

RESTORING JUSTICE TO THE DOCTRINE OF FORUM NON CONVENIENS FOR FOREIGN PLAINTIFFS WHO SUE U.S. CORPORATIONS IN THE FEDERAL COURTS

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This comment analyzes the current doctrine of forum non conveniens in federal courts and criticizes its departure from the policies of the original doctrine. This departure has inequitably resulted in dismissals of foreign plaintiffs and limited liability for U.S. corporate defendants. After considering a number of factors, including the need for even-handedness in the administration of justice and the U.S. interest in regulating and deterring the conduct of its corporations, this comment proposes appropriate changes in the doctrine. It is proposed that the definition of an adequate alternative forum be narrowed and the public/private interest factors be more equitably balanced. Finally, this novel framework is applied to the pending Bhopal litigation.

1. Introduction

A forum non conveniens [1] dismissal has become an effective means for U.S. corporations to limit their liability in suits brought by foreign plaintiffs [2]. In recent years U.S. federal courts [3] have consistently dismissed [4] foreign plaintiffs on the basis of forum non conveniens. These dismissals [5] have not only limited the liability of defendant companies, but have also limited the right of foreign plaintiffs to litigate in the U.S. courts [6]. There is currently a pressing need to evaluate the doctrine [7] in light of product liability suits pending in the federal courts [8]. On December 3, 1984, a toxic gas leak at a Union Carbide plant in Bhopal, India left over 2000 dead and many thousands more injured [9]. Bhopal citizens and the Government of India have filed suits in the United States against the Union Carbide Corporation. Before the courts hearing these cases decide the issue of liability, they will have to determine if the United States provides a convenient forum to adjudicate these suits [10].

Federal courts, which have consistently dismissed foreign plaintiffs' claims on the basis of forum non conveniens, have failed to adequately consider the policies underlying this doctrine: "the convenience of the parties and the ends

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of justice” [11]. Instead, these courts have been more concerned with the interests of the courts and of the defendants than of the plaintiffs [12]. As a result, foreign plaintiffs have been unfairly denied the remedies which would have been available to them in the federal courts [13].

This comment argues that the policies underlying forum non conveniens should be restored to the doctrine. Section 2 describes these policies and Section 3 analyzes the failure of the existing doctrine to reflect these policies. Section 4 proposes a reformulation of the forum non inquiry which redefines the meaning of an “adequate alternative forum” and rebalances the equities between the parties in the private/public interest analysis. It then illustrates the above reformulation in the context of the Bhopal litigation. This comment concludes by arguing in favor of wide spread adoption of this reformulation so that foreign plaintiffs will be afforded greater opportunity to litigate in the federal courts.

2. Policies Served by the Forum Non Conveniens Doctrine

The doctrine of forum non conveniens originated in Scottish law [14]. Trial courts in Scotland relied on the doctrine of forum non conveniens if justice would have been best served by trial in another forum [15]. Forum non conveniens was adopted by English courts to prevent them from taking jurisdiction of a case if it would create injustice to the parties [16]. The federal courts in the United States adopted the doctrine in the companion cases of *Koster v. (American) Lumbermens Mutual Casualty Co.* [17] and *Gulf Oil Corp. v. Gilbert* [18]. The policies influencing the Supreme Court to adopt forum non in the federal courts were similar to those guiding the Scottish and English courts [19]. The Court in *Koster* stated that “the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice” [20]. Although the convenience of the court itself was a factor for the court to consider in the forum non inquiry [21], it was not intended to be a significant factor [22]. Thus the important elements of the doctrine as applied in the federal courts were fairness, justice, and convenience between the parties.

The doctrine was intended to be applied with caution [23]. The Court in *Gulf Oil* emphasized that the plaintiff’s choice of forum should rarely be disturbed unless the defendant were greatly inconvenienced [24]. At the same time, the Court protected the defendant by articulating the test for dismissal as follows: “the plaintiff may not, by choice of an inconvenient forum, ‘vex’, ‘harass’, or ‘oppress’ the defendant by inflicting on him expense or trouble not necessary to his own right to pursue his remedy” [25]. This test ensured that undue hardship to either party would be avoided [26].

This traditional view also guarded against forum-shopping [27] by either plaintiffs or defendants [20]. The dangers of an improper application of the

doctrine were twofold: if dismissals were rare, plaintiffs would have virtually unrestrained freedom in their choice of forum [29]; if dismissals were frequent, defendants would be able to force plaintiffs to litigate in forums which limited their recovery [30]. It was also possible that the plaintiff would have no alternative forum available [31]. In *Pain v. United Technologies Corp.*, [32] the court emphasized the importance of not sanctioning forum-shopping by either party [33]. Guided by the policies in *Pain*, a number of cases decided before 1981 avoided forum-shopping by balancing the equities without favoring either party [34].

The basic policies underlying forum non conveniens have been overshadowed by concerns of efficiency and administrative convenience [35]. Since *Piper Aircraft v. Reyno* [36] was decided in 1981, the federal courts have not given deference to a foreign plaintiff's choice of forum [37]. As a result, foreign plaintiffs have been virtually unable to shop for their forums, whereas defendants have been gaining increased "buying power" in the choice of their forums [38].

3. The Existing Forum Non Conveniens Inquiry

3.1. *The Current Doctrine: The Letter and Spirit of Piper Aircraft v. Reyno*

The Supreme Court's opinion in *Piper Aircraft v. Reyno* [39] established the prevailing rules and reasoning for the forum non inquiry as applied to foreign plaintiffs. This decision created a different standard of review for foreign and domestic plaintiffs confronted with a forum non motion [40]. An analysis of the Court's opinion reveals that the Court's primary concern was the convenience of the courts. This analysis also illustrates how the Court responded to this concern by limiting the rights and remedies which foreign plaintiffs would receive in the U.S. federal courts.

The facts of *Piper Aircraft* are integral to an understanding of its holding. Wrongful death actions were brought on behalf of five passengers [41], all Scottish citizens [42], who were killed in an airplane crash in Scotland [43]. The aircraft was manufactured in Pennsylvania and the propellers were manufactured in Ohio [44]. The aircraft was registered in Great Britain and was owned, maintained, and operated in the United Kingdom [45]. The suits were brought against the Pennsylvania aircraft manufacturer and the Ohio propeller manufacturer [46]. The defendants moved to dismiss on the basis of forum non conveniens [47].

The trial court applied the private/public interest analysis required by *Gulf Oil* [48]. The test enunciated in *Gulf Oil* required that a trial court balance the public and private interest factors for and against dismissal of the suit [49].

The private interests to consider include, but are not limited to, the relative ease of access to sources of proof, availability of compulsory process for unwilling witnesses, the cost of obtaining attendance of willing witnesses, and the possibility of gaining a view of the premises (if relevant) [50]. Public interests include, but are not limited to, administrative difficulties of the court, the burden of jury duty, the difficulty of applying foreign law, and the interest in having a case adjudicated in its local forum [51].

The trial court dismissed the suit [52] after weighing the private and public interest factors. The Third Circuit Court of Appeals subsequently reversed the district court's dismissal [53]. The Supreme Court reversed the Third Circuit [54] and embraced the trial court's holding as well as its rationale [55]. Moreover, it upheld the trial court's rationale as a model for subsequent decisions [56].

The Court formulated two rules which would only apply to foreign plaintiffs and would limit their ability to sue in the federal courts. First, the Court held that a foreign plaintiff would not be afforded the same deference to choice of forum as a domestic plaintiff [57]. Secondly, the Court held that a possibility of a change in the substantive law as a result of dismissal should not be given substantial weight in the forum non inquiry [58]. A change in the substantive law would only be a relevant consideration "if the remedy provided by the alternative forum [were] so clearly inadequate or unsatisfactory that it [would be] no remedy at all" [59].

The Court's limitation of foreign plaintiffs' access to the federal courts was motivated, at least in part, by the fear of foreign plaintiffs crowding the already-overcrowded federal court dockets [60]. The Court feared that foreign plaintiffs would bring claims which were unrelated to the forum [61] simply to capitalize on generous damage awards in the United States [62]. The Court voiced its concern of allowing foreign plaintiffs to take advantage of the favorable U.S. Law [63]. The Court's concern for administrative convenience affected the disposition of the plaintiffs in *Piper Aircraft*. The Court concluded that "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" [64]. The Court determined that American manufacturers would not be additionally deterred from producing defective products if the case were tried in the United States [65].

The *Piper Aircraft* opinion not only articulated a new set of rules to apply to foreign plaintiffs in forum non motions, but also reflected a spirit of hostility towards foreign plaintiffs in U.S. courts [66]. This spirit changed the emphasis of the doctrine from justice and fairness between the parties themselves to justice and fairness between the parties and the courts [67]. This spirit was captured by federal courts which subsequently applied the *Piper Aircraft* decision [68].

3.2. Application of the Current Doctrine

When a federal court decides a forum non motion, the court must ask two questions: first, is there an adequate alternative forum where the plaintiffs will be able to bring suit if dismissed from this forum; and secondly, do the private and public interest factors warrant dismissal of this suit [69]? A broad definition of an adequate alternative forum and an emphasis on public interest factors has resulted in the consistent dismissal of foreign plaintiffs from the federal courts [70].

3.2.1. The Definition of an “Adequate Alternative Forum”

An adequate alternative forum exists if there is a forum in which the defendant is amenable to process [71], and if the remedy available is not so inadequate or unsatisfactory as to be equated with no remedy at all [72]. Thus, an adequate alternative forum will be found if it permits the filing of the suit and permits basic justice [73] to be afforded to the plaintiff. The burden is on the plaintiff to show that there is a possibility that an alternative forum would not provide a remedy [74].

This broad standard of adequacy coupled with the plaintiff's burden of proof has prevented dismissal of suits only in rare, egregious cases [75]. For example, in *Day & Zimmerman, Inc. v. Exportadora Salcedo de Elaboradoras de Cacao* [76], the court concluded that Ecuador could not provide an adequate alternative forum because the contract being sued upon was unenforceable in Ecuador [77]. The court in *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.* [78] held that Chile did not provide an adequate alternative forum because of the adverse relationship between the plaintiff and the government [79]. This court found that the plaintiff could not be given a fair trial because it was a state-owned corporation facing trial in a country where the judiciary was unduly influenced by the military junta in power [80]. The courts in these two cases based their decisions on the unique circumstances of the cases, not on the basic inadequacies of the legal systems of Chile and Ecuador [81].

Even if the alternative forum is initially found to be inadequate, it may become adequate through the granting of a “conditional” dismissal to the defendants [82]. In a typical case the suit will be dismissed if the defendant consents to suit and accepts process in the alternative forum [83]. The defendant may also be required to agree to make available any documents or witnesses within the defendant's control which are necessary for fair adjudication of the action [84], to consent to pay judgment(s) against it in the alternative forum [85], or to waive any statute of limitation defense [86]. Conditional dismissals have been granted in many of the forum non cases involving foreign plaintiffs [87]. As a result, defendants have been afforded an

opportunity to minimize their exposure to liability by agreeing to be sued in the foreign jurisdiction [88] which was initially unavailable [89].

The current definition of an adequate alternative forum will rarely allow a court to find a foreign forum inadequate [90]. Moreover, the definition is rendered meaningless when the defendant agrees to a conditional dismissal [91]. The defendants are now able to shop for forums which were initially unavailable to the parties and which may significantly minimize the defendants' liability [92].

3.2.2. *The Public / Private Interest "Balance"*

Although the *Piper Aircraft* decision continues to require district courts to balance the public/private interest factors set forth in *Gulf Oil* [93], the equities between the parties are no longer being truly balanced. By eliminating deference to the foreign plaintiff's choice of forum [94], the balance initially weighs in favor of the defendant [95]. Moreover, the courts' increased emphasis on the public interest factors [96] has decisively tipped the scales in favor of the defendant. The forum non decisions in product liability suits against pharmaceutical manufacturers [97] are representative examples of the courts' increased emphasis on the public interest factors.

Most recently, the Sixth Circuit in *Dowling v. Richardson-Merrell Co.* [98] dismissed British plaintiffs who were seeking damages on behalf of injured infants [99]. These infants had allegedly suffered serious birth defects as a result of their mothers' ingestion of Bendectin, a morning sickness drug [100], which had been purchased and taken in Great Britain [101]. Bendectin was allegedly planned, manufactured and tested in the United States [102]. Despite the parent company's alleged involvement in the creation of the drug, the appeals court refused to allow the plaintiffs to litigate in the U.S. courts [103]. The appeals court based its decision on the findings of the trial court [104] that there were private interest factors which favored both forums, but that, on balance, they favored the British forum [105]. The trial court also found that "the more impressive arguments in favor of dismissal in these cases address the 'public interest' factors which are involved in the *forum non conveniens* inquiry" [106]. The court concluded that the U.S. interest in the case was minimal and that the interest of the United Kingdom was great [107].

Other courts, hearing forum non motions in pharmaceutical product liability cases, have placed a similar emphasis on the public interest factors. For example, in *Harrison v. Wyeth Laboratories* [108] the plaintiffs, citizens of the United Kingdom, had allegedly been injured by taking, oral contraceptives manufactured by a U.S. defendant [109]. The plaintiffs had purchased and taken the contraceptives in the United Kingdom [110]. The court discussed at length the United Kingdom's interest in having the case adjudicated there [111], concluding that "Pennsylvania's interest in the regulation of the conduct of drug manufacturers and the safety of drugs produced and distributed within

its borders does not extend so far as to include such regulation of conduct on drugs produced or distributed in foreign countries” [112].

Although the existing forum non doctrine purports to balance the *Gulf Oil* private/public interest factors, it has only done so mechanically. It has failed to adequately consider the underlying policies of *Gulf Oil* – justice, fairness and convenience between the parties. As a result, foreign plaintiffs are being forced to litigate in a foreign forum where the remedies, if available at all, are inadequate [113]. Reform is necessary to give proper consideration to the interests of the plaintiffs and assure them, as well as the defendants, a just and convenient adjudication.

4. Reformulating the Doctrine

4.1. *Public Policies Supporting a Reassessment of the Doctrine*

A number of compelling public policies warrant a reassessment of the existing forum non conveniens doctrine. These policies are derived from the keystones of forum non – justice and fairness [114].

Most importantly, the decisions of the courts should reflect even-handedness in their treatment of foreign and domestic plaintiffs [115]. Treating them differently is not simply unfair, but leads to strained relations between the U.S. and foreign countries [116]. Differential treatment of these classes of litigants should be based on the balancing of the relative conveniences between plaintiffs and defendants. U.S. multinational [117] companies are not necessarily inconvenienced by litigation in which the injury occurred in another country [118]. It is questionable whether large, resourceful multinational companies can truly be inconvenienced in this age of quick, efficient transportation and communication systems [119]. Therefore, in cases involving foreign plaintiffs, the balance of equities should not initially favor one party over the other. It is particularly egregious for a defendant company, that has allegedly injured foreign and domestic plaintiffs in the same manner, to be accountable to the domestic plaintiffs but not to the foreign plaintiffs [120]. Defendants should not be permitted to escape or minimize their liability to foreign plaintiffs by forcing them to sue in a foreign court, while they are being required to litigate or settle their claims with domestic plaintiffs having identical injuries [121].

Second, the doctrine requires reassessment because of the U.S. interest in regulating business conduct of U.S. corporations in other countries [122]. The U.S. has a particular interest in regulating the conduct of multinational corporations whose parent companies reside in the United States. The U.S. interest in controlling a corporation’s activity abroad is similar to the U.S. interest in controlling the corporation domestically because the activities of a

parent corporation often influence the activities of its foreign subsidiary [123]. Neither the citizenship of the injured nor the place of injury should dilute the public interest in regulating the conduct of a U.S. corporation, domestically or through its foreign subsidiary [124].

Third, the U.S. has an interest in deterring injurious conduct of domestic parent corporations [125]. Generally, the courts have attempted to deter tortious conduct by imposing greater liability on corporations, including strict liability [126] and punitive damages [127]. Therefore, deterrence would be most effective if the defendants were sued in a jurisdiction where their liability were greater. Defendants should not be permitted to use the doctrine of forum non conveniens to limit their liability so that they may continue their injurious activity undeterred.

4.2. Public Policies Opposing a Reassessment of the Doctrine

A number of arguments have been articulated which express opposition to any change in the existing forum non doctrine. It is feared that if foreign plaintiffs are given the same deference as domestic plaintiffs, unfairness to the defendants, the U.S. legal system and the foreign jurisdiction will be the inevitable results. Although these concerns are legitimate, the compelling public policies which favor reassessment of the doctrine outweigh them.

The first concern is that any change in the existing doctrine would encourage forum-shopping [128]. Forum-shopping would be limited, however, by other measures provided in the federal system of civil procedure. First, a foreign plaintiff may only file suit in a federal court if authorized by a federal statute [129] or if the foreign plaintiff sues a citizen of a state in the United States [130]. This requirement ensures that the U.S. has an interest in adjudicating the suit, either because it arises out of its laws or involves one of its citizens. Secondly, a plaintiff may only sue a defendant in a particular forum if the defendant has "minimum contacts" with that forum [131]. This requirement protects a defendant against inconvenient litigation in a particular forum [132]. Thirdly, the suit must be brought in the proper venue. In the federal courts, in a case based on diversity of citizenship, the only proper venue is one in which "all plaintiffs or all defendants reside, or in which the claim arose" [134]. Thus, the plaintiff's choice of forum is significantly restricted even before the inquiry of forum non begins [135]. Considering these existing limitations on forum-shopping, the cautious and limited use of forum non dismissals will not significantly encourage this practice.

There is also the concern that retaining suits by foreign plaintiffs in the U.S. will usurp the foreign country's interest in redressing the injuries of its own citizens and regulating the conduct of its own corporations [136]. In product liability suits which involve a foreign subsidiary of a U.S. corporation, the regulatory interest of the foreign forum would be less than in suits where

the litigants are all citizens of the foreign forum. Moreover, the foreign forum's interest in adjudicating the suit competes with the interest of the United States in regulating and deterring the conduct of its own corporations [137]. In light of these competing interests, the plaintiffs should be permitted to exercise a choice of forum. Then, if the foreign plaintiffs bring their suit to the United States, a proper forum non inquiry will determine if the interest of the foreign forum in adjudicating the suit is sufficiently strong as to warrant dismissal of the suit.

Defendant companies, particularly those that manufacture drugs and health-related devices which involve inherent risks of injury, are concerned with the deterrent effect the denial of their forum non motions will have on research and development of new products. Allowing foreign plaintiffs to sue in the U.S. may, to some degree, slow companies' development and introduction of new products. Sound judgment, however, dictates that if a product may cause injury a company should not be permitted to continue to develop and sell it undeterred. Companies' avoidance of public responsibility through a forum non dismissal is particularly egregious when similar claims against them by domestic plaintiffs are not dismissed [138].

Finally, a reassessment will not necessarily mean, as it is feared, that foreign plaintiffs will automatically be permitted to remain in U.S. courts. A balance of equities is the goal to be achieved.

4.3. A Proposal for Reform: Giving Meaning to the Definition of Adequate Alternative Forum and Restoring an Equitable Balance of Private / Public Interest Factors

4.3.1. The Adequate Alternative Forum Redefined

According to the current definition, a forum will be found inadequate only if the defendant is not amenable to process or the plaintiff is unable to obtain basic justice [139]. Moreover, this definition becomes meaningless when the defendant agrees to a conditional dismissal [140]. This definition of adequacy should be redefined. The reform proposed narrows the definition of adequacy and thus permits foreign plaintiffs to remain in the U.S. federal courts more frequently. The relevant inquiry as to whether a foreign forum is adequate should be: Is there a possibility that the alternative forum will be unavailable to the plaintiff for any reason [141]? This inquiry encompasses any circumstance in which the plaintiff will be unable to sue or maintain suit in another jurisdiction [142]. It is important to emphasize the distinction between "maintenance" of the action and ability to sue at all. If the plaintiff has enough money to sue initially but not to maintain the action, the plaintiff will likely be forced to settle the claim early or drop the suit altogether, and the plaintiff's rights may not be vindicated [143]. Moreover, the action will not have the intended deterrent effect on the defendant.

A foreign plaintiff should not be dismissed if maintenance of suit in another forum would be financially impossible. For example, the plaintiff in *Fiorenza v. U.S. Steel International Ltd.* [144] was a citizen of Italy and resident of the Bahamas [145]. He sued a New York corporation for injuries allegedly sustained because of the defendant's negligence [146]. The plaintiff alleged that he would be unable to bring this action in the Bahamas because it did not have a contingent fee system [147], which would therefore require him to prepay a retainer and advance costs to a Bahamian attorney [148]. He would be unable to pay these legal fees because he had no source of income [149]. The court was convinced of the possible unavailability of the alternative forum and refused to dismiss the case [150].

In *Odita v. Elder Dempster Lines, Ltd.* [151] a federal court refused to dismiss the claim of a Nigerian citizen injured in England by a British corporation [152]. The plaintiff sued in New York because he had been hospitalized there [153]. Notwithstanding the inconvenience of litigating the suit in New York and the defendant's consent to submit to the jurisdiction of Great Britain, the court, on reargument, refused to dismiss the plaintiff's claim [154]. The court found that it was extremely doubtful that the plaintiff would be granted permission to enter Great Britain to prosecute his lawsuit [155]. The court also found that, even if he were admitted into Great Britain, the plaintiff would be financially unable to support himself during the period before the trial [156] and would be unable to obtain adequate legal representation there because of the lack of a contingent fee system [157]. The court in *Odita* recognized the importance of an expanded definition of inadequacy [158]. The equitable approach reflected in *Fiorenza* and *Odita* should be re-adopted by the federal courts.

Although the proposed definition of an adequate alternative forum does not include a forum which is unavailable to a plaintiff for any reason, a negative change in the substantive law should not constitute unavailability. California's statutory doctrine of *forum non conveniens* [159] adopts this narrow definition of adequacy. California's definition of adequacy is important because it is much narrower than the definition applied by the federal courts [160] and because it is frequently noted by commentators in this area [161].

California's definition of an adequate alternative forum is shaped by a policy of doing substantial justice to all parties [162]. This policy has been reflected in the California courts' rulings on the requirements of an adequate alternative forum [163], particularly in product liability suits brought by foreign plaintiffs. The leading case in this area is *Holmes v. Syntex Laboratories, Inc.* [164]. In this case, the California Court of Appeals found that Great Britain did not provide an adequate alternative forum because the plaintiffs would suffer "substantial disadvantage" if they were forced to litigate there [165]. The court held that because of Great Britain's more stringent conflict-of-laws rule [166] and lack of causes of action for strict liability [167], Great

Britain did not provide a suitable alternative forum [168].

The court's holding reflects a meaningful consideration of the equities in favor of the plaintiffs. The *Holmes* court, however, placed too much weight on the differences in the substantive law of Great Britain. *Piper Aircraft* correctly concluded that a change in substantive law should not be the determinative factor in the forum non inquiry [169]. Under the *Holmes* definition of an adequate alternative forum, any significant change of the substantive law in another jurisdiction negatively affecting plaintiffs would render it unsuitable. It would then be difficult to find any other foreign jurisdiction which would be adequate [170], thus allowing virtually all foreign plaintiffs to maintain suits in the United States. This result would not further the policies of forum non conveniens, because foreign plaintiffs would be permitted to litigate in the federal courts regardless of inconvenience to the defendant. The inquiry articulated above – Is there a possibility that the alternative forum will be unavailable for any reason? – adequately encompasses the equities of both plaintiff and defendant.

4.3.2. *Restoring an Equitable Balance of Private and Public Interest Factors*

Not only should an adequate alternative forum be redefined, but the balance of the private/public interest factors [171] should be reassessed. The balance of private/public interest factors should be guided by the forum non policies of justice and convenience to all of the parties [172]. The ultimate inquiry should be whether it is easier and fairer to try the case in an alternative forum [173]. Factors which should guide this ultimate inquiry include deference to the plaintiff, the characteristics of the parties, the characteristics of the lawsuit, and the burden on the U.S. courts.

Deference to the foreign plaintiff's choice of forum should be reinstated. There is no reason why the plaintiff's right to choose a forum should be proscribed if the U.S. forum is proper. Lack of deference to a foreign plaintiff [174] skews the balance of equities at the outset in favor of the defendant and denies the foreign plaintiff a right to initially choose a forum. Any inconvenience to the parties caused by the plaintiff's citizenship should be relevant only as it actually affects the balance of private/public interest factors [175]. The elimination of the presumption would best serve the underlying purposes of forum non conveniens.

The forum non inquiry should include a careful evaluation of the characteristics of the plaintiff and defendant. The size and financial resources of the defendant corporation are important considerations. A large multinational corporation would not be significantly inconvenienced by defending a suit in the United States, even if witnesses and other sources of proof were located in another jurisdiction [176]. The financial resources of the plaintiff are also relevant [177]; they may affect the plaintiff's ability to obtain necessary sources of proof in the foreign jurisdiction. The plaintiff or defendant may

have certain characteristics which would make it a substantial hardship to litigate in a particular forum [178]. Therefore, the characteristics of the particular parties affect the convenience and fairness of litigating in a particular jurisdiction.

The characteristics of the lawsuit itself significantly affect the balance of private/public interest factors. The characteristics may include the claim alleged, the nature of the product, and the number of plaintiffs. The type of claim determines the burden of obtaining sources of proof [179] and the interest of the forums in adjudicating the suit [180]. For example, if the plaintiff alleges liability resulting from the production of the drug, and the drug was produced in the U.S., the major sources of proof will most likely be located in the U.S. In addition, the United States would have an interest in regulating the conduct of the U.S. corporation and in deterring the future behavior of the corporation [181]. These factors would favor retaining suit in the United States. If, however, the drug were produced exclusively in the foreign jurisdiction, the public and private interests would favor dismissal [182].

The nature of the product affects the balance of public/private interest factors. For example, a propeller is manufactured in one location. On the other hand, a drug is likely to be produced and tested in one location, while manufactured and marketed in another. The number of plaintiffs claiming injury also affects the interest in retaining suit in the United States. The greater the number of plaintiffs in one suit, the more significant the burden on the U.S. court may be, but if dismissed, so will the hardship experienced by the plaintiffs be greater [183].

The degree to which a foreign subsidiary is implicated in the litigation influences the convenience and fairness of bringing suit against the parent company in a U.S. court [184]. The court should consider the possible liability and the independence of the subsidiary [185]. A more independent subsidiary might make it less likely that information relevant to the suit will be found in the U.S. or that the U.S. will have an interest in regulating the conduct of the parent corporation [186].

The burden of the lawsuit on the court is also a relevant consideration in the balance of public and private interests. The burden on the court should be evaluated primarily in relation to the burden on the parties [187]. A court should not simply determine whether it would be burdened, but whether it would be burdened unfairly. The court's burden should be evaluated in relation to the characteristics of the parties and the nature of the lawsuit. Moreover, the burden should be evaluated in relation to the degree of the foreign forum's interest in adjudicating the lawsuit. Factors affecting the foreign forum's interest include the independence of the foreign subsidiary and the extent to which the foreign forum regulates the product in question [188].

This proposed reassessment of the private/public interest factors should assist courts in evaluating forum non motions as equitably as possible. It is no longer sufficient for a court to determine that the forum in which the primary sources of evidence are located is the most convenient forum. A court should adopt this complex balancing process when determining whether one forum is more convenient than another.

4.3.3. Application of this Reformulation to the Bhopal Litigation

A preliminary analysis of the adequacy of the Indian forum and of the private/public interest factors in the Bhopal litigation favor retention of the suits in the U.S. courts [189]. The inadequacy of the Indian forum poses an initial barrier to dismissal on the basis of forum non conveniens. India may be an unavailable forum for a number of reasons: the lack of contingency fees [190], the requirement of a filing fee [191], and the lengthy delays in the Indian trial system [192]. Contingency fees are considered unethical and thus prohibited under Indian law [193]. Without contingency fees or an adequate legal aid system [194], financially limited plaintiffs may be prevented from maintaining their suits in the Indian forum [195]. The costs of a lawsuit in India may become prohibitive because Indian plaintiffs are required to pay an ad valorem filing fee when the suit is filed [196].

Finally, the long delays in the Indian trial system may make this foreign forum practically unavailable for many plaintiffs [197]. Although long delays do not foreclose per se the availability of the Indian forum, the overburdened status of the courts indicates the possibility that the Indian legal system is unable to accommodate the number and complexity of the suits brought by the Bhopal plaintiffs.

To determine whether the Indian forum is adequate, the court should assess the financial ability of the plaintiffs to maintain a suit in the foreign jurisdiction. To this end, the court should estimate the approximate cost of the suit and determine whether the plaintiffs can afford to sue in India. The court should also determine if the legal aid system and a waiver of filing fees would be sufficient to support the maintenance of the plaintiffs' suits [198]. Finally, the court should assess the ability of the Indian legal system to adjudicate these suits [199]. This assessment will ensure the preservation of an adequate alternative forum.

The private interest factors in these suits weigh both in favor of dismissal and retention. On balance, however, the private interest factors mandate against dismissal. First, the characteristics of the plaintiff and defendant contribute to the inconvenience of adjudicating these suits in India. Union Carbide as a large resourceful multinational corporation more likely will not be greatly inconvenienced by having to obtain evidence in the foreign jurisdiction. On the other hand, the limited resources of the plaintiff class [200] make it more burdensome for them to obtain proof in the U.S. and to re-file their

suits in another forum. Moreover, even if the financial burdens of the Indian legal system do not preclude litigation in India, litigation will be more difficult.

Second, the characteristics of this unique lawsuit show that the claim would be more conveniently adjudicated in the United States. The plaintiffs' claim is against the parent Union Carbide [201]. The claim alleges that Union Carbide designed and controlled the Bhopal plant, allowed dangerous conditions to persist, and did not properly inform anyone in India about the medical effects and treatment of methyl isocyanate poisoning [202]. Therefore, much of the evidence to substantiate or refute this claim will be located in the corporate headquarters in Connecticut [203] or in the West Virginia Union Carbide plant, which resembles the Bhopal plant [204].

Another characteristic of the lawsuit, the nature of the product or defective device at issue, favors suit in the U.S. The defective device appears to be the Bhopal plant itself which permitted the leakage of the toxic gas [205]. Although the plant was physically located in India and the labor, materials, machinery and staff in the plant were also Indian [206], the plant was allegedly designed and engineered on the basis of general criteria supplied by Union Carbide in the U.S. [207] and that, among other things, this faulty design caused the leak [208]. Because the plant was "created" in the U.S., relevant information will be located in the U.S.

The large number of plaintiffs may affect the convenience of adjudicating this suit in the United States. The large number of potential plaintiffs may create a greater burden on the U.S. courts, but may impose a significantly greater hardship on the plaintiffs if dismissed.

The final important aspect of the cause of action, the alleged involvement of the parent and subsidiary, favors a U.S. forum. The parent's contribution to liability is as yet unresolved, but from existing data it appears that the involvement of the parent was substantial. Union Carbide owned 50.9% of Union Carbide-India's stock [209]. From this controlling interest it can be inferred that Union Carbide was, or should have been, involved in the major decisions of the subsidiary [210]. In addition, two members of Union Carbide sat on the subsidiary's Board of Directors and thus were in a position to make major decisions for the subsidiary [211]. Important safety decisions which affected the subsidiary were reportedly made or reviewed, at Union Carbide's corporate headquarters [212]. In sum, Union Carbide was involved in the activities of the Bhopal subsidiary; this involvement will be an important issue to resolve in the litigation, and therefore the private interests will be served by adjudicating this case in the U.S. courts.

An assessment of the public interest factors also favors the U.S. courts. The U.S. has an interest in adjudicating a suit which directly involves the activities of one of its major corporations. It also has an interest in deterring actions of one of its citizens which may have caused the greatest industrial disaster in

history [213] and any other action that may potentially have this deleterious effect. Although India does have an interest in regulating its chemical industry, this interest is counterbalanced by the Government of India's choice to bring its cause of action against Union Carbide in the U.S. rather than in India [214]. Moreover, it would be in the interest of cooperative international relations to permit suit in the United States.

The U.S. courts will undoubtedly be burdened by these suits; however, they will not be burdened unfairly. Their burden is outweighed by the potential deterrent effects and the plaintiffs' ability to fairly vindicate their rights.

Ultimately, the court that decides this case must determine whether it would be easier or more convenient for the plaintiffs to try this suit in India. This comment theorizes that in such a case a forum non inquiry guided by the reforms and policies outlined in this comment will result in more federal courts finding that the foreign forums are not easier or more convenient [215]. Thus, more decisions will favor foreign plaintiffs.

5. Conclusion

A reassessment of the forum non conveniens doctrine is long overdue. Since *Piper Aircraft* was decided in 1981, the federal courts have strayed from the important policies which guided the initial development of the doctrine – justice and convenience for all the parties. The original policies have been replaced with a concern for judicial convenience. This practice has resulted in limited liability for defendants and inadequate relief for plaintiffs.

The forum non conveniens inquiry requires a redefinition of an adequate alternative forum and a reconsideration of the private/public interest factors described in *Gulf Oil*. The need for reform is pressing in light of the pending Bhopal litigation and the general increase in the number of product liability suits in recent years. Without reform, foreign plaintiffs who deserve to litigate their suits in the U.S. courts will continue to be denied this privilege. Without reform defendants will continue to escape or minimize liability. Although limited judicial resources would be exhausted if this reform were adopted, the increased justice achieved by this reform would far outweigh its burden on the courts. One desirable result will be achieved if the corporate resources saved by not litigating forum non conveniens motions are allocated to increase the safety of products. Another desirable result would be achieved by permitting the doctrine of forum non conveniens to serve the purposes it was intended to serve – justice and convenience for all of the parties.

Notes

[1] The doctrine of forum non conveniens permits courts to decline existing jurisdiction if considerations of justice and convenience warrant dismissal to a more appropriate forum. H.

Goodrich & E. Scoles, *Conflict of Laws* §11, at 15 (4th ed. 1964); *see also* *Gulf Oil v. Gilbert*, 330 U.S. 501, 507 (1947).

[2] *See infra* note 113 and accompanying text.

[3] This comment will focus on forum non dismissals in the federal rather than the state courts. This focus is necessary for a consistent analysis because federal courts apply federal law and state courts apply their own laws. *Fiorenza v. United States*, 311 F. Supp. 117, 119 (S.D.N.Y. 1969). The Supreme Court has never explicitly determined whether federal or state law applies in a diversity case in the federal courts. *Piper Aircraft v. Reyno*, 454 U.S. 235, 248 n. 13 (1981); Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 820 (1985).

[4] An objection to an inconvenient forum in the federal courts is ordinarily made by a motion to transfer pursuant to 28 U.S.C. §1404 (1982). Under this provision, a district court has the authority to transfer the case to a more convenient federal forum if the transfer is in the interest of justice. 28 U.S.C. §1404(a) (1982). If, however, the alternative forum is located in a foreign country, the defendant's objection will be made pursuant to a motion to dismiss on the basis of forum non conveniens. 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1352 (1969).

Although the requirements for transfer and forum non conveniens are different, the policies supporting them are the same. The Historical and Revision notes to 28 U.S.C. §1404(a) state that "[This section] was drafted in accordance with the doctrine of forum non conveniens The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." 28 U.S.C. §1404(a) (1982) (Historical and Revision Notes).

[5] *See, e.g.*, *Vas Borrallho v. Keydril Co.*, 696 F. 2d 379 (5th Cir. 1983); *Complaint of Geophysical Serv., Inc.*, 590 F. Supp. 1346 (S.D. Tex. 1984); *Rubenstein v. Piper Aircraft Corp.*, 587 F. Supp. 460 (S.D. Fla. 1984); *Pratt v. United Arab Shipping Co.*, 585 F. Supp. 1573 (E.D. La. 1984); *Bulk Oil (Milano) S.R.L. v. Sun Int'l Ltd.*, 584 F. Supp. 43 (S.D.N.Y. 1983), *aff'd*, 742 F. 2d 1431 (2d Cir. 1984); *Cruz v. Maritime Co.*, 549 F. Supp. 285 (S.D.N.Y. 1982), *aff'd*, 702 F. 2d 47 (2d Cir. 1983); *Abiaad v. General Motors Corp.*, 538 F. Supp. 537 (E.D. Pa. 1982), *aff'd*, 696 F.2d 980 (3d Cir. 1982). Dismissals of product liability cases have been significant. *See, e.g.*, *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984); *Hodson v. A.H. Robins Co.*, 715 F.2d 145 (4th Cir. 1983); *Purser v. American Home Prods. Corp.*, No. 80 Civ. 710 (S.D.N.Y. Jan. 30, 1981) *aff'd*, 676 F.2d 685 (2d Cir. 1982); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982). *But see* *Haddad v. Richardson-Merrell, Inc.*, 588 F. Supp. 1158 (N.D. Ohio 1984) (district court permitted Canadian plaintiffs to remain in U.S. because inconvenience of dismissal to plaintiffs outweighed inconvenience to defendants); *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984) (foreign plaintiffs not dismissed because defendant did not show alternative forum was best forum).

[6] *See infra* notes 57-68 and accompanying text.

[7] This comment will analyze the forum non conveniens doctrine in the context of product liability suits brought by foreign plaintiffs; however, the reform proposed in this comment can be adopted in suits by any foreign plaintiff against any U.S. defendant.

[8] Eighteen suits brought by citizens of Bhopal, India are currently pending in the Southern District of New York. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, No. 626, slip. op. at 1 (Judicial Panel on Multidistrict Litigation Feb. 6, 1985). *N.Y. Times*, Jan. 29, 1985, at A17, col. 2. The Government of India has also filed suit on behalf of the Bhopal victims. *N.Y. Times*, Apr. 9, 1985, at A1, col. 5.

[9] *In re Union Carbide Corp.* slip. op. at 1. The Bhopal citizens were injured by a release of toxic methyl isocyanate gas at the Union Carbide plant in Bhopal, India.

[10] Union Carbide has already filed a motion to dismiss on the basis of forum non conveniens. *N.Y. Times*, July 30, 1985, at D4, col. 1. Oral argument on this issue was heard on January 3, 1986. *Wall St. J.*, Jan. 2, 1986, at 6, col. 1.

[11] *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 527 (1947).

[12] See *infra* note 67 and accompanying text.

[13] Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 Geo. L.J. 1257, 1264–68 (1981) [hereinafter cited as Note, *Forum Non and Foreign Plaintiffs*]; 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, 757, 778–79 (1977) [hereinafter cited as Note, *Convenient Forum Abroad*].

[14] Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 386–87 (1947).

[15] *Id.* at 387; see also Dainow, *The Inappropriate Forum*, 29 Ill. L. Rev. 867, 884 (1935) (“[T]he question of the place of trial should be decided in all fairness to the parties concerned.”)

[16] Barrett, *supra* note 14, at 407.

[17] 330 U.S. 518 (1947).

[18] 330 U.S. 501 (1947).

[19] *But see* Barrett, *supra* note 14, at 405 (doctrine in American courts has emphasized inconvenience to the court as the principal reason to refuse jurisdiction).

[20] *Koster*, 330 U.S. at 527; see also *Rogers v. Guarantee Trust Co.*, 288 U.S. 123, 151 (1933) (“The doctrine of *forum non conveniens* is an instrument of justice.”) (Cardozo, J., dissenting). The “ends of justice” are served by the orderly administration of justice, the interest of the parties, the fairness between the parties, and the public interest. Dainow, *supra* note 15, at 886–87.

[21] *Gulf Oil*, 330 U.S. at 508.

[22] Barrett, *supra* note 14, at 409. (“[c]onvenience to the court is considered only to give added weight to a decision based on convenience to the parties and that it should have no independent significance.”) *But see* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 34 (1929) (practical aspects such as congested court calendars give the doctrine of *forum conveniens* a special significance); Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 Yale L.J. 1234, 1237 (1947) (U.S. doctrine differs from British doctrine in that U.S. emphasis has been less on the convenience of the parties than on convenience of the courts).

[23] *Gulf Oil*, 330 U.S. at 508; see Barrett, *supra* note 14, at 411; Note, *Forum Non and Foreign Plaintiffs*, *supra* note 13, at 1262–63.

[24] *Gulf Oil*, 330 U.S. at 508.

[25] *Id.*; see also Currie, *Change of Venue and the Conflict of Laws*, 22 U. Chi. L. Rev. 405, 421 (1955) (doctrine of *forum non conveniens* developed to determine if maintenance of action in place chosen by plaintiff would be inconvenient, vexatious, or oppressive to the defendant). Although the Supreme Court used slightly different language in *Koster* and *Gulf Oil*, *Koster* is seen as a consistent application of *Gilbet*. *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir. 1981).

[26] See Barrett, *supra* note 14, at 420. Barrett was perceptive in predicting the possible dangers of expanding the use of *forum non conveniens*. He noted that “caution must be exercised in every case if the plea of *forum non conveniens* is not to become a powerful weapon in the hands of a defendant who is seeking to avoid its obligations.” *Id.* His prediction of defendant’s behavior has become reality.

[27] “Forum-shopping” is the attempt by a party “to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.” Black’s Law Dictionary 590 (5th ed. 1979).

[28] *Pain v. United Technologies Corp.*, 637 F.2d 775, 783–84 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). The court explicitly stated that a *forum non conveniens* dismissal was never designed to permit *forum-shopping* by defendants. *Id.* at 783.

[29] See generally Bickel, *The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12, 14 (1949) (the problem of *forum non conveniens* is how much freedom a plaintiff is to have in choosing the place where he wishes to bring suit).

[30] See *infra* note 113 and accompanying texts.

[31] *Id.*

[32] 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). The court in *Pain* dismissed the foreign plaintiffs, finding that evidence overwhelmingly favored suit in the foreign forum. The evidence overcame the presumption in favor of the plaintiffs' choice of forum. *Id.* at 799.

[33] *Id.* at 783–84.

[T]rial judges applying the doctrine of forum non conveniens must walk a delicate line to avoid implicitly sanctioning forum-shopping by either litigant at the expense of the other. Defendants bear a heavy burden of establishing that plaintiff's choice of forum is inappropriate and that the action should therefore be dismissed. At the same time, however, a plaintiff cannot merely argue that his forum choice deserves blind deference because it does not rise to the level of an abuse of process which is "vexatious" or "oppressive" to the defendant.

[34] See, e.g., *Manu Int'l v. Avon Prods.*, 641 F.2d 62 (2d Cir. 1981); *Fiacco v. United Technologies Corp.*, 524 F. Supp. 858 (S.D.N.Y. 1981); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764 (D. Kan. 1981); *Fiorenza v. United States Steel Int'l Ltd.*, 311 F. Supp. 117 (S.D.N.Y. 1969); *Odita v. Elder Dempster Lines, Ltd.*, 286 F. Supp. 547 (S.D.N.Y. 1968).

[35] See *infra* notes 57–68 and accompanying text.

[36] 454 U.S. 235, *reh'g denied*, 455 U.S. 928 (1981).

[37] See e.g., *Dowling*, 727 F.2d at 613–14; see also Kennelly, *Choice of Laws, Jurisdiction, and Forum Non Conveniens*, 26 Trial Law. Guide 260, 292 (1982) ("some courts have seized upon the Reyno decision as *though* it authorizes wide discretion in regard to forum non conveniens.") (emphasis added).

[38] Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 Hofstra L. Rev. 103, 114–15 (1981). The probability of defendant (reverse) forum-shopping has been increased by the use of conditional dismissals. See *infra* notes 82–89 and accompanying text; see also Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, 6 Fordham Int'l L.J. 577, 583–84 (1983) (discussing ability of defendant to forum-shop by stipulating to jurisdiction abroad and moving for dismissal).

[39] 454 U.S. 235, *reh'g denied* 455 U.S. 928 (1981).

[40] See Stein, *supra* note 3, at 822–31; Birnbaum & Wrubel, *Foreign Plaintiffs and the American Manufacturer; Is a Court in the United States a Forum Non Conveniens?*, 20 Forum 59, 62–64 (1984).

[41] The actions were brought on behalf of the decedents by Gaynell Reyno, the legal secretary to the attorney who filed the lawsuit. *Piper Aircraft*, 454 U.S. at 239. She was neither related nor did she know any of the decedents. The fact that the decedents themselves were not able to sue in U.S. courts should have been an important factor in the Court's holding that U.S. courts were inappropriate forums for these suits. An injured party's ability to have standing in the U.S. courts should weigh in favor of the party's ability to maintain suit in the United States. In most cases suits are brought by the injured parties themselves. See, e.g., *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262 (N.D. Ohio 1982).

[42] *Piper Aircraft*, 454 U.S. at 239.

[43] *Id.* at 238–39.

[44] *Id.* at 239.

[45] *Id.* at 240.

[47] *Id.* at 241.

[48] *Gulf Oil*, 330 U.S. at 508–09.

[49] *Id.* at 508.

[50] *Id.*

[51] *Id.* at 508–09. Federal courts have frequently limited their analysis to an application of the public and private factors listed in *Gulf Oil*, although they are not bound to limit their analysis to these factors. *See, e.g., Complaint of Geophysical Serv.*, 590 F. Supp. at 1359; *Bulk Oil (Milano)*, 584 F. Supp. at 44; *Abiaad*, 538 F. Supp. at 541; *see also Stein, supra* note 3, at 831 (forum non analysis frequently limited to court's conclusion that application of quoted *Gulf Oil* factors favored retention or dismissal of suit).

[52] *Piper Aircraft*, 454 U.S. at 244.

[53] *Id.* at 244–46.

[54] *Id.* at 269.

[55] *Id.* at 255–61.

[56] *Id.* at 255–56.

[57] *Id.* at 255. The court justified this lack of deference:

When the home forum has been chosen, it is reasonable to assume that his 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.

Id. at 256. In contrast with the federal courts, the California courts continue to afford deference to foreign plaintiffs. *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773, 778 (1984); *Hemmelgarn v. Boeing corp.*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980). The *Holmes* Court reasoned that if a foreign plaintiff is willing to shoulder the burden of litigating in the U.S., the court should determine whether litigation in the plaintiff's home forum would be more convenient for defendants. *Holmes*, 156 Cal. App. 3d at 389–90, 202 Cal. Rptr. at 784–85. The *Hemmelgarn* court found:

[W]here the plaintiff is out of state but willing to shoulder the burden of inconvenience and additional expense of litigation in California, the motion to dismiss should be denied if plaintiff claims defendants are companies incorporated in California, maintain their principal place of business here, and conduct themselves here so as to cause injuries to others in another state.

Hemmelgarn, 106 Cal. App. 3d at 580, 165 Cal. Rptr. at 192.

The California view of deference balances the equities between the parties more meaningfully than *Piper Aircraft* and its progeny. *See infra* notes 159–67 and accompanying text.

[58] *Piper Aircraft*, 454 U.S. at 246. This conclusion is well-founded because the focus of the inquiry is convenience, not the favorability or unfavorability of the change in substantive law. *But see Holmes*, 156 Cal. App. 3d at 383–87, 202 Cal. Rptr. at 780–82.

[59] *Piper Aircraft*, 454 U.S. at 247.

[60] *But see Friendly, Indiscretion about Discretion*, 31 Emory L.J. 747, 752–53 (1982) (the dominant consideration in *Piper Aircraft* was the correct application of the conflict-of-laws rule).

[61] *Piper Aircraft*, 454 U.S. at 260–61. Admittedly, within the limited circumstances of the *Piper Aircraft* case, the connections of the litigation to the U.S. forum were very weak. Note, *supra* note 38, at 607.

[62] *Piper Aircraft*, 454 U.S. at 250. The plaintiff admitted that the purpose for bringing suit in the U.S. was to take advantage of more favorable laws in the United States, including damage awards. *Id.* at 240.

[63] *Id.* at 252. (“The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive.”)

[64] *Id.* at 261.

[65] *Id.* at 260.

[66] The *Piper Aircraft* decision also reflected a spirit of great deference to the discretion of the trial court. *See Friendly, supra* note 60, at 749–54. The Court emphasized that the trial court's

decision would have been reversed only if there was a clear abuse of discretion. *Piper Aircraft*, 454 U.S. at 257. Query if the trial court's decision would have been upheld if it had decided to deny the motion to dismiss.

[67] See Kennelly, *supra* note 37, at 292.

[68] See cases cited *supra* note 5.

[69] See, e.g., *Lake*, 538 F. Supp. at 267-70; *In re Disaster at Riyadh Airport*, Saudi Arabia, 540 F. Supp. 1141, 1144 (D.D.C. 1982); *Abiaad*, 538 F. Supp. at 539-41. The forum non inquiry has also been articulated as a four-part test in *Pain*, 637 F.2d at 784-85. For the purposes of this discussion, the differences between these tests are not significant.

[70] See cases cited *supra* note 5. *But see* Stein, *supra* note 3, at 831-40. Professor Stein contends that the discretionary nature of a forum non ruling by a trial court inevitably leads to arbitrary and inconsistent decisions. *Id.* at 830-31. With few exceptions, dismissals have consistently been granted to defendants in the federal courts since *Piper Aircraft* was decided. *But see* Note, *supra* note 38, at 582 (finding that courts have resisted dismissal on forum non grounds).

[71] *Gulf Oil*, 330 U.S. at 507.

[72] *Piper Aircraft*, 454 U.S. at 254.

[73] See, e.g., *Vas Barralho v. Keydril Co.*, 696 F.2d 379, 393 (5th Cir. 1983); *Pratt v. United Arab Shipping Co.*, 585 F. Supp. 1573, 1578 (E.D. La. 1984).

[74] See, e.g., *Vas Barralho*, 696 F.2d at 393; *Complaint of Geophysical Serv.*, 590 F. Supp. at 1359; *Rubenstein*, 587 F. Supp. at 461; *Pratt*, 585 F. Supp. at 1578; *Abiaad*, 538 F. Supp. at 540.

[75] See *Macedo v. Boeing Co.*, 693 F.2d 683 (7th Cir. 1982); *Manu Int'l*, 641 F.2d at 62; *Day & Zimmerman, Inc. v. Exportadora Salcedo de Elaboradoras de Cacao*, 549 F. Supp. 383 (E.D. Pa. 1982); *In re Air Crash Disaster Near Bombay, India*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337 (S.D.N.Y. 1982), *aff'd on other grounds*, 727 F.2d 274 (2d Cir. 1984).

[76] 549 F. Supp. 383 (E.D. Pa. 1982).

[77] *Id.* at 384-85.

[78] 528 F. Supp. 1337 (S.D.N.Y. 1982), *aff'd on other grounds*, 727 F.2d 274 (2d Cir. 1984).

[79] *Id.* at 1342.

[80] *Id.*

[81] Most legal systems will be found adequate for the purposes of a forum non dismissal. See, e.g., *Dowling*, 727 F.2d at 608 (Great Britain); *Complaint of Geophysical Serv.*, 590 F. Supp. at 1346 (Canada); *Cruz*, 549 F. Supp. at 285 (the Philippines); *Rubenstein*, 587 F. Supp. at 460 (West Germany); *Gibbons v. Udaras na Gaelbachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) (Ireland); *Bulk Oil (Milano)*, 584 F. Supp. at 43 (Italy); *Shipping Corp. of India, Ltd. v. American Bureau of Shipping*, 603 F. Supp. 801 (S.D.N.Y. 1985) (Yugoslavia); *Abiaad*, 538 F. Supp. at 537 (United Arab Emirates); *In re Disaster at Riyadh Airport*, 540 F. Supp. at 1141 (Saudi Arabia).

[82] See, e.g., *Dowling*, 727 F.2d at 608; *Harrison*, 510 F. Supp. at 1; *Dahl v. United Technologies Corp.*, 472 F. Supp. 696 (D. Del. 1979).

[83] *Dahl*, 472 F. Supp. at 699.

[84] E.g., *Harrison*, 510 F. Supp. at 6.

[85] E.g., *Dowling*, 727 F.2d at 622.

[86] E.g., *id.*

[87] E.g., *id.*; *Hodson*, 715 F.2d at 146; *Pratt*, 585 F. Supp. at 1578; *Rubenstein*, 587 F. Supp. at 461; *Complaint of Geophysical Service*, 590 F. Supp. at 544; *Harrison*, 510 F. Supp. at 6.

[88] Note, *supra* note 38, at 583-84.

[89] The Supreme Court has held that jurisdiction created by the consent of a defendant is impermissible. *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960). However, this holding only applies to motions made pursuant to 28 U.S.C. §1404(a) (1982), the federal change of venue provision. *Schertenlieb v. Traum*, 589 F.2d 1156, 1161 (2d Cir. 1978). This provision limits transfer to a forum available to the plaintiff when the suit was initially filed. 28 U.S.C. §1404(a) (1982). The

forum non conveniens doctrine has no such limitation. *Schertenlieb*, 589 F.2d at 1160–61. The court in *Fiacco v. United Technologies Corp.*, 524 F. Supp. 858, 861 (1981) questioned the legitimacy of succumbing to jurisdiction in the alternative forum:

[D]efendant has consented to submit to jurisdiction in Norway, and has sweetened the offer by agreeing to concede liability if the action is transferred there. If there were not clear jurisdiction over defendant in ... the United States, ... query whether defendant would have been willing to submit to jurisdiction in Norway.

See also *Hoffman*, 363 U.S. at 344 (permitting defendants to consent to jurisdiction would “inject gross discrimination” on plaintiffs).

[90] See *supra* notes 72–81 and accompanying text.

[91] See *supra* notes 82–89 and accompanying text.

[92] See Note, *Convenient Forum Abroad*, *supra* note 13, at 757 (forum non motion is an effective weapon for defendant wishing to avoid litigation, forcing plaintiff to face severe obstacles to litigating suit abroad); Note, *supra* note 38, at 605–06.

As predicted in Note, *Convenient Forum Abroad*, *supra* note 143, recent product liability suits have resulted in settlements for the U.S. plaintiffs and dismissals for the foreign plaintiffs. For example, in the Opren (arthritis drug) litigation, all British plaintiffs were dismissed from the U.S. courts, but 400 U.S. plaintiffs received compensation from Eli Lilly through settlement. The Times (London), Oct. 9, 1984, at 8, col. 3. In the Debendox (Bendectin, morning sickness drug) litigation, the U.S. plaintiffs settled their claims for 90 million pounds, but the British plaintiffs were dismissed and excluded from the settlement. The Times (London), July 18, 1984, at 3, col. 1.

[93] See *supra* notes 48–51 and accompanying text.

[94] *Piper Aircraft*, 454 U.S. at 255–56. It is possible that *Piper Aircraft* did not eliminate deference to foreign plaintiffs in all cases. *Piper Aircraft* did not decide whether deference would be given to foreign plaintiffs who sue in the U.S. courts under treaties granting them equal access to U.S. courts. Note, *supra* note 38, at 582–83, 591–92.

[95] The balance will weigh in favor of the defendant because the removal of deference is not based on any actual inconvenience to the individual defendant. Thus the conveniences are not truly being balanced. Moreover, a U.S. plaintiff injured in the same manner will be given deference, whereas the foreign plaintiff will not. The inconvenience to the defendant and the interest of the U.S. may be similar in both cases. Therefore, the factors should truly be balanced to determine the relative inconveniences in each case.

[96] See Stein, *supra* note 3, at 837–38.

[97] See, e.g., *Dowling*, 727 F.2d at 608 (Bendectin); *Hodson*, 715 F.2d at 142 (Dalkon Shield); *Purser v. American Home Prods. Corp.*, No. 80 Civ. 710 (S.D.N.Y. Jan. 30, 1981) (oral contraceptives), *aff'd*, 676 F.2d 685 (2d Cir. 1982). But see *Kontoulas*, 745 F.2d at 312 (refused to dismiss foreign plaintiffs because defendants did not show alternative forum was more appropriate forum); *Haddad*, 588 F. Supp. at 1158 (district court permitted foreign plaintiffs to remain in the U.S. because inconvenience to plaintiffs if case dismissed outweighed convenience to defendant). See generally Birnbaum & Wrubel, *supra* note 40, at 65–72 (analyzing the public and private interest factors in state and federal court forum non decisions involving prescription drugs); Stein, *supra* note 3, at 837–40 (forum non inquiry has produced erratic results in the “British Pill Litigation”); Annot., 59 A.L.R. 3d 138 (1974) (forum non conveniens in product liability cases).

[98] 727 F.2d 608 (6th Cir. 1984).

[99] *Id.* at 610.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 616.

[104] *Id.* at 614–16.

[105] In re Richardson-Merrell, Inc., 545 F. Supp. 1130, 1134 (S.D. Ohio 1982).

[106] *Id.* at 1135. The court accepted the defendant's argument that allowing suits like these would flood the country with transitory suits. *Id.*

[107] *Id.*

[108] 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982).

[109] *Id.* at 2. The plaintiffs had alleged that the U.S. company had actually produced and manufactured the drugs itself, or had done so through agency, license or otherwise. *Id.* The defendant claimed that the manufacturing, packaging and labelling were all performed in the United Kingdom by a wholly-owned subsidiary of the defendant company. *Id.* at 3. On reargument, the court found that all marketing, prescription, sale and ingestion of the drugs occurred in the United Kingdom. *Id.* at 8.

[110] *Id.* at 2.

[111] *Id.* at 4-5.

[112] *Id.* at 4. The court also concluded that fairness to the defendant dictated that the defendant's conduct be judged by the standards of the community affected by its actions, the United Kingdom. *Id.* at 4-5.

[113] See Note, *Convenient Forum Abroad*, *supra* note 13, at 757, 778: ("Indeed, the plaintiff ... foreclosed from the U.S. forum may be effectively prevented from obtaining any relief by the legal or financial obstacles to trial in the foreign forum.") *Id.* See also Note, *Forum Non and Foreign Plaintiffs*, *supra* note 13, at 1262-68 (discussing the obstacles to bringing suit after a forum non dismissal).

[114] Because this comment focuses on suits against U.S. corporations by injured foreign plaintiffs, the policies will address these situations.

[115] Note, *Forum Non and Foreign Plaintiffs*, *supra* note 13, at 1276-77 (discusses the even-handed administration of justice in the context of comparing the courts' treatment of injured foreign plaintiffs who are consistently dismissed with foreign business and government litigants who are permitted to remain in the U.S. courts).

[116] See Weinberg, *Insights & Ironies: The American Bhopal Cases*, 20 Tex. Int'l L.J. 307, 311 (1985); Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 Tex. Int'l L.J. 321, 330 (1985).

[117] A company is "multinational" if the firm has centers of operation in many countries. Black's Law Dictionary 916 (5th ed. 1979).

[118] See Kennelly, *supra* note 37, at 291 (questioning the convenience to the defendant of litigating the *Piper Aircraft* suit in Scotland, 3000 miles from the factory where aircraft designed and manufactured); see also *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609 (D.C. Cir. 1983) (fact that Lockheed was an American corporation engaged in business activity in the District of Columbia reduced concern that plaintiff was forum-shopping); *Holmes*, 156 Cal. App. 3d at 372, 202 Cal. Rptr. at 784 (court found that litigation in U.S. not inconvenient for defendants).

[119] See Note, *Convenient Forum Abroad*, *supra* note 13, at 778 ("A corporate defendant, particularly a multinational concern, should be able to litigate in either forum."); Note, *Forum Non and Foreign Plaintiffs*, *supra* note 13, at 1258-59 ("In terms of convenience, it is not readily apparent why an American defendant would seek the dismissal of a suit brought on his own 'home turf'"); see also Kennelly, *supra* note 37, at 331 ("The doctrine of forum non conveniens is as extinct as the dinosaur. People can travel from any place in the world to any other place in the world within 24 hours."); Silberman, *supra* note 38, at 116 ("In light of modern developments in transportation and communication, there is little hardship, inconvenience, or expense to a defendant in being haled before a distant forum.").

[120] See *supra* note 113 and accompanying text.

[121] *Id.*

[122] See, e.g., *Holmes*, 156 Cal. App. 3d at 372, 202 Cal. Rptr. at 783.

[123] *Id.* at 783. The court in *Holmes* determined that the defendant's premarketing research of a drug "tended to support the allegation ... that [the defendant], through conduct in California, had caused and allowed [the drug] to be distributed and marketed in the United Kingdom." *Id.* Because of the defendants' activities and their connection with California, they were required to litigate there. *Id.* But see *Harrison*, 510 F. Supp. at 4 (Pennsylvania's interest in regulated the conduct of drug manufacturers and the safety of drugs does not extend beyond its borders). In *Harrison* only marketing decisions were made in the U.S.

For examples of involvement of U.S. companies in the business of their subsidiaries, see *Dowling*, 727 F.2d at 610-11; *Haddad*, 588 F. Supp. at 1158.

[124] The U.S. has an interest in regulating multinational corporation for another reason. The United States has an interest in preventing U.S. corporations from exploiting the resources of foreign nations. Often a U.S. corporation, finding that labor and regulation is too expensive, will go to other countries where these expenses are limited. See McGarity, *Bhopal and the Export Technologies*, 20 Tex. Int'l L.J. 333, 333-34 (1985). The U.S. has an interest in ensuring that this efficiency is not achieved at the price of injuring foreign citizens.

[125] See *Piper Aircraft*, 454 U.S. at 260. The Court admitted that the United States had an interest in deterring the injurious conduct of the defendant companies, but concluded that the incremental deterrence gained in the federal courts would not be worth the judicial investment. See also Orban, *Product Liability: A Comparative Legal Restatement - Foreign National Law and the EEC Directive*, 8 Ga. J. Int'l Comp. L. 392-93 (1978) (an integral purpose of product liability litigation in the U.S. is to prevent future injuries in addition to compensating the victim).

[126] Strict liability is imposed in situations where it is found that the defendant is best able to bear the loss, even though fault has not been apportioned. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 536-37 (5th ed. 1984). A defendant enterprise must "pay its way" when embarking on abnormally dangerous activities which pose risks to the public. *Id.* at 536.

[127] The purpose of punitive damages is to punish the defendant, teach the defendant not to do it again, and to deter others from following the defendant's example. *Id.*; Restatement (Second) of Torts §908 comment a (1977).

[128] *Piper Aircraft*, 454 U.S. at 250; *Pain*, 637 F.2d at 775. For a description of the forum-shopping issue in forum non conveniens, see *supra* notes 27-34 and accompanying text.

[129] See, e.g., 28 U.S.C. §1331 (1982) (general federal question jurisdiction).

[130] 28 U.S.C. §1332(a) (1) (1982).

[131] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1979).

[132] *World-Wide Volkswagen Corp.*, 444 U.S. at 292. The factors in this inquiry include the burden on the defendant (the primary concern), the state's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief. *Id.*; see also *Helicopteros Nacionales de Columbia v. Hall*, 104 S.Ct. 1868 (1984) (refusing to exercise personal jurisdiction over foreign defendant because of insufficient contacts). See generally Stein, *supra* note, 3 at 794 (fairness and convenience concerns addressed in venue and personal jurisdiction analysis).

[133] Venue is defined as "the place or places where an action may be properly instituted and the suit determined, provided the court has subject-matter jurisdiction and the requisite jurisdiction over the defendant." 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.140(1) (1.-1) (2d ed. 1984).

[134] 28 U.S.C. §1391(a) (1982); see also 28 U.S.C. §1391(e) (1982) ("a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business").

[135] See generally Stein, *supra* note 3, at 786-95 (discussing the relationships among and characteristics of subject-matter jurisdiction, personal jurisdiction, venue and forum non conveniens).

[136] *Harrison*, 510 F. Supp. at 4–5.

[137] *See Holmes*, 156 Cal. App. 3d at 372, 202 Cal. Rptr. at 783.

[138] *See supra* note 113 and accompanying text.

[139] *See supra* notes 71–81 and accompanying text.

[140] *See supra* notes 82–89 and accompanying text.

[141] The term “possibility” means that if a trial court doubts that, as a practical matter, the alternative forum will be available, the doubt should be resolved in favor of the plaintiff. The term “for any reason” means that no *particular* reasons make a particular forum unavailable. The trial court has the flexibility to find inadequacy whenever the plaintiff provides a legitimate reason.

[142] *See, e.g., Manu Int'l*, 641 F.2d at 67 (plaintiff would not realistically bring suit in alternative jurisdiction if dismissed); *In re Air Crash Disaster*, 531 F. Supp. at 1175 (claims time-barred in India and unlikely Indian statute would permit defendant’s waiver of statute of limitations); *see also Macedo v. Boeing Co.*, 693 F.2d 683 (7th Cir. 1982) (case remanded because trial court failed to address financial burden of bringing action in Portugal).

[143] *See supra* note 113 and accompanying text; *see also Robertson, Introduction to the Bhopal Symposium*, 20 Tex. Int’l L.J. 269, 271 (1985) (“Typically, the transnational tort plaintiff who has lost his access to the United States forum either gives up altogether or manages to settle the case for a very small fraction of its value.”).

[144] 311 F. Supp. 117 (S.D.N.Y. 1969).

[145] *Id.* at 118.

[146] *Id.* at 118–19.

[147] *Id.* at 120.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 121. The court acknowledged that the witnesses and evidence were located primarily in the alternative forum, Bahamian law was applied, and the U.S. court was overburdened. However, the court concluded that “the doctrine of *forum non conveniens* presupposes the existence of the alternative forum in which suit can be brought When that alternative forum is not truly available *for any reason* ... the doctrine of *forum non conveniens* will not be applied to dismiss the action.” *Id.* (emphasis added).

[151] 286 F. Supp. 547 (S.D.N.Y. 1968).

[152] *Id.* at 550.

[153] *Id.* at 548–49.

[154] *Id.* at 551.

[155] *Id.* at 550.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 551. The *Odita* case has not been expressly overruled but its equitable approach has been effectively preempted since *Piper Aircraft* was decided.

[159] Cal. Civ. Proc. Code §410.30(a) (West 1970). The comments of the Judicial Council in this section state that the two most important factors in the court’s inquiry are (1) the plaintiff’s choice of forum should not be disturbed except for weighty reasons and (2) the action will not be dismissed unless a suitable alternative forum is available to the plaintiff.

[160] *Holmes*, 156 Cal. App. 3d at 383–86, 202 Cal. Rptr. at 777–79.

[161] *See Birnbaum & Wrubel, supra* note 40, at 68–71; Stein, *supra* note 3, at 839–40.

[162] *See generally* 16 Cal. Jur. 3d. Courts §67 (1983) (“[T]he exercise of ... discretion ... must be exercised in conformity with the spirit of the law and in a manner to subserve and not impede the ends of substantial justice The doctrine is, by its nature, a drastic remedy, to be exercised with caution and restraint.”)

[163] *See, e.g., Holmes*, 156 Cal. App. 3d at 372, 202 Cal. Rptr. at 773; *Hemmelgarn*, 106 Cal. App. 3d at 576, 165 Cal. Rptr. at 190; *Great Northern Ry. Co. v. Superior Court*, 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970), *cert. denied*, 401 U.S. 1013 (1971).

[164] 156 Cal. App. 3d at 372, 202 Cal. Rptr. at 773. The plaintiffs, British citizens, sued the corporate defendant, a U.S. citizen, for damages they suffered allegedly from taking an oral contraceptive manufactured by the defendant. *Id.* at 774.

[165] *Holmes*, 156 Cal. App. 3d at 384, 202 Cal. Rptr. at 780. For other discussions of the *Holmes* decision, see Birnbaum & Wrubel, *supra* note 40, at 68–71; Stein, *supra* note 3, at 839–40. Stein contends that the *Holmes* decision is an example of the inevitable arbitrariness and inconsistency of the forum non decisions. However, the *Holmes* decision is far from inevitably arbitrary when compared to federal decisions on this topic. The court in *Holmes* explicitly held that the California law of forum non does not mirror federal law. *Holmes*, 156 Cal. App. 3d at 381–82, 202 Cal. Rptr. at 778. The court then noted the limited relevance of the federal cases to rulings by the California courts. *Id.* at 779. Therefore, Stein's assertion of arbitrary and inconsistent decision-making is not as severe as he believes, the California court was relying on California law and the federal courts were relying on federal law.

[166] 156 Cal. App. 3d at 384, 202 Cal. Rptr. at 780. The court describes the British rule of conflicts as “double actionability.” This means that “an act committed in a foreign country is actionable as a tort in Great Britain only if it would be actionable under British law *and* under the law of the country where the act was committed.” *Id.* Therefore, the plaintiffs' relief would be limited to the relief permitted in Great Britain.

[167] *Id.* at 384–87, 202 Cal. Rptr. at 780–82. Commentators have agreed that Great Britain's negligence system provides limited redress to plaintiffs as compared to a strict liability system. *See, e.g.* The Law Commission and the Scottish Law Commission, Liability for Defective Products, Law Com. No. 82, June 1977, 7–9, 37.

[168] *Holmes*, 156 Cal. App. 3d at 386–87, 202 Cal. Rptr. at 782. Because the court found that the substantive law of Great Britain was inadequate, it did not consider the effects of the plaintiffs' loss of rights to discovery, punitive damages, a jury trial, and a contingent fee system. *Id.* at 387 n. 6, 202 Cal. Rptr. at 782 n. 6.

[169] *Piper Aircraft*, 454 U.S. at 261. Although a change in substantive law does affect the conveniences between the parties, this subject is more appropriately addressed in the choice of law determination. *See* Silberman, *supra* note 38, at 116; *see also* E. Scoles & P. Hay, Conflict of Laws §96 (4th ed. 1984):

Jurisdiction and choice of law address two different questions. Jurisdiction considers whether it is *fair* to cause this defendant to travel to this state; choice of law asks the further question of whether the application of this substantive law which will determine the merits of the case is fair to *both* parties. Thus, for choice of law there must be a sufficient *mexus between the transaction* to be adjudicated *and the forum* as well as the parties [emphasis in original].

A plurality of the Supreme Court in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) articulated the current constitutional standard governing a forum's ability to apply its own local law: “[F]or a state's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”

Although choice-of-law is an inquiry separate and different from forum non, it is relevant to this discussion. The choice-of-law analysis involves a similar balance-of-interests analysis to determine which forum has the most significant relationship to the occurrence and the parties. Restatement (Second) Conflict of Laws §145(1) (1971). For example, the Restatement approach analyzes the relevant contacts, including the place where the injury occurred, the place where conduct causing injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; the place where the relationship, if any, between the parties is centered. Restatement (Second) Conflict of Laws §145(2) (1971). Considering the contacts of a multinational corporation with the local forum and their conduct within the forum, it would not be unfair, in many cases, to apply U.S. law to these international disputes. U.S. law would most

likely be the applicable law even if a “reasonableness”, “minimum contacts” or a “non-utilitarianism” approach were used. See generally Silberman, *supra* note 38 (outlining these approaches in the context of *Allstate Insurance v. Hague*). It is the author’s view that U.S. law should be applicable law in the Bhopal litigation under any choice-of-law approach.

[170] *But see* Rehm v. Aero Engines, Inc., 164 Cal. App. 3d 715, 210 Cal. Rptr. 594 (1985). The court in Rehm dismissed a suit by Missouri and Texas citizens who were injured in an airplane crash in Canada. *Id.* at —, 210 Cal. Rptr. at 595. The plaintiffs alleged that the crash was caused by a defect in the engine manufactured by the defendant, a California-based company. *Id.* at —, 210 Cal. Rptr. at 596. The court found, *inter alia*, that the comparative disadvantage of the Canadian liability law was not substantial. *Id.* at —, 210 Cal. Rptr. at 597–98.

[171] See *supra* notes 48–51 and accompanying text.

[172] See *supra* notes 14–22 and accompanying text.

[173] *Manu Int’l*, 641 F.2d at 65.

[174] See *supra* note 94 and accompanying text.

[175] See Note, *Forum Non and Foreign Plaintiffs*, *supra* note 13, at 1271 (“The key issue is not citizenship, but rather the relative convenience of the parties, in light of the *Gulf Oil* factors and the presumption that favors a plaintiff’s choice of forum.”).

[176] See *supra* notes 118–19 and accompanying text.

[177] See *supra* notes 144–58 and accompanying text.

[178] For example, the age of the litigant may qualify as a special characteristic. A suit by elderly English citizens injured by an anti-arthritis drug, Opren, was dismissed from U.S. courts. *The Times* (London), June 7, 1984, at 2, col. 6. It may take the the plaintiffs up to five years to get to court in England. *Id.* The case is currently being presented to the Council of Ministers in Luxembourg and it could take up to two years to finish the hearings. *The Times* (London), Oct. 9, 1984, at 8, col. 3. In this case, the age of the plaintiffs could be considered a special characteristic because by the time they may be granted relief in England, they may be deceased.

[179] *E.g.*, *Holmes*, 156 Cal. App. 3d at 388–89, 202 Cal. Rptr. at 784.

[180] *E.g.*, *Harrison*, 510 F. Supp. at 4–5.

[190] See *Supra* notes 122–26 and accompanying text.

[182] *E.g.*, *Harrison*, 510 F. Supp. at 3–5.

[183] Another element of the lawsuit, the extent to which the actual litigation has progressed, affects the fairness and convenience of dismissal. *Friends for All Children*, 717 F.2d at 608. The litigation in this case had generated “tens of thousands” of pages of documents, and it would have been a great hardship to translate them if the plaintiffs had been dismissed to foreign jurisdictions. *Id.*

[184] For examples of cases involving U.S. parent companies and foreign subsidiaries, see *Dowling*, 727 F.2d at 608; *Haddad*, 588 F. Supp. at 1158; *Holmes*, 156 Cal. App. 3d at 372, 202 Cal. Rptr. at 773.

[185] See Note, *Forum Non and Foreign Plaintiffs*, *supra* note 13, at 1280–82.

[186] See *Harrison*, 510 F. Supp. at 5–7.

[189] The *Holmes* court properly defined the appropriate weight to be given this burden. The court concluded:

The financial burden on the court and administrative difficulties are legitimate concerns in a forum non inquiry The proper inquiry, however, is not simply whether the court is overburdened, but whether the action would impose a burden which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state.

156 Cal. App. 3d at 388–89, 202 Cal. Rptr. at 784.

[188] See *Harrison*, 510 F. Supp. at 4–5; see also Note, *Forum Non and Foreign Plaintiffs*, *supra* note 13, at 1278–80 (discussing the effect of a pervasive foreign regulatory scheme in the forum non inquiry, including a discussion of *Harrison*).

[189] For other analyses of the forum non conveniens issue in the Bhopal litigation, see Weinberg, *supra* note 116; Note, *The Razor's Edge: The Doctrine of Forum non Conveniens and the Union Carbide Methyl Isocyanate Gas Disaster at Bhopal, India*, 10 N.C.J. Int'l. L. & Com. Reg. 743 (1985); Recent Developments, 26 Harv. Int'l L.J. 637 (1985); Tompkins, *India is Proper Forum to Pursue Bhopal Litigation*. Legal Times, Jan. 21, 1985, p. 17, col. 1.

[190] Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 Tex. Int'l. L.J. 273, 278 (1985); *see also* N.Y. Times, Dec. 14, 1984, at A10, col. 2 (discussing lack of contingency fees in India and its effect on obtaining lawyers).

[191] The Court Fees Act (Act VII of 1870), 6 India A.I.R. Manual 1191 (3d ed. 1970).

[192] *In re Air Crash Disaster*, 531 F. Supp. at 1181 n. 7.

[193] The Indian Bar Councils Act (Act XXXVIII of 1926), 1 India A.I.R. Manual 1013, 1022 (3d ed. 1969).

[194] *See* Galanter, *supra* note 190, at 288, *citing* India Const. art. 39A, which requires providing free legal aid "to insure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

[195] *See supra* notes 144–58 and accompanying text; *see also* Robertson, *supra* note 133, at 271–72 (without contingency fee system, U.S. lawyers do not remain active and plaintiff may be unable to pay a lawyer).

[196] Galanter, *supra* note 190, at 274–75.

[197] Extensive delays are a routine part of the Indian judicial system. *In re Air Crash Disaster*, 531 F. Supp. at 1181 n. 7. The backlog of these cases in the lower courts in India are expected to drag on unresolved into the 1990's. Wall St. J., Jan. 23, 1985, at 1, col. 1.

[198] It has been suggested that the filing fees should be waived for the Bhopal victims if they sue in India. wall St. J., Jan. 23, 1985, at 1, col. 1. One court has found that a filing fee requirement does not render a forum inadequate. *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982). However, in that case the court noted that the plaintiffs had not alleged that the filing fee would make it impossible for them to prosecute their suit in China. *Id.* at 14. If the filing fees are not waived for the Bhopal victims, the fee requirement will probably bar most of the victims from the Indian courts. Wall St. J., Jan. 23, 1985, at 1, col. 1.

[199] In one opinion, the suits should not be pursued in India because the legal system is "hopeless". Wall St. J., Jan. 23, 1985, at 1, col. 1.

[200] *See* Galanter, *supra* note 190, at 282–83 (many seriously injured were rural migrants who had settled in shanty towns adjacent to Bhopal plant).

[201] N.Y. Times, June 29, 1985, at A35, col. 3.

[202] *Id.*

[203] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, No. 626, slip op. at 1 (Judicial Panel on Multidistrict Litigation Feb. 6, 1985).

[204] N.Y. Times, Dec. 12, 1985, at A1, col. 2. Because of the similarities between the Bhopal and Institute plant, Union Carbide closed the Institute plant for 5 months following the Bhopal leak in order to prevent another accident. N.Y. Times, Aug. 12, 1985, at A1, col. 6.

[205] N.Y. Times, June 29, 1985, at A35, col. 3.

[206] N.Y. Times, Dec. 13, 1984, at A10, col. 3.

[207] N.Y. Times, Dec. 12, 1984, at A1, col. 2.

[208] N.Y. Times, June 29, 1985, at A35, col. 3.

[209] N.Y. Times, Jan. 28, 1985, at A7, col. 1.

[210] *Id.*

[211] N.Y. Times, Jan. 28, 1985, at A6, col. 1.

[212] *Id.*

[213] N.Y. Times, Dec. 7, 1984, at A10, col. 5.

[214] N.Y. Times, Apr. 9, 1985, at A1, col. 5. Moreover, Indian officials have asserted that the claims should be litigated in the U.S. *See*, N.Y. Times, Dec. 7, 1985, at A10, col. 5 (lawyer

advising Indian consulate); col. 3 (India's Attorney General); Wall St. J., Jan. 23, 1985, at 1, col. 1 (Chief Judge of the Supreme Court of India).

[215] See *Friends for All Children*, 717 F. 2d at 607-10; see also *In re Union Carbide Corp.*, slip op. at 1. From among all the possible U.S. forums, the panel found that the Southern District of New York would "best serve the convenience of the parties and promote the just and efficient conduct of the litigation." The panel based its decision on the following factors: Union Carbide is a New York corporation, relevant witnesses and documents are located in the nearby corporate headquarters in Danbury, Connecticut, more actions are pending in the Southern District of New York, and the forum is more convenient for many parties. These issues will also be relevant in the forum non determination.