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FORUM NON CONVENIENS DISMISSAL: THE QUIETER SIDE OF SECTION 1782 DISCOVERY

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Preceding the Supreme Court's seminal decision in *Intel Corp. v. Advanced Micro Devices, Inc.*,[1] the National Chamber Litigation Center, Inc., of the U.S. Chamber of Commerce, filed an *amicus curiae* brief with the Court, predicting that a broad reading of 28 U.S.C. § 1782[2] would open U.S. courts to a "flood" of applications by foreigners for discovery in the United States.[3] This prediction reflected the concern of many U.S. entities engaged in business abroad that parties in foreign proceedings would increasingly rely on section 1782 applications to seek burdensome discovery against them at home.

Although the expansive reading of section 1782 set forth in *Intel* has led to the recent founding of a national network of law firms that specializes in section 1782 applications,[4] U.S. companies may take some comfort in the relatively positive consequences that a broad reading of section 1782 has had on many international disputes filed in U.S. courts. Specifically, federal and state courts have relied on the availability of section 1782 discovery as a factor in dismissing law suits on grounds of *forum non conveniens*, even where relevant witnesses and other evidence were located in the United States. Courts have also cited the availability of section 1782 discovery as a reason to stay an action in favor of a foreign forum.[5]

This article examines five tort cases, some pre-*Intel* and some post-*Intel*, in which federal and state courts have expressly referred to the availability of section 1782 discovery as a factor in their decision to dismiss on *forum non conveniens* grounds.[6] The broad reading given to section 1782 by *Intel* and its progeny has laid the groundwork for *forum non conveniens* jurisprudence that has benefited and will continue to benefit U.S. businesses that are engaged in international commerce and whose preference is that suits brought against them with respect to their international activities not be adjudicated in the United States.[7]

I. *Forum Non Conveniens* (Generally)

The two most significant decisions of the U.S. Supreme Court on the *forum non conveniens* doctrine are *Gulf Oil Corp. v. Gilbert*[8] and *Piper Aircraft Co. v. Reyno*.[9] In *Piper Aircraft*,[10] the Court recognized that U.S. courts are "extremely attractive" to

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non-U.S. plaintiffs wishing to sue U.S. defendants. The Court noted some of the attractions of suing in the United States:

> [The vast majority of] American States...offer strict liability. ...Rules roughly equivalent to American strict liability are effective in France, Belgium, and Luxembourg. West Germany and Japan have a strict liability statute for pharmaceuticals. However, strict liability remains primarily an American innovation. Second, the tort plaintiff may choose, at least potentially, from among 50 jurisdictions if he decides to file suit in the United States. Each of these jurisdictions applies its own set of malleable choice-of-law rules. Third, jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions. ...Even in the United Kingdom, most civil actions are not tried before a jury. ...Fourth, unlike most foreign jurisdictions, American courts allow contingent attorney's fees, and do not tax losing parties with their opponents' attorney's fees. ...Fifth, discovery is more extensive in American than in foreign courts.[11]

The Supreme Court has held that a federal court considering a motion to dismiss on *forum non conveniens* grounds is required to engage in a two-prong process: first, the court considers whether there is an adequate alternative forum to the one chosen by the plaintiff;[12] second, if the court is convinced that there is an adequate alternative forum, the court then considers and weighs a number of "public interest" and "private interest" factors.[13]

In *Piper Aircraft*, the Court summarized those factors as follows:

> The factors pertaining to the private interests of the litigants include 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 [where appropriate]; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. ...The public factors...include the 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 at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.[14]

It is also well recognized that, as a general matter, a plaintiff's choice of forum is entitled to a certain amount of deference,[15] but the degree of deference is less when the plaintiff is not a resident of the United States.[16]

II. Section 1782 Meets *Forum Non Conveniens*

Before *Intel*, courts in Florida considered the relevance of section 1782 discovery in the context of a *forum non conveniens* motion in two cases involving suits brought by non-U.S. plaintiffs against U.S. chemical manufacturers.

The first case was *Proyectos Orchimex De Costa Rica, S.A. v. Dupont*,[17] decided by the United States District Court for the Middle District of Florida in 1995. In *DuPont*, individuals and businesses from Costa Rica and Jamaica sued DuPont, a Delaware corporation with its principal place of business in Delaware, for damages to commercial nursery crops and real property. The damages allegedly resulted from use of a fungicide manufactured by DuPont; all of the alleged damages occurred outside the United States.[18]

After concluding that each home jurisdiction of the plaintiffs provided an adequate alternative forum,[19] the district court proceeded to consider the private interest factors outlined by *Gilbert* and *Piper Aircraft*. The court observed that there were relevant witnesses both in the United States and in the home countries of the plaintiffs, but the court concluded that there were virtually no witnesses with "direct knowledge" located in the Middle District of Florida.[20] The court next considered the location of relevant documents, stating:

> [I]t appears that most, if not all, of the relevant documents are maintained outside of this forum [Florida]. DUPONT's... documents are housed in a document

Specifically, federal and state courts have relied on the availability of section 1782 discovery as a factor in dismissing law suits on grounds of forum non conveniens, *even where relevant witnesses and other evidence were located in the United States.*

The availability of section 1782 discovery, coupled with the unavailability of discovery in the non-U.S. fora, was a significant factor in the court's decision.

> depository located in Wilmington, Delaware. The plaintiffs' business records are maintained in their respective home forums. It is reasonable to anticipate that there are relevant documents in the hands of third parties in the United States as well as in the foreign forums. In the event of dismissal to the foreign forums, the plaintiffs would nevertheless be able to obtain documents from third parties located in the United States under 28 U.S.C. § 1782 as well as through other extra-territorial means such as the Hague [Evidence] Convention. *The foreign forums have no provision comparable to 28 U.S.C. § 1782 allowing for the direct production from third parties.*[21]

The *DuPont* court concluded that, on balance, the question of relative ease of access to documents supported dismissal on *forum non conveniens* grounds[22] such that it was not necessary even to consider the "public interest" considerations.[23] The availability of section 1782 discovery, coupled with the unavailability of discovery in the non-U.S. fora, was a significant factor in the court's decision.

The second case filed in Florida by non-U.S. plaintiffs against U.S. chemical manufacturers was *Ciba-Geigy v. Fish Peddler*,[24] which involved the unusual *reversal* by an appellate court of a trial court's denial of a *forum non conveniens motion*.[25]

That case began as a suit for breach of an oral contract between two Florida corporations;[26] the plaintiff had sued for the defendant's failure to supply shrimp that conformed to the plaintiff's requirements of quantity, quality, and size. The defendant filed a third-party complaint against an Ecuadorian corporation for indemnification and breach of a separate contract between the defendant and the Ecuadorian company.[27] The Ecuadorian company then brought a fourth-party complaint for contribution, negligence, and product liability against five chemical manufacturers — three based in the United States, one in Switzerland, and one in Germany.[28] After the filing of the fourth-party complaint, approximately thirty Ecuadorian shrimp farmers filed suits against the same U.S. chemical manufacturers. All of the actions were consolidated for pre-trial purposes.[29]

The consolidated fourth-party claims alleged that fungicides manufactured by the U.S. chemical companies leached from farms in Ecuador into streams and rivers and spread to the plaintiffs' shrimp farms. The Ecuadorian shrimp farmers further asserted that the use of the fungicides resulted in the increased mortality rate of shrimp, causing those farmers to sustain economic loss.[30]

Although the Florida appellate court found numerous errors in the trial court's denial of the chemical manufacturers' *forum non conveniens* motion,[31] the appellate court focused on the private interest factors outlined by *Gilbert* — specifically, access to evidence and witnesses.[32] The appellate court observed that all of the physical evidence was in Ecuador and that relevant documents were located in at least four countries — including Germany and Switzerland — but that no relevant documents were located in the Florida county where the consolidated actions had been pending.[33]

The chemical manufacturers argued that the availability of section 1782 to obtain documents for use in Ecuador supported dismissal. In response, the fourth-party plaintiffs argued that section 1782 applications are "cumbersome and full of delays" and that sometimes section 1782 applications take up to seventeen months to resolve.

The court was unpersuaded by the "delay" objection, stating, "Nevertheless, there is a proven procedure [section 1782] to secure documentation of evidence located in the United States."[34] Echoing the statement by the *DuPont* court that the "[t]he foreign forums have no provision comparable to 28 U.S.C. § 1782 allowing for the direct production from third parties,"[35] the *Ciba-Geigy* court observed, "The affidavits [as to foreign law] do not address how the defendants would obtain evidence in Ecuador for trial in the United States."[36] The *Ciba-Geigy* court concluded that the private interest factors supported dismissal *on forum non conveniens* grounds.[37]

III. *Intel* Clarifies the Scope of Section 1782 Discovery

As a great deal has been written about *Intel* in the less than four years since it was decided, a full analysis of *Intel* is beyond the scope of this article. Suffice it to

say that *Intel* resolved a number of splits among the circuit courts of appeals, holding:

(1) there is no threshold requirement that evidence sought pursuant to section 1782 be "discoverable" under the law governing the non-U.S. proceeding;[38]

(2) a "tribunal" under section 1782 is a governmental body that acts as a "first-instance decisionmaker";[39] and

(3) a "proceeding" for which discovery is sought need merely to be in reasonable contemplation — it need not be pending or imminent.[40]

IV. Post-*Intel Forum Non Conveniens* Cases

Adamu v. Pfizer[41] was a purported class action brought in 2005 on behalf Nigerian citizens who allegedly suffered personal injuries from the experimental administration in Nigeria of an antibiotic manufactured by Pfizer, Inc.[42] The plaintiffs alleged claims arising under the federal Alien Tort Statute, international law, and certain Connecticut statutes.[43]

Pfizer moved to dismiss the claims on substantive and procedural grounds, and the court dismissed some of the claims on substantive grounds. In considering Pfizer's *forum non conveniens* motion as to the remaining claims, after concluding that Nigeria is an adequate alternative forum,[44] the court addressed the public interest factors outlined by *Gilbert*. Noting Nigeria's obvious interest in the adjudication of the suit, the *Adamu* court, at the same time, recognized the interest of American citizens in the litigation, stating:

> [C]itizens of this district as well as the District of Connecticut share an interest in this litigation because Pfizer developed, produced and performed preliminary testing of Trovan and designed the [Nigeria] treatment protocol within the United States as part of its plan to obtain FDA approval to sell and distribute [the antibiotic] domestically.[45]

The court concluded that the *public* interest factors do not support *forum non conveniens* dismissal and held that "the *Gilbert* public interest factors do not strongly support either forum over the other."[46]

The court turned to consider the *private* interest factors. It determined that "discovery related to Pfizer's alleged tortious conduct must occur within the United States,"[47] even though the witnesses who were "crucial" to the issues of "proof of causation, injury and damages" were all located in Nigeria.[48] The court balanced the private factors as follows:

> [M]ost of the documents and witnesses located in the United States are within Pfizer's control. Pfizer has stipulated that it will facilitate any Nigerian action by providing Plaintiffs with relevant records; making past or present Pfizer employees available for depositions pursuant to 28 U.S.C. § 1782; and using its "best efforts" to make past and present employees of Pfizer who would be subject to subpoena in [this district] available to testify at trial in [Nigeria] at Pfizer's cost. ...Thus, the balance of the *Gilbert* private interest factors clearly weighs in favor of...[dismissal on *forum non conveniens* grounds].[49]

It may not be commonplace for a defendant to stipulate to transport, at its own expense, an *unidentified* number of witnesses to a trial that will take place thousands of miles from their homes (and places of business). Nonetheless, given the equal weight that the *Adamu* court attributed to the public interest factors, the availability of testimony from American witnesses, whether through section 1782 discovery or otherwise, was a significant factor in the court's *forum non conveniens* analysis.[50]

Perhaps the most complex case involving a *forum non conveniens* motion and a court's willingness to refer a plaintiff to the availability of section 1782 discovery was *Gilstrap v. Radianz Ltd.*,[51] decided by the Southern District of New York in 2006. *Gilstrap* involved a purported class action on behalf of stock option holders of Radianz Ltd., a UK company that had maintained its "global headquarters" in New York.[52] Unlike in *Adamu*, where all members of the plaintiff class were non-U.S. residents suing only one U.S. defendant, in *Gilstrap* the plaintiff class was comprised of both residents and non-residents of the United States and the defendants included both U.S. and non-U.S. entities.

[T]he availability of testimony from American witnesses, whether through section 1782 discovery or otherwise, was a significant factor in the court's forum non conveniens *analysis.*

The role played by section 1782 in the district court's forum non conveniens *analysis in* Gilstrap *cannot be overstated.*

The *Gilstrap* plaintiffs alleged that, when Radianz Ltd. and Radianz America Inc.[53] were sold to British Telecommunications in 2005, the defendants manipulated the purchase price so as to render plaintiffs' options in Radianz Ltd. worthless.[54] The plaintiffs further asserted that Radianz had "sought out" U.S. citizens for employment and enticed them to work by offering participation in the company's option plan.[55] Regarding the make-up of the class of plaintiffs, two salient facts apparently were undisputed: (a) approximately 70 percent of the outstanding options were issued to employees who worked for Radianz Ltd. in the United States, and (b) approximately 60 percent of the putative class *members* resided in England.[56]

One of two putative class representatives was Gilstrap, the former president and CEO of Radianz Ltd. Gilstrap was a former resident of New York who, at the timing of filing the suit, resided in Texas. The other putative class representative was a resident of the United Kingdom.[57] The plaintiffs also sued (1) Radianz Americas, Inc., (2) Reuters Ltd., which was (directly or indirectly) the former controlling shareholder of Radianz Ltd., (3) two Delaware limited liability companies that Reuters formed in order to effectuate the transaction,[58] and (4) British Telecommunications, the company that acquired Radianz Ltd.[59] The plaintiffs asserted claims for (*inter alia*) breach of contract and breach of fiduciary duties.[60]

The defendants moved to dismiss on *forum non conveniens* grounds, arguing that virtually all of the parties, witnesses, and relevant evidence were located in England.

The court devoted most of its *forum non conveniens* analysis to the private factors identified by *Gilbert*. Regarding the issue of ease of access to sources of proof, the plaintiffs provided the court with a list of approximately ten likely witnesses based in the United States, and the defendants provided a list of approximately twenty likely witnesses based outside the United States (mostly in England).[61] The court acknowledged that there were residents of the United States who would likely be trial witnesses (including plaintiff Gilstrap himself).[62] Yet the court concluded that American-based evidence did not preclude dismissal on *forum non conveniens* grounds, stating:

> To the extent plaintiffs are concerned that, should this action be dismissed in favor of an English forum, they would be unable to obtain pretrial discovery of persons and documents located within the United States, they may, of course, request that this Court — and any other district court with jurisdiction over individuals they believe to have relevant testimony and/or documents — order such persons to provide such discovery in aid of a foreign proceeding. *See* 28 U.S.C. § 1782. That such information might not otherwise be discoverable in an English forum does not preclude a district court from ordering compliance.[63]

The extent of the district court's reliance upon the availability of section 1782 appears to have been unprecedented. Five of the U.S. residents listed by the plaintiffs as likely trial witnesses were identified as residing in the New York City area, one in Massachusetts, two in Virginia, and one in North Carolina.[64] Thus, in deciding that section 1782 afforded the plaintiffs a sufficient opportunity to obtain testimony from U.S. witnesses for use at trial in England, the district court in *Gilstrap* was implicitly stating that the inconvenience of having to file separate section 1782 applications in up to *four* different districts is not a significant factor in a *forum non conveniens* analysis.

In summary, although each element of the analysis by the district court in *Gilstrap* may have been consistent with traditional *forum non conveniens* jurisprudence, the result in the case was, nonetheless, remarkable: a non-U.S. corporation that maintained its principal place of business in New York (together with a related American corporation) succeeded in obtaining a *forum non conveniens* dismissal of a suit brought by a class of its employees, even though a significant number of class members were U.S. residents and even though at least some witnesses, including a named plaintiff, were based in the United States.

The role played by section 1782 in the district court's *forum non conveniens* analysis in *Gilstrap* cannot be overstated.[65]

On appeal, the Second Circuit issued a Summary Order, affirming, "In the end, while we may disagree with some of the district court's characterizations, the court did not abuse its discretion in applying the facts and weighing the factors relating to the [*forum non conveniens*] motion."[66]

A few months after the district court's decision in *Gilstrap*, the District of New Jersey decided *Windt v. Qwest Communications International, Inc.*,[67] a case involving claims asserted by Dutch attorneys who were acting as bankruptcy trustees of the estate of the Dutch company KPNQwest N.V. The defendants were Qwest Communications (based in Colorado) and former officers and directors of KPNQwest. The complaint asserted claims for securities fraud and corporate mismanagement. The alleged basis for venue was the domicile in New Jersey of two individual defendants.[68]

The court found that the plaintiffs, appointed by a Dutch court to act as trustees for a Dutch corporation, had essentially no contacts with the state of New Jersey or the United States and that, therefore, it could not be said that a New Jersey forum was convenient to the plaintiffs.[69] The court also observed that the plaintiffs could bring their claims against the defendants in the Netherlands, where related litigation was already pending.[70]

In considering the balance of private factors, the court addressed the plaintiffs' contention that the defendants' documents were located in the United States:

> [T]he holding of *Intel* (as does the language of § 1782) stands to assure that Plaintiffs are likely to have ample access to any evidentiary matters Plaintiffs might need if Plaintiffs are to commence this action in the Netherlands, and Plaintiff's private interests are unlikely to be negatively affected by this Court's dismissal of this action on the grounds of forum non conveniens.[71]

The court held that the private interests support dismissal.[72]

Conclusion

In light of the cases discussed above, a plaintiff who wishes to defeat a *forum non conveniens* motion may face difficulty arguing that a non-U.S. forum would deny him access to necessary evidence in the United States. In this regard, an expansive reading of section 1782 should be good news for U.S. companies that do business internationally and who wish to avoid being sued at home.

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[1] 542 U.S. 241 (2004). See *infra* III for a summary of *Intel*.

[2] Entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," section 1782(a) provides, in relevant part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. ...The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. ...The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> 28 U.S.C. § 1782(a).

[3] The *amicus curiae* brief is available at http://www.uschamber.com/NR/rdonlyres/ekyomdrjhgyccphway2z74vfszzrxbb26mnnsawcn63rngkl3qgo7l2zyucriyplm6rkpdf6waokxtchky44hghi47a/intel.v.amd0211.pdf.

Private law firms too know how to chant the "anti-U.S. business" mantra of section 1782. *See* Eric Schwartz and Alan Howard, *International Arbitration Discovery Applications to Rise?*, N.Y.L.J., May 4, 2007, *also available at* http://www.llgm.com/files/News/3ac208dc-e3a6-46e8-8d32 374b66f5681e/Presentation/NewsAttachment/e1b1b019-fa25-44cf-a40a-38fb92e631ab/5496.pdf). Schwartz and Howard argue that a December 2006 decision from a district court in Georgia could result in "the doors of the U.S. federal

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[17] 536 U.S. 304 (2002).

[18] *Id.* at 307 ("Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are 'cruel and unusual punishments' prohibited by the Eighth Amendment to the Federal Constitution.") (Citations omitted).

[19] *Id.* at 312.

[20] *Id.* at 321.

[21] *Id.* at 316 n.21.

[22] 543 U.S. 551 (2005).

[23] 492 U.S. 361 (1989).

[24] *Dusenberry v. U.S.*, 534 U.S. 161, 168 (2002).

[25] 358 U.S. 86 (1958).

[26] *E.g., Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating that the Court has "firmly embraced the holdings and dicta from" *Trop*, among other cases).

[27] 543 U.S. 551, 564 (2005).

[28] *Id.* at 552.

[29] *Id.* at 578.

[30] 536 U.S. 304, 316 n.21 (2002).

[31] 492 U.S. 361 (1989).

[32] American University Debate, *available at* http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument ("I doubt whether anybody would say, 'Yes, we want to be governed by the views of foreigners.' Well if you don't want it to be authoritative, then what is the criterion for citing it or not? That it agrees with you? I don't know any other criterion to bring forward.").

[33] 543 U.S. at 623 (Scalia, J., dissenting) (citing more "conservative" foreign rules regarding the exclusionary rule, separation of church and state, and abortion).

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courts [swinging] open to a *flood* of future applications *for the discovery of evidence against U.S. businesses* for use in international arbitration proceedings." (Emphasis added) (citing *In re Application of Roz Trading, Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006)). Schwartz and Howard further contend that such possibility should be "cause for alarm" for the U.S. business community.

[4] For more information about the International Litigation Network, which "is believed to be the only network of American law firms dedicated to representing non-U.S. clients in section 1782 proceedings," see http://www.intlawnet.com.

[5] *E.g., Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 449 (Del. Ch. 2007) (staying action against Delaware resident who was one of five partners in a German partnership; with respect to U.S.-based evidence, court referred to availability of section 1782 discovery and to *Intel*, stating that section 1782 applications "are now met with a warmer reception than they have ever before enjoyed"); *National Union Fire of Pittsburgh v. Kozeny*, 115 F. Supp. 2d 1243 (D. Colo. 2000) (staying case in favor of proceedings in London; plaintiff brought action in Colorado primarily in order to obtain order of attachment on assets in Colorado).

[6] The *Gilstrap* case, discuss *infra*, involved tort claims and a breach of contract claim.

[7] The availability of section 1782 discovery has also been cited as a basis for granting *forum non conveniens* motions in actions brought by American companies. *E.g., J.C. Renfroe & Sons v. Renfroe Japan Co.*, No. 3:2006cv00451, 2007 U.S. Dist. LEXIS 66233 (M.D. Fla. Sept. 7, 2007); *Potomac Capital Investment Corp. v. Koninklijke Luchtvaapt Maatschapplj NV*, No. 97 Civ. 8141, 1998 WL 92416 (S.D.N.Y. 1998).

[8] 330 U.S. 501 (1947).

[9] 454 U.S. 235 (1981).

[10] *Id.*

[11] *Id.* at 252, n.18 (citations omitted).

[12] *Id.* at 254 n.22 ("where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative").

[13] *See Gilbert*, 330 U.S. 501, 506-07, 508; *Piper Aircraft*, 454 U.S. at 241.

[14] *Piper Aircraft*, 454 U.S. at 241, n.6 (citing *Gilbert*; internal citations and quotation marks omitted).

[15] *Gilbert*, 330 U.S. at 508 ("plaintiff's choice of forum should rarely be disturbed"); *Piper Aircraft*, 454 U.S. at 255 ("there is ordinarily a strong presumption in favor of the plaintiff's choice of forum").

[16] *Gilbert*, 330 U.S. at 508, ("the presumption applies with less force when the plaintiff or real parties in interest are foreign"); *Piper Aircraft*, 454 U.S. at 256 ("a foreign plaintiff's choice deserves less deference").

[17] 896 F. Supp. 1197 (M.D. Fla. 1995).

[18] *Id.* at 1199.

[19] *Id.* at 1201-02.

[20] *Id.* at 1202.

[21] *Id.* at 1202-03 (emphasis added).

[22] *Id.* at 1203.

[23] Nonetheless, the court proceeded to consider the public interest factors and to find that they too supported dismissal. *Id.*

In another case, DuPont failed in its attempt to use the availability of section 1782 discovery in support of a *forum non conveniens* motion. In *Slight v. DuPont*, 979 F. Supp. 433 (S.D. W. Va. 1997),

the court denied a *forum non conveniens* motion with respect to a claim brought by British subjects for birth defects allegedly caused by the inhalation, ingestion, or dermal absorption of a fungicide manufactured by DuPont. The court found that both sides would encounter obstacles to English evidence wherever the case is tried, *id.* at 439-40, and the court was concerned that the likely inability of the plaintiffs to retain counsel on a contingency basis was a grounds ("while not dispositive") for retaining jurisdiction, *id.* at 441.

[24] 691 So.2d 1111 (Fla. App. 1997).

[25] *Id.* at 1113.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1113-14.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1114.

[32] *Id.* at 1117-21.

[33] *Id.* at 1119.

[34] *Id.*

[35] 896 F. Supp. at 1202-03.

[36] 691 So.2d at 1119.

[37] *Id.* at 1125-26. *See also PT United Can Co. v. Crown Cork & Seal*, 1997 U.S. Dist. LEXIS 692 at *22 (S.D.N.Y. 1997) (dismissing RICO and related corporate governance claims brought by Indonesian corporation; "under 28 U.S.C. § 1782, if this case were tried in Indonesia, either party could gain access to witnesses or documents located in the United States"), *aff'd*, 138 F.3d 65 (2d Cir. 1998).

[38] 542 U.S. at 260-62.

[39] *Id.* at 258.

[40] *Id.* at 259.

[41] 399 F. Supp. 2d 495 (S.D.N.Y. 2005).

[42] *Id.* at 497-98.

[43] *Id.* at 497. The action was initially filed in Connecticut and subsequently transferred to the United States District Court for the Southern District of New York due to the pendency there of a related action. *See Abdullahi v. Pfizer*, No. 01 Civ. 8118 (WHP), 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005).

[44] *Id.* at 504.

[45] *Id.* at 505.

[46] *Id.* (emphasis added).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 505-06.

[50] *But see Conti Zweite Cristallo Schiffarhrts GmbH v. PPG Indus.*, Nos. 99 Civ 10545 (RCC), 00 Civ 0194 (RCC), 2001 WL 1154690 at *3, *4-*5 (S.D.N.Y. Sept. 28, 2001) (where the public interest factors weighed in favor of retaining jurisdiction, a promise by an American defendant to cooperate in discovery was not enough to convince the court to grant a *forum non* dismissal).

[51] 443 F. Supp. 2d 474 (S.D.N.Y. 2006), *aff'd*, Nos. 06-3984-CV, 233 Fed. Appx. 83, 2007 WL 1541362 (2d Cir. May 25, 2007).

[52] 443 F. Supp. 2d. at 476.

[53] The decision is not clear as to the precise relationship between the two Radianz companies.

[54] 443 F. Supp. 2d. at 475.

[55] *Id.* at 480.

[56] *Id.* at 476.

[57] *Id.*

[58] *Id.* at 487, n.4.

[59] *Id.* at 475-77.

[60] *Id.* at 475.

[61] *Id.* at 483-87. The plaintiffs' list referred to three witnesses who were likely to testify about the role played by options in the compensation of employees. *Id.* at 483. None of the defense witnesses was identified as likely to testify on that topic.

[62] *Id.* at 488.

The court granted relatively scant deference to Gilstrap's choice of a New York forum. On the one hand, the court concluded that, because Gilstrap was suing in a *representative* capacity, his choice of a New York forum was entitled to less deference than it would be had he sued in an individual capacity, *id.* at 479; the court appears to have accorded little weight to the number of Radianz options that Gilstrap himself held. Yet in considering the likely *hardship* to Gilstrap in having to litigate in the United Kingdom, the court observed that his ownership of 20 percent of all outstanding options was a reason for believing that, regardless of the forum, he would have sufficient "incentive" to sue in England. *Id.* at 488.

[63] *Id.* at 489 (*citing Intel*).

[64] *Id.* at 483-84.

[65] It is worth noting that the court characterized the dispute as one surrounding a sale that took place in England "from one English company to another" English company. *Id.* at 476, 487. Such characterization appears to have been an oversimplification. In order to carry out the sale of Radianz to British Telecommunications, defendant Reuters formed two limited liability companies under Delaware law. The district court in *Gilstrap* mentioned the involvement of the two Delaware LLCs in a footnote only, raising the question of whether the court gave short shrift to the defendants' American contacts. *See id.* at 487 n.4.

[66] *Gilstrap*, 233 Fed. Appx. 83, 85-86, 2007 WL 1541362 at *2 (May 25, 2007).

[67] No. 04-cv-3026, 2006 U.S. Dist. LEXIS 75335 (D. N.J. Oct. 17, 2006).

[68] *Id.* at *3-*4.

[69] *Id.* at *23.

[70] *Id.* at *22.

[71] *Id.* at *58-*59.

[72] *Id.* at *45. *See also LaSala v. UBS*, No. 06-Civ-1736 (CSH) 2007 WL 2331054 at *11 (S.D.N.Y. Aug. 15, 2007) (dismissal on *forum non conveniens* grounds; citing availability of section 1782 discovery where plaintiff identified, at most, one U.S.-based witness who could assist fact-finder and where the vast majority of witnesses were based in Switzerland).