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Forum Non Conveniens - Nonresident Parties - Special Circumstances

Steven Ira Ginsberg

Forum Non Conveniens — Nonresident Parties — Special Circumstances

On 27 November 1962 an aircraft owned by S. A. Empresa De Viacao Rio Grandense (S. A. Varig), enroute from Rio de Janeiro, Brazil, to Los Angeles, California, crashed at Lima, Peru, killing all of the passengers. The plaintiffs' decedents were a Hungarian national residing in Brazil at the time of his death, a British national and a Mexican national. The plaintiffs, residents of Hungary, Great Britain and Florida,[1] respectively, instituted wrongful death actions in a New York trial court against S. A. Varig, the air carrier,[2] a corporation chartered in Brazil and doing business in New York, and the Boeing Company, the aircraft manufacturer, a corporation chartered in Delaware and doing business in New York. The trial court denied the defendants' motions to discuss the complaints on the ground of forum non conveniens, since the court found in its discretion that "special circumstances" existed which required acceptance of jurisdiction.[3] Applying the doctrine of forum non conveniens, based on a primary consideration of the convenience of the court, a New York intermediate appellate court reversed the order denying the motion for dismissal as the court found no "special circumstances" warranting retention of jurisdiction.[4] The plaintiffs appealed the dismissal to the New York Court of Appeals, the state's highest tribunal. *Held, reversed and remanded*: When New York courts exercise their discretion in applying forum non conveniens to a complex foreign-based tort action, such as an air crash case brought by nonresident parties against the air carrier and the airframe manufacturer alleging liability against both parties, the courts must consider "special circumstances" such as whether there is another forum in which the action could be brought against all of the parties, both the air carrier and the manufacturer, and whether there are other actions and legal poceedings pending in that state against the same parties regarding the same subject matter. *Varkonyi v. S. A. Varig*, 22 N.Y. 2d. 338, 292 N.Y.S. 2d 674 (1968).

I. Doctrine of Forum Non Conveniences

The doctrine of forum non conveniens has been developed and applied by a number of American courts to minimize the mischief of imported, transitory causes of action having no nexus with the state or the tribunal in which they are brought.[5] Among the factors which encouraged develop-

[1] After the commencement of the suit, the Florida plaintiff moved to New York, thus becoming a New York citizen and domiciliary.

[2] Varig Airlines, Inc., a New York subsidiary of S. A. Varig, was also a defendant but was not a party to the appeal to the New York Court of Appeals.

[3] Weinberger v. S. A. Varig, 52 Misc. 2d 357, 275 N.Y.S.2d 453 (Sup. Ct. 1966).

[4] Varkonyi v. S. A. Varig, 27 A.D.2d 731, 277 N.Y.S.2d 577 (App. Div. 1967).

[5] R. Leflar, American Conflicts Law 112 (1968) [Hereinafter cited as Leflar].

ment of the doctrine include considerations of convenience, overcrowded dockets and the reality of some plaintiffs choosing venue merely to obtain higher damage awards, to benefit from favorable procedure and to capitalize upon practical inconveniences which might force other parties into unwilling settlements.[6] Although a court may have venue and jurisdiction over the parties and the subject matter,[7] the following questions are, nevertheless, raised in tribunals which apply the doctrine: (1) whether the proper forum has been chosen by the parties; and (2) whether the forum is convenient for the parties and the court and serves the interest of justice.[8]

Some courts do not apply the doctrine; that is, if they have venue and jurisdiction over the parties and the suit, they make no further considerations calling for dismissal or transfer under the doctrine of forum non conveniens even though their calendar may be crowded or there exists a possibility of harassing suits or forum shopping.[9] However, the doctrine, as applied in many courts for numerous reasons, may be a ground for the dismissal of suits which have been brought by foreign parties against foreign parties on foreign-based causes of action. Authority exists in some states that residence of one party will almost assure retention of jurisdiction against a motion of dismissal on the grounds of *forum non conveniens*.[10] One scholar, citing two Supreme Court cases, reasons that the states are free to apply the rule of forum non conveniens, provided that the exclusions are not directed at non-citizens as such and do not violate the full faith and credit clause of the federal Constitution.[11]

In reacting to various forum shopping abuses the courts which have applied forum non conveniens tend to use a process of balancing the interests of one party against the other to determine whether to retain or reject jurisdiction. The development of the balancing test helps the legal system focus on the fact that not every plaintiff, resident or nonresident, who brings suit for damages or a redress of grievances in a particular court has bad intentions in mind, such as to obtain higher jury verdict than in his home state.

A balancing of interests test was applied in the leading case of *Gulf Oil Corporation v. Gilbert*, followed in many courts for the application of the doctrine.[12] In *Gulf* the plaintiff, a resident of Virginia, brought an action in a New York federal district court for damages against Gulf Oil Corporation for an allegedly negligent burning of plaintiff's storage warehouse located in Virginia. The defendant corporation was chartered in Pennsylvania and did business in New York and Virginia. The plaintiff was a

[6] *Id.* at 111.

[7] Canada Malting Co. v. Peterson Steamships, 285 U.S. 413 (1932).

[8] See Uniform Interstate and International Procedure Act, § 1.05. Uniform Laws Annotated.

[9] Chaney v. Williher, 205 So. 2d 770 (La. Ct. App. 1967), *writ ref.*; Lansverk v. Studebaker-Packard Corp., 54 Wash. 2d 124, 338 P.2d 747 (1959).

[10] De La Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949), *rehearing denied*, 300 N.Y. 644, 90 N.E.2d 496 (1950); Atlantic Coast Line R. Co. v. Wiggins, 77 Ga. App. 756, 49 S.E.2d 909 (1948).

[11] LEFLAR, at 113; Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929); Missouri ex. rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950).

[12] 330 U.S. 501 (1947).

foreign party suing a foreign defendant for an extrastate tort. The district court held for the defendant on its motion for dismissal on the ground that the proper place for trial was Virginia. The Second Circuit reversed and the Supreme Court granted certiorari. The main issue before the Court was whether the district court had an inherent power to dismiss the suit under the doctrine, and the allied question was whether the power was abused if it existed at all.[13] In discussing the doctrine with approval of how it had been applied in state courts, the Court described the principle as ". . . simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[14] The Court made two very important presumptions in upholding the discretionary power of the district court, and impliedly state courts, to resist impositions on their jurisdictions: (1) "[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them;"[15] and (2) the second presumption favors the plaintiff's choice of forum which "should rarely be disturbed"[16] unless the balance of factors to be considered in the exercise of the court's discretion is strongly in favor of the defendant. The Court delineated in detail a guideline of factors,[17] now often cited with *Gulf* as authority, to be considered in balancing the interests of the plaintiff, the defendant, the courts and the community. The Court held that the district court did not exceed its discretionary powers since the balance of interests was not in the plaintiff's favor.[18]

II. Federal Courts and the Doctrine

Subsequent to *Gulf*, the Judicial Code of 1948 codified the doctrine into 28 U.S.C. Section 1404(a)[19] which concerns the transfer of a case

[13] *Id.* at 502.

[14] *Id.* at 507.

[15] *Id.* at 506-07.

[16] *Id.* at 508.

[17] *Id.* at 508-09. The Court stated the factors in the following statement: "An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations 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. The Court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy . . . . Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation . . . . There is an appropriateness, too, in having the trial of a . . . case in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws and in law foreign to itself."

[18] *Id.* at 510. In fact, the only showing made by the plaintiff to justify the suit in New York, was readily dismissed by the Court. The plaintiff asserted that: "An action of this type involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature."

[19] 28 U.S.C. § 1404(a) (1964): "Change of Venue. (a) For the convenience of the parties and

from one federal district court to another which is more convenient for the parties, the courts and in the interests of justice. The doctrine, however, has been tempered in its codification by allowing transfers rather than dismissals.[20]

The relevant countervailing considerations, outlined in *Gulf*, and other considerations are applied to the statutory transfers which have the extra protection of a statutory limit on the transferee court to be one in which the defendant would be amenable to process and where the venue would be proper.[21] In ruling on motions for transfer to another district, the district courts place emphasis on the plaintiff's choice of venue since it should be rarely disturbed, on the existence of a second forum, on the various policy considerations of *Gulf* and on the movant's (usually the defendant) proof by a preponderance of the evidence that the balance of conveniences and considerations is strongly in his favor.[22] Moreover, the courts examine the actual nexus that the action has with the transferring court.[23] In *Van Dusen v. Barrack*[24] the Supreme Court declared a very important requirement for initial consideration of a 1404 (a) type transfer and for applying state law after a transfer has been effected to the more convenient forum made in the interest of justice. The Court in the *Van Dusen* case concerned itself with the prejudice that might occur by allowing a transfer from a federal district court sitting in one state to one in another state without considering what effects the change might have on the change of law that occurs as the suit crosses the state line. The Court held that a

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."

[20] 1 J. MOORE, FEDERAL PRACTICE ¶ 0.145(5), at 1784; *See* Dubin v. U.S., 380 F.2d 813 (5th Cir. 1967).

[21] Rosen v. Savant Instruments, Inc., 264 F. Supp. 232 (E.D.N.Y. 1967).

[22] 1 J. MOORE, *supra* note 20, at 1778 n.5: "Where a transfer would merely shift the inconvenience from one party to the other . . . or where after balancing the factors, the equities lean but slightly in favor of the movant . . . the plaintiff's choice of forum should not be disturbed."

[23] *See* Rodgers v. Northwest Airlines, Inc., 202 F. Supp. 309, 312 (S.D.N.Y. 1962), where the movants upheld the burden of proof for a transfer. The plaintiffs brought claims in the New York forum for wrongful death due to the alleged concurrent negligence of Northwest Airlines, Lockheed Aircraft and General Motors, in the crash of the airline's Electra in Indiana, in 1960. The defendants moved for transfer to an Illinois district court pursuant to § 1404(a). The New York forum found that neither the plaintiffs nor the decedents were residents of New York. At the same time, nineteen death actions arising from the plane crash were pending in the Illinois forum along with hull-suit actions by Northwest against Lockheed and General Motors in the same district. These actions had been assigned to one judge for pre-trial proceedings. The New York court granted transfer as it recognized a strong policy favoring litigation of related claims in the same tribunal, and the court held: (1) no witnesses lived in an area reasonably close to the New York forum; (2) no witnesses were within the subpoena range of the court; (3) the records of the three defendants (movants) were closer to the Illinois forum than the New York forum; and (4) the action had no nexus with the New York forum.

But see Schindelheim v. Braniff Airways Inc., 202 F. Supp. 313, 317 (S.D.N.Y. 1962), where the movants did not overcome the plaintiffs' choice of forum, New York, by failing to establish that the balance of conveniences predominated in their favor. Widows of four passengers, killed in a 1959 crash of a Braniff flight en route from Houston to New York, brought suit in New York against Braniff, Lockheed and General Motors. The defendants wished to transfer the case from New York to Texas. Several factors differed from *Rodgers*. In *Rodgers* there was no showing by the plaintiffs that they would be inconvenienced by the transfer. But in *Schindelheim*: (1) the plaintiffs were residents of the district; (2) important witnesses for them on the issue of damages were in the area; and (3) several of the plaintiffs' children would suffer by their separation if trial were held in Texas. Therefore, there was a sufficient nexus with the New York forum, and the court denied the transfer.

[24] 376 U.S. 612 (1964). For a treatment of the problems concerning transfers in federal courts see 36 J. Air L. & Com. 314.

transfer under 1404 (a) should generally be, with respect to state law, "but a change of courtrooms."[25] The Court reasoned this policy would maintain an identity between the transferee court and the courts of the state in which the suit was filed just the same as the general requirements that the law of the state where the federal court sits is applied to maintain an identity between a state court and a federal court sitting a block away.[26] The effect of the holding is to require that the substantive state law of the transferor court, the venue of the plaintiff's choice, be applied in the transferee court; and at the very least, the holding requires the change of law to be considered on motions for transfer.[27]

The federal courts show a definite reluctance to dismiss parties and actions completely under forum non conveniens which might have the result of putting the plaintiffs in poor positions with respect to: their ability to get jurisdiction elsewhere, joining important defendants in other jurisdictions, their statute of limitations and their ability to redress legal grievances ultimately. The problem of dismissal has generally been done away with by § 1404(a) transfers. Moreover the case of *Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A.*[28] illustrates the federal courts' reluctance to dismiss completely the action of an American citizen when the circumstances involve more than just two federal district courts which could merely be transfered between, namely, a federal district court and a foreign court. In *Ciprari* an American citizen brought an action for damages, which he allegedly sustained while on board the airline on a flight between two cities in Brazil, against a foreign airline having a purchasing office in New York. The district court ruled against the defendant's motion for dismissal. The defendant argued that, if the court retained jurisdiction, it would have to apply foreign concepts under Brazilian civil law, the court would have to hear over twenty Portuguese speaking witnesses and the defendant would have high costs of bringing its employees to the United States. Although the court recognized the defendant's grievances in the light of the *Gulf* decision and section 1404(a), of the United States Judicial Code, it refused to follow authority asserted that dismissal under the doctrine was not an impossibility when the action should have been brought outside the United States. The court kept in mind, however, the section 1404(a) type transfer when it considered the balance of interests involved. The court denied the dismissal and held:

> Although forum non conveniens remains a viable doctrine when the alternative forum is a court located outside the United States, it has been described as a harsh rule and is applied in rather rare cases, since, if the court invokes the doctrine it would have to dismiss the action, rather than transfer it to a

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[25] *Id.* at 639.
[26] *Id.* at 638.
[27] *Id.* at 612.
[28] 232 F. Supp. 433 (S.D.N.Y. 1964); *See* Poutos v. Mene Grande Oil Co., 123 F. Supp. 577 (S.D.N.Y. 1954), where a dismissal was granted since defendant's operations, records and witnesses were in a foreign forum. *See also* Heitner v. Zim Israel Navigation Co., 152 F. Supp. 3 (S.D.N.Y. 1957), where the court exercised its inherent powers to refuse to entertain a suit brought by an alien nonresident on a foreign cause of action against a foreign corporation and its New York representative.

more convenient forum, as it would be required to do if the alternative forum were another Federal Court. . . . American citizens do not have an absolute right to sue in an American court . . . But where application of the doctrine of forum non conveniens would force American citizens to seek redress in a foreign court . . . courts of the United States are reluctant to apply the doctrine.[29]

III. Forum Non Conveniens in New York

The New York law of forum non conveniens is summarized in *Interstate Steel Co. v. Manchester Liners, Ltd.*,[30] where the court granted the defendant's motion for dismissal. A foreign corporation had initiated an action against another foreign corporation in a New York court for damages to a shipment which was loaded in England. The court held: "While it is flattering to our [C]ourt system and jurisdiction that our neighbors, national and international, prefer our facilities, acumen and justice it is an unwarranted burden on our taxpayers and an added impediment to the speedy disposition of the controversies between and on behalf of our own citizenry."[31]

The position further unfolds in *Fishkin v. Transcontinental and Western Air, Inc.*[32] where California residents sued a Delaware corporation, doing business in New York, alleging an extrastate tort. On motion for dismissal made by the defendant, the court exercising discretion held that no "special circumstances" were shown by the non-resident plaintiff sufficient to warrant retention of jurisdiction over the action against a nonresident defendant on a foreign tort.[33]

The inherent discretionary power which the New York courts possess to determine whether the proper forum has been chosen by the parties is delineated in two major New York Court of Appeals cases, *Bata v. Bata*[34] and *Taylor v. Interstate Motor Freight System*.[35] In *Bata* a suit was brought by residents of Canada, against a resident of Brazil to impose a trust on property interests in a corporation to which the plaintiffs asserted their rights. The trial court denied the defendant's motion for dismissal in the exercise of its discretion. On appeal, the court of appeals held that there was jurisdiction of person and subject matter, and the

[29] 232 F. Supp. at 443. *See* De Sairigne v. Gould, 83 F. Supp. 272 (S.D.N.Y. 1949). Not only does an American citizen not have an absolute right under all circumstances to sue in an American court, but a fortiori an alien has no constitutional right to sue in our courts. The French plaintiff, who was dismissed to her proper forum on motion by defendant on the grounds of forum non conveniens, sued a U. S. citizen residing in France in the New York court on a debt. The court found: (1) the parties were foreign parties at all pertinent times; (2) the causes of action arose under French law which was inconsistent with New York law; (3) the transactions arose in France and, therefore, all important witnesses would be from France; and (4) the defendant had assets in France. The court rejected contentions by the plaintiff that § 1404(a) limited the court's inherent power to exercise discretion to reject cases to their proper forums since the section applies to diversity cases; and the court rejected contentions by the plaintiff that New York law would apply, since, as the doctrine is a procedural device, the inherent power of federal courts to refuse jurisdiction is not governed or affected by state law.

[30] 145 N.Y.S.2d 754 (Mun. Ct. New York City 1955).

[31] *Id.* at 755.

[32] 94 N.Y.S.2d 648-9 (Sup. Ct. 1949).

[33] *Id.*

[34] 304 N.Y. 51, 105 N.E.2d 623 (1952).

[35] 309 N.Y. 633, 132 N.E.2d 878 (1956).

court decided the question of whether the lower court was the appropriate forum in light of the circumstances and countervailing considerations. The court recognized the public policy reasons for rejecting nonresident suits for extraterritorial causes of action as an annoyance of the courts.[36] The plaintiff,[37] "whose choice of forum should rarely be disturbed,"[38] asserted as "special circumstances" (1) that there were other actions between the same parties pending in the New York forums, (2) that the defendant had assets in the forum and (3) that with defendant's ". . . assets scattered all over the world, there is no one 'appropriate' forum and that the difficulties and inconveniences listed by defendant would be found . . . in any suit brought anywhere."[39] The court, therefore, held that there was no abuse of discretion in the lower court's retention of the jurisdiction relying on the New York rule that "there is no absolute prohibition against such suits. . . ."[40]

In *Taylor* a resident of Pennsylvania brought an action in a New York trial court against a Michigan corporation doing business in New York for allegedly causing the death of her husband, a truck driver, in Ohio. defendant moved to dismiss the action as inconvenient, but the court denied the motion. The intermediate appellate court reversed the order on the ground that the lower court exceeded its discretionary power, and the plaintiff appealed to the court of appeals. The high state court recognized the public policy arguments against entertaining causes having no nexus with the forum, but the court held, remitting the case, that the intermediate appellate court abused its discretionary powers by not giving adequate consideration to the "special circumstance" that the statute of limitations had expired in Pennsylvania, the plaintiff's home forum. New York's public policy is against retention of nonresident actions for foreign torts; and the actions will be dismissed to their proper forum unless there are "special circumstances" shown which merit retention of jurisdiction.[41]

[36] 304 N.Y. at 56, 105 N.E.2d at 626.

[37] Influenced by *Gulf*, the defendant asserted: (1) laws of foreign lands would have to be applied; (2) witnesses from many lands would have to appear; (3) there would be an unreasonable burden on the courts of trying a case with so little connection with the forum; (4) the judgment would be unenforceable; (5) the assets in New York were of small amount; and (6) the defendant would suffer general hardship in trying the case in the New York forum.

[38] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

[39] 304 N.Y. at 57, 105 N.E.2d at 626.

[40] *Id.* at 56.

[41] "Special circumstances" were shown in Richter v. Chicago R.I. & P. R. R. Co., 123 Misc. 234, 205 N.Y.S. 128 (Sup. Ct. 1924) where the plaintiff was unable to serve process on the defendant in his home forum for a cause of action arising from a train wreck in Oklahoma. Defendant did not do business in plaintiff's home forum but he did do business in New York where the plaintiff chose to bring his action. Jurisdiction was retained. Inconvenience and financial burden to the plaintiff were the "special circumstances" in Murnan v. Wabash Ry. Co., 222 A.D. 833, 226 N.Y.S. 393 (App. Div. 1928), which warranted retention of jurisdiction. In *Murnan*, a Connecticut resident sued the railroad in the New York forum rather than in Indiana, the railroad's place of incorporation, or in Michigan where the accident occurred. Likewise, the prime concern in Zucker v. Raymond Laboratories, Inc., 74 N.Y.S.2d 7 (Sup. Ct. 1947) was the potential inconvenience and injustice that would have occurred to plaintiff if jurisdiction were rejected. The plaintiff was a resident of Pennsylvania, who sued in the New York forum rather than to go to the expense of suing in Minnesota, since the defendant was not doing business in the plaintiff's home state. Also, in Field v. Jordan, 14 A.D.2d 845, 220 N.Y.S.2d 899 (App. Div. 1961), "special circumstances" were present in a contract action where the plaintiff brought suit in a New York forum for a breach of contract, and both parties were nonresidents. The circumstances warranting retention were: (1) defendant voluntarily came to the forum in connection with the initial

Although the New York courts are not absolutely against the retention of transitory actions and will accept the plaintiff's choice against motions for dismissal on forum non conveniens in the event "special circumstances" are shown, there are many cases upholding the dismissal of the parties to their proper and more convenient forums. This is especially the case where the parties have actions concerning the same matter pending in other forums.[42] Even where the plaintiff has asserted what he thought were sufficient enough "special circumstances," the court in its sound discretion will weigh the validity of the asserted reasons.[43] The court weighed the validity of reasons in *Yesuvida v. Pennsylvania R. Co.*[44] where the plaintiff asserted the following "special circumstances," *inter alia*, which the court rejected:

> That in litigated actions against . . . railroad companies, involving claims for personal injuries and instituted in Luzerne County, Pennsylvania, where plaintiffs reside, none or very few of the plaintiffs in such actions have been successful and that the verdicts, when recovered, have not been even moderately compensatory for the injuries sustained; and that plaintiffs herein are in such straightened financial circumstances as not to have the funds necessary for the transportation, hotel bills and expenses which would be involved were these actions required to be brought in the courts of Ohio where the accident occurred.[45]

The court stated that the plaintiff could have a fair trial in Pennsylvania, where the defendant was incorporated; and the court also stated that if the plaintiff would have financial trouble in bringing the action in Ohio, the situs of the train wreck, then he would have the same burdens in bringing suit in New York.

The outright forum shopping, which the judge detected in *Yesuvida* and dealt with by granting a dismissal under the doctrine, has also been dealt within more recent decisions under New York law. In *Steingold v. Capital Airlines, Inc.*,[46] the plaintiff, a nonresident, brought an action for the death of a passenger in a Virginia airline crash against a British corportation in the New York forum. The court, on a reargument proceeding, besides finding that an action for the same accident had been litigated in Virginia, held that the action should be dismissed because the plaintiff had chosen an inappropriate forum. In so holding, the court reasoned that: "It is not a sufficient reason for this court to retain jurisdiction merely be-

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transaction; (2) certain material witnesses were in the forum; (3) the plaintiff would be subjected to a disadvantage to have trial in Brazil; and (4) New York law was applicable to the action.

[42] In Fikaris v. Atlantic Oil Carriers, 138 N.Y.S.2d 896, 898 (Sup. Ct. 1955), a Greek national, residing in England, sued a corporation in a New York court for injuries sustained while aboard their ship. The court dismissed the suit, finding no good reason to reach out to entertain the suit "in view of the pendency in England of an action for the same relief which is the logical forum close to the scene of the accident and where plaintiff resides and has full and complete jurisdiction."

[43] *Id.* at 898.

[44] 200 Misc. 815, 111 N.Y.S.2d 417 (Sup. Ct. 1951).

[45] *Id.*

[46] 34 Misc. 2d 33 (Sup. Ct. 1962), *aff'd*, 19 A.D.2d 752 (App. Div. 1963), *rehearing denied*, 14 N.Y.2d 548, 248 N.Y.S.2d 647 (1964), *cert. denied*, 379 U.S. 878 (1964), *aff'd sub nom.* 47 Misc. 2d 988, 263 N.Y.S.2d 450 (Sup. Ct. 1965).

cause the damages recoverable in New York may exceed that permitted in another state under its wrongful death actions."[47] While it is clear under New York law when foreign parties bring foreign based actions against other foreign parties they can be required to show "special circumstances" for retention of jurisdiction, it is just as well settled that where one party to the action is a resident of the forum the court is bound to try the action.[48]

IV. VARKONYI v. S. A. VARIG

The instant case was an air crash involving wrongful death suits alleging liability against both the air carrier and the manufacturer. One important "special circumstance" which the New York trial court found (which the highest New York appellate court recognized with approval) was that there was no showing by defendants that the plaintiffs could join both the air carrier and the manufacturer for trial in any other forum if the action was mismissed. There simply was no other place where both defendants did business for which jurisdiction could be obtained over them "as a matter of right."[49] Both the trial court and the highest court felt that in an air crash case, such as the instant case, it was all-imortant for the plaintiff to have suit against the manufacturer and the air carrier at the same time and in the same court, especially since New York was the only place where jurisdiction could be obtained over both defendants. Relying on the presumption of a second more appropriate forum with regard to this "special circumstance," the high court reasoned that there was no other forum as convenient as New York, recognized the substantial presence of S. A. Varig and Boeing in the jurisdiction and, most importantly, empathized with the potential and practical position of the plaintiffs if they were rejected from the forum:

> It is vital, in the trial of a complex action of this kind, in order to have all of the facts and all of the issues brought before the [C]ourt, to have all possible defendants present. Otherwise each defendant may point to the other as being responsible for the accident; and the plaintiff, a widow residing in Europe, with limited means, would have the burden of pursuing her proof against one defendant in North America and against the other defendant in South America. Employees of one defendant who might be essential as wit-

[47] 263 N.Y.S.2d at 451. *See also* Gilchrist v. Trans-Canada Airlines, 27 A.D.2d 524, 275 N.Y.S.2d 394 (App. Div. 1966), where four Canadian personal representatives brought actions against a Canadian airline in New York for wrongful deaths arising from an air catastrophe in Canada. The trial court denied the defendant's motion to dismiss under the doctrine and the defendant appealed. The intermediate appellate court reversed and granted dismissal for the defendant, since the court found: (1) other actions arising from the same accident were pending in Canadian courts along with actions by the same parties; and (2) Trans-Canada had offered to concede liability in the Canadian actions with an early trial. The court stated the general policy reasons against nonresident suits on foreign torts: "This forum should not be unnecessarily burdened with the trial of issues because of plaintiff's reluctance to accept appellants' concession of liability in the actions pending in the jurisdiction wherein plaintiffs reside and where they may be disposed of promptly."

[48] *See* De La Bouillerie v. De Vienne, 300 N.Y. 644, 90 N.E.2d 15 (1949), where the New York Court of Appeals declared that it was error for the lower court to dismiss a complaint on a foreign based tort without taking into consideration the residence of the defendant in New York.

[49] Weinberger v. S. A. Varig, 52 Misc. 2d 357, 275 N.Y.S.2d 453, 455 (Sup. Ct. 1966); Varkonyi v. S. A. Varig, 22 N.Y.S.2d 338, 292 N.Y.S.2d 674 (1968).

> nesses in the trial against the other defendant would be beyond the process of the court trying each action. Proof of the issue of manufacturer's liability may be inseperably connected with proof on the issue of faulty operation and maintenance.[50]

Another major consideration which the trial court and the highest court found to be an all-important "special circumstance" in favor of retaining the plaintiffs' cause was the presence in New York federal and state courts of similar actions (of which there were nine) based on the same crash in Peru for which a great deal of expensive discovery had already been made. Moreover, the court recognized in this "special circumstance" the major fact that: "It has been agreed by and between the attorneys for the parties hereto, who are the same attorneys in all of the actions . . . that preparation and discovery, including depositions and examinations before trial, were to be consolidated in order to save time and expense to the parties and to the court."[51]

On appeal from a reversal by an intermediate appellate court of New York[52] of the trial court's order retaining jurisdiction, the majority of the court of appeals recognized the general policy of rejecting suits having no particular nexus with the forum but reversed the intermediate court's order since the high court found, as a matter of law, that the intermediate court had abused its discretion by not taking into account the "special circumstances" that were found by the trial court.[53] The "special circumstances" were in effect (1) the potential death knell to plaintiffs of not being able to have both the air carrier and the manufacturer in the same court at the same time if suit were completely dismissed against them and (2) the fiction that would be furthered if nine other suits were held against the same defendants on the same subject matter just around the corner but not in this court because of an argument of inconvenience to the court and to the parties. The New York Court of Appeals took into account all the relevant factors in the exercise of its discretion, and the court remitted the case to the intermediate appellate court for further consideration of the matter. Both the majority and the dissenting opinions relied on the law and considerations of the *Gulf, Bata* and *Taylor* cases, and both felt there were "special circumstances" warranting retention, but the majority and minority opinions disagreed on what to do with the case after they reversed it. The majority remitted the case to the intermediate appellate court for consideration of all important "special circumstances," but the dissent felt that the order of the trial court should have been reinstated, rather than be reconsidered by the intermediate court.[54]

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[50] 275 N.Y.S.2d at 455; 22 N.Y.2d at 340; 292 N.Y.S.2d at 675.

[51] 275 N.Y.S.2d at 455.

[52] Varkonyi v. S. A. Varig, 27 A.D.2d 731, 277 N.Y.S.2d 577 (App. Div. 1967).

[53] 22 N.Y.2d 338, 292 N.Y.S.2d 674 (1968).

[54] Judge Keating commented in dissent: "In the present cases there is no dispute that from the practical standpoint, i.e., the availability of witnesses, enforceability of judgment, and the burden on defendants no problem is presented by the retention of jurisdiction. . . . These cases are not like the ordinary ones in which the plaintiff seeks to press litigation here rather than in the state of his residence or in another more convenient forum and has come here in anticipation of a high jury verdict or for other unjustified reasons. We are here concerned with plaintiffs . . . whose only other recourse would involve serious expense, inconvenience and prejudice." 22 N.Y.2d 342, 344, 292 N.Y.S.2d 677, 79 (1968).

V. Conclusion

It is apparent from the *Varkonyi* case and from the New York law of forum non conveniens that an alien laintiff suing a foreign corporation on a foreign tort must definitely show "special circumstances" which in the event of dismissal would result in prejudice, injustice, inconvenience, expense, travel and inability to bring an effective action against all the parties that need to be joined for a proper adjudication. The trial court approached air law and the problem of balancing the interests of the parties and the overcrowded forum in a realistic manner. The foreign corporations did business in New York; and their presence, both in the economics sense and in the pendency of actions against them concerning the same catastrophe, weighed heavily in the court's determination. Also the trial court's handling of the presumption of another accessible and more convenient forum should be commended and followed, since, if dismissed, the plaintiff should always have at least one other forum where he can proceed against all the parties where it is more convenient for all parties and in the interests of justice. The plaintiff should not be dismissed only to find that the statute of limitations has run in the "more proper" forum. The plaintiff should not be dismissed only to find that he is unable to get jurisdiction over all necessary parties in the supposed more convenient forum. Likewise, the plaintiff should not be inconvenienced more than his adversary would have been had the jurisdiction been retained in the initial court.

The doctrine of forum non conveniens should not be abused on arguments of burden on the parties especially when the parties have extensive business dealings in the forum and especially when the parties are subject to legal proceedings in other nearby courts concerning the same mishap or subject matter. Also, the convenience of the court argument should not be given too much weight unless many suits by resident parties and many more by nonresident parties are rejected because of overcrowded dockets. The plaintiff should ,however, be allowed a day in court somewhere to obtain relief.

The matter of inseparability of issues, which could potentially mean great inconvenience to the plaintiffs if the defendants are able to effect a separation, was another realistic approach, and one important to air law, which was taken in the trial court's and the court of appeal's discretion. The courts realized that, in international air flights, parties of several different nationalities would have a need to pursue their causes in one convenient forum against all parties rather than to have to travel the world to sue separate and reciprocally denying defendants at great expense and with little success. The courts recognized the value of having, if possible, both the air carrier and the manufacturer in the same court at the same time to resolve all possible issues.

Of course the doctrine of forum non conveniens still has much validity to combat the overburdening of the courts if the suits are brought for purposes other than in the interest of justice or convenience such as forum

shopping to find a higher paying jury, to bring suits for harassment purposes, to bring second actions or to have several suits pending in different forums between the same parties concerning the same matter at the same time. However, if the doctrine of forum non conveniens must be applied, would not a burden of proving by a preponderance of the evidence the necessity for a transfer or dismissal placed on the movant in the New York forum lead to more just results than making the plaintiff prove "special circumstances"? In light of a supposed presumption of the plaintiff's choice, it would seem that this would be the more proper approach.

Factors that are important to consider on a motion for transfer or dismissal under forum non conveniens include: (1) a second forum which is more convenient; (2) jurisdiction and venue of the tranfseree court; (3) the defendant's amenability to process in transferee court; (4) pendency of suits and other proceedings concerning the same subject matter against the same defendants in the forum of the plaintiff's choice; (5) joinability of all necessary parties to effect a just solution in the second more appropriate forum; (6) protection of the plaintiff's statute of limitations if dismissed to another forum and time elapsed from beginning of initial suit to time of motion for dismissal under forum non conceniens; (7) relative ease of access to sources of proof; (8) availability of compulsory process for attendance of unwilling witness; (9) necessity of view of premises by fact finder; (10) the plaintiff's residence; (11) place of vents of suit; (12) nature of suit; (13) distance between transferee and transferor courts; (14) docket conditions in the respective courts; (15) nature, materiality and essentiality of testimony to be elicited from witnesses who must be transported; (16) parties relative financial ability to bear expense of trial in either court; (17) complexity of suit; (18) respective court's familiarity with applicable law; and (19) differences in transferor forum law and transferee laws.[55]

Steven Ira Ginsberg

[55] 1 A.L.R. Fed. 15, 3F.