

# NOTES

## ZOOMING OUR WAY OUT OF THE FORUM NON CONVENIENS DOCTRINE

*Christabel Narh\**

*The effects of the pandemic have shed light on the evolution of technology in the legal space, including the use of technology in videoconferencing proceedings and facilitating court procedures. Despite the benefits associated with technology, the rapid adoption of videoconferencing proceedings in courts may have unprecedented impacts on the relevance and practicality of the forum non conveniens doctrine. Additionally, the drastically different approaches that federal courts have taken in response to the disproportionate geographic effects of the pandemic may give way to forum shopping. Plaintiffs may be more incentivized to bring their cases to forums that allow for videoconferencing proceedings as a strategic way to circumvent a defendant's potential forum non conveniens argument in a motion to dismiss.*

*This Note argues that videoconferencing technology allows courts to effectively transcend the restrictions of geography while mitigating arguments about the relative convenience of different forums. Creating more uniform rules for videoconferencing proceedings will ensure easier predictability and uniformity in the forum non conveniens analysis. Specifically, this Note recommends that Congress and the courts mandate standardized technological videoconferencing requirements and adopt the original understanding of the forum non conveniens doctrine for lower courts to more explicitly consider the benefits of technology when making a forum non conveniens determination.*

---

\* J.D. Candidate 2023, Columbia Law School. With thanks to my advisor, Professor Bert Huang, for his guidance and insight, Mayowa Olujohungbe, for her initial reads and support, and to the entire staff of the *Columbia Law Review*, particularly Valeria Flores and Ali Jiménez, for their excellent editorial support and encouragement. To my sister, Debbie Narh, for being my biggest fan and greatest teacher. To my partner, Emilio Méndez, for more than I know how to express. Finally, to my parents, Kate and Herbert Narh, and to God, whose endless love, support, and encouragement made this possible.

INTRODUCTION .....	762
I. THE FORMALIZATION AND EXPANSION OF THE FORUM NON CONVENIENS DOCTRINE.....	769
A. The Historical Development of Forum Shopping and the Forum Non Conveniens Doctrine .....	769
1. The <i>Gilbert</i> Decision.....	771
2. <i>Piper</i> 's Expansion and Refinement of the Forum Non Conveniens Doctrine .....	773
3. Comparing the Forum Non Conveniens Doctrine to Venue Transfer Under § 1404(a). .....	774
B. Forum Non Conveniens Dismissals in Practice: A Two-Step Analysis .....	775
1. Available Alternative Forum.....	776
2. Deference To Domestic Plaintiffs .....	777
C. Policies Surrounding Forum Non Conveniens Doctrine .....	778
II. EFFECTS OF VIDEOCONFERENCING PROCEEDINGS ON FORUM NON CONVENIENS AND FORUM SHOPPING.....	780
A. The Good and the Bad: The Impact of the Pandemic on Videoconferencing Proceedings .....	781
B. Pandemic-Created Disparities in Orders Governing Videoconferencing Proceedings .....	783
C. The Intersection of Videoconferencing Proceedings and the Forum Non Conveniens Doctrine .....	786
1. Private Factors Assessed.....	788
2. Public Factors Assessed.....	791
3. Deference to U.S. Plaintiffs' Choice of Forum Assessed.....	792
4. Videoconferencing Proceedings by the Foreign Forum Assessed.....	793
D. Forum Shopping and Videoconferencing Proceedings: Choosing the Most Favorable Court .....	794
III. CREATING MORE UNIFORMITY IN VIDEOCONFERENCING HEARINGS...	795
A. Adopt Uniform Videoconferencing Proceeding Rules Across the Nation.....	795
1. Framework of CARES Act Applied to the FRCP in the Context of Videoconferencing Proceedings .....	796
2. Videoconferencing Proceedings Operations and Efficiencies.....	799
B. Restore <i>Gilbert</i> 's Convenience Reading and Restructure the Balance of Consideration Factors.....	800
CONCLUSION.....	803

*“In the age of Zoom, is any forum more non conveniens than another? Has a venerable doctrine now gone the way of the VCR player . . . ?”<sup>1</sup>*

#### INTRODUCTION

Despite increased COVID-19 vaccination rates since the virus emerged,<sup>2</sup> the lingering effects of the pandemic may still force the federal judiciary to address its newly found ties to videoconferencing proceedings.<sup>3</sup> Amid the rapid spread of the COVID-19 virus following President Donald J. Trump’s national emergency declaration in 2020,<sup>4</sup> the Centers for Disease Control and Prevention encouraged practicing social distancing and minimizing person-to-person contact.<sup>5</sup> After the declaration, most states took further action by implementing social

---

1. *Kore Meals LLC v. Freshii Dev. LLC*, 2021 CanLII 2896, para. 1 (Can. Ont. Sup. Ct. J.) (noting the impact of videoconferencing on Canada’s forum non conveniens doctrine).

2. See Nambi Ndugga, Latoya Hill, Samantha Artiga & Sweta Haldar, *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, KFF (July 14, 2022), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity> [<https://perma.cc/JST8-4W5T>] (finding that seventy-eight percent of the U.S. population has received at least one dose of a COVID-19 vaccine).

3. In response to the pandemic, many courts started embracing videoconferencing proceedings to further the administration of justice and ease their growing backlogs. See Scott Dodson, *Videoconferencing and Legal Doctrine*, 51 Sw. L. Rev. 9, 12 (2021) (noting the widespread use of videoconferencing during the pandemic). Before the pandemic, some federal courts, under the judge’s discretion, utilized teleconferencing and videoconferencing technology to conduct various court proceedings. Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Nw. U. L. Rev. 1875, 1882 (2021) (“[T]he use of video and phone to hold remote proceedings has been part of the legal landscape for decades . . .”); see also, e.g., *Soloff v. Aufman*, No. 17cv1500, 2018 WL 3474639, at \*2 (W.D. Pa. July 18, 2018) (explaining that the plaintiff’s motion to appear via Skype, FaceTime, or conference call at the Rule 26(f) conference was granted by the court); *Staley v. U.S. Bank Nat’l Ass’n*, No. 1:10-cv-00591-BLW, 2013 WL 393325, at \*2 (D. Idaho Jan. 31, 2013) (“[T]he Court agrees with Staley that [the witness] is probably a critical witness, and it would be better if [the witness] could testify at trial, even if done via video conference.”).

4. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). President Joseph Biden also issued a notice continuing the national emergency concerning the COVID-19 pandemic on February 24, 2021. *Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, 86 Fed. Reg. 11,599 (Feb. 24, 2021). The extension of the COVID-19 national emergency through February 2023 remains despite President Biden’s recent announcement in a *60 Minutes* interview that the “[COVID-19] pandemic is over.” See Kanishka Singh, *U.S. Extends COVID-19 Public Health Emergency Declaration*, Reuters (Oct. 13, 2022), <https://www.reuters.com/world/us/us-extends-covid-19-public-health-emergency-declaration-2022-10-13/> [<https://perma.cc/N7C4-E86N>] (noting that while the toll of the pandemic has diminished significantly, hundreds of people a day continue to die from COVID-19 in the United States).

5. Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States*, February 24–April 21, 2020, 69 *Morbidity & Mortality Wkly. Rep.* 551, 551–55 (2020).

distancing and mask mandates.<sup>6</sup> Shortly thereafter, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act.<sup>7</sup> The Act officially gave chief judges of district courts the authority to permit “video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available” for certain criminal proceedings.<sup>8</sup> The Act also allocated six million dollars to the courts of appeals, district courts, and other judicial services to adapt to the novel virus.<sup>9</sup> During that same period, the Judicial Conference, a national policymaking body for the federal courts, temporarily approved court teleconferencing for certain criminal and civil proceedings.<sup>10</sup> Following this announcement, federal courts disjointly issued guidance on closures and the availability of videoconferencing proceedings.<sup>11</sup> In response to the pandemic, some

---

6. 2020 COVID-19 State Restrictions, Re-Openings, and Mask Requirements, Nat’l Acad. for State Health Pol’y, <https://nashp.org/2020-covid-19-state-restrictions-re-openings-and-mask-requirements/> [<https://perma.cc/GWG2-69RB>] (last updated Jan. 11, 2021); States’ COVID-19 Public Health Emergency Declarations and Mask Requirements, Nat’l Acad. for State Health Pol’y (Apr. 7, 2020), <https://www.nashp.org/governors-prioritize-health-for-all/> [<https://perma.cc/LZD7-UWB8>] (last updated Feb. 28, 2023).

7. CARES Act, Pub. L. No. 116-136, § 15002(b)(1), 134 Stat. 281, 528 (2020).

8. *Id.* The authorization is temporary and will expire when the state of emergency ends. *Id.* § 15002(b)(5).

9. *Id.* § 15001 (“For an additional amount for ‘Salaries and Expenses’, \$6,000,000, to prevent, prepare for, and respond to coronavirus, domestically or internationally . . .”).

10. Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic, U.S. Cts. (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic> [<https://perma.cc/S2J6-VXEY>] (“[T]he Judicial Conference of the United States has temporarily approved the use of video and teleconferencing for certain criminal proceedings and . . . for civil proceedings during the COVID-19 national emergency.”). For reference, the Judicial Conference is composed of the Chief Justice of the United States, who serves as the presiding officer, the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit. See About the Judicial Conference, U.S. Cts., <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [<https://perma.cc/DU2G-T33H>] (last visited Oct. 13, 2022).

11. See Court Orders and Updates During COVID-19 Pandemic, U.S. Cts., <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> [<https://perma.cc/V6VV-26X2>] [hereinafter U.S. Cts., Court Orders and Updates] (last updated Feb. 21, 2023) (“Below is a list of links to all federal court websites, as well as links to court orders and other information posted to the courts’ websites regarding the COVID-19 pandemic and court business.”). Although this Note recognizes a varying range of terms associated with the technological options that have expanded due to COVID-19, it—like Richard Susskind—adopts generic terminology to avoid confusion. This Note uses “videoconferencing hearings,” “proceedings,” or “technology” to refer to and encompass audio hearings, video hearings, videoconferencing hearings, virtual hearings, or remote hearings that occur without participants physically attending the proceedings in person. For reference, see Richard Susskind, *The Future of Courts*, Practice (July/Aug. 2020) <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/remote-courts/the-future-of-courts/> [<https://perma.cc/6C8E-G2FU>].

courts suspended civil hearings and jury trials, while others continued to conduct in-person and videoconferencing proceedings.<sup>12</sup>

Thus, the pandemic has dramatically transformed how federal courts operate in the United States. Videoconferencing proceedings have become the new normal, court deadlines and filings are more flexible than before, and the use of technology in depositions and discovery has increased.<sup>13</sup> With federal judges consistently exercising their discretion to conduct court proceedings via videoconferencing,<sup>14</sup> courts have increasingly turned to technology to administer essential court hearings and mitigate limitations to courtrooms.<sup>15</sup> Federal courts have taken drastically different approaches in adopting and using videoconferencing proceedings, partly due to the pandemic's disparate effects on various geographical regions.<sup>16</sup> Some courts use online-based platforms, like

---

12. See, e.g., Eighth Amended General Order, In re: Coronavirus COVID-19 Public Emergency, No. 20-0012, at 1 (N.D. Ill. Nov. 13, 2020) (ordering the substitution of remote telephone or videoconference for in-person hearings unless an in-person hearing is required by law in the Northern District of Illinois); District Court General Order, In re: Court Operations During the COVID-19 Pandemic, No. 2020-19, at 1 (D. Colo. Nov. 5, 2020) (ordering the delay of in-person trial proceedings in the District of Colorado); Seventh Amended General Order, In re: COVID-19 Public Emergency, No. 20-01, at 1 (C.D. Ill. Oct. 30, 2020) (ordering the suspension of jury trials in the Central District of Illinois).

13. See Herbert B. Dixon Jr., *Pandemic Potpourri: The Legal Profession's Rediscovery of Teleconferencing*, Judges' J., Fall 2020, at 37, 38–39 [hereinafter Dixon, *Pandemic Potpourri*] (“[L]awyers are nevertheless being forced to proceed with remote depositions at an increasing rate.”).

14. See Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, Bloomberg L. (July 30, 2020), <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change> [<https://perma.cc/3Q65-RQ9Y>] (“[F]ederal courts have autonomy to offer virtual options in many civil proceedings.”); *Trial by Zoom: Virtual Trials in the Time of COVID-19*, Eversheds Sutherland (Feb. 11, 2021), <https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/239466/Trial-by-Zoom-virtual-trials-in-the-time-of-COVID-19> [<https://perma.cc/K3CN-LULD>].

15. See Phil Goldstein, *Courts Have Embraced Videoconferencing Amid the Pandemic*, StateTech (Aug. 18, 2020), <https://statetechmagazine.com/article/2020/08/courts-have-embraced-videoconferencing-amid-pandemic> (on file with the *Columbia Law Review*) (“[C]ourt systems across the country have been conducting proceedings via videoconferencing technology as government buildings and courthouses closed and physical distancing guidelines have been implemented.”); Reed & Alder, *supra* note 14 (emphasizing that the legal profession has rediscovered videoconferencing technology because of the pandemic); *supra* note 10 and accompanying text.

16. See Madison Alder, Jasmine Ye Han & Andrew Wallender, *Federal Courts Respond to COVID-19: Live Map*, Bloomberg L. (Mar. 20, 2020), <https://news.bloomberglaw.com/us-law-week/arguments-axed-access-limited-courts-respond-to-covid-19-map> [<https://perma.cc/6QCH-UZXW>] (last updated Feb. 23, 2022) (tracking how federal courts are adjusting their operations to the COVID-19 virus). For example, Judge Kristen L. Mix noted that it seemed like Colorado is “on a different planet” because video technology was not as incorporated into Colorado’s court proceedings when compared to other districts that have used videoconferencing technology efficiently and effectively. Tom McParland, *Here to Stay: Expect Remote Hearings to Become Post-Pandemic Fixture*, Panelists Say, N.Y.L.J. (July 14, 2021),

Zoom, to enable all court participants—including attorneys, judges, court staff, and litigants—to appear remotely.<sup>17</sup> These courts have noted that videoconferencing technology in courts has reduced the burden of litigation that both domestic and international litigants face in the United States.<sup>18</sup> Many courts are now increasingly conscious—and similarly skeptical—of the benefits that technology, like Zoom, has provided in the administration of justice.

The increased use of videoconferencing proceedings in federal civil litigation, in turn, raises critical questions about the continued relevance of *forum non conveniens*, a traditional common law procedural doctrine.<sup>19</sup> The *forum non conveniens* doctrine is not to be confused with its codified sister doctrine of venue transfer under 28 U.S.C. § 1404(a), which only applies to cases in which the transferee forum is within the U.S. federal court system.<sup>20</sup> Defendants can raise *forum non conveniens* motions to dismiss a lawsuit during the first stage of the litigation process when responding to a plaintiff's complaint.<sup>21</sup> Courts are free to hear and rule on a defendant's *forum non conveniens* claim even if the court does

---

<https://www.law.com/newyorklawjournal/2021/07/14/here-to-stay-expect-remote-hearings-to-become-post-pandemic-fixture-rakoff-says/> (on file with the *Columbia Law Review*).

17. See Dixon, *Pandemic Potpourri*, supra note 13, at 38 (describing how judges, lawyers, parties, and jurors participated in a videoconference civil jury trial in a federal court in Seattle, Washington); see also Jenia I. Turner, *Remote Criminal Justice*, 53 *Tex. Tech. L. Rev.* 197 (2021).

18. See, e.g., *SAPS, LLC v. EZCare Clinic, Inc.*, No. 19-11229, 2020 WL 1923146, at \*2 (E.D. La. Apr. 21, 2020) (“This court will not require parties to appear in person with one another in the midst of the present pandemic. Nor is it feasible to delay the depositions until some unknown time in the future. . . . The depositions proposed here will be taken by video-conference software . . .”); *United Coals, Inc. v. Attijariwafa Bank*, No. 1:19-cv-95, 2020 WL 1866426, at \*7 n.8 (N.D. W. Va. Apr. 14, 2020) (“As counsel and the Court endeavor to litigate and adjudicate during the COVID-19 outbreak, the world in which lawyers toil for depositions and the like has shrunk even more than before the pandemic with the prevalence of Zoom, FaceTime, Skype and other virtual discovery platforms.”).

19. See Marc O. Wolinsky, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 *U. Chi. L. Rev.* 373, 374 (1980) (noting that *forum non conveniens* grants courts discretion to decline to hear certain cases); Scott Dodson, Lee H. Rosenthal & Christopher L. Dodson, *The Zooming of Federal Civil Litigation*, *Judicature*, Fall/Winter 2020–21, at 13, 14.

20. See Jeffrey B. Greenspan, *Seventh Circuit Reminds Litigants that Doctrine of Forum Non Conveniens Still “Has Continuing Application in Federal Courts”*, *Am. Bar Ass’n* (Feb. 13, 2018), <https://www.americanbar.org/groups/litigation/committees/trial-practice/practice/2018/mueller-v-apple-leisure-corp/> [<https://perma.cc/FU8N-MHAN>] (explaining that “28 U.S.C. 1404(a) is a codification of the doctrine of *forum non conveniens* for cases in which the transferee forum is within the federal court system”).

21. 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1352 (3d ed. 2022) (stating that a federal court will grant a motion to dismiss for *forum non conveniens* in instances where “the alternative forum is a state court or the court of a foreign country, or situations in which there is no alternative federal forum to which the action could be transferred”).

not retain personal or subject-matter jurisdiction over the case.<sup>22</sup> Federal courts commonly rely on the *forum non conveniens* doctrine to dismiss a lawsuit from the U.S. legal system to a more convenient international forum available for litigation.<sup>23</sup> In doing so, courts tend to focus on factors related to the parties' convenience and the adequacy of the remedy in the potential non-U.S. forum.<sup>24</sup>

Although the pandemic has subsided, and some courts are returning to business as usual, some judges continue to use videoconferencing proceedings and argue for the total adoption of videoconferencing technology in civil litigation. In contrast, others caution against the overwhelming use of videoconferencing technology in court proceedings.<sup>25</sup> The disparate and discretionary application of videoconference technology due to the lack of uniform, formal standards governing its widespread use raises significant concerns.<sup>26</sup> Consequently, the varying use of videoconferencing proceedings among federal district courts could result in far-reaching consequences across the court system by mitigating some of the convenience factors that impact the *forum non conveniens* calculus and thereby transforming the practicality of the doctrine.<sup>27</sup> Currently, research on the impact of videoconferencing proceedings on civil litigation is scarce, due to the legal field's initial resistance to adopting technological changes.<sup>28</sup> In addition, existing

---

22. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (“[W]here subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.”); 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3828 (4th ed. 2022).

23. See Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 Tul. L. Rev. 309, 311 (2002) [hereinafter Davies, *Change the Federal Forum Non Conveniens Analysis*] (“[Forum non conveniens motions] are motions to dismiss a claim that properly falls within the court’s jurisdictional rules, on the ground that it could be tried more conveniently in another country.”).

24. See *id.* at 316, 323 (explaining the *forum non conveniens* analysis that federal courts conduct).

25. Bannon & Keith, *supra* note 3, at 1889–93 (emphasizing that the rapid adoption of videoconferencing proceedings has further accentuated a digital divide).

26. See Sarah L. Büthe & Henning H. Krauss, *COVID-19 and the Courts: U.S. and German Courts Managing Civil Dockets in a Crisis*, 29 Tul. J. Int'l & Compar. L. 213, 220 (2021) (“While the federal courts have nearly unanimously used technology to enable physically distanced hearings, their approaches have varied. They use a bevy of different video conferencing platforms, including FaceTime, Cisco Jabber, Skype, and Zoom, with varying degrees of specificity and focus on telephonic versus video.”).

27. See generally Bannon & Keith, *supra* note 3 (arguing that remote courts have provided greater access to justice while also becoming instruments of unfairness depending on rules and procedures that courts have in place and the nature of the court proceedings).

28. See Alicia Bannon & Janna Adelstein, Brennan Ctr. for Just., *The Impact of Video Proceedings on Fairness and Access to Justice in Court 2*, 9 (2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> [<https://perma.cc/8UBR-E38Z>] (“There is only limited research on the benefits and harms of video proceedings with respect to access to the

scholarship primarily focuses on criminal and immigration proceedings because of the more significant constitutional considerations related to those proceedings.<sup>29</sup> This Note seeks to fill the gaps in existing scholarship by examining the impact of videoconferencing proceedings on the forum non conveniens doctrine, especially given the pandemic's unprecedented disruption to the court system.<sup>30</sup> Ultimately, this Note proposes a series of modifications in videoconferencing proceedings administered by federal courts applying the forum non conveniens doctrine.

This Note proceeds as follows: Part I summarizes the development and practice of the forum non conveniens doctrine in the United States. Part II discusses the growing use of videoconferencing proceedings in courts during the COVID-19 pandemic and explains the impact on the forum non conveniens doctrine. Part II also examines the disparate use of videoconferencing proceedings among federal courts and the effect of this disparity on forum shopping. Finally, Part III concludes that Congress and the Supreme Court should establish standardized videoconferencing technological requirements, and courts should explicitly consider technology's benefits and detriments when making a forum non conveniens determination.

---

courts."); Dixon, *Pandemic Potpourri*, supra note 13, at 37 (emphasizing that the legal profession has not easily embraced technological opportunities); Susskind, supra note 11 (noting the numerous calls for court transformation using technology that went unanswered before the pandemic); Robert Storace, *Zoom Forced Me to Quit: Lawyer Says Technology Accelerated His Retirement*, Conn. L. Tribune (July 28, 2021), <https://www.law.com/ctlawtribune/2021/07/28/zoom-forced-me-to-quit-lawyer-says-technology-accelerated-his-retirement/> (on file with the *Columbia Law Review*) (finding that some lawyers have struggled to adjust to technological changes).

29. See Lucy Lang, *Virtual Criminal Justice May Make the System More Equitable*, *Wired* (July 1, 2020), <https://www.wired.com/story/opinion-virtual-criminal-justice-may-make-the-system-more-equitable/> [<https://perma.cc/ZM3B-DYAQ>] (highlighting that the transition to videoconferencing engendered innovative practices that have proved to be more efficient and should be continued even after the pandemic ends). Others have objected to the use of videoconferencing in these proceedings. Lisa Bailey Vavonese, Elizabeth Ling, Rosalie Joy & Samantha Kobor, *How Video Changes the Conversation: Social Science Research on Communication Over Video and Implications for the Criminal Courtroom 1* (2020), [https://www.courtinnovation.org/sites/default/files/media/document/2020/Monograph\\_RemoteJustice\\_12032020.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2020/Monograph_RemoteJustice_12032020.pdf) [<https://perma.cc/AG3Q-VYQT>] (highlighting the lack of empirical research on the use and impact of video in courtrooms and especially cautioning against the permanent adoption of videoconferencing for high-stakes criminal proceedings when an individual's liberty is at risk).

30. This Note focuses primarily on federal rather than state civil litigation to allow for a more consistent analysis governing the application of forum non conveniens as a federal procedural common law doctrine. States continue to have different forum non conveniens policies; some refuse to recognize the doctrine at all. For more information about state doctrines on forum non conveniens, see generally William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 *Duke L.J.* 1163 (2023).



## I. THE FORMALIZATION AND EXPANSION OF THE FORUM NON CONVENIENS DOCTRINE

This Part provides background on the forum non conveniens doctrine and forum shopping in the transnational context. Section I.A examines the development of the common law doctrine of forum non conveniens in American courts after *Gulf Oil Corp. v. Gilbert*.<sup>31</sup> Next, section I.B. discusses the two-part test federal courts typically use in their forum non conveniens analysis. Finally, section I.C. addresses the various policy arguments for and against the continued use of forum non conveniens, including the doctrine's unfair treatment of foreign plaintiffs.<sup>32</sup>

### A. *The Historical Development of Forum Shopping and the Forum Non Conveniens Doctrine*

Courts designed the forum non conveniens doctrine to control forum shopping tendencies among domestic and foreign litigants.<sup>33</sup> Forum shopping occurs when litigants are motivated to choose one forum over another because they believe one forum will provide a more favorable outcome for their case than another forum.<sup>34</sup> “Forum shopping depends on two conditions: First, as the foregoing definition implies, more than one court must be potentially available for resolving the plaintiff’s claim. Second, the potentially available legal systems must be heterogeneous.”<sup>35</sup> Forum shopping is widely dynamic and depends upon a plaintiff’s expectations about court access and choice-of-law decisions.<sup>36</sup> Essentially, “the higher a plaintiff’s expectation that a particular court will make a favorable court access decision, the more likely she is to file a lawsuit in that court.”<sup>37</sup> In recent years, the Supreme Court has utilized various procedural doctrines—such as personal jurisdiction, subject-matter jurisdiction, and venue—to control forum shopping tendencies

---

31. 330 U.S. 501 (1947).

32. This Note defines “foreign plaintiffs” as non-U.S. nationals.

33. See, e.g., Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 *Cornell L. Rev.* 481, 498 (2011).

34. *Id.* at 485. Plaintiffs commencing litigation are given great flexibility in deciding where to commence the lawsuit because they are considered the “master of the claim.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). For example, a plaintiff may consider a jurisdiction’s procedural rules or choice-of-law rules in assessing where best to bring their claim. A plaintiff may also look to litigate in the United States in comparison to other countries because of various generous factors of the American legal system, such as jury trials, extensive pretrial discovery, and the possibility of punitive damages. For more in-depth examples of forum shopping, see *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

35. Whytock, *supra* note 33, at 486 (footnote omitted).

36. *Id.* at 487.

37. *Id.*

among litigants.<sup>38</sup> Forum non conveniens, a widely known procedural doctrine that the court uses aggressively, may be one of forum shopping's greatest enemies.<sup>39</sup>

The well-established common law doctrine of forum non conveniens is a discretionary power that infuses a district court with the ability to dismiss a case even if it could exercise jurisdiction and the venue is otherwise proper.<sup>40</sup> Beyond acting as a safeguard against instances in which a plaintiff successfully obtains jurisdiction and venue in a federal court that is not a proper forum to hear the case, the doctrine is rooted in preserving judicial efficiency, addressing forum shopping plaintiffs, and ensuring that foreign plaintiffs do not impose undue inconvenience upon the defendant and the court.<sup>41</sup> Section I.A.1 discusses how past Supreme Court decisions have defined the workings and limits of the forum non conveniens doctrine.

---

38. Allan R. Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L. Rev. 781, 786 (1985) (explaining that the hierarchy of procedural limitations on courts' authority, such as jurisdiction, venue, and choice of law, is redundant and problematic since courts have not been provided with meaningful guidance on when those limitations apply).

39. See Maggie Gardner, Retiring Forum Non Conveniens, 92 N.Y.U. L. Rev. 390, 404 (2017) ("The *Gilbert* test [adopting a federal forum non conveniens doctrine] was a pragmatic solution for a particular house-keeping problem faced by the federal courts in the years following *International Shoe Co. v. Washington*, as the expansion of available forums enabled greater forum shopping by plaintiffs." (footnote omitted)); Catherine Cervone, Note, Recalibrating the Forum Non Conveniens Analysis: The Effects of Technology on Transporting Evidence, 18 Nw. J. Tech. & Intell. Prop. 91, 95 (2020) ("Scholars suggest that the [forum non conveniens common law doctrine] was created in response to the Supreme Court's decision in *International Shoe* and reflected a desire to protect defendants against the floodgates of forum-shopping."); Maria A. Mazzola, Note, Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of *Reyno*, 6 Fordham Int'l L.J. 577, 577-78 (1982) ("The likelihood of dismissal on *forum non conveniens* grounds has been enhanced by the holding of the United States Supreme Court in *Piper Aircraft Co. v. Reyno*."). For an example of the application of the forum non conveniens doctrine, see *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002); see also Leah B. Moon, Comment, Should They Stay or Should They Go: Applying the Forum Non Conveniens Doctrine to Foreign Plaintiffs Injured Abroad in *Abad v. Bayer Corporation*, 5 Seventh Cir. Rev. 1, 2 (2009) ("The doctrine of forum non conveniens permits U.S. courts to dismiss the foreign plaintiff's case under certain circumstances.").

40. See Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 320 (6th ed. 2018) (defining forum non conveniens as "a common law doctrine that permits a court to decline to exercise judicial discretion if an alternative forum would be substantially more convenient or appropriate").

41. See Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 1 (1929) (noting that the use of the doctrine of forum non conveniens is an efficient method for "relieving calendar congestion by partially diverting at its source the flood of litigation by which our courts are being overwhelmed"); Whytock, *supra* note 33, at 485; Moon, *supra* note 39, at 4 ("By allowing courts to dismiss a case, the doctrine protects against forum shopping plaintiffs. Through dismissal, the court can prevent these foreign plaintiffs from imposing undue inconvenience on the defendant and the court." (footnote omitted)).

1. *The Gilbert Decision*. — Although early U.S. admiralty decisions indicate that judges were already applying forum non conveniens in their courts,<sup>42</sup> it was not until 1947 that the Supreme Court adopted and defined federal forum non conveniens in *Gulf Oil Corp. v. Gilbert*.<sup>43</sup> *Gilbert* centered on a dispute involving a citizen of Virginia and a Pennsylvania-formed corporation registered to do business in Pennsylvania and New York.<sup>44</sup> The Virginian plaintiff sought recovery from a fire allegedly caused by the defendant's negligence in delivering gasoline.<sup>45</sup> While the tort occurred in Virginia, and most of the witnesses lived in Virginia, the plaintiff sued in the Southern District of New York (SDNY); the court based subject-matter jurisdiction on diversity of citizenship.<sup>46</sup> Although the district court dismissed the claim based on forum non conveniens without hearing the merits of the case, the Second Circuit reversed this decision after adopting a more restrictive view of the forum non conveniens doctrine than the district court.<sup>47</sup>

On certiorari, the Supreme Court reversed the Second Circuit's decision, noting the discretionary nature of forum non conveniens and declining to expand on which particular instances would warrant exercising the doctrine.<sup>48</sup> The Court reversed because it agreed that the events leading to the litigation had occurred in Virginia rather than New York.<sup>49</sup> The witnesses and litigants were based in Virginia or conducted business in Virginia; thus, the Supreme Court found that it was proper for the district court to exercise its discretion to decline jurisdiction and allow for the Virginia courts to adjudicate the case.<sup>50</sup> The Court also established that the plaintiff's forum choice should rarely be disturbed unless there is a strong showing of private and public interest factors weighing in favor of dismissal.<sup>51</sup> Thus, the Court noted that forum non conveniens dismissals should be upheld only in exceptional circumstances where a plaintiff is

---

42. See Gardner, *supra* note 39, at 402 (asserting that admiralty courts started administering the doctrine eventually known as forum non conveniens even before land courts).

43. 330 U.S. 501, 504 (1947) ("This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances."). While the *Gilbert* case is not the first Supreme Court case to discuss forum non conveniens, many courts and practitioners hold *Gilbert* to be the seminal case on the doctrine. Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 Ind. L.J. 1059, 1062 & n.13 (2010).

44. *Gilbert*, 330 U.S. at 502–03.

45. *Id.*

46. *Id.*

47. *Id.* at 503.

48. *Id.* at 508.

49. *Id.* at 512.

50. *Id.* at 503.

51. *Id.* at 508; see also *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 523–25 (1947) (finding that a plaintiff's choice of forum should not be disturbed except upon clear showing of facts establishing oppressiveness, vexation, or inappropriateness).

“tempted to bring suit in a forum that is inconvenient for their adversaries, even if the choice inconveniences the plaintiff.”<sup>52</sup> In creating this balance of considerations test, the Court provided minimal guidance to the lower courts on how to weigh these factors, instead leaving it to the discretion of the district courts.<sup>53</sup>

The nonexclusive private interest factors are related to convenience for the litigants and 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; . . . all other practical problems that make trial of a case easy, expeditious and inexpensive[;] . . . the [enforceability] of a judgment if one is obtained[;] . . . [the] relative advantages and obstacles to fair trial[;] [and determining if] the plaintiff . . . [is working to] ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.<sup>54</sup>

The public interest factors focus on the court systems, local citizenry, and litigants. The Court specifically explained:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.<sup>55</sup>

Together, these factors provide the basis for determining whether the balance of considerations favors adjudicating the case in the alternative foreign forum or the current U.S. forum. It was not until the *Piper Aircraft*

---

52. See Moon, *supra* note 39, at 6 (citing *Gilbert*, 330 U.S. at 507).

53. *Gilbert*, 330 U.S. at 508 (“Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts . . .”). For more information regarding the effects of this limited guidance to the lower courts on the forum non conveniens doctrine, see Stein, *supra* note 38, at 785 (“[F]orum non conveniens decisions tend to be a mechanical litany of the seminal Supreme Court language followed by a summary conclusion. The result has been a crazy quilt of ad hoc, capricious, and inconsistent decisions.” (footnote omitted)).

54. *Gilbert*, 330 U.S. at 508–09 (citing Blair, *supra* note 41, at 2).

55. *Id.*

*Co. v. Reyno* decision that courts started to consider other factors apart from the balance of considerations in the *forum non conveniens* calculus.<sup>56</sup>

2. *Piper's Expansion and Refinement of the Forum Non Conveniens Doctrine.* — Thirty-five years after *Gilbert*, the Supreme Court addressed *forum non conveniens* again in another landmark decision centered around foreign plaintiffs and domestic defendants: *Piper*.<sup>57</sup> In its voyage from England to Scotland, a small commercial aircraft crashed in the Scottish Highlands, killing the pilot and all five passengers onboard.<sup>58</sup> The plaintiff, a personal representative for the estates of several Scottish residents who died in the crash, filed wrongful death actions in California state court against a Pennsylvania aircraft manufacturer and an Ohio propeller manufacturer.<sup>59</sup> First, the defendants successfully removed the case to the federal district court in California.<sup>60</sup> Then, the California district court transferred the action to a Pennsylvanian district court under § 1404(a).<sup>61</sup> Soon after, the defendants moved to dismiss the suit on *forum non conveniens* grounds, arguing that the case should be litigated in an international forum rather than a U.S. forum.<sup>62</sup> Although, the district court granted the motion, the Third Circuit reversed, finding that the United States was an adequate forum because of the possibility that the international forum would use a law unfavorable to the plaintiffs to adjudicate the case.<sup>63</sup>

On certiorari, Justice Thurgood Marshall, writing for the majority, clarified that the main purpose of the doctrine is to “ensure that the trial is convenient” for all the litigants involved.<sup>64</sup> Differences in the substantive laws across forums, including international forums, may be given significant weight in a *forum non conveniens* analysis only “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>65</sup> In other words, when a defendant makes a

---

56. 454 U.S. 235 (1981); see also Born & Rutledge, *supra* note 40, at 324 (“[*Piper*] is the leading contemporary statement of the *forum non conveniens* doctrine.”).

57. *Piper*, 454 U.S. at 238–40.

58. *Id.* at 238–39.

59. *Id.* at 239–40.

60. *Id.* at 240.

61. *Id.* at 240–41.

62. *Id.* at 241; Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 *Tex. Int'l L.J.* 467, 479 (2002) (“The plaintiff admitted forum shopping in order to get more favorable laws regarding liability, capacity to sue, and damages.”).

63. *Piper*, 454 U.S. at 241–46.

64. *Id.* at 256; see also Moon, *supra* note 39, at 12 (“The Court’s definition of ‘inconvenience’ to the defendant evolved from harassment or vexation in *Gilbert* to the broader notion of a merely inappropriate forum choice.”).

65. See *Piper*, 454 U.S. at 254 (“We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry.”). But the Court explained that a *forum non conveniens* dismissal may not be barred *solely* because of the possibility of an unfavorable change of law. *Id.* at 250–54. In its analysis of

forum non conveniens motion, the Court must examine whether a non-U.S. forum will provide a “minimally adequate remedy” for the dispute.<sup>66</sup>

The Court also gave lower courts direction in terms of how to treat both domestic and foreign plaintiffs, noting that the “ordinarily . . . strong presumption in favor of the plaintiff’s choice of forum” is lesser when the plaintiff is a non-U.S. national.<sup>67</sup> Thus, the Court preserved the *Gilbert* factors while refining the forum non conveniens doctrine to incorporate the requirement of an adequate alternative forum and greater deference to a U.S. national’s choice of a U.S. forum.<sup>68</sup> Accordingly, federal courts faced with forum non conveniens motions typically conduct a twofold analysis: (1) whether the proposed non-U.S. court can provide the plaintiff with an adequate, available alternative remedy, and (2) whether the dispute could manifestly be more conveniently litigated in a non-U.S. court based on the *Gilbert* factors.<sup>69</sup>

3. *Comparing the Forum Non Conveniens Doctrine to Venue Transfer Under § 1404(a)*. — After *Gilbert* but before *Piper*, Congress enacted 28 U.S.C. § 1404(a), a venue transfer statute that codified the forum non conveniens doctrine in the context of transfers between U.S. federal courts.<sup>70</sup> Under 28 U.S.C. § 1404(a), “[f]or the convenience of parties and witnesses, in the interest of justice, a [U.S. federal] district court may transfer any civil action to any other [U.S. federal] district or division where it might have been brought.”<sup>71</sup> Rather than dismissing a case outright because another U.S. federal court is more convenient, § 1404(a) empowers federal courts with sound discretion to transfer cases among themselves.<sup>72</sup> The statutory factors that courts must consider in making § 1404(a) decisions are similar to those mentioned in *Gilbert*, including the convenience of parties and witnesses.<sup>73</sup>

While courts initially “held that § 1404(a) was nothing more than a codification of forum non conveniens,” the differences between the two

---

forum non conveniens, the *Piper* Court applied *Gilbert* to the suit at hand, although it involved foreign plaintiffs. *Id.* at 255–61.

66. David Epstein & Charles S. Baldwin, IV, *International Litigation* § 1.03 (4th ed. 2010).

67. *Piper*, 454 U.S. at 255–56.

68. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–12 (1947).

69. See *Piper*, 454 U.S. at 254 n.22; Gardner, *supra* note 39, at 405–06 & tbl.1 (noting that the low bar of the adequate-and-available-alternative-forum requirement will be met so long as the defendant is amenable to process in the other forum and the plaintiff can access at least some remedy).

70. 28 U.S.C. § 1404(a) (2018); see also *Norwood v. Kirkpatrick*, 349 U.S. 29, 31–32 (1955) (explaining how § 1404(a) “revis[ed]” forum non conveniens by permitting transfer to another district court).

71. 28 U.S.C. § 1404(a).

72. Moon, *supra* note 39, at 9 (“[I]f a federal court decides that a domestic case is better off being heard in another federal court, the case is transferred pursuant to Section 1404(a) to the more appropriate federal court rather than dismissed under the forum non conveniens doctrine.”).

73. 28 U.S.C. § 1404(a).

doctrines grew to be well established.<sup>74</sup> For example, § 1404(a) does not cover forum non conveniens motions in which a party seeks to dismiss a federal court case whose alternative forum is a foreign judiciary.<sup>75</sup> In that instance, federal courts do not have the authority to transfer cases to non-U.S. courts outside the American judicial system—they must dismiss the case instead.<sup>76</sup> Thus, the federal statute supplants the common law doctrine of forum non conveniens only for transfers within the federal system.

The two doctrines also differ when it comes to applicable substantive law. Specifically, a venue transfer does not change the substantive law that a court would have applied in the original forum.<sup>77</sup> By contrast, federal courts cannot dictate to a non-U.S. court what law to apply to a case that the federal court has dismissed on forum non conveniens grounds.<sup>78</sup> Thus, compared to the forum non conveniens doctrine, federal courts have interpreted § 1404(a) in a narrower way that mitigates defendants' abilities to partake in forum shopping and transfer their case to another federal venue to obtain a more favorable applicable law.<sup>79</sup>

#### B. *Forum Non Conveniens Dismissals in Practice: A Two-Step Analysis*

A court must determine whether an alternative forum exists at the outset of any forum non conveniens inquiry.<sup>80</sup> This section will explore only the first consideration of the forum non conveniens analysis, which entails identifying what adequate alternative courts are available and the available procedures that may be comparable to the current forum.<sup>81</sup> The second prong of the forum non conveniens analysis, the balance of consideration factors, was adopted from *Gilbert* and will not be discussed

---

74. Note, Transfer of Civil Actions Under 28 U.S.C. § 1404(a), 36 Ind. L.J. 344, 347 (1961).

75. See *id.* (“[I]t is now settled that 1404(a) supplants forum non conveniens whenever the more convenient forum is another federal court where the action ‘might have been brought.’” (quoting *Collins v. Am. Auto. Ins. Co.*, 230 F.2d 416, 418 (2d Cir. 1956))).

76. 28 U.S.C. § 1404(a) (stating that a federal district court may transfer any civil action to any other “district” where it may have been brought, wherein “district” is limited only to U.S. territories).

77. James W. Curlee, Note, Law to be Applied Following Section 1404(a) Transfers, 18 Sw. L.J. 742, 744–45 (1964).

78. See Born & Rutledge, *supra* note 40, at 387–88. Instead, courts faced with a forum non conveniens determination have to examine whether the proposed non-U.S. forum is an available forum that provides an adequate remedy before they dismiss the action. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); Gardner, *supra* note 39, at 405–06 & tbl.1.

79. See Curlee, *supra* note 77, at 746 (“Whatever rights the plaintiffs acquired upon the filing of their suits will be unaffected by the transfer.”).

80. See *Piper*, 454 U.S. at 254 n.22; *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983) (noting that submission by a defendant “to the jurisdiction of an alternative forum renders that forum available for the purposes of forum non conveniens analysis”).

81. See *Piper*, 454 U.S. at 254 n.22.

in this section.<sup>82</sup> This section will also address the Court's view on deference to domestic and foreign plaintiffs. Unfortunately, the Supreme Court has provided little guidance on what constitutes an adequate alternative forum, resulting in broad interpretations and extensive litigation over this prong in the lower courts.<sup>83</sup>

1. *Available Alternative Forum.* — The *Piper* holding clarified that a forum non conveniens dismissal necessitates an adequate and available alternative forum.<sup>84</sup> Accordingly, the defendant must be “amenable to process” in another jurisdiction.<sup>85</sup> Various factors are critical to assessing an alternative forum's availability and adequacy. These include whether the foreign forum is unwilling to hear the case or whether the foreign forum lacks subject matter or personal jurisdiction to hear the case.<sup>86</sup> But even if a party is amenable to process in another jurisdiction, the alternative forum may still be deemed inadequate if no satisfactory remedy is available.<sup>87</sup>

Having an available alternative forum is not the only requirement for a forum non conveniens dismissal. Even if there appears to be an available foreign forum, the foreign forum must be able to grant the plaintiffs a fair and adequate opportunity to make out their claim and their dispute.<sup>88</sup> It is not enough that a plaintiff argues that the foreign forum is inadequate because the forum does not allow for recovery to the same extent as the

---

82. See *supra* section I.A.1.

83. See Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 *Rich. J. Global L. & Bus.* 513, 519 (2009) (“The Supreme Court . . . has given little guidance on how to conduct that analysis. The lack of clarity on what constitutes an adequate alternative forum contributes to the criticism surrounding the forum non conveniens doctrine.”); Samuels, *supra* note 43, at 1071 (“Courts have been left wide ambit to interpret that condition narrowly or broadly as they see fit.”); Andrew Filipour, *Comment, Forum Non Conveniens and the “Flat” Globe*, 33 *Emory Int'l L. Rev.* 587, 603 (2019) (“[T]he Supreme Court has offered little guidance as to what factors district courts should consider when making that initial determination [of an available alternative forum].”). See generally Megan Waples, *Note, The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 *Conn. L. Rev.* 1475, 1476 (2004) (“Without guidance on the [adequate forum] question, lower courts have applied a wide variety of standards and methods in evaluating the question of the adequate alternative forum. This inconsistency creates a difficult and uncertain challenge for a plaintiff to present the evidence that a particular court would find relevant.”).

84. *Piper*, 454 U.S. at 255–56.

85. *Id.* at 254 & n.22 (internal quotation marks omitted) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947)).

86. See *id.* (“Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.”); *Day & Zimmermann v. Exportadora Salcedo de Elaboradores de Cacao, S.A.*, 549 F. Supp. 383, 384–85 (E.D. Pa. 1982) (“If the contract is unenforceable as a matter of law, plaintiff's remedy in the Ecuadorian courts appears inadequate, if not illusory.”).

87. *Piper*, 454 U.S. at 254 & n.22.

88. See, e.g., *Fidelity Bank PLC v. N. Fox Shipping N.V.*, 242 F. App'x 84, 90 (4th Cir. 2007) (per curiam) (“The existence of an alternative forum depends on two factors: availability and adequacy.”).



U.S. forum.<sup>89</sup> In *Piper*, the Court held that “[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.”<sup>90</sup> Specifically, it is only “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>91</sup> If the courts were to provide significant weight to the possibility of an unfavorable change in the law, this weight could distort the central focus of the *forum non conveniens* inquiry—on inconvenience—since the dismissal of a case would not be allowed even in particular instances in which the chosen forum is profoundly inconvenient.<sup>92</sup>

Moreover, a *forum non conveniens* analysis would be drastically complex if courts were required to determine whether a plaintiff’s right to a remedy would decrease because of the alternative forum’s substantive law.<sup>93</sup> Affording substantial weight to a less favorable law would lead to further inconvenience and hardship for the courts since courts would engage in a choice-of-law exercise.<sup>94</sup>

If there is no adequate alternative forum available, the motion to dismiss will fail, and the litigants may continue their suit in the current forum.<sup>95</sup> However, if an adequate alternative forum exists, the court must balance *Gilbert*’s private and public factors.<sup>96</sup>

2. *Deference To Domestic Plaintiffs*. — The Supreme Court has stated that a court can heavily account for a plaintiff’s nationality in a *forum non conveniens* dismissal.<sup>97</sup> In *Gilbert*, the Court held that there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum, which a defendant may overcome only when the private and public interest factors

---

89. See *Piper*, 454 U.S. at 253 & n.18; cf. Gardner, *supra* note 39, at 423 (“[F]oreign forums are almost never found to be either inadequate or unavailable.”).

90. See *Piper*, 454 U.S. at 247.

91. *Id.* at 254.

92. See *id.* at 250 (“Ordinarily, . . . plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.”). The *forum non conveniens* analysis would also be overly focused on choice-of-law analysis if courts allowed unfavorable change in substantive law to have a significant weight in the *forum non conveniens* analysis. Such analysis was clearly rejected by the Court: “Choice-of-law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions.” *Id.* at 251.

93. Davies, *Change the Federal Forum Non Conveniens Analysis*, *supra* note 23, at 323 (asserting that the Supreme Court “rejected consideration of foreign law in [*Piper*] because to do otherwise would mean that” courts would have to conduct a choice-of-law analysis).

94. See *id.*

95. See Samuels, *supra* note 43, at 1096 (“In *Cabiri v. Assasie-Gyimah*, a court . . . held that Ghana was an inadequate forum where the Ghanaian plaintiff feared persecution in Ghana if he sued alleging torture by Ghanaian officials in their courts.” (citing 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996))).

96. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

97. See *Piper*, 454 U.S. at 242 (noting that “courts have been less solicitous when the plaintiff is not an American citizen or resident”).

point toward trial in the alternative forum.<sup>98</sup> *Piper* imposed a limitation on *Gilbert*'s presumption, finding that a foreign plaintiff's choice of a U.S. forum deserves less deference than the choice of forum by a U.S. plaintiff.<sup>99</sup> This approach reveals that the Court presumes that U.S. plaintiffs sue in the United States because it is more convenient to sue in their home country, whereas foreign litigants may have a somewhat strategic motive for suing in the United States.<sup>100</sup> As a result of this deference, the forum non conveniens analysis retains a discriminatory nature that favors U.S. plaintiffs.<sup>101</sup>

C. *Policies Surrounding Forum Non Conveniens Doctrine*

Because of the incentives associated with a litigant's choice of forum, defendants tend to file a forum non conveniens motion in nearly every case that involves a foreign party.<sup>102</sup> The party seeking the forum non conveniens dismissal has the burden of showing that the foreign forum is more proper than the U.S. forum and that the remedy in the foreign forum is adequate.<sup>103</sup> In addition, forum non conveniens is considered federal procedural law in federal courts.<sup>104</sup> Thus, diversity jurisdiction

---

98. *Gilbert*, 330 U.S. at 508; see also *Piper*, 454 U.S. at 255–56; Gardner, *supra* note 39, at 396 (“[T]he Supreme Court intended the [forum non conveniens] doctrine to be applied ‘rarely’ . . . .” (quoting *Gilbert*, 330 U.S. at 508)).

99. See *Piper*, 454 U.S. at 255–56 (“When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable.”). “Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.” *Id.* at 256. See generally Jennifer L. Rosato, Comment, Restoring Justice to the Doctrine of Forum Non Conveniens for Foreign Plaintiffs Who Sue U.S. Corporations in the Federal Courts, 8 J. Compar. Bus. & Cap. Mkt. L. 169, 172 (1986) (“The Court's limitation of foreign plaintiffs' access to the federal courts was motivated, at least in part, by the fear of foreign plaintiffs crowding the already-overcrowded federal court dockets.”).

100. See Rosato, *supra* note 99, at 176 (“It is feared that if foreign plaintiffs are given the same deference as domestic plaintiffs, unfairness to the defendants, the U.S. legal system and the foreign jurisdiction will be the inevitable results.”).

101. See *Piper*, 454 U.S. at 255 & n.23 (highlighting that “[c]itizens or residents deserve somewhat more deference than foreign plaintiffs” in a forum non conveniens determination); Brett J. Workman, Note, Deference to the Plaintiff in Forum Non Conveniens Cases, 86 Fordham L. Rev. 871, 877–78 (2017) (noting that U.S. citizens and residents receive greater deference in a forum non conveniens analysis compared to foreign plaintiffs).

102. See Cassandra Burke Robertson, Forum Non Conveniens on Appeal: The Case for Interlocutory Review, 18 Sw. J. Int'l L. 445, 451 (2012) (“[D]efendants file a forum non conveniens motion in nearly every case involving foreign parties, and the court must therefore take the time to work through all the arguments involved in that motion.”).

103. See Filipour, *supra* note 83, at 609–10 (noting that a defendant must meet the burden of establishing that an alternative forum is both available and adequate).

104. See Brian J. Springer, Comment, An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction, 163 U. Pa. L. Rev. 833, 840–41 (2015) (“[F]ederal courts that have reached the question [of whether to

defendants, like the *Piper* defendant, have a greater incentive to remove disputes from state courts to federal courts to leverage this doctrine in obtaining forum non conveniens dismissals.<sup>105</sup>

District courts are also afforded substantial discretion in conducting a forum non conveniens analysis<sup>106</sup> and often differ in weighing *Gilbert*'s public and private factors, thus making the doctrine even more puzzling.<sup>107</sup> The standard of review for a forum non conveniens appeal is a clear abuse of discretion.<sup>108</sup> An appellate court will not reverse a forum non conveniens decision if the district court has considered and reasonably balanced all relevant public and private interest factors.<sup>109</sup> Because of the sound discretion afforded to district courts and the lenient standard of review, district courts usually have “free reign” in determining the doctrine’s applicability.<sup>110</sup> As Justice Antonin Scalia noted, “[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible.”<sup>111</sup>

Perhaps due to the flexibility afforded to district courts, there is little uniformity among the circuit courts in the definition and application of the Supreme Court’s *Piper* test.<sup>112</sup> While several circuits have followed *Piper*

---

apply state or federal forum non conveniens doctrine] have almost universally concluded that federal forum non conveniens governs.”). But see *id.* at 841–42 (“There is continuing debate as to whether the federal courts have reached the right result.”). Some have argued that federal courts should apply state forum non conveniens law in diversity cases because of the impact of the choice of law on forum non conveniens determinations. See Laurel E. Miller, Comment, Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions, 58 U. Chi. L. Rev. 1369, 1392 (1991).

105. The *Piper* ruling did not elaborate on whether federal courts should apply federal or state doctrine when tasked with a forum non conveniens motion. Nevertheless, almost all federal courts have ruled that forum non conveniens is a federal procedural common law. See Springer, *supra* note 104, at 840–41. Some states, like Texas, have abolished the doctrine of forum non conveniens in their state courts. See, e.g., *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 674 (Tex. 1990) (“[W]e conclude that the legislature has statutorily abolished the doctrine of forum non conveniens . . .”).

106. *Piper*, 454 U.S. at 257 (“The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . .”); see also Filipour, *supra* note 83, at 610 (“United States district courts are afforded significant discretion when making a *forum non conveniens* decision . . .”).

107. Davies, Change the Federal Forum Non Conveniens Analysis, *supra* note 23, at 351–54 (surveying circuit courts’ treatments of the *Gilbert* factors). Because of the many problems associated with the doctrine, some commentators have advocated for the eradication of the doctrine. See Gardner, *supra* note 39, at 391 (proposing that the forum non conveniens doctrine should be narrowed and eventually eradicated).

108. *Piper*, 454 U.S. at 257.

109. *Id.*

110. See Moon, *supra* note 39, at 2.

111. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994).

112. Courts are also conflicted about: (1) “whether the United States’ judgment is enforceable abroad” or “whether a judgment acquired in the alternative jurisdiction would

in looking for an adequate alternative forum, other circuits have further refined *Piper* in their respective jurisdiction by using a two-prong approach in finding an adequate alternative forum.<sup>113</sup> As a result, the circuits do not have a uniform definition of the prongs that make up an adequate alternative forum.<sup>114</sup> This variation has caused the lower courts to apply the doctrine in ways that lack uniformity and remain unpredictable from court to court.<sup>115</sup> This already unpredictable doctrine faces further complexity in light of the varied use of videoconferencing proceedings in the federal judiciary.

## II. EFFECTS OF VIDEOCONFERENCING PROCEEDINGS ON FORUM NON CONVENIENS AND FORUM SHOPPING

This Part explores the evolution and impact of videoconferencing proceedings on the forum non conveniens doctrine. This Note proposes that the convenience concerns underpinning the forum non conveniens doctrine may be obsolete because more court proceedings are taking place via videoconferencing, and technology capabilities tend to be comparable across the globe. Thus, litigants can more easily participate in litigation in the United States.<sup>116</sup> This Part also highlights the discrepancies in videoconferencing proceedings within the federal court system by surveying the use of the doctrine in the lower courts. Finally, drawing on this survey, this Part explains how videoconferencing proceedings can lessen costs and access burdens, but can also lead to forum shopping and inconsistencies in the forum non conveniens analysis.

---

be enforceable in the United States”); (2) “[d]iffering policies about whether to consider the public interest factors at all when the private interest factors weigh in favor of dismissal”; (3) “[d]isagreement about whether to compare ‘the interests of the foreign forum’ with the interest of the U.S. forum”; and (4) “[d]iffering analyses of docket congestion, as some courts will provide a comparative analysis of congestion, while others will consider only ‘the absolute congestion of their own court dockets.’” Robertson, *supra* note 103, at 450 (quoting M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. Int’l L. & Mgmt. Rev. 21, 24 n.15 (2007)).

113. See Samuels, *supra* note 83, at 1077–78 (noting circuits that utilize a two-prong test to find an adequate alternative forum).

114. See *id.* at 1080 (demonstrating the lack of uniformity, certainty, and predictability of adequate alternative forum standards among courts through case law).

115. See Robertson, *supra* note at 102, at 446 (“In practice, the doctrine causes innumerable headaches to judges and litigants dealing with transnational cases. Scholars and litigators alike have criticized courts for applying the forum non conveniens doctrine in ways that are unpredictable, chaotic, and markedly different from one court to another.”).

116. See Cervone, *supra* note 39, at 104 (“[A]dvances in technology have made accessing evidence significantly more convenient.”).

A. *The Good and the Bad: The Impact of the Pandemic on Videoconferencing Proceedings*

Before the COVID-19 pandemic, some courts used videoconferencing technology at trials and depositions. These proceedings were most often limited to criminal and immigration-related cases.<sup>117</sup> The use of technology was not widespread, and incorporating these technological advancements in the *forum non conveniens* analysis remained geographically limited.<sup>118</sup> Despite the slow pace at which judicial institutions embraced technology in the past, the pandemic illustrated how lawyers and judges could adopt technological innovations on a scale and at a rate that allowed the judicial system to keep functioning.<sup>119</sup> While certain aspects of civil litigation are still best conveyed in person, courts conducted pretrial conferences, depositions, evidentiary proceedings, bench trials, and jury trials via videoconferencing during the pandemic.<sup>120</sup>

---

117. See Bannon & Keith, *supra* note 3, at 1882 (discussing pre-pandemic videoconferencing proceedings); Martin Davies, *Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation*, 55 *Am. J. Compar. L.* 205, 205 (2007) (“‘High tech’ courtrooms are becoming increasingly common, with electronic filing and case management systems, electronic access to legal authorities and case records, laptop ports and wireless Internet routers, presentation of evidence on computer monitors and display screens and remote appearances via video-conferencing.”); Cervone, *supra* note 39, at 96 (“[A]udio and video conferencing services have made it easier to take depositions and access evidence remotely.”).

118. See Bannon & Keith, *supra* note 3, at 1904–09 (arguing that widespread use and acceptance of videoconferencing in the legal industry was resisted because of due process, Confrontation Clause, fair-jury access, and credibility issues); Dixon, *Pandemic Potpourri*, *supra* note 13, at 37 (emphasizing that technology opportunities were not embraced by the legal profession in the past before the pandemic); Susskind, *supra* note 11 (noting that the author’s call for transformation of the legal system through technological advancement was given little attention for more than forty years). Various jurisdictions have permitted videoconferencing technology in the criminal context for certain proceedings such as initial appearances, felony arraignments, and pretrial release hearings. E.g., Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 *Pierce L. Rev.* 59, 62–63 (2006) (describing how videoconferencing has been used for arraignments, bail, sentencing, and post-conviction hearings in criminal trials, as well as for civil trials such as immigration hearings, civil commitment hearings, workers’ compensation hearings, and social security appeals). Videoconferencing technology has also been regularly used by immigration courts for removal proceedings since the mid-1990s. See *Video Hearings in Immigration Court FOIA*, Am. Immigr. Council, <https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia> [<https://perma.cc/V7VD-RERW>] (last visited Oct. 11, 2022); see also 8 U.S.C. § 1229(b)(2)(A)(iii) (2018); 8 C.F.R. § 1003.25(c) (2021) (“An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.”).

119. Pew Charitable Trs., *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations 3–7* (2021), <https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf> [<https://perma.cc/68WK-KP5W>]; Dixon, *Pandemic Potpourri*, *supra* note 13, at 37.

120. Pew Charitable Trs., *supra* note 120, at 8–9; Dixon, *Pandemic Potpourri*, *supra* note 13, at 37; Dodson et al., *supra* note 19, at 13–14; *As Pandemic Lingers, Courts Lean Into Virtual Technology*, U.S. Cts. (Feb. 18, 2021),

The pandemic dramatically accelerated the use of videoconferencing proceedings because of the detriments associated with delaying discovery and the reluctance from judges to “wait[] until some unknown date for the pandemic to end” before they could reopen their dockets.<sup>121</sup>

Critical participants in the court system, including federal judges, now cite numerous reasons for their acceptance and even encouragement of the videoconferencing process.<sup>122</sup> Most emphasize the convenience and efficiency courts have gained from this new process.<sup>123</sup> Videoconferencing technology provides litigants with more access to the justice system.<sup>124</sup> It also helps mitigate the hurdles associated with judicial traveling and scheduling since judges, lawyers, and litigants alike can appear in courts even if they are far away from the forum or have other commitments that may prevent them from appearing in person.<sup>125</sup> Key findings from a survey by Professor Jenia I. Turner revealed that judges and attorneys across the board had positive experiences with videoconferencing proceedings.<sup>126</sup> Some believed them to have reduced the costs associated with coming to court and helped promote conflict resolution during the pandemic, although there is some divergence on resource savings between groups.<sup>127</sup> Videoconferencing procedures drastically cut down the time demands of litigation, thus promoting greater participation and allowing the court to serve more people.<sup>128</sup>

Despite the purported benefits of videoconferencing, some have indicated that videoconferencing proceedings have given way to more substantial cybersecurity concerns, digital divide problems, and evidence and witness credibility difficulties.<sup>129</sup> With its positive and negative features, the adoption of videoconferencing proceedings during the

---

<https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology> [<https://perma.cc/9DBS-J3JZ>] [hereinafter U.S. Cts., *Pandemic Lingers*] (noting how various judges successfully conducted court proceedings via videoconferencing).

121. Dixon, *Pandemic Potpourri*, *supra* note 13, at 38; see also *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n*, 470 F. Supp. 3d 735, 738 (E.D. Mich. 2020) (authorizing under Federal Rules of Civil Procedure 77(b) and 43(a) a bench trial via videoconference due to the COVID-19 pandemic).

122. See U.S. Cts., *Pandemic Lingers*, *supra* note 120 (“Video jury trials are a tool that can be used, and it’s a tool we need to use unless we are going to be backed up forever and ever . . . .” (internal quotation marks omitted) (quoting Judge Marsha Pechman)).

123. *Id.* (“Overall, . . . judges said the virtual proceedings were fair and efficient.”).

124. See Susskind, *supra* note 11 (describing how legal disputes can be handled “at lower cost” and “more conveniently” through remote videoconferencing).

125. See Turner, *supra* note 17, at 241–43; Dodson et al., *supra* note 19, at 13–14.

126. Turner, *supra* note 17, at 241–43.

127. *Id.*

128. See Bannon & Keith, *supra* note 3, at 1887.

129. See *id.* at 1889–93 (arguing that “[t]echnology issues have also meant that some litigants have been unable to access proceedings altogether”); Dixon, *Pandemic Potpourri*, *supra* note 13, at 39 (“[Some stakeholders] oppose virtual hearings because of cybersecurity and hacking vulnerabilities.”).

pandemic indicates that civil procedure has been altered unprecedentedly and deserves greater scrutiny.<sup>130</sup>

B. *Pandemic-Created Disparities in Orders Governing Videoconferencing Proceedings*

Courts have taken diverse approaches in adapting to the pandemic due to different COVID-19 guidelines and policies across regions.<sup>131</sup> Additionally, fewer factors constrain the use of videoconferencing technology in civil proceedings compared to criminal proceedings.<sup>132</sup> As a result, judges tend to have broad discretion in permitting videoconferencing proceedings because of the lower constitutional stakes<sup>133</sup> associated with civil hearings.<sup>134</sup>

Thus, it is no wonder that there are immense differences among federal district courts in their use of videoconferencing proceedings.<sup>135</sup>

---

130. See Richard Marcus, Post Pandemic Procedure, In Brief & On Point (June 29, 2020), <http://sites.uchastings.edu/onpoint/2020/06/29/rick-marcus-on-post-pandemic-procedure/> [https://perma.cc/2YH4-Y4E7] (“Given the worries of travel, as well as the costs to clients, [videoconferencing proceedings] may cause litigators to decide not to go back to the old way [of doing business] even after the pandemic ends.”).

131. See Janna Adelstein, Courts Continue to Adapt to Covid-19, Brennan Ctr. for Just. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19> [https://perma.cc/N6BK-54FL] (identifying varying ways courts are adapting to the pandemic by adopting virtual proceedings and limiting in-person hearings); Janna Adelstein & Douglas Keith, Responses to Covid-19 Leave a Patchwork of Policies, Brennan Ctr. for Just. (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies> [https://perma.cc/EN75-EF8N] (analyzing federal, state, and immigration court responses to the pandemic); supra notes 6–11 and accompanying text.

132. See, e.g., *United States v. One Gulfstream G-V Jet Aircraft Displaying Tail Number VPCE5*, 304 F.R.D. 10, 17 (D.D.C. 2014) (“Ample case law recognizes that a videoconference deposition can be an adequate substitute for an in-person deposition, particularly when significant expenses are at issue . . . .”); U.S. Cts., *Pandemic Lingers*, supra note 120 (“The request [to draft a manual for judges and lawyers on virtual bench trials] forced [Judge Pechman] to consider legal and technical questions that literally had no precedent in the federal Judiciary.”). During the pandemic, there has been more uniformity in videoconferencing procedures on the criminal litigation front than on the civil litigation front. For example, federal courts do not have the authority to conduct jury trials via videoconferencing. This uniformity is most likely because the CARES Act authorized the Judicial Conference to provide authority to chief district court judges to permit the use of video or audio conference to conduct certain criminal proceedings. CARES Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 528 (2020). Section 15002(b)(1) of the CARES Act specifically enumerates the criminal procedures in which videoconferencing can be utilized for adjudication. *Id.* § 15002(b)(1).

133. See *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (“[In the criminal context], virtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.”).

134. See supra note 14 and accompanying text.

135. See Madison Alder, *Abandoned Masks, Vaccines Required: Court Reopenings Vary* (1), Bloomberg L. (May 25, 2021), <https://news.bloomberglaw.com/us-law->

According to the U.S. federal courts website, “[f]ederal courts are individually coordinating with state and local health officials to obtain local information about the coronavirus (COVID-19), and some have issued orders relating to court business, operating status, and public and employee safety.”<sup>136</sup> Even with increased vaccination rates, courts diverged on when to return to in-person proceedings.<sup>137</sup> For example, in the few days following President Trump’s COVID-19 national emergency declaration, Judge Colleen McMahon, then–SDNY ordered all criminal and civil trials to continue.<sup>138</sup> But, she gave the district judges the flexibility to enforce compliance with trial-specific deadlines and take actions so long as they were fair and lawful.<sup>139</sup> Presiding judges were “strongly encouraged to conduct court proceedings by telephone or video conferencing where practicable.”<sup>140</sup> By spring 2020, “no court conferences [were] being conducted except remotely, other than emergency motions to seal or for applications for a [temporary restraining order], which [were] conducted on the papers.”<sup>141</sup>

On the other hand, during this same period, the Northern District of New York continued civil and criminal trials scheduled to commence through May 15, 2020, and kept the courthouses open for business.<sup>142</sup> Courthouses in the Western District of New York remained open during

---

week/abandoned-masks-vaccines-required-u-s-court-reopenings-vary [https://perma.cc/AKT4-ETSN] (noting that approaches differ as courts adapt their operations to COVID-19); Alder et al., *supra* note 16; *supra* text accompanying note 16.

136. U.S. Cts., Court Orders and Updates, *supra* note 11.

137. Alder et al., *supra* note 16.

138. Standing Order In re Coronavirus/COVID-19 Pandemic, No. 21-MC-45, at 1 (S.D.N.Y. Jan. 19, 2021) (“In light of the continuing COVID-19 public health emergency, judicial proceedings in civil and criminal matters in the Southern District of New York are being conducted by teleconference or videoconference . . . .”); First Amended Standing Order, In re Coronavirus/COVID-19 Pandemic, No. 20-mc-622 (S.D.N.Y. Jan. 6, 2021); Standing Order, In re Coronavirus/COVID-19 Pandemic, 20-mc-622 (S.D.N.Y. Nov. 30, 2020); Standing Order, In re Coronavirus/COVID-19 Pandemic, No. 20 MISC 00154 (S.D.N.Y. Mar. 13, 2020).

139. Standing Order at 2, In re Coronavirus/COVID-19 Pandemic, No. 20 MISC 00154 (S.D.N.Y. Mar. 13, 2020).

140. *Id.*

141. Stephen T. Roberts, Co-Chair, Comm. & Fed. Litig. Section, N.Y. State Bar Ass’n, Comment Letter on Proposed Emergency Rule by the U.S. Courts, at 20-CIV-04 (May 21, 2020), [https://www.uscourts.gov/sites/default/files/appellate\\_and\\_civil\\_comments\\_0.pdf](https://www.uscourts.gov/sites/default/files/appellate_and_civil_comments_0.pdf) [https://perma.cc/F46R-D9PP]. These are only a few comments in response to the Rules Committees’ solicitation of public comments from lawyers, judges, parties, and the public on challenges encountered during the pandemic regarding court operations. Invitation for Comment on Emergency Rulemaking, U.S. Cts., <https://www.uscourts.gov/rules-policies/records-rules-committees/special-projects-rules-committees/invitation-comment> [https://perma.cc/Z7Z7-D8GK] (last visited Oct. 24, 2022).

142. General Order # 58, In re Coronavirus COVID-19 Public Emergency, at para. 1 (N.D.N.Y. Apr. 29, 2020).



the pandemic.<sup>143</sup> Judges in the Eastern District of New York were encouraged to conduct court proceedings by videoconference. However, they could schedule in-person trials or evidential hearings after consultation with the Chief Judge.<sup>144</sup>

The disparity in videoconferencing policies was noticeable across state jurisdictions. For example, the District of Wyoming “ordered that in-person civil proceedings were generally to be held remotely and provided special forms and detailed instructions for teleconferencing and Facetiming with the court.”<sup>145</sup> Contrastingly, “the District Court for Hawaii left up to each presiding judge how to proceed with civil non-jury matters, including whether to hold hearings via Zoom or telephonically.”<sup>146</sup> The District of Arizona gave individual judges the discretion to “continue to hold hearings, conferences, and bench trials.”<sup>147</sup> The court also allowed these proceedings to be held by videoconferencing when feasible.<sup>148</sup> These examples represent some of the differences in guidance offered by district courts across the country.

The timeline for resuming pre-pandemic court operations nationwide is still distant, especially with the unpredictable rise and fall of more transmittable variants of COVID-19, such as Omicron and Delta.<sup>149</sup> Simply put, decisions on whether to allow videoconferencing proceedings even after the pandemic ends are up to the discretion of respective courts and judges.<sup>150</sup>

---

143. General Order, Court Operations Under the Exigent Circumstances Created by COVID-19, at 3 (W.D.N.Y. Mar. 13, 2020) (ordering that “the Rochester and Buffalo Courthouses remain open,” subject to specific limitations).

144. Administrative Order, at 2–3, In re: Coronavirus/COVID-19 Pandemic, No. 2020-15 (E.D.N.Y. Apr. 21, 2020).

145. See General Order Vacating All Civil Trials and In Court Appearances Scheduled Prior to June 1, 2020, In re Vacating of Civil Trials Prior to June 1, 2020, Due to Public Safety Concerns Caused by the Coronavirus (COVID-19), No. 20-02, at 1–2 (D. Wyo. Mar. 20, 2020); Büthe & Krauss, *supra* note 26, at 220 (describing the District of Wyoming order after the onset of the pandemic).

146. See August 24, 2020 Temporary General Order Regarding District of Hawaii Response to COVID-19 Pandemic, In re: District of Hawaii Response to COVID-19 Pandemic, at 3–4 (D. Haw. Aug. 24, 2020); Büthe & Krauss, *supra* note 26, at 220 (describing the District of Hawaii order after the onset of the pandemic).

147. General Order, In re Continuing Court Operations Under the Exigent Circumstance Created by Coronavirus Disease (COVID-19), No. 20-13, at 2–3 (D. Ariz. Mar. 18, 2020).

148. *Id.*

149. See Crowell & Moring, Courts Reopen—or Try To 11 (2021), <https://www.crowell.com/files/Courts-Reopen-or-Try-to-Litigation-Forecast-2021-Crowell-Moring.pdf> [<https://perma.cc/255S-UBJE>] (“As COVID rates spiked in the summer, courts that had reopened a month or two earlier closed again for a few months. And by late fall, the resurgence of the pandemic prompted another round of changes, with many federal courts stepping back from holding in-person jury trials.”).

150. Reed & Alder, *supra* note 14.

C. *The Intersection of Videoconferencing Proceedings and the Forum Non Conveniens Doctrine*

The continued reliance on videoconferencing proceedings will most likely affect doctrines like forum non conveniens because of the dynamic impact of videoconferencing technology.<sup>151</sup> There will likely be increased use of videoconferencing proceedings now compared to previous years because of its benefits.<sup>152</sup> Videoconferencing proceedings have allowed society to reassess restrictions based on geography and altered the understanding of geographic-related legal procedural principles.<sup>153</sup> As such, videoconferencing proceedings may undermine some of the main concerns that the Court tailored the forum non conveniens doctrine to address, given that videoconferencing technology “equalize[s] the relative conveniences and inconveniences of each forum at stake from the perspectives of the parties, as long as the availability is equivalent in the forums.”<sup>154</sup> Some aspects of the forum non conveniens analysis—especially the private factors and the deference to domestic plaintiffs—may be rightfully obsolete in light of the increased use of videoconferencing hearings.<sup>155</sup> Said differently, the doctrine may no longer practically align with the Court’s intentions in *Gilbert and Piper*.<sup>156</sup>

When conducting a forum non conveniens analysis, courts examine if convenience tips in favor of the forum selected by the plaintiff or that proposed by the defendant.<sup>157</sup> Two significant applications of videoconferencing in the forum non conveniens context, during and before the pandemic, are the Canadian case of *Kore Meals v. Freshii Development*<sup>158</sup> and the U.S. case of *Overseas National Airways v. Cargolux*

---

151. Dodson, *supra* note 3, at 17 (finding that “the availability of videoconferencing can help equalize the relative conveniences and inconveniences of each forum at stake from the perspectives of the parties, as long as the availability is equivalent in the forums”); Dodson et al., *supra* note 19, at 18 (asserting that videoconferencing may affect the forum non conveniens calculus because videoconferencing “lessen[s] the weight of [convenience considerations] that are based on the difficulties and costs of traveling to one or the other location”).

152. See Dodson et al., *supra* note 19, at 13 (“[T]echnology will persist and continue to develop.”).

153. See *supra* note 151 and accompanying text.

154. See Dodson, *supra* note 3, at 17.

155. *Id.*

156. See Cervone, *supra* note 39, at 93 (finding that “the [forum non conveniens] doctrine no longer serves its intended purpose” given “technological advances”).

157. Romualdo P. Eclavea & Sonja Larsen, Courts, *in* 20 Am. Juris. § 109 (2d ed. 2022).

158. *Kore Meals LLC v. Freshii Dev. LLC*, 2021 CanLII 2896, para. 29 (Can. Ont. Sup. Ct. J.) (finding that the pandemic-fueled normalization of videoconferencing proceedings has rendered the doctrine of forum non conveniens obsolete when it comes to stay applications). While *Kore Meals* is a Canadian arbitration case, it is one of the first instances where a court directly addresses the impact of the pandemic on the forum non conveniens doctrine, especially given the drastic adoption of videoconferencing technology during this period. The private and public factors considered by the Canadian court in a forum non conveniens analysis are similar to the *Gilbert* factors. *Id.*

*Airlines International*.<sup>159</sup> In *Kore Meals*, the Canadian court determined whether to consider forum non conveniens as a relevant factor in the fairness of an arbitration venue dispute, given the regular use of Zoom during the pandemic.<sup>160</sup> The court ultimately found that the internet had eradicated barriers that would make one forum more convenient than another forum.<sup>161</sup> In light of the pandemic, the court emphasized that there would be little challenge “based on the unfairness or impracticality of any given forum” because some courts held hearings by videoconference and litigants were examining witnesses from remote locations.<sup>162</sup> The court indicated that the forum non conveniens doctrine “is now all but obsolete” because “a videoconference hearing is as distant and as nearby as the World Wide Web.”<sup>163</sup>

Like the *Kore Meals* court, Judge James L. Oakes, on the Court of Appeals for the Second Circuit, observed in *Overseas National Airways* that “the entire doctrine of forum non conveniens should be reexamined in light of [technological innovation].”<sup>164</sup> In a different case, he stressed that the technology and travel revolution had made “deposing of witnesses abroad or bringing them to the United States . . . a relatively simple and inexpensive matter.”<sup>165</sup> Similarly, Catherine Cervone argues that the forum non conveniens analysis has not adapted to fit the new age of advanced technology produced by the transportation revolution since evidence is easier and more convenient to access.<sup>166</sup> Because defendants can claim that “the private interest factors weigh in [their] favor when . . . evidence is difficult to obtain,” Cervone proposes that defendants should be required to show inconvenience with greater specificity.<sup>167</sup> Cervone holds that *Gilbert* requires the domestic forum chosen to cause “oppressiveness and vexation to a defendant” for a defendant to state a successful forum non conveniens argument.<sup>168</sup>

Because the pandemic has dramatically increased the use and acceptance of videoconferencing proceedings, it is crucial to scrutinize the impact on forum non conveniens to determine whether a reformulation

---

159. *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (Oakes, J., concurring).

160. *Kore Meals*, 2021 CanLII 2896, paras. 22, 25.

161. *Id.* para. 31.

162. *Id.* para. 29.

163. *Id.* para. 31.

164. *Overseas Nat'l Airways*, 712 F.2d at 14 (Oakes, J., concurring).

165. See *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting) (arguing that technological advances have rendered no forum “as inconvenient as it was in 1947”).

166. See Cervone, *supra* note 39, at 96–97 (arguing that the *Gilbert* factors ought to be “considered in the context of [technological] developments because what was inconvenient when *Piper* was decided may be convenient today”).

167. *Id.* at 102–04.

168. *Id.* at 103–04 (internal quotation marks omitted) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)).

of the doctrine is warranted. First, the private factors analysis may not be as applicable to the inconvenience problems the Court meant to address in the past because videoconferencing proceedings alleviate some of the burdens of a defendant's litigating in a U.S. forum.<sup>169</sup> Similarly, by easing the burden of jury duty and lessening the backlog in court dockets,<sup>170</sup> videoconferencing proceedings may alter the applicability of some of the *Gilbert* public interest factors.<sup>171</sup> Lastly, increased use of videoconferencing proceedings may undercut *Piper's* presumption against the foreign plaintiff, because videoconferencing availability tends to equalize the burdens and costs for both foreign and U.S. litigants.<sup>172</sup> The sections below elaborate on the various impacts of videoconferencing proceedings on the forum non conveniens doctrine.

1. *Private Factors Assessed.* — The growing use of videoconferencing proceedings in courts will drastically affect the private interest factors adopted by *Piper* because technology eases the burden of litigating by increasing convenience.<sup>173</sup> Whether the parties in a dispute have access to sources of proof, especially access to nonparty sources of proof, is one consideration that impacts a court's forum non conveniens decision.<sup>174</sup> Courts also consider the ability to compel witnesses to appear before the court and the cost of getting both willing and unwilling witnesses to

---

169. See Dodson et al., *supra* note 19, at 18 (“The availability of videoconferencing ought to reduce burdens on both parties and on nonparty witnesses, thereby enabling more robust use of remote nonparty examination and testimony.”).

170. See Federal Courts During the Covid-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary, 116th Cong. 64, 66 (2020) [hereinafter *Hearing on Federal Courts During the COVID-19 Pandemic*] (statement of Bridget M. McCormack, C.J., Michigan Supreme Court) (noting “virtual courtrooms have made our judiciary more accessible to the public”); Bannon & Keith, *supra* note 3, at 1881 (“[C]ourt systems increasingly turned to remote technologies to reopen and expand their dockets.”).

171. See Bannon & Keith, *supra* note 3, at 1885 (noting that “the expansion of remote proceedings has allowed courts to maintain many basic functions during the pandemic,” including their overwhelming backlogs that resulted from the pandemic); U.S. Cts., *Pandemic Lingers*, *supra* note 120 (“‘I have no backlog. Every single case I had set in 2020 got tried in 2020,’ Pechman said of her virtual civil jury trials. ‘I tell my fellow judges this may be the only way the wheels of justice will still turn.’” (quoting Marsha Pechman, J.)).

172. See *supra* note 151 and accompanying text.

173. See *supra* note 151 and accompanying text.

174. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); see also Christopher J. Vidrine, Note, *The Zoom Paradox: Schrodinger's Witness*, 82 La. L. Rev. 311, 327–28 (2021) (“[When] relevant documentary evidence is mostly electronic or there is no need to view any physical premises, videoconferencing . . . render[s] sources of proof . . . as accessible in a distant forum as they are in a court near the physical location associated with the cause of action.”); Craig C. Reilly, *Forum Non Conveniens: You Can Get There From Here*, *Litigation*, Fall 1997, at 36, 38 (“The ease of access to nonparty sources of proof can be determinative [of forum non conveniens motion].”).

attend.<sup>175</sup> To some extent, the Federal Rules of Civil Procedure (FRCP) consider the impact of technological advancements on discovery and witness testimony.<sup>176</sup> Specifically, Rule 43(a) allows for “testimony in open court by contemporaneous transmission from a different location” if litigants can show “good cause in compelling circumstances and with appropriate safeguards.”<sup>177</sup> Before the pandemic, some courts interpreted “contemporaneous transmission” to include videoconferencing.<sup>178</sup>

Videoconferencing mitigates several of those concerns. For one, litigants’ financial resources—or lack thereof—can hinder their ability to obtain, from foreign countries, the evidence necessary to adjudicate their case.<sup>179</sup> Videoconferencing lowers the barriers of national borders and promotes flexibility by enabling witnesses and evidence to be transported and viewed from anywhere in the world into a U.S. court.<sup>180</sup> Therefore, foreign witnesses may no longer have to travel to the United States to appear in person if the proceeding is accessible via videoconferencing. Additionally, videoconferencing proceedings could reduce depositions’ time and financial burdens.<sup>181</sup> Videoconferencing proceedings also make it easier for unwilling witnesses abroad to participate because they minimize the cost and disruptions associated with in-person hearings.<sup>182</sup>

---

175. See Reilly, *supra* note 174, at 38 (“The Supreme Court has recognized that disputes should be decided in courts that have the power to compel witnesses to appear at trial.”).

176. See Davies, *Change the Federal Forum Non Conveniens Analysis*, *supra* note 23, at 326 (“The Federal Rules of Civil Procedure now make provision for testimony to be taken by live videoconferencing link or alternatively for depositions to be videotaped.”); Cervone, *supra* note 39, at 98 (“The Federal Rules of Civil Procedure have modernized to accommodate new developments in technology.”).

177. Fed. R. Civ. P. 43(a).

178. Cervone, *supra* note 39, at 98; see also Vidrine, *supra* note 174, at 346 (“Modern technology can actually transmit a video that is so smooth that a human eye cannot distinguish the video from reality.”).

179. See Rosato, *supra* note 99, at 178 (“A foreign plaintiff should not be dismissed if maintenance of suit in another forum would be financially impossible.”); see also *Macedo v. Boeing Co.*, 693 F.2d 683, 691 (7th Cir. 1982) (holding that the trial court abused their discretion in granting a *forum non conveniens* dismissal by failing to consider the financial burden of bringing the action in the foreign forum).

180. See Gardner, *supra* note 39, at 409 (“[T]he private interests factors’ focus on access to evidence is increasingly anachronistic.”); Filipour, *supra* note 83, at 588 (explaining that technological advancements like videoconferencing “minimiz[e] the importance of [geographical] borders”); John Greacen, *Self-Represented Litig. Network, Executive Summary of the Resource Guide on Serving Self-Represented Litigants Remotely 3* (2016), [https://www.courts.ca.gov/partners/documents/Remote\\_Guide\\_Executive\\_Summary.pdf](https://www.courts.ca.gov/partners/documents/Remote_Guide_Executive_Summary.pdf) [<https://perma.cc/LHM9-L8UM>] (“Remote service delivery makes sense in urban as well as rural settings. This is especially true for people with mobility and transportation challenges as well as other barriers that make it difficult to physically go to the courthouse.”).

181. See Dodson, *supra* note 3, at 19 (stating that “depositions, especially depositions of remote nonparty witness, are prime candidates for being taken via videoconference”).

182. See Bannon & Keith, *supra* note 3, at 1887 (stating that the time-saving characteristics of videoconferencing proceedings positively impact witnesses who “often must take off work or line up childcare in order to wait for their cases to be called”); see

Thus, videoconferencing proceedings could incentivize witnesses to consent to depositions, so litigants do not have to experience the obstacles of obtaining formal subpoena services.<sup>183</sup>

Opponents of videoconferencing proceedings have noted that judges and juries may not always adequately assess evidence or body language over a video platform.<sup>184</sup> Despite this downside, videoconferencing may still ensure a more objective legal process.<sup>185</sup> Only allowing the judge or jury to see the upper body of the participants in a videoconferencing proceeding can “prevent[] the judge [and jury] from being swayed by body language, eye contact and style of dress.”<sup>186</sup> Videoconferencing proceedings consequently enable “judges to feel less personally connected to (or repulsed by) the individuals involved, make less emotional decisions, and be more focused on resolving issues as accurately as possible.”<sup>187</sup> Videoconferencing proceedings can also “remove[] the distractions and emotional pull of any family members and friends supporting the defendant or victims who would otherwise be present in an in-person courtroom.”<sup>188</sup> Finally, videoconferencing could neutralize convenience disparities between the United States and foreign forums by creating an effective way of delivering justice.<sup>189</sup> Thus, convenience disadvantages to the defendants during a videoconferencing proceeding

---

also Herbert B. Dixon Jr., *Technology and the Courts: A Futurist View*, *Judges' J.*, Summer 2013, at 36, 36 (predicting that the increasing prevalence of video hearings will cause “the legal profession [to] abandon its reservations about remote video participation in a court proceeding”).

183. See Dodson et al., *supra* note 19, at 18 (“[V]ideoconference might even induce the nonparty to consent to the deposition without the need to resort to formal service of a subpoena.”).

184. Bannon & Keith, *supra* note 3, at 1895 (“[C]ivil and criminal attorneys report that interactions with witnesses—assessing credibility, cross-examining, impeaching—are made more difficult by remote court . . . . [P]re-pandemic research suggests that . . . remote court can have subtle effects on credibility assessments.”); Turner, *supra* note 17, at 250 (noting that, at times, “the online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility”); Attison L. Barnes, III & Krystal B. Swendsboe, *Court Hearings in a Time of Social Distancing: Considerations for Video- or Teleconference Hearings*, Wiley (Apr. 1, 2020), [https://www.wiley.law/alert-Court\\_Hearings\\_in\\_a\\_Time\\_of\\_Social\\_Distancing\\_Considerations\\_for\\_Video\\_or\\_Teleconference\\_Hearings](https://www.wiley.law/alert-Court_Hearings_in_a_Time_of_Social_Distancing_Considerations_for_Video_or_Teleconference_Hearings) [<https://perma.cc/SJR8-99MZ>] (“[A] video- or teleconference hearing does not allow the court to evaluate a witness or attorney’s credibility in the same way that the court would during an in-person hearing.”).

185. Jennifer Shulkin, *Virtual Hearings May Serve Justice Better Than a Courtroom*, *Law360* (Dec. 10, 2020), <https://www.law360.com/legalindustry/articles/1334087> [<https://perma.cc/4R7X-H49T>].

186. *Id.*

187. *Id.*

188. *Id.*

189. See *supra* notes 179–183 and accompanying text.

may be far from vexing, harassing, or oppressing<sup>190</sup> with the adoption of videoconferencing proceedings.<sup>191</sup>

2. *Public Factors Assessed.* — Videoconferencing proceedings also impact forum non conveniens concerns regarding administering relief in transnational litigation. Unsurprisingly, “dispute resolution in public courts generally takes too long, costs too much, and the process is unintelligible to all but lawyers.”<sup>192</sup> Videoconferencing proceedings can mitigate some of these access-to-justice problems.<sup>193</sup> For example, during the pandemic, several judges used videoconferencing, ranging from videoconferencing jury trials to videoconferencing pretrial conferences, to address the growing backlog of cases in federal courts.<sup>194</sup> Accordingly, the availability of videoconferencing technology can undercut the court-congestion public interest factor of the forum non conveniens analysis.

Videoconferencing proceedings are effective and time-enhancing, thus allowing judges to hear more cases than they could through in-person proceedings.<sup>195</sup> Videoconferencing proceedings have been and may continue to be used to address “greatly reduce[d] courtroom capacity” due to the pandemic.<sup>196</sup> The administrative congestion factor of the forum non conveniens doctrine may be less dispositive in the forum non conveniens analysis, given that videoconferencing proceedings can accommodate and perhaps increase a court’s hearing capacity.<sup>197</sup> Moreover, several judges across the federal judiciary have already successfully conducted jury trials via videoconferencing. Many observed that jurors were greatly advantaged because they were not obligated to

---

190. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (“It is often said that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.” (citing Blair, *supra* note 41, at 2)).

191. See Vidrine, *supra* note 174, at 328 (“The use of videoconferencing would make it undeniably more convenient for parties to litigate in a distant forum. Rather than forcing a financially downtrodden party to bear the costs of litigation in a distant forum, videoconferencing can provide a much more cost-efficient means for parties to judicially resolve disputes.”).

192. Susskind, *supra* note 11.

193. See *id.* (“[W]hether remote courts secure and deliver justice is a more complex question than most commentators allow and we should view with skepticism any blanket rejections of remote courts on the grounds of justice.”).

194. See Shulkin, *supra* note 185.

195. See Susskind, *supra* note 11 (“In summary, the feedback and research we have seen so far suggests that some—and probably many—legal disputes can indeed be handled remotely, often at lower cost, more conveniently, more speedily, and less combatively than in our traditional system.”).

196. U.S. Cts., *Pandemic Lingers*, *supra* note 120.

197. See *id.* (“We will only have one courtroom in Minneapolis and one in St. Paul for trials . . . so the ability to do civil trials virtually while we catch up on our criminal trial backlog will be very helpful.” (internal quotation marks omitted) (quoting John R. Tunheim, C.J.)).

travel to a federal courthouse.<sup>198</sup> Nevertheless, the time-saving benefits of videoconferencing proceedings may fall short of impacting the public interest factor directed at ensuring that “[j]ury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation.”<sup>199</sup>

3. *Deference to U.S. Plaintiffs’ Choice of Forum Assessed.* — The presumption against foreign plaintiffs in the forum non conveniens doctrine may hold less weight due to videoconferencing proceedings.<sup>200</sup> The presumption recognized in *Piper* derives from the notion that a U.S. plaintiff has more legitimate reasons for choosing the U.S. forum compared to a foreign plaintiff who chooses a U.S. forum.<sup>201</sup> According to the Court, it is reasonable to assume that U.S. citizens who sue in their “home forum” have made a convenient choice.<sup>202</sup> In contrast, courts often find that non-U.S. citizens are forum shopping and suing in a U.S. forum because of strategic advantages, favorable damage awards, and broader substantive laws.<sup>203</sup> Videoconferencing, however, may now render this presumption against foreign plaintiffs somewhat of an overstatement, especially considering that the plaintiff is regarded as the master of their claim and should be able to decide where they bring their claim.<sup>204</sup> The increased globalization made possible by videoconferencing proceedings grants both foreign and domestic litigants similar, if not the same, advantages when it comes to convenience—the central inquiry of a forum non conveniens analysis.<sup>205</sup>

---

198. See *id.* (“For some jurors, not having to travel a hundred miles or more to a federal courthouse was a major advantage.”).

199. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947); see also Bannon & Keith, *supra* note 3, at 1887–89.

200. See Dodson et al., *supra* note 19, at 18.

201. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981); *supra* notes 98–101 and accompanying text.

202. See *Piper*, 454 U.S. at 255–56.

203. See, e.g., *id.* at 240 (noting that the foreign plaintiff sued in the United States “because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland”); *supra* note 34 and accompanying text. The distinction in *Piper*, however, “was not based on the nationality of the party so much as on the determination of convenience in applying the private factor test of *Gilbert*.” Brand, *supra* note 62, at 479–80.

204. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (emphasizing the principle that a plaintiff remains the master of their claim).

205. See Cervone, *supra* note 39, at 99 (“The use of contemporaneous transmission drastically affects consideration of the second private interest factor, ‘the cost of obtaining attendance of willing [sic] witnesses,’ because willing foreign witnesses no longer have to travel to the U.S. to testify.” (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)) (misquotation)); Filipour, *supra* note 83, at 603 (“To the extent individuals are required to travel for litigation, modern technology keeps them connected with business, mitigating work disruption.”); Vidrine, *supra* note 174, at 343 (noting that with modern technology, testimony by videoconferencing “can serve as a convenient, suitable alternative” to in-person testimony).



4. *Videoconferencing Proceedings by the Foreign Forum Assessed.* — The United States is not the only country that has expanded its judicial administration through videoconferencing proceedings; the COVID-19 crisis has accelerated the use of videoconferencing hearings in many other countries, including European countries.<sup>206</sup> Some scholars have noted that it is unlikely that video hearings in these countries will disappear even after the pandemic ends.<sup>207</sup> In *Piper*, the Supreme Court held that the district courts should consider whether the foreign forum is an adequate and alternative forum.<sup>208</sup> Intuitively, a U.S. court making a forum non conveniens decision should consider the use of videoconferencing proceedings—or the lack thereof—by the foreign forum proposed by the defendant. Specifically, if the foreign forum is utilizing videoconferencing proceedings that are equivalent to or better than ones that a court in the United States would use, then the U.S. court should only partake in the alternative and adequate analysis and decrease the weight it gives to the private factors, given that the forums are primarily equivalent in conveniences.<sup>209</sup> The court should also consider that the plaintiff is a master of their own claim, and their choice of forum “should rarely be disturbed.”<sup>210</sup> On the other hand, if the proposed foreign forum provides a videoconferencing proceeding option while the domestic forum does not, the U.S. court should also consider this accessibility in making its forum non conveniens decision since it directly affects the convenience of the litigants.<sup>211</sup>

---

206. See Bütthe & Krauss, *supra* note 26, at 219 (explaining that during the pandemic, Germany addressed resolving civil disputes through videoconferencing hearings); Anne Sanders, *Video-Hearings in Europe Before, During and After the COVID-19 Pandemic*, 12 *Int'l J. Ct. Admin.*, no. 2, 2021, at 1, 7 (“With the pandemic, courts . . . had to switch completely to remote hearings without any participant, or only the judge, present in the courtroom. This happened in many countries including Albania, Austria, Croatia, Finland, France, Germany, Hungary, Ireland, Lithuania, Poland, Portugal, San Marino, Serbia, Sweden, Switzerland, Ukraine and the UK.” (footnotes omitted)).

207. See Sanders, *supra* note 206, at 1.

208. See *supra* notes 84–92 and accompanying text.

209. See, e.g., *Kore Meals LLC v. Freshii Dev. LLC*, 2021 CanLII 2896, para. 32 (Can. Ont. Sup. Ct. J.) (“[The domestic and foreign forums] are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another.”).

210. *Gilbert*, 330 U.S. at 508.

211. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 479 (2d Cir. 2002) (finding “no abuse of discretion in the district court’s conclusion that [private] interests ‘weigh heavily’ in favor of” the foreign forum because evidence of defendant’s defenses implicating third parties was located in the foreign forum); Gardner, *supra* note 39, at 449 (“Alternatively, defendants may become more cautious about invoking forum non conveniens after some high-profile cases that were dismissed from U.S. courts were in fact refiled in foreign courts, resulting in generous plaintiff judgments.” (emphasis omitted)).

D. *Forum Shopping and Videoconferencing Proceedings: Choosing the Most Favorable Court*

The varying use of videoconferencing proceedings may create widely disparate results for litigants who litigate their case in a district court that allows for videoconferencing proceedings compared to a district court that has moved back to in-person proceedings.<sup>212</sup> Some courts, before COVID-19, had already incorporated technological advances in their forum non conveniens analysis of the private interest convenience factors.<sup>213</sup> For example, courts in New York encounter forum non conveniens motions most often, with data indicating New York courts release more than triple the forum non conveniens decisions than courts in the next highest state, Texas.<sup>214</sup> Thus, forum non conveniens dismissals may be less persuasive to courts that can utilize videoconferencing proceedings or obtain videotaped testimony in circumstances that litigants otherwise would not be able to access.<sup>215</sup>

Even if court proceedings move to a digital forum, differences in videoconferencing proceedings can lead to unpredictability and forum shopping among litigants. Geographical regions have different technological capabilities and internet speeds that could impact a party's case presentation.<sup>216</sup> Inadvertently, courts may incentivize plaintiffs to bring litigation in forums that have not moved back to the normalcy of in-person hearings because the convenience of videoconferencing technology could be a factor considered in defeating a possible forum non conveniens motion.<sup>217</sup> Furthermore, this discrepancy could alter the dynamics of the current forum non conveniens status quo given how the current system of aggressive forum non conveniens "foster[s] lower expectations of favorable court access decisions, thus reducing the

---

212. See *supra* section II.B.

213. See Filipour, *supra* note 83, at 615 ("Explicit reference to the importance of technological advancements by courts conducting a *forum non conveniens* inquiry are contained in several opinions released by the United States District Court for the Southern District of New York, with four of the five cases in the data set explicitly mentioning technology."); see also, e.g., *id.* at 615 & n.262.

214. Lii, *supra* note 83, at 527.

215. See Filipour, *supra* note 83, at 616 (noting that the "ability to videoconference or obtain videotaped testimony" made the issue of witnesses' inability or unwillingness to travel to the United States "less persuasive to the court").

216. Barnes & Swendsboe, *supra* note 184 (asserting that there are differences in technological capabilities based on geographic regionals); see also Bannon & Keith, *supra* note 3, at 1889–90 (discussing how "disparities in access to broadband internet and computers" have resulted in "substantial hurdles [in court] for individuals on the wrong side of the digital divide"); Vidrine, *supra* note 174, at 347 ("Although the average availability of the technology necessary to communicate via videoconference has increased, economic disparities and other factors may impede an individual's access.").

217. This Note assumes that there will be more than one district court that is a proper venue for the claim and that has personal jurisdiction over the litigants.

incentive to file transnational lawsuits in U.S. courts.”<sup>218</sup> The district courts within the federal system will be extensively heterogeneous and a breeding ground for forum shopping if there are differences in how courts employ technology—specifically videoconferencing proceedings in adjudicating a civil case.<sup>219</sup> Conversely, videoconferencing technology may make some forums more susceptible or “easier” to access, thus incentivizing forum shopping for other reasons besides mere technological preferences.

### III. CREATING MORE UNIFORMITY IN VIDEOCONFERENCING HEARINGS

This Part proposes that the Supreme Court, Congress, and the Judicial Conference impose standardized technological videoconferencing proceedings requirements among all federal courts while reassessing the forum non conveniens analysis to determine whether the current test fulfills its purpose. Section III.A considers how establishing uniform videoconferencing proceeding rules across all federal courts could mitigate forum shopping and standardize the forum non conveniens analysis. Section III.B argues that the Supreme Court should restore the original *Gilbert* reading of the forum non conveniens doctrine because of the effects of videoconferencing proceedings in possibly equalizing conveniences among multiple forums. This Part also recommends that the Supreme Court explicitly incorporate technology, including the availability and use of videoconferencing platforms, into the balance of considerations test and instruct lower courts to consider this in light of the nearly ubiquitous use of technology to enable distanced proceedings during the pandemic.<sup>220</sup>

#### A. *Adopt Uniform Videoconferencing Proceeding Rules Across the Nation*

Because courts created the forum non conveniens doctrine to address forum shopping among litigants, addressing the inconsistencies of videoconferencing proceedings among courts is imperative to mitigate incentives for forum shopping. Although “there is no express vehicle for [videoconferencing] hearings,” federal judges “have inherent authority to manage their dockets, including through the use of technology.”<sup>221</sup> Establishing uniform rules or operations that govern the acceptability of videoconferencing proceedings will standardize federal judges’ discretion in determining whether to permit videoconferencing civil proceedings.<sup>222</sup>

---

218. Whytock, *supra* note 33, at 504.

219. See *id.* at 486–87 (noting that forum shopping is dependent on the plaintiff’s expectations about their access to courts and outcomes).

220. See Büthe & Krauss, *supra* note 26, at 220 (noting that “federal courts have nearly unanimously used technology to enable physically distanced hearings”).

221. See *Id.* at 227.

222. See Vidrine, *supra* note at 174, at 353–54 (proposing that “the Judicial Conference should recommend that the Supreme Court amend Rule 43(a) of the Federal Rules of Civil

Although different regions may have different COVID-19 restrictions, a nationwide or more encompassing rule than usual could help address inconsistencies in the availability of videoconferencing proceedings.<sup>223</sup> While this recommendation may seem, on its face, to only impact forum shopping, it ought to be the first step in addressing the effects of videoconferencing proceedings on the forum non conveniens doctrine. Past empirical research already reveals that certain federal courts, more than others, have considered technological advancements in their forum non conveniens analysis.<sup>224</sup> Before the U.S. legal system can ensure that courts are fostering equal court access and outcomes, it is necessary that any technological advancement—specifically, the availability of videoconferencing proceedings—is consistent and available in all federal jurisdictions.<sup>225</sup>

1. *Framework of CARES Act Applied to the FRCP in the Context of Videoconferencing Proceedings.* — The CARES Act could provide the framework necessary to enhance federal courts’ uniform administration of videoconferencing proceedings.<sup>226</sup> The CARES Act, under § 15002(b)(6), directs the Judicial Conference and the Supreme Court to consider amending rules under the Rules Enabling Act<sup>227</sup> to include emergency procedures “that may be taken by the Federal courts when the President declares a national emergency.”<sup>228</sup> While rule changes in

---

Procedure to establish a standard for using videoconferencing for testimony at trials and hearings that provides judges with greater discretion”).

223. See Collected Comment Letters on Proposed Emergency Rule by the U.S. Courts, [https://www.uscourts.gov/sites/default/files/appellate\\_and\\_civil\\_comments\\_0.pdf](https://www.uscourts.gov/sites/default/files/appellate_and_civil_comments_0.pdf) [<https://perma.cc/F46R-D9PP>] (last visited Oct. 15, 2022) (tracking comments suggesting changes to the FRCP based on the pandemic and technological innovation).

224. See *supra* notes 213–214 and accompanying text.

225. See Bannon & Keith, *supra* note 3, at 1876–86 (“The COVID-19 pandemic has forced innovation, but the next step is to make sure we take the right lessons from the experience, so that technology is embraced when—and only when—it is consistent with fair proceedings and access to justice for all.”); John A. Hawkinson, Comment Letter on Proposed Emergency Rule by the U.S. Courts, at 20-CIV-29 (June 1, 2020), [https://www.uscourts.gov/sites/default/files/appellate\\_and\\_civil\\_comments\\_0.pdf](https://www.uscourts.gov/sites/default/files/appellate_and_civil_comments_0.pdf) [<https://perma.cc/F46R-D9PP>].

226. CARES Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 528–30 (2020).

227. 28 U.S.C. §§ 2071–2077 (2018).

228. See CARES Act § 15002(b)(6); Hearing on Federal Courts During the COVID-19 Pandemic, *supra* note 172, at 37–38 (statement of David G. Campbell, J., U.S. District Court for the District of Arizona). The six rules committees responsible for amending the Federal Rules of Civil, Criminal, Appellate, and Bankruptcy Procedure and the Federal Rules of Evidence under the Rules Enabling Act have already initiated emergency-procedure amendments to address emergencies in the future. *Id.* at 38 (statement of David G. Campbell, J., U.S. District Court for the District of Arizona) (“To . . . avoid the need for urgent legislation in future emergencies, the CARES Act directs the Judicial Conference and Supreme Court to consider whether the various sets of rules should be amended to include emergency procedures.”). Because the Rules Enabling Act is meant to be “deliberative, inclusive, and careful,” the timeline for establishing these amended rules may well be over two years from when these deliberations began. *Id.* at 39 (statement of David G. Campbell, J., U.S. District Court for the District of Arizona).

emergencies are essential, it is equally important to prepare for the normal future and address the use of videoconferencing proceedings even after the pandemic ends.<sup>229</sup>

To promote greater uniformity in videoconferencing proceedings, the Judicial Conference and the Supreme Court, in line with § 15002(b)(6), should conform to the approach established by the CARES Act in the criminal context to ensure consistent application of the forum non conveniens doctrine. The CARES Act authorizes videoconference criminal proceedings so long as the defendant or juvenile consents to the use after consultation with counsel.<sup>230</sup> In addition, the Act authorizes videoconferencing proceedings for various enumerated appearances such as pretrial, post-conviction, and ministerial proceedings.<sup>231</sup> Courts can also use videoconferencing proceedings for guilty pleas and sentencing for misdemeanors and felonies.<sup>232</sup>

In line with this approach, the Judicial Conference and the Supreme Court should explicitly specify and provide further guidance on videoconferencing proceeding rules in the FRCP to ensure that judges follow similar policies and leave little room for nonuniformity.<sup>233</sup> These decisionmakers could enumerate the various circumstances and proceedings whereby a judge must authorize videoconferencing proceedings—for example, in depositions and certain hearings.<sup>234</sup> In the context of depositions relating to discovery, many attorneys have noted that the Judicial Conference should consider amending the existing language in Rules 28, 29, 30, 31, 32, 34, and 45 to explicitly incorporate videoconferencing or telephone as a supplement for various in-person requirements.<sup>235</sup> These rules pertain directly to discovery. For example, as it stands, Rule 45 allows

---

229. See Bannon & Adelstein, *supra* note 28, at 2 (finding that while there are benefits to remote proceedings, judges should adopt them with caution and research).

230. CARES Act § 15002(b); see also Joanna R. Lampe & Barry J. McMillion, Cong. Rsch. Serv., IN11344, *The Federal Judiciary and the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)* 1–2 (2020).

231. Lampe & McMillion, *supra* note 230, at 1–2.

232. Steven Gordon, Holland & Knight LLP, *CARES Act and the Future of Remote Criminal Proceedings* (2020), <https://www.hklaw.com/-/media/files/insights/publications/2020/04/cares-act-and-the-future-of-remote-criminal-proceedings.pdf?la=es> [<https://perma.cc/9EGB-JTT5>].

233. The FRCP govern the procedures of federal courts and promote fairness and speedy adjudication of cases. See Fed. R. Civ. P. 1.

234. Cf. Eric Bellone, *The Perils of Videoconferencing in Criminal Courtrooms*, Scholars Strategy Network (Sept. 28, 2016), <https://scholars.org/brief/perils-videoconferencing-criminal-courtrooms> [<https://perma.cc/KU3A-WZJ4>] (“Standardized rules would help the [litigants] formulate strategies to overcome any communication difficulties and object to any irregularities in the proceedings.”).

235. Joseph D. Garrison, *Comment Letter on Proposed Emergency Rule by the U.S. Courts*, at 20-CIV-07 (May 29, 2020), [https://www.uscourts.gov/sites/default/files/appellate\\_and\\_civil\\_comments\\_0.pdf](https://www.uscourts.gov/sites/default/files/appellate_and_civil_comments_0.pdf) [<https://perma.cc/F46R-D9PP>].

for subpoenas to be issued, which would consequently command a person to attend a trial, hearing, or deposition only:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person.<sup>236</sup>

This rule does not directly address the issue of whether the issuer or the witness has “the right to a telephonic or videoconference appearance,” especially if videoconferencing proceedings are allowed under the discretion of the judge or if a state of emergency remains.<sup>237</sup> Accordingly, the Judicial Conference should consider amending and clarifying the rule to allow a witness to appear by videoconference or telephone by default as long as both parties consent or if it allows for greater convenience of the parties and witnesses.<sup>238</sup>

Similarly to Rule 45, Rule 43 provides for witness testimony at a trial in open court to be done by “contemporaneous transmission from a different location” under compelling circumstances if a litigant shows good cause and the court can implement appropriate safeguards.<sup>239</sup> The Judicial Conference should consider making explicit that “contemporaneous transmission” includes videoconferencing proceedings to ensure that all judges assess that option when administering justice. Additionally, these decisionmakers could amend the FRCP to mandate that the default means of depositions be by videoconference rather than in-person proceedings.<sup>240</sup> The court should also explicitly consider the parties’ and witnesses’ consent to participate in videoconferencing proceedings. Similarly, in the context of hearings, the Judicial Conference should consider amending the existing language in Rules 16, 23, 43, 47, and 77 to explicitly incorporate videoconference or telephone as a supplement for various in-person requirements.<sup>241</sup>

The Judicial Conference should review and amend the FRCP to enhance clarity about the availability and the applicability of videoconferencing proceedings in all steps of civil procedure. Such action would eliminate conflicting understandings of when videoconferencing proceedings are allowed. Amending the FRCP to incorporate more clarity surrounding videoconferencing proceedings would also ensure that all

---

236. Fed. R. Civ. P. 45.

237. Garrison, *supra* note 235.

238. See, e.g., Cervone, *supra* note 39, at 98 (“In 1996, Rule 43(a) was amended to permit ‘presentation of testimony in open court by contemporaneous transmission from a different location.’” (quoting Fed. R. Civ. P. 43(a))).

239. See Fed. R. Civ. P. 43(a).

240. See Michael A. Toomey, Comment Letter on Proposed Emergency Rule by the U.S. Courts, at 20-CIV-14 (June 1, 2020), [https://www.uscourts.gov/sites/default/files/appellate\\_and\\_civil\\_comments\\_0.pdf](https://www.uscourts.gov/sites/default/files/appellate_and_civil_comments_0.pdf) [<https://perma.cc/F46R-D9PP>].

241. These rules all address hearings and the procedures from hearings as written in the 2018 version of the Rules. See Fed. R. Civ. P. 16, 23, 43, 47 & 77.

federal district judges in the litigation process are on the same page when incorporating videoconferencing proceedings into a *forum non conveniens* analysis.<sup>242</sup> The Judicial Conference should also consider clarifying ambiguities in the FRCP relating to the necessity of in-person hearings, especially during emergencies.<sup>243</sup>

2. *Videoconferencing Proceedings Operations and Efficiencies.* — The uniformity requirement of videoconferencing proceedings necessitates equipping courts with technology that will allow them to administer justice effectively.<sup>244</sup> Currently, courts are struggling to determine how to address technological changes that have “no precedent in the federal Judiciary.”<sup>245</sup> Some courts have shared their experience and resource materials with other courts.<sup>246</sup> While continuous research and experience are needed to determine how to improve the operational processes of courts, courts ought to creatively assess their litigant and user needs and adopt technology that will promote efficiency and justice.<sup>247</sup> Congress should consider funding videoconferencing proceedings infrastructure to ensure that all federal courts access reliable and updated technology.<sup>248</sup>

More importantly, courts should adopt data-driven extensive remote planning goals and objectives and define critical timelines to promote efficiencies.<sup>249</sup> Courts should collaborate to achieve efficiencies and establish uniform technological guides to acclimate court users to the videoconferencing environment.<sup>250</sup> Stakeholders that were not necessarily as

---

242. See *supra* notes 135–150 and accompanying text.

243. See, e.g., Cervone, *supra* note 39, at 98 (noting that some courts have not followed the Advisory Committee’s notes suggesting a more conservative reading of some rules like Fed. R. Civ. P. 43(a), which requires compelling circumstances to allow contemporaneous transmission).

244. See U.S. Cts., *Pandemic Lingers*, *supra* note 120 (“Electronic proceedings also have shown vulnerabilities. . . . Overall, however, judges said the virtual proceedings were fair and efficient.”).

245. See *id.*

246. See *id.*

247. See *id.* (showing the range of difficulties and solutions the federal courts have faced in moving to videoconferencing proceedings).

248. For example, Congress provided the federal judiciary with more than seven million dollars in supplemental appropriations in the 2020 CARES Act “to address immediate information technology needs and increased testing and treatment costs in our probation and pretrial services program.” Hearing on Federal Courts During the COVID-19 Pandemic, *supra* note 170, at 37 (statement of David G. Campbell, J., U.S. District Court for the District of Arizona).

249. See Pew Charitable Trs., *supra* note 119, at 15 (recommending the use of data to evaluate technological tools in courtrooms); Dodson et al., *supra* note 19, at 18 (“Facilitating [videoconferencing proceedings adoption] requires uniform (or at least universally compatible), widely accessible, relatively easy-to-learn, functional, and secure technology . . .”).

250. Pew Charitable Trs., *supra* note 119, at 2 (noting that virtual proceedings, if implemented without care, can provide an advantage to already well-represented litigants); Dodson et al., *supra* note 19, at 16–17 (suggesting that, with appropriate accessibility

significant during the in-person hearings era, such as technology vendors, should partake in court technology policies to “ensure a common understanding of the business problems being addressed and user needs.”<sup>251</sup>

Finally, courts should actively consider balancing standardization and customization of technology to allow for the increased flexibility of court procedures.<sup>252</sup> Courts can also consider initiating pilot projects on a smaller scale before adopting larger-scale projects. For example, courts can test out videoconferencing bench trials and examine their success before determining whether to allow for jury trials uniformly via videoconferencing or at least allow litigants to consent to videoconferencing.<sup>253</sup> The data from these pilots could enable the court system to modify court proceedings and meet the needs of court users.<sup>254</sup>

B. *Restore Gilbert’s Convenience Reading and Restructure the Balance of Consideration Factors*

The increased use of videoconferencing proceedings has significantly impacted the private and public factors of the forum non conveniens analysis.<sup>255</sup> While the timeline associated with establishing uniform rules surrounding videoconferencing proceedings and the restructuring of the *Gilbert* factors could differ, the two proposals are codependent, and the Supreme Court should establish them simultaneously. Consider first what would happen if courts established a uniform rule but did not amend the *Gilbert* factors. Broad discretion would still be available to judges to consider videoconferencing proceedings when deciding on forum non conveniens motions. Consequently, jurisdictions that have always considered technological advances in their forum non conveniens motions, like the Southern District of New York, may continue.<sup>256</sup> In contrast, there is no guarantee that other jurisdictions will explicitly consider technological

---

measures, videoconferencing proceedings can make courts more accessible to litigants and the public).

251. Nat’l Ctr. for State Cts., *Guiding Principles for Post-Pandemic Court Technology 4* (2020), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf](https://www.ncsc.org/__data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf) [<https://perma.cc/NFR8-ZGV7>].

252. *Id.* at 5.

253. See Dixon, *Pandemic Potpourri*, *supra* note 13, at 38 (“[E]veryone should marvel that real judges, lawyers, parties, and jurors undertook and completed these experiments with a real case. I have no doubt that other courts and parties will undertake more experiments with virtual jury trials.”).

254. See Nat’l Ctr. for State Cts., *supra* note 251, at 3 (“[A]s remote services become more available, this means finding easy ways to collect data from users in a way that facilitates the transfer of that data across the court system.”).

255. See *supra* sections II.C.1–2 and accompanying text.

256. See Filipour, *supra* note 83, at 615–17 (discussing the use of videoconferencing in cases from the Southern District of New York that may have otherwise implicated forum non conveniens).



advances when granting a defendant's forum non conveniens motion, although they may be using videoconferencing proceedings.<sup>257</sup> On the other hand, explicitly incorporating the availability of advanced technology, such as the possibility of videoconferencing proceedings, into the *Gilbert* consideration without uniform videoconferencing proceeding rules would give way to forum shopping since litigants may choose the jurisdiction where judges allow or disallow videoconferencing proceedings depending on the outcomes they hope to accomplish.<sup>258</sup>

The Supreme Court should solely adopt the original reading of *Gilbert* as instructive on the forum non conveniens doctrine and formally revise the *Gilbert* private factors to incorporate the availability of videoconferencing proceedings. The Court should also instruct the lower courts to consider videoconferencing proceedings when deciding on forum non conveniens motions.<sup>259</sup> In addition, the Supreme Court can recalibrate the *Gilbert* factors by noting that videoconferencing proceedings could weigh on considerations relating to the private and public interests.

After the *Piper* holding, the Court has steadily moved away from requiring defendants to meet a high standard of proving that a plaintiff's choice of forum is unjust and unfair.<sup>260</sup> For example, the balance of considerations may initially be more favorable to defendants given *Piper*'s decreased deference to a foreign plaintiff's choice of forum and "the courts' increased emphasis on public interest factors" associated with court congestion.<sup>261</sup> The Court should return to the *Gilbert* reading of forum non conveniens that focuses on "fairness, justice, and convenience between the parties" rather than the distinctions in treatment between foreign and domestic plaintiffs.<sup>262</sup> The *Gilbert* Court explicitly established a high standard for occasions that would constitute true inconvenience.<sup>263</sup> Specifically, if "trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to the

---

257. See Lii, *supra* note 83, at 527.

258. See Whytock, *supra* note 33, at 486 (explaining that heterogeneity is a prerequisite for forum shopping).

259. See Cervone, *supra* note 39, at 93 (arguing that as a result of technological advancements, the forum non conveniens doctrine ought to be recalibrated to allow for dismissal only in cases where it would be impossible for the defendant to litigate in the original forum).

260. Rosato, *supra* note 99, at 174; see also Cervone, *supra* note 39, at 104.

261. Rosato, *supra* note 99, at 174.

262. See *id.* at 170–71 (arguing that the *Gilbert* case was the traditional view of forum non conveniens and it has been overshadowed by efficiency and administrative convenience after *Piper*, which failed to adequately consider the underlying policies of *Gilbert*).

263. See *id.* at 170. ("This [*Gilbert*] test ensured that undue hardship to *either* party would be avoided." (emphasis added)); cf. *id.* at 173 ("This broad standard of adequacy coupled with the plaintiff's burden of proof [that developed through *Piper*] has prevented dismissal of suits only in rare, egregious cases.").

plaintiff's convenience,' then dismissal is appropriate."<sup>264</sup> The Court was concerned with forum shopping as an act chosen by the plaintiff to establish oppression and vexation against the defendant "by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy" if trial in the chosen forum were to be accepted.<sup>265</sup>

In contrast, the *Piper* holding—the case that now establishes the forum non conveniens common law doctrine by incorporating the *Gilbert* factors<sup>266</sup>—did not convey as much of the high standard of inconvenience *Gilbert* had proffered. Indeed, the plaintiff in *Piper* brought the suit "in Piper's home state and in the location where the airplane was manufactured, hence, in [what the Court would have considered] a natural forum."<sup>267</sup> The *Piper* case does not seem like the case that the *Gilbert* Court would have believed to be a "case of vexatious or exorbitant jurisdiction."<sup>268</sup> Nevertheless, the Court's holding, though incorporating the *Gilbert* standard, instead "showed a greater concern for the problem of international forum shopping" and "suggested that a district court should give little deference to a foreign plaintiff's choice of forum when suing in a U.S. court."<sup>269</sup> While the Court in *Piper* seemed to state that the policies behind its holding centered on "convenience," it is evident that the Court's approach "showed an intent to limit forum shopping in international suits brought by foreign plaintiffs seeking to take advantage of the procedural advantages afforded by U.S. courts."<sup>270</sup> The Court's analysis in *Piper* focused on international litigants and forum shopping to promote administrative efficiency.<sup>271</sup> In contrast, *Gilbert's* reading seems to center on convenience and forum shopping.<sup>272</sup> Time and time again, the Court has emphasized that "the ultimate inquiry [of the forum non conveniens doctrine] is where the trial will best serve the convenience of the parties

---

264. See Cervone, *supra* note 39, at 103–04 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)).

265. *Id.*

266. See Rosato, *supra* note 99, at 171 ("The Supreme Court's opinion in *Piper Aircraft v. Reyno* established the prevailing rules and reasoning for the forum non [conveniens] inquiry as applied to foreign plaintiffs." (footnote omitted)).

267. Simona Grossi, *The U.S. Supreme Court and the Modern Common Law Approach* 87 (2015).

268. *Id.*

269. See Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations From Forum Shopping Plaintiffs*, 19 *U. Pa. J. Int'l Econ. L.* 141, 160 (1998).

270. *Id.* at 161.

271. See Grossi, *supra* note 267, at 88 ("Moreover, the [forum non conveniens] doctrine today may even be applied in cases, such as *Piper*, where there are significant connecting factors with the forum and where jurisdiction over the defendant is both fair and premised on traditional grounds."); Dorward, *supra* note 269, at 171.

272. See Rosato, *supra* note 99, at 170.

and the ends of justice,”<sup>273</sup> thus revealing that a forum non conveniens analysis should center extensively on the convenience of the litigants.

In adhering to this “ultimate inquiry,” the forum non conveniens doctrine would be more functional and streamlined if the Court had adopted *Gilbert*’s original reading in *Piper*.<sup>274</sup> With this reading, a court should grant a forum non conveniens motion only if it would be oppressive and vexing to force the defendant to litigate even with the forum’s videoconferencing technology.<sup>275</sup> The ability of videoconferencing proceedings to prevent one forum from being more inconvenient than another forum would be more in line with *Gilbert*’s high threshold for forum non conveniens dismissals since it would be less likely, in a videoconferencing world, that the “remote” forum would cause extreme inconvenience for the defendant.<sup>276</sup>

#### CONCLUSION

The pandemic has unprecedentedly accelerated the normalization and use of videoconferencing proceedings across jurisdictions, thus strengthening the prior weak ties between videoconferencing and the legal field. The drastic transition from in-person courtroom procedures to videoconferencing proceedings suggests that videoconferencing proceedings may be incorporated into our new normal even after the pandemic ends. In light of this trajectory into a unique “virtual” normal, it is necessary to reevaluate the current approach of the forum non conveniens doctrine. Accordingly, this Note calls on courts to adapt the *Gilbert* balance of considerations factors while establishing uniform videoconferencing proceedings rules because of how courts have adjusted to the pandemic. Thus, this Note joins the chorus that many past scholars have sung to implore courts to recognize the various policy concerns associated with the forum non conveniens doctrine and revisit our current forum non conveniens jurisprudence to ensure that it does not go “the way of the VCR player.”

---

273. See *Kest v. N.Y. Cent. R. Co.*, 116 F. Supp. 615, 616 (W.D.N.Y. 1953) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)).

274. See Grossi, *supra* note 267, at 88 (highlighting that after *Piper*, many lower courts disagree about “whether the doctrine is meant to protect defendants from a truly inconvenient forum or whether the doctrine is simply meant to identify the most suitable forum”); *id.* at 99 (“[T]he contemporary *forum non conveniens* doctrine—at least its federal version—has the effect of denying an otherwise proper assertion of jurisdiction and of significantly altering the rights and remedies at stake in the proceedings, without a defendant’s having to demonstrate any real unfairness.”).

275. For more information about reverting to the traditional view of forum non conveniens, see Rosato, *supra* note 99, at 170.

276. See Grossi, *supra* note 267, at 95 n.95.

