

Strategy in International Litigation*

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The choice of forum in international litigation — which country’s courts will hear the dispute — can be outcome determinative. This article discusses four doctrines by which a party may influence the choice of forum in international litigation:

- (1) *forum non conveniens*;
- (2) parallel proceedings;
- (3) motions to stay or dismiss U.S. proceedings in favor of parallel foreign proceedings; and
- (4) antisuit injunctions.

The brief introduction that follows in § I. sets forth the context in which these doctrines operate.

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I. Introduction

A. International Litigation and Choice of Forum

1. Multiple Fora

In the absence of an exclusive forum selection clause in an international contract, an international dispute — by its very nature — could likely be commenced in more than one forum.

- a. For example, if a U.S. corporation manufactures a product that injures someone in Scotland, that company is likely to be subject to personal jurisdiction in both the U.S. and Scotland.
- b. If a Japanese company enters into a distribution agreement with a U.S. company, in the event of a dispute, the Japanese company may well be subject to personal jurisdiction in the courts of both the United States and Japan.

2. Perceived Advantages of a U.S. Forum

In situations where a defendant is subject to personal jurisdiction both in the United States and another country, a plaintiff, even a non-U.S. plaintiff, may well choose to bring suit in the United States.

- a. As one English judge, Lord Denning, said, “As a moth is drawn to the light, so is a litigant drawn to the United States.” *Smith Kline & French Lab. Ltd. v. Bloch*, (1983) 1 W.L.R. 730, at 730.
- b. This is because certain features of the U.S. legal system are perceived to favor plaintiffs, including the following:
 - The availability of contingent-fee lawyers in the United States.
 - The availability of punitive or multiple damage awards.
 - The availability of jury trials in civil cases.
 - The availability of broader discovery.
 - The absence of rules making an unsuccessful party liable for the attorneys’ fees and costs of the successful party.

- The availability of causes of action that simply do not exist in other countries, like under the Racketeer Influenced and Corrupt Organization (RICO), the antitrust laws, or the securities laws.
 - The possibility of class action suits.
- c. As a corollary, a U.S. forum is often perceived to be unfavorable to defendants. Thus defendants, relying on various doctrines and strategies, go to great lengths to avoid suits in the United States.
 - d. Some defendants go so far as to stipulate that they will not contest liability in a foreign forum if the U.S. suit against them is dismissed. For example, *In re Air Crash off Long Island, New York*, 65 F. Supp. 2d 207 (S.D.N.Y. 1999), arose out of the crash of TWA Flight 800 on July 17, 1996, shortly after it took off from New York's John F. Kennedy Airport for Paris and Rome. Representatives of the deceased French domiciliaries brought suit against Boeing and TWA in the District Court for the Southern District of New York. Boeing and TWA made a motion to dismiss the suit on the grounds of *forum non conveniens* in favor of a French forum, predicated on a conditional promise, among other things, not to contest liability for full compensatory damages in the courts of France and promptly to pay any damages awarded. Presumably, defendants believed France to be a more favorable forum because it neither recognizes punitive damages nor permits contingency fee representation. Notwithstanding defendants' conditional promise, the court denied the defendants' motion. The court noted in this context:

If defendants were not willing not to contest liability as to compensatory damages, this motion would not require serious consideration. It would not be necessary to consider the public interest factors, because the private interest factors would themselves weigh heavily against dismissal. Defendants' willingness not to contest liability makes dismissal a closer issue. Nevertheless, an exception is not warranted here.

Id. at 218.

- e. The United States is not always the most favorable forum for a plaintiff and, when faced with an international dispute, it is important to

consider carefully the advantages and disadvantages of choosing one forum over another. England, for example, is a favorable forum for defamation actions.

- f. Moreover, in the event that a dispute involves a relatively modest amount, a foreign plaintiff might be better off in its home courts than have to incur the additional expense inevitably involved in litigating in another country.

3. Forum Shopping

When a party to an international dispute commences suit in a forum it believes to be favorable to its case, such party is often accused of forum shopping. But, as another English judge, Lord Simon of Glaisdale, has pointed out,

forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation.

Atlantic Star, (1974) A.C. 436, at 471.

B. Strategies for Selecting or Avoiding a Forum

1. Introduction

Because the choice of forum in international litigation can be outcome determinative, a party involved in an international dispute needs to be aware of various strategies and doctrines that can affect the location of the forum in which the case is heard. Some of these strategies and doctrines can often be employed simultaneously.

2. Exclusive Forum Selection Clauses

One strategy is to choose the forum before any dispute arises. This can be done by including an exclusive forum selection clause in a contract. An exclusive clause, as its name suggests, means that a suit can be brought only in the forum designated in the contract. By contrast, a nonexclusive clause permits, but does not require, a suit to be brought in a particular forum. Obviously, whether a party can insist that its home forum is designated in an exclusive forum selection clause turns on its bargaining power during negotiations or how strongly the other party views the issue.

In fact, one of the reasons that parties to international contracts often agree to resolve their disputes by arbitration is to have a “neutral forum” for the dispute, rather than the home court of one or other party.

A forum selection clause, by its very nature, operates only where the disputing parties have a contractual relationship, although the clause, if appropriately drafted, can include within its scope any tortious disputes that may arise out of that relationship — *e.g.*, a claim that the contract was fraudulently induced. (Appendix A contains some draft forum selection and related clauses.)

Where there is no contractual relationship between the disputing parties, however, then, *ex hypothesi*, there will be no forum selection clause governing where suit must be brought.

Thus, where a dispute arises in circumstances where either the disputing parties did not include an exclusive forum selection clause in their contract, or the dispute does not relate to or arise out of any such contract, then the parties must resort to various other strategies to influence the location of the forum in which the case is resolved.

3. Races to the Court House and Actions for Negative Declarations

In the absence of an exclusive forum selection clause, one common strategy for choosing the forum is to be the first to file suit.

- a. A prospective defendant does not have to wait for the allegedly injured party — the prospective plaintiff — to commence suit. The prospective defendant can launch a preemptive strike: it can bring an action in its own favored forum for a negative declaration — a declaration that it is not liable to the injured party (now the defendant) for a particular claim. This strategy works only if the law of the favored forum recognizes actions for negative declarations. Generally, such actions are recognized in both common law and civil law countries. Although, as Lawrence Collins has noted, “[i]n England, there has been some hostility to actions for negative declarations.” Lawrence Collins, “Essays in International Litigation and the Conflict of Laws” 276 (OUP 1994).
- b. *See generally*, Andreas Lowenfeld, “Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation,” 91 *Am. J. Int’l L.* 314 (1997).

- c. *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003), is a recent illustration of an unsuccessful attempt at an action for declaratory relief brought as a preemptive strike. The case arose out of a press release issued by Harrods intended as an April Fool's joke. The press release related to plans to "float" Harrods. The joke played on the word "float," suggesting that Harrods intended to build a floating version of its store. This release was later run by the *Wall Street Journal* (WSJ), which commented on the joke in a story titled "The Enron of Britain," stating that, "If Harrods, the British retailer, goes public, investors would be wise to question its every disclosure." Harrods claimed that this constituted libel and demanded an apology backed by the threat of litigation.

On May 24, 2002, Dow Jones brought suit in the District Court for the Southern District of New York seeking

- (i) relief under the Declaratory Judgment Act (DJA), asking the court to declare that any libel action based on the WSJ article would be insufficient as a matter of law; and
- (ii) an antisuit injunction enjoining Harrods and Al-Fayed, its owner, from pursuing any litigation related to the article.

On May 29, 2002, Harrods commenced suit in the High Court of Justice in London seeking damages for libel. The reason for Dow Jones's preemptive strike is that England is a far more favorable forum for libel actions than the United States.

Harrods moved to dismiss, claiming that the court lacked subject matter jurisdiction under the DJA. Harrods advanced three grounds:

- (i) declaratory judgment relief was not the proper mechanism to resolve tort claims;
- (ii) Dow Jones's action was a forum-shopping preemptive strike brought against the "natural plaintiff," and such a suit is outside of the purposes contemplated for the use of the DJA; and
- (iii) there was no "actual controversy" within the terms of the DJA.

In a lengthy and wide-ranging opinion, Judge Marrero granted

Harrods's motion to dismiss. While it is difficult to cover all the issues addressed in the court's lengthy opinion, three points are worth noting.

First, the district court found there was no "actual controversy" for the purposes of the DJA. Dow Jones had argued that there was an "actual controversy" on the ground that any judgment obtained in England would not be enforceable in the United States because it would violate the First Amendment. The court rejected this argument, stating that it was based on "premature concerns about contingencies that may or may not come to pass":

Even if Dow Jones' theory that a judgment against it in the London Action would be unenforceable in most or all American jurisdictions were conceded, it does not follow that the mere prospect that such a ruling may be rendered at some indefinite point in the future raises a sufficient actual controversy within the meaning of the DJA. The Court does not find enough immediacy and reality in Dow Jones' claim at this early stage of the London Action to warrant declaratory relief. In essence, Dow Jones' complaint is grounded on a string of apprehensions and conjectures about future possibilities: that the court in the London Action will find a basis to assert jurisdiction and will recognize the pleading of a sufficient claim; that an adverse ruling on the merits may be rendered against Dow Jones; that the adjudication may award Harrods compensatory damages or enjoin Dow Jones from publishing the April 5 Article; that Dow Jones may seek to enforce such judgment in the United States or elsewhere; that if enforcement is sought, the judgment will be recognized somewhere. At this juncture, however, these protestations and prospects amount to nothing more than what they still are: premature concerns about contingencies that may or may not come to pass.

Dow Jones, 237 F. Supp. 2d at 408.

Second, in support of its argument, Dow Jones also cited cases where federal courts had granted declaratory or injunctive relief enjoining parallel state court proceedings where fundamental constitutional rights, such as those under the First Amendment, were at stake. The district court was careful to distinguish these cases from the case before it, finding that different considerations applied in international cases. The court stated:

Thus, under Dow Jones' hypothesis, the DJA would confer upon an American court a preemptive style of global jurisdiction branching worldwide and able to strike down offending litigation anywhere on Earth. Intriguing as such universal power might appear to any judge, this court must take a more modest view of the limits of its jurisdiction, and offers a more humble response to the invitation and temptation to overreach.

Id. at 411.

Third, the district court also considered whether it would exercise its discretion to issue declaratory relief even if it were to have found an actual controversy. In addressing this question, the court found significant that Dow Jones filed its action as a preemptive strike, and stated that this weighed against the granting of declaratory relief:

Dow Jones' litigation in this court amounts to strategic forum-shopping motivated by pursuit of tactical edge over an opponent. In essence, it seeks to establish venue here and away from another jurisdiction where the action could properly be brought, and to haul foreign parties into this court for an application of American law in support of a declaration of nonliability shielding Dow Jones from damages for prior conduct. That in this race to the courthouse Dow Jones managed to file its declaratory action first is immaterial.

Id. at 440.

- d. Being the first to file suit is not dispositive. (Although, as set forth below, it is a factor considered under U.S. law on a motion to dismiss or stay on grounds that there is a parallel foreign proceeding.) A defendant may rely on certain strategies and doctrines in isolation or combination to defeat a plaintiff's choice of forum, and a plaintiff to defend its choice of forum:
 - i. motion to dismiss on grounds of *forum non conveniens*;
 - ii. the commencement of parallel proceedings;
 - iii. motion to stay or dismiss on grounds of parallel foreign proceeding; and
 - iv. antisuit injunctions.

- e. The following sections consider U.S. law relating to each of these doctrines.

II. *Forum Non Conveniens*

A. Basic Principles of U.S. Law

1. Introduction

As the U.S. Supreme Court stated in the leading case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947), “[i]n 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. [Italics omitted.]”

2. Presumption in Favor of Plaintiff’s Choice of Forum

The starting point for an analysis of the doctrine of *forum non conveniens* is that there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum that should “rarely be disturbed.” *Gulf Oil*, 330 U.S. at 508.

3. Two-Pronged Test

In addressing a motion to dismiss on *forum non conveniens* grounds, a court has to examine:

- a. The availability of an *alternative forum* to adjudicate the dispute.
- b. If an adequate alternative forum exists, the court will then balance the *public and private interests* to determine whether the convenience of the parties and the ends of justice would best be served by dismissing the action in favor of the alternative forum.

Gulf Oil, 330 U.S. at 508-509.

4. Discretion

Because the test is so fact-intensive, the *forum non conveniens* analysis is largely within the discretion of the district court.

- a. “[T]he decision lies wholly within the broad discretion of the district court and should be reversed only if that discretion has been clearly abused.” *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996) [internal quotation marks and citation omitted]. See *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998) (limited but “meaningful” appellate review).

- b. “Discretion is abused in the context of *forum non conveniens* when a decision (1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions ... or (3) fails to consider all the relevant factors or unreasonably balances those factors.” *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003).

5. Applicability to Actions to Confirm International Arbitration Awards

The Second Circuit held that an action for the recognition and enforcement of a foreign arbitral award could be dismissed on grounds of *forum non conveniens*. *In re Monégasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002). For a discussion of this decision, see William W. Park, “The International Currency of Arbitral Awards” (PLI Coursebook 2004).

B. Alternative Forum

1. Introduction

As noted above, the first prong of the *forum non conveniens* analysis requires a determination of whether an alternative forum is available to hear the dispute.

- a. An alternative forum is said to be “available” if the defendant is amenable to process in another jurisdiction, except in those “rare circumstances ... where the remedy offered by the other forum is clearly unsatisfactory.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).
- b. To be available, a forum must permit the “litigation of the subject matter of the dispute.” *Piper*, 454 U.S. at 254 n.22. Thus, an adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum. *BCCI v. State Bank of Pak.*, 273 F.3d 241, 246 (2d Cir. 2001). Courts often deal with statute of limitations issues by making conditional dismissals. See § I.G. below.
- c. One common argument made by a non-U.S. plaintiff in opposition to a defendant’s motion to dismiss on *forum non conveniens* grounds is that even though the defendant is amenable to process in a non-U.S. forum, that forum is not “available” because it is inadequate.

2. Two-Step Inquiry

Accordingly, some courts have further broken down this prong into a two-step inquiry:

- a. the party moving for dismissal on *forum non conveniens* grounds must be amenable to jurisdiction in another forum; and
- b. the other forum must satisfy certain minimal standards of adequacy.

C. Availability of Alternative Forum

1. Introduction

In order to satisfy this requirement, the foreign court must have jurisdiction over all the defendants, not just the “primary” defendants. *Madanes v. Madanes*, 981 F. Supp. 241, 265-66 (S.D.N.Y. 1997) (holding that dismissal of suit would be improper “absent a proffer by all of the Defendants that they would be willing to consent to the jurisdiction of the Argentine court ...”). See also *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282 (S.D.N.Y. 2000).

Where a defendant is considered to be “not essential,” however, the fact that he or she is not amenable to jurisdiction in the foreign forum will not preclude dismissal on grounds of *forum non conveniens*. *Murray v. British Broad. Corp.*, 81 F.3d 287, 293 n.2 (2d Cir. 1996).

2. Effect of Legislation in Some Latin American Countries

- a. Some Latin American countries have passed statutes that affect the *forum non conveniens* analysis by U.S. courts. See, e.g., *Decreto Numero 34-97* (1997) (Guatemala); *Ley de Defensa de Derechos Procesales de Nacionales y Residentes* (Law in Defense of the Procedural Rights of Nationals and Residents) (Honduras); *Ley 55* (Ecuador).
- b. The Guatemalan statute is illustrative. It provides that once a Guatemalan national files a suit in the United States on a particular claim, then the courts of Guatemala cease to have subject matter jurisdiction over that claim. In such a case, the Guatemalan national can argue that the Guatemalan forum is unavailable for the purposes of the U.S. *forum non conveniens* analysis.
- c. The purpose of these laws is to prevent U.S. defendants from obtaining dismissal on grounds of *forum non conveniens* of a case

brought in a U.S. court by a national of those Latin American countries.

- d. U.S. courts have generally rejected arguments based on these statutes. In *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512 (D. Minn. 1996), the court considered an argument against dismissal on *forum non conveniens* grounds advanced by a Guatemalan citizen who had brought suit in the United States. In granting the motion to dismiss, the court stated:

Plaintiff argues that Guatemalan law forbids disturbing a plaintiff's forum choice. Consequently, Guatemalan courts will not recognize jurisdiction that has been "manipulated" by a *forum non conveniens* transfer. However, a quick and decisive solution to this potential problem was reached in *Delgado v. Shell Oil*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995). After finding Guatemala and other fora to be adequate to merit *forum non conveniens* dismissal, the court directed that "in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction" of any plaintiff's case, that plaintiff may return, and the court will resume jurisdiction.

Id. at 1525.

- e. In *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 546 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002), plaintiff opposed a motion to dismiss on *forum non conveniens* grounds by relying on Ecuadorian Law 55. Law 55 provides in part, "Should the lawsuit be filed outside Ecuadorian territory, this will definitely terminate national competency as well as any jurisdiction of Ecuadorian judges over the matter."

Plaintiffs argued that Ecuador was not an available alternative forum on the ground that, under Law 55, Ecuadorian courts had no jurisdiction.

Judge Rakoff rejected this argument because it "relied on two doubtful assumptions." *Id.* at 546. The first is that Law 55 is retroactive (Law 55 was enacted in 1998, and the suit in question

was filed in the United States prior to 1998.) The second assumption is that Law 55 applies even after a case is dismissed on grounds of *forum non conveniens*.

Judge Rakoff found that “[w]hile the Ecuadorian courts have yet to resolve these issues, ... the unlikelihood that Ecuadorian courts would ultimately adopt both these dubious assumptions makes Law 55 an insufficient basis for concluding that the Ecuadorian forum is unavailable.” *Id.* at 547. Judge Rakoff qualified the dismissal of the case, however:

Nevertheless, as a safeguard, this Court ... will qualify the dismissals here to provide that in the event that a court of last review in Ecuador finally affirms the dismissal for lack of jurisdiction pursuant to Law 55 of any action raising the claims here at issue pursued in good faith in Ecuador by any of the plaintiffs here, this Court, upon motion made within sixty days, will resume jurisdiction over that action.

Id. at 547. The Second Circuit agreed with this reasoning and noted that, since the district court’s decision, the Ecuadorian Constitutional Court had declared Law 55 to be unconstitutional. *Aguinda v. Texaco, Inc.* 303 F.3d at 477 (2d Cir. 2002).

D. Adequacy of Alternative Forum

1. Burden to Show Adequate Forum

It is the moving party’s burden to demonstrate the existence of an adequate alternative forum. *BCCI v. State Bank of Pak.*, 273 F.3d 241, 248 (2d Cir. 2001).

2. Bases for Claiming Inadequacy

There are three different bases for claiming that a forum is inadequate:

- (1) the substantive law of the alternative forum is inadequate;
- (2) the procedures of the alternative forum are inadequate; or
- (3) the political or social circumstances in the alternative forum are such as to render it inadequate.

3. Adequacy of Alternative Forum: Substantive Law

- a. The fact that the substantive law of the foreign forum differs from

that of the United States “should ordinarily not be given conclusive or even substantial weight,” *id.* at 247, and “[t]he availability of an adequate alternative forum does not depend on the existence of an identical cause of action in the other forum.” *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998).

- b. Although the courts are not always in agreement, most courts have granted motions to dismiss on grounds of *forum non conveniens* notwithstanding the fact that foreign law does not provide the same remedy as that available under U.S. law, as long as there is some remedy under foreign law.
- c. Set forth below are some arguments considered by the courts in considering whether a forum is inadequate on the ground its substantive law differs from the United States:
 - i. RICO Claims. Because plaintiffs can still bring foreign suits based on the underlying predicate acts, RICO suits are subject to *forum non conveniens* dismissal. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 769 (9th Cir. 1991); *PT United Can Co.*, 138 F.3d at 74; *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (*per curiam*) (“A review of the legislative history of RICO ... discloses no mandate that the doctrine of *forum non conveniens* should not apply”) *See also In re Air Crash off Long Island, New York*, 65 F. Supp. 2d 207 (S.D.N.Y. 1999); *Alfadda v. Fenn*, 159 F.3d 41, 47 (2d Cir. 1998) (“Because the traditional Gilbert public interest factors weigh heavily in favor of France, we do not agree that the United States’ interest in applying its securities and RICO laws rendered Judge McKenna’s decision to dismiss on the grounds of *forum non conveniens* an abuse of discretion.”).
 - ii. Antitrust Suits. The circuits are divided on whether the doctrine of *forum non conveniens* is applicable to antitrust cases. The Fifth Circuit has reasoned that absent the antitrust claim, there may not be an alternate remedy available to a plaintiff and, therefore, these claims should not be subject to *forum non conveniens* dismissal. *Industrial Inv. Dev. Corp. v.*

Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), *vacated by* 460 U.S. 1007 (1983). *But cf.* *Capital Currency Exch., N.V. v. National Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998) (“[A]ntitrust suits are subject to dismissal under the *forum non conveniens* doctrine.”). *See also CSR Ltd. v. Federal Ins. Co.*, 141 F. Supp. 2d 484 (D.N.J. 2001).

- iii. Securities Law. Courts have held that claims based on U.S. securities laws are subject to *forum non conveniens* dismissal. *See, e.g., Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997), *aff’d*, 159 F.3d 41 (2d Cir. 1998); *But see Derensis v. Coopers & Lybrand*, 930 F. Supp. 1003, 1011 (D.N.J. 1996) (Canada was not adequate alternative forum for securities class action suit based on U.S. securities laws, noting that the United States “has a strong public policy of protecting the integrity of its securities markets”).
- iv. Copyright Law. Copyright suits have been dismissed on *forum non conveniens* grounds, as most countries have their own copyright laws available as a potential remedy. For example, the Ninth Circuit held that the Singapore Copyright Act provided an adequate alternative remedy to the U.S. Copyright Act, even though its territorial limitations reduced the scope of relief available. *Creative Tech., Ltd. v. Aztech System Pte., Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995). *See also Deston Songs LLC v. Wingspan Records*, 2001 U.S. Dist. LEXIS 9763 (S.D.N.Y. July 12, 2001). *But see Jose Armando Bermudez & Co. v. Bermudez Int’l*, 2000 U.S. Dist. LEXIS 12354 (S.D.N.Y. Aug. 28, 2000) (declining to dismiss on *forum non conveniens* grounds where plaintiff asserted trademark and copyright infringement claims).

4. Adequacy of Alternative Forum: Procedural Differences

- a. The fact that a foreign forum has different procedures to a U.S. forum will rarely render it inadequate. If all a plaintiff had to do was demonstrate that the foreign court had less favorable procedures than that of a U.S. court, as a practical matter almost every foreign forum would be found to be inadequate.

- b. Set forth below are some of the arguments considered by courts in assessing whether a foreign forum is inadequate on procedural grounds:
- i. Availability of Jury Trial. The fact that a foreign forum does not have jury trials does not render it inadequate. *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195,199 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987); *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d at 768 (9th Cir. 1991).
 - ii. Discovery. While most countries do not have the broad scope of discovery available in the United States, this will not render a foreign forum inadequate. *See, e.g., Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1123-24 (S.D.N.Y. 1992); *Pavlov v. Bank of N.Y. Co.*, 135 F. Supp. 2d 426, 434-435 (S.D.N.Y. 2001), *vacated on other grounds by* 25 Fed. Appx. 70 (2002) WL 63576 (2d Cir. Jan. 14, 2002).
 - iii. Contingent Fee Arrangements. *In Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2d Cir. 1996), an English national argued that while he could have brought suit against the BBC in England, England was not an adequate forum because it does not permit contingency fee arrangements. Therefore, he did not have the financial means to litigate in England, and hence, England was not available to adjudicate the dispute. The Court of Appeals for the Second Circuit rejected this argument.

The Second Circuit did not deny that the question of whether a plaintiff had the financial means to bring a suit in a non-U.S. forum was a factor to be taken into account after the court had determined that an alternative forum is available. But the court held that this financial issue could not be taken into account for the purposes of the threshold determination of whether an alternative forum was available in the first place. *Id.* at 292. *See In re Air Crash off Long Island*, 65 F. Supp. 2d at 217 (“The absence of contingent fee arrangements in a foreign jurisdiction is a permissible factor to weigh in the *forum non conveniens* analysis.”). *See also Byrne v. BBC*, 132 F. Supp. 2d 229, 237 (S.D.N.Y. 2001).

- iv. Delay. Generally, a delay of a few years in the foreign forum is insignificant in the *forum non conveniens* calculus. *See, e.g., Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085-86, 1086 n.6 (S.D. Fla. 1997) (five-year delay for civil actions not given great weight, although Bolivia ultimately found inadequate on other grounds); *Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 591 n.11 (S.D.N.Y. 1996) (three-year or longer delay in Brazil did not render forum inadequate).

However, there is a point where the prospective remedy becomes so remote, that it becomes no remedy at all. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995) (India held inadequate where there would be a delay of up to twenty-five years before the litigation could be resolved); *Sablic v. Armada Shipping Aps*, 973 F. Supp. 745, 748 (S.D. Tex. 1997) (backlog of cases in Croatia possibly resulting in a lengthy delay cited as one reason for finding it to be an inadequate forum).

Where the plaintiff produces significant evidence documenting the partiality or delay (in years) typically associated with the adjudication of claims, and these conditions are so severe as to call the adequacy of the forum into doubt, then the burden shifts to the defendant to persuade the district court that the forum is adequate. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1313 (11th Cir. 2001).

- v. Punitive Damages. A Brazilian forum was held to be adequate even though Brazil did not permit recovery of punitive damages or damages for pain and suffering. *De Melo v. Lederle Labs.*; 801 F.2d 1058 (8th Cir. 1986).
- vi. Class Actions. The absence of the class action procedure “does not ordinarily render a forum ‘inadequate’ for purposes of *forum non conveniens* analysis.” *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 541 (S.D.N.Y. 2001).

5. Adequacy of Alternative Forum: Political Issues/Institutional Infirmary

- a. While courts have dismissed *forum non conveniens* motions based

on assertions of political instability or a demonstrated institutional bias, these conditions must be very severe and well documented to be taken into account by courts.

- b. In the interests of comity, U.S. courts are reluctant to assess the integrity or quality of foreign judicial systems.
- c. Set forth below are some of the arguments considered by courts in assessing whether a foreign forum is inadequate on grounds of political instability or institutional bias:
 - i. Impartiality or Corruption. A generalized concern about the impartiality of a country's judicial system is not enough and such claims "[do] not enjoy a particularly impressive track record." *Eastman Kodak*, 978 F. Supp. at 1084 (collecting cases). Courts are particularly resistant to these claims when the plaintiff has chosen to transact business in the foreign forum. *Id.* at 1084-85. ("There is a substantial temerity to the claim that the forum where a party has chosen to transact business ... is inadequate.") In *Blanco v. Banco Industrial de Venezuela S.A.*, 997 F.2d 974, 981 (2d Cir. 1993), the Second Circuit rejected general concerns that the "Venezuelan system of justice is ... endemically incompetent, biased, and corrupt." *Id.* In *Mercier v. Sheraton International, Inc.*, 981 F.2d 1345 (1st Cir. 1992) *cert. denied*, 508 U.S. 912, the First Circuit rejected claims that the Turkish justice system exhibited a "profound bias" against Americans and foreign women. *Id.* at 1351. In *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002), the court found that, "The Peruvian courts furnish an available and adequate forum for the adjudication of plaintiffs' claims against Southern Peru and the awarding of appropriate damages if those claims succeed." *But cf. Eastman Kodak*, 978 F. Supp. at 1085 (holding that, despite the justifiably strong inclination against granting these claims, the corruption in the Bolivian system was "compelling" enough to render that forum inadequate).
 - ii. Fears for Safety. A plaintiff's concern for his or her individual safety may be given consideration in extreme situations. *See*,

e.g., *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854 (S.D.N.Y. 1983), *aff'd mem.*, 767 F.2d 908 (2d Cir. 1985) (denying *forum non conveniens* motion where plaintiffs would probably be executed if they returned to Iran). *But see Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891, 896 (S.D.N.Y. 1981) (rejecting plaintiff's assertions that his safety would be endangered in Saudi Arabia as "unsubstantiated speculation").

- iii. Political Unrest. Courts appear to be more sympathetic to claims of political unrest. In *Hatzlachh Supply Inc. v. Tradewind Airways Ltd.*, 659 F. Supp. 112 (S.D.N.Y. 1987), a U.S. corporation brought an action against an English airline for misdelivery of cargo in Nigeria. The court held that Nigeria was an inadequate forum, citing strict currency controls that may have prevented plaintiff from taking out of Nigeria any award he may have secured, as well as a statute of limitations that would have provided very little time for plaintiff to prepare his action. Although the court chose not to decide the case on this point, the opinion also referred to a travel advisory warning that portions of the Nigerian Constitution were suspended, all new legislation was by decree, and violators normally appear before a military tribunal. *See also Sablic*, 973 F. Supp. at 748 (holding that, although Croatia was making "great strides toward recovery," the political and military instability still rendered this country an inadequate forum).

Similarly, in *Canadian Overseas Ores Ltd. v. Compania de Acero Del Pacifico S.A.*, 528 F. Supp. 1337 (S.D.N.Y. 1982), the court denied a motion to dismiss, holding that the defendant failed to establish that Chile was an adequate forum: "[Plaintiff] has raised serious questions about the independence of the Chilean judiciary *vis à vis* the military junta currently in power." *Id.* at 1342. Although there were constitutional provisions in force guaranteeing the independence of the judiciary, the junta had the ability to amend or rescind the constitution. The plaintiff's concern about getting a fair trial in Chile was exacerbated because the defendant was a state-owned corporation.

E. Characteristics of Plaintiff Affecting *Forum Non Conveniens* Analysis

1. Introduction

As noted, a central aspect of the *forum non conveniens* analysis is the presumption in favor of the plaintiff's choice of forum. The degree of deference shown to a plaintiff's choice of forum depends in large part on certain characteristics of the plaintiff.

2. Citizenship and/or Residence of Plaintiff

a. General Principle

It has long been a general principle of the doctrine of *forum non conveniens* that a U.S. plaintiff's choice of forum is entitled to greater deference than that of a non-U.S. plaintiff. See *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947) (plaintiff's choice of forum is entitled to greater deference when the plaintiff has sued in the plaintiff's home forum). However, being a U.S. citizen is not dispositive. *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir. 1980) (*en banc*) ("American citizenship alone is not a barrier to dismissal on grounds of *forum non conveniens*.").

As a corollary, a non-U.S. plaintiff's choice of a forum is entitled to less deference than that of a U.S. plaintiff. *Piper*, 454 U.S. at 255-256. See also *Ralph v. Long*, 2001 U.S. Dist. LEXIS 8197 at *6 (D. Md. June 14, 2001). This is not based on a desire to disadvantage foreign plaintiffs, but rather on an assessment of the ultimate convenience of the forum:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Piper, 454 U.S. at 255-56.

The fact that a plaintiff is foreign, however, is not dispositive.

This does not mean, however, that dismissal is "automatically barred" when a plaintiff has chosen his home forum, nor that dismissal is automatically mandated when a foreign plaintiff is involved. Rather, "some weight" must be given to the foreign plaintiff's forum choice, and "this reduced weight is not an invitation to accord a foreign plaintiff's

selection of an American forum no deference since dismissal for *forum non conveniens* is the exception rather than the rule. [Citation omitted.]”

Cromer Fin. Ltd. v. Berger, 158 F. Supp. 2d 347, 354 (S.D.N.Y. 2001). See also *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001).

b. The *Iragorri* Case: Examining Motives for Choice of Forum and for Motion to Dismiss

In an *en banc* decision, the Court of Appeals for the Second Circuit addressed the general principle that a U.S. plaintiff’s choice of forum is entitled to greater deference than that of a non-U.S. plaintiff and has instructed courts to look behind the plaintiff’s citizenship and/or residence to other relevant considerations:

We regard the Supreme Court’s instructions that (1) a plaintiff’s choice of her home forum should be given great deference, while (2) a foreign resident’s choice of a U.S. forum should receive less consideration, as representing consistent applications of a broader principle under which the degree of deference to be given to a plaintiff’s choice of forum moves on a sliding scale depending on several relevant considerations.

Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001).

In *Iragorri*, the Second Circuit convened *en banc* in order to address the issue of the deference to be accorded a plaintiff’s choice of forum in the light of three earlier, recent decisions of the Second Circuit, *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); and *DiRienzo v. Philip Services Corp.*, 232 F.3d 49 (2d Cir. 2000), *vacated by* 294 F.3d 21 (2d Cir. 2002), which stand for the proposition that a U.S. resident’s choice of forum is entitled to deference even if that resident chooses to bring suit in a forum different from that plaintiff’s home forum.

Iragorri arose out of an elevator accident that took place in Cali, Colombia, in which a naturalized U.S. citizen and Florida domiciliary died. The plaintiffs, the wife and children of the deceased, who were also Florida domiciliaries, and the estate of the deceased, brought suit in the District Court for the District of Connecticut against the manufacturer of the elevators Otis Elevator Company and United Technologies Corporation, both of which had their principal places of business in Connecticut. The defendants moved

to dismiss on grounds of *forum non conveniens*, arguing that the suit should be brought in Cali. The district court granted the motion.

The Second Circuit reversed the decision, but, almost simultaneously, convened *en banc* to address the question of what degree of deference to accord a U.S. plaintiff's choice of forum where suit is brought in a U.S. district different from the one in which the plaintiff resides. In its *en banc* decision, the Second Circuit held that the district court did not accord the proper degree of deference to the plaintiff's choice of forum, and vacated the district court's decision and remanded the case for further proceedings.

In the course of its *en banc* decision, the Second Circuit rejected the notion that there was a hard and fast rule that a U.S. plaintiff's choice of forum should be accorded deference only where the suit is brought in plaintiff's home district. Rather, it is necessary to examine why the U.S. plaintiff brought suit outside of her home forum to determine whether it was done for valid reasons or to obtain a tactical advantage.

The Second Circuit stated:

The rule is not so abrupt or arbitrary. One of the factors that necessarily affects a plaintiff's choice of forum is the need to sue in a place where the defendant is amenable to suit. Consider for example a hypothetical plaintiff residing in New Jersey, who brought suit in the Southern District of New York, barely an hour's drive from the plaintiff's residence, because the defendant was amenable to suit in the Southern District but not in New Jersey. It would make little sense to withhold deference for the plaintiff's choice merely because she did not sue in her home district. Where a U.S. resident leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit, this would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant. This is all the more true where the defendant's amenability to suit in the plaintiff's home district is unclear. A plaintiff should not be compelled to mount a suit in a district where she cannot be sure of perfecting jurisdiction over the defendant, if by moving to another district, she can be confident of bringing the defendant before the court. In many circumstances, it will be far more convenient for a U.S. resident plaintiff to sue in a U.S. court than in a foreign country, even though it is not the district in which the plaintiff resides. *It is not a correct understanding of the rule to accord*

deference only when the suit is brought in the plaintiff's home district.
[Footnote omitted, emphasis added.]

Iragorri, 274 F.3d at 72-73.

Thus, instead of a hard and fast rule, the Second Circuit asserted that courts should look at the reasons or motivation that led a plaintiff to choose a particular forum. More particularly, the Second Circuit distinguished a forum chosen for “legitimate reasons” from one chosen for “tactical advantage.” *Id.* at 73.

The Second Circuit did not give an exhaustive list of what constitute “legitimate reasons” for the choice of forum or what constitutes a choice for “tactical advantage.” But it did allude to certain motives that would fall into one or another category.

Thus, one legitimate reason for the choice of a particular U.S. forum includes, in the case of a U.S. resident or citizen, the amenability of the defendant to suit in the chosen forum, as opposed to plaintiff’s home forum. “A plaintiff should not be compelled to mount a suit in a district where she cannot be sure of perfecting jurisdiction over the defendant, if by moving to another district, she can be confident of bringing the defendant before the court.” *Id.*

Similarly, a plaintiff would have been motivated by the desire to obtain a “tactical advantage” or has selected a forum for “forum-shopping reasons,” *id.* at 71, when it appears that a U.S. forum was chosen because:

- “United States courts award higher damages than are common in other countries”;
- “local laws ... favor plaintiff’s case”;
- of the “habitual generosity of juries in the United States or in the forum district”;
- of the “plaintiff’s popularity or the defendant’s unpopularity in the region”;
- of “the inconvenience and expense to the defendant resulting from litigation in that forum.”

Id. at 71-72.

The Second Circuit also made clear that the court should not simply scrutinize the motivations for a plaintiff's choice of a particular forum, but it should also examine a defendant's motivations in making a motion to dismiss on grounds of *forum non conveniens*.

Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience, but because of similar forum-shopping reasons. District courts should therefore arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum. And the greater the degree to which the plaintiff has chosen a forum where the defendant's witnesses and evidence are to be found, the harder it should be for the defendant to demonstrate inconvenience.

Id. at 75.

Moreover, the Second Circuit also made it clear that the appropriate degree of deference due to a U.S. citizen's choice of forum will also turn on whether that citizen is also a resident of the United States.

When *Guidi* spoke of the deference due to the choice of forum by U.S. "citizens," we understand these references to signify citizens who were also U.S. residents, rather than situations in which an expatriate U.S. citizen residing permanently in a foreign country brings suit in the United States As to such suits, it would be less reasonable to assume the choice of forum is based on convenience.

Id. at 73 n.5.

While the facts of *Iragorri* — and the specific question to be addressed by the Second Circuit — relate to the choice by a U.S. resident plaintiff of a forum other than its home forum, the Second Circuit made clear that principle articulated in that case was not limited to that fact pattern, but applied more generally to all plaintiffs, whether domestic or forum.

The Second Circuit stated,

[t]he more it appears that a domestic *or foreign* plaintiff's choice of forum has been dictated by reasons that the law will recognize as valid, the greater the deference that will be given to the plaintiff's choice of forum. On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons the less deference the plaintiff's choice commands [Emphasis added.]”

Id. at 71-72.

Thus, in *Iragorri*, it appears that the Second Circuit has instructed district courts conducting a *forum non conveniens* analysis not to attach decisive significance to the citizenship or residence of the plaintiff, but, rather, to attempt to ascertain the reasons for why a plaintiff chose one forum rather than another.

As the Second Circuit stated in *Iragorri*, “while plaintiff's citizenship and residence can serve as a proxy for, or indication of, convenience, neither the plaintiff's citizenship nor residence, nor the degree of deference given to her choice of forum controls the outcome.” *Id.* at 74.

c. Decisions Applying *Iragorri*

Recent decisions applying *Iragorri* have applied to foreign plaintiffs. These decisions have also made it clear that it is hard to distinguish between bringing suit for “tactical advantage” and bringing suit for “legitimate considerations.” In *In re Rezulin Products Liability Litigation*, 214 F. Supp. 2d 396 (S.D.N.Y. 2002), a Canadian plaintiff brought suit in the United States and sought to justify litigating in the United States “by noting that Canada does not permit punitive damages awards in cases like these, a point that underscores the fact that plaintiff's suit here is the product of forum shopping.” *Id.* at 400. The court held that “[p]laintiff's choice of forum is entitled to little weight in view of his foreign residence and forum shopping.” *Id.*

In *Wesoke v. Contract Services, Ltd.*, No. 00 Civ. 1188 (CBM), 2002 WL 1560775 (S.D.N.Y. July 15, 2002), by contrast, the court held that the U.S. plaintiff brought suit in the United States for legitimate reasons because “[P]laintiffs' papers make clear that their main purpose in bringing this action in the United States was to avoid the substantial (and in all likelihood prohibitive) expense of litigating in the United Kingdom (U.K.) — expenses generally associated with litigating a case overseas coupled with the

particular requirement in the U.K. that a plaintiff post a substantial bond to guarantee the payment of attorneys' fees." But bringing suit in one forum to avoid costs of litigation in another could just as easily be characterized as an attempt to receive a "tactical advantage" as opposed to a "legitimate consideration."

In *DiRienzo v. Philip Services Corp.*, 294 F.3d 21, 29 (2d Cir. 2002), the court, relying on *Iragorri*, questioned the defendant's motives for moving to dismiss on *forum non conveniens* grounds.

3. Treaties

There are several trade agreements between the United States and other countries that accord nationals of these countries the equivalent access and consideration that U.S. citizens receive in U.S. courts. When a foreign plaintiff is a national of a country that is party to such a treaty, that plaintiff's choice of forum is accorded the same presumption as a U.S. citizen's. *See, e.g., Blanco v. Banco Indus. de Venez. S.A.*, 997 F.2d 974, 980 (2d Cir. 1993) (holding that, due to treaty between the U.S. and Venezuela, "no discount may be imposed upon the plaintiff's initial choice of a New York forum"); *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152-53 (2d Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 890 (1980).

In the *Iragorri* case, the Second Circuit cited to a letter provided to the Second Circuit by the Department of Justice in response to its inquiry about how the question to be addressed by the *en banc* panel "might be affected by U.S. treaty obligations, including those affording access to U.S. courts." *Iragorri*, 274 F.3d at 69 n.2. It is interesting to note that while the Department of Justice acknowledged the existence of treaties that accorded to foreign nationals access to U.S. courts on terms no less favorable than those enjoyed by U.S. nationals, it added that "any right of access afforded to a foreign national plaintiff by treaty will generally be only a right to the same access that would be accorded to a U.S. national *who is otherwise similarly situated*. (Emphasis added.)" *Id.*

In *Iragorri*, the Second Circuit stated that "[t]hough the instant case does not implicate any treaty obligations, the *forum non conveniens* analysis that we articulate here is mindful of those considerations." *Id.*

In *Pollux*, 329 F.3d at 73, the Second Circuit considered a treaty between

the United States and Liberia, which provided “freedom of access” to citizens of Liberia. The court distinguished this treaty from treaties that provide “equal access” to foreign nationals, and held that plaintiffs’ choice of forum should be accorded “the lesser degree of deference typically afforded foreign plaintiffs.” *Id.*

4. Suit Involves Plaintiff’s Activities Abroad: Corporations versus Individuals

When a U.S. corporation engages extensively in business in a foreign country and brings suit in a U.S. court based on events occurring abroad, the strong presumption in favor of a plaintiff’s choice of forum is discounted.

- a. This is based on the underlying rationale of the doctrine of *forum non conveniens*: “A corporate plaintiff’s citizenship or residence may not correlate with its real convenience because of the nature of the corporate entity, while an individual’s residence more often will correlate with his or her convenience.” *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 n.8 (8th Cir. 1991). As the court also noted, “Judicial concern for allowing citizens of the United States access to American courts has been tempered by the expansion and realities of international commerce.” *Id.* at 1395.
- b. By contrast, the strong presumption in favor of a plaintiff’s choice of forum is affirmed when the plaintiff is a U.S. individual in a tort action, such as the plaintiffs in *Reid-Walen*, a couple injured while vacationing in Jamaica. *Id.* at 1392. *See also Guidi*, 224 F.3d at 147, where the court stated, “Plaintiffs are ordinary American citizens for whom litigating in Egypt presents an obvious and significant inconvenience, ... this is not a case where the plaintiff is a corporation doing business abroad and can expect to litigate in foreign courts.”

5. Class Actions

If a plaintiff brings suit as a representative of a class, his or her choice of forum is entitled to less weight. *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002). But this does not mean that the plaintiff’s choice of forum is entitled to no weight, it depends on plaintiff’s motive for choosing a U.S. forum. *Id.* (“[P]laintiffs offered a quite valid reason for litigating in federal court: this county’s interest in having United States courts enforce United States securities laws.”)

F. Balancing Public and Private Interests

1. Introduction

The courts must also balance certain public and private interests to determine whether to dismiss the suit on grounds of *forum non conveniens*.

There is a relationship between the degree of deference accorded a plaintiff's choice of forum and the balancing of the private and public interest factors. The greater the deference due, the stronger a showing of inconvenience a defendant must make, and vice versa. *Iragorri*, 274 F.3d at 74-75.

2. Public Interests

- a. The administrative difficulties stemming from court congestion.

The Southern District of New York is indisputably "one of the busiest districts in the country." Not surprisingly, the judges in this district have placed additional weight on this factor, citing "[t]he need to guard our docket from disputes with little connection to this forum. [Citations omitted.]" *Hyland*, 807 F. Supp. at 1128. *But see Cromer*, 158 F. Supp. 2d at 355, where the court stated that: "While the docket of the Southern District [of New York] is an active one, courts in this district have shown themselves more than able to address the issues that arise in complex actions in an expeditious and comprehensive manner."

- b. The local interest in having controversies decided at home.
- c. The interest in having the trial in a forum that is familiar with the law governing the action.
- d. The avoidance of unnecessary problems in conflict of laws or in the application of foreign law.
- e. The unfairness of burdening citizens in an unrelated forum with jury duty. *But see Moscovits v. Magyar Cukor Rt.*, 2001 U.S. Dist. LEXIS 9252, at *21 (S.D.N.Y. June 29, 2001), where the court noted that this was not a consideration because the court's subject matter jurisdiction was based on the Foreign Sovereign Immunities Act, which does not allow for a jury trial.

3. Private Interests

- a. The relative ease of access to sources of proof and the cost of obtaining attendance of willing witnesses.

As modern advances have made international travel and communication both easier and cheaper, this factor has taken on a reduced importance. *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (Oakes, J., concurring) (“[T]he entire doctrine of *forum non conveniens* should be reexamined in light of the transportation revolution ...”). *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 44 (D. Conn. 1996). (“To the extent documents exist in England, advances in transportation and communication accord this issue less weight.”)

- b. The availability of compulsory process for attendance of unwilling witnesses.
 - i. U.S. courts have recently relied upon 28 U.S.C. § 1782 in considering motions to dismiss on *forum non conveniens* grounds.
 - ii. Specifically, § 1782, which permits a party to a foreign litigation to obtain evidence located in the United States, has been relied upon to meet an objection to a motion to dismiss that U.S. documents or witnesses are beyond the reach of the foreign court.
 - iii. *See PT United Can Co.*, 138 F.3d at 75 (affirming that the Indonesian court would be an adequate alternate forum and noting the district court’s consideration of “the possibility, under 28 U.S.C. § 1782, of gaining access to witnesses or documents in the United States”); *Potomac Capital Inv. Corp. v. Koninklijke Luchtvaart Maatschappij N.V.*, No. 97 Civ. 8141, 1998 WL 92416, at *9 (S.D.N.Y. Mar. 4, 1998) (holding that the Netherlands was an adequate forum and that “[Potomac] can use 28 U.S.C. 1782 to obtain discovery from ... U.S. based nonparty witnesses for use at trial in the Netherlands.”); *Pyrenee, Ltd. v. Wocom Commodities, Ltd.*, 984 F. Supp. 1148, 1162 (N.D. Ill. 1997) (holding that Hong Kong was a more convenient forum and the concern that U.S. documents would not be attainable was alleviated by § 1782).
 - iv. *But cf. Slight v. E.I. Du Pont de Nemours & Co.*, 979 F. Supp. 433, 440 (S.D. W. Va. 1997) (observing that while § 1782

would provide access to needed documents, the “frequent shuttling of documents and attorneys” such requests would entail would be costly).

- c. The remoteness of forum from the situs of the event, including possibility of viewing premises, if it would be appropriate to the action.
- d. The ability to implead third parties.
- e. The need to translate documents.

Translation is considered a serious problem and where all of the documents and testimony would be in a foreign language, this factor “militates strongly in favor of the [foreign forum].” *Blanco*, 997 F.2d at 982. *But see Ingram Micro, Inc. v. Airoute Cargo Express, Inc.*, 2001 U.S. Dist. LEXIS 2912 at *14 (S.D.N.Y. 2001) (finding that the need for translation of documents alone is not a hardship of sufficient magnitude to justify dismissal).

- f. Issues concerning the enforceability of judgment if obtained.
- g. All other practical problems that make trial of a case easy, expeditious, and inexpensive or the opposite.

4. Completion of Pretrial Discovery

- a. In *Alfadda*, 159 F.3d at 48, the plaintiff argued that the fact that the pretrial discovery had been completed in New York favored that forum rather than the French forum.
- b. The Second Circuit noted in passing that there was some dispute as to whether completed discovery was a public or private factor. Compare *Schexnider v. McDermott Int’l, Inc.*, 817 F.2d 1159, 1163 (5th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987) (public interest) with *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1329 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985) (private interest) and *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991) (discovery “goes to both private concerns ... and public ones”).

c. The Second Circuit went on to note that

[a]ssuming, *arguendo*, that the extent of completed discovery is relevant whether as a public or private interest we do not believe that it tips the balance towards an American forum. The traditional public and private interest factors weigh heavily in favor of France. Completing discovery within the Southern District and investing financial resources in order to facilitate trial in the United States does not sufficiently tip the scales of the Gilbert balance, especially since plaintiffs are free to use the existing discovery material to whatever extent the French tribunal will permit.

Alfadda, 159 F.3d at 48.

G. Conditional Dismissals

1. Introduction

Conditioned dismissals protect the plaintiff from being penalized by choosing to file suit first in the United States while also facilitating the dismissal of suits. If the proponent of dismissal fails to comply with the order, the action will be reinstated in the United States. “[*F*]orum non *conveniens* dismissals are often appropriately conditioned to protect the party opposing dismissal.” *Blanco*, 997 F.2d at 984.

2. Standards for Granting a Conditional Dismissal

In the *BCCI* case, the Second Circuit set forth “the type of finding that the district court should make regarding the adequacy of an alternative foreign forum in a case in which foreign law or practice is at issue, and in which a case is dismissed conditionally.” *BCCI*, 273 F.3d at 247.

In that case, following a review of competing expert affidavits about whether Pakistan was an adequate forum, the district court granted a motion to dismiss on *forum non conveniens* grounds on three conditions:

- (i) plaintiff’s agreement in writing to waive any statute of limitations defense;
- (ii) the Pakistani courts not refusing to hear the case on *forum non conveniens* grounds; and
- (iii) plaintiff’s agreement in writing to permit defendants to remove any judgment rendered by a Pakistani court out of Pakistan.

Id. at 244. The district court granted this conditional dismissal based on a “justifiable belief” that Pakistan was an adequate alternative forum. *See id.* at 247 (citing cases applying the “justifiable belief” standards).

Under the “justifiable belief” standard a court may dismiss a case on *forum non conveniens* grounds “despite its inability to make a definitive finding as to the adequacy of the foreign forum, if the court can protect the nonmoving party by making the dismissal conditional.” *Id.*

The Second Circuit made it clear, however, that the justifiable belief standard imposed certain requirements on the district court. *Id.* at 248.

First, the district court is required to engage in a full analysis of those issues of foreign law and practice relevant to its decision.

Second, the district court is required to closely examine all submissions relating to the adequacy of the foreign forum.

Third, if the court concludes it has a justifiable belief that the foreign forum is adequate, it should cite to evidence in record supporting that belief.

Fourth, the district court should keep in mind that it is the defendant’s burden to demonstrate the existence of an adequate alternative forum.

Finally, the Second Circuit noted that the degree of certainty a district court needed to have about the existence of an adequate alternative forum turned on “how protective of the nonmoving party the conditional dismissal will in fact be.” *Id.* The Second Circuit stated, therefore, that if the condition on which dismissal is granted might not sufficiently protect the plaintiff, then “the court should either be more sure of its finding as to the uncertain question of law or practice, and therefore as to the adequacy of the alternative forum, or frame the condition differently, if that is possible, in order to minimize the risk.” *Id.*

The Second Circuit concluded:

we observe that while the conditional dismissal device can help to protect the non-moving party in circumstances where the district court remains concerned about the accuracy of its “justifiable belief” as to a foreign forum’s adequacy, the mechanism is not a substitute for the initial

“justifiable belief” of adequacy. *Conditions cannot transform an inadequate forum into an adequate one.* [Emphasis added.]

Id.

3. Conditions Typically Imposed

The following are the most commonly granted conditions and have been almost universally deemed permissible:

- a. Statute of Limitations. An adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum. *BCCI*, 273 F.3d at 246. In order to deal with this, courts have conditioned *forum non conveniens* dismissals on an agreement by the defendant to waive any statute of limitations defense that may exist in the foreign forum. This condition protects a plaintiff from possibly losing the opportunity to litigate in another forum because of the time spent pursuing a case in the United States. *See, e.g., Transunion*, 811 F.2d at 128; *In re Union Carbide Corp. Gas Plant Disaster in Bhopal, India*, 809 F.2d 195, 203-04 (2d Cir. 1987); *Blanco*, 997 F.2d at 984 (collecting cases). *See Ilusorio v. Ilusorio-Bildner*, 103 F. Supp. 2d 672, 675 n.4 (S.D.N.Y. 2000).
- b. Jurisdiction. A number of courts have dismissed cases on *forum non conveniens* grounds conditioned on the party’s consent to jurisdiction in the foreign forum. *See, e.g., R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991); *Mercier*, 981 F.2d at 1349. *See also Ilusorio v. Ilusorio-Bildner*, 103 F. Supp. 2d 672, 682 (S.D.N.Y. 2000). The importance of this factor was demonstrated in a recent Second Circuit decision that overturned a *forum non conveniens* dismissal because the district court failed to have the plaintiff stipulate to jurisdiction in Ecuador. *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).
- c. Availability of witnesses or documents. In *Piper*, the Supreme Court specifically condoned the possibility of conditioning a *forum non conveniens* dismissal on the proponent’s agreement to provide the relevant records. *Piper*, 454 U.S. at 257 n.25. However, this condition is not without limits, and courts have been hesitant to grant the full panoply of U.S. discovery provisions. While such a broad grant is sometimes appropriate, *see, e.g., Union Carbide*, 809 F.2d at 205

(collecting cases), it is generally looked upon with disfavor. *Hyland*, 807 F. Supp. at 1132 (citing concern that the routine granting of this condition would encourage litigants, without any real chance of success, to file suit in the United States simply to gain this advantage).

- d. Delay. In *BCCI*, the case was to be heard in Pakistan's courts if it were dismissed. Expert evidence was submitted by the plaintiff to the effect that a suit might take up to twenty-five years to be resolved in the Pakistani court system. Defendant's expert submitted evidence that plaintiff's claim would be heard by a special banking court in Pakistan, in which the case would proceed on an expedited basis. On appeal the Second Circuit remanded the case to the district court with instructions to include a condition to deal with the delay in Pakistan in the event the district court dismissed the case. Specifically, it instructed the district court to condition any dismissal on the banking court's acceptance of jurisdiction and to permit the plaintiff to return to the district court in the event Pakistan's banking court declined to exercise jurisdiction. The Second Circuit stated:

Accordingly, the district court, if it decides to dismiss, should condition dismissal on the Banking Court's accepting jurisdiction over this case.

In specifying this condition, we do not mean to impose any requirement on the Banking Court, a step that could be beyond our authority. We are simply requiring the district court to permit *BCCI Overseas* to restore this case to the district court's docket in the event that the Banking Court determines it lacks jurisdiction.

BCCI, 273 F.3d at 247.

- e. Enforcement of Judgment. Courts have also conditioned dismissals on the proponent's agreement to pay any judgment rendered in the foreign forum.

4. Conditions Typically Rejected

However, not all conditions are permissible and appellate courts will review and strike down conditions that are overreaching. The following are examples of conditions that have been rejected as an inappropriate interference with the foreign forum:

- a. Waiver of cost bond. In *Mercier*, the plaintiffs proposed that the dismissal be conditioned on defendant's waiving the cost bond that is normally imposed on foreign litigants in Turkish courts. *Mercier*, 981 F.2d at 1353. The court, noting that the bond was not excessive and the plaintiffs were not indigent, rejected this proposal. *Id.*
- b. Monitor for due process violations. Citing concerns with perceived shortcomings of the Indian judicial system, the plaintiffs in *Union Carbide* requested that the American judge monitor the proceedings in India so that there were not any due process violations and, if necessary, remedy any abuses. *Union Carbide*, 809 F.2d at 204-05. The Second Circuit denied this request, noting that once the case is dismissed the United States "ceases to have any jurisdiction over the matter." *Id.* at 205.

III. Parallel Proceedings

Commencing Parallel Proceedings

1. Introduction

If party A files suit in one forum (F1) against party B, party B could commence suit against party A on the same claim in another forum (F2). In F2, party B could either seek a negative declaration or assert as affirmative claims the counterclaims it could assert in F1.

2. Strategic Considerations

- a. There are several reasons why party B might commence parallel proceedings:
 - i. In the hope of winning a race to judgment in the more favorable forum (F2) and securing a judgment that can be pled as *res judicata* in the other jurisdiction (F1).
 - ii. To put pressure on party A by waging a war on two fronts.
 - iii. To obtain discovery of material located in F2 that it might otherwise be unable to obtain.
- b. If a party to a U.S. suit is considering commencing a parallel proceeding in a foreign forum, it should take into account the reaction of the U.S. judge in the pending U.S. suit.

3. Races to Judgment

- a. If party B commences a parallel proceeding in a foreign jurisdiction with the aim of winning a race to judgment, it is important for it to seek advice from a local lawyer as to how long it would take to litigate the case to judgment in the foreign court.
- b. It is also important for party B to ascertain in advance, to the extent possible, whether a judgment from F2 is likely to be recognized and granted *res judicata* effect in F1.
- c. This issue was addressed in *Alfadda*, 966 F. Supp. at 1325-32. Here, the plaintiffs, non-U.S. citizens residing in Saudi Arabia, brought parallel proceedings in the courts of the United States and France in connection with their investment in defendant Saudi European Investment Corporation, a Netherlands Antilles corporation. In the U.S. suit, the plaintiffs alleged violations of RICO and the U.S. securities laws.
 - i. There followed a race to judgment. Defendants prevailed in the French courts, and moved to dismiss the U.S. actions on the basis of the preclusive effect of the French action. There were two issues for the court:
 - whether to recognize the French judgment; and
 - having decided to recognize it, to determine the scope of its preclusive effect.
 - ii. In determining whether to recognize the French judgment, the court applied the doctrine of comity as set forth in the leading case of *Hilton v. Guyot*, 159 U.S. 113 (1895), which holds that, for reasons of international comity, a U.S. court will enforce a foreign judgment “whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.” *Id.* at 1326 (citing *Hilton*, 159 U.S. at 202-03). The court found that the French judgment satisfied this test, especially in light of the fact that plaintiffs themselves initiated proceedings in France.
 - iii. In determining whether to grant preclusive effect to the French

judgment, the court took into account nine factors. Four of these factors are relevant to assessing the preclusive effect of any judgment, whether it be a U.S. or a foreign judgment; the other five were applied because they were said to be relevant to recognition of non-U.S. judgments.

- iv. The four factors applicable to both the domestic and international context are:
 - (i) the issues of both proceedings must be identical;
 - (ii) the relevant issues were actually litigated and decided in the prior proceeding;
 - (iii) there must have been “full and fair opportunity” for the litigation of the issues in the prior proceeding; and
 - (iv) the issues were necessary to support a valid and final judgment on the merits.

- v. The five additional factors relevant to issue preclusion in the international context are:
 - (i) a desire to avoid the duplication of effort and the waste involved in reconsidering a matter that has already been litigated;
 - (ii) a desire to protect the successful litigant from harassing or evasive tactics on the part of his previously unsuccessful opponent;
 - (iii) a policy against making the availability of local enforcement the decisive element, as a practical matter, in the plaintiff’s choice of forum;
 - (iv) an interest in fostering stability and unity in international litigation; and
 - (vi) a belief that the rendering court was the more appropriate forum.

- vi. In *Alfadda*, the district court reviewed the French judgment and found that it was preclusive of the U.S. proceeding because the issues considered by the French court were sufficiently identical to those the plaintiffs would have had to establish in order to prevail on their claims and the issues were necessary to support the French court’s judgment. The court

also noted “that France, the rendering jurisdiction, is a more appropriate forum, both because of convenience, and because France, the home country to all the defendant banks and much of the alleged conduct, has a greater interest in the litigation.” *Alfadda*, 966 F. Supp. at 1332.

- d. By contrast, in *Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 666 (S.D.N.Y. 1996), *aff’d*, 122 F.3d 1055 (2d Cir. 1997), the court recognized a Saudi Arabian judgment on a breach of contract claim, but denied its preclusive effect because of different standards of proof. Specifically, although Alesayi, a Saudi Arabian company, failed to prevail in the Saudi court, the U.S. court did not give preclusive effect to this judgment because, in Saudi Arabia, Alesayi was required to prove its claim for breach of contract beyond a reasonable doubt. In the United States, however, it only had to prove its breach of contract claim by a preponderance of the evidence.
- e. *See generally* Linda Silberman, “Enforcement and Recognition of Foreign Country Judgments,” *International Business Litigation and Arbitration* (PLI Coursebook 2004).

4. Parallel Proceedings and Other Strategies

- a. The commencement of parallel proceedings works best when combined with other strategies. For example, if party B (a defendant in a U.S. action) commences a parallel proceeding outside the United States in an attempt to win a race to judgment, it could also combine it with the following motions:
 - (i) a motion for an antisuit injunction in the non-U.S. court seeking to enjoin party A from pursuing its U.S. lawsuit;
 - (ii) a motion in the U.S. court to dismiss the U.S. action on grounds of *forum non conveniens* (*see* § III above); or
 - (iii) a motion in the U.S. court to stay or dismiss the U.S. action on the ground that there is a parallel proceeding (*see* § IV below).
- b. If party B (a defendant in a U.S. action) commences a parallel proceeding in a non-U.S. forum, party A (the plaintiff in the U.S. action) could respond by making a motion for an antitrust injunc-

tion in the U.S. court seeking to enjoin party B from pursuing the action in the non-U.S. forum (*see* § V below).

IV. Motions to Stay or Dismiss U.S. Proceedings in Favor of Parallel Foreign Proceedings

A. Basic Principles

1. International Abstention

- a. In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996), the Supreme Court held that “federal courts have the power to dismiss or remand cases based on abstention principles *only where the relief being sought is equitable or otherwise discretionary*” (emphasis added). *See also Lewin v. Cooke*, 95 F. Supp. 2d 513 (E.D. Va. 2000) (abstention doctrines are simply not applicable to suits for damages, but apply only to suits in equity).
- b. There is some dispute as to whether *Quackenbush* applies in cases involving parallel foreign litigation.
 - i. Some courts that have addressed the issue have held that *Quackenbush* is simply inapplicable in cases involving concurrent international litigation. *See Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222-23 (11th Cir. 1999); *Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (“*Quackenbush* does not crisply govern in the area of international abstention because the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings.”).
 - ii. Some post-*Quackenbush* decisions have held that a court has an inherent power to dismiss an action based on the pendency of a related proceeding in a foreign jurisdiction without specifically seeking to distinguish *Quackenbush*. *See, e.g., Evergreen Marine Corp. v. Welgrow Int’l Inc.*, 954 F. Supp. 101, 104 n.1 (S.D.N.Y. 1997) (noting that “the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings, where concerns of international comity arise and issues of federalism and federal supremacy are not in play”). *But see Exxon Research & Eng’g Co. v. Industrial Risk Insurers*, 775 A.2d

601, 611 (N.J. Super. Ct. App. Div. 2001) (finding that the same general principles apply regardless of whether they arise from similar actions brought in state or foreign courts); *EFCO Corp. v. Aluma Sys., USA, Inc.*, 983 F. Supp. 816, 824 (S.D. Iowa 1997) (staying U.S. action in favor of Canadian action). *But see Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1291 (E.D. Mo. 1997) (holding that *Quackenbush* precludes an outright dismissal, but not a stay, in favor of parallel foreign litigation).

2. Factors Used to Determine Whether to Grant a Stay on International Abstention Grounds

In determining whether an action should be dismissed or stayed under the doctrine of "international abstention," courts take into account the following factors:

- (a) the similarity of parties and issues involved in the foreign litigation;
- (b) the promotion of judicial efficiency;
- (c) adequacy of relief available in the alternative forum;
- (d) issues of fairness to and convenience of foreign witnesses;
- (e) the possibility of prejudice to any of the parties; and
- (f) the temporal sequence of the filing of the actions.

Evergreen, 954 F. Supp. at 103; *Abdullah*, 988 F. Supp. at 1289; *National Union Fire Ins. Co. of Pittsburgh v. Kozeny*, 115 F. Supp. 2d 1243, 1246 (D. Colo. 2000).

3. Similarity of Parties

It is settled that the parties need not be identical. For example, in *Goldhammer*, even though an individual shareholder or plaintiff corporation was named as a party in U.S. litigation, but not in parallel English litigation, the court noted that the individual held a two-thirds interest in the corporation and, therefore, had substantially similar interests to those of the corporation. "While a shareholder may have claims independent of the corporation, the parties and claims need not be identical in order for one action to be stayed or dismissed in deference to an earlier action." *Goldhammer*, 59 F. Supp. 2d at 253. *See also Caspian Inv., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991); *Dragon Capital Partners L.P. v. Merrill Lynch Capital Servs., Inc.*, 949 F. Supp. 1123, 1127 (S.D.N.Y. 1997); *Continental*

Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408, 410 (S.D.N.Y. 1982).
800537 Ont., Inc. v. World Imports U.S.A. Inc., 145 F. Supp. 2d 288
 (W.D.N.Y. 2001) (finding that similarity of actions and issues trumps
 absence of similarity of parties).

4. Conditional Stays

As with *forum non conveniens*, courts may grant abstention motions only on certain conditions. In *Evergreen*, the stay granted in favor of the Belgian proceeding was conditioned on an

- agreement by the party to consent to jurisdiction of Belgian courts;
- agreement by the party to waive any statute of limitations defense;
- agreement by the party to be bound by the judgment of the Belgian court; and
- to pay any judgment obtained.

Evergreen, 954 F. Supp. at 105.

B. Contrast to *Forum Non Conveniens*

1. Conceptual Difference

The conceptual difference between the doctrine of *forum non conveniens* and that of international abstention is that the former can be invoked even if there is no parallel foreign proceeding, whereas the latter presupposes a parallel foreign proceeding: if there is no parallel foreign proceeding, a party can rely only on the doctrine of *forum non conveniens*; if there is one, a party can rely on both doctrines.

2. Practical Difference

While the factors used to assess motions based on each of the doctrines are not identical, courts generally consider the two doctrines together (with the exception of one factor discussed below). See, e.g., *American Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1154 (D.N.J. 1990) (“The factors informing the decision on *forum non conveniens* appear to be fully responsive to those informing a decision to stay [in favor of a parallel French action], and a detailed presentation on both grounds is simply unwarranted.”); *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666, 671 n.3 (D. Del. 1980) (defendant’s motions to dismiss on *forum non conveniens* grounds, and motion to stay in favor of Venezuelan action, addressed together under the doctrine of *forum non conveniens*); *General Motors Corp. v. Lopez de Arriortua*, 948 F. Supp. 656, 668-69 (E.D. Mich. 1996) (denying both a motion to dismiss for *forum non conveniens* and motion to stay pending outcome of German proceeding).

3. Earlier Filed Foreign Proceeding

One factor relevant to a motion for a stay on international abstention grounds has no explicit role in the *forum non conveniens* analysis the sequence of the filing of the actions. It is worth noting, however, that some courts have not attached much significance to the argument that the U.S. action should be stayed because the foreign action was filed earlier. For example, in *American Cyanamid*, the court denied the motion to dismiss on grounds of *forum non conveniens*, but went on to consider as a separate factor of the motion to stay the fact that the French action was filed first. It found “little merit” in this argument. *American Cyanamid*, 741 F. Supp. at 1159. The court stated that where parallel proceedings are taking place in different countries, “the preferred course of action is to permit each sovereign to reach judgment and apply the findings of one to the other under principles of *res judicata*.” *Id.* (citing *Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1213-14 (D.C. Cir. 1989)). The *American Cyanamid* court also considered the “first to file” argument “as a call for judicial efficiency presumably on the ground that the court first obtaining jurisdiction will have already expended some resources on the case.” *American Cyanamid*, 741 F. Supp. at 1159. The court found, on the facts, that more progress had been made in the second-filed U.S. action than in the first-filed French action, and, therefore, rejected this argument. This suggests, however, that where more progress has been made in the earlier-filed foreign action, this would weigh in favor of staying the U.S. action in favor of the foreign one. *See also General Motors*, 948 F. Supp. at 669 (“While Plaintiffs sought the jurisdiction of the German civil court by filing their counterclaim there before filing their complaint in this court, that factor does not compel a stay of this case because the counterclaim is not identical to this suit.”) *But see National Union*, 115 F. Supp. 2d at 1249 (finding that because the London proceeding was first filed, there were practical advantages to advancing the litigation in that forum).

V. Antisuit Injunctions

A. Basic Principles

1. Introduction

It is well settled that U.S. courts have the power to issue an antisuit injunction that is an injunction enjoining a person subject to their jurisdiction from prosecuting a foreign suit. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996). It is important to note that this injunction is aimed not at the foreign court, but at the party over which the U.S. court has jurisdiction. Failure to comply with the antisuit injunction, therefore, is contempt of court.

2. Threshold Requirements

Three threshold requirements must be met before a court will consider issuing an antisuit injunction.

- a. Jurisdiction must be established. *See In re Complaint of Rationis Enters., Inc. of Panama v. AEP/Borden Indus.*, 261 F.3d 264 (2d Cir. 2001).
- b. The parties must be the same in both matters. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987).
- c. Resolution of the case before the enjoining court must be dispositive of the action to be enjoined. *See id.*

B. Circuit Split

U.S. courts differ on the appropriate legal standard for issuing an antisuit injunction once the threshold requirements have been met.

1. Restrictive Standard: Comity

The Courts of Appeals for the Second, Third, Sixth, and District of Columbia Circuits follow a strict test based on the notion of comity. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *China Trade*, 837 F.2d at 34; *Compagnie Des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co.*, 167 F. Supp. 2d 743, 745-46 (E.D. Pa. 2001). Courts following the comity standard have held that as a result of comity concerns, antisuit injunctions should be “rarely issued” and only in two situations:

- (i) to protect the U.S. forum’s jurisdiction, or
- (ii) to prevent evasion of important public policies.

2. Liberal Standard: Vexatiousness

The Courts of Appeals for the Fifth, Seventh, and Ninth Circuits follow a more relaxed test based upon several factors, the most important of which is the vexatiousness or oppressiveness of the non-U.S. litigation. *See, e.g., Kaepa*, 76 F.3d at 626-27; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105

(1982). Courts that have adopted the “vexatiousness” standard hold that an antisuit injunction is appropriate in circumstances when the foreign litigation:

- (a) would frustrate a policy of the forum issuing the injunction;
- (b) would be vexatious or oppressive;
- (c) would threaten the issuing court’s jurisdiction; and
- (d) when adjudication in separate actions would result in delay, inconvenience, expense, inconsistency, or race to judgment.

3. Totality of Circumstances Standard: First Circuit

In a decision of March 8, 2004, the First Circuit, which up to now had not ruled on the appropriate standard for antisuit injunctions, has weighed in with its views. Rather than join one or the other side of the circuit split, the First Circuit has staked out a third position. The First Circuit acknowledges that considerations of international comity should be accorded great weight in deciding whether to issue an antisuit injunction. In doing so, it follows the conservative approach. It departs from that approach, however, by declining to endorse the view that an antisuit injunction is justified only in two circumstances that prove a threat to jurisdiction and public policy. The First Circuit, instead, offers a new test that looks to the “totality of circumstances.”

C. Comity Standard

1. Basic Principles

- a. Courts following the comity standard observe the general principle that one court will not interfere with or try to restrain proceedings in another court. *See, e.g., Laker Airways*, 731 F.2d at 26-27.
- b. Rather, in cases involving parallel proceedings, the court will allow the litigation to proceed in both forums until judgment is obtained in one court which may be pled as *res judicata* in the other court. *Id.*
- c. Under the comity standard, duplication of issues, vexatiousness, and harassment do not justify interfering in an action in a foreign court. *Id.* at 928.

2. Requirements for Antisuit Injunction

A court following the comity standard will refrain from issuing an antisuit injunction unless one of two factors can be shown:

- (i) the foreign action threatens the jurisdiction of the enjoining court; or
 - (ii) a party is attempting to evade an important public policy.
- a. Foreign Action Threatens the Jurisdiction of the Enjoining Court. An antisuit injunction may be appropriate where the foreign action threatens the jurisdiction of the enjoining court. *China Trade*, 837 F.2d at 35. A court may find that a foreign action threatens its jurisdiction in one of two circumstances:
- (i) an antisuit injunction may be appropriate when a proceeding is *in rem* since *res judicata* alone will not protect the jurisdiction of the first court. Where jurisdiction is based on the presence of property within the court's jurisdictional boundaries, a concurrent proceeding in a foreign court poses a danger that the foreign court will order the transfer of the property out of the jurisdictional boundaries of the first court, thus depriving it of jurisdiction over the matter. See *Gau Shan*, 956 F.2d at 1355; or,
 - (ii) in an *in personam* proceeding where the *foreign court is attempting to carve out exclusive jurisdiction* over the action. *China Trade*, 837 F.2d at 35.
- b. Evasion of Important Public Policies. An antisuit injunction may be issued when a party attempts to evade compliance with a statute of the forum that effectuates important public policies. An injunction is not appropriate merely to prevent a party from seeking slight advantages in substantive or procedural law to be applied in a foreign court. *Id.* at 37.

3. Actions for Negative Declaration

The fact that the defendant in the U.S. proceeding commenced an action in a foreign court seeking a negative declaration does not in itself warrant the issuance of an antisuit injunction.

- a. In *China Trade*, plaintiff China Trade sought to import soybeans from the United States to China using a vessel provided by defendant, Ssangyong Shipping Company. The vessel ran aground, allegedly contaminating the soybeans with water. Plaintiff filed suit in federal court for damages resulting from failure to deliver the soybeans. While discovery was still progressing, defendant Ssangyong filed an action in Korea seeking a declaratory judgment that it was not liable for the

damaged soybeans. The plaintiff sought an antisuit injunction in the United States preventing the defendants from pursuing the Korean action.

The Second Circuit denied the motion, stating that parallel proceedings are generally tolerable. *China Trade*, 837 F.2d at 36. The court noted that vexatiousness and a race to judgment are inevitable by-products of parallel proceedings and in themselves are not sufficient justifications for issuing an antisuit injunction. *See id.*

The court held, instead, that the most important factors relevant to the decision whether to grant an antisuit injunction are (i) whether the foreign action threatens the jurisdiction of the enjoining forum, and (ii) whether strong public policies of the enjoining forum are threatened by the foreign action. *Id.*

The court held that since neither the defendant nor the Korean court had attempted to enjoin the New York proceedings, there was no threat to the jurisdiction of the U.S. court. *Id.* at 37. In considering the second factor, evasion of important public policies, the court observed that an injunction is not appropriate merely because a party has attempted to seek slight advantages in the procedural or substantive law by litigating in a foreign court. *Id.*

4. *Laker Airways*

The leading series of cases on the “comity” standard arise out of the *Laker Airways* litigation.

- a. Laker Airways brought suit against various airlines in a U.S. federal court alleging that they had violated the U.S. antitrust laws by engaging in predatory pricing to drive Laker out of business. British Airways (B.A.) responded by filing an action against Laker in the British High Court in which it sought an antisuit injunction enjoining Laker from proceeding with the U.S. suit.
- b. In response, Laker sought an injunction from the U.S. court restraining the defendants from continuing with the suit in England. The lower court issued the injunction. The Court of Appeals for the D.C. Circuit affirmed, *Laker Airways*, 731 F.2d 909, analyzing the principles relating to antisuit injunctions.

The court stated that “parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one that can be pled as *res judicata* in the other. The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction. ***For this reason, injunctions restraining litigants from proceeding in courts of independent countries are rarely issued.*** (Emphasis added.)” *Laker Airways*, 731 F.2d at 926-27.

The D.C. Circuit found, therefore, that issuing an antisuit injunction to avoid a “vexatious” litigation was inappropriate for two reasons: (i) issues concerning vexatiousness were more properly considered in a motion to dismiss on *forum non conveniens* grounds; and (ii) such issues “do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings.” *Id.* at 928.

Although the court found that comity favored respect for a non-U.S. court’s ability to reach a judgment, it also found that a U.S. court had the power to resist the attempt of a foreign court to interfere with its ability to reach a judgment. It found on the facts that when the English High Court issued its antisuit injunction, it was attempting to prevent *Laker* from litigating altogether and, thus, to deprive the U.S. court of jurisdiction:

[T]he British and American actions are not parallel proceedings in the sense the term is normally used. This is not a situation where two courts are proceeding to separate judgments simultaneously under one cause of action. Rather, the sole purpose of the English proceeding is to terminate the American action.

Id. at 930. The court also noted that antisuit injunctions are justified when necessary to prevent the litigants’ evasion of the U.S. forum’s important public policies. It cautioned, however, that the standard for granting antisuit injunctions on public policy grounds are strict.

5. **Cases Denying Antisuit Injunctions under the Comity Standard**
 - a. In *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff’d*, 346 F.3d 357 (2d Cir. 2003), discussed above, the court declined to grant an antisuit injunction enjoining

Harrods from bringing a defamation action against Dow Jones in London. The court stated:

Absent extraordinary circumstances, it would not comport with considerations of “practicality and wise administration of justice” for the courts of one nation as a matter of course to sit in judgment of the adequacy of due process and the quality of justice rendered in the courts of other sovereigns, and to decree injunctive relief at any time the forum courts conclude that the laws of the foreign jurisdiction under scrutiny do not measure up to whatever the scope of rights and safeguards the domestic jurisprudence recognizes and enforces to effectuate its own concept of justice. On this larger scale, there can be no room for arrogance or presumption, or for extravagant rules or practices that may encourage insularity or chauvinism rather than respect for comity. It cannot be the proper province of any one judge in any one country, giving expression to the push of a moment or the pull of the immediate case, to promulgate judgments that impose that court’s rule and will across all sovereign borders so as to reach the rest of humankind.

* * *

Specifically, an injunction issued by one forum restraining parties from pursuing litigation pending in a foreign tribunal with jurisdiction over the matter could invite a duel of injunction and counterinjunction to thwart the attempt of the enjoining court to exercise exclusive jurisdiction and protect the foreign state’s own judicial power. As the *Laker Airways* court noted, in a dispute depicting precisely this dynamic: “The consequences to international trade and to amicable relations between nations that would result from the kind of interference are difficult to overestimate.”

Dow Jones, 237 F. Supp. 2d at 428-29.

- b. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 126 F.3d 365 (2d Cir. 1997). Plaintiff, Computer Associates, previously brought and lost a U.S. copyright infringement action in the United States. Com-

puter Associates then brought an action in a French court alleging infringement on the same computer program. Defendant, Altai, unsuccessfully sought an antisuit injunction in federal court. On appeal, the Second Circuit affirmed the district court's denial of the antisuit injunction. The court found that there was no threat to the jurisdiction of the U.S. court and that the French action would in no way affect the decision already rendered by the U.S. court in the prior action. *Id.* at 372. The court also noted that, while the action may be vexatious, the interests of comity cautioned against an injunction. *Id.*

- c. *Compagnie des Bauxites*, 651 F.2d 877. In *Bauxites*, CBG, a company that mines and sells bauxite in the Republic of Guinea, sued its excess insurers in the United States because the insurers allegedly improperly refused a claim. Four years later, the insurers sued in England to rescind the insurance contract because CBG allegedly failed to disclose material facts. The district court enjoined the insurers from pursuing the English action.

The Court of Appeals reversed, holding that “duplication of issues and the insurers’ delay in filing the London action were the sole bases for the district court’s injunction [T]hese factors alone did not justify the breach of comity among the courts of separate sovereignties.” *Id.* at 887.

- d. *Gau Shan*, 956 F.2d 1349. Plaintiff, Gau Shan, was a cotton merchant engaged in marketing cotton to the People’s Republic of China. Gau Shan sought to purchase a large amount of American cotton. Gau Shan arranged financing from Banker’s Trust, the primary financier of the American cotton supplier. As part of the deal, Banker’s Trust required that Gau Shan sign a promissory note containing a forum selection clause, which Gau Shan did under protest. The American cotton supplier failed to deliver the contracted amount of cotton and Gau Shan refused to pay on the promissory note. Banker’s Trust advised Gau Shan in a letter that if the promissory note was not paid it would file suit in Hong Kong. Without responding, Gau Shan brought an action in the United States seeking rescission of the promissory note, claiming fraud, deceit, and negligence. Gau Shan also sought an antisuit injunction to prevent a Hong Kong action from proceeding,

arguing that a Hong Kong action would allow Banker's Trust to gain control of Gau Shan through a receivership. Such a result, according to Gau Shan, would lead to a voluntary dismissal of the U.S. case in a way that would threaten the jurisdiction of the U.S. court.

The Court of Appeals for the Sixth Circuit reversed the district court's grant of an antisuit injunction. The court noted that threats to jurisdiction are "quite unusual" and that there was no such threat in this instance. *Gau Shan*, 956 F.2d at 1356. The court observed that "its jurisdiction was not threatened by the possibility that a ruling of a foreign court might eventually result in the voluntary dismissal of the claim before the United States court." *Id.* Rather than threatening its jurisdiction, the court found that such a result would merely threaten Gau Shan's private interest in prosecuting its claim.

The court then addressed whether there were any attempts to evade an important public policy, noting that "courts rarely resort to public policy as a basis for refusing to enforce a foreign judgment." *Id.* at 1358. Gau Shan argued that by filing in Hong Kong, the defendant was seeking to avoid the regulatory effect of Tennessee's tort statute. The court dismissed this argument because Gau Shan had pointed only to Tennessee's public policy and not to any national public policy. The court went on to reason that "public policies of a state deserve less weight than public policies of the nation." *Id.* Finally, the court stated that "although evasion of an important national policy might outweigh certain principles of international comity, we question whether the public policy of one state could ever outweigh those principles." *Id.*

- e. *Hamilton Bank, N.A. v. Kookmin Bank*, 999 F. Supp. 586 (S.D.N.Y. 1998). In a dispute concerning the default on a letter of credit, Kookmin Bank brought suit in Korea against Hamilton Bank, located in the United States. Hamilton Bank brought an action in federal court seeking an injunction enjoining Kookmin from proceeding with the Korean action. Hamilton Bank maintained that it lacked minimal contacts with Korea and was not subject to the personal jurisdiction of the Korean court. Hamilton Bank argued that to allow the Korean court to obtain personal

jurisdiction under these circumstances would offend the principles of the Due Process Clause of the Constitution.

After examining the means by which personal jurisdiction is obtained in Korea, the court concluded that an exercise of personal jurisdiction by the Korean court over Hamilton Bank would not offend U.S. constitutional principles. The court denied the antisuit injunction, stating that no compelling public policy grounds justified overriding principles of international comity.

- f. *Berkshire Furniture Co. v. Glattstein*, 921 F. Supp. 1559 (W.D. Ky. 1995). In a copyright dispute, both plaintiff and defendant claimed ownership of several bed frame designs under U.S. law. Defendant also claimed ownership of the designs in U.K. and Malaysian courts. Plaintiff sought an antisuit injunction to prevent defendant from enforcing its intellectual property rights in Malaysia.

The court denied an injunction on two grounds: the Malaysian litigation posed no threat to its continuing jurisdiction and offended no compelling public policy. First, the court noted that an intellectual property right cannot be moved from the court's jurisdictional boundaries, thus depriving the court of jurisdiction. The court also observed that there had been no attempt by the defendant to carve out exclusive jurisdiction in the Malaysian court. In addition, the court found that Malaysian determination of the validity of the U.K. and Malaysian designs did not undermine U.S. public policy favoring the protection of intellectual property of its citizens.

6. Cases Granting Antisuit Injunctions under the Comity Standard

As noted, under the comity standards, antitrust injunctions are issued only in two situations:

- (i) to protect the U.S. forum's jurisdiction; and
- (ii) to prevent evasion of important public policies.

a. Foreign Action Threatens the U.S. Court's Jurisdiction

Mutual Serv. Cas. Ins. Co. v. Frit Indus., 805 F. Supp. 919 (M.D. Ala. 1992), *aff'd per curiam*, 3 F.3d 442 (11th Cir. 1993). Plaintiff, Mutual

Service Casualty Insurance Company, was an insurer of defendant Frit Industries, a corporation conducting business in the British Isles. Plaintiff filed a lawsuit against defendant in federal court seeking a determination of the scope of coverage under the insurance policies. Plaintiff was later named as a defendant in a counterclaim filed by Frit Industries in the British Isles and in a cross-claim filed by two other insurers of Frit Industries in the Cayman Islands.

Plaintiff sought an antisuit injunction enjoining the proceedings in the British Isles and the Cayman Islands. The court found that this was a rare instance where there was a sufficient threat to the court's jurisdiction to justify overriding the principles of international comity, and granted an antisuit injunction. Significant to the court's decision was that the defendants in the British Isles had sought an antisuit injunction enjoining Mutual Service from continuing the U.S. action. The court viewed this as an attempt to carve out exclusive jurisdiction over the action. The court, emphasizing that an antisuit injunction should be no broader than necessary, enjoined the defendants from seeking to establish the British Isles as the exclusive forum for the claim, either through injunctive or declaratory relief.

b. Evasion of Important Public Policies

Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp. 2d 118 (S.D.N.Y. 1997), *aff'd sub nom. Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (2d Cir. 1998). Plaintiff, Farrell Lines Inc., operated a merchant vessel that was involved in an accident while delivering cargo in Norfolk, Virginia. As a result of this accident the cargo suffered \$800,000 of damage. After an exchange of correspondence concerning insurance settlement, plaintiff Farrell Lines filed suit in the Southern District of New York, the jurisdiction specified in a forum selection clause. The court issued a declaratory judgment of nonliability in plaintiff's favor. Farrell Lines also sought an antisuit injunction preventing defendants from filing or prosecuting a suit related to the damaged cargo in any other forum, including Italy, where suit was pending.

Applying the comity standard for determining antisuit injunctions, the court found that defendants in this case had sued in a foreign forum to evade two important public policies. The court determined that the defendants had filed suit in Italy to avoid the U.S. policy favoring enforcement of forum selection clauses. In addition, the court found that the defendants sued in Italy to evade the contractual liability limitation provisions. Finally, the court noted that

since it had already granted a declaratory judgment in favor of plaintiff, there was less justification for permitting litigation in a foreign court. *See also International Fashion Prods., B.V. v. Calvin Klein, Inc.*, 1995 WL 92321 (S.D.N.Y. Mar. 7, 1995) (enjoining foreign suit filed in violation of forum selection clause).

D. Vexatiousness Standard

1. Basic Principles

- a. U.S. courts that have adopted the vexatiousness standard for granting antisuit injunctions are more likely to grant them than those that have adopted a comity standard.
- b. A court operating under the vexatiousness standard will issue an antisuit injunction if allowing the foreign proceeding to go forward would
 - (i) frustrate a policy of the forum issuing the injunction;
 - (ii) be vexatious or oppressive;
 - (iii) threaten the issuing court's jurisdiction; and
 - (iv) result in delay, inconvenience, expense, inconsistency, or race to judgment. *See Seattle Totems*, 652 F. 2d at 855.

2. Cases Denying an Antisuit Injunction under the Vexatiousness Standard

- a. *Robinson v. Jardine Ins. Brokers Int'l Ltd.*, 856 F. Supp. 554 (N.D. Cal. 1994). Plaintiff, Robinson, was a California citizen and a former employee of defendant, Jardine Insurance Brokers International Ltd., an English corporation. Robinson resigned from employment with defendant and allegedly began to solicit defendant's colleagues and clients in violation of a noncompete clause. The defendant obtained a temporary restraining order in England enjoining Robinson from competing with his former employer. Robinson sought an antisuit injunction to prevent the defendant from enforcing the temporary restraining order issued by the English court.

The District Court for the Northern District of California, following the vexatiousness standard, granted an antisuit injunction prohibiting the defendant from enforcing the English temporary restraining order in the United States, but not precluding the

defendants from enforcing it in England. The court reasoned that the English order frustrated California's public policy disfavoring unreasonable restrictions on lawful competition. The court noted, however, that under the principles of international comity, it would defer to the English court's injunction preventing plaintiff from competing against his former employer in England.

- b. In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003), the Fifth Circuit considered the issue of whether or not to grant an antisuit injunction in connection with a proceeding to enforce a Swiss arbitration award in the United States.

Karaha Bodas Company (KBC), a power company, entered into two contracts with the defendant (Pertamina, an energy company wholly owned by the Indonesian government) to construct a power plant in Indonesia. The contract contained a clause requiring the parties to arbitrate any disputes in Switzerland under the U.N. Commission on International Trade Law rules. Following a dispute between the parties, KBC initiated arbitration proceedings in Switzerland, and, following a hearing, the arbitration panel ruled in favor of KBC, awarding it damages of over \$260 million.

Immediately after the award was rendered, Pertamina sought to vacate it in the Swiss courts. While that proceeding was pending, KBC commenced proceedings in the District Court for the Southern District of Texas to confirm the award pursuant to the New York Convention. Pertamina defended and also moved to stay the U.S. proceedings pending the outcome of the Swiss proceedings. While the district court declined to stay the proceedings, it agreed to slow the proceedings in deference to Pertamina's request. After the Swiss court dismissed Pertamina's action, the district court granted KBC's motion for summary judgment enforcing the award.

Shortly thereafter, Pertamina began proceedings to vacate the award in the Indonesian courts and also sought there an injunction and penalties to enjoin KBC from enforcing the award in the United States. Just days before the hearing scheduled by the Indonesian court on the proposed injunction, KBC sought a

temporary restraining order (TRO) to enjoin Pertamina from seeking injunctive relief in Indonesia. The district court issued a TRO ordering Pertamina to withdraw its application to the Indonesian court for an injunction and enjoining it from taking any substantive steps in that court. Pertamina claimed it did not have sufficient time to withdraw its request for injunctive relief, and the Indonesian court issued an injunction prohibiting KBC from enforcing the award. KBC filed a motion asking the district court to hold Pertamina in contempt for violating the TRO. The district court found KBC in contempt of the TRO, again ordered Pertamina to withdraw its Indonesian application for injunctive relief against KBC, and ordered Pertamina to indemnify KBC for any fines resulting from the Indonesian injunction. KBC next asked the district court to issue a preliminary injunction enjoining Pertamina from enforcing the Indonesian injunction and from further pursuing the annulment action in Indonesia. Pertamina responded by filing a motion to purge the contempt order. The district court granted KBC's motion for a preliminary injunction enjoining Pertamina from enforcing the Indonesian injunction and from taking any substantive steps to prosecute the Indonesian annulment action. The court also denied Pertamina's motion to purge contempt. Pertamina appealed.

The Fifth Circuit had to deal with two issues on appeal. First, did the New York Convention preclude the district court from issuing an antisuit injunction? Second, assuming the district court could, consistent with the New York Convention, issue an antisuit injunction, was it appropriate for the court to have exercised its discretion to do so?

Pertamina argued that the New York Convention prevented a district court from exercising its inherent power to issue an antisuit injunction. The Fifth Circuit rejected this view on the ground that nothing in the Convention or the implementing legislation limited the power of a federal court to issue an antisuit injunction:

Although these treaty obligations limit the grounds on which the court can refuse to enforce a foreign arbitral award, there is nothing in the Convention or implementing legislation that expressly limits the inherent authority of a federal court to

grant injunctive relief with respect to a party over whom it has jurisdiction. Given the absence of an express provision, we discern no authority for holding that the New York Convention divests the district court of its inherent authority to issue an antisuit injunction.

Id. at 365. The court then turned to the question of whether it was appropriate for the district court to have exercised its discretion to issue an antisuit injunction in the circumstances of the case. As noted, the Fifth Circuit has adopted the “vexatious and oppressive” standard for antisuit injunctions. Under this standard, in determining whether to issue an antisuit injunction, courts look to such factors as whether the foreign lawsuit will lead to delay, expense, or inefficiency, whether the foreign lawsuit is duplicative, or whether it threatens the U.S. court’s jurisdiction.

The Fifth Circuit held that the district court erred in issuing an antisuit injunction, reaching this conclusion by examining the U.S. and Indonesian proceedings in the context of the New York Convention.

Central to the Fifth Circuit’s analysis was that the New York Convention distinguished between courts of “primary jurisdiction” and courts of “secondary jurisdiction.” A court of primary jurisdiction is one with the authority to set aside an arbitral award. The courts of the country whose arbitration laws apply to the case, typically the country of the arbitral situs, are those of primary jurisdiction. The New York Convention is silent on the grounds on which a court of primary jurisdiction may rely to set aside an award, such that the issue turns on the domestic law of that country. A court of secondary jurisdiction is one with the authority to confirm an arbitral award. Article V of the New York Convention sets forth the exclusive grounds on which the court may refuse to confirm an arbitral award. Moreover, petitions to confirm an arbitral award can be brought in more than one court of secondary jurisdiction. As a result, “[b]y allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award.” 335 F.3d at 367.

In seeking an antisuit injunction, one central argument advanced by KBC was that the Indonesian court was not a court of primary jurisdiction, and, therefore, did not have the authority to annul the award. The Fifth Circuit did not necessarily disagree with KBC's assertion that the Indonesian court did not have primary jurisdiction. *Id.* at 371 ("We agree that there is strong evidence in this instance favoring Switzerland as the paramount country of primary jurisdiction under the Convention."). *See also id.* at 373 ("It is true that Pertamina is likely in the wrong here, and that Indonesia's injunction and annulment may violate comity and the spirit of the Convention much more than would the district court's injunction.").

The Fifth Circuit held, however, that it did not have to reach the issue of whether or not Indonesia was a court of primary jurisdiction. "To resolve the instant dispute, however, it is not necessary for us to address the Indonesian court's decision to issue its own injunction and to entertain an annulment action under the Convention." *Id.* at 366. Rather, it found that "[s]everal structural aspects of the New York Convention indicate that none of the factors that usually contribute to vexatiousness and oppressiveness are at play here." *Id.*

First, the court relied on the fact that the New York Convention permits simultaneous proceedings both in a court of primary jurisdiction to vacate an award and in the courts of secondary jurisdictions to confirm an award. Since "the Convention already provides for multiple simultaneous proceedings, it is difficult to envision how court proceedings in Indonesia could amount to an inequitable hardship." *Id.* at 368.

Second, the court found that "there is little evidence that the Indonesian injunction or annulment action will 'frustrate and delay the speedy and efficient determination of the case.'" *Id.* at 369. The court noted in this context that a U.S. court can enforce an arbitral award even if it has been annulled in a country with primary jurisdiction. *Id.* at 370 (citing *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 909-13 (D.D.C. 1996) (enforcing an arbitral award rendered in Egypt notwithstanding annulment in Egypt)). Thus, the fact that there was an annulment

proceeding in Indonesia would result in only a “slight additional expenditure of judicial resources.” *Id.* at 370. This is because a U.S. court called upon to confirm an arbitral award would have to undertake some analysis to decide whether or not to do so regardless of whether there were annulment proceedings elsewhere, and the additional resources devoted to determine whether to confirm an award notwithstanding its annulment by another court would be “inconsequential.” *Id.*

Third, the issues in the Indonesian case (an action to set aside the arbitral award) were not identical to those in the U.S. case (an action to confirm the award). This is because, as noted, an action to set aside an award is governed by the domestic law of the country in which the action is brought (*i.e.*, Indonesian law), whereas an action to confirm an award is governed by the Convention. “Thus, assuming *arguendo* that the Indonesian courts might somehow be deemed to be courts of primary jurisdiction, they still would not precisely duplicate the enforcement proceedings that took place in the United States.” *Id.* at 370.

Finally, the Fifth Circuit concluded that the Indonesian court proceedings “do not threaten the integrity of the district court’s jurisdiction or its judgment enforcing the Award Thus, the integrity of our jurisdiction will not be affected unless we decide that the Indonesian annulment is in fact valid *and* that this annulment outweighs the Swiss court’s confirmation of the Award. [Emphasis supplied by the court.]” *Id.* at 370. The Fifth Circuit’s conclusion on this last point is questionable as the Indonesian court was not only considering whether or not to annul the arbitral award, but also had entered an antisuit injunction enjoining KBC from enforcing the award. It was an injunction such as this one that the Laker Airways court found was a threat to its jurisdiction. An antisuit injunction although it is aimed at a party to a lawsuit rather than a foreign court does have the effect of depriving the foreign court of jurisdiction.

The Fifth Circuit did not ignore the effect of the antisuit injunction on KBC itself, stating:

as a court of secondary jurisdiction under the New York

Convention, charged only with enforcing or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it.

Id. at 369. However, the Fifth Circuit failed to consider that those "legal hardships" that may include a fine for contempt of court can have the effect of compelling a party to U.S. proceedings to curtail its action in the United States, which has the corollary of depriving the U.S. court of jurisdiction.

Against the vexations of the Indonesian proceedings, the court balanced considerations of international comity. Significant to its analysis was that allowing the antisuit injunction to stand "could set an undesirable precedent under the [New York] Convention, permitting a secondary jurisdiction to impose penalties on a party when it disagrees with that party's attempt to challenge an award in another country." *Id.* at 373.

3. Cases *Granting* an Antisuit Injunction under the Vexatiousness Standard

- a. *Kaepa*, 76 F.3d 624, involved a contract between Kaepa, a U.S. athletic shoe manufacturer, and Achilles, a Japanese corporation that agreed to distribute Kaepa's footwear in Japan. The contract explicitly provided that Texas law and the English language would govern its interpretation, that it would be enforceable in Texas, and that Achilles consented to the jurisdiction of the Texas courts. There arose a dispute, and Kaepa filed suit in Texas. After about a year, during which time discovery had occurred in the Texas suit, Achilles filed suit in Japan.

Kaepa sought an antisuit injunction from the Texas court asking it to enjoin Achilles from prosecuting its suit in Japan. Achilles responded by moving to dismiss on *forum non conveniens* grounds. The lower court denied Achilles' motion to dismiss and granted Kaepa's motion to enjoin.

Achilles appealed and sought to persuade the Court of Appeals

for the Fifth Circuit to adopt the comity standard. The court rejected that standard, declining “to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.” *Id.* at 627. Rather, the court found that an antisuit injunction was warranted because prosecution of the Japanese action would be considerably duplicative and would result in unwarranted inconvenience, expense, and vexation.

- b. *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993). Bull Data Systems (BDS), a French computer manufacturer, negotiated an insurance agreement with Allendale, a U.S. insurance company. The insurance policy, covering BDS’s French locations, was negotiated under the French insurance code. After a suspected arson destroyed a warehouse full of BDS inventory, a dispute arose regarding the scope of Allendale’s insurance coverage. Pending a criminal investigation into the possible arson, Allendale refused to indemnify BDS and instead filed an action in the Northern District of Illinois. BDS commenced suit in the commercial court of France, a court of limited jurisdiction. Allendale petitioned the district court to enjoin the French proceedings, arguing that the French court, due to its limited jurisdiction, was not equipped to resolve the arson issue, which was an essential component of the insurance dispute.

The district court granted the antisuit injunction after determining that the U.S. court was a more appropriate forum to resolve the entire dispute. The Court of Appeals for the Seventh Circuit affirmed the grant of the antisuit injunction after cautioning that it would be improper to consider the relative merits of the French and U.S. procedural systems. The court pointed to the vexatiousness and “absurd duplication of effort” that would arise out of allowing both actions to proceed. *Id.* at 431.

The court went on to discuss the importance of international comity. While international comity was a relevant factor, the court emphasized that it would not presume a threat to comity without evidence of such a threat. The court then suggested that such evidence of a threat to foreign relations could be presented by a representation from the State Department or an appropriate foreign

body. The court compared the comity standard to the vexatiousness standard:

The strict cases [those following the comity standard] presume a threat to international comity whenever an injunction is sought against litigating in a foreign court. The lax cases [those following the vexatiousness standard] want to see some empirical flesh on the theoretical skeleton. They do not deny that comity could be impaired by such an injunction but they demand evidence ... that comity is likely to be impaired in this case.

Id.

- c. *Seattle Totems*, 652 F.2d 852. The owners of the Seattle Totems, an ice hockey team in the now defunct Western Hockey League, brought a private antitrust action in federal district court against the National Hockey League, Northwest Sports, and various other league officers and club owners claiming unlawful monopolization of the ice hockey industry in North America and seeking to have certain agreements relating to the sale and management of the Seattle Totems declared void and unenforceable. Northwest Sports commenced suit in Canada with respect to the same agreements that were the subject of the U.S. action. Plaintiff moved for an antisuit injunction in the U.S. court to enjoin Northwest Sports from pursuing its contract claim in Canada.

Following the vexatiousness standard, the Ninth Circuit issued the antisuit injunction after finding that adjudicating the contract issue in two separate actions would result in unnecessary delay and substantial inconvenience and expense to the parties and the witnesses. The court expressed concern that separate adjudication could result in inconsistent rulings or a race to judgment. *Id.* at 856. The court also found that the claim brought by defendants in the foreign jurisdiction was in fact a compulsory counterclaim under Federal Rule of Civil Procedure 13(a) which should be adjudicated where the original claim was brought. *Id.* at 854. The court concluded that policies favoring convenience to the parties and witnesses, the interest in efficient administration of justice, the potential prejudice to the parties, and the rationale behind Rule 13(a) weighed in favor of granting the antisuit injunction.

- d. *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F. Supp. 710 (D. Minn. 1982). A Minnesota company brought suit against two insurers seeking to recover losses incurred by an English affiliate. One of the insurers brought suit against plaintiff Cargill, Inc. in England to determine the scope of insurance coverage. The district court, without discussing principles of international comity, granted plaintiff's motion for an antisuit injunction. The court based the injunction on the grounds that it would be vexatious to Cargill and a waste of judicial resources to require adjudication in two separate forums. The court also expressed concern about the risk of prejudice to plaintiff from possible inconsistent results and a race to judgment.

E. Totality of the Circumstances Standard

The First Circuit's Decision

a. The Facts

Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, No. 03-2704, 2004 WL 415282 (1st Cir. Mar. 8, 2004), arose out of an audit engagement undertaken by a Belgian accounting firm Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren (KPMG-B) on behalf of Lernout & Hauspie Speech Products, N.V. (L&H). After L&H collapsed, several securities fraud actions were commenced in the United States against KPMG-B. These cases were consolidated before the district court for the District of Massachusetts. KPMG-B did not dispute that it was subject to personal jurisdiction in the United States, although it unsuccessfully moved to dismiss the suits on grounds of *forum non conveniens* and the failure to satisfy the pleading requirements of the Private Securities Litigation Reform Act of 1995.

After KPMG-B's motion was denied, plaintiffs served document requests on KPMG-B for its audit records and work papers. KPMG-B refused to produce them, asserting that to do so would violate Belgian law. Plaintiffs moved to compel, and the district court granted that motion. In response, KPMG-B sought relief from the Belgian courts. Specifically, KPMG-B filed an *ex parte* petition with a court in Brussels seeking to enjoin the plaintiffs in the U.S. action from "tak[ing] any step of a procedural or other nature in order to proceed with the discovery procedure." To ensure compliance, KPMG-B also asked the Belgian court to impose a fine of one million euros for each violation of the proposed injunction.

The Belgian court refused to act *ex parte*. Instead, it required KPMG-B to give notice of the Belgian proceedings to the plaintiffs in the U.S. litigation, and it scheduled a hearing. Before that hearing took place, the plaintiffs in the U.S. proceedings sought an antisuit injunction from the U.S. court enjoining KPMG-B from pursuing the proceedings in Belgium.

The district court granted the injunction. KPMG-B appealed. The First Circuit issued a partial stay of the injunction (permitting KPMG-B to appear at the hearing in Brussels for the sole purpose of asking for a continuance), and expedited the appeal. The First Circuit dealt with two basic issues on appeal — the standards for appellate review of a district court’s order on an international antisuit injunction and the standards a district court should use in deciding whether or not to issue such an injunction.

b. Standard of Review

While the First Circuit acknowledged that the grant of preliminary injunctions, as a general matter, should receive “deferential review” on appeal, the court noted that because international antisuit injunctions involve “important considerations of comity,” they warrant “a heightened level of appellate review.” This review is more rigorous than the abuse of discretion or clear error standard, but involves less scrutiny than *de novo* review. “Given our chosen standard of review, we cede a modest degree of deference to the trier’s exercise of discretion, but we will not hesitate to act upon our independent judgment if it appears a mistake has been made.”

c. Standard for Antisuit Injunction

In addressing the appropriate standard for issuing an antisuit injunction, the court rejected the liberal approach because it assigned “too low a priority” to international comity. And, although it found that the conservative approach “has more to commend it,” the First Circuit “stop[ped] short ... of an uncritical acceptance” of it.

Instead, the First Circuit adopted a third position. It stated that considerations of international comity “ordinarily establish a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings.” The court made it clear, however, that, contrary to the conservative approach, it did not believe that the circumstances in which that presumption could be overcome should be limited to two grounds, threat to jurisdiction and public policy. Rather the court instructed district courts to examine “the totality of the circumstances” in deciding whether the

presumption against the issuance of an antisuit injunction had been overcome. These circumstances “include (but are by no means limited to) such things as: the nature of the two actions (*i.e.*, whether they are merely parallel or whether the foreign action is more properly classified as interdictory); the posture of the proceedings in the two countries; the conduct of the parties (including their good faith or lack thereof); the importance of the policies at stake in the litigation; and, finally, the extent to which the foreign action has the potential to undermine the forum court’s ability to reach a just and speedy result.”

Having articulated a new standard, the court went on to apply it to the case before it, and found that the district court was justified in issuing the antisuit injunction.

d. Applying the New Standard

The First Circuit characterized the KMPG-B’s Belgian action as one seeking “to arrest the progress of the securities fraud action by thwarting the very discovery that the district court, which is intimately familiar with the exigencies of the underlying case, has deemed essential to the continued prosecution of the action against any of the defendants.” While KPMG-B’s Belgian action did “not constitute a frontal assault on the district court’s jurisdiction,” its effect was the same. A “court has a right indeed, a duty to preserve its ability to do justice between the parties in cases that are legitimately before it.” Thus, the court affirmed the district court’s grant of the antisuit injunction.

VI. Conclusion

The doctrine and strategies discussed in this article are critical to parties involved in international litigation who wish to secure the most favorable forum for an action.

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Appendix

Draft Forum Selection and Related Clauses

1. Exclusive and Nonexclusive Forum

i. Exclusive Forum

The courts of [Country X] shall have exclusive jurisdiction over all actions relating to or arising out of this Agreement.

ii. Nonexclusive Forum

The courts of [Country X] shall have jurisdiction to decide all actions relating to or arising out of this Agreement, without prejudice to the right of either party to commence such actions in any other court of competent jurisdiction.

iii. Asymmetrical Forum Selection Clause

The parties agree that all actions arising out of or in connection with this Agreement shall be resolved exclusively in the courts of [Country X], provided however, that [Party A] shall be also free to commence such actions in any court of competent jurisdiction, including without limitation the courts of [Country Y] and [Country Z].

iv. Defendant's Place of Business as Forum

Any suit relating to this Agreement brought by [Party A] shall be brought in the place where [Party B's] principal place of business is located; any suit relating to this Agreement brought by [Party B] shall be brought in the place where [Party A's] principal place of business is located.

v. Subject Matter Jurisdiction

N.B. In the United States, because a party cannot confer subject matter jurisdiction on a federal court, a party should provide that either the state or federal courts of that state shall have jurisdiction. For example:

The state and federal courts of New York shall have exclusive jurisdiction over all actions relating to or arising out of the Agreement.

2. Scope of Clause

i. Broad Scope

All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement, or the subject matter of this Agreement, shall be subject to the exclusive jurisdiction of the courts of [Country X], and no others.

ii. Exclusions

All disputes relating to this Agreement, with the exception of claims arising under Article III, shall be resolved exclusively in the courts of [Country X].

3. Other Common Provisions

i. Consent to Service of Process

[Party A] irrevocably designates, appoints, and empowers [Agent D] with offices on the date hereof at [Address in City E], as its agent with respect to any action or proceeding in [Country X] to receive, on its behalf, and in respect of its property, service of any and all legal process, summons, notices, and documents which may be served in any such action or proceeding, and agrees that the failure of the agent to notify [Party A] of any such service of process does not impair or affect the validity of service. [Party A] further irrevocably consents to the service of process out of any of the courts listed in [Article II] by the mailing of copies by registered or certified mail, postage prepaid, to [Party A] at its address set forth in [Article III], such service to become effective thirty days after such mailing. If for any reason [Party A] shall cease to be available to act as agent, [Agent D] agrees to designate a new agent in [City E] on the same terms and for the same purposes.

ii. Waiver of Foreign Sovereign or State Immunity

[Party A] is subject to civil and commercial law with respect to its obligations under this Agreement. The execution, delivery, and performance by [Party A] of this Agreement constitute private and commercial acts rather than public or governmental acts. Neither [Party A], nor any of its properties or revenues, is entitled to or will claim any right of immunity in any jurisdiction from suit, jurisdiction, judgment, attachment (whether before or after judgment), set-off or execution of a judgment or from any other legal process or remedy relating to the obligations of [Party A] under this Agreement.

iii. Choice-of-Law Clauses

a. Scope of Choice-of-Law Clause

This agreement shall be interpreted in accordance with, and governed by, the laws of [Country X]. *Or*

This agreement shall be construed in accordance with the laws of [Country X]. *Or*

This Agreement will be governed by, and all disputes relating to or arising out of this Agreement [or the subject matter of this Agreement] shall be resolved in accordance with, the laws of [Country X].

b. Renvoi versus “Whole Law”

This Agreement will be governed by, and all disputes relating to or arising out of this Agreement shall be resolved in accordance with, the laws of [Country X] (to the exclusion of its conflict of laws rules).

iv. Waiver of Forum Non Conveniens

Each party waives any right to invoke, and agrees not to invoke, any claim of *forum non conveniens*, inconvenient forum, or transfer or change of venue.

v. Waiver of Jury Trial

[Party A] expressly waives any right to a trial by jury with respect to disputes relating to this Agreement, and agrees not to seek or claim any such right.

vi. Application of Forum Selection Clauses to Actions Seeking Provisional or Interim Relief

Nothing in this Agreement shall prevent either party from applying to a court that would otherwise have jurisdiction for provisional or interim measures, including but not limited to any claim for preliminary injunctive relief. *Or*

All disputes relating to this Agreement shall be resolved exclusively in the courts of [Country X], provided that claims alleging unlicensed or otherwise unauthorized use of the [Trademarks] may be asserted in any court of competent jurisdiction. *Or*

All disputes relating to this Agreement (with the exception of claims arising under Article X) shall be resolved exclusively in the courts of [Country X].

vii. Basic Forum Selection Clause

All disputes relating to this Agreement shall be subject to the exclusive jurisdiction of the courts of [Country X], and shall be decided in accordance with the laws of [Country X].