

Forum Selection and *Forum Non Conveniens*: A Plaintiff's Perspective

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I. Introduction

Selecting a forum in which to litigate is one of the most important decisions in the litigation process and requires a thorough analysis of jurisdictional issues, procedural and substantive law, and relevant political factors. A United States forum may offer plaintiffs substantial legal benefits for prospective claims, including unparalleled breadth of discovery and a unique potential for substantial monetary awards. However, a party also risks delays and even dismissal of its claims due to jurisdictional challenges. One of the greatest challenges for international plaintiffs is the doctrine of *forum non conveniens* ("FNC"), which allows a court, in its discretion, to refuse to take jurisdiction over matters where there is a more appropriate alternative forum available to the parties. This article describes some of the key factors in assessing whether a foreign plaintiff should bring suit in a United States forum, followed by a closer analysis of the challenges in overcoming an FNC defense.¹

II. Choosing the Proper Forum for International Litigation: Key Factors

Key Factor # 1: Jurisdiction

Before a United States court may even reach the merits of a claim, it must satisfy itself that it has jurisdiction over the parties (personal jurisdiction) as well as jurisdiction over the subject matter of the suit (subject matter jurisdiction). A plaintiff must plead the facts supporting personal jurisdiction and subject matter jurisdiction, as well as the legal basis for jurisdiction, in the initial complaint. Thus, determining whether a strong case for jurisdiction can be made requires careful consideration at the outset of the domicile, citizenship, and relationship of the parties before a claim is filed.

¹ The discussion in this paper is not meant to present a comprehensive analysis of the issues addressed, but is intended to raise for consideration the various factors that may impact a party's decision to bring a suit in a United States forum. Before making the ultimate decision regarding where to bring suit, parties are cautioned to conduct a thorough legal analysis of the factors identified herein.

- *Personal Jurisdiction*

A United States court may have personal jurisdiction over a defendant under the provisions of a federal or state statute only where the defendant has “minimum contacts” with the state in which the court is located. In addition, a plaintiff must examine state law requirements for personal jurisdiction set forth in the state’s “long-arm statute” which sets out the circumstances under which an entity is considered subject to the court’s jurisdiction, even though it is not physically “present” in that state.²

Whether a party satisfies the “minimum contacts” threshold is a fact intensive inquiry. Contacts may include contracting for the provision of goods or services within the forum, owning property in the forum, or placing an item in the stream of commerce with the intention that it is to be sold in the forum. With the advent of modern technology and the expansion of the global economy, it has become easier for parties to establish that a company or entity has sufficient contacts with a jurisdiction to satisfy “minimum contacts.”

Parties to a contract may consent to personal jurisdiction in a particular forum by incorporating a forum selection clause in the agreement. Where the dispute arises from the contract, a forum selection clause may be sufficient to confer jurisdiction in that particular forum. In some states, however, consent to jurisdiction still must be accompanied by minimum contacts with the state for a court to exercise personal jurisdiction over a non-resident defendant. *See, e.g., Rexam Airspray Inc. v. Arminak*, 471 F. Supp. 2d 1292, 1298 (S.D. Fla. 2007) (citing *McRae v. J.D./M.D. Inc.*, 511 So.2d 540, 542 (Fla. 1987)).

One common issue that arises in international litigation is whether a foreign parent is subject to personal jurisdiction in the United States based on its affiliation with a domestic subsidiary company. While some United States courts have allowed a foreign parent that otherwise lacks contacts in the United States to be sued along with a domestic subsidiary, the courts have required that the plaintiff do more than simply allege the existence of the parent/subsidiary relationship. In New York, for example, some courts have exercised jurisdiction over foreign entities on the basis of their domestic affiliate’s activities where there is

² The Restatement (Third) of Foreign Relations Law provides for a “reasonableness” standard for personal jurisdiction over a foreign defendant. According to the Restatement, jurisdiction is “reasonable” where the defendant is present in the forum, has consented to jurisdiction, avails itself of the forum by regularly carrying on business or other activities in the forum, or engages in activity outside of the forum that has a substantial, direct, and foreseeable effect within the forum. *See* Restatement (Third) Foreign Relations Law § 421 (2)(a)-(e), (g), (h)-(k).

an agency relationship between the entities, or where they are so closely tied that one is a “mere department” of the other. *See, e.g., Frummer v. Hilton Hotels*, 227 N.E.2d 851 (N.Y. 1967).

- *Subject-Matter Jurisdiction: Federal Question and Diversity Jurisdiction*

Federal courts have original “federal question” jurisdiction over certain types of cases as provided for in the United States Constitution, United States federal law, or treaties of the United States. For example, both the Torture Victims Protection Act and the Alien Tort Claims Act confer jurisdiction on United States federal courts to hear claims of non-United States citizens against foreign defendants. *See, e.g., 28 U.S.C. § 1350 (ATCA)*. Federal district courts also have original jurisdiction over certain actions against foreign states under the Foreign Sovereign Immunities Act, so long as the claim falls under one of the statute’s exceptions. 28 U.S.C. § 1330.

A plaintiff also may bring a case in federal court against a foreign defendant based on diversity jurisdiction – or “alienage jurisdiction” – where either the plaintiff *or* the defendant is a foreign citizen. As a general matter, the presence of foreign citizens on both sides of a matter will destroy the complete diversity required to obtain jurisdiction under the diversity statute. Some courts have held, however, that diversity jurisdiction may lie even where aliens are present on both sides of the controversy, as long as the aliens are merely additional parties, and not the true parties in interest. 28 U.S.C. § 1332(a)(3) (providing original jurisdiction over “citizens of different States and in which citizens or subjects of a foreign state are *additional parties*”) (emphasis added)). In other words, alienage jurisdiction may permit certain “citizen and alien v. citizen and alien” suits in federal court, so long as the citizens are from different states. Wright, Miller, & Cooper, 14A Federal Practice and Procedure *Jurisdiction and Related Matters* § 3661 (citing cases).

Key Factor # 2: International Comity

- *Parallel Proceedings: Abstention, Lis Alibi Pendens, and Anti-Suit Injunctions*

A plaintiff may consider filing a claim in the United States and also suing in a foreign court or commencing an international arbitration. This multi-jurisdictional approach may result in a judgment in one forum that the plaintiff may then raise as *res judicata* in the other forum. It also may aid in the discovery of material in one forum that otherwise may be inaccessible in the other. *See John Fellas, Important Doctrines and Tools of International Litigation*, 624 PLI/Lit 121 (2000).

On the other hand, the existence of an ongoing parallel proceeding in a foreign forum may provide a defendant with grounds to dismiss or stay a duplicative United States proceeding. In particular, notions of international comity, including the doctrine of international abstention – or *lis alibi pendens* (“a suit pending elsewhere”) – may induce a United States court to decline to exercise jurisdiction in favor of a foreign parallel proceeding.

Under this theory, courts have found that “[i]nternational comity counsels voluntary forbearance when a sovereign, which has a legitimate claim to jurisdiction, concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.” *United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 8 (1st Cir. 1997); *see also Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Although the Supreme Court has not yet articulated a uniform standard for granting a motion to stay or dismiss in favor of a parallel proceeding, federal courts have considered the following factors:

- (1) similarity of the parties and issues involved in the foreign litigation;
- (2) the promotion of judicial efficiency;
- (3) adequacy of relief available in an alternative forum;
- (4) issues of fairness to and convenience of the parties, counsel, and witnesses;
- (5) the possibility of prejudice to any of the parties;
- (6) the temporal sequence of the filing of the actions.

Goldhammer v. Dunkin’ Donuts, Inc., 59 F. Supp. 2d 248, 252-53 (D. Mass. 1999) (collecting cases). Federal courts are under a “strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996). Thus, where a proper basis for jurisdiction exists, federal courts likely will be reluctant to abstain from exercising jurisdiction under this theory and are more likely to allow both proceedings to go forward until one reaches conclusion and may be asserted as *res judicata*. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984).

Alternatively, a plaintiff may request a court to issue an anti-suit injunction, which enjoins private parties from pursuing claims in a foreign jurisdiction. To issue an anti-suit injunction, courts require that the domestic and foreign suits involve the same parties and the same issues. Varying standards have been applied by courts in determining whether to grant an injunction. Some courts have adopted an extremely conservative approach by generally declining to enjoin foreign proceedings unless *res judicata* would bar the foreign proceeding, or allowing the foreign proceeding to go forward would conflict with United States public policy. Other courts have been more flexible and have considered a variety of factors, including the posture of the two proceedings, the conduct of the parties, and whether the foreign proceeding would undermine the jurisdiction of the United States court. *See generally* Arif Ali, Katherine Nesbitt, and Jane Wessel, *Anti-suit Injunctions in Support of International Arbitration in the United States and the United Kingdom*, 1 Int. A.L.R. 12 (2008).

- *Political Question Doctrine*

In certain types of cases, a United States court also may decline to hear a case under the Political Question doctrine. This doctrine is grounded in the notion of separation of powers and admonishes the federal judiciary to refrain from intervening in matters outside of its purview.

The Supreme Court has articulated a six-factor test for courts to apply in considering whether to dismiss a claim based on the Political Question doctrine. These factors ask the court to consider whether there exists:

- (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;”
- (2) “a lack of judicially discoverable and manageable standards for resolving it;”
- (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;”
- (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;”
- (5) “an unusual need for unquestioning adherence to a political decision already made;” or
- (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

Baker v. Carr, 369 U.S. 186, 217 (1962).

- *Act of State Doctrine*

In international cases involving acts of a foreign sovereign, courts also may consider dismissal based on the Act of State doctrine. A foreign defendant may plead the Act of State doctrine to dismiss a claim on grounds that the claim requires review of official acts of a foreign state or acts ratified by a foreign sovereign within its own territory that are not justiciable in a United States court. The doctrine is intended, in part, to prevent the embarrassment of a United States court by offending a foreign government. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The doctrine is premised on the central principle that “[t]he courts of one country will not sit in judgment on the acts of the government of another.” *Underhill v. Hernandez*, 168 U.S. 250 (1897).

The Act of State doctrine has been found inapplicable by some courts in at least four situations: First, where treaty obligations or other controlling legal standards would resolve the issues involved; second, where the Executive Branch has advised that the exercise of jurisdiction would impact foreign relations — an exception known as the “*Bernstein* exception;” third, where the case involves the commercial acts of a foreign state; and finally, under the “Second Hickenlooper Amendment,” where the case involves expropriation in violation of international law. See Epstein and Snyder et. al., *International Litigation: A Guide to Jurisdiction, Practice and Strategy*, §§ 8.01- 8.14 (3d ed. 2008).

- *Foreign Sovereign Immunities Act*

A foreign sovereign may be sued in a United States federal district court under 28 U.S.C. § 1330, so long as the claim falls under an exception to the Foreign Sovereign Immunities Act (“FSIA”). Defendants who qualify as a foreign state or one of its agencies or instrumentalities likely will raise the defense of sovereign immunity under the FSIA. While the FSIA grants foreign sovereigns general immunity from suit in United States courts, it also provides numerous exceptions to immunity. A brief overview of the key exceptions follows:

Waiver Exception: A foreign sovereign may waive its immunity either implicitly or explicitly. Waiver often takes the form of an arbitration clause, a forum selection clause, or a choice of law clause in the underlying contract at issue in the case. 28 U.S.C. § 1605(a)(1).

Commercial Activity Exception: Immunity is not afforded the sovereign where the claim is based on a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity elsewhere; or upon an act taken outside of the United States in connection with a commercial activity of the foreign state elsewhere that causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2).

Takings Exception: Foreign sovereigns are not immune from suits arising from the taking of property in violation of international law where the property has a nexus to the commercial activity of a foreign sovereign in the United States, or where the property is owned by an agency or instrumentality of the foreign sovereign engaged in commercial activity in the United States. 28 U.S.C. § 1605(a)(3).

Non-Commercial Tort Exception: Foreign sovereigns are not immune from suits for money damages that arise from tortious acts carried out by a foreign sovereign or an official acting within the scope of his employment that result in personal injury, death, damages, or loss of property in the United States. 28 U.S.C. § 1605(a)(5).

Arbitration Exception: Sovereign immunity will not bar a United States court from enforcing an agreement to arbitrate or an arbitral award where either: (1) the arbitration took place or is intended to take place in the United States; or (2) the award is governed by a treaty or other international agreement calling for the recognition and enforcement of arbitral awards. 28 U.S.C. § 1605(a)(6).

Terrorism Exception: The recently amended terrorism exception, 28 U.S.C. § 1605A, not only lifts immunity for certain terrorism-related claims against designated state sponsors of terrorism, but also explicitly creates a private cause of action for United States nationals, members of the armed forces, employees of the United States government, and the legal representatives of such individuals. 28 U.S.C. § 1605A.

The FSIA also raises issues for foreign sovereign *plaintiffs*. In particular, government officials, agencies, and instrumentalities of foreign sovereigns bringing suit in the United States should be aware that availing themselves of the benefits of a United States forum may result in a waiver of sovereign immunity for counterclaims or other related actions. Thus, defendants may bring counterclaims against foreign sovereigns that fall within an exception to the FSIA, arise out of the same transaction or occurrence as the sovereign's claim, and do not exceed the amount claimed by the sovereign. 28 U.S.C. § 1607.

Key Factor # 3: Choice of Law

In choosing a particular forum, a plaintiff should consider the applicable choice of law principles in that forum that will govern the determination of what law applies to its claims. The variety of choice of law theories in United States courts provides a foreign plaintiff with a myriad of options and considerations. Some United States jurisdictions adhere to the traditional *lex loci* choice of law principle that applies the law of the locus of the underlying event (*i.e.* the location of the tort, the situs of the property at issue, or the place of negotiation of the contract). Other jurisdictions apply some variation of an "interests analysis" that accounts for the policies underlying potentially applicable laws. Still others take a more modern approach under the Restatement (Second) of Conflict of Laws that applies the law of the jurisdiction with the "most significant relationship" to the parties and the controversy. Also, some jurisdictions permit the use of *dépeçage*, a doctrine under which different laws govern different issues. These choice of law theories are flexible in nature and require a fact intensive analysis which can lead to unpredictable results.

Key Factor # 4: Damages

Foreign plaintiffs often are drawn to the United States because American juries are well-known for granting large damages awards. Further, the United States is one of few countries that permits awards in favor of private plaintiffs for punitive damages. Plaintiffs, however, should keep in mind that even if they are entitled to a jury trial, foreign law may govern substantive limits on a plaintiff's entitlement to recovery of damages. For example, in *Bowen et al. v. E.I. DuPont de Nemours*, Civ. A. No. C.A. No. 97C-06-194 (CHT) (Del.), plaintiffs residing in the United Kingdom sued a chemical manufacturer in Delaware state court, alleging that the manufacturer's fungicide caused serious birth defects in their children. The parties agreed that English law applied, however, English law set strict requirements on the maximum amount of damages for personal injury awards and barred punitive damages, thus significantly limiting the plaintiffs' potential recoveries. Thus, a plaintiff always should be aware of the applicable choice of law rules before jumping to the conclusion that a United States forum necessarily will yield a larger damages award.

Key Factor # 5: Discovery

One of the most significant differences between litigating in the United States and litigating in other jurisdictions is the scope of discovery available to the parties. While other legal systems allow some limited discovery before a case is tried, United States discovery rules offer far more expansive discovery than other jurisdictions. English discovery rules, for example, do not provide the same opportunity for oral depositions or discovery from third-parties, while in the United States, parties freely may take depositions, serve interrogatories, and request production of documents. *See Epstein and Snyder et. al., International Litigation: A Guide to Jurisdiction, Practice and Strategy* § 3.02 (3d ed. 2008). Electronic discovery presents an even greater level of complexity to the issue of United States discovery. As a matter of convenience, discovery of emails and other electronic communications can be a particularly attractive discovery tool because the materials can be searched, stored, and organized far more easily than boxes of paper. On the other hand, the sheer volume of available electronic materials and the frequent need to hire electronic discovery vendors or forensic analysts can quickly drive up the cost of litigation for all parties.

Thus, discovery, while serving as an important tool for plaintiffs, can be time-consuming, intrusive, and financially burdensome for litigants. For this reason, plaintiffs should be mindful of the costs of discovery and their own potential discovery obligations before bringing a claim in the United States.

Key Factor # 6: Evidentiary Issues

Litigation involving foreign entities frequently will require obtaining evidence located overseas. While liberal discovery rules in the United States may assist a foreign party's factual investigation within the United States, complicated foreign laws pertaining to document custody, privilege, and privacy, may impede a party's ability to uncover evidence located abroad. Indeed, the threat of adjudicating discovery disputes involving unfamiliar foreign laws may dissuade a domestic court from retaining jurisdiction over the case in the first instance, if there is a valid basis for dismissal on jurisdictional or jurisprudential grounds. Even if a domestic court is willing to take on the task, the cost of accessing evidence abroad may be prohibitive. Distance, time differences, travel costs, language problems, and complex or unfamiliar rules and procedures may impede the collection of evidence abroad, thereby impacting (possibly significantly) the litigation.

Key Factor # 7: Jury Appeal

In civil law countries, courts (and not attorneys) guide the litigation. Courts decide which witnesses to call to testify and conduct the witness examinations. Thus, for a foreign plaintiff, litigating in the United States presents the unique opportunity in most cases for access to witnesses, testimony under oath, and cross-examination, all before a jury. But as with purely domestic litigation, jury trials may benefit certain types of plaintiffs more than others. Foreign

plaintiffs must consider the risks of a jury trial, including the possibility of prejudice against foreign plaintiffs - including multinational corporate parties or foreign banks - seeking remedies in United States courts. See David Boyce, *Foreign Plaintiffs and FNC: Going Beyond Reyno*, 64 Tex. L. Rev. 193, 200 (1985). This is not to say that a United States jury necessarily will be unfavorable to the foreign litigant, but it is a factor that must be considered carefully.

III. Overcoming a *Forum Non Conveniens* Challenge

One of the biggest challenges for a foreign plaintiff in United States courts is overcoming a *forum non conveniens* ("FNC") challenge. The equitable doctrine of FNC ensures that the lawsuit is adjudicated in a forum convenient for the parties and the court. To successfully oppose an FNC challenge, a foreign plaintiff should emphasize the connection of its claim to the United States forum, the ease of access to witnesses and documents by the parties and the Court, and the interest of the United States in investing resources in hearing the claim. This section discusses some of the tools and common arguments available to a plaintiff seeking to avoid dismissal on grounds of FNC.

A. The Elements of *Forum Non Conveniens*

The FNC doctrine provides an overarching venue analysis to determine whether suit is proper in the plaintiff's chosen forum. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007). If a challenge to personal or subject-matter jurisdiction will be "difficult to determine," or will burden the parties with "expense and delay" that may be avoided by direct recourse to FNC, the court may dismiss on that basis without reaching other jurisdictional issues. *Id.* at 435-36.

Nonetheless, courts have been admonished to apply the doctrine only in "rare cases," *Gulf Oil Corp.*, 330 U.S. at 510, and a defendant invoking FNC "bears a heavy burden in opposing the plaintiff's chosen forum," particularly when the plaintiff's choice is his home forum. *Id.* at 430. The analysis is two-tiered. First, a defendant seeking dismissal must establish that an alternative forum is both available and adequate. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). An alternative forum is typically "available" where the foreign court could have jurisdiction over the matter and the defendant is "amenable to process" there. *Id.* at 262, n. 22. Although the alternative forum "need not be perfect" to meet the requirement of adequacy, it must provide "some relief." See *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001).

Second, the defendant must establish that the balance of the private and public interest factors favors dismissal. *Id.* Private interest factors include the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing ones, the possibility to view potentially relevant evidence, and all other practical problems that make trial of a case easy, expeditious and inexpensive. See *Piper Aircraft*, 454 U.S. at 241 n. 6; see also *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica*,

S.A., 382 F.3d 1097, 1100 (11th Cir. 2004). Public interest factors include administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action, the avoidance of unnecessary problems in conflict of laws, the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty. *See Piper Aircraft*, 454 U.S. at 241 n. 6.

B. Responding to a *Forum Non Conveniens* Challenge

Although an FNC inquiry is highly fact intensive, foreign plaintiffs should be aware of particular legal arguments that may be critical for a foreign plaintiff seeking to overcome an FNC challenge.

1. Federal v. State Forum

The first step in staving off an FNC challenge is to choose a favorable forum. Some state FNC statutes are particularly favorable to foreign plaintiffs. For example, Delaware courts require defendants seeking dismissal on FNC grounds to establish that litigating in Delaware would impose an “overwhelming hardship.” *See, e.g., Mar-Land Indus. Contrs., Inc. v. Carribean Petroleum Ref., L.P.*, 777 A.2d 774, 778 (Del. 2001). Similarly, a Texas statute entirely divests Texas state courts of the discretion to dismiss on grounds of FNC with respect to personal injury and wrongful death actions brought by foreign plaintiffs in Texas. *See Epstein* at § 5.08 (citing Texas Civil Practice and Remedies Code, § 71.031); *see also Dow Chem. Co. v. Alfaro*, 786 S.W. 2d 674 (Tex. 1990). Until 1996, Florida courts had no discretion to dismiss on grounds of FNC in a suit where at least one party was a Florida resident. *See Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978) (holding that state courts should dismiss a suit “only under the most compelling circumstances.”). Florida has since changed its state rule to match the federal rule, which considers domicile of the parties as but one factor in the FNC analysis. *See Kinney System, Inc. v. Continental Ins. Co.*, 674 So.2d 86, 88 (Fla. 1996); Fla.R.Civ.P. Rule 1.061(a). In any case, favorable state statutes may provide additional security to a plaintiff’s choice of forum.

2. Even a Foreign Plaintiff’s Choice of Forum Deserves Some Deference

Under the doctrine of FNC, a strong presumption favors the plaintiff’s choice of forum. Indeed, the presumption is strongest when a plaintiff is a United States citizen, resident, or corporation. *Haddad v. RAV Bahamas, Ltd.*, No. 05-21013-CIV, 2008 WL 1017743 (S.D. Fla. April 9, 2008). To overturn a United States plaintiff’s choice of a United States forum, courts “require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.” *Id.* (citing *SME Racks, Inc.*, 382 F.3d at 1101-02, n. 6 (citation omitted)).

One of the greatest challenges for a foreign plaintiff, however, is the Supreme Court's instruction that this presumption "applies with less force" where the plaintiff or the real party in interest is foreign to the forum. See *Sinochem*, 549 U.S. at 430 (quoting *Piper Aircraft*, 454 U.S. at 255-56 (1981)); see, e.g., *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983). Still, courts have made clear that nationality of the parties is not the critical factor in an FNC determination, but rather the impact of the parties' nationality on the convenience of the chosen forum. See *Irragori v. United Technologies Corp.*, 274 F.3d 65, 72-73 (2d Cir. 2001) (applying sliding scale of deference to plaintiff's chosen forum). Thus, a foreign plaintiff may obtain greater deference for its choice of forum in some cases by showing that the choice was dictated by valid reasons of convenience, as opposed to forum-shopping.

Additionally, some treaties, including bilateral investment treaties and friendship, navigation, and commerce treaties, provide foreign plaintiffs with equal access to the courts of the United States. See *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978). In theory, such equal access clauses are intended to provide foreign plaintiffs with the same opportunities as United States citizens in domestic courts. Some United States courts, however, have limited the impact of such equal access clauses. For example, the Second Circuit has explained that the magnitude of deference provided to a foreign plaintiff under such a provision is equal to the deference given to a United States citizen living abroad who sues in a United States forum. See *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1383 (11th Cir. 2009). This is because the chosen forum would provide the plaintiff in each case the same degree of convenience. *Id.* (citing *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003) (finding less deference owed to forum choice of expatriate United States citizen because "it would be less reasonable to assume the choice of forum is based on convenience.")). Equal access clauses, however, provide a strong basis for increasing the deference typically afforded a foreign plaintiff's choice of forum.

In any event, even a foreign plaintiff's choice of forum is provided some degree of deference. See *In re West Caribbean Crew Members*, No. 07-22015-CIV., 2009 WL 1974238 (S.D.Fla. 2009) ("less deference' to their choice of forum does not mean 'no deference.'"). "While a foreign plaintiff's choice of forum is entitled to less deference than the choice of a local plaintiff, dismissal on *forum non conveniens* grounds remains the exception rather than the rule." *Haddad v. RAV Bahamas, Ltd.*, No. 05-21013-CIV, 2008 WL 1017743 (S.D. Fla. April 9, 2008). The burden remains with the defendant to prove that the forum is inconvenient for the litigation. Thus, where the private and public interest factors balance in equipoise or near equipoise, defendants typically will fail to meet their burden of persuading the court that the case must be dismissed.

3. *Showing That the Plaintiff's Chosen Forum is Not Inconvenient for the Defendant.*

a. *Bringing Suit in the Defendant's Home Forum or a Forum Which Has Personal Jurisdiction Over the Defendant*

A foreign plaintiff can increase the chances of overcoming an FNC challenge by bringing claims in the defendant's home forum or in a forum that would have personal jurisdiction over the defendant. The defendant's continuous contacts with the plaintiff's chosen forum militate against dismissal because the location is likely convenient for the defendant. *TNT USA, Inc. v. TrafiExpress, S.A. de C.V.*, 434 F.Supp. 2d 1322, 1334 (S.D. Fla 2006) (finding no inconvenience to defendants to litigate in Miami where two of four defendants had a presence there and the third did business there). Thus, in considering where to bring suit, a foreign plaintiff should assess the defendant's contacts with each forum.

b. *Bringing Suit in a Forum Designated in Forum Selection Clause*

A court is likely to deny an FNC motion when the parties have agreed to a mandatory forum selection clause to litigate in that forum. By agreeing to the forum selection clause, a defendant acknowledges that it may be sued in the chosen forum concerning claims arising out of the agreement. See, e.g., *J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co., Ltd.*, No. 3:08-cv-31-J-32MCR, 2009 WL 55010, at *8 (M.D. Fla. January 7, 2009). Courts typically will enforce a forum selection clause absent a strong showing that enforcement would be unjust or unreasonable, or that the clause is invalid. *Id.* (citing *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991)). Under Florida law, however, even where a forum selection clause exists, courts may require minimum contacts with the state beyond an agreement between the parties to allow personal jurisdiction to be exercised over a non-resident defendant. See *Rexam Airspray Inc. v. Arminak*, 471 F. Supp. 2d 1292, 1298 (S.D. Fla. 2007) (citing *McRae v. J.D./M.D. Inc.*, 511 So.2d 540, 542 (Fla. 1987)).

Foreign plaintiffs should be cautioned that the presumption in favor of forum selection clauses applies with equal force to clauses in international contracts that designate a non-United States forum. Kenneth B. Reisenfeld, *Six Common Defense Strategies in Cross-Border Litigation in International Litigation Strategies and Practice, International Practitioner's Deskbook Series* (ABA Section of International Law) 75, 83 (Barton Legume ed. 2005) (citing *Bonny v. Society of Lloyd's*, 3 F.3d 146 (7th Cir. 1993)). Thus, where a foreign plaintiff bring suit in a United States forum, such a provision may support a motion to dismiss on FNC grounds, thereby denying the foreign plaintiff its chosen forum.

c. *Discovery and the Hague Convention on the Taking Of Evidence*

Defendants often argue that litigating against a foreign plaintiff in the United States is inconvenient because it deprives the defendant of access to the plaintiff's documents and witnesses that are located abroad. Yet, nearly 50 countries are contracting states to the *Hague*

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (date in force Oct. 7, 1972) (“Hague Evidence Convention”), which is intended to facilitate discovery between countries by reconciling conflicting procedural differences.³ The Hague Evidence Convention provides three methods of obtaining evidence from abroad: Letters of Request, Diplomatic or Consular Officer, or specially appointed Commissioners.⁴

A plaintiff seeking to overcome an FNC challenge should determine whether the alternative forum is a contracting state to the Hague Evidence Convention and identify any relevant reservations, declarations, or notifications that may limit access to evidence located abroad.

In determining the availability of relevant evidence under an FNC analysis, courts also will consider whether the plaintiff controls crucial documents and testimony. Courts favor a forum where a plaintiff can induce witnesses to appear voluntarily or procure the attendance of witnesses under its control. *See, e.g., Gonzalez v. Pirelli Tire, LLC*, No. 07-80453-CIV, 2008 WL 516847, at * 3-4 (S.D. Fla. Feb. 22, 2008).

CONCLUSION

Every case involving a foreign entity presents unique and practical issues that must be considered carefully in the context of the United States and international legal systems. Litigating in United States courts can offer plaintiffs significant advantages, including expansive discovery, jury trials, and high damage awards. Nevertheless, navigating jurisdictional hurdles, choice of law issues, *forum non conveniens* motions, and other defenses can be a challenging task, and, thus, each case must be analyzed thoroughly both on the facts and the law in order to determine whether the United States is in fact the optimal forum for the claims.

³ A complete list of state signatories can be found at http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last accessed 9/9/09).

⁴ For a useful analysis of the procedures for obtaining evidence from overseas entities *see* Epstein and Snyder et. al., *International Litigation: A Guide to Jurisdiction, Practice and Strategy* § 10.10 (3d ed. 2008).