Northwestern Journal of Technology and Intellectual Property

Volume 18
Issue 1 *Fall*

Article 3

11-2020

RECALIBRATING THE FORUM NON CONVENIENS ANALYSIS: THE EFFECTS OF TECHNOLOGY ON TRANSPORTING EVIDENCE

Catherine Cervone
Northwestern Pritzker School of Law

N O R T H W E S T E R N
JOURNAL OF TECHNOLOGY
AND
INTELLECTUAL PROPERTY

RECALIBRATING THE FORUM NON CONVENIENS ANALYSIS: THE EFFECTS OF TECHNOLOGY ON TRANSPORTING EVIDENCE

Catherine Cervone

November 2020 VOL. 18, NO. 1

Volume 18, Number 1 (2020)
Northwestern Journal of Technology and Intellectual Property

RECALIBRATING THE FORUM NON CONVENIENS ANALYSIS: THE EFFECTS OF TECHNOLOGY ON TRANSPORTING EVIDENCE

CATHERINE CERVONE

ABSTRACT—This Note seeks to reexamine the judge-made doctrine of forum non conveniens. Advances in technology and changes in the rules governing evidence transportation render it easier for a defendant to litigate in foreign fora than ever before. Judges should consider these developments in the litigation landscape when evaluating a defendant's motion to dismiss pursuant to forum non conveniens. The doctrine should be recalibrated so that it leads to dismissal only in cases where it is impossible for the defendants to litigate in plaintiff's chosen forum.

INTRODUCTION

Forum non conveniens is a judge-made doctrine that allows a court to decline jurisdiction at its discretion, even when the elements of personal and subject matter jurisdiction have been satisfied.[1] A defendant can make a motion to dismiss pursuant to forum non conveniens or a court can invoke the doctrine independently. A court will decline jurisdiction when it determines that another adequate forum is more suitable for the interests of all parties and for justice to prevail. The doctrine's origins find roots in the 19th century practice of Scottish courts, which used the term "forum non conveniens" to distinguish between cases dismissed for lack of jurisdiction and cases dismissed because of inconvenience to the parties.[2]

[1] *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 350 (6th ed. 2018).

[2] Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909–10 (1947); *see* BORN & RUTLEDGE, *supra* note 1, at 350.

When a U.S. court considers a motion for dismissal pursuant to forum non conveniens, it looks to the bifurcated analysis of private and public interest factors articulated in the 1947 Supreme Court case, *Gulf Oil Corp. v. Gilbert.*[3] The public interest factors evaluate the inconvenience of the local forum court.[4] These considerations include congestion in the court, the need for a jury trial, and the complexity and length of trial. The private interest factors address potential problems the parties would face if the litigation were to continue in the U.S. forum.[5] Three of the five private interest factors focus on the availability of evidence, either documents or testimony, from abroad.[6] When considering motions to dismiss pursuant to forum non conveniens, lower courts are supposed to balance these factors. The Court adjusted the forum non conveniens analysis slightly in the 1981 case, *Piper Aircraft Co. v. Reyno*, but the factors remained the same.[7]

The doctrine's application has led to a patchwork of lower court decisions.[8] Confusion seems to stem from the fact that the doctrine is unclear as to whom it is designed to benefit.[9] The forum non conveniens analysis was designed to balance the convenience of the plaintiff, the defendant, and the

---

[3] 330 U.S. 501, 508–09 (1947).

[4] *Id.* at 508; *see also* BORN & RUTLEDGE, *supra* note 1, at 403 n.4.

[5] Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 Tul. L. Rev. 309, 312 (2002).

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

[7] 454 U.S. 235, 246–61 (1981).

[8] A good example of this is the so-called "British-Pill Litigation," where a group of British women claimed injury due to oral contraceptives manufactured by American corporations. Allen R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 836–38 (1985). The plaintiffs brought several hundred actions in federal and state courts across the U.S. *See id.* at 837 & nn.241-42; *see, e.g.*, Bewers v. Am. Home Prods. Corp., 472 N.Y.S.2d 637 (1984); Harrison v. Wyeth Lab'ys, 510 F. Supp. 1, 2–3 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d. Cir. 1982); Jones v. Searle Lab'ys, 444 N.E.2d 157, 163 (Ill. 1982); *In re* British Oral Contraceptives Cases, No. L44473-78 (Morris County Sup. Ct. July 20, 1981), *aff'd*, No. A-348-81T3 (N.J. Sup. Ct. App. Div. Dec. 23, 1982). The manufacturers' motions to dismiss pursuant to forum non conveniens were granted in federal and state actions in Pennsylvania, New Jersey, New York, Illinois, and Ohio. Only the California Court of Appeals found that the United Kingdom was not an adequate alternative forum and therefore retained jurisdiction. *See* Holmes v. Syntex Lab'ys, 202 Cal. Rptr. 773, 780 (Ct. App. 1984); *see generally* Stein, *supra*, at 836–37.

[9] In the British Pill Litigation, for example, the California Court of Appeals was primarily concerned with the absence of strict liability in the United Kingdom. *Holmes*, 202 Cal. Rptr. at 780. The Court found that such a deficiency in British law indicated that there was no other suitable forum *for the plaintiff* to bring suit in. The courts that dismissed the case did so for their own convenience, reasoning that the United States should not impose its view of drug labeling standards upon a foreign country. *See Harrison*, 510 F. Supp. at 4. It would be thorny for a U.S. Court to impose its own view of safety warnings on a foreign country. This is more of an institutionalist analysis because it considers the Court's role, duties, and limitations rather than focusing on what is best for the plaintiffs, which is what the California Court which retained jurisdiction prioritized.

court. Federal courts and state courts use the doctrine for case management.[10] Defendants use the doctrine in situations where the forum selected by the plaintiff is inconvenient. Technology has amplified confusion by increasing the convenience with which plaintiffs can bring suit in foreign fora and the convenience with which defendants can defend in foreign fora. Developments in communications abilities have rendered the doctrine's focus on transporting evidence outmoded, while also making it easier for foreign plaintiffs to forum shop and bring suit in U.S. courts.

The forum non conveniens analysis of evidence transportation is outdated in light of technological advances. The doctrine no longer serves its intended purpose. The private interest factors need to be recalibrated so that they point to dismissal only in cases where it is impossible for the defendant to litigate in plaintiff's forum.

This Note proposes recalibrating the private interest factor analysis so that these factors are better situated to give effect to their intended purpose. Developments in communications abilities have rendered the concern with transporting evidence largely obsolete. Amendments to the Federal Rules of Civil Procedure and the genesis of the Hague Evidence Convention have made obtaining evidence located abroad significantly easier. Some courts already undertake their analysis of the private interest factors with an eye towards technological advancements, but these courts seem to be confined to specific jurisdictions.[11]

A defendant seeking dismissal pursuant to forum non conveniens should be required to certify, through affidavit, which evidence is unobtainable in plaintiff's chosen forum and why such evidence is necessary. This proposed solution is consistent with the purposes of forum non conveniens because it limits dismissals to situations where making the defendant litigate in the plaintiff's forum of choice would lead to injustice.[12]

---

[10] Thirty states, the District of Columbia, and all U.S. territories engage in an analysis using similar factors. *See* Davies, *supra* note 5, at 315 n.17. State courts often use this doctrine to dismiss a case in favor of another state. Most U.S. state courts recognize a version of the doctrine. For a discussion of the diversity of state forum non conveniens doctrines, see David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950–51 (1990).

[11] *See* Andrew Filipour, *Forum Non Conveniens and the "Flat" Globe*, 33 EMORY INT'L L. REV. 587, 615–17 (2019) (suggesting that there may be a geographical bias in the Southern District of New York because that District often considers technological advances in its forum non conveniens analyses).

[12] *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 414 (2017) (suggesting that the "Scottish and English practices from which the[] private interest factors derive were emphatic that forum non conveniens was not about mere inconvenience, but actual injustice").

I. BACKGROUND

The history of the doctrine of forum non conveniens is "murky" at best.[13] The U.S. doctrine's origins trace to the discretionary practice of Scottish courts in the 1800s of declining to exercise jurisdiction when doing so would be unfair to a foreign defendant.[14] U.S. Courts recognized a similar doctrine for federal admiralty cases throughout the nineteenth century, although the doctrine was not officially referred to as forum non conveniens until 1947.[15]

Gulf Oil Corp. v. Gilbert was the first case in which the Supreme Court applied forum non conveniens. *Gulf Oil* involved a citizen of Virginia and a Pennsylvania corporation registered to do business in Pennsylvania and New York.[16] The Virginian plaintiff sought damages from a fire allegedly caused by the defendant's negligence.[17] The damage occurred in Virginia, but the plaintiff sued in the Southern District of New York.[18]

In upholding the New York court's dismissal of the case for forum non conveniens, the Court held that plaintiff's choice of forum should not be disturbed unless there was a strong showing of private and public interest factors weighing in favor of dismissal.[19]

The private interest factors are:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action and all other practical problems that make trial of a case easy, expeditious and inexpensive[;] . . . enforceability of a judgment if one is obtained.[20]

The public interest factors are:

> Administrative difficulties arising from congestion of court dockets; the burden placed on a jury required to decide a case with no connection to the community from which it is drawn; and the desirability of having a dispute tried in a forum

---

[13] Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994).

[14] Braucher, *supra* note 2, at 909–11 (tracing the international history of forum non conveniens).

[15] *See* ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 123 (1962) ("Admiralty courts have administered what in effect has been a doctrine of *forum non conveniens* much longer than land courts.").

[16] Gilbert v. Gulf Oil Corp., 330 U.S. 501, 502–03 (1947).

[17] *Id.*

[18] Gilbert v. Gulf Oil Corp., 62 F. Supp. 291, 291 (S.D.N.Y. 1945).

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

[20] *Id.*

> familiar with the governing law, rather than in a forum that would have to untangle problems in conflict of laws itself.[21]

The *Gulf Oil* Court reasoned that nearly all the evidence in the case was located in Virginia and that the Virginian Plaintiff had not made a strong argument for why New York was a convenient forum. Scholars suggest that the *Gulf Oil* factor test was created in response to the Supreme Court's decision in *International Shoe* and reflected a desire to protect defendants against the floodgates of forum-shopping.[22]

In the 1981 case, *Piper Aircraft Co. v. Reyno*, the Court revisited the *Gulf Oil* factors and applied forum non conveniens in a transnational context.[23] *Piper* involved an airplane crash in Scotland, which resulted in the deaths of all the Scottish passengers aboard. The plane's parts were manufactured in both Pennsylvania and Ohio. The plaintiff, an estate administrator for the Scottish beneficiaries, brought claims in the U.S. The district court dismissed, the Third Circuit reversed, and the Supreme Court affirmed the district court's dismissal.

Justice Marshall, writing for the majority, explained that "the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient."[24] To justify dismissal, the Court reasoned that local judicial convenience, the private convenience of the defendant, foreign regulatory interests, and public policy all indicated that the case was better suited for a court in the United Kingdom.[25] The Court applied the *Gulf Oil* factors but slightly altered the standard by requiring that an adequate and alternative forum exist before a court balances the private and public interest factors.[26]

---

[21] *Id.* at 508–09.

[22] *See* Filipour, *supra* note 11, at 595 (explaining the *Gulf Oil* test as a response to plaintiffs' increased discretion and options to forum shop in light of *International Shoe*'s minimum contacts standard); Gardner, *supra* note 12, at 404 ("The *Gilbert* test was a pragmatic solution for a particular house-keeping problem faced by the federal courts in the years following *International Shoe Co. v. Washington*, as the expansion of available forums enabled greater forum shopping by plaintiffs."); Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12, 14 (1949) (commenting on the need for forum non conveniens in light of expanding personal jurisdiction provisions); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 210–11 (2001) (connecting the adoption of forum non conveniens to *International Shoe*); *Gulf Oil Corp.*, 330 U.S. at 507 ("[An] open [jurisdictional] door may admit those who seek justice but perhaps justice blended with some harassment.").

[23] 454 U.S. 235, 239, 241–44, 255 (1981).

[24] *Id.* at 256.

[25] *See* BORN & RUTLEDGE, *supra* note 1, at 369–70.

[26] *Piper Aircraft Co.*, 454 U.S. at 254–55.

II. REFORMULATING THE PRIVATE INTEREST ANALYSIS

When a court considers the private interest factors, the sole inquiry should be whether a defendant could feasibly litigate in plaintiff's chosen forum. A defendant should be required to prove to the court why evidence cannot be transported to the plaintiff's chosen forum. The location of documents, witnesses, and other evidence is a critical element of the balancing of private interest factors in many forum non conveniens cases.[27] However, as the U.S. Court of Appeals for the Eighth Circuit has noted, "[t]he time and expense of obtaining the presence or testimony of foreign witnesses is greatly reduced by commonplace modes of communication and travel."[28] Judges, including the late Judge Oakes on the Court of Appeals for the Second Circuit, have suggested, "[t]he entire doctrine of forum non conveniens should be reexamined in light of the transportation revolution."[29]

A. The Effects of Technology on Evidence Transportation

Technological advances have made litigating internationally more convenient for defendants than it was at the time *Piper* was decided. For example, audio and video conferencing services have made it easier to take depositions and access evidence remotely.[30] The private interest factors of access to evidence and witnesses must be considered in the context of these developments because what was inconvenient when *Piper* was decided may be convenient today. Additionally, the rules governing how litigants use technology to obtain evidence have adapted to the technological advances.[31]

1. Audio and Video Conferencing Technologies Have Made Obtaining Distant Testimony and Depositions More Convenient.

In 1999, Fredric Lederer addressed the effects of the tech age on the legal system where he analyzed the courtrooms of the future: virtual

---

[27] *See id.* at 257 (evaluating the "relative ease of access to sources of proof"); Duha v. Agrium, Inc., 448 F.3d 867, 876 (6th Cir. 2006) (focusing on the access to non-witness sources of proof, including relevant documents); Blanco v. Banco Indus. de Venez., S.A., 997 F.2d 974, 982–83 (2d Cir. 1993) (looking at the location of sources of evidentiary proof); Lacey v. Cessna Aircraft Co., 932 F.2d 170 (3d Cir. 1991) (analyzing ease of access to evidence).

[28] Reid-Walen v. Hansen, 933 F.2d 1390, 1396 (8th Cir. 1991).

[29] Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A., 712 F.2d 11, 14 (2d Cir. 1983) (Oakes, J., concurring).

[30] *See* Martin Davies, *Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation*, 55 AM. J. COMP. L. 205, 205 (2007) (noting that "high tech courtrooms are becoming increasingly common, with electronic filing and case management systems, electronic access to legal authorities and case records, laptop ports and wireless Internet routers, presentation of evidence on computer monitors and display screens and remote appearances via video-conferencing") (internal quotation marks omitted).

[31] Davies, *supra* note 5, at 324–25.

courtrooms or "cyber courts."[32] A cyber court, which only exists virtually, is extreme in its integration of technological advancements. A more modest embrace of technology might include the use of information sharing systems such as email, audio and video conferencing, and e-documents or scanned and uploaded images of physical pieces of evidence. Today, "the ease of access to documents," has greatly increased because of the ability to access electronically stored documents remotely—that is, from a place other than the offices of the law firm in which they are located.[33] *Gulf Oil* and *Piper* reflect a world when the "best evidence rule" required the production of original documents.[34] With the advent of technologies such as scanning, email, and other file and content sharing software, evidence can exist virtually. When documents exist online, the geographical location of the forum court is less relevant because an attorney only needs internet connection to access that evidence.

For non-document-based information, audio and video conferencing permit the transportation of remote information into the walls of the courthouse. Many courts are equipped with the technology to Skype in witnesses, their depositions, and potentially even live video of the premises about which the case concerns.[35] The use of integrated controllers allows the sources of images and sound to be displayed in real time in the court through the use of its video and audio conferencing systems. Using platforms such as Skype, Cisco WebEx, GoToMeeting, Google Chat, and FaceTime, lawyers can transport witnesses from anywhere in the world onto a screen in the court, without any transportation, travel costs, or inconvenience to the witness.

Some courts have recognized how technology has altered the forum non conveniens private interest factor analysis.[36] However, this recognition is not widespread and may be geographically limited.[37] As technology has

---

[32] Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High Technology Courtrooms*, 50 S.C. L. REV. 799, 837 (1999).

[33] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

[34] Gardner, *supra* note 12, at 409.

[35] *See* Herbert B. Dixon Jr., *The Courtroom of the Present: The Bare Essentials for a Technologically Competent Courtroom*, 48 JUDGES' J. 37, 40 (2009).

[36] *See* City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 795 (S.D.N.Y. 2017) ("[P]rejudice flowing from the inability of forcing parties to travel to the appointed forum may often be substantially ameliorated—or at least mitigated—by, for example, testimony by videoconference. . . ."); Eclaire Advisor Ltd. v. Daewoo Eng'g & Constr. Co., 375 F. Supp. 2d 257, 265 (S.D.N.Y. 2005) ("In this day and age of rapid transportation and instant communications, the convenience of immediate physical proximity to documents, testimony, and other proof has become of less consequence to a *forum non conveniens* analysis. . . .").

[37] In an empirical study of forum non conveniens cases where foreign plaintiffs successfully overcame motions to dismiss pursuant to the doctrine, Andrew Filipour found that the United States

changed, the rules governing how litigants can avail themselves of these advancements have adapted. The Federal Rules of Civil Procedure and the Hague Evidence Convention provide the procedural framework for understanding how litigants can benefit from these advances in technology. The next section looks at the procedural changes permitting litigants to benefit from the uses of technology.

2. Changes in the Federal Rules of Civil Procedure Make Using Distant Evidence More Convenient.

The Federal Rules of Civil Procedure have modernized to accommodate new developments in technology. Rule 43 of the Federal Rules of Civil Procedure governs the taking of witness testimony in court.[38] In 1996, Rule 43(a) was amended to permit "presentation of testimony in open court by contemporaneous transmission from a different location."[39] The Rule permits "contemporaneous transmission" for a "good cause shown in compelling circumstances and upon appropriate safeguards."[40] Contemporaneous transmission has been interpreted by courts to include live video-conferencing.[41] The Notes of the Advisory Committee suggest a more conservative reading of what constitutes compelling circumstances. The Notes indicate that a foreseeable difficulty in attending trial because the witness lives far from the forum court might not be sufficiently compelling to warrant the use of a contemporaneous transmission.[42] However, Courts have largely not followed this restrictive reading, and the inconvenience posed by travelling to the forum court has often been considered sufficiently compelling under Rule 43(a) to permit testimony to be taken via contemporaneous transmission.[43] The party who seeks the virtual testimony

District Court for the Southern District of New York frequently recognized the effects of technology on the private interest factors. Four of the five cases in his data set from the Southern District of New York explicitly referenced the importance of technological advancements. *See* Filipour, *supra* note 11, at 615–17.

[38] Fed. R. Civ. P. 43(a).

[39] *Id.*

[40] *Id.*

[41] *See* Norris v. Shiley, Inc., No. CIV. A. 97-1953, 1999 WL 1487499, at *1 (W.D. Pa. Sept. 24, 1999) (finding that evidence given by an expert in California and transported by live video to a trial in Pennsylvania was acceptable under Rule 43(a)).

[42] Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendments.

[43] *See* United States v. One Gulfstream G-V Jet Aircraft Displaying Tail Number VPCES, 304 F.R.D. 10, 17 (D.D.C. 2014) ("Ample case law recognizes that videoconference deposition can be an adequate substitution for an in-person deposition, particularly when significant expenses are at issue. . . ."); Hernandez v. Hendrix Produce, Inc., 297 F.R.D. 538, 541 (S.D. Ga. 2014); Dagen v. CFC Grp. Holdings, No. 00 Civ. 5682, 2003 WL 22533425, at *1–2 (S.D.N.Y. Nov. 7, 2003) (holding that despite the importance of live, in-court testimony, it was appropriate to permit five witnesses to deliver testimony over the phone from Hong Kong because of the costs of international travel, the impact on the defendant's

of the remote witness usually has the burden of establishing that there is a legitimate reason, but that party does not necessarily need to show that it would cause the witness hardship to get to the forum court.[44] The effect of amended Rule 43(a) is that contemporaneous testimony is as acceptable as live testimony.[45]

The use of contemporaneous transmission drastically affects consideration of the second private interest factor, "the cost of obtaining attendance of willing witnesses," because willing foreign witnesses no longer have to travel to the U.S. to testify.[46] Today, the cost of obtaining witnesses abroad is relatively low since the disruption caused to businesses and professionals through absences is minor.

If the witness cannot appear live via audio or video conference, the witness' testimony has always been available pursuant to Rule 32(a)(3)(B), which permits the deposition of a witness to be used by any party for any purpose if the witness is farther than 100 miles from the forum court or is outside of the United States.[47] Because this rule was on the books in 1947 when *Gulf Oil* was decided, it is likely that the Court was only referring to the cost of bringing key witnesses to the U.S. Key witnesses were those whose demeanor had to be observed in person.[48] Unimportant witnesses could always be deposed outside of the country pursuant to 32(a)(3)(B).[49]

The Federal Rules also permit recording of depositions for later use at trial as a feasible alternative to travelling to the witness' location to obtain the deposition.[50] In 1993, Rule 30 was amended to permit depositions by

---

business, and the possible difficulties of the witnesses in obtaining visas); FTC v. Swedish Match N. Am., Inc., 197 F.R.D. 1, 2–3 (D.D.C. 2000) (finding compelling circumstances in the "serious inconvenience" posed by requiring a witness who was a resident of Oklahoma to travel to the forum court in Washington, D.C. and subsequently permitting the witness' testimony to be taken via videoconferencing software in live court).

[44] *See* Davies, *supra* note 30, at 215 n.59 (collecting cases).

[45] *See Swedish Match N. Am., Inc.*, 197 F.R.D. at 2 ("I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are a) equivalent to his presence in court and b) preferable to reading his deposition into evidence. To prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness' testimony which is exactly equal to the other.").

[46] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

[47] FED. R. CIV. P. 32(a)(4)(B); *see also* Davies, *supra* note 5, at 329.

[48] FED. R. CIV. P. 32(a)(4)(B); *see also* Davies, *supra* note 5, at 329.

[49] Fed. R. Civ. P. 32(a)(3)(B).

[50] *See* Bohn v. Bartels, 620 F. Supp. 2d 418, 432 (S.D.N.Y. 2007) (refusing to dismiss because of the inability to compel foreign witnesses to appear because of the availability of "alternatives to live testimony"); City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 795 (S.D.N.Y. 2017) ("'[D]espite the preference for live testimony,' alternative options, such as 'videotaped depositions, obtained through letters rogatory,' can still 'afford the jury an opportunity to assess the credibility' of absent witnesses") (citing Direnzo v. Philip Servs. Corp., 294 F.3d 21, 30 (2d Cir. 2002)).

phone "or other remote electronic means."[51] Videotaped depositions afford the court the opportunity to assess the validity of the witness' demeanor during cross-examination.[52] According to the Seventh Circuit Court of Appeals, "[v]ideotaped depositions are a necessary and time effective method of preserving witness' time . . . in this age of advanced court technology. . . ."[53] Rule 30(b)'s amendment as well as the advances in video-recording technology have transformed the ease with which depositions can be obtained.

3. The Hague Evidence Convention Makes Collecting Evidence from Foreign Countries More Convenient.

The Hague Evidence Convention governs what the Federal Rules of Civil Procedure cannot: obtaining evidence from an unwilling foreign national.[54] The Convention sets up a Central Authority System in each member country, which is equipped to receive letters requesting depositions of citizens from other member countries.[55] When one member requests a deposition of a citizen of another member country, the requesting country must specify the questions it wants the receiving country to ask the citizen.[56] Pursuant to Article 12, the receiving country can refuse the request on two narrow grounds: when executing the request would be outside of that country's judiciary's functions or when the security or sovereignty of the receiving country could be prejudiced by implementation of the request.[57] However, Article 12 specifies that a receiving country cannot refuse to execute a letter of request solely on the grounds that it has exclusive jurisdiction over the subject matter of the action or because the cause of action is not recognized under the country's laws.[58] The receiving country then implements the request according to its own laws.[59] Because in most civil law countries, the taking of evidence is conducted by courts rather than private attorneys, Article 9 of the Convention allows U.S. Courts to request

[51] FED. R. CIV. P. 30(b)(7) (1993) (repealed 1996).

[52] *See* Davies, *supra* note 5, at 329.

[53] Com. Credit Equip. Corp. v. Stamps, 920 F.2d 1361, 1368 (7th Cir. 1990).

[54] *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention].

[55] *Id.* art. 3.

[56] *Id.*

[57] *Id.* art. 12.

[58] *Id.*

[59] *Id.* art. 10.

verbatim transcripts or videotaping of the requested deposition.[60] Unless the domestic law of the receiving country prevents videotaping, it is unlikely that a receiving country will refuse to record.[61]

The Evidence Convention alters the analysis of the second private interest factor, the "availability of compulsory process for attendance of unwilling witnesses."[62] When documents are held by third-parties not subject to a U.S. Court's personal jurisdiction, the Evidence Convention now provides a solution for obtaining that evidence.[63]

The Hague Evidence Convention alters the forum non conveniens analysis because, today, the only witnesses that would be unreachable are those in countries which are not members to the Convention. Some countries have resisted broad, U.S.-style requests for discovery and adopted reservations under the convention's Article 23. Article 23 objections can be used to preclude pretrial discovery—which some member states, such as the United Kingdom, see as "fishing expeditions"—but these blocking techniques reflect a misunderstanding of U.S.-style pretrial discovery, and some member states entered into Article 23 to limit their participation in such discovery.[64]

The Hague Evidence Convention is largely determinative on the question of availability of compulsory process for unwilling witnesses; if the unwilling witness is a citizen of a member country, her deposition is obtainable. Some courts have relied on the possibility of obtaining information through the channels of the Hague Evidence Convention when considering dismissals pursuant to forum non conveniens.[65]

---

[60] Videotaping of questioning is particularly relevant in civil law countries, where witnesses are usually questioned by a Judge and no verbatim transcript is produced. *See* Davies, *supra* note 5, at 333–34.

[61] *See id.* (explaining that the judicial authority will implement its own laws but will follow specifically requested procedures unless the procedure is incompatible with the country's own internal procedure and pointing out that this exception is particularly important in civil law countries).

[62] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

[63] *See* Gardner, *supra* note 12, at 410–11.

[64] BORNE & RUTLEDGE, *supra* note 1, at 1022–23.

[65] *See* Bigio v. Coca-Cola Co., 448 F.3d 176, 179–80 (2d Cir. 2006) ("[T]o the extent there are witnesses abroad who are beyond the court's subpoena power, their testimony can be provided by depositions taken pursuant to letters rogatory."); City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 794–95 (finding witness' inability or unwillingness to travel from Switzerland to the forum court in the U.S. to be inconsequential given the opportunity for "alternative manner[s] of testifying at trial"); Terra Firma Invs. (GP) 2 Ltd. v. Citigroup Inc., 725 F. Supp. 2d 438, 443 (S.D.N.Y. 2010) (noting that the fact that several witnesses were located in England and were not amenable to compulsory process was not a problem because the court was willing and able to assist the parties in obtaining foreign discovery through depositions taken pursuant to letters rogatory).

4. Increasing the Defendant's Burden of Proving Inconvenience.

Some scholars suggest that the doctrine needs to be retired completely, but this Note suggests a less drastic alternative: requiring the defendant to show, with greater specificity, why the plaintiff's chosen forum is inconvenient.[66] This specificity requirement would compel the defendant to show how the private interest factors weigh in its favor, explaining how necessary evidence is unobtainable despite changes in technology, amendments to Federal Rules of Civil Procedure, and the enactment of the Hague Evidence Convention. For example, if the defendant can demonstrate that it will not be able to obtain an essential witness because the witness is unwilling and resides in a country that is not a party to the Hague Evidence Convention, then the case should be dismissed because the defendant will likely have to relitigate the issue in the future in a forum where it has access to all its witnesses.

In *Piper*, the Court explicitly rejected a method similar to this proposal. There, the Court of Appeals required the defendants to describe with specificity the evidence that would be unattainable if the trial were to be held in a U.S. forum.[67] The Court of Appeals suggested that defendants seeking dismissal pursuant to forum non conveniens provide affidavits "identifying the witnesses they would call and the testimony these witnesses would provide."[68] The Supreme Court wrote that, "[s]uch detail is not necessary" because "requiring extensive investigation would defeat the purpose of their motion" since many of the "crucial witnesses [we]re located beyond the reach of compulsory process, and thus [we]re difficult to interview."[69] The Court cited various cases where lower courts had rejected that requirement and noted that although that requirement was present in transfers pursuant to 28 U.S.C. §1404(a), such transfers were not directly comparable and thus should have a different standard. The Court endorsed a standard where "vague assertions of difficulty" were sufficient to prove inconvenience.[70]

Today, few fora are truly inconvenient. This Note has argued that technology has made transportation of foreign evidence more convenient. Requiring a defendant to justify its claim that certain evidence is unobtainable does not defeat the purpose of its forum non conveniens motion. A forum non conveniens dismissal is often a "complete victory for

---

[66] *See* Gardner, *supra* note 12, at 390.

[67] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 258 (1981).

[68] *Id.*

[69] *Id.*

[70] Gardner, *supra* note 12, at 445.

the defendant."[71] Defendants, particularly corporate ones, should not be able to claim inconvenience and avoid being held responsible for their actions in a forum they dislike. A specificity requirement furthers the public policy consideration of policing corporate misconduct by requiring defendants to prove the nature and magnitude of the alleged inconveniences they would suffer. The requirement would also avoid duplicative and wasteful litigation. If a case proceeds without necessary witnesses and evidence, the defendant might seek to relitigate the case in the forum in which it can fully access its evidence. Adding a specificity requirement would modernize the forum non conveniens by incorporating the changes that have occurred in technology to the Federal Rules of Civil Procedure and to international treaties. The defendant should have to prove why the evidence it is seeking is not available through these channels.

One might argue that increasing the defendant's burden through a specificity requirement is inconsistent with the *Gulf Oil* and *Piper* Courts' original understanding of how forum non conveniens should be used. However, the Scottish and English cases from which forum non conveniens originated emphasized that the doctrine was about injustice, not just inconvenience.[72] Scholars agree that "'[f]orum non conveniens' translates more accurately to 'innappropriate' or 'unsuitable' forum."[73] Additionally, the language used in *Gulf Oil* and *Piper* for defining the standard of inconvenience sets a high bar on the types of occurrences that constitute inconvenience: if "trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to the

[71] Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) ("A *forum non conveniens* dismissal is often, in reality, a complete victory for the defendant . . . Empirical data available demonstrate that less than four percent of cases dismissed under the doctrine . . . ever reach trial in a foreign court.").

[72] *See* La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français", [1926] S.C. (H.L.) 13, 19 (Lord Shaw of Dunfermlime) (appeal taken from Scot.) (holding that "the mere balance of convenience is not enough"); *In re* Norton's Settlement [1908] 1 Ch 471 at 479, 482 (Williams L.J.) (Eng.) (finding that dismissal requires more than "the mere fact of increased expense at trial"). Early, pre-*Gulf Oil* American cases followed the same line of reasoning. *See* Pierce v. Equitable Life Assurance Soc'y of U.S., 12 N.E. 858, 863 (Mass. 1887) (explaining that it is likely that a business would "anticipate[] that the profits of the business will compensate for the inconvenience of being held to answer" in state courts of the state where it's doing business); Kantakevich v. Del., L. & W.R. Co., 10 A.2d 651, 653 (N.J. Cir. Ct. 1940) (refusing to dismiss a case on the grounds that "the present day conveniences for travel" and the "[a]dvances in the art of photography and the skill of engineers furnish[] ample facilities for a fair presentation of the place of the occurrence.").

[73] Gardner, *supra* note 12, at 414. *See also* ANDREW DEWAR GIBB, THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 212 (1926) ("The inconvenience, then, must amount to actual hardship. . . ."); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 412–13, 421 (1947) ("Mere general allegations that witnesses and documents must be transported from a distant state should not suffice [for dismissal], since individuals and corporations who choose to do business in many states will probably be put to such inconvenience wherever suit is brought. . . .").

plaintiff's convenience,' then dismissal is appropriate."[74] Although the *Piper* Court rejected a specificity requirement in the 1980s, it is likely that the Court would not approve of the misuse of forum non conveniens by corporate defendants to get out of fora which are not actually inconvenient.

If this requirement were implemented, forum non conveniens would function as a safety valve for situations where it would be oppressive to force the defendant to litigate because it would not have access to all relevant witnesses and evidence. This solution starts from the presumption that technology has made international evidence transportation convenient to the defendant, and puts the onus on the defendant to prove why a forum is truly inconvenient but leaves room for dismissals when the defendant can prove that the evidence could not be obtained through available technological means, as permitted by the Rule Amendments and the Hague Evidence Convention.

III. RECALIBRATING THE INTEREST FACTORS: A PROPOSED SOLUTION

The world is drastically different than it was in 1947, when the Supreme Court outlined the private and public interest factors a Court should consider when deciding a motion to dismiss pursuant to forum non conveniens. A defendant will claim that the private interest factors weigh in its favor when the evidence is difficult to obtain. However, advances in technology have made accessing evidence significantly more convenient. Technology is not the only factor which has made the transportation of evidence easier. The rules and treaties governing how evidence can be obtained and moved across borders have adapted to new technologies as well. To reflect these changes, courts should impose a heightened standard on defendants seeking dismissals pursuant to forum non conveniens where they have to prove, with specificity, why plaintiff's chosen forum is inconvenient.

CONCLUSION

If the private interests are to achieve their purpose of determining whether a case can be efficiently litigated in a specific forum, the defendant seeking dismissal should have a higher burden of demonstrating why litigating in the plaintiff's chosen forum is impossible. Defendants must demonstrate why, despite advances in technology, they cannot transport evidence to plaintiff's chosen forum.

This Note's proposed solution asks judges to update the forum non conveniens analysis in light of technological advances. A court should

[74] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)).

dismiss a case pursuant to forum non conveniens only in situations where it would be impossible for the defendant to litigate in plaintiff's forum. This solution is consistent with the doctrine's purpose of preventing injustice to the defendant because, today, it is only unjust to force the defendant to litigate in a foreign forum if the defendant would be unable to present its evidence and witnesses. By recalibrating this aspect of forum non conveniens, courts would bring the analysis into the 21st century and ensure that the factors serve their intended purposes.