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Alcoa Steamship Co. v. M/V Nordic Regent: Narrowing the Scope of Inquiry in Forum Non Conveniens

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NOTE

Alcoa Steamship Co. v. M/V Nordic Regent: Narrowing the Scope of Inquiry in *Forum Non Conveniens*

Increases in the amount and complexity of international trade[1] and changes in jurisdictional rules[2] over the last thirty years have often resulted in American courts serving as forums for suits involving nonresidents. Very often these suits are the result of transactions that have occurred abroad and may be governed by foreign law as well. Obvious difficulties confront a party compelled to defend in a foreign court. Problems such as unfamiliarity with the language or legal process, unavailability of witnesses, or expenses incurred in bringing evidence from another country have led foreign defendants to seek dismissal of suits on the grounds of *forum non conveniens*.[3]

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[1] *See generally* Parkany, *International Trade Trends*, 13 BUS. ECON. 58 (1978); Comment, *International Legal Practice Restrictions on the Migrant Attorney*, 15 HARV. INT'L L.J. 298, (1974) [hereinafter cited as HARVARD Comment]; Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57 (1967) [hereinafter cited as STANFORD Note].

[2] *See generally* International Shoe Co. v. Washington, 326 U.S. 310 (1945); *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1000-08 (1960).

[3] *Forum non conveniens* lies within the discretionary powers of a court, enabling it "to decline to exercise a possessed jurisdiction whenever it appears that the case before it may be more appropriately tried elsewhere." Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929). This is to be distinguished from the federal transfer statute, 28 U.S.C. § 1404(a) (1976), which provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Cases under this section result in a transfer of the action to a more convenient American forum and not a dismissal. The enactment of § 1404(a) has not, however, terminated the federal court's power to dismiss a case on *forum non conveniens* grounds, especially when an alternative forum is available and the more convenient forum is located in a foreign country. *See* Vanity Fair Mills, Inc v. T. Eaton Co., 234 F.2d 633, 645-46 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 87 (1960).

The decision to dismiss a suit on *forum non conveniens* grounds is left "soundly to the discretion of the presiding judge,"[4] who will generally grant a motion whenever it is shown that the case would be tried more appropriately elsewhere.[5] A court's decision to dismiss will be based upon what it considers to be in the best interest of justice.[6] Just as important as the doctrine itself, however, is the relationship of the parties to the American forum. Admiralty courts, for example, have exercised their discretion to decline jurisdiction in suits involving both a foreign plaintiff and a foreign defendant for over 175 years.[7] In such cases, courts have looked to the subject matter of the litigation and the apparent merits of the case, and then balanced the conveniences of each party before deciding whether to grant a *forum non conveniens* motion.[8] Furthermore, the courts generally have not granted such motions unless the balance was strongly in favor of the defendant.[9]

An added factor has been stressed when the plaintiff is an American citizen. In such situations, the courts traditionally have attached great significance to the plaintiff's American citizenship when deciding a *forum non conveniens* question.[10] Although the courts are in almost unanimous agreement that an American has no *absolute* right to sue in an American court,[11] as a practical matter courts have been reluctant to dismiss any suit brought by an American, who sues in his own right,[12]

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4 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

5 Blair, *supra* note 3, at 1.

6 *See* Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 527 (1947).

7 *See* Willendson v. Forsoket, 29 F. Cas. 1283 (D.C. Pa. 1801) (No. 17,682).

8 *See* STANFORD Note, *supra* note 1, at 59-67.

9 Gulf Oil Corp. v. Gilbert, 330 U.S. at 508.

10 *See* Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A. 339 U.S. 684, 697 (1950). Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972); Olympic Corp. v. Société Générale, 462 F.2d 376, 378 (2d Cir. 1972).

11 *See* Mizokami Bros. of Arizona, Inc. v. Baychem Corp , 556 F.2d 975, 977 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978); Hoffman v. Goberman, 420 F.2d 423, 428 (3d Cir. 1970); Mobil Tankers Co., S.A. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966); Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 645 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956). *See also* Christovao v. Unisul-Uniao, 41 N.Y.2d 338, 339, 392 N.Y.S.2d 609, 610, 360 N.E.2d 1309, 1310 (1977) (per curiam); Silver v. Great American Insurance Co., 29 N.Y.2d 356, 361, 328 N.Y.S.2d 398, 402, 278 N.E.2d 619, 621 (1972). *See generally* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12, 44-45 (1949). There are also decisions holding that a citizen has an indefeasible constitutional right of access to United States courts of admiralty. The Epsan, 227 F. 158 (W. D. Wash. 1915); The Neck, 138 F. 144 (W.D. Wash. 1905); The Falls of Keltie, 114 F. 357 (D. Wash. 1902); Bolden v Jensen, 70 F. 505 (D. Wash. 1895). It should be noted, however, that these cases were all in the same district court and that the latter three were all decided by the same judge.

12 This note is not concerned with situations in which a plaintiff's claims are based on rights acquired by either subrogation or assignment. An American who acquires rights in this manner stands in the shoes of the assignor for purposes of discretionary dismissal. *See* United States

when by so doing the American will be forced to seek relief in the courts of a foreign nation.[13] The balancing process utilized in these cases is essentially the same as that used in cases involving only foreign parties, except that the court assigns very heavy weight to the factor of plaintiff's American citizenship.

In *Alcoa Steamship Co. v. M/V Nordic Regent*,[14] the United States Court of Appeals for the Second Circuit held that this balancing process is not to be used when an American plaintiff brings suit against a foreign defendant.[15] Instead of utilizing the balancing approach, the court of appeals simply stated that a *forum non conveniens* dismissal is appropriate only when it is clearly shown that the plaintiff's motive in bringing the suit in the American forum was to "vex or harass" the defendant.[16] In addition, such allegation by the defendant, that the plaintiff chose an American forum in order to vex or harass, is effectively nullified if the plaintiff establishes that a single convenience exists if the suit proceeds in an American court.[17] The *Alcoa* decision, therefore, eliminates a trial court's discretion to balance conveniences once a single plaintiff convenience is established.

This note will examine the Second Circuit's holding in *Alcoa*, focusing specifically on the elimination of the balancing approach and the consequent elimination of judicial discretion in *forum non conveniens* cases involving an American plaintiff and a foreign defendant.

Merchants and Shippers' Insurance Co. v. A/S Den Norske Afrika OG Australie Line, 65 F.2d 392 (2d Cir. 1933).

13 *See, e.g.*, Leasco Data Processing Equip. Co. v. Maxwell, 468 F.2d at 1344; Hoffman v. Goberman, 420 F.2d at 428; Mobil Tankers Co., S.A. v. Mene Grande Oil Co., 363 F.2d at 614; Thompson v. Palmieri, 355 F.2d 64, 65 (2d Cir. 1966); Vanity Fair Mills v. T. Eaton Co., 234 F.2d at 646.

14 No. 78-7054 (2d Cir., filed Jan. 10, 1979), *rehearing docketed*, No. 78-7054 (2d Cir. Mar. 12, 1979).

15 It is not clear whether the court framed its decision in terms of suits brought only in admiralty. There appears to be no reason to distinguish, however, between actions in admiralty or law courts, for the standards employed in deciding *forum non conveniens* cases have been identical for each type of suit. Moreover, it appears that an admiralty suit would give the presiding judge more discretion than he might have had otherwise. In *Gulf Oil Corp. v. Gilbert*, Justice Black dissented on the grounds that common law courts were without discretion to dismiss on grounds of inconvenience, distinguishing this absence of power from the acknowledged power of courts of admiralty which act upon "enlarged principles of equity." 330 U.S. at 513-4 (1947).

16 No. 78-7054, slip op. at 5372 (2d Cir., filed Jan. 10, 1979).

17 The court implies that a single convenience is enough to negate an allegation of vexatious intent by stating:

> In the instant case, appellant's convenience will be served by suit in the United States because its damaged dock is being repaired by a United States contractor under the supervision of appellant's United States employees. This was sufficient to negate any charge of vexation, oppression, or harassment. . . . The district court's weighing-of-inconveniences test . . . was an improper basis for dismissal.

Id. at 5373-74.

This note will demonstrate that the Second Circuit's abandonment of the balancing approach is unsupportable for two reasons: (1) the court misread the standards of earlier cases which have indicated a clear preference for a balancing approach in this area, and (2) by eliminating the discretion to balance, the court ignored the trend toward the flexibility needed in deciding cases of this type. This trend toward flexibility has developed largely through the judicial realization that America's dependance on international trade and contact requires that her courts abandon the parochial concept that all disputes be resolved in American courts.[18] A view such as this can only hinder the expansion and development of America's international trade.

THE *ALCOA* OPINION: A NEW INTERPRETATION OF OLD PRECEDENTS

On June 2, 1977, the *M/V Nordic Regent* struck and heavily damaged a pier owned by the plaintiff, Alcoa Steamship Company while attempting to dock in Trembladora, Trinidad. Alcoa, a New York corporation, brought suit in the southern district of New York against Norcross Shipping Company, the owner of the *M/V Nordic Regent*. The defendant moved for dismissal on *forum non conveniens* grounds. After considering the conveniences of the parties, as required under *Gulf Oil Corp. v. Gilbert*,[19] the district court granted the motion.[20]

Since 1947, the standard set forth in *Gulf Oil* has been used whenever a court was faced with a *forum non conveniens* motion.[21] In *Gulf Oil*, the Supreme Court established the factors to be balanced in such situations.[22] These factors can be divided into two basic sets of conveniences: the conveniences of each litigant and the convenience of the court, which includes the interest that the community at large has in the case.[23]

In terms of litigant conveniences, the courts are required to weigh the plaintiff's choice of forum, the relative ease of access to sources of proof, the availability of compulsory process for the attendance of wit-

18 *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-9 (1972).

19 330 U.S. 501.

20 Alcoa S.S. Co. v. M/V Nordic Regent, 453 F. Supp. 10, 13 (S.D.N.Y. 1978).

21 *See, e.g.*, Mobil Tankers Co., S.A. v. Mene Grande Oil Co., 363 F.2d 611 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966); Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A., 232 F. Supp. 433 (S.D.N.Y. 1964); States Marine Lines Inc. v. M/V Kokei Maru, 180 F. Supp. 255 (N.D. Calif. 1960).

22 330 U.S. 501, 508 (1947). The Court stated: "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy." *Id.*

23 *Id.*

nesses, the cost of obtaining the attendance of witnesses, the possibility of viewing the premises if necessary, and all other practical problems that prevent the trial of a case from being "easy, expeditious and inexpensive."[24] The balance was not intended to be an equal one. The Court stated that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[25] The factors to be weighed and balanced in terms of a court's convenience and the public interest include the court's own administrative difficulties, the difficulties involved in applying foreign law, and the community's own interest in the litigation.[26]

Relying upon these standards, the *Alcoa* district court determined that, on balance, the inconvenience to the defendant in having to mount a defense in the United States "substantially outweighed" the convenience to the plaintiff in having the suit proceed in America.[27] Stressing that all dockworkers, pilot personnel, and repair witnesses were residents of Trinidad, that the defendant may be prejudiced by its inability to implead the pilot, and that dismissal would not leave the plaintiff without a remedy because there was a forum available in Trinidad, the court found dismissal to be appropriate.[28]

The court of appeals reviewed the district court decision and upon finding no abuse of discretion, initially entered an order of affirmance.[29] Upon rehearing, however, the Second Circuit reversed its original affirmance[30] and, in a brief and unclear opinion, held that the *Gulf Oil* balancing approach used by the district court was inappropriate.[31] The reviewing court stated that the proper standard governing cases involving an American plaintiff and a foreign defendant requesting a *forum non conveniens* dismissal was not to be found in *Gulf Oil*, but rather in *Koster v. Lumbermens Mutual Casualty Co.*,[32] a case decided by the Supreme Court on the same day as *Gulf Oil*.[33]

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24 *Id.*

25 *Id.*

26 *Id.* at 508-09.

27 453 F. Supp. at 13.

28 *Id.* The defendant had agreed that if the dismissal were granted, it would submit to the jurisdiction of the Trinidadian courts. The granting of *forum non conveniens* is premised upon the moving party's willingness to submit to the jurisdiction of a different court. As the Supreme Court stated in *Gulf Oil*: "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." 330 U.S. at 506-07.

29 No. 78-7054, slip op. at 4587 (S.D.N.Y., filed Aug. 31, 1978).

30 No. 78-7054 (2d Cir., filed Jan. 10, 1979).

31 *Id.* slip op. at 5373-74.

32 330 U.S. 518 (1947).

33 No. 78-7054, slip op. at 5371 (2d Cir., filed Jan. 10, 1979).

In reaching this decision, the Second Circuit was careful to distinguish the two cases on their facts. *Gulf Oil* arose out of a suit brought by a non-resident plaintiff against a non-resident defendant. *Koster*, on the other hand, involved a suit by a resident plaintiff against a non-resident defendant and was thus more in line with the facts of the instant case. The court concluded, therefore, that *Koster* and not *Gulf Oil* should be utilized when determining the standards for a dismissal of the kind presented.[34]

Once the court had determined that *Koster* contained the correct standard, it then interpreted that case to hold that no balancing of conveniences was necessary when an American plaintiff brings suit against a foreign defendant.[35] A trial court's inquiry was to be restricted to whether the plaintiff's intent in bringing the suit in the American forum was to vex, harass, or oppress the defendant.[36] Quoting *Koster*, the court of appeals stated:

> Where there are only two parties to a dispute there is good reason why it should be tried in the plaintiff's home forum if that has been his choice except upon a clear showing of such oppressiveness and vexation to the defendant as to be out of all proportion to plaintiff's conveniences.[37]

The *Alcoa* court then implied that any allegation of intent to vex, harass, or oppress on the part of the plaintiff could be negated by a single showing of convenience to the plaintiff in having the suit conducted in the United States.[38] In the instant case, the Second Circuit found such a requisite convenience established by the fact that the plaintiff had hired a United States contractor to repair the dock under the supervision of plaintiff's United States employees.[39] The court of appeals, therefore, reversed the district court's *forum non conveniens* dismissal.[40]

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34 *Id.* at 5370-71.

35 *Id.* at 5373-74.

36 *Id.* at 5372.

37 *Id.* at 5371 (quoting Koster v. Lumbermens Mutual Casualty Co., 330 U.S. at 524).

38 The Second Circuit failed to articulate an exact standard, but it did apply a "single convenience" test when it stated:

> In the instant case, appellant's convenience will be served by suit in the United States because its damaged dock is being repaired by a United States contractor under the supervision of appellant's United States employees. This was sufficient to negate any charge of vexation, oppression or harassment. . . .

Id. at 5373.

39 *Id.*

40 *Id.* at 5374.

THE ELIMINATION OF THE DISCRETION TO BALANCE:
MISREADING THE PRECEDENTS

By narrowing the scope of the inquiry to a search for a single plaintiff convenience, the court of appeals eliminated judicial discretion to balance the conveniences and inconveniences of both parties in order to determine the appropriateness of a *forum non conveniens* dismissal. Such a narrowing is neither necessary nor appropriate given that *forum non conveniens* is an equitable doctrine that "resists formalization and looks to the realities that make for doing justice."[41] Prior case law cannot be read to support the elimination of judicial discretion in this area. While it is true that American courts have been reluctant to relegate American plaintiffs to foreign courts and that relatively few cases can be cited in which an American plaintiff was so dismissed,[42] the courts generally have arrived at their determinations after a careful balancing process.[43] The courts, therefore, have been free to evaluate the unique circumstances of each case in order to decide the ultimate question in any *forum non conveniens* decision, *i.e.*, where will the trial best serve the convenience of the parties and the ends of justice.[44]

Even the Second Circuit had approved the use of a balancing approach in a case decided only three weeks before *Alcoa, Farmanfarmaian v. Gulf Oil Corp.*[45] In *Farmanfarmaian*, the court of appeals reviewed the district court's application of the *Gulf Oil* standard in dismissing a suit brought against an Iranian subsidiary of various American and European oil companies.[46] This suit had been initiated by an Iranian national who, due to the existance of bilateral treaties between the United States and Iran, was to be treated under the same standards as an American citizen for the purposes of the litigation.[47] Upon the defendant's motion, the suit was dismissed on *forum*

41 Koster v. Lumbermens Mutual Casualty Co., 330 U.S. at 528.

42 *See, e.g.*, Mizokami Bros. of Arizona, Inc. v. Baychem. Corp., 556 F.2d 975 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978); Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A., 437 F. Supp. 331 (S.D.N.Y. 1977); Mohr v. Allen, 407 F. Supp. 483 (S.D.N.Y. 1976); Bernuth Lembcke Co. v. Siemens A/G, [1976] Am. Mar. Cas. 2175 (S.D.N.Y.); Harrison v. Capivary, Inc., 334 F. Supp. 1141 (E.D. Mo. 1971). *Cf.* Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880 (2d Cir. 1978) (foreign plaintiff treated as American national due to treaty provisions).

43 *See, e.g.*, cases cited in note 21, *supra*.

44 Koster v. Lumbermens Mutual Casualty Co., 330 U.S. at 527.

45 588 F.2d 880 (2d Cir. 1978).

46 Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910 (S.D.N.Y. 1977).

47 588 F.2d at 882. The treaty allowed the nationals of each country access to the courts of the other country on terms no less favorable than those applicable to the nationals of the court's country. Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 900, T.I.A.S. No. 3853 (1957).

non conveniens grounds by the trial court.[48] The court of appeals reviewed the factors that the district court had determined as weighing in favor of dismissal and affirmed the lower court holding.[49] Approving the use of balancing and noting that a trial court should have discretion in this area, the Second Circuit stated:

> While we believe that the issue whether the action should have been dismissed is perhaps somewhat closer . . . , we affirm the dismissal without much pause because a *district judge has wide discretion in this area. . . . [H]e had the power to apply the forum non conveniens doctrine after balancing all of the relevant considerations.*[50]

The *Alcoa* majority failed to cite *Farmanfarmaian* and thus appears to be severely departing from its own precedents. This departure is not justifiable. In order to understand why this is so, it is first important to analyze the standards that *Koster* actually had established because it is not the *Alcoa* court's switch from *Gulf Oil* balancing to *Koster*'s "vexatious intent" standard that is significant. What is most important is the *Alcoa* court's misreading of the *Koster* standard and misinterpretation of the cases that have applied it. Those cases cited by the Second Circuit in *Alcoa* as utilizing the "vexatious intent" standard do not support the use of a "single convenience" test, but rather support the use of a *Gulf Oil* balancing of conveniences approach to determine the existence of vexatious intent on the part of the plaintiff.

The Koster *Standard*

A careful reading of *Koster*, and the cases interpreting it, clearly present a test that will often result in a denial of a foreign defendant's *forum non conveniens* motion, if the plaintiff is an American citizen. It will not establish, however, the more stringent "single convenience" test that the *Alcoa* court found nor will it indicate an abandonment of judicial discretion to balance conveniences in such cases.

Koster was an action brought by a New York resident against an Illinois corporation in the District Court for the Eastern District of New York. The defendant corporation successfully moved for dismissal, and the Supreme Court, applying the doctrine of *forum non conveniens*, affirmed.[51] The Court was careful to point out that the plaintiff had failed to show any single fact provable by record or wit-

48 437 F. Supp. at 926-28.

49 588 F.2d at 882.

50 Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1979) (emphasis added).

51 Koster v. Lumbermens Mutual Casualty Co., 64 F. Supp. 595 (E.D.N.Y. 1945), *aff'd*, 330 U.S. 518, 526 (1947).

nesses to be within the chosen forum.[52] Every source of evidence required to prove plaintiff's own case, as well as that needed by the defendant to disprove it, was located in Illinois. Hence, the forum was inconvenient.[53] In the course of its opinion, however, the court articulated, in dicta, the following standard:

> Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived . . . of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation . . . as to be out of all proportion to a plaintiff's convenience, which may be shown to be slight or nonexistant, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of convenience, a real showing of convenience by a plaintiff . . . will normally outweight the inconvenience the defendant may have shown.[54]

The first two sentences of the passage above were relied upon and quoted by the Second Circuit in *Alcoa*.[55] The court of appeals made no mention, however, of the last sentence. It is this last sentence in which the key to understanding the *Koster* standard lies, for in it the Supreme Court called upon trial courts to balance the conveniences of the parties. The Court stated what is merely a truism in any weighted balancing test, *i.e.* that a showing of "real convenience" by a plaintiff will "normally" outweigh a defendant's inconvenience. The Supreme Court did not state, as the *Alcoa* court implied, that a single plaintiff convenience will automatically eliminate judicial discretion and balancing.

An indication that the Second Circuit's reading of *Koster* is inapposite is that the Supreme Court has never expressed hostility toward the use of judicial discretion in this area. In fact, Justice Jackson, who spoke for the Court in both *Koster* and *Gulf Oil*, indicated support for judicial discretion when he stated in the latter that, although the doctrine of *forum non conveniens* left much to the discretion of a court, experience had not shown a "judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."[56]

The Supreme Court further indicated that a balancing approach was appropriate in *Swift and Co. Packers v. Compania Colombiana Del Caribe, S.A.*,[57] its only other significant consideration of the *forum non*

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52 330 U.S. at 526.
53 *Id.* at 531-32.
54 *Id.* at 524.
55 No. 78-7054, slip op. at 5371 (2d Cir., filed Jan. 10, 1979).
56 330 U.S. at 508 (1947).
57 339 U.S. 684 (1950).

conveniens question. *Swift* involved an admiralty suit brought by an American plaintiff against a Colombian corporation. The defendant had contracted with the plaintiff to transport a rice cargo which was subsequently lost in a shipwreck. An ancillary question in the case was the defendant's motion for dismissal on *forum non conveniens* grounds. In addressing this issue, the Supreme Court stated that such a dismissal would not be appropriate under the particular facts of the case.[58] The Court did imply, however, that dismissal would be appropriate under the correct circumstances. The decision, which was written by Justice Frankfurter, noted:

> [I]n any event, it was improper under the circumstances here shown to remit a United States citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court.[59]

The standard that the *Swift* Court would have applied had the proper assurances and security been given, was not revealed in *Swift*. The Court did indicate, however, that a balancing of conveniences approach would meet with their approval when, in their only reference to governing standards in this area, they quoted, in a footnote, the now familiar *Koster* "third sentence", *i.e.*: "In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the convenience the defendant may have shown."[60]

The Second Circuit, in *Alcoa*, noted that the *Swift* Court had cited language from *Koster* and not *Gulf Oil*.[61] This fact was relied upon by the Second Circuit to support its holding that *Koster* contained the governing standards in *forum non conveniens* decisions involving an American plaintiff and a foreign defendant. While this aspect of the Second Circuit's reasoning may be correct,[62] the court failed to appreciate that any reliance placed upon *Swift*'s citing of *Koster* as the governing standard must stem from the exact *Koster* language that *Swift* found appropriate to quote, *i.e.*, the language relating to a balancing of conveniences. It was precisely this point that the *Alcoa* court ignored in its citation of *Koster*, but which the Supreme Court, in *Swift*, had specifically emphasized. This is not to say that the courts are to aban-

58 *Id.* at 697.

59 *Id.* at 697-98.

60 *Id.* at 697 n.9 (quoting 330 U.S. at 524).

61 No. 78-7054, slip op. at 5371-72 (2d Cir., filed Jan. 10, 1979).

62 In his dissent, Judge Timbers wrote that he did not feel that *Swift* offered any guidance to the court since that case was decided on other grounds. *Id.* at 5383.

don the search for a vexatious intent on the part of the plaintiff, for *Koster* clearly demands that such a search be undertaken.[63] *Koster* also demands, however, that the determination of such an intent be accomplished through a balancing of conveniences.[64] It is this approach that was utilized by the cases cited by the *Alcoa* court a supporting the use of a single convenience test.

Discovery of Vexatious Intent Through a Balancing Approach

One of the cases cited by the *Alcoa* court was an earlier case from the Second Circuit, *Thomson v. Palmieri*.[65] In *Thomson*, the court recognized that the plaintiff's intent was controlling on the *forum non conveniens* issue stating, "we should respect plaintiff's choice of forum as long as no harassment is intended."[66] While this language is the same as that used in *Alcoa*, the methods of analysis used in the two cases differed.

Thomson involved a derivative suit brought by a New York corporation against one incorporated in the United Kingdom. The defendant British corporation moved for a dismissal on the grounds of *forum non conveniens*, claiming that the United Kingdom, and not the United States would be the most convenient place for the action. The defendant supported its proposition with the fact that all relevant witnesses were located in the United Kingdom.

The Second Circuit upheld the district court's denial of the motion stressing that an intent to harass on the part of the plaintiff would have to be found before dismissal would be granted.[67] In holding that no such intent existed, the court did not search for a single plaintiff convenience in having the action proceed in the United States. The court, instead analyzed the situation in terms of the obvious plaintiff convenience in having the action proceed in the United States and the defendant's lack of inconveniences in having to defend in the American forum.[68] The court specifically took note of the fact that there were "substantial New York facets of the business" in that the British corporation carried on its air transport business largely from New York.[69]

63 The Court stated: "He should not be deprived of the advantages of his home jurisdiction except upon a clear showing of facts which . . . establish such oppressiveness and vexation as to a defendant as to be all out of proportion to plaintiff's convenience." 330 U.S. at 524.

64 *See* notes 51-56 and accompanying text *supra*.

65 355 F.2d 64 (2d Cir. 1966).

66 *Id.* at 66.

67 *Id.*

68 *Id.*

69 *Id.* at 65.

The court also noted that, although the witnesses employed by the defendant resided in Great Britain, they could be examined by letters rogatory and that the witnesses, who would be required to come to the United States, had occasion to travel to New York for business purposes and could do so on the defendant's aircraft.[70] The *Thomson* court never considered any single convenience of the plaintiff as decisive in its determination that no vexatious intent existed. Instead, the court reached its conclusion through an analysis of the conveniences and inconveniences to the parties.

The *Alcoa* court also cited *Founding Church of Scientology v. Heinrich Bauer Verlag*[71] in support of its holding.[72] In *Scientology*, an American religious organization brought a libel action against a distributor of a West German magazine in a United States District Court. The defendant moved for dismissal on *forum non conveniens* grounds. The court denied this motion[73] and the Court of Appeals for the District of Columbia Circuit affirmed, holding that the *forum non conveniens* decision should be based only upon an inquiry into the plaintiff's intent in bringing the suit in the United States.[74] Absent a finding of an intent to vex and harass, the court would not dismiss the suit.[75]

In its search for vexatious intent, the *Scientology* court balanced factors similar to those set out in *Gulf Oil*. Specifically, the court noted that although the American forum would have to apply foreign law, the case did present important questions which turned upon evidence collected in the United States.[76] Also balanced was the defendant's inconvenience in having to call German witnesses to America against the plaintiff's inconvenience in having to call American witnesses to Germany.[77] The court of appeals further noted that the Federal Rules of Civil Procedure made provision for obtaining foreign testimony.[78] The risk that foreign evidence could not be obtained was therefore no greater in the District of Columbia than it would be in a West German court.[79] In its conclusion, the court stated:

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70 *Id.* at 66.

71 536 F.2d 429 (D.C. Cir. 1976).

72 No. 78-7054, slip op. at 5372 (2d Cir., filed Jan. 10, 1979).

73 No. 1924-73 (D.D.C., filed May 29, 1974).

74 536 F.2d at 435 (quoting Thomson v. Palmieri, 355 F.2d at 65).

75 536 F.2d at 435.

76 *Id.* at 436.

77 *Id.*

78 *Id.* at 436 n.118 (referring to FED. R. CIV. P. 28(b), 37(e), 45(e)(2)).

79 *Id.* at 436. The court also noted that any language problems were provided for by FED. R. CIV. P. 43(f), which allows for an interpreter. *Id.*

> *Our weighing of the relative advantages and obstacles to a fair trial* in the District convinces us that, while it is a somewhat inconvenient forum for the defendant, it is by no means apparant that the choice has been prompted by an intent to vex and harass.[80]

This same process of balancing appeared in a third case cited in *Alcoa* by the Second Circuit, *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa*.[81] In *Top Form*, a purchasing New York corporation brought an action against a selling Italian corporation based upon a defective shipment of knit fabric. The defendants moved for dismissal claiming that the suit would be best tried in Italy. The district court denied the motion stating that it could find no motive on the plaintiff's part to vex, harass, or oppress the defendant.[82] The court reached this conclusion, however, only after it had engaged in a *Gulf Oil* balancing of conveniences test. As was done in *Scientology*, the defendant's inconvenience in having to transport witnesses to the United States was balanced against the plaintiff's inconvenience in having to transport witnesses to Italy.[83] The district court further noted that, in terms of relevant Italian witnesses, there was "no serious question raised concerning the availability of compulsory process"[84] and that, in any event, letters rogatory were available to examine the witnesses that could not come to the forum.[85] As in *Scientology* and *Thomson*, the *Top Form* court failed to emphasize any single plaintiff convenience in deciding the *forum non conveniens* question. Instead, the court searched for the requisite intent through a balancing of conveniences approach.[86]

The balancing approach, while unquestionably weighted in favor

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80 *Id.* at 436 (emphasis added). Equally as potent is this statement by the court: "A trial judge has great, but not unlimited discretion to apply the doctrine of *forum non conveniens*. Where as here, there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused." *Id.* (emphasis in original).

81 428 F. Supp. 1237 (1977).

82 *Id.* at 1253.

83 *Id.* at 1252-53.

84 *Id.* at 1253.

85 *Id.*

86 *Id.* In addition to *Scientology, Thomson*, and *Top Form*, the *Alcoa* court also cited *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Altman v. Central of Ga. R. Co.*, 363 F.2d 284 (D.C. Cir.), *cert. denied*, 385 U.S. 920 (1966); *Mobil Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966); and *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955), in support of its holding. While these cases do indicate that "vexatious intent" is the governing standard, none support the use of a single convenience test. The most stringent test prior to *Alcoa* was articulated in *Burt*, in which the court stated that "courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of his country." 218 F.2d at 357.

of the plaintiff, appears a more effective way to determine intent than a single convenience test. Finding a single plaintiff convenience dispositive in a *forum non conveniens* question may allow a plaintiff to benefit from a vexatious intent, for it can lead to the purposeful creation of conveniences by the plaintiff. This is especially evident when the test is applied in considering conveniences that arise after the cause of the action has accrued. The Second Circuit appears to accept even this type of application, for the dispositive convenience in *Alcoa* was the plaintiff's hiring of a United States contractor to repair the docking facilities, an event which, of course, occurred *after* the collision.

The use of a single convenience test is inappropriate for another reason. The test makes no effort to weigh the importance of the convenience to the plaintiff or to evaluate its importance in light of defendant's inconveniences. Such an approach, therefore, denies flexibility to trial courts. This flexibility is necessary in light of modern commercial operations which often find American companies conducting a significant portion of their operations abroad.[87] To allow plaintiffs of this type to maintain suit in the United States merely because they can establish a single convenience, when other reasonable circumstances indicate that the suit may be more justly maintained abroad, is to ignore the purpose of *forum non conveniens* and to impede, possibly, the development of American international trade and commerce.

THE NEED FOR FLEXIBILITY IN *FORUM NON CONVENIENS* DECISIONS

The Second Circuit emphasized that a *forum non conveniens* dismissal would relegate Alcoa to the courts of a foreign country. In such circumstances, the court declared, "the *Koster* standards should be strictly applied. . . . American courts are 'maintained to give redress to their own citizens'. . . . They should consider the convenience of American citizens, whose taxes keep the courts in existence."[88] While it has been traditionally held that the convenience of American citizens should be paramount in any *forum non conveniens* decision, the court failed to appreciate that the balancing approach accomodates this in-

[87] Between 1965 and 1975, the value of U.S. direct investment abroad almost tripled from $46.5 billion to $133.2 billion. BANKERS MAGAZINE, Summer 1977, at 93. Direct investment is defined as the ownership of 10% or more of a foreign business. *Id.* The above figures are amplified by the fact that over 80 of the *Fortune* 500 largest U.S. companies have 25% or more of their assets, earnings, production, or employment overseas and that 199 of the companies had 10% or more abroad. 1 U.S. DEP'T OF COMMERCE, BUREAU OF INT'L COMMERCE, THE MULTINATIONAL CORPORATION STUDIES ON U.S. FOREIGN INVESTMENTS 7-8 (Mar. 1972).

[88] No. 78-7054, slip op. at 5372-73 (2d Cir., filed Jan. 10, 1979) (citations omitted).

terest by requiring that dismissal be granted only when the balance "strongly" favors the defendant.[89] The balancing approach also has an added advantage, for it not only allows a court to favor American plaintiffs, but in addition, gives a court the flexibility to dismiss a suit when the equities in the case require such a dismissal. For example, if a court is required to apply complex foreign law in a given case, it should be allowed the opportunity to evaluate its competence to do so, since this competence goes directly to a court's ability to reach a just result. The application of complex foreign laws was a factor in three *forum non conveniens* cases, *Wells Fargo and Co. v. Wells Fargo Express Co.*,[90] *Vanity Fair Mills v. T. Eaton*,[91] and *Farmanfarmaian v. Gulf Oil Corp.*[92] In each of these cases, the courts voiced skepticism about their ability to effectively apply complex foreign law and this skepticism, when weighed along with other factors, led the courts to decline jurisdiction on *forum non conveniens* grounds.[93]

The Second Circuit's single convenience test also denies a court the opportunity to evaluate the plaintiff's nexus to the American forum. The failure to address this question, whenever a single convenience is established, allows for the maintenance of suits by plaintiffs who may have only minimal contacts with the United States. This results in the further congestion of dockets and the expenditure of tax dollars, which could be better utilized for cases in which the community has a greater interest.[94] In the context of today's multinational corporate setting, a nexus scrutiny is not unwarranted. Many corporations not only con-

89 *See* Gulf Oil Corp. v. Gilbert, 330 U.S. at 508.

90 358 F. Supp. 1065, 1077-78 (D. Nev. 1973).

91 234 F.2d at 646.

92 437 F. Supp. at 924.

93 The application of foreign law can bring forth other concerns. In *Vanity Fair*, 234 F.2d at 647, the court expressed concern about the enforcing its judgement and the possible conflicts with authorities of other countries. *See also* Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. at 924.

94 A recent trend in New York State *forum non conveniens* law is illustrative of the move towards a nexus scrutiny. New York, long a congested center of litigation, had developed a judicial rule which prohibited the application of the doctrine of *forum non conveniens* when one of the parties was a New York resident. The doctrine could only be applied when a suit involved two non-residents. This rule fell into disfavor in 1972 when New York courts began to face increasingly congested dockets full of suits in which the parties had very little nexus with the state, except for the citizenship of one of the parties. As a result, the rule was relaxed in *Silver v. Great American Insurance Co.*, 29 N.Y.2d 356, 328 N.Y.S.2d 398, 278 N.E.2d 619 (1972). *Silver* held that the application of *forum non conveniens* should turn on considerations of justice, fairness, and convenience and not on the residence of one of the parties. This rule has been extended even further. Not only is the fact that one of the parties is a New York resident no longer conclusive on the *forum non conveniens* question, but the fact that the tort alleged occurred within New York does not provide, necessarily, the definative answer to the nexus question. Martin v. Mieth, 35 N.Y.2d 414, 418, 362 N.Y.S.2d 853, 857, 321 N.E.2d 777, 780 (1974).

duct a significant proportion of their operations in foreign countries,[95] but are also well equipped to handle litigation in foreign forums.[96] These considerations weighed heavily in favor of dismissal in *Texico Trinidad, Inc. v. Astro Exito Navegacion S.A., Panama*.[97]

In *Texaco Trinidad*, a Delaware corporation brought a maritime action in the southern district of New York against a shipowner, seeking restitution for damages resulting from the collison of the defendant's vessel with the plaintiff's island jetty in Trinidad. Defendant successfully moved for dismissal on *forum non conveniens* grounds.[98] As part of its balancing process, the court was careful to point out that the plaintiff's nexus with New York was almost nonexistant and that the balancing of this factor would work little hardship on the plaintiff.[99] The court stated that the plaintiff's principal office and area of operations were in Trinidad and that "plaintiff is fully capable of litigating this action for damages to its Trinidadian property in that jurisdiction."[100]

The approach taken by the court in *Texaco Trinidad* recognizes the realities of today's international commerce. American companies operating in foreign countries have already determined the possible benefits to be greater than the possible risks of such operations. One such risk is the possibility of having to conduct their litigation in the courts of other countries, and, as *Texaco Trinidad* illustrates, companies are often prepared to handle such litigation.[101] The need for increased flexibility to evaluate the contacts of an American plaintiff to the chosen forum, in light of these commercial realities, appears to be growing[102] and has been articulated best by the Ninth Circuit:

> In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation, they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.[103]

The Supreme Court has also recognized that the increased depen-

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95 *See* note 87 *supra*.

96 *See* HARVARD Comment, *supra* note 1, at 298-99.

97 437 F. Supp. 331 (S.D.N.Y. 1977).

98 *Id.* at 334.

99 *Id.*

100 *Id.*

101 *See also* Bernuth Lembcke Co. v. Siemens A/G, [1976] Am. Mar. Cas. 2175 (S.D.N.Y.).

102 *See* Ionescu v. E.F. Hutton & Co. (France) S.A., 465 F. Supp. 139, 146 (S.D.N.Y. 1979); Bernuth Lembcke Co. v Siemens A/G, [1976] Am. Mar. Cas. 2175 (S.D.N.Y.).

103 Mizokami Bros. of Arizona v. Baychem Corp., 556 F.2d at 978.

dence on international trade requires courts to demonstrate more, and not less, flexibility when dealing with questions of international business relations. In *The Bremen v. Zapata Off-Shore Co.*,[104] the Court considered the validity of a forum selection clause in a suit between an American plaintiff and a foreign defendant.[105] The effect of the clause was to relegate the American plaintiff to the trial of an admiralty case in England. Though not a *forum non conveniens* decision, the *Bremen* Court suggested that an American plaintiff involved in international business operations may be denied, if appropriate, his chosen forum.[106] The Court stated:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. . . . The expansion . . . will hardly be encouraged if . . . we insist on a parochial concept that all disputes be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[107]

This policy articulated by the Supreme Court has been applied subsequently in *forum non conveniens* cases. In *Bernuth Lembcke Co. v. Siemens A/G*,[108] the United States District Court for the Southern District of New York considered a foreign defendant's *forum non conveniens* motion. The plaintiff, a New York corporation, had contracted with the defendant to have repairs done to its ship, the *S.S. Jean Hancock*. The ship docked in Rotterdam, the Netherlands, where, under the defendant's supervision, its turbine was dismantled and sent to the defendant's German plant for repair. After the turbine had been rebladed, the defendant shipped it back to Rotterdam and supervised its installation. The turbine developed trouble during that final operation, and the plaintiff sought damages in the district court. The defendant's motion for dismissal on *forum non conveniens* grounds was granted, but only after the court extended the *Bremen* policy to encompass the *forum non conveniens* question, stating, "courts must consider the expansion of American business and industry in considering the application of certain traditional legal concepts to international commercial disputes."[109]

This same concern for international trade also appeared in *Ionescu*

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104 407 U.S. 1 (1972).

105 *Id.* at 15. A forum selection clause is a contractual clause in which the parties stipulate where suit will be brought should a violation of their agreement occur.

106 *Id.* at 8-9.

107 *Id.*

108 [1976] Am. Mar. Cas. 2175 (S.D.N.Y. 1976).

109 *Id.* at 2176.

v. E.F. Hutton & Co. (France) S.A.[110] In *Ionescu*, an American citizen brought suit in the Southern District of New York against a French corporation, seeking a share of a brokerage commission. The court granted the defendant's *forum non conveniens* motion holding that all important witnesses were in France, virtually all witnesses and reliable evidence were in France, and that France had the greatest interest in adjudicating the case.[111] As one of its considerations, however, the court cited the *Bremen* policy and quoted the above *Bernuth* language.[112]

It has become apparent that the policy set out in *Bremen* has a much broader reach than forum selection clause cases. Certainly this reach has encompassed *forum non conveniens* questions and will continue to do so, unless, and until, the Supreme Court limits its *Bremen* holding. Absent this, concern for American international commercial development should continue to be a part of the overall balancing process in *forum non conveniens* decisions. The Second Circuit's *Alcoa* opinion should not be allowed to impede the consideration of this factor in *forum non conveniens* decisions and, thereby, ignore the realities of international commercial development.

CONCLUSION

In *Alcoa Steamship Co. v. M/V Nordic Regent*, the Court of Appeals for the Second Circuit narrowed the scope of the inquiry that courts may engage in when considering a foreign defendant's *forum non conveniens* motion in a suit brought by an American plaintiff. Traditionally, the courts have engaged in a weighted balancing of conveniences test to determine the appropriateness of a *forum non conveniens* dismissal. The *Alcoa* court, however, discarded this test in favor of a more stringent standard that mandates the exercise of a court's jurisdiction whenever it is established that a single plaintiff convenience will exist if the suit proceeds in the United States.

The court properly followed the line of cases that stresses the need to find a vexatious intent, on the part of the plaintiff in bringing suit in the United States, before a *forum non conveniens* dismissal is granted. The Second Circuit's error, however, stems from an incomplete analysis of the process that other courts have used to determine the existence of such intent. A single plaintiff convenience had never been found dispositive on this question, rather those courts, which have followed

110 465 F. Supp. 139, 146 (S.D.N.Y. 1979).
111 *Id.* at 146-48.
112 *Id.* at 146.

the vexatious intent standard, have engaged in a balancing of conveniences approach to determine the existence of such an intent on the part of the plaintiff.

The *Alcoa* single convenience standard will result in the increased exercise of jurisdiction by American courts in suits involving a United States plaintiff and a foreign defendant. The wisdom of such a course has already been questioned. In an era of increased dependence upon international trade and at a time in which American companies often conduct a significant portion of their operations overseas, American courts should not be bound by the ethnocentric concept that all international disputes involving Americans be settled in American courts. Such a limited approach can only serve to impede the expansion of American business in international commerce.

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