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I. INTRODUCTION

“As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”¹

On March 5, 2007, the United States Supreme Court resolved the split among the circuit courts as to whether a federal court must first establish its own jurisdiction before dismissing a suit using the forum non conveniens doctrine.² Speaking for a unanimous Supreme Court, Justice Ginsburg reversed the Third Circuit Court of Appeals’ judgment,³ holding that because the “resol[ution of] a forum non conveniens motion does not entail any assumption by the

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¹ Smith Kline & French Labs. Ltd. v. Bloch, (1982) 1 W.L.R. 730, 733 (Eng.). This oft-quoted passage by the late British jurist, Lord Denning, will be referenced, both directly and indirectly, throughout this Note.


court of substantive ‘law-declaring power,’” a federal “district court has discretion to respond at once to a defendant’s forum non conveniens plea, and need not take up first any other threshold objection.” Having returned an “arrow” to the district courts’ “dismissal quivers,” Justice Ginsburg noted that “[t]his is a textbook case for immediate forum non conveniens dismissal” because determining “subject-matter jurisdiction presented an issue of first impression in the Third Circuit” and determining personal jurisdiction would have required extensive discovery “burden[ing] the defendant] with expense and delay.”

Under the federal doctrine of forum non conveniens, a court may dismiss a case where the inconvenience of the selected forum to the defendant and the court significantly exceeds its convenience to the plaintiff. Given the Supreme Court’s opinion in Sinochem International reaffirming the discretionary power a trial court wields in exercising this common law tool, it is incumbent on the parties litigating a dispute to have a full-fledged and working knowledge of how to facilitate a trial court in arming, or disarming, their proverbial bows with a forum non conveniens arrow. This Note will primarily address this topic from a defense counsel perspective; the insights offered, however, can be invaluable to the plaintiff’s bar as well. While offering a descriptive view of the current state of the forum non conveniens doctrine, chiefly within the Second Circuit, the author will, on occasion, reference scholarly works by other authors who offer either their critiques or normative judgments of the doctrine; but it should be kept in mind that the aim of this Note is practical, not critical. Because of forum non conveniens’ continuing application in federal cases, for the most

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4 Sinochem Int’l, 127 S. Ct. at 1192–93.
5 Id. at 1188.
6 See Malay. Int’l, 436 F.3d at 364. In reversing the trial court’s forum non conveniens dismissal, the Third Circuit regrettfully noted, we would like to leave district courts with another arrow in their dismissal quivers. . . . [W]e recognize that this result may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of resources if the case is again dismissed before the substance of [the plaintiff’s] claim is decided.
7 Sinochem Int’l, 127 S. Ct. at 1194. The Supreme Court went on to note that the Eastern District of Pennsylvania “inevitably would dismiss the case” based on forum non conveniens even if the subject-matter and personal jurisdiction inquiries were fulfilled and that such would disserve judicial economy. Id.
part, where the alternative forum is abroad, this Note will assume a situation where a foreign plaintiff has brought suit against either an international or domestic defendant within the United States.\(^9\) Also to be taken into account is that the case law adduced throughout this Note will be, for the most part, federal, and thus distinct from any common law or statutory enactments by the individual states of the *forum non conveniens* doctrine.\(^10\)

This Note will begin by exploring the history of the doctrine from its inception in state courts, to its formal recognition by the Supreme Court, and all of the way up to its present-day status. Next, this Note will examine the *Sinochem International* decision and delve into the practicalities and enduring problems that may arise, while proposing ideas that will expedite litigation on *forum non conveniens* dismissals. Lastly, this Note will focus specifically on cases brought within the Second Circuit. In so doing, the Second Circuit’s standard will be reviewed both at the trial court and appellate court levels. In particular, this Note will examine how Second Circuit courts have addressed areas of the doctrine left open

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\(^9\) As will be discussed in greater detail below, however, the doctrine of *forum non conveniens* may apply equally to, and result in dismissal of, either a foreign or domestic plaintiff’s U.S. initiated suit. See infra note 127 and accompanying text. Where the assumption that the plaintiff is foreign is deviated from, this Note will take care to make such explicit.

\(^10\) State courts are not obligated to follow the federal *forum non conveniens* doctrine. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149–50 (1988) (holding that states are not bound by federal determination of federal *forum non conveniens* where state law is incompatible); Mo. ex rel. S. Ry. Co. v. Mayfield, 340 U.S. 1, 4 (1950) (“[A State’s] acceptance or rejection of the doctrine of *forum non conveniens* [is] a question of State law not open to review here.”). Nonetheless, “[v]irtually all U.S. states have adopted some variation of... the doctrine.” GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 354 (4th ed. 2007) [hereinafter BORN & RUTLEDGE]. Many states have enacted, either by judge-made law or by legislative enactment, *forum non conveniens* inquiries very similar, if not identical to the federal practice. See Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1371 (1991) (putting the number at over thirty). For a comprehensive review of state *forum non conveniens* rules, see David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950–52 (1990). See also Martin J. McMahon, Annotation, *Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum*, 57 A.L.R. 4th 973 (1987 & Supp. 2008) (collecting and analyzing state cases in which the courts have addressed the *forum non conveniens* doctrine as affected by the availability of an alternative forum). While state courts may have significant leeway in the doctrine’s application, federal courts, pursuant to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, are much more limited. See Am. Dredging Co. v. Miller, 510 U.S. 443, 453, 454 n.4 (1994) (suggesting that in domestic actions *forum non conveniens* is procedural and thus should be governed by state law in state courts and federal law in federal courts); see also infra notes 40–41 and accompanying text (further reviewing the American Dredging case’s examination of the procedural nature of *forum non conveniens*).
for interpretation by the Supreme Court as well as how its courts have finessed the Supreme Court’s standard in the aftermath of *Sinochem International*. This last section will offer suggestions that defense counsel should consider both in advance of making a *forum non conveniens* dismissal motion and during the motion’s consideration by the court; ultimately the goal will be to increase the prospects for dismissal and lessen the possibility of plaintiff’s success upon an appeal.

United States courts are particularly attractive to foreign plaintiffs (moths) for a variety of different reasons.\(^\text{11}\) As defense counsel, the burden rests heavily in ensuring one’s clients that they will not be disappointed that the resources they will have to expend in a *forum non conveniens* motion will be worthwhile.\(^\text{12}\) To do so, proper knowledge of the relevant law as well as its local application is essential. From the moment either the client himself or herself, or general counsel, gives notice about a suit suspected to be susceptible to such a motion, to the moment of the actual filing of the motion with the court, possession and utilization of such knowledge will make favorable results more likely.\(^\text{13}\) It should be defense counsel’s objective to figuratively end the plaintiff-moths’ lives in U.S. courts by procuring dismissal as soon as possible; the *forum non conveniens* motion is an excellent tool, or better yet, arrow, for shooting these moths out of the sky. As Virginia Woolf candidly observed, “[the moth] fell, fluttering his wings, on to his back...the unmistakable tokens of death showed themselves...The struggle was over. The...little creature now

\(^{11}\) These reasons include, but are not limited to: “the availability of jury trials”; “the availability...of substantially higher damage awards”; “the United States legal system’s allowance of contingency fees to attorneys”; “the minimal likelihood of having to pay the other party’s expenses, including attorney fees, in the event of a loss”; “the availability of extensive pretrial discovery”; “favorable American substantive law, including strict liability and possibility of punitive damages”; “the sophistication of American lawyers and courts”; “choice[s] of different state forums with differing choice of law rules”; “lower filing fees”; “relatively prompt trial settings”; “the possibility of class actions”; “and liberal joinder rules.” Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 Brook. J. Int’l L. 241, 242–43 (1990); Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. Pa. J. Int’l Econ. L. 141, 146 n.37 (1998); see *Piper Aircraft*, 454 U.S. at 252 n.18.

\(^{12}\) The word “burden” is used here in the psychological meaning of the word; as will be demonstrated in Part IV.B.2., however, this word also takes on a legal connotation in a *forum non conveniens* analysis.

\(^{13}\) The author does not purport to guarantee any results, as *forum non conveniens* is a wholly discretionary and inherent power exercised by the court, and has no federal statutory basis ensuring its application.
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knew death.”

II. HISTORY AND EVOLUTION OF THE DOCTRINE: A METAMORPHOSIS

A. Before The Plaintiffs Grew Wings: Pre-Piper Aircraft Co.

Forum non conveniens refers to the doctrine that permits a court to “divest itself of jurisdiction” even though competent under the law, “if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.” The doctrine’s origin has generally been traced back to nineteenth century Scottish law; it was not until Paxton Blair’s 1929 article, however, that the doctrine was explicitly recognized in the United States. In his article, Blair, a young associate at a Wall Street law firm, encouraged more widespread use of the doctrine, praising its value as a solution in dealing with “the flood of litigation by which our courts are being overwhelmed.”

14 VIRGINIA WOOLF, The Death of the Moth, in THE DEATH OF THE Moth AND OTHER ESSAYS 3, 5, 6 (1942).
16 Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994); see also Robert Braucher, The Inconvenient Federal Forum, 60 HARV. L. REV. 908, 909–10 (1947) (offering a detailed analysis of application of the doctrine in Scottish cases); 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 (1994) (offering a similar examination); but see Thomas R. Anderson, Note, American Dredging Co. v. Miller: Clouding the Waters of Maritime Litigation, 59 ALB. L. REV. 1519, 1523, 1530, 1532 (1996) (“[T]hough forum non conveniens might have originated in Scottish estate cases, ‘[f]or reasons peculiar to the special problems of admiralty,’ inconvenient forum dismissals in the United States likely originated, and were certainly most often seen, in maritime cases” (emphasis added) (internal citation omitted)).
17 See Paxton Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 COLUM. L. REV. 1 (1929). Blair argued that the doctrine had been applied in state courts, though not by name, as early as the beginning of the 1900’s. These applications, which he termed “conspicuous,” demonstrated a court’s willingness to dismiss a cause of action based upon the unavailability of witnesses and unfairness to a state’s own citizens, notwithstanding a plaintiff’s having established the necessary jurisdictional requirements. Id. at 23–25.
18 Id. at 1. Particularly relevant for the purposes of this Note is the fact that Blair was significantly perturbed as a result of the docket overcrowding in New York federal and state courts. He recognized that this overcrowding resulted from forum-shopping, or the practice of “suing where verdicts are largest,” and pointed out that some of the “necessary effect[s are] the complete frustration of the legislative scheme for apportioning the number of courts and judges to population” as well as “local taxpayers suffer[ing] unjustly from the burden of contributing to the expense of trying imported controversies” both “merit[ing] the unequivocal condemnation of the bench and bar.” Id. at 34. “Blair’s article [proceeded to] become the principle source on which the [Supreme] Court relied eighteen years later” in its first formal application and recognition of the doctrine. Jeffrey A. Van Detta, Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five
article sparked great interest in the doctrine and it was only four years later that the Supreme Court, though not explicitly referencing the doctrine, cited to the article, observing that “the proposition that a court having jurisdiction must exercise it, is not universally true.”

Referring to the doctrine as “familiar” and “firmly imbedded in our law,” Justice Frankfurter, in a dissenting opinion, admonished the Court for not employing *forum non conveniens* “in the interest of justice.” However, it was not until *Gulf Oil Corp. v. Gilbert*, as every practitioner remembers from first year civil procedure, that the Supreme Court formally recognized the doctrine as a legitimate means for dismissal.

*Gulf Oil* involved a diversity action between a Virginia citizen and a Pennsylvania corporation brought in the Southern District of New York. Affirming the trial court’s dismissal, a closely divided Supreme Court advised that as a threshold matter, “[i]n all cases in which the doctrine of *forum non conveniens* comes into play . . . at least two forums in which the defendant is amenable to process [must be present].” Next, the Court articulated a list of public and private interest factors that should be weighed before granting dismissal on *forum non conveniens*, to determine whether adjudication of the cause of action in the original, chosen forum would be inconvenient and unjust. Among the private interests of a

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19 See Canada Malting Co. v. Paterson SS Ltd., 285 U.S. 413, 422 (1932). The Court continued: “Courts of equity and of law . . . occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where . . . the litigation can more appropriately be conducted in a foreign tribunal.” *Id.* at 423 n.6 (citing Blair, *supra* note 17, at 1). Scholars have noted that it is “[t]his statement [that] represented the views of the judiciary and laid the foundation for an express approval and incorporation of the doctrine into American law.” See Reus, *supra* note 16, at 461.

20 See Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 55–56, 57 (1941) (Frankfurter, J., dissenting) (citing to, inter alia, Blair, *supra* note 17, at 1). Justice Frankfurter continued: It does not comport with equity and justice to allow a suit to be litigated in a forum where, on the balance, unnecessary hardship and inconvenience would be cast upon one party without any compensatingly fair convenience to the other party, but where, on the contrary, the suit might more conveniently be litigated in another forum available equally to both parties. *Id.* at 57.


22 See Gilbert v. Gulf Oil Corp., 62 F. Supp. 291 (S.D.N.Y. 1945). The trial court dismissed the action concluding “that for good and sufficient reasons . . . this Court in the exercise of its discretion . . . decline[s] to assume jurisdiction of this action.” *Id.* at 292.

23 *Gulf Oil Corp.*, 330 U.S. at 506–07. This threshold concept embodies the notion of the “adequate alternative forum” and is a fundamental inquiry in any *forum non conveniens* litigation. See *infra* Part IV.A.2. Strategies on locating, securing, and presenting alternative fora will be discussed in Part IV.B.2.a.
litigant that should be considered are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.24

Discussing the public interest factors, the Gulf Oil Court stated: Administrative difficulties follow for courts when litigation is piled up in congested centers . . . . Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is a reason for holding the trial in their view . . . . There is a local interest in having localized controversies decided at home.25

The Court warned that “the plaintiff’s choice of forum should rarely be disturbed,” and should only happen when “the balance [of the factors] is strongly in favor of the defendant.”26

One year later, Congress responded to the Gulf Oil decision by enacting 28 U.S.C. §1404(a),27 allowing for the transfer of cases among the federal district courts.28 Though applying nearly

24 Id. at 508.
25 Id. at 508–09. “[I]eav[ing] much to the discretion of the [trial] court,” the Supreme Court noted that it “w[isely] . . . has not been attempted to catalogue the circumstances which will justify or require either grant or denial of [the] remedy.” Id. at 508. For a critical analysis on the Gulf Oil Court’s “amorphous” factors test, see David W. Robertson, Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,” 103 L. Q. REV. 398, 399 (1987) (noting “[t]here is now too much discretion and too little clarity in [the doctrine’s] application”). See also Allan R. Stein, Forum Non Conveniens and the Redundancy of the Court Access Doctrine, 133 U. PA. L. REV. 781, 814–15 (1985) (“[T]he Court’s conclusion that it ‘wisely’ did not attempt to articulate more precise guidelines and that application of the amorphous doctrine must be left to the discretion of the trial court . . . . is a remarkable assumption . . . . The Court offered no further explanation why more specific guidance was not feasible or why full appellate review was inappropriate.”); Jacqueline Duval-Major, Note, One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff, 77 CORNELL L. REV. 650, 651 (1992) (arguing that the doctrine “fails to adequately serve the interests it purports to protect. . . . [and] is based on a vague set of factors that leaves much to the discretion of the trial court”).
26 Gulf Oil Corp., 330 U.S. at 508.
27 This section provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. §1404(a) (2000).
28 This statutory provision partially superseded the forum non conveniens doctrine applied in Gulf Oil Corp. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996) (“The dispute in Gulf Oil was over venue . . . . This transfer of venue function of the forum non conveniens doctrine has been superseded by statute . . . .”). It is important to note that “[s]uch a dismissal would be improper today because of the federal venue transfer statute.” Am.
identical factors, this provision was more than a codification of the pre-existing law on the doctrine of *forum non conveniens*. Rather, a lesser showing of inconvenience was necessary to obtain a transfer than to invoke *forum non conveniens* because the statute eliminates the “harshest part of the doctrine”—dismissal of the action. Nonetheless, the doctrine remained applicable to actions that could not be transferred to federal district courts.

**B. Learning to Fly: The Modern Doctrine of Forum Non Conveniens and the International Litigant**

Seemingly dead in the domestic litigation context, the federal doctrine of *forum non conveniens* received minimal attention by the Supreme Court, and it was not until over 30 years later that the doctrine was reexamined in *Piper Aircraft Co. v. Reyno*.  

*Piper* involved a lawsuit by the families of the victims of an airplane crash, which occurred in Scotland, against the manufacturers of the fallen aircraft (a Pennsylvania company) and the aircraft’s propeller (an Ohio company), alleging negligence and strict liability.  

Upholding the trial court’s dismissal for *forum non conveniens* based on a *Gulf Oil* factor analysis weighing heavily in favor of the defendants, the Supreme Court modified the existing

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A federal district court does not have the power to transfer a case to a court in a foreign nation or even to a state court for that matter; it may only dismiss the case based on *forum non conveniens*, and, at most, impose conditions on the dismissal and hope that another tribunal will hear the matter. See David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: “An Object Lesson in Uncontrolled Discretion,”* 29 TEX. INT’L L. J. 353, 370 (1994) (“[A] court in New York cannot transfer a case to a court in India. It can only dismiss, impose conditions, and wish the plaintiffs ‘Godspeed.’”); Cf. Sinochem Int’l Co. v. Malay. Int’l Shipping Corp., 127 S. Ct. 1184, 1190 (2007) (“The common-law doctrine of *forum non conveniens* has continuing application [in federal courts] only in cases where the alternative forum is abroad,” and perhaps in rare instances where a state or territorial court serves litigational convenience best.”) (citation omitted); Am. Dredging Co., 510 U.S. at 449 n.2 (“[T]he federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad.”).  

51 454 U.S. 235 (1981). During the time after the transfer of venue statute was enacted, and before hearing the *Piper Aircraft* case, the Supreme Court did address the doctrine, but primarily it was to distinguish it from and to better articulate the newly enacted venue provision. See, e.g., *supra* notes 25–28 and accompanying text.  

52 454 U.S. at 235.  

9 See Reyno v. Piper Aircraft Co., 479 F. Supp. 727 (M.D. Pa. 1979). The district court dismissed the case commenting, “[g]enerally, the courts have been less solicitous when the
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discipline in several respects.34

First, the Court held that the presumption favoring the plaintiff’s choice of forum applies with less force when the plaintiff is foreign, rather than a citizen.35 Second, the Court addressed the fact that a forum non conveniens dismissal might lead to a change in law, and commented that “if the possibility of an unfavorable change in substantive law is given substantial weight . . . dismissal would rarely be proper” and that the “doctrine would become virtually useless.”36 The Court continued that “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.”37 Lastly, the Court reiterated the discretion given to a trial court, reasoning that each case presents a unique factual inquiry and “emphasiz[ing] the need to retain flexibility” by not ascribing “central emphasis . . . on any

plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States.” Id. at 731. The Third Circuit Court of Appeals disagreed, reversing and remanding the case on the grounds that the trial court abused its discretion in its application of the Gulf Oil factors and that Scottish law was less favorable to the plaintiff, who would bear the burden of proving negligence, instead of being able to rely on strict liability. Reyno v. Piper Aircraft Co., 630 F.2d 149, 160, 163–64 (3d Cir. 1980), rev’d, 454 U.S. 235 (1981).

34 Some scholars argue that in this case “the Supreme Court totally reformulated the parameters of the doctrine, however others disagree. Compare Alan Reed, To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages, 29 GA. J. INT’L & COMP. L. 31, 50–51 (2000) (arguing that the impact of this case “marks a pronounced abdication from the original purpose underpinning the doctrine” which “was to protect the chosen forum and the defendant from the inconveniences of litigating a case brought by the plaintiff in a clearly inappropriate forum.” Now, “[t]he new policy . . . is inculcated by the desire to grant a court both greater discretion to decline to exercise its jurisdiction, and vastly enhanced flexibility, and the desire to grant the defendant greater affirmative power to determine the forum.”) with Julius Jurianto, Forum Non Conveniens: Another Look at Conditional Dismissals, 83 U. DET. MERCY L. REV. 369, 380 (2006) (“Although the Piper Court followed the factors analysis in Gilbert . . . it also established several important points. Piper did not redefine Gilbert, but rather liberalized the use of the FNC doctrine in several ways.” (emphasis added)), and Dorward, supra note 11, at 160 (“Rather than creating an entirely new doctrine to govern forum shopping in international disputes, the Court in Reyno stretched the old Gilbert standard to fit this new problem.”).

35 454 U.S. at 255–56. The Court rationalized this view with the “reasonable” assumption that when a plaintiff chooses to sue in his/her “home forum,” such a choice is convenient. Conversely, “[w]hen [a] plaintiff is foreign . . . this assumption is much less reasonable.” Id.

36 Id. at 250.

37 Id. at 254 (emphasis added). The Court concluded that although Scottish law did not permit the recovery under a strict liability theory, and that the “damages award may be smaller,” these facts “do not [place Plaintiffs] within this category of “depriv[ing them] of any remedy or treat[ing them] unfairly.” Id. at 255.
one factor.”

Following Piper, and up to Sinochem, the Supreme Court provided little guidance to the district courts in their application of the modified doctrine. In Van Cauwenberghe v. Biard, the Supreme Court held that “the denial of a motion to dismiss on the ground of forum non conveniens” was not a final decision for purposes of the collateral-order doctrine because, “[a]lthough the determination . . . may not require significant inquiry into the facts and legal issues in some cases, in the main, a district court . . . will generally become entangled in the merits of the case [when weighing the Gulf Oil factors].” Next, in American Dredging Co. v. Miller, the Supreme Court clarified that “forum non conveniens is not a substantive right of the parties, but a procedural rule of the forum,” essentially “nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.” As a result of these two cases, various treatments emerged within the circuits, especially with respect to the procedural nature of the doctrine.

The Court’s opinions in Steel Co. v. Citizens for a Better Environment and Ruhrgas AG v. Marathon Oil Co. caused further disagreement among the circuit courts. Delivering the opinion of the Court in Steel Co., Justice Scalia pronounced that federal courts may not decide the merits of a case without first determining that they have jurisdiction over the case and the parties. The following year, in an attempt to elucidate Steel Co.,

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38 Id. at 249–50.
39 Van Cauwenberghe v. Biard, 486 U.S. 517, 518, 527, 529 (1988). Generally, a party must ordinarily raise all claims of error in a single appeal following final judgment. See 28 U.S.C. § 1291 (2000). A final judgment contemplates that “there has been a decision by the district court that ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” Van Cauwenberghe, 486 U.S. at 521 (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). Though not immediately appealable under §1291, the Supreme Court reassured that “interlocutory review under 28 U.S.C. § 1292(b) of forum non conveniens determinations [may be heard] in appropriate cases.” Id. at 518, 530.
41 Id. at 454 n.4. Continuing, the Court advanced that “[u]nlike burden of proof . . . and affirmative defenses such as contributory negligence . . . forum non conveniens does not bear upon the substantive right to recover.” Id. at 454. These passages, in comparison with the language in Van Cauwenberghe, raised significant questions as to whether or not forum non conveniens is a merit-based dismissal. This was ultimately settled in Sinochem International.
44 See Steel Co., 523 U.S. at 101–02. The thrust of the opinion renounced the practice of “hypothetical jurisdiction”:
the Court decided *Ruhrgas AG*, recognizing that while “subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues.”\(^{45}\) Essentially, the opinion authorized district courts to dismiss an action for want of personal jurisdiction, and bypass any determination on whether or not there is proper subject matter jurisdiction.\(^{46}\)

Subsequently, various circuit courts of appeals interpreted these cases, coming up with three different approaches as to whether district courts may dismiss a case for *forum non conveniens* prior to establishing jurisdiction.\(^{47}\) The Second and D.C. Circuit Courts of Appeals approved such dismissals, holding that *forum non conveniens* does not constitute a decision on the merits.\(^{48}\) Conversely, the Fifth Circuit was “unable to characterize *forum non conveniens* as a ‘non-merits’ issue,” requiring its district courts to first determine whether or not they have jurisdiction.\(^{49}\) Lastly, in a decision prompting the Supreme Court to grant certiorari, the Third Circuit held that *forum non conveniens* is a non-merits based grounds for dismissal, but “jurisdiction—both subject matter and personal jurisdiction—is a *sine qua non* for *forum non conveniens*.”\(^{50}\)

Under which [a court] . . . proceed[s] immediately to the merits question, despite jurisdictional objections . . . where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. [Hypothetical jurisdiction] carries the courts beyond the bounds of authorized judicial action and thus offends fundamental separation-of-powers principles. Id. at 84.

\(^{45}\) *Ruhrgas AG*, 526 U.S. at 584.

\(^{46}\) Justice Ginsburg recognized that there may be times when “subject-matter jurisdiction raises a difficult and novel question” and personal jurisdiction is a “straightforward” issue “presenting no complex question of state law.” In times like this “the court does not abuse its discretion by turning directly to personal jurisdiction.” Id. at 588.

\(^{47}\) For an in-depth discussion of the following cases, and a prediction, which turned out to be correct, on how the Supreme Court should rule, see David W. Feder, Note, *The Forum Non Conveniens Dismissal in the Absence of Subject-Matter Jurisdiction*, 74 *Fordham L. Rev.* 3147 (2006).

\(^{48}\) See *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998). “Forum non conveniens does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction. While such abstention may appear logically to rest on an assumption of jurisdiction it is as merits-free as a finding of no jurisdiction.” Id. (citation omitted). See also Monegasque de Reassurances S.A.M. v. Nak Naftogaz, 311 F.3d 488, 498 (2d Cir. 2002) (agreeing with *In re Papandreou* and stating “neither we nor the district court are barred from passing over the question of jurisdiction and going directly to the *forum non conveniens* issue” (emphasis added)). The First Circuit also indicated that it accepted this line of reasoning. See *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 293–94 (1st Cir. 2005).

\(^{49}\) See *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 652, 654 (5th Cir. 2005) (emphasis added).

\(^{50}\) *Malay. Int’l Shipping Corp. v. Sinochem Int’l Co.*, 436 F.3d 349, 361 (3d Cir. 2006). The
Agreeing with the Second, D.C., and Third Circuits, the Supreme Court held that \textit{forum non conveniens} constitutes a non-merits based dismissal.\textsuperscript{51} The Court, however, parted ways with the Third Circuit’s conclusion that “only after a domestic court determines that it has jurisdiction over the cause and the parties and is a proper venue for the action” can a \textit{forum non conveniens} dismissal be granted,\textsuperscript{52} and held that “[a] district court therefore may dispose of an action by a \textit{forum non conveniens} dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.”\textsuperscript{53} The Third Circuit had also refused to bypass jurisdictional issues out of the concern that it would be unable to successfully condition a \textit{forum non conveniens} dismissal and be powerless to protect the plaintiff in the instance that the alternative forum (China) refused to hear the case.\textsuperscript{54} The Supreme Court deferred directly addressing this issue stating that it “need not decide whether a court conditioning a \textit{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” because, in this particular instance, jurisdiction in the alternative forum had already “been raised, determined, and affirmed on appeal [in the Chinese courts].”\textsuperscript{55}

With this substantive and procedural framework in place, the Supreme Court has left the circuit courts to their own accord to mold the doctrine into a more comprehensive litigation tool. The

\textsuperscript{51} See Sinochem Int’l Co. v. Malay. Int’l Shipping Corp., 127 S. Ct. 1184, 1192 (2007) (“A \textit{forum non conveniens} dismissal ‘den[ies] audience to a case on the merits,’ it is a determination that the merits should be adjudicated elsewhere.” (alteration in original) (internal citation omitted)).

\textsuperscript{52} Id. at 1193.

\textsuperscript{53} Id. at 1186–87.

\textsuperscript{54} See Malay. Int’l, 436 F.3d at 363–64. A conditional dismissal is when a “court dismisses the case only if the defendant waives jurisdiction and limitations defenses, and only if it turns out that another court ultimately exercises jurisdiction over the case. This allows the district court to ‘reassert jurisdiction in the event that the foreign court refuses to entertain the suit.’” Id. at 363 n.21 (citation omitted). Essentially, the Third Circuit was worried that if it could not grant a conditional dismissal, “the plaintiff [w]ould find itself without any guaranteed forum” and there was the possibility that upon the plaintiff’s refiling in the U.S. forum, it might be discovered that the transferring forum had no jurisdiction in the first place, thus “the judicial economy claimed . . . ceases to exist.” Id. Litigating \textit{forum non conveniens} motions to accommodate conditional dismissals will be discussed in further depth in Part IV.B.3.a.

\textsuperscript{55} Sinochem Int’l, 127 S. Ct. at 1193–94.
next section will address the practical effects of the *Sinochem* decision.

III. DISSECTING *SINOCHEN* TO FIND PRO-DEFENDANT IMPLICATIONS

While *Sinochem* stands generally for the principle that *forum non conveniens* constitutes a non-merits based dismissal tool that can be raised prior to any jurisdictional determinations, a more thorough analysis reveals that, when considered in conjunction with existing substantive *forum non conveniens* jurisprudence, several other propositions may be derived.

**A. Deferential Standard of Review: Preserving Efficiency Driven Dismissal on Appeal**

It has not been disputed that Congress has the power to “restrict the discretionary dismissal authority of courts under the *forum non conveniens* doctrine.”56 Since, however, “in no statute currently in force has Congress expressly granted or refused courts the authority to decline jurisdiction,” judicial legislation has served as a substitute.57 The Supreme Court has consistently noted that the doctrine of *forum non conveniens* “resists formalization and looks to the realities that make for doing justice.”58 This is due to the fact that “laying down a rigid rule to govern [a trial court’s] discretion” would be ineffective because “[e]ach case turns on its facts.”59 As a result, the Supreme Court has made clear that the federal circuit courts may overturn a district court’s determination of *forum non conveniens* only upon a showing of an abuse of discretion.60

Contrasting this standard of review with those of dismissals predicated on jurisdictional defects,61 which require an appellate court to review a trial court’s determination de novo,62 it is evident

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56 See Lonny Sheinkopf Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMMORY L.J. 1137, 1141 (2000) (emphasis added) (discussing purported deficiencies of the current *forum non conveniens* doctrine in cases predicated on federal statutes and offering suggestions for improving the doctrine’s application in these cases).

57 *Id.*


59 *Id.* (quoting *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 557 (1946)).

60 See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (“[The trial court’s decision] may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.”).

61 See *FD. R. CIV. P. 12(b)(1), (2).*

62 See, e.g., *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001) (stating the
that determinations by a trial court on forum non conveniens grounds are much harder for plaintiff-moths to disturb than determinations based on lack of subject matter and/or personal jurisdiction. Following Sinochem, defendants have been placed in position where they may raise both jurisdictional and forum non conveniens grounds for dismissal in their answering papers, and then immediately turn around and file forum non conveniens dismissal motions, securing “virtually insulate[d] district court determinations” and ending any further litigation either domestic or abroad.

B. Limiting Discovery to Only That Which is Necessary

Sinochem has also silenced, to some extent, the critics who argue that jurisdictional and forum non conveniens determinations are redundant court-access doctrines. The Sinochem Court made it a point to note that “[i]n the mine run of cases, jurisdiction ‘will involve no arduous inquiry,’” and that if a court “can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground.”

standard of review for 12(b)(2) determinations); Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (stating the standard of review for 12(b)(1) determinations).

This, of course, also applies to defendants who seek appeal of unfavorable forum non conveniens decisions. See, e.g., Van Cauwenbergh v. Biard, 486 U.S. 517, 529 (1998) (order denying motion to dismiss on ground of forum non conveniens is not collateral order subject to appeal as final judgment under 28 U.S.C. § 1291).

See Duval-Major, supra note 25, at 682–83 (“This . . . standard of appellate review further weakens the seriousness with which courts will inquire into the relevant factors for a forum non conveniens determination.”).

See Megan Waples, Note, The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case For Reform, 36 CONN. L. REV. 1475, 1476 (2004). Waples notes that a forum non conveniens dismissal may, in reality, be a “death knell” for a case as a whole and cites to Professor David W. Robertson’s empirical analysis, in which surveys were mailed to the lawyers in 180 reported cases dismissed by federal courts for forum non conveniens from 1981–87. See Robertson, supra note 25, at 418. Robertson received responses on a little less than 50% (eighty-five) of the cases. Of these, eighteen plaintiffs abandoned further effort once the case was dismissed, in twelve cases the lawyer did not know what happened, and in three the lawyer had not yet decided on a next step. Thirty-six cases settled; of these fifteen settled for less than 30% of their estimated value, seven settled for between 31% and 50% of their estimated value, nine settled for more than 50%, and five were for an unspecified amount. Ten cases were pending in a foreign court and three in a state court. Three cases had been lost in foreign courts, and none had been won in either a foreign or a state court. Waples, supra note 65, at 1476 n.5.

See, e.g., Stein, supra note 25, at 795 (“In short, the very qualities presumably considered under jurisdictional rules are again considered under forum non conveniens because the jurisdictional rules were underinclusive; the rules were not effective in selecting those cases that were appropriate or inappropriate for resolution in the forum.”).

the Court continued, in those instances where “jurisdiction is
difficult to determine, and forum non conveniens considerations
weigh heavily in favor of dismissal, the court [should] properly
take[] the less burdensome course.” With such a directive at hand,
preliminary discovery for determining non-merits dismissals has
greatly been reduced. Like motions for dismissal based on lack of
subject matter or personal jurisdiction, a motion for dismissal based
on forum non conveniens will almost always require some degree of
discovery. Therefore, if necessary, discovery should be limited and
“addressed solely to proving the requisite adequacy of the
alternative forum and compliance with the private and public
interest factors.” Once a defendant recognizes the prospects for an
expeditious Sinochem dismissal, discovery can be initiated and
limited solely to the forum non conveniens issue alone.

C. Non-Merits Decisions Entrenched in the Merits Nonetheless

Another repercussion stemming from Sinochem is that even
though forum non conveniens has been determined to be a non-
merits based grounds for dismissal, “district court[s] generally
become[] entangled in the merits of the underlying dispute” and therefore the probability that merits-based issues will be affected is
increased. When evaluating the Gulf Oil factors such as “the
relative ease of access to sources of proof and the availability of
witnesses,” a court is required to examine “the substance of the
dispute between the parties to evaluate what proof is required, and
determine whether the pieces of evidence cited by the parties are


68 Id.

69 See Duval-Major, supra note 25, at 676 (“Extensive discovery may be necessary to
adjudicate the question of convenience properly, and both sides are likely to expend private
and public resources to prevail on this issue, because it is generally recognized as outcome
determinative.”).

70 Desmond T. Barry, Jr., Foreign Corporations: Forum Non Conveniens and Change of

71 See Mitchell M. Wong, Forum Non Conveniens: Circumstances After 'Sinochem,' 237
N.Y. L.J 4 (2007). Limiting the scope of discovery in forum non conveniens motions will be
discussed at greater length in Part IV.B.3.e.

at 1187 ("Forum non conveniens, like other threshold issues, may involve a brush with 'factual
and legal issues of the underlying dispute.").

73 See Duval-Major, supra note 25, at 676 (“Modern forum non conveniens inquiries require
a preliminary hearing of the relevant private and public factors, and these very factors
necessarily concern the merits of the underlying cause of action.” (emphasis added)).

74 Van Cauwenberghe, 486 U.S. at 528 (quotations omitted).
critical, or even relevant, to the plaintiff’s cause of action and to any potential defenses to the action.”

Further “thrust[ing] the court into the merits of the underlying dispute,” is the “consider[ation of] the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff’s chosen forum.” These considerations “can prejudice merits-based issues. . . such as choice of law, the availability of remedies, and the applicability of statutes of limitations.” For instance, in Piper Aircraft, the trial court had determined that Scottish law was to apply to one of the defendants, and Pennsylvania law to the other, and that this was a factor weighing in favor of dismissal. Though this enunciation was not binding on any Scottish courts, there was a possibility that a foreign tribunal, which did not recognize strict liability as part of its own law, would accept the American court’s determination, and allow recovery in the event that there was a dismissal. Conversely, if the trial court had gone through the same analysis, finding Pennsylvania and Scottish law to be applicable in the case, but concluded instead that a forum non conveniens dismissal would be improper, this choice of law decision, which had certain remedial consequences, could have made the difference between opting for a settlement or continuing litigation. Assuming now a Sinochem-type situation, where jurisdiction has not yet been determined and forum non conveniens raised, a defendant may find him or herself precluded from later relitigating any determinations made in the above Piper hypothetical based on principles such as judicial-estoppel, law-of-the-case and res judicata. As such, proper consideration must be given to formulating the litigation strategy to

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75 Id.
76 Id.
77 Wong, supra note 71.
78 See Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 736–37 (M.D. Pa. 1979) “[A] trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties.” Id. at 734.
79 It is possible that the trial court could have attributed a higher degree of aptitude to the jury in resolving similar liability issues while applying different laws.
80 See Wong, supra note 71. This area of forum non conveniens litigation, however, has not been fully fleshed-out and language in Sinochem has caused a divergence of opinion. See Georgene M. Vairo, High Court’s Efficiency, Nat’l L. J., Apr. 16, 2007, at 13 (“[T]he court noted that forum non conveniens issues frequently overlap with issues on the merits. A court may need to identify the claims presented and the evidence relevant to those issues to rule on a forum non conveniens motion. This overlap does not convert a forum non conveniens determination to a merits determination. The crucial distinction is that dismissal based on forum non conveniens does not entail any assumption by the court of substantive ‘law-declaring power.’” (emphasis added)).
be employed, and to whether or not an early, but unsuccessful, *forum non conveniens* motion might hinder contesting on grounds of choice of law, statute of limitations, or other procedural or substantive issues in the future.

**D. Conditional Dismissals**

Generally, a successful *forum non conveniens* motion results in a dismissal that is subject to varying conditions. In order to ensure that relief is available in the foreign forum, a district court may require a defendant to consent to jurisdiction in the alternative forum, waive any statute of limitations problems, commit to reconsider the case if the foreign forum does not accept jurisdiction, or accept various other conditions. While, “[c]ases holding a particular condition to be improper are relatively rare,” the *Sinochem* Court left undecided the question whether, when a *forum non conveniens* dismissal is conditioned on a defendant’s waiver of jurisdictional or limitations defenses in the foreign forum, the domestic court must first determine its own jurisdiction, to adjudicate the case.

As noted in the Court’s opinion, several circuit courts have articulated their concern on this matter. While the Second Circuit Court of Appeals has not spoken directly on the subject, a district court has dealt with the issue and permitted a conditional dismissal

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81 See generally John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 491, 501–05 (2000) (dividing conditions into two categories—those that ensure the availability of the alternate forum and those that compensate the plaintiff for lost conveniences—and arguing that trial courts properly impose conditions “when the conditions prevent dismissals from unduly penalizing plaintiffs who acted reasonably in pursuing their legal rights in a U.S. forum”); Jurianto, supra note 34, at 370, 410 (arguing that by conditioning dismissals, courts have “gently twisted” the traditional analysis of the doctrine in situations “where . . . alternative forums do not actually exist but are artificially created through the dismissal decisions,” and that this “may render a benefit to certain types of foreign plaintiffs who wish to pursue American defendants in the plaintiffs’ own home courts”).

82 Tim A. Thomas, Annotation, *Validity and Propriety of Conditions Imposed Upon Proceeding in Foreign Forum by Federal Court in Dismissing Action Under Forum Non Conveniens*, 89 A.L.R. Fed. 238, 242 (1988 & Supp. 2007) (collecting and discussing federal cases concerning the validity of one or more conditions contained in a court order dismissing a case pursuant to *forum non conveniens*).


84 See Malay. Int’l Shipping Corp. v. Sinochem Int’l Co., 436 F.3d 349, 363 (3d Cir. 2006); *In re Papandreou*, 139 F.3d 247, 256 n.6 (D.C. Cir. 1998) (suggesting that any dismissal on *forum non conveniens* grounds without a prior determination of subject matter jurisdiction should not be subject to conditions, on the theory that “exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction”).
without first ascertaining whether or not it had proper subject matter or personal jurisdiction.\textsuperscript{85} This fact, taken in conjunction with the Supreme Court’s reluctance to squarely address the matter when it had the opportunity to, calls for the inference that the judicial climate, at least within the Second Circuit, is that conditional dismissals without the antecedent confirmation of jurisdiction, are permitted.\textsuperscript{86}

Having discussed the practical implications of the \textit{Sinochem} decision, this Note will now change focus and, in the next section, examine the \textit{forum non conveniens} doctrine as it has been applied in the Second Circuit. Through this circuit-specific lens, litigation techniques that have proven successful, as well as proposals for litigating around the inconclusive and, at times, plaintiff-friendly features of the doctrine will be analyzed, keeping in mind the pragmatic underpinnings of the doctrine as a whole.

\section*{IV. SHOOTING DOWN THE MOTH: EFFICIENT AND SUCCESSFUL \textit{FORUM NON CONVENIENS} LITIGATION IN THE SECOND CIRCUIT}

\subsection*{A. Second Circuit Standard}

Characterizing the objective of any \textit{forum non conveniens} inquiry as serving to “ensure that the place where a trial is held is convenient . . . [and] that the forum fits the needs and is suitable to the circumstances of the case,” the Second Circuit has established a three-part test to evaluate motions to dismiss on grounds of \textit{forum non conveniens}.\textsuperscript{87} The first part requires a court to determine the degree of deference to accord to the plaintiff’s choice of forum.\textsuperscript{88} The

\textsuperscript{85} See \textit{Turedi v. Coca Cola Co.}, 460 F. Supp. 2d 507, 518, 529 n.2 (S.D.N.Y. 2006) (“The action now before the Court represents a prime example of why . . . dismissal of a suit on the basis of \textit{forum non conveniens} prior to the court’s confirmation of personal or subject matter jurisdiction is justified. . . . [C]onditional \textit{forum non conveniens} dismissals are standard in the Second Circuit. Such conditions may, as is the case here, be necessary to the \textit{forum non conveniens} analysis itself, for such conditions create the adequate alternative forum.” (emphasis added)).

\textsuperscript{86} Although \textit{Turedi} represents the current state of the law, it should be remembered that “[l]aw never is, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires.” \textit{Benjamin N. Cardozo, The Nature of The Judicial Process} 126 (1921). As such, prudent defense counsel will want to raise this concern, preferably ahead of the plaintiff, to assure the court that familiarity with the fact that the law is ambiguous in this area is known and to demonstrate that counsel has acted in good faith and is not attempting to obscure the law in favor of a dismissal that will ultimately result in the plaintiff not being able to seek relief.

\textsuperscript{87} \textit{Pollux Holding Ltd. v. Chase Manhattan Bank}, 329 F.3d 64, 67, 70 (2d Cir. 2003).

\textsuperscript{88} \textit{Norex Petroleum Ltd. v. Access Indus., Inc.}, 416 F.3d 146, 153 (2d Cir. 2005).
second part requires a court to determine “whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute.” And the last part requires a court to “balance[] the private and public interests implicated in the choice of forum.” The defendant seeking dismissal bears the burden both as to whether an adequate alternative forum exists and the balancing of public and private interest factors.

1. Degree of Deference Due to the Plaintiff

The “first level of inquiry,” requiring a trial court to “determin[e] whether the plaintiff’s choice [of forum] is entitled to more or less deference,” is an elaboration on Piper Aircraft’s lesser-deference rule. Based on the theory that the plaintiff selects a forum because it is more convenient than any other alternatives, the trial court begins with the presumption that the plaintiff’s forum choice is entitled to substantial deference. This presumption, however, “is ‘not dispositive, and it may be overcome’ . . . where it becomes apparent that [the] plaintiff’s choice of forum was not made with regard to convenience, and instead was made for ‘forum-shopping reasons.’” To determine whether there are reasons to doubt the presumption of convenience, the Second Circuit has articulated a “sliding scale” approach that “consider[s] the totality of circumstances supporting a plaintiff’s choice of forum.” The degree of deference a court affords the plaintiff’s choice is not outcome determinative; instead, “it merely re-calibrates . . . for the remaining two steps of the analysis.”

Under this approach, the more a plaintiff’s choice of forum appears to be based on legally “valid” reasons, or those that were “likely motivated by genuine convenience,” the more it is entitled to deference. Conversely, the more a plaintiff’s choice appears motivated by forum-shopping objectives, or those where the

90 Id.
91 See Aguinda v. Texaco, Inc., 303 F.3d 470, 476 (2d Cir. 2002).
93 Id. at 70; Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 71 (2d Cir. 2003).
95 Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 154 (2d Cir. 2005).
97 Norex Petroleum Ltd., 416 F.3d at 154–55; see also Irarorri, 274 F.3d at 71–72.
“plaintiff’s pursuit [is] not simply of justice but of ‘justice blended with some harassment,’”98 the less deference should be attributed to the plaintiff’s choice “and, consequently, the easier it becomes for the defendant to succeed on a forum non conveniens motion by showing that convenience would be better served by litigating in another country’s courts.”99

Factors articulated by the Iragarri court to determine whether the forum was selected for legally valid reasons include “the convenience of the plaintiff’s residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant’s amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense.”100 Factors that demonstrate that a plaintiff’s choice of forum was motivated by forum-shopping include

- attempts to win a tactical advantage resulting from local laws that favor the plaintiff’s case, the habitual generosity of juries in the United States or in the forum district, the plaintiff’s popularity or the defendant’s unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum . . . .101

A court need not consider each of these factors individually in

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98 Norex Petroleum Ltd., 416 F.3d at 155 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947)).
99 Id. at 154–55 (citing Iragarri, 274 F.3d at 71–72). Though there has been no precise articulation of the differing degrees of deference on the sliding scale, common sense dictates that “substantial” or “greatest deference” is most likely the utmost degree a court will ascribe, and “zero” or “no deference” is the least. However, what lies in-between these two poles is not clear. See, e.g., Bohn, 2007 WL 4334667, at *7–8 (“[O]n the ‘sliding scale’ of deference, the Court grants some deference to Bohn’s choice, but will not afford [a] ‘high degree of deference . . . .’” (emphasis added)); Colombia v. Diageo N. Am., Inc., 531 F. Supp. 2d 365, 405 (E.D.N.Y. 2007) (“This court will accord reasonable, but not substantial, deference to Plaintiffs’ choice of forum.” (emphasis added)); Construtora Norberto Oderbrecht S.A. v. Gen. Elec. Co., No 07-CV-8014 (CM), 2007 WL 3025699, at *8 (S.D.N.Y. Oct. 12, 2007) (“Defendants have offered sufficient proof that plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons . . . . Accordingly, I grant plaintiff’s choice of this forum little deference.” (citation omitted) (emphasis added)); Esheva v. Siberia Airlines, 499 F. Supp. 2d 483, 488 (S.D.N.Y. 2007) (“Applying the Iragarri convenience factors, the plaintiffs’ choice of forum is entitled to substantially reduced deference.” (emphasis added)); E.ON AG v. Acciona, S.A., 468 F. Supp. 2d 559, 587 (S.D.N.Y. 2007) (“E.ON’s choice of forum is entitled to only modest deference.” (emphasis added)).
100 Iragarri, 274 F.3d at 72. With that stated, “[k]nee-jerk decisions that rely on only one consideration are [also] prohibited.” Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs., Corp., 421 F. Supp. 2d 741, 755 (S.D.N.Y. 2006).
101 Iragarri, 274 F.3d at 72.
making its decision,\textsuperscript{102} and in most cases, the greater the plaintiff’s or the claim’s “bona fide connection to the United States,”\textsuperscript{103} the more likely a court will be to view the choice of forum as stemming from reasons of convenience or expense, rather than forum-shopping.

2. Adequate Alternative Forum

Having determined the level of deference accorded plaintiff’s choice of forum, a district court will next entertain arguments from the defendant that there is an alternative forum which is more convenient to hear the case.\textsuperscript{104} As discussed in \textit{Gulf Oil}, the doctrine of \textit{forum non conveniens} assumes the existence of no fewer than two fora where a defendant is amenable to service of process.\textsuperscript{105} From this decree, the Second Circuit has derived two separate requirements, each of which must be satisfied prior to dismissal. First, the defendants must be subject to service of process in proposed alternative forum.\textsuperscript{106} Second, the proposed alternative forum must allow for “litigation of the subject matter of the dispute” and provide adequate procedural safeguards.\textsuperscript{107}

Forums have been determined inadequate\textsuperscript{108} when: a statute of limitation bars the suit from being brought in the alternate forum;\textsuperscript{109} the defendants are not subject to personal jurisdiction in

\begin{itemize}
\item \textsuperscript{102} \textit{Norex Petroleum Ltd.}, 416 F.3d at 155.
\item \textsuperscript{103} \textit{Iragorri}, 274 F.3d at 72.
\item \textsuperscript{104} Remember, it is the defendant who bears the initial burden of establishing the adequacy of the alternative forum. \textit{See supra} Part IV.A.
\item \textsuperscript{105} \textit{Gulf Oil Corp. v. Gilbert}, 330 U.S. 501, 506–07 (1947).
\item \textsuperscript{106} \textit{Bank of Credit and Commerce Int’l (Overseas) Ltd. v. State Bank of Pak.}, 273 F.3d 241, 246 (2d Cir. 2001) \textit{[hereinafter BCCI Ltd.]}; \textit{DiRienzo v. Phillip Servs. Corp.}, 232 F.3d 49, 57 (2d Cir. 2000).
\item \textsuperscript{107} \textit{BCCI Ltd.}, 273 F.3d at 246; \textit{DiRienzo}, 232 F.3d at 57. “[L]itigation of the subject matter of the dispute” does not contemplate the existence of an identical cause of action in alternative forum, nor does it require that such forum provide the same degree of relief. \textit{See LaSala v. UBS, AG}, 510 F. Supp. 2d 213, 222 (S.D.N.Y. 2007). However, it does require “a finding that the foreign jurisdiction is as presently capable of hearing the merits of [the] plaintiff’s claim . . . as the United States court where the case is pending.” \textit{Norex Petroleum Ltd.}, 416 F.3d at 159; \textit{see also Saud v. PIA Invs. Ltd.}, No. 07 Civ. 5603(NRB), 2007 WL 4457441, at *3 (S.D.N.Y. Dec. 14, 2007) (“[T]he foreign court need not be the best possible court but must simply be capable of litigating the dispute.”).
\item \textsuperscript{108} The Second Circuit recognizes that in “rare circumstances’ . . . the remedy offered by the [alternative] forum [may be] clearly unsatisfactory.” \textit{Gross v. British Broad. Corp.}, 386 F.3d 224, 231 (2d Cir. 2004) (citing \textit{Piper Aircraft Co. v. Reyno}, 454 U.S. 235, 254 n.22 (1981)).
\item \textsuperscript{109} \textit{BCCI Ltd.}, 273 F.3d at 246–47; \textit{see also In re Ski Train Fire in Kaprun Austria on Nov. 11, 2000}, 499 F. Supp. 2d 437, 443 (S.D.N.Y. 2007) (quoting \textit{Norex Petroleum Ltd.}, 416 F.3d at 159).
\end{itemize}
the alternate forum;\textsuperscript{110} the proposed forum will not have subject matter jurisdiction over the dispute;\textsuperscript{111} the court system in the alternate forum is seriously congested and litigation would be unduly delayed;\textsuperscript{112} the plaintiff lacks access, in some form or another, to the foreign forum;\textsuperscript{113} and the court to which the dispute would be transferred has been demonstrated to be biased in some way.\textsuperscript{114}

Second Circuit courts have not entertained arguments by plaintiffs that a foreign forum is inadequate because of: the differing

\textsuperscript{110} See In re Air Crash Off Long Island, N.Y., On July 17, 1996, 65 F. Supp. 2d 207, 211 (S.D.N.Y. 1999) (“[P]arties must be subject to personal jurisdiction and service of process in the alternative forum.”); ESI, Inc. v. Coastal Corp., 61 F. Supp. 2d 35, 63 (S.D.N.Y. 1999) (Defendant “failed to demonstrate the existence of an adequate alternative forum where all defendants would be subject to jurisdiction by failing to address whether the El Salvadoran courts would have personal jurisdiction over Delasa by consent or otherwise.”).

\textsuperscript{111} Colombia v. Diageo N. Am. Inc., 531 F. Supp. 2d 365, 405 (E.D.N.Y. 2007) (“[T]he court notes that, where Colombian courts have subject-matter jurisdiction over a matter and personal jurisdiction over the parties to a dispute, the Colombian courts have the procedures required to constitute an adequate alternative forum.”); Reers v. Deutsche Bahn AG, 320 F. Supp. 2d 140, 159 (S.D.N.Y. 2004) (“[A]n ‘unsatisfactory remedy,’ in this context, means no remedy at all. The . . . concern [is] about situations in which the alternative forum . . . refuses to permit litigation of the subject matter of the suit . . . .” (citation omitted)).

\textsuperscript{112} See, e.g., USHA (India), Ltd. v. Honeywell Int’l, Inc., 421 F.3d 129, 135 (2d Cir. 2005) (It is unquestionable “that if it would take ten to fifteen years for the New Delhi High Court to reach and decide a vigorously prosecuted action . . . it is an inadequate alternative forum.”); Bohn v. Bartels, No. 06 Civ. 1390(PKL), 2007 WL 4334667, at *8 n.11 (S.D.N.Y. Dec. 12, 2007) (“[A] determination of the time to resolve the case here or in Portugal would be speculative. Nonetheless, the Court notes that potential delay of resolution of the action is a practical consideration that may weigh in favor of retaining the action here.”). \textit{But see} Seales v. Panamanian Aviation Co., No. CV-07-2901 (CPS)(CLP), 2008 WL 544705, at *4 (E.D.N.Y. Feb. 26, 2008) (“Even if it would take four years, ‘delays in an alternative forum’s judicial system are not sufficiently harmful of due process to prevent dismissal on the ground of \textit{forum non conveniens}.’” (quoting Broad. Rights Int’l Corp. v. Societe du Tour de Fr., 708 F. Supp. 83, 85 (S.D.N.Y. 1989))).

\textsuperscript{113} This can either be legal or physical access. See, e.g., Fiorenza v. U.S. Steel Int’l, Ltd., 311 F. Supp. 117, 120–21 (S.D.N.Y. 1969) (stating that plaintiff might not have been able to enter Bahamas for purposes of seeking a remedy); HSBC USA, Inc. v. Prosegur Paraguay, S.A., No. 03 Civ. 3336(LAP), 2004 WL 2210283, at *3–4 (S.D.N.Y. Sept. 30, 2004) (stating that plaintiff faced the risk of personal harm if forced to litigate in Paraguay); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 335–36 (S.D.N.Y. 2003) (stating that plaintiff faced risk of personal harm in Sudan). However, courts will not frequently recognize unsubstantiated assertions of danger. \textit{See, e.g.,} BFI Group Divino Corp. v. JSC Russian Aluminum, 247 F.R.D. 427, 431–32 (S.D.N.Y. 2007) (citing cases which have held foreign forums unsafe for \textit{forum non conveniens} purposes but rejecting plaintiff’s argument because “plaintiff [did] not off[er] evidence of violence directed towards this litigation or individuals connected with this case”) (quotations omitted).

\textsuperscript{114} \textit{See} Esheva v. Siberia Airlines, 499 F. Supp. 2d 493, 499 (S.D.N.Y. 2007) (The Second Circuit has been hesitant “to find foreign courts corrupt or biased. . . . [T]o find an alternative forum inadequate on that basis, a plaintiff should show that the alternative forum is characterized by a complete absence of due process or an inability of the forum to provide substantial justice to the parties.” (quotations omitted)).
nature of the substantive law of the foreign forum compared to American law; the unavailability of specific procedural mechanisms available in U.S. courts but not foreign tribunals; the claim of financial hardship by the plaintiff in litigating in the foreign forum; or the possibility of some delay.

If a trial court is unable to determine whether or not the alternative forum is adequate, the Court of Appeals has advised that a trial court may nonetheless conditionally dismiss the case such that a plaintiff may reinstate his or her claim, in the instance that the alternative forum declines to accept jurisdiction.

3. Balancing of Public and Private Interests

The last step in the Second Circuit’s three-part analysis is a balancing of the private and public interest factors elaborated in *Gulf Oil Corp. v. Gilbert*. To review, the private interest factors include:

- the relative ease of access to sources of proof; availability of
  
115 *See* Capital Currency Exch., N.V. v. Nat’l Westminster Bank PLC, 155 F.3d 603, 610 (2d Cir. 1998) (unavailability of treble damages does not render a forum inadequate); Gilstrap v. Radianz, Ltd., 443 F. Supp. 2d 474, 481 (S.D.N.Y. 2006); *see also* Hoffman & Rowley, *supra* note 56, at 1173–74 (discussing cases and noting that since 1987, the Second Circuit has not recognized an exemption to the general *forum non conveniens* doctrine for federal cases grounded on statutory venue provisions and that the contemporary view “is that any such interest is not enough, by itself, to prohibit the dismissal of a claim on *forum non conveniens* grounds”).

116 *See* Blanco v. Banco Indus. de Venez., S.A., 997 F.2d 974, 982 (2d Cir. 1993); Gilstrap, 443 F. Supp. 2d at 482 (foreign tribunal’s lack of class actions and contingent fees “does not render a foreign forum inadequate as a matter of law”); Potomac Capital Inv. Corp. v. Koninklijke Luchtvapen Maatschappij N.V., No. 97 Civ. 8141(AJP)(RLC), 1998 WL 92416, at *5 (S.D.N.Y. Mar. 4, 1998) (“[w]here a forum considered inadequate merely because it did not provide for federal style discovery, few foreign forums could be considered ‘adequate’—and that is not the law.”); *see also* Waples, *supra* note 65, at 1488 (citing cases and noting that “courts of the Second Circuit remain . . . reluctant to find a foreign forum inadequate based on procedural deficiencies including lack of civil juries, tighter restrictions on discovery and denial of oral cross-examinations, and other concerns regarding due process” (footnotes omitted)).


compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.\textsuperscript{121}

When reviewing these factors, the Second Circuit has directed the district courts to concentrate specifically on the “precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues.”\textsuperscript{122}

The public factors include
the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.\textsuperscript{123}

This balancing must be conducted keeping in perspective the degree of deference the plaintiff’s choice of forum has been accorded.\textsuperscript{124} Given the onerous nature of this inquiry, an appellate court rarely disturbs the findings of a trial court, and will overturn a decision only if it rests either on an error of law or on a clearly erroneous finding of fact; it cannot be located within the range of permissible decisions; or it fails to consider all the relevant factors or unreasonably balances those factors.\textsuperscript{125}

\textsuperscript{121} Gross, 386 F.3d at 232 (quoting \textit{Gulf Oil Corp.}, 330 U.S. at 508). In Gross, the Second Circuit termed the weighing of the \textit{Gulf Oil} factors as “the most substantial part of the analysis.” \textit{Id.} With that in mind, it is imperative that defense counsel properly spend time articulating arguments for each factor, of both the private and public interests, weighing in favor of dismissal. Since an appellate court will review a trial court’s decision for an abuse of discretion, a fully-developed record will increase the likelihood of an opinion affirming the trial court.

\textsuperscript{122} Iragarri v. United Techs. Corp., 274 F.3d 65, 74 (2d Cir. 2001)).

\textsuperscript{123} Gross, 386 F.3d at 233 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981)).

\textsuperscript{124} See Bigio v. Coca-Cola Co., 448 F.3d 176, 180 (2d Cir. 2006) (“[I]t cannot be said that there are private inconveniences present here that outweigh the deference that the district court should have accorded plaintiffs’ choice of forum. Likewise, in evaluating the ‘public interest’ factors of inconvenience, the district court again failed to take account of the deference due the plaintiffs’ legitimate choice of forum.” (citation omitted)).

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Having discussed the standard applied by both Second Circuit trial and appellate courts, this Note will next offer suggestions for defense counsel who anticipate raising a motion to dismiss on *forum non conveniens* grounds, are in the process of litigating such a motion, expect to appeal an unfavorable decision, or suspect that a favorable trial court order may be appealed by an unhappy plaintiff’s lawyer.

**B. Practical Litigation Techniques**

Raising the *forum non conveniens* issue, and subsequently bearing the burden of proof on each of the factors, falls squarely on the shoulders of the defendant. To bear this burden effectively, defense counsel must be prepared to engage in an “epic” battle, and at times appear to advance contradictory positions. But such is inherent in the doctrine, and in most instances the effort is well worth the time, money, and resources expended, provided that the case is ultimately dismissed. The following sections will offer guidelines, derived from case law in the Second Circuit, on issues pertaining to procedural, evidentiary, and substantive aspects of the doctrine that often arise during the course of litigation, keeping in mind the consequences of the *Sinochem* decision. As mentioned earlier, state courts are not obligated to follow the federal *forum non*...
conveniens doctrine, and in fact, New York’s legislature has codified a state statutory provision for the inconvenient forum doctrine. Though almost identical to the federal doctrine, in practice New York’s provision may have subtleties developed through judicial interpretation, which the federal doctrine does not, or vice-versa. This analysis, however, is outside the scope of this article. Though detailed in nature, the following discussion does not nearly exhaust the concerns defense counsel should take into account, as each forum non conveniens inquiry rests on unique factual scenarios, necessarily raising different issues.

1. When to File

As a general matter, motions to dismiss for forum non conveniens should be filed as early as possible. However, unlike venue, there is no time limit on when a defendant must make such a motion. It has been held the defense of forum non conveniens may, in fact, be raised at any time during the litigation. While a defendant may not necessarily waive the doctrine by failing to raise it in a responsive pleading, courts tend to disfavor motions made late in the litigation process and will normally increase the presumption against dismissal on such grounds in proportion to the time difference between when the motion could have been initially raised and when it was actually raised. Often a court will refer to the

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129 See supra note 10 and accompanying text.
133 See FED. R. CIV. P. 12(h)(1).
134 See Bank of America Corp. v. Lemgruber, 385 F. Supp. 2d 200, 238 (S.D.N.Y. 2005) (“[A] defendant does not waive his right to move for forum non conveniens dismissal if he fails to raise it in his Rule 12 pre-answer motion.” (emphasis added)); Jacobs v. Felix Bloch Erben Verlag fur Buhne Film Und Funk KG, 160 F. Supp. 2d 722, 742 (S.D.N.Y. 2001) (finding that no cases support the view that a motion to dismiss for forum non conveniens has to be made before a responsive pleading and that such “motions are not governed by the same time constraints imposed by Rule 12(h)” for personal jurisdiction and venue motions (emphasis added)).
135 See Alnwick v. European Micro Holdings, Inc., 29 F. App’x 781, 783 (2d Cir. 2002) (vacating and remanding the district court’s dismissal based on forum non conveniens because of, inter alia, the district court’s failure to give due deference to the stage at which the
rationale behind the doctrine of forum non conveniens when dealing with a motion late in the litigation process, and admonish the defendant that the doctrine was created to protect defendants and the federal courts from using resources on matters having little connection to this country and from litigation in an inconvenient forum.\textsuperscript{137}

Given the recent ruling in Sinochem, these motions may be filed even before personal or subject matter jurisdiction is litigated. In that respect, it is imperative that defense counsel makes his or her client’s intent to raise a forum non conveniens motion known to the court as early as possible, irrespective of whether or not counsel plans on moving to dismiss for lack of personal jurisdiction or subject matter jurisdiction. An early statement of intent would ensure that the presiding judge or magistrate will not subsequently modify any presumptions to penalize the defendant for delay. Additionally, it would informally give notice to the plaintiff that they should begin drafting affidavits and limited discovery requests on the issue of forum non conveniens. Finally, early notice of a motion to dismiss for forum non conveniens would appeal to the judge’s own notions of fairness.\textsuperscript{138}

2. What to Allege and How

The Second Circuit requires that a defendant carry the burden to establish clearly each factor in a motion to dismiss for forum non conveniens.\textsuperscript{139} This includes demonstrating the adequacy of the litigation in the United States had already proceeded); see also Genpharm Inc. v. Pliva-Lachema A.S., 361 F. Supp. 2d 49, 59 (E.D.N.Y. 2005) (noting that there is no time limit but stating that delay “is a factor to be considered” in the convenience analysis). \textsuperscript{137} Krepps v. Insead, No. 04 CIV.3260 RWS, 01 Civ.9468 RWS, 2004 WL 2066598, at *2 (S.D.N.Y. Sept. 16, 2004) (citing [Supreme Court of New York, Oct. 7, 1996]); see also Genpharm Inc. v. Pliva-Lachema A.S., 361 F. Supp. 2d 49, 59 (E.D.N.Y. 2005) (noting that there is no time limit but stating that delay “is a factor to be considered” in the convenience analysis). \textsuperscript{139} PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 74 (2d Cir. 1998).
alternate forum, showing that a Gulf Oil factor balancing weighs in defendant’s favor, and, presumably, establishing that the plaintiff’s choice of forum should be accorded minimal deference. The following subsections will review each of these inquiries and present suggestions for offering evidence in support of them.

a. Degree of Deference Accorded

As mentioned earlier, the first step a Second Circuit court will take in evaluating a motion to dismiss will be to determine the degree of deference it will accord to the plaintiff’s choice of forum. This “sliding scale” inquiry is relatively new, and as such it has not been as fully developed as the other two steps. Though the plaintiff begins with a tactical advantage—the presumption of substantial deference to his or her choice—such can easily be rebutted. The first thing defense counsel should consider is the type of action that the plaintiff has brought; courts have usually...

140 At the time of the PT United Can Co. opinion, the “level of deference” inquiry had not been formally realized by the Second Circuit. In fact, it was not until 2001 in Iragarri v. United Technologies Corp. that an en banc Court of Appeals distinguished this as a separate step from the other two. 274 F.3d 65, 73 (2d Cir. 2001).

141 See supra Part IV.A.1.

142 See, e.g., supra notes 95–97, 127 and accompanying text.

143 The Second Circuit Court of Appeals has not explicitly pronounced that the defendant alone bears the burden in rebutting the presumption. Though at least two separate panels, both citing to Iragarri, have stated that the presumption “will stand unless the defendant can demonstrate that reasons exist to afford it less deference,” a closer reading of Iragarri demonstrates that this is not the language the en banc court used. Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 70–71 (2d Cir. 2003); accord DiRienzo v. Philip Servs. Corp., 294 F.3d 21, 28 (2d Cir. 2002). But see Iragarri, 274 F.3d at 71. The actual language used in Iragarri is that “a court reviewing a motion to dismiss for forum non conveniens should begin with the assumption that the plaintiff’s choice of forum will stand unless the defendant meets the burden of demonstrating the points outlined below.” Iragarri, 274 F.3d at 71. From a practical standpoint this might not make too much of a difference, as a plaintiff will rarely, if ever, want to rebut a presumption in its own favor. However, from a shrewd litigator’s perspective, the language in Iragarri does not foreclose the possibility of a judge taking judicial notice of any facts pertinent to the motion to dismiss. See Fed. R. Evid. 201 (permitting a court at any time and either at the request of a party or sua sponte to “judicially notice[] [any] fact . . . not subject to reasonable dispute” and that “is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). Judicial notice can be an excellent tool to utilize during a forum non conveniens hearing where defense counsel realizes that he or she does not have any substantive evidence to support some type of newly discovered reason why the plaintiff’s choice should be accorded less deference or abrogated altogether. See, e.g., Giaguara S.p.A. v. Amiglio, 257 F. Supp. 2d 529, 532 n.1, 537 (E.D.N.Y. 2003) (taking judicial notice of complaints and decisions from foreign jurisdictions and determining that plaintiffs were not forum-shopping for purposes of a motion to dismiss for forum non conveniens).
accorded less deference to non-tort actions. If the action does sound in tort, counsel should analyze the exact nature of the claims as courts will apply a substance over form approach. If, however, the action does not sound in tort, defense counsel should next consider the following: whether it was the plaintiff who sought out the transaction, the subject of which is in dispute; whether an action in the foreign forum was foreseeable in light of the nature of the transaction; and whether the plaintiff is an organization, rather than an individual.

Though not an explicit guide post, judges tend to assume that organizational plaintiffs “can [more] easily handle the difficulties of engaging in litigation abroad” than individual plaintiffs.

With the following considerations in mind, counsel should acquire as much substantive evidence as possible pertaining to pre-contractual negotiations, solicitation letters (if they exist), or other ancillary contracts to prove who initiated the transaction. Further, counsel should use these papers as well as conduct interviews with principals who have entered into similar transactions—either with the plaintiff directly or with similar enterprises—in order to examine the reasonability of having to litigate abroad consequent to a similar dispute. It may turn out that within these ancillary documents, explicit forum clauses exist which will bolster any foreseeability arguments. Also, during the course of interviews, counsel may learn that plaintiff has had to litigate abroad under similar circumstances, and that there were no records of such as a result of settlement agreements. Counsel should also investigate, whether the plaintiff is an organizational entity or an individual, who will directly and indirectly benefit from the litigation. It is rare that a plaintiff only has one personal interest at stake in litigation. By demonstrating, for instance, that an individual plaintiff is a member of some sort of foreign organization which is involved in heavy litigation with the same or similar defendants abroad, this may outweigh any presumption of non-forum-shopping motivations.

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145 Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG, 535 F. Supp. 2d 403, 408 (S.D.N.Y. 2008) (“While Plaintiff’s claims sound in the tort of interference with contract, that business tort arises out of voluntary contractual relations.”) (citing Carey v. Bayerische Hypo-Und Vereinsbank AG, 370 F.3d 234, 238 (2d Cir. 2004)).
146 Id. (citing ICC Indus. Inc., 170 F. App’x at 767–68).
147 Id. (citing ICC Indus. Inc., 170 F. App’x at 767–68).
148 See, e.g., id. at 409.
b. Adequacy of the Alternative Forum

The next step a court will take in evaluating a motion to dismiss will be whether the defendant has demonstrated the existence of an adequate alternative forum.\textsuperscript{149} This analysis requires a court to make a two-part determination. The first is whether or not the defendant is subject to service of process in the proposed alternative forum.\textsuperscript{150} Often, when this factor is absent, defendants will agree that as a condition of dismissal they will consent to personal jurisdiction in the alternative forum and accept service of process.\textsuperscript{151} In addition, to err on the safe side, defendants should also explicitly agree to “waive any statute of limitations defense matured since the commencement of the action, make available all witnesses and documents in the foreign forum proceedings and satisfy any final judgment entered by the foreign court.”\textsuperscript{152}

A major source of problems may come about in proving the second aspect of this step—that the proposed alternative forum allows for litigation of the dispute’s subject matter and provides some form of adequate procedural safeguards.\textsuperscript{153} At a bare minimum, this can be done simply by having an expert on the foreign jurisdiction’s local law submit an affidavit to establish that the foreign forum provides a similar remedy that is not “clearly unsatisfactory.”\textsuperscript{154} Most times, however, a plaintiff will try to inflame a trial judge’s concern that a

\textsuperscript{149} See supra Part IV.A.2.


\textsuperscript{151} See, e.g., In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203–04 (2d Cir. 1987) (affirming dismissal for forum non conveniens that was conditioned upon defendant’s consent to personal jurisdiction in India; such conditions “are not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition”); accord Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998). But see infra Part IV.B.3.b (discussing the enactment of legislation in numerous foreign jurisdictions that attempts to hinder any consent a defendant might give to personal jurisdiction by refusing to recognize any cause of action once a plaintiff has chosen to litigate in a forum other than the proposed alternative forum).

\textsuperscript{152} Barry, supra note 70, at 546.

\textsuperscript{153} BCCI Ltd., 273 F.3d at 246; DiRenzo, 232 F.3d at 57.

\textsuperscript{154} Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) (“In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.”). Although there have been no formal qualification requirements for these local law experts, “[t]he weight given to the evidence of a senior local practitioner often will far exceed that of a widely published U.S. academic with little practical experience in the relevant court system.” Nicholas Diamand, Forum Non Conveniens—Practical Tips, in 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS (2005) (citing In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 846 (S.D.N.Y. 1986)).
trial in the proposed alternative forum would not be fair by subjecting the court to a “parade of horribles . . . seek[ing] to emphasize the differences and presumed inferiorities of the foreign legal system.” Defense counsel’s task, in lieu of this, is three-fold. First, defendant must rebut each one of plaintiff’s assertions about how bad the alternative forum’s judicial system is. This may be done by having the same, or a different, local law expert evaluate the plaintiff’s affidavits and briefs, and compile some form of a rebuttal, which might include statutes, judicial opinions, scholarly treatises, etc. The second task requires defense counsel to act as an educator to the court. As two scholars have noted, “the defendant should seek to over-familiarize the judge with the favorable aspects of the foreign judicial system.” While sound advice in theory, counsel should always be weary about how much might be too much. In order to educate the court, these same scholars have suggested that an evidentiary showing, which places foreign judicial system in context, be made. This showing should include discussion on:

(a) when and how the foreign country’s constitution was adopted;
(b) how it provides for the country’s court system;
(c) the specific court in which the plaintiff’s claim may be heard;
(d) the general procedure by which claims in that court are resolved, emphasizing the types of procedural protections available to the parties, and describing the specific sources of procedural law that would apply;
(e) facts that tend to show independence of the judiciary; and
(f) the degree to which that jurisdiction’s judgments are

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156 Cf. Barry, supra note 70, at 547 (“[E]xpert witness on foreign law should attest that the foreign judicial system reflects the modern trends in procedural law and affords the parties fair and adequate remedies in an adversarial system, including pretrial discovery, compelling the attendance of unwilling witnesses, adequate monetary remedies, and the right to appeal.”).
158 See, e.g., Republic of Colombia v. Diageo N. Am., Inc., 531 F. Supp. 2d 365, 403 (E.D.N.Y. 2007) (“[S]ubmissions on the forum non conveniens issue appear far more like treatises exhaustively prepared for the purpose of cataloguing every conceivable forum non conveniens argument than like focused ‘briefs’ designed to cut to the heart of the . . . forum non conveniens issue. As a result, I will not take the time to identify each of the arguments made by the parties.”).
159 Reetz & Fraga, supra note 138, at 14.
enforced in the courts of other jurisdictions.\textsuperscript{160}

The last task defense counsel is charged with is reminding the court that it must do all within its power to remain objective and adhere to well-settled Second Circuit case law. Though \textit{forum non conveniens} is a discretionary tool, the principle of stare decisis requires that a court adhere to earlier decisions when the same points are raised in later litigation.\textsuperscript{161} As such, defense counsel should supply relevant case law where the foreign forum has been held by a Second Circuit Court, or any federal court for that matter, to constitute an adequate alternative forum for \textit{forum non conveniens} purposes.\textsuperscript{162} In addition to case law, whether or not the United States and the foreign forum have entered into treaties which provide for reciprocity for litigation purposes should also be researched and submitted to the court.\textsuperscript{163} It should be noted, however, that courts in the Second Circuit have found foreign jurisdictions to be unsatisfactory;\textsuperscript{164} in all likelihood, plaintiffs will attempt to analogize their case to one of those cases which have held in this way.\textsuperscript{165} Aside from attacking the factual disparities between cases that plaintiffs attempt to utilize, defense counsel will also want to remind the court that inadequacy cannot be based solely on the differing nature of the two fora’s judicial systems.\textsuperscript{166}

\textsuperscript{160} Reetz \& Fraga, \textit{supra} note 138, at 13.

\textsuperscript{161} See \textit{BLACK’S LAW DICTIONARY} 1443 (8th ed. 2004). Even plaintiffs’ attorneys have realized that attempting to argue inadequacy of the alternative forum based on the differing remedies offered by distinct jurisdictions “seems to be a dead issue.” See Stuart R. Fraenkel, \textit{Preparing For and Presenting Opposition to Forum Non Conveniens Motions, in 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS, AVIATION LAW SECTION} (2001).

\textsuperscript{162} See, e.g., Blanco v. Banco Indus. de Venez., S.A., 997 F.2d 974, 981–82 (2d Cir. 1993) (discussing other courts which have held Venezuela satisfactory for \textit{forum non conveniens} purposes).

\textsuperscript{163} See, e.g., Murray v. British Broad. Corp., 81 F.3d 287, 291 & n.1 (2d Cir. 1996) (identifying individual countries and their respective treaties with the United States); cf. Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 72–73 (2d Cir. 2003) (holding that a treaty with Liberia providing for “freedom of access” did not explicitly guarantee equal access, so the plaintiffs’ forum choice received the lesser deference).

\textsuperscript{164} See \textit{supra} Part IV.A.2; see also \textit{BORN \& RUTLEDGE, supra} note 10, at 415–20.

\textsuperscript{165} E.g. Fraenkel, \textit{supra} note 161 (“Notwithstanding the somewhat low threshold imposed on the defendant by case law, there are situations where a forum may not be considered an adequate alternative forum. For example: (1) if there is no remedy available to the plaintiffs in the foreign forum; (2) if the courts are so corrupt in the foreign forum that the plaintiff will not get a fair trial; (3) if there are no procedural devices to obtain or enforce judgments in the foreign forum, and so forth. It is incumbent upon the plaintiff to prove that the dismissal of his or her action would in effect preclude any and all remedies.”)

\textsuperscript{166} Parex Bank v. Russian Sav. Bank, 116 F. Supp. 2d 415, 423 (S.D.N.Y. 2000); see also Waples, \textit{supra} note 65, at 1488–89 (citing cases and noting that “[t]he courts of the Second Circuit remain . . . reluctant to find a foreign forum inadequate based on procedural deficiencies including lack of civil juries, tighter restrictions on discovery and denial of oral
and that “considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards.”

By taking sufficient time to amass evidence in support of the adequate alternative forum, defendants will be sure to the meet “the somewhat low threshold imposed” by case law.

c. Public and Private Interest Factors

The last step in the Second Circuit’s forum non conveniens inquiry is to evaluate the Gulf Oil factors. As a listing of the factors has been repeated several times above, it will not be repeated in this section. However, one aspect that does deserve a brief revisiting is the standard an appellate court will use to review a trial court’s decision. While given a great deal of discretion, a trial court will be found to have abused its discretion for, inter alia, failing to consider all of the Gulf Oil factors or unreasonably balances them. Therefore it is imperative that defense counsel ensures that he or she has provided relevant evidence or testimony that will support
each of the public and private interest factors.

The majority of these factors appear either intuitive (the fact that local controversies should be decided at home and that local juries should not be burdened with jury duty and tax expenditures for imported controversies) or within the court’s own knowledge (congestion of court systems), and as a result would appear not to need any physical evidence to substantiate them. The remaining factors, however, especially those pertaining to evidence and witnesses, require more than conclusory allegations.

The primary vehicle for substantiating claims of inconvenience and addressing the Gulf Oil factors is the submitting of factual affidavits. These affidavits do not have to be overly detailed; however they must, as a matter of law, “provide enough information to enable the [d]istrict [c]ourt to balance the parties’ interests.” These affidavits should address the different issues raised in the case; who the witnesses are that will be called to testify and the subject matter about which they will testify; where documents relating to the stated issues are housed, how many there are, and certain unique qualities they may have; and the law that will probably govern each of the stated issues.

It is well-established that “generalized and unsworn list[s]” as well as “conclusory representations” in the affidavits will rarely suffice, especially once a plaintiff has contested them. Therefore, it is important to address each of the above-mentioned aspects in order.

Usually the biggest point of tension between litigants relates to the witnesses that each side anticipates calling and the burdens, expenses, and sometimes impossibilities of acquiring testimony in the United States. The most important aspect in this area for defense counsel to focus is on the witnesses who cannot be compelled to appear in court in the United States. Not only must it be demonstrated that these witnesses are outside of the court’s subpoena power, but counsel must also show that there has been a

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171 See infra note 187 and accompanying text.
173 Reetz & Fraga, supra note 138, at 16. Moths have developed an acute sense of seeking out and exploiting factually deficient allegations made by defendants. See Fraenkel, supra note 161 (“To circumvent defendants’ classic allegations that they cannot proceed with their defense because they cannot obtain documentary or witness testimony in the United States requires [plaintiffs to make] a factually based showing that the specific information is available, or that there is no credible proof that it is not available, or that the information complained of is not critical to the court’s analysis.”).
good faith effort to try and obtain testimony from these witnesses, and that they have been “unwilling.”

Though plaintiffs will necessarily argue that there are other procedural devices for obtaining testimony, such as depositions, letters of rogatory, process through the Hague Convention, etc., defense counsel should remind the court that “[t]he focus on the availability of compulsory process for unwilling witnesses reflects a strong preference for live trial testimony” and that “even if depositions in theory might be an acceptable substitute for live testimony, adequate depositions of unwilling witnesses is difficult and many times impossible to obtain.”

Though “defendants seeking dismissal on forum non conveniens grounds need not ‘submit affidavits identifying [all] the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum,’” counsel should identify witnesses he or she believes are key or material and supply the court with such witness’ names and locations. Failure to do so may result in the court giving less consideration to this factor, or ignoring it wholly because it was not properly substantiated by the defendant. While sheer number is important, it is not dispositive and may not give the court enough information to make a reasoned judgment as to whether or not these witnesses are truly material and/or unavailable, therefore, defense counsel should elaborate on the nature of the testimony that will be elicited from these witnesses and why such testimony is material to the case.

178 See Ingram Micro, Inc. v. Airoute Cargo Express, Inc., No. 99 Civ. 12480(SAS), 2001 WL 282696, at *4 (S.D.N.Y. 2001) (“Though essential witnesses may be in Canada, Airoute has failed to meet its burden of identifying those witnesses. Airoute has neither provided their names nor described the proof these witnesses would provide. Such a conclusory assertion is insufficient.”).
179 Nippon Fire & Marine Ins. Co. v. M.V. Egasco Star, 899 F. Supp. 164, 169 (S.D.N.Y. 1995) (“[W]hen the greater number and more relevant witnesses are located in a foreign forum, common sense suggests that the litigation proceed in that forum.”).
Another important area for defense counsel to focus his or her efforts is in the identification of documentary and physical evidence which will be necessary for examination before and presentation at trial. Usually significant evidence will be in more than one location and “the law is clear that if the parties themselves are in control of the relevant documentary evidence, the physical location of that evidence is irrelevant to an FNC issue.”181 As such, it is important to identify, in addition to the volume of such evidence, the particular custodians of the documents, and their independence from both of the parties.182 Particular qualities relating to the documents are also important to bring to the court’s attention in these affidavits. If, for instance, the majority of such documents is written in a foreign language, and will necessarily need to be translated into English for litigation purposes in the United States, a finding of inconvenience is likely.183 Also, although the need to physically transport documentary evidence has greatly decreased given advances in technology, courts will still consider the location and format the documents in assessing litigation burdens.184

The last “catch-all” factor discussed in Gulf Oil, “other practical problems that make trial of a case easy, expeditious and inexpensive”185 provides defense counsel with significant leeway in creativity for crafting arguments supporting dismissal. Aside from asserting the significant expenses that will be incurred in transporting documents and witnesses to the United States, defense counsel should underscore the extent of and likely costs of discovery that will need to be conducted to establish issues such as causation, injuries, damages, joinder of parties, etc.186

Other factors worth setting forth in such affidavits that will have bearing on a court’s evaluation of the public and private interest factors include:

(a) facts showing the various parties’ connections to the

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182 Demonstrating who is a custodian of the documents itself can be an issue, as much of this evidence is digital in nature. Such an inquiry is outside the scope of this article, however, it should be noted that possession, custody, or control is generally a good indicator of who has the documents for a forum non conveniens motion purpose.
184 Id.
alternative forum (similar to a personal jurisdiction [or] minimum contacts analysis);
(b) facts showing the presence in the alternative jurisdiction of a party whose joinder is required for complete relief;
(c) facts showing the lack of a substantial connection between the plaintiff’s claim and the U.S. forum in which plaintiff brought the case; and
(d) the pendency of related litigation in the alternative forum.\footnote{Reetz & Fraga, supra note 138, at 16.}

In addition, it has also been suggested that “\[t\]o the extent that the defendant has one or more counterclaims (especially where the counterclaims are compulsory), the defendant may seek to expand the \textit{forum non conveniens} analysis, and the evidence supporting the motion, to include interest factors relating to the counterclaims.”\footnote{Id. at 17.}

The last area that defense counsel should spend some degree of time on is devising counter-points to undercut any arguments that plaintiff will try to make that suggest the United States has an interest in hearing the cause of action. Many times these will be policy based, and sometimes, when the plaintiff has asserted some form of claim based on a statutory provision, legislative history provides an excellent resource for disposing of any notion that Congress drafted the legislation with foreign parties’ interests in mind.

3. What to Look Out For

While the following subsections recite considerations defense counsel should keep in mind, they do not constitute the full range of possible problems that counsel might encounter. As mentioned numerous times throughout this article, motions seeking dismissal based on the doctrine of \textit{forum non conveniens} are fact-intensive, hence necessarily unique in nature from each other.

\textit{a. Conditional Dismissals}

In most instances it will be advantageous for a defendant to consent to any of the above-referenced conditions, which are usually prerequisites for dismissal. It must be underscored, however, that such consent \textit{does not waive appellate review of these conditions}; the
fact that the defendant so consents does not foreclose the defendant’s right to appeal the dismissal order.\footnote{In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203 (2d Cir. 1987), cert. denied, 484 U.S. 871 (1987).} Reserving the right to appeal the dismissal order, and the conditions therein, should be done expressly and counsel should ensure that such a request is incorporated into the record. By explicitly reserving the right to appeal a conditional forum non conveniens dismissal order, counsel shields him or herself from the possibility of future malpractice liability and also gives the defendant another “time at bat” in the instance that the foreign tribunal’s assertion of jurisdiction materially prejudices the defendant in some way.\footnote{Id. Though appellate review, in this context, has not been explored in great depth within the Second Circuit—that is, beyond that which the Union Carbide panel took to discussing—the panel cited, with approval, to a Fifth Circuit for the same proposition. See id. (citing LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976)). The LeCompte panel held that where prejudice in a legal sense exists, appeal would be allowed. In setting up a framework for determining whether the imposed conditions in that case constituted legal prejudice, the panel noted that “usual conditions attached to a voluntary dismissal involve prejudice only in a practical sense (e.g., paying costs or expenses, producing documents, producing witnesses). . . . [And these] type[s] [of] condition[s] do[ ] not amount to . . . ‘legal prejudice.’” LeCompte, 528 F.2d at 603 (emphasis added). However, legal prejudice entitling a party to appeal a conditional dismissal will exist when a party “is severely circumscribed in his freedom to bring a later suit. . . . [and such prejudice] goes to the heart of [a party’s] legal cause of action.” Id. at 604; accord Cauley v. Wilson, 754 F.2d 769, 770 (7th Cir. 1985); see generally Thomas, supra note 82, at § 3 (discussing the appealability of conditional dismissals and citing to, inter alia, Union Carbide).}

b. Anti-Forum Non Conveniens Statutes

It is often the case that moths will flutter very far from their home forum or the forum in which the acts, the subject of which the litigation encompasses, occurred. By choosing to bring their cause of action in the United States, plaintiffs weigh numerous factors\footnote{See supra note 11.} and ultimately make their decision on the forum that will potentially yield the most beneficial results. In recognition of this fact, as well as the fact that many of the defendants in these proceedings are subsidiaries of U.S. corporations, foreign legislatures, particularly in South America, have enacted what have been commonly termed “anti-forum non conveniens statutes.”\footnote{See Henry Saint Dahl, Forum Non Conveniens, Latin America and Blocking Statutes, 35 U. MIAMI INTER-AM. L. REV. 21, 22–23, 37 (2003) (discussing countries that have passed such legislation and citing to each of the respective countries’ statutes).} The intent of these statutes is to inhibit U.S. courts from dismissing a case based on forum non conveniens by divesting the plaintiffs of
the right to file suit in the alternative forum once an action has been filed in the United States, or some other country. As part of the forum non conveniens analysis, a federal court must determine whether there is an adequate alternative forum in which the defendant is amenable to service of process. By disallowing the plaintiffs to even commence an action, once there has been a dismissal in the United States, the foreign legislatures implicitly attempt to mandate that U.S. courts retain their jurisdiction.

Though U.S. courts have been persuaded by these types of legislation in denying motions to dismiss, such occasions are rare and often courts will be unaware of such laws or will ignore them altogether. However, as defense counsel, it is important to be aware of the existence of such statutes and have arguments readily available that will negate a plaintiff attempting to demonstrate the inadequacy of the alternative forum. Some preliminary steps defense counsel may take are retrieving and reviewing U.S. case law dismissing in favor of the alternative forum in question notwithstanding such enactments and securing an affidavit by a local practitioner or law expert in the foreign jurisdiction who will attest that the statute is rarely enforced or is likely to soon be deemed unconstitutional.

c. Parallel Proceedings

Once notice of a suit potentially subject to a non conveniens dismissal is filed, defense counsel’s reaction might be to immediately draft and file a claim in the desired alternative forum. This litigator would then use this fact to bolster the notion that such forum is both available and adequate to hear a plaintiff’s newly-filed

193 Several of these statutes have been found unconstitutional under the respective constitution of the alternative fora. However, such a discussion is outside the scope of this paper. For more information on the constitutionality of these statutes see E.E. Daschbach, Where There’s a Will, There’s a Way: The Cause for a Cure and Remedial Prescriptions of Forum Non Conveniens as Applied in Latin American Plaintiffs’ Actions Against U.S. Multinationals, 13 LAW & BUS. REV. AM. 11, 58–59 (2007).

194 See, e.g., Leon v. Million Air, Inc., 251 F.3d 1305, 1307–08, 1313 (11th Cir. 2001) (Ecuadorean anti-forum non conveniens statute did not render Ecuador inadequate forum for litigation of Ecuadorian citizens’ claims against American air carrier for injuries arising from crash in Ecuador); see also Saint Dahl, supra note 192, at 45 (“In U.S. practice, motions for FNC usually ignore the illegalities this theory would cause in Latin America. Such motions are normally plead from an abstract point of view, explaining the availability of jurisdiction abroad in a general way.”).

195 It is important to verify that the case law does not pre-date the respective countries’ legislation, as many of these statutes are relatively new.
U.S. claim and that the foreign litigation should be considered against retaining jurisdiction in a *Gulf Oil* factor balancing.\textsuperscript{196} While “[t]he presence of related litigation abroad is [a] powerful factor favoring dismissal,”\textsuperscript{197} such a tactic has been met with mixed results as courts have begun to question the legitimacy of many of these actions.\textsuperscript{198} *Sinochem* itself was characterized as “a textbook case for immediate *forum non conveniens* dismissal”\textsuperscript{199} for, inter alia, the fact that one of the only reasons the case was brought in the United States was to try and either stall or terminate a parallel proceeding, initiated before the U.S. action, in China.\textsuperscript{200} Although the Second Circuit has fashioned a separate formal test to aid in determining whether to dismiss a case out of deference to a pending foreign action,\textsuperscript{201} many of the factors are identical to those that are examined in a *forum non conveniens* inquiry.

Ultimately, the weight accorded to the existence of a parallel proceeding will lie within the discretion of the trial court. Defense counsel should conduct research as to whether or not the particular judge or magistrate that has been assigned takes a certain position.

\textsuperscript{196} See supra notes 21–26 and accompanying text.
\textsuperscript{198} Compare Anglo Am. Ins. Group v. Califed Inc., 940 F. Supp. 554, 565 (S.D.N.Y. 1996) (“[T]he pendency of foreign proceedings does not guarantee dismissal.”), with Overseas Media, Inc. v. Skvortsov, 441 F. Supp. 2d 610, 618 (S.D.N.Y. 2006) (“[A]ny assertion that a Russian court is an inadequate forum is undercut by the fact that at least one plaintiff in this action is a Russian entity that is a party to a related . . . action . . . presently pending in Russia.”), and Nat’l Union Fire Ins. Co. v. BP Amoco P.L.C., No. 03 Civ. 0200(GEL), 2003 WL 21180421, at *4 (S.D.N.Y. May 20, 2003) (“It is not clear that the existence of a pending lawsuit . . . renders a potential forum inadequate for purposes of *forum non conveniens* analysis.”) (emphasis added)), and First Union Nat’l Bank v. Paribas, 135 F. Supp. 2d 443, 453 (S.D.N.Y. 2001) (“[T]he existence of . . . some tangential connection to New York does not alone require the denial of a *forum non conveniens* dismissal, particularly where there is an adequate alternative forum in which related litigation is pending.”). An attorney should always keep in mind his obligations that when he submits any written motion to a court, he is “certifying] that to the best of [his] knowledge, information, and belief . . . [such motion] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.” FED. R. CIV. P. 11(b)(1).
\textsuperscript{200} Though the situation was reversed in *Sinochem*—the defendant in the Chinese action was trying to file suit as a plaintiff in the United States court, rather than what might normally occur, a defendant in a U.S. action attempting to file a suit as a plaintiff in a foreign forum—the underlying ideas are wholly consistent; courts are becoming more shrewd and looking beyond procedural façades to the substance of the parallel claims and whether or not there are sufficient similarities between the nature of the two.
\textsuperscript{201} See Mastercard Int’l Inc. v. Argencard Sociedad Anonima, No. 01 CIV. 3027(JGK), 2002 WL 432379, at *8 (S.D.N.Y. Mar. 20, 2002).
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towards parallel proceedings. If such research indicates any tendency one way or another, counsel should focus on the time of the alternate proceeding’s commencement as well as the parallel proceeding’s substance. Judges may be more inclined to dismiss if similar foreign litigation pre-dates the U.S. litigation, than if the foreign litigation post-dates the U.S. claim. In presenting the parallel proceeding to the court, defense counsel should do his or her best to demonstrate that the foreign litigation, if it did not pre-date the U.S. litigation, was commenced in good faith and for reasons independent of anticipation of a forum non conveniens dismissal motion.

d. Discovery Issues

Because forum non conveniens dismissals are factually driven, plaintiffs will normally assert that they need significant time to conduct discovery on the issues that make up such a dismissal (adequacy of the alternative forum and the balancing of the private and public interest factors). This is problematic for a defendant who wants dismissal as soon as possible. Though classified as a non-merits based dismissal, forum non conveniens inquiries

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202 The Supreme Court has explicitly allowed for “reverse forum shopping” by defendants. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252–53 n.19 (1981) (“We recognize . . . that [Defendants] may be engaged in reverse forum-shopping. However, this possibility ordinarily should not enter into a trial court’s analysis of the private interests. . . . [D]ismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.”). Notwithstanding the Supreme Court’s stance, particular Second Circuit judges do not appreciate these maneuvers and have used the word “ordinarily” to their advantage in evaluating defendant’s intentions. See, e.g., Iragorri v. United Techs. Corp., 274 F.3d 65, 75 (2d Cir. 2001) (“Courts should be mindful that . . . 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.”).

203 But see Mastercard Int’l, 2002 WL 432379, at *8–9 (denying dismissal in favor of a parallel Argentine litigation that concerned “substantially similar” issues and that was filed before the U.S. action, and in so holding, the court noted “that the Argentine action was an effort to ‘jump the gun’ and that the action’s “temporal priority” did “not weigh heavily, if at all, in favor of dismissal”).

204 These reasons may include, but are not limited to, the ability to join parties that would be unavailable to be sued in the United States; the ability to assert specialized crossclaims or countersuits, the practicability of which would be null in the United States litigation; or the fact that the United States does not recognize particular causes of action in the foreign litigation.

205 See, e.g., Fraenkel, supra note 161 (“Upon receipt of a FNC motion, the first thing plaintiff’s counsel must do is continue the hearing to allow formal FNC discovery to be conducted.”).

206 See supra Part III.C.
almost always “become[] entangled in the merits” of the case.207 Therefore, it is imperative for defense counsel to try and avoid lengthy discovery that will necessarily delve into the merits of the dispute, in turn delaying the case and increasing any presumption against dismissal.208

The accepted practice in the Second Circuit is to decide forum non conveniens motions on the basis of affidavits alone.209 Although occasionally a court will allow for discovery on the forum non conveniens issue alone, this is the exception rather than the rule because “requiring extensive investigation” defeats the motion’s purpose.210 Defense counsel should make his or her best effort to present the court with the argument that detailed discovery is both unnecessary and inappropriate. In the event that a court does allow for discovery, defense counsel should obtain a protective order limiting its scope.211 Because jurisdiction may be bypassed in favor of a forum non conveniens dismissal, discovery on personal jurisdiction and subject matter jurisdiction should be forbidden.212

208 See supra Part IV.B.1. The discretionary nature of the doctrine places courts in a strange position: [I]f insufficient facts concerning potential witnesses and evidence are available, [this] may lead to the anomalous situation that such a motion can be denied early in an action due to lack of discovery of facts and then denied again later because [too many] resources have been expended in discovering facts.
209 Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127, 130 (2d Cir. 1987); Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 158–59 (2d Cir. 1980) (en banc), cert. denied, 449 U.S. 890 (1980); Norex Petroleum Ltd. v. Access Indus., Inc., No. 02 Civ. 1449(LTS)(KNF), 2003 WL 1484269, at *2 (S.D.N.Y. Mar. 21, 2003) (“Generally, a motion to dismiss premised upon a claim of forum non conveniens is decided based upon affidavits solely.” (emphasis added)).
210 See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 258 (1981); Norex Petroleum Ltd., 2003 WL 1484269, at *2; Beekmans v. J.P. Morgan & Co., 945 F. Supp. 90, 95 (S.D.N.Y. 1996) (“The fact that this motion is based on affidavits does not compel the conclusion that discovery should be granted. . . . A motion to dismiss for forum non conveniens does not call for a detailed development of the entire case through discovery.” (emphasis added)).
211 See Fed. R. Civ. P. 26(c). Defense counsel should ensure that such orders are strictly complied with by immediately bringing sanctions against plaintiff’s for dilatoriness or exceeding the scope of discovery. See, e.g., Norex Petroleum Ltd., 2003 WL 1484269, at *2 (“[I]t appears to the Court, from the scope of the discovery demanded, that Norex is seeking to do indirectly what it cannot do directly: obtain discovery germane to the merits of the underlying action.”).
212 See Von Spee v. Von Spee, No. 3:05cv1488 (JBA), 2007 WL 1455848, at *3 (D. Conn. May 16, 2007) (“[T]he bulk of the information sought by plaintiffs (i.e., ‘assets and contacts and conduct by defendants in the United States’) appears to be information relevant to a personal jurisdiction dispute, rather than to a forum non conveniens assessment.” (first emphasis added)).
The issues specified as discoverable should entail only the access to and “location of important sources of proof;” the backgrounds of the foreign law experts who have submitted affidavits in support of the motions to dismiss; “the location and availability of witnesses;” and the costs in doing the foregoing. Though the aforementioned discoverable issues represent the “ideal level” as well as the level at which courts will normally allow for, defense counsel should be aware that plaintiffs will try and maximize any discovery permitted to take place in the United States, and as such, some courts have been more exacting than others.

The bottom line remains that defense counsel must vehemently object to any discovery taking place with respect to the *forum non conveniens* dismissal motion. If the court entertains the notion of discovery, then concessions must be made, but defense counsel must be conscientious to limit discovery solely to the *forum non conveniens* issues, sifting out any discovery that might relate more to jurisdiction, liability and/or damages.

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213 Fitzgerald v. Texaco, Inc., 521 F.2d 448, 451 n.3 (2d Cir. 1975).
214 Base Metal Trading S.A. v. Russian Aluminum, No. 00 Civ.9627 JGK FM, 2002 WL 987257, at *3–4 (S.D.N.Y. May 14, 2002). This may include allowing plaintiffs to depose such experts; this, however, should be raised by plaintiffs, not defense counsel. If plaintiffs do wish to depose these experts, it should be done “as soon as practicable.” Id. at 5. Defense counsel should ask the court to set strict deadlines for this type of discovery because, as Justice Black warned in his dissenting opinion in *Gulf Oil*, the doctrine of *forum non conveniens* has the tendency to “clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting); see, e.g., *Norex Petroleum Ltd.*, 2003 WL 1484269, at *3 (“Within 21 days of service of the expert-related data upon Norex, Norex shall depose the experts. The parties are directed to confer and thereafter to select a time and place for taking the depositions that is mutually convenient to the parties.”).
217 This is because the alternative forum’s discovery procedure, if such a procedure exists at all, will most likely be substantially less favorable than the U.S. procedure. Also, the longer a plaintiff can keep an action in the United States and amass more discovery, the greater the presumption against a non conveniens dismissal proportionately increases. This will also be of motivating force to plaintiffs.
218 See, e.g., *von Spee v. von Spee*, No. 3:05cv1488 (JBA), 2007 WL 1455848, at *4 (D. Conn. May 16, 2007) (“[D]iscovery is limited to requests that pertain to . . . (a) the location of parties and witnesses and the ability of compulsory process for attendance of unwilling witnesses (whether located in Connecticut, elsewhere in the United States, or abroad), (b) the location of documentary evidence needed for the litigation (whether located in Connecticut, elsewhere in the United States, or abroad), (c) whether or not the relevant documentary evidence is in the German language, and if not, what language it is in (i.e., English or other), (d) how often defendants have traveled to the United States in the past, and (e) whether or not defendants have assets in the United States, as this will relate to the source of proof issue.”).
V. CONCLUSION

As noted by Paxton Blair in the early twentieth century, “our courts are being overwhelmed” by a “flood of litigation.” This phenomenon has increased as travel has become both easier and cheaper, communication and technology has become more readily available, and globalization has resulted in the “dispersion of corporate authority” by “multinational subsidiaries to conduct international business.” Particularly within the Second Circuit, docket congestion has become a source of tension among litigants as well as the courts themselves. Although courts have suggested that docket congestion alone should not be a dispositive factor in a motion to dismiss for *forum non conveniens*, this has not stopped them from either explicitly or implicitly making these the

219 Blair, supra note 17, at 1.
221 See, e.g., Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 146 n.5 (2d Cir. 2000) (“Although the district court noted that the Southern District of New York is ‘heavily overburdened,’ the recent filling of all judicial vacancies and the resulting full complement of judges for the District makes this concern of little or no present significance.”); Quan v. Computer Scis. Corp., Nos. CV 06-3927 (CBA)(JO), CV 06-5100(CBA)(JO), 2008 WL 89679, at *9 (E.D.N.Y. Jan. 7, 2008) (“Docket conditions and calendar congestion—in both the transferor and transferee districts—are also relevant considerations for the court and may be afforded ‘some weight.’” (quoting Chong v. Heulthronics, Inc., No. CV-06-1287 (SJF)(MLO), 2007 WL 1836831, at *15 (E.D.N.Y. June 20, 2007)); BFI Group Divino Corp. v. JSC Russian Aluminum, 481 F. Supp. 2d 274, 284 (S.D.N.Y. 2007) (“Although the courts in the Southern District of New York are heavily congested, it is well-accepted that the Southern District of New York has the resources to adjudicate complex litigation such as the present action.” (citation omitted)); Miller v. Calotychos, 303 F. Supp. 2d 420, 429 (S.D.N.Y. 2004) (“The Court is not prepared to make subjective or conclusory comparative assessments of docket congestion.”); World Film Serv., Inc. v. RAI Radiotelevizione Italiana S.p.A., No. 97 Civ. 8627(LMM), 1999 WL 47206, at *9 (S.D.N.Y. Feb. 3, 1999) (“Busy district[s] such as this should resist the temptation to transfer or dismiss cases that may be as appropriately, or even slightly more appropriately, tried elsewhere.”).
222 See Tel. Sys. Int’l v. Network Telecom PLC, 303 F. Supp. 2d 377, 384 (S.D.N.Y. 2003) (“A district court must ‘guard [its] docket from disputes with little connection to this forum.’” (citation omitted); see also Bitton v. TRW, Inc., No. 93 Civ. 7407 (PKL), 1994 WL 414368, at *3 (S.D.N.Y. Aug. 5, 1994) (“[T]his Court . . . is one of the busiest . . . in the country. . . . [and] ought not be burdened with the administrative difficulties of a case having no meaningful nexus with this congested center of litigation when the forum with the greatest interest in this action, Israel, is available.” (citation omitted)); Doe v. Hyland Therapeutics Div., 807 F. Supp. 1117, 1128 (S.D.N.Y. 1992) (noting that the Southern District is “one of the busiest districts in the country” . . . making it one of the ‘congested centers’ of litigation referred to in *Gilbert* and that its docket should be guarded from lawsuits having no connection to the forum (citations omitted)).
223 See Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 754 (1982) (noting that the standard of review in *forum non conveniens* motions is not a “healthy” one because “in these days of crowded dockets there is an inevitable risk of some degree of subconscious bias when decision whether to dismiss a case because of *forum non conveniens* is
bases for their decisions to dismiss.

In the twenty-first century, plaintiffs are willing to fly over mountains and seas in search of a favorable forum in which to bring their claim. Such plaintiffs and their respective counsel celebrate that “[t]he days of factually deficient and legally baseless [forum non conveniens] motions have come to an end” and that “[t]he playing field seems to have leveled.” Therefore, it is up to defense counsel to articulate to the courts, reasons why they should dismiss these claims that have, at best, tangential ties to the United States, and to assure the courts that alternative fora have more efficient dispute-settling resources as well as more substantial connections to the claims being asserted. In the aftermath of Sinochem International, defense counsel has been entrusted with a great weapon that will make forum non conveniens motions more expedient and less costly. Though new in its existence, such a mechanism promises to be invaluable, especially in the Second Circuit, a circuit notoriously incandescent to plaintiff-moths. How exactly this decision will change the landscape of forum non conveniens dismissals is unclear, however, prudent defense counsel will be ready for whatever plaintiffs might advance by doing the necessary research, expending the proper resources, and crafting well-tailored arguments that will reach such plaintiffs in mid-air.

[The] little creature now knew death. As I looked at the dead moth, this minute wayside triumph of so great a force over so mean an antagonist filled me with wonder. Just as life had been strange a few minutes before, so death was now as strange. The moth having righted himself now lay most decently and uncomplainingly composed. O yes, he seemed to say, death is stronger than I am.

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made by the judge who will have to try it if the motion is denied” (emphasis added). Judge Friendly served on the Second Circuit Court of Appeals from 1959–1974. He served as Chief Judge from 1971–1973.

224 See David Boyce, Note, Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno, 64 TEX. L. REV. 193, 216 (1985) (arguing that in considering whether to dismiss based on forum non conveniens, a court ought not to look at what is more convenient for the parties, as “the whole notion of 'convenience' begins to lose its relevance” once “parties are willing to crisscross the globe in search of a favorable forum;” but rather, to consider “which forum ought to adjudicate the case from the perspective of judicial comity”).

225 Fraenkel, supra note 161.

226 WOOLF, supra note 14, at 6.