Civil Procedure Review
AB OMNIBUS PRO OMNIBUS

Shooting Down Moths – How Foreign Plaintiffs are denied access in U.S. Courts*

Jacopo Crivellaro

J.D. Columbia Law School, 2012 (Harlan Fiske Stone Scholar 2011), LLB King's College, London (Hons) 2012. Head editor of the Columbia Journal of European Law Online

Keywords: Pleading Standards, Forum Non Conveniens, United States, Personal Jurisdiction.

Abstract: This author considers the recent trend of preventing foreigners from accessing United States federal courts through the heightening of pleading standards and the reinvigorated use of the forum non conveniens doctrine. The landmark Supreme Court case of *Bell Atlantic v Twombly* has raised the requirements for a plaintiff to survive a 12(b)(6) motion to dismiss for failure to state a claim. This is particularly troublesome for foreign plaintiffs who will have to gather sufficient information to satisfy the standard before having the benefit of discovery. *Sinochem International v Malaysia International Shipping* strengthened the application of the forum non conveniens doctrine by permitting federal courts to dismiss cases before considering issues of personal or subject matter jurisdiction. On the other hand, the two recent judgments of the Supreme Court, *Nicastro v McIntyre* and *Goodyear v Brown* restricted general and specific jurisdiction over foreign plaintiffs. The unexpected consequence of restricting foreign access to US courts and limiting suits against foreign defendants might homologize the US judicial system and demagnetize its appeal for foreign litigants.

* An earlier draft of this article was published in King's Student Law Review, vol.3, issue 1, and is available at http://www.kslr.org.uk/?q=node/11.

> "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[1]

A. Introduction

As Lord Denning opined, the US federal court system has long been an attractive venue for foreign litigants. It is perceived as offering a foreign plaintiff significant procedural and substantive advantages. These include: the availability of contingent fee lawyers,[2] the American Rule for litigation costs,[3] the presence of causes of action that are unique to the United States,[4] the readiness to accept class action suits (thus permitting litigation in cases where the individual damages are likely to be small but the aggregate amount would be significant),[5] permissive rules of discovery,[6] the more extensive role of the jury,[7] the frequency with which punitive or multiple damages are awarded[8] and a perception that US Courts might be "more efficient, less biased, and better insulated from corruption" than other alternative forums.[9]

[1] *Smith Kline & French Laboratories Ltd v Bloch* [1983] 1 WLR 730, 733 (Lord Denning).
[2] *Piper Aircraft v Reyno* 454 US 235, 252 n18 (1981); Cassandra Burke Robertson, 'Transnational Litigation and Institutional Choice' (2010) 51 BCLR 1081, 1087.
[3] *Piper Aircraft* (n 2) 252 n18; R. Schlesinger, Comparative Law: Cases, Text, Materials 275-277 (3d ed.1970).
[4] Like RICO (Racketeering Influenced and Corrupt Organizations) or other particular securities laws. John Fellas, 'Strategy in International Litigation' (2009) 14 ILSAJICL 317, 320.
[5] Fellas, '*Strategy in International Litigation'* (n 4) 320; Burke Robertson, '*Transnational Litigation and Institutional Choice*' (n 2) 1087.
[6] *Piper Aircraft* (n 2) 252 n18; Stephen B. Burbank and Linda J. Silberman, 'Civil Procedure Reform in Comparative Context: The United States of America' (1997) 15 AM J COMP L 675, 678: "Both inside and outside the United States, American pretrial has been criticized for encouraging 'easy' pleadings."
[7] *Piper Aircraft* (n 2) 252 n18.
[8] The quantum of ordinatory, compensatory damages in America is also greater than in other countries. Russell J. Weintraub, 'International Litigation and Forum Non Conveniens' (1994) 29 TEX INT'L LJ 321, 323; Beth Stephens. 'Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 YALE J INT'L L 1, 31.
[9] Alan O. Sykes, 'Transnational Forum Shopping As A Trade and Investment Issue' (2008) 37 JLEGST 339, 342.

"Simply put, compared with foreign courts, United States forums offer both lower costs and higher recovery".[10]

As a consequence, national defendants would often "go to great lengths to avoid suits in the US".[11] This essay seeks to clarify how recent decisions of the US Supreme Court have done much to favour national defendants and "demagnetize" American federal courts.[12]

B. Traditional Structure of Litigation in the US Courts

When the Federal Rules of Civil Procedure regulating procedure in federal courts were introduced in 1938 the drafters sought to subvert the formalized system of writs and single pleading and introduce a liberal model inspired by the flexibility of equity.[13] The philosophical premise was "equality of treatment of all parties and claims in the civil adjudication process".[14]

When compared with the former system, the Rules provided expansive means of discovery,[15] and encouraged parties to assert even unrelated claims so as to resolve the dispute in a "just, speedy and inexpensive" manner.[16] In particular the liberality of pleadings was hailed

[10] Weintraub, '*International Litigation*' (n 8) 323.
[11] Fellas, '*Strategy in International Litigation*' (n 4) 320.
[12] "Demagnetization" was expressly advocated by Professor Weintraub. Russell J. Weintraub, 'The United States as a Magnet Forum and What, if Anything, to Do About It' in Jack L. Goldsmith (ed), *International Dispute Resolution: the Regulation of Forum Selection* (Transnational Publishers 1997) 213; Weintraub, '*International Litigation*' (n 8) 352.
[13] The 1848 Field Code for example required the plaintiff to plead "ultimate facts" as opposed to evidence or "evidentiary facts." Scott Dodson, 'Comparative Convergences in Pleading Standards' (2010) 158 UPALR 441. Christopher M. Fairman, 'Heightened Pleading' (2002) 81 TEX L REV 551, 554–57: "The Federal Rules remove these 'procedural booby traps' [referring to the procedural obstacles caused by the former Codes." See also Charles E. Clark, 'Pleading Under the Federal Rules' (1958) 12 WYO L J 177, 188, 190; Stephen N. Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 U PA L REV 909, 943–975.
[14] Arthur R. Miller, 'A Double Play on the Federal Rules' (2010) 60 Duke Law Journal 1, 5.
[15] Clark, '*Pleading Under the Federal Rules*' (n 13) 190.
[16] Federal Rules of Civil Procedure 13, 14, 15, 18, 20 (for the liberal rules on joinder of parties, claims, counterclaims, and amendments) Rules 26-37 (for the rules on discovery and disclosure) and Rule 1 for the canon of construction.

as the countermark of the new system.[17] Given the elasticity of the procedural requirements and the overarching "liberal ethos", cases were unlikely to be dismissed at the pleading stage.[18] Discernment of meritorious claims would occur only after discovery had commenced, at summary judgment stage.[19]

A foreign plaintiff bringing suit in America would benefit from this structural permissiveness in his litigation. Like all plaintiffs he must satisfy the requirements of personal and subject matter jurisdiction and venue. Yet, as the plaintiff can choose the forum, and as an American defendant will invariably be subject to a federal court's jurisdiction in one of the states, these are but "minimal obstacles".[20]

This article suggests that in the past decade by reinterpreting the Federal Rules of Civil Procedure and altering common law doctrines, the Supreme Court has quickened discernment of claims and restricted a foreign plaintiff's access to a full scale trial.

C. Heightened Pleading Requirement under Rule 12(b)(6)

i. Supreme Court Pleading Standards

Historically the standard to dismiss a claim for insufficient pleadings was set comparatively low.[21] The text of FRCP Rule 8 only requires a claim for relief to contain "a short

[17] Fairman, '*Heightened Pleading*' (n 13) 551.
[18] Richard L. Marcus, 'The Revival of Fact Pleading under the Federal Rules of Civil Procedure' (1986) 86 COLUM L REV 433, 439: "The preferred disposition is on the merits, by jury trial, after full disclosure through discovery." Charles E. Clark, 'The Handmaid of Justice' (1938) 23 WASH U LQ 297, 318-19: "To attempt to make the pleading serve as such substitute [as a trial], is in very truth to make technical terms the mistress and not the handmaid of justice."
[19] Miller, '*A Double Play on the Federal Rules*' (n 14) 5: "...discovery and summary judgment were designed to expose and separate the meritorious from the meritless."
[20] Sykes, *'Transnational Forum Shopping As A Trade And Investment Issue'* (n 9) 342.
[21] Dodson, *'Comparative Convergences in Pleading Standards'* (n 13) 443 with reference to civil law countries.

and plain statement of the ground for the court's jurisdiction"[22] and even permits claims in the alternative, "regardless of consistency".[23]

Charles E. Clark, one of the drafters of the Rules, repeatedly emphasized how "the notice in mind [for Rule 8 is]... that of the general nature of the case and the circumstances or events upon which it is based... to inform the opponent of the affair or transaction to be litigated... and to tell the court of the broad outlines of the case".[24] Sitting as Circuit Judge for the Second Circuit Judge Clark coined the famous "day in court" maxim to entitle Mr Dioguardi access to justice regardless of the imperfections in his complaint.[25] The Supreme Court then lowered the standard in *Conley v Gibson.*[26] Justice Hugo Black asserted that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim" but only required "simplified notice pleading".[27] Therefore, a motion to dismiss a case for failure to state a claim will only succeed "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".[28]

Despite attempts by the lower federal courts to raise the requirements for pleadings in civil rights cases[29] and antitrust cases[30] the standard applied relatively uniformly until the landmark *Bell Atlantic v Twombly* Supreme Court judgment of 2007.[31] The Court held that

[22] Federal Rules of Civil Procedure Rule 8(a)(1). The pleading also requires Rule 8(a)(2) "short and plain statement of the claim showing that the pleader is entitled to relief" and Rule 8(a)(3) "a demand for the relief sought, which may include relief in the alternative or different types of relief."
[23] Federal Rules of Civil Procedure Rule 8(d)(3).
[24] Charles E. Clark, 'Simplified Pleading' in '*Opinions Decisions and Rulings Involving the Federal rules of Civil Procedure*', vol 2 (West Publishing 1943) 456, 460-61.
[25] *Dioguardi v Durning* 139 F.2d 774, 775 (2d Cir. 1944); Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil,* vol 5 (3rd edn) para 1220 (stating how Dioguardi is illustrative of the pleading philosophy created by the Federal Rules of Civil Procedure); Miller, '*A Double Play on the Federal Rules*' (n 14) 6: "[Dioguardi] best represents the access-minded and merit-oriented ethos at the heart of the original Federal Rules."
[26] Conley v Gibson 355 US 41 (1957).
[27] *Conley* (n 26) 47.
[28] *Conley* (n 26) 47-48.
[29] *Leatherman v Tarrant Country Narcotics Intelligence and Coordination Unit* 954 F.2d 1054 (5th Cir. 1992); *Elliot v Perez* 751 F.2d 1472 (5th Cir. 1985).
[30] Harvey Kurzweil, Eamon O'Kelly and Susannah P. Torpey, 'Twombly: Another Swing of the Pleading Pendulum' (2008) 9 Sedona Conf J 115, 118.
[31] *Bell Atlantic Corp v Twombly* 550 US 544 (2007).With the exception of limited statute based heightened pleading standards in the Private Securities Litigation Reform Act of 1995, and the Y2K Act. See also Dodson, '*Comparative Convergences in Pleading Standards*' (n 13) 455-456.

plaintiffs now had to prove by non-conclusory allegations the plausibility of their claim.[32] The complaint must contain "direct or inferential allegations respecting all the material elements"[33] with enough facts to raise "a reasonable expectation that discovery will reveal evidence [of the alleged misconduct giving rise to the cause of action.]"[34]

The *Twombly* standard was confirmed two years later by the Supreme Court in *Ashcroft v Iqbal.*[35] The Court clarified how plausibility is a factual sufficiency standard that applies "independently of notice"[36] and tran-substantively.[37]

Procedurally, the *Iqbal* standard requires federal district court judges to first distinguish "factual allegations from legal conclusions, since only the former need be accepted as true".[38] Second, judges must conclude whether a claim for relief that is plausible has been presented based on the factual allegations presented, "their judicial experience and common sense".[39]

ii. *Twombly/Iqbal* Implications on Foreign Plaintiffs

The Supreme Court did not acknowledge raising the pleading standards for a plaintiff's complaint. [40] Previous case law was not overruled,[41] and the loosely-worded Official Form 9

[32] *Bell Atlantic Corp* (n 31) 570: "enough facts to state a claim to relief that is plausible on its face." Kevin M. Clermont, 'Three Myths About Twombly-Iqbal' [2010] Wake Forest Law Review 101, 102; Miller, '*A Double Play on the Federal Rules*' (n 14) 14.
[33] *Bell Atlantic Corp* (n 31) 562.
[34] *Bell Atlantic Corp* (n 31) 556.
[35] *Ashcroft v Iqbal* 129 S. Ct. 1937 (2009). Miller, '*A Double Play on the Federal Rules*' (n 14) 27 suggests Iqbal might establish "a more demanding pleading standard than Twombly" as it requires more than mere plausibility but even a reasonable inference of plausibility, and it favours a somewhat "sterilized evaluation of the complaint" by focusing solely on "purely factual allegations."
[36] Dodson, *'Comparative Convergences in Pleading Standards'* (n 13) 461 suggesting that the Ashcroft court did not even consider elements of "notice" in its new standard of pleading.
[37] Twombly is not restricted to the anti-trust setting but applies to "all civil actions."*Ashcroft* (n 35) 1953; Miller, '*A Double Play on the Federal Rules*' (n 14) 36.
[38] Miller, '*A Double Play on the Federal Rules*' (n 14) 23-24.
[39] *Ashcroft* (n 35) 1950; Miller, '*A Double Play on the Federal Rules*' (n 14) 29 criticizes the "palpably subjective factors of judicial experience, and common sense."
[40] *Bell Atlantic Corp* (n 31) 570: "Here... we do not require heightened fact pleading of specifics..."
[41] *Bell Atlantic Corp* (n 31) 569-570 the Supreme Court cited but did not claim to overrule its own precedent in *Swierkiewicz v Sorema* 122 S.Ct. 992 (2002).

(now Official Form 11) complaint for negligence was reaffirmed.[42] In practice, the recent Court's judgments will have adverse implications on a plaintiff's access to evidence through the discovery process.[43] In fact, the Court was firm in concluding that Rule 8, as now understood, only permits discovery to begin once the plausibility standard has been met.[44] As such, it adopted a draconian stance and in fear of excessive discovery costs[45] ignored case management and other forms of judicial involvement to permit limited pre-trial discovery.[46] Professor Miller is critical of the way what is termed "abusive", "excessive" or "frivolous" discovery is used to justify the need for earlier dismissal of cases without addressing these perceived wrongs with the appropriate "sanction structure, the discovery regime or more effective judicial oversight".[47]

The difficulties a plaintiff faces in meeting the new standard are particularly evident when his foreign status complicates the gathering of even the simplest facts without the compulsive powers of the discovery rules.[48] As a consequence, it is foreseeable to expect that

[42] *Bell Atlantic Corp* (n 31) 565 n10; Miller, '*A Double Play on the Federal Rules*' (n 14) 40: "the Twombly Court was careful to assert the continuing validity of Form 11". Federal Rules of Civil Procedure, Official Form 11, reads "On <Date>, at <Place> the defendant negligently drove a motor vehicle against the plaintiff."

[43] Miller, '*A Double Play on the Federal Rules*' (n 14) 43; "It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant, especially when the defendant denies access."

[44] *Ashcroft* (n 35) 1950-1954: "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions...Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."

[45] *Bell Atlantic Corp* (n 31) 559 "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases."

[46] cf *Ashcroft* (n 35) 1961-1962 (Bryer J dissenting): "a trial court, responsible for managing a case and mindful of the need to vindicate the purpose of the qualified immunity defense, can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials." Miller, '*A Double Play on the Federal Rules*' (n 14) 60 Professor Miller considers the Court's dismissal of case management techniques "dubious" as "none of the then-sitting Justices had been a federal district court judge and therefore they collectively lacked federal civil trial experience."

[47] Miller, '*A Double Play on the Federal Rules*' (n 14) 61, 68, 81-82 Professor Miller suggests the Supreme Court's negative view of case management is a "reminder of how much is not known about litigation cost and delay" as it is a "one-sided" appraisal which ignores how costs have been shifted to the other party, "in the form of imposing higher costs for entering and surviving in the system."

[48] Stephen B. Burbank, 'Pleading and the Dilemmas of General Rules' [2009] WIS L REV 535, 561: "Perhaps the most troublesome possible consequence of Twombly is that it will deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive prefiling investigation or because of informational asymmetries." cf Paul R. Dubinsky, 'Is Transnational

the new standards "will chill a potential plaintiff's or lawyer's willingness to institute an action".[49]

Professor Miller suggests that the Supreme Court's concerns of excessive discovery could have been solved in other ways. In fact, he proposes the following remedies to confront the informational asymmetry which now plagues the plaintiff/defendant balance: 1)some form of limited pre-institution discovery to provide access to critical information,[50] 2) a limited "pinpoint" or flash discovery ordered once the defendant files a motion to dismiss,[51] 3) lowering the *Twombly* plausibility requirement where the plaintiff can demonstrably allege "the inaccessibility of critical information and articulates a reasonable basis for the information's existence and the defendant's control over it",[52] or 4)dramatically modifying the American litigation system introducing a tracking system based on the quantum of the case, operating like the English system.[53]

Litigation A Distinct Field? The Persistence of Exceptionalism in American Procedural Law' (2008) 44 STJIL 301, 338: "Undesirable results may follow from U.S. courts routinely granting foreign litigants access to information on the same scale as that which prevails under U.S. domestic discovery norms."

[49] Miller, '*A Double Play on the Federal Rules*' (n 14) 71.

[50] Lonny S. Hoffman, 'Using Presuit Discovery to Overcome Barriers to the Courthouse' (2008) 34 LITIGATION 31-35. See also Miller, '*A Double Play on the Federal Rules*' (n 14) 106, 113 quoting as an illustrative example of the possible amendment the Texas Rules of Civil Procedure 202.1(b), a rule which permits the court to order discovery to "investigate a potential claim or suit," or alternatively, expanding the role of Federal Rules of Civil Procedure Rule 26(a)(1) on mandatory disclosures.

[51] Miller, '*A Double Play on the Federal Rules*' (n 14) 107, 108: "discovery would focus solely on what is necessary to meet the plausibility requirement."

[52] Miller, '*A Double Play on the Federal Rules*' (n 14) 110 proposing that if this procedural change were adopted, and the burden met by the plaintiff, then the burden would shift on the defendant to provide the plaintiff with the relevant information.

[53] Miller, '*A Double Play on the Federal Rules*' (n 14) 119-124 this tracking system would then tailor particular discovery rules depending upon the harm extensive discovery could cause in each particular case.

D. Forum Non Conveniens Repercussions for Foreign Plaintiffs

i. *Sinochem International Consequences*

As well as the new standards for "plausibility" of pleadings the Supreme Court has recently addressed the doctrine of *forum non conveniens* enlarging its scope and favouring early dismissal of foreign suits.

Forum non conveniens originated as a Scottish common law principle[54] providing judges with the discretionary power to decline jurisdiction where they reasonably believed that another forum was more appropriate.[55] Yet, the doctrine received minimal attention until the Supreme Court determined the claims of Scottish plaintiffs in the *Piper Reyno* aircraft litigation.[56] Applying a series of private and public interest factors,[57] the Court dismissed the case finding Scotland the appropriate forum.

[54] Robert Braucher, 'The Inconvenient Federal Forum' (1947) 60 HARV L REV 908, 909; Alexander Reus, 'Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, The United Kingdom, and Germany' (1994) 16 LOY L A INT'L & COMP L J 455, 459.

[55] J. Stanton Hill, 'Towards Global Convenience, Fairness, And Judicial Economy: an Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts' (2008) 41 VNJTL 1177, 1182: "Scottish courts held, independent of the issue of whether the court had jurisdiction, that the convenience and expediency of the forum should be satisfied to the discretion of the court before passing judgment."

[56] *Piper Aircraft* (n 2)*;* Michael Greenberg, 'The Forum Non Conveniens Motion And The Death Of The Moth: A Defense Perspective In The Post-Sinochem Era' (2009) 72 ALBLR 321, 328: "Seemingly dead in the domestic litigation context, the federal doctrine of forum non conveniens received minimal attention by the Supreme Court... [until Piper Aircraft v Reyno]."

[57] Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters,* vol 14D (3rd edn) para 3828.4. The private interest factors were summarised by the Supreme Court as "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained." *Gulf Oil Corp v Gilbert* 330 US 501, 508 (1947). The private factors are considered first, and in case they strongly favour dismissal the action is dismissed. If the private factors are "nearly equivalent", then the court must inquire into the public factors. *Brokerwood Int'l Inc v Cuisine Crotone Inc* 104 Fed.Appx. 376, 383 (5th Cir. 2004); Greg Vanden-Eykel, 'Civil Procedure--Convenience For Whom? When Does Appellate Discretion Supercede A Plaintiff's Choice Of Forum?--Aldana V. Del Monte Fresh Produce' (2010) 15 SFKJTAA 307, 314. The public interest factors were considered by the Supreme Court as: "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the

While deferring to the plaintiff's forum choice, courts have held that the plaintiff's preference in a forum is not dispositive;[58] and can be displaced on a case by case basis depending on the underlying principles of "convenience, fairness and judicial economy".[59] However, the forum where the defendant seeks to relocate the trial must be both available and adequate.[60]

The Supreme Court has significantly strengthened the reach of the doctrine in its recent case law. *Sinochem International v Malaysia International Shipping*[61] established how a court

---

state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp v* Gilbert 330 US 501, 508-509 (1947).

[58] *Gulf Oil* (n 57) 508: "Unless the balance is strongly in favour of the defendant" and another foreign forum is available, the "plaintiffs choice of forum should rarely be disturbed."

[59] Stanton Hill, *'Towards Global Convenience*' (n 55) 1195: "Convenience, fairness, and judicial economy are recurring themes in the Supreme Court's forum non conveniens jurisprudence from Gilbert to Sinochem."

[60] This is a two prong test, where both adequacy and availability must be satisfied. *McLennan v Am Eurocopter Corp* 245 F.3d 403, 424 (5th Cir. 2001); *Norex Petroleum Ltd v Access Indus* 416 F.3d 146, 157-60 (2d Cir. 2005): "An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *Piper Aircraft (n 2)* 254 n 22; Walter W. Heiser, 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 UKSLR 609, 612, 614 Availability means that the "defendant is subject to personal jurisdiction... and no other procedural bar, such as the statute of limitation, prevents resolution of the merits in the alternative forum." John Bies, 'Conditioning Forum Non Conveniens' (2000) 67 U CHI L REV 489, 501 nn 54-57 suggests, that this is rarely a problem as the relocation of cases under the doctrine is usually conditional on the defendant waiving all procedural defences. An alternative forum is adequate, unless there are "clearly inadequate and unsatisfactory" circumstances in the presumptive forum, such as specific evidence of danger to the plaintiffs, or no "remedy at all" is offered to the plaintiffs. *Piper Aircraft* (n 2) 254. Arguments that the alternative forum is inadequate because of "procedural deficiencies" are rarely successful, as "Courts in the United States are hesitant to label the court system of another country procedurally inadequate." Walter W. Heiser, 'Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic' (2008) 56 UKSLR 609, 616; *Chesley v Union Carbide Corp* 927 F.2d 60, 66 (2d Cir. 1991) :"'[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."' "But even from an early time, the forum non conveniens doctrine has not been limited to these prudential goals [of judicial efficiency]; instead, it also captures broader policy considerations that could be affected by court access." Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1096. Professor Cassandra Burke Robertson suggests that these policy considerations include the relevance of the litigation to the taxpaying community that funds the courthouse operations, substantive economic goals, as well as personal assessments such as distaste for "contingent fee lawyers for foreign plaintiffs who seek higher damage awards than their own countries would be willing to award." See also Alexandra Wilson Albright, 'In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens' (1992) 71 TEX L REV 351, 398:"In making decisions about forum non conveniens, the state is making public policy decisions that affect the state's economy as well as the influence that the state's laws may have in foreign countries."

[61] *Sinochem Int'l Co v Malay Int'l Shipping Corp* 127 S. Ct. 1184 (2007).

may dismiss a case under *forum non conveniens* as a preliminary step even before addressing questions of personal or subject matter jurisdiction.[62]

The Supreme Court judgment resolves a split in former appellate case law,[63] and clarifies how dismissal for *forum non conveniens* is a not a dismissal on the merits as it is just a "brush with factual and legal issues of the underlying dispute" insufficiently superficial to be an assessment of the underlying merits.[64] In essence, the Justices of the Supreme Court were concerned that preliminary discovery and research to ascertain personal or subject matter jurisdiction, could burden the defendant with "expense and delay"[65] and therefore efforts should be "limited... solely to proving the requisite adequacy of the alternative forum and compliance with the private and public interest factors".[66]

Yet, if the court can dismiss the case before ascertaining whether the alternative forum has jurisdiction over the case in the "worst-case scenario [the foreign plaintiff] may well be left in a ... jurisdictional limbo".[67]The plaintiff's case worsens where he loses the opportunity to sue in the alternative forum because of a statute of limitations, or because of other procedural implications.[68] The likely result of these early dismissals will be that many foreign plaintiffs will

[62] *Sinochem Int'l Co* (n 61) 1187-1188: "a forum non conveniences motion does not entail any assumption by the court of substantive law-declaring power [and therefore] a federal district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take p first any other threshold objection;" Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828.

[63] Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828. Stanton Hill, *'Towards Global Convenience, Fairness'* (n 55) 1181.

[64] *Sinochem Int'l Co* (n 61) 1187-1188; Stanton Hill, *'Towards Global Convenience'* (n 55) 1192.

[65] *Sinochem Int'l Co* (n 61) 1194.

[66] Desmond T. Barry, 'Foreign Corporations: Forum Non Conveniens and Change of Venue' (1994) 61 DEF COUNS J 543, 551; Greenberg, *'The Forum Non Conveniens Motion'* (n 56) 335.

[67] Nathan Viavant, 'Sinochem International Co v Malaysia International Shipping Corp: The United States Supreme Court Puts Forum Non Conveniens First' (2008) 16 TLNJICL 557, 570.

[68] Such as if the plaintiff is precluded from bringing a case in his home state if he chose to initially pursue the action in a foreign forum.

settle or abandon cases rather than resort to alternative courts.[69] In these cases, the greater efficiency of the federal courts comes at the expense of the foreign plaintiff's rights. [70]

ii. Other Relevant Forum Non Conveniens Judicial Practices

The higher tiers of the federal courts have also endorsed another practice to extend and anticipate *forum non conveniens* dismissals. Under the traditional doctrine, an alternative forum was considered inadequate where that court lacked jurisdiction or in other ways prohibited the plaintiff's access or where the court was perceived as biased or corrupt.[71]

However, recent case law confirmed how federal courts can dismiss cases under the doctrine without an alternative forum, if the "foreign forum is unavailable as a result of plaintiffs' early choices in litigation".[72] Such an expansion of the doctrine seems to undermine the history, the theory and the policy underpinning dismissals under the *forum non conveniens.*

In addition, federal courts take a restrictive view of what counts as an inadequate forum.[73] The burden plaintiffs must discharge "is difficult to overcome"[74] often serving the convenience of the courts rather than necessarily the interests of the parties.

[69] Laurel E. Miller, 'Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions' (1991) 58 U CHI L REV 1369, 1388: "few cases dismissed... on forum non conveniens grounds ever reach trial abroad"; David W. Robertson, 'Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"' (1987) 103 LQR 398, 418-20; Weintraub, '*International Litigation*' (n 8) 335: "faced with higher costs and lower returns abroad... the vast majority of foreign plaintiffs decide not to sue or settle for a fraction of the claim's 'estimated value."

[70] Viavant, *'Sinochem International*' (n 67) 570.

[71] Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* (n 57) para 3828.3.

[72] *Veba-Chemie AG v M/V Getafix* 711 F.2d 1243, 1248 n10 (5th Cir. 1983):" Perhaps if the plaintiffs plight is of his own making--for instance, if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum--the court would be permitted to disregard [the available forum requirement] and dismiss. As we have pointed out, forum non conveniens is sensitive to plaintiffs motive for choosing his forum, at least in the extreme case where his selection is designed to 'vex, harass, or oppress the defendant"; Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1103.

[73] *Eastman Kodak Co v Kavlin* 978 F. Supp. 1078, 1084 (S.D. Fla. 1997): "The "alternative forum is too corrupt to be adequate" argument does not enjoy a particularly impressive track record. The Court has been unable to locate any published opinion fully accepting such an argument;" Virginia A. Fitt, 'The Tragedy of Comity: Questioning The American Treatment Of Inadequate Foreign Courts' (2010) 50 VAJIL 1021, 1029.

[74] Fitt, '*The Tragedy Of Comity*' (n 73) 1028.

In response to the greater number of dismissals under the *forum non conveniens* doctrine several nations have enacted blocking statutes, or statutes which bar resort to national courts if any "action by one of their residents ... was previously commenced in another country and later dismissed based on forum non conveniens".[75] These statutes serve to render the court of the foreign national permanently inadequate under the *forum non conveniens* analysis and, until the aforementioned recent developments, would have impeded all dismissals.[76]

Alternatively, countries have reacted by authorizing national courts to apply the procedural rules of the country in which the case was first filed and later dismissed under *forum non conveniens.*[77] This means applying American tort liability and damages for cases dismissed by federal courts.[78]

These legislative responses emphasize the serious concerns felt for the unprecedented expansion of the *forum non conveniens* doctrine.[79] It is likely that the greater the number of cases federal courts will dismiss the stronger the remedies foreign legislatures will adopt to not disfavour their own nationals.[80] Probably, the underlying fallacy in the Court's enhancement of the *forum non conveniens* doctrine has been to consider the foreign plaintiff's choice of forum invariably motivated by forum shopping. [81] In fact, courts should realise that when defendants

[75] Heiser, '*Forum Non Conveniens and Retaliatory Legislation*' (n 60) 610; Henry Saint Dahl, 'Forum Non Conveniens, Latin America and Blocking Statutes' (2004) 35 U MIAMI INTER-AMERI L REV 21, 22-24, 47-63 highlighting examples of blocking statutes.

[76] See n 72.

[77] Heiser, *'Forum Non Conveniens and Retaliatory Legislation'*(n 60) 610-611.

[78] Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n 60) 622: "The intent behind these statutes is to make tort litigation in the courts of these countries no more attractive to U.S. defendants than tort litigation in U.S. courts." See also Paul Santoyo, 'Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability' (2005) 27 HOUS J INT'l L 703, 727-29; Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1083 quoting the Model Law on International Jurisdiction and Applicable Law to Tort Liability and suggesting that they operate to permit national courts to grant damages comparable to what a plaintiff would receive in the US.

[79] Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1083.

[80] See for example the facts of Chevron's Environmental lawsuit in Ecuador, (following the forum non conveniens dismissal in America in *Aguinda v Texaco Inc* 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001); summarised in Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1082-1084.

[81]*Piper Aircraft* (n 2) 256: "...[b]ecause the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." Stanton Hill, *'Towards Global Convenience'*(n 55) 1185: "these statements create a suspicion--if not presumption--that the foreign plaintiff comes to the federal forum for vexatious purposes." Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n

file for relocation of lawsuits they will be pursuing a forum which they perceive as favourable, clearly operating as "reverse forum shopping" and thus of equal reprehensibility.[82]

E. Jurisdiction over Foreign Defendants

Until June 2011 a trend to extend jurisdiction over foreign defendants in domestic law suits brought by US plaintiffs was evident. The highest courts of the states of New Jersey and North Carolina had validated state jurisdiction over foreign defendants and the *certiorari* granted by the Supreme Court was expected to address only nuanced doctrinal elements of the applicable tests.[83]

Yet, the Supreme Court's judgments stood traditional principles of constitutional and civil procedure law "on its head."[84] The Supreme Court "performed miserably"[85] as it attempted to "roll back the clock by a century and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before."[86]

Historically a federal court's personal jurisdiction was limited by territoriality and service of process[87] but throughout the twentieth century it gradually extended to "vague concepts labelled with precise sounding names" [88] such as the minimum contacts analysis, the "test being

---

60) 613-614: "consequently, a foreign plaintiff's choice of a U.S. forum is rarely a significant factor in favor of retaining jurisdiction."

[82] *Stangvik v Shiley Incorporated* 819 P.2d 14, 25 (CA 1991); Heiser, *'Forum Non Conveniens and Retaliatory Legislation'* (n 60) 609-613. Linda J. Silberman, 'Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard' (1993) 28 TEX INT'L L J 501, 525; Martin Davies, 'Time to Change the Federal Forum Non Conveniens Analysis' (2002) 77 TUL L REV 309, 315-16; David Boyce, 'Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno' (1985) 64 TEX L REV 193, 215-16.

[83] *Robert Nicastro v McIntyre Machinery America Ltd* 987 A.2d 575 (NJ 2010); and certiorari granted 131 S.Ct. 62 (2010); *Brown v Meter and others* 681 S.E.2d 382 (NC Court of Appeals 2009); leave to appeal denied 695 S.E.2d 756 (NC 2010); certiorari granted 131 S.Ct. 63 as *Goodyear Luxembourg Tires v Brown.*

[84] Patrick J. Borchers, *J.McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test,* (2011) 44 CREIGHTON LAW REV. 1245, 1264.

[85] Borchers, *J.McIntyre Machinery, Goodyear,* (n 84) at 1245.

[86] Borchers, *J.McIntyre Machinery, Goodyear,* (n 84) at 1245.

[87] *International Shoe v State of Washington* 66 S.Ct. 154, 158 (1945): "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him."

[88] Mark P. Chalos, 'Successfully Suing Foreign Manufacturers' (2008) 44 NOV JTLATRIAL 32, 33.

whether, under those facts, the forum state has a sufficient *relationship with the defendant and the litigation* to make it *reasonable* ("fair play") to require him or her to defend the action in a federal court located in that state."[89] In other words, for an out-of-state defendant to be liable to suit, he must "purposefully avail himself" of the privilege of doing business in the forum state.[90]

The current position of the law was stated in a case concerning liabilities between a Japanese valve producer and a Taiwanese tyre manufacturer: *Asahi Metal Industries v Superior Court of California.*[91] The court *prima facie* found sufficient minimum contacts under the 'stream of commerce' inquiry although the fairness factors ultimately prevented the State of California from asserting personal jurisdiction.[92]

The recent Supreme Court judgment in *Nicastro v McIntyre Machinery* addressed the *Asahi* stream of commerce terminology. The appellee, Mr Roberto Nicastro was severely injured by the malfunctioning of a recycling machine with which he was working. The machinery had been manufactured in the United Kingdom by the appellants, and had been sold in America exclusively through its United States distributor, McIntyre Machinery America. Justice Albin for the Supreme Court of New Jersey had concluded (rather ominously) that "[a] manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State".[93] The New Jersey Court found sufficient minimum contacts in McIntyre's targeting of the US market through its US based subsidiary, and in McIntyre's awareness that the distribution system extended to New Jersey. This awareness matured after the officials of the company attended scrap metal conventions in America where they saw their products advertised.[94]

---

[89] Hon. William W Schwarzer, Hon. A. Wallace Tashima and James M. Wagstaffe, *Practice Guide: Federal Civil Procedure Before Trial – National Edition,* (2009) Chapter 3:77:2.

[90] *International Shoe* (n 83) 158 establishing the "minimum contacts" test; *Hanson v Denckla* 357 US 235, 253: holding that to warrant exercise of personal jurisdiction, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state."

[91] *Asahi Metal Indus Co v Superior Court of California* 480 U.S. 102 (1987).

[92] *Asahi Metal* (n 87) 114-116; Weintraub, *The United States as a Magnet Forum* (n 12) 229 suggests the reasons given by Justice O'Connor to determine the unconstitutionality of subjecting Asahi to federal jurisdiction "echo the public and private interest factors of forum non conveniens."

[93] *Robert Nicastro* (n 89) 987 A.2d 575, 591.

[94] *Robert Nicastro* (n 89) 987 A.2d 575, 592.

The Supreme Court judgment in *McIntyre* is a plurality opinion which adds little certainty to this area of the law. Justice Kennedy voiced the plurality's opinion and held specific jurisdiction only legitimate where the defendant "purposefully avails itself of the privilege of conducting activities within the forum state."[95] Furthermore, a judgment is only "lawful [if the] sovereignty has authority to render it."[96]

Goodyear v Brown examined whether a foreign corporation can be subject to general personal jurisdiction because of its extensive contacts with the US. General jurisdiction means the defendant can be sued for activities which are unrelated to its specific contacts with the forum state. The appellees were the co-administrators of the estates of two young American boys who died in a road accident in Paris after one of the Goodyear tyres of the bus in which they were travelling burst.[97] The North Carolina Court of Appeals held that the appellants had "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina"[98] and upheld the trial court's finding that the cause of action was "closely related to the contacts with the defendants" and in the "substantial interest" of North Carolina to pursue in order to provide a forum for its citizens to redress their grievances.[99]

The Supreme Court disagreed on the facts and established a new quantum of sufficient contacts: a test of whether the defendant be "essentially at home" in the forum.[100]

Needless to say, under these heightened standards both suits against foreign defendants were dismissed leading to fears that US plaintiffs may be left "without recourse to a

[95] *J. McIntyre Machinery Ltd v Nicastro,* 131 S.Ct. 2780, 2787, 2879 (2011).
[96] *J. McIntyre Machinery Ltd v Nicastro,* 131 S.Ct. 2780, 2879 (2011).
[97] *Brown v Meter and others* (n 90) 681 S.E.2d 382, 384.
[98] *Brown v Meter and others* (n 90) 681 S.E.2d 382, 395.
[99] *Brown v Meter and others* (n 90) 681 S.E.2d 382, 395: "The trial court's findings are supported by competent evidence, and the findings in turn support the conclusion that the exercise of general personal jurisdiction over Goodyear Luxembourg, Goodyear Turkey, and Goodyear France was appropriate pursuant to N.C. Gen.Stat. § 1-75.4(1)(d) [the North Carolina long-arm statute] and the due process clause."
[100] *Goodyear Dunlop Tires, S.A. v Brown,* 131 S.Ct. 2846, 2851 (2011).

U.S. forum against product manufacturers who target and benefit greatly from serving the U.S. market."[101]

Conclusion

So what can these latest judgments of the Supreme Court mean? What underlying policy justifies the restrictions on foreign plaintiffs when a substantial limitation on foreign defendants is also introduced?

On the one hand, the federal courts might be seeking to avoid the inconvenience and expense of multinational suits thereby preferring to dismiss claims regardless of the claimant's nationality. This would respond to policy calls to demagnetize American courts in order that "forums that are more appropriate for adjudicating the matters in dispute" are selected.[102] However can the *ad hoc* set of disparate standards really serve this policy objective well? At least in terms of foreign claimants, will this choice not antagonize foreign legislatures, and "backfire as foreign courts... [adapt themselves to American judicial standards, for example by awarding] large judgment against U.S. defendants?"[103]

On the other hand, these procedural changes can be seen as an attempt to standardize American procedural practice to the rules adopted in most other countries, and are aims that could be legitimately pursued by increasing the pleading requirements or thinning the docket with common law doctrines such as *forum non conveniens.*[104] However, if so radical a change is undertaken with so little notice, it cannot but cause injustice to individual plaintiffs which will see their forum of preference unexpectedly different.

[101] Borchers, *J.McIntyre Machinery, Goodyear,* (n 84) at 1275. To the same extent, according to Professor Borchers these two judgments might "frustrate the efforts of victims of human rights violations of terrorism at the hands of foreign defendants to seek redress in the United States." *Id,* at 1246.
[102] Russell J. Weintraub, International Litigation And Arbitration: Practice And Planning 224 (5th ed. 2006).
[103] Burke Robertson, '*Transnational Litigation And Institutional Choice'* (n 2) 1085.
[104] Dodson, *'Comparative Convergences in Pleading Standards'* (n 13) 442-443.

In conclusion, when focusing on the greater picture of federal civil procedure, it is clear courts have favoured early disposition of cases and restrictions on plaintiff's access. Yet, as Professor Miller emphasizes while these changes ensure a more "speedy" and "inexpensive" resolution of cases, they should not be at the expense of the third founding principle of the Rules of Civil Procedure: justice.[105]

[105] Federal Rules of Civil Procedure, Rule 1 "These rules govern the procedure in all civil actions and proceedings in the United States district courts... They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."