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The Emerging Doctrine of "forum non conveniens": A Comparison of the Scottish, English and United States Applications

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NOTES

THE EMERGING DOCTRINE OF FORUM NON CONVENIENS: A COMPARISON OF THE SCOTTISH, ENGLISH AND UNITED STATES APPLICATIONS

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I. INTRODUCTION

Despite the many difficulties and uncertainties associated with any effort to maintain or resolve international litigation, this year thousands of individuals and companies worldwide have proven once again that litigation is remarkably easy to institute. The facts supporting international litigation may involve nothing more complex than the failure of an exporter in one country to

fulfill his agreement with an importer located in a neighboring country. By contrast, the litigation could be brought by a citizen of one country, who resides in another country, who was treated in a hospital that is chartered in yet a third country and has a board of directors made up of citizens from several other nations.[1] Similarly, an ever increasing number of actions involve large manufacturers whose products are marketed worldwide because any litigation arising from injuries that result from alleged flaws in the manufacturing process necessarily involve persons in several countries.[2]

It is readily apparent that many differences exist among these actions. One important similarity, however, is that in every one of the cases the plaintiffs are free to choose the forum in which to bring the action. As long as the chosen forum recognizes under its own laws that it has jurisdiction over the defendant, the same laws will probably prohibit the court from refusing to entertain the plaintiff's action. Because the statutory jurisdictional laws in many countries have traditionally provided little or no flexibility for the courts to decline jurisdiction, even in cases when the plaintiff has filed suit in a distant forum that has no significant ties to the facts underlying the cause of action, the courts in several countries have developed or adopted the doctrine of *forum non conveniens.*[3]

The traditional doctrine of *forum non conveniens* permits a court to decline to exercise jurisdiction over a particular matter when the defendant is amenable to process in an alternate forum and when the court believes the alternate court presents a more appropriate forum in which to decide the issues involved in the litigation.[4] Although each nation has developed its own set of factors to evaluate the appropriateness of dismissing or staying an action in favor of another forum,[5] nations which have adopted the doctrine unanimously recognize that the plaintiff's choice of fo-

1. *See* Gibbon v. American University of Beirut, 83 Civ. 1183 (S.D.N.Y. Sept. 27, 1983) (available on LEXIS, Genfed library, Dist file).

2. *See, e.g.,* Dowling v. Richardson-Merrell, Inc., 727 F.2d 608 (6th Cir. 1984); Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980).

3. For an examination of the United States development of this doctrine in various state court decisions, see Blair, *The Doctrine of* Forum Non Conveniens *in Anglo-American Law,* 29 COLUM. L. REV. 1 (1929).

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

5. *See infra* sections II (Scotland), III (Great Britain), and IV (United States).

rum, when coupled with proper jurisdiction over the defendant, should not be rejected lightly.[6]

The *forum non conveniens* doctrine was originally adopted to protect courts from the need to adjudicate matters having little or nothing to do with the forum where they were brought and to protect defendants from the need to defend in a forum that causes unnecessary inconvenience.[7] Although modern courts are still likely to cite its original purposes,[8] the doctrine now is used frequently by defendants as a purely defensive maneuver in any action involving international litigation.[9] The highest courts in the United States, Scotland, and Great Britain are increasingly willing to accept an argument to dismiss or to stay an action based on *forum non conveniens*.[10] The increased liberalism clearly benefits these judicial systems by decreasing their workloads, and may even further a sense of international legal interdependence.[11] The policy, however, should not be applied so readily when its use would punish the plaintiff rather than protect the defendant.

This Note will first examine the development of *forum non conveniens* in Scotland, the country of the doctrine's origin. It will compare the doctrine to the traditional English policy of staying proceedings in situations involving vexation or oppression,

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6. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Societe du Gaz de Paris v. "Les Armateurs francais", 1925-1926 Sess. Cas. 13; Logan v. Bank of Scotland, [1906] 1. K.B. 141, 150.

7. *See* Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1258 (1981).

8. *See, e.g.*, Pain v. United Technologies Corp., 637 F.2d 775, 783 (D.C. Cir. 1980).

9. *See* Note, *supra* note 7, at 1258. In Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), the Supreme Court recognized the possibility that the motive for defendants' *forum non conveniens* motions may not be the desire to resolve the litigation in a more appropriate forum, but instead to engage in "reverse forum-shopping"—an attempt to have the litigation decided under laws that are perceived to offer a more favorable outcome. *Piper Aircraft Co.*, 454 U.S. at 252 n.19.

10. *See, e.g.*, The Abidin Daver, [1984] 1 All E.R. 470; Credit Chimique v. James Scott Engineering Group Ltd., [1982] Scots L.T. 131; *Piper Aircraft Co.*, 454 U.S. 235 (1981).

11. *See* Pryles, *Liberalising the Rule on Staying Actions—Towards the Doctrine of Forum Non Conveniens*, 52 AUSTL. L.J. 678, 684 (1978). Pryles supports the adoption of a more liberal view because "[i]t cuts down local parochialism as regards judicial adjudication, and is consistent with a spirit of international legal cohesion and integration." *Id.*

and examine how the liberalization of the English policy has led ultimately to the recognition of *forum non conveniens* as an appropriate description for the factors an English court will consider prior to a dismissal or stay of an action. Similarly, the doctrine of *forum non conveniens* in the United States will be compared with the doctrines in the other two jurisdictions, with particular reference to the increasing propensity of United States courts to dismiss actions brought by foreign plaintiffs.

II. SCOTLAND

A. Origins

Although its exact genesis is uncertain, the doctrine of *forum non conveniens* first appeared in Scotland during the early nineteenth century.[12] In its earliest form, the plea was often labelled *forum non competens* and was apparently used to argue insufficiency of jurisdiction or to raise some other question about the court's power to hear a particular matter.[13] By the middle of the nineteenth century, however, the Scottish courts perceived the doctrine to be applicable to their discretion to exercise jurisdiction rather than their capacity to do so.[14] The doctrine was designated *forum non conveniens*[15] at this point to reflect the Scottish courts' recognition that they possessed some discretion over whether to hear a particular action, even when there was no question regarding either the competence of the court to hear the case or to exercise jurisdiction over the parties and the subject matter.[16] Several early decisions developed the doctrine of *forum non conveniens* by illustrating the circumstances that would warrant a dismissal or stay of the action. The factors and considerations set forth in these decisions as guidelines for evaluating the appropriateness of granting a plea on *forum non conveniens* grounds remain important sources for the contemporary Scottish judiciary.[17]

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12. Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947).

13. A. ANTON, PRIVATE INTERNATIONAL LAW: A TREATISE FROM THE STANDPOINT OF SCOTS LAW 148 (1967).

14. *See* Braucher, *supra* note 12, at 909-10.

15. *Id.* Braucher hypothesized that *forum non conveniens* was a "neo-Latin translation of the English phrase already familiar to Scottish judges." *Id.* at 909.

16. A. ANTON, *supra* note 13, at 149-50.

17. For an example of a modern case that relies heavily on the principles set forth in these decisions, see Credit Chimique v. James Scott Engineering Group

B. The Early Cases

The decision in *Clements v. Macaulay*[18] was one of the first Scottish cases to recognize that the plea of *forum non competens* involved not only a consideration of the competency of the forum to hear a particular action, but also an examination of the convenience of the forum to the parties and the appropriateness of the forum as the *situs* for a proper determination of the action. In that case, Clements sought an accounting by Macaulay of profits realized from a joint venture that was formed to ship guns to Texas for use by the Confederate Army; plaintiff and defendant, both United States citizens, were two of five partners to the venture.[19] The plaintiff was a resident of London at the time of the action; the summons was issued against and delivered to the defendant while he was on business in Scotland. Consequently, the Scottish court's jurisdiction over the parties was not questioned.[20] The defendant moved to dismiss the action on the basis of *forum non competens*, arguing that the only proper and competent forum to determine the rights of the parties to the joint venture was the state in which the agreement was formed.[21]

The court in *Clements v. Macaulay* first stated the general proposition that whenever a Scottish court has competent jurisdiction over a particular action, that court cannot freely refuse to exercise its jurisdiction unless given a compelling reason not to do so.[22] One such reason may be the court's determination that the forum where the action is brought is not the appropriate forum in which to adjudicate the particular action. Because this determination would allow removal under *forum non conveniens*, the court

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Ltd., [1982] Scots L.T. 131. For a detailed discussion of this decision, see *infra* notes 52-70 and accompanying text.

18. 4 M. 583 (1866).

19. *Id.* at 583-84.

20. *Id.* at 590.

21. *Id.* at 586. The defendant also based his motion to dismiss on the following grounds: (1) the joint venture was between two United States citizens, and no decision invoking its provisions would be enforceable in this country; (2) because the contract was illegal under the laws of Texas and the laws of the United States, the provisions of the venture agreement would not be enforceable there and so should not be enforceable in Scotland; and (3) even under the laws of the Confederate State of Texas, the plaintiff's allegations have no merit and would be dismissed. *Id.* Although the trial court dismissed the action, the appellate Court of Sessions reversed the decision. *Id.* at 586, 595.

22. *Id.* at 595.

must decide either to dismiss the action, or to delay the proceedings, "in order that the merits of the claim may be submitted to the cognizance of a more convenient and competent tribunal in a foreign country."[23] The statement logically presupposes that there is an alternate forum that is more convenient and competent to which the matter can be referred. The defendant first failed on this point, because he neglected to indicate another court "where the cause could be tried with advantage to the parties and to the ends of justice."[24] Although the defendant did not explicitly suggest an alternate forum that would be more appropriate,[25] the court examined the "implicit" alternative—Texas—and determined that Texas could not exercise jurisdiction over the defendant.[26]

The court similarly dismissed the defendant's second allegation to support the *forum non conveniens* motion—that questions involving Texas and United States law would necessarily have to be determined by the court adjudicating the dispute. The court first found that the facts did not indicate the clear necessity to examine any question of another state's municipal law.[27] Instead, it concluded that the questions of law to be determined were questions of international law, "such as, whether it is illegal or not for a merchant to furnish munitions of war to his own countrymen during the subsistence of a blockade,"[28] and that the Supreme

23. *Id.* at 593.

24. *Id.* at 592.

25. As part of the motion on *forum non conveniens,* the defendant apparently was required to propose to the court an alternate forum possessing jurisdiction over the parties and the subject matter. As Lord Cowan stated:

> The defender does not name any one State in whose Courts he is willing and ready to meet the pursuer, with the exception of the Court of Texas. . . . Where, then, is the forum in which the defense is founded? When the Court has given effect to such a plea, it has always been because another forum, specially referred to by the defender as that in which he undertakes to plead, has been regarded as the more convenient and preferable for securing the ends of justice.

Id. at 594.

26. The court determined that Texas did not possess jurisdiction over the parties and that such jurisdiction would not follow simply from the law of the place of contract. Texas could not exercise personal jurisdiction over the defendant because the defendant was not present there, he did not own any property in Texas, and no other "reason known in law" would support an exercise of jurisdiction. *Id.* at 592.

27. *Id.*

28. *Id.* at 595.

Court of Scotland was as capable of deciding questions of international law as would be the supreme court of any other nation.[29] Notwithstanding their presumption that international law would apply, the justices decided that even if they were forced to decide issues of foreign municipal law, the necessity of such an examination would not, in and of itself, support a dismissal on the grounds of *forum non conveniens*. "If the only grounds of objection are that questions of foreign law are involved in the case, we can ascertain what the law is, and we are not entitled to send away the parties because there may be some difficulty in ascertaining that fact."[30] Consequently, *Clements v. Macaulay* may be interpreted to hold that although the resolution of questions involving foreign law may be considered in a motion to dismiss on *forum non conveniens* grounds, that factor will not be determinative.

The decision in *Societe du Gaz de Paris v. "Les Armateurs francais"*[31] further clarified the circumstances under which a motion on *forum non conveniens* grounds would be granted and set forth the factors that determine the appropriateness of adjudication in the Scottish court. In that case, a French gas company sued a French merchant ship company in Scotland for the loss of a coal shipment due to the alleged unseaworthiness of one of defendant's ships.[32] To perfect jurisdiction in Scotland, one of defendant's ships was "arrested" while in a Scottish port, this being a valid means to acquire jurisdiction over a party under Scottish law.[33] Despite unquestioned jurisdiction, the defendant argued that Scotland was not the proper forum to decide the case and sought a dismissal on the grounds of *forum non conveniens*, alleging that numerous considerations supported transferring the action to the courts of France.[34]

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29. *Id.* at 592.

30. *Id.* at 595.

31. 1925-1926 Sess. Cas. 13.

32. The French gas company explained that the actual reason for bringing the action in Great Britain was that British underwriters had been subrogated to the rights of the French plaintiff. *Id.* Thus, although the "real" plaintiffs apparently were British, the court did not allow this fact to affect their decision on *forum non conveniens* grounds: "The underwriters can only stand in the shoes of those to whose rights they are subrogated . . . ." *Id.* at 17.

33. *Id.* at 16. The formal name for this jurisdictional procedure was "arrestments *ad fundandam jurisdictionen.*" *See id.* at 14.

34. The defendant alleged that the following considerations supported its

The plaintiff countered that although much of defendant's allegation might be true, the various considerations should not be determinative. Instead, the plaintiff argued that the traditional rule of *forum non conveniens* would not permit a court to decline the exercise of its recognized jurisdiction absent a showing that the Scottish court could not do justice in the action or that justice would undoubtedly be better served in an alternate forum.[35] Further, any determination of the particular forum where justice could best be served should be made after the court had considered not only the interests of the defendants, but the interests of the plaintiff as well.[36] The plaintiff contended that the possible need to apply French law should not weigh heavily in the outcome, because the judge possessed the power both to ascertain the applicable law and to resolve questions arising under French law.[37]

The House of Lords ultimately upheld the decisions of the Scottish courts to dismiss the action on the ground of *forum non conveniens*. In doing so, the court relied on the established policy set forth in earlier Scottish decisions that dismissal may be proper whenever there is "another Court of competent jurisdiction in which the case may be tried more suitably for the interest

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contention that France offered the most convenient forum:

> The pursuers and defenders were French companies, neither having a place of business in Scotland; the ship was built in France; the cargo was to be delivered in France under a charter-party of which none of the obligations were prestable in Scotland. The surviving members of the crew were French, and the ship's log-books and other documents were in that language, and the vessel was a special French type which had been the subject of consideration by a French Commission. Further, it was averred that the law of France allowed the defenders, under certain circumstances, to limit their liability by abandoning the ship and freight, and that, if the case was tried in Scotland, they would lose the benefit of this right.

Id. at 15.

35. *Id.* (citing *e.g.* Clements v. Macaulay, 4 M. 583, 592 (1866)).

36. *Id.* Among the connections allegedly supporting continued Scottish jurisdiction were: (1) the "real" plaintiffs were English; (2) the charter-party agreement was written in English; and (3) because the action alleged unseaworthiness—an allegation that required a determination of facts as to the time the ship left an English port—many of the witnesses necessary to defend the allegation were located in England. *Id.* at 16.

37. *Id.* In addition, the plaintiff denied that the defendant would lose any rights it possessed under French law if the action were maintained in Scotland. *Id.*

of all the parties and for the ends of justice."[38] Thus, the holding does not suggest that the Scottish court lacked the capacity or competency to properly decide the issues, but only that the court's determination that there existed another, more convenient forum for trial was proper.[39]

Supplementary explanations by concurring judges refined the general holding and illustrated the relative weight that was given to the numerous contentions of the two parties. The court reaffirmed that a mere balance between convenience and inconvenience of the parties would never alone suffice to indicate the proper forum.[40] The "convenience" in question should reflect a "wider consideration of all the available facts,"[41] limited neither to the convenience of the parties nor to the convenience of the court in which the action was brought.[42] Instead, the word "convenience" should be interpreted broadly so as to intimate the overall convenience of deciding the accumulated facts and legal questions in the particular case in one forum.[43]

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38. *Id.* at 18 (citing Sim v. Robinow, 19 R. 665 (1892)).

39. *See id.* The proclivity for seeking the forum in which the action could most conveniently be held has subsequently been labelled the "Scottish approach" to *forum non conveniens.* Briggs, *Forum non conveniens—now we are ten?*, 3 LEGAL STUD. 74, 80 (1983).

40. *Societe Du Gaz,* 1926 Sess. Cas. at 19.

41. *Id.*

42. *Id.* at 21. Indeed, with regard to the convenience of the court, Lord Sumner stated that "the Court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in French, as a grounds for refusal." *Id.*

43. *See id.* at 22; *see also* A. ANTON, *supra* note 13, at 150-51. In determining whether Scotland or France offered the most "convenient" forum on the facts in this case, the court considered many of the contentions presented by the two parties. Neither of the French companies had any place of business in Scotland, nor did they regularly carry on business outside of France. *Societe du Gaz,* 1926 Sess. Cas. at 17. In addition, the vessel, the crew members, and many of the documents were French, and the French Government had instituted a Commission to ascertain the safety of this particular class of vessels. *Id.* The court rejected the plaintiff's suggestion that the nationality of the true plaintiffs, the underwriters, should favor a Scottish forum; the underwriters were Englishmen doing business in England, not Scotland. *Id.* The court also dismissed plaintiff's assertions that the ship's departure point, the presence of English witnesses, and the use of the English language in the charter-party agreement lent support for the maintenance of the Scottish forum. *Id.* While these assertions would likely lend some credence to an argument in support of an English forum, the court determined that none of these arguments strongly favored a trial in Scotland. *See id.* In fact, as Lord Chancellor Cave stated it, there was "not a breath of

C. Traditional Principles and Factors

As a result of the early cases, several principles emerged as guidelines for the consideration of a plea based on *forum non conveniens*. First, the burden of convincing the court that a case should not be allowed to proceed rests with the defendant.[44] Second, the defendant must offer evidence of reasons why the admitted jurisdiction of the present forum should be declined—a mere balance between the relative convenience and inconvenience of the various parties will not suffice.[45] Third, another forum with competent jurisdiction where the case can be litigated must exist.[46] Last, the court's consideration of all these principles must lead it to conclude that "the interest of the parties can more appropriately be served and the ends of justice can more appropriately be secured in that other court."[47]

Scottish courts applying these principles have employed several factors in deciding whether to retain or dismiss jurisdiction. Although some decisions suggest that the need to apply foreign law may be considered in a motion to dismiss based on *forum non conveniens*, that factor alone has not been sufficient to sustain the motion.[48] One factor that courts have found to be irrelevant is the possibility that defendant's chance to succeed may improve in another forum; on the other hand, courts are free to consider whether the defendant will be unfairly disadvantaged if forced to

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Scottish atmosphere" in the entire case. *Id.* The court therefore concluded that all considerations suggested that France was the forum "more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends." *Id.* at 22.

44. *See* Credit Chimique v. James Scott Engineering Group Ltd., [1982] Scots L.T. 131, 133.

45. *Id.* This principle was fairly well established in *Societe du Gaz. See supra* notes 40-43 and accompanying text.

46. *Credit Chimique,* [1982] Scots L.T. at 133. A corollary to this principle suggests that a defendant must both indicate the alternate forum and show that the alternate forum possesses jurisdiction over the parties. *See* Clements v. Macaulay, 4 M. at 594; *supra* note 25. This corollary was subsequently upheld in Sim v. Robinow, 19 R. 665 (1892), in which Lord Kinnaird held that "the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried. . . ." *Id.* at 668.

47. *Credit Chimique,* [1982] Scots L.T. at 133.

48. A. ANTON, *supra* note 13, at 151 (citing Parken v. Royal Exchange Assurance Co., 8 D. 365 (1846)).

defend in Scotland.[49] The latter factor applies not only to differences in causes of action and permissible defenses, but also to situations in which the defendant would be punished unduly because of the location of necessary witnesses or other evidence in a foreign forum.[50] Last, in addition to the location of the witnesses, courts also consider where the facts involved in the action actually occurred and the location of any documents, at least to the extent that the situs of all these items would help in determining where the case should be heard.[51]

D. *Credit Chimique v. James Scott Engineering Group Ltd.*

Although its conclusion was based on a recent decision, *Credit Chimique v. James Scott Engineering Group Ltd.*,[52] suggests a diminished inclination to preserve a case within the Scottish court system. Language reaffirming the court's adherence to the principle that no Scottish court will voluntarily relinquish jurisdiction unless there is a compelling reason to do so, prominent in nearly every other Scottish *forum non conveniens* decision, is conspicuously absent.[53]

The plaintiffs in the action were members of an association of French banks that had been formed to provide credit to a French company, Milde-Massot-Disdier (MMD). The defendant James Scott Engineering (Scott) was a Scottish company with its corporate base in Glasgow. The defendant's wholly-owned subsidiary, Massot-Disdier, was organized under the laws of France,[54] and owned, in turn, sixty-five percent of the shares of MMD. Credit Chimique alleged that it had agreed to loan MMD more than ten million French francs in reliance upon a guarantee or *contract de cautionment* signed by Scott. MMD subsequently was forced into liquidation and Credit Chimique, after determining that it would not receive any proceeds from the liquidation, initiated this ac-

49. *Id.*
50. *Id.* at 151-52.
51. *See* Briggs, *supra* note 39, at 80.
52. [1982] Scots L.T. 131.
53. *See, e.g.*, Clements v. Macaulay, 4 M. 583 (1866), discussed *supra* at text accompanying note 22.
54. The plaintiffs apparently no longer insisted upon joining Massot-Disdier as a second defendant, although it is unclear whether the motives behind this decision were based on *forum non conveniens* considerations or purely on matters of corporate law. *See Credit Chimique*, [1982] Scots L.T. at 132.

tion against Scott to seek repayment on the guarantee.[55] The defendant challenged the validity and continued effectiveness of the guarantee, but moved first to dismiss the action on the grounds that Scotland constituted a *forum non conveniens.*

The court first considered the alleged need to apply foreign law and examined the existing case law construing the relevance of that need to a plea of *forum non conveniens.*[56] The court recognized that the vast majority of dicta in previous cases indicated that the need to inquire into foreign law was a common incident of litigation and would not be sufficient in itself to support a dismissal.[57] Nevertheless, the court also cited instances in which courts suggested that the necessary inquiry was a legitimate factor in determining the appropriate forum.[58] Lord Jauncey ultimately concluded that the authorities stated no hard and fast rule governing the issue and suggested one of his own: that a distinction be drawn between cases in which the question of law may be relatively simple, thus posing no substantial problem to a Scottish court, and those cases in which the application of a foreign law would involve issues either so complex or so numerous that the Scottish court would have to rely on substantial and potentially variable testimony from experts on the foreign country's law.[59] Lord Jauncey concluded that the fact situation in the instant case presented numerous and complex questions of French law,[60] and conceded that an attempt to decide every issue might

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55. Defendant raised some questions regarding the completion of the liquidation proceedings and whether this action was correspondingly premature. *Id.* at 133.

56. The court had already implicitly recognized that France had jurisdiction over both these parties and was willing to exercise it if the case were released to its courts. *See id.* at 133-34.

57. *Id.* at 134 (*citing* Clements v. Macaulay, 4 M. at 585 ("If the only grounds of objection are that questions of foreign law are involved in the case, we can ascertain what that law is, and we are not entitled to send away the parties because there may be some difficulty in ascertaining that fact.")).

58. *Id.* (*citing Societe du Gaz,* 1925-1926 Sess. Cas. 13); *see also* A. ANTON, *supra* note 13, at 151.

59. *See Credit Chimique,* 1982 Scots L.T. at 135.

60. The court suggested several of the issues involving French law that would have to be considered:

> (1) the capacity of the pursuers as the original and subsequent members of a pool or association of banks to acquire rights in the transaction in question and their title to sue for a single sum; (2) whether the telex and letter from the defenders of 10 October 1972 were together or separately

well result in the Scottish court's erroneous determination of one or more issues.[61] The court concluded that such a result would not further the ends of justice, and because the French courts presumably would avoid the same errors, the litigation would be better pursued in France.[62]

Resolution of the issues created by the need to apply foreign law did not conclude the *forum non conveniens* discussion, however, for plaintiff also had raised the issue of defendant's domicile. Credit Chimique argued that defendant would have difficulty showing that it would suffer overwhelming inconvenience by being sued in the country of its incorporation and where it maintained its principal place of business.[63] The court agreed that the plea of *forum non conveniens* is more readily available to nondomiciliary defendants[64] and fully recognized that no prior Scottish decision had sustained a defendant's plea of *forum non conveniens* when the action was brought in the defendant's domicile.[65] Nevertheless, the court failed to discover any case suggesting that the appropriateness of bringing suit in defendant's domicile could never be questioned under any circumstances.[66] The plaintiff's suggestion that defendant's domicile should be of "fundamental significance" in determining the appropriateness of

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> habile in form and content to constitute any valid guarantee; (3) whether, if a valid guarantee was granted by the defenders by way of the telex or letter or both, that guarantee was cancelled automatically when the crédits par découvert granted by the pursuers to M-M-D fell below a certain figure. This question may in turn involve consideration of the detailed nature of the credit facilities afforded to M-M-D; (4) whether any guarantee given by the defenders was unenforceable and null because of non-compliance with a requirement "d'ordre public"; (5) whether the first-named pursuers by their subsequent actings released the defenders from any guarantee which may have been granted by them on 10 October 1972; and (6) whether the liquidation proceedings not being complete the defenders are entitled to the "benefice de discussion" with the result that the action is premature.

Id. at 134.

61. *See id.* at 136.

62. *Id.*

63. *Id.* at 135.

64. Jurisdiction in these cases would be *in rem* or "by virtue of arrestments and fundandam jurisdiction." *See id.; see also supra* note 33.

65. *Credit Chimique,* 1982 Scots L.T. at 135 (*citing* Municipal Council of Johannesburg v. D. Stewart & Co., 1909 Sess. Cas. 860).

66. *Id.*

that forum was dismissed as overly broad.[67] The court concluded instead that if "other and more weighty considerations militating against the court exercising its discretion [exist] in a particular case then these considerations [need] not [be disregarded] solely to the fact that the defender's domicile was Scottish."[68]

The decision of the Sessions Court in *Credit Chimique v. James Scott Engineering Group Ltd.* illustrates the extent to which contemporary Scottish courts are willing to expand the traditional parameters established by earlier cases for the consideration of *forum non conveniens* motions. Clearly, a Scottish defendant now will not face insuperable barriers in its attempt to have a case dismissed on the grounds that the action was brought in an inappropriate or inconvenient forum, even when the forum is Scotland, the defendant's domicile. This is particularly true when the court is faced with "weighty considerations" pointing toward another forum. Yet the weighty considerations in *Credit Chimique* involved the need to apply foreign law, a factor traditionally given little weight in motions to dismiss on the grounds of *forum non conveniens*.[69] Although the overriding purpose of Scotland's *forum non conveniens* defense—to permit the trial to proceed in a forum where the interest of all the parties and the ends of justice can best be served[70]—unquestionably remains intact, it appears that contemporary Scottish courts will interpret this purpose in a decidedly more "international" fashion than have traditional courts. For example, the established presumption in favor of the plaintiff's choice of forum, especially if the forum chosen is the defendant's domicile, no longer influences as heavily the decision to dismiss. Instead, the Sessions Court, working

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67. *Id.*

68. *Id.* It should be noted that the decision in *Credit Chimique* also expanded Scottish precedent in another way. The court will usually dismiss the action when a plea of *forum non conveniens* is granted. *See* A. ANTON, *supra* note 13, at 154. However, Scottish courts have voted to sist, or stay, the proceedings in certain circumstances, such as when Scotland would be the only jurisdiction that could maintain an action *in rem*. *Id.* In this case and despite the court's declaration that "enforcement under the 1933 Act is a simple process," the court agreed to sist the case in apparent response to plaintiff's claim that Scotland's Foreign Judgments (Reciprocal Enforcement) Act of 1933 might present problems in the subsequent enforcement in the Scottish courts of any valid French decree. *Credit Chimique*, 1982 Scots L.T. at 135.

69. *See supra* notes 57-58 and accompanying text.

70. *See supra* text accompanying note 38.

within the rubric of established precedent, now appears to view the search for the "ends of justice" in a very different manner: the search no longer centers on whether the retention of Scottish jurisdiction will serve the ends of justice, but rather on which forum, considering all the facts and interests, will best secure justice.

III. GREAT BRITAIN

A. Vexatious, Oppressive, and Unjust Jurisdiction

Historically, English law did not permit the dismissal or stay of an action solely on the grounds that another court presented a more convenient forum in which to litigate the case.[71] The early English courts examined the appropriateness of exercising jurisdiction in a very different manner from their Scottish counterparts: the sole criteria for granting a stay, even in a case involving *lis alibi pendens*,[72] was whether the plaintiff had instituted an action in a forum that would be "vexatious, oppressive or unjust to the defendant."[73] Consequently, the traditional English approach maintained jurisdiction: (1) unless the defendant could show that the plaintiff instituted the action in an English court to harass the defendant, or (2) when the defendant's need to respond in the action caused such oppression that the defendant would be subject to substantial injustice that could be avoided only by litigating the matter in another court of competent jurisdiction.[74] The justification for a stay in this type of action reflected the court's belief that to continue the proceeding would constitute an "abuse of process."[75] The Scottish approach, on the other hand, searched for the forum that would best serve the ends

71. *See* Briggs, *supra* note 39, at 74.

72. *Lis alibi pendens* literally means a "suit pending elsewhere." BLACK'S LAW DICTIONARY 840 (rev. 5th ed. 1979). The English law permits a plea of *lis alibi pendens* when litigation has already been instituted in another country. A stay is not lightly given, however, and the defendant must show vexation or oppression. *See* P. NORTH, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 114-19 (10th ed. 1979).

73. P. NORTH, *supra* note 72, at 119.

74. *See* Logan v. Bank of Scotland, [1906] 1 K.B. 141, 150-51.

75. *See* Briggs, *supra* note 39, at 78. Older decisions found the power to stay actions that were oppressive or vexatious in the power of the Court of Chancery to grant a stay "based on an equitable defense arising out of the traditional equity jurisdiction to enjoin unconscionable suits." Braucher, *supra* note 12, at 911.

of justice—the doctrine of *forum non conveniens.*[76]

The principles governing the traditional English doctrine on stays of an action were set forth in *St. Pierre v. South American Stores.*[77] The defendants were two English companies doing business exclusively in South America; the plaintiff was a Chilean lessor seeking missed rental payments from the defendant lessees for property the plaintiff owned in Chile.[78] The defendants sought to have the case stayed on the grounds that it was vexatious and oppressive for them to have to defend this action in England.[79] In support of their motion, the defendants claimed that the action was oppressive and should be stayed because: (1) the English courts did not have jurisdiction to decide a question involving real property outside England; and (2) even if the English courts had jurisdiction, the exercise of that jurisdiction would constitute inconvenience resulting in an injustice to the defendant.[80]

The court recognized that the defendants' two arguments were based on very different grounds.[81] The first questions the power of the court to exercise its jurisdiction, and the second challenges the propriety of the court in exercising any jurisdiction it possesses.[82] The court characterized the second argument as essentially *forum non conveniens* with the additional claim that the inconvenience the defendants would suffer if the stay were not

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76. *Id. (citing* Societe du Gaz de Paris v. "Les Armateurs francais", 1925-1926 Sess. Cas. 13). Justice Barnes, in *Logan,* [1906] 1 K.B. 141, commented that at the time of that decision there was "not really any very substantial difference between the practice in Scotland and that of our Courts," both of which call for the court to intervene "to prevent vexatious proceedings which would have the effect of preventing the due administration of justice." *Id.* at 149. His opinion suggested that the same results would be reached in both countries under facts similar to those before the court, but not that the two systems would look for the same things in reaching their decisions. *See id.*

77. [1936] 1 K.B. 382.

78. *Id.* at 383-84. The defendants claimed that certain Chilean legislation made it illegal to pay in the manner called for in the contract agreement. *Id.* at 385.

79. *Id.* at 390.

80. *Id.* The defendants offered other reasons to support their claim. First, the stay should be granted on the grounds of *lis alibi pendens,* and second, the court should infer from the parties' domicile that the parties intended the Chilean courts to have exclusive jurisdiction on this matter. *Id.* The court dismissed these claims on the basis of existing English law, and asserted that the latter claim would best be decided at trial. *Id.* at 393.

81. *Id.* at 395.

82. *See id.*

granted would render the action "vexatious and oppressive and an abuse of the process of the Court."[83] The court first upheld its power to exercise jurisdiction in this matter,[84] and then proceeded to examine the evidence offered to support the second question of alleged oppressive inconvenience.

The defendants presented numerous reasons supporting the conclusion that Chile offered a more convenient forum in which to try the dispute.[85] The court agreed that the reasons indicated a strong tie between the circumstances of the litigation and the Chilean forum, thus supporting the assertion that Chile was a more convenient forum.[86] The court concluded nevertheless that the grounds went *only* to the questions of convenience and did not support a finding of oppression such that the plea for dismissal could be granted.[87] This conclusion supported the validity of English jurisdiction, and the plea for a stay of proceedings was denied. The court set forth rules that summarized the existing law applicable to a plea for dismissal in cases such as the one before the court:

> (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must

83. *Id.*

84. The court determined that this case did not involve a question "relating to land" in a foreign country. Instead, this question involved the interpretation of a covenant in a lease, in which case the court would not hesitate to exercise jurisdiction. *Id.* at 396-97.

85. The following reasons were offered in support of Chile as the more convenient forum:

> (1) the contract is in Spanish; (2) the law of the contract is Chilean as to both interpretation and performance; (3) the action is about land in Chile; (4) the respondent companies, though registered in England, carry on all their business in Chile; and (5) Chilean lawyers are so scarce in England that expert evidence for the Court here will be difficult to obtain.

Id. at 397.

86. *See id.*

87. *See id.* at 397-98.

not cause an injustice to the plaintiff.[88]

A clear result of this test was that English courts would not relinquish jurisdiction based solely on a balancing of conveniences. Evidence of the plaintiff's intent to harass or of a potentially oppressive result would be needed before a defendant could secure a stay of the proceedings. Yet, it remained unclear exactly what actions in what circumstances would constitute oppressiveness. Similarly, if the purpose behind the rules governing a stay of action was to prevent abuses of the process of the court, a search for vexatious or oppressive behavior would be the only investigation a court could undertake.[89] Any examination that sought even tangentially to balance the various advantages and disadvantages or conveniences and inconveniences of the parties would exceed the mandate set forth in *St. Pierre*.[90]

B. *The Atlantic Star* and *MacShannon v. Rockware Glass, Ltd.*

The decision of the House of Lords in *The Atlantic Star*[91] provided one of the first clear indications that the rules set out in *St. Pierre* would relax as the courts began to doubt the need for inflexible standards on questions of jurisdiction. In *The Atlantic Star*, a Dutch vessel had collided with two barges, one Dutch and one Belgian, in Belgian waters. The owners of the Belgian barge brought an action in Belgium, and the Dutch owners commenced in *in rem* action in the English courts.[92] To avoid the formal arrest of their ship, the owners of the vessel agreed to jurisdiction in the English courts and then attempted to obtain a stay of the English action.[93] Shortly thereafter, the Dutch barge owners also filed suit in Belgium to meet a Belgian statute of limitations, thus preserving their rights against the vessel's owners if the stay in the English court was granted.[94]

The primary consideration before the English courts was whether the action brought by the Dutch barge owners was suffi-

88. *Id.* at 398.
89. *See* Briggs, *supra* note 39, at 79.
90. St. Pierre v. South American Stores, [1936] 1 K.B. 382; *see* Briggs, *supra* note 39, at 79.
91. 1974 A.C. 436.
92. *Id.* at 439-40.
93. *Id.* at 440.
94. *Id.*

ciently oppressive to justify a decision to decline jurisdiction. Their inquiry centered on the issue of "forum-shopping," focusing specifically on whether the Dutch barge owners had an honest belief that filing suit in England gave them a legitimate advantage that was reasonable under the circumstances.[95] Both the trial and the appeals courts refused to grant the stay, holding that although the proceedings could be characterized as inconvenient, they could not be considered vexatious or oppressive.[96]

The House of Lords rejected the lower courts' position and granted the stay. Although the Justices gave facile support to the traditional rules that would grant a stay only in cases involving vexation or oppression,[97] the majority no longer desired to have their options confined by the strict application of those limiting words.[98] Lord Wilberforce described the words as "pointers rather than boundary marks," and said that they should "illustrate but . . . not confine the courts' general jurisdiction."[99] The court, however, expressly rejected any assertion that the liberalization of existing policy indicated an acceptance of *forum non conveniens*.[100] Despite the expression of policy, it is evident that the decision in *The Atlantic Star* suggested a departure from the rule that vexatiousness is a necessary prerequisite to stay, and that other factors, as yet unarticulated, had to be considered in evaluating the propriety of a stay. Whether the basis for the decision was "*forum non conveniens*" remains unclear; nevertheless, it is clear that a motion based on an abuse of process would no longer be necessary.[101]

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95. *Id.* at 452-54, 459-60, 470-71.

96. *See* The Atlantic Star, [1973] Q.B. 364. Lord Denning rejected the negative connotations associated with forum shopping by asserting that the English court system is "not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service." *Id.* at 382, *quoted in* P. North, *supra* note 72, at 121.

97. *See* Carter, *Jurisdiction: the propriety of an English forum,* 49 Brit. Y.B. Int'l L. 291, 292 (1978); P. North, *supra* note 72, at 122.

98. *See* The Atlantic Star, 1974 A.C. at 454.

99. *Id.* at 468, *quoted in* Carter, *supra* note 97, at 292.

100. The Atlantic Star, 1974 A.C. at 464-65.

101. One commentator has suggested this decision indicates that:

> the abuse of process justification no longer represents English law. Nor can it be argued that the justification of abuse is the same, but the criteria by which it is to be discovered have changed. . . . Good faith is no longer the

Four years later, the House of Lords decision in *MacShannon v. Rockware Glass Ltd.*[102] clarified *The Atlantic Star* decision and led many commentators[103] and several of the Lord Justices[104] to conclude that very little difference remained between the Scottish doctrine of *forum non conveniens* and the parallel English formula governing stays of proceedings. No member of the court, however, expressly accepted the doctrine of *forum non conveniens*; in fact, at least one member expressly denied that the decision should be interpreted as an acceptance of the Scottish doctrine.[105]

The complaint in *MacShannon* was brought by four Scotsmen who had been injured in industrial accidents in Scotland.[106] The defendants were English companies that owned and operated the plants in which the plaintiffs were injured. The defendants entered a motion to stay the actions, arguing that the plaintiffs had shown no legitimate reason for bringing their actions in England.[107] The English companies further asserted that defending an action in England would subject them to such disadvantage that trying the case would be oppressive.[108] The plaintiffs countered that they were reasonably justified in bringing suit in England because an action brought in England would be shorter, less costly, and might yield higher damages.[109]

The House of Lords resolved the litigants' dispute and clarified

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> sole determinant, vexation is no longer required. And the change in basis cannot be disguised or made to go away by calling the criteria of vexation and oppression 'pointers rather than boundary marks'. If they are no longer boundary marks the juridical basis of the law has changed.

Briggs, *supra* note 39, at 79.

102. 1978 A.C. 795.

103. *E.g.*, Pryles, *supra* note 11; Carter, *supra* note 97.

104. *See MacShannon*, 1978 A.C. 795, 822 (decision of Lord Fraser), 823 (decision of Lord Russell); *see also id.* at 827-29 (decision of Lord Keith).

105. *MacShannon*, 1978 A.C. at 817 (decision of Lord Salmon) ("This doctrine however, has never been part of the law of England. And, in my view, it is now far too late for it to be made so save by Act of Parliament.").

106. *Id.* at 809.

107. *Id.* at 798.

108. *Id.* at 801. The defendant argued that there had been a calculated increase in these same types of actions being brought against English companies in England by Scotsmen claiming injuries from accidents occurring in defendants' plants in Scotland. *Id.* at 800-01. The defendants also characterized this as a battle between powerful litigants; large English companies on one side and trade unions on the other. *Id.* at 799.

109. *Id.* at 803.

prior holdings by affirmatively eliminating the requirement that the defendant show the plaintiff had acted in a vexatious or deliberately oppressive manner.[110] Several of the judges expressly rejected the continued use of the words "vexatious" and "oppressive" to describe the set of factors that the defendant must show to sustain his plea.[111] Other Lords diluted the substance behind the words to such a degree that they emerged as malleable, and effectively useless in any determination by an English court. Lord Keith's opinion suggested that the terms should only be used by the court "in a broad and reasonable sense and without any necessary moral connotations."[112]

The *MacShannon* decision also removed any doubt that the test[113] set forth in *St. Pierre* no longer applied. Lord Diplock suggested a radical reworking of the latter part of the test to read:

> (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.[114]

This test omitted the use of the words "vexatious" and "oppressive." Lord Diplock suggested they be replaced in the analysis by the availability of another, substantially less inconvenient forum, one of the court's primary determinations in a motion to stay a proceeding. He admitted that if the distinction between the proposed test and the Scottish doctrine of *forum non conveniens* were fine, that should not indicate the statement was any less useful as an expression of current English legal opinion.[115]

While the *MacShannon* decision did a great deal to clarify what factors should not be considered, it did little to establish new factors for future courts to use. Even Lord Diplock's suggested replacement for the *St. Pierre* test[116] was subject to a vari-

110. *See id.* at 810.
111. *Id.* at 810, 817-19, 822-23.
112. *Id.* at 829.
113. *See supra* text accompanying notes 87-88.
114. *MacShannon,* 1978 A.C. at 812.
115. *See id.*
116. *See supra* text accompanying note 99; *see also* Carter, *supra* note 97, at

ety of interpretations, particularly in regard to the possible construction of the words "substantially" or "legitimate" to recharacterize the degree of inconvenience or advantage that would need to be shown. The House of Lords did suggest the need to discuss the appropriateness of a dismissal in terms of identifying the most "natural" forum to hear the case.[117] Although the factors used to determine the natural forum apparently included expense and inconvenience,[118] the decision did not state whether these factors should be applied in all cases, or whether they were applicable only to the facts and allegations presented in *MacShannon*. The idea that the plaintiff should not be forced to sacrifice a "legitimate personal or juridical advantage"[119] was also accepted by the court as a proper consideration for the court in any decision to relinquish jurisdiction. The court failed, however, to elucidate criteria for determining which advantages should be considered legitimate. After *MacShannon*, it was clear only that the old system's reliance upon "vexatiousness" and "oppressiveness" was no longer appropriate, and that a new system, which balanced a determination of the natural forum with the juridical advantages available to the parties in either jurisdiction, had taken its place. It remained for future decisions to define the scope of Lord Diplock's broadly stated formula and to identify factors evaluating the merits of a motion to stay a proceeding.

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117. *See* Briggs, *supra* note 39, at 81.

118. *MacShannon*, 1978 A.C. at 812; *see also* Briggs, *supra* note 39, at 82.

119. *MacShannon*, 1978 A.C. at 812. An attempt by subsequent courts to clarify what was meant by a legitimate advantage to the plaintiff also resulted in some lingering ambiguity, although the trend in these cases indicated that the courts began to expect evidence of increasingly important advantages for the plaintiff litigating in England to justify denying defendant's plea for dismissal. In an earlier case, The "Wladyslaw Lokietek," [1978] 2 Lloyd's L.R. 520, the advantage of bringing suit in England—having a court system experienced with the maritime collision issues presented in the pleadings—was presumably an appropriate consideration. In a later decision, however, The "El Amria,"[1980] 1 Lloyd's L.R. 390, *aff'd*, [1981] 2 Lloyd's L.R. 119, the attempt to evaluate the relative quality of the legal systems in England and Egypt, and a suggestion that the English courts might be better prepared to handle the complex issues contained in the facts were considered inappropriate factors to use in weighing the sufficiency of plaintiff's advantages.

For a discussion of the effect The "Wladyslaw Lokietek" decision had on clarifying the House of Lords' opinion in *MacShannon*, see Carter, *supra* note 97.

C. Acceptance of *Forum Non Conveniens: The Abidin Daver*

Working within the confines of the new system after *The Atlantic Star* and *MacShannon*, courts approached the decision to stay proceedings by identifying the "natural" forum for the litigation. The selection of the natural forum was only a preliminary inquiry, and not necessarily conclusive;[120] the determination that a forum other than England might be the natural forum was a prerequisite to further examination of the facts surrounding a particular motion to stay the proceedings. The possible existence of more than one natural forum,[121] or of several fora all lacking sufficient connections with the action to constitute the natural forum,[122] raised questions regarding not only the nature of the criteria used to determine the natural forum but also the ultimate utility of the determination itself.

The increasingly liberal approach to granting defendants' motions to stay proceedings ultimately led to the House of Lords' recognition in *The Abidin Daver*[123] that the policies being furthered within the English system were indistinguishable from the Scottish doctrine of *forum non conveniens*.[124] The case arose from a collision between a Turkish vessel and a Cuban vessel in the Bosphorus.[125] The Turkish shipowners first brought suit in a Turkish court, where proper jurisdiction had been secured by arrest of the Cuban ship in a Turkish port.[126] The Cuban shipown-

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120. Briggs, *supra* note 39, at 82.

121. *Id.* at 88.

122. *Id.* (*citing* European Asian Bank v. Punjab and Sind Bank, [1981] 2 Lloyd's L.R. 651, 658, *aff'd* [1982] 2 Lloyd's L.R. 356).

123. [1984] 1 All E.R. 470.

124. Lord Diplock stated:

> My Lords, the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions that have been achieved step by step during the last ten years as a result of the successive decisions of this House in *The Atlantic Star, MacShannon* and *Amid Rasheed* is that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of *forum non conveniens*.

Id. at 476.

125. *Id.* at 472. The collision actually took place in Turkish territorial waters, just outside the port of Buyukdere. *Id.*

126. The action was brought in the District Court of Sariyer. *Id.* The Cuban shipowners obtained the release of their ship after remitting sufficient security to the Turkish court. *Id.*

ers subsequently instigated the English action by obtaining jurisdiction over one of the defendant's ships in an English port. After providing security for their ship and obtaining its release, the Turkish shipowners filed a motion in the English court to stay the English proceedings.[127]

The House of Lords granted the defendant's motion to stay the proceedings after determining that Turkey presented the natural forum for the litigation, and that the plaintiff would not be subjected to any substantial disadvantage by pursuing its claims in the Turkish courts. *The Abidin Daver* decision went much further than prior decisions in examining what was meant by the term "natural" forum and the factors that a court could appropriately consider in determining this forum. The Lords expressly accepted the factors discussed in the trial court decision and concluded that the trial court had considered all legitimate factors in evaluating whether the English Court or another forum constituted the natural forum.[128] The trial judge in *The Abidin Daver* considered: (1) the location of the collision; (2) the nationalities of the two ships and their crews; (3) the location of the witnesses, and the relative convenience of asking witnesses to appear in one forum rather than another; (4) the basis for jurisdiction in each forum; and, (5) the efforts already undertaken by the two countries' courts.[129] The trial court concluded, and the House of Lords agreed, that the balance of these factors suggested overwhelmingly that Turkey was the natural forum.[130] Lord Keith characterized the natural forum as the one "with which the action has the most real and substantial connection."[131]

The House of Lords also examined the relative weight to be given the various advantages and conveniences available to the parties.[132] Although the court recognized that a mere balance of convenience should not determine the outcome of a motion to

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127. *Id.*

128. *Id.* at 484.

129. *See id.* at 484-85.

130. *See id.* at 484. The appellate court, however, had reversed the trial court's decision in the interim. *See id.* at 484-85 (quoting *The Abidin Daver,* [1983] 3 All E.R. 46, 51-52).

131. *Id.* at 479. This position had earlier been suggested by the legal commentator Adrian Briggs as an appropriate characterization of the term "natural" in light of Lord Keith's earlier position in *MacShannon. See* Briggs, *supra* note 39, at 85.

132. The Abidin Daver, [1984] 1 All E.R. at 477, 485.

stay the proceedings, the House of Lords put a much greater emphasis on the word "mere" than it did on "balance of convenience."[133] Lord Brandon suggested that a strong balance of convenience in one direction or another would very likely be sufficient to tip the scales.[134] The recognition that a balancing of conveniences could determine the outcome of a motion to dismiss prompted Lord Diplock to acknowledge that English law had incorporated and adopted the principles of *forum non conveniens*.[135]

The decision in *The Abidin Daver* is the product of a slow but steady transformation of the English law. A system designed to sustain jurisdiction over all cases in which the exercise of that jurisdiction would not be abusive has transformed into a system that recognizes the propriety of relinquishing jurisdiction in favor of the natural forum when the plaintiff would not be subject to a substantial juridical disadvantage. Thus, a system that previously had strongly favored the plaintiff's choice of forum has become sufficiently flexible to recognize that a defendant should not be forced to litigate in England when an English court believes another forum is a proper and more natural forum in which to litigate the action.

IV. The United States

A. Acceptance of *Forum Non Conveniens* in the Federal System: *Gulf Oil Corporation v. Gilbert*

The doctrine of *forum non conveniens* first appeared in the United States in several early state court decisions.[136] Although not specifically referred to by name in many of these decisions, the principle was used to support the discretionary power of a court to decline jurisdiction in cases that could be better tried elsewhere.[137] The motion to dismiss an action in a *forum non conveniens* could be made not only by the defendant but by the court itself, and clearly did not represent the court's lack of jurisdiction but rather the perceived impropriety of the court's exer-

133. *Id.* at 485.

134. *Id.*

135. *See supra* text accompanying note 115.

136. *See* Blair, *supra* note 3, at 2; *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 n.4 (1947).

137. *See* Blair, *supra* note 3, at 1-2.

cise of jurisdiction in a particular matter.[138] Although the common law of various states developed criteria for applying the doctrine,[139] no federal criteria emerged until the United States Supreme Court's decision in *Gulf Oil Corp. v. Gilbert.*[140]

The parties in *Gulf Oil* were United States citizens, and the action was in federal court on the basis of diversity jurisdiction.[141] The plaintiff, Gilbert, owned a warehouse in Virginia and alleged that the negligent delivery of gasoline by the defendant, Gulf Oil Corporation, resulted in the warehouse and all the property located inside being destroyed by fire.[142] The plaintiff brought suit in a federal district court in New York, one of the states, including Virginia, in which the defendant was qualified to do business.[143] Although it was conceded that the New York court possessed jurisdiction over the parties,[144] the defendant moved to remove the action from New York under the doctrine of *forum non conveniens,* arguing that Virginia constituted the appropriate forum in which to litigate the case.[145] In support, the defendant observed that Virginia was "where the plaintiff lives and defendant does business, where all events in litigation took place, where most of the residents reside, and where both state and fed-

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138. *Id.* at 2-3.

139. *See Gulf Oil,* 330 U.S. at 507 (citing, *e.g.,* Pietraroia v. New Jersey and Hudson R.R. Co., 197 N.Y. 434, 91 N.E. 120 (Ct. App. 1910); Great Western Railway Co., 19 Mich. 305(1869)).

140. 330 U.S. 501 (1947).

141. *Id.* at 503.

142. *Id.* at 502-03.

143. Although Gulf Oil Corporation was incorporated under the laws of Pennsylvania, *id.* at 503, and the facts giving rise to the case arose in Virginia, plaintiff justified his decision to instigate the trial in New York on the basis that a New York jury could more easily relate to the large sum of money damages claimed and that a New York jury would be less susceptible to "local influences and preconceived notions." *Id.* at 510.

144. The Supreme Court recognized that the doctrine of *forum non conveniens* is inapplicable unless there are at least two jurisdictions in which the defendant is amenable to process, one of which is the plaintiff's chosen forum. *Id.* at 504, 506-07. The factors associated with the doctrine are designed to help the court decide whether it is appropriate to decline jurisdiction and allow the litigation to proceed in an alternate forum. *See id.* at 507.

145. *Id.* at 503. This motion was based on the application of New York's state law of *forum non conveniens.* The district court felt that because this action was brought in the federal courts on the basis of diversity jurisdiction, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), the application of the appropriate state law was mandated. *Gulf Oil,* 330 U.S. at 503.

eral courts are available to plaintiff and are able to obtain jurisdiction of the defendant."[146]

The Supreme Court agreed that Virginia, not New York, constituted the appropriate forum in which to conduct the litigation. Thus, the court expressly adopted a federal rule of *forum non conveniens* that set forth the factors a federal court should consider in evaluating a motion to dismiss.[147] The factors fell into two broad groups, the private interests of the litigants and the public interests of the chosen forum.[148] The private interests included: (1) the litigants' accessibility to the sources of proof; (2) an ability to compel the attendance of important witnesses and the cost of obtaining those witnesses; and (3) the possibility of examining the premises, if applicable.[149] The Court's list of public interests that affect the appropriateness of a forum's exercise of jurisdiction included: (1) the court's caseload; (2) the burden of asking local juries to consider matters only tangentially related to their forum; and (3) the problems inherent in conflict of law questions or associated with applying a foreign law. Although the Court granted the motion to dismiss on *forum non conveniens* grounds, it tempered its decision by proposing that a simple balance between the inconvenience to the defendant and the convenience to the plaintiff was inappropriate;[150] unless the balance strongly favored another forum the "plaintiff's choice of forum

146. *Gulf Oil,* 330 U.S. at 503.

147. *Id.* at 509. The Court recognized that the standards set forth in this case to guide federal courts were the same as the New York rule. *Id.*

148. *Id.* at 508.

149. *Id.* The Court stated that it would weigh these factors in light of the various advantages or obstacles they would present in maintaining a fair trial, but that in no event would the plaintiff be permitted to "vex, harass, or oppress the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." *Id.* (citing Blair, *supra* note 3, *passim*). Although the Supreme Court expressly recognized the abuse of process associated with any case in which a plaintiff institutes litigation in a particular forum with the overt or implicit intention of harassing the defendant, there is no indication that the Court, unlike the British judicial system at that time, required that the degree of inconvenience to the defendant rise to the level of vexatiousness before the Court would grant a stay or dismiss a particular action. *See supra* text accompanying notes 83-88. Instead, the Court applied a doctrine that recognizes the relative inconvenience to the defendant and requires a strong showing that the convenience to the plaintiff of litigating in a particular forum be proven. *See Gulf Oil,* 330 U.S. at 509-12.

150. *Gulf Oil,* at 508-09.

should rarely be disturbed."[151]

B. Application of the *Gulf Oil* Factors to International Litigation

The factors set forth in the Supreme Court's *Gulf Oil* decision were subsequently applied as guidelines not only in domestic cases between United States citizens residing in different states, but also in cases involving one or more parties from foreign countries.[152] Nevertheless, to apply the *Gulf Oil* factors to international litigation necessitated a reconsideration and expansion of the "private" and "public" factors to reflect the additional concerns involved in determining whether the jurisdiction of a United States court should be relinquished in favor of a forum outside of the United States. Certain assumptions routinely taken for granted by United States courts determining which of two domestic jurisdictions constituted the appropriate forum had to be weighed consciously in cases involving a choice between a domestic and a foreign forum.

In domestic *forum non conveniens* cases, the forum court limited its examination of the adequacy of the alternate forum to the validity of the alternate forum's jurisdiction over the parties, the alternate court's inclination to exercise that jurisdiction and, in certain circumstances, the defendant's willingness to submit to the jurisdiction of the alternate forum.[153] In international cases,

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151. *Id.* at 508.

152. *See, e.g.*, Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956) (litigation involving United States and Canadian litigants). In fact, the circuit court recognized that its inherent power to refuse jurisdiction now applied solely to cases in which the alternate forum was outside the United States. Title 28 section 1404(a) of the United States Code effectively codified the doctrine of *forum non conveniens* as it was set forth in *Gulf Oil* for all circumstances involving a choice of forum between two federal districts. *See id.* at 645.

153. *See Gulf Oil*, 330 U.S. at 506. In both domestic and international *forum non conveniens* decisions, courts often qualify their decisions to dismiss by requiring the defendant to waive any procedural technicalities, such as the expiration of the applicable statute of limitations, which would bar the alternate court's exercise of jurisdiction. *See, e.g.*, Calavo Growers of California v. Belgium, 632 F.2d 963 (2d Cir.), *cert. denied*, 449 U.S. 1084, *reh'g denied*, 451 U.S. 934 (1980). As the *Calavo Growers* opinion stated, "the conditional dismissal device obviates the need for extensive inquiry into foreign jurisdictional law, since if the foreign court refuses to take jurisdication, 'plaintiff is still protected by the conditional nature of the dismissal.' " *Id.* at 968 (quoting Schertenlieb v.

however, challenges to the adequacy of the alternate forum included not only jurisdictional concerns, but also: (1) the plaintiff's ability to raise certain substantive causes of action in the alternate forum,[154] (2) the adequacy of the procedural protections offered by the alternate forum's court system,[155] and (3) the independence or "fairness" of the country's judicial system.[156] Evaluation by United States courts of foreign judicial systems necessarily raised serious questions of political propriety and, in unusual cases, was a reason to refuse to dismiss the action.[157]

Although the question of applying one state's law in the court of another state was often raised in domestic *forum non conveniens* cases,[158] it does not appear to have been given a disproportionate weight. In international litigation, however, the perceived need to apply a foreign law to a particular set of facts appears to carry greater weight in determining whether the foreign court constitutes the more appropriate forum to hear the litigation.[159] Although its recognition that the law of a foreign jurisdiction will apply militates in favor of a dismissal on *forum non conveniens* grounds,[160] a court retains the discretion to refuse to dismiss a case in which foreign law will be applied.[161] A court's choice of forum decision is not determined by its choice of law

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Traum, 549 F.2d 1156, 1163 (2d Cir. 1978).

154. *See, e.g.*, Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 78 F.R.D. 445, 456 (D. Del. 1978) (no remedy available to plaintiff in Ecuador for two of the three legal remedies available in the United States).

155. *E.g.* Mobil Tankers Co., S.A. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 383 U.S. 945 (1966).

156. *See Phoenix Canada*, 78 F.R.D. at 455-56 (concern over the independence of the judiciary in light of the power exercised by the ruling military government).

157. *Compare Mobil Tankers*, 363 F.2d at 615 (refusal to grant *forum non conveniens* motion despite recognition that Venezuelan law applied) *with* Dahl v. United Technologies Corp., 632 F.2d 1027 (3d Cir. 1980) (granting *forum non conveniens* motion based, at least in part, on the applicability of Norwegian substantive law). The British judicial system has also been faced with this political dilemma, particularly in regard to admiralty cases. *See supra* note 119.

158. The Supreme Court in *Gulf Oil* noted the appropriateness in locating litigation in a forum that is intimately familiar with the state law that will govern the case. *Gulf Oil*, 330 U.S. at 509.

159. *See, e.g., Dahl*, 632 F.2d at 1032; *Schertenlieb*, 589 F.2d at 1165 (2d Cir. 1978).

160. *See Dahl*, 632 F.2d at 1032 (quoting *Gulf Oil*, 330 U.S. at 509).

161. *See, e.g., Mobil Tankers*, 363 F.2d at 615.

analysis;[162] however, a court's recognition of the need to apply a foreign law greatly increases its inclination to grant a dismissal.[163]

A related concern is the degree to which a court should consider the effect of changes in the applicable law. To grant a *forum non conveniens* motion might cost the plaintiff the opportunity to assert all of the causes of action available in the United States, or the relevant law in the foreign forum might reduce the plaintiff's chance to prevail. United States courts have wrestled with the propriety of their making a comparative examination of the relevant foreign laws and with the degree of detrimental effect that needed to be shown to refuse dismissal.[164] Most courts concluded that the probability of a decreased recovery under foreign law did

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162. It is difficult to determine the degree to which the choice of law decision results in an independent factor to be weighed in a balancing of factors for *forum non conveniens*. Although courts often apply a traditional choice of law analysis, *see Dahl*, 632 F.2d at 1032, this analysis depends on other factors that are made a part of a *forum non conveniens* examination. For example, in torts cases the traditional choice of law determination frequently depends upon the place where the tort arose, which in turn is often interpreted as the place where the injury occurred. *See id.* Such private interests as obtaining witnesses, viewing the premises and facilitating access to sources of proof will nearly always be served by holding the trial at the place where the injury occurred. Consequently, the choice of law decision often directly depends on other factors which have been independently taken into consideration by a court in its *forum non conveniens* decision. Given the general importance with which United States courts view the choice of law decision in relation to motions to dismiss on *forum non conveniens* grounds, however, failure to resolve the question by way of formal analysis seems unjustified. *See Calavo Growers*, 632 F.2d at 967 (concluding that "the likelihood that Belgian law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction").

163. At least one commentator has suggested that a court's choice of law examination should not be limited to the determination of which law applies, at least in regard to considerations of *forum non conveniens*, but should also consider the "degree of difficulty in interpreting the law and the degree to which it comports with United States standards of justice." Recent Decision, *infra* note 175, at 587 n.24. This may be compared with the Scottish judiciary's recognition of the distinction between being asked to apply a relatively simple concept of foreign law to a simple set of facts, and being asked to interpret substantial questions of foreign law with numerous and complex issues, and its conclusion that the distinction should be considered in making a *forum non conveniens* determination. *See supra* notes 56-62 and accompanying text.

164. This concern was also present in the English courts' conclusion that a plaintiff should not be forced to sacrifice a legitimate "juridical advantage." *See supra* note 119 and accompanying text.

not bar a dismissal,[165] but a few courts expanded this proposition whereby evidence of divergent potential recoveries became irrelevant to a *forum non conveniens* inquiry.[166] Greater disagreement existed between the courts on the relative weight to be given evidence of juridical disadvantage in the foreign forum. Several distinct trends emerged: (1) some courts felt a dismissal should not entail a change in the applicable law governing the action;[167] (2) other courts were willing to grant a dismissal when the cause of action alleged under United States law was not likely to succeed;[168] and (3) some courts concluded that a *forum non conveniens* decision should not involve considerations of the governing law that may affect the substantive outcome of the case, provided that the balance of "relevant factors" weighed in favor of the alternate forum.[169] It was apparent that without uniform application the distinctions among the courts might cause plaintiffs to bring their actions in a particular United States forum.

The application of the *Gulf Oil* factors in an international setting also prompted further consideration of whether a United States court should give greater weight to a United States plaintiff's decision to litigate in the United States. The Supreme Court recognized that a suit between foreigners was very different from a suit involving a United States citizen,[170] and that the circumstances under which a United States citizen would be denied access to United States courts would be extremely difficult, if not impossible, to imagine.[171] The decision was apparently based on a

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165. *See, e.g.*, Fitzgerald v. Texaco, Inc., 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

166. *E.g.* Pain v. United Technologies Corp., 637 F.2d 775, 794 (D.C. Cir. 1980).

167. *See Phoenix Canada*, 78 F.R.D. at 456.

168. *See Dahl*, 632 F.2d 1027 (3d Cir. 1980).

169. *See Fitzgerald*, 521 F.2d at 453.

170. *See* Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684, 697 (1950).

171. *See id.*; *see also* Burt v. Isthmus Development Co., 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955). Subsequent courts, however, recognized that no United States citizen possesses an absolute right to litigate in this country, *see Vanity Fair Mills*, 234 F.2d at 645-46, and that any United States citizen who relies solely on his citizenship as the basis for bringing suit in this country may find the litigation dismissed to a more appropriate forum if all the appropriate considerations support such a dismissal. Mizokami Bros. of Arizona, Inc. v. Baychem Corp., 556 F.2d 975, 977-78 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

concern that a United States citizen might be subject to prejudice in a foreign forum if forced to bring an action abroad following a dismissal on the grounds of *forum non conveniens.*[172] The acceptance by many United States courts of the proposition that the citizenship of a United States plaintiff should tip the balance in favor of the plaintiff's chosen forum prompted a few courts to apply a corollary to that proposition—that a decision by a foreign plaintiff to bring suit in the United States should be given somewhat less deference.[173] The propriety of permitting citizenship to determine the outcome of a *forum non conveniens* decision and the degree to which any consideration of the parties' citizenship should affect the balance of the *Gulf Oil* factors remained, however, the subjects of considerable debate.[174]

C. *Piper Aircraft Co. v. Reyno*

The Supreme Court's decision in *Piper Aircraft Co. v. Reyno*[175] resolved many of the questions that had arisen from the application of the *Gulf Oil* factors to litigation involving foreign parties. The case was brought in the United States by a representative of the estates of several Scottish citizens killed in an accident in Scotland involving an airplane manufactured by Piper.[176] The

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172. *See* Recent Decision, *infra* note 175, at 589 n.34. This concern, however, has been rejected as "overly protective of American plaintiffs" and insensitive to the abilities of foreign courts to competently handle the pertinent litigation. *Pain*, 637 F.2d at 796-97 (quoting Recent Development, *Federal Courts: Forum Non Conveniens*, 20 HARV. INT'L L.J. 404, 412 (1979)).

173. *See, e.g.*, Founding Church of Scientology v. Verlag, 536 F.2d 429, 435 (D.C. Cir. 1976).

174. *See Pain*, 637 F.2d at 796-98; *see also infra* notes 187-88.

175. 454 U.S. 235 (1981). For a detailed treatment of this decision and its effect on the doctrine of *forum non conveniens*, see Recent Decision, *The Foreign Plaintiff Is Entitled to Less Deference in his Choice of Forum Than Is a Citizen or Resident Plaintiff; A Change of Law Resulting From Dismissal Is Not a Substantial Factor in the Forum Non Conveniens Analysis*, 15 VAND. J. TRANS. L. 583 (1982).

176. *Piper*, 454 U.S. at 238-39. Gaynell Reyno was appointed by the California probate court to administer the estates of the five decedents; her only connection with the litigation, however, was that the attorney for whom she worked as a legal secretary had brought the action. *Id.* at 239. Pursuant to 28 U.S.C. § 1404(a), the litigation was transferred from California to the United States District Court for the Middle District of Pennsylvania where the original *forum non conveniens* decision was reached. *Id.* at 240. For purposes of its *forum non conveniens* decision, the district court looked beyond the representative nature of

wrongful death action against Piper alleged that the airplane was defective. The plaintiffs sought recovery on the basis of negligence and strict liability.[177] Asserting that justice could better be served by having the litigation transferred to the Scottish courts, the defendants moved to dismiss on the ground of *forum non conveniens*.[178] The defendants supported their motion by noting that the decedents and their heirs were Scottish citizens, the accident had taken place in Scotland, and numerous witnesses essential to the defense were located in Scotland and not subject to compulsory process in the United States.[179] The plaintiffs countered by asserting that all the evidence concerning the manufacture of the plane was located in the United States[180] and that dismissal would not be fair because the Scottish law applicable to products liability was less favorable than the applicable United States law.[181]

The Supreme Court first considered the weight that should be given to evidence which indicates that a dismissal to another forum will bring about an unfavorable change in the applicable substantive law. The Court held that its *Gulf Oil* decision "implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in the law,"[182] and that to give this factor conclusive or even substantial weight would rob the doctrine of *forum non conveniens* of the flexibility which

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Reyno's status as named plaintiff and recognized that the real plaintiffs in interest were foreign citizens. *Id.* at 242.

177. Reyno admitted that one basis for filing the suit in the United States had been the more favorable laws available to the plaintiffs; Scottish law apparently limited the injuries for which wrongful death damages could be awarded and did not recognize strict liability in tort. *See id.* at 240. The Supreme Court determined, however, that the presence of a juridical advantage in the United States should not be considered a substantial deterrent to dismissing the action on the ground of *forum non conveniens* when other *Gulf Oil* factors favor such a dismissal. *See infra* notes 180-84 and accompanying text.

178. *See Piper*, 454 U.S. at 241.

179. *Id.* at 242-44. The Court also noted that litigation had been instigated in the United Kingdom against several defendants, including Piper, and that the appropriate British governmental authorities had already undertaken an investigation. *Id.* at 239-40 & 240 n.2.

180. *Id.* at 242.

181. *Id.* at 244; *see also infra* text accompanying note 185.

182. *Id.* at 249 (citing Williams v. Green Bay & Western R. Co., 326 U.S. 549, 555 n.4 (1946)).

makes it useful to United States courts.[183] Although the Court recognized that there might be circumstances in which the possibility of an unfavorable change in the substantive law might be given substantial weight, such a circumstance would only arise if the alternate forum provides a remedy which is "so clearly inadequate or unsatisfactory that it is no remedy at all."[184] In litigation involving an alternate forum that provides some basis for a remedy, as in the action against Piper, the Court concluded that the other *Gulf Oil* factors should determine the outcome of the *forum non conveniens* decision, and that the potential change in law should not be given substantial weight.[185]

The Court next examined whether the citizenship of the plaintiff constitutes an appropriate consideration in the balancing of the *Gulf Oil* factors. Although the development of the *Gulf Oil* criteria had been based on the assumption that the plaintiff's choice of forum would be given substantial deference, the Court concluded that a foreign plaintiff's decision to litigate in the United States should be given less deference.[186] The basis for the conclusion rested on the supposition that it is reasonable to assume that it is convenient for a plaintiff to choose his home forum in which to litigate, but it is less reasonable to make a similar assumption when a foreign plaintiff has chosen the same forum.[187] The Supreme Court's decision solidified the policy of giving greater deference to a United States citizen's choice of forum and expanded this policy by expressly accepting that a foreign plaintiff's choice of the United States as the appropriate jurisdiction was entitled to less deference.[188] In light of the predisposition against exercising United States jurisdiction when solicited by a foreign plaintiff, the Supreme Court concluded that the balance of the *Gulf Oil* factors supported granting the defendant's motion

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183. *Id.* at 250.

184. *Id.* at 254. As the Court implicitly recognized in its footnote, this determination goes not so much to the question of changes in substantive law, but to the initial determination of whether there exists an adequate alternate forum, which determination must be made prior to any weighing of the appropriate *Gulf Oil* factors. *See id.* at 254-55 n.22; *see also supra* notes 169-72 and accompanying text.

185. *See Piper*, 454 U.S. at 247.

186. *Id.* at 256.

187. *Id.*

188. *See supra* notes 170-74 and accompanying text.

to dismiss.[189]

The Supreme Court's decision in *Piper* did not simply preserve the flexibility inherent in the existing doctrine of *forum non conveniens;* the decision has enabled and, to some extent, forced the lower federal courts to exercise far greater latitude in dismissing international litigation by submitting for consideration a plaintiff's citizenship and residence. Prior to the *Piper* decision a strong presumption favored the plaintiff's chosen forum and could only be overcome when the private and public factors set forth in *Gulf Oil* clearly recommended a trial in the alternate forum.[190] In effect, the presumption no longer exists for foreign plaintiffs. Consequently, the decision to dismiss on the grounds of *forum non conveniens* depends much more on the relative weight given to the public and private factors rather than whether the factors, when weighed together, suggest that an alternate forum is clearly more appropriate than the chosen forum.

Since the *Piper* decision, lower federal courts considering a *forum non conveniens* motion in international litigation have placed significant weight on the plaintiff's citizenship. Failure to recognize or examine the citizenship of a plaintiff constitutes an abuse of the trial court's discretion;[191] similarly, a trial court's express assumption that a strong presumption exists in favor of a foreign plaintiff's choice of forum amounts to an error and requires de novo appellate analysis of the *forum non conveniens* factors.[192] The examination of citizenship does not, in itself, indicate a substantial diversion from the traditional doctrine of *forum non conveniens* as expressed in *Gulf Oil.* The importance given to the question of citizenship, however, indicates a shift away from the original purpose behind the doctrine—to protect the chosen forum and the defendant from the inconveniences of litigating a case brought by the plaintiff in a clearly inappropriate forum—and toward a policy that grants the court greater discretion to decline to exercise its jurisdiction and the defendant greater affirmative power to determine the forum.

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189. *Piper,* 454 U.S. at 261.

190. *See supra* text accompanying notes 150-51.

191. Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1335 (9th Cir. 1984).

192. Friends For All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 606-07 (D.C. Cir. 1983).

V. Conclusion

The doctrine of *forum non conveniens* was adopted by the courts of Scotland, England, and the United States as a standard by which they could decline to exercise their jurisdiction when the circumstances surrounding particular litigation indicated that another forum was more appropriate. Each of these judicial systems also recognized that a court possesses an interest in ensuring that defendants not be subjected to unnecessary inconvenience if the litigation could be adjudicated elsewhere. It remains clear, however, that the continued viability of the doctrine for these judicial systems and the ability of the doctrine to satisfy its enumerated purposes depends heavily upon the flexibility inherent in the factors considered in a *forum non conveniens* decision. The need for flexibility has become increasingly apparent in light of substantially more congested courts and the growing intricacies involved in international litigation. Each judicial system has responded to these pressures by encouraging the evolution of the doctrine of *forum non conveniens* in a common fashion: by slowly, yet systematically, eliminating barriers to dismissal.

In Scotland, evolution of the doctrine of *forum non conveniens* has taken the form of a willingness by the courts to give greater weight to factors which historically were not given substantial consideration.[193] In addition, the Scottish judiciary appears more inclined to consider earlier the propriety of litigating a matter in an alternate forum rather than to focus on the appropriateness of the Scottish forum. The English courts have proceeded in a similar fashion. The traditional propensity toward upholding jurisdiction in all circumstances except those oppressive to the defendant has been superseded; under the current doctrine the English courts first determine the "natural forum" in which the matter should be litigated,[194] eliminating vexation and oppressiveness as prerequisites to considering a defendant's motion to stay a proceeding.[195] The effect in both Scotland and England has been to facilitate dismissal. Similarly, in the United States there has been a shift away from the presumption in favor of a plaintiff's choice

193. *See supra* notes 56-62 and accompanying text (discussing the increased willingness to consider the difficulties associated with applying questions of foreign law).

194. *See supra* notes 117, 120-22 & 130-31 and accompanying text.

195. *See supra* notes 110-14 and accompanying text.

of forum,[196] to recognize more frequently the adequacy of an alternative forum.[197] The effect has been to eliminate what were once substantial barriers to a defendant's motion to dismiss on the grounds of *forum non conveniens.*

The jurisdictional concerns that prompted various judicial systems to adopt the doctrine of *forum non conveniens* have not disappeared. The need for flexibility when a court considers whether to exercise its jurisdiction has increased due to the sheer volume and complexity of contemporary international litigation. The doctrine, however, is designed to serve a dual purpose: to protect judicial systems from adjudicating litigation which has little or no connection with the particular forum, and to protect defendants from having to defend a claim in a forum that is unnecessarily inconvenient. Although the current trend toward dismissal serves both concerns, it necessarily strips the plaintiff of much of its flexibility to choose the forum in which to adjudicate its claims. The doctrine of *forum non conveniens* should not be permitted to expand to the point that the defendant exercises ultimate control over choice of forum in international litigation. Instead, the doctrine should ensure that litigation is not allowed to proceed in a forum where it subjects the defendant to an unnecessary burden or in circumstances that indicate the claims between the parties can more appropriately be adjudicated by the courts of an alternate forum.

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196. *See supra* text accompanying notes 186-89.
197. *See supra* notes 153-57, 182-85 and accompanying text.