
**SHOULD THEY STAY OR SHOULD THEY GO:
APPLYING THE FORUM NON CONVENIENS
DOCTRINE TO FOREIGN PLAINTIFFS INJURED
ABROAD IN *ABAD V. BAYER CORPORATION***

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INTRODUCTION

As globalization continues to make it easier for U.S. companies to export their products abroad, a defective product can cause life-threatening harm to consumers throughout the world. For example, when U.S. drug companies exported defective blood clotting products to hemophiliacs worldwide, reports of hemophiliacs infected with Human Immunodeficiency Virus (“HIV”) arose in France, Japan, Iran, Canada, and Portugal, among other countries.¹ When the product of a U.S. company injures a consumer outside of U.S. borders, the foreign plaintiff² must choose the forum in which to bring suit. Historically, U.S. courts have been an attractive forum for foreign plaintiffs,

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¹ *Aids Scandal Around the World*, BBC NEWS, Aug. 9, 2001, <http://news.bbc.co.uk/2/hi/europe/1482021.stm>.

² For purposes of this discussion, a “foreign plaintiff” refers to a party who is not a U.S. citizen or resident.

leading some to sue U.S. companies in a U.S. court rather than in the plaintiff's home country.³

The doctrine of forum non conveniens permits U.S. courts to dismiss the foreign plaintiff's case under certain circumstances.⁴ Even if the plaintiff has satisfied jurisdiction and venue requirements, this common law doctrine permits trial courts to dismiss a suit over which it would normally have jurisdiction if both the parties' convenience and the ends of justice are best served through dismissal.⁵ The Supreme Court of the United States has, through *Gulf Oil Corporation v. Gilbert*⁶ and *Piper Aircraft Company v. Reyno*,⁷ announced how the doctrine should be applied, as well as the level of deference that should be given to a plaintiff's choice of forum.

As in other circuit courts of appeal, in the Seventh Circuit the nature of the doctrine of forum non conveniens and the lenient standard of review together confer district courts with nearly free reign to determine whether to apply the doctrine. As Justice Scalia has noted, "[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, make uniformity and predictability of outcome almost impossible."⁸ This unbridled discretion is starkly illustrated in *Abad v. Bayer Corporation* ("*Abad II*"), in which the Seventh Circuit upheld dismissal on forum non conveniens grounds of two cases involving Argentinean plaintiffs who brought product liability claims against U.S. companies in federal district courts.⁹

³ Helen E. Mardirosian, *Developments in the Law: Federal Jurisdiction and Forum Selection*, 37 LOY. L.A. L. REV. 1643, 1667 (2004).

⁴ *Id.* at 1643.

⁵ See Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 36 (2000). This note does not discuss the analysis of whether the adjudications of whether the foreign forum is adequate or available, and assumes that the foreign plaintiff can satisfy both jurisdiction and venue rules in the U.S. forum.

⁶ 330 U.S. 501 (1947).

⁷ 454 U.S. 235 (1981).

⁸ *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (citations omitted).

⁹ 563 F.3d 663, 673 (7th Cir. 2009).

An analysis of the district court and Seventh Circuit's opinions in *Abad II* highlights the inconsistent approaches that district courts use when applying the private and public interest factors set forth in *Gilbert*. Part I of this note summarizes the development of the forum non conveniens doctrine in the Supreme Court of the United States. Part II discusses the district court and Seventh Circuit opinions in *Abad II*. Finally, Part III proposes modest solutions that the Seventh Circuit should adopt to ensure that district courts apply the *Gilbert* factors consistently and make forum non conveniens decisions more uniform and predictable.

I. BACKGROUND

A. *Forum Non Conveniens Generally*

The Fifth Circuit has noted aptly that just as “a moth is drawn to the light, so is a litigant drawn to the United States.”¹⁰ Foreign plaintiffs that can satisfy U.S. jurisdiction and venue rules have a plethora of incentives to bring suit in the United States.¹¹ In contrast to other jurisdictions, U.S. courts offer plaintiffs the potential availability of class actions, strict liability as a cause of action, and a broader scope of evidence through more extensive discovery rules.¹² Furthermore, litigation in the United States can be more affordable for plaintiffs because of the availability of contingent fee arrangements and the absence of monetary penalties in the form of attorney's fees on the losing party.¹³ Even if the case does not reach trial, having the case proceed through a U.S. court can influence claim settlement because U.S. cases tend to settle for higher amounts than in European countries.¹⁴ Most importantly, U.S. forums offer foreign plaintiffs in

¹⁰ *Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1146 (5th Cir. 1984).

¹¹ *Mardirosian*, *supra* note 3, at 1667.

¹² *Id.*

¹³ *Id.*

¹⁴ Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323 (1994).

civil suits the right to trial by jury, which raises the possibility of larger damage awards.¹⁵

Of course, a foreign plaintiff who opts to bring suit in a U.S. court also faces potential disadvantages. Foreign plaintiffs can encounter discrimination in U.S. courts simply because they are not American.¹⁶ Moreover, as willing as juries may be to award large amounts of damages, juries may be equally unwilling to award such damages to foreign plaintiffs. Despite these potential disadvantages, foreign plaintiffs often seek to have their cases heard in U.S. courts rather than their home country.

In light of these incentives, the doctrine of *forum non conveniens* serves important practical purposes. By allowing courts to dismiss a case, the doctrine protects against forum shopping plaintiffs.¹⁷ Through dismissal, the court can prevent these foreign plaintiffs from imposing undue inconvenience on the defendant and the court.¹⁸ Second, the doctrine also can be used to correct those cases that fall through the cracks – in other words, those cases in which venue and jurisdiction rules “fail” such that a foreign plaintiff successfully obtains jurisdiction in a federal court that is not a proper forum to hear the case.¹⁹ However, because the consequences of a *forum non conveniens* dismissal are severe, courts weigh the considerations of convenience to the defendant and the court against the plaintiff’s interest in justice.²⁰

¹⁵ *Id.*

¹⁶ See Kevin M. Clermont & Theodore Eisenberg, Commentary, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1133–35 (1996).

¹⁷ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

¹⁸ *Id.*

¹⁹ Michael M. Karayanni, *The Myth and Reality of a Controversy: “Public Factors” and the Forum Non Conveniens Doctrine*, 21 WIS. INT’L L.J. 327, 341–43 (2003).

²⁰ Mardirosian, *supra* note 3, at 1645–46.

*B. Historical Development of the Forum Non Conveniens
Doctrine in the Supreme Court*

The doctrine of forum non conveniens appeared in the opinions of U.S. courts in the early nineteenth century, but the Supreme Court did not explicitly adopt the doctrine until 1947.²¹ That year, the Court applied the doctrine of forum non conveniens for the first time in *Gilbert* and its companion case, *Koster v. Lumbermens Mutual Casualty Co.*²² In both cases, the Court voted 5–4 in favor of applying the forum non conveniens doctrine.²³

Gilbert was a “classic case of domestic forum shopping”²⁴ involving a Virginia plaintiff who brought suit in New York federal district court against a Pennsylvania corporation qualified to do business in New York.²⁵ The plaintiff alleged that the defendant’s negligent delivery of gasoline caused fire damage to the plaintiff’s warehouse in Virginia.²⁶ The defendant moved for a forum non conveniens dismissal, and the Court upheld the New York district court’s decision to grant the dismissal.²⁷

The *Gilbert* decision marked the Court’s official approval for federal courts to dismiss civil cases on forum non conveniens grounds.²⁸ Aside from generally referring to plaintiffs’ misuse of venue, the Court did not explain its need to adopt the doctrine.²⁹ However, legal commentary at the time suggested that the Court’s

²¹ Warren Freedman, FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS 4 (1988).

²² See generally *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501(1947); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

²³ *Gilbert*, 330 U.S. at 501; *Koster*, 330 U.S. at 123.

²⁴ Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 564 (2007).

²⁵ *Gilbert*, 330 U.S. at 502–03.

²⁶ *Id.*

²⁷ *Id.* at 503, 512.

²⁸ Lear, *supra* note 24, at 564.

²⁹ David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction”*, 103 L. Q. REV. 398, 401 (1987).

main concern was personal injury plaintiffs engaged in forum shopping.³⁰

In the opinion, the Court repeatedly emphasized that courts should grant forum non conveniens dismissals only in exceptional cases.³¹ The Court explained that a court's power to dismiss a case on forum non conveniens grounds is founded on the idea that plaintiffs sometimes can be tempted to bring suit in a forum that is inconvenient for their adversaries, even if the choice inconveniences the plaintiff.³² The Court announced that a judge should grant a forum non conveniens dismissal only in "rare" circumstances when litigation in the plaintiff's chosen forum would be highly inconvenient for the parties or the court.³³ Thus, a plaintiff's choice of forum should rarely be disturbed, unless the choice of forum vexes, harasses, or oppresses the defendant.³⁴

To guide lower courts, the Court set forth a number of private and public interest factors that a court must balance to determine whether a forum non conveniens dismissal is warranted.³⁵ The *Gilbert* private interest factors include:

- (i) the relative ease of access to sources of proof;
- (ii) the availability of compulsory process for attendance of unwilling witnesses;
- (iii) the cost of obtaining attendance of willing witnesses;
- (iv) the possibility of viewing premises if such view is appropriate to the action; and
- (v) all other practical problems that make trial of a case easy, expeditious, and inexpensive.³⁶

³⁰ *Id.*

³¹ *Gilbert*, 330 U.S. at 507–08.

³² *Id.* at 507.

³³ *Id.*

³⁴ *Id.* at 508.

³⁵ *See Gilbert*, 330 U.S. at 508.

³⁶ *Id.*

The Court also provided a number of public interest factors that courts should consider:

- (i) the administrative difficulties following for courts when litigation is piled up in congested centers instead of being handled at its origin;
- (ii) the imposition of the burden of jury duty on the people of a community that has no relation to the litigation;
- (iii) the local interest in having localized controversies decided at home;
- (iv) the appropriateness in having the trial of a diversity case in a forum that familiar with the state law that must govern the case; and
- (v) the avoidance of having a court in some other forum untangle problems in conflicts of law and foreign law.³⁷

Together, the factors assess whether it is more convenient for the parties to adjudicate the case in the current federal forum or the alternative foreign forum.³⁸

In dissent, Justice Black vigorously opposed the Court's decision to grant judges the discretion to dismiss cases on forum non conveniens grounds.³⁹ He criticized the relative ease with which defendants would be able to obtain a forum non conveniens dismissal.⁴⁰ Foreshadowing the development of multistate corporations and globalization, Justice Black noted that defendants could use the doctrine often because a defendant who does business in states other than the one in which he is sued can almost invariably claim that he has been put to some inconvenience to defend himself in that state.⁴¹ Justice Black believed that only poorly represented defendants would fail to produce substantial evidence illustrating that

³⁷ *Id.* at 508–09.

³⁸ *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981).

³⁹ *Gilbert*, 330 U.S. at 515–16 (Black, J., dissenting).

⁴⁰ *Id.* at 515.

⁴¹ *Id.* at 515–16.

the plaintiff's chosen forum is inconvenient enough to satisfy the majority's test.⁴²

Justice Black also suggested that the doctrine would clutter courts with an inquiry that would create uncertainty, confusion, and hardship for plaintiffs.⁴³ He warned that "[t]he broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors . . . will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible."⁴⁴ Justice Black pointed out that, despite the unpredictability of this case law, plaintiffs nonetheless would be expected to navigate through the haze of inconsistent decisions to determine the proper forum to bring suit.⁴⁵ He also warned that plaintiffs could endure substantial financial loss through the delay and expense of litigation, only to discover that the statute of limitations in the proper forum barred the plaintiff's claim while pursuing the claim elsewhere.⁴⁶ In conclusion, Justice Black believed that the decision whether to adopt the forum non conveniens was best left to Congress.⁴⁷

Decided the same day as *Gilbert*, in *Koster* the Court upheld another dismissal on forum non conveniens grounds.⁴⁸ The plaintiff, a citizen of New York, was a policyholder of a mutual insurance company domiciled in Illinois, and brought suit in New York federal district court alleging breach of fiduciary duties.⁴⁹ In the majority opinion, Justice Jackson focused on the application of the forum non conveniens doctrine in a derivative action, and emphasized that a plaintiff's choice to bring suit in his or her home forum is entitled to

⁴² *Id.* at 516.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 532 (1947).

⁴⁹ *Id.* at 518–19.

significant deference.⁵⁰ A plaintiff who brings suit in his or her home forum should not be deprived of the presumed advantages of the home forum except upon a clear showing of facts establishing that (1) the forum causes such oppressiveness and vexation to the defendant as to be out of all proportion to the plaintiff's convenience, or (2) trial in the chosen forum is inappropriate because of facts affecting the court's administrative and legal problems.⁵¹ The Court stated that when balancing the private and public interest factors, a plaintiff's showing that the home forum is convenient will normally outweigh any inconvenience to the defendant.⁵² Applying this test, the Court held that dismissal of the plaintiff's suit was proper because the plaintiff was "utterly silent" as to why hearing the case in New York would be of convenience to himself or his witnesses.⁵³

At the same time that the *Gilbert* and *Koster* cases worked their way to the Supreme Court, Congress contemplated legislation that would in effect nullify the application of the forum non conveniens doctrine as to domestic plaintiffs. About one year after *Gilbert*, Congress passed legislation that made forum non conveniens dismissals unavailable to defendants when the dispute was a wholly domestic one as in *Gilbert*.⁵⁴ Today, 28 U.S.C. § 1404(a) provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."⁵⁵ Thus, if a federal court decides that a domestic case is better off being heard in another federal court, the case is transferred pursuant to Section 1404(a) to the more appropriate federal court rather than dismissed under the forum non conveniens doctrine.⁵⁶ As a consequence, federal

⁵⁰ *Id.* at 521, 524.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 531.

⁵⁴ See Robertson, *supra* note 29, at 402 (stating that *Gilbert* soon became almost completely obsolete).

⁵⁵ 28 U.S.C. § 1404(a) (2006).

⁵⁶ See Robertson, *supra* note 29, at 402 (explaining Section 1404(a)).

courts no longer apply *Gilbert* to domestic cases; instead, forum non conveniens dismissals in federal courts occur only in cases in which the alternative forum is foreign.⁵⁷

In 1981, the Supreme Court provided the second landmark decision regarding forum non conveniens dismissals in *Piper*.⁵⁸ The plaintiff, the representative of the estates of several Scottish citizens killed in a plane crash, brought a wrongful death suit in federal district court against a Pennsylvania aircraft manufacturer and Ohio propeller manufacturer.⁵⁹ The issue in *Piper* was whether a motion to dismiss on grounds of forum non conveniens should be denied when the law of the alternate forum is less favorable to recovery than that which would be applied by the district court.⁶⁰ Although the *Gilbert* case involved domestic plaintiffs, the *Piper* Court applied *Gilbert* to a suit involving foreign plaintiffs.⁶¹

The Court upheld the district court's forum non conveniens dismissal using a two-prong test.⁶² The Court announced that, when analyzing a motion to dismiss on forum non conveniens grounds, a court first must determine whether an adequate alternate forum is available to hear the suit.⁶³ Generally, an alternate forum is adequate when the defendant is amenable to process in the other jurisdiction.⁶⁴ In rare circumstances, the other forum may not be an adequate alternative if it offers a remedy that is clearly unsatisfactory.⁶⁵ If an adequate alternate forum is not available, dismissal on forum non conveniens grounds is improper.⁶⁶ Second, if an adequate alternative forum exists, the court must balance the *Gilbert* public and private

⁵⁷ Lear, *supra* note 24, at 565.

⁵⁸ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 235 (1981).

⁵⁹ *Id.* at 238–39.

⁶⁰ *Id.* at 246 n.12.

⁶¹ *Id.* at 238.

⁶² *Id.*

⁶³ *Id.* at 255 n.22.

⁶⁴ *Id.*

⁶⁵ *Id.* at 255.

⁶⁶ *Id.*

factors to determine whether the balance of the factors favors litigation in the alternate forum.⁶⁷

The *Piper* Court also set forth the standard of review for a trial court's decision regarding a forum non conveniens motion.⁶⁸ The Court stated that the forum non conveniens determination is left to the sound discretion of the trial court, and should be reversed only when a clear abuse of discretion has occurred.⁶⁹ Absent such abuse, the court's decision deserves substantial deference if the court has considered all relevant public and private interest factors, and the balancing of these factors is reasonable.⁷⁰

Piper made it easier for domestic defendants to obtain a forum non conveniens dismissal. Until the 1970s, lower courts generally declined to dismiss transnational cases on the basis of forum non conveniens unless the defendant could show that it would be unfairly prejudiced or that an injustice would occur by hearing the case in the United States.⁷¹ In practice, only a handful of reported federal decisions resulted in forum non conveniens dismissals.⁷² Yet, *Piper* instituted three important changes in the federal forum non conveniens doctrine that made forum non conveniens dismissal more readily accessible for defendants.

First, the *Piper* Court altered the presumption of convenience to which a foreign plaintiff's choice of forum is entitled.⁷³ The Court generally adhered to the principles announced in *Gilbert*, stating that "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public factors clearly point towards trial in the alternative forum."⁷⁴

⁶⁷ *Id.* at 257.

⁶⁸ *Id.* at 257.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Robertson, *supra* note 29, at 403.

⁷² See *id.* at 403 (italics omitted); see, e.g., *Founding Church of Scientology v. Vertag*, 536 F.2d, 429 (D.C. Cir. 1976).

⁷³ Lear, *supra* note 24, at 566.

⁷⁴ *Piper*, 454 U.S. at 255.

However, in Part III of the opinion, Justice Marshall stated that a foreign plaintiff's choice of forum deserves less deference than that of a plaintiff bringing suit in his or her home forum.⁷⁵ He declared that when a plaintiff chooses his or her home forum, it is reasonable to assume that the choice is convenient, but this presumption is much less reasonable when a foreign plaintiff is involved.⁷⁶ Notably, three Justices declined to join in Part III of the opinion, and in total Part III represented the views of only four Justices.⁷⁷ Nonetheless, following *Piper*, foreign plaintiffs bringing suit in the United States face an uphill battle when trying to survive a defendant's motion to dismiss on forum non conveniens grounds.

Second, *Piper* indirectly altered the defendant's burden of proof. Under *Gilbert*, the presumption that a plaintiff's choice of home forum was convenient became relevant only when a plaintiff sought to rebut and overcome a defendant's showing of serious hardship.⁷⁸ However, unlike the Court in *Gilbert*, the *Piper* Court changed forum non conveniens analysis of the *Gilbert* factors into a true balancing test.⁷⁹ Rather than require the defendant to demonstrate that the plaintiff's choice of forum constituted an overwhelming hardship, the *Piper* court simply evaluated the evidence as a whole.⁸⁰ The Court's definition of "inconvenience" to the defendant evolved from harassment or vexation in *Gilbert* to the broader notion of a merely inappropriate forum choice.⁸¹ Thus, even though the burden remains on the defendant to show that a forum non conveniens dismissal should be granted, the post-*Piper* defendant faces a lower hurdle to do so.

Finally, defendants can obtain a forum non conveniens dismissal more easily after *Piper* because the opinion reflects a presumption that the U.S. public interest in having a foreign plaintiff's suit heard in a

⁷⁵ *Id.* at 255–56.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Lear*, *supra* note 24, at 566.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

U.S. court is minimal.⁸² In *Piper*, Justice Marshall’s analysis of the public interest factors focused on the local interest in having localized controversies decided at home, the “catch-all” *Gilbert* factor.⁸³

Rejecting the plaintiff’s assertion that U.S. citizens have an interest in deterring U.S. manufacturers from producing defective products that injure consumers abroad, Justice Marshall stated that the incremental deterrence gained if the case was heard in a U.S. court likely was insignificant.⁸⁴ He stated that the United States’ minimal interest in the accident was “not sufficient to justify the enormous commitment of judicial time and resources” that the *Piper* case would require if tried in the United States.⁸⁵ Thus, Justice Marshall introduced the notion that the United States does not have a strong deterrence interest in hearing a foreign plaintiff’s suit in a U.S. court.

II. FORUM NON CONVENIENS IN THE 7TH CIRCUIT

A. Current Doctrine

The Seventh Circuit test for forum non conveniens dismissals applies *Piper* and *Gilbert* virtually unchanged. A dismissal on forum non conveniens grounds is appropriate if a trial in the chosen forum would result in vexation or oppression to the defendant that would far outweigh the plaintiff’s convenience, or when the chosen forum would generate administrative and legal problems for the trial court.⁸⁶ To determine whether to dismiss the case, the court must first determine whether an adequate alternative forum is available to hear the case.⁸⁷

⁸² *Id.* at 567.

⁸³ *Id.* Lear notes that had Justice Marshall addressed *Gilbert*’s “jury duty” and local law factors, the analysis should have supported the exercise of jurisdiction because “[a] Pennsylvania jury could hardly be said to be uninterested in a dispute involving a resident corporation to which Pennsylvania law would apply.” *Id.* at 566–67.

⁸⁴ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260–61 (1981).

⁸⁵ *Id.*

⁸⁶ *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 802 (7th Cir. 1997).

⁸⁷ *In re Ford Motor Co.*, 344 F.3d 648, 651–52 (7th Cir. 2002).

In the Seventh Circuit, an alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly.⁸⁸

If an adequate alternative forum exists, the court then must decide whether various private and public and private interest factors clearly indicate that the suggested alternative forum is superior.⁸⁹ This analysis includes the public and private interest factors set forth in *Gilbert*, but the list is non-exhaustive.⁹⁰ As a consequence, parties are free to suggest any reason why the case should be litigated in one court or another.⁹¹ Furthermore, as in both *Gilbert* and *Piper*, the defendant carries the burden of persuading the court that dismissal on forum non conveniens grounds is warranted.⁹²

The Seventh Circuit has adopted the “less deference rule” from *Piper* in whole. Accordingly, in the Seventh Circuit, a plaintiff who sues in his or her home forum normally receives the benefit of the presumption that it is a convenient forum, and a defendant opposing that choice has a heavy burden of persuasion.⁹³ However, if the plaintiff brings suit in a forum far from home, it is less reasonable to assume that the forum is a convenient one.⁹⁴ The presumption regarding the plaintiff’s choice of forum applies with less force, and the choice is accorded less deference.⁹⁵ The Seventh Circuit has upheld the application of the forum non conveniens doctrine in several products liability cases involving foreign plaintiffs, most recently in *Abad II*.

⁸⁸ *Kamel*, 108 F.3d at 803.

⁸⁹ *Id.*

⁹⁰ *Abad v. Bayer Corp. (Abad II)*, 563 F.3d 663, 668 (7th Cir. 2009) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See Clerides v. Boeing Co.*, 534 F.3d 623, 628 (7th Cir. 2008).

⁹⁴ *Id.*

⁹⁵ *Id.*

B. The Abad II Case

In *Abad II*, the Seventh Circuit applied the forum non conveniens doctrine to affirm the dismissal of two suits brought by foreign plaintiffs injured outside of the United States.⁹⁶ *Abad II* consolidated two cases that represented two different, but widespread, products liability scandals: defective Firestone tires on Ford Explorers causing rollover accidents, and blood-clotting medicines infected with HIV or Hepatitis.⁹⁷ The Seventh Circuit's affirmation of these cases illustrates the vast discretion that trial courts can exercise when analyzing the *Gilbert* factors.

1. The *Abad I* Case

Abad I, a class action suit partly composed of Argentine plaintiffs, involved hemophiliacs and their spouses who alleged that the hemophiliac contracted either HIV or Hepatitis through the defendants' blood clotting products.⁹⁸ The four defendants, each a U.S. corporation, produced all or virtually all of the blood clotting products used in the United States.⁹⁹ *Abad I* was considered part of the "second generation" of litigation arising out of the blood clotting products because the plaintiffs were residents of foreign countries.¹⁰⁰ The defendants moved to dismiss on forum non conveniens grounds

⁹⁶ *Abad II*, 563 F.3d at 673.

⁹⁷ *Id.* at 668, 671.

⁹⁸ In re Factor VIII or IX Concentrate Blood Prods. Litig. (*Abad v. Bayer Corp.*) (*Abad I*), 531 F. Supp. 2d 957, 958–59 (N.D. Ill. 2008).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 959. Generally, second-generation plaintiffs claimed that the defendant negligently failed to sterilize their products, failed to screen and adequately test blood plasma donors, failed to warn users once the defendants became aware of the risk, and failed to withdraw the products from the market once the danger of infection was known. *Gullone v. Bayer Corp.*, 408 F. Supp. 2d 569, 571 (N.D. Ill. 2006). The foreign plaintiffs also claimed that the defendants, after being aware of the risk of viral contamination, fraudulently concealed the risk and dumped the untreated products on unsuspecting foreign markets. *Id.* at 573.

the claims of 619 plaintiffs infected in Argentina whose cases the Judicial Panel on Multidistrict Litigation (“MDL”) transferred to the Northern District of Illinois.¹⁰¹ Although two of the cases were originally filed in the Northern District of Illinois, the remaining cases originated in the Southern District of Florida and Northern District of California.¹⁰² After an extensive discussion involving a battle of the experts, the district court concluded that Argentina was both an available and adequate alternative forum.¹⁰³

Before addressing the *Gilbert* factors, the court addressed whether the plaintiffs’ choice of forum was entitled to any deference. Adhering to *Piper*, the court stated when plaintiffs sue in their home forums, they are entitled to the benefit of the presumption that their choice of forum is convenient.¹⁰⁴ The court determined that this presumption applied with less force because the plaintiffs brought suit in the United States, not in their home country Argentina.¹⁰⁵ Accordingly, the court stated that it would apply the *Gilbert* factors with this in mind.¹⁰⁶ Despite this pronouncement, it is unclear in the court’s application of the *Gilbert* factors how the presumption of convenience applied with less force. Instead, the court appeared to balance the factors without taking into consideration the presumption at all.¹⁰⁷

The court held that the private interest factors strongly favored dismissal because none of the factors favored the plaintiffs.¹⁰⁸ The defendants’ inability to join third parties if the cases were tried in U.S. courts favored dismissal.¹⁰⁹ Similarly, the defendants’ need for compulsory process of witnesses warranted dismissal because most of the witnesses who could testify about the injuries resided in Argentina

¹⁰¹ *Abad I*, 531 F. Supp. 2d at 959.

¹⁰² *Id.*

¹⁰³ *Id.* at 960–72.

¹⁰⁴ *Id.* at 972.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 972–82.

¹⁰⁸ *Id.* at 977.

¹⁰⁹ *Id.* at 972–73.

and could not be required to testify in the United States.¹¹⁰ The relative ease of access to evidence also favored the defendants because the plaintiffs would not suffer any substantial detriment if the cases were litigated in Argentina.¹¹¹ The plaintiffs already concluded their core discovery in the MDL, and the remaining discovery consisted of the case-specific medical histories of the plaintiffs located in Argentina.¹¹² Thus, the defendants had stronger argument for dismissal on forum non conveniens grounds solely because the plaintiffs completed their discovery first. Lastly, the court declined to determine which party the costs of translating evidence favored because both parties provided hyperbolic arguments that translation into either English or Spanish would involve millions of pages and exorbitant amounts of money.¹¹³

Turning to the public interest factors, the court held that all of the factors were neutral except for the Argentina's overriding interest in adjudicating the claims, which favored dismissal.¹¹⁴ Importantly, the court announced that when comparing the public interest factors, the court would compare the interest of Argentina to the interest of the state in which the federal district where the case was filed.¹¹⁵ Applying this principle, the court compared the interests of Argentina to Florida, Illinois, and California.¹¹⁶ The court determined that both Florida and Illinois had relatively small interests in the litigation.¹¹⁷ Strangely, the court also concluded that California's interest was minimal, even though the blood-clotting products were manufactured there, because there was no indication that the defendants' alleged misconduct was ongoing.¹¹⁸ Because California lacked a present interest in stopping an

¹¹⁰ *Id.* at 975.

¹¹¹ *Id.* at 975.

¹¹² *Id.* at 973.

¹¹³ *Id.* at 976–77.

¹¹⁴ *Id.* at 982.

¹¹⁵ *Id.* at 978.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

ongoing harm, the court concluded that the state had less interest in adjudicating the case than Argentina.¹¹⁹ Ultimately, the court concluded that Argentina, the plaintiff's residence, would endure the greatest impact.¹²⁰

The court held that the remaining public interest factors were neutral.¹²¹ Neither a potential conflict of law nor the problems of applying foreign law favored dismissal because, regardless of where the case was heard, U.S. law probably would apply.¹²² As for burdening citizens with jury duty, the court stated that this factor weighed in favor of dismissal for both the Florida and Illinois claims, but not the California claims.¹²³ California, as the state in which the defective products were manufactured, had an interest that justified imposing the burden of jury duty on its citizens.¹²⁴ Finally, the court held that alleged corruption in Argentine courts did not favor dismissal, and deemed the court congestion factor neutral because of the difficulty in predicting how quickly the cases could be resolved.¹²⁵

In *Abad II*, the Seventh Circuit affirmed the forum non conveniens dismissal, engaging in a cursory review of the trial court's decision.¹²⁶ The court first noted that had the plaintiffs provided a realistic estimate of the costs of translating the discovery materials, the court would have given the estimate substantial weight.¹²⁷ In the absence of such evidence, the factor remained neutral.¹²⁸ As for potential conflict of law or application of foreign law problems, the court reasoned that the district court erroneously determined that U.S.

¹¹⁹ *Id.* at 978–79.

¹²⁰ *Id.*

¹²¹ *Id.* at 978–92.

¹²² *Id.* at 979.

¹²³ *Id.* at 979–80.

¹²⁴ *Id.*

¹²⁵ *Id.* at 980–82. The court also stated that another factor that affects the speed with which a case can come to trial is the diligence of plaintiffs' attorneys. *Id.*

¹²⁶ *Abad v. Bayer Corp. (Abad II)*, 563 F.3d 663, 669–71, 673 (7th Cir. 2009).

¹²⁷ *Id.* at 669.

¹²⁸ *Id.*

law would apply; rather, the choice of law approaches of most U.S. jurisdictions and Argentina suggested that Argentine law would apply.¹²⁹ Because it was unclear whether Argentine courts would accept the plaintiffs' market share liability argument, the Seventh Circuit stated that this uncertainty was a compelling reason why an Argentine, not U.S., court should hear the case.¹³⁰ As a result, correcting the district court's error in conflict of laws analysis further supported dismissal of the case.¹³¹

2. The *Pastor* Case

In *Abad II*, the Seventh Circuit also affirmed the district court's decision in *Pastor* to grant the defendants' motion to dismiss two cases involving Argentine citizens on forum non conveniens grounds.¹³² In *Pastor*, Argentine citizens brought suit against Ford Motor Company and Bridgestone/Firestone North American Tire, LLC for injuries sustained in two separate car accidents in Argentina.¹³³ In both cases, the plaintiffs alleged that the Bridgestone/Firestone tires on their Ford Explorers failed and caused the automobile to roll over.¹³⁴ One case was originally brought in a Florida state court and subsequently removed to federal court.¹³⁵ The other case was brought in a federal district court in North Carolina.¹³⁶ The Judicial Panel on MDL to

¹²⁹ *Id.* at 670–71.

¹³⁰ *Id.* at 671. It was unclear whether Argentine courts would apply the theory of market share liability or joint and several liability. *Id.* at 670–71.

¹³¹ *Id.* at 670.

¹³² In Re: Bridge Stone/Firestone, Inc. Tire Products Liability Litigation [sic] (*Pastor*), No. IP-04-C-5796-B/S, slip op. at 2 (S.D. Ind. Jan. 31, 2007), *aff'd sub nom.* *Abad v. Bayer Corp. (Abad II)*, 563 F.3d 663 (7th Cir. 2009), available at http://www.insd.uscourts.gov/Firestone/bf_docs/93743722.pdf.

¹³³ *Id.*

¹³⁴ *Id.* at 5–7.

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

transferred both cases to the Southern District of Indiana.¹³⁷ After determining that Argentina was an adequate alternative forum, the court proceeded to analyze both the *Gilbert* private and public interest factors.¹³⁸

The district court first addressed whether the plaintiffs were entitled to a presumption in favor of their choice of forum.¹³⁹ As in *Abad I*, the court adhered to the less deference rule for foreign plaintiffs set forth in *Piper*.¹⁴⁰ However, in stark contrast with the district court in *Abad I*, the *Pastor* court announced that non-U.S. resident treaty nationals from a country that ratified the International Covenant on Civil and Political Rights were entitled to the same deference regarding their choice of forum as resident U.S. nationals.¹⁴¹ As a consequence, the court stated that it would apply a “neutral rule” when comparing the relative convenience of the parties.¹⁴² Significantly, the court noted that it would compare the interests of Argentina to those of the United States, not the interest of the respective states from which the cases were transferred as in *Abad I*.¹⁴³ Applying this “neutral rule,” the court held that the plaintiffs’ foreign residence in Argentina was more convenient than Florida, North Carolina, or any other U.S. forum and weighed in favor of dismissal.¹⁴⁴

¹³⁷ *Id.* Forum non conveniens analysis does not change when a case is part of an MDL proceeding, except that the transferee court will compare the relative conveniences of the foreign forum and the transferor court, not the MDL transferee court. *See, e.g., Abad II*, 563 F.3d at 668–72.

¹³⁸ *Pastor*, slip op. at 15–18.

¹³⁹ *Id.* at 19.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* Argentina ratified the International Covenant on Civil and Political Rights on August 8, 1986. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

¹⁴² *Pastor*, slip op. at 19.

¹⁴³ *Id.* at 20 n.20.

¹⁴⁴ *Id.* at 19–20.

Analyzing the private interest factors, the court held that the factors clearly pointed to dismissal of the two cases.¹⁴⁵ Noticeably, the defendants reacted to any of the plaintiffs' reasons why the cases should remain in the U.S. courts by making a concession.¹⁴⁶ As a consequence, the private interest factors that, absent the defendants' concessions, would have favored the plaintiffs instead favored the defendants' motion for dismissal. For example, the court determined that the ease of access to evidence factor favored dismissal because the defendants agreed that as a condition of dismissal they would provide the plaintiffs with access to all materials discovered through the MDL proceedings.¹⁴⁷

The defendants' willingness to make concessions also affected the court's analysis of other private interest factors, including the location of evidence and the enforceability of judgment. The location of the defendants' evidence regarding case-specific liability and damages weighed heavily in favor of dismissal because the majority of the non-party witnesses and documents were in Argentina and beyond the subpoena power of the U.S. court.¹⁴⁸ Notably, the court was swayed by the defendants' assurance that, if dismissal was granted, they would ensure that all U.S. witnesses affiliated with the defendants would be willing to testify in Argentina.¹⁴⁹ Absent the defendants' concession, the fact that an Argentine court could not compel these witnesses to testify in Argentina should have supported the plaintiffs' argument to deny the motion for dismissal. Similarly, because the defendants agreed to comply with the judgment of an Argentine court if the motion was granted, the court stated that this concession equalized the two forums because any judgment rendered by a U.S. court could also be enforced.¹⁵⁰

¹⁴⁵ *Id.* at 28.

¹⁴⁶ *See id.* at 21–22, 26–28.

¹⁴⁷ *Id.* at 21.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 27.

The court held that the remaining private interest factors—the costs of translating the evidence and the ability to view the accident scene—did not favor retaining the case.¹⁵¹ The court acknowledged that translating the evidence related to the design and testing of the defendants’ products to Spanish would be a significant and costly task that favored the plaintiffs.¹⁵² However, the court rejected that this factor weighed against dismissal because the court expected similar translation issues inevitably to arise if the case was heard in the United States.¹⁵³ As a consequence, the court concluded that the burden of translation did not outweigh the benefit of easier access to proof in Argentine courts.¹⁵⁴ Lastly, the court held that the ability to view the accident scene favored dismissal.¹⁵⁵ Although accident scene factor was of less importance because photographs of the accidents could be viewed in both North Carolina and Florida courts, the court indicated that this factor supported dismissal because an Argentine court would be familiar with the local topography.¹⁵⁶ In sum, the court held that the private interest factors clearly pointed towards dismissal of both cases.¹⁵⁷

The court then addressed the public interest factors, and held that none of the factors favored the plaintiffs.¹⁵⁸ First, the court concluded that the court congestion factor was neutral because the parties failed to provide sufficiently detailed information regarding which court would suffer the greater burden from adding this particular trial to its workload.¹⁵⁹ Next, the court considered the local interests of the forums, and determined that Argentina’s greater interest in the case

¹⁵¹ *Id.* at 21–22, 26–28.

¹⁵² *Id.* at 21–22.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 27–28.

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 28.

¹⁵⁸ *Id.* at 31.

¹⁵⁹ *Id.* at 28.

favored dismissal.¹⁶⁰ According to the court, Argentina had an interest in regulating potentially dangerous products used within its borders, and the United States had an interest in regulating the conduct of global businesses headquarters in the United States.¹⁶¹ The court reasoned that the United States' interest was less significant because the plaintiffs were foreign citizens and the defendants were American corporations with extensive foreign business dealings.¹⁶²

The remaining public interest factors also favored dismissal. Accordingly, the court held that potential burdening of juries in North Carolina and Florida supported dismissal.¹⁶³ Although both states had an interest in protecting the lives of their residents, neither state had an interest in the case because the plaintiffs were not foreign, not state residents.¹⁶⁴ Finally, the court held that the parties' interest in having foreign law issues determined by a court familiar with the law, clearly favored a forum non conveniens dismissal.¹⁶⁵ As in *Abad I*, the *Pastor* court reasoned that the substantive law of Argentina likely applied to this case.¹⁶⁶ Even if U.S. law did apply, any difficulty that an Argentine court might have in applying U.S. state law did not clearly point towards retaining the cases.¹⁶⁷

3. The Seventh Circuit's Opinion in *Abad II*

In *Abad II*, the Seventh Circuit affirmed the district court's dismissal of the two cases.¹⁶⁸ The court first addressed whether the

¹⁶⁰ *Id.* at 29–30.

¹⁶¹ *Id.* at 29.

¹⁶² *Id.* (stating that “[d]omestic public policy concerns regarding consumer safety are insufficient to establish a local interest on the part of American courts sufficient to tip the second public interest factor in favor of retaining jurisdiction”).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 29–30.

¹⁶⁵ *Id.* at 30.

¹⁶⁶ *Id.* at 31.

¹⁶⁷ *Id.*

¹⁶⁸ *Abad v. Bayer Corp. (Abad II)*, 563 F.3d 663, 673 (7th Cir. 2009).

district court judge failed to apply the presumption in favor of the plaintiffs' choice of forum properly because the judge applied a "neutral rule" to the plaintiffs' choice of forum.¹⁶⁹ The Seventh Circuit interpreted this "neutral rule" simply to mean that "[w]hen the plaintiff wants to sue on the defendant's home turf, and the defendant wants to be sued on the plaintiff's home turf . . . there is no reason to place a thumb on the scale . . ."¹⁷⁰ The court ignored the district court's line of reasoning that resulted in the neutral rule, and notably did not address its recognition of the treaty between the U.S. and Argentina.¹⁷¹ The court concluded that "[w]hen application of the doctrine would send the plaintiffs to their home court, the presumption in favor of giving plaintiffs their choice of court is little more than a tie breaker."¹⁷² Thus, the court diminished the *Piper* concept of giving less deference to a foreign plaintiff's choice of forum than that of a domestic plaintiff into nothing more than an afterthought.

The court then analyzed the *Gilbert* factors, but not without giving a scathing commentary on how parties manipulate these factors. Although the list of *Gilbert* factors is not exclusive, the court noted that parties inevitably try to make their arguments correspond to the list of factors, regardless of how "violent a dislocation of reality results."¹⁷³ Despite the parties' incentive to manipulate the *Gilbert* factors, the court held that the district court in *Pastor* did not abuse its discretion in analyzing the public interest factors.¹⁷⁴ The court noted that the district court correctly determined that Argentine law would apply to the cases.¹⁷⁵ As a consequence, Argentina was a more proper forum because Argentine courts are more competent at applying Argentine law.¹⁷⁶ Furthermore, the Seventh Circuit held that the

¹⁶⁹ *Id.* at 667.

¹⁷⁰ *Id.* at 667.

¹⁷¹ *See id.*

¹⁷² *Id.* at 667.

¹⁷³ *Id.* at 668.

¹⁷⁴ *Id.* at 671–73.

¹⁷⁵ *Id.* at 671.

¹⁷⁶ *Id.*

location of the evidence also favored dismissal because the plaintiffs had already conducted the bulk of their discovery regarding their negligence claim, and a significant amount of discovery still needed to be conducted in Argentina.¹⁷⁷ Thus, as in *Abad I*, the fact that the plaintiffs completed their discovery first ultimately strengthened the defendants' argument in favor of dismissal.

Turning to the public interest factors, the Seventh Circuit stated that in both *Abad I* and *Pastor*, neither the United States nor Argentina had any interest in having the litigation tried in its courts rather than in the courts of the other country.¹⁷⁸ Rejecting the district court's analysis of the national interests at stake, the court highlighted that the governments of both nations failed to intervene and express a desire to have the lawsuits litigated in their courts.¹⁷⁹ As a consequence, the court concluded that both cases consisted of ordinary private tort litigation that failed to implicate any national interests.¹⁸⁰ The court also rejected the plaintiffs' arguments that costs of translation, which the plaintiffs failed to specify, favored hearing the case in the United States.¹⁸¹ Similarly, the court rejected the plaintiffs' argument that court congestion was worse in Argentina than in the United States, because the plaintiffs relied on dated statistics that did not reflect the current condition of Argentine courts.¹⁸² Ultimately, the only public interest that the Seventh Circuit acknowledged that favored dismissal was the defendants' need to collect evidence from third parties in Argentina that could not be compelled to testify in the United States.¹⁸³

¹⁷⁷ *Id.* at 672.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

III. PROPOSED SOLUTIONS

Abad II illustrates how district court judges retain nearly unbridled discretion when applying the flexible *Gilbert* factors.¹⁸⁴ As a consequence, parties have an incentive to engage in a free-for-all and create a wide variety of arguments in hopes that at least some will resonate with the judge. In the absence of a Court decision augmenting the forum non conveniens test, the doctrine as it stands will continue to lack both uniformity and predictability. The Seventh Circuit should adjust the doctrine to ensure that district courts apply a consistent framework by requiring district courts to: (1) return to the original conception of the doctrine set forth in *Gilbert*, (2) use a nation-to-nation analysis of the relative public interests, (3) adopt the Second Circuit's sliding scale approach to the less deference rule, and (4) refuse to consider parties' willingness to make concessions.

A. Return to the Original Conception of the Doctrine Set Forth in Gilbert

The Seventh Circuit should instruct district courts to apply the forum non conveniens doctrine in a way that properly reflects its original purpose as expressed in *Gilbert*—to grant dismissal in those rare instances when plaintiff's choice of a U.S. forum is an abuse of process or harasses the defendant.¹⁸⁵ In *Abad II*, both district courts engaged in an analysis of which forum was more convenient.¹⁸⁶ Yet, the corporate defendants and the courts would have endured some logistical difficulties regardless of whether the cases were litigated in a U.S. or Argentine court. These difficulties stem from the transnational nature of the cases, not because of the plaintiff's choice of forum, and

¹⁸⁴ See *id.* at 666–73.

¹⁸⁵ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

¹⁸⁶ In re Factor VIII or IX Concentrate Blood Prods. Litig. (*Abad v. Bayer Corp.*) (*Abad I*), 408 F. Supp. 2d 957, 982 (N.D. Ill. 2008); In Re: Bridge Stone/Firestone, Inc. Tire Products Liability Litigation [sic] (*Pastor*), No. IP-04-C-5796-B/S, slip op. at 32 (S.D. Ind. Jan. 31, 2007), available at http://www.insd.uscourts.gov/Firestone/bf_docs/93743722.pdf.

inevitably arise anytime that the parties involved originate from different countries. In both *Abad I* and *Pastor*, the plaintiffs' choice to bring suit in the United States cannot be said undoubtedly to have vexed, harassed, or oppressed the corporate defendants. Under the formulation of the doctrine as expressed in *Gilbert*, the plaintiffs' choice of the United States as a forum arguably did not impose a sufficiently heavy burden on the defendants to justify dismissal.

Even on the international level, there is a growing consensus that a forum non conveniens dismissal is not warranted merely because the plaintiff's choice of forum inconveniences the defendant. For example, in 2001, the Hague Conference on Private International Law attempted to resolve the civil law and common law approaches to forum selection.¹⁸⁷ In civil law countries like Argentina, once a court determines that it has jurisdiction over a case, it is assumed that the jurisdiction should be exercised.¹⁸⁸ The civil law approach differs starkly from the common law approach, which focuses on determining which forum is the most proper.¹⁸⁹ To unify these approaches, the Conference proposed that

In exceptional circumstances . . . the court may, on application by a party, suspend its proceedings in that case if it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute

The court shall take into account, in particular –

a) any inconvenience to the parties in view of their habitual residence;

¹⁸⁷ Ronald A. Brand & Scott R. Jablonski, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 148–49 (2007).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation or prescription periods;
- d) the possibility of obtaining recognition and enforcement of any decision on the merits.

[I]n deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.¹⁹⁰

Like the *Gilbert* Court, the Hague Convention envisioned the forum non conveniens doctrine to apply only in those rare or “exceptional” cases in which trying the case in the plaintiff’s chosen forum would be “clearly inappropriate.”¹⁹¹ The Convention’s proposed rule even goes so far as to prohibit courts from giving more deference to a local plaintiff’s choice of forum than a foreign plaintiff.¹⁹² The Convention’s approach aligns with *Gilbert* because it places a greater burden on the defendant than currently is applied under Supreme Court precedent.¹⁹³

Although the distinction is subtle, the proper inquiry, as expressed in both *Gilbert* and the Hague Convention, should be whether the U.S. forum is so clearly inconvenient for the defendant or court that dismissal is warranted.¹⁹⁴ If the foreign plaintiff can satisfy venue and

¹⁹⁰ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, COMMISSION II ON JURISDICTION & FOREIGN JUDGMENTS IN CIVIL & COMMERCIAL MATTERS, SUMMARY OF THE OUTCOME OF THE DISCUSSION IN COMMISSION II OF THE FIRST PART OF THE DIPLOMATIC CONFERENCE 6–20 JUNE 2001: INTERIM TEXT 20 (2001) (numbering omitted), *available at* http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf (last visited Dec. 2, 2009), *reprinted in Hague Conference on Private International Law Commission II*, 77 CHI.-KENT L. REV. 1015, 1040 (2002).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Brand, *supra* note 187, at 157.

¹⁹⁴ *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 190, at 20; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

jurisdiction requirements, the U.S. court should retain its jurisdiction and hear the case unless the plaintiff's choice of forum imposes a threshold level of hardship on the defendant or court.

Defendants' abuse of the forum non conveniens doctrine serves as evidence that the doctrine has strayed from *Gilbert*. In practice, defendants have a relatively easy time obtaining a forum non conveniens dismissal of cases that have significant contacts with the United States, just as Justice Black foretold in his *Gilbert* dissent.¹⁹⁵ The doctrine has become a powerful tool for defendants, and is criticized for providing defendants with the opportunity to engage in reverse forum shopping.¹⁹⁶ One commentator asserts that U.S. corporations have "bastardized" the doctrine by increasingly trying to remove a foreign plaintiff's case to a foreign jurisdiction where U.S. products liability laws, which favor plaintiffs, do not extend.¹⁹⁷

Another problem with abandoning the *Gilbert* articulation of the doctrine is that U.S. courts improperly assume that a foreign plaintiff can bring a subsequent suit in the foreign forum after the U.S. case is dismissed on forum non conveniens grounds. However, in reality a forum non conveniens dismissal often operates as a kiss of death. One commentator, David Robertson, has studied the subsequent history of foreign plaintiffs' cases that were dismissed from U.S. courts on forum non conveniens grounds.¹⁹⁸ His research revealed that the vast majority of these dismissed cases were not pursued further, or were settled for a fraction of the value that an American jury could have awarded.¹⁹⁹ Robertson argued that in most cases the application of the forum non conveniens doctrine is outcome-determinative, even if the judge attaches many conditions to the dismissal.²⁰⁰ As a consequence, a forum non conveniens dismissal plausibly can leave foreign plaintiffs with no adequate redress for their injury. In light of

¹⁹⁵ See *Gilbert*, 330 U.S. at 515–16 (Black, J., dissenting).

¹⁹⁶ Freedman, *supra* note 21, at 28.

¹⁹⁷ *Id.*

¹⁹⁸ Robertson, *supra* note 29, at 418–19.

¹⁹⁹ *Id.* at 419–20.

²⁰⁰ *Id.* at 408–09.

Robertson's research, the Seventh Circuit's framework of analysis that permits dismissal if the foreign forum is merely more convenient than the U.S. court seems flawed.

B. Use a Nation-to-Nation Analysis of the Relative Interests

The Seventh Circuit also can promote uniformity and predictability amongst district courts applying the *Gilbert* public interest factors to a foreign plaintiff's case by ensuring that courts consistently adopt a nation-to-nation approach when analyzing local interests. One of the starkest differences between the district courts' analyses in *Abad I* and *Pastor* arose during each court's comparison of the local interests in hearing the cases.²⁰¹ While the *Pastor* court specifically noted that its inquiry would compare the national interests of Argentina to the United States, the *Abad I* court compared Argentina's interests to that of states where the plaintiffs originally filed suit.²⁰² Predictably, this distinction created two very different frameworks for the courts' analysis.

A state-to-nation analysis of the *Gilbert* factors improperly narrows the scope of the court's analysis. This method fails to consider the larger public interests that support hearing a foreign plaintiffs' case in a U.S. federal court. As Professor Elizabeth T. Lear notes, "[a] forum non conveniens decision pits a foreign forum against an American forum. State interests should be irrelevant here; the alternative forum is foreign. Our national interests in adjudicating the dispute are at stake."²⁰³ In mass tort cases such as those addressed in *Abad II*, the United States has a strong interest in safeguarding the health of its citizens, which in aggregate is much stronger than that of

²⁰¹ See *In re Factor VIII or IX Concentrate Blood Prods. Litig. (Abad v. Bayer Corp.) (Abad I)*, 408 F. Supp. 2d 957, 978 (N.D. Ill. 2008); *In Re: Bridge Stone/Firestone, Inc. Tire Products Liability Litigation [sic] (Pastor)*, No. IP-04-C-5796-B/S, slip op. at 20 n.16 (S.D. Ind. Jan. 31, 2007), available at http://www.insd.uscourts.gov/Firestone/bf_docs/93743722.pdf.

²⁰² *Abad I*, 408 F. Supp. 2d at 978; *Pastor*, slip op. at 20 n.16.

²⁰³ Lear, *supra* note 24, at 569–70.

an individual state. Narrowly taking into account only the states' interest fails to account for such interests.

In addition to engaging in a nation-to-nation comparison, the Seventh Circuit also should ensure that district courts consider the deterrence effect that litigating a foreign plaintiff's claim can have on U.S. corporations. Ignoring this interest, both district courts in *Abad II* focused only on the state or national interest in regulating U.S. corporations and did not consider this broader national interest at stake.²⁰⁴ Rather shockingly, in *Abad II* the Seventh Circuit declined to consider whether national interests were implicated because neither the U.S. nor Argentine government intervened in the case and announced that it had an interest in hearing the case.²⁰⁵ Despite Justice Marshall's position in *Piper* that U.S. citizens' interest in having a foreign plaintiff's case litigated in a U.S. court only minimally deters U.S. corporations from producing defective products,²⁰⁶ prior mass tort situations indicate otherwise.

For example, the Bridgestone/Firestone and Ford rollover controversy illustrates how a nation-to-nation comparison that recognizes a U.S. interest in a foreign plaintiff's product liability claim could have prevented countless injuries in the United States. Professor Lear posits that multinational corporations like Bridgestone/Firestone and Ford seem to evade liability for a large proportion of foreign accidents, which allows them to absorb the costs of many U.S. injuries before having to fix a defective product.²⁰⁷ In the rollover controversy, Bridgestone/Firestone and Ford apparently were aware of the tire and rollover problem seven years before a recall occurred in the United States, and the recall was initiated only after a large number of lawsuits were filed.²⁰⁸ However, Ford recalled and offered to repair or

²⁰⁴ *Abad I*, 408 F. Supp. 2d at 978; *Pastor*, slip op. at 29.

²⁰⁵ *Abad v. Bayer Corp. (Abad II)*, 563 F.3d 663, 668 (7th Cir. 2009).

²⁰⁶ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260–61 (1981).

²⁰⁷ See Lear, *supra* note 24, at 574.

²⁰⁸ *Id.* at 576.

replace the tires in all Ford Explorers in Venezuela, Ecuador, and Colombia *three years* before the U.S. recall.²⁰⁹

Permitting foreign plaintiffs to litigate their claims in the United States could have shed light on the defects years earlier. One look at a newspaper proves that litigation attracts the attention of the U.S. press, and raises the awareness of U.S. consumers.²¹⁰ Such attention could have pushed the defendants to recall the cars in the United States years earlier. This example illustrates that refusing to hear a foreign plaintiff's claim can cause indirect harm to U.S. consumers. By adopting a nation-to-nation approach, the Seventh Circuit can ensure that district courts consistently apply this public interest factor and consider all relevant national interests.

C. Adopt the Sliding Scale Approach to the Less Deference Rule

By also adopting the Second Circuit's sliding scale approach to the less deference rule, the Seventh Circuit can ensure that district courts apply the *Gilbert* factors consistently. The vastly different approaches in *Abad I* and *Pastor* illustrate the difficulty that district courts have in determining how much deference to give a foreign plaintiff's choice of forum under *Piper*.²¹¹ In both cases, the district court stated that, according to *Piper*, a foreign plaintiff's choice of forum is entitled to less of a presumption of convenience, or less deference, if the plaintiff does not sue in his or her home forum.²¹² The *Abad I* court adopted this rule virtually unchanged, stating that the court's deference to the Argentine plaintiffs' choice of forum applied with less force.²¹³ In contrast, the *Pastor* court determined that, as a consequence of Argentina's ratification of the International Covenant on Civil and Political Rights, the Argentine plaintiffs were entitled to the same deference regarding their choice of forum as U.S. citizens

²⁰⁹ *Id.*

²¹⁰ *Id.* at 578.

²¹¹ See *Abad I*, 408 F. Supp. 2d at 972; *Pastor*, slip op. at 19.

²¹² *Abad I*, 408 F. Supp. 2d at 972; *Pastor*, slip op. at 19.

²¹³ *Abad I*, 408 F. Supp. 2d at 972.

and residents.²¹⁴ Accordingly, the court stated that it would apply a “neutral rule” when comparing the relative convenience of the parties.²¹⁵ Notably, both Argentina and the United States ratified the International Covenant on Civil and Political Rights years before both *Abad I* and *Pastor* arose, yet the treaty’s effect on forum non conveniens analysis is discussed only in *Pastor*.²¹⁶ By affirming both cases, the Seventh Circuit endorsed two conflicting approaches, while simultaneously degrading the presumption into merely a tiebreaker.²¹⁷

Rather than continue to carve out exceptions to the default rule that a domestic plaintiffs’ choice of forum is entitled to substantial deference, the Seventh Circuit should adopt the Second Circuit’s “sliding scale” approach. In *Iragorri v. United Technologies Corp.*, the Second Circuit rejected the notion that whether a plaintiff’s choice of forum is entitled to deference depends upon the plaintiff’s status as foreigner or U.S. citizen or resident alone.²¹⁸ Rather, the court stated that

the greater the plaintiff’s or the lawsuit’s bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for forum non conveniens. . . . On the other hand, the more it

²¹⁴ *Pastor*, slip op. at 19. The *Pastor* court’s use of a “treaty exception” to the less deference rule is nothing new. The Second Circuit endorsed the use of such an exception if a treaty guarantees equal court access in *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978). The court stated that the less deference rule should not apply when “a treaty between the United States and the foreign plaintiff’s country allows nationals of both countries access to each country’s courts on terms no less favorable than those applicable to nationals of the court’s country.” *Id.* at 882.

²¹⁵ *Pastor*, slip op. at 19.

²¹⁶ See International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/English/law/ccpr.htm>.

²¹⁷ *Abad v. Bayer Corp. (Abad II)*, 563 F.3d 663, 667 (7th Cir. 2009).

²¹⁸ 274 F.3d 65, 71–72 (2d Cir. 2001).

appears that the plaintiff's choice of forum was motivated by forum-shopping reasons . . . the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a forum non conveniens motion²¹⁹

After determining whether the plaintiff's choice of forum is entitled to more or less deference, the Second Circuit still requires district courts to conduct the required forum non conveniens analysis under *Gilbert*, *Koster*, and *Piper*.²²⁰

The Second Circuit's sliding scale approach provides a flexible alternative to the less deference rule. The approach does not disadvantage foreign plaintiffs merely because of their status as foreigners; instead, the Second Circuit requires district courts to view the plaintiff's choice of forum in light of all of the surrounding circumstances.²²¹ This approach furthers the purpose of the forum non conveniens doctrine because it eliminates categorical discrimination against foreign plaintiffs, yet trial courts still retain the discretion to raise an eyebrow at suspicious and perhaps forum shopping plaintiffs.

The Second Circuit is not the only court to express disapproval of the rigid less deference rule. For example, in *Myers v. Boeing Co.*, the Supreme Court of the state of Washington declined to adopt the less deference rule.²²² The court reasoned that the rule from *Piper* reflected the views of only four Justices and "consist[ed] of a few conclusory sentences with no supportive analysis or reasoning."²²³ Aside from questioning the rule's support in *Piper*, the *Myers* court also raised substantive objections to the less deference rule.²²⁴ The court stated that the less deference rule purported to give less deference to a

²¹⁹ *Id.* at 72 (footnotes and italics omitted).

²²⁰ *Id.* at 73.

²²¹ *See id.* at 73 (stating that a district court "must consider a plaintiff's likely motivations in light of all of the relevant indications").

²²² 794 P.2d 1272, 1280 (Wash. 1990).

²²³ *Id.*

²²⁴ *See id.* at 1280–81.

foreign plaintiffs' choice of forum, but in practice gives less deference to foreign plaintiffs themselves solely because of their status as foreigners.²²⁵ As a consequence, the less deference rule raised xenophobia concerns.²²⁶ Finally, the court explained that it declined to adopt the less deference rule because it simply was not necessary.²²⁷ The court reasoned that the *Gilbert* factors could lead to fair and equitable results that balance the conveniences based on the foreign plaintiff's choice of forum, without relying on his or her status as a foreigner.²²⁸

Like the *Myers* court, the Seventh Circuit has also expressed its disdain for discriminating against foreign plaintiffs based on their status alone. For example, in *Abad II*, the court stated that it agreed with the Argentine plaintiffs that foreign plaintiffs have the same rights in an American court as an American citizen.²²⁹ Yet the Seventh Circuit's current application of the *Piper* less deference rule unchanged maintains such discrimination in practice. So long as a plaintiff is foreign, the choice of a forum that is not the plaintiff's home forum automatically receives less deference.

The Seventh Circuit should adopt the Second Circuit's sliding scale approach because it permits district courts to take into account the totality of the circumstances, such as existing treaty relations, when determining whether a plaintiff's choice of forum is entitled to a presumption of convenience. The desire to promote consistent application of U.S. justice should be a valid reason to retain jurisdiction over a foreign plaintiff's case.²³⁰ Applying the Second Circuit's approach, which would not discriminate against foreign plaintiffs, ensures that courts in the Seventh Circuit reach fair and just results.

²²⁵ *Id.* at 1281.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Abad v. Bayer Corp. (Abad II)*, 563 F.3d 663, 666 (7th Cir. 2009).

²³⁰ Freedman, *supra* note 21, at 84.

D. Ignore Defendants' Willingness to Make Concessions

Lastly, the Seventh Circuit should instruct district courts that the defendants' willingness to make concessions should not influence the courts' decision whether or not to grant the forum non conveniens dismissal. The district court's decision in *Pastor* illustrates the extent to which such concessions can help defendants tip the scale in favor of dismissal.²³¹ In *Pastor*, the district court repeatedly noted the defendants' willingness to make the alternative forum, Argentina, more convenient.²³² The court's analysis was influenced by the defendants' agreement that, as a condition of dismissal, they would provide the plaintiffs with access to all materials discovered through the MDL proceedings, ensure that all witnesses affiliated with the defendants would be willing to testify in Argentina, and comply with the judgment of an Argentine court.²³³

Two problems arise when courts give weight to defendants' concessions towards granting the forum non conveniens dismissal. First, this approach gives defendants an incentive to concede on issues that the defendant does not have the authority to concede. For instance, in *Pastor* the defendants promised that if the forum non conveniens dismissal was granted, it would make critical evidence and witnesses available to the plaintiffs in an Argentine court.²³⁴ This concession implicitly acknowledged that dismissal on forum non conveniens grounds would disadvantage the plaintiffs' access to certain evidence in an Argentine court. However, whether this evidence would be admissible in an Argentine court is a matter of Argentine law, not the defendants' discretion. Even if a defendant agrees to concede on certain issues, a foreign court is not bound to honor those concessions. Moreover, for some evidence this created an

²³¹ See In Re: Bridge Stone/Firestone, Inc. Tire Products Liability Litigation [sic] (*Pastor*), No. IP-04-C-5796-B/S, slip op. at 21, 25, 27 (S.D. Ind. Jan. 31, 2007), available at http://www.insd.uscourts.gov/Firestone/bf_docs/93743722.pdf.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

appearance of a concession, without actually making one, because the evidence would have been admitted into an Argentine court anyway. Thus defendants can use such concessions to create an appearance of helpful participation and perhaps appeal to the sympathies of the court without necessarily disadvantaging their own position.

Second, this approach can give wealthy defendants an advantage, particularly in products liability cases like *Abad I* and *Pastor*. As *Pastor* illustrated, a defendant who is willing to pay the costs of transporting witnesses to Argentina can make such a concession, while a defendant who is an individual or small company cannot.²³⁵ Thus, the Seventh Circuit should ensure that district courts do not take defendants' willingness to make concessions into account when weighing the *Gilbert* factors.

CONCLUSION

Absent a ruling from the Supreme Court, federal courts addressing the forum non conveniens doctrine will continue to apply the *Gilbert* factors haphazardly. Through the relatively modest changes proposed in this note, the Seventh Circuit can ensure that district courts apply the factors consistently and reach more uniform results.

²³⁵ *Id.* at 25 (stating that the defendants assured the court that all U.S. witnesses affiliated with the defendants would be available to testify in an Argentine court).