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Piper Aircraft Co. v. Reyno

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FORUM NON CONVENIENS—EFFECT OF LAW OF ALTERNATE FORUM ON
PROPRIETY OF DISMISSAL—Piper Aircraft Co. v. Reyno — In Piper Aircraft Company v. Reyno, the Supreme Court was faced with the issue of whether dismissal on the ground of forum non conveniens is proper when the substantive law of the alternate forum is less favorable to the plaintiff than the law of its chosen forum. The Court, in an opinion written by Justice Marshall, concluded that the possible application of less favorable law is ordinarily not a proper factor on which to rest the forum non conveniens determination. Although this was the basis of its grant of certiorari, the Court also took the opportunity to review the district court’s application of the standard balancing test used to determine motions for forum non conveniens dismissals.

Piper was brought as a wrongful death action. In 1976 a small commercial aircraft crashed in Scotland killing the pilot and five passengers, all of whom were Scottish citizens and residents. The plane and its propellers were manufactured in Pennsylvania and Ohio, respectively, by petitioners Piper Aircraft Company and Hartzell Propeller, Inc. When the accident occurred, the aircraft was owned, oper-

3. 454 U.S. at 246 & n.12.
4. Id. at 238. If, however, the remedy provided by the alternate forum is clearly unsatisfactory, the district court may give this factor substantial weight and deny dismissal. Id. at 254.
5. Id. at 246 n.12.
7. In the companion cases Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) and Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518 (1947), the Supreme Court first announced the proper factors for trial courts to balance when faced with motions to dismiss for forum non conveniens. See infra notes 20 and 47 and accompanying text.
8. See infra notes 89-91 and accompanying text.
9. 454 U.S. at 238.
10. Id. at 238-39.
11. Id. The manufacturer of the engine was named as a defendant, but was dismissed by stipulation. Id. at 240 n.1.

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ated and maintained by companies located in the United Kingdom. Separate actions were filed in Great Britain against the British companies and against the pilot's estate.\textsuperscript{18}

Gaynell Reyno, an American citizen, was appointed administratrix of the decedents' estates.\textsuperscript{18} She initially brought the wrongful death actions against Piper and Hartzell in a California state court.\textsuperscript{14} The actions were subsequently removed to the United States District Court for the Central District of California,\textsuperscript{18} and then transferred, on Piper's motion, to the Middle District of Pennsylvania. This latter transfer was made pursuant to 28 U.S.C. § 1404(a).\textsuperscript{18}

Reyno claimed negligence and strict liability and admitted that the actions were filed in the United States, rather than in Scotland, because United States law was more favorable to her position. Two obstacles would have confronted Reyno in Scotland. First, Scottish law does not provide for strict tort liability.\textsuperscript{17} Second, its laws regarding capacity to sue are more restrictive than those found in most American jurisdictions.\textsuperscript{18}

The district court granted Piper's motion to dismiss the action on the ground of forum non conveniens.\textsuperscript{19} The court reached its conclu-

\begin{itemize}
  \item \textsuperscript{12} Id. at 240.
  \item \textsuperscript{13} Reyno was the secretary of the attorney who initiated the lawsuit on behalf of the Scottish heirs. Id.
  \item \textsuperscript{14} The complaint was filed July 21, 1977 in the Superior Court of California, Los Angeles County. Id. at 239-40.
  \item \textsuperscript{15} The federal removal statute, 28 U.S.C. § 1441(a) (1976) provides:

  Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

  \item \textsuperscript{16} Section 1404(a) provides: "For the convenience of the 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) (1976). This section only provides for venue change within the federal judicial system. Where the more convenient forum is a state or foreign court, a forum non conveniens dismissal, rather than a transfer, is the proper procedure. See infra notes 51-60 and accompanying text.
  \item \textsuperscript{17} Negligence of the manufacturer must be proved. 479 F. Supp. at 735. For a more detailed discussion of the different theories of liability involved, see Reyno v. Piper Aircraft Co., 630 F.2d 149, 167-68 (3d Cir. 1980).
  \item \textsuperscript{18} Under the Damages (Scotland) Act of 1976, ch. 13, only relatives of the decedent may sue for loss of support and society. Id. In Pennsylvania, if no relatives survive the decedent, the personal representative (executor or administrator of the estate) may recover for medical and funeral expenses, as well as administrative expenses necessitated by reason of injuries causing death. 42 PA. CONS. STAT. ANN. § 8301(d) (Purdon 1982).
  \item \textsuperscript{19} 479 F. Supp. at 728. "We have the inherent power to refuse jurisdiction over a case such as this one where the interests of justice require that the suit be brought in a foreign country." Id. at 730.
\end{itemize}
sion by balancing the private and public interest factors set forth by the Supreme Court in *Gulf Oil Corporation v. Gilbert*. At the outset, the court noted that the forum non conveniens inquiry presupposed the existence of an alternate forum where the defendant would be amenable to process. The court’s second consideration, prior to undertaking the balancing test, was the importance of plaintiff’s choice of forum. Although generally, great deference is paid to the plaintiff’s choice, “the courts have been less solicitous when the plaintiff is not an American citizen or resident.” Because the real parties in interest

20. 330 U.S. 501 (1947). The private interest factors 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. . . . Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. 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. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. *Id.* at 508-09. See *infra* note 47 for the criteria that are set forth in *Koster v. Lumbermans Mutual Casualty Co.*, 330 U.S. 518 (1947).

21. 479 F. Supp. at 731. In cases involving § 1404(a) transfer, the issue of alternate forum availability has been widely litigated. The Supreme Court in *Hoffman v. Blaski*, 363 U.S. 335 (1960), held that the proposed transferee forum must have been one in which the plaintiff could have initiated the suit. *Id.* at 343. In other words, a forum would not be considered an adequate alternative merely if a defendant agreed to waive jurisdiction and venue requirements. In his widely quoted *Hoffman* dissent, Justice Frankfurter pointed out that since § 1404(a) was drafted “in accordance with the doctrine of forum non conveniens,” *id.* at 363, and since the alternate forum under that doctrine may exist after a defendant consents to jurisdiction there, then a § 1404(a) transfer should be made under similar conditions. *Id.* at 365. This view, however, has never received majority support.

22. 479 F. Supp. at 731.

23. An injured party has the right to choose the forum in which he seeks redress, subject to satisfying jurisdiction and venue requirements. “Unless the balance is strongly in favor of the defendant, the plaintiff’s choice should rarely be disturbed.” *Gilbert*, 330 U.S. at 508.

24. 479 F. Supp. at 731. Forum choices of American citizen or resident alien plaintiffs have been accorded greater deference than those of foreigners because of a general reluctance to deny Americans access to their own courts. See *infra* notes 41-50 and accompanying text.
in *Piper* were foreign, the court concluded that the plaintiff's choice of forum deserved little weight.

Turning to the *Gilbert* test, the court found that all private interest factors pointed to Scotland as the appropriate forum. The defendants' inability to implead necessary third parties such as the owner of the aircraft, the operating company and the pilot's estate, was of particular importance to the court. Because these parties had already been joined with defendants in an action pending in Great Britain, the court concluded it would be fairer and more expeditious if the cases were consolidated.

Factors of public interest also indicated that dismissal would be appropriate. The primary factor influencing the court's decision was that under its choice-of-law analysis, different laws would apply to different parties. The court determined that if the trial were held in its forum, Pennsylvania law would apply to *Piper*, and Scottish law would apply to *Hartzell*. This would "cause hopeless confusion and would

25. See supra note 13.
27. *Id*. The court's reasoning included the following factors: the accident occurred in Scotland, the decedents were all Scottish citizens, the plane was owned and operated by a Scottish company, the wreckage was located in the United Kingdom and all evidence relating to damages was in Scotland.
28. *Id* at 733. The court rejected as unpersuasive the plaintiff's contention that the case should be heard in the Middle District of Pennsylvania because the aircraft was designed and manufactured there. The court noted that because the aircraft was manufactured seven years prior to the accident, any evidence of changes in the plane would be found in Scotland. In addition, the allegedly defective part, the propeller, was neither manufactured nor designed within the forum.

The court relied on two cases to support its view: *Michell v. General Motors Corp.*, 439 F. Supp. 24 (N.D. Ohio 1977) (products liability action for allegedly defective infant seat brought by Canadian plaintiffs resulting from accident in Canada); and *Dahl v. United Technologies Corp.*, 472 F. Supp. 696, aff'd 632 F.2d 1027 (3d Cir. 1980) (wrongful death actions filed as a result of a helicopter crash in the North Sea). In both cases, dismissal for forum non conveniens was granted although evidence relating to design or manufacture was located within the initial forum.

29. 479 F. Supp. at 734. This conclusion was reached as follows. When a case has been transferred pursuant to § 1404(a), the applicable choice-of-law rules are those of the state from which the case was transferred. This case was transferred from California, hence its choice-of-law rules should apply. This result was correct with respect to defendant Piper. Defendant Hartzell, however, was found to have insufficient contacts with California and service had been quashed. The court held that "[p]laintiff cannot take advantage of the law of California when she could not properly obtain jurisdiction over Defendant Hartzell. Thus, to Hartzell we must apply Pennsylvania choice-of-law rules." *Id*.

California courts utilize the governmental interest approach in resolving conflict of law problems, while Pennsylvania courts follow the significant contact approach. *Id* at 734-36. Under the governmental interest approach, the court concluded that the strict
likely lead to [an] inconsistent or . . . inequitable result." Further administrative difficulties would be caused by the number of foreign witnesses needed at the trial. In addition, Scotland was found to have a greater interest in the outcome of the suit because the accident occurred in its airspace.

The court refused to be swayed by the fact that Scottish law, which presumably would be applied by a trial court in Scotland, would be less favorable to the plaintiff. It noted that “[i]f the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum.”

The Court of Appeals for the Third Circuit, in reversing the district court, found fault with nearly every step of the lower court's analysis. In contrast to the district court, the court of appeals held that “citizenship of the plaintiff does not affect the defendant's burden” of proving that the forum is inconvenient. With respect to the private interest factor of witness convenience, the appellate court added one requirement. It found that affidavits identifying the witnesses and giving a general statement of their testimony were necessary in order to determine whether the forum was truly inconvenient for the witnesses. The court conducted its own choice-of-law analysis and concluded that Pennsylvania’s strict liability laws would apply to both defendants. It found, in addition, that this country had greater policy liability law of Pennsylvania would apply to Piper. Id. Under Pennsylvania’s significant contact approach, rights and liabilities are circumscribed by the “local law which has the most significant relationship to the occurrence or to the parties.” Id. at 736. It was found that Scottish law would apply to Hartzell under this formula. Id. at 737.

30. Id.
31. Id.
33. 630 F.2d 149 (3d Cir. 1980).
34. Id. at 159. Both the court of appeals and the district court gave rather cursory treatment to an issue that had been the subject of confusion and disagreement in the federal courts. The question of how much deference should be paid to the foreign plaintiff's forum choice was finally resolved by the Supreme Court's decision in Piper. See infra notes 41-50, 82 and accompanying text.
35. 630 F.2d at 161. The court analyzed other private interest factors as follows. The defendant's inability to implead other parties was deemed “burdensome,” but not “unfair.” Id. at 162. The risk of inconsistent verdicts was dismissed by the court's assumption that res judicata is followed in Scotland. Id. Similarly, the factor of view of the premises was accorded little weight.
36. Id. at 164-68. The court of appeals agreed with the district court that California choice-of-law rules applied to Piper and Pennsylvania rules applied to Hartzell. The dis-
interests in the litigation than did Scotland.\textsuperscript{37}

The crux of the Third Circuit's decision, however, rested on the fact that dismissal would result in the elimination of plaintiff's strict liability claim. The court held that dismissal would be inappropriate if it were to result in a change in law.\textsuperscript{38} "Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified."\textsuperscript{39} The United States Supreme Court granted certiorari in order to consider whether Scotland's less favorable law should bar a forum non conveniens dismissal.

The forum non conveniens doctrine is applied with flexibility and discretion.\textsuperscript{40} The lower federal courts have used various approaches in deciding motions for dismissal under this doctrine. An analysis of precedent reveals concerns regarding the importance of a plaintiff's citizenship, the analogies that may or may not be drawn from § 1404(a) transfers and the effect of the law of the alternate forum upon the propriety of dismissal. A brief discussion of these three areas follows.

One question that has been raised in forum non conveniens determinations is what, if any, weight should be given to the plaintiff's citizenship. Until quite recently, the courts had shown a general reluctance to deny United States plaintiffs access to courts of their own country.\textsuperscript{41} But in \textit{Mizokami Brothers of Arizona, Inc. v. Baychem Cor-
The Ninth Circuit refused to give plaintiff's citizenship determinative weight. The court stated that "parties who choose to engage in international transactions should know that when their foreign operations lead to litigation, they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere." Although it is easy to understand why the courts would not want to close their doors to American litigants, the Mizokami court looked beyond the mere fact of citizenship to other considerations that would lead to a more equitable result.

The trend of not according determinative weight to forum choices of American plaintiffs was continued in two recent court of appeals cases: Pain v. United Technologies Corporation and Alcoa Steamship Company v. M/V Nordic Regent. In Alcoa, the plaintiff was a New York corporation that owned and operated a transfer station pier in Trinidad. Defendant was a Liberian corporation which owned a vessel that collided with plaintiff's pier. The court, in a rehearing en banc, affirmed the district court's dismissal of the action, noting that

42. 556 F.2d 975 (9th Cir. 1977), cert. denied, 434 U.S. 1035 (1978).
43. Id. at 978. A similar approach was taken in Calavo Growers of California v. Belgium, 632 F.2d 963 (2d Cir. 1980). This suit, by a California corporation against foreign insurance underwriters, was dismissed by the district court and affirmed on appeal. The Second Circuit held that "this [Belgian] connection with the lawsuit militates ... in favor of the application of Belgian law ... [and] the likelihood that Belgian law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction." Id. at 967. See infra note 86 and accompanying text regarding the need to apply foreign law as a justification for dismissal.
44. Two analogous state court decisions merit attention. In Silver v. Great American Insurance Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), the New York Court of Appeals held that the then prevailing New York rule, barring dismissal of a foreign tort action if either party were a New York resident, ought to be relaxed. The court reasoned that since the doctrine of forum non conveniens is one of flexibility based on the facts of a particular case, this very flexibility would be undercut by refusing to allow its application in a case where one of the parties was a New York resident.

This view was also embraced by the District of Columbia in Carr v. Bio-Medical Applications of Washington, Inc., 366 A.2d 1089 (D.C. Ct. App. 1976). That court rejected "any per se rule which would prohibit the application of the doctrine of forum non conveniens whenever one of the parties is a District of Columbia resident." Id. at 1093. See Note, Forum Non Conveniens and American Plaintiffs in the Federal Courts, 47 U. Chi. L. Rev. 373 (1980).
46. 654 F.2d 165 (2d Cir. 1979), rev'd on rehearing, 654 F.2d 169 (1979), vacated en banc, 654 F.2d 147 (1980) [hereinafter cited as Alcoa en banc].
"[n]either the admiralty nature of an action nor the American citizenship of a plaintiff justifies creating a special rule of forum non conveniens."47

The cause of action in *Pain* arose out of a helicopter crash in the North Sea.48 The decedents' survivors filed wrongful death actions in a United States district court against the manufacturer of the helicopter. Only one of the five plaintiffs was an American citizen.49 The court of appeals upheld the dismissal of the case and adopted the reasoning of *Alcoa* insofar as it rejected according any "talismanic significance to the citizenship or residence of the parties."50

Many courts faced with forum non conveniens motions have turned to the § 1404(a) precedents for guidance. Although similar at first glance, these remedies involve different considerations. Prior to the adoption of § 1404(a),51 dismissal was the only remedy when a case was brought in an inconvenient forum. Section 1404(a) provides for transfer, rather than dismissal, within the federal court system. The differences between the remedies are: 1) the stage in the proceedings when the alternate forum is considered available; 2) the law to be applied in the alternate forum and 3) the discretion available to the trial court deciding the motions. Within these areas many courts have blurred the distinctions between the two remedies.

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47. *Alcoa en banc*, 654 F.2d at 159. The court also concluded that *Gilbert* and *Koster* did not establish two different balancing tests. As noted supra, note 20, *Gilbert* set forth public and private interest factors to be weighed by the trial court. In *Koster*, the court stated that plaintiff's choice should not be disturbed except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.

330 U.S. at 524. The *Alcoa en banc* court read *Koster* as a consistent application of *Gilbert*, stating "the factors weighed by the *Koster* court are precisely those of the public and private tests—judicial administration and harassment—discussed in *Gilbert*." *Alcoa en banc*, 654 F.2d at 152.

48. 637 F.2d at 779.

49. *Id.* at 780. The passengers in the helicopter were citizens of France, Norway, Britain and Canada. The sole American citizen was a resident of Norway. *Id.* at 779.

50. *Id.* at 796, quoted in *Alcoa en banc*, 654 F.2d at 154. The court also pointed out that a nominal American plaintiff (such as a subrogee, assignee or representative) has generally not been granted special deference. *Id.* at 798.

51. Section 1404(a) was enacted in 1948 to give flexibility to the venue statutes and to remedy the effects of forum shopping. 1 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice 1581 (2d ed. 1981).
In *Hoffman v. Blaski* the Supreme Court held that in order to effect a § 1404(a) transfer, the plaintiff must have been able to initiate the suit in the alternate forum. This is not the case with forum non conveniens. Under that doctrine, the defendant may agree to submit to the jurisdiction of the alternate forum after the proceedings have begun. The § 1404(a) approach to availability, however, has been applied by at least one district court determining the propriety of a forum non conveniens dismissal.

A § 1404(a) transfer affects the place of trial only. When a case is transferred, the laws of the transferor state are applied. The court in *Greve v. Gibraltar Enterprises, Inc.* noted the different rule for forum non conveniens:

In such respect, the proceedings [of a § 1404(a) transfer] differ from the forum non conveniens rule which often dismissed the action in the original court and compelled the institution of a new suit in another district where the plaintiff might meet and be subjected to hazards such as the running of a statute of limitations.

In other words, when a case is dismissed pursuant to forum non conveniens, it is almost as if the action had never been brought. The law of the alternate forum governs the proceedings. The court of appeals in *Piper*, however, analogized to § 1404(a) in holding that a forum non conveniens dismissal should not result in a change in law.

A final dissimilarity between forum non conveniens and § 1404(a) is the discretion available to the court deciding the motions. Trial courts are vested with broader discretion to grant a § 1404(a) transfer than a forum non conveniens dismissal. In *Texas Gulf Sulphur Co. v.*

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52. 363 U.S. 335 (1960).
53. *Id.* at 343-44. See supra note 21.
54. See *Silver v. Countrywide Realty, Inc.*, 39 F.R.D. 596 (S.D.N.Y. 1966) where the court held it was immaterial that defendants were willing to submit to Canadian jurisdiction to achieve a forum non conveniens dismissal. "The test is whether the plaintiff could have brought the action in Canada in the first instance." *Id.* at 598. This test appears to be incorrect. See *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1029 n.1 (3d Cir. 1980); *Schertenlieb v. Traum*, 589 F.2d 1156, 1163 (2d Cir. 1978).
55. *See Van Dusen v. Barrack*, 376 U.S. 29, 32 (1955). The Court pointed out that: Theorem non conveniens doctrine is quite different from Section 1404(a).
Ritter, the court cited Gilbert factors as controlling the decision of whether to grant statutory transfer. The Gilbert test, however, pertains to forum non conveniens. In contrast to the above situations where courts have used § 1404(a) rules to decide forum non conveniens motions, the Texas Gulf Sulphur court relied on forum non conveniens precedent when faced with a § 1404(a) transfer request. As the above three situations indicate, the analogies that may be drawn between forum non conveniens and § 1404(a) are weak at best.

The third area of forum non conveniens precedent that had an impact upon the Supreme Court’s reversal of the Third Circuit in Piper concerns the effect of the law of the alternate forum upon the propriety of dismissal. Prior to the Third Circuit’s ruling, the prospect of a potentially unfavorable change in law resulting from a forum non conveniens dismissal had not influenced most decisions granting motions to dismiss for forum non conveniens. If the forum provided an adequate alternative, the courts generally did not give much weight to the matter of its substantive law unless the remedies provided by the proposed forum were extremely limited. In the latter case, however,

where else. It is quite naturally subject to careful limitation, for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.

Id. at 31 (quoting All States Freight v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952)).

60. 371 F.2d 145 (10th Cir. 1967).


62. See, e.g., Mobil Tankers Co., S.A. v. Mene Grande Oil Co., 363 F.2d 611 (3d Cir. 1966), cert. denied, 385 U.S. 945 (1966) (procedural remedies available in Venezuela found to be less than adequate); Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F.R.D. 445 (D. Del. 1978) (due to military government in power in Ecuador, jurisdiction was questionable; government’s right to intervene in judicial matters also militated against dismissal).
the courts really were questioning the forum in terms of availability, rather than in terms of substantive law.\(^{63}\)

Against this background, it appears that the Supreme Court in Piper followed existing precedent in holding that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."\(^{64}\) In its opinion,\(^{65}\) the Court relied first on Canada Malting Co., Ltd. v. Paterson Steamship Co., Ltd.\(^{66}\) to refute the court of appeals position. Canada Malting was an admiralty action brought by cargo owners in a district court in New York to recover for loss resulting from a collision with defendant's steamship. The accident occurred on the American side of Lake Superior and all parties were Canadian citizens.\(^{67}\) The suit was brought in the United States ostensibly because its laws allowed for more favorable recovery.\(^{68}\) In upholding the district court's dismissal, the Court stated that: "We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that . . . it lay within the discretion of the District Court to decline to assume jurisdiction."\(^{69}\)

Although Canada Malting was decided before the Court's definitive exposition of the forum non conveniens doctrine in Gilbert, the Piper Court found that its validity was not affected by the Gilbert decision.\(^{70}\) In addition, because the early forum non conveniens decisions stressed flexibility,\(^{71}\) if determinative weight were given to one factor,

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63. See supra note 62 and accompanying text.
64. 454 U.S. 235, 247.
67. Id. at 417.
68. Id. at 418. The Court stated that when both vessels are at fault, Canadian law provides that each vessel is liable for not more than half of the loss. American law will grant the cargo owner full recovery of damages from the noncarrying vessel. Id. See also Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975), cert. denied, 423 U.S. 1052 (1976) (involving general maritime principles of England and United States regarding duty of care owed by owner of wreckage of vessel); Anglo-American Grain Co. v. S/T Mina D'Amico, 169 F. Supp. 908 (E.D. Va. 1959) (same principles as Canada Malting).
70. 454 U.S. 235, 248-49. The Court's rationale was that since Gilbert stressed convenience as the focal point of the forum non conveniens determination, it acknowledged that any one factor would not, by itself, bar dismissal. Id. at 249.
71. See Gilbert, 330 U.S. 501 (1947); Koster, 330 U.S. 518 (1947); Williams v. Green Bay & Western R. Co., 326 U.S. 549 (1946) (district court's denial of forum non conveniens dismissal was proper when the only factor pointing toward dismissal was that the action concerned the internal affairs of a foreign corporation).
as in the court of appeals' decision, "the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." 72

The Court also argued that the court of appeals' approach would logically lead to a virtual extinction of the doctrine. A plaintiff, in most instances, has a choice of available forums, hence if the one with the most advantageous laws were selected, dismissal would be barred regardless of inconvenience. 73

The Court pointed out two practical problems that would result from the Third Circuit's holding. First, the decision of whether to grant a forum non conveniens motion would become extremely complicated. The district court would be required to conduct a choice-of-law analysis to determine what law would apply in each forum and to compare the substantive and procedural remedies of both. It could dismiss the case only if the relief offered by the alternate forum was at least as favorable as that provided by the chosen forum. 74 Second, American courts would become more accessible to foreign plaintiffs, thus increasing litigation in already crowded courts. 75

Next, the Court turned to the court of appeals' use of § 1404(a) precedent. The court of appeals had reached its conclusion, in part, by relying on dictum in an earlier Third Circuit decision 76 interpreting the Supreme Court's holding in *Van Dusen v. Barrack*. 77 It was in *Van Dusen* that the Court first announced the rule that a § 1404(a) transfer

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72. 454 U.S. at 250.

73. The Court noted that its holding implied that a change in law more favorable to the defendant also should not be considered by the trial court. Although Piper's motive in requesting dismissal was to limit its liability, the Court found this irrelevant if, on balance, the factors favored dismissal. 454 U.S. at 252 n.19.

74. *Id.* at 251. This argument is somewhat unpersuasive. A district court must undertake this analysis in part when balancing Gilbert factors in order to determine whether foreign law will govern the action. *See infra* note 86.

75. 454 U.S. at 252. The Court reasoned that under the Third Circuit's approach, a foreign plaintiff could be assured of an American forum if it named an American corporation as defendant (or a foreign corporation conducting business in the United States) and the law of the alternate forum was less favorable. *Id.* According to the Court, United States courts are desirable to foreign plaintiffs due to the availability of jury trials, extensive discovery rules and strict liability. In addition, a tort plaintiff will have a choice of fifty potential jurisdictions in which to file suit. In addition, if he does not prevail at trial, he will not have to pay his opponent's attorney fees, as is required in many foreign jurisdictions. *Id.* at 252 n.18.

76. The court of appeals quoted *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), in its statement that "a dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.'" 630 F.2d at 164.

77. 376 U.S. 612 (1964).
should not result in the application of different law. The court of appeals' reliance on this rule for forum non conveniens was misplaced. According to the Piper Court, the Van Dusen rule was confined to the § 1404(a) context.

The Supreme Court recognized that under certain circumstances an unfavorable change in law might be relevant. This factor would be considered if "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." The Court found that this was not the situation in Piper, where the plaintiffs, although deprived of strict liability, would still be able to allege negligence in Scotland.

In the final part of its opinion, the Supreme Court found no abuse of discretion by the district court, and concluded that the court of appeals "substituted its own judgment for that of the District Court." The majority opinion agreed with the district court's recognition that a foreign plaintiff's choice of forum should be accorded less deference than that of a citizen or resident.

The Court did, however, reject the district court's assertion that connections with Scotland were "overwhelming." Instead, it found that although the factor of ease of access to sources of proof was evenly balanced, the court was not unreasonable in concluding that fewer evidentiary problems would be present if trial were in Scotland. The private interest factor relating to petitioners' inability to implead third

78. Id. at 624.
79. 454 U.S. at 253-54. "The reasoning employed in Van Dusen v. Barrack is simply inapplicable to dismissals on grounds of forum non conveniens. That case did not discuss the common-law doctrine. Rather, it focused on 'the construction and application' of 1404(a)." Id. (quoting Van Dusen, 376 U.S. at 613).
80. 454 U.S. at 254. See supra note 62 and accompanying text.
81. 454 U.S. at 257.
82. Id. at 256. The Court noted that "[c]itizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum." Id. at 256 n.23. The Supreme Court's position appears to fall midway between such cases as Burt v. Isthmus Development Co., 218 F.2d 353 (5th Cir. 1955) (requiring "positive evidence of unusually extreme circumstances" before denying a citizen access to United States courts, id. at 357); and Alcoa en banc, 654 F.2d 147 (2d Cir. 1980) (refusing to accord "talismanic significance" to the parties' citizenship, id. at 154). See supra notes 41-50 and accompanying text.
84. The position taken by the court of appeals, requiring affidavits specifying witnesses and general testimony, was rejected by the Supreme Court. 454 U.S. at 258. This approach was found to be an inappropriate reliance on analogous § 1404(a) requirements. Id. at n.26.
party defendants was found to be clearly in favor of having the trial in Scotland.\textsuperscript{85}

In its review of the public interest factors, the Court gave short shrift to both lower courts’ choice-of-law analyses. Even if the district court’s conclusion that Scottish law\textsuperscript{86} would apply to Hartzell was not correct, the Court reasoned that the balance was tipped by the other public interest factors.\textsuperscript{87}

Thus, the majority held that the court of appeals erred both in determining that an unfavorable change in law must bar a forum non conveniens dismissal and in rejecting the district court’s \textit{Gilbert} analysis.\textsuperscript{88}

Justices Powell and O’Connor took no part in the decision.\textsuperscript{89} Justice White joined that part of the decision which determined that an unfavorable change in law should not bar dismissal, but would not proceed to review the district court’s \textit{Gilbert} analysis.\textsuperscript{90} Similarly, Justices Stevens and Brennan dissented, finding it more appropriate to remand the case to the court of appeals on the issue of whether the district court was correct in its application of the \textit{Gilbert} test.\textsuperscript{91}

\textsuperscript{85} \textit{Id.} at 259. The Court reasoned that although petitioners could institute an action for indemnity or contribution in Scotland, it would be more convenient to present all claims at one trial. \textit{Id.}

\textsuperscript{86} The application and interpretation of foreign law has long been recognized as a factor pointing to dismissal. In \textit{Rogers v. Guaranty Trust Co.}, 288 U.S. 123, 130 (1933), the Court held that a court sitting in one state may decline to hear a case involving the \textit{internal affairs of a corporation organized under the laws of another state}. This view, however, was rejected in \textit{Williams v. Green Bay & Western R. Co.}, 326 U.S. 549, 553 (1946), where the Court refused to dismiss solely on this ground. But, in \textit{Gilbert}, 330 U.S. 501, 509 (1947), the Court held that the need to apply foreign law was an important criterion in a forum non conveniens decision.

\textsuperscript{87} These factors included Scotland’s interest in the litigation, because the accident occurred in its airspace, and that the decedents, as well as all potential parties other than Piper and Hartzell, were Scottish or British. 454 U.S. at 260.

\textsuperscript{88} \textit{Id.} at 261. It is interesting to note that in its first major decision on forum non conveniens in nearly thirty-five years (\textit{Gilbert} and \textit{Koster} were decided in 1947), the Court’s analysis was almost identical to that used in earlier cases. The advances in air travel and communication that have occurred since the 1940’s seem to have had no influence on the Court’s decision to uphold dismissal. The reluctance to reconsider the forum non conveniens doctrine in light of these technological changes may be due to the generally acknowledged overburdened condition of federal court docketts. At least one circuit has confronted this issue, albeit not in majority opinions. Judge Newman, concurring in \textit{Calavo Growers of California v. Belgium}, 632 F.2d 963 (2d Cir. 1980), stated that: “\textit{Jet travel and satellite communications have significantly altered the meaning of ‘non conveniens’}.” \textit{Id.} at 969. In a similar vein, Judge Oaks, dissenting in \textit{Fitzgerald v. Texaco}, 521 F.2d 448 (2d Cir. 1975) wondered “whether the doctrine should be reexamined in light of the transportation revolution.” \textit{Id.} at 456.

\textsuperscript{89} 454 U.S. at 261.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Id.} at 261-62. The majority justified its position by stating that “[a]n order limit-
To date, at least two federal district courts have had occasion to interpret the *Piper* decision. In *Lake v. Richardson-Merrel, Inc.*, five Canadian plaintiffs sued an Ohio drug manufacturer to recover for injuries suffered as a result of using the drug thalidomide. The defendant's motion to dismiss on the ground of forum non conveniens was denied. The court found the *Piper* holding somewhat confusing:

Although the Supreme Court has said that a district judge may give strong consideration to an extremely unfavorable change in substantive law, (citations omitted) it is unclear whether this factor should come into play (1) in the preliminary determination of whether an alternative forum exists . . . (2) in balancing the private and public factors . . . or (3) at both stages of the inquiry.

Clearly, it is redundant to consider this factor at both stages. Nevertheless, the court felt that this two-step process was implied by the Supreme Court and it proceeded to consider the factor at both the preliminary and the balancing stages.

In *Abiaad v. General Motors Corp.*, the plaintiff, a Lebanese citizen residing in Philadelphia, was injured in Abu Dhabi, United Arab Emirates while repairing an automobile manufactured by the defendant. He brought a personal injury suit in the Eastern District of...
Pennsylvania. The court conditionally granted defendant's motion to dismiss for forum non conveniens.\(^{101}\) While the court acknowledged that the United Arab Emirates may not be an adequate alternative, it refused to deny dismissal on this unsubstantiated possibility.\(^{102}\) This case differed from *Piper* in that the plaintiff in *Abiaad* was a permanent resident of the United States. Although the Supreme Court held in *Piper* that greater deference was to be paid to a citizen or resident plaintiff,\(^ {103}\) the Court did not preclude dismissal in the appropriate case. The *Abiaad* court's refusal to apply a blanket prohibition against dismissing an American plaintiff's action illustrates a careful adherence to the letter and spirit of the *Piper* decision.\(^ {104}\)

The Supreme Court decision in *Piper* is noteworthy for several reasons. First, it reestablishes the standards to be used by trial courts when faced with forum non conveniens motions. Second, it reemphasizes the doctrine's flexible nature and how it best effects the interests of justice by requiring the trial court to take into account all factors relevant to convenience of litigation. Nonetheless the decision, at least in part, seems to be aimed at restricting foreign access to United States courts. In reaffirming the distinction between foreign and American plaintiffs, the Court has made it more difficult for foreigners to bring suit in this country against American manufacturers for accidents occurring outside the United States. This approach should help reduce the strain on federal courts which is caused by expensive and complex litigation with which the United States has little connection.

Conversely, the Court refuses to bar dismissal automatically if the plaintiff is American. The effects of this aspect of the decision may be felt in the commercial setting. Americans conducting international

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101. *Id.* at 545. The court ordered that: (1) the defendant consent to suit in Abu Dhabi; (2) the defendant agree to make any documents or witnesses available in Abu Dhabi at its own expense; (3) the defendant consent to pay any judgment rendered against it; (4) the defendant give its consent to the conditions within ten days of the court's order and (5) should the plaintiff be unable to achieve an adjudication under the laws of Abu Dhabi, United Arab Emirates, it could reinstate its claims in the district court.

102. *Id.* at 540. The plaintiffs did not bring any information to the court's attention to demonstrate the forum's inadequacy.

103. *See supra* note 82.

104. The private interest factors influencing the court in *Abiaad* were that the accident occurred in Abu Dhabi; all witnesses to the event were there; what remained of the car was there and the medical personnel who treated plaintiff were also located in Abu Dhabi. Public interest factors included defendant's inability to implead third party defendants, the need to apply the law of the United Arab Emirates and the greater policy interest of the United Arab Emirates. 538 F. Supp. at 542-43.
transactions who may want their claims adjudicated by American tribunals will now have a heavier burden of showing a connection between this country and their causes of action.

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