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THE ARENA: DEFENDANT'S CHOICE OF FORUM

CLINTON H. CODDINGTON* AND RANDOLPH S. HICKS**

I. INTRODUCTION

THROUGHOUT THE pendency of a case, the choice of a forum in complex aviation litigation is one of the most important strategic decisions to be made by trial counsel, his client, and/or his principal. This choice is as important as the strategic choice made by a battlefield commander regarding the arena in which his troops will be committed; yet, it is extraordinary how often little time is spent by lawyers in these choices as compared with their counterparts in war. Strategy, we are told, is the "employment of the battle to gain the end of the war." It is the "link which binds the series of acts that lead to the final decision." What more crucial strategic consideration could there be than the choice of the place at which to wage the friendly strife?

This article will deal with choice of judges, jurors, courts, com-

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9 Id.
munities, evidence (and access to it), and witnesses (and access to them). In addition, it will treat choice of rules and principles of law by which actions are tried and relief granted or denied. We address these choices from the viewpoint of a defendant who, without the benefit of having the initial choice, must decide what alternatives, if any, exist and which choice might best aid his cause. We, like defenders in war, have important choices of locality and geography and opportunities to assemble our power in space and time.

II. PRACTICAL CONSIDERATIONS IN SELECTING THE FORUM

A. In General

Establishment of criteria for forum selection by a defendant who is disenchanted with the plaintiff's choice is challenging indeed. Weighing the various considerations which contribute to the decision to seek an alternative forum requires extensive legal research on substantive and procedural law, a thorough knowledge, understanding and analysis of the facts of the case at bar, and an understanding of all of the opportunities and dangers existing in the alternative forum being considered.

Plaintiff's counsel normally has many selections from which to choose; the defendant but one or two alternative forums to which he may have a chance of moving the case. In the best of all worlds, the defendant would choose a forum where both it and its counsel are well known and loved, where the law is highly favorable, where courts are strict constructionists and friendly to defendants, where discovery rules and laws are liberal, and where the "reach" of the local court is insufficient to bring defendant's employees before the trier of fact. Lamentably, such a choice never exists and defense counsel is thus left with the more difficult task of weighing the factors.

3 Id. at 193.
4 Id. at 250.
5 Id. at 276.
6 Id. at 277.
7 For a discussion of forum selection from a plaintiff's standpoint seeAbramson, Where to Sue in Aviation Products Liability Cases, 40 J. AIR L. & COM. 369 (1974).
Among the important factors for defense counsel to weigh is whether to try the case in a local forum. Litigation in local courts where counsel is familiar with local procedures, judges, and attachés, is obviously desirable, all other things being equal. This choice is often made by the plaintiff's counsel, to the defendant's distress, during both discovery and trial.

The values and interests of the various communities being considered are extremely important. Whether jurors are likely to come from urban, suburban or rural areas is significant. The different make-up between federal and state court juries must be accounted for. A review of past jury verdicts in the communities being considered is appropriate, and contact with local counsel is indispensable in making these comparisons.

When possible, counsel should compare the available judiciary. In California and other states there are books available which give biographical data on courts. Once again, local counsel can be of invaluable assistance in evaluating the judiciary, particularly when counsel is considering trial by the court as opposed to trial by jury.

Local rules of court, including pre-trial procedures, evidence, and discovery, must be separately analyzed and compared with the forum selected by the plaintiff in determining whether to move. The degree to which alternative sites permit practice by out-of-state counsel may be a factor. Counsel must also consider that some courts order, as a means of exerting pressure, sessions six days a week, three evening sessions a week, multiple juries and the like.

Differences in substantive rules of law dealing with such areas as products liability, common carriers, financial responsibility acts, damages, statutes of limitations, and claim statutes are critically important. It is theoretically true that transfer under either section 1404(a) or section 1407 of the Judicial Code does not result in a change of substantive law because the transferee court is bound to apply the transferor court's choice of law rules. As a practical

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matter, however, a change usually does result since the transferee court invariably finds a way, to the extent possible, to apply its own rules and laws since it is more familiar with them. Procedural and choice of law considerations are extremely important in evaluating these potential choices. Thorough understanding of these rules of law gained through consultation with local counsel, perhaps defendant's in-house counsel and its insurers (who after all should have a more global view of the situation) is necessary.

Whether defendant's corporate domicile is an advantageous forum can be a more troublesome question than it might appear superficially. It is not necessarily true that large local employers are popular with their citizenry. Additionally, it may not be desirable to be "at home" where the reach of process of local courts can compel the attendance of employees whose appearance, demeanor and testimony may be inimical to the defense at trial.

Convenience or inconvenience to counsel is a critical factor in the selection of a forum. From the defendant's viewpoint, this may be of little moment if success on a transfer or dismissal motion results in acquisition of new local counsel. Invariably transfer is inimical to plaintiff's counsel since presumably he has already selected the most convenient forum. Depending on the various attorneys' relationship with the courts, distances involved, time in the case, familiarity with the product or procedures involved, a judgment must be made of relative convenience and expense.

Court congestion is a very important consideration in transfer evaluation. If, for example, the alternative forum being considered produces long delay, and if it is felt that the plaintiffs lack the financial ability to survive the delay, that factor may tip the balance. On the other hand, counsel must consider the effect of presentation of stale evidence.

B. Federal Versus State Courts

Although many defense practitioners in California and parts of New York might well disagree, federal courts are often thought to be more competent than their state court counterparts. The rules of discovery and evidence are generally more liberal in federal court than in state courts, although there are exceptions. Pre-trial proceedings in federal courts are much more flexible than those in
state courts. Judges in federal court, however, exercise a great deal more power and control than those in state courts. This results in less flexibility and is much more burdensome to all counsel. Both sides of the bar normally disfavor pre-trial discovery in federal courts. In addition to the power wielded by the federal judge, counsel should consider that the subpoena power of the federal court is more extensive than that of the state court.

Unanimous verdicts are required in civil actions in federal courts and this is generally thought to favor the defendant rather than the plaintiff. In reality, however, since the difficulty is normally caused by one or two hold-outs, the argument probably cuts both ways, especially with weak burdens of proof now existing in many jurisdictions. Federal jury panels are felt to be more defense oriented since, as a rule, they are more heterogeneous, come from a wider geographical area, have a higher percentage of male jurors and come from a higher socio-economic status.

Counsel must consider that the judge has the power to and usually does conduct extensive and exclusive voir dire, whereas in most state courts it is conducted by counsel. Furthermore, judges in federal courts are more apt than their state court counterparts to interfere with the proceedings, cross-question witnesses, comment upon the evidence, and the like. In addition counsel must consider that, in federal court, transfer vehicles such as sections 1404(a) and 1407 are available; this is invariably not the case in state courts.

The final comment which should be made with respect to a choice between federal and state courts concerns the inherent and express power of federal judges to resolve matters without a jury trial. Federal courts are much more likely to grant any one of a number of available summary resolutions and are much more likely to take action which would produce an abrupt and early resolution of the case. Such propensities should be evaluated in light of the case at bar and its strengths and weaknesses.

III. VEHICLES AVAILABLE TO EFFECT THE CHANGE

Although a defendant's ability to change a forum may be somewhat limited when the litigation is commenced in the state courts,
a number of vehicles exist under federal law for producing a change of courtrooms. We shall examine the primary tools which exist in the federal courts: dismissal under the common law doctrine of forum non conveniens, transfer under section 1404(a), and transfer under section 1407. We shall also briefly look at similar procedures available in state court practice. For our purposes it will be assumed that subject matter jurisdiction, personal jurisdiction and venue are proper under the applicable federal and state law in the forum initially selected by plaintiff.

A. Forum Non Conveniens—Dismissal

1. Introduction

The doctrine of forum non conveniens has recently experienced a dramatic evolution and has been liberally applied by both federal and state courts in several cases. The courts increasingly have invoked the doctrine when the litigation arises out of an accident that occurred outside of the United States and is brought by plaintiffs who are neither citizens nor residents of the United States. In such circumstances the courts reason that since the litigation has little or no connection with the selected forum, other than the fact that defendants do business there or the forum is the home of plaintiffs’ counsel, it should be dismissed. The expansion of the laws of

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jurisdiction and venue, coupled with the plaintiffs' ability to select virtually any forum, has subjected the plaintiffs' initial forum selection to closer scrutiny and less deference by the courts.\(^\text{14}\)

2. History

The doctrine of forum non conveniens, which had its origin in the common law of Scotland,\(^\text{15}\) was introduced into federal diversity jurisdiction by *Gulf Oil Corp. v. Gilbert*,\(^\text{16}\) decided by the Supreme Court in 1947. Although the Court has never determined definitively whether federal or state law of forum non conveniens applies in a diversity case,\(^\text{17}\) most federal courts have applied federal law.\(^\text{18}\) For over three decades *Gulf Oil Corp.* has been recognized as the leading authority on the doctrine.

Stated simply, the principle of forum non conveniens is that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."\(^\text{19}\) The court is permitted to decline jurisdiction even though jurisdiction and venue are proper, on the theory that the convenience of the parties and witnesses or the ends of justice require that the action be tried in another judicial forum. The doctrine applies to any civil action and to admiralty actions brought by either American resident libelants or foreign libelants.\(^\text{20}\)

3. Limitations on the Doctrine

a. *The Existence of a More Convenient Federal Forum*

With the enactment of Section 1404(a) in 1948, which authorizes the transfer of a case from one federal district to another on forum non conveniens grounds, dismissal on the basis of forum

\(^\text{14}\) In Dahl v. United Technologies Corp., 15 Av. Cas. 18,352 (3d Cir. 1980), the court stated: "Courts know from experience that the selection of a forum is sometimes dictated not only by the search for justice but the temptation of the plaintiff 'to resort to a strategy forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself'." Id. at 18,353.


\(^\text{19}\) Alcoa Steamship Co., Inc. v. M/V Nordic Regent, 636 F.2d 860 (2d Cir. 1980); Fitzgerald v. Texaco, Inc. 521 F.2d 448 (2d Cir. 1975).
non conveniens is not proper when there is a significantly more convenient federal forum to which the action can be transferred.\(^{21}\) The traditional remedy of dismissal, however, is available where the more convenient forum is a foreign country.\(^{22}\)

b. *The Citizenship or Residence of the Parties*

The citizenship or residence of the parties generally has not recently been accorded talismanic significance by the courts.\(^{23}\) The courts have repeatedly noted that under the common law and under admiralty law "American citizenship is not an impenetrable shield against dismissal on the ground of forum non conveniens."\(^{24}\) In *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*,\(^{25}\) the court expressly rejected the notion that *Koster v. Lumbermens Mutual*...
Casualty Co., a Supreme Court opinion decided the same day as Gulf Oil Corp., established a different standard where plaintiff sued in his home forum. The court impliedly rejected language in Olympic Corp. v. Societe Generale which stated that defendant's burden is greater when an American plaintiff is to be consigned to a foreign forum, and held that the American citizenship of a plaintiff did not justify creating a special rule of forum non conveniens. Thus, a defendant’s burden is not increased when plaintiff is an American citizen, it may, however, be lessened when the plaintiff is of foreign citizenship.

c. The Existence of an Alternative Foreign Forum

The principle of forum non conveniens “presupposes at least two forums in which defendant is amenable to process.” In contrast to the limitations imposed under the federal forum non conveniens venue transfer statute, however, the court has the power to

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Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction 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, which may be shown to be slight or non-existent, or (2) make trial in the chosen forum inappropriate because of considerations effecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by the plaintiff who has sued in his home forum will normally outweigh the inconvenience that defendant may have shown.

303 U.S. at 524.

31 462 F.2d 376 (2d Cir. 1972).


35 28 U.S.C. § 1404(a). In Hoffman v. Blaski, 363 U.S. 335 (1960), the court held that transfer was authorized only to an alternative forum in which jurisdiction over the defendant might have been obtained at the time suit was commenced, irrespective of defendant's consent.
apply the remedy of dismissal under the doctrine "even if there [is] no alternative forum in which plaintiff could have originally commenced his action without the consent of defendant." A defendant's consent to submit voluntarily to the jurisdiction of the more convenient foreign forum is usually sufficient to invoke the doctrine, and the court will not determine whether a defendant was initially subject to compulsory jurisdiction in the foreign forum.

A few recent cases have introduced an additional limitation and require that the alternative federal forum not only be able to exercise jurisdiction over defendant but also that it be "proper" or "suitable." As a condition to dismissal, the element has been generally satisfied by the courts' requirement that: (1) defendant consent to personal jurisdiction or agree to accept service of process in the foreign forum; (2) defendant waive any defense of the statute of limitations or consider the statute having been tolled since institution of the action; and (3) defendant offer a letter of guaranty that a foreign judgment will be satisfied or agree to pay any judgment rendered against it by a foreign court. In concluding that Norway was a "proper" alternative forum, one court examined Norway's substantive and evidentiary laws and judicial procedures,


34 Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978).


and determined that plaintiffs had presented no evidence that they would not receive a full and fair trial in the foreign forum.⁴⁰

Although the applicable law in the alternative foreign forum may be less favorable to the plaintiff's chance or amount of recovery, the court nevertheless has discretion to apply the remedy of dismissal under the doctrine of forum non conveniens.⁴¹ The courts have reasoned that a refusal to dismiss because of the prospect of a less favorable recovery by plaintiffs "would emasculate the doctrine for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover."⁴²

4. The Applicable Factors

In Gulf Oil Corp. v. Gilbert,⁴³ the Supreme Court delineated the factors to be considered under the doctrine of forum non conveniens. The factors were divided into those affecting the private interests of the litigants and those in which the public had an interest. The various factors are to be weighed by the court in order to determine the "relative advantages and obstacles to a fair trial,"⁴⁴ but "[u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."⁴⁵

⁴⁰ Fosen v. United Technologies Corp., 484 F. Supp. 490, 504 (S.D.N.Y. 1980), aff'd, No. 80-7180 (2d Cir. June 13, 1980). Some courts have stated that if a contingent fee arrangement did not exist in the proposed foreign forum, this would bear some weight in the determination of whether such foreign forum was practically available to plaintiffs. However, when liability is conceded, this factor would not be entitled to consideration since plaintiffs would be ensured a fund from which to pay attorneys' fees. See Bouvy-Loggers v. Pan American World Airways, Inc., 15 Av. Cas. 17,153, 17,155 (S.D.N.Y. 1978).


⁴⁴ Id. at 508.

⁴⁵ Id.
a. Private Interests

The factors relating to the private interests of the litigants enumerated by the court in *Gulf Oil Corp.* 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. There may also be questions as to the enforceability of a judgment if one is obtained.\(^4\)

Although relatively simple to articulate, the doctrine is complex in application and "leaves much to the discretion of the court to which plaintiff resorts."\(^47\) As previously noted, in recent years the courts frequently have invoked the doctrine to dismiss cases involving accidents or collisions occurring outside of the United States that could be more conveniently litigated in a foreign forum.\(^48\)

Recent cases have concluded that when the preponderance of evidence concerning the issues of liability and damages is located in a foreign forum, the balance weighs strongly in favor of defendant and decisively against plaintiff's choice of forum.\(^49\) In an action arising out of an accident occurring outside the United States, certain demonstrative and documentary evidence may be located in the foreign forum. This evidence may include:

1. the wreckage and component parts of the wreckage;
2. the flight data recorder and cockpit voice recorder;
3. the aircraft maintenance, operational and flight records;
4. the records concerning the flight crews' training and qualifications;
5. the investigative reports rendered by the foreign government.

Testimonial evidence\(^50\) which may be located in the foreign forum can involve:

\(^{40}\) Id.  
\(^{47}\) Id.  
\(^{48}\) See note 12 supra.  
\(^{50}\) In *Piper Aircraft Co. v. Reyno*, 50 U.S.L.W. 4055, 4061 (1981), the Court held that the requirement of clearly specifying the witnesses to be called and the nature of their testimony for a transfer under 28 U.S.C. § 1404(a) was in-
1. government officials who investigated the accident;
2. survivors of the accident;
3. witnesses to the accident or persons familiar with the crash site;
4. employees of the foreign airline;
5. maintenance and service personnel;
6. damage witnesses if the plaintiffs are foreign citizens or residents;
7. persons familiar with the meteorological conditions;
8. air traffic controllers and airport personnel.

In aviation litigation, plaintiffs usually seek recovery under theories of strict products liability, negligence and breach of warranty, alleging that the crash aircraft and its component parts were defectively designed and manufactured. Documentary evidence located within the United States respecting these theories may include the aircraft's design and manufacture records, testing records and governmental certification records. Testimonial evidence located within the United States may involve witnesses familiar with the design and manufacturing process, governmental employees familiar with the testing and certification of the aircraft, and damages witnesses if plaintiffs are American citizens or residents. Despite the existence of such evidence within the United States, the existence of a preponderance of the evidence outside the United States will militate in favor of a foreign forum.\footnote{51}

In recent cases, the courts have further concluded that when many of the non-party witnesses reside in a foreign forum, the inability of a United States court to compel the attendance of such persons operates in favor of a foreign forum.\footnote{52} In such circumstances, applicable to a *forum non conveniens* dismissal. See notes 175-79 *infra* and accompanying text.

\footnote{51} See Fosen v. United Technologies Corp., 484 F. Supp. 490, 506 (S.D.N.Y. 1980), *aff'd*, No. 80-7180 (2d Cir. June 13, 1980); Grodinsky v. Fairchild Indus., Inc., 507 F. Supp. 1245, 1250 (D. Md. 1981). *But see* Petroleum Helicopters de Columbia, S.A. v. Textron, Inc., 15 Av. Cas. 18,112 (D.D.C. 1980). Plaintiff, a Columbian corporation with headquarters in Columbia, alleged that the tail rotor drive shaft of the helicopter was defective and sought recovery under theories of negligence, breach of warranty and strict products liability. Although the helicopter crash occurred in Columbia and the maintenance work was performed in Columbia, the court summarily concluded that dismissal on the ground of forum non conveniens was inappropriate. The court was persuaded by the following: (1) the helicopter was designed and manufactured in the United States; and, (2) the statute of limitations apparently would bar plaintiff from refiling its action in Columbia.

\footnote{52} Pain v. United Technologies Corp., 637 F.2d 775, 781 (D.C. Cir. 1980); Dahl v. United Technologies Corp., 15 Av. Cas. 18,352, 18,354 (3d Cir. 1980);
es the courts have reasoned that a defendant would be seriously pre-
judiced if the action went forward in the United States. The in-
ability to compel process in the United States has been viewed as
a crucial impediment to a fair trial: "Certainly to fix the place of
trial at a point where litigants cannot compel personal attendance
and may be forced to try their cases on deposition, is to create a
condition not satisfactory to the court, jury or most litigants."
A plaintiff's claim that the evidence and witnesses relative to his var-
ious liability theories are located within the United States and like-
wise not subject to the compulsory process of a foreign forum may
be effectively rebutted by defendant's agreement to make all of the
witnesses and documents under its control available in the foreign
forum should the action be dismissed. Although not all relevant
evidence may be under defendant's control, defendant's offer to
produce such evidence under its control, coupled with its inability
to subpoena foreign documents and witnesses for trial in the
United States, points toward trial in the foreign forum. The court
in Dahl v. United Technologies Corp. stated: "Undoubtedly, no
matter where the case is tried there will be some difficulty in ac-
cess to materials, but we believe that more relevant materials and
easier access to them will occur if the case is tried in Norway with
[defendant's] agreement to provide all necessary materials under its
control."

When liability is admitted or not contested by defendant and
plaintiffs are citizens and residents of foreign countries, the courts


An example of this would be when various witnesses are no longer employed by defendant.


15 Av. Cas. 18,352 (3d Cir. 1980).

Id.
recently have shown an inclination to invoke the doctrine of forum non conveniens. In *Bouvy-Loggers v. Pan American World Airways, Inc.*, the plaintiff, a citizen of the Netherlands, commenced an action in the Federal District Court in New York for the wrongful death of her Dutch spouse in the collision between a Pan Am 747 aircraft and a KLM Royal Dutch Airlines 747 aircraft at Santa Cruz de Tenerife, Canary Islands, Spain. The sole issue in the litigation was the amount of the plaintiff's damages, since Pan Am's and KLM's agreement not to contest liability if the plaintiff would waive any claims for punitive damages was accepted by plaintiff. The court noted that the witnesses and documents with regard to this issue were located in the Netherlands and concluded that the balance of conveniences weighed heavily toward dismissal. The court stated:

The public interest also weighs heavily toward the conduct of this litigation in The Netherlands and against its continuation in New York. While this forum has some interest in protecting its resident defendants, the fact that defendants are New York domiciliaries is not alone sufficient to warrant the court's retention of an action. ... Here, The Netherlands has a strong interest in insuring that this Dutch decedent's heirs are adequately compensated, for if they are not, it is The Netherlands and its citizens who will bear the financial responsibility for supporting them.

A court may find that it should not retain jurisdiction because it may be necessary or appropriate for the jury to see the accident site. This may be true even though plaintiffs are pursuing a products liability case. In *Macedo v. The Boeing Co.*, arising out of the crash of a Transportes Aereos Portugueses airliner on landing at Funchal Airport, Madeira Islands, Portugal, the court stated that "all of the circumstances that surrounded the crash are rele-

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62 *Id.* at 17,154.
63 *Id.*
64 *Id.* at 17,155.
65 *Id.*
66 15 Av. Cas. 18,032 (N.D. Ill. 1980).
vant, including runway conditions, topography and weather.

The inability to implead other parties directly involved in the controversy also weighs against a retention of jurisdiction in the United States. For example, the foreign owner or operator of the aircraft may not be subject to personal jurisdiction in the United States, thus precluding the defendant from impleading such a party. In *Piper Aircraft Co. v. Reyno*, the Court concluded that defendant's inability to implead another potentially liable party, a foreign air taxi service, would make litigation in the United States more burdensome.

Practical problems encountered in the trial of cases involving evidence in other countries include translation of foreign documents and testimony of foreign witnesses, and the evaluation of damages to be awarded to a foreign resident. Although such factors alone do not justify dismissal on forum non conveniens grounds, the courts have accorded them weight in the exercise of their discretion. Since translation may pose linguistic difficulties wherever the trial is held, the court may explicitly place the burden of translation of the evidentiary documents which the defendant has consented to produce on the defendant.

b. Public Interests

Factors in which the public has an interest, enumerated by the court in *Gulf Oil Corp.*, are:

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

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67 Id. at 18,034.
71 Id. at 4061-62.
a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial in 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 laws foreign to itself.

In determining whether to invoke the doctrine, the courts have focused their attention on the following:

1. Whether the docket of the United States court in which the action is brought is congested;\[79\]
2. Whether the lawsuit should be tried to a jury in a community that bears no relation to the litigation;\[78\]
3. Whether the local controversy should be decided close to home;\[77\]


\[78\] Pain v. United Technologies Corp., 637 F.2d 775, 792 (D.C. Cir. 1980) (“Perhaps the most striking feature of this case is the lack of any significant contacts between the event in dispute and the forum chosen by the plaintiffs in which to litigate the consequences of that event.”); Dahl v. United Technologies Corp., 15 Av. Cas. 18,352, 18,355 (3d Cir. 1980); Fosen v. United Technologies Corp., 484 F. Supp. 490, 507 (S.D.N.Y. 1980), aff'd, No. 80-7180 (2d Cir. June 13, 1980) (“Not only is the Southern District of New York the quintessential 'congested center,' but no element of this lawsuit is related to New York in any way.”); Macedo v. The Boeing Co., 15 Av. Cas. 18,032, 18,034 (N.D. Ill. 1980); Orion Ins. Co., Ltd. v. United Technologies Corp., 15 Av. Cas. 18,061 (S.D.N.Y. 1980) (“I see no reason why this court, with its heavy burdens and responsibilities, should be burdened with cases like these which, from every point of view, should be tried in the courts of the nation where all the relevant events occurred and whose own citizens are primarily involved. Certainly this district in the Metropolitan area in which it is situated has no conceivable relation to this litigation except for the fact that the defendant happens to be doing business here.”)

\[77\] Pain v. United Technologies Corp., 637 F.2d 775, 784 (D.C. Cir. 1980); Macedo v. The Boeing Co., 15 Av. Cas. 18,032, 18,034 (N.D. Ill. 1980). In Macedo, the court stated:

The fact that the aircraft was manufactured in the United States
4. Whether foreign law will be applied.\textsuperscript{10}

In many recent cases, the courts have exhibited a strong tendency to put great emphasis on the public interest factors where the forum selected by the plaintiff has absolutely no nexus with the litigation. In \textit{Dahl v. United Technologies Corp.}, \textsuperscript{11} four wrongful death actions arising out of the crash of a helicopter in the icy waters of the North Atlantic were brought against United Technologies Corporation, the manufacturer of the helicopter. These actions were filed in the federal district court in Delaware, United Technologies' state of incorporation. Plaintiffs were residents and citizens of Norway and United Technologies' principal place of business was in Connecticut. The court dismissed plaintiffs' action under the doctrine of forum non conveniens and stated, "The commitment of Delaware judicial time and resources to this case is not justified by any nexus Delaware has with what is essentially a Nor-
When an accident or collision occurs outside the United States, our courts will not permit the very intimate relation of the foreign country to the accident be eliminated simply by plaintiffs' characterization of the claim as one for products liability.

5. Application of the Doctrine in State Court

The state courts have followed the lead of the federal courts and have applied liberally the forum non conveniens doctrine. Both California and New York, where a large percentage of all aviation disaster litigation is conducted, have codified and liberally applied the common law doctrine of forum non conveniens. The factors that guide the discretion of the California and New York state courts in applying the doctrine are generally the same as those set forth in *Gulf Oil Corp. v. Gilbert*.

a. California

California's forum non conveniens doctrine, which is of common law origin, is codified in California Code of Civil Procedure Section 410.30(a).

When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside the state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.

The philosophy behind the state doctrine, like the federal doctrine, is equitable in nature, "embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere.”

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83 *Id.* at 18,355. See also *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980).

84 *Macedo v. The Boeing Co.*, 15 Av. Cas. 18,032, 18,034 (N.D. Ill. 1980).

85 See CAL. CIV. PROC. CODE §410.30 (West 1973); N.Y. CIV. PRAC. LAW §327 (McKinney Supp. 1980).


88 Id.

Unlike the federal doctrine of forum non conveniens, however, the court has no discretion, except under extraordinary circumstances, to dismiss an action brought by a California resident under the doctrine of forum non conveniens. As stated by one California court, "[t]his limitation of the forum non conveniens doctrine does not rest on any conclusion derived from a balancing of conveniences; it reflects an overriding state policy of assuring California residents an adequate forum for the redress of grievances." Although the court lacks the power to dismiss an action brought by a California resident, it may stay such action under the traditional forum non conveniens balancing analysis. The courts reason that by staying the action, a California court is not divested of jurisdiction and may properly protect the interests of a California resident, pending a final decision in the foreign forum.

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90 See notes 24-30 supra and accompanying text.
91 Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 859 (1973). In Archibald, the court stated:
The exceptional case which justifies the dismissal of a suit under the doctrine of forum non conveniens is one in which California cannot provide an adequate forum or has no interest in doing so. Examples would include cases in which no party is a California resident... or in which the nominal California resident sues on behalf of foreign beneficiaries or creditors.

15 Cal. 3d at 859.
93 Id. at 858. See Ferreira v. Ferreira, 9 Cal. 3d 824, 837 (1973), where the court stated: "In the ordinary case, the doctrine of forum non conveniens does not permit the dismissal of an action itself, as distinguished from a stay of that action, brought by a California resident." See also Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 742 (1967) ("Forum non conveniens has only an extremely limited application to a case where as here, the plaintiff is a bonafide resident of the forum state."); Goodwine v. Superior Court, 63 Cal. 2d 481, 485 (1965) ("A determination that a plaintiff is domiciled here would ordinarily preclude granting the defendant's motion for dismissal on the ground of forum non conveniens."). This policy is inapplicable, however, where the action is brought by a nominal plaintiff, e.g., the resident administrator of the estate of a non-resident decedent. Great Northern Ry. Co. v. Superior Court, 12 Cal. App. 3d 105, 111 (1970).
94 Id. at 860.
95 Id. at 862. In Archibald, the court stated:
California's appetite for litigation must not be so gluttonous as to compel it to engage in the trial of causes that are found by the court of first resort to be more conveniently resolved elsewhere, since if redress in the foreign jurisdiction proves abortive, California courts retain the option to resume proceedings.
Id. at 862. See also Jagger v. Superior Court, 96 Cal. App. 3d 579, 589, where the court stated: "Ordinarily dismissal is an exceptional remedy, and a stay the usual
A further limitation on the court's discretion to dismiss under the doctrine of forum non conveniens was noted by the court in *Brown v. Chlorox Co.* In *Brown*, the plaintiff, a minor, brought an action for damages for personal injuries sustained as a result of her ingestion of a toxic product manufactured and sold by defendant. The court held that the trial court had abused its discretion in staying the plaintiff's action on the grounds of forum non conveniens where the defendant companies were incorporated in California, had maintained their principal place of business in California and had conducted themselves in California so as to cause injury to others in another state.

The factors to be considered in resolving a motion to dismiss or stay on forum non conveniens grounds in California are generally the same as those enumerated by the court in *Gulf Oil Corp. v. Gilbert.* These factors have been articulated as follows:

The amenability of the parties to personal jurisdiction in this state and in the alternative forum; the relative convenience to the parties and trial witnesses of the competing forum; the differences in the conflict of law rules applicable in the competing forum; the selection of a convenient, reasonable and fair place of trial; defendant's principal place of business; the extent to which the cause of action arose out of events related to this state; the extent to which any party will be substantially disadvantaged by a trial in either forum; the relative enforceability of judgments rendered in this state or in the alternative forum; the relative inconvenience to witnesses and relative expense to parties of proceedings in this state or the alternative forum; the significance and necessity of a view by the trier of fact of physical evidence not conveniently moveable from the alternative forum; the extent to which prosecution of the action in this state would place a burden upon this state's judicial resources equitably disproportionate to the relationship of the parties or cause of action to this state; the extent to which the relationship of the moving party to this state obligates him to participate in judicial proceedings here; this state's interest in providing a forum one so that if obstacles develop to litigation in the convenient forum the parties may resume litigation in California."

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97 Id. at 308.
98 Id. at 313-14.
for some or all of the parties; this state's public interest in the litigation; the avoidance of multiplicity of actions and inconsistent adjudications; the relative ease of access to sources of proof; the availability of compulsory process for attendance of witnesses; the relative advantages and obstacles to a fair trial; the burden upon jurors, local court and taxpayers of a jurisdiction having a minimal relationship to the subject of the litigation; the difficulties and inconveniences to the defendant, the court and jurors incident to the presentation of evidence by deposition; and the availability of the suggested forum.\(^{103}\)

In balancing these factors, the court is required to make a qualitative rather than a quantitative analysis "with heavy weight given not only to plaintiff's choice of forum, but the effect of that choice of forum on conflict of law rules and [California's] private and public interest in the litigation."\(^{101}\) The court may not consider the convenience of counsel \(^{102}\) or "the probability, if such exists, that a California jury may be more generous in its awards than the proper forum."\(^{103}\)

The most recent California case to consider the doctrine of forum non conveniens as it relates to mass disaster aviation litigation was *Hemmelgarn v. The Boeing Co.*\(^{104}\) In *Hemmelgarn*, wrongful death actions were brought on behalf of Canadian decedents. The actions arose out of the crash of a Boeing 737 aircraft at Cranbrook Airport, British Columbia, Canada.\(^{105}\) The defendants, over which the court had jurisdiction, included Rohr Industries, Inc. (Rohr), a California resident and component parts manufacturer, and The Boeing Company (Boeing), a Washington resident and manufacturer of the aircraft.\(^{106}\) The California court had no jurisdiction over the Canadian defendants Pacific Western Airlines (PWA), the government of Canada and the City of Cranbrook.\(^{107}\) Boeing and the Canadian defendants subsequently entered into an

\(^{101}\) *Id.* at 586.
\(^{104}\) 106 Cal. App. 3d 576 (1980).
\(^{105}\) *Id.* at 581.
\(^{106}\) *Id.* at 582.
\(^{107}\) *Id.* at 589.
agreement which authorized PWA to negotiate settlement of all passenger claims in Canada and left the ultimate allocation of responsibility of fault for later resolution.  

The court in *Hemmelgarn* made two initial observations: the majority of the forum non conveniens factors overwhelmingly favored a Canadian forum and examination of the factual underpinning of plaintiffs' claims revealed only a nominal connection between Rohr and the facts relating to the accident. These findings thwarted plaintiffs' claim that California had an overriding and substantial state interest in applying its law to resident corporate defendants who design or manufacture defective products in the state. More importantly, however, the court stated that in determining whether "it is in the interest of substantial justice" to dismiss an action, the court must consider the governmental interest affecting the relationship among defendants, such as California's public policy considerations relating to the equitable apportionment of liability among defendants in multi-party tort litigation. Although the court noted that Boeing and Rohr may not feel the full sting of damages as computed in accordance with California law, it concluded that retention of the cases would frustrate "California policy in multi-party tort litigation by reducing the possibility of settlement and eliminating, or at least making more costly, the equitable apportionment of damages based on comparative fault among all responsible parties." Since trial of the cases in

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108 Id. at 583.
109 Id. at 585-86.
110 Id. at 587.
111 Id. at 588.
112 Id. Although the plaintiffs acknowledged that Canada had no statutory ceiling on damages, they alleged that:
The elements of damages which may be considered in Canada will necessarily result in lower damages there.... Unlike California, Canada does not permit an allowance for further inflation in assessing loss of future earnings and compensation for loss of society, comfort and protection is either non-existent or outrageously low. Further, in Canada lost earning damages are based on after tax income and Canada requires substantial reductions for such contingencies as future illness, prospective financial disasters, personality defects, remarriage and inheritance.
Id. at 586-87.
113 Id. at 589. The court noted that "the likelihood of settlement is reduced when all parties are not involved for there is always a tendency by the defendant present at settlement discussion to point the finger at the missing defendant who
Canada pursuant to the defendants’ settlement agreement would more fully satisfy California’s public policy, the court affirmed the trial court’s dismissal of the actions on the condition that Boeing and Rohr submit to the jurisdiction of the British Columbia courts.

b. New York

New York’s forum non conveniens doctrine is codified in Rule 327 of the Civil Practice Law and Rules:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

This rule codifies the doctrine enunciated in Silver v. Great American Insurance Co., where the New York Court of Appeals rejected the long-standing rule that the residence in New York of either party to an action barred a New York court from dismissing the action on the grounds of forum non conveniens. Although the residence of the parties remains an important factor for consideration, the doctrine is applied based upon considerations of justice, fairness and convenience. Accordingly, dismissal “should be granted when it plainly appears that New York is an inconvenient forum and that another is available that will best serve the ends of justice and the convenience of the parties.”

The factors to be considered in resolving a motion to dismiss or stay on forum non conveniens grounds in New York are generally the same as those delineated by the Supreme Court in Gulf Oil

invariably is described as the real culprit without whom the case cannot be resolved.”

115 The settlement agreement provided that indemnity would be based upon the respective fault of the parties. Id.


119 Id.

120 Id. at 361, 328 N.Y.S.2d at 402, 278 N.E.2d at 622.

121 Id.
DEFENDANT'S CHOICE OF FORUM

Corp. and subsequently applied by the federal courts. These factors include:

On the one hand the burden on New York courts and the extent of any hardship to the defendant that prosecution of the suit would entail and, on the other, such matters as the unavailability elsewhere of a forum in which the plaintiff may obtain effective redress and the extent to which the plaintiff's interest may otherwise be properly served by pursuing his claim in this State.

In Varkonyi v. S. A. Empresa de Vicao Airea Rio Grandense, the plaintiffs, who were residents of Hungary, Great Britain and Florida, filed actions in the New York County Supreme Court for wrongful death arising out of the crash of a Boeing 727 aircraft in Lima, Peru. The defendants included the airline, a corporation chartered in Brazil but doing business in New York, and the manufacturer of the aircraft, a corporation chartered in Delaware and doing business in New York. The defendants' motions to dismiss on the ground of forum non conveniens were denied by the court at special term. The order of the intermediate appellate division dismissing plaintiffs' complaints under the doctrine was reversed by New York's highest tribunal, since the appellate division failed to consider "special circumstances" that favored acceptance of the lawsuit in New York. The actions were remitted to the appellate division for consideration of the special circumstances, which included the absence of any other forum in which all defendants could be joined, and the presence of other wrongful death actions arising from the same accident in the federal and state courts in New York.

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122 See Fosen v. United Technologies Corp., 484 F. Supp. 490, 503 n.8 (S.D.N.Y. 1980), aff'd, No. 80-7180 (2d Cir. June 13, 1980); Schertenleib v. Traun, 589 F.2d 1156, 1162 n.13 (2d Cir. 1978). In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the Supreme Court noted that "[t]he law of New York as to the discretion of a court to apply the doctrine of forum non conveniens, and as to the standards that guide discretion is, so far as here involved, the same as the Federal rule." Id. at 509.


125 Id. at 336, 292 N.Y.S.2d at 72, 239 N.E.2d at 543.

126 Id.

127 Id.

128 Id. at 338, 292 N.Y.S.2d at 674, 239 N.E.2d at 544.

129 Id. For a discussion of Varkonyi and New York's "special circumstances"
In Gettler v. Piper Aircraft Corp., the plaintiff, a resident of Connecticut, brought an action for damages for personal injuries arising out of an aircraft accident that occurred in Rhode Island. The defendant, the manufacturer of the aircraft, was a Delaware corporation with its principal place of business in Pennsylvania. The only contacts which the litigation had with New York were the presence of the plaintiff's attorney and the occurrence in New York of one prior accident involving the same type of aircraft. The court granted defendant's motion to dismiss on the grounds of forum non conveniens, holding that this connection with New York was "too tenuous particularly in view of the pendency in Connecticut of actions by the passengers of the plane and others, who reside in that state."

A recent New York aviation related case to apply the doctrine is Hudson's Bay & Annings Ltd. v. KLM Royal Dutch Airlines. In Hudson's Bay, the plaintiff, a foreign corporation organized under the laws of Great Britain with its principal place of business in England, brought an action for alleged water damage to goods transported by air from Illinois to England via the Netherlands against defendant, a corporation organized and existing under the laws of the Netherlands. The court summarily concluded that New York had no relationship to the issues of the case other than the fact that defendant was amenable to process there and dismissed the action under the doctrine of forum non conveniens.


10 Av. Cas. 17,918 (Sup. Ct. N.Y. 1968).
11 Id. at 17,918-19.
12 Id. at 17,919.
13 Id.

14 Id. But see Boskoff v. The Boeing Co., 16 Av. Cas. 17,753 (Sup. Ct. N.Y. 1981).
15 15 Av. Cas. 18,496 (Sup. Ct. N.Y. 1980).
16 Id.

17 Id. The court's dismissal was on the condition that defendant stipulate to submit itself to jurisdiction and to waive any defense of statute of limitations or lack of jurisdiction. See also Adipaz, Ltd. v. Swiss Air Transp., Ltd., 16 Av. Cas. 17,580 (Sup. Ct. N.Y. 1981); Crown Cork & Seal Co. v. Rheem Mfg. Co., 406 N.Y.S.2d 849, 64 A.D.2d 545 (1978). In Crown Cork, the court held that New York was an inconvenient forum since all of the issues related to events in South Africa, where by far the greatest number of witnesses were located, and it would constitute an unnecessary burden on the New York courts to apply foreign law.
The private interest factors that are to be weighed by the court in applying the doctrine were not mentioned in the court's opinion.

6. Pitfalls, Traps and Other Opportunities

The doctrine presupposes the existence of an alternative forum. While the significance of "alternative" has not been definitely set forth, it apparently at least includes subject matter and personal jurisdiction. Whether, in addition, it truly includes everything required to obtain effective redress is unknown at this time. One prolific writer taking the plaintiff's viewpoint has consistently observed:

The reality of international aviation is that there is no place outside of the United States where airline passengers can "obtain effective redress." In most nations they can't even get access to their own government's accident investigation data, and discovery is practically non-existent [sic]; they can't get lawyers to represent them on a contingent basis; they can't afford to pay the huge hourly fees which would be rolled up in the absence of contingent fees; they can't take the risk of being wiped out by a bill of costs which would include the fees of all defendants' attorneys if they lost; and they would have to break new grounds in attempting to hold manufacturers liable for defective aviation products.188

Surely the doctrine does not require that, in addition to a forum, foreign nationals must have all of the benefits of the most liberal of American law in their own country. Some countries, for example, forbid contingency fees, forbid agreements affecting foreign exchange, and require substantial deposits in court for the bringing of lawsuits.190 While the effect of such rules of law may be to preclude the bringing of a particular lawsuit by a particular plaintiff, it cannot be said that an alternative forum does not exist. Ease of access and likelihood of success are quite different from existence of a proper court.

The defendant should always consider retention of an expert on

However, as a condition of the judgment of dismissal, defendant was required to (1) waive any objection to subject matter jurisdiction in South Africa; (2) accept service of process in that jurisdiction; (3) waive objection to compulsory process requiring appearance of witnesses and production of documents; (4) consent to full faith and credit for any judgment obtained in South Africa; and (5) waive any defense of limitation of time.

188 Speiser, From Roosevelt Field to Tenerife, 82 CASE & COMMENT, (1977).
190 See e.g., INDIA CODE CIV. P.
foreign law and should submit affidavits in support of the motion to dismiss. In view of language in recent court opinions that the alternative foreign forum should be "proper" or "suitable," the defendant should be prepared to consent to personal jurisdiction and to waive technical defenses such as statute of limitations, as well as be prepared to sign letters guaranteeing payment of a judgment. The defendant should also be prepared to answer arguments that foreign courts will not afford foreign nationals due process in accordance with precepts of American law, even though they offer them the full process of their own law. Of course, foreign nationals lacking the appropriate connection with the United States are not entitled to due process of our laws at all.140

In showing that the balance weighs strongly in favor of a foreign forum, the defendant should be prepared to identify all key issues in the case in order to show that the evidence on those issues is located in a foreign country. This will require extensive legal research and analytical efforts concerning the facts of the case at bar. The defendant must show by issue and by witness the testimony or documentary evidence sought to be elicited. A laundry list of witnesses and their addresses invariably will prove insufficient.

Recent cases indicate that when liability is contested defendant's consent to produce documents and witnesses under its control in a foreign forum will be very useful and could well tip the scales in favor of dismissal. The courts reason that by this device all litigants have complete access to essential sources of proof. Where English is not the major language of the foreign forum, the defendant should also be prepared to offer translation of critical documents at its own expense. When liability is admitted or uncontested and the plaintiffs are neither American citizens nor American residents, the defendant should remember that the court will be more favorably inclined to dismiss under the doctrine of forum non conveniens. In such circumstances, the only issue remaining is one of damages, and witnesses as well as documents, in all likelihood, will be located in a foreign forum. If the foreign country is not a signatory to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,141 which permits the taking of evidence by

140 Pauling v. McElroy, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960).
Defendant's Choice of Forum

Deposition, or has no law similar to Title 28, Section 1782, of the United States Code which allows a district court in the United States to order persons to give testimony for use in foreign proceedings, this, of course, is yet another reason to press for dismissal. A powerful showing of diligent but unsuccessful effort to obtain evidence in a foreign country will be most useful in supporting the motion to dismiss, especially when due process is denied an American domiciliary by its inability to obtain and present evidence necessary to establish its own defense.


In Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980), the court noted the multifarious problems in obtaining foreign evidence as follows:

We recognize, of course, that some of the necessary documents and testimony could be obtained from abroad through the channels of international judicial assistance which have been negotiated in conjunction with the Federal Rules of Civil Procedure. While these mechanisms exist, however, they are far from perfect. If trial were to be conducted here, significant procedural obstacles might limit the availability of foreign discovery to the parties. The Hague Convention on the Taking of Evidence Abroad to which the United States, France, Norway, and Great Britain are all signatories specifies that when a party fails to secure a witness' voluntary cooperation by notice or commission procedure, it may seek discovery via a letter rogatory—a letter of request from an American judge for the assistance of a foreign judicial authority. Although the Hague Evidence Convention provides a mechanism whereby the recipient nation's executing authority is required to assist an American court with such compulsory force as its own courts can exercise in a pretrial evidentiary situation, numerous exceptions to this international obligation exist, which potentially bar this device from being executed at all. For example, foreign judicial cooperation may be withheld altogether if the discovery assistance requested is deemed prejudicial to state sovereignty.

Furthermore, even when discovery abroad is available, the breadth of evidence ordinarily expected from a full-fledged American-style deposition might be constricted for any number of reasons. The foreign state's own procedures might limit or foreclose cross-examination, full participation of counsel might not be allowed, or a verbatim record might not result, thus limiting admissibility of the testimony in an American court. The scope of foreign privilege might prove broader under the letter rogatory procedure than under either local law or American law, and in some cases, official translators might be required for each piece of paper involved. Regardless of whether or not foreign evidence would be as fully available were trial to be conducted here, there can be little doubt that the cost to the litigants of employing such procedures would be exceedingly high.

637 F.2d at 782 (citations omitted).

The right to a fair hearing and to be heard at a meaningful time in a
The inability to implead other parties directly involved in the controversy is also a factor that requires serious consideration by the defendant. When a non-joined party such as a foreign airline is critically involved, inability to join that party weighs in favor of dismissal as much as ability to join the third party militates against it. The decision to join the third party often will turn on economic considerations such as the threatened bringing of a hull subrogation lawsuit. Where the action has been brought in admiralty under the Death on The High Seas Act, impleading may be unnecessary if damages recovered are allowed to be reduced by the amount of percentage responsibility assigned to the absent defendant.

Practical problems which make trial of a lawsuit in the United States less expeditious and more expensive should be stressed. For example, obtaining evidence in Third World countries, half way around the world, in multiple languages is an expensive, time-consuming and often unproductive process. In addition, translation of documents and testimony can be an awesome burden for American domiciliaries to be forced to undertake.

Application of foreign law can be critically important to a consideration by the court; therefore, it behooves the defendant to undertake a thorough and comprehensive analysis of the conflict of laws and foreign law involved. Invariably, the defendant should not only attempt to show that foreign law does apply but also that the court will be required to use principles of jurisprudence with which it is not familiar and to interpret concepts and rules which it may find altogether quite offensive. Determination of the applicable law may be a tortuous and complicated process. Lamentably, some courts discharge their obligation in this regard simply by throwing up their hands and choosing the law with which they meaningful manner are incorporated into the due process guarantee of the Fifth Amendment. Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The Supreme Court has held that in order to be heard in a meaningful manner, "due process requires that there be an opportunity to present every available defense." Lindsey v. Normet, 405 U.S. 56, 66 (1972). See American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932); Hardy v. Gassendaner, 508 F.2d 1207, 1209 (5th Cir. 1975).

have the greatest familiarity. Equally easy, of course, would be dismissal of the action.

B. Forum Non Conveniens—Transfer

1. History

Prior to 1948 the federal courts had no power to transfer an action to a more convenient forum. The only remedy available was dismissal under the doctrine of forum non conveniens. In order to mitigate this harsh result, yet preserve forum non conveniens as a vehicle of judicial administration, Congress enacted Section 1404(a) of the Judicial Code. The statute provides, “for 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.”

Although section 1404(a) was “drafted in accordance with the doctrine of forum non conveniens,” the Supreme Court in Norwood v. Kirkpatrick concluded that the statute was not merely a codification of the forum non conveniens doctrine and stated:

Congress, in writing 1404(a), which was an entirely new section, was revising as well as codifying . . . . When the harshest part of the doctrine (dismissal) is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff’s choice of forum is not to be considered, but only that the discretion to be exercised is broader.

Like the doctrine of forum non conveniens, section 1404(a) has been construed to apply to proceedings in admiralty as well as to ordinary civil actions.

2. Limitations on the Doctrine

Section 1404(a) specifies that an action may be transferred to

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148 Id.
151 Id. at 32.
any other district court "where it might have been brought." Prior to 1960 the federal courts permitted transfer to a district where jurisdiction and venue were improper, if the defendant sought transfer and consented to such jurisdiction and venue. In *Hoffman v. Blaski*, however, the Supreme Court severely restricted the scope of section 1404(a) and held that the statute authorized transfer only to a district in which jurisdiction over the defendant could have been obtained and venue was proper at the time suit was commenced, regardless of defendant's consent.

The phrase "where the action might have been brought" was further construed by the Supreme Court in *Van Dusen v. Barrack*. In *Van Dusen* the Court held that this phrase referred only to defendant's "suability" under the federal laws of venue, service and jurisdiction, and not to the capacity of plaintiff to bring an action, which was governed by state law.

3. The Applicable Factors

a. Introduction

The factors to be applied under section 1404(a) are essentially the same as those enumerated by the Court in *Gulf Oil Corp. v. Gilbert*. A lesser showing of inconvenience, however, is required under 1404(a) than is necessary under the doctrine of forum non

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154 363 U.S. 335 (1960).
155 Id. at 343. The court, citing Paramount Pictures Inc. v. Rodney, 186 F.2d 111 (3d Cir. 1950), cert. denied, 340 U.S. 953 (1951), stated: But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted. 363 U.S. at 343. See Cessna Aircraft Co. v. Brown, 348 F.2d 689, 691-92 (10th Cir. 1965).
157 Id. at 621. See Farrell v. Wyatt, 408 F.2d 662, 665-66 (2d Cir. 1969).
conveniens,"\(^{159}\) while the discretion to be exercised by the courts under 1404(a) is broader.\(^{160}\)

In *Popkin v. Eastern Airlines,\(^{161}\)* a Pennsylvania district court stated:

A motion to transfer is not susceptible to an exact weighing. The relevant factors remain too vague in application and the value to which they are entitled is at best a calculated guess . . . . Since district judges have not been endowed with Solomonic wisdom we must be content with an inexact balancing.\(^{162}\)

In *Wright v. American Flyers Airlines Corp.* \(^{163}\) a South Carolina district court stated, "t[he burden is upon the movant to show by a preponderance of the evidence that the transfer will serve more conveniently the interests of the parties and witnesses and promote the ends of justice."\(^{164}\) A showing of inconvenience to the defendant is insufficient to warrant transfer where it would merely shift the inconvenience to the other parties.\(^{165}\)

b. Plaintiff's Choice of Forum

In construing section 1404(a) the courts have recognized that although the plaintiff does not have an absolute right to the choice of forum his choice is a factor to be considered and, when other factors are equally balanced, his choice is determinative.\(^{166}\) When


\(^{162}\) Id. at 251.


\(^{166}\) Wright v. American Flyers Airlines Corp., 263 F. Supp. 865, 867 (D.S.C. 1967). See also Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir. 1950) ("Plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered."); Humphreys v. Tann, 13 Av. Cas. 18,229, 18,233 (E. D. Mich. 1976) ("Plaintiff's choice of forum bears considerable weight."); Schin-
the plaintiff's action is brought in his district of residence, the plaintiff's choice of forum becomes a very relevant consideration in weighing the disadvantages to the defendant.\textsuperscript{167} When the plaintiff's action is filed in a district which is not his residence or in a district which has no connection with the litigation, however, the plaintiff's choice of forum is entitled to substantially less consideration.\textsuperscript{168} In \textit{Chicago, Rock Island & Pacific Railroad Co. v. Igoe},\textsuperscript{169} the court stated that the plaintiff's choice of forum "has minimal value where none of the conduct complained of occurred in the forum selected by plaintiff."\textsuperscript{170} The plaintiff's choice of forum is also given less weight when he has freely chosen a different forum in the first instance.\textsuperscript{171}

c. \textit{Convenience of Parties and Witnesses}

In balancing the convenience of parties and witnesses in avia-


Overwhelming balance of convenience of witnesses and parties, as well as sound and efficient judicial administration, dictates the transfer of these two actions to the Northern District of Oklahoma where this large number of cases involving the same crash are pending and will be determined, where the principal acts and omissions alleged to constitute negligence took place, where those who participated in such acts reside and work.

5 Av. Cas. at 18,180.


\textsuperscript{169} 220 F.2d 299 (7th Cir. 1955).

\textsuperscript{170} \textit{Id.} at 304. \textit{See also} Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 954 (9th Cir. 1968); Xerox Corp. v. Litton Ind., 353 F. Supp. 412, 416 (S.D.N.Y. 1973).

\textsuperscript{171} Merrill v. National Airlines, Inc., 8 Av. Cas. 17,192 (S.D.N.Y. 1962). In \textit{Merrill}, plaintiff originally filed wrongful death actions in the Pennsylvania state courts. After the actions had been removed to federal court by defendants, plaintiffs refiled identical actions in the Southern District of New York. \textit{Id.}
tion litigation, the courts examine both the issue of liability and damages. Thus, where the plaintiffs or their decedents are residents of the district and the preponderance of evidence on the issue of damages is located in the plaintiffs' selected forum, some courts have concluded that trial may more conveniently proceed in that district. The issue of damages in aviation tort litigation, however, has been recognized to consume far less time than the issue of liability. Thus the convenience of witnesses testifying to such issues should generally be accorded less weight than convenience of witnesses testifying to liability.

It is well settled that a mere listing of the names and addresses of the witnesses that may be required to testify at trial is insufficient to establish that a transfer based on the convenience of the witnesses is appropriate. As stated by a District of Columbia court, "A defendant moving to transfer on the basis of the convenience of the witnesses must meet its burden of persuasion with precise information." The courts have required that the defendant identify the key liability issues, the key witnesses relative to these issues, the nature of the testimony reasonably anticipated from these witnesses, and how such testimony is relevant or necessary to the key liability issues. If the court discerns that the importance of the identified witnesses' testimony is questionable, such witnesses

176 Petroleum Helicopters De Columbia S.A. v. Textron, Inc., 15 Av. Cas. 18,112, 18,113 (D.D.C. 1980). In Petroleum the court allowed defendant a further opportunity to support his transfer motion "with affidavits identifying particular potential witnesses, specific categories of documents, and their current whereabouts" since the forum selected by plaintiff had no real contact with the operative facts underlying the controversy and it appeared likely that transfer would serve the convenience of the witnesses and parties. Id.
will be accorded little weight.\textsuperscript{178} The qualitative value of the testimony of the liability witnesses, rather than the number of such witnesses, is given greater weight in determining whether transfer will serve the convenience of the witnesses.\textsuperscript{179}

A defendant's ability to transfer on the basis of convenience of the parties and witnesses is considerably greater if wrongful death actions arising out of a foreign accident are brought by foreign plaintiffs rather than American residents and citizens. In \textit{Quandt v. Beech Aircraft Corp.},\textsuperscript{180} the plaintiffs, citizens and residents of West Germany, brought a wrongful death action in the District of Delaware, the defendant's state of incorporation, as a result of an air crash that occurred in Italy.\textsuperscript{181} At the defendant's request, the court transferred the action under section 1404(a) to the district where the aircraft was manufactured and designed. The court concluded that the balance of convenience to parties and to witnesses tipped the scales in favor of transfer.\textsuperscript{182} The court noted that their convenience would not be affected by the choice of forum because the plaintiffs and any witnesses residing outside of the United States would have extensive travel whether the case was tried in Delaware or Kansas.\textsuperscript{183}

The convenience of expert witnesses has been held not to be determinative under section 1404(a) in balancing the convenience of witnesses.\textsuperscript{184} Likewise, the convenience of counsel is not entitled


\textsuperscript{181} Id. at 1013.

\textsuperscript{182} Id. at 1012. See also Petroleum Helicopters De Columbia S.A. v. Textron, Inc., 15 Av. Cas. 18,112 (D.D.C. 1980), an action for property damage brought by plaintiff, a Columbian corporation, arising out of the crash of a helicopter in Columbia, South America. The Court intimated that transfer to the district where the helicopter was designed and manufactured would likely serve the convenience of the parties and witnesses. Id. at 18,113.


to consideration in weighing the balance under 1404(a). In Cressman v. United Airlines, the court stated: "It will almost always be the case that the granting of a transfer motion will inconvenience counsel in the transferor district or necessitate the engagement of new counsel. Were this fact to be accorded much weight in motions of this type, Section 1404(a) would be rendered virtually nugatory."

Under certain circumstances a defendant's offer to defray the plaintiff's expenses in transferring forums may operate in favor of transfer. In Wright v. American Flyers Airline Corp., the court concluded that the defendant's offer to minimize the inconvenience that transfer would impose upon plaintiff by defraying the expense of plaintiffs, their witnesses and their counsel, in conjunction with admitted inconvenience to many of the liability witnesses, tipped the scales in favor of transfer. Where the balance of interest weighs strongly in favor of plaintiff, however, a defendant's offer to pay the plaintiff's expenses will have a much lesser effect.

Some courts have concluded that when the liability witnesses who are significant and who are allegedly inconvenienced are under the defendant's control, this militates against transfer. The courts have simply reasoned that such witnesses could be transported to

187 Id. at 407. In Danon v. United States, 9 Av. Cas. 17,206 (S.D.N.Y. 1964), however, the defendants delayed 14 months in making a motion to transfer and plaintiff's attorneys prepared for trial during this delay. The Court ordered that the transfer motion under Section 1404(a) be granted conditioned upon defendant's payment to plaintiff of reasonable attorney's fees for services performed by New York counsel for plaintiff. For an argument that convenience of counsel should be entitled to consideration by the courts, see Federal Transfer, supra note 153, at 627-28.
188 For an analysis of when defendant's offer to defray plaintiff's expenses may tip the scales in favor of transfer, see Federal Transfer, supra note 153, at 631-38.
191 See Federal Transfer, supra note 153, at 637-38.
the forum selected by plaintiff at a minimum of inconvenience and expense to the defendants, especially when the defendant is an airline operator. One court, however, has recognized that although the defendant may be able to transport such witnesses under its control at a minimum of inconvenience, such witnesses themselves will be inconvenienced by trial in the forum selected by plaintiff.

d. Interest of Justice

In aviation tort litigation the primary factor the courts have considered in determining whether the interests of justice will be served by transfer has been the effect of other pending actions. When other actions arising from the same aircrash are pending in the district selected by the plaintiff, or in the state courts encompassed within that federal district, the courts have often concluded that this weighs against transfer. The court has been unable to discern how the defendant would be prejudiced or inconvenienced when other actions with nearly identical issues will be tried in either the same forum selected by the plaintiff or a nearby forum. The possibility of consolidation with related actions advances the strong public

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In Bush, the court stated:

The defendant is engaged in an extensive nationwide business of transporting passengers by air. In operating a business of this nature, it is reasonable to expect the defendant to anticipate the hazard and expense of suits filed against it at various points over the territory in which it operates. Moreover, the defendant should expect that such suits will require the transportation of such of its employees as it must call as witnesses to the places of trial. The matter of the transportation of witnesses would pose a problem more easily solved by the defendant than by the plaintiff. The fortuitous circumstances that this accident occurred through a collision with a mountain in Wyoming should not operate to deprive the plaintiff of her choice of forum.

148 F. Supp. at 105.


policy of avoiding duplicitous litigation and inconsistent determinations, and thus represents a preferable alternative to transfer in such situations. On the other hand, when many other actions arising from the same aircrash are pending in the proposed transferee forum, the courts have often concluded that this operates in favor of transfer. Transfer, in such circumstances, will accomplish the strong policy favoring the litigation of related claims in the same tribunal. In addition, the possible consolidation in the transferee forum will serve the interests of expediency and will lessen the expense to the courts and the parties.

Despite the presence of other actions pending in the proposed transferee forum, some courts have concluded that this does not necessarily operate in favor of transfer. These courts have reached their conclusion for the following reasons: (1) the transferee court may not necessarily consolidate the actions; (2) actions pending in other districts may not necessarily be transferred to the

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The benefits and advantages to all parties in having the related actions considered in one jurisdiction under one judge are obvious. Pre-trial proceedings can be conducted more efficiently, duplication of time and effort can be avoided and the benefit to witnesses and to the parties calling them and having them attend only once at one location is plain. Furthermore, to require defendants to re-litigate the issue of liability in a number of forums would be vexatious and would not serve the ends of justice. The transfer of this case to the District Court sitting in Chicago is in the interest of sound judicial administration as well as speedier and more efficient disposition of the mass of litigation arising out of this accident. The phrase in § 1404(a) “in the interest of justice” requires that “[b]oth the interest of the parties to the lawsuit as well as society in general should be considered.”

202 F. Supp. at 313.
proposed transferee forum;\textsuperscript{203} (3) practical solutions to the multifarious problems of duplication and inconvenience during pre-trial procedure exist;\textsuperscript{204} (4) consolidation with the actions pending in the proposed transferee forum may be impossible due to juror confusion resulting from the application of differing state substantive laws of liability at trial, as required by \textit{Van Dusen};\textsuperscript{205} (5) the issue of damages requires separate trials;\textsuperscript{206} (6) the benefits of consolidation may be achieved without transfer since a verdict unfavorable to defendant in the transferee forum may be determinative of the liability issues in the transferor forum under collateral estoppel principles.\textsuperscript{207} Other considerations which may bear on the interest of justice and which may influence transfer include the inability to implead third parties in the forum selected by the plaintiff,\textsuperscript{208} the application of foreign law in the forum selected by the plaintiff,\textsuperscript{209} and the congestion of the docket in the forum selected by the plaintiff.\textsuperscript{210}

4. Pitfalls, Traps and Other Opportunities

In making a 1404(a) transfer motion it is incumbent upon the defendant to remember that its burden of persuasion must be met


\textsuperscript{207} Id. at 750-51; Schmidt v. American Flyers Airline Corp., 260 F Supp. 813, 816 (S.D.N.Y. 1966). It should be noted that the cases cited in notes 197-203 were decided prior to the enactment of 28 U.S.C. § 1407 (1976) which provides for pretrial consolidation of multi-district litigation.


with precision and specificity. Once again, a laundry list of witnesses and their addresses will prove insufficient. The defendant should identify the critical issues, witnesses and the nature of the testimony reasonably anticipated from such witnesses. Damages should be down-played, especially when the plaintiff is a resident of the forum and argues that many of the witnesses regarding damages reside locally. The court must be persuaded that this is not a "wink" motion, where aggressive oral argument is accompanied by the crossed fingers of an attorney who does not wish to "lose" the case to another law firm. Sometimes this reluctance can and should be addressed explicitly, especially where courts mention their own reluctance to give up "interesting" cases.

One final danger which should be mentioned is that of making a 1404(a) motion prior to making a forum non conveniens dismissal motion. In *Reyno v. Piper Aircraft Co.*, arising out of the crash of a Piper aircraft in Scotland, a wrongful death action was filed in the California state court. The plaintiff was a California resident and the personal representative of the estates of various Scottish decedents. The defendants, after removing the case to federal court, successfully moved to transfer the litigation to the Middle District of Pennsylvania under 1404(a). After the litigation had been transferred to the federal court in Pennsylvania, defendants then moved to dismiss on forum non conveniens grounds. Their motion was granted by the court.

Plaintiff argued on appeal that the district court erred in not considering whether the defendants were equitably estopped from moving to dismiss. The court gave serious consideration to this argument and concluded:

Although a party who moves for transfer under Section 1404(a) will not be automatically estopped to assert forum non conveniens after a transfer is accomplished, the fact that a party previously succeeded in a statutory transfer ought to be weighed against dis-

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212 Id.
213 Id.
214 Id.
215 Id.
216 Id. at 150.
missing for forum non conveniens and as adding to a defendant's already substantial burden on a later motion.\(^\text{217}\)

In order to overcome this added burden, the defendant may plead that new facts bearing on the motion to dismiss on forum non conveniens grounds were discovered after the 1404(a) motion was made in the transferor court. A showing that defendant's fuller knowledge of the relevant facts has been acquired as a result of more thorough research, however, is not likely to be received sympathetically by the court.\(^\text{218}\) The defendant possibly can avoid this danger by specifically reserving the right to make a forum non conveniens dismissal motion after the litigation has been transferred under section 1404(a). To accomplish this, the defendant should clearly represent to the court hearing the 1404(a) motion that the other United States forum is the most convenient place to try the case only if it is to be tried in this country.

A better approach may be to make a section 1404(a) motion in the alternative with a forum non conveniens dismissal motion. In \textit{Macedo v. The Boeing Co.},\(^\text{219}\) wrongful death actions arising out of the crash of a Portuguese airliner in Portugal were brought against the foreign airline and the manufacturers, including Boeing, in the federal district court in Illinois.\(^\text{220}\) The defendants moved for dismissal of the litigation under the doctrine of forum non conveniens.

\(^{217}\text{Id. at 151. The Reyno court cited Insurance Co. of North America v. Ozean-Stinnes-Linien, 367 F.2d 224 (5th Cir. 1966) where an insurance company, as subrogee of a Swiss shipper, brought an action in admiralty for damages to cargo in shipment against a German association. The action was originally commenced in the Eastern District of Louisiana, New Orleans. The litigation was subsequently transferred under section 1404(a) to the Southern District of Georgia, Savannah Division. After transfer, the federal court in Georgia granted defendant's motion to decline jurisdiction on forum non conveniens grounds. On appeal, the court held that defendant should not be permitted, after securing a section 1404(a) transfer from Louisiana to Georgia, to contend that Georgia was not really an appropriate forum. The court concluded that defendant may not "so trifle with the judicial process." 367 F.2d at 227. Language in the court opinion, however, implied that defendant may reserve the right to file a motion to dismiss. In order to do so, a defendant apparently must assert in the section 1404(a) motion that the suggested transferee forum within the United States is the most convenient place to try the case only if it is to be tried in this country. Id. Cf. Grodinsky v. Fairchild Indus., Inc., 507 F. Supp. 1245, 1248 (D. Md. 1981) (defendant, having moved for dismissal in the original forum, preserved his right to file a motion to dismiss in the transferee forum).}

\(^{218}\text{630 F.2d at 150-51.}

\(^{219}\text{15 Av. Cas. 18,032 (N.D. Ill. 1980).}

\(^{220}\text{Id.}
VENIENS OR, IN THE ALTERNATIVE, FOR TRANSFER OF THE LITIGATION UNDER 1404(a). ALTHOUGH THE PACIFIC NORTHWEST WAS THE PRINCIPAL PLACE OF BUSINESS OF SEVERAL DEFENDANTS, THE COURT STATED THAT "SEATTLE, WASHINGTON [WAS] NOT A SIGNIFICANTLY MORE CONVENIENT FORUM" AND THEREFORE GRANTED DEFENDANTS' MOTION TO DISMISS. THUS, THE MERE EXISTENCE OF AN ALTERNATIVE FEDERAL FORUM WILL BE INSUFFICIENT TO PRECLUDE A DISMISSAL ON FORUM NON-CONVENIENS GROUNDS, WHEN DEFENDANT MAKES A 1404(a) TRANSFER MOTION IN THE ALTERNATIVE WITH A DISMISSAL MOTION.

C. Coordination and Consolidation of Pre-Trial Proceedings—Section 1407

1. History

Due to congestion in the federal court system caused by multiple anti-trust suits brought against the electric equipment industry, and the limitations of section 1404(a) to consolidate efficiently such litigation, Congress, in 1968, enacted Section 1407 of the Judicial Code. This statute established the Judicial Panel on Multidistrict Litigation and the procedures for coordinated or consolidated pre-trial proceedings in multidistrict litigation. Section 1407(a) provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pre-trial proceedings. Such transfer shall be made by the Judicial Panel on Multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pre-trial proceedings to the district from which it was transferred unless it shall have been previously terminated...

Although the statute was not specifically designed for aviation disaster litigation, it has been liberally resorted to by the Panel and litigants in aircrash cases.

231 Id. at 18,035 (emphasis added).
2. Applicable Factors

Transfer for coordinated or consolidated pre-trial proceedings is permitted under section 1407 when (1) there exists one or more common questions of fact; (2) transfer would be for the convenience of the parties and witnesses; and (3) transfer would promote the just and efficient conduct of the actions. Although "each [§ 1407] application must be considered upon its merits and in relation to particular problems in the various pending suits which are the subject of the motion for consolidation or coordinated pre-trial proceedings," the question of whether the pending actions should be transferred is rarely disputed in multi-district aviation disaster litigation. The Panel has concluded summarily that air

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225 In Re Air Crash Disaster at Falls City, Nebraska on August 6, 1966, 298 F. Supp. 1323, 1324 (J.P.M.D.L. 1969).
226 In Re Air Crash Disaster Near Saigon, South Vietnam, on April 4, 1975, 404 F. Supp. 478, 479 (J.P.M.D.L. 1975); In Re Air Crash Disaster Near Upper-ville, Virginia, on December 1, 1974, 393 F. Supp. 1089 (J.P.M.D.L. 1975). In Re Air Crash Disaster in the Ionian Sea on September 8, 1974, 407 F. Supp. 238.

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224 Id. One commentator has stated that the grounds sufficient for transfer under section 1407 differ markedly from those under section 1404(a). The primary purpose of 1407 is judicial efficiency and weight will be given to those factors which bear directly on the smooth administration of the pre-trial proceedings. Although the convenience of the parties and witnesses is a factor under 1407, it should not be a controlling factor. And in contrast to 1404(a), the Panel need not give any weight to the plaintiff's initial venue selection. See Comment, The Search For The Most Convenient Federal Forum: Three Solutions To The Problems Of Multi-District Litigation, 64 Nw. U. L. Rev. 188, 195-96 (1969) [herein-after referred to as The Search For the Most Convenient Federal Forum].
disaster litigation clearly meets all three requirements for section 1407 applicability.\textsuperscript{227} One commentator has even noted that the Panel “will presume that it should order a transfer in disaster litigation.”\textsuperscript{228}

Despite the Panel’s tendencies to transfer aviation disaster litigation under section 1407 for coordinated or consolidated pre-trial proceedings, transfer has been denied under certain circumstances. The Panel has denied transfer of aviation disaster litigation when the following conditions existed: (1) substantial venue and service questions remain unresolved;\textsuperscript{229} (2) extensive pre-trial discovery had been completed;\textsuperscript{230} (3) many plaintiffs had settled their claims;\textsuperscript{231} (4) only a few actions were pending;\textsuperscript{232} (5) the pending

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(\textsuperscript{J.P.M.D.L. 1974}, the Panel noted that “the existence of common questions of fact among these actions, as is usually the case in multi-district air disaster litigation, is readily apparent.” 407 F. Supp. at 239.

\textsuperscript{227} In Re Air Crash Disaster Near Saigon, South Vietnam, on April 4, 1975, 404 F. Supp. 478, 479 (J.P.M.D.L. 1975).

\textsuperscript{228} Comment, Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed In Light of Rule 42(a) and 28 U.S.C. Section 1404(a), 22 Hastings L.J. 1289, 1311-12 (1971) [hereinafter cited as Consolidation and Transfer].

\textsuperscript{229} In Re Air Crash Disaster at Falls City, Nebraska on August 6, 1966, 298 F. Supp. 1323, 1324 (J.P.M.D.L. 1969). The Panel there stated that “[s]uch undetermined issues will not be resolved by a transfer under Section 1407, whereas transfers to the Southern District of New York under Section 1406, if warranted, will resolve the venue and service problems now existing in some of those cases.” Id. at 1324.

\textsuperscript{230} Id. But see In re Air Crash Disaster Near Pellston, Michigan, on May 9, 1970, 357 F. Supp. 1286, 1287 (J.P.M.D.L. 1973).

\textsuperscript{231} In Re Air Crash Disaster at Falls City, Nebraska on August 6, 1966, 298 F. Supp. 1323, 1324 (J.P.M.D.L. 1969).

\textsuperscript{232} In Re Air Crash Disaster at Anchorage, Alaska on November 27, 1970, 342 F. Supp. 755, 756 (J.P.M.D.L. 1972). In In re Anchorage, three actions arising out of the crash of a military charter flight operated by Capitol International Airways, wherein forty-seven persons suffered fatal injuries, eighteen persons suffered serious injuries and thirty-four persons suffered minor injuries, were pending in three different districts. The Panel stated, “We think it premature to decide the question of transfer and to choose a transferee district until more actions have been filed.” Id. at 756. But see In Re Air Crash Disaster Near Saigon, South Vietnam, on April 4, 1975, 404 F. Supp. 478 (J.P.M.D.L. 1975), where five actions were pending in five different districts arising out of the crash of a Lockheed C-5A aircraft in which over 155 persons suffered fatal injuries. The Panel rejected plaintiff’s claim that transfer under Section 1407 would be premature and stated:

Although additional actions will likely be filed in this litigation, there has been sufficient development so that an informed decision on the propriety of transfer and the appropriate transferee court can be made. And, we note, there are well established procedures
actions raised substantially different questions of fact;\textsuperscript{233} or (6) the possibility of duplicative discovery could be easily avoided through cooperative efforts among the parties.\textsuperscript{234} The Panel has also vacated conditional transfer orders of tag-along\textsuperscript{235} cases where liability is admitted by the defendant\textsuperscript{236} and where pre-trial proceedings in the transferee forum concerning the common issue of liability have been concluded.\textsuperscript{237} The requirement of commonality of factual issues will not be deemed to have been subverted by the presence of differing legal theories with regard to the liability of the aircraft manufacturer, the airline and the individual airline employees.\textsuperscript{238} The Panel has concluded that consolidation of actions brought by survivors of the crew of the aircraft and actions brought by survivors of passengers onboard the aircraft, where differing legal the-

\textsuperscript{233} In Re Air Crash Disaster Near Natchitoches Parish, Louisiana, on September 20, 1973, 391 F. Supp. 765 (J.P.M.D.L. 1975). In In Re Natchitoches three actions arising out of the crash of an aircraft into a tree on take off were pending in two districts. Two of the actions were instituted against the owner and operator of the crash aircraft under a theory of negligent operation. The other remaining action was instituted against the owner and maintainer of the airport under a theory of negligence due to his failure to cut down, mark or advise pilots of the trees near the end of the runway. The Panel found that the actions raised substantially different questions of fact and therefore transfer was not justified. \textit{Id.} at 766-67.

\textsuperscript{234} Id. But see In Re Aircrash Near Van Cleve, Mississippi, on August 13, 1977, 15 Av. Cas. 18,072 (J.P.M.D.L. 1980), where the Panel rejected defendant's argument that voluntary cooperation among the parties in courts involved in the litigation was a viable and preferable alternative to a Section 1407 transfer. The Panel stated, "While voluntary coordination of pretrial efforts is always commendable, transfer of these actions to a single district under Section 1407 will ensure the streamlining of discovery and all other pretrial proceedings." \textit{Id.} at 18,073.

\textsuperscript{235} Rule 1 of the Rules of Procedure of the Judicial Panel on Multi-District Litigation defines "tag-along" action as a civil action involving common questions of fact with actions previously transferred under Section 1407.

\textsuperscript{236} In Re Air Crash Disaster at Pago Pago, American Samoa, on January 30, 1974, 394 F. Supp. 799 (J.P.M.D.L. 1975).

\textsuperscript{237} In Re Air Crash Disaster Near Upperville, Virginia on December 1, 1974, 430 F. Supp. 1295 (J.P.M.D.L. 1977).

ories were pursued, would not be prejudicial and therefore has refused to sever such actions.\textsuperscript{229}

3. Selecting the Transferee Forum

In contrast to section 1404(a), actions subject to section 1407’s procedures may be transferred to any district regardless of where they “might have been brought.”\textsuperscript{340} Thus, actions may be transferred under section 1407 to any district even though venue and jurisdiction would not exist in the transferee district.\textsuperscript{41} Although section 1407 offers no guidelines in selecting the transferee forum, the Panel has developed criteria for selecting the transferee district in aviation disaster litigation. These criteria distinguish between accidents that occur within the United States and accidents that occur outside of the United States.\textsuperscript{243}

a. Domestic Accidents

For aviation accidents occurring within the United States, the Panel has frequently chosen the forum where the accident occurred.\textsuperscript{243} The Panel’s proclivity to transfer to the situs of the crash

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\textsuperscript{229} In Re Air Crash Disaster at the Greater Cincinnati Airport on November 8, 1965, 295 F. Supp. 51 (J.P.M.D.L. 1968). See In Re Air Crash Disaster at Paris, France, on March 3, 1974, 386 F. Supp. 1404, 1405 (J.P.M.D.L. 1975), where the Panel noted that “Plaintiffs [representing deceased crew members] fear of conflict in the transferee district between themselves and plaintiffs representing deceased passengers is unwarranted. The transferee judge has considerable flexibility in supervising the pretrial proceedings to insure that any conflicting interests among the various plaintiffs are accommodated.” 386 F. Supp. at 1405.


\textsuperscript{241} In Re Air Crash at Schenley Golf Course, Pittsburgh, Pennsylvania, on August 21, 1977, 510 F. Supp. 1228, 1231 (J.P.M.D.L. 1979).

\textsuperscript{242} The commentators have proffered a number of practical considerations for selection of the transferee forum in aviation disaster litigation. See Farrell, Multi-District Litigation in Aviation Accident Cases, 38 J. AIR L. & COM. 159, 163 (1972); Atkins, An Apologia for Transfer of Aviation Disaster Cases Under Section 1407, 38 J. AIR L. & COM. 205, 210-11 (1972).

\textsuperscript{243} In Re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 407 F. Supp. 244, 246 (J.P.M.D.L. 1976); In Re Air Crash Disaster Near Upperville, Virginia, on December 1, 1974, 393 F. Supp. 1089, 1090 (J.P.M.D.L. 1975); In Re Delta Airlines Crash at Boston, Massachusetts, on July 31, 1973, 373 F. Supp. 1406 (J.P.M.D.L. 1974); In Re Air Crash Disaster Near Coolidge, Arizona, on May 6, 1971, 362 F. Supp. 572 (J.P.M.D.L. 1973); In
"is grounded on the belief that discovery proceedings on the common issue of liability can ordinarily be most effectively and expeditiously supervised in that district." The Panel has deviated from the "situs of the crash" rule on occasion, utilizing a number of different criteria to select the transferee forum. In some instances the Panel has applied the same policy considerations that underlie the "situs of the crash" rule and has selected the forum where the majority of documents and witnesses relative to the liability issues were located. For example, in In Re Air Crash Disaster Near Atlantic City, New Jersey and In Re Air Crash Disaster at Las Vegas, Nevada the Panel transferred multi-district actions to districts where the documents and witnesses concerning the design and manufacture of the aircraft were located. In Re Air Crash Disaster Near Van Cleve, Mississippi the Panel therefore

Re Air Crash Disaster at Florida Everglades on December 29, 1972, 360 F. Supp. 1394 (J.P.M.D.L. 1973); In Re Air Crash Disaster at Huntington, West Virginia on November 14, 1970, 342 F. Supp. 1400, 1402-03 (J.P.M.D.L. 1972); In Re Mid-Air Collision Near Fairland, Indiana on September 9, 1969, 309 F. Supp 621, 622-23 (J.P.M.D.L. 1970).

In Re Air Crash Disaster Near Atlantic City, New Jersey, on July 26, 1969, 352 F. Supp. 969, 971 (J.P.M.D.L. 1973); In Re Air Crash Disaster at Las Vegas, Nevada on October 8, 1968, 336 F. Supp. 414, 415 (J.P.M.D.L. 1972).

15 Av. Cas. 18,072 (J.P.M.D.L. 1980).
transferred the actions to the more centrally located and easily accessible forum in order to further the most expeditious resolution of the actions.\textsuperscript{240}

In some instances the Panel has inexplicably varied from the policy considerations that underlie the "situs of the crash" rule and has applied other criteria. These include: (1) where the majority of other actions were pending;\textsuperscript{250} (2) where discovery was advanced and where the transferee judge was familiar with the issues raised in the litigation;\textsuperscript{251} and (3) where there existed an opportunity to coordinate discovery with pending state court actions.\textsuperscript{252} When actions have been transferred under section 1404(a) prior to the Panel's transfer determination, the district selected under 1404(a) considerations will be given deference by the Panel in making its determination.\textsuperscript{253}

b. Foreign Accidents

Different approaches have been developed by the Panel for foreign accidents, since the Panel may not transfer actions to the situs of the crash when the accident has occurred outside of the United States.\textsuperscript{244} No general rule, however, has yet emerged with respect to the Panel's selection of a transferee forum in litigation involving overseas air disasters.\textsuperscript{255} The recent trend of the Panel

\textsuperscript{240} Id. at 18,073-74.
\textsuperscript{250} See In Re Air Crash Disaster Near Upperville, Virginia, on December 1, 1974, 393 F. Supp. 1089, 1090 (J.P.M.D.L. 1975); In Re Mid-Air Collision near Fairland, Indiana on September 9, 1969, 309 F. Supp. 621, 622 (J.P.M.D.L. 1970).
\textsuperscript{251} In Re Air Crash Disaster Near Pellston, Michigan, on May 9, 1970, 357 F. Supp. 1286, 1287 (J.P.M.D.L. 1973); In Re Air Crash Disaster Near Atlantic City, New Jersey, on July 26, 1969, 352 F. Supp. 969-71 (J.P.M.D.L. 1973).
\textsuperscript{252} In Re Air Crash Disaster at Florida Everglades on December 29, 1972, 360 F. Supp. 1394, 1395-96 (J.P.M.D.L. 1973); In Re Air Crash Disaster Near Silver Plume, Colorado, on October 2, 1970, 352 F. Supp. 968, 969 (J.P.M.D.L. 1972).
\textsuperscript{253} In Re Air Crash Disaster Near Hanover, New Hampshire, on October 25, 1968, 314 F. Supp. 62, 63 (J.P.M.D.L. 1970).
\textsuperscript{244} The Panel has noted that "the mere proximity of the East Coast to the situs of the crash, however, is not in and of itself a persuasive reason to support transfer of all actions to an East Coast forum." In Re Air Crash Disaster at Paris, France, on March 3, 1974, 376 F. Supp. 887, 888 (J.P.M.D.L. 1974).
\textsuperscript{255} See In Re Air Crash Disaster Near Santa Cruz Airport, Bombay, India on January 1, 1978, 463 F. Supp. 158, 159 (J.P.M.D.L. 1979); In Re Air Crash Disaster at Taipei International Airport on July 31, 1975, 453 F. Supp. 1120, 1121 (J.P.M.D.L. 1977); In Re Air Crash Disaster Near Saigon, South Vietnam, on April 4, 1975, 404 F. Supp. 478, 479 (J.P.M.D.L. 1975).
has been to follow the policy behind the “situs of the crash” rule and transfer actions to the forum that appears to have the greater nexus to the liability phase of the litigation. In In Re Air Crash Disaster Near Bombay, India, an Air India 747 jumbo jet crashed shortly after take-off from the Santa Cruz airport, Bombay, India, killing all 213 persons onboard. Shortly thereafter, sixty-three actions were instituted in the Central District of California and two actions were instituted in the district court of the District of Columbia against the Boeing Company, the manufacturer of the aircraft, and Lear Siegler, Inc., the manufacturer of component parts of the aircraft. Although most of the actions were pending in the Central District of California and the judge who assigned those actions had considerable prior experience with air disaster litigation, the Panel found that the Western District of Washington, the district in which the aircraft had been manufactured, “ha[d] the most substantial connection to the common factual questions raised in [the] litigation.” Despite the Panel’s noted reluctance

In Re Air Crash Disaster at Tenerife, Canary Islands on March 27, 1977, 435 F. Supp. 927, 929 (J.P.M.D.L. 1977); See In Re Air Crash Disaster Near Santa Cruz Airport, Bombay, India on January 1, 1978, 463 F. Supp. 158, 159 (J.P.M.D.L. 1979); In Re Air Crash Disaster at Taipei International Airport on July 31, 1975, 433 F. Supp. 1120, 1122 (J.P.M.D.L. 1977); In Re Air Crash Disaster at Paris, France, on March 3, 1974, 376 F. Supp. 887, 888 (J.P.M.D.L. 1974). In In Re Tenerife, the Panel concluded that a New York forum would have a greater nexus than a California forum and stated:

The surviving pilot and the first officer of the Pan Am aircraft reside in the New York area and are key witnesses. Also important are investigators of the collision from the Federal Aviation Administration and the National Transportation Safety Board, who apparently reside in either the New York area or the Washington, D.C. area. In addition, Pan Am’s headquarters are located in New York and, as certain defendants and plaintiff represent, many of the relevant documents and witnesses will be found in the New York vicinity.

435 F. Supp. at 929.


435 F. Supp. at 929. The Panel premised their finding on the following:

Boeing is headquartered in that district and the aircraft involved in this crash was manufactured there. As a result, Boeing’s documents and personnel relating to the design, manufacture and testing of the aircraft are located there. Moreover, the Federal Aviation Administration’s Regional Office that has custody of the records relating to certification of the aircraft is located there, and Boeing employees who participated in the on-site investigation of the accident can be found there.

Id.
to transfer actions to a district in which no related action was pending,259 the Panel in In Re Air Crash Disaster Near Bombay, India concluded that appropriate circumstances existed warranting such a transfer and for the first time transferred aviation disaster litigation to a district where no actions were pending.260 The Panel concluded that, not only did the Western District of Washington have the most substantial connection to the common factual questions, but none of the other districts in which the actions were pending offered a strong nexus to such questions.261

In earlier cases the Panel applied other criteria in determining the transferee forum. The Panel, in such cases, had focused on the following criteria: (1) where the majority of other actions were


260 In Re Sundstrand five actions concerning the validity of certain Sundstrand patents were brought in four federal districts, two in Oklahoma and one each in Florida, Illinois and Iowa. All parties agreed that the five actions should be consolidated pursuant to Section 1407 and, except for Sundstrand, argued for transfer to the Western District of Washington, where Sundstrand had its principal place of business. The Panel transferred the actions to the Western District of Washington, where no related actions were pending, and stated:

None of the districts in which actions are pending offers a strong nexus to the common factual questions in this litigation and little discovery on those issues could be expected to occur in any of them. Nor, by counsel for SDC's admission at the hearing of this matter could pre-trial proceedings be characterized as significantly further advanced in any one particular district .... The Western District of Washington, however, has a substantial connection to the common factual questions raised in the litigation. SDC's principal place of business is located in that District and it is undisputed that many of the ground proximity warning systems chief inventors reside there. Additionally, it appears that records relating to flight tests of SDC's ground proximity warning system are located at the FAA's Regional Office in Seattle. All parties also agree that discovery regarding the development of the ground proximity warning system will be taken from the Boeing Company, an aircraft concern which is headquartered in the Western District of Washington as well as from SDC. Thus, we are persuaded that most of the relevant documents and witnesses on the central issue of the validity of SDC's patents are located in the vicinity of that District. Moreover, several parties represent that significant discovery on anti-trust issues involved in this litigation will also focus on the SDC documents found in the Seattle area.

433 F. Supp. at 1021.

261 Id. at 159.
pending;\textsuperscript{202} (2) where discovery and pre-trial proceedings were advanced;\textsuperscript{203} (3) where there existed an opportunity to coordinate discovery with pending state court actions;\textsuperscript{204} (4) where the docket of the court was less congested;\textsuperscript{205} (5) where the convenience of the transferee judge would best be served;\textsuperscript{206} and (6) where the transferee judge was experienced with air disaster litigation or was familiar with the issues.\textsuperscript{207}

4. Remand at Conclusion of the Pre-Trial Proceedings

Section 1407 explicitly provides that, at or before the conclusion of the pre-trial proceedings, each action transferred under the statute \textit{shall} be remanded by the Panel to the district from which it was transferred.\textsuperscript{208} Despite this clear statutory mandate, the operational effect has been the absence of remand upon the completion of pre-trial proceedings. Thus, although the Panel's initial transfer determination under section 1407 is not affected by the possibility of a subsequent section 1404(a) transfer for the purposes of trial by the transferee judge,\textsuperscript{209} section 1407 effectively determines the district in which the litigation will be tried.

The reasons actions have not been remanded by the Panel after a section 1407 transfer are generally twofold. First, upon comple-

\textsuperscript{202} In Re Air Crash Disaster in the Ionian Sea on September 8, 1974, 407 F. Supp. 238, 240 (J.P.M.D.L. 1974) (the Panel's decision was also colored by the fact that some discovery had already advanced and that a substantial amount of additional discovery would occur in the transferee district); In Re Air Crash Disaster Near Saigon, South Vietnam, on April 4, 1975, 404 F. Supp. 478, 480 (J.P.M.D.L. 1975) (the Panel's decision was again influenced by the fact that discovery would be sought in the transferee forum); In Re Air Crash Disaster at Bali, Indonesia, on April 22, 1974, 400 F. Supp. 1402, 1403 (J.P.M.D.L. 1975).

\textsuperscript{203} In Re Air Crash Disaster Near Santa Cruz Airport, Bombay, India on January 1, 1978, 463 F. Supp. 158, 159 (J.P.M.D.L. 1979); In Re Air Crash Disaster in the Ionian Sea on September 8, 1974, 407 F. Supp. 238, 240 (J.P.M.D.L. 1974).

\textsuperscript{204} In Re Air Crash Disaster at Tenerife, Canary Islands on March 27, 1977, 435 F. Supp. 927, 929 (J.P.M.D.L. 1977).

\textsuperscript{205} In Re Air Crash Disaster at Taipei International Airport on July 31, 1975, 433 F. Supp. 1120, 1122 (J.P.M.D.L. 1977).

\textsuperscript{206} In Re Air Crash Disaster at Pago Pago, American Samoa, on January 30, 1974, 383 F. Supp. 501, 502 (J.P.M.D.L. 1974).

\textsuperscript{207} In Re Air Crash Disaster Near Papeete, Tahiti, on July 22, 1973, 397 F. Supp. 886, 887 (J.P.M.D.L. 1975).

\textsuperscript{208} 28 U.S.C. § 1407(a) (1976).

\textsuperscript{209} In Re Air Crash Disaster at Toronto International Airport on July 5, 1970, 346 F. Supp. 533, 534 (J.P.M.D.L. 1972).
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tion of discovery and pre-trial proceedings in the transferee forum, a trial on the merits may no longer be necessary because the defendants have either admitted liability or agreed not to contest liability pursuant to a contribution formula. Second, the transferee judge may determine the substantive liability or damages issue by the use of the following procedures: (1) motion for summary judgment or partial summary judgment; \(^{270}\) (2) transfer of all the 1407 consolidated cases to himself under section 1404(a) for purposes of trial; \(^{271}\) (3) consolidated trial of the liability issues pursuant to the parties' consent; \(^{272}\) or (4) trial of a test case originally brought in the transferee court.

Although the commentators have questioned critically the practice of the transferee courts which transfer actions previously assigned under section 1407 to themselves under section 1404(a)

\(^{270}\) Reidinger v. Trans World Airlines, Inc., 463 F.2d 1017, 1018 n.2 (6th Cir. 1972). With regard to the power of the transferee court under Section 1407 to grant summary judgment the court in Reidinger stated: "The legislative history indicates that the power to conduct civil pre-trial proceedings includes the power to consider motions for summary judgment: under the Federal rules the transferee district could have authority to render summary judgment ... 1968 U.S. Code Congressional and Administrative News, p. 1900." Id.

Rule 11 of the Rules of Procedure of the Judicial Panel on Multi-District Litigation provides: "In the absence of unusual circumstances—(a) Actions terminated in the transferee court by valid judgment, including but not limited to summary judgment ..., shall not be remanded by the Panel and shall be dismissed by the transferee court." 28 U.S.C. § 1407 (1976).


Rule 11(b), of the Rules of Procedure of the Judicial Panel on Multi-District Litigation provides:

Each transferred action that has not been terminated in the transferee court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. In the event that the transferee judge transfers an action under 28 U.S.C. §§ 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial.


for purposes of trial, the power of the transferee courts to accomplish this result is well settled. In *In Re Air Crash Near Duarte, California* the court ordered *sua sponte* that the actions assigned for purposes of consolidated pre-trial proceedings be transferred to itself for purposes of trial on all issues under section 1404(a). The court reasoned that:

There is only one operative set of facts for the determination of liability. To remand the cases to the various courts for trial after the completion of discovery would require trials on the merits in three different districts. No matter how much some counsel may puff their own claims of ability to secure swift judgment on liability in such cases and demean all other counsel's ability, the raw, hard, and inescapable fact is that such trials, at best, require extensive and intensive preparation and skill and are usually prolonged, and may produce different results in different districts. Such a result in this case is certainly not "in the interest of justice" nor "for the convenience of witnesses."

The transferee court's use of section 1404(a), however, is subject to the limitation embodied in the statute: the transferee court must be a district where the actions "might have been brought."

The facts weighed by the transferee court in determining whether to transfer the assigned actions to itself for purposes of trial under section 1404(a) tend to be different than those normally employed by the transferor judge. The transferee judge, who is primarily interested in efficient judicial administration, inevitably considers his own convenience in making the transfer determination at the expense of the convenience of the parties. Contrary

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274 See note 271 supra.
276 *Id.* at 1016
277 *Id.*
278 See notes 153-57 supra and accompanying text.
279 Kalinowski, supra note 273, at 199-200; *The Experience of the Transferee Courts*, supra note 273, at 607.
280 Kalinowski, supra note 273, at 199-200; *The Experience of the Transferee Courts*, supra note 273, at 607.
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to the dictates of section 1404(a), "the important and controlling factor [seems to be] whether the transferee judge who conducts the pre-trial proceedings wants to try the cases."^281

A request that the Panel determine the propriety of remand at the time the section 1407 transfer motion is heard has been held to be fatally premature. An early determination by the Panel would infringe upon the transferee judge's discretion to make orders he deems appropriate to effectuate the expeditious and harmonious conduct of the litigation. Likewise, a request for remand after a section 1407 transfer is ordered may be premature when notice of suggestion of remand from the transferee judge to the Panel is absent. When the movant has failed to meet the strong burden of persuasion to show that remand is proper, the motion, of course, will be denied.

A recent case to consider the power of a court to order the remand of actions transferred under section 1407 is In re Air Crash Disaster at John F. Kennedy International Airport. In Kennedy, numerous actions pending in four federal districts and arising from the crash of an Eastern Airlines 727 jet were transferred under section 1407 to the Eastern District of New York for consolidated and coordinated pre-trial proceedings. Thereafter, the transferee court transferred the actions assigned under section 1407 to itself for trial of the liability issues pursuant to section 1404(a). The transfer for purposes of trial under 1404(a) was effected without prejudice to the right of any plaintiffs to move, subsequent to final judgment, for an order remanding their actions to the district from which they originated for trial of the damages issues. After the jury returned a verdict in favor of plaintiffs and against the defendant, Eastern Airlines, on the issue of liability,

^281 Kalinowski, supra note 273, at 200.
^283 Id.
^284 In Re Air Crash Disaster in the Ionian Sea on September 8, 1974, 438 F. Supp. 932, 934 (J.P.M.D.L. 1977).
^285 Id.
^287 Id. at 1120.
^288 Id.
^289 Id.
the plaintiffs moved the court under 1404(a) to remand their actions to the district from which they originated for trial of the damages issue. The court granted plaintiffs' motions to remand, concluding that there existed no commonality of facts or considerations of party or witness convenience that tied trial of the damages issues to the federal forum in New York. The following facts were significant to the court's decision:

The business records of both the plaintiffs and the decedents are located in Louisiana, most of their damage witnesses reside in Louisiana, the defendant Eastern Airlines does business and has been served with process in Louisiana, and the respective districts represent the plaintiffs' choice of forum as their original actions were filed there.

5. Availability of Pre-Trial Coordination or Consolidation in State Courts

Although universal acceptance of the federal pre-trial coordination and consolidation procedures has not been attained, some states have adopted similar procedures. For example, provisions were added to the California Code of Civil Procedure in 1972 authorizing the coordination of civil actions pending in different courts which share common questions of fact or law. These pro-
visions were based in part on the experience of the federal courts in handling multi-district litigation under section 1407. 294 Since the coordination procedures were not operative until 1974 there is scant legal precedent concerning the interpretation and application of these procedures.

The standards to be considered in determining whether civil actions sharing common questions of fact or law 295 should be coordinated are set forth in section 404.1: 296

Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of the parties, witnesses and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the Court; the disadvantages of duplicative and inconsistent rulings, orders or judgment; and, the likelihood of settlement of the actions without further litigation should coordination be denied. 297

However, the California Rules of Court provide that "the imminence of trial in any action otherwise appropriate for coordination may be a ground for summary denial of a petition" for coordination. 298

The California coordination statute and rules have adopted several provisions not found in the federal statutes and rules. For example, a petition for coordination may be accompanied by an application for an order staying all actions pending the coordination determination. 299 In addition, any party may file a peremp-

295 One commentator has stated that "the drafters of 1407 intentionally avoided providing for transfer of actions involving only common questions of law, in part, to avoid the necessity of having the transferee court apply transferor state law in the determination of local issues." The Search for the Most Convenient Federal Forum, supra note 224, at 200. This problem, of course, does not arise when all actions are originally filed in the courts of the same states.
297 Id.
298 CAL. RULES OF COURT 1521(d).
299 CAL. CIV. PROC. CODE § 404.5; CAL. R. OF COURT 1514(a). The application must establish that "a stay order is necessary and appropriate to effectuate the purposes of coordination," CAL. R. OF COURT 1514(a). Unless otherwise specified in the stay order, all proceedings in the action to which it applies are sus-
tory challenge of an assigned coordination trial judge within 20 days after service of the order assigning such judge. After the actions have been ordered coordinated, the assigned coordination trial judge shall select a court he deems “appropriate” for trial of the coordinated proceedings. The discretion of the coordination trial judge is to be guided by criteria outlined in the Judicial Council Rules. The relevant provision provides that the assigned trial judge may:

schedule and conduct hearings, conferences and a trial or trials at any site within the state he deems appropriate with due consideration to the convenience of the parties, witnesses and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; and the calendar of the courts. . .

In a mass disaster aviation tort case, litigation arising from the PSA mid-air collision in San Diego was transferred for coordinated proceedings to the county in which the accident occurred.

In contrast to section 1407, the California coordination statute provides that coordination shall be for all purposes. There are provisions, however, which permit the trial judge to remand or transfer any coordinated action. If remand is opposed by any of

[Notes and references]

300 CAL. R. OF COURT 1514(c). See generally Keenan v. Superior Court, 111 Cal. App. 3d 336 (1980). The pendency of coordination proceedings before the Panel under Section 1407 does not affect or suspend orders in pre-trial proceedings in district courts in which such actions are pending and does not limit the pre-trial jurisdiction of the court. R. Proc. J.P.M.D.L. 16. See In Re Air Crash Disaster at Paris, France, on March 3, 1974, 376 F. Supp. 887, 888 (J.P.M.D.L. 1974), wherein the Panel stated that the question of whether discovery proceedings should be stayed pending the Panel's coordination determination was within the sole discretion of the transferor judge.

301 CAL. CIV. PROC. CODE § 404.3 (West Supp. 1981) provides:

If the assigned judge determines that coordination is appropriate, he shall order the actions coordinated, report that fact to the Chairman of the Judicial Council, and the Chairman of the Judicial Council shall assign a judge to hear and determine the action in the site or sites the assigned judge finds appropriate.

302 CAL. R. OF COURT 1541(b)(2).

303 Id.


305 CAL. CIV. PROC. CODE § 404.1 (West 1981).

306 CAL. R. OF COURT 1542.

307 CAL. R. OF COURT 1543.
the parties the assigned trial judge shall consider the same factors specified in section 404.1 to justify coordination. If transfer is opposed by any of the parties, the assigned trial judge shall consider factors nearly identical to the factors specified in section 404.1.

In *Pesses v. Superior Court,* numerous wrongful death actions arising out of the mid-air collision between a Pacific Southwest Airline ("PSA") 727 aircraft and a Cessna aircraft were coordinated for pre-trial and trial in San Diego, the county where the accident occurred. PSA stipulated to liability after the actions had been ordered coordinated and transferred to San Diego. The plaintiffs, who originally had filed actions in Los Angeles, then moved the coordinated trial judge to remand or transfer their actions back to Los Angeles for pending trials of the damages issues.

The plaintiffs made a strong showing of witness inconvenience and hardship and asserted that denial by the Los Angeles court prior to coordination of PSA's motion to change venue to San Diego had established suitability of venue in Los Angeles. Plaintiffs further pointed out that the original order coordinating the actions had been made "without prejudice to the parties in any action originally filed outside San Diego County to request a re-transfer of such action to the originating county for trial on the issue of damages." Although the court in *Pesses* intimated that plaintiffs would be prejudiced if the burden rested on them to establish the grounds for transfer, and that the order coordinating the actions shifted the burden to PSA to justify retention of the actions in San Diego, the court held that it was inappropriate.

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208 CAL. R. OF COURT 1542.
209 CAL. R. OF COURT 1543. Criteria delineated in Section 404.1 that are omitted from Rule 1543 include the disadvantages of duplicative and inconsistent rulings, orders or judgments and the likelihood of settlement of the actions.
311 Id. at 119.
312 Id.
313 Id.
314 Id. at 120-22.
315 Id. at 119-20.
316 Id. at 120.
317 Id. at 124.
318 Id. at 120.
to remand or transfer the cases to Los Angeles for pending trials of damages. The court noted that the California venue cases limited to the narrow perspective of witness convenience did not determine the coordination question, rather, the question of remand or transfer rested on broader considerations specified in the coordination statutes and rules, including:

1. the presence of common questions of law;
2. the efficient utilization of judicial facilities and manpower;
3. the calendar of the court;
4. the disadvantage of duplication and inconsistent rulings.

Since the assigned trial judge must weigh and balance these factors in order to determine whether coordination or severance serves the ends of justice, a rule of automatic remand or transfer when common questions of law or fact cease to exist was rejected.

The court concluded that the assigned trial judge did not abuse his discretion, since there was evidence in the record indicating that the foregoing considerations would be served by retention of the litigation in San Diego.

6. Pitfalls, Traps and Other Opportunities

When actions are pending in only two districts the plaintiff may attempt to oppose a section 1407 transfer by dismissing one of

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319 Id.
320 Id. at 124.
321 Id. at 125. These factors are set forth in Section 404.1 and are incorporated in both the remand and transfer rules.
322 Id. at 126.
323 Id. The court stated:

There is some evidence in the record all of these factors will be served by retaining the case in San Diego. Plaintiffs do not deny the existence of common questions of law, particularly that of prejudgment interest, and the possible unfairness of inconsistent rulings on that issue among the various heirs of victims of the same air-crash. Likewise, it is clear the considerable time invested in coordinating the cases in San Diego and conducting pre-trial preparation would also be wasted if the cases must proceed anew in Los Angeles. Likewise, the additional burden on the Court calendar in Los Angeles, coupled with the necessary rescheduling here, may be a burden on the calendar of either or both courts, and an imposition on the statewide judiciary as a whole in negating much of the benefits so far realized from coordination.

Id. at 125. Compare Pesses with the Panel's remand determination under Section 1407 in In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 479 F. Supp. 1118 (E.D.N.Y. 1978). See notes 286-92 supra and accompanying text.
the actions so that actions are pending in only one district, thereby rendering 1407 inapplicable. The defendant, however, can resist the plaintiff's efforts to dismiss by asserting that dismissal would affect a substantive legal right: the application of different law to the litigation. If transfer of the litigation to another forum under section 1407 is desired, consideration should be given to making an application to the Panel at the earliest opportunity. This may be necessary since the Panel may decline to transfer the litigation under section 1407 once the pre-trial proceedings have advanced and the assigned judge has become familiar with the issues.

An argument can certainly be made that transfer to certain courts or retention in others is impractical due to the congested nature of the docket. For example, the defendant may argue that other air disaster litigation has been transferred to the proposed forum and is still pending, thereby making that locale impracticable. It should always be remembered that a section 1407 transfer, while theoretically only for pre-trial purposes, may be for all purposes, including trial.

In multi-district litigation, section 1407 has numerous advantages including the avoidance of duplication, inconsistent pre-trial rulings and collateral estoppel problems. This is especially true where voluntary coordination is not possible and where there are many documents to be produced or witnesses to be deposed. When one plaintiff plans to proceed expeditiously with the minimum of discovery, of course, collateral estoppel problems multiply.

Section 1407 allows the defendant great flexibility in selecting the place of trial, since residences of the plaintiff and of the damage witnesses are entitled to minimal consideration. As a result, section 1407 can be used to force plaintiffs to litigate in inconvenient locations and to force the trial of damages in more conservative communities. Section 1407 usually results in a more advantageous contribution formula since plaintiff is forced to focus upon all defendants, and it allows a possible conflict to develop between the plaintiffs' counsel, such as between counsel representing the passengers and counsel representing the crew. The settle-

\footnote{See Le Compte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976); Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856 (8th Cir. 1975); Kennedy v. State Farm, 46 F.R.D. 12 (E.D. Ark. 1969).}
ment and bargaining positions of the plaintiffs are weakened somewhat due to the formalities caused by transfer, litigation in an inconvenient forum, and the requirement to engage other local counsel.

There are, of course, disadvantages. State court actions may not be removable and, more often than not, may not be amenable to voluntary coordination. When liability is relatively certain and the client prefers a speedy resolution transfer may make the litigation more expensive and settlement more difficult. Inconsistent choice of law principles may produce inconsistent and troublesome results, as well as create havoc in court. For example, one court has required multiple juries to sit and hear evidence at the same time in order subsequently to apply different substantive and procedural rules of law.\textsuperscript{325} Although venue and jurisdiction may be improper in the transferee forum, the litigation may nonetheless remain there for trial.\textsuperscript{326}

There is, of course, always the spectre of being assigned to one of the several judges known throughout the country for troublesome idiosyncracies and bias against defendants. Other disadvantages include long, drawn-out, structured discovery whereby the defendant loses a certain amount of flexibility and the right to control the litigation, and incurs a greater involvement by the judiciary in the discovery process. In addition the defendant must deal with the binding effect of the Manual for Complex Litigation.\textsuperscript{327} For those defendants only marginally involved in just a few actions, transfer under section 1407 would sweep them into complex, expensive and difficult litigation. If a far away forum is selected inconvenience to the defendant and its counsel is an obvious disadvantage. Similarly, the defendant is inconvenienced by the plaintiffs' selection of highly experienced lead counsel who can bring strength to cases which otherwise would be weak. It is the obligation of counsel to weigh the advantages against the disadvantages in attempting to come to a resolution of whether to proceed.

\textsuperscript{325} Martin v. Bell Helicopter Co., 85 F.R.D. 654 (D. Colo. 1980).

\textsuperscript{326} The judge in the transferee forum may order immediate trial of a test case originally brought in that court, thereby perhaps precluding defendant from further litigating the issues under collateral estoppel principles.

\textsuperscript{327} \textit{Manual for Complex Litigation} (1978).
IV. Conclusion

Is there an available election? Does there exist a real, viable, discriminating alternative to the plaintiff's selection of the forum, a choice we have assumed for the purposes of this article was "proper" in the first place? These are the first questions that trial counsel ought to have asked himself before undertaking the analysis offered in this enterprise. He should have determined the likelihood of success in his press for a new arena. He should have searched all of the applicable law and should have become intimately familiar with all relevant factors in the case at bar. He should have weighed the time, effort and expense of making a motion to change the forum and should have considered whether the gain would be worth the cost in time and treasure.328

The motion to change the situs of a lawsuit may well be the most important appearance counsel makes in court, other than for trial itself. The hearing can determine the success of all future proceedings and its significance is enhanced by the fact that there is only a limited right of appellate review for section 1404(a) and section 1407 motions.329 A section 1407 motion has the added characteristic that most courts do not remand actions transferred under the statute upon the completion of pre-trial proceedings.

The strategy and tactics to be employed in the making of the motion should be directed towards the ultimate aims and goals, in addition to victory on the motion itself. This may require counsel to treat the motion as a mini-trial and to ask the court that additional time be set aside for the hearing and for the receipt of evidence. The use of training aids certainly should be considered, including flow charts, diagrams and charts showing relevant contact with various states.

On many occasions the courts have stated that section 1404(a) and section 1407 are not mutually exclusive and that a section 1404(a) motion can be made either before or after a section 1407 motion has been made.330 When transfer is desired, section 1407

328 There are those benefits which accrue simply from the making of a motion even though ultimately it is denied. The court, for example, may be educated concerning plaintiff's counsel's practice, the weakness of his case or overreaching in resisting the motion.

329 See Consolidation and Transfer, supra note 228, at 1306-07, 1310.

330 See, e.g., In Re Frost Patent, 316 F. Supp. 977 (J.P.M.D.L. 1970); In Re
seems to be an easier route than section 1404(a). Transfer rarely is denied under section 1407 in air disaster litigation, the only genuine question being one of choice of transferee forum. Under section 1407, the Panel will likely choose the forum with the most substantial connection to the liability issues and, sometimes, as in the In Re Air Crash Disaster Near Bombay, India litigation, this may result in the choice of a forum with no cases pending at all. The defendant's burden under section 1404(a) is undoubtedly greater than under section 1407, and when actions are filed in many districts, section 1407 clearly provides the most effective tool.

When the opportunity presents itself, the optimal choice of a transferee court will usually be a foreign one, especially if the accident occurred outside of the United States and the plaintiffs are neither American residents nor American citizens. In this circumstance, a strong effort should be made to dismiss under the doctrine of forum non conveniens. This motion ought to be made prior to any motion to transfer under section 1404(a) and, more often than not, should not be made in the alternative to a motion to transfer. The motion to dismiss is not as strong, and the argument is weakened, when twin motions are made under these two sections. Twin motions also put the defendant in the conflicting position of arguing, on the one hand, that a foreign forum is the most convenient and, on the other hand, that a United States forum is less inconvenient. As previously noted, however, this tactic has been successfully used by defendants.

We embarked upon this enterprise by suggesting that the choice of place at which to wage the friendly strife in civil litigation is

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33 One commentator has stated, "It is a fair conclusion that, practically speaking, section 1407 has circumvented all the limitations which the federal courts had placed on section 1404(a)." Consolidation and Transfer, supra note 228, at 1310 n.118.


33 One commentator has stated: "It is doubtful that the problem of multiple litigation was even considered when 1404(a) was enacted, and it is obvious that the statute is wholly inadequate to meet the situation." Comment, The Problem of Venue in Multiple District Litigation, 41 Notre Dame Law. 507, 522 (1966).

334 See notes 219-21 supra and accompanying text.
just as important as selection of a battlefield in war. Counsel should therefore treat this crucial strategic choice with the same deference accorded by his military counterpart. By undertaking serious effort to analyze all of the factors which bear upon this difficult judgment, defendant may be able to effectuate a change of arena.