



Choosing and Challenging an International Forum: A Quick Look at *Forum Non Conveniens*

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Originally published in *San Francisco Attorney*, April/May 2002.

Deciding where to bring suit in a case with an international aspect—between citizens of different countries or based on conduct outside the country, or both—can be perplexing and quite frustrating, should the judge decide to deport your case by granting a forum *non conveniens* motion or the foreign equivalent. It is well worth your time, whether plaintiff or defendant, to carefully analyze the question of forum as you consider the merits of the case.

Though California is large and most of us practice nowhere near a national border, Californians interact with foreign citizens and companies constantly. We share the roads with them, fly on one another's airlines, vie with them for IP protection, contract with them, invest in their securities and sell them ours, and swap manufactured products and components. Consequently, many otherwise ordinary conflicts are procedurally difficult because of the presence of one or more foreign entities. When one of these cases comes to you, be wary but don't panic. Often there is no one correct forum.

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I. The Choice

Jurisdiction over Defendants

The plaintiff's first step is to determine where jurisdiction over the dispute lies, as to each prospective defendant. It is not worth the trouble to file suit in a location where one or more defendants can challenge personal jurisdiction. California has broad personal jurisdiction statutes. If a foreign citizen has "minimum contacts" here or somehow has caused injury to occur in California, jurisdiction probably lies. On the other hand, foreign countries usually will assert jurisdiction over actions against their own citizens. Assuming each forum has jurisdiction, the next step is to decide where it would be best for your client to litigate. This will depend not only on where the law is most favorable, but also on the location of witnesses and other evidence favorable to your client.

Is There a Contract?

In contract-based actions, a forum selection clause may already have done the thinking for you. But unless such a clause uses absolute terms, there is wiggle room. Courts have held the following forum-selection clauses to be merely "permissive" and therefore "only one factor in the forum non conveniens mix": "courts of California shall have jurisdiction over the parties" (*Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987)); and "The [defendant] has expressly submitted to the jurisdiction of the State of California...for the purpose of any suit, action, or proceedings arising out of this Offering." (*Berg v. MTC Electronic Technologies*, 61 Cal.App.4th 349, 357-59.) The Ninth Circuit clarified in *Docksider Ltd. V. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) that when the term "venue" rather than "jurisdiction" is used to specify forum, the clause will be readily enforced. Still, the court may find some other reason to reject a forum-selection clause, such as if it was not entered voluntarily or if the forum lacks a logical nexus to any of the parties. See *America Online, Inc. v. Superior Ct.*, 90 Cal. App. 4th 1. 12 (2001).

Don't Be Too Greedy

Forum-shopping for the most favorable laws may not yield the best result. The worse the cards are stacked against your opponent, the more likely he will try to change dealers. A motion to dismiss or stay pursuant to *forum non conveniens* arises under the common law and need not be brought prior to responsive pleadings, unlike an FRCP 12(b)(3) motion based on improper venue within the federal court system. In fact, judges sometimes encourage the parties to first perform whatever discovery is necessary to allow the court to make an informed decision regarding the importance and location of witnesses and other evidence, and the relative burden to the parties of litigating in the U.S. forum. Keep an eye on the bottom line. Filing and service

fees, mandatory court appearances, and compliance with local pleading and disclosure rules will seem very expensive if you must ultimately start over in another country.

Statute of Limitations

Consider the limitations periods for relevant claims in the alternative fora. If there is some chance the case will be dismissed from your forum of choice, make sure your limitations periods in another forum do not first expire. Remember, a *forum non conveniens* motion need not be brought at the pleadings stage and some time may pass before the court gets around to hearing the motion. For this reason, it may be best to file in the forum where your most important claims have the shortest limitations periods. On the other hand, American courts as a rule will not dismiss a case if the foreign limitations period has expired. See *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 752 (1991). All things being equal, then, timely filing suit in America appears the safest bet when deadlines loom near.

Would the Foreign Court Dismiss?

Also consider the international venue law of the foreign country. Just because an American court may deem the foreign court to be the more convenient forum does not mean the foreign court would not itself decline jurisdiction and send the case to the U.S. if given first opportunity to do so. Looking to Canada as an example, the case law of Alberta features several decisions in which the court sent Albertan parties (plaintiff and defendant) packing to the country where their dispute arose, one case an auto accident across the border in Montana, another a dispute over job performance in the United Arab Emirates. The foreign court may well stress different factors than an American court would.

Service of Foreign Defendant

Regardless of where suit is filed, serving process on foreign entities often requires retention of foreign counsel and/or compliance with the Hague Convention, addressed at length in appendices to FRCP Rule 4. (Many countries are covered by the Convention, most of which, like Canada and Botswana, are located nowhere near the Hague.) Don't underestimate the amount of time it will take to perfect service, which, depending on the country, may require language translation and the involvement of government officials.

II. The Challenge

A practical element of choosing forum is your review of the criteria to be applied by the court in the event the defendant raises a challenge. Note that sometimes the shoe is on the other foot: The plaintiff, too, has the right to bring a motion to dismiss or stay pursuant to *forum non*

conveniens. This typically arises when the plaintiff has been required to seek redress rapidly, such as in obtaining a TRO or injunction at the location of misconduct, and thereafter has the luxury of addressing venue. Note also that *forum non conveniens* may be raised in state court (under CCP § 418.10) to assert not only the relative convenience of a foreign country, but also another U.S. state.

Adequate Alternative Forum

When faced with a *forum non conveniens* motion, the court may only dismiss if there is an “adequate alternative forum,” which means a country where the defendant is subject to service of process and which offers the plaintiff some remedy. The U.S. Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) held that a forum is not inadequate “merely because its laws offer the plaintiff a lesser remedy than he could expect to receive in the United States’ court system.” This is seen recently in *Lueck v. Sunstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001), where the Ninth Circuit in a plane crash case dismissed under *forum non conveniens* even though New Zealand offered only a “no fault” personal injury remedy.

Nor is a foreign court system rendered inadequate by shortcomings in its pretrial discovery or appellate review. *Lockman Foundation v. Evangelical Alliance Mission*, 930 F. 2d 764, 768 (9th Cir. 1991). However, the American court may elect to stay rather than dismiss a case on the possibility a party will not receive a fair trial abroad. See *Chong v. Superior Ct.*, 58 Cal.App.4th 1032, 1039-40 (1997).

The Factors Considered by the Court

Given an adequate alternative forum, the court ruling on a *forum non conveniens* motion must consider specified private interest factors and public interest factors. A court of appeal reviewing application of these factors, in either federal or state court, will apply the forgiving “abuse of discretion” standard, so judges have considerable latitude to grant or deny such a motion.

The private interest factors are:

The residence of the parties and the witnesses; the forum’s convenience to the litigants; access to physical evidence and other sources of proof; whether unwilling witnesses can be compelled to testify; the cost of bringing witnesses to trial; the enforceability of the judgment; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Lueck*, 236 F.3d at 1145.

The public interest factors are:

Local interest of the lawsuit; the court’s familiarity with governing law; burden on local courts and juries;

congestion in the court; and the costs of resolving a dispute unrelated to this forum. *Id.* at 1147.

Degree of Importance

Of the public factors, 1 and 2 should play the greatest role, though defendants should harp on numbers 3, 4, and 5, whose phraseology alone seems to instruct the judge to get this case off the docket. In *Lueck*, for example, the Ninth Circuit deemed the interest of Arizona’s citizens in a local defendant to be “slight compared to the time and resources the District Court in Arizona would expend if it were to retain jurisdiction over this dispute.” *Id.* at 1147.

The private factors are where courts focus most of their attention. Of these, numbers 3 and 4 are very important, as they evaluate the parties’ ability to present a complete evidentiary picture to the finder of fact. Courts acknowledge it is just not fair to require a party to litigate where it cannot present relevant evidence.

The Importance of Non-Party Evidence

Though a resident plaintiff’s choice of forum is accorded considerable deference, the location of key independent witnesses and documentary evidence may be as important as the residence of the parties. In *Lueck*, even though several defendants were American, the Ninth Circuit reasoned that “the district court cannot compel production of much of the New Zealand evidence, whereas the parties control, and therefore can bring, all the United States evidence to New Zealand.” 236 F.3d at 1147.

Bear in mind, courts in the United States for the most part cannot compel a foreign resident who is not a party to attend trial here. Nor, generally speaking, can foreign courts drag Americans across the border to testify. You might be able to perpetuate testimony in a foreign country by, for example, obtaining from the U.S. court a commission for a deposition abroad, but the reverse may not be true litigating from a foreign jurisdiction. Using Canada, again, as an example, Alberta civil procedure does not permit the parties to take the deposition of *any* third party, foreign resident or not. Unless you have the unusual case in which non-party witnesses will commit to testify at trial absent process of law, their location certainly matters.

It stands to reason, then, that courts tend to hold that the place where the relevant acts occurred is the more convenient forum. Prominent examples include *Lueck* (plane crash in New Zealand); *Piper Aircraft* (plane crash in Scotland); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (explosion and fire in Virginia warehouse); *Leetsch v. Freedman*, 260 F.3d 1100 (9th Cir. 2001) (attorney rendered services in Germany); and *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088 (9th Cir. 1998)

(dispute over operation of fishing fleet located in State of Yap, Micronesia).

The Gravitational Pull of Unnamed Parties and Governments

Another issue the court may believe important is whether the desired forum has jurisdiction over not only the target defendant, but other potentially liable parties. In *Piper Aircraft*, the Supreme Court said, “The problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland.... It would be far more convenient. . . to resolve all claims in one trial.” 454 U.S. at 259. In another Supreme Court opinion, *Gulf Oil*, above, the fact the defendant could not interplead a Virginia corporation in New York justified dismissal under *forum non conveniens*.

The idea that all related claims should be resolved in a single action—to avoid inconsistent judgments, as well as for the sake of efficiency—also figures prominently when a government entity is one of the defendants and sometimes when suit is brought under a federal statute. For instance, the Foreign Sovereign Immunities Act grants foreign states (or their political subdivisions or “agencies or instrumentalities”) immunity to certain actions against them if brought in the U.S.—those involving a “discretionary function.” Federal Tort Claims Act lawsuits against the U.S. may be brought only in the federal district where the incident occurred. Similarly, the Jones Act and the Federal Employer’s Liability Act require venue in particular federal districts. Note that where exclusive jurisdiction is granted to federal courts *generally*, suit may be filed abroad. The *Ninth Circuit in Creative Technology, Ltd. v. Aztech System PTE, Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995), said “exclusive” in this sense means “exclusive of the courts of the states,” not exclusive of foreign courts.

Choice of Law

Though you certainly should analyze the choice of law rules of the respective fora, the court may be reluctant to look closely at this question, even though it is suggested by public interest factor 2. The Supreme Court in *Piper Aircraft* said that a court hearing a *forum non conveniens* motion should not engage in “complex exercises in comparative law.” The Ninth Circuit at one time thought choice of law important (*see, e.g., Contact Lumber Co. v. PT Moges Shipping Co.*, 918 F. 2d 1446, 1449 (9th Cir. 1990) (“Me district court must determine which country’s law should apply to the merits of the case”)), but in *Lueck*, the court, almost as an afterthought, simply said choice of law should be considered “before dismissing a case.” 236 F.3d at 1148. The *Lueck* court thereupon declined to do so, saying choice of law is only “determinative” when the case involves a U.S. statute requiring venue in the U.S. *Id.* The court did, however, cite the district court’s reasoning

that it “would likely need to apply and interpret [unfamiliar] New Zealand law.” *Id.* at 1148, fn. 6. The Ninth Circuit expanded this theme last August in *Leetsch v Freedman*, 260 F.3d at 1104, stating that in addition to applying unfamiliar German law the district court “would be required to translate a great deal of that law from the German language.”

Loath as the court may be to wax academic about choice of law, the parties should not hesitate to inform the court which country’s law will be applied as to liability, damages, and even evidence including matters of privilege. Don’t forget to discuss the laws themselves, particularly where differences might work to your client’s detriment.

For its part, California uses a three-step governmental interest analysis for choice of law. Under this test, the court will compare the laws of the respective jurisdictions and, assuming they are not identical, decide whether each jurisdiction has an interest in having its law applied. That is, the court will determine whether a true “conflict of laws” exists. If so, the court must then focus on the “comparative impairment” of the interested jurisdictions and “apply the law of the state whose interest would be more impaired if its law were not applied.” *Abogados v AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). California courts look to several factors in this regard but generally have held that, “with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.” *See Hernandez v. Berger*, 102 Cal.App.3d 795, 802 (1980).

Room for Negotiation

There are many considerations when deciding where to file suit or whether to challenge forum. Among them are the foreign dispute resolution process, foreign discovery tools, the expected cost of litigation abroad, the length of time to verdict, the ability to appeal or enforce a judgment, the necessity of retaining foreign counsel, and the extent to which U.S. counsel may participate in presenting the case to the foreign tribunal, to say nothing of the relative cost and inconvenience to your opponent. Don’t rule out negotiation over forum, either with your opponent or, in effect, with the court. A court may grant the defendant’s motion conditioned on terms such as waiver of a foreign statute of limitations, compliance with certain methods of discovery, or submission to a foreign jurisdiction. Therefore, a defendant should make it easy for the court to rule in its favor by offering those concessions it can live with. Similarly, a plaintiff fighting to keep the lawsuit where it is should consider alternatives within its control, such as an offer to travel abroad for particular discovery, to contribute to the cost of witness plane tickets, even to apply specified rules of evidence or substantive law.

Asking too much of your opponent may leave your client
the party *sans conveniens*.

About the Author

Robert B. Mullen maintains a practice in all areas of commercial litigation. He has tried jury and bench trials to verdict, conducted binding and non-binding arbitrations, handled appeals to state and federal appellate courts, and frequently represents clients in mediation.

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