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trict court uses on remand to decide the validity of the claimed "bfoq" exception, Sumitomo will have the advantage of the uniqueness of its treaty rights and its requirements as a Japanese company to bolster its argument for an exception to Title VII standards, at least for some of the executive positions in question. This conclusion is premised on the factors cited in the appellate opinion as worthy of consideration: linguistic and cultural skills; knowledge of Japanese products, markets, customs, and business practices; familiarity with the parent enterprise in Japan; and acceptability to those persons with whom the company or branch does business.[34]

To predict the outcome on remand would be mere speculation, but in light of precedent and the uniqueness of its treaty reights, Sumitomo will have a good argument for the validity of the "bfoq" exception even though the court has spoken out in favor of a strong commitment to anti-discrimination principles.

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Forum Non Conveniens: Limiting Access to Federal Courts for Transnational Disputes

United States citizens conducting business abroad should be aware of recent court decisions restricting access to United States courts for redress of grievances against foreign nationals.[1] The federal appeals courts in these cases have allowed the trial courts broad discretionary power to dismiss transnational suits based upon the doctrine of forum non conveniens. The courts' application of the doctrine effectively remits a United States citizen's claim to a foreign country's jurisdiction: the ramifications of this ouster are serious for U.S. litigants. The decisions represent a shift from the traditional preference for upholding the plaintiff's choice of forum toward allowing the court to dismiss an action based upon judicial efficiency and convenience. The courts in *Pain v. United Technologies Corp.*[2] and *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*[3] adopted a new basis for dismissal of actions brought in United States courts which is ideologically inconsistent with the concept of the right of access to United States courts.[4]

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34. 638 F.2d at 559.

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1. Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980); Alcoa S.S. Co., Inc. v. M/V Nordic Regent, 636 F.2d 860 (2d Cir. 1980).

2. 637 F.2d 775 (D.C. Cir. 1980).

3. 636 F.2d 860 (2d Cir. 1980).

4. *See* Comment, *Forum Non Conveniens and American Plaintiffs in Federal Courts*, 47 U. CHI. L. REV. 373 (1980) (discussing Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821)).

A. *Recent Interpretations of the Doctrine of Forum Non Conveniens*

1. *Pain v. United Technologies Corp.*

The district court in *Pain v. United Technologies Corp.*[5] simplified the standards to be applied by the trial court when dismissing an action based upon forum non conveniens, requiring that 1) the action be an "imposition upon [the court's] jurisdiction" and 2) an "alternative forum" be available. Within these parameters the court must weigh the "relative advantages and obstacles to fair trial,"[6] a function which lies within the sound discretion of the court and is not readily accessible to attack. Acceptance of a standard allowing the dismissal of an action based upon inconvenience to the court is a clear departure from the traditional application of doctrine of forum non conveniens, the purpose of which was previously to prevent hardship to the litigants rather than to the court.[7]

The action in *Pain* arose from a helicopter crash in the North Sea which killed passengers of different nationalities, including an American citizen. The defendant in the action, United Technologies Corp. (U.T.C.) was a Delaware corporation with its principal place of business in Connecticut. A subsidiary of U.T.C. which designed and manufactured the helicopter involved in the crash was owned and operated by a Norwegian corporation. The trial court dismissed the action based upon stipulations that U.T.C. consent to: "personal jurisdiction in the foreign court where plaintiffs might subsequently bring suit;" and that U.T.C. agree "to waive any defense of statute of limitation were such a suit to be brought within one year of the date of dismissal," and agree to "proceed directly to trial only on the issues of damages without contesting liability in any suit filed by plaintiffs outside the United States."[8] Not only was an alternative foreign forum available to the plaintiff, but the court also ensured the cooperation of the defendant in an action to be brought outside the United States.[9]

In *Pain*, dismissal of the action was justified, in light of the fact that the United States court was without personal jurisdiction over the Norwegian corporation and would therefore have had to proceed solely against the American defendant. However, the doctrine of forum non conveniens could have been applied consistent with traditional standards of

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At common law, U.S. courts subscribed to the general rule that if a court was of competent jurisdiction it was required to hear a case brought before it. The doctrine of forum non conveniens was initially adopted by the courts to avoid unnecessary involvement in the internal affairs of a corporation foreign to that jurisdiction where the domicile of the corporation would be the more appropriate forum. *See* Rogers v. Guaranty Trust Co., 288 U.S. 123, 130-31 (1933); Williams v. Green Bay & W.R. Co., 326 U.S. 549 (1946).

5. 637 F.2d at 775.

6. 637 F.2d at 779, *quoting* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

7. For the historical development of forum non conveniens and its application in American courts, *see* Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 912 (1947).

8. 637 F.2d at 780.

9. *Id.*

convenience of litigation. Instead, the court reconciled apparent inconsistencies in prior cases—*Gulf Oil Corp. v. Gilbert*[10] and *Koster v. (American) Lumbermens Mutual Casualty Co.*[11]—and applied the rule of *Alcoa Steamship Co., Inc. v. M/M Nordic Regent*[12] that the domestic standards of forum non conveniens are to be applied to transnational disputes in such a way as to establish a liberal precedent allowing the trial court broad power to dismiss a case brought in its court by an American plaintiff.

2. *The Standards: Gulf Oil v. Gilbert and Koster v. (American) Lumbermens Mutual Casualty Co.*

Gulf Oil Corp. v. Gilbert is recognized as having established guidelines for a trial court to consider in a motion to dismiss on the ground of forum non conveniens.[13] With any application of the doctrine goes the presumption that "at least two forums are available in which the defendant is amenable to process." Beyond this fundamental requirement, the use of the doctrine rests primarily within the discretion of the court.[14] Factors for the court to consider include: the private interests of litigants; access to evidence; availability of witnesses; expense of litigation; advantages and obstacles to a fair trial; and public policy, including recognition of the problem of excess litigation in congested centers rather than in the origins of the cause of action. These discretionary considerations are to be balanced against the rule that the plaintiff's choice of forum should rarely be disturbed.[15] The priority of the plaintiff's choice of forum has been lost in recent decisions along with other factors which the courts, before *Alcoa* and *Pain*, had established as controlling dismissal of an action to another jurisdiction.

The Supreme Court emphasized different criteria to be considered when depriving a plaintiff of his choice of forum in *Koster v. (American) Lumbermens Mutual Casualty Co.*[16] *Koster* adhered to the balancing of interests set forth in *Gilbert* but implied an additional requirement that the defendant show harassment before the plaintiff's choice of forum is disturbed. Regarding the application of the doctrine of forum non conveniens the Court stated the general rule:

> 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 the presumed advantages of his home jurisdiction except upon a clear showing of the facts which either (1) establish such oppressiveness and vexation as to defendant

10. 330 U.S. 501 (1947).
11. 330 U.S. 518 (1947).
12. 637 F.2d at 775.
13. 636 F.2d at 863.
14. 330 U.S. at 507.
15. *Id.* at 508. *See generally* Recent Decisions, *Civil Practice—Forum Non Conveniens*, 39 BROOKLYN L. REV. 218 (1972).
16. 330 U.S. at 518.

> as to be out of all proportion to the plaintiff's convenience, which may be shown to be silent or non-existent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.[17]

The concern in *Koster* was whether the court had the power to disturb the plaintiff's choice of forum. *Pain* approaches the problem of forum non conveniens from a different perspective and considers the more objective question of where the action should be brought, independent of the plaintiff's choice of forum.

3. *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*

Pain was based primarily upon *Alcoa Steamship Co., Inc. v. M/V Nordic Regent.*[18] *Alcoa* was an admiralty action brought in New York by a New York corporation against a Liberian shipping corporation for damages sustained by the New York corporation in a collision in Trinidad, West Indies. The suit was dismissed by the trial court on the ground of forum non conveniens. On appeal, the Second Circuit discussed the proper standard to determine a motion to dismiss an admiralty action brought by a United States resident and held that the trial court had not abused its discretion in dismissing the case but had properly considered the *Gilbert* standard.[19]

The *Alcoa* court addressed the potential conflict in application of the *Gilbert* standard without specific adherence to the *Koster* decision. It suggested that *Koster* did not create a new standard, but rather a pragmatic application of *Gilbert* in derivative actions.[20] The court's reasoning is not compelling; however, the basis for its approach may be revealed in a footnote which notes the impracticality of applying the *Koster* requirement that the defendant be harassed in the chosen forum before a change of venue may be granted. There the decision cites the various treaties between the United States and foreign countries which provide "for access to each country's courts on a 'national treatment' basis."[21] Therefore, if a court is to provide for special treatment of a resident's claim it is equally obliged to afford the same treatment to a foreign claim brought in United States courts.

Consistent with this reasoning the court discussed the relevance of the U.S. citizenship of the plaintiff.[22] In essence the court concluded that

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17. *Id.* at 524.

18. 636 F.2d at 860.

19. *Id.* at 861. The court noted that the principles of *Gilbert* had recently been applied in Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880 (2d Cir. 1978). Farmanfarmaian involved an action brought by an Iranian national in New York District Court against a U.S. corporation for breach of contract. The Second Circuit affirmed the trial court's dismissal of the action based upon the availability of an alternative forum and the trial court's wide discretion in the application of the doctrine of forum non conveniens.

20. 636 F.2d at 865.

21. *Id.* at 865 n.6.

22. *Id.* at 867.

citizenship is not a relevant factor (nor could it be, in light of the court's deference to treaties promising equal access to the courts). The court recognized a preference for liberal application of the doctrine as evidenced by state court decisions.[23] *Silver v. Great American Insurance Co.*[24] is cited as authority for a more liberal application of forum non conveniens: it represents a pronounced departure from the general rule of upholding plaintiff's choice of forum and allows the court to disregard the residence of the plaintiff if the litigation is clearly in an inconvenient forum.[25]

The court cites numerous cases supporting its willingness to refer U.S. citizens to foreign jurisdictions.[26] Likewise, the court deemphasizes plaintiff's choice in deference to the convenience of the court. Thus the doctrine of forum non conveniens, at one time referring to the convenience of the litigants, is evolving into a doctrine of convenience to the court. The minimum requirement at the inception of the doctrine—that an alternative forum be available—may, based upon the wide discretion of the court and its liberal construction, be the sole determinant of relegability of an action to a foreign jurisdiction.

B. *Right of Access to United States Courts*

An American citizen does not have an absolute right of access to United States courts. Courts have, however, been reluctant to send Americans into foreign courts.[27] Despite the recent trend to lessen the significance of the claim brought by an American plaintiff there is considerable authority to the contrary. To a certain extent the argument may be raised that the right of access to the courts is protected by the Constitution.[28] The difficulty in applying this argument to the U.S. citizen's right to bring an action against a foreign party in U.S. courts is that the Constitution's reference to jurisdiction between state and federal courts "cannot

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23. *Id.* at 868.

24. 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

25. 636 F.2d at 867. *See* Schertenleib v. Traum, 589 F.2d 1156, 1163 (2d Cir. 1978), which asks "should defendant and the court be burdened with [the case's] continuing there, if an alternative forum now exists so that plaintiff will not be without a remedy?"

26. 636 F.2d at 869, *citing, 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); Mohr v. Allen, 407 F. Supp. 483 (S.D.N.Y. 1976); Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956), *cert. denied*, 352 U.S. 871 (1956).

27. Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (1956). The status of a suit between two non-residents is discussed in Barratt, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1941), in a domestic context, *i.e.*, where both parties are residents of different states rather than foreign countries. The general rule provides that, where a more appropriate forum is available, the court may dismiss the action. Some states compel the court to accept jurisdiction where either party is a resident of the state and a dismissal for forum non conveniens is not allowed. *Id.* at 410-13. *See generally* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949). *See also* note 4 *supra*.

28. *See* The Epson, 227 F. 158 (W.D. Wash. 1915); Note, *Forum Non Conveniens: Two Views on the Decision of the Court of Appeals for the Second Circuit in Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 12 J. MARITIME L. 123 (1980).

be construed to interfere with the treaty-making power of the Executive and the Senate."[29] In addition, the argument has been raised that the U.S. citizen has a right of access to the courts because of his taxpayer status.[30] However, in the interest of the integrity of the court there can be no necessary connection between paying taxes and using the courts. Moreover, the payment of taxes as a basis for access to the courts would be inequitable, for a "resident alien may pay considerable American taxes, while a company incorporated in the United States but conducting all of its business elsewhere may pay little or none."[31]

Taken to the extreme, it has been suggested that the doctrine of forum non conveniens may be applied without any consideration of the citizenship of the parties.[32] This argument assumes that any presumption against the adequacy of a foreign court is unjustified, or that, if the forum court is inadequate, it is inadequate regardless of whom (alien or citizen) the court may relegate to that jurisdiction. That is, if a forum is unfair and aliens have to redress their grievances there when ousted from U.S. courts, the same should be applied to citizens.[33]

Convenience and court efficiency are not controlling values inherent in the historical development of the judicial system in the United States. The complexities of international issues and the popular preference for a fair resolution to conflicts which can be found in U.S. courts should not provide a basis for the court to dismiss a case. Beyond the constitutional and taxation arguments, the U.S. citizen has a right of access to the courts based upon his right to choose his forum to litigate his grievance. The right, though limited, is consistent with the notion of freedom and justice for United States citizens. The rule which more closely expresses traditional American values is found in *The Saudades*:[34]

> [A]n American court may not refuse to try a case brought by an American citizen, unless it feels that injustice would be done by allowing him to proceed in his own court. The result of such a rule is that the discretion of the court, so far as it has any existence, is limited, and that mere inconvenience to the respondent, or to both parties, will not be considered a ground for exercising it to refuse jurisdiction.

C. *Conclusion*

The present trend is moving away from the plaintiff's choice to de-

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29. Bickel, *supra* note 27, at 43 n.129. For a discussion of the constitutional ramifications of using forum non conveniens, *see* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM L. REV. 1, 3-19 (1929).

30. 636 F.2d at 977 (Oakes, J., dissenting); 12 J. MARITIME L. 123 (1980), note 28 *supra*.

31. Comment, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373 (1980).

32. *Id.* at 393.

33. *Id.* at 379.

34. 67 F. Supp. 820, 821 (E.D. Pa. 1946).

mands of public policy in determining forum non conveniens.[35] The plaintiff's access to the U.S. courts is necessarily limited. Likewise, predictable limitations on the discretion of the trial court to dismiss the plaintiff's claim are necessary. As the law presently stands, the trial court has broad discretion to determine the viability of a U.S.-foreign action. The general standards, albeit ambiguous, require a showing of "inconvenience" and "public interest" to deprive an American plaintiff of an American forum.[36] In balancing the standards, weight is to be accorded plaintiff's citizenship and residency in favor of continuance in the forum wherein the plaintiff initiated the action.[37]

The fundamental principles underlying the doctrine of forum non conveniens have not been abolished. But the businessperson should be aware of *Pain and Alcoa* which grant the trial court broad discretion to dismiss a case based upon the doctrine of forum non conveniens. The discrepancy between the purported standards and their application alert the prudent businessperson to a need for contractual safeguards regarding choice of forum and arbitration provisions in transnational agreements lest he find himself on an unexpected "vacation" abroad for litigation.

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35. 637 F.2d at 784.
36. Note 31 *supra*, at 379.
37. 637 F.2d at 795.