

STRATEGY IN INTERNATIONAL LITIGATION

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

- Forum Non Conveniens;
- Parallel Proceedings;
- Motions to Stay or Dismiss U.S. Proceedings in Favor of Parallel Foreign Proceedings; and
- Antisuit Injunctions.

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

I. INTRODUCTION

A. INTERNATIONAL LITIGATION AND CHOICE OF FORUM

1. Multiple Fora

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

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

2. Perceived Advantages Of A U.S. Forum

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

- a. As one English judge, Lord Denning, said: “As a moth is drawn to the light, so is a litigant drawn to the United States.” *Smith*

Kline & French Lab. Ltd. v. Bloch, [1983] 1 W.L.R. 730, at 730.

- b. This is because certain features of the U.S. legal system are perceived to favor plaintiffs, including the following:
 - i. The availability of contingent-fee lawyers in the U.S.
 - ii. The availability of punitive or multiple damages awards.
 - iii. The availability of jury trials in civil cases.
 - iv. The availability of broader discovery.
 - v. The absence of rules making an unsuccessful party liable for the attorneys' fees and costs of the successful party.
 - vi. The availability of causes of action that simply do not exist in other countries, like under RICO, the antitrust laws or the securities laws.
 - vii. The possibility of class action suits.
- c. As a corollary, a U.S. forum is often perceived to be unfavorable to defendants. Thus defendants, relying on various doctrines and strategies, go to great lengths to avoid suits in the U.S.
- d. Some defendants go so far as to stipulate that they will not contest liability in a

foreign forum if the U.S. suit against them is dismissed.

For example, *In re Air Crash off Long Island, New York*, 65 F. Supp. 2d 207 (S.D.N.Y. 1999) arose out of the crash of TWA Flight 800 on July 17, 1996 shortly after it took off from New York's John F. Kennedy Airport for Paris and Rome. Representatives of the deceased French domiciliaries brought suit against Boeing and TWA in the District Court for the Southern District of New York. Boeing and TWA made a motion to dismiss the suit on grounds of forum non conveniens in favor of a French forum, predicated on a conditional promise, among other things, not to contest liability for full compensatory damages in the courts of France and promptly to pay any damages awarded. Presumably, defendants believed France to be a more favorable forum because it neither recognizes punitive damages nor permits contingency fee representation. Notwithstanding defendants' conditional promise, the court denied the defendants' motion. The court noted in this context:

If Defendants were not willing not to contest liability as to compensatory damages, this motion would not require serious consideration. It would not be necessary to consider the public interest factors, because the private interest factors would themselves weigh heavily against dismissal. Defendants' willingness not to contest

liability makes dismissal a closer issue. Nevertheless, an exception is not warranted here.

Id. at 218.

- e. The U.S. is not always the most favorable forum for a plaintiff and, when faced with an international dispute, it is important to consider carefully the advantages and disadvantages of choosing one forum over another. England, for example, is a favorable forum for defamation actions.
- f. Moreover, in the event that a dispute involves a relatively modest amount, a foreign plaintiff might be better off in its home courts than have to incur the additional expense inevitably involved in litigating in another country.

3. Forum Shopping

When a party to an international dispute commences suit in a forum it believes to be favorable to its case, such party is often accused of forum shopping. But, as another English judge, Lord Simon of Glaisdale, has pointed out, “forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation.” *The Atlantic Star*, [1974] A.C. 436, at 471.

B. STRATEGIES FOR SELECTING OR AVOIDING A FORUM

1. Introduction

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

2. Exclusive Forum Selection Clauses

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

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

A forum selection clause, by its very nature, operates only where the disputing parties have a

contractual relationship, although the clause, if appropriately drafted, can include within its scope any tortious disputes that may arise out of that relationship — e.g., a claim that the contract was fraudulently induced.

(Appendix A contains some draft forum selection and related clauses.)

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

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

3. Races To The Court House And Actions For Negative Declarations

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

- a. A prospective defendant does not have to wait for the allegedly injured party — the prospective plaintiff — to commence suit. The prospective defendant can launch a pre-emptive strike: it can bring an action in its own favored forum for a negative declaration — a declaration that it is not

liable to the injured party (now the defendant) for a particular claim. This strategy works only if the law of the favored forum recognizes actions for negative declarations. Generally, such actions are recognized in both common law and civil law countries. Although, as Lawrence Collins has noted, “[i]n England, there has been some hostility to actions for negative declarations.” Lawrence Collins, *ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS* 276 (OUP 1994).

- b. *See generally*, Andreas Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 *Am. J. Int. L.* 314 (1997).
- c. *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003), is a recent illustration of an unsuccessful attempt at an action for declaratory relief brought as a pre-emptive strike. The case arose out of a press release issued by Harrods intended as an April Fool’s joke. The press release related to plans to “float” Harrods. The joke played on the word “float,” suggesting that Harrods intended to build a floating version of its store. This release was later run by the Wall Street Journal (WSJ) which commented on the joke in a story entitled “*The Enron of Britain*,” stating that: “If Harrods, The British retailer, goes public, investors would

be wise to question its every disclosure.” Harrods claimed that this constituted libel and demanded an apology backed by the threat of litigation.

On May 24, 2002, Dow Jones brought suit in the District Court for the Southern District of New York seeking (i) relief under the Declaratory Judgment Act (DJA), asking the court to declare that any libel action based on the WSJ article would be insufficient as a matter of law; and (ii) an anti-suit injunction enjoining Harrods and Al-Fayed, its owner, from pursuing any litigation related to the article. On May 29, 2002, Harrods commenced suit in the High Court of Justice in London seeking damages for libel. The reason for Dow Jones’ preemptive strike is that England is a far more favorable forum for libel actions than the U.S.

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

- (i) declaratory judgment relief was not the proper mechanism to resolve tort claims;
- (ii) Dow Jones’ action was a forum-shopping pre-emptive strike brought against the “natural plaintiff,” and such a suit is outside of the purposes contemplated for the use of the DJA; and

- (iii) there was no “actual controversy” within the terms of the DJA.

In a lengthy and wide-ranging opinion, Judge Marrero granted Harrods’ motion to dismiss. While it is difficult to cover all the issues addressed in the court’s lengthy opinion, three points are worth noting.

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

Even if Dow Jones’ theory that a judgment against it in the London Action would be unenforceable in most or all American jurisdictions were conceded, it does not follow that the mere prospect that such a ruling may be rendered at some indefinite point in the future raises a sufficient actual controversy within the meaning of the DJA. The Court does not find enough immediacy and reality in Dow Jones’ claim at this early stage of the London Action to warrant declaratory relief. In essence, Dow Jones’ complaint is grounded on a string of apprehensions and conjectures about future possibilities: that the court in the London Action will find a basis to assert jurisdiction

and will recognize the pleading of a sufficient claim; that an adverse ruling on the merits may be rendered against Dow Jones; that the adjudication may award Harrods compensatory damages or enjoin Dow Jones from publishing the April 5 Article; that Dow Jones may seek to enforce such judgment in the United States or elsewhere; that if enforcement is sought, the judgment will be recognized somewhere. At this juncture, however, these protestations and prospects amount to nothing more than what they still are: premature concerns about contingencies that may or may not come to pass.

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

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

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

jurisdiction, and offers a more humble response to the invitation and temptation to overreach.

Id. at 411.

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

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

Id. at 440.

- d. Being the first to file suit is not dispositive. (Although, as set forth below, it is a factor considered under U.S. law on a motion to dismiss or stay on grounds that there is a parallel foreign proceeding.) A defendant may rely on certain strategies and doctrines

in isolation or combination to defeat a plaintiff's choice of forum, and a plaintiff to defend its choice of forum:

- i. Motion To Dismiss on Grounds of Forum Non Conveniens;
 - ii. The Commencement of Parallel Proceedings;
 - iii. Motion To Stay or Dismiss On Grounds of Parallel Foreign Proceeding; and
 - iv. Anti-Suit Injunctions.
- e. The following sections consider U.S. law relating to each of these doctrines.

II. FORUM NON CONVENIENS

A. BASIC PRINCIPLES OF U.S. LAW

1. Introduction

As the United States Supreme Court stated in the leading case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947), “[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.” (italics omitted.)

2. Three-Part Test

In addressing a motion to dismiss on *forum non conveniens* grounds, courts have begun to use a three-part test:

- a. assessing the degree of deference to accord the plaintiff's choice of forum;
- b. determining the availability of an alternative forum to adjudicate the dispute; and
- c. assessing if an adequate alternative forum exists, and, if so, balancing the public and private interests to determine whether the convenience of the parties and the ends of justice would best be served by dismissing the action in favor of the alternative forum.

Norex Petroleum Ltd. v. Access Indus. Inc., 416 F.3d 146, 153 (2d Cir. 2005); *see also Gulf Oil*, 330 U.S. at 508-09., *Clerides v. Boeing Co.*, 534 F.3d 623, 628-30 (7th Cir. 2008).

4. Discretion

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

- a. “The decision to dismiss a case on *forum non conveniens* grounds lies wholly within the broad discretion of the district court and may be overturned only when we believe the discretion has been clearly abused.” *Usha (India) Ltd. V. Honeywell Int’l, Inc.*, 421 F.3d 129, 134 (2d Cir. 2005) (italics)

omitted); *See Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998) (limited but “meaningful” appellate review). *But see Bigio v. Coca-Cola*, 448 F.3d 176, 179 (2nd Cir. 2006) (“As for *forum non conveniens*, the issue, once again, is not whether the district court abused its broad discretion, but whether it misapprehended or misapplied the relevant legal standards.”)

- b. “A district court abuses its discretion in granting a *forum non conveniens* dismissal when its decision (1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions, or (3) fails to consider all the relevant factors or unreasonably balances those factors.” *Overseas Media, Inc. v. Skvortsov*, Nos. 06-4095-cv, 07-2952-cv, 2008 U.S. App. LEXIS 10128, at *8-9 (2d Cir. May 8, 2008) (citing *Norex*, 416 F.3d at 153).
- c. A court may dismiss on *forum non conveniens* grounds even if the court has not established that it has personal or subject-matter jurisdiction over the case. *Sinochem Int’l Co., Ltd., v. Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1194 (U.S. 2007) (“[W]here subject-matter or personal jurisdiction is difficult to determine and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.”)

5. Applicability To Actions To Confirm International Arbitration Awards

The Second Circuit has held that an action for the recognition and enforcement of a foreign arbitral award could be dismissed on grounds of forum non conveniens. *In re Monégasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine et al.*, 311 F.3d 488 (2d Cir. 2002). For a discussion of this decision, see William W. Park, *The International Currency of Arbitral Awards*, (PLI Coursebook 2005).

B. DEFERENCE ACCORDED PLAINTIFF'S CHOICE OF FORUM

1. Presumption In Favor Of Plaintiff's Choice Of Forum

The starting point for an analysis of the doctrine of forum non conveniens is that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum that should "rarely be disturbed." *Gulf Oil*, 330 U.S. at 508. The degree of deference shown to a plaintiff's choice of forum depends in large part on certain characteristics of the plaintiff.

2. Citizenship And/Or Residence of Plaintiff

a. General Principle

It has long been a general principle of the doctrine of forum non conveniens that a U.S. plaintiff's choice of forum is entitled to greater deference than that of a non-U.S. plaintiff. *See Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518

(1947) (plaintiff's choice of forum is entitled to greater deference when the plaintiff has sued in the plaintiff's home forum). The Eleventh Circuit goes so far as to give American plaintiffs extra-heightened deference such that dismissal on forum non conveniens grounds is appropriate only where there is "positive evidence of unusually extreme circumstances" and the court is "thoroughly convinced that material injustice [would be] manifest" in keeping the case in the American court. *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1102 (11th Cir. 2004). This somewhat extreme formulation of the rule is the exception however, and generally a plaintiff's "American citizenship alone is not a barrier to dismissal on grounds of forum non conveniens." *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir. 1980) (en banc)).

As a corollary, a non-U.S. plaintiff's choice of a forum is entitled to less deference than that of a U.S. plaintiff. *Piper*, 454 U.S. at 255-256. See also *Cortec Corp. v. Erste Bank Ber Oesterrichischen Sparkassen AG*, 535 F. Supp. 2d 403, 407 (S.D.N.Y. 2008). This is not based on a desire to disadvantage foreign plaintiffs, but rather on an assessment of the ultimate convenience of the forum:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of

any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

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

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

This does not mean, however, that dismissal is 'automatically barred' when a plaintiff has chosen his home forum, nor that dismissal is automatically mandated when a foreign plaintiff is involved. Rather, 'some weight' must be given to the foreign plaintiff's forum choice, and 'this reduced weight is not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for *forum non conveniens* is the exception rather than the rule.'

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

b. The Iragorri Case: Examining Motives For Choice Of Forum And For Motion To Dismiss.

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

plaintiff's citizenship and/or residence to other relevant considerations:

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

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

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

Iragorri arose out of an elevator accident that took place in Cali, Colombia, in which a naturalized U.S. citizen and Florida domiciliary died. The plaintiffs, the wife and children of the deceased, who were also Florida domiciliaries, and the estate of the deceased,

brought suit in the District Court for the District of Connecticut against the manufacturer of the elevators — Otis Elevator Company, and United Technologies Corporation — both of which had their principal places of business in Connecticut. The defendants moved to dismiss on grounds of forum non conveniens, arguing that the suit should be brought in Cali. The district court granted the motion.

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

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

The Second Circuit stated:

The rule is not so abrupt or arbitrary. One of the factors that necessarily affects a plaintiff's choice of forum is the need to sue in a place where the defendant is amenable to suit. Consider for example a hypothetical

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

Iragorri, 274 F.3d at 72-73 (footnote omitted, emphasis added).

The Second Circuit distinguished a forum chosen for “legitimate reasons” from one chosen for “tactical advantage.” *Id.* at 73.

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

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

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

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

- of “the inconvenience and expense to the defendant resulting from litigation in that forum.”

Id. at 71-72.

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

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

Id. at 75.

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

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

Id. at 73 n.5.

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

The Second Circuit stated that: “The more it appears that a domestic or foreign plaintiff’s choice of forum has been dictated by reasons that the law will recognize as valid, the greater the deference that will be given to the plaintiff’s choice of forum On the other hand, the more it appears that the plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference the plaintiff’s choice commands . . .” *Id.* at 71-72 (emphasis added).’

Thus, in *Iragorri*, it appears that the Second Circuit has instructed district courts conducting a forum non conveniens analysis not to attach decisive significance to the citizenship or residence of the plaintiff, but, rather, to attempt to

ascertain the reasons for why a plaintiff chose one forum rather than another.

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

c. Decisions Applying *Iragorri*

One recent Second Circuit case, *Gross v. British Broad. Corp.*, 386 F.3d 224 (2d Cir. 2004), explained that “the *Iragorri* scale is a tool to assess whether there are reasons to doubt the presumption” in favor of the plaintiff’s choice of forum. In *Gross*, the plaintiff had attempted to negotiate a contract in England, and therefore, according to the court, “could reasonably expect that dispute arising from those contracts might be litigated in the courts of Great Britain.” *Id.* at 231. However, because the plaintiff was a New York citizen, who brought suit in New York, the Second Circuit, applying *Iragorri*, held that “[n]othing in our sliding scale approach calls into question the very strong deference traditionally given a U.S. plaintiff suing in her home forum.” *Id.*

Recent decisions applying *Iragorri* have applied to foreign plaintiffs. In *Usha (India) Ltd. v. Honeywell Int’l, Inc.*, 2004 WL 540441, at *4 (S.D.N.Y. Mar. 17, 2004), the court found that an Indian plaintiff had brought suit in New York for forum shopping reasons, and accordingly

accorded its choice of forum less deference, because (i) they were Indian corporations; (ii) the defendant was based in New Jersey rather than New York (and Usha had urged the court to transfer the case to New Jersey under 28 U.S.C. § 1404(a) rather than dismiss on forum non conveniens grounds) and (iii) Usha's argument that it wanted to avoid India because of delays was undermined by the fact that it had opposed the defendant's motion to compel an ICC arbitration where no delays were alleged.

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

In *Wesoke v. Contract Servs., Ltd.*, No. 00 Civ. 1188 (CBM), 2002 WL 1560775 (S.D.N.Y. July 15, 2002), by contrast, the court held that the U.S. plaintiff brought suit in the United States for legitimate reasons because "[P]laintiffs' papers make clear that their main purpose in bringing this action in the United States was to avoid the substantial (and in all likelihood prohibitive)

expense of litigating in the United Kingdom — expenses generally associated with litigating a case overseas coupled with the particular requirement in the United Kingdom that a plaintiff post a substantial bond to guarantee the payment of attorneys’ fees.” But bringing suit in one forum to avoid costs of litigation in another could just as easily be characterized as an attempt to receive a “tactical advantage” as opposed to a “legitimate consideration.”

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

In one case, a court found that the presence of a permissive forum selection clause in favor of New York “shows the plaintiff’s choice of forum was not intended to burden the defendants or obtain some tactical advantage.” *Concesionaria DHM, S.A. v. Int’l Fin. Corp.*, 307 F. Supp. 2d 553, 563 (S.D.N.Y. 2004).

In another Southern District of New York case, *Wilson v. ImageSat Int’l N.V.*, 2008 U.S. Dist. LEXIS 57897, (S.D.N.Y. July 30, 2008), the court cited *Iragorri* in the context of holding that plaintiffs’ choice of US forum deserved “minimal” deference, even though half the plaintiffs were US residents and two out of fifteen of them resided in New York. *Id.* at *11-12. The court also downplayed New York choice-of-law and forum selection clauses in contracts between the plaintiffs and defendants in its calculus because it found that the more convenient site for

the litigation was in Israel and that the plaintiffs had engaged in forum-shopping. *Id.* at 17-18. As evidence of forum-shopping the court cited the plaintiffs' attempt to plead RICO and get its attendant treble damages, plaintiffs' request for a jury trial, and plaintiffs' contention that defendants' political connections in Israel made that country "unduly favorable to defendants." *Id.*

c. Other Circuits Holding that any US plaintiff is in its home forum, regardless of his or her home district

The 7th and 8th Circuits have spoken to the original *Iragorri* issue of how much deference to give US plaintiffs bringing suit outside of their home districts:

At the outset, it is important to note that in forum non conveniens cases involving a potential reference to a foreign court, the relevant distinction is whether or not the plaintiff who has selected the federal forum is a United States citizen, not whether the plaintiff resides in the particular district where the case was brought. In other words, the 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives. *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) (finding district court gave insufficient deference to US plaintiff and

reversing district court’s forum non conveniens dismissal). *See also, Macedo v. Boeing*, 693 F.2d 683 (7th Cir. 1982) (reversing district court’s forum non conveniens dismissal for not giving enough deference to US plaintiffs who were not residents of the district court’s district). *But see Intec USA, LLC v. Engle*, 467 F.3d 1038, 1040 (7th Cir. 2006) (“[US plaintiff] says that, because its claims rest on U.S. law, this nation should do the enforcement to protect domestic firms. Why courts should favor their citizens in court—and why the first litigant to reach a courthouse should receive this benefit (if it is one) – are mysteries. International business transactions depend on evenhanded application of legal rules; hometown favoritism is the enemy of commerce.”) (upholding district court’s dismissal, but changing grounds from forum non conveniens to lack of subject-matter jurisdiction).

3. Treaties

There are several trade agreements between the U.S. and other countries that accord nationals of these countries the equivalent access and consideration that U.S. citizens receive in U.S.

courts. When a foreign plaintiff is a national of a country that is party to such a treaty, that plaintiff's choice of forum is accorded the same presumption as a U.S. citizen's. *See, e.g., Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73 (2d Cir. 2003); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152-53 (2d Cir. 1980) (en banc), *cert. denied*, 449 U.S. 890 (1980); *Blanco v. Banco Indus. de Venez. S.A.*, 997 F.2d 974, 980 (2d Cir. 1993) (holding that, due to treaty between the U.S. and Venezuela, "no discount may be imposed upon the plaintiff's initial choice of a New York forum"). *But see Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 686-88 (S.D. Tex. 2004) (The court stated that Venezuela's treaty "applies only to Venezuelans present in the United States and citizens of the United States present in Venezuela. Nothing within this provision suggests that Venezuelan plaintiffs not located in the territory of the United States may bring suit within the latter's courts for events that took place abroad on equal footing with citizens of the United States or *vice versa*.").

In the *Iragorri* case, the Second Circuit cited to a letter provided to the Second Circuit by the Department of Justice in response to its inquiry about how the question to be addressed by the *en banc* panel "might be affected by U.S. treaty obligations, including those affording access to U.S. courts." *Iragorri*, 274 F.3d at 69 n.2. It is interesting to note that while the Department of Justice acknowledged the existence of treaties that accorded to foreign nationals access to U.S. courts on terms no less favorable than those enjoyed by

U.S. nationals, it added that “any right of access afforded to a foreign national plaintiff by treaty will generally be only a right to the same access that would be accorded to a U.S. national who is otherwise similarly situated.” *Id.* (emphasis added).

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

In *Pollux*, 329 F.3d at 73, the Second Circuit considered a treaty between the United States and Liberia, which provided “freedom of access” to citizens of Liberia. The court distinguished this treaty from treaties which provide “equal access” to foreign nationals, and held that plaintiffs’ choice of forum should be accorded “the lesser degree of deference typically afforded foreign plaintiffs.” *Id.*

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

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

- a. This is based on the underlying rationale of the doctrine of forum non conveniens: “A corporate plaintiff’s citizenship or residence may not correlate with its real convenience

because of the nature of the corporate entity, while an individual's residence more often will correlate with his or her convenience.” *Reid-Walen* at 1395 n.8. As the court also noted: “Judicial concern for allowing citizens of the United States access to American courts has been tempered by the expansion and realities of international commerce.” *Id.* at 1395.

- b. By contrast, the strong presumption in favor of a plaintiff's choice of forum is affirmed when the plaintiff is a U.S. individual in a tort action, such as the plaintiffs in *Reid-Walen*, a couple injured while vacationing in Jamaica. *Id.* at 1392. *See also Guidi*, 224 F.3d at 147, where the court stated: “Plaintiffs ... are ordinary American citizens for whom litigating in Egypt presents an obvious and significant inconvenience, ... This is not a case where the plaintiff is a corporation doing business abroad and can expect to litigate in foreign courts.” In *Carey v. Bayerische Hypo- Und Vereinsbank AG*, 370 F.3d 234, 238 (2d Cir. 2004), the Second Circuit contrasted individuals and corporations from the standpoint of forum non conveniens: “For an individual of modest means, the obligation to litigate in a foreign country is likely to represent a considerably greater obstacle than for a large business organization – especially one maintaining a business presence in foreign countries. For this reason, such an individual's choice of the home forum may receive greater deference than the similar choice made by a large organization

which can easily handle the difficulties of engaging in litigation abroad.”

- c. But even suits brought by individual U.S. citizens in their home fora may be subject to forum non conveniens dismissal where they concern events abroad. *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1355 (1st Cir. Mass. 1992)(“Provided adequate recognition is accorded ‘the substantial public interest in providing a convenient United States forum for an action in which all parties are United States citizens and residents,’ the trial court may weigh, as a subsidiary consideration, any attenuated connection between the particular United States forum and the matter in litigation.... Courts may validly protect their dockets from cases which arise within their jurisdiction, but which lack significant connection to it; [and] may legitimately encourage trial of controversies [****31**] in *the localities* in which they arise.”)(citing cases).
- d. However, the mere existence of related litigation in a foreign forum should not lead a court to dismiss a U.S. citizen’s suit for *forum non conveniens* where the other factors such as public and private interests are even or fall in favor of the U.S. citizen. *Adelson v. Hananel*, 510 F. 3d 43 (1st Cir. 2007)(reversing district court’s *forum non conveniens* dismissal where litigation on same subject was ongoing in Israel and public and private interest factors were in “ equipoise,” because foreign litigation alone

not sufficient to overcome deference due domestic plaintiff.)

5. Class Actions

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

C. ALTERNATIVE FORUM

Introduction

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

- a. An alternative forum is said to be “available” if the defendant is amenable to process in another jurisdiction, except in those “rare circumstances. . . where the remedy offered by the other forum is clearly unsatisfactory.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).
- b. To be available, a forum must permit the “litigation of the subject matter of the dispute.” *Piper*, 454 U.S. at 254 n.22. Thus, an adequate forum does not exist if a statute of limitations bars the bringing of the

case in that forum. *See Norex*, 416 F.3d at 159; *Omollo v. Citibank*, No. 07-Civ. 9529, 2008 U.S. Dist. LEXIS 36917, at *16 (S.D.N.Y. May 6, 2008). Courts often deal with statute of limitations issues by making conditional dismissals. *See Point G* below.

- c. One common argument made by a non-U.S. plaintiff in opposition to a defendant's motion to dismiss on forum non conveniens grounds is that even though the defendant is amenable to process in a non-U.S. forum, that forum is not "available" because it is inadequate.

2. Two-Step Inquiry

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

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

C. AVAILABILITY OF ALTERNATIVE FORUM

1. Introduction

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

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

2. Effect Of Legislation In Some Latin American Countries

- a. Some Latin American countries have passed statutes which affect the forum non conveniens analysis by U.S. courts. *See, e.g.*, Decreto Numero 34-97 (1997) (Guatemala); Ley de Defensa de Derechos Procesales de Nacionales y Residentes (Law in Defense of the Procedural Rights of Nationals and Residents) (Honduras); Ley 55 (Ecuador); Article 40 of the Statute of Private international Law (Venezuela).

- b. The Guatemalan statute is illustrative. It provides that once a Guatemalan national files a suit in the U.S. on a particular claim, then the courts of Guatemala cease to have subject matter jurisdiction over that claim. In such a case, the Guatemalan national can argue that the Guatemalan forum is unavailable for the purposes of the U.S. forum non conveniens analysis.
- c. The purpose of these laws is to prevent U.S. defendants from obtaining dismissal on grounds of forum non conveniens of a case brought in a U.S. court by a national of those Latin American countries.
- d. U.S. courts have generally rejected arguments based on these statutes. In *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512 (D. Minn. 1996) the court considered an argument against dismissal on forum non conveniens grounds advanced by a Guatemalan citizen who had brought suit in the U.S. In granting the motion to dismiss, the court stated:

Plaintiff argues that Guatemalan law forbids disturbing a plaintiff's forum choice. Consequently, Guatemalan courts will not recognize jurisdiction that has been "manipulated" by a forum non conveniens transfer. However, a quick and decisive solution to this potential problem was reached in *Delgado v. Shell Oil*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995).

After finding Guatemala and other fora to be adequate to merit forum non conveniens dismissal, the court directed that “in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction” of any plaintiff’s case, that plaintiff may return, and the court will resume jurisdiction.

Polanco, 941 F. Supp. at 1525.

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

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

Judge Rakoff rejected this argument because it “relied on two doubtful assumptions.” *Id.* at 546. The first is that Law 55 is retroactive (Law 55 was enacted in 1998, and the suit in question was filed in the U.S. prior to 1998.) The second assumption is that Law 55 applies even after a case is dismissed on grounds of forum non conveniens.

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

Nevertheless, as a safeguard, this Court . . . will qualify the dismissals here to provide that in the event that a court of last review in Ecuador finally affirms the dismissal for lack of jurisdiction pursuant to Law 55 of any action raising the claims here at issue pursued in good faith in Ecuador by any of the plaintiffs here, this Court, upon motion made within 60 days, will resume jurisdiction over that action.

Id. The Second Circuit agreed with this reasoning and noted that, since the district court’s decision, the Ecuadorian Constitutional Court had declared Law 55 to be unconstitutional. 303 F.3d at 477.

In *Morales*, 313 F. Supp. 2d 672, the court rejected a similar argument based on a Venezuelan statute, which required both parties to submit to the jurisdiction of the Venezuelan courts before a case could be maintained. The court stated: “Plaintiffs’ argument elides the distinction between their willingness to avail themselves of the Venezuelan forum and its unavailability.” *Id.* at 676.

E. ADEQUACY OF ALTERNATIVE FORUM

1. **Burden To Show Adequate Forum**

It is the moving party's burden to demonstrate the existence of an adequate alternative forum. *Usha (India) Ltd.*, 421 F.3d at 135.

2. **Bases For Claiming Inadequacy**

There are three different bases for claiming that a forum is inadequate: (a) the substantive law of the alternative forum is inadequate; (b) the procedures of the alternative forum are inadequate; or (c) the political or social circumstances in the alternative forum are such as to render it inadequate.

3. **Adequacy Of Alternative Forum: Substantive Law**

- a. The fact that the substantive law of the foreign forum differs from that of the U.S. "should ordinarily not be given conclusive or even substantial weight", *id.* at 247, and the availability of an adequate alternative forum does not depend on the existence of an identical cause of action in the other forum. *Ismail v. Am. Univ. of Beirut*, 246 F. Supp. 2d 300, 333 (S.D.N.Y. 2003).
- b. Although the courts are not always in agreement, most courts have granted motions to dismiss on grounds of forum non conveniens notwithstanding the fact that foreign law does not provide the same remedy as that available under U.S. law, as

long as there is some remedy under foreign law.

- c. Set forth below are some arguments considered by the courts in considering whether a forum is inadequate on the ground its substantive law differs from the U.S.:
 - i. RICO Claims. Because plaintiffs can still bring foreign suits based on the underlying predicate acts, RICO suits are subject to forum non conveniens dismissal. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 769 (9th Cir. 1991); *PT United Can Co.*, 138 F.3d at 74; *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (per curiam) (“A review of the legislative history of RICO . . . discloses no mandate that the doctrine of forum non conveniens should not apply”) *See also In re Air Crash off Long Island, New York*, 65 F. Supp. 2d 207 (S.D.N.Y. 1999); *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 700 (S.D.N.Y. 2003) (Although there is no exact equivalent of the RICO statute in Russia, the defendants' legal experts argue convincingly that the plaintiffs can bring a cause of action for fraud that would provide an adequate alternative remedy.) *Alfadda v. Fenn*, 159 F.3d 41, 47 (2d Cir. 1998) (“Because the

traditional Gilbert public interest factors weigh heavily in favor of France, we do not agree that the United States' interest in applying its securities and RICO laws rendered Judge McKenna's decision to dismiss on the grounds of forum non conveniens an abuse of discretion."'). *Windt v. Qwest Comms. Int'l Inc.*, 529 F. 3d 183, 193 (3rd Cir. 2008) ("Federal courts have refused to afford RICO claims special treatment in *forum non conveniens* inquiries and have found dismissal on this basis proper in cases involving RICO claims. Were this case to remain in New Jersey, the District Court would be required to examine and apply eleven provisions of the Dutch Civil Code. On this basis, we cannot say that the District Court was unreasonable in concluding that avoiding problems in the application of foreign law favored dismissal."')

- ii. Antitrust Suits. The Circuits are divided on whether the doctrine of forum non conveniens is applicable to antitrust cases. The Fifth Circuit has reasoned that absent the antitrust claim, there may not be an alternate remedy available to a plaintiff and therefore, these claims should not be subject to forum non conveniens dismissal. *Indus. Inv. Dev. Corp. v.*

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

- iii. Securities Law. Courts have held that claims based on U.S. securities laws are subject to forum non conveniens dismissal. *See, e.g., Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 41 (2d Cir. 1998); *But see Derensis v. Coopers & Lybrand*, 930 F. Supp. 1003, 1011 (D.N.J. 1996) (Canada was not adequate alternative forum for securities class action suit based on U.S. securities laws, noting that the U.S. “has a strong public policy of protecting the integrity of its securities markets”).
- iv. Copyright Law. Copyright suits have been dismissed on forum non conveniens grounds, as most countries have their own copyright laws available as a potential remedy. For example, the Ninth Circuit held that

the Singapore Copyright Act provided an adequate alternative remedy to the U.S. Copyright Act, even though its territorial limitations reduced the scope of relief available. *Creative Tech., Ltd. v. Aztech System Pte., Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995). See also *Deston Songs LLC v. Wingspan Records*, 2001 U.S. Dist. LEXIS 9763 (S.D.N.Y. July 12, 2001). But see *Heriot v. Byrne*, 2008 U.S. Dist. LEXIS 60600 (N.D. Ill. July 21, 2008) (declining to dismiss on forum non conveniens grounds in part because Australian courts could not adjudicate copyright infringement that took place in US and therefore “[d]efendants fail to demonstrate as a matter of law that Australia is an adequate forum to adjudicate plaintiffs’ claim of copyright infringement in the United States”), *Jose Armando Bermudez & Co. v. Bermudez Int’l*, 2000 U.S. Dist. LEXIS 12354, (S.D.N.Y. Aug. 28, 2000) (declining to dismiss on forum non conveniens grounds where plaintiff asserted trademark and copyright infringement claims).

4. **Adequacy of Alternative Forum: Procedural Differences**
 - a. The fact that a foreign forum has different procedures to a U.S. forum will rarely render it inadequate. If all a plaintiff had to

do was demonstrate that the foreign court had less favorable procedures than that of a U.S. court, as a practical matter almost every foreign forum would be found to be inadequate.

- b. Set forth below are some of the arguments considered by courts in assessing whether a foreign forum is inadequate on procedural grounds:
 - i. Availability of Jury Trial. The fact that a foreign forum does not have jury trials does not render it inadequate. *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195,199 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987); *Lockman Found.*, 930 F.2d at 768.
 - ii. Discovery. While most countries do not have the broad scope of discovery available in the U.S., this will not render a foreign forum inadequate. *See, e.g., Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1123-24 (S.D.N.Y. 1992); *Pavlov v. Bank of N.Y. Co.*, 135 F. Supp. 2d 426, 434-435 (S.D.N.Y. 2001), *vacated on other grounds by* 25 Fed. Appx. 70, 2002 WL 63576 (2d Cir. Jan. 14, 2002); *Van Der Velde v. Philip Morris, Inc.*, No. 02 Civ. 783, 2004 WL 48891, *4-5 (S.D.N.Y. July 15, 2004).

- iii. Contingent Fee Arrangements. In *Murray v. British Broad. Corp.*, 81 F.3d 287 (2d Cir. 1996), an English national argued that while he could have brought suit against the BBC in England, England was not an adequate forum because it does not permit contingency fee arrangements. Therefore, he did not have the financial means to litigate in England, and hence, England was not available to adjudicate the dispute. The Court of Appeals for the Second Circuit rejected this argument.

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

- iv. Delay. Generally, a delay of a few years in the foreign forum is insignificant in the forum non conveniens calculus. *See, e.g., Henderson v. Metropolitan Bank & Trust Co.*, 470 F. Supp. 2d 294, 307 (S.D.N.Y. 2006) (“Assuming that [estimate of] filing-to-completion times may exceed five years is accurate, this is within the range other courts have deemed acceptable. Indeed, delays of a few years [are] of no legal significance in the forum non conveniens calculus.”); *Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 591 n.11 (S.D.N.Y. 1996) (three year or longer delay in Brazil did not render forum inadequate).

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

Bhatnagar was recently distinguished because it “was decided almost nine years ago and therefore does not reflect the recent reforms in the Indian legal system.” *Usha*, 2004 WL 540441, at *5. In *Usha*, the court relied on an affidavit of an Indian law expert to the effect that the case could be resolved by the Delhi High Court in two to three years. Significant to the court’s decision were the following facts: (i) the number of cases pending in the Delhi High Court had decreased by 75% due to a recent increase in the amount in controversy for jurisdictional purposes; (ii) the Indian Code of Civil Procedure had been reformed in an effort to reduce delays and streamline case management; and (iii) a related dispute, already being litigated in India, had proceeded in an expeditious manner.

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

- v. Punitive Damages. A Brazilian forum was held to be adequate even though Brazil did not permit recovery of punitive damages or damages for pain and suffering. *De Melo v. Lederle Labs.*, 801 F.2d 1058 (8th Cir. 1986); *Exter Shipping Ltd. V. Kilakos*, 310 F. Supp. 2d 1301,1322 (N.D. Ga. 2004) (same, England).
- vi. Class Actions. Another country's lack of a class action procedure does not render that country's courts an inadequate alternative forum. *Aguinda v. Texaco, Inc.*, 303 F. 3d. 470, 478 (2d. Cir. 2002) ("While the need for thousands of individual plaintiffs to authorize the action in their names is more burdensome than having them represented by a representative in a class action, it is not so burdensome as to deprive the plaintiffs of an effective alternative forum.").

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

- a. While courts have dismissed forum non conveniens motions based on assertions of political instability or a demonstrated institutional bias, these conditions must be very severe and well documented to be taken into account by courts.

- b. In the interests of comity, U.S. courts are reluctant to assess the integrity or quality of foreign judicial systems.
- c. Set forth below are some of the arguments considered by courts in assessing whether a foreign forum is inadequate on grounds of political instability or institutional bias:
 - i. Impartiality or Corruption. A generalized concern about the impartiality of a country's judicial system is not enough and such claims "[do] not enjoy a particularly impressive track record." *Eastman Kodak*, 978 F. Supp. at 1084 (collecting cases). Courts are particularly resistant to these claims when the plaintiff has chosen to transact business in the foreign forum. *Id.* at 1084-85 ("There is a substantial temerity to the claim that the forum where a party has chosen to transact business . . . is inadequate.") In *Blanco v. Banco Indus. de Venez. S.A.*, 997 F.2d 974, 981 (2d Cir. 1993), the Second Circuit rejected general concerns that the "Venezuelan system of justice is . . . endemically incompetent, biased, and corrupt." *Id.* In *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345 (1st Cir. 1992) *cert. denied*, 508 U.S. 912, the First Circuit rejected claims that the Turkish justice system exhibited a "profound bias" against

Americans and foreign women. *Id.* at 1351. In *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002), the court found that “the Peruvian courts furnish an available and adequate forum for the adjudication of plaintiffs’ claims against Southern Peru and the awarding of appropriate damages if those claims succeed.” *But cf.* *Eastman Kodak*, 978 F. Supp. at 1085 (holding that, despite the justifiably strong inclination against granting these claims, the corruption in the Bolivian system was “compelling” enough to render that forum inadequate).

- ii. Fears for Safety. A plaintiff’s concern for his or her individual safety may be given consideration in extreme situations. *See, e.g., Rasoulzadeh v. Assoc. Press*, 574 F. Supp. 854 (S.D.N.Y. 1983), *aff’d mem.*, 767 F.2d 908 (2d Cir. 1985) (denying forum non conveniens motion where plaintiffs would probably be executed if they returned to Iran). *But see MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 31 (D.D.C. 2008) (holding that “the mere fact that [plaintiff] could not personally travel to the proceedings in Cameroon without fear of reprisal [upon his physical person] does not establish that

Cameroon is an inadequate alternative forum” because Cameroon is a civil law country where entire proceeding can be conducted in writing and therefore plaintiff would not have to visit the country), *Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891, 896 (S.D.N.Y. 1981) (rejecting plaintiff’s assertions that his safety would be endangered in Saudi Arabia as “unsubstantiated speculation”).

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

F. Supp. at 748 (holding that, although Croatia was making “great strides towards recovery,” the political and military instability still rendered this country an inadequate forum).

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

F. BALANCING PUBLIC AND PRIVATE INTERESTS

1. **Introduction**

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

There is a relationship between the degree of deference accorded a plaintiff’s choice of forum

and the balancing of the private and public interest factors. The greater the deference due, the stronger a showing of inconvenience a defendant must make, and vice versa. *Iragorri*, 274 F.3d at 74-75.

2. Public Interests

- a. The administrative difficulties stemming from court congestion.
 - i. The Southern District of New York is indisputably “one of the busiest districts in the country.” Not surprisingly, the judges in this district have placed additional weight on this factor, citing “[t]he need to guard our docket from disputes with little connection to this forum.” *Hyland*, 807 F. Supp. at 1128 (citations omitted); *see also Maersk, Inc. v. Neewra Inc.*, 554 F. Supp. 2d 424 (S.D.N.Y. 2008). *But see Cromer*, 158 F. Supp. 2d at 355, where the court stated that: “While the docket of the Southern District [of New York] is an active one, courts in this district have shown themselves more than able to address the issues that arise in complex actions in an expeditious and comprehensive manner.”
 - ii. The Ninth Circuit has articulated this factor somewhat differently: “[T]he real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court

because of its less crowded docket." *Gemini Capital Group v. Yap Fishing Corp.*, 150 F.3d 1088, 1095 (9th Cir. 1998), accord *Gullone v. Bayer Corp.*, 484 F.3d 951, 958 (7th Cir. 2007).

- b. The local interest in having controversies decided at home. In *Exter Shipping Ltd. V. Kilakos*, 310 F. Supp. 2d 1301, 1326 (N.D. Ga. 2004), the court stated that “[u]nderlying this factor... is the public interest in having foreign courts with stronger claims to jurisdiction over the matter adjudicate such claims. The interest in international judicial comity is a critical component of *forum non conveniens* determinations.” (citations omitted). In this context, the court took into account the fact that an English court had issued an anti-suit injunction prohibiting the plaintiff from filing suit in the U.S. court. The court noted that this anti-suit injunction suggested “that this Court would not advance international judicial comity by retaining jurisdiction over this litigation. Thus, although the present controversy clearly is not ‘localized’ in the United Kingdom or Greece, these European courts, with greater claims to jurisdiction over the action, provide more appropriate fora for its resolution.” *Id.*
- c. The interest in having the trial in a forum that is familiar with the law governing the action.

- d. The avoidance of unnecessary problems in conflict of laws or in the application of foreign law. *See, e.g., Exter Shipping*, 310 F. Supp. 2d at 1327 (“[T]his Court would be forced to engage in the significant interpretation and application of foreign law, further suggesting that dismissal of the action pursuant to the doctrine of *forum non conveniens* is proper.”).
- e. The unfairness of burdening citizens in an unrelated forum with jury duty. *But see Moscovits v. Magyar Cukor Rt.*, 2001 U.S. Dist. LEXIS 9252, at *21 (S.D.N.Y. June 29, 2001), where the court noted that this was not a consideration because the court’s subject matter jurisdiction was based on the Foreign Sovereign Immunities Act (“FSIA”), which does not allow for a jury trial.

3. Private Interests

- a. The relative ease of access to sources of proof and the cost of obtaining attendance of willing witnesses.
 - i. As modern advances have made international travel and communication both easier and cheaper, this factor has taken on a reduced importance. *Overseas Nat’l Airways, Inc. v. Cargolux Airlines Int’l, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (Oakes, J., concurring) (“[T]he entire doctrine of *forum non conveniens* should be

reexamined in light of the transportation revolution. . . .”). *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 44 (D. Conn. 1996). (“To the extent documents exist in England, advances in transportation and communication accord this issue less weight.”)

- b. The availability of compulsory process for attendance of unwilling witnesses.
 - i. U.S. courts have recently relied upon 28 U.S.C. § 1782 in considering motions to dismiss on forum non conveniens grounds.
 - ii. Specifically, section 1782, which permits a party to a foreign litigation to obtain evidence located in the U.S., has been relied upon to meet an objection to a motion to dismiss that U.S. documents or witnesses are beyond the reach of the foreign court.
 - iii. *See PT United Can Co.*, 138 F.3d at 75 (affirming that the Indonesian court would be an adequate alternate forum and noting the district court’s consideration of “the possibility, under 28 U.S.C. § 1782, of gaining access to witnesses or documents in the United States”); *Potomac Capital Inv. Corp. v. Koninklijke Luchtvaart Maatschappij N.V.*, No. 97 Civ. 8141, 1998 WL 92416, at *9 (S.D.N.Y. Mar.

- 4, 1998) (holding that the Netherlands was an adequate forum and that “[Potomac] can use 28 U.S.C. 1782 to obtain discovery from . . . U.S. based non-party witnesses for use at trial in the Netherlands.”); *Pyrenee, Ltd. v. Wocom Commodities, Ltd.*, 984 F. Supp. 1148, 1162 (N.D. Ill. 1997) (holding that Hong Kong was a more convenient forum and the concern that U.S. documents would not be attainable was alleviated by section 1782).
- iv. *But cf. Slight v. E.I. Du Pont de Nemours & Co.*, 979 F. Supp. 433, 440 (S.D. W.Va. 1997) (observing that while section 1782 would provide access to needed documents, the “frequent shuttling of documents and attorneys” such requests would entail would be costly).
- v. At least one court has dismissed a case in favor of a court in a country not a party to the Hague Evidence Convention, on the ground that the case was better heard in that country where third-party witnesses could be subject to compulsory process. *See Usha*, 2004 WL 540441 (“Because India is not a signatory to the Hague Convention on taking discovery through letters rogatory or letters of request, the parties would have no

assurance of obtaining discovery from any unwilling witnesses if the case were tried in the United States.”).

- c. The remoteness of forum from the situs of the event, including possibility of viewing premises, if it would be appropriate to the action.
- d. The ability to implead third parties. *See Morales*, 313 F. Supp. 2d 672, 678 (defendants seeking to dismiss are “at least required to suggest in general terms who such third-parties might be.”).
- e. The need to translate documents.
 - i. Translation is considered a serious problem and where all of the documents and testimony would be in a foreign language, this factor “militates strongly in favor of the [foreign forum].” *Blanco*, 997 F.2d at 982. *But see Ingram Micro, Inc. v. Airoute Cargo Express, Inc.*, 2001 U.S. Dist. LEXIS 2912, at *14 (S.D.N.Y. Mar. 22, 2001) (finding that the need for translation of documents alone is not a hardship of sufficient magnitude to justify dismissal).
- f. Issues concerning the enforceability of judgment if obtained.
- g. All other practical problems that make trial of a case easy, expeditious and inexpensive or the opposite.

4. Completion of Pretrial Discovery

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

[a]ssuming, arguendo, that the extent of completed discovery is relevant — whether as a public or private interest — we do not believe that it tips the balance towards an American forum. The traditional public and private interest factors weigh heavily in favor of France. Completing discovery within the Southern District and investing financial resources in order to facilitate trial in the United States does not sufficiently tip the

scales of the *Gilbert* balance, especially since plaintiffs are free to use the existing discovery material to whatever extent the French tribunal will permit.

Alfadda, 159 F.3d at 48.

G. CONDITIONAL DISMISSALS

1. Introduction

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

In *Gross v. British Broad. Coporation*, 386 F.3d 224 (2d. Cir. 2004), the Second Circuit distinguished “personal” from “institutional” conditions. The former relate to defenses that are personal to the defendant, *e.g.*, a defendant can waive a defense of statute of limitations or personal jurisdiction. Institutional defenses, by contrast, are those that relate to a particular legal system, *e.g.*, its rules about fee-shifting or contingent fees. “A legal system’s rules pertaining to fee-shifting and contingent fees reflect policy judgments about the goals of that legal system, the incentives for and against litigation, and the availability of representation in various circumstances.” *Id.* at 234. In *Gross*, the

district court dismissed the case in favor of England on grounds of forum non conveniens, conditioned on the BBC's acceptance of certain conditions designed to alleviate plaintiff's difficulty in retaining U.S. counsel—namely rules on contingent fees and waiver of fee-shifting rules that award attorney's fees to the prevailing party, so that plaintiff would not have to face a large financial burden if she lost. The Second Circuit reversed the district court's decision and rejected these conditions noting:

There is a point at which conditions cease to be a limitation on the defendant and become instead an unwarranted intrusion on the transferee forum's policies governing its judicial system. By applying conditions that implicate the British legal system's rules on fee-shifting and the availability of contingent fees, the district court effectively stepped into the middle of Britain's policy debate on those issues. Principles of comity demand we respect those policies. We urge the district courts to be cognizant of the prudential choices made by foreign nations and not to impose conditions on parties that may be viewed as having the effect of undermining the considered policies of the transferee forum.

Id. at 235.

2. Standards For Granting A Conditional Dismissal

In the *BCCI* case, the Second Circuit set forth “the type of finding that the district court should make regarding the adequacy of an alternative foreign forum in a case in which foreign law or practice is at issue, and in which a case is dismissed conditionally.” *BCCI v. State Bank of Pakistan*, 273 F.3d 241, 247 (2d Cir. 2001).

In that case, following a review of competing expert affidavits about whether Pakistan was an adequate forum, the district court granted a motion to dismiss on forum non conveniens grounds on three conditions: (i) plaintiff’s agreement in writing to waive any statute of limitations defense; (ii) the Pakistani courts not refusing to hear the case on forum non conveniens grounds; and (iii) plaintiff’s agreement in writing to permit defendants to remove any judgment rendered by a Pakistani court out of Pakistan. *Id.* at 244. The district court granted this conditional dismissal based on a “justifiable belief” that Pakistan was an adequate alternative forum. *See id.* at 247 (citing cases applying the “justifiable belief” standards).

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

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

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

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

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

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

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

The Second Circuit concluded:

we observe that while the conditional dismissal device can help to protect the non-moving party in

circumstances where the district court remains concerned about the accuracy of its “justifiable belief” as to a foreign forum’s adequacy, the mechanism is not a substitute for the initial “justifiable belief” of adequacy. Conditions cannot transform an inadequate forum into an adequate one.

Id. (emphasis added).

3. Conditions Typically Imposed

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

- a. Statute of Limitations. An adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum. *BCCI*, 273 F.3d at 246. In order to deal with this, courts have conditioned forum non conveniens dismissals on an agreement by the defendant to waive any statute of limitations defense that may exist in the foreign forum. This condition protects a plaintiff from possibly losing the opportunity to litigate in another forum because of the time spent pursuing a case in the U.S. *See, e.g., Transunion*, 811 F.2d at 128; *In re Union Carbide Corp. Gas Plant Disaster in Bhopal, India*, 809 F.2d 195, 203-04 (2d Cir. 1987); *Blanco*, 997 F.2d at 984 (collecting cases). *See Ilusorio v. Ilusorio-Bildner*, 103 F. Supp. 2d 672, 675 n.4 (S.D.N.Y. 2000).

- b. Jurisdiction. A number of courts have dismissed cases on forum non conveniens grounds conditioned on the party's consent to jurisdiction in the foreign forum. *See, e.g., R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991); *Mercier*, 981 F.2d at 1349. *See also Ilusorio v. Ilusorio-Bildner*, 103 F. Supp. 2d 672, 682 (S.D.N.Y. 2000). The importance of this factor was demonstrated in a Second Circuit decision that overturned a forum non conveniens dismissal because the district court failed to have the plaintiff stipulate to jurisdiction in Ecuador. *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998).
- c. Availability of witnesses or documents. In *Piper*, the Supreme Court specifically condoned the possibility of conditioning a forum non conveniens dismissal on the proponent's agreement to provide the relevant records. *Piper*, 454 U.S. at 257 n.25. However, this condition is not without limits, and courts have been hesitant to grant the full panoply of U.S. discovery provisions. While such a broad grant is sometimes appropriate, *see, e.g., Union Carbide*, 809 F.2d at 205 (collecting cases), it is generally looked upon with disfavor. *Hyland*, 807 F. Supp. at 1132 (citing concern that the routine granting of this condition would encourage litigants, without any real chance of success, to file suit in the U.S. simply to gain this advantage).

- d. Delay. In *BCCI*, the case was to be heard in Pakistan's courts if it were dismissed. Expert evidence was submitted by the plaintiff to the effect that a suit might take up to 25 years to be resolved in the Pakistani court system. Defendant's expert submitted evidence that plaintiff's claim would be heard by a special Banking Court in Pakistan, in which the case would proceed on an expedited basis. On appeal the Second Circuit remanded the case to the district court with instructions to include a condition to deal with the delay in Pakistan in the event the district court dismissed the case. Specifically, it instructed the district court to condition any dismissal on the Banking Court's acceptance of jurisdiction and to permit the plaintiff to return to the district court in the event Pakistan's Banking Court declined to exercise jurisdiction. The Second Circuit stated:

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

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

BCCI, 273 F.3d at 247.

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

4. Conditions Typically Rejected

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

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

U.S. “ceases to have any jurisdiction over the matter.” *Id.* at 205.

Conditional Fees and Fee-Shifting Rules. *See Gross*, 386 F.3d at 235.

5. It is unclear if a court can impose a conditional dismissal prior to establishing that it has jurisdiction. The D.C. Court of Appeals has held in dictum that a court cannot do so. *In re Papandreou*, 139 F.3d 247, 256 n. 6 (“Any such forum non conveniens dismissal cannot, however, be subject to conditions, e.g., a condition that defendants promise to submit to the jurisdiction of another court, for exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction”). But the Supreme Court left the question open in its *Sinochem* decision allowing courts to dismiss on forum non conveniens grounds prior to establishing jurisdiction. 127 S. Ct. at 1193-94 (“We therefore need not decide whether a court conditioning a *forum non conveniens* dismissal on the waiver of jurisdictional or limitations defenses in the foreign forum must first determine its own authority to adjudicate the case.”)

III. PARALLEL PROCEEDINGS

A. COMMENCING PARALLEL PROCEEDINGS

1. Introduction

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

2. Strategic Considerations

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

3. Races To Judgment

- a. If party B commences a parallel proceeding in a foreign jurisdiction with the aim of winning a race to judgment, it is important for it to seek advice from a local lawyer as to how long it would take to litigate the case to judgment in the foreign court.
- b. It is also important for party B to ascertain in advance, to the extent possible, whether a judgment from F2 is likely to be recognized and granted *res judicata* effect in F1.
- c. This issue was addressed in *Alfadda*, 966 F. Supp. at 1325-32. Here, the plaintiffs, non-U.S. citizens residing in Saudi Arabia, brought parallel proceedings in the courts of U.S. and France in connection with their investment in defendant Saudi European Investment Corporation, a Netherlands Antilles corporation. In the U.S. suit, the plaintiffs alleged violations of RICO and the U.S. securities laws.
 - i. There followed a race to judgment. Defendants prevailed in the French courts, and moved to dismiss the U.S. actions on the basis of the preclusive effect of the French action. There were two issues for the court:
 - whether to recognize the French judgment; and

- having decided to recognize it, to determine the scope of its preclusive effect.
- ii. In determining whether to recognize the French judgment, the court applied the doctrine of comity as set forth in the leading case of *Hilton v. Guyot*, 159 U.S. 113 (1895), which holds that, for reasons of international comity, a U.S. court will enforce a foreign judgment “whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.” *Id.* at 1326 (citing *Hilton*, 159 U.S. at 202-03). The court found that the French judgment satisfied this test, especially in light of the fact that plaintiffs themselves initiated proceedings in France.
 - iii. In determining whether to grant preclusive effect to the French judgment, the court took into account nine factors. Four of these factors are relevant to assessing the preclusive effect of any judgment, whether it be a U.S. or a foreign judgment; the other five were applied because they were said to be relevant to recognition of non-U.S. judgments.
 - iv. The four factors applicable to both the domestic and international context are:

- the issues of both proceedings must be identical;
 - the relevant issues were actually litigated and decided in the prior proceeding;
 - there must have been “full and fair opportunity” for the litigation of the issues in the prior proceeding; and
 - the issues were necessary to support a valid and final judgment on the merits.
- v. The five additional factors relevant to issue preclusion in the international context are:
- a desire to avoid the duplication of effort and the waste involved in reconsidering a matter that has already been litigated;
 - a desire to protect the successful litigant from harassing or evasive tactics on the part of his previously unsuccessful opponent;
 - a policy against making the availability of local enforcement the decisive element, as a practical matter, in the plaintiff’s choice of forum;

- an interest in fostering stability and unity in international litigation; and
 - a belief that the rendering court was the more appropriate forum.
- vi. In *Alfadda*, the district court reviewed the French judgment and found that it was preclusive of the U.S. proceeding because the issues considered by the French court were sufficiently identical to those the plaintiffs would have had to establish in order to prevail on their claims and the issues were necessary to support the French court's judgment. The court also noted "that France, the rendering jurisdiction, is a more appropriate forum, both because of convenience, and because France, the home country to all the defendant banks and much of the alleged conduct, has a greater interest in the litigation." *Alfadda*, 966 F. Supp. at 1332.
- d. By contrast, in *Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 666 (S.D.N.Y. 1996), *aff'd*, 122 F.3d 1055 (2d Cir. 1997) the court recognized a Saudi Arabian judgment on a breach of contract claim, but denied its preclusive effect because of different standards of proof. Specifically, although Alesayi, a Saudi Arabian company, failed to prevail in the Saudi court, the U.S. court did not give

preclusive effect to this judgment because, in Saudi Arabia, Alesayi was required to prove its claim for breach of contract beyond a reasonable doubt. In the U.S., however, it only had to prove its breach of contract claim by a preponderance of the evidence.

- e. *See generally* Linda Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States, International Business Litigation and Arbitration* (PLI Coursebook 2005).

4. Parallel Proceedings And Other Strategies

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

action) could respond by making a motion for an antitrust injunction in the U.S. court seeking to enjoin party B from pursuing the action in the non-U.S. forum (*see* Section V below).

IV. MOTIONS TO STAY OR DISMISS U.S. PROCEEDINGS IN FAVOR OF PARALLEL FOREIGN PROCEEDINGS

A. BASIC PRINCIPLES

1. International Abstention

- a. In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996), the Supreme Court held that “federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary” (emphasis added). *See also Lewin v. Cooke*, 95 F. Supp. 2d 513 (E.D.Va. 2000) (abstention doctrines are simply not applicable to suits for damages, but apply only to suits in equity).
- b. There is some dispute as to whether *Quackenbush* applies in cases involving parallel foreign litigation.
 - i. Some courts which have addressed the issue have held that *Quackenbush* is simply inapplicable in cases involving concurrent international litigation. *See Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222-23 (11th Cir. 1999); *Goldhammer v. Dunkin’ Donuts, Inc.*,

59 F. Supp. 2d 248, 252 (D. Mass. 1999) (“*Quackenbush* does not crisply govern in the area of international abstention because the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings.”).

- ii. Some post-*Quackenbush* decisions have held that a court has an inherent power to dismiss an action based on the pendency of a related proceeding in a foreign jurisdiction without specifically seeking to distinguish *Quackenbush*. See, e.g., *Evergreen Marine Corp. v. Welgrow Int’l Inc.*, 954 F. Supp. 101, 104 n.1 (S.D.N.Y. 1997) (noting that “the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings, where concerns of international comity arise and issues of federalism and federal supremacy are not in play”). But see *Exxon Research & Eng’g Co. v. Indus. Risk Insurers*, 775 A.2d 601, 611 (N.J. Super. Ct. App. Div. 2001) (finding that the same general principles apply regardless of whether they arise from similar actions brought in state or foreign courts); *EFCO Corp. v. Aluma Sys., USA, Inc.*, 983 F. Supp. 816, 824 (S.D. Iowa 1997) (staying U.S. action in favor of

Canadian action). *But see Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1291 (E.D. Mo. 1997) (holding that *Quackenbush* precludes an outright dismissal, but not a stay, in favor of parallel foreign litigation).

2. **Factors Used To Determine Whether To Grant A Stay On International Abstention Grounds**

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

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

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

3. Similarity Of Parties

It is settled that the parties need not be identical. For example, in *Goldhammer*, even though an individual shareholder or plaintiff corporation was named as a party in U.S. litigation, but not in parallel English litigation, the court noted that the individual held a two-thirds interest in the corporation and, therefore, had substantially similar interests to those of the corporation. “While a shareholder may have claims independent of the corporation, the parties and claims need not be identical in order for one action to be stayed or dismissed in deference to an earlier action.” *Goldhammer*, 59 F. Supp. 2d at 253. See also *Caspian Inv., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991); *Dragon Capital Partners L.P. v. Merrill Lynch Capital Servs., Inc.*, 949 F. Supp. 1123, 1127 (S.D.N.Y. 1997); *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982). *800537 Ont., Inc. v. World Imps. U.S.A. Inc.*, 145 F. Supp. 2d 288 (W.D.N.Y. 2001) (finding that similarity of actions and issues trumps absence of similarity of parties).

4. Conditional Stays

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

- agreement by the party to consent to jurisdiction of Belgian courts;

- agreement by the party to waive any statute of limitations defense;
- agreement by the party to be bound by the judgment of the Belgian court; and
- to pay any judgment obtained. *Evergreen*, 954 F. Supp. at 105.

B. CONTRAST TO FORUM NON CONVENIENS

1. **Conceptual Difference**

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

2. **Practical Difference**

While the factors used to assess motions based on each of the doctrines are not identical, courts generally consider the two doctrines together (with the exception of one factor discussed below). *See, e.g., Am. Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1154 (D.N.J. 1990) (“The factors informing the decision on *forum non conveniens* appear to be fully responsive to those informing a decision to stay [in favor of a parallel French action], and a detailed presentation on both grounds is simply unwarranted.”); *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666, 671 n.3 (D. Del.

1980) (defendant's motions to dismiss on forum non conveniens grounds, and motion to stay in favor of Venezuelan action, addressed together under the doctrine of forum non conveniens); *General Motors Corp. v. Lopez de Arriortua*, 948 F. Supp. 656, 668-69 (E.D. Mich. 1996) (denying both a motion to dismiss for forum non conveniens and motion to stay pending outcome of German proceeding).

In *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), the Eleventh Circuit discussed the doctrine of abstention in some detail finding it to be based on international comity. The court noted that “[t]he doctrine of international comity can be applied retrospectively or prospectively. When applied retrospectively, domestic courts consider whether to respect the judgment of a foreign tribunal or to differ to parallel foreign proceedings... When applied prospectively, domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum.” *Id.* at 1238.

Abstention involves a prospective application of the doctrine of international comity and “[a]ppplied prospectively, federal courts evaluate several factors, including the strength of the United States’ interest in using a foreign forum, the strength of the foreign governments’ interests, and the adequacy of the forum.” *Id.* These factors find expression in the forum non

conveniens analysis. Moreover, the court noted explicitly that the determination of the adequacy of the alternative forum” is informed by the forum non conveniens analysis. *Id.*

In this case, brought by a plaintiff who alleged that the Nazis stole assets from their family, the court dismissed the case on abstention grounds in favor of a legal foundation established by the U.S. and German governments to hear claims brought by victims of the Nazi regime. The court found that the governments of the U.S. and Germany had an interest in resolving claims of the type brought by the plaintiffs and that it was an adequate alternative forum.

3. Earlier Filed Foreign Proceeding

One factor relevant to a motion for a stay on international abstention grounds has no explicit role in the forum non conveniens analysis — the sequence of the filing of the actions. It is worth noting, however, that some courts have not attached much significance to the argument that the U.S. action should be stayed because the foreign action was filed earlier. For example, in *American Cyanamid*, the court denied the motion to dismiss on grounds of forum non conveniens, but went on to consider as a separate factor of the motion to stay the fact that the French action was filed first. It found “little merit” in this argument. *American Cyanamid*, 741 F. Supp. at 1159. The court stated that where parallel proceedings are taking place in different countries, “the preferred course of action is to permit each sovereign to reach judgment and apply the findings of one to

the other under principles of *res judicata*.” *Id.* (citing *Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1213-14 (D.C. Cir. 1989)). The *American Cyanamid* court also considered the “first to file” argument “as a call for judicial efficiency — presumably on the ground that the court first obtaining jurisdiction will have already expended some resources on the case.” *American Cyanamid*, 741 F. Supp. at 1159. The court found, on the facts, that more progress had been made in the second-filed U.S. action than in the first-filed French action, and therefore rejected this argument. This suggests, however, that where more progress has been made in the earlier-filed foreign action, this would weigh in favor of staying the U.S. action in favor of the foreign one. *See also General Motors*, 948 F. Supp. at 669 (“While Plaintiffs sought the jurisdiction of the German civil court by filing their counterclaim there before filing their complaint in this court, that factor does not compel a stay of this case because the counterclaim is not identical to this suit.”) *But see Nat’l Union*, 115 F. Supp. 2d at 1249 (finding that because the London proceeding was first filed, there were practical advantages to advancing the litigation in that forum).

V. ANTISUIT INJUNCTIONS

A. BASIC PRINCIPLES

1. Introduction

It is well settled that U.S. courts have the power to issue an antisuit injunction — that is an injunction

enjoining a person subject to their jurisdiction from prosecuting a foreign suit. *Quaak Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004). It is important to note that this injunction is aimed not at the foreign court, but at the party over which the U.S. court has jurisdiction. Failure to comply with the antisuit injunction, therefore, is contempt of court.

2. Threshold Requirements

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

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

B. CIRCUIT SPLIT

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

1. Restrictive Standard: Comity

The Courts of Appeals for the Third, Sixth and District of Columbia Circuits follow a strict test

based on the notion of comity. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *Compagnie Des Bauxites de Guinea v. Ins. Co. of N. America*, 651 F.2d 877 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982), *Younis Brothers & Co., Inc. v. Cigna Worldwide Ins. Co.*, 167 F. Supp. 2d 743, 745-46 (E.D. Pa. 2001).

Courts following the comity standard have held that as a result of comity concerns, antisuit injunctions should be “rarely issued” and only in two situations:

- a. to protect the U.S. forum’s jurisdiction, or
- b. to prevent evasion of important public policies.

The Second Circuit used to follow this same test, looking exclusively to these two situations, but the Court recently held in that the multiple factors set forth in the case of *China Trade and Dev. Corp. v. M.V. Choong Yong* should be used. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 119 (2d Cir. 2007) (“we have reiterated that all of the additional factors should be considered when determining whether an anti-suit injunction is warranted). *See Ibeto Petrochem Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007). (disagreeing with courts and commentators that have erroneously interpreted *China Trade* to say that we consider only these two [more significant] factors).

- a. Courts following the comity standard observe the general principle that one court will not interfere with or try to restrain proceedings in another court. *See, e.g., Laker Airways*, 731 F.2d at 926-27.
- b. Rather, in cases involving parallel proceedings, the court will allow the litigation to proceed in both forums until judgment is obtained in one court which may be pled as res judicata in the other court. *Id.*
- c. Under the comity standard, duplication of issues, vexatiousness and harassment do not justify interfering in an action in a foreign court. *Id.* at 928.

A court following the comity standard will refrain from issuing an antisuit injunction unless one of two factors can be shown: (a) the foreign action threatens the jurisdiction of the enjoining court, or (b) a party is attempting to evade an important public policy.

- a. Foreign Action Threatens the Jurisdiction of the Enjoining Court. An antisuit injunction may be appropriate where the foreign action threatens the jurisdiction of the enjoining court. A court may find that a foreign action threatens its jurisdiction in one of two circumstances.
 - i) An antisuit injunction may be appropriate when a proceeding is in rem since res judicata alone will not

protect the jurisdiction of the first court. Where jurisdiction is based on the presence of property within the court's jurisdictional boundaries, a concurrent proceeding in a foreign court poses a danger that the foreign court will order the transfer of the property out of the jurisdictional boundaries of the first court, thus depriving it of jurisdiction over the matter. *See Gau Shan*, 956 F.2d at 1355; or,

- ii) In an in personam proceeding where the foreign court is attempting to carve out exclusive jurisdiction over the action. *China Trade*, 837 F.2d at 35.
- b. Evasion of Important Public Policies. An antisuit injunction may be issued when a party attempts to evade compliance with a statute of the forum that effectuates important public policies. An injunction is not appropriate merely to prevent a party from seeking slight advantages in substantive or procedural law to be applied in a foreign court.

2. Liberal Standard: Vexatiousness

The Courts of Appeals for the Fifth, Seventh, and Ninth Circuits follow a more relaxed test based upon several factors, the most important of which is the vexatiousness or oppressiveness of the non-

U.S. litigation. *See, e.g., Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626-27 (5th Cir. 1996); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). Courts that have adopted the “vexatiousness” standard hold that an antisuit injunction is appropriate in circumstances when the foreign litigation:

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

3. Multiple Factors Test: First and Second Circuits

Both the First and the Second Circuits look to multiple factors in determining whether to issue anti-suit injunction. The First Circuit acknowledges that considerations of international comity should be accorded great weight in deciding whether to issue an anti-suit injunction. In doing so, it follows the conservative approach. It departs from that approach, however, by declining to endorse the view that an anti-suit injunction is justified only in two circumstances — threat to jurisdiction and public policy. The

First Circuit, looks to the “totality of circumstances.” According to the First Circuit, there is a rebuttable presumption against an anti-suit injunction which “may be counterbalanced by other facts and factors particular to a specific case.” See *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004).

The Second Circuit Court of Appeals follows the approach set out in *China Trade and Dev. Corp. v. M.V. Choong Yong*, placing great weight on comity, while considering a variety of equitable factors in determining whether to issue an anti-suit injunction. These factors include whether the foreign litigation would: (i) frustrate a public policy in the enjoining forum; (ii) be vexatious; (iii) threaten the issuing court’s jurisdiction; (iv) result in prejudice to other equitable considerations; or (v) result in delay, inconvenience, expense, inconsistency, or a race to judgment. See *Ibeto Petrochem Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64-65 (2d Cir. 2007) *China Trade* instructs that two of these factors should be accorded “greater significance”: whether the foreign action threatens the enjoining forum’s jurisdiction or its “strong public policies.” *China Trade*, 837 F.2d at 36. While some courts in the Second Circuit have made determinations as to whether to issue an anti-suit injunction by focusing exclusively on these two “greater weight” *China Trade* factors, 837 F.2d at 35, as noted, the Second Circuit recently reiterated that all of the additional *China Trade* factors should be considered when determining whether an anti-suit

injunction is warranted. *China Trade* also states that “principles of international comity” counsel that injunctions restraining foreign litigation be “used sparingly” and “granted only with care and great restraint.” 837 F.2d at 35-36. The main difference between the Second Circuit standard and the liberal standard is that the Second Circuit puts more weight on comity than the liberal circuits.

C. ANTI-SUIT INJUNCTIONS AND ARBITRATION

Some recent cases have considered anti-suit injunctions in the arbitration context.

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

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

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

Shortly thereafter, Pertamina began proceedings to vacate the award in the Indonesian courts and also sought there an injunction and penalties to enjoin KBC from enforcing the award in the United States. Just days before the hearing scheduled by the Indonesian court on the proposed injunction, KBC sought a temporary restraining order ("TRO") to enjoin Pertamina from seeking injunctive relief in Indonesia. The district court issued a TRO ordering Pertamina to withdraw its application to the Indonesian court for an injunction and enjoining it from taking any substantive steps in that court. Pertamina claimed it did not have sufficient time to withdraw its request for injunctive relief, and the Indonesian court issued an injunction prohibiting KBC from enforcing the award. KBC filed a motion asking the district court to hold Pertamina in contempt for violating the TRO. The district court found KBC in contempt of the TRO, again ordered

Pertamina to withdraw its Indonesian application for injunctive relief against KBC, and ordered Pertamina to indemnify KBC for any fines resulting from the Indonesian injunction. KBC next asked the district court to issue a preliminary injunction enjoining Pertamina from enforcing the Indonesian injunction and from further pursuing the annulment action in Indonesia. Pertamina responded by filing a motion to purge the contempt order. The district court granted KBC's motion for a preliminary injunction — enjoining Pertamina from enforcing the Indonesian injunction and from taking any substantive steps to prosecute the Indonesian annulment action. The court also denied Pertamina's motion to purge contempt. Pertamina appealed.

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

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

Although these treaty obligations limit the grounds on which the court can refuse to enforce a foreign arbitral award, there is nothing in the

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

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

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

Central to the Fifth Circuit’s analysis was that the New York Convention distinguished between courts of “primary jurisdiction” and courts of “secondary jurisdiction.” A court of primary jurisdiction is one with the authority to set aside an arbitral award. The courts of the

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

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

Convention much more than would the district court's injunction.”)

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

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

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

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

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

Finally, the Fifth Circuit concluded that the Indonesian court proceedings “do not threaten the integrity of the district court’s jurisdiction or its judgment enforcing the Award. . . . Thus, the integrity of our jurisdiction will not be affected unless we decide that the Indonesian annulment is in fact valid *and* that this annulment outweighs the Swiss court’s confirmation of the Award.” *Id.* at 370. The Fifth Circuit’s conclusion on this last

point is questionable as the Indonesian court was not only considering whether or not to annul the arbitral award, but also had entered an antisuit injunction enjoining KBC from enforcing the award. It was an injunction such as this one that the *Laker Airways* court found was a threat to its jurisdiction. An antisuit injunction — although it is aimed at a party to a lawsuit rather than a foreign court — does have the effect of depriving the foreign court of jurisdiction.

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

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

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

Against the vexations of the Indonesian proceedings, the court balanced considerations of

international comity. Significant to its analysis was that allowing the antisuit injunction to stand “could set an undesirable precedent under the [New York] Convention, permitting a secondary jurisdiction to impose penalties on a party when it disagrees with that party’s attempt to challenge an award in another country.” *Id.* at 373.

- b. Two recent cases considered the grant of anti-suit injunctions in the context where arbitration proceedings were pending. *Paramedics Electromedicina Comercial, Ltda. V. GE Med. Sys. Info. Technologies, Inc.*, No. 02 Civ. 9369, 2003 WL 2364159 (S.D.N.Y. June 4, 2003), *aff’d*, 369 F.3d 645 (2d Cir. 2004) and *Laif X Sprl v. Axtel, S.A. de C.V.*, 310 F. Supp. 2d 578 (S.D.N.Y. 2004), *aff’d*, 390 F.3d 194 (2d Cir. 2004).

In *Paramedics*, the Second Circuit affirmed the grant of an anti-suit injunction enjoining a party from pursuing a lawsuit in Brazil regarding issues that were the subject of an arbitration proceeding that had been commenced in the United States.

Paramedics arose out of a dispute between a Brazilian company, Paramedics Electromedicina Comercial, Ltda. known as “Tecnimed,” and a U.S. company, GE Medical Systems

Information Technologies, referred to as “GEMS-IT,” an affiliate of General Electric. GEMS-IT produced medical equipment. It entered into two agreements with Technimed – a Sales and Service Agreement, and a Distribution Agreement – under which Technimed would distribute GEMS-IT’s medical equipment in Brazil. The agreements contained an arbitration clause requiring disputes to be resolved under the Rule of the Inter-American Commercial Arbitration Commission (“IACAC”) in Miami, Florida.

A dispute arose between the parties under the agreements. Notwithstanding the arbitration clause, Technimed filed a lawsuit in the Tenth Civil Circuit Court of Porto Alegre, Brazil against GEMS-IT and GE Brasil. GE Brasil was an affiliate of General Electric based in Brazil and not a party to the underlying agreements. In its Brazilian lawsuit, Technimed asserted, among other things, that it was not required to arbitrate its dispute with GEMS-IT, and that GEMS-IT imported three pieces of equipment into Brazil in violation of Brazil’s import and licensing laws causing Technimed to suffer “moral damages.” 369 F.3d at 650.

After Technimed had filed its Brazilian suit, GEMS-IT commenced an arbitration under the IACAC Rules. In response to

GEMS-IT's Requet for Arbitration, Tecnimed informed the IACAC that it would not participate in the arbitration on the ground that the dispute was not arbitrable. The IACAC nonetheless appointed a panel to hear the case. GEMS-IT also answered the complaint in Brazil.

In response, Tecnimed filed a petition in a New York state court seeking a permanent stay of the arbitration. GEMS-IT removed the petition to the United States District Court for the Southern District of New York, and asserted counterclaims for an order compelling arbitration and for an anti-suit injunction to enjoin Tecnimed from proceeding with the Brazilian lawsuit.

In the meantime, the arbitral tribunal rejected Tecnimed's challenge to its jurisdiction, finding both that the claims GEMS-IT asserted in the arbitration and the claims Tecnimed asserted in the Brazilian lawsuit were arbitrable. The tribunal stated that it would consider the issues in the Porto Alegre action to the extent necessary.

Shortly thereafter, the district court considered the issue: GEMS-IT's claims in the arbitration were arbitrable, and Tecnimed's claims in the Brazilian lawsuit were within the scope of the arbitration clauses. The district court's

finding included Tecnimed's claim for "moral damages" under Brazil's import and licensing laws: "to the extent that the claim is arbitrable, the district court's ruling is dispositive even if the claim is unique to Brazil." 369 F.3d at 653. Thus the court granted Tecnimed's motion to compel arbitration, rejected Tecnimed's request for a stay, and entered an anti-suit injunction ordering Tecnimed to "immediately take all steps necessary to cause dismissal of the [Porto Alegre] Action." *Id.* at 650 (citation omitted).

Tecnimed filed a notice with the Brazilian court asking the case to be placed on its "suspense" calendar. Because, according to GEMS-IT's Brazilian law expert, this did not have the effect of halting proceedings permanently, the district court directed GEMS-IT to draft a Joint Petition to Dismiss to be signed by both parties and filed in the Brazilian court.

GEMS-IT prepared a Joint Petition, but Tecnimed refused to sign it. GEMS-IT moved to hold Tecnimed and its President, who resided in Brazil, in contempt. Tecnimed responded by raising some objections to the wording of the Petition. The district court issued an order to modify the Petition to deal with those objections, ordered Tecnimed to sign the Petition as modified, and gave

Tecnimed notice that it would be sanctioned if it failed to comply with the court's order.

Tecnimed refused to sign the modified Petition, moved the district court for a stay of the injunction pending appeal and sought postponement of an upcoming hearing. The district court found Tecnimed to be in contempt and ordered it to pay \$1,000 for each day of continued noncompliance. The district court also ordered Tecnimed's President to appear at a future hearing and "to show cause why Tecnimed should not be subjected to further sanctions." Tecnimed and its President disobeyed this order, and the court increased the sanction to \$5,000 per day.

Tecnimed appealed the grant of the anti-suit injunction and the contempt ruling. The Second Circuit began by identifying the two threshold factors used to determine whether a court should grant an anti-suit injunction "against parallel litigation." First, the parties are the same in both matters; second, resolution of the case before the enjoining court is dispositive of the action to be enjoined.

The Court found both these factors to be satisfied notwithstanding the fact that the two parties were not identical in both matters, in that GE Brasil was a party to the Brazilian action, but not to the New

York one. The Court found that GE Brasil's presence as a party of the Brazilian action did not render the parties any less the same in both action because "GE Brazil is named in the Porto Alegre action chiefly on the basis of its aspects of identity with GEMS-IT The district court did not abuse its discretion in ruling that the parties to the two actions are thus sufficiently similar to satisfy the first threshold requirement." 369 F.3d at 652.

The Court turned to the second threshold consideration – whether the case before the district court was dispositive of the Brazilian action. "The case before the enjoining court here concerns the arbitrability of the parties' claims; therefore the question . . . is whether the ruling on arbitrability is dispositive of the Porto Alegre litigation, even though the underlying disputes are confided to the arbitral panel and will not be decided by the enjoining court." *Id.* at 653. The Second Circuit held that it did; the district court's ruling was dispositive of the Brazilian action in that its finding that the claims asserted by Tecnimed were arbitrable of necessity precluded the Brazilian litigation. "In short, the district court's judgment disposes of the Porto Alegre action because the Porto Alegre litigation concerns issues that, by virtue

of the district court's judgment, are reserved to arbitration." *Id.*

Having concluded that the threshold requirements were satisfied, the Second Circuit turned to consider whether the other factors that bear on the grant of an anti-suit injunction were satisfied. As noted, the Second Circuit follows a strict approach – finding that anti-suit injunctions are justified only in two circumstances: (i) a ground of public policy; (ii) to protect the jurisdiction of the rendering court. It found both criteria were satisfied in this case.

As far as public policy is concerned, the Second Circuit invoked the federal policy “favoring the liberal enforcement of arbitration clauses” which “applies with particular force in international disputes.” 369 F.3d at 654. The Second Circuit found that Tecnimed commenced the Brazilian action after GEMS0IT commenced arbitration proceedings as “a tactic to evade arbitration.” *Id.* The Second Circuit, however, declined to adopt a strict rule that the commencement of litigation in an attempt to avoid arbitration alone is sufficient grounds for an anti-suit injunction to enjoin that litigation.

The Second Circuit also justified the anti-suit injunction on the grounds that the Brazilian litigation threatened the

jurisdiction of the rendering court. It reasoned as follows: the district court had rendered a judgment in a case involving the same issues and the same parties as the Brazilian court. Having done so, “[a]n anti-suit injunction may be needed to protect a court’s jurisdiction once a judgment has been rendered.” *Id.* Thus, while considerations of comity usually weigh heavily against the “extreme measure” of an anti-suit injunction, “where one court has already reached a judgment – on the same issues, involving the same parties – considerations of comity have diminished force.” *Id.* at 655.

To the objection that an anti-suit injunction is unnecessary because the more appropriate remedy for the party seeking the anti-suit injunction would be to plead the U.S. judgment as *res judicata* in the foreign forum, the Second Circuit responded that “a foreign court might not give *res judicata* effect to a United States judgment.” *Id.*

In a more recent decision, *Laif X*, 390 F.3d 194 (2d Cir. 2004), the Second Circuit affirmed the denial of an anti-suit injunction in the arbitration context. This case arose out of a dispute between two shareholders of Axtel, S.A. de C.V., a Mexican telecommunications company,

Telinor Telefonía and Laif X Sprl, a Belgian partnership.

The bylaws of Axtel provided that disputes among the company and its shareholders were to be resolved by arbitration under the Commercial Arbitration Rules of the American Arbitration Association in New York. Laif X commenced an arbitration proceeding against Telinor asserting that Telinor had violated Axtel's bylaws by entering into a subscription agreement that illegally diluted Laif X's ownership interest.

Before answering Laif X's arbitration demand, Telinor filed a lawsuit in Monterrey, Mexico seeking a declaration that Laif X obtained its Axtel shares through an invalid assignment, and therefore was not a shareholder of Axtel. Telinor also answered the arbitration demand requesting that the arbitration be dismissed because the dispute was not arbitrable, or, alternatively, that it be stayed pending the outcome of the Mexican lawsuit.

Laif X responded by petitioning the District Court for the Southern District of New York for an order compelling Telinor to arbitrate the issue of its title to the shares in the New York arbitration proceedings and an order issuing an anti-

suit injunction barring Telinor from pursuing the Mexican lawsuit.

Judge Rakoff denied both the petition for both orders. Laif X appealed. The Second Circuit reviewed the denial of the petition to compel arbitration *de novo*, and affirmed. The Court began by noting that “[u]nder the FAA, the role of courts is limited to determining two issues: (i) whether a valid agreement or obligation to arbitrate exists, and (ii) whether one party to the agreement has failed, neglected or refused to arbitrate.” *Laif X Sprl*, 390 F.3d at 198.

The Court assumed, therefore, that there was a valid agreement to arbitrate, and turned to consider the second issue of whether Telinor’s actions could be characterized as a refusal to arbitrate.

Critical to the Second Circuit’s decision was the view that the commencement of litigation, notwithstanding the presence of an arbitration clause, did not per se constitute a refusal to arbitrate. In other words, even if a party commenced litigation in spite of the presence of an arbitral clause, it was an independent and further question whether that party could be characterized as refusing to arbitrate. And in order to answer that question the focus should be on the party’s actions in the arbitration proceedings.

In this case, the Second Circuit held that Telinor was not refusing to arbitrate because it had participated in the arbitration proceedings. “It is difficult to see, however, how an order to compel would operate on Telinor’s course of conduct. Telinor has answered the arbitration demand. Telinor’s challenge to the arbitrability of Laif X’s claims before the AAA does not constitute a refusal to arbitrate. IF the AAA concludes that the issues raised in Telinor’s Mexican lawsuit are not arbitrable and need to be decided before the arbitration continues, the AAA will issue a stay, in which event Telinor’s conduct will be in accord with the arbitral process. It may be another story if the AAA denies a stay or if Telinor ignores an arbitral order to suspend or discontinue the suit in Mexico; but that has not happened.” *Id.* at 198-99.

The Second Circuit moved next to consider the district court’s order denying petition for an anti-suit injunction, which it reviewed on an abuse of discretion standard.

The Second Circuit found that the district court did not abuse its discretion in issuing the anti-suit injunction. The court assumed that the two threshold considerations were satisfied, but found that three considerations supported the

district court's view. "Regardless of these [threshold] considerations, however, the district court did not abuse its discretion by declining to issue the anti-suit injunction, because: (i) principles of comity counsel against issuing the anti-suit injunction; (ii) the United States federal courts have no interest in enjoining Telinor's Mexican lawsuit; and (iii) Telinor's Mexican lawsuit is not directed at sidestepping arbitration." *Id.* at 200.

Appendix A

DRAFT FORUM SELECTION AND RELATED CLAUSES

1. Exclusive and Non-Exclusive Forum

i. Exclusive Forum

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

ii. Non-Exclusive Forum

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

iii. Asymmetrical Forum Selection Clause

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

iv. Defendant's Place of Business As Forum

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

v. *Subject Matter Jurisdiction*

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

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

2. Scope of Clause

i. *Broad Scope*

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

ii. *Exclusions*

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

3. Other Common Provisions

i. *Consent to Service of Process*

[Party A] irrevocably designates, appoints and empowers [Agent D], with offices on the date hereof at [Address in City E], as its agent with respect to any action or proceeding in [Country X] to receive, on its behalf, and in respect of its

property, service of any and all legal process, summons, notices and documents which may be served in any such action or proceeding, and agrees that the failure of the agent to notify [Party A] of any such service of process does not impair or affect the validity of service. [Party A] further irrevocably consents to the service of process out of any of the courts listed in [Article II] by the mailing of copies by registered or certified mail, postage prepaid, to [Party A] at its address set forth in [Article III], such service to become effective 30 days after such mailing. If for any reason [Party A] shall cease to be available to act as agent, [Agent D] agrees to designate a new agent in [City E] on the same terms and for the same purposes.

ii. Waiver of Foreign Sovereign or State Immunity

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

iii. Choice-of-Law Clauses

a. Scope of Choice-of-Law Clause

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

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

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

b. Renvoi Versus “Whole Law”

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

iv. Waiver of Forum Non Conveniens

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

v. Waiver of Jury Trial

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

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

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

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

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

vii. *Basic Forum Selection Clause*

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