Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

FORUM NON CONVENIENS

S. Donald Gonson

Volume 12, numéro 2, 1999

URI : https://id.erudit.org/iderudit/1100324ar
DOI : https://doi.org/10.7202/1100324ar

Aller au sommaire du numéro

Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)
2561-6994 (numérique)

Découvrir la revue

Citer cet article

Gonson, S. (1999). *FORUM NON CONVENIENS. Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, *12*(2), 23–32. https://doi.org/10.7202/1100324ar

Résumé de l'article

Aux États-Unis, la doctrine du forum non conveniens fait référence au pouvoir discrétionnaire que possède le tribunal de décliner sa compétence dans le cas où l'intérêt des parties serait mieux servi si l'action était entendue devant un autre forum. Il s'agit d'une doctrine assez flexible car la décision finale dépendra des faits propres à chaque espèce. L'analyse américaine du *forum non conveniens* place le fardeau de la preuve sur le défendeur qui devra démontrer d'une part la « disponibilité » et d'autre part la « l'opportunité » du choix d'un forum alternatif, et que la balance des intérêts publics et privés pertinents favorise le rejet de l'action. Cette analyse appliquée aux faits établis par le tribunal dans l'affaire *Cambior*, montre à la fois la disponibilité et l'opportunité de la Guyana comme forum alternatif. Les remèdes à la disposition du demandeur, bien que moins complets, ne seraient pas suffisants pour trouver la Guyana inadéquate, pas plus que les différences procédurales entre les deux juridictions. En comparaison avec l'affaire *Union Carbide*, il est apparent que les intérêts publics et privés sont mieux servis en Guyana. Ainsi, à la lumière de l'affaire *Union Carbide*, il semble que si l'affaire *Cambior* avait été initialement intentée aux États-Unis, elle aurait été rejetée en faveur de la Guyana.

FORUM NON CONVENIENS

By S. Donald Gonson[*]

Aux États-Unis, la doctrine du forum non conveniens fait référence au pouvoir discrétionnaire que possède le tribunal de décliner sa compétence dans le cas où l'intérêt des parties serait mieux servi si l'action était entendue devant un autre forum. Il s'agit d'une doctrine assez flexible car la décision finale dépendra des faits propres à chaque espèce. L'analyse américaine du *forum non conveniens* place le fardeau de la preuve sur le défendeur qui devra démontrer d'une part la « disponibilité » et d'autre part la « l'opportunité » du choix d'un forum alternatif, et que la balance des intérêts publics et privés pertinents favorise le rejet de l'action. Cette analyse appliquée aux faits établis par le tribunal dans l'affaire *Cambior*, montre à la fois la disponibilité et l'opportunité de la Guyana comme forum alternatif. Les remèdes à la disposition du demandeur, bien que moins complets, ne seraient pas suffisants pour trouver la Guyana inadéquate, pas plus que les différences procédurales entre les deux juridictions. En comparaison avec l'affaire *Union Carbide*, il est apparent que les intérêts publics et privés sont mieux servis en Guyana. Ainsi, à la lumière de l'affaire *Union Carbide*, il semble que si l'affaire *Cambior* avait été initialement intentée aux États-Unis, elle aurait été rejetée en faveur de la Guyana.

The United States *forum non conveniens* doctrine refers to the discretionary power of the court to decline jurisdiction when the convenience of the parties would be better served if the action was brought and tried in another forum. It is a flexible doctrine in that the ultimate resolution will depend of the particular facts of each case. The two-pronged United States *forum non conveniens* analysis places the burden of proof on the defendant to show the "availability" and "adequacy" of an alternate forum, and that the balance of relevant private and public interest factors favors dismissal. Such an analysis applied to the facts as found by the court in the *Cambior* decision reveals both the availability and adequacy of Guyana as an alternate forum. The available remedies to the plaintiff, although less extensive, would not be sufficient to find Guyana inadequate, nor would differences in procedural law between the two jurisdictions. Upon comparison with the *Union Carbide* case, it is apparent that private and public interest factors in *Cambior* are better served in Guyana. Thus, in light of *Union Carbide*, it seems that where *Cambior* first lodged in the United States, it would have been dismissed in favor of Guyana.

---

[*] Senior Partner, Hale and Dorr LLP, Boston, Massachusetts, USA. I would like to thank my associate, Aaron Moore, of Hale and Dorr LLP, for his preparation of this outline and related material.

I. General Comments

A. US Treatment Much Like That in *Cambior*

The *forum non conveniens* inquiry in the United States shares much with that in Canada. Although the structure of the analyses differs, many of the individual considerations are the same.

B. Flexible

Forum non conveniens as applied in the United States is, as in Canada, a flexible doctrine with multiple factors, the ultimate resolution of which will depend on the particular facts of each case. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981). Thus, in the United States, as in Canada, the list of factors is meant to serve as a guideline, not as a "scorecard" on which the factors are simply totalled. *See Cambior*, at 19.

II. Application of the United States' *Forum Non Conveniens* Law to the Facts of the *Cambior* Case

A. The Approach

This analysis applies the Unites States' *forum non conveniens* doctrine to the facts as found by the *Cambior* court, making conservative assumptions as to other pertinent facts where necessary.

B. Union Carbide

The analysis also compares the *Cambior* situation with the facts of *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987), because of the many similarities between the two cases. The *Union Carbide* case arose from the Bhopal disaster in India, was filed in a United States federal court in New York, was subsequently dismissed on *forum non conveniens* grounds, and the dismissal was affirmed.

C. Presumption in Favor of the Plaintiff's Choice of Forum

As a general rule, there is a strong presumption in favor of the plaintiff's choice of forum. *See Piper*, 454 U.S. at 255. Where the plaintiff is foreign, however, its choice is entitled to less deference. *See ibid.*; *see also Tech. Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995); *Great Prize S.A. v. Mariner Shipping*

Ltd., 967 F.2d 157, 160 (5th Cir. 1992). The reduced deference is not intended to be a discrimination against foreign plaintiffs, but rather is a recognition that the United States probably is not the most convenient forum for such a plaintiff, but was more likely chosen for tactical reasons, such as to inconvenience the defendant or to take advantage of favorable United States law. *See Piper*, 454 U.S. at 255-56.

D. Two Pronged Analysis

In the United States, the *forum non conveniens* analysis consists of two prongs: the defendant must show (1) the "availability" of an "adequate alternative forum" and (2) that the balance of the relevant private and public interest factors favors dismissal. The pertinent factors will be familiar to those who have read *Cambior*.

1. Availability and Adequacy of Guyana as an Alternative Forum

The defendant bears the burden of proving both availability and adequacy of the alternative forum. *See Mercier v. Sheraton Intern., Inc.*, 981 F.2d 1345, 1349 (1st Cir. 1992).

(a) "Availability"

An alternative forum is "available" when the defendant is "amenable to process" in that jurisdiction, and where there are no other bars to suit, such as statutes of limitation. *See Piper*, 454 U.S. at 254 n.22; *Mercier*, 981 F.2d at 1350. However, even where problems *are* present, courts will often dismiss if the defendant agrees (which they usually will) to submit to jurisdiction or waive the application of any other bars. For example, in the *Union Carbide* case, the court conditioned the dismissal on the defendant's consent to jurisdiction in India and waiver of its statute of limitations defense. *See* 809 F.2d at 203-204.

(b) "Adequacy"

It is "rare" for an alternate forum to be inadequate. *See Piper*, 454 U.S. at 254 n.22. Most United States courts will find a foreign forum inadequate *only* if it does not permit litigation of the particular subject matter at all or if there are "significant legal or political obstacles" to suit. *See Piper*, 454 U.S. at 254 n.22; *Mercier*, 981 F.2d at 1350 (noting that Castro's Cuba was unavailable as an alternative forum to political refugees). In practice, some courts go so far as to apply a *presumption* that the alternative forum is adequate. *See, e.g., Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 729 (5th Cir. 1990). This is in contrast to the Canadian approach, in which the existence of a more appropriate forum must be "clearly established." *See Cambior*, at 15.

Guyana Would Surely Be "Adequate"

It is quite apparent that a United States court would hold Guyana to be an adequate alternative forum. The analysis of this issue would be similar to that undertaken by Judge Maughan in his discussion of the "interest of justice" factor in *Cambior*.

– Differences in Substantive Law Would Be Unlikely to Render Guyana an Inadequate Forum

Less favorable substantive law does not render a foreign court inadequate unless it is *so* unfavorable as to provide "no remedy at all." *Piper*, 454 U.S. at 254. For example, in *Piper*, the fact that Scotland did not have strict liability (while the United States did) did not render Scotland inadequate. *See id.* at 254-55.

Here, there is no evidence that the substantive law of Guyana is such that the plaintiffs would be left without a cause of action. In fact, Judge Maughan specifically noted the existence of Guyanese mass tort law, which presumably would apply in this situation. See *Cambior*, at 30.

– Similarly, Less Extensive Remedies Would Not Likely Lead a United States Court to Find Guyana Inadequate

Similar to the treatment of the issue of the substantive law, the fact that fewer or different remedies are available in the foreign forum does not render that forum inadequate, provided that *some* remedy is available. *See Piper*, 454 U.S. at 255. For example, in *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1980), the fact that the foreign forum would have capped recovery at $570,000, while recovery in the United States may have been as much as $8 million, did not render the foreign forum inadequate. *Id.* at 159.

There is no indication that the Guyanese courts would not provide a remedy. In fact, Judge Maughan specifically found that "the remedy sought by the victims is available to them in Guyana." *Cambior*, at 42.

– Differences in Procedural Law Would Not Render Guyana an Inadequate Forum

That the procedures in the foreign jurisdiction are less favorable also does not render a foreign jurisdiction inadequate. *See Piper*, 454 U.S. at 255. For example, in *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764 (9th Cir. 1991), the court found that Japan was an adequate alternative forum even though it did not offer jury trials and provided for more limited discovery procedures. *Id.* at 768. Similarly, in the *Union Carbide* case, the more limited discovery provided by the Indian judicial system did not render that forum inadequate. *See* 809 F.2d at 205-206.

There is no indication that the Guyanese courts would not provide a remedy. In fact, Judge Maughan specifically found that "the remedy sought by the victims is available to them in Guyana." *Cambior*, at 42.

– Differences in Procedural Law Would Not Render Guyana an Inadequate Forum

That the procedures in the foreign jurisdiction are less favorable also does not render a foreign jurisdiction inadequate. *See Piper*, 454 U.S. at 255. For example, in *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764 (9th Cir. 1991), the court found that Japan was an adequate alternative forum even though it did not offer jury trials and provided for more limited discovery procedures. *Id.* at 768. Similarly, in the *Union Carbide* case, the more limited discovery provided by the Indian judicial system did not render that forum inadequate. *See* 809 F.2d at 205-206.

The primary procedural disadvantage of proceeding in Guyana would be the lack of the liberal class action treatment available in Canada. See *Cambior*, at 31. However, in *Union Carbide*, the court noted that the lack of a class action vehicle would not render an alternative forum inadequate, particularly where that forum had an alternative mechanism available. *See* 809 F.2d at 199. Similarly, as the Guyanese victims could proceed in Guyana with representative or, at least, individual actions, the lack of the "class action" vehicle would not render Guyana inadequate.

– Guyana Would Be An Appropriate Forum

In sum, because the courts of Guyana would have subject matter and personal jurisdiction over the suit, and because the procedural and substantive law of Guyana is not such that the plaintiffs would be wholly deprived of a remedy, a United States court would find that forum "available" and "adequate."

2. BALANCING THE CONVENIENCE OF THE PARTIES AND THE ENDS OF JUSTICE

In the language of the Supreme Court, this prong requires that the defendant show either (1) "oppressiveness and vexation to [the] defendant [...] out of all proportion to [the] plaintiff's convenience, or (2) that "considerations affecting the court's own administrative and legal problems" make the plaintiff's chosen forum "inappropriate." *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1946).

Some lower courts interpret this to require a showing of "serious unfairness," while others view the inquiry more as one of simple convenience. *Compare Mercier*, 981 F.2d 1345, *with Great Prize*, 967 F.2d 157. However, where the presumption favoring the plaintiff's choice of forum is reduced because he has brought suit away from his home, the burden on the defendant is generally reduced. *See, e.g., Great Prize*, 967 F.2d at 160.

(a) Private Interest Factors

Ease of Access to Sources of Proof

The inquiry here concerns both documentary and testimonial evidence. In *Cambior*, Judge Maughan noted that the river, the plans and other documentary evidence relating to the dam, the victims' medical records, governmental records, and the materials compiled by the investigating committee were all located in Guyana. *See Cambior*, at 26-27. Judge Maughan also noted that the majority of the witness were located in Guyana. *See id.* at 22-26. It seems unlikely that a United States court considering this issue would disagree with his conclusion that, although most of the sources of proof *could* be transported to Canada, the fact that they were *already in Guyana* tilts this factor in favor of dismissal. Similarly, the dismissal in *Union Carbide* was based in large part on the fact that "[t]he vast majority of material witnesses and documentary proof bearing on causation and liability for the accident is located in India [...] and would be more accessible to an Indian court than to a United States court." 809 F.2d at 201.

Availability of Compulsory Process

In the United States, this is often considered the most important of the private interest factors, because live evidence is favored. *See Mercier*, 981 F.2d at 1355-56; *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 951-52 (1st Cir. 1991). Presumably, parties and employees of parties can be compelled to testify in either jurisdiction. However, with respect to the non-parties, Judge Maughan noted that 10 of 40 are subject to compulsory process in Canada, while none of the 40 could be compelled in Guyana. For that reason, this factor appears to weigh against dismissal, although its importance is reduced by the fact that three-quarters of the witness cannot be compelled in either jurisdiction. This factor weighed in favor of dismissal in *Union Carbide*. *See* 809 F.2d at 201.

Cost of Obtaining Witnesses' Attendance

It appears that either the liability witnesses will have to travel to Guyana, or the damages witnesses will have to travel to Canada; for this reason, this factor seems neutral.

Whether a View is Necessary

Were a view necessary in this case, this factor would favor Guyana. Because the ruptured dam has been repaired, however, it is unlikely that a view would be useful and this factor thus appears to be neutral. This factor also weighed in favor of dismissal in *Union Carbide*. *See* 809 F.2d at 201.

Enforceability of the Judgment

As Judge Maughan noted, Cambior has assets in both jurisdictions sufficient to satisfy the judgment. *See Cambior*, at 28-29. Thus, this factor also appears to be neutral. It was neutral in *Union Carbide* as well. *See* 809 F.2d at 204-205.

Financial Hardship to the Plaintiff Should it Be Forced to Litigate in the Alternative Forum

This factor would appear inapplicable. Although it would surely be cheaper for the plaintiff to litigate in the alternative forum, its home, it has chosen the distant venue. Such was the case in *Union Carbide*.

(b) Public Interest Factors

Court Congestion

This factor appears neutral. The *Cambior* court credited the testimony of the defendant's expert that in Guyana the case would likely be heard within 2½ years, a timeframe that was apparently comparable to the time to suit in Canada. The burden that the *Union Carbide* case would have placed on the US courts favored dismissal in that case. *See* 809 F.2d at 199.

The Interest in Having Localized Controversies Decided in Their Home Forum

Plainly, this factor favors dismissal. The citizens of Quebec have substantially less interest than the citizens of Guyana in addressing the damage done to the people and environment of Guyana. This was a big factor in *Union Carbide*, the court noting that India had "a greater interest than [did] the United States in facilitating the trial and adjudication of the victims' claims" and that the American interest was "relatively minor." 809 F.2d at 201.

The Imposition of Jury Duty on Citizens of a Forum that is Unrelated to the Subject of the Litigation

For obvious reasons, this factor also favors dismissal.

The Interest in Having the Case Tried in a Forum Familiar with the Applicable Law

The parties do not contest that Guyanese law applies; this factor thus obviously favors dismissal. This factor was also important to the decision to dismiss in *Union Carbide*, the court noting that "Indian courts would be in a superior position

to construe and apply applicable Indian laws" as compared to the courts of the United States." 809 F.2d at 199.

The Balance of the Public and Private Factors Appears to Favor Transfer

Given that the bulk of the documentary and testimonial evidence is located in Guyana, and that the public interest factors weigh heavily in favor of dismissal (the disaster at issue having taken place in Guyana), it seems almost certain that a United States court would dismiss this case on *forum non conveniens* grounds if asked to do so.

* * *

Guyana is an adequate alternative forum and the balance of individual factors clearly favors dismissal. While *Cambior* might not call for dismissal quite as loudly as *Union Carbide* (few do, the appeals court noting that it might have been an abuse of the trial court's discretion to *not* transfer that case), it seems plain that, were this case first lodged in the United States, it would have been dismissed in favor of Guyana.

SUMMARY OF THE US *FORUM NON CONVENIENS* CONSIDERATIONS AS APPLIED IN *UNION CARBIDE* AND THE FACTS OF *CAMBIOR*

		Union Carbide	***Cambior***
Factual Background		The case arose from an environmental disaster stemming from the failure of a gas plant and causing injury to 200,000 people.	The case arose from an environmental disaster stemming from the failure of a dam and causing injury to 23,000 people.
		The gas plant was owned by an Indian corporation that was 59.9% owned by the American defendant.	The dam was owned by a Guyanese corporation that was 65% owned by the Canadian defendant.
		The plaintiff was not a resident of the country (the US) in which the suit was brought.	The plaintiff was not a resident of the country (Canada) in which the suit was brought.
Deference to Plaintiff's Choice of Forum	In both cases, the deference ordinarily afforded to the plaintiff's choice was (or would be) reduced because the plaintiff sued away from home.		
Adequacy of the Alternative Forum	In both cases, the foreign forum, although disadvantageous to the plaintiff in some ways, was (or would be) adequate.	The defendant consented to jurisdiction in the foreign forum and waived the statute of limitations defense. There were no other bars to suit.	The defendant (parent corporation) similarly waived objection to jurisdiction in the foreign forum and there were no other bars to suit.
		India had a body of tort law applicable to the disaster.	Guyana had a body of tort law applicable to the disaster.
Private Interest Factors	Ease of Access to the Sources of Proof	**"The great majority of the documents bearing on the design, safety, start-up and operation of the plant, as well as the safety training of the plant's employees were located in India." The documents were in Hindi or other Indian languages.**	**The sources of proof (the river, the plans, the medical records, and the materials complied by the investigating committee) were located primarily in Guyana. Because the language of Guyana is English, no translation would be necessary.**

	Availability of Compulsory Process	More witnesses were subject to process in India than in the United States.	*Ten of forty non-party witnesses were subject to compulsory process in Canada; none were subject to compulsory process in Guyana.*
	Cost of Obtaining Witnesses' Attendance	Regardless of where the trial was held some witness would have had to travel.	Regardless of where the trial would be held, some witness would have to travel.
	Whether a View Was Necessary	**An Indian court could better supervise a view of the sealed plant.**	No view likely because the dam had been repaired.
	Enforceability of the Judgment	A judgment would be enforceable in either jurisdiction.	A judgment would be enforceable in either jurisdiction.
	Financial Hardship to the Plaintiff if Forced to Litigate in Alternative Forum	This factor is inapplicable because the plaintiff chose to litigate in a forum far from home.	This factor is inapplicable because the plaintiff chose to litigate in a forum far from home.
Public Interest Factors	Court Congestion	The litigation would place more weight on the already overburdened United States court. The Indian courts had special expediting procedures for extraordinary cases.	Probably a neutral factor. The 2_ year time to trial in Guyana is apparently comparable to that in Canada.
	The Interest in Deciding Localized Controversies in their Home Forum	**Favored deciding the case in India, the location of the plant and the victims.**	**Favors deciding the case in Guyana, the location of the river and the victims.**
	Imposition of Jury Duty on Citizens of an Unrelated Forum	**Favored trying the case in India, as the citizens of New York had little connection to the disaster.**	**Favors trying the case in Guyana, as the forum chosen by the plaintiff has few connections to the disaster.**
	The Interest in Trying the Case in a Forum Familiar with the Applicable Law	**Favored trying the case in India, as Indian law likely applied.**	**Favors trying the case in Guyana, as the parties agree that Guyanese law applies.**

* Shaded factors favor dismissal; Italicized factors favor not dismissing.