Forum Non Conveniens in the United States and Canada

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INTRODUCTION

Forum non conveniens is a procedural rule giving a judicial forum discretion to dismiss an action. Even if jurisdiction and proper venue are established, a court may dismiss a case when: [1] an alternative forum has jurisdiction to hear a case; [2] when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience; or [3] when the chosen forum is inappropriate because of considerations affecting the court's own administrative problems . . . .

The doctrine's straightforward rationale belies the controversy that has developed over its application. Critics describe it as a shield for multi-national corporations or a tool to perpetrate environmental offenses, and urge its cancellation or modification. Proponents, however, contend the doctrine is a vital safety valve to relieve
pressure from the deluge of foreign plaintiffs seeking U.S. damage awards in cases better tried elsewhere.\(^5\)

Forum non conveniens doctrine does not appear to be controversial in Canada, possibly since it is applied so routinely between provinces.\(^6\) Despite current procedural usage of this doctrine within Canada, its reliance on old English precedent is often questioned. One leading Canadian authority described Canadian forum non conveniens doctrine as "confused."\(^7\) Forum non conveniens analysis is, therefore, ripe for comparison and possible modification in both forums.

Forum non conveniens analyses in Canada and the United States are notably different in their intent, application and, where pertinent, post-dismissal conditions. To some extent, these differences are a subset of the overall contrast between the two national systems.\(^8\)


\(^8\) In a typical United States case, either a state or federal court may hear the same matter provided the subject matter jurisdictional requirements are met. It is, however, the defendant's right to move for relocation to the federal court. There is substantial overlap between state and federal jurisdictions in this dual system.

Canada, on the other hand, maintains a unified system meaning that federal courts are not parallel to provincial courts, but simply act as appellate courts of the province. On appeal, issues may go forward to the Federal Court of Canada and the Supreme Court of Canada. Canadian federal courts have original jurisdiction over only very narrow matters in comparison to the federal courts in the United States. **Gerald L. Gall, The Canadian Legal System, 63** (Carswell ed., 3d ed. 1990).

The practical effect of these differences is that a change of venue is a very different procedural matter in Canada than the United States. Like pre-1404 U.S. cases, venue transfer in Canada is a conflicts of law matter, implicating forum non conveniens. A federal oversight role and ultimate recourse to the Canadian Supreme Court lends some uniformity to Provincial conflicts rules, which must abide by the Constitutional Act of 1867 (formerly known as the British North America Act). **J.G. Castel,**
These differences distort the flow of litigation between these forums which foster uncertainty and inefficiency in litigation and strain judicial comity. This paper examines the analytical differences in the application of forum non conveniens between the U.S. and Canada. Specifically, it discusses the baseline forum non conveniens analysis of each forum and then compares the two in specific factors. In closing, it proposes a reform of U.S.-Canadian judicial relations and creation of a forum non conveniens agreement between the two fora.

I. U.S. AND CANADIAN FORUM NON CONVENIENS ANALYSIS

Although both the United States and Canada draw much of their legal heritage from British legal jurisprudence, forum non conveniens doctrine provides an excellent example of where the common legal stream has diverged. Even though the United States has developed a considerably different version of the doctrine, Canada has closely followed the English analytical basis.

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CANADIAN CONFLICT OF LAWS, 228-29 (3d ed. 1994).

As Justice Scalia noted, the origins of the forum non conveniens doctrine in Anglo-American law are murky. Nevertheless, Scotland is generally recognized as the place of origin of what has come to be known as the forum non conveniens doctrine. American Dredging Company v. Miller, 510 U.S. 443, 444 (1994). Scottish courts would often allow Scottish plaintiffs to use the arrestment ad fundandum to seize and attach foreign assets to force foreign defendants to defend themselves in Scotland. This process eventually became more lenient as some Scottish courts required that the plaintiff have acted in a manner so as to abuse process in order for the motion to be granted. Alexander Reus, Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom and Germany, 16 Loy. L.A. Int'l & Comp. L.J. 455, 459-60 (1994).

While Scotland is frequently noted as the place of origin of forum non conveniens doctrine, dismissals for lack of an appropriate forum were already well underway in the United States early in the history of the republic. WARREN FREEDMAN, FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS, 4 (1992).
Accordingly, judicial mechanisms analyzing how and when a particular court is determined for a particular cause of action also developed differently in the two countries. In the United States, the phrase "forum non conveniens" is used to describe the process by which cases inconvenient to a litigant or a particular forum may be dismissed at the discretion of the court. Canadian courts on the other hand, make a "forum non conveniens" finding when the given forum is incorrect. The phrase "forum conveniens", in itself, better describes the Canadian process since the Canadian inquiry is geared less to a process of elimination and more towards an objective determination of the most appropriate forum.

A note of caution is in order when analyzing Canadian forum non conveniens doctrine. While the doctrine has only one meaning in the United States, it is used in multiple contexts in Canada (e.g. anti-suit injunctions, validity of service of process and lis alibi pendens actions). In reading such analysis, it is important to ensure the doctrine in question is the appropriate one.

Here, the analysis focuses on one particular application of Canadian forum non conveniens analysis: the common-law derived doctrine whereby courts may, in their discretion, determine whether an action should proceed in a certain venue. In this context, the analysis commences when a defendant moves to dismiss a claim from one court despite its subject matter jurisdiction and personal jurisdiction. A defendant asks the court to decline to exercise its jurisdiction because another forum is more efficient or convenient.

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10 White, supra note 4.

11 See infra section IB. See also Castel, supra note 8, at 230.

12 See id.

13 Under Ontario's Rule 17, for example, a foreign defendant can petition to determine whether the court, under which service has been brought, is forum conveniens or not. ONT. R. CIV. P. 17.02. In the United States a defendant can bring up forum non conveniens in a pre-answer motion. The Federal Rules do not break down service of process into in juris and ex juris categories, opting for one rule for all service.

If the court finds that it is "forum non conveniens," the action is dismissed for litigation in another country's forum.\textsuperscript{15}

Traditionally, Canada followed English rulings which emphasize deference to the plaintiff; this underpinning has weakened as Canada moves to a more party-neutral approach in determining the most appropriate forum. In contrast, the broad theme in United States forum non conveniens analysis is a concern for judicial efficiency evaluated via the weighing of public and private factors relevant to the forum in question.

A. United States law examines the public and private factors indicating whether the forum is convenient

United States courts occasionally declined to exercise jurisdiction over predominately foreign-related cases long before the announcement of the forum non conveniens doctrine.\textsuperscript{16} Those cases with little relation to an American forum or those "inexpedient" for a United States court were simply rejected.\textsuperscript{17}

\textsuperscript{15} Castel, \textit{supra} note 8, at 229-30.

\textsuperscript{16} In the United States, forum non conveniens "may have been given its earliest and most frequent expression in admiralty cases." American Dredging Company v. Miller, 510 U.S. 443, 449 (1994). Justice Scalia cited two maritime cases, The Maggie Hammond, 9 Wall. 435, 457 (1870) and The Belgenland, 114 U. S. 355, 365-66 (1885). Forum non conveniens was not limited to admiralty, however, since there is "a long history of valid application of the doctrine by state courts as well, both at law and in equity." American Dredging, 510 U.S. at 448 (citing Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 513 (1947)).

\textsuperscript{17} As early as 1885, in The Belgenland, 114 U.S. 355, the Supreme Court allowed the lower court’s discretion to refuse jurisdiction stemming from a controversy between two foreign ships colliding on the high seas. The Court opined that to accept such a case would have been "inexpedient."

Forum non conveniens attained a high degree of popularity in the late 1920's, as legalists began to view forum non conveniens doctrine as a good way to relieve an overcrowded docket. Paxton Blair, \textit{The Doctrine of Forum Non Conveniens in Anglo-American Law}, 29 Colum. L. Rev. 1 (1929).

The doctrine continued to grow in importance in United States courts especially after the Supreme Court, in Canada Malting Co. v. Paterson Steamships, 285 U.S. 413
A more structured test for retaining or rejecting such cases (i.e., forum non conveniens) originated in *Gulf Oil v. Gilbert,* a case in which the Supreme Court evaluated the costs and benefits of the potential forum against a number of public and private factors.

1. *Gulf Oil v. Gilbert.* In *Gulf Oil,* a Virginia plaintiff sued a Pennsylvania corporation in the federal district court of New York for negligence which resulted in the destruction of a Virginia warehouse. Ultimately, the United States Supreme Court upheld the district court's decision to dismiss the case on forum non conveniens grounds; a decision whereby the plaintiff would lose the advantage of a higher likely award of a New York jury. Ironically, while the case applied to two domestic parties, *Gulf Oil* would have its most important application in international cases.

*(1932)*, specifically endorsed the right of courts to decline to exercise jurisdiction in maritime cases between aliens or non-residents when a foreign tribunal would be more appropriate. In this early example of international "forum shopping," a Canadian plaintiff had sued a Canadian firm in admiralty in United States court to obtain more favorable liability law. The court explicitly held that despite the plaintiff's loss of choice favorable law, the case was better tried in Canada.


*Id.* The Supreme Court listed the factors relevant to each category. The private factors included:

- ease of access to evidence; availability of compulsory procedures for forcing attendance on unwilling witnesses; cost of attaining attendance of willing witnesses; the possibility of viewing the premises; enforceability of judgments abroad; all other practical problems promoting an easy, expeditious and inexpensive trial.

The public factors included:

- administrative burden of crowded dockets; the public interest in having local controversies decided at home; public interest in having the trial of a diversity case in a forum familiar with the applicable law; difficulties in the application of forum law; avoiding undue forum shopping; unfair burden on citizens of an unrelated forum of jury and tax duties.
One year later Congressional attention to the problem that *Gulf Oil* presented interstate federal venue transfers based on forum non conveniens resulted in the enactment of federal legislation.\(^2\) This legislation revised the powers of federal courts to transfer inconvenient claims to a more appropriate United States forum. The analytical duality set forth in *Gulf Oil* was not forgotten, however; reappearing in the 1981 landmark case of *Piper v. Reyno.*\(^{21}\)

2. *Piper v. Reyno.* *Piper* arose from the crash of a United States (Pennsylvania) manufactured passenger aircraft in Scotland.\(^{22}\) Seeking the more favorable liability and damage rules of the United States, the administratrix of the Scottish decedents of the crash commenced a lawsuit against the aircraft and propeller manufacturers in California. Initially, the defendants successfully moved to transfer the case to the Middle District of Pennsylvania.\(^{23}\) The trial court later granted the defendant's motion to dismiss on grounds of forum non conveniens, basing its analysis on the public and private factors it derived from *Gulf Oil.*\(^{24}\)

Upon its review, the Supreme Court specifically endorsed the holding in *Gulf Oil,* stating that the determinative feature of the *Piper* analysis to be "convenience."\(^{25}\) Once the plaintiff's choice became open to scrutiny by the defendant, the role of the court was to conduct an analysis of "all relevant public and private interest factors" to determine where the case should be heard.\(^{26}\)

The Supreme Court, in affirming the trial court's utilization of the *Gulf Oil* analytical basis for forum non conveniens, clearly indicated its preference for United States rather than foreign plaintiffs. The Court held that the plaintiff's choice of forum should be entitled

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\(^{22}\) Id.at 238-39.

\(^{23}\) Id. at 240.


\(^{25}\) Piper, 454 U.S. at 249.

\(^{26}\) Id. at 257.
to less deference because the plaintiff was foreign. It stated that the distinction between resident and citizen plaintiffs is "fully justified" since there is less presumption that the plaintiff chose the forum for his convenience. Specifically rejected was the idea that the case could not be dismissed if it would result in an unfavorable change of law for the plaintiff. The court opined that an inadequate remedy in an alternate forum could be given substantial weight. Where the plaintiffs faced no danger of being "deprived of any remedy or treated unfairly," less favorable Scottish law would not bar a forum non conveniens dismissal.

The Piper court then conducted a comprehensive analysis of forum non conveniens analysis based on public and private factor convenience. In terms of private factors, access to sources of proof and evidence pointed in "both directions." Records of design and manufacture of the aircraft existed in the United States, while much of the relevant crash-related evidence was located in Great Britain. Nevertheless, the aircraft manufacturers' affidavits persuaded the Court that the location of witnesses beyond compulsory process would present significant evidentiary problems. Furthermore, the defendant's inability to implead potential third-party defendants, including the Scottish pilot's estate and the foreign airline, militated against dismissal. While the defendants, if found liable, could sue for indemnity or contribution at a later time against Scottish defendants, the Court thought it would be more convenient to resolve all claims in one trial.

Turning to the public factors, the Court emphasized that when applying foreign law (in this case Scottish law), a court must look to dismissal. In addition, the Court said that since all plaintiffs and some

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27 Id. at 255-56.  
28 Id. at 252.  
29 Id. at 255.  
30 Id. at 257-61.  
31 Piper, 454 U.S. at 257-58.  
32 Id. at 259.  
33 Id. at 258-59.
defendants were Scottish and all the decedents were Scottish, Scotland had a very strong interest in this case.\textsuperscript{34} The plaintiffs countered that United States courts held a priority interest based on potential application of United States liability law as a means of additional deterrence to United States plane manufacturers. The Court rejected this greater deterrence value against United States corporations as insufficient to justify "the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here."\textsuperscript{35}

On the surface, Piper makes sense because the case arose from an airplane crash in Scotland involving a Scottish flight crew with Scottish passengers. Clearly, there are a lot of Scottish connections which suggest the case should have been transferred to Scotland. It is ironic, however, that the United States defendant would argue that its own forum is inconvenient. Typically, a party would be expected to seek home-field advantage in litigation.

The Piper test fails to incorporate what was probably the most important factor for the American defendant in making the forum non conveniens motion avoiding potentially onerous damage awards typically awarded in a United States forum.\textsuperscript{36} While the veneer of forum non conveniens analysis is whether a forum is convenient, the issue may actually be raised and litigated for reasons completely separate from "convenience" the fear of greater liability arising in United States courts.

Notwithstanding the unspoken motivations for a defendants' forum non conveniens motion to dismiss, Piper and its progeny clearly established the private/public factors based United States forum non conveniens test. This test ultimately focuses on the interests of the

\begin{itemize}
  \item \textsuperscript{34} Id. at 260.
  \item \textsuperscript{35} Id. at 261.
  \item \textsuperscript{36} Forums may apply another forum's law; keeping the case in the United States would not have precluded use of Scottish liability law. Nevertheless, United States judgments might still reflect higher United States valuation standards, and United States procedural law could have a substantial impact on a trial's outcome.
\end{itemize}
forum and the burden a trial will place on a court and the community. By contrast, the Canadian test historically focuses more on the interests of the parties, notably the plaintiff's choice of the forum. This dominant aspect of Canadian forum non conveniens analysis slowly fades as Canada imports more of the multi-faceted public and private factors of analysis into its forum non conveniens doctrine.

B. The Canadian test searches for the most appropriate forum, but requires deference to the plaintiff's choice of forum

Canadian forum non conveniens analysis uses similar wording as the United States; however, appearances are deceiving. Both countries now employ a two-part analysis to determine whether the forum is appropriate. Yet there are major structural differences in how the tests work. Under Piper, United States courts sift through the multiple public and private factors to determine dismissal or retention of the case in a United States forum. The Canadian test, on the other hand, examines two distinct components: first, the availability of a better forum in which to try the case and second, whether the plaintiff, not the forum, would be disadvantaged by dismissal.

Another basic difference is that the forum non conveniens standard in the United States is largely a creation of common law; and although the standard in Canada is also a creation of common law, Canadian courts are statutorily empowered to make forum non conveniens determinations. Canadian courts are statutorily empowered to make a forum conveniens determination, although Furthermore, unlike United States courts, Canadian rulings show no preference for their own citizen plaintiffs over foreign plaintiffs.

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37 Telephone interview with Robin Junger, Faculty of Law, University of Victoria, British Colombia (June 21, 1996)
38 CASTEL, supra note 8, at 230.
39 Edinger, supra note 6, at 292.
1. **MacShannon**: The English case of *MacShannon v. Rockware Glass* is one of the most widely influential cases in Canadian forum conveniens analysis. *MacShannon* sets forth a two part forum conveniens analysis:

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

In other words, the initial prong of Canadian forum analysis requires the defendant to find a better forum for the case if he chooses to challenge the forum. If the defendant can find no other suitable forum, the motion to dismiss fails. Conversely, if the defendant can point to a better forum, the burden shifts to the plaintiff to show that the change of forum would cause him to lose a legitimate advantage

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41 Knowledge of English legal doctrine is critical for understanding Canadian legal doctrine, especially in the area of forum non conveniens. With some variation in timing and specifics, the provinces of Canada (expect Quebec) have adopted the English common law system. Until the Statute of Westminster in 1931, the English parliament could legislate for Canada. Moreover, Canadian laws could not contradict English law or they would be inoperative to the extent they contradicted English rules. The ascendancy of the Supreme Court of Canada in 1949 as the final court of appeal in respect of all criminal and civil matters in Canada strengthened the use of Canadian-developed legal authority. Nevertheless, English law, especially decisions of the House of Lords, are often cited as persuasive authority for Canadian cases regarding forum non conveniens. GALL, *supra* note 8, at 50.
43 CASTEL, *supra* note 8, at 231.
he would have had in the original forum. If the plaintiff cannot show that he would be disadvantaged by dismissal in favor of an alternate forum, the court may dismiss on the grounds of forum non conveniens. Dicta in some decisions suggests a possible collapse of the two steps of the Canadian analysis into one balancing test of all relevant factors. The advantage to the plaintiff becomes merely one of the factors regarding the appropriateness of the forum. This dicta has not been widely followed.

The general outlines of the two-step Canadian process go back to English authority from the 1930s yet the wordings of the tests have changed over time. Canadian provinces have shown considerable variation in giving deference to the various English authority which complicates matters of analysis. Nevertheless, there are some leading cases and standards which provide overall guidance.

2. Antares. The leading Canadian Supreme Court authority addressing forum non conveniens is the case of Antares Shipping Corp. v. The Ship "Capricorn." The case arose when one Liberian company seized the Capricorn while pursuing a claim against the Liberian owners of the vessel. The plaintiff sought to serve the foreign owner of the vessel ex juris. The trial and appellate courts held that the Canadian forum was forum non conveniens, therefore,

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44 Id.
46 See generally, CASTEL, supra note 8, at 230-35.
47 Edinger, supra note 6, at 290.
48 Antares Shipping Corp. v. The Ship "Capricorn", 65 D.L.R. 3d 105 (1976). The case involves a forum conveniens decision in the context of a defendant ex juris, where the burden on the defendant to find an alternate forum is usually construed to be lighter. Although the reasoning for differentiating between service in the forum or ex juris has gradually decreased over time, and may eventually disappear, the analysis in this case is quite useful for demonstrating the first prong of the Canadian search for the most appropriate forum.
49 Id. at 106.
50 Id. at 120.
the case should be dismissed. The Canadian Supreme Court reversed, holding that Canada was forum conveniens and that the service should proceed. The majority based its decision on the fact that no other jurisdiction was more appropriate than Canada, and therefore, Canada was "forum conveniens." This analysis was significant because it foreshadowed the emerging trend in Canadian forum analysis to select a trial's forum based on which forum was the most objectively appropriate forum, and rejected the dissent's approach which focused more narrowly on whether the defendant has sufficient ties to Canada.51

According to the court, the overwhelming consideration in whether to take the case was the existence or non-existence "of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice."52 There was no "centre of gravity," because both parties were foreign and the ships operated under flags of convenience. Ultimately disregarding Canadian precedent requiring a tie to Canada, the court (citing the decision in Gulf Oil)53 found determinative the lack of a more appropriate jurisdiction.54

The reasoning of Antares is consistently applied in Canadian courts which favor the pursuit of the most appropriate or just forum.55 This is in stark contrast to the United States determination under the rubric of "convenience." Like Piper, this first "appropriateness" test looks into a multitude of factors relating to convenience. Unlike Piper, however, the end sought is not possible elimination of the defendant's home forum because of inconvenience, but the finding of the forum to which the action most appropriately belongs.

The second part of the Canadian examination is whether the plaintiff would be deprived of a legitimate advantage if the case were

51 Id. at 129.
52 Id. at 123.
53 Id.
54 Id. at 129.
55 CASTEL, supra note 8, at 230.
dismissed on forum non conveniens grounds.\textsuperscript{56} In this context, whether or not a given procedural or legal advantage constitutes a "legitimate advantage" has been the focus of much litigation.\textsuperscript{57} Over time, the "legitimate advantage" has been found to include a variety of advantages, such as: a less expensive trial, better discovery, better statute of limitations (a remedy not available in another forum), and better substantive law.\textsuperscript{58}

The strong deference to the plaintiff set forth in \textit{MacShannon} is a remnant of the old English standard favoring the plaintiff's choice of forum unless it was "oppressive or vexatious."\textsuperscript{59} The deference to the potential "legitimate" advantages available to a plaintiff in the plaintiff's chosen forum seems to be an open invitation, if not endorsement, to forum shopping. As a consequence, deference to the plaintiff has been restricted in some cases where the plaintiff had no other preference for or connection to the forum outside of egregious forum shopping.\textsuperscript{60}

3. \textbf{Spiliada}. Canadian forum non conveniens analysis continues to evolve with an eye towards English legal authority. A more recent English decision, \textit{Spiliada Maritime Corporation Ltd. v. Cansulex Ltd.},\textsuperscript{61} advocated reducing the deference shown to the plaintiff's choice of forum (the second test in the Canadian test mentioned above). Instead, the court moved toward a simple, one step balancing of convenience test. The specific factors of this test are very similar to

\begin{quote}
\textsuperscript{56} Edinger, \textit{supra} note 6, at 293.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{CASTEL}, \textit{supra} note 8, at 245-47.
\textsuperscript{60} DeSavoye v. Morguard Investments Ltd. et al., 76 D.L.R.4th 256 (1990).
\end{quote}
those found in *Piper*, yet this formulation is not controlling in Canada since it contradicts Canadian precedent.

Nonetheless, *Spiliada* continues to influence the analysis of Canadian courts in determining the most appropriate venue. In sum, the United States generally follows the *Piper* standard, while in Canada, the courts generally follow some variation of the *MacShannon* test.

II. KEY FACTOR COMPARISON

The following examples compare the factors of Canadian and United States forum non conveniens analyses. First, the United States analysis emphasizes judicial economy whereas the expenditure of the forum's resources is less important for Canadians. Second, United States courts are more willing to impose conditions on the dismissal of a case to an alternate forum. This second factor may be a symptom of judicial chauvinism - United States courts attempting to impose United States procedural standards in foreign jurisdictions. Finally,

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62 Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). The specific *Spiliada* factors include:

- the location and convenience of parties and witnesses; avoidance of a multiplicity of proceedings; the existence of another similar action; the place where the cause of action arose; the location of documentary evidence; the interference with the business of the defendant; possible savings of cost and time; the applicable national law.


63 CASTEL, *supra* note 8, at 137.

64 Id.

65 Edinger, *supra* note 6, at 289-90.
the simple economic reality that many lucrative litigation targets are in the United States makes the burden of foreign plaintiff litigation in United States courts a constant burden on corporate defendants and the federal bench.

A. Whether dismissal will deprive the plaintiff of favorable law

Most states in the United States require a defendant moving to dismiss on the basis of forum non conveniens must establish that an alternative forum exists. Often this is satisfied when the defendant is agreeable to process in another jurisdiction. While a defendant


68 Some states, such as New York, do not require an alternative forum. In Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 247-50 (N.Y. 1984), the state of Iran attempted to impress a constructive trust on the world wide assets of their deposed rulers for crimes against the state. The New York court hearing the case opined that the Supreme Court had never suggested that "the doctrine of forum non conveniens implicates constitutional due process rights." The court held that since New York could not afford proper relief for the plaintiff and the case had little nexus to New York, the forum non conveniens action was dismissed "notwithstanding the fact that the record does not establish an alternative forum where the action may be maintained and they could do so without conditioning their dismissal on defendant's acceptance in another jurisdiction."

69 See generally Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, (3rd Cir. 1995), where an Indian national sued an Indian shipping company for injuries on the high seas. India was not considered an adequate alternative forum because completion of an Indian judicial remedy would take a quarter of a century. The forum non conveniences motion was dismissed.

70 See generally Ceramic Corp. of America v. Inka Maritime Corp., 1 F.3d 947 (9th cir. 1993), in which the Japanese forum ordinarily would have been adequate because the defendant was amenable to service there. However, since Japanese courts would
must show an alternative forum exists, the alternative forum need not "provide the same range of remedies as are available in the home forum." However, if the alternative forum’s remedy is so "clearly inadequate or unsatisfactory that it is no remedy at all", dismissal from the United States forum would not be appropriate. As a result, United States courts do not usually consider whether a plaintiff will encounter less favorable law, unless such a change would effectively eliminate the possibility of a remedy.

In Canada, the lack of an alternative forum for an otherwise sound case would bar a forum non conveniens dismissal. Furthermore, Canadian courts show strong deference to a plaintiff's choice of forum, even if the forum was selected merely for more favorable law. Accordingly, virtually any unfavorable change in the procedural law for a plaintiff would effectively bar a forum non conveniens dismissal by a Canadian court.

1. United States: Because United States laws are so plaintiff-friendly, plaintiffs who are dismissed from United States courts on forum non conveniens grounds are unlikely to be able to bring their case or recover as large an amount in an alternate forum. This issue arose in Ledingham v. Parke Davis when a Canadian plaintiff sued a United States drug manufacturer in New York. A court that was contractually required to hear the case summarily dismissed the case. The United States court did not consider Japan to be an adequate alternative forum.

Id.

Id. (quoting Piper Aircraft Co. v. Reno, 454 U.S. 235, 254 (1981)).

Id.

One study reported that forum non conveniens dismissals are "outcome determinative" for cases which are dismissed. "[Of approximately] 180 international forum non conveniens dismissals granted by United States federal courts from 1947 to 1984, almost none of the dismissed cases were litigated in the alternative forum. Only three went to trial and lost, signifying that litigation to the point of judgement is very rare and that the majority of disputes were either settled or were never pursued in the alternative forum." Reus, supra note 9, at 474 (quoting David W. Robertson, Forum Non Conveniens in America and England: A Rather Fantastic Fiction, 103 Law Q. Rev. 398, 412 (1987)).

tort suit was filed on behalf of a Canadian child afflicted with birth defects associated with the effects of the drug Dilantin. Dilantin is an anti-convulsant developed in the United States, but in this case the drug was allegedly manufactured and administered in Canada.\textsuperscript{76}

The plaintiff argued that a forum non conveniens dismissal from the United States was inappropriate since the defendant had originally placed the drug in the stream of commerce. The initial failure to warn allegedly occurred in the United States. The defendant countered that the case should be brought in Ontario, despite the admission by the defendant's Canadian counsel that certain aspects of Canadian law would be unfavorable to the plaintiff. Defendant's counsel cited the provinces' restrictions on contingency fee representation, its nonrecognition of strict liability, and its endorsement of damage award caps.\textsuperscript{77}

The court in \textit{Ledingham} rejected the notion that the possibility of less plaintiff-favorable law resulting from a forum non conveniens dismissal would impact its decision.\textsuperscript{78} Following the reasoning in \textit{Piper} the court held, where dismissal would create the possibility that the law of the alternative forum will be less favorable to the plaintiff, such a factor, while subject to consideration, would be "not sufficient, alone, to bar dismissal."\textsuperscript{79} The court continued, "although plaintiff's potential damage award may be smaller in Canada, and although litigation there might be more expensive and more difficult," the fact that a Canadian forum might be less favorable to the plaintiff was not dispositive.\textsuperscript{80}

The court determined that the private interests (witnesses, evidence) and public interests (forum's interest in the injury and industry in question, fairness, burden on the court) suggested dismissal to Canada. Although evidence of liability existed in both for a, most

\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 1450.
\textsuperscript{79} \textit{Id.} at 1449.
\textsuperscript{80} \textit{Id.} at 1450.
of the medical witnesses were from the Canadian forum.\textsuperscript{81} Furthermore, the United States defendant planned to implead the Canadian physicians. Simply, the defendants would have to bring a separate indemnification action in Canada if a New York court heard the case. Finding that the Canadian forum had a far stronger interest over the safety of Canadian manufactured drugs than a United States forum, the court determined that Canadian law would likely apply to the action.\textsuperscript{82}

2. Canada: Although a United States court can dismiss a case despite the likelihood of less favorable law, the same is not true in Canada. In fact, with few exceptions,\textsuperscript{83} disfavorable law in the alternate forum can be dispositive of the court's decision, ensuring its retention in the Canadian forum.\textsuperscript{84} This fact has often resulted in forum shopping in Canada to exploit certain "niche" areas where Canadian law is more favorable than the laws of other nations.

Libel and slander is one specific area where Canadian law is more plaintiff-favorable than United States law. In \textit{Pindling v. National Broadcasting Corp.},\textsuperscript{85} the Prime Minister of the Bahamas sued NBC, Inc. for libel after the network reported, both in the United States and in Canada, that the minister was "dishonest, corrupt and guilty of criminal acts."\textsuperscript{86} The criminal acts reported on were

\begin{itemize}
\item \textit{Id.}
\item \textit{Id.} at 1451-52.
\item \textit{SDI Simulation}, is one example of a case where the exception was applied. In that case the plaintiff convinced a judge that the defendant would flee, thereby invoking a unique Canadian legal device known as a 'Mareva injunction.' The defendant then moved to stay, claiming that Ontario was forum non conveniens. The Ontario court balanced the interests and found that the United States would be more appropriate forum for the action. The court dismissed the case, discontinued the Mareva injunction and chastised and penalized the plaintiff for abusing the forum. In the opinion the court declared the action to be essentially "litigious blackmail" between two United States parties. \textit{SDI Simulation Group Inc. v. Chameleon Technologies, Inc.}, [1994] O.J. No. 2195, 12-15.
\item \textit{CASTEL}, \textit{supra} note 8, at 247.
\item \textit{Id.} at 61.
\end{itemize}
Pindling's alleged facilitation of drug smuggling. Pindling tried to sue NBC in the Bahamas, but NBC had reportedly failed to appear in Bahamian courts. Pindling subsequently sued NBC in Ontario, and the Canadian court dismissed NBC's forum non conveniens motion.

Pindling prevailed on both prongs of the Canadian forum non conveniens test. The Ontario court found that the Bahamas was the most appropriate forum, but noted that NBC's failure to appear in the Bahamian courts made Canada the only appropriate alternative forum. Moreover, Pindling successfully argued that he would lose a definite advantage if the case were dismissed in favor of the United States forum. In contrast to the United States, Canadian law does not require a libel plaintiff to prove actual malice, nor does Canadian law acknowledge the public figure defense. Finding that as long as Pindling was not merely seeking an "oppressive and vexatious" advantage, the Ontario court would not dismiss the action on forum non conveniens grounds.

This case reveals the contrast to the Ledingham analysis which pays scant attention to whether a plaintiff will lose favorable law as a result of forum non conveniens dismissal. In Pindling, the potential change in libel law was dispositive. In the words of the Ontario court, Canadian libel and slander law was "a substantial juridical advantage" to which the plaintiff was entitled, and would not be jeopardized by a forum non conveniens dismissal.

B. Deference to plaintiff's choice based on citizenship

One complaint regarding forum non conveniens in the United States is that defendants often invoke the doctrine to dismiss a case in

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87 Id.
88 Id. at 63.
89 Id.
90 Id. at 64.
91 Id. at 65.
92 Id.
93 Id. at 66.
their own home forum, where, presumably, it should actually be the most convenient.\textsuperscript{94} Since United States law is so plaintiff-friendly, it is common for United States defendants, especially large corporations, to argue a foreign venue is more appropriate.\textsuperscript{95} The doctrine has diverged from its original purpose to protect citizens from being forced to litigate far from home, to a doctrine protecting far-flung corporate enterprises from being held accountable in their home country. The converse of American corporate defendants fleeing to foreign courts to avoid huge judgments and an aggressive plaintiff's bar is the flood of foreign litigants attempting to get into United States courts.\textsuperscript{96} Many alien plaintiffs sue in the United States to avoid their own forums which would often dismiss their case.\textsuperscript{97}

Since there are fewer enticing multinational corporate targets and lower rewards for suing in Canada, this threat of excessive filings posed by foreign plaintiffs is not as severe in the Canadian forum. As a consequence, United States courts apply standards significantly less welcoming to foreign plaintiffs than Canadian courts. Furthermore, United States courts often defer to American plaintiffs, no matter where the most appropriate forum might be. This policy reflects the courts' concern that American taxpayers/plaintiffs are granted expansive opportunity for access.

1. Deference to domestic plaintiff when defendant is foreign. It is tempting for courts to allow the citizens of their home forum an advantage when they have a dispute with a foreign defendant. Allowing domestic plaintiffs to run roughshod over foreign defendants in the home forum can waste judicial resources and may sour the relations between forum states. Judicial comity suggests that courts should respect the power of other courts to hear cases which more

\textsuperscript{94} Duval-Major, supra note 65, at 651.

\textsuperscript{95} Id.

\textsuperscript{96} Silva, supra note 5, at 480 (stating that "foreign plaintiffs now exploit the United States justice system as a natural resource.")

\textsuperscript{97} Duval-Major, supra note 65, at 650.
correctly might be heard in another venue, and furthermore, to respect a forum's ability to try cases. The following examples reveal how Canadian and United States courts differ in the amount of emphasis they place on judicial comity, and the degree to which domestic plaintiffs should be favored over foreign ones.

a. United States. Even though there is a presumption that a United States plaintiff should have greater access to United States courts, this presumption is not absolute. Take, for example, the case of *J.F. Pritchard and Company v. Dow Chemical of Canada, Ltd.*, where a United States federal court dismissed a United States citizen's suit to recover funds for work performed for a Canadian corporation.

The court's analysis balanced the public and private interests for and against dismissal based on forum non conveniens. Stating that the situs of the case was Canadian, the court held that the "whole case is Canadian." Despite the strong presumption not to disturb the plaintiff's choice, especially a United States plaintiff, the court found this to be "one of those rare instances" where the surrounding circumstances so favored trial in the foreign forum that a domestic plaintiff's case would be dismissed in favor of taking the court to a foreign forum. The court noted that the United States party had taken affirmative steps making Canada a more logical forum, and had acceded to contractual provisions also more favorable to Canada. It stated in closing: "[a]ppellant made his bed in Canada; now he must lie in it if he wishes to proceed."

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98 Judicial comity has been defined as: [t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. *BLACK'S LAW DICTIONARY* 267 (6th ed. 1990). Viewed expansively, comity would include letting a forum hear a case when it most properly belongs in another forum.


100 *Id. at 999.*

101 *Id. at 1002.*

102 *Id. at 1000.*

103 *Id. at 1002.*
Despite the Pritchard court's neutral approach to determination of the appropriate forum, other United States courts place great weight on whether the plaintiff is American. An example of one such case arose in Aigner v. Bell Helicopters, Inc.\textsuperscript{104} The plaintiffs in the case sued the defendant Canadian travel and ski business operators in Illinois federal district court in tort for personal injury and wrongful death arising from the crash of a helicopter carrying a group of skiers to their drop-off point in the mountains of western Canada.\textsuperscript{105}

All the plaintiffs except one were German. The presence of one American created a presumption in favor of the domestic plaintiffs availing themselves of a United States court.\textsuperscript{106} The Canadian defendants argued that Canadian law applied in the case as the defendants were Canadian; the accident occurred in Canada; and most of the investigatory and medical witnesses were in Canada. The plaintiffs countered that the Illinois plaintiff received most of his medical treatment in the United States (making it easier for United States doctors to testify in the forum). Furthermore, German medical treatment witnesses could reach the Illinois forum easier.\textsuperscript{107}

The court stated the burden on the Canadian defendants to obtain a forum non conveniens dismissal was "a decidedly heavy one."\textsuperscript{108} The district court further surmised that the burden is even more onerous when the plaintiff is a "United States resident and the only alternative forum available is a foreign jurisdiction."\textsuperscript{109} In the court's view, however, the defendants failed to show injustice or oppression if the matter remained in the United States district court.

Reading between the lines of the decision, it appears the Canadian defendants made a fatal strategic error in their motion to dismiss. Although the defendants argued to dismiss the Illinois suit on forum non conveniens grounds, they also attempted to dismiss an

\textsuperscript{104} Aigner v. Bell Helicopters, Inc., 86 F.R.D. 532 (N.D.Ill. 1980).
\textsuperscript{105} Id. at 534.
\textsuperscript{106} Id. at 543.
\textsuperscript{107} Id. at 542.
\textsuperscript{108} Id. at 543.
\textsuperscript{109} Id.
action arising from virtually identical facts in British Columbia.\textsuperscript{110} By doing this the Canadians appeared to be arguing for a forum non conveniens dismissal from the United States. While the court said it would "not rest its determination of the motion under discussion on that factor," the appearance of double-dealing by the defendants decreased the likelihood of a successful forum non conveniens motion.\textsuperscript{111} If the defendant sincerely wanted to litigate in the Canadian forum, the appropriate action was to move for forum non conveniens in the United States forum and litigate the action in Canada. The court noted that United States courts are very unlikely to dismiss a United States plaintiff where the existence of an alternate forum is uncertain.

b. \textit{Canada}. Canadian courts face pressure to defer to local citizens, and to ensure their access to the machinery of justice. While the Canadian forum non conveniens test treats domestic and foreign plaintiffs equally on face, the degree varies to which this nationality-neutral principle is actually applied.\textsuperscript{112}

In \textit{Bluewater Agromart Ltd. v. Paul's Machine and Welding Corp},\textsuperscript{113} an Ontario court dismissed an Ontario corporation's lawsuit against an Illinois agricultural sprayer manufacturer on forum non conveniens grounds. The Canadian corporation purchased the equipment in Illinois and brought it to Canada, where it caught fire and injured the operator. The court determined the most appropriate forum, holding that the case had a "natural and compelling substantial connection" with Illinois. The balance of convenience and expense, and the necessity of applying Illinois law suggested proceeding in the Illinois forum.\textsuperscript{114} Furthermore, since the Canadian plaintiff could not point to any juridical reasons that would make Ontario the better forum (such as a better statute of limitations period) the case should be dismissed. The Canadian defendant attempted to justify staying in

\begin{footnotes}
\item[110] \textit{Id.} at 542-43.
\item[111] \textit{Id.} at 543.
\item[112] \textit{CASTEL, supra} note 8, at 235.
\item[114] \textit{Id.} at 410.
\end{footnotes}
Canada by arguing that important witnesses were Canadian, and could more conveniently testify in the chosen Canadian forum. The court said that the "bare fact" that some witnesses were from Ontario was not of enough significance to favor the Canadian party.  

A Nova Scotia court came to the opposite conclusion in Carroll v. WAG-AERO. This case involved a Nova Scotia plaintiff who sued a Wisconsin corporation alleging that aircraft parts sold to him caused his Piper aircraft to crash. The United States defendant moved to stay the action as forum non conveniens in Nova Scotia. The Nova Scotia court started its analysis with a description of the Spiada balance test, weighing the conveniences of the defendant and the plaintiff. The analysis soon turned, however, to the MacShannon test requiring the defendant to prove that a better alternate forum existed, and that the plaintiff would not be denied a legitimate advantage if the action were transferred.

In the end, the court held the plaintiff's choice of forum to be "reasonable." While the United States forum might have been more convenient for the defendant, the court found insufficient proof to require dismissal from Canada and resumption of the suit in America. The plaintiff had merely chosen to sue in Canada because it was the cheaper option; such behavior was not oppressive or vexatious, thus dismissal would not be required.

2. *Deference to foreign plaintiff when the defendant is domestic.* One key difference in United States and Canadian forum non conveniens analysis is the degree to which foreign plaintiffs are allowed access to a domestic forum's courts. While Canada generally does not differentiate between domestic and foreign plaintiffs, domestic plaintiffs are explicitly favored in the United States, ala *Piper* and its progeny.

115 *Id.*
117 *Id.* at 9.
118 *Id.* at 10.
a. *United States.* How the courts determine whether a Canadian case will be turned down in the United States on forum non conveniens grounds remains unpredictable. The *Piper* standard is not entirely uniform among United States jurisdictions.¹¹⁹ California and Texas have been the most foreign plaintiff friendly in the past. However, the negative consequences of becoming a "litigation magnet" prompted their reconsideration. Both of these jurisdictions moved closer to *Piper's* standard giving less deference to foreign plaintiffs in recent years.¹²⁰

An interesting example occurred in *Picketts v. International Playtex.*¹²¹ In *Picketts*, a Canadian widower sued Playtex for the death of his wife from toxic shock syndrome. Although the product was manufactured in Canada,¹²² the design specifications, including an allegedly lethal chemical component, were developed in the United States. That Playtex’s corporate "center of gravity" was in Connecti-

¹¹⁹ This paper generally discusses the federal standard for forum non conveniens. Individual states are free to regulate their respective fora as they see fit:

The *Piper* decision is an interpretation of federal forum non conveniens law, and as such, does not necessarily control litigation in the state courts. Thus state courts have tended to freely define their own forum non conveniens standards or reject the doctrine altogether ... State forum non conveniens cases merit several observations. States that reject the *Piper* approach will likely become litigation magnets for product liability lawsuits. When the defendants are not citizens of the forum state, the defendants have the option of removing the case to federal court. When the defendants are citizens of the forum state or when other forum state defendants are joined in the action, however, removal is impossible. Plaintiffs can thus structure a lawsuit to take advantage of particular states' favorable access rules.


¹²⁰ *Id.* at 521-24.


¹²² *Id.* at 519.
cut became a very important fact. The Connecticut state trial court dismissed the case on the grounds of forum non conveniens, assessing that British Columbia was an acceptable and more appropriate forum. Connecticut's interest in the case, while a consideration, failed to outweigh the balance of convenience of trying the case in Canada.

The Connecticut Supreme Court, however; took a contrary view of this forum non conveniens issue. The court held that while foreign plaintiffs are not due the same deference as domestic plaintiffs, their choice of forum is still entitled to some consideration. Even though:

the plaintiffs' preference has a diminished impact because the plaintiffs are themselves strangers to their chosen forum, Connecticut continues to have a responsibility to those who properly invoke the jurisdiction of this forum, especially in the 'somewhat unusual situation where it is the forum resident who seeks dismissal.'

The court agreed with the Canadian plaintiff that the burden be placed on the defendant to prove the domestic forum inconvenience, rather than the plaintiff to prove convenience.

Although the court justified its decision, it's analysis remains somewhat strained. As the defense argued (and the dissent pointed out), several of the medical witnesses who could have testified on the many potential causes of the victim's death were in Canada. This presented no difficulty to the defendant's case, however, since there was no dispute over the "inability of the defendants to bring these

123 Id. at 520-21.
124 Id. at 522.
125 Id. at 523.
126 Id. at 524-25.
127 Id. at 528-29.
128 Id. at 530 (Shea, J., dissenting).
witnesses to Connecticut by compulsory process.  

Furthermore, how the trial court applied Canadian law in this matter is another factor suggesting dismissal to Canada.  

The case ultimately hinged upon the plaintiff's argument that although device in question was manufactured in Canada, the tortious act (the defective design) occurred in the United States.  

By pointing out a direct relation between in-forum activity and harm outside the forum, the plaintiff showed a close link between the corporate defendant and Connecticut.  

Perhaps the Connecticut Supreme Court's decision was not swayed by its factor based analysis, but by the compelling human side of the case. The contest resembled a "David and Goliath" contest between a sympathetic victim and a huge corporate defendant arguing forum dismissal on grounds of inconvenience. It may have been another instance of "hard facts making bad law."

b. Canada. Canadian forum non conveniens analysis does not facially discriminate against non-Canadians. In Continental Insurance v. Harrowston, a California insurance corporation sued the Canadian holder of an insurance policy. The plaintiff may have sought to pre-empt its policyholder and obtain more insurer favorable law in Ontario; California law would place more burden on insurer. The judge indicated preliminarily that California law would likely apply, possibly frustrating the plaintiff's attempt to sue under more favorable law. The Canadian defendant moved to dismiss on forum non conveniens grounds. The court, citing Amchem Products Inc. et al. v. Worker's Compensation Board et al., declined to stay the action. It opined that California was clearly a more appropriate or convenient forum, thus leaving the issue open for a later date. In the final analy-

\footnotesize{129} Id.
\footnotesize{130} Id. at 531.
\footnotesize{131} Id. at 530.
\footnotesize{132} Id.
\footnotesize{134} Id. at 3.
\footnotesize{135} Id. at 4.
sis, the court did not factor the plaintiff's United States nationality into account, apparently regarding it as unimportant.\textsuperscript{136}

The willingness of Canadian courts to treat foreign jurisdictions, parties and plaintiffs on an equal footings with Canadians illustrates the notion of judicial comity. Canada has taken an active interest in creating an international forum conveniens transfer law. Although, legislation which would accomplish this task has not yet been adopted in Canada, it has been accepted as valid by important Canadian procedural authority.\textsuperscript{137}

\textbf{C. Attachment of Conditions upon dismissal}

One final area of difference between United States and Canadian fora is the greater willingness of United States courts to attach conditions to the resumption of a case in another forum if it is dismissed. Conditioning dismissal of cases on the use of American

\textsuperscript{136} Id.

\textsuperscript{137} Canadian authorities, namely the Uniform Law Conference of Canada, drafted a statute, finalized in September of 1994, that would establish a uniform forum non conveniens transfer. Taking a step beyond 28 U.S.C. §1404 rules, this statute made explicit provisions for transfer, not only to another province but outside the country as well. Telephone Interview with E. Edinger, Associate Professor of the Faculty of Law, University of British Columbia (Feb. 23, 1995).
law in the foreign forum is reminiscent of antiquated attitudes of English courts, sometimes termed "judicial chauvinism." Whether an exercise of judicial chauvinism, or in a genuine pursuit of justice, United States courts are willing to attach protective conditions regarding how a case is to be handled in the new forum. Canadian courts, on the other hand, have shown little inclination to impose conditions linked to forum non conveniens dismissals, other than requiring the tolling of the statute of limitations or waiver of a defense of lack of personal jurisdiction. There may be less to this difference than meets the eye.

First, since the Canadian forum conveniens test guarantees that a plaintiff will not be dismissed if dismissal would deprive him of a legitimate advantage, by definition the plaintiff will not be in a position to have to ask for the attachment of post-dismissal conditions. Second, the United States has a wealth of pro-plaintiff rules which are unavailable in Canada, and therefore would not be in a position to attach upon dismissal. For these reasons, United States willingness to attach conditions is more useful to demonstrate the differing overall justice systems and attitudes towards foreign litigation than as a major practical difference between the two countries.

One of the leading American authorities regarding the attachment of conditions is In Re Union Carbide Corporation Gas

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138 As noted in an oft-quoted English decision:

[n]o one who comes to these courts asking for justice should come in vain ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of goods and the speed of service.

Feldman and Vella, supra note 58, at 164.

139 English courts did not favor forum non conveniens dismissals. Foreign plaintiffs were often encouraged to use English courts as a way to export "superior" English judicial values. Reus, supra note 9, at 481.
In this case, the Second Circuit affirmed forum non conveniens dismissal of a large class action suit arising from a gas leak that killed thousands. The dismissal was subject to three conditions: 1) the defendants’ consent to the Indian court’s personal jurisdiction; 2) the defendants’ consent to enforceability of an Indian judgment; and 3) the defendants’ consent to United States style discovery. The appellate court found the first condition necessary to insure an alternate forum. The other two conditions posed problems. Policing the enforceability of a foreign judgment would create unmanageable burdens on the dismissing court. Forcing the United States defendant to consent to United States style discovery was not reciprocal, and therefore unfair.

This flexibility in the attachment of conditions has appeared in the United States-Canadian context as well.

In large damage award cases, there is often a strong incentive for Canadians to seek the procedural advantages of a United States forum. Likewise, it presents an equally strong incentive for Americans to try to avoid the United States and those same disadvantageous procedures. Stewart v. Dow Chemical exemplifies of the peculiar forum analysis that takes place between the United States and Canada where both parties attempt to flee their own forums.

In Stewart, a United States federal appellate court dismissed a Canadian class action claim of exposure to United States-made herbicides on forum non conveniens grounds. The Canadian plaintiffs proffered few strong reasons to sue in the United States forum, while the United States defendant pled that it could adequately defend itself only in Canada. The appellate court conditioned its dismissal on the

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140 In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India, 809 F.2d 196 (2nd. Cir. 1987).
141 Id. at 198.
142 Id. at 203-04.
143 Id.
144 Stewart v. Dow Chemical, 865 F.2d 103 (6th Cir. 1989).
defendant’s assent to United States-style discovery and Canadian jurisdiction and service of process.\textsuperscript{145}

The court expressed its amusement at the desire of both parties to avoid their own fora:

In terms of convenience, it appears inevitable that one of the parties will be inconvenienced by having to proceed in the court in a foreign jurisdiction. Both parties seem peculiarly willing to do so . . . . Thus, in examining the interests involved, the inconvenience or costs of travel does not seem to be an issue, as each side strenuously contends for the privilege of bearing them.\textsuperscript{146}

Since the United States court was likely to grant the Canadian plaintiff a number of advantages upon dismissal, it is not hard to see why it sought the United States forum initially. The plaintiff could gain more favorable law if it withstood a forum non conveniens motion to dismiss. Even if it lost such a motion, they could still obtain significant procedural advantages upon a United States court's dismissal.

The attachment of post-conditions may help individual foreign plaintiffs, but it may do more harm than good to the United States-Canadian judicial relationship.\textsuperscript{147} The above-mentioned problems with the post-dismissal conditions are twofold in nature. First, they do not serve judicial comity. Where the United States imposes conditions that would not have been available had the case been brought in the appropriate forum initially, such attachment evinces the attitude of judicial chauvinism. Second, attaching conditions encourages Canadian plaintiffs to sue in the United States even if forum non conveniens dismissal is likely. If the plaintiff remains in the United

\textsuperscript{145} Id. at 104.
\textsuperscript{146} Id. at 106.
\textsuperscript{147} Edinger, supra note 6, at 292.
States, the plaintiff gains an advantage. If the case is dismissed, disappointed plaintiffs bring certain advantages gained in the United States forum to the Canadian forum. The plaintiffs are secure in the knowledge the action expelled them from the other forum for litigation. There is no disincentive to sue in the United States first and entering the post-dismissal condition lottery.

III. PROPOSALS FOR UNITED STATES - CANADA FORUM NON CONVENIENS REFORM

The United States forum non conveniens test and its application entail problems of chauvinism against foreign fora, an excessive concern for economy and efficiency over justice and conflicts arising from attaching conditions to cases dismissed from its courts. Canadian law of forum non conveniens, on the other hand, appears fairly even-handed. Its deference to the plaintiff's "legitimate juridical advantage," however; seems out of step with a contest geared towards the objective ends of justice.

An opportunity exists to reform application of forum non conveniens between Canada and the United States. The goals of such an effort include: increasing comity between the nations; decreasing (though not eliminating) forum shopping; reducing costs and administrative burdens; and increasing exposure of United States parties to Canadian rules and vice versa. This may spur positive dialogue within the fora over new or different approaches to their respective legal problems. For example, the United States legal community could learn how Canada fares with damage caps and with less extensive discovery.

A treaty agreement between the United States and Canada can create this new legal regime. On the United States federal level, it requires amending 28 U.S.C. §1404, the United States federal interdistrict venue transfer statute. Subsequently, as supreme law of
the land, its application amongst the states. The specific wording aside, the following paragraphs would form the basis of a draft agreement:

(a) In the interests of justice, efficiency and the interests of the parties, a United States or Canadian court may transfer any civil action to any district or division of either country where the action originated. The courts of both nations are considered to be adequate forums for civil litigation.

(b) Such transfer is within the discretion of the court, as derived from the balancing the public and private factors of such transfer. The plaintiff's choice of forum shall be included in the private factors analysis, regardless of whether the plaintiff is a United States or Canadian citizen. After balancing the factors, the case shall be tried in the most appropriate forum.

(c) A court must not dismiss a cause of action based on the defendant's acceptance of post-dismissal conditions, except to waive defenses of statute of limitations or personal jurisdiction. Other procedural rights shall not be enlarged should a foreign plaintiff's action be dismissed for litigation in its own forum.

Both nations should use the private and public factors of analysis test. Its success in United States courts will continue to lead Canadian legal authorities to move in favor of the multi-factor approach. The Canadian requirement that the defendant must be able to reveal another forum should also be included in the analysis. However, the chance that a plaintiff may encounter less favorable law should not be a factor. One important factor in United States forum non conveniens analysis is whether a forum bears the burden of applying foreign law. Thus a court is forced to consider whether the shift of forum entails less favorable law for the plaintiff creates a burden without even going to trial, and is inefficient and wasteful.
United States and Canadian courts continue to give the plaintiff's choice of forum substantial deference. Discrimination against foreign parties in both countries should be discontinued. The new test creates a middle ground that prevents the plaintiff such an easy showing as "any legitimate tactical advantage." Instead, while the plaintiff's choice of forum needs to be considered, it should not be dispositive of whether the dismissal of the action would be barred. For example, the fact that a United States or Canadian plaintiff might lose certain advantages relating to the size of damage awards, contingency fees and discovery rules should not prevent dismissal to a Canadian forum.

Aside from waiving statute of limitations or personal jurisdiction defenses, United States courts must discontinue imposing conditions on cases which are dismissed to Canada. With such conditions foreclosed, plaintiffs would then have to abide by rules of the most appropriate forum. The elimination of post-dismissal conditions would also eliminate some of the forum shopping from Canada to the United States. This will hold true since Canadian plaintiffs will know that even if their case is dismissed, they may no longer take away procedural advantages unavailable in Canada. The United States must no longer be a "litigation magnet" for questionable claims.

CONCLUSION

United States and Canadian forum non conveniens doctrines are ripe for reform. The judicial chauvinism of United States courts shown in discrimination against foreign plaintiffs and the application of conditions upon forum non conveniens dismissal fail to serve the interests of judicial comity. Canada's retention of cases based on any

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148 In following the MacShannon test, which explicitly requires the plaintiff to retain any "legitimate tactical advantage," Canadian courts also give greater deference to the plaintiff's choice. Edinger, supra note 6, 292.
legitimate advantage for the plaintiff is an outmoded rule based on
ingaging precedent.

The United States and Canada must synthesize some of the
best parts of their existing forum non conveniens tests to insure the
litigation occurs in the proper forum. However, there are limits to
reform. The presence of the multitude of potential litigation targets
and the vastly disproportionate rewards of suing in the United States
suggest that the flood of foreign plaintiffs entering the United States
forum will not subside. Nevertheless, the United States - Canadian
judicial relationship is a proper and limited forum in which to seek a
more modern and fair application of the forum non conveniens
docline to create a more orderly and proportionate flow of litigation.