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FORUM NON CONVENIENS: A REVIEW OF ITS APPLICATION IN PAST AND RECENT CASES

Charles Eric Ruhr

I. INTRODUCTION

Forum Non Conveniens is a theory of law that allows dismissal of a case when the three procedural requirements for allowing a lawsuit to go forward are met, Subject Matter Jurisdiction, Personal Jurisdiction and Venue. The theory is that the court in which the lawsuit was originally filed is not substantially the most convenient court and that the suit should therefore be dismissed in favor of a more convenient court.¹ Although the Supreme Court has said that the "doctrine of forum non conveniens has a long history,"² its history is of relatively recent origins.

Once again, although the theory has a latin name, no scholar has ever traced its use to Roman or continental courts. The theory has its origins in 19th Century Scottish Courts, where the term inconvenient forum was loosely translated into the latin forum non conveniens. The word was used to distinguish from forum non competens, or those procedural dismissals based on lack of jurisdiction versus those dismissals based on discretion of the court.³

The theory was first used in the admiralty courts under other names in the United States in the early part of the 19th Century. A law journal article in 1929 by Paxton Blair extolled the virtues of forum non conveniens dismissals, the greatest one being the virtue of reducing congestion in certain overly used courts, such as the Southern District of New York. The article influenced the minds of judges at that time and the theory gained wider usage under the name of forum non conveniens.⁴ The de-

1. GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 289 (1996).

2. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981), reprinted in BORN, *supra* note 1 at 289.

3. BORN, *supra*, note 1, at 289-90.

4. BORN, *supra*, note 1, at 292-3.

fining opinion for the common law theory of forum non conveniens came in a 1947 case entitled *Gulf Oil Co. v. Gilbert*.

A. Gulf Oil Company v. Gilbert and the basic elements of Forum Non Conveniens

The plaintiff was a Virginian who owned a warehouse with gasoline pumps supplied by Gulf Oil Corp. The warehouse caught fire and burned as gas was being unloaded from trucks to the tanks. The Virginian asserted claims against Gulf Oil for its negligence in transferring the gas from the trucks to the holding tanks. Gulf Oil was a corporation registered in Pennsylvania but also doing business in New York. The plaintiff filed suit in New York. The trial court dismissed due to forum non conveniens. The circuit court reversed. The Supreme Court agreed with the trial court and dismissed due to forum non conveniens although subject matter, personal jurisdiction and venue were present.⁵ The Court identified three elements that were necessary for a dismissal.

The first element was that there must be an adequate alternative forum. The Court ruled that this forum would be Virginia. The court said that "In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."⁶

The second element was that the criteria must weigh strongly against the plaintiff. The court said that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."⁷

Finally, the court identified the criteria that must be weighed or balanced. These criteria, the court identified as public and private interest factors. The court declined to give an absolute rendition of what these factors must be, but it noted that the "doctrine leaves much to the discretion of the court to which the plaintiff resorts."⁸ However, it did give a list of what this court saw the public and private interest factors to be. To this day, these factors and the balancing of them between the plaintiff and the defendant is used to determine in large part whether to dismiss the case. The *Gilbert* court identified the following private interest factors:

The relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing,

5. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502. Similar facts are also summarized in BORN, *supra*, note 1 at 294.

6. *Gilbert*, 330 U.S. at 506-7. Reprinted in BORN, *supra*, note 1 at 295, although Born does not describe it as an element.

7. *Id.* at 508.

8. *Id.* at 508 reprinted in BORN, *supra*, note 1 at 295. Once again, I attribute this idea largely to Born's interpretation.

witnesses; possibility of view of premises, if view would be appropriate to the action ... all other practical problems ... the enforceability of judgment ... and [whether] the plaintiff [seeks] vex, harass or oppress the defendant.⁹

The court identified the following public interest factors:

Administrative difficulties follow for courts when litigation is piled up in congested centers, ... Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is a reason for holding the trial in their view. ... There is a local interest in having localized controversies decided at home.¹⁰

The Court's analysis of these factors included such reflection that the evidence was all in Virginia, that the defense would want to interplead an independent contractor in Virginia, and that Virginia law would apply, something with which Virginia courts would be familiar, but that New York courts would not be. Furthermore, the Court dismissed the plaintiff's only major point against holding the trial in New York, that of the provincialism of the residents of Lynchburg, Virginia, which would not allow them to award large damage amounts. The court noted that the plaintiff chose to do business there, and should, therefore expect a jury trial there.¹¹

B. Piper Aircraft v. Reyno

Piper concerned a wrongful death action on behalf of Scottish citizens who died in Scotland during a charter plane flight with a Scottish passenger company against the Pennsylvania manufacturers of the propeller and Ohio manufacturers of the plane. In the case of *Piper Aircraft Corp. v. Reyno* the Supreme Court made three holdings that concern the basic elements of the forum non conveniens analysis. The Court held that one, there may be an adequate alternative forum even if the substantive law of the alternative forum is different from the plaintiff's chosen forum and negates some of the plaintiff's claims,¹² two, the fact that the real parties at interest are foreigners meant that the plaintiff's side of the *Gilbert* scale should not be given added weight,¹³ and, three, the balancing of the *Gilbert* factors led to dismissal due to more weight being on the defendant's side even though the defendant propeller manufacturing and

9. *Id.*

10. *Id.*

11. See *Gilbert*, 330 U.S. at 509-11.

12. See *Piper*, 454 U.S. 235, 249.

13. See *Piper*, 454 U.S. 235, 255-6.

engineering design center was in the federal district where the trial was to be held.¹⁴

C. Analysis of Gilbert Factors by the Court in Piper

The Court found that the *Gilbert* factors led towards dismissal from the plaintiff's chosen forum. They did note that "Particularly with respect to the question of relative ease of access to sources of proof, the private interest factors point in both directions."¹⁵ They noted that there were the sources of proof that the defendant would supply, which would weigh in the plaintiff's favor. These sources would be the "records concerning the design, manufacture, and testing of the propeller and plane (engine)."¹⁶ These records were located in the United States, and therefore would lead to having the trial in the United States.

However, the Court noted that there were significant problems due to the fact that the pilot's estate, the plane's owners, and the charter company could not be impleaded in the United States. The Court noted that liability on the part of any of the above three could relieve the plane and propeller manufacturer of all liability. The Circuit Court had noted that the plane and propeller manufacturer could always go to Scotland and hold trial there for indemnification. But the Court felt that two trials would place a burden on the defendants and saw it as a factor towards dismissal.¹⁷ Finally, although the Court noted that the private interest factors could go either way, the Court said that the public interest factors weighed heavily towards holding trial in Scotland. The Court said that Scottish law might apply, which would lead towards holding trial in Scotland. Then they said that:

Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper (the plane manufacturer) and Hartzell (the propeller manufacturer), all potential plaintiffs and defendants are either Scottish or English. As we stated in *Gilbert*, there is 'a local interest in having localized controversies decided at home.' Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products.... However, the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant.¹⁸

In summary, the Court believed that district court did not abuse its dis-

14. See *Piper*, 454 U.S. 235, 257-9.

15. *Id.* at 257.

16. *Id.*

17. *Id.* at 259.

18. *Piper*, 454 U.S. 235, 260.

cretion in stating that the private and public interest factors should weigh towards dismissal.

Even though the Court did not state this specifically, there were many factors of proof for holding the case in Scotland. The maintenance logs were in Scotland. The air traffic controllers log was in Scotland. The British equivalent of the FAA had a preliminary hearing that showed propeller malfunction, then a review board hearing that showed possible fault on the part of the pilot. Any evidence regarding the abilities of the pilot, including personal logs, would be in Scotland. Evidence that would go towards damages, such as loss of consortium and support, which would come in the form of testimony by surviving family members, would be in Scotland. Finally, should the choice of law analysis lead to Scottish law applying, then there would be problems of proof as to what that law was. All of these factors, which were mainly evidentiary problems, would all point towards holding trial in Scotland.

However, other cases have presented dissenting opinions to the opinions expressed in *Piper*. Although the Supreme Court has not found them to be persuasive, they were good opinions, and should be noted.

The Texas state court system did not recognize the common law practice of forum non conveniens until recently. The Supreme Court of Texas ruled that the legislature had effectively abolished the theory of forum non conveniens under § 71.031 of the Texas Civil Practice and Remedies Code. The Supreme Court in the 1990 case of *Dow Chem. Co. v. Castro Alfaro* ruled that this section precluded the courts from enforcing the doctrine of forum non conveniens. It said that the statutory language gave an absolute right to enforce wrongful death and personal injury cases before the courts of Texas, so long as other civil procedure requirements were met.¹⁹ A concurring opinion in this case outlines many of the problems with forum non conveniens analysis, and it is therefore a helpful case to examine for this purpose. Just as an aside, the Texas Legislature recently passed a law § 71.051 which statutorily recognizes the theory of forum non conveniens in the state courts.²⁰ However, there are still some suits pending under the old laws. Most of these lawsuits are for personal injury claims on behalf of banana workers that were, among other things, sterilized by the use of a chemical exported by Dow Chemical and Shell Oil to banana plantations around the world. The successful suit of *Castro Alfaro* originated with Costa Rican banana workers. Other

19. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Texas Supreme Court 1990) (Doggett J., concurring).

20. For a discussion of the old and new laws see Carl Christopher Scherz, Comment, Section 71.051 of the Texas Civil Practice and Remedies Code—the Legislature's Answer to *Alfaro*: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation, 46 BAYLOR L. REV. 99.

banana workers around the world filed the same suit in the Texas courts.

However, recently Dow and Shell have been successful at impleading an Israeli company that also manufactured the chemical at question. They have then removed to the federal courts on diversity of citizenship and dismissed on forum non conveniens grounds in the federal courts of the Fifth Circuit, which we will later discuss is one of the few remaining circuits that does not recognize forum non conveniens in all cases, not recognizing it for anti-trust lawsuits.²¹

A concurring opinion in *Castro Alfaro* listed five main reasons for not allowing forum non conveniens. Justice Doggett noted that one, the lawsuit was in the backyard of the defendants, some of the most powerful corporations in the world; this could not be an inconvenience. He noted that Shell had its Corporate headquarters minutes from the courthouse and that Dow operated the country's largest chemical plant in the same district where the trial was to be held. Most of the decisions to use this chemical (even when its manufacture and use was banned in the U.S. for causing sterility and other problems) would have been made in the Shell Corporate headquarters. Both Dow and Shell enjoyed business protections from their operations in the district, why should they be insulated from the legal consequences of their actions.²²

Two, Justice Doggett noted that the reason for forum non conveniens, convenience, is a myth with modern technology. Either corporation can fly their experts down to Costa Rica in a short plane ride to examine the plaintiffs to find out if they are permanently sterile and what other effects they suffer.²³ Or they could rely upon doctors in Costa Rica and simply mail or fax documents back to Houston. Justice Doggett quoted from *Calavo Growers of California v. Belgium*:

A forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel. It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit. Jet travel and satellite communications have significantly altered the meaning of 'non conveniens.'²⁴

Thirdly, Justice Doggett noted that a forum non conveniens dismissal

21. See generally, *Delgado V. Shell Oil Co.*, 890 F.Supp. 1324. This case follows the scenario described above.

22. See *Castro Alfaro*, 786 S.W.2d 674, 681. "The decision to manufacture DBCP for distribution and use in the third world was made by these two American companies in their corporate offices in the United States. Yet now Shell and Dow argue that the one part of this equation that should not be American is the legal consequences of their actions."

23. *Id.* at 684.

24. *Id.* at 684 (quoting *Calavo Growers of California v. Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman J., concurring)).

was usually a death knell to the lawsuit. "Empirical data available demonstrate that less than four percent of cases dismissed under the doctrine of forum non conveniens ever reach trial in a foreign court."²⁵

Fourthly, Justice Doggett noted that "the misconduct of even a few multinational corporations can affect untold millions around the world."²⁶ Justice Doggett noted numerous instances where corporations shipped dangerous items, such as children's sleepwear and pacifier, and dangerous chemicals, overseas. The theory of forum non conveniens essentially resulted in insulation for the actions of these corporations.²⁷ To put it more simply, it is unjust to ship products to other countries that are banned for use in the United States.

Furthermore, Justice Doggett noted that the world is increasingly interdependent. The chemicals that are used on bananas and other crops come back to the United States when those products are shipped back to the United States.²⁸ This is similar to the argument made in *Piper* that American consumers use these products: if they are found to be defective overseas, they may affect consumers here in the United States as well.

The arguments made by Justice Doggett were powerful arguments and should be made to any court contemplating forum non conveniens.

One case that followed some of the arguments that Justice Doggett made was a case decided months before the *Piper* decision. This was the *Fiacco* decision from the Federal District of the Southern District of New York. The facts were similar to *Piper* in that it was an air crash of a helicopter. This time the crash occurred in Norway. The helicopter was owned by a foreign company and chartered with a foreign company. There were similar facts in all but one respect, one of the passengers was an American.²⁹

The trial court in that case made three rulings. One, the court noted that "with respect to design and manufacture, the potential witnesses are located in the United States."³⁰ The court seemed to imply that the fact that it was a product manufacturing case and that all the design and manufacturing took place in the district where the lawsuit was filed led to not dismissing the lawsuit on the basis of forum non conveniens.

However, there were two other reasons that the court noted, that led to the prevention of dismissal. One, the court refused to separate the American plaintiff from the other plaintiffs, thereby creating two lawsuits. Instead, the court held that since there was an American, there was

25. *Id.* at 683.

26. *Id.* at 688.

27. *Id.*

28. *Id.* at 689. " ... actions of our corporations affecting those abroad will also affect Texans."

29. *Fiacco v. United Technologies Corp.*, 524 F.Supp. 858, 858.

30. *Id.* at 860.

a "real and tangible interest in this forum. This factor augments in this case the weight which normally should be given to the plaintiff's choice of forum."³¹ As noted earlier in the discussion of the *Gilbert* case, one of the elements of forum non conveniens is that the plaintiff's choice of forum is given added weight in weighing the private and public interest factors. This normally gives more weight to the side of the plaintiff. However, the Court in *Piper* held that a foreign plaintiff is to be given no added weight to his/her choice of forum due to the fact that the presumption is the forum is not local and therefore not convenient.

In *Fiacco*, the court combined the fact that much of the evidence was in the United States and that there was an American plaintiff. It gave added deference to the plaintiff's choice of forum and therefore ruled that the *Gilbert* factors did not weigh in favor of dismissal. Furthermore, the court said that the fact that the defendant might not be subject to personal jurisdiction in the alternative forum unless the defendant gave consent, was a factor for holding the trial in the present district.

In *Howe*, a 1st Circuit decision and *Linter*, a 2nd Circuit decision, the fact that there is an American plaintiff does not always tip the scales in favor of the plaintiff. In those cases, American plaintiffs argued that the case should not be dismissed to another forum on forum non conveniens grounds. However, the courts in those cases gave added weight to the plaintiff's choice of forum, but that was not enough to overcome the factors weighing against the plaintiff.³²

Realistically, the Supreme Court has already ruled that airplane crash products liability cases should be dismissed on forum non conveniens grounds. However, the fact that one of the plaintiffs was American might give enough added weight to keep the case in American courts. However, I would say that with the Circuit Court cases of *Linter* and *Howe*, where the courts ruled against the American in spite of giving added deference to the American plaintiff's choice of forum, it might be hard to persuade a court to refuse to dismiss even given the scenario of *Fiacco* today.

For those cases that do not include United States citizens as plaintiffs, I think in aircraft products liability cases, the ruling will go as it did in the *Magnin*, a 1996 case. The facts of that case were similar to *Piper* but with the alternative forum being France. The facts involved a French

31. *Id.*

32. *See Allstate Life Insurance Co. v. Linter Group Ltd.*, 994 F.2d 996, 1001. The court in this case did not rule that the American had an absolute right to trial in the United States. The plaintiff's choice of forum should be given added deference creating a high hurdle, but when all the *Gilbert* factors weigh against the plaintiff's choice, that weight can be overcome. *See also Howe v. Goldcorp. Investments, Ltd.*, 946 F.2d 944, 953. "We cannot say that the district court was clearly wrong in finding that the balance of conveniences favors suit in Canada and that litigation in Mr. Howe's chosen forum would likely prove both unfair and oppressive."

citizen who died piloting a privately owned plane in France.³³ There was a twist to this case. I presume that since there was such a battle to keep the case in the Alabama state courts, that the Alabama state courts do not recognize forum non conveniens dismissals. The estate of the pilot initially filed their case in Alabama state courts. However, one of the people they named in their suit was "a designated manufacturing inspection representative" theoretically of the FAA. Since federal employees can always remove to the Federal Courts on subject matter jurisdiction, the defendants removed to federal court, where the case was dismissed under forum non conveniens.³⁴

The court looked at the private and public interest factors much as did the Court in *Piper*. The said the majority of evidentiary problems would be due to the crash site being in France. They said that the French equivalent of the FAA, who did a report on the crash would have to testify. They would have to fly over to Alabama, and their testimony would have to be translated. Other witnesses under similar circumstances would include maintenance witness, witnesses who would testify about the flightworthiness of the pilot, and relatives who survived the pilots death who would testify regarding damages. Once again, the court also said that the fact that French law would apply led to the public interest factors weighing towards dismissal. Finally, the court noted that since the plaintiff was foreign, there would be no added deference given to the plaintiffs choice of forum.³⁵

The court also noted that the plaintiff reasoned that there was no contingency fee arrangement allowable in France and that there would be no jury trial. The court dismissed both of these ideas, noting that if these factors were taken into account, there would almost never be dismissal since the U.S. is the only legal system that allows for civil jury trials and contingency fee arrangements.³⁶

The fact of the matter is that most of the evidentiary material would come from reports by experts, experts on the crash, the design of the motor, the failure rate, experts who examine the particular motor in question, and so on. Most of these experts could write a report that could easily be translated and transported to Alabama. So it is not so easy to see as the court makes it out that the majority of evidence would lead to the case being held in France, especially since a significant portion of the evidence would be the design specifications and manufacturing process, all of which took place in Alabama.

33. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1426.

34. *Id.*

35. *Magnin*, 91 F.3d 1424, 1430.

36. *See id.*

D. Special Venue Statutes

Special venue statutes have been enacted with various laws such as RICO violations, antitrust violations, and securities and exchange violations. The reason they are important regarding forum non conveniens analysis is that they have been cited as authority for not permitting dismissals on forum non conveniens grounds. The theory is that Congress enacted that special venue statute to give a wide range of venue options to the plaintiff due to the nature of the claim. Once filed under the special venue statute, theoretically the courts have no power to dismiss under a venue changing grounds such as forum non conveniens.

Venue traditionally has meant which court the plaintiff can file in out of all the courts where subject matter jurisdiction and personal jurisdiction are found. Traditionally, the common law was that venue was where the defendant was an inhabitant or where the defendant was a resident. Now, in federal law, all venue is codified as either special venue statutes or general venue statutes. An example of a special venue statute is that found in the Clayton Act, which deals with antitrust claims that, "any suit under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant but also in any district wherein it may be found or transacts business."³⁷

This language may be compared to that in the general venue statute of 28 U.S.C. § 1391:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omission giving rise to the claim occurred... or (3) a judicial district in which the defendants are subject to personal jurisdiction....³⁸

So you can see that the special venue statute no longer expands the concept of venue in diversity actions; the general venue statute actually allowing for just as wide or wider venue choices as the special venue statutes. The purpose of the special venue statute, however, when it was first enacted, was to expand venue options.

So you may be asking yourself what does special venue statutes have to do with forum non conveniens. As I noted at the outset of this section, it is argued in many decisions that special venue statutes prevent forum non conveniens dismissals.

37. *Industrial Investment Development Corporation v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 n.17 (5th Cir. 1982) (quoting 15 U.S.C. § 22).

38. 28 U.S.C. § 1391, *reprinted in* WEST PUBLISHING, *FEDERAL RULES OF CIVIL PROCEDURE* 564 (1995).

As traced in numerous modern cases, including *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, a 1982 case and *Capital Currency Exchange v. National Westminster Bank PLC*, a 1998 case, the Supreme Court ruled in a case from 1948, commonly known as *National City Lines I*³⁹ that special venue statutes prevented dismissal of the case due to forum non conveniens.⁴⁰ The case was an antitrust case "alleging that the defendants conspired to monopolize public transportation in a number of cities."⁴¹ The case was initially filed in the Federal District Court of the Southern District of California, but the defendant bus company moved for it to be transferred to the Northern District of Illinois, where its corporate headquarters was located, and where it believed would be a more convenient trial.⁴² The Supreme Court ruled that the case could not be dismissed or transferred on forum non conveniens grounds due to the fact that the case was filed using the Clayton Act special venue statute quoted above.⁴³

Congress, soon after the trial, passed 28 U.S.C. § 1404(a), which allowed for a forum non conveniens type transfer between federal district courts. This was what the court in *Capital Currency Exchange* had to say about this:

In September 1948, shortly after *National City I* was decided, Congress enacted 28 U.S.C. § 1404(a), which provides that 'for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' Section 1404(a) thus supplanted the common law doctrine of forum non conveniens for transfers between United States district courts Section 1404(a) does not apply in cases here the purportedly more convenient forum is not a United States district court. In such cases, almost always involving foreign countries, the common law doctrine of forum non conveniens still governs.⁴⁴

After Congress passed this new section to the Code of Civil Procedure, defendant *National City Lines* again tried to transfer and this time the transfer was approved by the Circuit Court and the Supreme Court denied certiorari in what is known as the case *National City Lines II*.⁴⁵

The Fifth Circuit has ruled in *Mitsui* that *National City Lines II* in no

39. See *United States v. National City Lines*, 334 U.S. 573 (1948).

40. See *Mitsui*, 671 F.2d 876, 890.

41. *Capital Currency Exchange v. National Westminster Bank PLC*, 155 F.3d 603, 606 (2nd Cir. 1996).

42. *Id.*

43. *Id.*

44. *Capital Currency Exchange*, 155 F.3d 603, 607.

45. *Id.* See *United States v. National City Lines*, 337 U.S. 78 (1949).

way overrules *National City Lines I* as regards the effect of the special venue statute found in the Clayton Act on common law forum non conveniens. The Fifth Circuit explained its ruling in this way:

Defendants argue that the Supreme Court 'effectively nullified' its holding in *National City Lines* by its second decision in that case.... Shortly after the Court's first decision, Congress, in an unrelated move, enacted 28 U.S.C. § 1404(a), which authorizes the district courts to 'transfer any civil action to any other district or division' 'for the convenience of parties and witnesses.' In *National City Lines II*, the Court, relying on the legislative history and the broad term 'any civil action,' concluded that the transfer statute applied to antitrust actions.... The Court in no way questioned its earlier holding concerning the effect of 15 U.S.C. § 22 on common law forum non conveniens. Since defendants can point to no statute authorizing dismissal of an action on forum non conveniens grounds, *National City Lines II* does not help them in any way.⁴⁶

In other words, the Fifth Circuit believed that *National City Lines II* only overruled *National City Lines I* as regards the codified venue transfer statute. However, the Fifth Circuit still followed the ruling in *National City Lines I* that the special venue statute in the Clayton Act prevented transfer of cases on common law forum non conveniens grounds, i.e. where the alternative forum is foreign.

The First Circuit overruled this type of reasoning in *Howe* and the Second Circuit overruled the reasoning in *Transunion*.⁴⁷ *Howe* regarded a case where an American investor in a Canadian Investment Corporation brought SEC charges against that corporation in Federal District Court in Massachusetts. The investor alleged fraud in changing the bylaws of the corporation to allow investment of more than 10% in a single company. The company subsequently invested around 40% of its capital in two gold companies each. The company lost money in this deal and the investor sued. The investment company moved to dismiss the case on forum non conveniens grounds. The Securities and Exchange Commission (SEC) filed an amicus brief on behalf of the investor claiming among other things that the special venue statute of the Security and Exchange Act prevented the court from dismissing the case on forum non conveniens grounds.⁴⁸ The SEC reasoned as had the Fifth Circuit in *Mitsui*, that *National City Lines I* prevented forum non conveniens dismissals. Essentially, the SEC said that since *National City Lines I* had prevented dis-

46. *Mitsui*, 671 F.2d 876, 890 n.18.

47. See *Howe v. Goldcorp. Investments, Ltd.*, 946 F.2d 944, see also *Transunion v. PepsiCo, Inc.*, 811 F.2d 127.

48. *Howe*, 946 F.2d 944, 144-47.

missal of an antitrust suit on forum non conveniens grounds because that antitrust suit carried with it a special venue statute, the First Circuit should not allow dismissal in this SEC claim because the SEC claim also has a special venue statute.⁴⁹ The court rejected the arguments in the amicus brief for three reasons.

The first reason was that there was no legislative history supporting the idea that the special venue statute in this case was meant by Congress to prevent forum non conveniens transfers. The court noted that there really was nothing different in the special venue statute from the general venue statute, under which forum non conveniens transfers were allowed. The Court said:

What is so special about a special venue statute? If a general venue statute opening federal court doors (say, in New York) is compatible with an international forum non conveniens transfer (say, to Italy) why does a special venue statute which simply opens another court's doors (say, in California) suddenly make the same international transfer unlawful?⁵⁰

The second reason that the court gave for denying the special venue statute effectiveness in preventing forum non conveniens transfers was the court's interpretation of *National City Lines II*. The SEC said, as had the Fifth Circuit, that *National City Lines II* only overruled *National City Lines I* for purposes of domestic transfers on forum non conveniens grounds but not foreign transfers. The court noted that many courts had contemplated this issue and few courts have held with the SEC. In addition, the court noted that at the very least *National City Lines II* did not eliminate that possibility of forum non conveniens transfers to foreign courts.⁵¹

Finally the court noted a public policy reason for dismissing the case on forum non conveniens grounds even when there was a special venue statute. The court noted:

We can find no good policy reason for reading the special venue statute as if someone in Congress really intended them to remove the courts' legal power to invoke the doctrine of forum non conveniens in an otherwise appropriate case. The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes. To insist that American courts hear

49. *Id.* at 948.

50. *Id.* at 949.

51. *Id.*

cases where the balance of convenience and the interests of justice require that they be brought elsewhere will simply encourage an international forum shopping that would increase the likelihood that decisions made in one country will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy. And, to deprive American courts of their transfer power, when, but only when, one of more than three hundred special venue statutes apply, would create a hodgepodge, that would, or would not, bring about American adjudication of an essentially foreign controversy, depending upon the pure happenstance of whether Congress – at some perhaps distant period and likely out of a desire to widen the plaintiffs venue choices in typically domestic cases – enacted a special venue statute.⁵²

I quote this public policy argument against special venue statutes standing in the way of forum non conveniens dismissals, but also because it does an excellent job of explaining why we have forum non conveniens in the first place. Courts around the world are interrelated. So is business. If we do not want them to work at cross purposes then we need forum non conveniens to dismiss a case so that an essentially foreign case does not wind up in the American courts, where the American courts would alienate the foreign country and prevent trade with that country from happening. Of course, the opposite is true as well. Since trade is global now, why can't we say that all lawsuits touch upon American interests, and the protagonists should therefore have access to American courts.

The Fifth Circuit has also limited its reasoning in *Mitsui* that *National City Lines I* prevented forum non conveniens in situations where there is a special venue statute and the alternative forum is foreign. The Fifth Circuit in *Kempe* held that *National City Lines I* did not apply to RICO violations, where RICO had a special venue statute.⁵³ Therefore, the only time that special venue statutes will prevent forum non conveniens dismissals now is when the special venue statute is the Clayton Act antitrust suit. However, the Fifth Circuit contemplated one other component of antitrust law, and that is their ruling that antitrust law has no substantive counterpart in a foreign country.

E. Substantive Law of the Alternative Forum

Regarding change of substantive law in the *Piper* case, the Court said:

We do not hold that the possibility of an unfavorable change in law should never be a relevant consideration in a forum non conveniens inquiry. Of course,

52. *Id.* at 950.

53. *See Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144.

if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice. In these cases, however, the remedies that would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.⁵⁴

There is no doubt from what the Court said above that it would take an extremely unfavorable change in law, or perhaps a court that is so corrupt that a trial cannot take place on favorable terms in order for it to hold that there is no adequate alternative forum.

However, the Fifth Circuit not only has found the special venue statute of the Clayton Act to be a bar to forum non conveniens dismissals, it has also found that no other foreign alternative forum allows for antitrust claims to be a bar to dismissal on forum non conveniens grounds. In other words, the fact that the Fifth Circuit believes that foreign alternative forums would not recognize claims based on antitrust statutes means that the alternative forum is inadequate due to change in substantive law.

In *Mitsui*, the Fifth Circuit said:

The treble damages action created for "private attorneys general" by § 4 of the Clayton Act, while "designed primarily as a remedy,"⁵⁵ ... is designed at least in part to "penalize wrongdoers and deter wrongdoing"⁵⁶.... Since it is a well-established principle of international law that "the Courts of no country execute the penal laws of another,"⁵⁷ ... we have little doubt that the Indonesian courts would quite properly refuse to entertain plaintiffs' Sherman Act claim. A dismissal for forum non conveniens, then, would be the functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act.⁵⁸

The Fifth Circuit obviously believed that Sherman Act claims would not be recognized in Indonesia, the alternative forum in this case, and that therefore the suit should not be dismissed on forum non conveniens grounds. It is peculiar that the reason the court gave for why the Indonesian courts would not recognize the Sherman Act, was that the treble damages make the Act a private penal claim. The same argument was

54. Piper, 454 U.S. 235, 254.

55. *Mitsui*, 671 F.2d 876, 891 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486).

56. *Mitsui*, 671 F.2d 876, 891 (quoting *Brunswick*, 429 U.S. 477, 485).

57. *Id.* at 891 (quoting *The Antelope*, 23 U.S. (10 Wheat.) 66, 123, 6 L.Ed. 268 (1825)).

58. *See id.*

made in *Piper*, that the substantive law would change and that the plaintiffs would not be able to get treble damages in a personal injury action as a punitive measure. The Court in *Piper* however said that even though the courts of Scotland would not recognize punitive damages and strict liability, they do recognize other claims that would allow the lawsuit to proceed. The Fifth Circuit apparently believed that without the Sherman Act claims, which could be analogized as being similar to strict liability, the lawsuit would fail entirely. There was no indication however that the lawsuit in *Mitsui* would fail entirely. The plaintiffs would have other claims on which to base their lawsuit, such as misrepresentation and fraud. The Fifth Circuit, however, must have believed that without the Sherman Act claims, the lawsuit would go nowhere, and that thus the plaintiffs would be deprived of their lawsuit. Since the substantive law of the alternative forum was inadequate, the lawsuit could not be dismissed on forum non conveniens grounds. The alternative forum was considered to be inadequate due to a change in the substantive law.

Apparently, the Fifth Circuit's ruling was limited to antitrust actions because a similar argument was made in *Kempe* where RICO claims were alleged, but the Fifth Circuit went ahead and dismissed the lawsuit on forum non conveniens grounds. *Kempe* involved a Bahamian insurance company that went bankrupt. In the liquidation proceedings it was alleged that the company had a reinsurance scam going that allowed it to modify the balance sheet. The company was created to insure an American oil drilling company based out of New Orleans. It was alleged that there was racketeering between these companies that allowed the scam to proceed.⁵⁹

The plaintiff alleged that RICO laws were similar to antitrust laws. The plaintiff proposed that the purpose of RICO laws was to create a private attorney general who would make essentially penal claims against the defendants, much as in the case of the antitrust claims in *Mitsui*.⁶⁰

The Fifth Circuit denied that the substantive law would have changed so greatly that it would become, as in *Piper*, so clearly inadequate as to be no remedy at all. The court noted the Supreme Court had held in a case entitled *Shearson/American Express* that "the private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff..."⁶¹ In other words, the court found that the RICO statutes, unlike their antitrust counterparts, were not simply penal statutes that would not be enforced in a foreign forum's court. The court noted that the plaintiffs would not be deprived of any remedy, the test from *Piper*. They noted that Bermuda, the alternative forum, would

59. See *Kempe*, 876 F.2d 1138, 1139-42.

60. See *Kempe*, 876 F.2d 1138, 1142.

61. *Kempe*, 876 F.2d 1138, 1144, (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242).

recognize "fraud, negligent misrepresentation, breach of fiduciary duty, and piercing the corporate veil counts of the liquidator's complaint."⁶²

The court also examined the legislative history for RICO statutes but that "our independent review of the legislative history does not disclose that Congress intended directly or by fair inference to suggest that RICO would be immune from the doctrine's (forum non conveniens) operation."⁶³

However, the Fifth Circuit refused to overturn their earlier decision in *Mitsui* that antitrust lawsuits have no counterpart in a foreign forum. They quoted from a 1983 Federal District court of the District of Columbia in denying that antitrust lawsuits have a counterpart in foreign law:

Antitrust cases are unlike litigation involving contracts, torts, or other matters recognized in some form in every nation. A plaintiff who seeks relief by means of one of these types of actions may appropriately be sent to the courts of another nation where presumably he will be granted, at least approximately, what he is due. But the antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated. To relegate a plaintiff to the courts of a nation which does not recognize these antitrust principles would be to defeat this congressional direction by means of a wholly inappropriate procedural device.⁶⁴

The Second Circuit examined the substantive law issue of the alternative forum in *Capital Currency Exchange*. The Second Circuit, unlike the Fifth Circuit and the District of Columbia Federal District Courts, did not recognize that antitrust claims were so singular to American law that they would not be recognized in other courts. In other words, the Second Circuit held that foreign forums would recognize claims similar to antitrust claims, so that there would be a remedy available to the plaintiff in the foreign forum and the lawsuit could be dismissed.

In *Capital Currency Exchange* the Second Circuit noted that "English courts will not enforce the Sherman Act."⁶⁵ However, they then noted that "the availability of an adequate alternate forum does not depend on the existence of an identical cause of action in the other forum."⁶⁶ The court then noted that anti-competitive actions may be challenged under Articles 85 and 86 of the Treaty of Rome, "which English courts are

⁶² *Id.* at 1145.

⁶³ *Id.*

⁶⁴ *Kempe*, 876 F.2d 1138, 1142, (quoting *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811, 818 (D.D.C. 1983)).

⁶⁵ *Capital Currency Exchange*, 155 F.3d 603, 609.

⁶⁶ *Id.* at 610 (quoting from *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998)).

bound to enforce."⁶⁷ Basically, in Articles 85 and 86 of the Treaty of Rome, the second circuit found a rough equivalent of our antitrust statutes here in the United States. They found that even antitrust claims have a remedy in those foreign forums, those in the European Union, that have ratified the Treaty of Rome.

However, the Second Circuit analysis did not end there. They also contemplated whether these Articles that codify laws against anti-competitive practices allow for a remedy, i.e. damages to be awarded. If there was a right without a monetary remedy, then the court would not have found that the Articles satisfy the requirement that the alternative forum offer a remedy, or some law under which the plaintiffs can gain a remedy. The court noted that although no plaintiff had ever received monetary damages under Articles 85 & 86, in theory they could be gotten. The plaintiff's own expert on British law admitted as much. Furthermore, the court cited to a British case where the Law Lords of the House of Lords had considered the question of whether monetary damages could be awarded under Articles 85 & 86. The Law Lords held in dicta that you could receive monetary damages although a final judgment was never rendered in the case.⁶⁸

The Second Circuit has not been immune to the idea that the inability to receive a remedy in a foreign forum provides an effective barrier to dismissal on forum non conveniens grounds. The Second Circuit, in *Irish National Insurance Co., Ltd. v. Aer Lingus Teoranta* in 1984, ruled that the inability to receive monetary damages suing in a foreign court would prevent a forum non conveniens dismissal.

The case stands for more than that one proposition, so I will go into detail regarding it now, rather than wait until later in my paper. The case concerned a subrogated insurance company suing the air freight carrier of a package of circuits that were damaged in route to destination between Ireland and the United States. The insurance company had already paid the insured for damages, but was attempting to collect the amount paid from the freight carrier due to negligent handling of the circuits.⁶⁹

There was a question of whether the alternative forum was the Republic of Ireland or the United Kingdom. However, the court resolved this by stating that the courts of either country would apply the law in the same fashion. They would apply the law so that the indemnification of damages would be limited to U.S. \$260, while the insured had already paid out U.S. \$120,000.⁷⁰

67. *Id.*

68. *Id.*

69. *Irish National Insurance Co., Ltd. v. Aer Lingus Teoranta*, 739 F.2d 90, 90 (2d Cir., 1984).

70. *Id.* at 91.

The court noted that under the Warsaw Convention, the plaintiff would be allowed to bring its action "'before the court at the place of destination,' which, in this case, was New York."⁷¹ The court also noted that the evidence would also be mainly in New York, since apparently the damage occurred to the circuits after they reached the U.S. customs. Its wasn't until after customs that Aer Lingus handled them negligently.⁷²

In addition, the court noted that the plaintiff was a national of Ireland, which has signed a Treaty of Friendship, Commerce and Navigation with the United States. This treaty allowed Irish nationals to "national treatment with respect to ... having access to the courts of justice..., both in pursuit and in defense of (its) rights."⁷³ The language in this compact between the U.S. and Ireland would give the plaintiff equal standing to that of a United States citizen in terms of forum non conveniens analysis. As the court said, "Because of the existence of the two international compacts, the district court should have applied the same forum non conveniens standards that it would have applied to a United States citizen. It specifically failed to do so, and this failure tainted its entire holding."⁷⁴ What the equal footing with an American citizen language does, is eliminate the idea from *Piper* that the plaintiff's choice of forum should not be given added deference due to the plaintiff being foreign. Therefore, this plaintiff's choice of forum, New York should be given added deference when weighing the *Gilbert* factors.

Finally, the court noted that the standard of review was abuse of discretion, but that that standard of review still left room for overturning if the analysis was done totally wrong.

Given all these factors, that the alternative forum would not give a remedy, that the *Gilbert* factors led to there being substantial weight on the plaintiff's side, that the plaintiff's choice of forum should be given added weight in weighing the *Gilbert* factors due to the United States having signed a Treaty of Friendship, Commerce and Navigation with the state where the plaintiff was a citizen, and lastly that the abuse of discretion standard of the court in reviewing the district court's opinion left open the possibility of overturning the lower court's decision, the Second Circuit overturned the lower courts ruling and prevented a forum non conveniens dismissal.

In summary of this section, the Fifth Circuit would decline to dismiss a case brought under clear antitrust laws of this country. They would do

71. *Id.* (quoting Convention for the Unification of Certain Rules Relating to International Transportation by Air (*hereinafter* Warsaw Convention), art. 28(1), *reprinted in* 49 U.S.C. § 1502).

72. *Id.*

73. *Id.* (quoting Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. VI(1)(c), 1 U.S.T. 785, 790-91, T.I.A.S. No. 2155, at 8).

74. *Aer Lingus*, 739 F.2d 90, 92.

so for two reasons. One, they have held that *National City Lines I* was never overturned as regards common law forum non conveniens. They believe that they are prevented from dismissing on forum non conveniens grounds when the Clayton Act special venue statutes are invoked. Two, the Fifth Circuit also has ruled that antitrust laws are not recognized by other countries. They believe that they are prevented from dismissing on forum non conveniens grounds when the claim is an antitrust claim. This argument would also be important to make in other circuits, because it may be found that countries that do not have an equivalent to the Sherman Act, that do not fall under the Treaty of Rome, for instance, do not have any remedy available to the plaintiff and thus are not adequate alternative forums. The District of Columbia Federal District Courts also conform to this analysis. They believe that antitrust claims are so singular to the laws of the United States that you cannot make the same claim in foreign courts, thus making those courts inadequate alternative forums.

Finally, the Second Circuit has not held that antitrust claims are a bar to forum non conveniens dismissals. In *Captial Currency Exchange* they noted the courts of the United Kingdom have recognized claims for anti-competitive practices and that they can give remedies, if they so decide. However, this was due to the United Kingdom having ratified the Treaty of Rome, which is a European Union treaty. States outside the European Union may still have no authority for recognizing anti-competition claims. Therefore, the argument should still be made before the Second Circuit where the state has not signed the Treaty of Rome, that antitrust claims are so singular to the United States that the alternative forum will not recognize them, and therefore the alternative forum is not adequate. However, regarding the Fifth Circuit's holdings that special venue acts prevent forum non conveniens dismissals, the Second Circuit, as well as all others that have ruled on this subject, does not recognize this ruling. They do not believe that special venue statutes prevent forum non conveniens dismissals.

F. How the Treaty of Friendship, Commerce and Navigation affects the analysis

Treaties of Friendship, Commerce and Navigation negate, according to the Second Circuit, the holding of *Piper* that a foreign plaintiff's choice of forum should not be given added weight under the *Gilbert* analysis. The Second Circuit has held in *Aer Lingus* and *Blanco v. Banco Industrial de Venezuela* that since friendship treaties give the citizens of the foreign status equal status before the law of the United States as to citizens of the United States, the plaintiff in a state that has signed a treaty should be given due deference to its choice of forum, as would an American citizen. In *Aer Lingus*, this teamed with other factors in the plaintiff's favor lead to dismissal of the forum non conveniens claims. In *Blanco*

there were no other factors, and therefore the factor of added deference to the plaintiff's choice of forum did not play into consideration. However, the reasoning of this argument should be argued before all courts. I will go in to this case in the following section, where I discuss how some recent cases have interpreted the forum non conveniens doctrine.

II. RECENT CASES AND FORUM NON CONVENIENS

A. *Blanco v. Banco Industrial de Venezuela*⁷⁵

This case arose from the construction of a large, privately owned residential apartment development in Maracay, Venezuela. Plaintiff construction company entered into an agreement with the Banco Industrial de Venezuela (BIV) and a Middle Eastern Consortium (MEC) to borrow money from the MEC, while allowing BIV to disburse the funds and oversee the financial management of the project. BIV refused to disburse funds to the construction company even though the construction company alleged that it had completed all the work on the project. Blanco, representing the shareholder's of the construction company then sought to sue BIV in the Southern District of New York Federal Court on claims involving breach of contract, fiduciary duty and other claims all arising from the failure to allegedly disburse the funds properly.⁷⁶

This case is most frequently cited for the proposition that foreign nationals from states that have signed Treaty of Peace, Friendship, Navigation and Commerce must be accorded the same access to U.S. courts as that provided to American citizens. *Piper* had said that "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."⁷⁷ However, since the Treaty of Friendship accords equal status before the courts of this country to citizens of other countries that have signed such a treaty with the U.S., and Venezuela is one of those countries, the plaintiff's forum in this case should be given equal deference to that of an American citizen. In other words, it should be accorded added deference because it is the plaintiff's choice of forum.

However, the *Gilbert* factors still weighed against the plaintiff in this case. The court concluded that Venezuelan law would govern. The fact that Venezuelan law would govern was a factor against holding the trial in New York, just as this factor had weighed against holding the trial in New York in *Gilbert* and against Pennsylvania in *Piper*.⁷⁸ Other weights against the plaintiff's choice of forum was that the apartment buildings were located in Venezuela and they would have to be inspected to show

75. *Blanco v. Banco Industrial de Venezuela*, 997 F.2d 974 (2d. Cir., 1993).

76. *Id.* at 976-78.

77. *Piper*, 454 U.S. 235, 256.

78. *Blanco*, 997 F.2d 974, 983.

that they met the specifications for disbursement.⁷⁹ This related to the factor of relative ease of access to sources of proof. Finally, regarding other access to sources of proof would be the project documents, the bank documents, witnesses as to what those documents meant, and the fact that all the witnesses would testify in Spanish.⁸⁰ These would all be in Venezuela. Thus, the court ruled that even given added deference to the plaintiff's choice of forum, there would still be a weight of factors balanced against the plaintiff's choice of forum, New York, and in favor of the defendant Bank's alternative forum, Venezuela.

Once again, I note that there is considerable difference of opinion over these factors. Some commentators have held that it is not an inconvenience to bring the evidence over to the United States in the form of reports or certain key witnesses. For instance, even given that the case would take place in Venezuela, the judges are not qualified to go to the construction site and determine if the apartment complex has been completed to the specifications of the disbursement in the contract. You would need the testimony of an engineer, one that could easily be appointed by the court (to achieve a lack of bias that you would find if each side appointed their own separate engineers) to go do the inspection and write a report to the court. Given the easily resolvability of that central issue, it is difficult to see exactly how it would be inconvenient to hold the trial in New York.

This case, however, touched on two other issues. The first issue was whether or not Venezuela was an adequate forum for lack of a remedy. One of the reasons that was given in *Piper* as to why an alternative forum could be inadequate was due to the possibility that the courts would be so unjust that the plaintiff could not get a fair trial.⁸¹ The plaintiff, in this case, argued that the alternative forum, Venezuela, would be so biased against them that they could not get a fair trial. The reason they offered for this argument was that the bank was essentially an arm of the government, being fully owned by the government. The government would not let the money be taken from this bank, they would exert pressure on the judges involved to force them to rule against the contractor.⁸² The court did not factor this argument in much. They noted that Venezuela was a reputable country and that the U.S. courts routinely recognized judgments from that country. Furthermore, the noted that Venezuela was selected as an option in the forum selection clause of the contract for where the disputes may be litigated should they arise.⁸³

79. *Id.*

80. *Id.* at 982.

81. *Piper*, 454 U.S. 235, 254.

82. *Blanco*, 997 F.2d 974, 981

83. *Id.*

This brings us to the last issue that of whether the forum selected in the forum selection clause will cause the court to favor the choice of forum selected by the plaintiff. The plaintiff argued that they had chosen New York as a forum in the forum selection clause. They felt that the Supreme Court ruling in a case called *M/S Bremen v. Zapata* meant that the Second Circuit must respect their choice of forum. In *M/S Bremen* the Supreme Court ruled for dismissal of the case from the Southern District of Florida, noting that the parties had agreed to London Court of Justice as the choice of forum should a dispute arise.⁸⁴ The Second Circuit ruled against this argument, however, distinguishing from *M/S Bremen* in that the language of the contract had been concrete. The language of this contract was equivocal, and gave New York, England and Venezuela as choices in the forum selection clause. The Second Circuit said that since the plaintiff allowed Venezuela to be one of the chosen sites in the forum selection clause, they could not argue that it would be impermissible to dismiss the trial to that forum.⁸⁵

In summary, the Second Circuit upheld dismissal on forum non conveniens grounds due to the fact that the *Gilbert* factors weighed against the plaintiff's choice of forum even given added deference to the plaintiff's choice, even given the plaintiffs complaint that the courts of Venezuela were not so corrupt that you could not get a fair trial, and even though New York was a forum selected by the contract.

*B. Murray v. British Broadcasting Corporation*⁸⁶

Murray is a British citizen who created a costume for a Mr. Blobby for a British television show on the British Broadcasting Corporation (BBC). The costume became the standard attire for a character known as Mr. Blobby. Mr. Blobbys were then marketed for sale as a toy within the United Kingdom, and they were being contemplated for sale in the United States. Murray brought what was seen by the court as essentially a copy-right infringement claim in the U.S. courts versus the BBC.⁸⁷

Three issues arose under this case. The first issue was whether the plaintiff Murray's choice of forum was due added weight in the *Gilbert* balancing scale. As I noted before, the Second Circuit, which ruled in this case as well, already said that citizens of states who had signed Treaties of Friendship, Commerce and Navigation with the United States were due equal status under law to that of an American citizen, and therefore, due

84. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), *reprinted in* ROSENBERG, HAY & WEINTRAUB, *CONFLICT OF LAWS CASES AND MATERIALS*, TENTH EDITION 169-170 (1996).

85. *Blanco*, 997 F.2d 974, 979.

86. *Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2d Cir. 1996).

87. *Id.* at 289.

deference to the plaintiff's choice of forum in the *Gilbert* analysis. Unfortunately for plaintiff Murray, no such treaty has been signed with the United Kingdom. However, both the United States and the United Kingdom have signed the Berne Convention for the Protection of Literary and Artistic Works. This treaty guarantees that the law of the forum where the violation occurred governs any dispute brought in that country.⁸⁸ Plaintiff Murray argued that that meant he should be given equal status as an American citizen before the courts of the United States. The court ruled that this convention does not call for equal status before the courts of the United States because nowhere does it use such language. The court ruled that if they had meant for equal status to be given then the treaty negotiators would have put that in because they knew from the Treaties of Friendship, Commerce and Navigation what language was necessary for foreigners to be granted equal status to American citizens.⁸⁹

Furthermore, plaintiff Murray argued in the alternative that this was the congressional intent when it was ratified by Congress. The Second Circuit saw nothing in the legislative history that would justify such an interpretation of the Berne convention. For these reasons, no specific language within the treaty and no legislative history, the Second Circuit held that plaintiff Murray, who was a British citizen, should not be given equal status before the courts.⁹⁰ Therefore, his choice of forum, since he was a foreigner, should not be given added deference, as occurred also in *Piper*.

A second issue in this case was whether there was an adequate alternative forum. The plaintiff Murray argued that since he could not afford a lawyer in the United Kingdom due to there being no contingency fee arrangements allowed in that country. He claimed that it would cost from 100,000 to 200,000 pounds to bring his case to trial in the U.K. This was beyond his means. The court noted his claim, but said, unlike the Eleventh Circuit in *Magnin*, that his claim was just one of the many private interest factors which the court must take into account.⁹¹ The Eleventh Circuit said that it would be given no weight in the analysis at all.⁹²

Taking into account the *Gilbert* private and public interest factors, the court found that the case did not really have much to do with the United States or the Southern District of New York at all. The court said:

The central issue in (this) dispute concerns the circumstances surrounding the

88. *Id.* at 290, *See* Berne Convention for the Protection of Literary and Artistic Works, Paris text, July 24, 1971, Art. V. paragraph 2, S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. 40 (1986) *reprinted in* 6 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT, Appendix 27-5 (1995).

89. Murray, 81 F.3d 287, 290-91.

90. *Id.* at 291.

91. *Id.* at 292.

92. *Magnin*, 91 F.3d 1424, 1430.

creation of Mr. Blobby. Once that dispute is resolved, the right to exploit the character will be quickly resolved. The crux of the matter, therefore, involves a dispute between British citizens over events that took place exclusively in the United Kingdom. Moreover, it appears that much of the dispute over the creation of Mr. Blobby implicates contract law. British law governs those issues. The United States thus has virtually no interest in resolving the truly disputed issues.⁹³

Even given added deference to the plaintiff's choice of forum, I do not think the court would have ruled against a *forum non conveniens* dismissal. The factors weigh too heavily in favor of a British forum.

C. *Gemini Capital Group, Inc. v. Yap Fishing Corp.*⁹⁴

Plaintiff Gemini, a group of investors and tuna fishermen, became business partners with the State of Yap of the Federated States of Micronesia and some others in a tuna fishing venture, which they named the Yap Fishing Corporation (YFC). The YFC negotiated a loan with the Overseas Private Investment Corporation, an agency of the United States government for a 9 million dollar loan. The plaintiffs were to manage the vessels while the defendants were to provide logistical and other support, including purchase of some of plaintiff's vessels. The agreement went sour and the state of Yap took the vessels into receivership and began managing them. OPIC sued some of the plaintiffs in Federal District Court in the District of Columbia. The plaintiffs claim specific enforcement of contracts paying them money to manage the vessels and paying them money to buy other vessels and RICO violations in that the state of Yap was like an organized crime syndicate conspiring to rip them off.⁹⁵

The court discussed four different issues: (1) deference to plaintiff's choice of forum, (2) whether there was an adequate alternative forum, (3) the private interest factors, and (4) the public interest factors.

Regarding deference to the plaintiff's choice of forum, the plaintiff's made one essential claim for deference to their choice of Hawaii. The plaintiff's argued that since they are American citizens, their choice of an American court was due greater deference. The Ninth Circuit denied this, stating that since the plaintiff's were not residents of Hawaii, but of California, that therefore, the plaintiff's choice of Hawaii was not due greater deference. It was not their local court, therefore it was due not greater deference.⁹⁶

Regarding the issue of whether Yap was an adequate alternative fo-

93. Murray, 81 F.3d 287,293.

94. *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088 (9th Cir. 1998).

95. *Id.* at 1090-91.

96. *Id.* at 1091.

rum, the plaintiff's essentially made two claims. (1) Yap was not an alternative forum because it would not entertain RICO claims. The court said that this was not true; Yap courts had claims that they could sue under, and had claims that in some ways mirrored RICO claims, therefore Yap was an appropriate forum. (2) Yap was an inadequate legal system. This was a variation on the argument heard in *Blanco* that since the corporation, the plaintiffs were suing was owned by the government of Yap, the courts of Yap could not be expected to give them a fair trial. The court summarily denied that Yap was corrupt, and then denied this claim because the plaintiff's did not bring it up at the lower court level and thus the argument was not in the record and they were precluded from bringing it before the court now.⁹⁷

Regarding the private interest factors, the Circuit Court made a number of holdings. The OPIC officers, who were allegedly part of the RICO scheme and thus would have to testify, could just as easily fly to Yap as they could to Hawaii. One of the officers of Gemini was bankrupt and could not afford to fly to Yap. The court held that he could just as easily fly to Yap as to Hawaii. The plaintiffs argued that the district court gave too much weight to the factor of viewing the premises. The court said that this was irrelevant, but that the district court was right in that most of the evidence was in Yap. Finally, the Circuit Court held that since a trial was already begun in Yap on essentially the same issues that that factor weighed towards dismissal. The factor that the court was referring to was the enforceability of judgment. Any judgment from Hawaii would have to be taken to Yap for enforcement. It would be unlikely that Yap would recognize judgment until judgment in Yap on the same issue was rendered.⁹⁸

Finally, the court weighed the public interest factors. The court said that in spite of the fact that some of the contract agreements for the management of the vessels chose Hawaii as the forum in a forum selection clause, that Yap law would govern the proceedings. Since Yap law governed, it was mainly seen as a localized controversy to be decided by the state of Yap.⁹⁹

This case is novel for the fact that the court held that no deference would be given an American plaintiff who had chosen an American forum because that forum was not the home state of the plaintiff. In ruling that other countries had legal equivalent to RICO laws, the Ninth Circuit was simply ruling in keeping with other courts. Also, the ruling that Yap had courts that were not corrupt is in keeping with most other cases examined in this paper. As in *Blanco* there was a reluctance to rule that the

97. *Id.* at 1092-93.

98. *Id.* at 1093-94.

99. *Id.* at 1094-95.

courts of a foreign country, especially one in which the plaintiffs chose to do business in, were corrupt. The Ninth Circuit did look at the evidentiary factors, and as in so many cases, ruled that the locality where most of the action occurred, such as the operation of the vessels, was the deciding factor over the place of contract. This is roughly equivalent to the airplane crash cases, where the operation of the plane and the site of the crash are given extra weight over the forum where the manufacturing and design took place. The Ninth Circuit, in keeping with other decisions, refused to second guess the district court's conflict of laws analysis. Although the choice of law does weigh heavily in that localized controversies need local forums, one of the public interest factors, forum non conveniens analysis does not seem to be the place where circuit courts will engage in extensive choice of law analysis. Finally, the Ninth Circuit looked at the enforceability of judgment issue and noted that because a lawsuit had already begun in Yap that that weighed against this factor. This was due the fact any judgment rendered in Hawaii would have to go to Yap for enforcement, where it would have to wait on the Yap courts ruling in the other case. One other case I mentioned previously, held similarly. In the *Linter* case, the court also weighed the fact that a case on the same facts and issues was already being heard in Australia as a factor for dismissal.¹⁰⁰

III. CONCLUSION

From *Gilbert* there were three traditional elements to forum non conveniens: an adequate alternative forum, the public and private interest factors to be balanced in favor of the plaintiffs choice of forum or the defendants choice of forum, and added deference to the plaintiffs choice of forum. The court in *Piper* changed the way other courts look at those factors. The court held that change in substantive law between the forum initially filed in and the alternative forum should not matter to a forum non conveniens analysis unless the change was so drastic as to allow for no remedy. The court also held that only if the foreign court was so unjust as to prevent a remedy would that be appropriately taken into the analysis. Finally, the Court in *Piper* looked at the evidence as lining up where the events that led to the accident took place as having more evidentiary value than those events leading to the design and manufacture of the product. Judge Doggett in the *Castro Alfaro* decision in the Texas State Courts did not think that to be a fair analysis because (1) the plaintiff is suing in the backyard of the defendant where it has its corporate headquarters, what could be more convenient for the defendant than that, (2) American consumers have a vested right to be protected from products that are used in this country and others that are manufactured faultily in

100. Allstate Life Insurance Co. v. Linter Group Ltd., 994 F.2d 996, 1002.

our country and are being subjected to a suit to prevent future faulty products, (3) A dismissal in all but 4% of the cases means that the case will never go to trial, and (4) unjust to ship products known to be defective to third world countries who have no legal enforcement mechanism to prevent this.

In *Howe* it was held that there was nothing special about special venue statutes that the use of which prevented dismissal on forum non conveniens. In spite of that the Fifth Circuit has held that the special venue statutes of the antitrust acts, found in the Clayton Act, prevent common law forum non conveniens dismissals when the alternative forum is another country. They hold thus because they believe that a Supreme Court decision in the 1947 *National City Lines I* case has never been overruled.

Regarding substantive law, the courts of many cases have heard the claim that a change in substantive law renders the alternative forum inadequate. Most courts side with the Supreme Court in *Piper* that there must be no remedy available in the foreign forum, or that the foreign forum must be so corrupt as to render a remedy impossible. No court in the cases I examined has ever considered another country's court so corrupt as to prevent forum non conveniens transfers, although the argument was made in *Blanco* and in *Gemini*.

The Fifth Circuit has held that in antitrust cases there can be no remedy expected in the foreign forum, and therefore these cases should not be dismissed. The Second Circuit has held this tenant of the Fifth Circuit to not hold weight, at least as far as the European Union signatories of the Treaty of Rome goes. The theory is that the Treaty of Rome provides a right of action for antitrust cases and therefore there is a remedy. But it is a possibility that the Second Circuit might hold differently regarding antitrust cases when the forum is in a state that is not a signatory of the Treaty of Rome. Regarding RICO and Securities claims, it is pretty much held that all other countries have laws that give rise to similar claims, thus there would not be enough of a change in substantive law to prevent dismissal of these claims.

Regarding Treaties of Friendship, Commerce and Navigation, the Second Circuit has held that since the language of the treaty gives equal status to foreign citizens of signatories of such treaties with the United States, the foreign plaintiff's choice of forum should be given added deference as an American citizen's choice would. However, the Berne Convention does not have similar language and so foreign citizens of states that are signatories to that convention will not be given added deference.

The cases I summarized in the last section of the paper give credence to the idea that not much has changed since *Piper*. The weighing of the *Gilbert* factors still mainly goes against the plaintiff, usually because the place of the crash or conflict occurred in the foreign forum. The choice of

law analysis is usually made haphazardly as it was in the *Piper* district court case. The circuit court in *Piper* which did a modern, in depth analysis of choice of law found that the choice of law favored the United States. However, that was overruled and the Supreme Court specifically said that such an in depth analysis was not necessary. However, using a more cursory analysis, if it is found that the alternative forum's law would apply, then that usually weighs heavily towards dismissal. Finally, in one final twist, if a case has already been started in a foreign forum on the same issues that usually weighs against the plaintiff.

Overall, it appears from the cases mentioned in this paper that foreign plaintiffs would have a difficult time getting past the barrier of forum non conveniens in American courts, especially on products liability claims. In addition, American plaintiffs who file lawsuits in the American courts on matters whose essential evidentiary matters take place in other countries would also have a difficult time proceeding past a forum non conveniens dismissal.

