fair trial."¹³ Public interest factors include administrative difficulties faced by congested courts, the burdens of jury service on a populace with no connection to the litigation, problems of conflict of law and of applying foreign law, and the "local interest in having localized controversies decided at home."¹⁴

Moreover, the courts will engage in this balancing analysis only where an adequate alternative forum is shown to exist:

[a]t the outset of any *forum non conveniens* inquiry, the

real parties in interest and the potential application (if the case should be heard in a foreign court) of foreign law. The Court held that a foreign plaintiff's choice of forum was entitled to less deference than that of a resident plaintiff, and that the possibility that a foreign court will apply law less favorable to the plaintiff than the domestic court should not ordinarily be given substantial weight under the doctrine. *Piper*, 454 U.S. at 247.

11. See generally 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (2d ed. 1986 & 2003 supp.); 17 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 111.70 *et seq.* (2003) (discussing development of the doctrine in the federal courts).

12. *Piper*, 454 U.S. at 241.

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

14. *Id.*

court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is “amenable to process” in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.¹⁵

The Supreme Court has made it clear that the touchstone of the doctrine is, as suggested by its name, convenience: the relative convenience to the parties and to the courts of having the case tried in a different forum. The *Gilbert* court explained that “the 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 [the plaintiff’s] own right to pursue his remedy.” Thus, in determining whether the doctrine was properly applied, the court expressly weighed the parties’ competing claims of inconvenience.¹⁶ Similarly, in *Koster*, the court referred to the issue as a “balancing of conveniences,” and noted that “a real showing of convenience by a plaintiff who has sued in his home state will normally outweigh the inconvenience the defendant may have shown.”¹⁷ Finally, in *Piper*, the court referred to *Gilbert*’s holding “that the central focus of the *forum non conveniens* inquiry is convenience,” and again emphasized that “the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient. . . .”¹⁸

B. Application as a Doctrine of Fairness

Although the Supreme Court and various lower courts have articulated standards for the application of the doctrine of *forum non conveniens*, those standards nevertheless leave the trial courts ample room for the exercise of discretion and for the potential weighing of factors not expressly articulated in the standards. As the Supreme Court has cautioned,

[t]he *forum non conveniens* determination is committed to

15. *Piper*, 454 U.S. at 254 n. 22 (citations omitted).

16. *Gilbert*, 330 U.S. at 508-11.

17. *Id.* at 524.

18. *Piper*, 454 U.S. at 249; see also *id.* at 255 n.23 (“As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for defendant of the court, dismissal is proper.”).

the sound discretion of the district court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.¹⁹

Indeed, the various standards to be applied by the courts are sufficiently vague that they provide few substantive guideposts to direct the courts' discretion. For example, although a foreign plaintiff's choice of forum "deserves less deference" than a domestic plaintiff's choice,²⁰ the degree of deference to be awarded in either case is far from clear.²¹ Likewise, the alternative forum may be inadequate if the remedy offered there "is clearly unsatisfactory" – whatever that means.²² Many of the interest factors are themselves vague, such as "all other practical problems that make trial of a case easy, expeditious and inexpensive," "relative advantages and obstacles to fair trial," and the "local interest in having localized controversies decided at home."²³ Perhaps most significant, the courts are given no real guidance as to how to perform the balancing of the various interest factors other than the propositions that "[e]ach case turns on its facts,"²⁴ and that, "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable."²⁵

Because the doctrine leaves considerable room for exercise of judicial discretion, and given the frequently crushing caseload borne by many U.S. courts, cynics might expect that trial judges would invoke the doctrine as frequently as possible as a form of

19. *Id.* at 257.

20. *Id.* at 256.

21. A domestic plaintiff's choice of forum "deserves substantial deference." *Id.* at 242. It "should rarely be disturbed" – "unless the balance is strongly in favor of the defendant." *Gilbert*, 330 U.S. at 508. Nevertheless, it "should not be given dispositive weight." *Piper*, 454 U.S. at 255 n. 23. The lesser amount of deference to which a foreign plaintiff's forum choice is entitled "cannot be done with mathematical precision," but means something more than "no deference." *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1226 n.4 (3d Cir. 1995). In the Third Circuit, the district court resolving such a motion is expected to "provide some reasoned indication of how much deference it is according to the particular foreign plaintiff's decision to sue in the United States." *Id.* (citing *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 179 (3d Cir. 1991)).

22. *Piper*, 454 U.S. at 254 n. 22.

23. *Gilbert*, 330 U.S. at 508-09.

24. *Piper*, 454 U.S. at 249 (quoting *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946)).

25. *Piper*, 454 U.S. at 249-50.

docket management. The *Gilbert* court, however, argued that—at least as of 1947—“experience has not shown a judicial tendency to renounce one’s own jurisdiction so strong as to result in many abuses.”²⁶ In the authors’ experience, this remains generally true today.²⁷ Instead of reflexively dismissing cases, it appears that judges addressing *forum non conveniens* motions, given considerable discretion and faced with unclear standards, are following their own sense of what is fair and equitable under the circumstances.

While it is hardly surprising that judges should be trying to reach decisions that are *fair*, and while the cases developing the *forum non conveniens* doctrine do contain some references to fairness and justice,²⁸ an equity-driven approach to the doctrine differs from its formal articulation as a doctrine of *convenience*. The recognition that judges’ resolution of these motions are more likely to be colored by perceptions of what is fair than by a mechanical application of the law means that advocates must address concerns that are not encompassed by the list of public and private interest factors. In particular, defendants must be prepared to address potential preconceptions and assumptions that are not part of the formal analysis outlined by the courts, and to persuade the trial court, not merely that litigating the case else-

26. *Gilbert*, 330 U.S. at 508 & n.7 (citing Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 889 (1935)).

27. Indeed, it appears that courts may often be reluctant to dismiss even cases that *should* be dismissed under the doctrine when doing so will send the case to an unfamiliar foreign forum. Because a federal court’s order denying dismissal for *forum non conveniens* is not an immediately appealable collateral order, however, *Van Cauwenbergh v. Biard*, 486 U.S. 517, 530 (1988), and because post-judgment reversals of such rulings are extremely unlikely, see Christina Melady Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715, 715, 727-29 (1991), federal appellate decisions do not provide a helpful tool for empirical verification. However, in state court systems (such as Florida’s) that permit interlocutory appeal of such decisions, there are numerous appellate decisions that reverse trial courts that have declined to grant motions to dismiss based on *forum non conveniens*. See, e.g., *Mursia Investments Corp. v. Industria Cartonera Dominicana*, 847 So.2d 1064, 1065 (Fla. 3d DCA 2003); *Cruise Ships Catering & Services International, N.V. v. Tananta*, 823 So.2d 258, 259 (Fla. 3d DCA 2002); *Resorts Int’l, Inc. v. Spinola*, 705 So.2d 629, 630 (Fla. 3d DCA 1998); *Ciba Geigy, Ltd. v. The Fish Peddler, Inc.*, 691 So.2d 1111, 1113 (Fla. 4th DCA 1997); *Neuter, Ltd. v. Citibank, N.A.*, 657 N.Y.S.2d 663 (1997); *World Point Trading Pte, Ltd. v. Credito Italiano*, 649 N.Y.S. 2d 689, 694 (1996). The fact that trial courts often retain cases even under circumstances in which doing so is found to exceed the trial courts’ broad discretion suggests that the trial courts are not motivated primarily by docket management in deciding whether to grant *forum non conveniens* motions.

28. E.g., *Koster*, 330 U.S. at 527 (“[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.”) (emphasis added).

where would be much more *convenient*, but that it would also be more *fair*.

II. PRESUMPTIONS AND PREJUDICES CONCERNING ADEQUACY

Perhaps the most challenging preconception faced by a defendant seeking dismissal in favor of a foreign forum is the vague notion that a hearing in an unknown foreign judicial system will somehow be less fair than a hearing in the United States. Although a defendant's burden of demonstrating adequacy of the alternative forum is theoretically a minimal one, in practice, the defendant must be prepared to persuade the court that the proceedings in that forum will, in fact, be fair.

A. *The Adequate Alternative Forum Requirement*

As a formal matter, the requirement of an alternative forum is ordinarily "satisfied when the defendant is 'amenable to process' in the other jurisdiction."²⁹ Such a forum will be found inadequate only "[i]n rare circumstances," where "the remedy offered by the other forum is clearly unsatisfactory. . . ."³⁰ The courts have generally interpreted the "clearly unsatisfactory" standard to mean that "a foreign forum will be deemed adequate unless it offers no practical remedy for the plaintiff's complained of wrong."³¹

In general, U.S. courts have asserted great reluctance to expressly find that the courts of another sovereign are inadequate forums.³² This reluctance is based, at least in part, on considerations of comity and respect for other nations' sovereignty.³³ Thus,

29. *Piper*, 454 U.S. at 254 n. 22.

30. *Id.*

31. *Lueck v. Sunstrand*, 236 F.3d 1137, 1144 (9th Cir. 2001).

32. *Blanco v. Banco Indus. de Venezuela*, 997 F.2d 974, 982 (2d Cir. 1993) ("we have repeatedly emphasized that 'it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.'") (citation omitted); *Gonzales v. P.T. Pelangi Niagra Mitra Int'l*, 196 F. Supp. 2d 482, 488-89 (S.D. Tex. 2002) ("[T]he Court refuses to sit in judgment upon the integrity of the entire Indonesian judiciary. Making a generalized pronouncement condemning the Indonesian court system as 'inadequate' is not the right nor the duty of this Court."); *Banco Latino v. Gomez-Lopez*, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998) (quoting *Blanco*).

33. *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001) ("Among its central ends, the *forum non conveniens* doctrine serves precisely to avert. . . unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations. . . . Not only considerations of the efficiency of our own judicial system but principles of comity and the self-fulfilling consequences of a pronouncement of deficiency in the quality of

despite determined attacks by plaintiffs, courts have typically held that differences between U.S. procedural and substantive law and that of the foreign forum do not justify finding the latter forum to be inadequate. For example, U.S. courts have rejected adequacy attacks based upon a foreign court's substantive laws being less favorable,³⁴ substantial limitations on damages in the foreign jurisdiction,³⁵ unavailability of treble damages or particular causes of action,³⁶ non-recognition by the foreign jurisdiction of strict products liability,³⁷ unavailability of contingent-fee counsel in the foreign jurisdiction,³⁸ alleged differences in "judicial culture" that limit the admissibility and use of evidence,³⁹ unavailability of jury trials,⁴⁰ limitations on discovery,⁴¹ requirements that plaintiffs pursue an administrative remedy rather than litigation,⁴² and requirements of a substantial filing fee or bond.⁴³ The Fifth Circuit has summarized the applicable principle: differences in the alternative forum's laws will not render that forum inadequate so long as they "would not deprive the plaintiff of all remedies or result in unfair treatment."⁴⁴

justice in another state, compel judicious restraint from our courts in accepting invitations to engage in such value judgments."); *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415, 423 (S.D.N.Y. 2000) (comity requires court to abstain from finding foreign justice system inadequate unless lack of adequate procedural safeguards is shown to exist); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1076 (S.D.N.Y. 1992) ("Absent . . . a fundamental obstacle to plaintiff's recovery . . . , American courts are not prone to characterizing a sovereign nation's courts as 'clearly unsatisfactory.' International comity plays a part in this context as well.").

34. *Piper*, 454 U.S. at 247-55.

35. *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980).

36. *Capital Currency Exchange, N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609-10 (2d Cir. 1998).

37. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 380-82 (5th Cir. 2002) (noting that "[i]t would be inappropriate – even patronizing – for us to denounce this legitimate policy choice by holding that Mexico provides an inadequate forum for Mexican tort victims.").

38. *Murray v. British Broad. Corp.*, 81 F.3d 287, 292-93 (2d Cir. 1996).

39. *Empresa Lineas Maritimas Argentinas, S.A. v. Shichau-Unterweser, A.G.*, 955 F.2d 368, 372 (5th Cir. 1992).

40. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991).

41. *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1352-53 (1st Cir. 1992); *Banco Latino v. Gomez-Lopez*, 17 F. Supp. 2d 1327, 1331-32 (S.D. Fla. 1998).

42. *Lueck v. Sunstrand Corp.*, 236 F.3d 1137, 1143-45 (9th Cir. 2001).

43. *E.g.*, *Mercier*, 981 F. 2d at 1353 (cost bond representing 15% of plaintiff's demand); *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 127-28 (S.D.N.Y. 1986) (filing fee representing 2% of demand); *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 16 (N.D. Cal. 1982) (1% filing fee).

44. *Empresa Lineas Maritimas Argentinas, S.A. v. Shichau-Unterweser, A.G.*, 955 F.2d 368, 372 (5th Cir. 1992) (citing *Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1165 (5th Cir. 1987)); see *Satz v. McDonnell-Douglas Corp.*, 244 F.3d 1279, 1283

In some extreme circumstances, however, the courts have expressly found the proposed alternative forum to be inadequate. In *Bhatnagar v. Surrendra Overseas Ltd.*,⁴⁵ for example, the court found that a "profound and extreme" delay of up to twenty-five years in resolving disputes rendered the Calcutta (India) High Court an inadequate alternative forum.⁴⁶ Similarly, the court in *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico, S.A.*, held that the defendant had failed to establish the adequacy of the Chilean courts due to "serious questions about the independence of the Chilean judiciary vis-a-vis the military junta currently in power."⁴⁷ Jurisdictions to which plaintiffs could not, for political reasons, safely travel have also been found inadequate.⁴⁸ Finally, courts will also find inadequacy where a foreign jurisdiction simply does not provide *any* remedy for the wrongs alleged by plaintiffs.⁴⁹ The extreme nature of these examples, though, confirms the courts' repeated statements that a foreign forum will be deemed inadequate only when, either on a systematic basis or under the particular circumstances of the case, the foreign forum offers plaintiffs "no practical remedy" whatsoever.⁵⁰

(11th Cir. 2001) (*quoting* *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 829 (2d Cir. 1990)); *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 515 n. 32 (S.D.N.Y. 1982) (alternative forum's procedures will be considered adequate "as long as the alternative forum is not 'wholly devoid of due process.'").

45. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995).

46. *Id.* at 1227-28. The court expressly agreed, however, "with those courts that have found delays of a few years to be of no legal significance in the *forum non conveniens* calculus." *Id.*

47. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982) ("Specifically, the expressed power of the junta to amend or rescind constitutional provisions by decree impugns the continuing independence of the judiciary regardless of the fact that it appears that the constitutional provisions relating to the independence of the judiciary are currently in force.").

48. *Menendez-Rodriguez v. Pan Am. Life Insurance Co.*, 311 F.2d 429, 433 (5th Cir. 1962), *vacated on other grounds*, 376 U.S. 779 (1964) (Cuban refugees could not likely obtain justice in Cuban courts under the Castro regime); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (Iranian courts inadequate where plaintiffs "would probably be shot" if they returned to Iran to prosecute their claim there).

49. *See El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677-79 (D.C. Cir. 1996) (Jordanian courts could not be adequate alternative forum if Jordan barred all claims against defendant); *Ceramic Corp. of Am. v. Inka Maritime Corp.*, 1 F.3d 947, 949-50 (9th Cir. 1993) (Japan was inadequate forum when Japanese court would automatically dismiss plaintiff's claim *sua sponte* in favor of litigation in Germany pursuant to forum selection clause).

50. *See Lueck v. Sunstrand*, 236 F.3d 1137, 1144 (9th Cir. 2001).

B. *Unarticulated Concerns with Adequacy*

Notwithstanding the courts' professed reluctance to find an alternative forum to be inadequate, and the minimal showing that is formally required to establish adequacy, plaintiffs have continued to argue that procedural and substantive differences between U.S. and foreign courts render the latter inadequate.⁵¹ Although these arguments have almost uniformly failed to result in a formal finding of inadequacy, plaintiffs' persistence in raising them suggests that they are nevertheless believed to affect a judge's perception of whether it is fair to require a matter to be litigated abroad.

Numerous factors suggest that many U.S. judges may be predisposed to believe that litigation in the U.S. is generally fairer than litigation abroad. Within the United States, the conduct of litigation is remarkably consistent across different jurisdictions due to the relative uniformity of procedural, evidentiary and substantive law. In contrast, litigation abroad, which is based upon different legal norms, may seem strange and unfamiliar to the average trial judge who is not a scholar of international comparative law. U.S. judges have typically been educated at U.S. law schools, focusing on U.S. state and federal law, in the common-law tradition. They have studied the U.S.'s body of constitutional law in which certain procedural protections that are virtually unique to the U.S. system rise to the level of constitutionally protected rights.⁵² Having chosen to serve as key participants in the U.S. legal system and to administer justice based on its legal principles and procedures, U.S. judges would be remarkable if they did *not* have a deep and abiding belief in the superiority of their own legal system.⁵³

51. See *supra* notes 29-50 and accompanying text.

52. One example of such a protection is the right to trial by jury. As the *Piper* court noted, jury trials are "never provided in civil law jurisdictions" and only rarely in the United Kingdom. 454 U.S. at 252 n. 18, *citing* G. GLOSS, *COMPARATIVE LAW* 12 (1979), J. MERRYMAN, *THE CIVIL LAW TRADITION* 121 (1969), 1 G. KEETON, *THE UNITED KINGDOM: THE DEVELOPMENT OF ITS LAW AND CONSTITUTIONS* 309 (1955); see Bella Louise Morris, *Jury Trials in Personal Injury Claims – Is There a Place for Them?*, *J.P.I. LAW* 2002 at 310 (2002) (discussing limited availability of civil jury trial under English law but noting that "[i]n Scotland, trial by jury in personal injury cases is the norm."); U.K. Supreme Court Act, 1981, § 69 (trial by jury).

53. Similarly, the courts have for the most part been reluctant to look to foreign jurisdictions (apart from occasional references to the English common law) as providing persuasive authority for the resolution of legal disputes under U.S. law. See generally Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28. *YALE J. INT'L L.* 409, 417-23 (2003); Cody Moon, Note, *Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?*, 12 *WASH.*

To the legal formalist, a judicial preconception that litigation in foreign jurisdictions is less likely to be fair should not matter. The courts are reluctant to label foreign tribunals as inadequate, and the liberal standard of adequacy – that the remedy offered by the other forum not be “clearly unsatisfactory”⁵⁴ – should generally preclude judicial preconceptions from leading to a finding of inadequacy. To the legal realist, however, such a judicial preconception is highly relevant because it affects the judge’s perception of what is fair, and thus may find expression not only in an adequacy determination, but also in the court’s interpretation and balancing of *all* of the factors to be considered in resolving the motion. Accordingly, while plaintiffs may seek to take advantage of, and even inflame, judicial preconceptions with arguments that a particular jurisdiction’s protections are inferior to those of the U.S., defendants must seek to overcome such preconceptions with an affirmative showing that the trial abroad will be fair.

C. *Meeting the Hidden Burdens of Demonstrating Adequacy*

Because of the liberal standard for adequacy articulated by *Piper*, defendants seeking a dismissal for *forum non conveniens* typically make only a cursory adequacy showing. This is often done by submitting the affidavit of an “expert” on the foreign jurisdiction’s law to establish (1) that the foreign court has jurisdiction over the defendant and (2) that the foreign forum provides a remedy that is not “clearly unsatisfactory” for the wrongs alleged by the plaintiff.⁵⁵ A defendant seeking to overcome a judicial preconception of unfairness, however, must do much more. Because

U.J.L. & POL’Y 229, 239-42 (2003). Most recently, the U.S. Supreme Court’s citation of foreign legal authorities in several of its decisions has been hailed as a departure from its usual practice – and has drawn sharp dissent. Javier H. Rubenstein, “International Law’s New Importance In The U.S.”, 9/15/2003 NAT’L L.J. 16 (col. 1); Tony H. Mauro, “Court Shows Interest in International Law”, 7/14/2003 N.Y.L.J. 1 (col. 3); see *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (citing to British parliamentary report and to European Court of Human Rights decision); *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) (citing to international conventions as reflecting “the international understanding of the office of affirmative action”); *Atkins v. Virginia*, 536 U.S. 304, 325, 347-48, (2002) (Rehnquist, C.J., dissenting) (“the viewpoints of other countries are simply not relevant” to national consensus on cruel and unusual punishment) (Scalia, J., dissenting) (finding “irrelevant” to Eighth Amendment analysis “the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people”).

54. *Piper*, 454 U.S. at 254 n. 22.

55. See 17 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 111.92 (2003)

much of the trial judge's concern over the fairness of the foreign tribunal may be due to unfamiliarity, the defendant should seek to over-familiarize the judge with the favorable aspects of the foreign judicial system. This can best be accomplished by making an evidentiary showing placing the foreign judicial system in context, generally explaining how it works, and why it is fair.

Such a showing could be in the form of an affidavit by a qualified person that discusses the following matters:

- (a) when and how the foreign country's constitution was adopted;
- (b) how it provides for the country's court system;
- (c) the specific court in which the plaintiff's claim may be heard;
- (d) the general procedure by which claims in that court are resolved, emphasizing the types of procedural protections available to the parties, and describing the specific sources of procedural law that would apply;
- (e) facts that tend to show independence of the judiciary; and
- (f) the degree to which that jurisdiction's judgments are enforced in the courts of other jurisdictions.

In addition to offering such an affidavit, defendants should direct the court to any prior U.S. judicial decisions that have found the foreign jurisdiction to be an adequate alternative forum.⁵⁶ If relatively few such decisions can be located, defendants may also wish to cite to U.S. decisions that have enforced judgments rendered in the alternative jurisdiction.⁵⁷ Defendants should investigate whether the foreign country is a party to a friendship, commerce, and navigation treaty with the United States that guarantees U.S. citizens access to, and equal treatment in, the courts of the foreign jurisdiction⁵⁸ – a guarantee that

(expert affidavits are the "most effective way to establish the adequacy or inadequacy of the alternative foreign forum").

56. See, e.g., *Blanco v. Banco Industrial de Venezuela*, 997 F.2d 974, 981-82 (2d Cir. 1993) (relying, in part, upon prior decisions concluding that Venezuela is adequate alternative forum for purposes of *forum non conveniens*).

57. Both the Uniform Foreign Money-Judgments Recognition Act and the alternative Restatement standard require the enforcing court to consider matters affecting the basic fairness of the foreign proceeding, including whether the foreign "judicial system . . . does not provide impartial tribunals or procedures compatible with due process of law." RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §482(1)(a) (1986); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 ULA 263 § (4)(a)(1).

58. Cf. *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 291 & n.1 (2d Cir. 1996) (identifying treaties).

the trial court should be asked to respect as meaningful.⁵⁹ Indeed, it can also be helpful to mention other litigation-related treaties to which the U.S. and the other country are parties, such as the Hague Evidence Convention,⁶⁰ the Hague Service Convention,⁶¹ or the Inter-American Convention on Letters Rogatory,⁶² because these treaties strongly imply that the United States is to treat the courts of the counterpart states with equal dignity.

Finally, defendants must be prepared to respond to the "parade of horrors" that plaintiffs will invoke as part of an inadequacy argument. Plaintiffs typically seek to emphasize the differences and presumed inferiorities of the foreign legal system in order to inflame the trial judge's concern that a trial there may not be fair. Because such an argument is likely to have effects that reach beyond the adequacy issue, defendants should do more than merely cite to legal authorities holding that the foreign legal system's differences in law and procedure do not render it inadequate. Rather, defendants should show, if possible, that the challenged practices are hardly unique to the jurisdiction in question. For example, defendants should remind the court that a foreign jurisdiction that severely limits discovery and does not conduct jury trials is well within the mainstream of judicial systems outside the U.S.⁶³ Moreover, where the foreign jurisdiction's practice can be defended on policy grounds, the defense should be

59. However, some courts have held that the existence of such a treaty provision (which gives reciprocal privileges to citizens of the foreign country) requires that the foreign plaintiff's choice of a U.S. forum be given the same deference that would be shown to a domestic plaintiff's choice (thus altering the analysis announced by *Piper*). *E.g.*, *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1994).

60. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Nov. 15, 1965, 23 U.S.T. 2555847 U.N.T.S. 231.

61. Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361658 U.N.T.S. 163.

62. Inter-American Convention on Letters Rogatory, Jan. 30, 1975, 1483 U.N.T.S. 288, 14 I.L.M. 339; Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 1438 U.N.T.S. 322, 18 I.L.M. 1238.

63. Defendants may also wish to blunt the force of plaintiffs' "unfairness" arguments by pointing out, where applicable, that plaintiffs are citizens of, or have otherwise voluntarily associated with, the jurisdiction whose laws they now claim to be fundamentally unfair. *See, e.g.*, *Blanco*, 997 F.2d at 981 ("It is at least anomalous for a Venezuelan corporation to contract with a Venezuelan bank for the financing of a housing project in Venezuela, specify in both pertinent contracts that litigation concerning them may be brought in Venezuela, and then argue to an American court that the Venezuelan system of justice is so endemically incompetent, biased, and corrupt as not to provide an adequate forum for the resolution of such disputes"); *Mercier v. Sheraton International, Inc.*, 981 F.2d 1345, 1351 (1st Cir. 1992) ("[I]t is not unfair that a plaintiff's conclusory claims of social injustice in the foreign nation where she deliberately chose to live, work, and transact the business out of which the

made. Countervailing protections in the foreign forum that are unavailable in the U.S. legal system should also be emphasized. By providing the court with a comprehensive understanding of the rationale for procedural differences and the context in which they occur, defendants can often reveal the “parade of horrors” to be a mere sideshow.

III. PRESENTING PERSUASIVE PROOF TO SUPPORT THE MOTION

It is the defendant’s burden to invoke the doctrine and to present sufficient proof to justify its application. As part of meeting that burden, a defendant “must provide enough information to enable the District Court to balance the parties’ interests.”⁶⁴ Moreover, as with any contested factual matter, the parties should submit *proof* of their contentions rather than mere allegations.⁶⁵

The defendant’s burden is complicated by the need to assert the *forum non conveniens* defense at an early stage of the litigation. Because *forum non conveniens* is not one of the defenses enumerated in Rule 12(b) of the Federal Rules of Civil Procedure, many courts do not require that the defense be asserted by pre-answer motion.⁶⁶ Nevertheless, a defendant’s delay in asserting the defense is typically viewed as a factor weighing against dis-

litigation arises should be accorded less than controlling weight in the selection of a judicial forum for the related litigation.”)

64. *Piper*, 454 U.S. at 258. The Supreme Court rejected the suggestion of the Court of Appeals that defendants “must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum.” As the court explained, the same factors that may render the plaintiffs’ chosen forum inconvenient – *e.g.*, lack of compulsory process over or other access to witnesses – render such a requirement unworkable. However, the court noted that the defendants did submit affidavits describing the evidentiary problems they would face in the U.S. courts. *Id.* at 258-59.

65. Although defendants have the initial burden, plaintiffs are also well-advised to make a substantial evidentiary showing. For example, the *Gilbert* court accepted the defendant’s showing of inconvenience and found that the plaintiff had failed to submit any countervailing proof that his chosen forum was more convenient than the alternative forum. *Gilbert*, 330 U.S. at 509-10 (plaintiffs’ “affidavits and argument [were] devoted to controverting claims as to defendant’s inconvenience rather than to showing that the present forum serves any convenience of his own, with one exception” which, upon examination, turned out to be an “unproven premise”). See also *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001) (defendant has “ultimate burden of persuasion” on adequacy issue, “but only where the plaintiff has substantiated his allegations of serious corruption or delay”).

66. *E.g.*, *Jacobs v. Felix Bloch Erbern Verlag*, 160 F. Supp. 2d 722 (S.D.N.Y. 2001); *Snam Progetti S.p.A. v. Lauro Line*, 387 F. Supp. 322 (S.D.N.Y. 1974); *but see Sangdahl v. Litton*, 69 F.R.D. 641 (S.D.N.Y. 1976); *Silver v. Countrywide Realty, Inc.*, 39 F.R.D. 596 (S.D.N.Y. 1966).

missal.⁶⁷ The need to invoke the defense early in the litigation leads many defendants to file their motions without thorough investigation or sufficient evidentiary support. This problem is compounded in the international context, where defense counsel must quickly gather information across borders, often in circumstances involving language difficulties, and must familiarize themselves with, and evaluate the desirability of, the proposed alternative forum.

In addition to the obligatory, and limited, expert's affidavit concerning the adequacy of the foreign forum, defendants often support their *forum non conveniens* motions with a generalized and unsworn listing of the significant witnesses and document custodians in the various jurisdictions, and conclusory representations about the languages in which the documents are written and which country's law will apply to the dispute. If the defendant's assertions are contested by the plaintiff, such a showing is unlikely to be persuasive. Rather, defendants must promptly investigate and offer evidentiary support (e.g., affidavits) establishing each of the factual propositions underlying their motion. This evidentiary support should not merely describe the significant witnesses and document custodians, but should also address, to the extent possible, any other public or private interest factors that would support dismissal, as well as any other factors that suggest that it would be more fair for the case to be heard elsewhere. Helpful facts include the following:

- (a) facts showing the various parties' connections to the alternative forum (similar to a personal jurisdiction / minimum contacts analysis);
- (b) facts showing the presence in the alternative jurisdiction of a party whose joinder is required for complete relief;
- (c) facts showing the lack of a substantial connection between the plaintiff's claim and the U.S. forum in which plaintiff brought the case; and
- (d) the pendency of related litigation in the alternative forum.

Moreover, although the plaintiff determines the case's initial parameters, the defendant may have some control over the boundaries of the universe of relevant private and public interest fac-

67. *Breindel & Ferstendig v. Willis Faber & Dumas Ltd.*, 95 Civ. 7905, 1996 U.S. Dist. LEXIS 10432 at *6 n. 1 (S.D.N.Y. 1996); see also Fla.R.Civ.P. 1.061(g) (imposing 60-day time limit for service of motion in Florida courts).

tors. To the extent that the defendant has one or more counterclaims (especially where the counterclaims are compulsory), the defendant may seek to expand the *forum non conveniens* analysis, and the evidence supporting the motion, to include interest factors relating to the counterclaims.

Significantly, defendants who simply list all of the helpful facts for the court to weigh in some sort of esoteric balancing process lose an additional opportunity to persuade. To the extent possible, the helpful information should be woven together into one or more coherent themes that explain why it would be unfair and inefficient for the court to retain the case.⁶⁸ For example, one possible theme might be that the plaintiff is seeking to obscure the facts and the law by bringing the case in the wrong court. To support this theme, defendants would argue that the plaintiff's chosen court is the "wrong court" because it lacks familiarity with the governing law, is not fluent in the witnesses' language or the language in which the documents and laws are written, is geographically distant from the place where the relevant events occurred, and lacks the power to call the indispensable witnesses. Defendants would also argue that the plaintiff's jury demand is a further effort by the plaintiff to compound the obfuscation, because an American jury will be even *less* prepared to evaluate the case. Such a presentation is most likely to be persuasive if it is formulated based on the realization that the court will be weighing not only the relative convenience of the parties, but the equities of retaining the case.

IV. ADDRESSING THE PERCEIVED LACK OF INCONVENIENCE TO THE RESIDENT DEFENDANT

In addition to judicial preconceptions concerning foreign jurisdictions and problems marshalling evidence to support the motion, defendants face a third practical difficulty when they are sued in their home jurisdictions. In such a case, the court's first inclination, from both a convenience perspective and a fairness perspective, is that it is unlikely to be inconvenient or unfair to require a resident defendant to litigate at home.⁶⁹ After all, the

68. See Richard Pozzuto, et al., *For Juries, Does Truth Require Facts?*, 25 AM. J. TRIAL ADVOC. 135, 136, 138 (2001) (for jurors, facts acquire their meaning and thus their persuasive power from the thematic context in which they are presented).

69. Indeed, until 1996 the Florida state courts held that the state's *forum non conveniens* doctrine was *per se* inapplicable to cases in which any of the defendants were residents of Florida. *Houston v. Caldwell*, 359 So.2d 858 (Fla.1978), *overruled*

court may believe, the defendant presumably has counsel in its home jurisdiction; it is probably relatively comfortable with the laws and legal institutions there; it is not being required to travel to a foreign jurisdiction in order to conduct the litigation; and its decision-makers, key witnesses and documents are more likely to be within the home jurisdiction than elsewhere.

Defendants seeking to overcome this preconception will want to remind the court of two basic principles. First, the doctrine of *forum non conveniens*, which is grounded in considerations of convenience and efficiency, is separate and distinct from the mere jurisdictional inquiry of whether a defendant may fairly be summoned into court in a particular forum. The latter question is a prerequisite of personal jurisdiction,⁷⁰ and the doctrine of *forum non conveniens* assumes that personal jurisdiction has already been found to exist.⁷¹ Second, *forum non conveniens* does not concern convenience to a party generally, but rather in the context of a particular case. Although defendants may prefer to litigate in their home jurisdictions as a general rule, the interplay of the circumstances of a given case with the factors enumerated in *Gilbert* may make it highly inconvenient and unfair to require a particular dispute to be resolved in a defendant's home jurisdiction.

In arguing that a particular case calls for the application of *forum non conveniens*, resident defendants must attempt to focus the court's attention on the underlying *practical* reasons why resolving the given dispute in the defendant's home jurisdiction would be inconvenient and unworkable. The presentation should focus on factors that arguably render the plaintiff's chosen forum somehow "inadequate" or undesirable for resolving the parties' dispute. These factors may include, for example, the inability to compel the testimony of important witnesses;⁷² the complexity of resolving disputed questions of foreign law, particularly from a civil law system or one involving a foreign language;⁷³ and the alternative forum's strong interest in resolving a dispute in which its regulatory interests are implicated.⁷⁴ They may also include

by *Kinney Sys. Inc. v. Cont'l. Ins. Co.*, 674 So.2d 86 (Fla. 1996); see *Murdoch v. A.P. Green Indus., Inc.*, 603 So. 2d 655 (Fla. 3d DCA 1992).

70. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

71. *Gilbert*, 330 U.S. at 506-07.

72. See, e.g., *ACLI Int'l Commodity Services, Inc. v. Banque Populaire Suisse*, 652 F. Supp. 1289 (S.D.N.Y. 1987).

73. See, e.g., *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506 (S.D.N.Y. 1982).

74. See, e.g., *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984).

circumstances unique to the individual parties involved, such as a court order preventing the plaintiff from traveling outside his home country. One persuasive technique is to place all of the helpful factors in context by illustrating for the court how the litigation would proceed differently in the two different jurisdictions, and why the proposed alternative forum would resolve the parties' dispute more efficiently and effectively.⁷⁵

Because of the likelihood that equitable considerations will enter into the trial court's analysis, the resident defendant must take pains to show not only that trial in the alternative forum would be more practical and efficient, but also that it would be fair to the plaintiff to require litigation in the alternative forum. One common argument is that the foreign plaintiff lacks any meaningful connection to the U.S. and has merely sought out the U.S. courts in order to avail itself of their plaintiff-friendly procedures, substantive law and generous damages awards. However, because the trial judge applies those procedures and rules as a matter of course, he or she is unlikely to see any great unfairness in applying them to a foreign plaintiff's claim. Defendants are more likely to be successful in arguing fairness by establishing that the plaintiff has substantial connections to the alternative forum, especially in connection with the matter at issue (much like a personal jurisdiction argument in reverse). This analysis serves as a counterbalance to the court's likely initial perception that a resident defendant can hardly be prejudiced by being forced to litigate at home.

V. CONCLUSION

The realization that judges are likely to seek to do equity in resolving *forum non conveniens* motions presents defendants with new obstacles and new opportunities. Defendants must confront and overcome possible judicial preconceptions that are nowhere acknowledged in the decisions outlining the doctrine. However, the doctrine is sufficiently flexible to permit defendants to appeal

75. As part of this description, defendants should point out that, if the case proceeds in the foreign jurisdiction, the U.S. district courts are authorized by 28 U.S.C. § 1782 (2000) to provide discovery in aid of a foreign litigation. Moreover, because a court dismissing for *forum non conveniens* may impose reasonable conditions upon the dismissal, *see, e.g.*, *Mercier v. Sheraton Int'l. Inc.*, 981 F.2d 1345, 1352 (1st Cir. 1992), defendants may adjust their comparison of how litigation would proceed in the two jurisdictions by incorporating proposed conditions of dismissal into their analysis.

to the court's sense of fairness while arguing the issues outlined by *Gilbert*.

As economic globalization continues and transnational litigation leads to greater familiarity, interaction and procedural coordination with foreign judicial systems, the preconceptions that presently pose unwritten obstacles to defendants invoking the *forum non conveniens* doctrine will likely disappear. Paradoxically, though, the same factors that lead to their disappearance may also lessen the barriers, inefficiencies, and inconveniences that presently create a need for the doctrine.