

# APPENDIX



**BLACKROCK, INC., Plaintiff, - against - SCHRODERS PLC, Defendant.**

**07 Civ. 3183 (PKL)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

*2007 U.S. Dist. LEXIS 39279*

**May 30, 2007, Decided**

**May 30, 2007, Filed**

**COUNSEL:** [\*1] SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Jay Samuel Berke, Esq., New York, NY, Attorney for Plaintiff.

PILLSBURY WINTHROP SHAW PITTMAN, LLP, Frederick Arthur Brodie, Esq., New York, NY, Christine N. Kearns, Esq., Attorneys for Defendant.

**JUDGES:** Peter K. Leisure, U.S.D.J.

**OPINION BY:** Peter K. Leisure

**OPINION**

**OPINION AND ORDER**

**LEISURE, District Judge:**

Plaintiff BlackRock, Inc. ("BlackRock") brought this action seeking to enjoin defendant Schrodgers plc ("Schrodgers") and its subsidiary companies from employing former employees of BlackRock and from inducing those employees to violate their contractual obligations and fiduciary duties to BlackRock. Schrodgers now moves to dismiss the complaint on the grounds that this Court lacks personal jurisdiction over Schrodgers and pursuant to the doctrine of *forum non conveniens*. For the reasons set forth below, Schrodgers' motion is GRANTED on the grounds of *forum non conveniens*.

**BACKGROUND**

BlackRock is an asset management firm incorporated in Delaware and headquartered in New York. (Connolly Aff. P 2.) BlackRock (Deutschland) GmbH ("BlackRock Germany") is a German subsidiary of BlackRock, and it has offices in Frankfurt, [\*2] Germany. (Id. at 4.) Schrodgers, a United Kingdom public limited company with offices only in London, England, is a holding company for a portfolio of asset management companies. (Trust Decl. PP 2, 4.) One of these companies is Schrodgers Investment Management GmbH ("Schrodgers Germany"), an indirect subsidiary of Schrodgers. (Id. P 2.)

This action arises out of the March 5, 2007 resignation of Achim Kussner from BlackRock and BlackRock Germany, where he had been a Managing Director of both. (Connolly Aff. P 4.) On March 12, 2007, Schrodgers Germany announced that Mr. Kussner would become its new Country Head. (Id.) Between March 8 and March 12, 2007, five other employees of BlackRock Germany, including three directors, also resigned. (Id.) BlackRock claims that Mr. Kussner solicited these employees to leave BlackRock Germany for Schrodgers Germany (id. P 7) and that Schrodgers induced him to do so (Comp. P 2). BlackRock contends that Mr. Kussner's actions were in violation of the Confidentiality and Employment Policy that is part of Mr. Kussner's employment contract (the "Employment Contract") with BlackRock Germany<sup>1</sup> (see id. Ex. A) and that Mr Kussner breached [\*3] the fiduciary duties

he owes his employer. (Id. P 3.) According to the Employment Contract's choice of law provision, the Employment Contract, and thus the Confidentiality and Employment Policy, is subject to German law. (Kearns Decl. Ex. A P 13.1); see *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 739 n.2 (2d Cir. 1994) (choice of law provision in agreement applies also to subsequent, modifying agreement with no choice of law provision).

1 Mr. Kussner was initially employed by Merrill Lynch Investment Managers (Deutschland) GmbH ("MLIM Germany"), the original counterparty to the Employment Contract. (See Kearns Decl. Ex. A; Connolly Aff. P 8.) In the second half of 2006, Merrill Lynch Investment Managers merged with BlackRock, and MLIM Germany changed its name to BlackRock (Deutschland) GmbH (referred to herein as BlackRock Germany). (See Connolly Aff. P 8.) As a result of the merger, Mr. Kussner became an employee of BlackRock Germany. (See id.) On September 29, 2006, in anticipation of the merger, MLIM Germany and Mr. Kussner expressly amended the Employment Contract to include BlackRock's Confidentiality and Employment Policy. (Id. P 9; Kearns Decl. Ex. B.)

[\*4] Mr. Kussner is not a party to this action. BlackRock maintains that this is because it might not be able to assert jurisdiction over him in this forum promptly enough for the purposes of a preliminary injunction. (See Hr'g Tr. 6:11-16, May 9, 2007.) Schrodgers notes that Mr. Kussner's employment contract with BlackRock Germany provides for jurisdiction in Frankfurt, Germany, not this forum. (See Kearns Decl. Ex. A § 13.1.)

## DISCUSSION

Schrodgers has moved to dismiss BlackRock's complaint on the grounds of lack of personal jurisdiction and pursuant to the doctrine of *forum non conveniens*. The issue of personal jurisdiction in this matter is closely intertwined with the merits of the case, and the inquiry into the issue promises to be fact-intensive. Accordingly, the Court first assesses the convenience of this forum. Because the result of this inquiry is dispositive, the Court does not reach the question of whether it has personal jurisdiction over Schrodgers. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 127 S. Ct. 1184, 1194, 167 L. Ed. 2d 15 (2007) ("[W]here subject-matter or personal jurisdiction is difficult to determine, and *forum non*

*conveniens* [\*5] considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.").

### I. *Forum Non Conveniens* Dismissal Standards

The doctrine of *forum non conveniens* is based on the principle that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F. Supp. 842, 845 (S.D.N.Y. 1986) (Keenan, J.) ("The doctrine of *forum non conveniens* allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute."), *aff'd*, 809 F.2d 195 (2d Cir. 1987). Notwithstanding the propriety of the action under the venue statute, "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. [\*6] " *Piper Aircraft Co. v. Reyno*, 454 U.S. 233, 249, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). The Supreme Court has declined to fashion the exact circumstances that would "justify or require either grant or denial of remedy." *Id.* (quoting *Gilbert*, 330 U.S. at 508). Consequently, a district court's inquiry is highly fact-specific. *Id.* ("Each case turns on its facts." (quoting *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 557, 66 S. Ct. 284, 90 L. Ed. 311 (1946))); *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 712 F. Supp. 383, 392-93 (S.D.N.Y. 1989) (Leisure, J.) ("The Supreme Court has emphasized the flexibility with which the District Court must approach a *forum non conveniens* determination, and consequently there are no specific circumstances which would require either a grant or denial of the remedy.").

In furtherance of these general principles of law, the Second Circuit has crafted a three-step inquiry for its district courts to follow:

At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate

[\*7] to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum.

*Norex*, 416 F.3d at 153 (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001) (en banc)). A defendant moving for dismissal on *forum non conveniens* grounds bears the burden of proof. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002); see also *VictoriaTea.com, Inc. v. Cott Beverages Canada*, 239 F. Supp. 2d 377, 381 (S.D.N.Y. 2003). Finally, the Second Circuit's review of a district court's dismissal on the basis of *forum non conveniens* is "severely cabined." *Alfadda v. Fenn*, 159 F.3d 41, 45 (2d Cir. 1998). Analysis of each of these three steps follows.

## II. The Degree of Deference Due the Plaintiff

Under Supreme Court and Second Circuit precedent, a court should defer to a plaintiff's choice of forum. *Iragorri*, 274 F.3d at 70; see also *Piper*, 454 U.S. at 255 ("[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum."); *Gilbert*, 330 U.S. at 508 [\*8] ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."). However, such deference is "not dispositive, and it may be overcome." *Iragorri*, 274 F.3d at 71. It is important to note that "the reason we give deference to a plaintiff's choice of her home forum is because it is presumed to be convenient." *Id.* (citing *Piper*, 454 U.S. at 255-56). Therefore, where it becomes apparent that plaintiff's choice of forum was not made with regard to convenience, and instead was made for "forum-shopping reasons," it is acceptable to afford plaintiff's choice less deference. *Iragorri*, 274 F.3d at 71.

Under this general approach, a district court's determination of "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations." *Iragorri*, 274 F.3d at 71. Specifically, "the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United [\*9] States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*." *Id.* at 71-72 (footnotes omitted). The factors favoring denial of a motion for dismissal include

the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense.

*Id.* at 72. Conversely, where it appears that a plaintiff has chosen a U.S. forum because of forum-shopping reasons less deference will be afforded plaintiff's choice and, consequently, the greater the likelihood of dismissal. *Id.* Such forum-shopping reasons include

attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum.

*Id.*; see, e. [\*10] g., *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71 (2d Cir. 2003) ("In such circumstances, it is more likely that forum-shopping for a higher damage award or for some other litigation advantage was the motivation for plaintiff's selection.").

Schroders brings this motion for dismissal claiming that "BlackRock's choice of forum deserves no deference." (Def.'s Mot. at 18.) It believes no deference is warranted because it claims the core of the dispute is based in Germany. (Def.'s Mot. at 16.) Schroders further argues that BlackRock's decision not to name BlackRock Germany as plaintiff - the party Schroders believes is the correct plaintiff - is evidence that BlackRock was motivated by forum-shopping reasons, primarily that the discovery procedures in Germany would not be as favorable to BlackRock as the procedures in New York. (Def.'s Mot. at 17-18.)

BlackRock responds, contending that, because it is headquartered in Manhattan and it has chosen to file the instant action in this District, the Court should accord full deference to that decision. BlackRock claims that deference to its choice must be given unless Schroders shows "such oppressiveness and vexation [\*11] as to be out of all proportion to plaintiff's convenience." (Pl.'s

Opp. at 20 (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir. 2000)).<sup>2</sup> BlackRock further contests Schroders's claim of forum-shopping by claiming it has named the correct party in interest as Schroders, rather than Schroders Germany.<sup>3</sup> (Pl.'s Opp. at 2-4, 20-22.) BlackRock also suggests that by claiming Germany as the correct alternate forum rather than the United Kingdom, Schroders is forum shopping. (Pl.'s Opp. at 22.)

2 The Court believes BlackRock mischaracterizes *Wiwa*, and misses its core holding: Second Circuit case law on this issue shows that there is not a "rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens*." *Wiwa*, 226 F.3d at 102. Instead, the *Wiwa* Court held that the key to the case law in this Circuit is "a consistent, pragmatic application' of the Gilbert factors to actions in which a plaintiff has particular ties to the forum state." *Id.* (citations omitted).

3 Interestingly, BlackRock discusses at length the appropriateness of its choice of defendant rather than focusing on the relevant considerations of the lawsuit's ties to this District and questions of convenience. BlackRock explains this by claiming that Schroders's allegations of forum-shopping are based on BlackRock's choice of defendant (Pl.'s Opp. at 21), however, Schroders's primary argument is that BlackRock brought its claim in this District to "obtain[] U.S.-style discovery." (Def.'s Mot. at 18.)

[\*12] It is undisputed that BlackRock itself has "bona fide connection" to this District, *Iragorri*, 274 F.3d at 71-72, as it is headquartered in Manhattan. It is less clear that BlackRock is, in fact, the real plaintiff in interest in this matter, or simply a "prox[y] chosen for an improper purpose," as Schroders claims. (Def.'s Reply at 4.) The Court will not defer to a plaintiff's choice of forum where that plaintiff "falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States." *Ionescu v. E.F. Hutton & Co. (France) S.A.*, 465 F. Supp 139, 146 (S.D.N.Y. 1976) (Pollack, J.) (quoting *Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977) (per curiam)). Nor will the Court give a plaintiff's choice of forum strong deference where it is not "one of the principal parties in interest." *VictoriaTea.com*, 239 F. Supp. 2d at 381; see also

*Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 612 (2d Cir. 1998) ("Because the real parties in interest are foreign corporations, there is not [\*13] a strong presumption in favor of the plaintiffs' choice of forum."). It is also unclear that the lawsuit as a whole has sufficient connections to this District to warrant deference to BlackRock's choice of forum. *Iragorri*, 274 F.3d at 71-72; see also *Ionescu*, 465 F. Supp at 146 (dismissing on grounds of *forum non conveniens* where "no act whatsoever of the defendant in connection with this claim took place in this country").

To determine if BlackRock is the real party in interest here, the Court looks to whether it was a key member of the "relationships and transactions that engendered the action." *VictoriaTea.com*, 239 F. Supp. 2d at 381. Mr. Kussner went from being an employee of MLIM Germany to "an employee and Managing Director of BlackRock Germany." (Complaint P 16.) The employees Mr. Kussner allegedly enticed away from BlackRock were employed by BlackRock Germany. (Complaint P 22.) Moreover, the agreement at issue was signed in Germany as a condition to work at BlackRock Germany, expressly references German law, is subject to German law and is written in German. (Connolly Aff. P 8; Complaint Ex. A; Kearns Decl. Ex. A P 13.1, [\*14] Ex. B.)

BlackRock, however, claims that it has been and will be harmed directly, in addition to the harm done to its BlackRock Germany subsidiary. (Pl.'s Opp. at 2; Complaint P 65.)<sup>4</sup> Certainly as an employee of BlackRock and BlackRock Germany, Mr. Kussner had fiduciary duties to both BlackRock and BlackRock Germany. As in *Ionescu*, however, none of the acts by Schroders upon which this claim is based took place in the United States, let alone this District. Instead, all of the key events upon which this dispute is based took place either in Germany or in the United Kingdom.

4 BlackRock also claims that Mr. Kussner had contact with New York in his position as Managing Director of BlackRock Germany (Complaint P 16) and that it will be harmed directly because "BlackRock, Inc. . . . measures and reports its income and financial performance . . . based on the performance of all its subsidiaries and affiliates, including BlackRock Germany" (Complaint P 65; Def.'s Mot. at 16-17). However, the Court finds these claims insufficient to

overcome the dearth of connections between the underlying lawsuit and this forum.

[\*15] Thus, the Court's concerns about whether BlackRock is the key party in interest coupled with the lack of ties to this District in the core underlying facts of the dispute convince this Court that the lawsuit itself does not have a sufficient connection to this forum to warrant strong deference. See *Kirch v. Liberty Media Corp., No. 4 Civ. 667 (NRB), 2006 U.S. Dist. LEXIS 82175, at \*4, 2006 WL 3247363 (S.D.N.Y. Nov. 8, 2006)* ("[P]laintiff's choice of this forum is not to be afforded great deference, in light of the inherently Germany nature of this dispute."); *VictoriaTea.com, 239 F. Supp. 2d at 381* (dismissing for *forum non conveniens* where "the principal parties in interest to the underlying relationships and transactions that engendered the action" were not citizens of the United States or of the chosen forum); *Diatronics, Inc. v. Elbit Computers, LTD, 649 F. Supp. 122, 128 (S.D.N.Y. 1986)* (dismissing for *forum non conveniens* where "[a]lmost every significant event concerning the pertinent transaction took place in Israel").

Having evaluated the connection of BlackRock and the underlying lawsuit to this [\*16] forum, the Court also must weigh the question of convenience to determine if it may save BlackRock's request for strong deference to its choice of forum. See *Iragorri, 274 F.3d at 71-72*. Thus, the Court now turns to a consideration of

the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense.

*Id.* at 72.

As has been discussed in detail above, BlackRock's residence is in its chosen forum. However, after consideration of the other factors at issue, it seems this forum is not the most convenient for this litigation. The majority of witnesses BlackRock claims are necessary to depose - eight of the eleven mentioned in BlackRock's papers - are in Germany or the U.K.<sup>5</sup> (See *Connolly Aff., Kushel Aff., Oliner Aff.*); see also *Kirch, 2006 U.S. Dist.*

*LEXIS 82175, at \*4*. Further, Schroders has already indicated that it would be amenable to suit in the forum district. (Trust Dec. P [\*17] 15; Def.'s Mot. at 18; Def.'s Reply at 5.) And finally, as the early communications between the parties prior to the filing of the Order to Show Cause in this Court show, legal assistance would be readily available to both parties in Germany. (See Trust Dec. at Exs. 1-2.) Thus, factors of convenience do not convince this Court that BlackRock's choice of forum deserves strong deference.

5 As is discussed in detail below, factors relating to BlackRock's ability to obtain witnesses' attendance weigh heavily in favor of dismissal.

Instead, it seems that BlackRock was motivated to bring suit in this forum based on considerations related to procedure available here. See *Iragorri, 274 F.3d at 72* (finding evidence of forum-shopping where reasons for bringing case in chosen forum include "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case"). Specifically, BlackRock has indicated that a preliminary injunction is the goal of its action here. (See [\*18] Hr'g Tr. 22:14-16). According to BlackRock, however, it believes it will not be able to obtain a preliminary injunction without expedited discovery, which it seems to claim would not be available to it in Germany. (See Pl.'s Opp. at 23.) Moreover, Mr. Kussner, who is seemingly a key party at interest to this case, is not even named by BlackRock because BlackRock believes it is unlikely to be able to assert jurisdiction over him in this District within the time frame it would like. (See Hr'g Tr. 6:11-16.) Schroders also points out that BlackRock relies on e-mail communications it "discovered" and has attached to its complaint, many of which may not be admissible under German constitutional and statutory law. (See Def.'s Mot. at 18 n.14.) The Court addresses many of these issues in greater detail below, but for purposes of the analysis at hand here, they do provide some indication that forum-shopping informed BlackRock's choice of forum.

Thus, given all of the *Iragorri* factors this Court has considered -- that the connection of the underlying litigation to this forum is attenuated, and that there is some inference of forum-shopping -- the Court concludes that BlackRock's [\*19] choice of forum will not be given the strong deference ordinarily afforded a plaintiff in a *forum non conveniens* analysis. Instead, BlackRock's choice of venue will be given limited deference.

### III. Adequacy of an Alternative Forum

The second step in this analysis involves considerations related to selection of an alternate forum. A complaint is not properly dismissed under the doctrine of *forum non conveniens* unless a suitable alternate forum for the dispute exists. *Iragorri*, 274 F.3d at 73; see *Piper*, 454 U.S. at 254 n.22. The movant bears the burden of demonstrating that an adequate alternative forum exists. *Bank of Credit and Commerce Int'l (OVERSEAS) Ltd. v. State Bank of Pak.*, 273 F.3d 241 248 (2d Cir. 2001). "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." *Norex*, 416 F.3d at 157 (quoting *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003)).

Schroders contends that the courts of Germany present an adequate alternative forum and that this case [\*20] should be tried there. BlackRock disputes the adequacy of the forum that German courts provide, apparently on the basis that German procedure does not permit for expedited discovery. BlackRock maintains that it requires expedited discovery for its application for a preliminary injunction. BlackRock's argument is unpersuasive.

"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." *Norex*, 416 F.3d at 157 (quoting *Pollux*, 329 F.3d at 75). Implicit in a finding that an alternative forum permits litigation of the subject matter of the dispute is "a finding that the foreign jurisdiction is as presently capable of hearing the merits of the plaintiff's claim . . . as the United States court where the case is pending," *Norex*, 416 F.3d at 159, and that the alternative forum offers a remedy that is not "clearly unsatisfactory," *Piper*, 454 U.S. at 254 n.22. The possibility of a difference in substantive law between the forums "should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* [\*21] inquiry." *Piper*, 454 U.S. at 247.

Schroders has represented to this Court that it will consent to the personal jurisdiction of the courts in Germany. (Trust Decl. P 15.) Thus Schroders is amenable to service of process in Germany, and BlackRock does not dispute this.

It is also not disputed that German courts will permit

the litigation of BlackRock's claims. Rather, BlackRock argues that German courts cannot provide a satisfactory remedy to BlackRock because a timely preliminary injunction -- the remedy it seeks foremost -- is not available to it in a German court. (See Hr'g Tr. 22:14-16 ("[T]he needs that BlackRock has turned to this Court for . . . is ultimately a preliminary injunction.") ) BlackRock argues that a preliminary injunction will not be available to it without expedited discovery. (See Pl.'s Opp. at 23.) In essence, BlackRock argues that without the sort of expedited discovery sometimes permitted by United States courts, it will not be able to prevail in an application to a German court for a preliminary injunction. (Id.)

Initially, the Court notes that German courts are empowered to issue preliminary injunctions in civil matters. ( [\*22] See Driver-Polke Decl. P 7.5 (citing Zivilprozessordnung § 916 et seq.)) Further, it is not in dispute that BlackRock's underlying claims can be litigated in German courts. In fact, as discussed below, most of the claims arise out of German law.

What is more, it is clear that "the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) (citing *Borden, Inc. v. Meiji Milk Products Co., Ltd.*, 919 F.2d 822, 829 (2d Cir. 1990)); see also *Panama Processes, S.A. v. Cities Service Co.*, 650 F.2d 408, 415, 416 (2d Cir. 1981) (Kearse, J.) (affirming dismissal over dissent's objection that no discovery would be available to plaintiff in the alternative forum); *Potomac Capital Inv. Corp. v. KONINKLIJKE LUCHTVAAPT MAATSCHAPPLJ N.V.*, 97 Civ. 8141, 1998 U.S. Dist. LEXIS 2343, 1998 WL 92416, at \*5 (S.D.N.Y. Mar. 4, 1998) ("[W]ere a forum considered inadequate merely because it did not provide for federal style discovery, few foreign forums could be considered 'adequate'--and that is [\*23] not the law."). For this reason, courts in this District have repeatedly found Germany to be an adequate alternative forum despite the differences in discovery procedures. See, e.g., *Kirch*, 2006 U.S. Dist. LEXIS 82175, at \*\*19-21; *Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 382 (S.D.N.Y. 2006); *NCA Holding Corp. v. Norddeutsche Landesbank Girozentrale*, 96 Civ. 9321 (LMM), 1999 U.S. Dist. LEXIS 817, 1999 WL 39539, at \*2 (S.D.N.Y. Jan. 28, 1999) ("That the German legal system is different than that of the United States does not render

Germany an inadequate forum."); *Opert v. Schmid*, 535 F. Supp. 591 (S.D.N.Y. 1982).

Furthermore, the sort of expedited discovery that BlackRock argues is unavailable in German courts is not necessarily available in this forum. Rather, it is available only at the district court's sound discretion. See *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005). Courts in this district apply one of two tests to determine whether the expedited discovery is appropriate. Depending on the test the court applies, the party requesting expedited discovery must either satisfy [\*24] a four-part test similar to the standard for a preliminary injunction, see *Notaro v. Koch*, 95 F.R.D. 403, 405 n.4 (S.D.N.Y. 1982), or demonstrate that it has "good cause" for its request and that the request is reasonable in light of the circumstances, see *Ayyash*, 233 F.R.D. at 327. This Court has not granted BlackRock's application for an order granting expedited discovery. Thus, the inadequacy BlackRock perceives in German courts does not necessarily distinguish the alternative forum from the present forum.

For these reasons, this Court agrees with the many other courts in this district that have found the courts of Germany to provide an adequate forum.

#### IV. Private and Public Interest Factors

Once a court has determined the degree of deference due a plaintiff's choice of forum and satisfied itself that an alternate forum exists, it must weigh two sets of factors to determine whether adjudication is more appropriate in the present forum or the alternative forum. See *Pollux*, 329 F.3d at 75. The first set of factors concerns the private interests of the litigants. See *Iragorri*, 274 F.3d at 73. In considering [\*25] these factors, the district court weighs the hardships the defendant will face if jurisdiction is retained in the present forum against the hardships plaintiff will face if the motion to dismiss is granted. *Pollux*, 329 F.3d at 75. The court must also weigh the public interest factors of justice and court efficiency. *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 151 (2d Cir. 1978) (en banc). In short, "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable." *Iragorri*, 274 F.3d at 74-75.

##### A. Private Interest Factors

The private interest factors address the convenience to the litigants. These factors 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, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

*Iragorri*, 274 F.3d at 73-74 (quoting *Gilbert*, 330 U.S. at 508). [\*26] While analyzing these factors, a district court weighs the difficulties a defendant would suffer if the dispute were adjudicated in the present forum against the difficulties a plaintiff would face if the case were dismissed and the plaintiff were thus forced to bring suit in an alternate forum. See *id.* at 74.

Two private interest factors strongly favor dismissal of this case in favor of litigation in the courts of Germany. These factors are the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses. The other private interest factors are not significant in this case. The bulk of the non-testimonial sources of proof in this case is documentary, and largely electronic, and thus is readily transportable. Further, it appears that the documents are not concentrated in any one geographic area. Likewise, it appears that some documents are in English and others in German and that translation will be necessary regardless of forum.

Compulsory process is unavailable in this forum for attendance of most, if not all, of the unwilling witnesses in this matter. It is undisputed that the eight identified witnesses for [\*27] which BlackRock sought an order for expedited depositions cannot be compelled to appear at trial if it were to take place in New York. (See Order to Show Cause, Att. A, Apr. 20, 2007.) Likewise, compulsory process is not available for Mr. Kussner, who is perhaps the single most important witness in this matter.<sup>6</sup> Compulsory process is available in Germany for the witnesses who are residents of Germany, however. See *NCA Holding Corp.*, 1999 U.S. Dist. LEXIS 817, at \*6.

<sup>6</sup> BlackRock assumes that Mr. Kussner and the other former employees of BlackRock Germany

will appear willingly as witnesses on Schroders' behalf. This might well be the case. However, the Court is unwilling to base its decision on a party's speculations about its adversary's litigation strategy and about non-party witnesses' intentions.

This matter could be tried without the live trial testimony of the unwilling witnesses. However, so proceeding would be contrary to the policy of this Circuit. Unwilling witnesses can be [\*28] deposed pursuant to the Hague Evidence Convention, to which the United States, Germany, and the United Kingdom are all signatories. See Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555. Likewise, there are alternatives to live, in-person testimony at trial. However, there is a preference in this Circuit for live trial testimony. See *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 30 (2d Cir. 2002). This preference is even stronger in cases such as this one where the jury's ability to assess the credibility of the witnesses will be particularly important. See *id.* Further, it would be undesirable to proceed in this matter without the presence of Mr. Kussner given that, at its core, this action concerns Mr. Kussner's alleged breach of contractual obligations and violation of fiduciary duties. See *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 1001 (2d Cir. 1993) (unavailability of key witnesses is a factor favoring dismissal on the grounds of *forum non conveniens*.) Thus, this factor favors dismissal of the complaint in favor of litigation in the courts of Germany.

[\*29] The cost of obtaining attendance of willing witnesses also favors dismissal in favor of litigation in Germany. Most of the witnesses involved in this matter are in Germany or the United Kingdom. Indeed, the only witnesses in New York are two of BlackRock's lawyers and a member of BlackRock's management committee, and it appears from the affirmations of these New York witnesses that they have no information pertaining to Schroders' alleged torts. (See Connolly Aff., Kushel Aff., Oliner Aff.) Any of the European witnesses willing to appear would need to be transported to New York. With a trial in Germany, transport of English witnesses would be considerably less costly, in terms of time and money, and the transport of German witnesses would, of course, not be an issue to consider.

In sum, the private interest factors that are of significance in this case decidedly favor dismissal in favor of adjudication in Germany.

## B. Public Interest Factors

The Court now turns to those considerations of the *forum non conveniens* inquiry that protect the public's interest. These factors include (1) the consideration that jurors should not be obligated to decide disputes with no relation [\*30] to their community; (2) the fact that where a case affects many people, a forum that allows those affected to view the suit, rather than learn of it by report from a foreign forum, is preferable; (3) the forum's local interest in having its own controversies decided at home; and (4) the potential pitfalls that stem from a diversity case being heard in a foreign forum that must resolve conflicts of law and substantive law problems, rather than a forum familiar with the state law to be applied to the case.<sup>7</sup> *Gilbert*, 330 U.S. at 508-09; *Iragorri*, 274 F.3d at 74.

7

*Gilbert* also specifies administrative difficulties resulting from court congestion as a public factor consideration. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). This consideration is not presently applicable in this District, however. Cf. *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 147 (2d Cir. 2000) ("the recent filling of all judicial vacancies and the resulting full complement of judges for the District makes this concern of little or no present significance").

[\*31] As previously noted, this case is at heart a German one. The application of *Gilbert*'s public interest factors reflects this and weighs further in favor of dismissal. New York jurors have no connection to this German dispute and should not be burdened with the duty of finding the facts of this case. Likewise, to the extent this case touches on the affairs of other people, those people are in Germany, not New York, further supporting trial in Germany rather than in the Southern District of New York.

Of greater significance is Germany's interest in having this case decided in Germany. This case implicates issues such as German competition law (see Driver-Polke Decl. P 3.1), German employment law (see *id.* at P 6.3), and German privacy law (see *id.* at P 7.1), which are clearly of interest to Germany. See *Allstate*, 994 F.2d at 1002 (government has a strong interest in enforcing its own laws); *Kirch*, 2006 U.S. Dist. LEXIS

82175, at \*30 (forums have an interest in applying their own laws). Further, to the extent these concerns appear in procedural or evidentiary contexts, they may be completely ignored by a court in this district, even if the [\*32] district court applies German law. For example, BlackRock's review and use of Mr. Kussner's e-mails may violate German criminal statutes and the German Constitution. (Id. at P 7.1.) Accordingly, a German court might exclude such evidence. (Id. at P 7.1-7.2.) However, a district court sitting in diversity jurisdiction could well find that such an exclusionary rule is evidentiary and, accordingly, not applicable. See, e.g., *L-3 Communications Corp. v. OSI Systems, Inc.*, 02 Civ. 9144 (PAC), 2006 U.S. Dist. LEXIS 19686, at \*\*54-55, 2006 WL 988143, \*17 (S.D.N.Y. Apr. 11, 2006) (Federal courts apply the Federal Rules of Evidence without regard for the Erie doctrine).

Finally, as indicated, trial in this forum would likely require the application of German law. The likelihood that the present forum would have to apply a foreign jurisdiction's law "lends weight to the conclusion that the suit should be prosecuted in that jurisdiction." *Calavo Growers of Cal. v. Generali Belg.*, 632 F.2d 963, 967 (2d Cir. 1980). Inherent in the application of foreign law is the risk of the misunderstanding or misapplication of the foreign law. In the [\*33] words of Judge Friendly,

try as we may to apply the foreign law as it comes to us through the lips of the experts, there is an inevitable hazard that, in those areas, perhaps interstitial but far from inconsequential, where we have no clear guides, our labors, moulded by our own habits of mind as they necessarily must be, may produce a result whose conformity with that of the foreign court may be greater in theory than it is in fact.

*Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 667 (2d Cir. 1960).

A court in this forum would likely apply German law to this case. Further, although a definitive determination that German substantive law applies to this case would be premature, the mere need to "untangle problems in conflict of laws" is part of the Court's consideration in evaluating the public interest factors. *Peregrine Myanmar v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996). As a general matter, a district court sitting in diversity jurisdiction

applies the choice of law rules of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999). [\*34] In this respect, it is worth noting that, when faced with a conflict of tort laws, New York courts apply an "interest analysis" to determine which jurisdiction's law will apply. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 50 (2d Cir. 2005) (quoting *Padula v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 521, 644 N.E.2d 1001, 620 N.Y.S.2d 310 (1994)). Where, as is the case here, the laws in question regulate conduct, courts in New York will usually apply the law of the place of the tort. *Lee*, 166 F.3d at 545. As previously discussed, the actions giving rise to BlackRock's complaint occurred largely in Germany. However, in New York, the first step in a choice of law analysis is to determine whether an actual conflict of laws exists. *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998); *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904 (N.Y. 1993) (Kaye, C.J.). The Court is not now in the position to determine if an actual conflict exists and, accordingly, notes that it appears that German law will likely apply rather than holding so. However, "the likelihood [\*35] that [foreign] law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction." *Calavo Growers*, 632 F.2d at 967.

In sum, the private factors strongly favor dismissal of this case in favor of trial in Germany, and public factors overwhelmingly favor dismissal in favor of trial in Germany. The Court would have found this even if granting the plaintiff's selection of forum maximum deference. Dismissal is warranted, a fortiori, in light of the reduced deference the plaintiff's selection of forum is entitled to in this case.

## CONCLUSION

For the reasons set for herein, Schroders' motion to dismiss BlackRock's action is hereby GRANTED on the grounds of *forum non conveniens*.

## SO ORDERED.

**New York, New York**

May 30, 2007

2007 U.S. Dist. LEXIS 39279, \*35

Peter K. Leisure

U.S.D.J.



**LAURA DORFMAN, Plaintiff, -against- MARRIOTT INTERNATIONAL  
HOTELS, INC., DUNA SZALLUDA Rt., OTIS ELEVATOR COMPANY and OTIS  
FELVANO kft., Defendants.**

**99 Civ. 10496 (CSH)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

*2001 U.S. Dist. LEXIS 642*

**January 26, 2001, Decided  
January 29, 2001, Filed**

**DISPOSITION:** [\*1] Motions of defendants Marriott International Hotels, Inc., Duna Szalluda Rt. and Otis Felvano Kft. to dismiss complaint on ground of forum non conveniens denied.

**COUNSEL:** For LAURA DORFMAN, plaintiff: Lawrence Goldhirsch, Weitz & Luxenberg, P.C., New York, NY.

For MARRIOTT INTERNATIONAL, INC., DUNA SZALLODA RT., defendants: Benjamin A. Fleischner, White, Fleischner & Fino, New York, NY.

For MARRIOTT INTERNATIONAL, INC., DUNA SZALLODA RT., cross-claimants: Benjamin A. Fleischner, White, Fleischner & Fino, New York, NY.

**JUDGES:** CHARLES S. HAIGHT, JR., SENIOR UNITED STATES DISTRICT JUDGE.

**OPINION BY:** CHARLES S. HAIGHT, JR.

**OPINION**

**MEMORANDUM AND ORDER**

HAIGHT, Senior District Judge:

Plaintiff brings this negligence action against the captioned defendants. According to her complaint, in June of 1998 the plaintiff was a guest at the Budapest Marriott Hotel ("Hotel") located in Budapest, Hungary. On or about June 25 she suffered personal injuries upon exiting an unlevelled elevator located in the Hotel. These injuries required immediate medical attention by medical personnel in Budapest, and eventual surgery in the United States. A self-described youthful octogenarian, Dorfman [\*2] alleges that her injuries were caused by a defective, dangerous, and/or hazardous condition in, on or about said elevator. See Declaration in Opposition to Motion to Dismiss Complaint at 2. Such condition, in turn, was allegedly due to the carelessness, recklessness and negligence of defendants, or their agents, in variously owning, managing, maintaining, operating, supervising, inspecting and repairing the Hotel property and its elevator.

Dorfman claims damages in the amount of \$ 5,000,000, and asserts that this Court has jurisdiction pursuant to diversity of citizenship between the parties.

Specifically, plaintiff alleges that she is a citizen and resident of the state of New York; that defendant Marriott International Hotels, Inc. ("Marriott") is a Delaware corporation doing business in New York; that defendant Duna Szalloda Rt. ("Duna") is a corporate Hungarian citizen with a principal place of business in Budapest, and

the name under which Marriott does business in Hungary; that defendant Otis Elevator Company ("OE") is a New Jersey corporation with its principal place of business in New Jersey and doing business in New York; and that defendant Otis Felvono kft. ("OF") is a [\*3] branch of OE doing business in Hungary.

The complaint has given rise to a spate of defensive motions. OE moves pursuant to *Rule 12(b)(6)*, *Fed.R.Civ.P.*, to dismiss the complaint for failure to state a claim against OE upon which relief can be granted. OE also moves on the same ground to dismiss the cross-claims alleged against it by Marriott and Duna. Marriott and Duna cross-move to dismiss the complaint on the grounds of *forum non conveniens*, lack of personal jurisdiction over Duna, and failure to join all necessary parties. OF cross-moves to dismiss the complaint pursuant to 28 U.S.C. § 1391(a) and *Rules 12(b)(2)*, (3), (4) and (5) on the grounds of lack of personal jurisdiction over OF, insufficient service of process, and *forum non conveniens*.

I

OTIS ELEVATOR'S MOTION TO DISMISS COMPLAINT AND CROSS-CLAIM PURSUANT TO *RULE 12(b)(6)*

As with any motion pursuant to *Rule 12(b)(6)*, all factual allegations contained in the complaint must be treated as true by the Court. *Cohen v. Koenig*, 25 F.3d 1168 (2d Cir. 1994). The court must not dismiss the [\*4] action "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Frasier v. G.E. Co.*, 930 F.2d 1004, 1007 (2d Cir. 1991). In addition, all reasonable inferences must be made in the plaintiff's favor. *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995).

In evaluating a *Rule 12(b)(6)* motion, the Court may look only to the complaint and any exhibits attached to it or other documents incorporated by reference. *Leonard v. Israel Discount Bank of New York*, 199 F.3d 99, 107 (2d Cir. 1999); *Trugman-Nash v. New Zealand Dairy Board*, 1996 U.S. Dist. LEXIS 1957, No. 93 Civ. 8321, 1996 WL 77933 at \*3 (S.D.N.Y. Feb. 23, 1996).

According to the complaint, defendant OE is incorporated in the State of New Jersey, which is also its

principal place of business. OE additionally conducts business in New York. Defendant OF, the plaintiff alleges, [\*5] is "the name under which Otis Elevator, Co. does business in Hungary, is merely a branch of defendant [OE] and is not a true subsidiary, due to common ownership, financial dependency, identity of personnel, failure to observe corporate formalities and other circumstances." Complaint at 2. Under this theory of the corporate relationship, OF "does business" in New York through OE, and is therefore continuously and systematically present in New York so as to purposefully avail itself of the protection and benefits of New York law.

OE contends that OF is a separate corporation, that the veil of corporate ownership should not be pierced, and that OE owed no duty of care to the plaintiff, and thus could not have acted negligently toward her. OE attaches to its motion to dismiss an affidavit of Douglas Pew, associate counsel for OE. Pew challenges the characterization of OF as alleged in plaintiff's complaint. Pew asserts that OF is a separately incorporated and managed company under the laws of Hungary.

In its Declaration in Opposition to the Motion to Dismiss, the plaintiff attached pages allegedly from OE's website, www.otis.com, which it claims belie OE's statements to the effect [\*6] that OF and OE are distinct corporate entities for our purposes. Specifically, plaintiff says, OE proclaims on its website that OE's "mechanics and agent representatives maintain in excess of 700,000 elevators and escalators in virtually every country of the world" (quite possibly including Hungary), and "over 80% of its employees are of nationalities other than American" (quite possibly including Hungarian). See document downloaded from the OE website, plaintiff's Declaration in Opposition to the Motion to Dismiss, Exhibit B.

Predictably, OE's Reply Affidavit on its Motion to Dismiss disputes the conclusions the plaintiff draws concerning the contents of the defendant's website.

Within the context of a *Rule 12(b)(6)* motion, a district court may not consider matters outside the pleading unless it converts the motion into one for summary judgment under *Rule 56*. Thus, the last sentence of *Rule 12(b)* provides that in such event, "the motion shall be treated as one for summary judgment and disposed of as provided in *Rule 56*, and all parties shall be given reasonable opportunity to present [\*7] all

material made pertinent to such a motion by *Rule 56*."

This is an appropriate case in which to convert OE's *Rule 12(b)(6)* motion into one for summary judgment under *Rule 56*. The OE website constitutes a matter outside the pleadings, so that conversion is necessary for the Court to consider it; and consideration of the website's unabashed claims is appropriate, since at face value they tend to support the plaintiff's jurisdictional theories.

The parties will need to conduct discovery before being in a position to submit all the additional material pertinent to a summary judgment motion. The scope of that discovery is considered under Point IV, *infra*.

## II

### DEFENDANT OTIS FELVANO'S MOTION TO DISMISS PURSUANT TO 28 U.S.C. § 1391 (a), RULES 12(b)(2)-(5) AND FORUM NON CONVENIENS

Defendant OF moves to dismiss the complaint for lack of personal jurisdiction under *Rule 12(b)(2)*, insufficiency of process and service of process pursuant to *Rules 12(b)(4)* and (5), and for improper venue, pursuant to both *Rule 12(b)(3)* and the doctrine of *forum non conveniens*. The crux of OF's argument parallels that of OE, namely, that OF is organized under the laws of Hungary [\*8] and is not a "mere department" of OE.

The Court will first consider the threshold question of whether this Court has personal jurisdiction over OF.

A plaintiff bears the ultimate burden of establishing jurisdiction over a defendant by a preponderance of the evidence. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985). However, when a *Rule 12(b)(2)* motion to dismiss is brought by a defendant at this stage of the litigation - before discovery and without an evidentiary hearing - the plaintiff need only make a *prima facie* showing that personal jurisdiction exists. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.), cert. denied 498 U.S. 854, 112 L. Ed. 2d 116, 111 S. Ct. 150 (1990). Though eventually the court must determine whether the defendant in fact subjected itself to its jurisdiction, at this stage the plaintiff may rely on mere allegations of fact, which will be taken as true. *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 153 (2d Cir. 1999); *Cornell v. Assicurazioni Generali S.P.A., Consolidated*, 2000 U.S. Dist. LEXIS

11004, [\*9] No. 97 Civ. 2262, 2000 WL 1099844, at \*1 (S.D.N.Y. August 7, 2000). Courts are given "considerable procedural leeway" in deciding motions under *Rule 12(b)(2)*, *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981), and are entitled to consider matters outside the pleadings without converting the motion to dismiss into one for summary judgment. *Gianino v. Panacya*, 2000 U.S. Dist. LEXIS 12338, No. 00 Civ 1584, 2000 WL 1224810 at \*4 (S.D.N.Y. August 29, 2000); *Huangyan Import & Export Corp. v. Nature's Farm Products*, 2000 U.S. Dist. LEXIS 12335, No. 99 Civ. 9404, 2000 WL 1224814, at \*4 (S.D.N.Y. August 29, 2000); *Baron Philippe de Rothschild, S.A. v. Paramount Distillers, Inc.*, 923 F. Supp. 433, 436 (S.D.N.Y. 1996)<sup>1</sup>.

1 This principle is not inconsistent with the conclusion reached under Point I, that OE's *Rule 12(b)(6)* motion must be converted into one for summary judgment. OE, a domestic corporation, does not and cannot contend that it is not subject to the Court's jurisdiction. Rather, OE contends it is not liable for OF's conduct. For the reasons stated in Part I, the contention raises issues which are a fair ground for discovery.

[\*10]

It is well settled that in a diversity case a federal court exercises personal jurisdiction over a party in accordance with the law of the forum state. *Marine*, 664 F.2d at 901. The plaintiff here contends that OF is subject to the Court's jurisdiction pursuant to *New York CPLR § 301*. Under § 301 a foreign corporation is subject to suit if "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its presence in this jurisdiction." *Koehler v. Bank of Bermuda*, 101 F.3d 863, 865 (2d Cir. 1996), citing *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 227 N.E.2d 851, cert. denied, 389 U.S. 923, 19 L. Ed. 2d 266, 88 S. Ct. 241 (1967). The plaintiff does not allege that defendant OF directly conducted business in New York within the meaning of § 301. However, under New York law, jurisdiction may be obtained over a foreign company if it is a "mere department" of an entity [\*11] that is present in New York, as the plaintiff alleges here, or, if the relationship between the foreign corporation and the local one gives rise to the valid inference of an agency relationship. *Palmieri v. Estefan*, 793 F. Supp. 1182, 1187 (S.D.N.Y. 1992).

In *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft*, 751 F.2d 117, 119-22 (2d Cir. 1984), the Court announced the factors to consider in determining whether to assert jurisdiction over a related foreign corporation. The "essential factor," which by itself is not determinative, is common ownership. *Volkswagenwerk*, 751 F.2d at 120. Here, it is uncontested that OF is wholly owned by OE. See Memorandum of Law in Support of Defendant OF's Motion to Dismiss, at 6. Three other factors to consider are the financial dependency of the subsidiary on the parent, the degree to which the parent interferes in personnel and fails to observe corporate formalities, and the degree of control over marketing and operations by the parent over the subsidiary. *Volkswagenwerk*, 751 F.2d at 120-22.

[\*12] The plaintiff here concedes that at this stage of litigation it has not obtained information regarding financing or control by OE with regard to OF. Plaintiff's Memorandum of Law in Opposition to Motions to Dismiss, at 6. As discussed above, in response to defendants' motions to dismiss, the plaintiff has submitted pages from www.otis.com, OE's corporate website, which advertise that OE has employees in 1700 worldwide locations, that 80% of its employees are non-Americans and that 80% of its revenues are generated abroad.

OF argues that plaintiff's factual allegations are, in fact, bare legal conclusions not worthy of consideration. OF argues further that OE's website in fact contains no information related to OF, nor any other dealings in Hungary by OE. Otis Felvano Kft.'s Memorandum of Law in Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, at 5. Furthermore, reiterates the defendant, OF is a separately incorporated and managed entity, with its own officers and Board of Managers (none of whom are in common with OE), maintaining its own corporate records and paying employees and expenses with its own accounts.

[\*13] The defendant is correct that legal conclusions masquerading as factual allegations cannot substitute for actual facts, and will fail to preserve a complaint even under the liberal standard appropriate to this pre-discovery stage of litigation. Cornell, 2000 WL 1099844, at \*1, citing *Papasan v. Allain*, 478 U.S. 265, 286, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986). However, unlike in Cornell, the plaintiff has not altogether "failed to cure the deficiencies of its...complaint," and factual

allegations do exist. 2000 WL 1099844, at \*2. Specifically, the facts recited on OE's corporate website raise a legitimate question as to the level of control exercised by OE with respect to OF, and the fact of 100% ownership by OE of OF.

The questions raised by the Beech factors are appropriately addressed after discovery has occurred, at which point the plaintiff will be required to establish the presence of the factors by a preponderance of the evidence.

To that end, the Court hereby allows the plaintiff limited discovery to ascertain the jurisdictional facts necessary to establish this Court's jurisdiction. James Wm. Moore et al., *Moore's* [\*14] *Federal Practice*, § 12.31[7] (2000 Edition); *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982)(sanction may be imposed for failure to comply with a limited discovery order for purposes of establishing jurisdictional facts). Where a plaintiff must, as here, establish jurisdiction by a preponderance of the evidence, the court is wise to allow this discovery. *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990)("generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue"); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir.), cert. denied, 507 U.S. 1017 (1993)("where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed"; quoting *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989)).

The discovery contemplated within the context of OF's motion will also be pertinent to the resolution of OE's motion. Its scope is considered under Point IV, *infra*.

### III.

#### CROSS-MOTIONS TO DISMISS MADE [\*15] BY DEFENDANTS MARRIOTT INTERNATIONAL HOTELS, INC. AND DUNA SZALLUDA Rt.

Defendants Marriott and Duna are jointly represented by counsel. Their cross-motion papers, far from a model of clarity, complicate judicial analysis.

For example, the Notice of Motion states that Marriott and Duna are moving to dismiss the complaint "pursuant to *Rule 12(b)*," without specifying which of the

seven separate grounds specified in the Rule the defendants have in mind. The Notice then states three bases for dismissal: *forum non conveniens*, which does not implicate *Rule 12(b)* at all; "this Court lacks jurisdiction over defendant Duna," which would appear to invoke *Rule 12(b)(2)* ("lack of jurisdiction over the person"), although Duna may also have in mind *Rule 12(b)(4)* ("insufficiency of process") and *Rule 12(b)(5)* ("insufficiency of service of process"); and a failure to join all necessary parties, which would implicate *Rule 12(b)(7)* ("failure to join a party under Rule 19"). To the limited extent that these defendants' briefs clarify their arguments, it would seem that this indispensable party ground for dismissal is based upon the contention that "plaintiff has failed properly to serve process [\*16] upon two parties which are indispensable to this action," namely, Duna and OF. Main Brief for Marriott and Duna at 20.

OF also moves to dismiss the complaint on the ground of *forum non conveniens*. All motions to dismiss the complaint on that ground are denied for the reasons stated in Point V, *infra*.

With respect to the Court's jurisdiction over the person of Duna, and the sufficiency of service of process upon Duna, the questions would appear to mirror those presented by OF's cross-motion concerning the relationship between OE and OF, discussed in Parts I and II, *supra*.

Thus plaintiff's complaint alleges that Marriott is a Delaware corporation, P 2, and that Duna "is the name under which defendant [Marriott] is doing business in Hungary and is merely a branch of defendant [Marriott]." P 4. If those allegations are correct, so that in effect Marriott managed the Budapest hotel bearing its corporate name and Duna was only Marriott's instrument for that purpose, then service upon Marriott may be regarded as service upon Duna; or, in the alternative, Duna may not be a party upon which service need be made at all. The latter proposition seems to be illustrated by *Guidi v. Inter-Continental Hotels Corp.*, 1997 U.S. Dist. LEXIS 10444, 1997 WL 411469 [\*17] (S.D.N.Y.), reversed on other grounds, 224 F.3d 142 (2d Cir. 2000). In *Guidi*, the allegedly tortious conduct occurred at the Semiramis Hotel in Cairo, Egypt. Plaintiffs sued Inter-Continental Hotels Corp., a Delaware corporation, and five other corporate defendants. The district court observed that "of the six defendants named in the

Complaint, only defendant Inter-Continental Hotels Corp., a Delaware corporation that manages the Semiramis Hotel, has been served." 1997 U.S. Dist. LEXIS 10444, \*2, 1997 WL 411469 at \*1 (emphasis added). The district court granted Inter-Continental's motion to dismiss the complaint on the ground of *forum non conveniens*. The Second Circuit reversed and remanded the case to the district court for full litigation on the merits of wrongful death claims arising out of the killing of guests by an Egyptian terrorist. I will discuss the court of appeals' *forum non conveniens* ruling in *Guidi* under Point IV, *infra*. The present point is that if an American hotel corporation (such as Inter-Continental or Marriott) "manages" a hotel in a foreign country (such as the Semiramis in Egypt or the Marriott Budapest [\*18] in Hungary) where American guests are killed or injured, service upon the American corporation alone may be sufficient to support a plenary trial on the merits in a Federal district court.

All these considerations turn, of course, upon the exact nature of the relationship, if any, between Marriott and Duna. That is equally true of the relationship, if any, between OE and OF. The several defendants' motions raise those issues; and it is crystal clear that limited discovery must be pursued before the parties are in a position to brief them fully and the Court can decide them. The nature of the discovery to be taken is considered under Point IV.

IV.

#### THE NATURE AND BOUNDARIES OF THE DISCOVERY NECESSITATED BY THESE MOTIONS

The discovery to be had pursuant to this Opinion must be limited to the issues which the Opinion discusses. That is to say: the relationships between the American and Hungarian corporations involved (both elevator and hotel); the degree of control and management direction exercised by one over the other; and any other factors which bear upon the questions of (1) whether service upon the American corporation constitutes service over the Hungarian corporation; and [\*19] (2) even if it does not, whether the American corporation is liable for the conduct of the Hungarian corporation.

It necessarily follows that discovery will not be permitted into the underlying merits. That is to say: the cause of the accident; the particulars of the conduct of the

plaintiff and any other individuals; and any other factors which bear upon the questions of negligence, causation, and the plaintiff's damages.

Those limitations are necessary because (1) if it is ultimately determined that a particular defendant is not properly before this Court, that defendant should not have to subject itself to discovery into its conduct; and (2) such defendant would not have the right to inquire into the plaintiff's conduct or the extent of her damages.

Given the age of the plaintiff and the attendant circumstances, I direct that this discovery be conducted on an expedited basis. I am making an order of reference to a Magistrate Judge to supervise discovery and to set a schedule for the submission of further motion papers on the jurisdictional and procedural questions raised by the present papers. This Court will decide those motions when they are fully ripe.

V.

THE MOTIONS OF [\*20] DEFENDANTS MARRIOTT INTERNATIONAL HOTELS, INC., DUNA SZALLUDA Rt., AND OTIS FELVANO Kft. TO DISMISS THE COMPLAINT ON THE GROUND OF FORUM NON CONVENIENS

As noted, Marriott, Duna, and OF move to dismiss the complaint on the ground of *forum non conveniens*.

A federal court's inherent power to decline to entertain a case over which it has jurisdiction is embodied in the doctrine of *forum non conveniens*, a doctrine serving the ends of justice and efficiency. *DiRienzo v. Philip Services Corp.*, 232 F.3d 49, 56 (2d Cir. 2000). The modern doctrine was established by the Supreme Court in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947), and its companion *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 91 L. Ed. 1067, 67 S. Ct. 828 (1947). *Gilbert* involved removal from one federal court in favor of another federal court. Congressional enactment thereafter of 28 U.S.C. § 1404(a), which authorizes transfers between federal courts, relegated common law *forum non conveniens* [\*21] to cases where the transfer is proposed to a foreign venue. *DiRienzo*, 232 F.3d at 56. Where a proposal to transfer a case to a foreign jurisdiction is made, the courts continue to apply *Gilbert* and its progeny in this circuit.

In order for a defendant to prevail on a motion to

dismiss for *forum non conveniens* the defendant must demonstrate two things. First, as a threshold matter, the defendant must show that an adequate alternative forum exists. *Peregrine Myanmar, Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996). Second, the defendant must demonstrate "that the ordinarily strong presumption favoring the plaintiff's chosen forum is countered by the private and public interest factors set out in *Gilbert*, which weigh so heavily in favor of the foreign forum that they overcome the presumption for plaintiff's choice of forum." *DiRienzo*, 232 F.3d at 57. As *Gilbert* made clear, unless the balance strongly favors the defendant, the plaintiff's chosen forum will rarely be disturbed. 330 U.S. at 508.

[\*22] Initially the Court must determine the adequacy of the proposed forum, namely, Hungary, the situs of the alleged accident. The standard imposed on the defendant to establish such adequacy is not heavy. The alternative forum will normally be adequate so long as the defendant is amenable to process there, *DiRienzo*, 232 F.3d at 57, and the forum permits litigation of the subject matter of the dispute, adequate procedural safeguards, and an adequate remedy. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981).

The defendants here submit an affidavit by Dr. Emese Koranyi, a Hungarian attorney, familiar with its laws. See Notice of Cross-Motion by Marriott International Hotels, Inc. and Duna Szalluda Rt., Exhibit J. The affidavit states that Hungarian law recognizes the right of a plaintiff to recover for injuries sustained as a result of the "negligence" of another. Under Section 339 of the Hungarian Civil Code, says Koranyi, "a person who causes damage to another person in violation of the law shall be liable for such damage," unless they can show that they acted in [\*23] a manner "generally to be expected." The Statute of Limitations for such actions is said to be five years.

The plaintiff, in response, does not contest the claims made in Koranyi's affidavit. Since the standard for establishing adequacy is minimal, and defendants concede, importantly, that the "Courts of Hungary would have jurisdiction over the defendants," I conclude that the defendants have established the adequacy of an alternative forum.

Having established an adequate forum elsewhere, the Court must now apply the *Gilbert* test to the choice between Hungary and the Southern District of New York. This analysis requires applying a "strong presumption in

favor of the plaintiff's chosen forum when weighing the public and private interest factors favoring each location." *DiRienzo*, 232 F.3d at 60. Further, a plaintiff's U.S. citizenship and residence is entitled to consideration favoring retaining jurisdiction. *Guidi*, 224 F.3d 142; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000).<sup>2</sup>

2 The defendants challenge the currency of *Guidi*, and argue that its reasoning be confined to the extreme situation found in its fact pattern. See Reply Memorandum of Law in Support of Marriott International Hotels, Inc. and Duna Szalluda Rt. Cross-Motion to Dismiss, at 2 ("*Guidi* should be limited to its facts"). The Second Circuit recently, in *DiRienzo*, however, explicitly stated that "*Guidi* and *Wiwa* are not limited to their facts, as the dissent argues." 232 F.3d at 63.

[\*24]

I turn first to the four public interest factors Gilbert announced for courts to examine in its *forum non conveniens* inquiry: (1) administrative difficulties associated with court congestion; (2) the fairness of imposing jury duty on the local community; (3) the local interest; (4) avoiding difficult conflicts of law and application of foreign law. 330 U.S. at 508-09.

The first factor, considerations of court congestion, favors neither party. Our courts are regularly congested, but not inordinately so at this time. Further, there is no evidence to show that Hungarian courts are any less congested than this Court is. As the Court in *Guidi* stated, "the recent filling of all judicial vacancies and the resulting full complement of judges for the District makes this concern of little or no present significance." 224 F.3d at 147.

The second and third factors operate in tandem, and focus on whether local interest in the controversy justifies maintaining jurisdiction here. Though the Court recognizes the factual distinctions between the two cases, we find [\*25] *Guidi* instructive on this question. In that case, the plaintiffs' sued an international hotel on wrongful death claims. The plaintiffs' decedents were assaulted, and four killed, by a gunmen who entered a hotel restaurant in Egypt and began shooting. The lawsuit was filed in the Southern District of New York. There, as here, the claim was a relatively uncomplicated tort

matter. There, as here, the defendant corporation was incorporated in the United States, doing business abroad. The "local interest" in having the controversy adjudicated locally is similar, namely, that Americans injured abroad through the alleged fault of American corporations acting overseas is a local concern, worth the relatively minimal costs of local adjudication. As the Court in *Guidi* stated, "[defendant] is a corporate defendant with its principal place of business [in the U.S.] and is being sued for a relatively simple tort violation," while the plaintiff, "[is an] ordinary American citizen for whom litigating in Egypt presents an obvious and significant inconvenience, especially considering their adverse experience with that country to date." 224 F.3d at 147. While our plaintiff [\*26] here suffered no terrorist attack, she alleges a series of emotionally traumatic experiences in Hungary which, coupled with her advanced age, make travel to the area for purposes of litigation a serious burden. As the Supreme Court held in *Koster*, "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." 330 U.S. at 524. The Court finds that factors two and three weigh toward the plaintiff.

Factor four asks courts to avoid difficult problems in conflict of laws and the application of foreign law. The Court assumes without deciding that Hungarian law might, at least in part, be applied to this case. Neither party discusses to any meaningful degree the extent of any potential conflict of laws or foreign application. It would be premature to decide the conflict of law questions at this stage of litigation, without briefing by the parties. Needless to say, this factor weighs in neither direction.

I now examine the private interest factors. [\*27] Private interest factors recommended by Gilbert include: (1) relative ease of access to evidence; (2) availability for compulsory process; (3) cost of obtaining attendance of the willing witnesses; (4) possibility of view of the premises; (5) and all other practical considerations bearing on speed and economy. 330 U.S. at 508.

In failing to address this prong of the analysis at all, the plaintiff appears to concede to the defendants that most of these private interest factors weigh in their favor. The Court need not belabor the obvious point that most the evidence and witnesses are located in Hungary. As the defendants note, "most of the witnesses, including the

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employees of the Hotel and Otis Felvano, Kft., as well as the medical personnel who initially treated the plaintiff, will find Hungary a more convenient forum." Memorandum of Law in Support of Defendants Marriott International Hotels, Inc. and Duna Szalluda Lt. Motion to Dismiss, at 18. In addition to the fact that the jury would be unable to witness for itself the situs of the injury, the defendants emphasize the prejudice they would suffer by the unavailability [\*28] of compulsory process to compel material witnesses to testify for the defense, and the cost of transporting those who would travel to New York.

Accepting those dilemmas as real, the Court must note that litigation of this nature is hardly unprecedented. Though these private interest concerns weigh in favor of the defendants, letters rogatory, videotaped depositions, and other procedural tools exist to mitigate somewhat these concerns. *DiRienzo*, 232 F.3d at 66. Regardless, based upon the evidence presented by the defendants, "the private interest factors fall far short of clearly showing that trial in the Southern District is oppressive or vexatious to defendants," and "as a consequence, the public and private interest factors have not overcome the strong presumption that must be accorded plaintiffs' choice of forum." *DiRienzo*, 232 F.3d at 66. Unless the balance "strongly favors" the defendants, the plaintiffs selection is to be "rarely disturbed." *Gilbert*, 330 U.S. at 508.

For these reasons, defendants motion to dismiss on grounds of *forum non conveniens* is denied.

#### CONCLUSION

For the foregoing reasons, the motions of defendants [\*29] Marriott International Hotels, Inc., Duna Szalluda Rt., and Otis Felvano Kft. to dismiss the complaint on the ground of *forum non conveniens* are denied.

Decision on all the other motions described in this Opinion is reserved, pending completion of discovery of a nature and scope consistent with this Opinion.

By separate Order entered concurrently herewith, the case will be referred to a Magistrate Judge for supervision of such discovery and the scheduling of the submission of further motion papers.

It is SO ORDERED.

Dated: New York, New York

January 26, 2001

CHARLES S. HAIGHT, JR.

SENIOR UNITED STATES DISTRICT JUDGE

Not Reported in F.Supp.2d, 2009 WL 948764 (S.D. Ohio)  
(Cite as: 2009 WL 948764 (S.D. Ohio))

Only the Westlaw citation is currently available.

United States District Court,  
S.D. Ohio,  
Eastern Division.  
DRFP, L.L.C., d/b/a Skye Ventures, Plaintiff,  
v.  
THE REPUBLICA BOLIVARIANA DE  
VENEZUELA, et al., Defendants.

No. 2:04-cv-793.  
April 1, 2009.

Rex H. Elliott, Charles Horne Cooper, Jr., John C. Camillus, Sheila P. Vitale, Cooper & Elliott, John Patrick Kennedy, Steven Beryl Ayers, Crabbe Brown & James LLP, Luis Manuel Alcalde, Pica Corporation, Columbus, OH, Andrew G. Douglas, OCSEA, Westerville, OH, for Plaintiff.

Pierce Edward Cunningham, Cunningham, Taliaferro & Eynon, LLC, David William Burleigh, Peter Anthony Schmid, Deters Benzinger & Lavelle PSC, Cincinnati, OH, for Intervenor Plaintiff. Daniel William Costello, Porter Wright Morris & Arthur, David S. Bloomfield, Jr., James Dodds Curphey, Porter Wright Morris & Arthur, Columbus, OH, Bonard Molina-Garcia, Daniel Salinas-Serrano, Dmitri Evseev, Gaela K. Gehring Flores, Jay Kelly Wright, Paolo Di Rosa, Robert A. Schwartz, Susan G. Lee, Arnold & Porter LLP, Washington, DC, for Defendants.

#### **MEMORANDUM OPINION AND ORDER**

JOHN D. HOLSCHUH, District Judge.

\*1 Plaintiff DRFP, L.L.C., d/b/a Skye Ventures (“Plaintiff”) sued Defendant The Republica Bolivariana de Venezuela and the Venezuelan Ministry of Finance (collectively, “Defendants”) for default on two promissory notes allegedly guaranteed by Defendants. Defendants moved to dismiss the case on the grounds of foreign sovereign immunity and *forum non conveniens*, but on February 13,

2009 this Court denied Defendants' motion and found that 1) assuming the promissory notes in question are valid, the Court has subject matter jurisdiction pursuant to the commercial activity exception to foreign sovereign immunity contained in 28 U.S.C. § 1605(a)(2); and 2) the case could not be dismissed pursuant to the doctrine of *forum non conveniens* because Venezuela is not a currently available alternative forum. (Mem. Op. & Order p. 24, doc. # 144.)

This matter is before the Court on Defendants' Motion for Certification. (Doc. # 145.) Defendants can appeal this Court's denial of foreign sovereign immunity as of right under the collateral order doctrine pursuant to 28 U.S.C. § 1291, *see O'Bryan v. Holy See*, 556 F.3d 361, 372 (6th Cir.2009), and Defendants represent that they intend to exercise this right (Mot. Certification p. 3, doc. # 145). Defendants' Motion asks the Court to certify for an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), this Court's refusal to dismiss the case for *forum non conveniens*. Defendants also ask the Court to certify an issue this Court alluded to, but did not actually rule on, in its February 13, 2009 Memorandum Opinion and Order: the issue of whether this Court should recognize and enforce a decision of the Venezuelan Supreme Court in the interests of international comity. (*See* Mem. Op. and Order p. 23 n. 5, doc. # 144.)

#### **I. Applicable Legal Standard**

Ordinarily, an appeal may only be taken following a final judgment. *See* 28 U.S.C. § 1291. However, limited exceptions exist. One of these exceptions provides that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination

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of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). “Exceptional circumstances must exist ... before leave is granted for an interlocutory appeal,” *W. Tenn. Chapter of Associated Builders and Contractors, Inc. v. City of Memphis*, 138 F.Supp.2d 1015, 1018 (W.D.Tenn.2000), and the decision lies within the discretion of the Court. To certify an issue or order for an interlocutory appeal under § 1292(b), the Court must be satisfied that “(1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation.” *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir.2002).

\*2 If this Court certifies an issue for an interlocutory appeal, the Sixth Circuit also has discretion over whether to hear the appeal, *see* 28 U.S.C. § 1292(b), and Defendants would bear “the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

## II. Analysis

### A. Certification of the *Forum Non Conveniens* Issue

Defendants ask the Court to certify this issue for an interlocutory appeal because, in Defendants' view, *forum non conveniens* is an important threshold issue that is well-suited for an interlocutory appeal because a *forum non conveniens* dismissal has the potential to avoid an unnecessary trial. Defendants also point out that there will already be an appeal in this case on the foreign sovereign immunity issue, and that certifying the *forum non conveniens* issue will promote judicial economy by giving the Sixth Circuit the opportunity to

review this Court's disposition of this issue along with the disposition of the foreign sovereign immunity issue. Plaintiff, however, opposes certification and argues that allowing an interlocutory appeal will not materially advance the ultimate termination of the litigation because, even if the Sixth Circuit disagreed with the Court's analysis of the *forum non conveniens* issue, the case would be remanded for further consideration of that issue.

The Court agrees with Defendants, and finds that the requirements for certifying this issue for an interlocutory appeal have been satisfied. This Court found that a *forum non conveniens* dismissal would be inappropriate because a recent decision by the Venezuelan Supreme Court “conclusively decided an issue central to Plaintiff's case adversely to Plaintiff's stated position [,]” rendering Venezuela unavailable as an alternative forum. (Mem. Op. and Order p. 22, doc. # 144.) This Court's interpretation of that decision and of Venezuelan law is a pure question of law that is reviewed de novo on appeal, *see Johnson v. Ventra Group, Inc.*, 191 F.3d 732, 738 (6th Cir.1999), and thus the issue involves a question of law.

This question of law, moreover, is controlling because its resolution “could materially affect the outcome of the case.” *See In re City of Memphis*, 293 F.3d at 351. Plaintiff is correct that, if the Sixth Circuit disagrees with this Court's finding that Venezuela is not an available forum, the Sixth Circuit would remand the case for a consideration of the *Gulf Oil* public and private factors, *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-9, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), rather than immediately dismiss the case. However, such a remand could still impact the outcome and resolution of the case by presenting the possibility of avoiding protracted and expensive litigation. *See Kraus v. Bd. of County Comm'ns. for Kent County*, 364 F.2d 910, 922 (6th Cir.1966). Absent review or a contrary decision from the Sixth Circuit, the parties would proceed to litigating the remainder of Defendants' motion to dismiss and to merits discovery related to the valid-

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ity of the promissory notes at issue. Given the already extensive history of this case, such litigation would certainly qualify as “protracted and expensive.” However, if the Sixth Circuit disagreed with this Court on the availability issue, balancing the *Gulf Oil* factors could be quickly accomplished because the parties have already briefed this issue. If the Court concluded that the balance of those factors favored dismissal, the case would be quickly terminated and its outcome affected by the *forum non conveniens* issue.

\*3 The Court also finds that there are substantial grounds for a difference of opinion as to the correct interpretation of the Venezuelan Supreme Court's opinion, as Defendants articulate in their motion (see Mot. Certify pp. 11-15). Interpreting a foreign country's law presents issues about which reasonable jurists may certainly disagree, and this case is no exception. Moreover, for many of the reasons articulated above, an immediate appeal may materially advance the ultimate termination of this litigation. Considerable time and expense may be saved by allowing the Sixth Circuit to review this issue along with Defendants' appeal as of right of the foreign sovereign immunity issue.

The Court thus concludes that an interlocutory appeal on the issue of *forum non conveniens* is appropriate, and hereby certifies that issue pursuant to 28 U.S.C. § 1292(b). Defendants now bear the burden of convincing the Sixth Circuit to agree to hear this issue.

#### **B. Certification of the Issue of Whether or Not to Recognize and Enforce the Venezuelan Supreme Court Opinion**

The Court, however, cannot reach the same conclusion with respect to Defendants' second requested issue for certification. Defendants ask the Court to certify the issue of whether or not this Court must follow the holding of the Venezuelan Supreme Court's recent opinion. But as Plaintiff correctly points out (Resp. p. 17, doc. # 152) and Defendant also acknowledges (Mot. Certify p. 16, doc. # 145), this Court has not yet ruled on this is-

sue and certifying it for “review” by the Sixth Circuit would be nonsensical.

In a footnote to the Court's holding that the Venezuelan Supreme Court's opinion rendered Venezuela an unavailable forum, the Court stated that “[t]his ruling should not be construed to conclusively resolve the issue of what binding effect the Venezuelan Supreme Court opinion may have on *this* Court,” and noted that federal courts may recognize and enforce foreign judgments out of comity and respect, but that federal courts are by no means required to do so. (Mem. Op. & Order p. 23 n. 5, doc. # 144.) The Court expressed no opinion as to whether it would actually enforce or decline to enforce the Venezuelan Supreme Court opinion, and clearly left that decision for another day. Defendant now asks the Court to certify for review “the issue flagged by footnote 5” (Mot. Certify p. 16, doc. # 145), but there is simply nothing for the Sixth Circuit to review with respect to this issue. The Court made no ruling on it, so there can be no substantial ground for a difference of opinion on a nonexistent ruling. To the extent that Defendants are questioning the actual *ability* of this Court to, at some point in the future, decide this issue against them, there can be no ground for debate. The law is clear that “a foreign country's judgments are not subject to the Full Faith and Credit Clause [.]” *Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir.2007) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981)), and that recognition in the interests of comity is not an absolute command, *id.*

\*4 Defendants, in effect, are asking the Sixth Circuit to decide this issue in the first instance, but that is not how the federal judicial system works. Issues must be first litigated and passed on in the district courts before they are ready for review on appeal; in this case neither party has briefed the question of whether or not to recognize and enforce the holding of the Venezuelan Supreme Court, and the issue is not ripe for a decision by this Court or review by the Sixth Circuit.

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### III. Conclusion

For the reasons stated above, Defendants' Motion to Certify is **GRANTED IN PART** and **DENIED IN PART**. The Court certifies its denial of Defendants's request for dismissal due to *forum non conveniens* for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), but declines to certify the question of whether or not to recognize and enforce the recent Venezuelan Supreme Court decision.

### IT IS SO ORDERED.

S.D. Ohio, 2009.

DRFP, L.L.C. v. The Republica Bolivariana de Venezuela

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**ALEXANDER MOSCOVITS, as assignee of Interbarter-Lombard, Kft., Plaintiff,  
-against- MAGYAR CUKOR Rt. and AGRANA Int'l AG, Defendants.**

**00 Civ. 0031 (VM)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

**2001 U.S. Dist. LEXIS 9252**

**June 29, 2001, Decided**

**July 9, 2001, Filed**

**DISPOSITION:** [\*1] Defendants' motion to dismiss on ground of forum non conveniens GRANTED.

**COUNSEL:** ALEXANDER MOSCOVITS, plaintiff, Pro se, Miami Beach, FL.

For MAYGAR CUKOR RT., AGRANA INTERNATIONAL AG, defendants: John J. Kenney, Simpson Thacher & Bartlett, New York, NY.

**JUDGES:** VICTOR MARRERO, United States District Judge.

**OPINION BY:** VICTOR MARRERO

**OPINION**

**DECISION AND ORDER**

VICTOR MARRERO, United States District Judge.

Plaintiff Alexander Moscovits ("Moscovits"), *pro se*, a United States Citizen and Florida resident, brought this action as assignee of the now defunct Interbarter-Lombard, Kft. ("Interbarter"), a Hungarian corporation, against defendants Magyar Cukor Rt. ("Magyar"), a Hungarian corporation, and Agrana International AG ("Agrana"), Magyar's Austrian parent

corporation. Moscovits asserted common law claims of breach of contract, conversion, fraud, and defamation. Magyar and Agrana jointly moved for dismissal of all claims on the ground of forum non conveniens, among other things, arguing that Hungary is the more convenient place for this litigation. In response to the motion, Moscovits invoked this Court's subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), [\*2] 28 U.S.C. §§ 1330(a), 1605(a)(2). For reasons stated below, the motion is granted based on forum non conveniens and the complaint is dismissed.

**BACKGROUND**

In 1992 and 1993, Interbarter entered into a series of contracts with Sarkadi Cukorgyar Rt. ("Sarkadi") and Mezohegyesi Cukorgyar Rt. ("Mezo"), both Hungarian state owned sugar mills. Compl. Count I P 7, Count II P 7; Affidavit of Zoltan Moscovits ("Z. Moscovits Aff.") P 3; Affidavit of Miklos Fekete In Support of Defendants' Motion to Dismiss the Complaint, Dated November 24, 2000 (4 pp.) ("Fekete One Aff.") PP 4-5. Sarkadi, Mezo, and three other companies merged in 1995 to form Magyar, which was then privatized. Compl., Count I, P 5; Fekete One Aff. P 4.

Under the terms of the contracts, Interbarter promised to finance equipment, materials, and other assets necessary for the production of sugar, and to obtain lines of credit for Sarkadi and Mezo. Compl. Count I P 7,

Count II P 7. Sarkadi and Mezo, in turn, were obligated to order the needed materials through Interbarter, which would purchase them in its own name and ship them to Sarkadi and Mezo. Compl., Ex. B (Framework contract between Interbarter [\*3] and Sarkadi, dated March 17, 1992), Ex. H. (Framework contract between Interbarter and Mezo, dated September 12, 1992); Plaintiff's Verified Sur-Reply ("Sur-Reply") at 2. Moscovits avers that farm equipment was to be purchased from American companies in the United States. Z. Moscovits Aff. P 4. In exchange for Interbarter's services, Sarkadi and Mezo promised to pay Interbarter a fee equal to a percentage of the obtained credit, and a penalty if they failed to use any of the obtained credit. Compl. Count I P 10, 14, Count II P 10, 14. The contracts called for these payments to be in United States Dollars, but did not specify a destination for such payments. Compl., Ex. H. Moscovits claims, however, that Interbarter could designate the destination of payment and that it chose a New York bank. Z. Moscovits Aff. PP 3-5.

As collateral for the financing, Sarkadi and Mezo promised to place a specified amount of sugar in a public warehouse. Compl. Count I P 8, Count II P 8. The warehouse documents were to be endorsed to Interbarter, who would hold them until Sarkadi and Mezo were able to repay the credit to Interbarter or to the bank from which Interbarter procured the credit. Compl. Count [\*4] I P 9, Count II P 9. Sarkadi and Mezo also promised to insure the collateral. Id. The contracts were executed in Hungary and did not specify under what law they would be enforceable. Compl., Ex. B-I (framework contracts, specific contracts, and contract modifications between Interbarter and Sarkadi and Mezo).

Interbarter secured the financing for Sarkadi and Mezo from a Hungarian bank. Z. Moscovits Aff. P 6; Affidavit of Miklos Fekete in Support of Defendants' Motion to Dismiss the Complaint, Dated March 28, 2001 (28 pp.) ("Fekete Two Aff.") P 21. Sarkadi and Mezo secured insurance for the collateral from Hungarian insurance companies. Fekete Two Aff. P 22. Moscovits claims that both Sarkadi and Mezo failed, however, to use the full lines of obtained credit and that they did not pay upon demand the transaction fee or the penalty fee for the unused credit. Compl. Count I P 20, Count II P 16. The payments that were made by Sarkadi and Mezo, he claims, were supposed to be wired to a New York bank account, but were instead paid to Interbarter in Hungary. Sur-Reply at 1-2. Sarkadi and Mezo also never

ordered the equipment that was supposed to be purchased and imported from the United [\*5] States, and it was thus never bought. Moscovits further claims that the collateral and insurance were not produced by Sarkadi and Mezo in a timely fashion. Id.

In 1993, Sarkadi sued Interbarter in Hungary for breach of contract, claiming that Interbarter endorsed and used the warehouse documents in violation of the contracts. Compl., Count I, P 22; Fekete Two Aff. PP 40-45. Simultaneously, Sarkadi filed a criminal complaint against Interbarter charging improprieties pertaining to the warehouse documents. Compl., Count I, P 20. After Sarkadi and Mezo merged, Magyar continued the legal actions. Compl. I, P 20; Fekete Two Aff. PP 41, 44. Interbarter and Moscovits, who intervened in the Hungarian proceedings as assignee of Interbarter, counter-sued Magyar for breach of contract arising from the Sarkadi and Mezo dealings, as well as for defamation for false criminal charges. Affidavit of Dr. Zoltan Jeszenszky, dated January 29, 2001 ("Jeszenszky Aff.") P 2. In December 2000, the Hungarian court ruled in favor of Magyar. Response at 10.

In January 2000, Moscovits filed the instant complaint against Magyar and Agrana based on the same events which were the subject of the Hungarian litigation. [\*6] He seeks compensatory and punitive damages for breach of contract, fraud, conversion and defamation. Magyar and Agrana moved to dismiss on the ground of forum non conveniens, arguing that Hungary is the more convenient jurisdiction for the litigation of these claims.

## DISCUSSION

Courts analyze an invocation of the forum non conveniens doctrine in two parts. Initially, the court determines whether there exists an adequate alternative forum. See *Gulf Oil Corp. v. Gilbert*. 330 U.S. 501, 506-07, 91 L. Ed. 1055, 67 S. Ct. 839 (1947). If so, the court chooses between the two forums by balancing the private interests of the litigants and the public interest concerns of the court. See *id.* at 508-09.

Forum non conveniens analysis is independent of the basis for this Court's subject matter jurisdiction. Consequently, whether Moscovits invokes diversity jurisdiction or federal question jurisdiction under FSIA, this Court's analysis is the same. See *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 977 (2d Cir. 1993); see also *Verlinden B.V. v. Central Bank of*

*Nigeria*, 461 U.S. 480, 491, n. 15, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983). [\*7] In addition, that this dispute has been substantially adjudicated in another country is a factor to be considered in the forum non conveniens inquiry, but it is not a dispositive one. The analysis does not ask whether foreign decisions should be controlling, but rather whether in the interest of justice and all other relevant concerns the action would best be brought in another forum.

#### A. ADEQUATE ALTERNATIVE FORUM

The requirement of an adequate alternative forum is ordinarily satisfied if the defendants are amenable to service of process in the alternative forum and the forum permits litigation of the subject matter of the dispute. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981); *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49, 57 (2d Cir. 2000).

Defendant Magyar is clearly amenable to service of process in Hungary, not only because it is a Hungarian corporation and thus subject to lawsuits in that country, Fekete One Aff. P 2, but also because Moscovits did in fact sue Magyar there based on the same conduct at issue here, Jeszenszky Aff. P 2; Affidavit of Dr. Istvan Rubanyi in Support of Defendant's Motion [\*8] to Dismiss the Complaint ("Rubanyi Aff.") P 15. It is unclear whether Agrana is also amenable to service in Hungary, but since Agrana argues that Hungary is an adequate alternative forum, it is estopped from asserting that Hungary lacks jurisdiction over these claims and dismissal of this action as to Agrana may be conditioned upon it agreeing not to challenge personal jurisdiction of the Hungarian court. See *Ilusorio v. Ilusorio-Bildner*, 103 F. Supp. 2d 672, 680, (S.D.N.Y.), aff'd, F.3d , 2001 U.S. App. LEXIS 17157 (2d Cir. 2001).

Moscovits has already litigated the subject matter of his claims in Hungary, suing for breach of contract and defamation. He now brings suit in this Court for those causes of action as well as for conversion and fraud. While Moscovits contends that Hungary does not provide specific causes of action for conversion and fraud, Jeszenszky Aff. P 2, the adequacy of an alternate forum does not depend upon the availability of causes of action identical to those in the United States. See *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 610 (2d Cir. 1998). In any event, Hungary does recognize a general cause of [\*9] action for damages, which Moscovits does not deny, Response at

6-7, and under which he likely could have brought suit asserting a right to recover damages for the type of injury he alleges.<sup>1</sup>

1 The Hungarian legal system separates contractual from non-contractual damages. There is only one cause of action and theory of damages for extra-contractual harm: where one unlawfully causes damage to another, the injured party must be compensated, but damages are never punitive. See Martindale-Hubbell Int'l Law Digest at HGRY-8 (2000); see also Rubanyi Aff. PP 6, 9 (citing Hung. Civ. Code of 1959, Title II, ch. XXIX, § 339, ch. XXI, § 355).

Moscovits claims, however, that the Hungarian legal system is not adequate because it does not comport with due process. He contends, for instance, that Hungary lacks formal evidence rules, and complains that in his case the trial judge in Hungary held *ex parte* hearings and excluded the public from the courtroom, and moreover, that such occurrences are commonplace. [\*10] Moscovits's personal experiences in the Hungarian proceedings, however, are not relevant to whether the Hungarian judicial system is generally an adequate alternative forum. An alternative forum is not deemed inadequate unless it is characterized by a "complete absence of due process". *Broadcasting Rights Intern. Corp. v. Societe du Tour de France, S.A.R.C.*, 708 F. Supp. 83, 85 (S.D.N.Y. 1989) (quoting *Panama Processes, S.A. v. Cities Serv. Co.*, 500 F. Supp. 787, 800 (S.D.N.Y.1980), aff'd, 650 F.2d 408 (2d Cir. 1981)); see also *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998). That Hungary's courts may not offer the full range of procedural protections available to litigants in United States federal courts is insufficient reason to conclude that the Hungarian forum is inadequate. See *Blanco*, 997 F.2d at 982; *Younis v. American University in Cairo*, 30 F. Supp. 2d 390, 394 (S.D.N.Y. 1998).

Finally, Moscovits argues that delays litigants encounter in Hungary are so long that prosecuting his case there is tantamount to a denial of due process. He points to the Third Circuit's [\*11] decision in *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995), which held that a twenty-five year delay in India rendered the forum inadequate. But without specific evidence of pervasive delays, Moscovits's assertion is speculative at best. Moreover, Moscovits is not faced with any delay because his case has already been

adjudicated. Moscovits also asserts that an appeal is likely to take two years. But forum non conveniens analysis looks only at whether there is an adequate alternative forum, not whether an adequate alternative appeals process exists.

To the foregoing analysis of applicable case law principles, the Court has added consideration of another policy note which, other things being equal, may weigh against exercising jurisdiction in some forum non conveniens situations, including the case at bar. Many litigants, as Moscovits here suggests, advocate upon us the notion that courts in this country should sit in judgment of the adequacy of justice and of the legal systems of other nations; that we should hold them to our standards and by so doing encourage the perception that only in American courts may litigants be assured full, expeditious [\*12] and fair adjudication of their disputes. It is not only the arrogance inherent in this attitude that this Court finds troubling.

Rendering value judgments about the sufficiency of foreign justice systems, assuming that universally acceptable methods and measures to do that may be devised, itself is laden with legal difficulties and political perils. From the standpoint of efficiency, our legal system could and should not be expected to assume the costs and burdens entailed in serving as court to the world, no more so than in foreign affairs it would be generally tolerable to encourage the impression that our military should perform at all times and all places as policeman to the world. See *Blanco*, 997 F.2d at 982 ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation").

Finally, for this Court generally to pronounce judgment on the adequacy of justice of a particular foreign state would undermine any efforts those legal systems may be undergoing to reform and to foster domestic and international confidence in the country's laws. See *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998) [\*13] (comity precludes a court from judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards). This consideration is especially pertinent as regards nations, such as Hungary, emerging from dramatic transition to a political system that strives to model its means of adjudication and concept of due process on principles prevailing here. See *In Re Union Carbide*

*Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 867 (noting that inflicting foreign standards and values on a developing nation would "deprive the Indian judiciary of this opportunity to stand tall before the world"), aff'd as modified, 809 F.2d 195 (2d Cir. 1987). A determination by this Court that the other country's justice system affords an inadequate forum for resolution of disputes is tantamount to a denunciation that may tend to become a self-fulfilling prophecy. Such a course would only work to ingrain the perception of deficiency in that legal system. To this extent, it could retard endeavors to improve any flaws in due process which litigants like Moscovits rely upon in urging that the forum should be deemed insufficient to warrant transferring [\*14] to it matters that otherwise would be more conveniently litigated there.

Accordingly, because Magyar and Agrana are amenable to service of process in Hungary, and because Moscovits could, and in fact did, litigate the subject matter of this dispute there, this Court concludes that Hungary offers an adequate alternative forum for further litigation of this action.

## B. GILBERT FACTORS

Generally, there is a strong presumption in favor of the plaintiff's choice of forum. See *Reyno*, 454 U.S. at 255-6. As such, defendants usually have the burden of overcoming this presumption by establishing that the Gilbert factors "tilt strongly in favor" of the alternative forum. See *id.*; accord *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164 (2d Cir. 1991). But where the complainant is the assignee of a foreign corporation, the "courts have generally refused to give special deference" to plaintiff's choice of forum. *Pain v. United Technologies Corp.*, 205 U.S. App. D.C. 229, 637 F.2d 775, 797 (D.C. Cir. 1980) (citing *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika OG Australie Line*, 65 F.2d 392 (2d Cir. 1933) [\*15] and *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499 (2d Cir. 1966)) (finding that the domestic forum choice of a 'nominally American plaintiff', defined as subrogees, assignees, or representatives of foreign companies, is not generally given special deference). Because Moscovits is the assignee of Interbarter, a Hungarian corporation, and is suing in that capacity, his choice of forum is not entitled to the standard deference.

### 1. Private Interest Factors

When weighing the private interests of the litigants, the court must consider: (a) the ease of access to sources of proof; (b) the availability of compulsory process for attendance of unwilling witnesses; (c) the cost for cooperative witnesses to attend trial; (d) the enforceability of a judgment; and (e) all other practical matters that might expedite a trial or make one less expensive. See *Gilbert*, 330 U.S. at 508. Here, these private interest factors weigh heavily in favor of dismissal of this action.

Almost all of the evidence relevant to the dispute at hand is located in Hungary. Because all events underlying Moscovits's claims occurred in Hungary, documents, materials and witnesses concerning [\*16] the controversy are most likely to be found there. As noted above, the contract parties were Hungarian, their agreements were negotiated and signed in Hungary, the sugar was processed in Hungary, the financing was obtained from a Hungarian bank, the insurance on the collateral was obtained from Hungarian insurance companies, and the collateral sugar was stored in a Hungarian warehouse. Moscovits claims that dollars were to be paid to a New York bank account, but also admits that the money was never received there. Similarly, he claims that equipment was to be bought from American companies, but admits that these purchases never occurred.

Magyar and Agrana argue that all relevant documents are in Hungary and that some documents are in the control of non-party witnesses, such as the public warehouse. Fekete Two Aff. PP 27-37. Moscovits counters that he took all relevant documents back to the United States and that he has already presented these documents to the court, translated from Hungarian into English. Kiss Aff. P 17. It seems unlikely, however, that Moscovits possess every document relevant to Magyar and Agrana's defenses. Thus, consideration of this factor balances, at best, [\*17] evenly.

Magyar and Agrana contend that the vast majority of witnesses are in Hungary, and that many do not speak English, Fekete Two Aff. PP 16-26, while Moscovits finds this to be "purely speculative", Response at 25. All the individuals who were involved in the contracts and subsequent events, however, are Hungarians located in Hungary, save Zoltan Moscovits, who is Moscovits's father and a resident of Florida. Z. Moscovits Aff. P 1. Although Zoltan Moscovits is of advanced years, his

testimony may be preserved by deposition. Magyar and Agrana name five Hungarian witnesses who are located in Hungary and list many more by their positions of employment, such as the operators of the Hungarian warehouse where the sugar was stored as collateral and the Hungarian police who investigated the criminal report. Fekete Two Aff. PP 18-26. Additionally, four of Magyar and Agrana's affiants and two of Moscovits' affiants are Hungarians located in Hungary.

Because many of these witnesses are Hungarians and non-parties, they are therefore not subject to compulsory process. See *Fed. R. Civ. P. 45(b)(2)*. The inability to bring witnesses to the United States for live cross-examination weighs [\*18] heavily in favor of finding litigation in an United States court inappropriate. See *Alfadda v. Fenn*, 159 F.3d 41, 47 (2d Cir. 1998).

Moscovits asserts that the testimony of Hungarian witnesses may be obtained via letters rogatory. But this Court has held that such a method, especially when used for the vast majority of witnesses, is inefficient and expensive. See *Ilusorio*, 103 F. Supp. 2d at 677.

As to execution of any judgment Moscovits may obtain in a United States court, such a judgment is probably not enforceable in Hungary because there is no bilateral treaty between the two countries so permitting, Rubanyi Aff. P 17, and may not be enforceable within the United States because the only connection that Moscovits claims Magyar and Agrana have to this country is that they maintain bank accounts here, which the defendants vehemently dispute, compare Compl., Count I, P 21, with Grausam Aff. P 15 and Fekete 1 Aff. P 15. Regardless, a Hungarian judgment against Magyar and Agrana would certainly be enforceable in Hungary. Thus, even if a judgment of this Court could be enforced against the defendants in this country, the United States would [\*19] still not be any more of a convenient forum than Hungary with respect to the enforceability of judgment. As such, this factor is neutral at best.

Lastly, judicial economy is best served by dismissal in favor of Hungary. Moscovits brought suit against defendant Magyar in Hungary based upon the same facts as are at issue here. Judicial resources are not well served by trying nearly identical cases on either side of the Atlantic Ocean. Accordingly, the Court finds that the private interests involved in this case weigh strongly toward dismissal.

## 2. Public Interest Factors

The public interest factors to be weighed by the court include (a) administrative difficulties that arise when litigation is brought in a congested forum instead of at its origin; (b) imposing jury duty on citizens of a community that has no relation to the litigation; (c) the local interest in having disputes settled at home; and (d) avoiding unnecessary problems associated with the application of foreign law. See *Gilbert*, 330 U.S. at 508-9. These factors also weigh heavily in favor of dismissal of this case.

Moscovits asserts that delays in Hungarian courts are unacceptable. But, as noted above, [\*20] his allegations in this regard are unsubstantiated. Nor is the protraction of litigation unique to any one forum. Indeed, it is endemic. Even in our own court it is not unheard-of for actions, especially those entailing complexities such as characterize this case, to require several years to reach final disposition. It is clear that the Southern District of New York is heavily congested, see *PT United Can Co. v. Crown Cork & Seal Co.*, 1997 U.S. Dist. LEXIS 692, No. 96 CV. 3669, 1997 WL 31194 at \*9 (S.D.N.Y. Jan. 28, 1997) (reconfirming *Gilbert*'s specific reference to this District as one that is heavily congested), *aff'd*, 138 F.3d 65 (2d Cir. 1998), and that "there is a legitimate interest in ensuring that disputes with little connection to the district be litigated elsewhere", *CCS Int'l, Ltd. v. ECI Telesystems, Ltd.*, 1998 U.S. Dist. LEXIS 12755, No. 97 CIV. 4646, 1998 WL 512951 at \*10 (S.D.N.Y. Aug. 18, 1998).

This action has minimal ties to the United States or New York. Moscovits alleges that dollars were to be deposited in a New York bank, and that equipment was to be purchased and imported from companies in the United States, but neither of these events occurred. Because Moscovits [\*21] asserts jurisdiction under FSIA, which does not allow for a jury trial, see *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 46 F. Supp. 2d 231, 239 (S.D.N.Y. 1999); 28 U.S.C. §§ 1330, 1441(d), the public interest in not imposing jury duty on citizens to whom litigation has no relation may not be relevant. Any potential burden on a jury is thus excluded from the balance of considerations.

Regardless, the analysis weighs heavily in favor of dismissal because while the case has, at best, trace connections to the United States, its ties to Hungary are strong. The dispute arises out of an era in which Hungarian corporations were embracing capitalism and

eschewing communism. The parties are Hungarian and the conduct giving rise to the causes of action never left Hungary's borders. Thus, Hungary has a weighty interest in trying this case, and indeed already has. New York, on the other hand, has little or no interest in the resolution of this case.

The Court also recognizes the interest in avoiding unnecessary complexities associated with the application of foreign law. Although hesitance to apply foreign law is not dispositive [\*22] to the issue of dismissal, it is a legitimate factor favoring dismissal. See *Boosey & Hawkes Music Publishers Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998). It is highly likely that Hungarian law would apply here, regardless of whether federal or New York State choice of law rules apply. Both doctrines usually apply the law of the jurisdiction with the most significant interest in or relation to the action being adjudicated. Compare *In re Gaston & Snow*, 243 F.3d 599, 605 (2d Cir. 2001)(federal choice of law rules apply the law of the jurisdiction with the most significant relationship to the action) with *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996), cert. denied, 519 U.S. 1116, 136 L. Ed. 2d 845, 117 S. Ct. 959 (New York State choice of law rules usually "apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute"). With respect to all causes of action here, both contract and tort, Hungary has the most significant interest in and relationship to the dispute for the reasons mentioned above.

Finally, a forum non conveniens dismissal [\*23] may be conditioned on the occurrence of an event in order to protect the party opposing dismissal. See *Blanco*, 997 F.2d at 984. Thus, implicit in the rule of forum non conveniens is that a defendant cannot assert that another forum is more convenient and just, and while at the same time, refuse to accept the jurisdiction of that forum. See *Ilusorio*, 103 F. Supp. 2d at 680. Magyar and Agrana filed a joint motion to dismiss in this case on the ground of forum non conveniens. Accordingly, the Court conditions dismissal on Agrana's consent to personal jurisdiction of the Hungarian courts.

## ORDER

For the reasons stated above, it is hereby

ORDERED that defendants' motion to dismiss on the ground of forum non conveniens is GRANTED; and it is

2001 U.S. Dist. LEXIS 9252, \*23

further

ORDERED that the time to appeal from the final judgment entered in this action on June 1, 2001 is hereby extended to thirty (30) days from the date of entry of this Decision and Order.

Dated: 29 June 2001

New York, New York

SO ORDERED

Victor Marrero, U.S.D.J.