NOTES AND COMMENTS

Forum Shopping in International Air Accident Litigation: Disturbing the Plaintiff's Choice of an American Forum

I. INTRODUCTION

The growth of multinational corporations and international trade, improvements in modes of transportation and increased ease of communication have given rise to an increase in international litigation.[1] They have also provoked a call for the reexamination of the doctrine of forum non conveniens.[2] A wrongfully injured party's choice of forum has broadened immensely in the past quarter century.[3] Personal jurisdiction over a potential defendant may exist in several countries, since the choice of whom to sue may relate to the number of corporate veils a plaintiff can pierce.[4] The number of potential defendants may also be large, depending upon how many parties have exercised control over the design, creation, production or operation of the instrumentality which caused the injury.[5] As the choice of jurisdictions and defendants has expanded, advances in transportation[6] have enabled a plaintiff to bring suit in distant forums. In addition, news now travels rapidly even to obscure parts of the earth. This fact

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1. *See* Martin, *Death and Injury in International Air Transport*, 41 J. AIR L. & COM. 255, 256 (1975); *cf.* Kennelly, *Litigation of Foreign Aircraft Accidents — Advantages (Pro and Con) from Suits in Foreign Countries*, 16 FORUM 488, 488-89 (1981).

2. *See* Fitzgerald v. Texaco, Inc., 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J. dissenting); Kennelly, *supra* note 1, at 488.

3. Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 57 (1967).

4. *See, e.g.*, Castanho v. Jackson Marine, Inc., 484 F. Supp. 201 (E.D. Tex. 1980). In this case, the Portuguese seaman injured on board a vessel docked in an English harbor, could have sued theoretically: (1) in the country of registry of the ship on which he was injured (Panama); (2) in the country of incorporation of the company which managed and controlled the affairs of the ship at the time of the injury (Netherlands Antilles); (3) in the country of incorporation of the parent company (Panama) of which the ship's operator in (2) was a wholly-owned subsidiary; or (4) in the country of incorporation of the parent company (United States) of which the ship operator's parent company was a wholly-owned subsidiary. *Id.* at 204-05.

5. Kennelly, *Transitory Tort Litigation — The Need for Uniform Rules Pertaining to In Personam Jurisdiction, Forum Non Conveniens, Choice of Laws, and Comparative Negligence*, 22 TRIAL LAW. GUIDE 422, 433 (1978). Such instrumentalities have included an aircraft or aircraft component, *see, e.g.*, Hemmelgarn v. Boeing Co., 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980); an automobile tire, Danser v. Firestone Tire & Rubber Co., 86 F.R.D. 120 (S.D.N.Y. 1980); a drug, Lake v. Richardson-Merrell, Inc., 538 F. Supp. 262 (N.D. Ohio 1982); or even a contract, Shields v. Mi Ryung Constr. Co., 508 F. Supp. 891 (S.D.N.Y. 1981), or antitrust violation, Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982).

6. Kennelly, *supra* note 5, at 425.

may well encourage litigation by inducing remote yet better informed parties to seek recovery[7] or refuse offers of settlement.[8]

In spite of the increased ease with which people can communicate and travel today, U.S. courts continue to apply the doctrine of forum non conveniens.[9] This doctrine recognizes the principle that a court with little relation to either the parties or the cause of action may decline jurisdiction of a cause otherwise properly before it.[10] Critics argue that the doctrine is outmoded[11] and serves only to alleviate court docket congestion.[12] The doctrine, however, has not remained stagnant. The variety of factors which comprise the doctrine lends it continued flexibility and dynamism.[13] The underlying principles of justice and fairness remain, while the significance of each element has changed through time to maintain the vitality of the doctrine.

This Comment provides the international lawyer with guidelines for assessing the likelihood that a U.S. forum will entertain a foreign suit.[14] The author concentrates on aviation litigation, since air disaster cases offer a broad array of potential defendants and forums,[15] present the complexities involved in most foreign suits,[16] and occasionally touch upon admiralty law,[17] the field which has predominantly shaped the doctrine of forum non conveniens.[18] The principles adduced are applicable, however, to product liability and personal injury suits in general.

This Comment first examines the factors which have deterred foreign air accident litigation and the elements which make a U.S. forum attractive, espe-

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7. *See* Martin, *supra* note 1, at 256.

8. *Cf. id.* It may also encourage litigation by providing information regarding potential clients to members of the "plaintiff's bar" who are looking for contingency fees. *See, e.g.*, Pain v. United Technologies, 637 F.2d 775, 797 n.130 (D.C. Cir. 1980) *cert. denied* 454 U.S. 1128 (1981); Castanho v. Brown & Root (U.K.) Ltd., [1981] 1 All E.R. 143 (H.L.); *cf.* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 239 (1981) *reh'g denied* 455 U.S. 928 (1982) (the nominal plaintiff was the secretary of the lawyer).

9. *See, e.g., Piper*, 454 U.S. 235 (1981).

10. Restatement (Second) of Conflicts of Laws § 84 (1971); *see also* Jones v. Searle Laboratories, 100 Ill. App. 3d 165, 168, 426 N.E.2d 917, 920 (1981). The doctrine presupposes at least two forums in which the defendant is amenable to process, or to whose jurisdiction he will consent, Schertenleib v. Traum, 589 F.2d 1156, 1164 (2d Cir. 1978), and furnishes criteria for a choice between them. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). When a court determines that the interest of justice dictates relegation of the suit to a foreign forum, whether upon the motion of a party or its own motion, the court shall stay or dismiss the action in whole or in part, on any conditions that may be just. *See, e.g.*, CAL. CIV. PROC. CODE § 410.30(a) (West 1973).

11. *See supra* note 2.

12. *Cf.* Kennelly, *supra* note 1, at 493.

13. *See Piper*, 454 U.S. at 249-50.

14. A foreign suit, as the term is used in this Comment, is one brought to a U.S. forum but concerns an injury or damages initially if not totally incurred outside the borders of the United States.

15. *Cf.* Kennelly, *supra* note 1, at 492.

16. *See generally* Kennelly, *supra* note 5.

17. *See, e.g., in re* Air Crash Disaster Near Bombay, 531 F. Supp. 1175 (W.D. Wash. 1982).

18. *See generally* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949).

cially in aviation crash cases. The Comment also addresses the issues of personal and subject matter jurisdiction, for only after the jurisdictional prerequisites of the U.S. forum are met does the doctrine of forum non conveniens present an obstacle.[19] The author then reviews the development of the modern doctrine in the United States. Finally, the Comment analyzes the pivotal factors in a modern application of forum non conveniens. The author concludes that it is the nuances of these factors which should guide the practitioner in determining the proper forum.

II. DIMINISHING DETERRENTS TO INTERNATIONAL AIR ACCIDENT LITIGATION

Potential foreign plaintiffs are generally less litigious than U.S. residents, and acquiesce to their national legal methods of damage assessment rather than undergo protracted litigation.[20] Jurisdictional complexities concomitant with the growth of the aviation industry may serve to frustrate the already reluctant litigant. Such obstacles as inadequate accident investigation,[21] the Warsaw Convention[22] and government immunity[23] discourage potential foreign plaintiffs from pursuing remedies in the courts.[24] The barriers to international air accident litigation are, however, breaking down.

A. *The Growth of International Aviation*

The growth of international aviation has brought businesses of diverse nationalities into the air transportation market.[25] Virtually every nation has introduced its own flag air carrier[26] in commercial operations. Jurisdictional problems of increasing complexity may arise when airlines or products of multinational ventures[27] are involved in air accidents.[28] The inability to join all potential defendants, *i.e.*, the airline, the air traffic controller, the airport operator, the

19. "[T]he doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue." *Gilbert*, 330 U.S. at 504; *see also* Tompkins, *Barring Foreign Air Crash Cases from American Courts*, 23 For Def. 16, 17 (June, 1981); Kennelly, *supra* note 1, at 503.

20. Martin, *supra* note 1, at 255.

21. *See infra* § II.B.

22. *See infra* § II.C.

23. *See infra* § II.D.

24. *See* Martin, *supra* note 1, at 255.

25. *See* Salacuse, *The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law*, 45 J. AIR L. & COM. 807, 833 (1980); Cook, *Counting the Dragon's Teeth: Foreign Sovereign Immunity and its Impact on International Aviation Litigation*, 46 J. AIR L. & COM. 687, 705-06 (1981).

26. A "flag air carrier" is an airline which conducts commercial flights beyond the borders of the nation of its domicile, for which international operations it displays the registration ("flag") of its home country. There are about one hundred major foreign airlines in international operations. Cook, *supra* note 25, at 705.

27. The consortium Airbus Industrie, the Franco-German manufacturer of the Airbus, is one example. Air Afrique and Scandinavian Airlines System (SAS) are examples of multinational airline operators.

28. Kennelly, *supra* note 1, at 494.

maintenance provider, the aircraft designer and the component manufacturer, may force a plaintiff to pursue several separate actions or to attempt to impose total liability on a single defendant.[29]

If international air services follow the example of the U.S. domestic air industry, airline deregulation may help to reduce the complexities by inducing a splintering of services and the use of smaller aircraft. A movement in favor of competition is currently apparent in the commercial air transportation industry.[30] The United States' passage of the International Air Transportation Competition Act[31] and the push toward less restrictive bilateral air commerce agreements[32] indicate that the United States is attempting to reduce nationalistic protections and free up natural market forces internationally.[33]

Following domestic deregulation[34] in the United States, major airlines reduced the number of their routes but commuter and air taxi services proliferated.[35] Nationalistic as well as economic motivations are, however, responsible for the growth of international flag air carriers.[36] The effect of the United States' deregulation policy[37] on international operations is, therefore, difficult to predict. The consolidation of air services, which would require larger aircraft, would complicate the choice of a proper forum in the event of an accident, since passengers of diverse nationalities are more likely to be involved.[38] On the other hand, a development similar to that of the commuter air service in the United States in the wake of deregulation[39] may lead to splitting of services among smaller aircraft over divergent, shorter routes. Such a development might reduce the number of competing international interests in the event of an individual accident.[40] In either case, the obstacles described in the following sections will still await the practitioner.

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29. *Id.* at 492.

30. *See* Driscoll, *Deregulation* — The U.S. Experience, 9 INT'L BUS. LAW. 154, 157-58 (1981).

31. Pub. L. No. 96-192, 94 Stat. 35 (1980) (codified in scattered sections of 49 U.S.C.).

32. *See* Driscoll, *supra* note 30, at 157-58.

33. *See id.*

34. The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.).

35. For articles on the growth of the commuter industry in the wake of deregulation in the United States, see 40 TRAVEL WEEKLY 1, 5-108 (May 1981); *see also* Note, *Commuter Airlines and the Airline Deregulation Act of 1978*, 45 J. AIR L. & COM. 685, 701-09 (1980).

36. *See* Salacuse, *supra* note 25, at 833; *cf.* Rosenfield, *International Aviation: A United States Government Industry Partnership*, 17 INT'L LAW. 473, 473 (1982) (asserting that airlines have become instruments of foreign policy).

37. Salacuse, *supra* note 25, at 837.

38. *See, e.g., in re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1974) (laws of over twenty countries could have been found to apply); *see also* Kennelly, *supra* note 1, at 506.

39. *See supra* note 35.

40. The likelihood of reduced diversity of nationalities involved in the event of a crash relates inversely to the size of the aircraft: smaller aircraft mean fewer passengers and shorter flights having destinations within or close to the country of the airline's domicile.

B. *Investigation of Accidents Abroad*

U.S. courts have expertise in air accident litigation[41] due largely to the ability of U.S. investigative agencies, notably the National Transportation Safety Board (NTSB), to collect and analyze facts regarding an air accident and its probable causes.[42] By contrast, the inadequacies of accident investigation in other parts of the world pose obstacles to discovery in foreign jurisdictions.[43] These difficulties have presented a virtually insurmountable hurdle to aircraft accident litigation.[44] Investigating agents often deny passengers and their representatives access to the investigative proceedings.[45] The resulting report, if any, may also be without value as evidence, especially where other governmental bodies or the nation's flag air carrier pressure the investigating agency to obscure indications of potential liability.[46]

Annex 13 of the Chicago Convention[47] and the International Civil Aviation Organization (ICAO) Manual of Aircraft Accident Investigation,[48] provide guidelines for accident investigations and reports. Many foreign agencies either do not apply the minimum standards of the provisions, or comply with them only technically.[49] Often compounding the problem is the lack of expertise of the foreign investigating agency, which may not understand the legal significance of evidence, even within its own legal system.[50] But ameliorative steps are apparent even in this area, fraught as it is with political and practical problems, as

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41. Kennelly, *supra* note 1, at 521.

42. Congress had delegated the duty to investigate major air accidents in the United States to the Civil Aeronautics Board (CAB). Pub. L. No. 85-726, 72 Stat. 781 (1958); Pub. L. No. 87-810, 76 Stat. 921 (1962). After reorganization under the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966), and the passing of the Independent Safety Board Act, Pub. L. No. 93-633, 88 Stat. 2156 (Jan. 3, 1975), the National Transportation Safety Board (NSTB) bears the responsibility. 49 U.S.C. §§ 1441, 1903(a)(l)(A) (1976).

43. *See* Martin, *supra* note 1, at 258-61.

44. *See id.*

45. *Cf. id.* at 257 (stating that there is now a growing pressure for access).

46. *Id.* at 259.

47. Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 43, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 *(entered into force* Apr. 4, 1947). For a discussion of the Chicago Convention and its subsequent developments, see Gertler, *Amendments to the Chicago Convention: Lessons From Proposals That Failed*, 40 J. AIR L. & COM. 225 (1974).

48. ICAO Doc. No. 6920. Part I of the Manual covers "General Considerations" and notification of accidents. Part II gives guidelines for the organization of an accident investigation. Part III outlines various aspects an investigation should cover, including operation, structures, powerplants, aircraft systems, maintenance and post-accident activities. Part IV details the types and purposes of reports which should follow different stages of investigation. Part V deals with accident prevention. The appendix contains examples of investigation material and forms, and a list of national laws relating to aircraft accident investigation. *Id.* (available through the Office of Publications, International Civil Aviation Organization (ICAO), Montreal, Canada).

49. *See* Martin, *supra* note 1, at 259.

50. *Id.* at 259-60; *cf.* 2 L. KREINDLER, AVIATION ACCIDENT LAW § 24.06 (1980) (stating that foreign governments seem to make secrecy a policy).

countries attempt to improve accident investigation and facilitate access to information.[51]

C. *The Warsaw Convention*

The Warsaw Convention[52] governs the liability of nearly all commercial airlines in international operations.[53] The Hague Protocol of 1955 established the limitation of liability at its present level of approximately $16,600 for international travel which does not reach the United States.[54] The United States, dissatisfied with such a low limit, imposes liability up to $75,000 upon air carriers for flights to and from the United States.[55]

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51. *See, e.g.*, Schoner, *Switzerland: new legislation on air accident investigation*, 7 AIR L. 122 (1982), *citing* Lur, *Die neue Verordnung über die Flugunfalluntersuchungen*, 8 ASDA BULL. 3, 3-14 (1980).

52. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) [hereinafter cited as Warsaw Convention].

53. 1 L. KREINDLER, AVIATION ACCIDENT LAW § 11 (1982). Enacted in 1929, the international treaty was the product of two international conferences concerning the emergence of the air transportation industry and the development of air law. *Id.* The purpose of the treaty was "to limit [international air carriers' potential] liability [and] to facilitate recovery by injured passengers." Husserl v. Swiss Air Transp., 388 F. Supp. 1238, 1247 (S.D.N.Y. 1975). The original limitation of liability was 25,000 Poincaré French Francs, or about $8,300, for personal injury or death of a passenger, absent wilful misconduct. Warsaw Convention, *supra* note 52, art. 22.

54. *International Civil Aviation Organization, International Conference on Private Air Law*, Doc. 7686-LC/140 (1956).

55. The Montreal Interim Agreement, 49 U.S.C. § 1502 (1976); Civil Aeronautics Board Order E23-680, 31 Fed. Reg. 7302 (1966). The Convention limitations apply to all international transportation, defined as any air transportation between one signatory nation and another, or between points within or from and returning to a signatory nation as long as the total trip includes a point within the territory of another country, whether the latter adheres to the Convention or not. Warsaw Convention, *supra* note 52, art. 1(2). The item which determines the applicability of the Convention limitations is the passenger's contract for carriage or airline ticket, which reflects the intended destinations for the journey. 1 L. KREINDLER, *supra* note 53, § 11.05[2]. A discussion of the complex technicalities of the application of the Warsaw Convention is beyond the scope of this Comment. For a practical discussion, see 1 L. KREINDLER, *supra* note 53, §§ 11, 12, 27. For a more in-depth study, see R. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER (1981). For a discussion of the United States' involvement in the development of the Convention, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

Three recent cases have challenged the enforceability, scope, and effect of the Convention. The Second Circuit has held that recent international disagreement concerning the gold standard upon which the damage limitations are based, has rendered the limits of liability unenforceable. Franklin Mint v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982), *aff'd*, __ U.S. __ (1984). The unenforceability of the damages limitations invalidates, therefore, the Convention as a defense. *In re* Aircrash at Kimpo Int'l Airport, Korea, 558 F. Supp. 72 (C.D. Cal. 1983). These courts applied the principle of *rebus sic stantibus*, which dictates that if later events change the conditions upon which a treaty is founded, compliance is no longer obligatory. Moller, *The Warsaw Convention: Can It Survive? reprinted in* 129 CONG. REC. S2276 (daily ed. Mar. 8, 1983); *see* BLACK'S LAW DICTIONARY 1139 (rev. 5th ed. 1979).

If the Warsaw Convention is found nonetheless to apply, the limitation of liability could constitute a deprivation of property interests entitling the injured party to just compensation as required by the fifth amendment of the U.S. Constitution. A U.S. plaintiff might then sue for compensation through the U.S. Court of Claims under the Tucker Act, ch. 646, 62 Stat. 940 (1948) (codified as amended at 28 U.S.C. § 1491 (Supp. V 1981)). *In re* Aircrash in Bali, Indonesia, 684 F.2d 1031 (9th Cir. 1982).

The Warsaw Convention has greatly deterred international commercial air accident litigation. By creating limits of liability,[56] originally to protect the fledgling industry, and shifting the burden of proof from the injured passenger to the airline,[57] the Convention has been effective in producing settlements.[58] As the Convention limits are increasingly called into question,[59] however, injured parties may seek to recover damages in excess of the limitation.[60] Furthermore, as the media disseminate information on air accidents and ensuing lawsuits more quickly and broadly,[61] parties suffering similar injuries may be prompted to pursue redress in the courts.[62]

D. *Government Immunity*

It is a recognized principle that a government and its entities accept liability only by consent.[63] Those nations, notably the Soviet Bloc,[64] which do not acknowledge government liability may not only control the airways and operate the airports, but also own the national airlines.[65] The absolute defense of govern-

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56. *See* Warsaw Convention, *supra* note 52, art. 22.

57. Martin, *supra* note 1, at 255.

58. *Id.*

59. *Id.* at 261. A tabulation by the CAB of settlements and court judgments for passenger deaths and serious injuries involving U.S. air carriers for the years 1960-69 revealed that a limitation of liability would have to exceed $100,000 in order to compensate 80% of the U.S. traveling public for loss of future earnings, loss of society, pain and suffering, etc. 1 L. KREINDLER, *supra* note 53, § 12B.02. According to the best information available, 85% of the airline accident settlements and verdicts during the 1970's have not exceeded $320,000. 129 CONG. REC. S2236 (daily ed. Mar. 7, 1983) (statement of Sen. Percy).

60. *See, e.g.*, Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977); *in re* Air Crash Disaster at Warsaw, Poland, 535 F. Supp. 833 (E.D.N.Y. 1982); *in re* Air Crash in Bali, Indonesia, 462 F. Supp. 1114 (C.D. Cal. 1978), *rev'd* 684 F.2d 1301 (9th Cir. 1982); *cf.* Adamsons v. American Airlines, 16 Av. Cas. (CCH) 17,195 (N.Y. Sup. Ct. 1980).

61. Martin, *supra* note 1, at 256.

62. *See, e.g., id.*

63. *See* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 478, 481-82 (1812) (Marshall, J.).

64. Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1861, 1868 n.56 (1981).

65. According to the best information available, among the totally state-owned airlines are the following: Aeromexico (Mexico), Air India (India), Air New Zealand (New Zealand), Aerolineas Argentinas (Argentina), British Airways (United Kingdom), British West Indies (Trinidad and Tobago), Nigeria Airways (Nigeria), and Qantas (Australia).

The following are majority state-owned: Air France (France — 98.55%), Air Jamaica (Jamaica — 60.00%), Air Pacific (Fiji — 60.69%), Air Zaire (Zaire — 64.00%), Bahamasair (Bahamas — 84.00%), Finnair (Finland — 73.00%), Pakistan International (Pakistan — 90.00%), Royal Air Maroc (Morocco — 67.73%), Sabena (Belgium — 65.00%), and Viasa (Venezuela — 55.00%).

The following appear to be at least 50% state-owned: Aeroflot (U.S.S.R.), Avianca (Colombia), Czechoslovak OK Airlines (Czechoslovakia), Iberia (Spain), LOT (Poland), South African Airways (South Africa), TAP (Portugal), and TAROM (Romania).

The above lists do not include those wholly or partially state-owned airlines whose governments have expressly waived their immunity. U.S. Dept. of Transportation, CAB, Bureau of International Aviation, Governmental Ownership, Subsidy, and Economic Assistance in International Commercial Aviation (1975), *cited in* Cook, *supra* note 25, at 705 n.86.

ment immunity may thus rule out such potential defendants.

An increasing number of nations apply a doctrine of limited immunity, under which a sovereign enjoys immunity only for *acta jure imperii, i.e.,* the exercising of governmental authority in a purely governmental capacity.[66] Some statutes, such as the United States' Foreign Sovereign Immunity Act of 1976[67] and Great Britain's State Immunity Act of 1978,[68] may, however, enable suits against a foreign sovereign under certain circumstances. A finding of circumstances described in the statutes which constitute, for example, a commercial activity,[69] or an express or implied waiver,[70] may render a foreign sovereign vulnerable to suit. The combination of a plaintiff's fear of a home court's potential bias and the immunity piercing statutes of foreign nations may motivate the foreign plaintiff to seek out a foreign forum.[71]

When faced with the obstacles of government immunity and liability limits,[72] an injured party may still seek to recover from an aeronautics manufacturer who enjoys no such defenses;[73] many of these manufacturers are headquartered in the United States.

III. BRINGING THE SUIT TO A U.S. FORUM

Since court docket congestion can cause a loss of valuable time between the filing and hearing of a suit,[74] the proper choice of forum is crucial in order to avoid dismissal after the cause of action has expired due to statutes of limitations or similar laws. In choosing a jurisdiction, the practitioner should assess not only the probability of a court's retention of the suit, but also the potential degree as well as the likelihood of success.

Criteria which influence the choice of forum are special legal factors such as the required elements of proof, the rules of liability, and additional theories of

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66. Note, *The State Immunity Act 1978*, 42 MOD. L. REV. 72, 73 (1979).

67. Pub. L. No. 94-583, 90 Stat. 2891 (1976), 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976). For a discussion of the Immunities Act, see generally Cook, *supra* note 25.

68. State Immunity Act, 1978, ch. 33. For a discussion of the English Immunity Act, see Bird, *The State Immunity Act of 1978: An English Update*, 13 INT'L LAW. 619 (1979), *cited in* Cook, *supra* note 25, at 688 n.2; see also Mann, *The State Immunity Act 1978*, 50 BRIT. Y.B. INT'L L. 43 (1979).

69. *See, e.g.*, 28 U.S.C. § 1605(a)(2) (1976).

70. *See, e.g.*, 28 U.S.C. §§ 1604, 1605(a)(1) (1976); 14 C.F.R. § 375.26 (1983).

71. Note, *supra* note 64, at 1868-69.

72. *See* Martin, *supra* note 1, at 255.

73. Loggans, *Personal Injury Damages in International Aviation Litigation: The Plaintiff's Perspective*, 13 J. MAR. L. REV. 541, 544 n.11 (1980); *see also* Martin, *supra* note 1, at 255.

74. The number of civil cases filed in the U.S. district courts rose 17.4% in the most recently recorded year, from 190,428 for the calendar year 1981, to 223,581 in 1982. The median time lapse between filing and disposition of a case for the second quarter of 1982 was eight months for the District Court, Southern District of New York, ten months for the District Court, Eastern District of New York, and seven months for all federal district courts. Telephone interview with Ms. P. Crawford, Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, Washington, D.C. (April 26, 1983).

recovery;[75] the possibility of higher awards for damages;[76] problems of costs,[77] including attorney fees which are recoverable in some jurisdictions and may be arranged on a contingency basis in others;[78] problems with the production of evidence, including the existence of favorable or liberal rules of pre-trial discovery;[79] and the efficiency of a given forum in rendering a just decision.[80]

In international aircraft accidents,[81] a plaintiff's choice will include a U.S. forum in virtually every case.[82] U.S. Federal District Courts are attractive forums, as evidenced by the amount of aviation disaster litigation they have adjudicated. The extensive experience of U.S. courts in such cases enhances their attraction quality.[83]

A. *Factors Favoring a U.S. Forum*

A variety of factors may induce the legal practitioner to file suit in a U.S. court.[84] In personal injury and wrongful death suits a favorable judgment in a U.S. court will frequently produce a considerably higher award than is to be expected elsewhere, due largely to the U.S. jury system.[85] The contingency fee system, liberal discovery rules, and a strict liability theory of recovery facilitate bringing, preparing, and presenting a case. The combination of these factors makes a U.S. court an attractive forum in which to pursue a personal injury or wrongful death suit.

1. Amount of Potential Recovery

In the United States the jury system and the recognition of numerous elements of damages produce awards for personal injury or death which are

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75. Lyall, *Forum Shopping: Problems*, 27 J. L. SOC'Y SCOT. 165, 165 (April 1982).

76. *Id.*

77. The filing fees in some countries are based upon the alleged value of the recovery sought. Kennelly, *supra* note 1, at 493.

78. Lyall, *supra* note 75, at 165; Martin, *Recent Trends in International Aviation Accident Litigation — A Practical View*, 5 ANN. AIR & SPACE L. 189, 189 (1980); S. SPEISER, LAWSUIT 437 (1980). In general, no European country allows contingency fee arrangements. Grossen & Guillod, *Medical Malpractice Law: American Influence in Europe?* 6 B.C. INT'L & COMP. L. REV. 1, 25 (1983).

79. *See* Martin, *supra* note 1, at 256-57.

80. Lyall, *supra* note 75, at 165; Kennelly, *supra* note 1, at 489, 493; *see, e.g., In re* Air Crash Disaster Near Bombay, 531 F. Supp. 1175 (W.D. Wash. 1982); *cf.* Tokio Marine and Fire Ins. v. Bell Helicopter Textron, 17 Av. Cas. (CCH) 17,321 (S.D. Tex. 1982).

81. Although this article draws predominantly from foreign aircraft accident cases, the principles derived are applicable to other cases brought in a U.S. forum concerning a controversy arising, or an injury sustained, outside the borders of the United States.

82. *See, e.g.*, Martin, *supra* note 1, at 263. In virtually all cases, many components of an aircraft, if not the aircraft itself, will be U.S. products.

83. *See* Kennelly, *supra* note 1, at 521.

84. *See, e.g.*, Lyall, *supra* note 75, at 165.

85. *See* 2 L. KREINDLER, *supra* note 50, § 20.05[2][d].

generally higher than in any other national jurisdiction.[86] In the U.S. jury system, ordinary citizens assess the damages.[87] Jurors tend to be more emotional and sympathetic than a judge or tribunal toward the plaintiff in a personal injury or wrongful death suit, and award higher damages accordingly.[88] As an indication of probable court awards, settlement figures for U.S. airlines show an average amount of nearly $140,000 per person in recent major accidents.[89]

Survival and wrongful death statutes of virtually all state jurisdictions recognize elements of damages beyond those allowed in many foreign jurisdictions.[90] These elements include loss of future earnings, loss of society, loss of parental guidance, pain and suffering or fear of impending death, and funeral expenses.[91] Several U.S. jurisdictions also allow punitive damages where the injury is wilfully or wantonly inflicted.[92] By contrast, foreign law may impose limits of liability under given circumstances, regardless of the depth of the defendant's pocket.[93] These damage ceilings and the promise of higher awards in the United States[94] may induce the foreign plaintiff to bring suit there.

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86. Martin, *supra* note 78, at 189; *see* Kennelly, *supra* note 1, at 489. The relatively high standard of living in the United States induces juries to assess damages on the basis of local perspectives, giving life and injury a greatly enhanced value as compared to the value given them in many other jurisdictions. Furthermore, U.S. jurisdictions generally allow: (a) an inflation factor in assessing the loss of future earnings; (b) compensation for loss of society; and (c) no reductions for the estimated tax liability on future earnings or for other contingencies such as future illness, prospective financial setbacks, personality defects, remarriage and inheritance, which other countries, *e.g.*, Canada, may apply. Hemmelgarn v. Boeing Co., 106 Cal. App. 3d at 586-87, 165 Cal. Rptr. at 196. For examples of damages awarded by a U.S. judge, see Nilsson v. Columbia Pacific Airlines, 15 Av. Cas. (CCH) 18,098 (Wash. Super. Ct. 1980) and Coster v. Columbia Pacific Airlines, 15 Av. Cas. (CCH) 18,101 (Wash. Super. Ct. 1980).

87. *See* U.S. CONST. amend. VII.

88. 2 L. KREINDLER, *supra* note 50, § 20.05[2]. Within the United States, the most generous juries, and the courts with the most crowded dockets, seem to be located in New York City, Chicago, Los Angeles, Miami, and, more recently, Houston. *Id.*, § 20.03[2].

89. 129 CONG. REC. S2239 (daily ed. Mar. 7, 1983) (statistical analysis submitted by Sen. Percy). Due to the Warsaw Convention limitations and other factors of foreign law, settlement figures for international accidents average $70,900, while U.S. domestic accidents average $198,600. *Id.*

90. *See, e.g.*, N.J. STAT. ANN. 2A:31-1 (West 1952).

91. *See, e.g., Hemmelgarn*, 106 Cal. App. 3d at 586-87, 165 Cal. Rptr. at 196.

92. In wrongful death actions, Missouri, Oklahoma, and Texas allow punitive or exemplary damages. *In re* Air Crash Disaster Near Chicago, Illinois, 644 F.2d 594, 606, 607 (7th Cir.) *cert. denied* 454 U.S. 878 (1981). Plaintiffs cannot recover punitive damages in Illinois, *id.* at 605, California, *id.* at 607, Hawaii, *id.* at 631, or Delaware, Magee v. Rose, 405 A.2d 143, 147 (Del. Super. Ct. 1979). As of Sept. 1, 1982, New York allows punitive damages, N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(b) (McKinney 1981) amended by 1982 N.Y. Laws 100, § 1.

93. *See, e.g.*, Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1981) (plaintiff sustained $8 million damage to pier in collision by ship; Trinidad law limits recovery to $570,000); Ciprari v. Servicos Aereos Cruzeiro do Sul (Cruzeiro), 232 F. Supp. 433 (S.D.N.Y. 1964) (severe personal injury suffered as result of crash in Brazil of intranational flight; Brazil Air Code limits liability to $170).

94. Only where the court finds that the *lex fori* applies will the plaintiff be able to escape the imposition of the foreign jurisdiction's damage ceilings or other disadvantageous application of law. *See* cases cited *supra* note 93; *see also infra* § IV.B.1.c .

2. Ease of Discovery

The discovery rules of U.S. federal courts are among the most liberal in the world,[95] a factor which can both advantage and disadvantage the plaintiff.[96] Although an unscrupulous defendant might use discovery to wear down a plaintiff's resolve as well as his resources,[97] the strict rules of foreign jurisdictions tend to push plaintiffs toward a U.S. forum.[98] Pre-trial discovery in England, for example, does not allow for depositions of foreign witnesses[99] so that testimony must be expensively procured or foregone. English practice limits discovery to documents,[100] the request for which must be specific and narrow.[101] Virtually every signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Cases[102] — except for the United States — has elected not to permit "common law pre-trial discovery of documents."[103] West Germany even recognizes a "business secret privilege" which denies a plaintiff access to commercial information.[104]

3. Availability of Contingency Attorney Fees

The U.S. contingency fee system gives the financially weak plaintiff the means to pursue redress for injuries sustained, even against the corporate giant.[105] Plaintiff's counsel bears the risk, and earns his fee only if he wins the suit, then taking from ten up to forty percent of the award.[106] Furthermore, unlike in the English system,[107] U.S. courts do not require the losing party to pay his opponent's attorney fees in addition to court costs.[108] Despite the controversy sur-

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95. *Piper*, 454 U.S. at 252 n.18 (1981), *citing* R. SCHLESINGER, COMPARATIVE LAW: CASES, TEXT, MATERIALS 307, 310 & n.33 (3d ed. 1970).

96. The liberal rules of discovery enable the plaintiff to procure a broad array of information, and to request court sanctions to compel cooperation and disclosure. *See* FED. R. CIV. P. 37; *see, e.g., Chicago Disaster*, 90 F.R.D. 613 (N.D. Ill. 1981).

97. SCM Societa Commerciale S.P.A. v. Industrial and Commercial Research Corp., 72 F.R.D. 110, 113 (N.D. Tex. 1976).

98. *Cf.* Lyall, *supra* note 75, at 165. ("[T]he U.S. [is] the main jurisdiction to which one might be tempted to look.")

99. *See* Aboujdid v. Gulf Aviation Co., 108 Misc. 2d 175, 179, 437 N.Y.S.2d 219, 222 (Sup. Ct. 1980).

100. *Id.*

101. *See* Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States* — A Practical Guide, 16 INT'L LAW. 575, 579 (1982).

102. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Cases, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

103. Platto, *supra* note 101, at 579.

104. *Id.* at 584. *See* ZIVILPROZEßORDNUNG (ZPO) §§ 383, 384, *reprinted in* H. THOMAS & H. PUTZO, ZIVILPROZEßORDNUNG (1977) (for West German statute).

105. *Cf.* S. SPEISER, *supra* note 78, at 437; *e.g.*, Fiorenza v. United States Steel, 311 F. Supp. 117, 120-21 (S.D.N.Y. 1969).

106. For a discussion of the American contingency fee system from a British point of view in relation to the British and U.S. *Castanho* suits, see Martin, *supra* note 78.

107. *See* Platto, *supra* note 101, at 580 n.17.

108. *Piper*, 454 U.S. at 252 n.18.

rounding the contingency fee system,[109] its availability in the United States is a significant factor in the plaintiff's choice of a U.S. forum.[110]

4. The Availability of Strict Liability as a Theory of Recovery

Strict liability as a theory of recovery is not recognized in many foreign jurisdictions.[111] Most European jurisdictions apply a fault or culpability standard derived from Roman and Canon Law.[112] Where strict liability does exist, it has generally developed through decisional law and created "a liability system where the loss is allocated along clear lines, easy to anticipate."[113] Under this system the party with control over the manufacture or operation of the instrumentality has the burden of insuring itself against mishaps.

The Restatement (Second) of Torts, § 402A, states the theory of strict liability in tort which most U.S. jurisdictions apply.[114] Section 402A provides:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer [even though] the seller has exercised all possible care in the preparation and sale of his product.[115]

The doctrine requires no privity between the seller and the user or consumer.[116]

Under the theory of strict liability, a plaintiff need not prove fault: he need only show a defect which renders the product unreasonably hazardous.[117] A party injured in an aircraft accident need not prove that the manufacturer was negligent, only that there was a defect in the design or manufacture of a product which made it unreasonably unsafe.[118] The plaintiff would have to produce evidence of a damaging event and show, either through common knowledge or expert testimony, that a defect was the most likely cause.[119] Since the extension

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109. *See* Martin, *supra* note 1, at 267.

110. *See* Kennelly, *supra* note 1, at 493.

111. Strict liability as a theory of recovery is not recognized, for example, in Scotland, *see infra* note 262 ; Japan, *see infra* note 263; or Sweden, Wahlin v. Edo Corp., 17 Av. Cas. (CCH) 17,562, 17,564 (N.Y. Sup. Ct. 1982).

112. KOBBE, SECTION 153 OF THE NORWEGIAN AVIATION STATUTE AND STRICT LIABILITY 49 (1982).

113. *Id.* at 62.

114. W. PROSSER, LAW OF TORTS 657-58 (4th ed. 1971). Only six of the fifty United States do not recognize strict liability in tort: Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming. 1 PROD. LIAB. REP. (CCH) § 4016, *cited in Piper*, 454 U.S. at 252 n.18.

115. RESTATEMENT (SECOND) OF TORTS §§ 402A (1), (2)(a) (1966).

116. *Id.* at § 402A (2)(b); Greenman v. Yuba Power Products, 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

117. *See generally* Keeton, *Products Liability and the Meaning of Defect*, 5 St. Mary's L.J. 30 (1973).

118. *Cf.* W. PROSSER, *supra* note 114, at 659.

119. *See* Friedman v. General Motors, 43 Ohio St. 2d 209, 331 N.E.2d 702 (1975); *cf.* Hurley v. Beech Aircraft, 355 F.2d 517 (7th Cir. 1966).

of strict liability to aircraft servicers has generally failed, the plaintiff must prove negligence where those who maintain aircraft are defendants.[120] The lawyer should check the law regarding strict liability when choosing to sue in a particular jurisdiction, since uncertainties still mark the field.[121]

B. *Factors in Choosing a Particular Jurisdiction*

For a U.S. court to entertain suit, it must have subject matter jurisdiction over the controversy[122] and personal jurisdiction over the parties.[123] Without these, a court is powerless to hear a case.

1. Personal Jurisdiction

If a court is to hear the case it must have personal jurisdiction over the defendant. If the defendant manufacturer or aircraft operator is not a resident of the district[124] in which the plaintiff wishes to bring suit, one must show some contacts between the defendant and the forum.[125] That the defendant is present within the territory is the clearest proof of his meaningful contact with it.[126] The concept of meaningful contact in effect protects those whose physical presence in the territory is only momentary and, at the same time, encompasses those who transact business within the forum without entering it physically.

The decision of the U.S. Supreme Court in *International Shoe Co. v. Washington*[127] refined the concept of meaningful contact. In *International Shoe* and subsequent cases, the Court determined that the defendant must purposefully have entered the forum state at some time or have invoked the benefit or protection of the forum state's laws in some way.[128] The concept of minimum contacts[129] allows courts to exercise jurisdiction over entities which benefit from contacts with the forum.[130] Only a defendant having sufficient minimum contacts with

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120. *See, e.g.*, Hoffman v. Simplot Aviation, 97 Idaho 32, 539 P.2d 584 (1975).

121. *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 742 (6th ed. 1976). A full discussion of strict liability in U.S. practice would comprise an entire treatise. For further explanation of strict liability, see R. HURSCH & H. BAILEY, AMERICAN LAW OF PRODUCT LIABILITY (1974); L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (rev. ed. 1974). For the most recent cases, see PROD. LIAB. REP. (CCH) and PROD. SAFETY & LIAB. REP. (BNA).

122. 28 U.S.C. §§ 1331, 1332, 1333 (1976 & Supp. V 1981).

123. For a discussion of in personam jurisdiction in the United States, see Kennelly, *supra* note 1, at 494-503.

124. *See* 28 U.S.C. § 1391(c) (1976).

125. World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977).

126. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

127. 326 U.S. 310 (1945).

128. *See supra* note 125.

129. 326 U.S. at 316.

130. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

the forum state will be subject to the jurisdiction and judgments of its courts.[131]

2. Subject Matter Jurisdiction

A federal district court is one of limited jurisdiction.[132] A plaintiff may invoke the subject matter jurisdiction of a federal court under federal question jurisdiction,[133] admiralty jurisdiction,[134] or diversity jurisdiction.[135] Most foreign crash cases fall under diversity.[136] The invocation of jurisdiction under the other headings may, however, serve to strengthen the connection of the controversy with the forum,[137] since U.S. courts would have a heightened interest in adjudicating maritime and, especially, federal question controversies.

a. *Federal Question Jurisdiction*

Federal question jurisdiction exists when the Constitution, laws, or treaties of the United States apply to the dispute.[138] Foreign air crash cases have been based upon the Warsaw Convention,[139] a treaty of the United States, and on the U.S.

131. *See supra* note 125. For an illustration of the parameters of personal jurisdiction, *compare* Donahue v. Far Eastern Air Transp., 652 F.2d 1032 (D.C. Cir. 1981), *rev'g* Misc. No. 77-0147 (D.D.C. 1979), *with* Ciprari v. Cruzeiro, 232 F. Supp. 433 (S.D.N.Y.), *aff'd* 359 F.2d 855 (2d Cir. 1964); *see also* Jayne v. Royal Jordanian Airline, 502 F. Supp. 848 (S.D.N.Y. 1980).

132. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522 (1975); *see also* U.S. CONST. art. III, § 1. The plaintiff could also bring suit in the state courts, which are, for the most part, of general jurisdiction. A plaintiff in state court may, however, lose any state procedural advantage if the defendant is a nonresident or can for any other reason remove the suit to federal court. *See* 28 U.S.C. § 1441 (1976). Under federal question jurisdiction, the defendant may remove the suit to federal court whether he is a resident of the district or not. *See* Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968). After removal, the defendant may have the suit transferred to another district if a more appropriate forum exists or if venue is improper. 28 U.S.C. § 1404(a) (1976); *see also* § 1391 (1976) (venue generally). If, in a diversity case, any defendant is a resident of the jurisdiction in which the suit is brought, removal to federal court is not possible. 28 U.S.C. § 1441(b) (1976); Martin v. Synder, 148 U.S. 663 (1893). For a discussion of removal, see C. WRIGHT, LAW OF FEDERAL COURTS 148-68 (3d ed. 1976).

133. 28 U.S.C. § 1331 (1976 & Supp. V 1981).

134. 28 U.S.C. § 1333 (1976).

135. 28 U.S.C. § 1332 (1976). The powers of the federal district courts derive from the acts of Congress, U.S. CONST. art. III, § 1, and are subject to alteration by law. There has been an on-going movement to abolish federal diversity jurisdiction. The House Judiciary Committee reported H.R. 6816 on August 10, 1982, 128 CONG. REC. H4699 (daily ed. Aug. 10, 1982) but the Senate has no bill before it. 68 A.B.A. J. 1561 (Dec. 1982). The House bill was referred to the Committee of the Whole House on the State of the Union. 128 CONG. REC. H7087 (daily ed. Sept. 15, 1982). Five new bills, which propose restrictions, modifications, mandatory arbitration, reference to state courts, and a floor limitation of $100,000 for the amount in controversy, have since been referred to the House Judiciary Committee. 129 CONG. REC. H5918 (daily ed. July 28, 1983).

136. 1 L. KREINDLER, *supra* note 53, § 2.10[1].

137. *Cf.* Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), discussed in 44 J. AIR L. & COM. 669 (1979) [hereinafter cited as *Casenote*].

138. 28 U.S.C. § 1331 (1976 & Supp V 1981).

139. Warsaw Convention, *supra* note 52, discussed *infra* § II.C; *compare Benjamins*, 572 F.2d 913, *with* Smith v. Canadian Pacific Airways, 452 F.2d 798 (2d Cir. 1971), discussed in 38 J. AIR L. & COM. 573 (1972).

Death On the High Seas Act (DOHSA).[140] Until recently, courts held that the Warsaw Convention did not create a cause of action.[141] In 1978, however, the Second Circuit held that if one of the places recognized by the Convention as a proper forum in which to bring suit was in the United States,[142] a suit for wrongful death[143] could be sustained under federal question jurisdiction.[144]

For DOHSA[145] to apply in the case of an air crash, the crash must have occurred "on the high seas beyond a marine league[146] from the shore of any State, the District of Columbia, or the Territories or dependencies of the United States."[147] Although DOHSA provides a basis for jurisdiction in admiralty,[148] a district court need not exercise its admiralty jurisdiction to hear foreign suits under the Act.[149] Nevertheless, DOHSA applies only if there are sufficient contacts between the United States and the transaction giving rise to the claim to warrant jurisdiction.[150]

b. *Admiralty Jurisdiction*

The sustaining of general maritime jurisdiction[151] follows closely the analysis applicable to federal question claims arising under DOHSA.[152] To establish subject matter jurisdiction under admiralty, an aviation case must possess a "maritime nexus,"[153] but where DOHSA applies, no such showing is required.[154]

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140. 46 U.S.C. §§ 761-68 (1976 & Supp. V 1981).

141. *See Casenote, supra* note 137, at 671-74.

142. Article 28(1) of the Warsaw Convention lists the following four places in which a passenger may bring suit against a commercial airline: the domicile of the airline; the airline's principal place of business; the country where the passenger entered into a contract of carriage (*i.e.*, bought the ticket); and the country of ultimate destination of passage. Kennelly, *supra* note 5, at 450.

143. The action was brought under Article 17 of the Warsaw Convention, which provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

See 49 U.S.C. § 1502 (1976).

144. *Benjamins*, 572 F.2d 913; *see also Casenote, supra* note 137.

145. *See supra* note 140.

146. A marine league is three nautical miles or 18,240 feet (5556 meters).

147. 46 U.S.C. § 761 (1976).

148. *Id.*

149. Tompkins, *supra* note 19, at 18, 20 n.3.

150. *Id.*, *citing* Fitzgerald v. Texaco, Inc., 521 F.2d 448, 454 (2d Cir. 1975), *cert. denied* 423 U.S. 1052 (1976); *cf.* Chiazor v. Transworld Drilling, 648 F.2d 1015, 1018 (5th Cir. 1981).

151. "Admiralty" and "maritime" are synonymous terms. Renew v. United States, 1 F. Supp. 256, 259 (S.D. Ga. 1932).

152. Tompkins, *supra* note 19, at 19.

153. *In re* Air Crash Disaster Near Bombay, 531 F. Supp. 1175, 1184 (W.D. Wash. 1982). A brief definition of maritime law clarifies what a "maritime nexus" would entail:

> [Maritime law includes] jurisdiction of all things done upon or relating to the sea, or, in other words, all transactions and proceedings relating to commerce and navigation, and to damages and injuries, upon the sea. . . . [I]t extends . . . to civil marine torts and injuries . . . illegal

The court's finding of a maritime nexus to sustain jurisdiction under admiralty does not, however, dictate the application of U.S. law. The court must assess the "points of contact between the transaction and the states or governments whose competing laws are involved."[155] As criteria for a choice of law analysis,[156] but applicable to jurisdictional inquiries as well,[157] the leading case of *Lauritzen v. Larsen*[158] furnishes the following seven points:

1) the place of the wrongful act;
2) the law of the flag (under which the ship operates);
3) the allegiance or domicile of the injured party;
4) the allegiance of the shipowner;
5) the place of the making of the contract (*e.g.*, shipping);
6) the inaccessibility of the foreign forum; and
7) the law of the chosen forum.[159]

The Court in *Hellenic Lines Ltd. v. Rhoditis*[160] added an eighth point: the base of the ship operations.[161] Courts apply these points, by analogy, to aircraft operations.[162]

c. *Diversity Jurisdiction*

Most air accident litigation falls under diversity of citizenship jurisdiction. The diversity requirements are met, in general terms, when the plaintiff, who must allege more than $10,000 in damages, is from a foreign country or from a state

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dispossession or withholding of possession from the owners of ships, [and] municipal seizures of ships. . . .

Jervey v. The Carolina, 66 F. 1013, 1015 (E.D.S.C. 1895).

154. *Bombay Disaster*, 531 F. Supp. at 1184.

155. *Id.* at 1188, *quoting* Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).

156. A choice of law situation arises where at least two jurisdictions have contacts with the issues before the given forum. The forum must then decide which jurisdiction's law should govern the issue in dispute. According to the principle of dépeçage, a court can apply the law of a different jurisdiction to each issue in the case before it. *See infra* note 264. Choice of law principles have changed dramatically in the last twenty years in many jurisdictions, from the relatively simple concept that in tort actions, the substantive law of the place of the tort governs, to a "substantial weight" of the contacts or interest analysis test. Coyle, *Choice of Law in International Aviation Accidents*, 16 FORUM 658, 659-66 (1981).

157. Tompkins, *supra* note 19, at 19; *cf.* Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 769-72 (1977) (factors are relevant considerations under *Gilbert*, *see infra* text accompanying notes 189-90, but are not controlling).

158. 345 U.S. 571 (1953).

159. *Id.* at 583-92; *cf.* The S.S. Lotus (Turk. v. Fr.), 1927 P.C.I.J., ser. A, No. 10 (Judgment of September 7).

160. 398 U.S. 306 (1970).

161. *Id.* at 309.

162. *See, e.g.*, Bombay Disaster, 531 F. Supp. at 1189-90.

other than that of the defendant.[163] A federal court has no power to hear a controversy between an alien plaintiff and an alien defendant,[164] regardless of the other parties involved.[165] Furthermore, the addition of parties who are U.S. residents will not cure a jurisdictional defect: each individual plaintiff must be able to sue each individual defendant.[166]

Further complications arise when one of the parties to a suit is a corporation. For purposes of jurisdiction a corporation is "a citizen of any State by which it has been incorporated *and* of the State where it has its principal place of business."[167] For purposes of venue, a foreign plaintiff suing on a foreign claim in diversity cases can only bring suit in the district in which all corporate defendants are incorporated, are doing business, or are licensed to do business.[168] Such factors increase the difficulty of finding the appropriate forum. They also impede transfer to another court or dismissal on the basis of forum non conveniens, however,[169] unless all defendants consent to the jurisdiction of the alternate forum.

Once a court has in personam and subject matter jurisdiction, the hurdle of forum non conveniens looms large where the claim has arisen in a foreign country. Federal courts[170] and most state courts[171] may decline jurisdiction

163. 28 U.S.C. § 1332, which requires in part that:

> [T]he matter in controversy [exceed] the sum or value of $10,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state . . . are additional parties;
>
> . . . .

28 U.S.C. § 1332(a) (1976); *cf.* U.S. CONST. art.III, § 2.

164. Montalet v. Murray, 8 U.S. (4 Cranch) 14 (1807); *see also* Tompkins, *supra* note 19, at 19.

165. *See, e.g.*, Macedo v. Boeing Co., 15 Av. Cas. (CCH) 18,032 (N.D. Ill. 1980) (foreign plaintiffs could not sue foreign airline along with U.S. manufacturer, although in same suit U.S. plaintiffs were suing both).

166. Tompkins, *supra* note 19, at 19. Impleading of third parties may also destroy diversity and defeat jurisdiction if the plaintiff joins a third party defendant who shares the plaintiff's status as a resident of the forum or an alien. *See* Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978).

167. 28 U.S.C. § 1332(c) (1976) (emphasis added).

168. 28 U.S.C. § 1391(c) (1976).

169. *See* Kennelly, *supra* note 5, at 427; Kennelly, *supra* note 1, at 489. For example, there may be only one forum in which to bring suit against an airframe manufacturer, a component manufacturer, and an aircraft operator: it might be the factory location, *i.e.*, the principal place of business, of the first, the state of incorporation for the second, and a place where the third is doing business.

170. Each opportunity the Supreme Court has had to resolve the issue of whether, under the Erie doctrine, state or federal law of forum non conveniens applies in a diversity case, there has been no discernible difference between the two, and the Court has not had to address the question. *Piper*, 454 U.S. at 248 n.13. The weight of authority leans toward the view that federal law would govern. *See* Thomson v. Palmieri, 355 F.2d 64, 66 (2d Cir. 1966); Szantay v. Beech Aircraft, 349 F.2d 60, 65 (4th Cir. 1965); Grodinsky v. Fairchild Indus., 507 F. Supp. 1245, 1249 n.2 (D. Md. 1981); Ciprari v. Cruzeiro, 232 F. Supp. 433, 442 (S.D.N.Y. 1964).

171. Apparent in state decisional law is a trend toward liberal application of the doctrine of forum non conveniens. Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 155 (2d Cir. 1981). Among the possible exceptions are Colorado, South Carolina, and Florida. *Id.* at 155 n.10.

where the court does not appear to be the "natural forum,"[172] and there are compelling reasons for the suit to recommence in a more appropriate one.[173] The historical development of the doctrine of forum non conveniens provides insight into its underlying principles, which are still applicable in present-day cases.

IV. DEVELOPMENT OF THE MODERN PRINCIPLES OF FORUM NON CONVENIENS

The term "forum non conveniens"[174] is perhaps a poor label for the principles the doctrine has come to embrace. The inconvenience and expense of litigating in a distant forum have undoubtedly decreased due to advances in transportation and communication.[175] The increased number of suits foreign plaintiffs have brought in the United States is evidence of greater mobility. The increased number of defendants in those suits who attempt to divert the litigation to a foreign, more distant forum, is another indication.[176]

The congestion of U.S. court dockets has forced the courts to give serious consideration to motions for forum non conveniens dismissals. When a defendant invokes the doctrine of forum non conveniens, the court must evaluate critically whether resolution of the dispute warrants the expenditure of its judicial resources, or whether an alternative forum could equally, if not better, serve the interest of justice.[177] In spite of claims to the contrary, such congestion surely invites courts with crowded dockets to relegate a suit to another forum.[178]

In addition to the temptation the doctrine poses to courts with crowded dockets, the validity of the defendant's need for a convenient forum is another criticized aspect of the doctrine. Critics of forum non conveniens should, however, not allow the connotations of "convenience" to mask the fundamental principles, such as fairness and comity, which underlie the modern doctrine.[179]

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172. The "natural forum," as used by British courts, *see* Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," 1926 Sess. Cas. (H.L.) 13, 20, is that which is ostensibly most closely connected with the transaction which occasioned the injury, *see* Martin, *supra* note 78, at 197, usually the situs of the accident in aviation crash litigation.

173. Paper Operations Consultants Int'l v. S.S. Hong Kong Amber, 513 F.2d 667, 670 (9th Cir. 1975); *see* Norwood v. Fitzpatrick, 349 U.S. 29, 31 (1955).

174. *See supra* text accompanying note 9.

175. *See supra* note 2.

176. *Cf.* Kennelly, *supra* note 1, at 521; Tompkins, *supra* note 19, at 16.

177. Kennelly, *supra* note 5, at 462.

178. *See* Kennelly, *supra* note 1, at 493; *but cf. Hemmelgarn*, 106 Cal. App. 3d at 586, 165 Cal. Rptr. at 195 (burden on courts should not work to deprive litigants of fair use of judicial resources).

179. *See* Blair, *The Doctrine of Forum Non Conveniens in Anglo American Law*, 29 COLUM. L. REV. 1, 33 (1929); DeMateos v. Texaco, Inc., 562 F.2d 895, 900 (3d Cir. 1977).

From the early Scottish doctrine[180] to the present day, the doctrine has evolved to meet the juridical needs of a changing world.

A. *Development of the Modern Doctrine in the United States*

The doctrine of forum non conveniens reflects the need of the courts to protect the judicial system from potentially abusive forum-shopping by plaintiffs.[181] Courts have frequently applied the doctrine to actions involving aliens, nonresidents, foreign corporations, and suits touching upon the internal affairs of a foreign corporation.[182] U.S. courts recognize forum non conveniens as a trial court's exercise of discretion to refuse to entertain suits more appropriately heard elsewhere.[183]

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180. Legal historians believe forum non conveniens is a development of Scottish jurisprudence. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 386 (1947). The term is apparently a Latin neologism, derived from neither Roman law nor civil practice on the European continent. *Id.* at 386 n.34. Scottish courts applied the doctrine of "forum non competens," as the term originally appeared in a few seventeenth and eighteenth century cases, where they lacked jurisdiction. Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947). More significantly, the term appeared in disputes between nonresidents where jurisdictional requirements were technically met, but the oppressive inconvenience of trying the case in Scotland led to dismissal. *See* Barrett, *supra*, at 387 n.35 and cases cited. The original purpose of the defensive plea was to prevent a plaintiff from forcing a defendant to litigate in a forum which technically had jurisdiction over the parties and controversy, but in which defense of the suit would be unfairly impractical or expensive. *See* Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armeteurs Français," 1926 Sess. Cas. (H.L.) 13, *cited in* Blair, *supra* note 179, at 20. Forum non conveniens in England still retains the narrow view of the traditional concept. Barrett, *supra*, at 407. Scotland applies the doctrine more broadly, but not as broadly as the United States. *Id.* at 406-08.

By the beginning of the twentieth century, it was well settled in Scottish, English, and U.S. practice that a court could refuse to hear a case if it felt that another forum could better elicit the truth. In fact, U.S. courts had been applying the doctrine since the beginning of the nineteenth century. *See, e.g.*, Willendson v. Forsoket, 29 F.Cas. 1283 (D. Pa. 1801) (No. 17,684).

181. *See* Barrett, *supra* note 180, at 420.

182. Braucher, *supra* note 180, at 914; *see also* Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933), *cited in* Barrett, *supra* note 180, at 395.

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

From the beginning of the nineteenth century, courts in the United States declined to hear certain cases in which at least one of the parties was not a citizen or resident of the forum. In several states, the pattern appeared that state courts commonly assumed jurisdiction over suits involving a citizen-party of their respective states, while refusing cases of noncitizens on the basis of forum non conveniens. *See* Blair, *supra* note 179, at 12-19. Such a practice seemed to violate the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, and exposed the doctrine of forum non conveniens to constitutional jeopardy. The distinction between residents and citizens, and the less than dispositive nature of residence as a factor, however, have saved the doctrine from unconstitutionality. Note, *supra* note 3, at 65; Barrett, *supra* note 180, at 393. In most jurisdictions the significance of residence, or lack thereof, will not by itself secure or inhibit the court's discretionary assumption of jurisdiction. *See* Barrett, *supra* note 180, at 411-14; *see generally* Note, *supra* note 3; *cf.* Blair, *supra* note 179, at 18-19. The residence factor is discussed more fully *infra* at § IV.B.2.a.

For a brief comparison of the U.S. doctrine to that of other countries, namely England, France, Greece, Japan, Norway, Sweden, and Taiwan, see Paulsen & Burrick, *Forum Non Conveniens in Admiralty: The Availability of the United States Courts for Trial of Maritime Cases Arising Outside U.S. Territorial Waters*, 17 FORUM 1350, 1365-68 (1982).

1. The *Gilbert* Principles

In the landmark cases of *Gulf Oil Corp. v. Gilbert*[184] and *Koster v. Lumbermens Mutual Casualty Co.*,[185] the U.S. Supreme Court articulated the considerations affecting the application of forum non conveniens and firmly established the doctrine in practice in the United States.[186] The Court divided the relevant criteria into the two categories of private interests and public interests.[187] These categories have been the foundation of virtually all forum non conveniens decisions since, whether state or federal.[188]

Among the "private interest" considerations, the Court included relative ease of access to sources of proof; availability of compulsory process to secure the attendance of unwilling witnesses; relative costs of bringing cooperative witnesses to the forum; the possibility of a view, where appropriate, of the premises; and "all other practical problems that make trial of a case easy, expeditious, and inexpensive."[189] These considerations look to factors concerning the parties and the controversy which are external to the court.

The Court addressed as factors of "public interest" the administrative difficulties which courts with congested dockets must face, the burden of jury duty upon the people of a community which has no relation to the controversy, the value of "having localized controversies decided at home," and, should foreign law apply to the dispute, the preference of having the forum whose substantive law applies be the court to apply it.[190] These criteria prompt a court to assess the strengths and weaknesses of its own policy considerations relative to those of an alternative forum.

A court must also determine whether its decision will be effective.[191] A judgment which the court will not be able to enforce, or which another jurisdiction might not recognize, is valueless, and a court should not waste its resources in reaching it.[192] By contrast with the foregoing, however, the Court asserted the principle that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[193]

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184. 330 U.S. 501 (1947).

185. 330 U.S. 518 (1947).

186. *See* Barrett, *supra* note 180, at 397; Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1257 (1981).

187. *Gilbert*, 330 U.S. at 508-09.

188. *See* Tompkins, *Barring Foreign Air Crash Cases from American Courts*, 23 FOR DEF. 12, 13-14 (July 1981).

189. *Gilbert*, 330 U.S. at 508.

190. *Id.* at 508-09.

191. *Id.* at 508.

192. *Cf. id.*

193. *Id.*

In the wake of *Gilbert*, Congress enacted a statute, ch. 646, 62 Stat. 937 (1948) (codified as amended at 28 U.S.C. § 1404(a) (1976)), providing for transfer of an action to the alternative, more appropriate federal district instead of dismissal. Tompkins, *supra* note 188, at 13. The change of venue provision

2. The *Piper* Decision

The U.S. Supreme Court's most recent decision concerning the doctrine of forum non conveniens is *Piper Aircraft Co. v. Reyno*.[194] *Gilbert's* guidelines escaped unscathed. The Court sought, however, to clarify two points upon which circuit courts had been wavering: the effect of unfavorable law of the alternative forum[195] and the significance of the plaintiff's place of residence.[196]

The Supreme Court succinctly put to rest the notion that dismissal should be barred where the law of the alternative forum is less favorable.[197] As the Court explained:

> Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice of law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper.[198]

To accord an "unfavorable change in law" factor substantial weight would emasculate the doctrine of forum non conveniens.

The *Piper* Court offered no bright line distinctions regarding the weight to be given the factor of the plaintiff's residence.[199] The underlying principle is that the plaintiff's choice of forum should rarely be disturbed,[200] but where the real party in interest is foreign, the presumption in favor of the plaintiff's choice applies with "less than maximum force."[201] A U.S. citizen's choice of forum should receive somewhat greater deference than that of a foreign plaintiff, since the presumption of convenience is more reasonable where a citizen of the United States chooses a U.S. court.[202] Accordingly, there is a presumption of inconve-

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mandates transfer where the alternative forum would be another federal court, but does not affect the common law doctrine of forum non conveniens where the proper forum would be a state or foreign court. *See generally* Annot., 10 A.L.R. FED. 352 (1972).

Venue and jurisdiction must not be confused. Jurisdiction relates to the power of a court to hear the case, while venue relates to the place, convenient for the parties and the forum, where a court may exercise its power. It is possible to have jurisdiction but improper venue, and proper venue but no jurisdiction. A party can waive objection to lack of personal jurisdiction and improper venue, *see* FED. R. CIV. P. 12(h)(1), but not to a lack of subject matter jurisdiction, *cf.* FED. R. CIV. P. 12(h)(3), which the forum may raise *sua sponte*. Venue requirements vary according to the subject matter jurisdiction invoked. *See* C. WRIGHT, LAW OF FEDERAL COURTS 169-92 (3d ed. 1976).

194. 454 U.S. 235 (1981), *reh'g denied* 455 U.S. 928 (1982).
195. *Id.* at 247-49.
196. *Id.* at 255-56.
197. *Id.* at 247.
198. *Id.* at 250.
199. *See id.* at 255-56.
200. *Gilbert*, 330 U.S. at 508.
201. *Piper*, 454 U.S. at 261.
202. *See id.* at 255-56.

nience where the plaintiff chooses a distant forum.[203] The Court further pointed out, however, that citizenship does not preclude dismissal "if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court. . . ."[204]

Piper emphasized that appellate courts were to review forum non conveniens rulings only for abuse of discretion.[205] The vague standards of the *Gilbert* analysis[206] grant trial courts broad discretion, and an appellate court is not to substitute its judgment for that of the lower court.[207] Such a review standard compounds the breadth of discretion and, as a result, contrasting decisions in similar cases may withstand review in spite of the similarities in their fact patterns. Also as a result of broad discretion, each of the *Gilbert* factors may carry different weight in nearly identical cases. A trend apparent in case law shows, nevertheless, that particular factors may sway a court's decision from case to case.[208]

B. *Modern Principles of the Doctrine*

The Supreme Court's decision in *Piper Aircraft Co. v. Reyno*[209] did not create a new trend. It reasserted the principles pronounced in *Gulf Oil Corp. v. Gilbert*[210] and reinforced the trend apparent in the courts.[211] The weight courts are to give competing factors, however, remains undefined.[212] The failure to develop reli-

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203. *See id.*, nn.23-24; *cf.* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) (plaintiff's choice of forum is entitled to greater deference when it is the home forum).

204. *Piper*, 454 U.S. at 256 n.23; *see, e.g.*, Shields v. Mi Ryung Constr. Co., 508 F. Supp. 891 (S.D.N.Y. 1981) (In spite of U.S. plaintiff's assertion that he could not return to Saudi Arabia, could not obtain counsel there, and would be subject to detainment and even personal endangerment, the court conditionally dismissed his suit, since all events regarding the breach of contract, breach of fiduciary duties, and fraud issues took place in Saudi Arabia, and all witnesses, documents, and interested parties were located there.); *but cf.* Mobil Tankers Oil Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir.), *cert. denied* 385 U.S. 945 (1966) (A U.S. plaintiff's choice of a U.S. forum "should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in manifest injustice to the respondent."); *accord* Burt v. Isthmus Dev. Co., 218 F.2d 353, 356-57 (5th Cir. 1955).

205. *Piper*, 454 U.S. at 257.

206. *See* Gilbert, 330 U.S. at 508-09.

207. *Piper*, 454 U.S. at 257. Broad discretion invites disharmony from circuit to circuit, district to district, and judge to judge. *Cf.* Kennelly, *supra* note 5, at 423, 486. The resultant diverse interpretations under the *Gilbert* principles, augmented in *Piper*, impair an attorney's ability to assess the probability of outcome, *Gilbert*, 330 U.S. at 516 (Black, J., dissenting), since discretion means uncertainty. Note, *supra* note 3, at 58. Such discretion is unavoidable, however, and even desirable in order to treat the unique facts which comprise each case. *Gilbert*, 330 U.S. at 508; *Piper*, 454 U.S. at 249-50.

208. *See* discussion *infra* at § IV.B.

209. 454 U.S. 235 (1981).

210. 330 U.S. 501 (1947); *see supra* text accompanying notes 189-90.

211. The Supreme Court reversed the Circuit Court's holding in Reyno v. Piper Aircraft Co., 630 F.2d 149 (3d Cir. 1980), which represented virtually the only deviation from the trend.

212. Justice Jackson noted this difficulty in *Gilbert*. 330 U.S. at 508. To enhance an appreciation of the potential complexities, California courts are to balance the following criteria, derived from *Gilbert*, in a forum non conveniens inquiry:

able standards continues to hinder the plaintiff's assessment of whether a court will assume jurisdiction in a given case.[213] A broad grant of discretion to trial courts is concededly necessary to further the ends of justice, since each case must turn on its individual facts.[214] Yet where so many competing factors come into play,[215] the doctrine eludes predictability.[216] Underlying principles of justice do offer some guidance, but the relative weights accorded factors fluctuate not only with the facts of the case,[217] but also with the world role the court feels it must play in dispensing justice with an impact on foreign jurisdictions as well as on the parties before it.[218]

The Court's decision on a forum non conveniens issue therefore derives from a contacts analysis and an assessment of the relative adequacy of an alternative forum.[219] One of several forums usually has some form of direct connection with the controversy or the parties, whether because of the residence of a party, the situs of the injury, the place of the occurrence of the wrongdoing, or the place of production or exercise of control over the instrumentality causing the injury. Factors that would comprise a contacts analysis include the plaintiff's residence, the plaintiff's theories of the case, and access to proof of these theories, and the law to be applied.[220] The factors which measure the adequacy of the alternative

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the amenability of the parties to personal jurisdiction in this state and in the alternative forum; the relative convenience to the parties and trial witnesses of the competing forums; the differences in the conflict of law rules applicable in the competing forums; the selection of a convenient, reasonable and fair place of trial; defendant's principal place of business; the extent to which the cause of action arose out of events related to this state; the extent to which any party will be substantially disadvantaged by a trial in either forum; the relative enforceability of judgments rendered in this state or the alternative forum; the relative inconvenience to witnesses and relative expense to parties of proceeding in this state or the alternative forum; the significance and necessity of a view by the trier of fact of physical evidence not conveniently movable from the alternative forum; the extent to which prosecution of the action in this state would place a burden upon this state's judicial resources equitably disproportionate to the relationship of the parties or cause of action to this state; the extent to which the relationship of the moving party to this state obligates him to participate in judicial proceedings here; this state's interest in providing a forum for some or all of the parties; this state's public interest in the litigation; the avoidance of multiplicity of actions and inconsistent adjudications; the relative ease of access to sources of proof; the availability of compulsory process for attendance of witnesses; the relative advantages and obstacles to a fair trial; the burden upon jurors, local court and taxpayers of a jurisdiction having a minimal relation to the subject of the litigation; the difficulties and inconveniences to defendant, the court and jurors incident to the presentation of evidence by deposition; and the availability of the suggested forum.

Hemmelgarn v. Boeing Co., 106 Cal. App. 3d 576, 584-85, 165 Cal. Rptr. 190, 194-95 (1980).

213. Paulsen & Burrick, *supra* note 183, at 1368; Note, *supra* note 186, at 1261; Note, *supra* note 3, at 58; *see Gilbert*, 330 U.S. at 516 (Black, J., dissenting).

214. *Piper*, 454 U.S. at 249.

215. *See, e.g., Hemmelgarn*, 106 Cal. App. 3d at 584-85, 165 Cal. Rptr. at 194-95.

216. *See supra* note 213.

217. *Piper*, 454 U.S. at 249.

218. *Compare* Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1981) *with* Castanho v. Jackson Marine, 484 F. Supp. 201 (E.D. Tex. 1980) *and* Mobil Tankers Oil Co. v. Mene Grande Oil Co., 363 F.2d 611 (3d Cir.) *cert. denied* 385 U.S. 945 (1966).

219. *Cf. Gilbert*, 330 U.S. at 508-09 (private and public interest factors).

220. *Id.*

forum include the plaintiff's ability to pursue redress there,[221] the availability of compulsory process, the potential for the foreign forum's inequitable application of law, and principles of comity.[222]

1. Contacts Analysis Factors

a. *Plaintiff's Residence*[223]

At one time, a party's residence in the forum was a dispositive factor.[224] State statutes still exist which narrow a court's discretion in certain instances where the doctrine of forum non conveniens might otherwise apply.[225] As courts have dealt with an increasingly mobile society and expansions of personal jurisdiction,[226] the trend has been to afford the factor of residence little weight.[227] The first step in this trend came in the recognition that citizens of the United States do not have an absolute right to sue in U.S. courts,[228] although a court might accord a U.S. plaintiff greater deference in his choice of forum than it would a foreign plaintiff.[229] Courts have frequently distinguished the U.S. citizen or resident

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221. *See* Piper, 454 U.S. at 254 n.22.

222. *Cf. Gilbert*, 330 U.S. at 508-09.

223. The residence of the defendant is of primary importance regarding personal jurisdiction and venue. Although a court may consider forum non conveniens as an alternative to an objection to the court's jurisdiction, *cf. Piper*, 454 U.S. at 240 n.5, it will generally consider the defendant's contacts, including residence, in finding personal jurisdiction. *See supra* § III.B.1. When forum non conveniens is invoked, attention turns, therefore, toward the plaintiff's contacts, such as his residence. Residence is not a jurisdictional question, since the plaintiff consents to the court's jurisdiction by filing suit there. Adam v. Saenger, 303 U.S. 59 (1938).

224. *Cf.* Silver v. Great American Ins. Co., 29 N.Y.2d 356, 278 N.E.2d. 619, 328 N.Y.S.2d 398 (1972) (in which New York abandoned its rigid citizenship rule).

225. *See, e.g.*, S.C. CODE ANN. § 15-5-150 (Law. Co-op. 1976) ("door closing" statute), which provides:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the [state] circuit court:
>
> (1) [b]y any resident of this State for any cause of action; or
>
> (2) [b]y a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

226. *Cf. Alcoa S.S. Co.*, 654 F.2d at 154.

227. *See, e.g., id.*; Donahue v. Far Eastern Air Transp., 652 F.2d 1032, 1039 n.12 (D.C. Cir. 1981); Mizokami Bros. v. Baychem Corp., 556 F.2d 975, 978 (9th Cir. 1977); Macedo v. Boeing Co., 15 Av. Cas. (CCH) 18,032 (N.D. Ill. 1980); *but cf.* Fiacco v. United Technologies, 524 F. Supp. 858 (S.D.N.Y. 1981) ("Perhaps Mrs. Fiacco's New York citizenship alone would not have been enough to persuade me to deny defendant's motion" in suit that was held to be essentially a product liability suit. *Id.* at 861 n.6); Boskoff v. Boeing Co., 16 Av. Cas. (CCH) 17,753 (N.Y. Sup. Ct. 1981) (the U.S. plaintiffs dismissed in *Macedo* filed suit in New York, and the New York court held that the defendants had failed to meet the burden of showing overwhelming inconvenience of litigating in New York. *Boskoff* at 17,755); Kahn v. United Technologies, 16 Av. Cas. (CCH) 17,651 (Conn. Super. Ct. 1981) (one U.S. plaintiff, but court retained jurisdiction due to Connecticut's strong interest as the domicile of the manufacturer). These last three cases are cited with brief elaboration in Tompkins, *Barring Foreign Air Crash Cases From American Courts* — Update, 24 FOR DEF. 10, 16-18 (October 1982).

228. Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 645 (2d Cir.) *cert. denied* 352 U.S. 871 (1956).

229. *Piper*, 454 U.S. at 255-56; *cf.* Pain v. United Technologies, 637 F.2d 775, 796-99 (D.C. Cir. 1980) *cert. denied* 454 U.S. 1128 (1981). The assertion that foreign plaintiffs deserve less deference finds

from the foreign plaintiff for the purpose of applying the forum non conveniens doctrine,[230] and have likewise distinguished citizens of nations which had treaty agreements with the United States allowing equal rights of access to U.S. courts.[231] The most recent movement has been to apply the doctrine equally to foreign and citizen plaintiffs.[232]

b. *Complications of Multiple Theories and Access to Proof*

In virtually every air accident case the plaintiff will proffer theories of negligence, breach of warranty, and strict (product) liability.[233] Often involved in the suit are parties responsible for the manufacture, operation, or maintenance of the aircraft or a component.[234] Evidence relating to each theory of causation is usually found in different places: (1) the place of manufacture — almost always in the United States; (2) the accident situs; (3) the maintenance base; and (4) in some cases, the air carrier's or aircraft operator's head office.[235] A court must,

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support in a contacts analysis which starts with the natural presumption that the plaintiff's most convenient forum is that of his home. *See* Piper, 454 U.S. at 256 & n.24. But the residence factor deserves little weight, however, since the place where the plaintiff resides has no bearing on the issues of liability and causation. *Cf.* Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 CHI. L. REV. 373, 384-85 (1980).

230. Even prior to the *Piper* decision in 1981, several recent lower court decisions had held that a foreign plaintiff's choice of forum was entitled to less weight than a U.S. plaintiff's choice. *See* Piper, 454 U.S. at 255 n.23 and cases cited. Yet other holdings have rejected that view. *See* Hodson v. A.H. Robins Co., 528 F. Supp. 809, 817 n.7 (E.D. Va. 1981). A correct, albeit imprecise, proposition is that which the Second Circuit asserted in *Manu Int'l v. Avon Products*: "Although residence of the parties is no longer considered dispositive in forum non conveniens cases . . . , it remains a significant factor." 641 F.2d 62, 67 (2d Cir. 1981); *cf.* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 525 (1947) (residence is a "fact of high significance"). The *Piper* decision added no further clarification. *See Piper*, 454 U.S. at 255-56, 261.

Two law review articles have focused on the plaintiff's status in forum non conveniens inquiries: *see* Note, *supra* note 229, and Note, *supra* note 186.

231. Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880 (2d Cir. 1978); Grimandi v. Beech Aircraft, 512 F. Supp. 764 (D. Kan. 1981). The United States has treaties with several nations guaranteeing nationals of both countries access to each country's courts on terms equal to those granted citizens. *See Pain*, 637 F.2d at 795 & n.113. Where such a treaty applies to the foreign plaintiff, his choice of an American forum is entitled to the same deference accorded an American plaintiff. *Farmanfarmaian*, 588 F.2d at 882; *Grimandi*, 512 F. Supp. at 778. But such reasoning misses the point. *See Pain*, 637 F.2d at 797 (citizenship is an inadequate proxy for residence); Note, *supra* note 229, at 381-83.

232. *Alcoa S.S.*, 654 F.2d at 157; *see, e.g.*, *Pain*, 637 F.2d at 797; Mizokami Bros. v. Baychem Corp., 556 F.2d at 978; Panama Processes v. Cities Serv. Co., 500 F. Supp. 787, 792 (S.D.N.Y. 1980). Some commentators have even asserted that U.S. citizenship or residency has become a liability rather than an advantage. *See* Paulson & Burrick, *supra* note 183, at 1352.

233. *See, e.g.*, *Pain*, 637 F.2d at 779; Dahl v. United Technologies, 632 F.2d 1027, 1032 (3d Cir. 1980); Grodinsky v. Fairchild Indus., 507 F. Supp. 1245, 1246 (D. Md. 1981); *in re* Disaster at Riyadh Airport, Saudi Arabia, 540 F. Supp. 1141, 1146 (D.D.C. 1982); *cf. A.H. Robins*, 528 F. Supp. at 811 (Dalkon Shield case); Lake v. Richardson-Merrell, Inc., 538 F. Supp. 262, 265 (N.D. Ohio 1982) (birth defects due to drug use).

234. Kennelly, *supra* note 5, at 433.

235. *See, e.g.*, *Riyadh Disaster*, 540 F. Supp. at 1146-47.

therefore, make a preliminary judgment on the merits in determining which evidence will be most crucial.[236] Such a determination will significantly affect the relationship of the controversy to the forum.[237] Accordingly, the plaintiff in choosing a forum should assess which of his theories of recovery is strongest, since access to proof of that theory would gain greatest significance.[238]

Courts will assess the importance of each issue — causation, liability, and damages — before determining the weight of the access-to-proof factor.[239] Where the only issue is that of damages, the appropriate forum is the home forum of the plaintiff.[24] Where the court sees negligent operation or maintenance as the probable cause, the appropriate forum is usually that of the accident situs.[241] Where faulty design or manufacture appears to lie at the heart of the issue of liability, the forum with the most significant contact with the suit is the forum in which such activity took place.[242]

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236. *Cf.* Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 452 (D. Del. 1978) ["Because at issue . . .is the trial court's jurisdiction . . . , there is substantial authority that the trial court is free to weigh the evidence. . . .[T]he existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims," *quoting* Mortenson v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)].

237. *A.H. Robins*, 528 F. Supp. at 815; *see Grodinsky*, 507 F. Supp. at 1250.

238. In assessing the merits of a faulty design or manufacture theory, courts may be implicitly considering the historical performance of the allegedly defective product. *See, e.g.*, Grimandi, 512 F. Supp. at 767 (other incidents involving the Pratt & Whitney engine). An attorney should refer to the certification records and Airworthiness Directives of the Federal Aviation Administration for any aircraft component — foreign or domestic — as an indication of a product's historical reliability. These and other materials may be available through a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1977) (as amended — West Supp. 1983).

A significant factor has been the amount of time elapsed between the manufacture of the aircraft or component and the accident. *See, e.g.*, Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 729 (M.D. Pa. 1979). Where as many as twenty years, *Grodinsky*, 507 F. Supp. at 1250, or as few as seven years had elapsed, *Dahl*, 632 F.2d at 1031, the court implicitly found that the product liability claim had little merit. *See id.* (After listing the contacts the accident had with Norway, the court, without criticizing the product liability claim, noted that the manufacturer's last contact with the helicopter had been seven years prior to the crash, during which period it had been under the control of owners living outside the United States.) By contrast, where only two years had passed, the court gave the claim based on product liability equal or more weight than that based on negligent operation or maintenance. Tokio Marine Ins. v. Bell Helicopter, 17 Av. Cas. (CCH) 17,321 (S.D. Tex. 1982). Where parties who subsequently control a product have had little opportunity to alter it, evidence of intervening causes will be less significant than evidence related to its manufacture. *See id.* at 17,324; *A.H. Robins*, 528 F. Supp. at 820-21.

239. *Cf. Piper*, 454 U.S. at 249-50: "If central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable."

240. Bouvy-Loggers v. Pan American World Airways, 15 Av. Cas. (CCH) 17,153 (S.D.N.Y. 1978); *cf. Pain*, 637 F.2d at 785. This is not to say that a U.S. court is incapable of assessing a foreign plaintiff's damages. *See, e.g.*, Nilsson v. Columbia Pacific Airlines, 15 Av. Cas. (CCH) 18,098 (Wash. 1980) (in suit for wrongful death stemming from U.S. crash, court determined damages on basis of economic and social security systems existing in Sweden).

241. *See, e.g.*, Dahl, 632 F.2d 1027; *Grodinsky*, 507 F. Supp. 1245; *Macedo*, 15 Av. Cas. (CCH) 18,032; Lampitt v. Beech Aircraft, 17 Av. Cas. (CCH) 17,358 (N.D. Ill. 1982).

242. *Grimandi*, 512 F. Supp. at 780; *Tokio Marine*, 17 Av. Cas. (CCH) at 17,324; *cf. A.H. Robins*, 528 F. Supp. at 823; *Fiacco*, 524 F. Supp. at 860; *Kahn*, 16 Av. Cas. (CCH) at 17,653.

A product liability claim will not distract the court from considering other possibilities:[243] "Plaintiffs cannot, by characterizing their causes of action as products liability claims, eliminate the very intimate relation" of another forum.[244] If a court were to sustain jurisdiction merely because a claim was couched in product liability terms, "plaintiffs could avoid dismissal on forum non conveniens grounds by the inclusion of a substantive count based on American law regardless of the merits of that claim."[245] Courts may also balance the portability of evidence and the defendant's consent to provide all pertinent information to a foreign forum against the hardship of procuring proof, which is related to other issues, located within a foreign jurisdiction.[246]

c. *Application of Foreign Law*

The choice-of-law analysis with respect to a transitory tort action may be more dispositive than any other factor.[247] The fact that foreign law may apply is not in itself dispositive, since federal courts have the capacity to apply foreign law under choice-of-law rules.[248] The fact that foreign law is applicable indicates, however, a close relationship between the foreign jurisdiction and the issue.[249] The Restatement (Second) of Conflicts, Section 145, reflects a contacts analysis resembling and overlapping in part the *Gilbert* weighing.[250] The Restatement lists the following four contacts to be considered in deciding what law is to apply: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.[251]

Some courts hold that if U.S. law applies, the trial court should not dismiss on

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243. *Macedo*, 15 Av. Cas. (CCH) at 18,034.

244. *Id.*

245. *Dahl*, 632 F.2d at 1032; *but cf. Fiacco*, 524 F. Supp. at 858, and *Kahn*, 16 Av. Cas. (CCH) at 17,651, which latter case arose out of the same accident as in *Pain*, 637 F.2d 775.

246. *See, e.g., Bombay Disaster*, 531 F. Supp. at 1175; *Macedo*, 15 Av. Cas. (CCH) at 18,032; *see* Compulsory Process, discussed *infra* at § IV.B.2.b.

247. Tompkins, *supra* note 188, at 15; *see, e.g.*, Donohue v. Far Eastern Air Transp., 652 F.2d at 1039 n.12; *Pain*, 637 F.2d at 793; *Dahl*, 632 F.2d at 1032; *Grodinsky*, 507 F. Supp. at 1252; *but cf. Bombay Disaster*, 531 F. Supp. at 1191 (court retained suit although "India's paramount interest in this accident is evident," due to inadequacy of Indian forum); *Fiacco*, 524 F. Supp. at 861 (court had not yet assessed what law would apply, but intimated it could be that of Norway).

248. *See Riyadh Disaster*, 540 F. Supp. at 1153; *Ciprari*, 232 F. Supp. at 443.

249. *See supra* note 247 and cases cited.

250. *Compare* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971), *quoted in* text accompanying note 251 *infra*, *with* the *Gilbert* interest factors, 330 U.S. at 508-09, *see supra* text accompanying notes 189-90.

251. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971), *cited in Grimandi*, 512 F. Supp. at 780 (describing the section as "the significant contacts" test).

grounds of forum non conveniens.[252] Several state jurisdictions still apply the *lex loci delicti* rule,[253] which dictates that the law of the place of wrongdoing will apply.[254] The more recently developed "substantial weight," "center of gravity," or "contacts" test closely parallels the *Gilbert* analysis,[255] and the conclusion that foreign law applies will, therefore, point toward dismissal on forum non conveniens grounds.[256] Similarly, if a jurisdiction applies the *lex loci delicti* rule, a product liability claim will not serve to strengthen the relationship between the forum and the controversy[257] unless other factors compel retention of the suit in spite of the applicability of foreign law.[258]

Although *Piper* dictates that courts should not delve into choice-of-law questions in order to compare the favorability of the substantive law of an alternative forum,[259] at least a threshold analysis is necessary in order to complete the *Gilbert*

252. Chiazor v. Transworld Drilling Co., 648 F.2d 1015, 1018 (5th Cir. 1981); *cf.* Volyrakis v. M/V Isabelle, 668 F.2d 863, 866 (5th Cir. 1982); DeMateos v. Texaco, Inc., 562 F.2d 895, 899-900 (2d Cir. 1977), *cert. denied* 435 U.S. 904 (1978).

253. Among the states applying the substantive law of the place of the wrong are: *Tennessee*: Mayes v. Gordon, 536 F. Supp. 2, 5 (E.D. Tenn. 1981); *North Carolina*: Santana, Inc. v. Levi Strauss and Co., 674 F.2d 269, 272 (4th Cir. 1982); *Georgia*: Baltimore Football Club v. Lockheed Corp., 525 F. Supp. 1206, 1207 (N.D. Ga. 1981); *Indiana*: Eaton Corp. v. Appliance Valves Corp., 526 F. Supp. 1172, 1178 (N.D. Ind. 1981), Maroon v. State Dept. of Mental Health, 411 N.E.2d 404, 409 (Ind. App. 1980); *South Carolina*: Mizell v. Eli Lilly & Co., 526 F. Supp. 589, 594-95 (D.S.C. 1981); *Connecticut*: Bailey Employment Sys. v. Hahn, 655 F.2d 473, 476 (2d Cir. 1981); *Delaware*: Panter v. Marshall Field & Co., 646 F.2d 271, 298 n.10 (7th Cir. 1981), Tew v. Sun Oil Co., 407 A.2d 240, 242 (Del. Super. Ct. 1979); *Puerto Rico: in re* Air Crash Disaster Near Chicago, Ill., 644 F.2d 594, 630 (7th Cir. 1981); *Maryland*: President and Directors of Georgetown College v. Madden, 505 F. Supp. 557, 569 (D. Md. 1980); *Kansas*: Grimandi v. Beech Aircraft, 512 F. Supp. 764, 780 (D. Kan. 1981); *Michigan*: Bennett v. Enstrom Helicopter Corp., 679 F.2d 630, 631 (6th Cir. 1982), *cf.* Bennett v. Enstrom Helicopter Corp., 686 F.2d 406 (6th Cir. 1982).

Almost all the above cases are from federal courts. Since diversity cases produce the most choice of law questions, the federal courts encounter most of the problems. They are, nonetheless, bound to apply the choice of law rules of the state in which they sit, as interpreted by the highest court of that state. Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

254. Some jurisdictions define *lex loci delicti* as the law of the place of the injury based upon the following reasoning: the tort is deemed to have occurred where the last event to complete the tort took place; injury or damages is seen as the last element; thus the rule is to apply the law of the place of the injury. *See, e.g., Santana*, 674 F.2d at 272 (interpreting North Carolina law); Baltimore Football Club v. Lockheed Corp., 525 F. Supp. at 1208 (Georgia); *cf.* Lake v. Richardson-Merrell, Inc., 538 F. Supp. 262, 273-74 (N.D. Ohio 1982); *A.H. Robins*, 528 F. Supp. at 823 (Virginia). A jurisdiction using such an interpretation would accordingly apply the substantive law of the place of the accident in aviation crash cases. *Grimandi*, 512 F. Supp. at 780. The plaintiff in such cases would therefore confront at least one factor pointing toward dismissal at the outset. *See id.* at 781; *but cf.* Fisher v. Agios Nicolaos V, 628 F.2d 308, 313 (5th Cir. 1980) (holding that choice of law factors are not determinative in forum non conveniens decisions).

255. *Compare* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971), which represents a synthesis of these tests, *with* the public and private interest factors of *Gilbert*, 330 U.S. at 508-09.

256. *See supra* note 247 and cases cited.

257. *Cf. Piper*, 454 U.S. at 255 (plaintiff's inability to rely on strict liability theory in the alternative forum does not preclude a forum non conveniens dismissal).

258. *See, e.g., A.H. Robins*, 528 F. Supp. at 809; *Grimandi*, 512 F. Supp. at 764.

259. *Piper*, 454 U.S. at 251.

test.[260] A court could conceivably perform an initial conflicts analysis simultaneously with the *Gilbert* balancing.[261] If foreign law applies, a court will not be able to entertain a claim of strict liability in tort if the foreign jurisdiction, such as Scotland[262] or Japan,[263] recognizes no such theory.[264] Thus a court must weigh the different theories of recovery the plaintiff proposes, since U.S. law would be applicable to a product liability claim, but not to a claim based on negligent operation or maintenance which took place outside the country.[265]

2. Adequacy of the Alternative Forum

a. *Plaintiff's Ability to Obtain Effective Redress*

An inadequate forum is usually described as one that would treat the parties unfairly or would not recognize a plaintiff's substantive claim under any theory.[266] More specifically, U.S. courts have looked to the effect, if any, of statutes of limitations,[267] prohibitions against contingency fee arrangements,[268] and the foreign forum's inability to enforce a judgment[269] as possible grounds for denying a forum non conveniens dismissal. Although the court may examine other factors such as the congestion of the alternative forum's docket,[270] the significant factors are those which would either directly affect the plaintiff's claim or render any judgment ineffective.[271]

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260. The doctrine of forum non conveniens is, in part, to relieve courts of the need to conduct complex exercises in comparative law. *Piper*, 454 U.S. at 251. Although a court need not compare potentially applicable laws, it should determine whether foreign law might apply as a part of its assessment of a request for a forum non conveniens dismissal. *Cf. Gilbert*, 330 U.S. at 509.

261. *See supra* note 250.

262. *Piper*, 454 U.S. at 240.

263. *Tokio Marine*, 17 Av. Cas. (CCH) at 17,322.

264. *Id.* Product liability has become a recognized theory of recovery in Europe, although it is in a state of flux. *See generally* Note, *The EEC's Proposed Directive on Product Liability: A Call for Reappraisal in Light of the Model Uniform Product Liability Act*, 6 B.C. INT'L & COMP. L. REV. 315 (1983). A brief caveat: a court may apply the law of a different jurisdiction for each particular issue, a process known as "dépeçage." *See generally* Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

265. *Compare* Fiacco v. United Technologies, 524 F. Supp. 858 (S.D.N.Y. 1982); Tokio Marine v. Bell Helicopter, 17 Av. Cas. (CCH) 17,321 (S.D.Tex. 1982); *and* Kahn v. United Technologies, 16 Av. Cas. Ct. (CCH) 17,651 (Conn. Super. Ct. 1981); *with Piper*, 454 U.S. 235 (1981); Dahl v. United Technologies, 632 F.2d 1027 (3d Cir. 1980); *in re* Disaster at Riyadh Airport, Saudi Arabia, 540 F. Supp. 1141 (D.D.C. 1982); Grodinsky v. Fairchild Indus., 507 F. Supp. 1141 (D. Md. 1981); *and* Lampitt v. Beech Aircraft, 17 Av. Cas. (CCH) 17,358 (N.D. Ill. 1982).

266. *See Piper*, 454 U.S. at 254 & n.22.

267. *See, e.g., Grodinsky*, 507 F. Supp. at 1251.

268. *See, e.g.*, Bouvy-Loggers v. Pan American World Airways, 15 Av. Cas. (CCH) 17,153, 17,155 (S.D.N.Y. 1978).

269. *See, e.g.*, Castanho v. Jackson Marine, Inc., 484 F. Supp. 201, 206 (E.D. Tex. 1980).

270. *Tokio Marine*, 17 Av. Cas. (CCH) at 17,325 (five years between filing and hearing); *Bombay Disaster*, 531 F. Supp. at 1181 & n.7 (up to fifteen years' wait).

271. *See Piper*, 454 U.S. at 254 & n.22; *Gilbert*, 330 U.S. at 508.

i. Statute of Limitations

Several courts have held that the forum non conveniens doctrine will not apply if the alternative forum's statute of limitations would bar the plaintiff's claim.[272] Other courts hold that the plaintiff's failure to determine the proper forum and file suit there prior to the running of the statute of limitations does not require a court to entertain a suit it would otherwise dismiss.[273] The defendant's consent to waive any statute of limitations defense would seem to undercut such an impediment, should one exist, to a forum non conveniens dismissal.[274] Many civil code jurisdictions have, however, a prescriptive law which extinguishes the cause of action, and a defendant's consent to suit cannot revive it.[275] Where there is any doubt, a court may condition dismissal upon acceptance of the suit by the alternative forum.[276]

ii. Contingency Fees

Many suits filed in U.S. courts would not have come to a U.S. forum without contingency fee arrangements.[277] If such arrangements were not available, it has been argued, the plaintiff's impecunity would preclude him from seeking redress in any forum.[278] Several courts have looked upon the prohibition of contingency fees in the foreign forum[279] as a factor favoring, but not mandating, retention in the U.S. court.[280] While the plaintiff's financial condition is significant as a practical matter, it impacts only indirectly on the fair treatment of the plaintiff by the alternative forum, and reflects neither inequitability nor impotence on the part of a foreign tribunal or legal system.[281] The impecunious plaintiff must forego his day in court not because of the lack of a cognizable harm or the inadequacy of the forum, but because he cannot afford to hire

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272. Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079, 1084 (D. Kan. 1978), *citing* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 84, comment (c) (1971).

273. Proctor & Schwartz, Inc. v. Rollins, 634 F.2d 738, 740 (4th Cir. 1980).

274. *Pain*, 632 F.2d at 780; *Grodinsky*, 507 F. Supp. at 1251; *Lampitt*, 17 Av. Cas. (CCH) at 17,360; *Macedo*, 15 Av. Cas. (CCH) at 18,035; *cf. Bouvy-Loggers*, 15 Av. Cas. (CCH) at 17,155 (defendant to consider statute to have tolled).

275. *See Lake*, 538 F. Supp. at 269-70 (Canada); *Bombay Disaster*, 531 F. Supp. at 1179-81 (India); *Grodinsky*, 507 F. Supp. at 1251 (Canada).

276. *See supra* note 274.

277. Martin, *supra* note 78, at 189. The nominal plaintiff in Reyno v. Piper Aircraft, 479 F. Supp. 727 (M.D. Pa. 1979), was a legal secretary from the same office which represented plaintiffs, under the name of another legal secretary as administratrix, in Aanestad v. Beech Aircraft Corp., 521 F.2d 1298 (9th Cir. 1974) and Aanestad v. Air Canada Inc., 390 F. Supp. 1165 (C.D. Cal. 1975).

278. *See* S. SPEISER, *supra* note 78, at 437.

279. *See* Grossen & Guillod, *supra* note 78, at 25.

280. *A.H. Robins*, 528 F. Supp. at 818; *cf. Bouvy-Loggers*, 15 Av. Cas. (CCH) at 17,155 (not a factor since the defendant's concession of liability would provide a fund from which to pay attorney fees).

281. *See Riyadh Disaster*, 540 F. Supp. at 1145-46.

counsel. Accordingly, the contingency fee factor would gain significance only where the major contending interests counterbalance one another.[282]

iii. Enforceability of a Judgment

If the plaintiff can bring suit, the question of the enforceability of a favorable judgment is of considerable significance.[283] Although the foreign forum may have jurisdiction over the defendant, it may lack jurisdiction over his assets and thus be unable to enforce the judgment.[284] The defendant's consent to the jurisdiction of the foreign forum does not in itself ensure that he will compensate the plaintiff if judgment so demands. Where enforceability has been a concern, however, courts have conditioned dismissal on the defendant's stipulation that he will pay any judgment obtained in the foreign forum.[285] Principles of res judicata and comity would of course apply.[286] The mechanism of a conditional dismissal removes some variables from the equation and frees the court to assess the remaining issues more clearly.[287]

b. *Impleader and Compulsory Process*

The availability of compulsory process over persons not before the court ties in closely with the factor of access to proof and, accordingly, with the court's evaluation of the merits of alternate theories of the case.[288] The court must

282. *Cf. A.H. Robins*, 528 F. Supp. at 818-19. The Supreme Court pointed out five factors that would make U.S. courts attractive to foreign plaintiffs: availability of strict liability as a theory of recovery, flexibility in choice of law rules, availability of jury trials, more extensive discovery, and allowance of contingency fees. *Piper*, 454 U.S. at 252 n.18. It is implied that, while these factors may bear some weight, they are readily overridden by the private and public interests articulated in *Gilbert*, 330 U.S. at 508-09.

283. *Gilbert*, 330 U.S. at 508.

284. *See, e.g., Jackson Marine*, 484 F. Supp. at 206.

285. *Lampitt*, 17 Av. Cas. (CCH) at 17,360; Note, *supra* note 157, at 768.

286. *But cf.* Castanho v. Jackson Marine, Inc., 484 F. Supp. 201 (E.D. Tex. 1980), where the court refused to recognize an English court's injunction imposed upon the plaintiff not to proceed in a foreign court pending final disposition of his case, Castanho v. Brown & Root (U.K.) Ltd., [1981] 1 All E.R. 143 (H.L.). Ironically, the District Court denied a forum non conveniens dismissal because it feared that a U.S. court might not honor a judgment of an English court. *Jackson Marine*, 484 F. Supp. at 206.

287. If hard cases make bad law, the chances for a just decision increase with the reduction of the number of factors a court must assign individual weights to and balance. Therefore, where the defendant's concession or stipulation removes uncertainty regarding personal jurisdiction in the alternative forum (as in *Dahl*, 632 F.2d 1027; *Macedo*, 15 Av. Cas. (CCH) 18,032; *Riyadh Disaster*, 540 F. Supp. 1141; and Lorca S.A.C. v. Pettibone Corp., No. 81 Civ. 2863 (N.D. Ill. May 23, 1982)), statutes of limitations (as in *Macedo*, 15 Av. Cas. (CCH) 18,032; *Riyadh Disaster*, 540 F. Supp.1141; and *Grodinsky*, 507 F. Supp. 1245), access to proof (as in *Dahl*, 623 F.2d 1027), honoring of a judgment (as in *Lampitt*, 17 Av. Cas. (CCH) 17,358) and even liability (as in *Pain*, 637 F.2d 775; *Riyadh Disaster*, 540 F. Supp. 1141; and *Bouvy-Loggers*, 15 Av. Cas. (CCH) 17,153), the defendant's act relieves the court of some of the guesswork and allows a judge to focus on the remaining issues more clearly.

288. *Compare Piper*, 454 U.S. 235; *Grodinsky*, 507 F. Supp. 1245; and *Lampitt*, 17 Av. Cas. (CCH) 17,358 (cases in which courts found negligent operation or maintenance to be the stronger claim) *with Tokio Marine*, 17 Av. Cas. (CCH) 17,321; *Fiacco*, 524 F. Supp. 858; and *Kahn*, 16 Av. Cas. (CCH) 17,651 (held to be essentially product liability suits).

frequently determine whether proper resolution of the case depends more on the production of evidence and witnesses regarding liability, or on the production of evidence and witnesses regarding causation and damages.[289] Although in most cases the U.S. court may exercise compulsory process over persons and documents relating to the design and manufacture of an aircraft or component, neither the court nor the parties before it can compel unwilling witnesses or third parties in foreign countries to submit to the jurisdiction of the U.S. forum with regard to such issues as operation or maintenance, or the training of staff and crew abroad.[290]

When the court is persuaded that theories of causation other than product defects have merit,[291] the availability of sources of proof in other jurisdictions attains great importance.[292] The danger of rendering an unjust decision based on incomplete information becomes greater as the likelihood of third party culpability increases, which third party the defendant is unable to implead.[293] Although the defendant manufacturer could sue the third party in a separate indemnification action in the foreign forum, judicial economy would lean toward a consolidated action if possible.[294] There is also the possibility that the manufacturer may not be able to get full indemnification, in spite of the third party's superseding culpability, due to limits of liability or other impediments imposed by the foreign forum.[295]

An additional problem arises when an insurance carrier sues on behalf of its insured. The insured is usually the owner or operator of the aircraft, and is therefore directly involved in a hull loss,[296] *i.e.*, damage requiring replacement of the aircraft. But the filing of a subrogation suit by the insurer does not bring the insured within the power of the court.[297] Thus, while the insurer as subrogee is subject to the same defenses which the adverse party would want to assert against its insured, the insured is beyond the jurisdiction of the forum.[298] Such a factor

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289. *See, e.g., A.H. Robins,* 528 F. Supp. 809; *Lampitt,* 17 Av. Cas. (CCH) 17,358.

290. *See* Siemer v. Bahri Aviation, Inc., 16 Av. Cas. (CCH) 18,048 (S.D.N.Y. 1981); *cf. Riyadh Disaster,* 540 F. Supp. at 1148.

291. *Cf. Fiacco,* 524 F. Supp. 858; *Tokio Marine,* 17 Av. Cas. (CCH) 17,321; *Kahn,* 16 Av. Cas. (CCH) 17,651; and *A.H. Robins,* 528 F. Supp. 809 (cases not sent to alternative forums due to overwhelming weight of product liability claims).

292. *See Piper,* 454 U.S. 235; *Pain,* 637 F.2d 1027; *Dahl,* 632 F.2d 1027; *Lampitt,* 17 Av. Cas. (CCH) 17,358; *Macedo,* 15 Av. Cas. (CCH) 18,032.

293. Fitzgerald v. Texaco, Inc., 521 F.2d 448, 453 (2d Cir. 1974), *cert. denied* 423 U.S. 1052 (1976); *Dahl,* 632 F.2d at 1031.

294. *Pain,* 637 F.2d at 790.

295. *Id.* at 790-91 & n.78.

296. *See, e.g.,* Orion Ins. Co. v. United Technologies, 15 Av. Cas. (CCH) 18,061 (S.D.N.Y. 1980).

297. *Id.* at 18,062.

298. *Id.*; *cf. Tokio Marine,* 17 Av. Cas. (CCH) at 17,324 (no obstacle where no claim asserted against insured). For example, if the insurance company alleges that an aircraft crashed because of a manufacturing defect, the manufacturer may allege as a defense that the owner's pilot lacked proper qualifications and training to operate the airplane. The issue could not be resolved without obtaining information from the owner or pilot. *See, e.g., Bahri Aviation,* 16 Av. Cas. (CCH) at 18,051.

would weigh heavily against retention of the suit by a U.S. court, especially if all parties could be brought together in the foreign forum.[299]

Since in most cases the U.S. court will not have the power of compulsory process over foreign witnesses and documents regarding an air accident, and the alternative forum similarly lacks the power over witnesses and documents relating to design and manufacture,[300] a defendant manufacturer's offer to produce all necessary papers and personnel for the foreign litigation[301] is an attractive solution.[302] Not only does such an offer appeal to the conservation of judicial resources, but it also appeals to policies of multitort litigation.[303] It creates the possibility of a single forum which has jurisdiction over most, if not all, necessary parties, and access to information on all theories of causation, liability, and damages.[304] Furthermore, where a court finds it necessary to look beyond product liability, its inability to obtain jurisdiction over other involved entities will point toward a forum non conveniens dismissal.[305]

c. *Unfavorable Application of Law*

The Court in *Piper Aircraft Co. v. Reyno*[306] made it clear that the relatively unfavorable law of the foreign forum should not preclude a court from exercising its discretion to dismiss on the basis of forum non conveniens.[307] Even drastic limitations of liability at the expense of a U.S. plaintiff will not compel retention.[308] The factor of moment is not whether the applicable law is unfavorable, but whether the foreign forum is likely to treat the plaintiff in an unfavorable and unfair manner.[309]

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299. *Cf.* Kennelly, *supra* note 5, at 433; *but cf. id*:

> The name of the new game may be to divide and conquer — to employ outmoded rules pertaining to jurisdiction and forum non conveniens to force innocent victims of international catastrophes to bring different suits against different defendants in different jurisdictions in different countries, with different rules and languages — and to thereby render the achievement of effective redress but an illusion.

Id. at 425.

300. *See, e.g.*, Hemmelgarn v. Boeing Co., 106 Cal. App. 3d 576, 586, 165 Cal. Rptr. 190, 195 (1980).

301. A defendant might make such an offer to avoid the high damages U.S. courts generally award.

302. *See, e.g.*, *Piper*, 454 U.S. 235; *Pain*, 637 F.2d 775; *Dahl*, 632 F.2d 1027; and *Macedo*, 15 Av. Cas. (CCH) 18,032; *cf. Tokio Marine*, 17 Av. Cas. (CCH) at 17,321 (plaintiff supplied defendant with report of the Japanese Aviation Accident Investigation Committee and maintenance records for the aircraft, all translated into English).

303. Kennelly, *supra* note 5, at 430, *citing* Proceedings of the Seminar on Protracted Cases, 21 F.R.D. 395 (1957) (U.S. Judicial Conference recognized the need for handling of catastrophe litigation in a single forum).

304. *See Pain*, 637 F.2d 775; *Dahl*, 632 F.2d 1027; *Grodinsky*, 507 F. Supp. 1245; and *Hemmelgarn*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190.

305. *Cf.* FED. R. CIV. P. 12(b)(7) (dismissal for failure to join a party "needed for just adjudication").

306. 454 U.S. 235 (1981).

307. *Id.* at 247, 254 n.22.

308. *See* Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1980) ($8 million alleged damages; the laws of Trinidad limit liability to $570,000. *Id.* at 159).

309. *See, e.g.*, Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 453-55 (D. Del. 1978).

Although U.S. courts will defer to most courts throughout the world, doubts can arise regarding potentially overriding political or economic considerations in the foreign forum's dispensing of justice.[310] In one such suit the court retained jurisdiction, even though the balancing of factors pointed toward Ecuador, because of its concern about Ecuador's ability to provide effective relief.[311] Another court refused to relegate the plaintiff to a Venezuelan forum, explaining that "[Venezuela's] remedies are far less conducive to fair administration of justice than those available under our admiralty rules. The mode of trial, the lack of adequate pre-trial procedures, and the limitation on the manner in which expert testimony may be offered do not comport with our concepts of fairness."[312]

Such cases are, however, rare.[313] Their number may diminish further as U.S. courts hesitate to impose "our concepts of fairness" on foreign jurisdictions by deciding their controversies for them.[314] Deference to the principle of "having localized controversies decided at home"[315] will militate against retention of jurisdiction except where the foreign forum is obviously hampered in its ability to serve the ends of justice.[316]

d. *Principles of Comity*

Virtually every international air accident involves divergent national interests.[317] Some nations will have a greater stake in the outcome of litigation than others, and will, therefore, want to ensure that their interests and policies are protected.[318] The application of its laws in any litigation will help to serve a nation's purpose or policy, but not to the extent that deference to its courts would.[319] A court must not overlook the greater interest, as compared to its own, a foreign sovereign power may have in the controversy.[320] A U.S. court should

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310. *See* Note, *supra* note 229, at 384.

311. *Phoenix Canada Oil*, 78 F.R.D. at 455.

312. Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir.), *cert. denied* 385 U.S. 945 (1966).

313. *See Piper*, 454 U.S. at 254 n.22.

314. *See* Donohue v. Far Eastern Air Transp., 652 F.2d 1032, 1038 (D.C. Cir. 1981); *Riyadh Disaster*, 540 F. Supp. at 1153; *Grodinsky*, 507 F. Supp. at 1252; *Dahl*, 632 F.2d at 1032-33.

315. *Gilbert*, 330 U.S. at 509.

316. *See, e.g., Bombay Disaster*, 531 F. Supp. at 1175; *Phoenix Oil*, 78 F.R.D. at 455; *but cf.* Shields v. Mi Ryung Constr. Co., 508 F. Supp. 891, 895 (S.D.N.Y. 1980).

317. *See, e.g.*, S. SPEISER, *supra* note 78, at 438 (Paris crash of DC-10 involved 346 families from 24 different nations); *cf.* Kennelly, *supra* note 1, at 489.

318. *See supra* note 314 and cases cited.

319. This principle augments the factor in *Gilbert* that the jurisdiction comfortable with the law governing the case should ideally be the one to apply it. *See Gilbert*, 330 U.S. at 509.

320. *See supra* note 314; *see also Bouvy-Loggers*, 15 Av. Cas. (CCH) at 17,154; *Fitzgerald*, 521 F.2d at 453.

give deference to the need of a foreign nation to prescribe a remedy where that nation has a strong interest due to injuries to its citizens or the culpability of parties within its jurisdiction.[321] The suggestion that courts of the United States should retain jurisdiction in every suit brought to them involving a U.S. manufacturer "is a variety of social jingoism which presumes that the 'liberal purposes' of American law must be exported to wherever our multinational corporations are permitted to do business."[322] Justice is not an export commodity.[323]

V. CONCLUSION

Every plaintiff who brings a foreign air crash suit in the United States must reckon with the possibility of a forum non conveniens dismissal. In assessing the likelihood that a U.S. court will entertain the suit, plaintiff's counsel should weigh the strengths of the contacts of the controversy with the forum. A second and equally important consideration is the capability of an alternative forum to effect redress. Weakness in the contacts will invite dismissal, whereas weakness in the alternative forum will favor the U.S. court's retention of the suit.

The plaintiff's residence is one element of contact with the forum, although its significance has greatly diminished in recent years. The plaintiff's counsel should assess the various theories of recovery he might use, and which theory would have sources of proof within the contemplated jurisdiction. The choice-of-law rules of the jurisdiction are also important, since the application of the law of the forum will create a strong bond between the court and the controversy.

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321. *See Grodinsky*, 507 F. Supp. at 1251-52; *Dahl*, 632 F.2d at 1033.

One U.S. court has weighed the following as factors in resolving comity issues:

(1) Degree of conflict (of U.S. law or policy) with foreign law or policy;
(2) Nationality of the parties;
(3) Relative importance of the alleged violation of conduct here compared to that abroad;
(4) Availability of a remedy abroad and the pendency of litigation there;
(5) Existence of intent to harm or affect American commerce and [the] foreseeability [of such an effect];
(6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
(7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
(8) Whether the court can make its order effective;
(9) Whether an order for relief would be acceptable in this country if made by a foreign nation under similar circumstances;
10) Whether a treaty with the affected nations has addressed the issue.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); *see also* Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied* 455 U.S. 1001 (1982).

Although the argument has been proffered that a jurisdiction's retention of a "big case" can benefit the forum community both in terms of prestige and economic gain, *see* Kennelly, *supra* note 5 at 478; Note, *supra* note 186, at 1276; S. SPEISER, *supra* note 78, at 489-90; the dispensing of justice should not suffer distortion into a business enterprise.

322. DeMateos v. Texaco, Inc., 562 F.2d 895, 902 (3d Cir. 1977).

323. *Cf.* Lauritzen v. Larsen, 345 U.S. 571, 582 (1953): "[International law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own." *Quoted in Bombay Disaster*, 531 F. Supp. at 1188.

In looking at the alternative forum, counsel must assess his client's ability to initiate suit there and obtain a fair trial. If the alternative forum cannot compel the production of evidence related to the many theories of recovery, or the attendance of witnesses, its ability to elicit the truth will be hampered. A court whose judgment cannot be enforced will have no effect, and is thus an inadequate forum. A U.S. court will carefully compare itself with the alternative forum before relegating the plaintiff to a distant jurisdiction.

Counsel should also be aware of the deterrents to international air accident litigation. He or she must assess the obstacles of the Warsaw Convention, government immunity, and inadequate accident investigations before considering filing suit in the United States. Then an appraisal of a U.S. court's powers to hear a suit, its rules and jurisdictional requisites, and the awards it can grant as relief assist the attorney in deciding where to file. The attorney may then have to confront the doctrine of forum non conveniens.

The doctrine of forum non conveniens is a balancing test in search of a scale. The requirement of a high degree of flexibility to meet the ends of justice will continue to render predictability elusive. The variety of elements challenges a court to sift out the public and private interests articulated in *Gulf Oil Corp. v. Gilbert*, without disregarding the minor factors which may, in the end, determine the proper choice. Dismissal or retention must turn on the weight of the contacts with the chosen forum as compared to the "natural forum." Such contacts include those of the parties, and those of the causation, liability, and damages issues and their proof. It is consistent with the foregoing that the theory of recovery which has defeated motions for forum non conveniens dismissals most successfully remains that based on product liability.

It is unfortunate that the doctrine of forum non conveniens, because of its origin and terminology, implies party convenience as a primary principle. Advances in transportation and communication have greatly reduced the inconvenience to any party of litigating in a distant forum. The inconvenience to be measured is not that of the parties, but that of the rendering of justice with respect not only to the impact on the parties, but also on their respective communities. Accordingly, U.S. courts have refused to establish a firm principle that perfunctorily dictates the relegation of foreign claims to foreign courts, nor will the retention over such claims against U.S. defendants ever be automatic.[324] Each case must be assessed according to its individual merits. The proper forum is that which facilitates the dispensing not of parochial, but of international justice.

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324. *See, e.g., Piper*, 454 U.S. 235; *Dahl*, 632 F.2d 1027; *Lampitt*, 17 Av. Cas. (CCH) 17,358; *Grodinsky*, 507 F. Supp. 1245; *Hemmelgarn*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190.