Forum Non Conveniens: A Common-Law Doctrine Recently Revised

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defendant is entitled to costs. 144 Nevertheless, if the counterclaim is independent and aggressive in nature, the court has discretion to deny costs to him. 145

The rationale implicit in the Graybill decision is that the determination of who is entitled to costs should generally be based along upon the success or failure of the party who initially invokes the court's jurisdiction, i.e., the plaintiff. If the plaintiff fails on his cause of action, he becomes liable for costs. The outcome of the adjudication of any counterclaim is irrelevant, unless the counterclaim is independent and unsuccessful, in which case the court may deny costs to the defendant. This rule is equitable, especially since the counterclaim is often a strategic device employed to bolster the defense to the main claim. Moreover, it is complementary to CPLR 8103, which enables the court to award costs to a defendant who prevails upon a counterclaim "which is not substantially the same as any cause of action upon which the plaintiff recovered the judgment."

The theory of costs is that they are in a sense indemnification for a party against the expense of successfully asserting his rights in court. The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to the defendant, that the plaintiff sued him without cause. 146

DEVELOPMENTS IN NEW YORK PRACTICE

Forum Non Conveniens: A Common-Law Doctrine Recently Revised

Introduction

While New York courts are vested with broad jurisdiction, 147 the exercise of their power is, under certain circumstances, discretionary. The doctrine of forum non conveniens, under which jurisdiction may be declined, has long been available in actions between nonresidents arising without the state. It has been applied when such actions would have

144 Id. at 232, 324 N.Y.S.2d at 294. Accord, Rypkema v. Frauenhofer, 55 Misc. 2d 1000, 286 N.Y.S.2d 867 (Tioga County Ct. 1968).
147 CPLR 302 gives the courts personal jurisdiction over a nondomiciliary who, in person or through an agent, transacts any business within the state, commits a tortious act within the state, or under certain circumstances, commits a tortious act without the state; CPLR 313 provides for service without the state to secure personal jurisdiction; New York Business Corporation Law § 1314 outlines circumstances under which an action can be brought against a foreign corporation by another foreign corporation. See generally von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121 (1966) (suggesting lines for further development in cases and statutory law).
been more appropriately tried elsewhere. This report seeks to serve two functions: (1) to summarize the development of the doctrine in New York, and (2) to evaluate its revision in recent cases.

Historical Background

The doctrine of *forum non conveniens* originated with the Scottish courts of the seventeenth century. The first reported cases used the phrase *forum non competens* to indicate that the court was inappropriate or without jurisdiction of the subject matter. Later Scottish cases utilized the words *forum non conveniens* to indicate that the court had jurisdiction but that its exercise was inappropriate. The nature of this inappropriateness was discussed in *Longworth v. Hope*, where it was asserted that every court has the discretion “not to exercise its jurisdiction if there are grounds for holding that, by an exercise of that jurisdiction, the defender, who objects to it, will be put to an unfair disadvantage which he would not be subjected to in another accessible and competent Court.”

This emphasis on inconvenience to the parties remained peculiar to the Scottish courts until the twentieth century.

The development of *forum non conveniens* in England progressed somewhat more slowly than that in Scotland. Though early cases acknowledged the Scottish application of the doctrine, their holdings

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150 Id.

151 2 MacPherson (Sess. Cas. 3d Ser.) 1049 (1865).

152 Id. at 1057. Note however, the result in Williamson v. North Eastern Ry., 11 Rettie (Sess. Cas. 4th Ser.) 596 (1884). In Williamson, the plaintiff, whose husband had been domiciled in Scotland, sued an English company based upon a negligent act in England which resulted in her husband’s death. *Forum non conveniens* was sustained despite proof that the plaintiff could not afford to sue in England. The court reasoned that as the action arose in England and the English law governed the suit, the English forum would be the most convenient one. Id. at 598.

153 The reason for this was Lord Mansfield’s indication that English courts lacked subject matter jurisdiction in actions between foreign parties based on foreign causes of action involving breach of the peace. Mostyn v. Fabrignas, 1 Cowp. 161, 176, 98 Eng. Rep. 1021, 1030 (K.B. 1774).

154 See, e.g., Ewing v. Orr Ewing, 10 App. Cas. 453 (1885), wherein Lord Selborne drew a distinction between the English and Scottish courts’ application of *forum non conveniens*:

It appears also that the doctrine of forum conveniens, which in England seldom comes into consideration when jurisdiction exists apart from service of process abroad, unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the Court is satisfied that the suit might have been brought, and effectively prosecuted in a more convenient forum, although this may not actually have been done.

Id. at 506.
reflected a line of thinking independent of Scottish precedent. Indeed, the first application of the doctrine, by the Court of Equity in 1885, limited its use to cases where competition of suits existed. Subsequently, however, a broader basis for *forum non conveniens* was recognized by the Common Law Court in *Logan v. Bank of Scotland*. Therein, the plaintiff, a resident of Scotland, brought an action for damages against several defendants, including a Scottish corporation. The defendant Bank of Scotland was the banker of the corporation and had a branch in London. Only one defendant resided in England and he did not defend the action. The court, finding that the objective of bringing the action in England was to harass the defendant into a settlement, invoked the doctrine of *forum non conveniens*, on the ground that the action was "vexatious and an abuse of the process of the Court." Relying in part on an earlier New York decision, the court maintained that the difficulty in procuring witnesses and documents and the necessity for applying a foreign law were important considerations in the application of the doctrine. These elements, plus the fact that the plaintiff had a forum readily available in Scotland, persuaded the court to refuse this transitory action.

Although the *Logan* court undoubtedly considered the convenience of the parties when it refused to retain jurisdiction, the application of the doctrine nonetheless turned on the inconvenience to the court. It was not until two decades later that the House of Lords, in *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français"*, affirmed the litigant-oriented usage of *forum non conveniens* adopted by the Scottish courts.

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155 *Id.*
157 *Id.* at 142. The concept of "prevention of vexation and oppression" was introduced in *McHenry v. Lewis*, 22 *Ch. D.* 397 (1882).
159 1 *K.B.* at 147.
160 "The jurisdiction of this Court to try a transitory action of this kind is unquestionable, but the Court has a discretion in the matter and not an obligation." *Id.* at 142-43. *See also Egbert v. Short*, [1907] 2 *Ch.* 205, for a discussion of the party to be benefitted by application of *forum non conveniens*.
162 *See, e.g.*, cases cited notes 151 & 152 *supra.*

*La Société du Gaz* was a suit by a French manufacturer against a French shipowner for breach of contract, executed in France, under which defendant was to deliver goods from England to France. The sole basis for jurisdiction in Scotland was the arrest there of a vessel belonging to the defendant. In denying the Scottish forum to the plaintiffs, the House of Lords concluded that the ends of justice could best be served by bringing the action elsewhere. Lord Sumner opined:

"Obviously the Court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in French,
Forum Non Conveniens in the United States

In the United States, application of *forum non conveniens* preceded the actual terminology. At the onset of the nineteenth century, New York courts exercised their discretionary power to refuse jurisdiction in certain types of cases. The earliest of these cases were actions between aliens for torts which arose on the high seas. Additionally, some courts were willing to decline to hear cases between residents of sister states upon causes of action arising without New York. However, this exercise of discretion was challenged in later opinions as being contra to the privileges and immunities clause of the Constitution. This con-

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164 See, e.g., *Collard v. Beach*, 93 App. Div. 339, 87 N.Y.S. 884 (1st Dep't 1904), refusing jurisdiction of a cause of action in negligence which arose in Connecticut, where both parties were resided. The court stated:

The calendars of the courts of this State are congested, and it being difficult to administer speedy justice to litigants who are obliged to submit their controversies to our courts and have no other forum, it is eminently proper that we should refuse jurisdiction over actions for tort that properly belong in another forum.

*Id.* at 340, 87 N.Y.S. at 885-86. As such, the acceptance of jurisdiction would impose an undue burden upon the courts of our State if the practice were established of assuming jurisdiction in such cases.

*Id.* at 340-41, 87 N.Y.S. at 886.

See also *Gardner v. Thomas*, 14 Johns. 134 (N.Y. Sup. Ct. 1817), wherein the court declined to entertain suits involving torts committed on the high seas on board a foreign vessel, both parties being subjects of the country under whose flag the vessel sailed.


166 In *Molony v. Dows*, 8 Abb. Pr. 316 (N.Y.C.P. 1859), the court was of the opinion that a foreign court had no jurisdiction of the actions between citizens of another state for purely personal torts committed within that state. The court added, however, that if such jurisdiction did exist, it rested in the "sound discretion" of the court to accept the case. *Id.* at 321. In *Latourette v. Clark*, 30 How. Pr. 242 (Sup. Ct. N.Y. County 1856), the court agreed that there was no jurisdiction over actions between nonresidents based upon foreign torts. In *Dewitt v. Buchanan*, 54 Barb. 31 (Sup. Ct. Franklin County 1868), the court opined that there is jurisdiction in such actions, but that exceptional circumstances should be shown before it is exercised. *Accord*, *Collard v. Beach*, 91 App. Div. 582, 81 N.Y.S. 619 (1st Dep't 1903), rev'd, 93 App. Div. 339, 87 N.Y.S. 884 (1st Dep't 1904); *Ferguson v. Neilson*, 11 N.Y.S. 524 (1st Dep't 1890); *Burdick v. Freeman*, 46 Hun 138 (5th Dep't 1887), aff'd, 120 N.Y. 420, 24 N.E. 949 (1890).


It is now settled that the courts of this state have, and will entertain, jurisdiction of actions for personal injuries committed abroad, when both, or either of the parties, are citizens of the United States.
stitutional problem was of such paramount concern to the federal courts that the development of *forum non conveniens* in actions between nonresidents upon foreign causes of action was virtually stifled until 1930.\(^{168}\)

Despite the retardation of this application of *forum non conveniens*, the federal courts recognized many situations where refusal of jurisdiction was proper. Among the earliest applications of this discretionary power was in suits in Admirality between aliens. In *The Belgenland*,\(^{169}\) the United States Supreme Court opined that jurisdiction could be refused when (1) both parties were subject to laws of the same country and could easily resort to its court; or (2) the dispute was between seaman and master and the counsel of the country did not consent to jurisdiction; or (3) jurisdiction had bee invoked for matters affecting only parties on the vessel and which had to be determined by the laws of the home country of the vessel.\(^{170}\) Of course, these guidelines were applicable when only nonresidents were involved.\(^{171}\)

Aside from these suits in Admiralty, courts in different states decided numerous cases illustrating the principle of *forum non conveniens*, without expressly recognizing the doctrine.\(^{172}\) Underlying their decisions to accept or reject jurisdiction was a tendency to consider the convenience of both the court and the parties. Availability of witnesses,\(^{173}\)

\(^{168}\) According to Professor Barrett, *supra* note 149, at 389, full utilization of the *forum non conveniens* doctrine in the United States was postponed by the opinion of Judge Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (E.D. Pa. 1823). Therein, the privileges and immunities clause of the Constitution was interpreted as entitling residents of sister states to invoke the jurisdiction of the courts of any state. *Id.* at 552. As a result of this dictum, courts held that the privileges and immunities clause precluded the use of discretionary power to decline suits between nonresidents.

Ultimately, the New York view was accepted by the Supreme Court in *Douglas v. New Haven R.R.*, 279 U.S. 377 (1929), aff'g 248 N.Y. 580, 162 N.E. 532 (1928). In that case the Court validated a section of the New York Code of Civil Procedure which authorized the courts to refuse cases involving a nonresident plaintiff and a foreign defendant where the cause of action arose outside the state. The term "resident" was held to include anyone living in New York at the time so as not to discriminate against non-citizens.

For a more complete study of the entire struggle involving the privileges and immunities clause, see Blair, *supra* note 163, at 3-19. *See also* 18 CALIF. L. REV. 159 (1929); 24 ILL. L. REV. 826 (1930); 30 Mich. L. REV. 610 (1932); 39 YALE L.J. 388 (1930).

\(^{169}\) 114 U.S. 355 (1885).

\(^{170}\) *Id.* at 363-65.


\(^{172}\) *E.g.*, Great W. Ry. v. Miller, 19 Mich. 305 (1869) (difficulty of applying a foreign law); Pietraroia v. New Jersey & H.R. Ry. & Ferry Co., 197 N.Y. 434, 91 N.E. 120 (1910) (action between nonresidents was a burden on the state); Consolidated Coppermines Corp. v. Nevada Consol. Copper Co., 127 Misc. 71, 215 N.Y.S. 265 (Sup. Ct. N.Y. County 1925) (case involving mining); Alger v. Alger, 31 Hun 471 (3d Dep't 1884); Howell v. Chicago & N.W. Ry., 51 Barb. 378 (Sup. Ct. N.Y. County 1868) (basis of rejection was the necessity of supervising the internal affairs of a foreign corporation); Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co., 80 Barb. 159 (Sup. Ct. N.Y. County 1859) (case concerning real property in other jurisdictions).

\(^{173}\) *E.g.*, Zeikus v. Florida East Coast Ry., 70 Misc. 339, 128 N.Y.S. 931 (Sup. Ct. N.Y.}
financial burden on the forum state, and application and enforcement of foreign law were significant factors bearing upon the question of whether to retain jurisdiction.

Acceptance by the Supreme Court

Despite the trend toward *forum non conveniens* in the states, the Supreme Court was reluctant to approve of the doctrine. In *Second Employers' Liability Cases*, the Court overruled the decision of the Supreme Court of Errors of Connecticut which had held, in essence, that the superior courts were at liberty to decline to determine actions to enforce rights arising under the Federal Employers' Liability Act. The Court stated:

The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. . . . But it has never been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

Subsequently, however, the Court issued a series of decisions clearly upholding the right of a court to refuse jurisdiction under certain sets of facts. Cases involving interference in the internal affairs of foreign corporations, enforcement of a foreign law where the remedy was not

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174 E.g., Wertheim v. Clergue, 53 App. Div. 122, 65 N.Y.S. 750 (1st Dep't 1900). The court reasoned that contract cases were of more benefit to the state than tort actions and were therefore not subject to dismissal under *forum non conveniens*. Subsequently, however, the doctrine was extended to include contract cases. Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952).

175 E.g., Slater v. Mexican Nat'l R.R., 194 U.S. 130 (1904). The plaintiff had sued in Texas for negligence causing death. However, the remedy which was available in Mexico, where the cause of action arose, was not available in Texas. See also Mosely v. Empire Gas & Fuel Co., 313 Mo. 225, 281 S.W. 762 (1925) (dismissal of a suit based on workman's compensation laws where the remedy was exclusively available in a different forum).

176 223 U.S. 1 (1912).

177 Id. at 55-56.

178 Id. at 58-59.

available in the forum, and questions of the constitutionality of state laws already being litigated in the state's courts were considered proper instances in which to decline to exercise jurisdiction. Additionally, certain actions between a nonresident and a foreign corporation, or between two foreign corporations, upon a foreign cause of action, were susceptible to dismissal under *forum non conveniens*. Ultimately, in *Gulf Oil Corp. v. Gilbert*, the Supreme Court laid down a general rule regarding the availability of *forum non conveniens*, under which the determinative considerations were the interests of the litigants and of the public. Relevant factors in the interest of the parties included the relative ease of access to sources of proofs, availability of compulsory process for attendance of unwilling witnesses, and possible view of the premises. Among the considerations in the public interest were the undesirability of retaining litigation in congested centers, the burden of jury duty on people having no relation to the litigation, the local interest in having localized controversies decided at home, and the problems of conflicts of law.

**Development of the Doctrine in New York from 1900-1950**

When *forum non conveniens* was first invoked in New York, the courts were motivated by a desire to avoid unnecessary burden upon the courts and taxpayers of the state. Certain types of cases, however, were

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180 See cases note 160 *supra* and accompanying text.
184 330 U.S. 501 (1947). The case involved an action by a Virginia resident against a Pennsylvania corporation doing business in Virginia and New York. It was brought in federal court in New York City for damages accruing in Virginia. Though the court had jurisdiction and the venue was proper, the action was dismissed on the grounds of *forum non conveniens*, as all the events had occurred in Virginia, the witnesses resided there, and both the federal and state courts in Virginia were available to the plaintiff and jurisdiction over the defendant could be obtained there.
185 *Id.* at 509-12
186 *Id.* at 508-09.

It is the well-settled rule of this state that, unless special reasons are shown to exist which make it necessary or proper to do so, the courts will not retain jurisdiction of and determine actions between parties residing in another state for personal injuries received in that state.

*See generally Pietraroia v. New Jersey & H.R. Ry. & Ferry Co.*, 197 N.Y. 434, 91 N.E. 120
required to be accepted by the courts; if either the plaintiff or the defendant were a resident of New York, the court was without discretion to refuse to entertain the action.\textsuperscript{188} There was some uncertainty as to whether a court could decline to exercise jurisdiction if a nonresident plaintiff joined nonresident defendants with resident ones. Nevertheless, the courts were reluctant to apply the doctrine in such instances.\textsuperscript{189}

Contract actions were originally deemed to be outside the scope of \textit{forum non conveniens}.\textsuperscript{190} Presumably, it was believed that some benefit

(1910), wherein a New York resident, the administrator for a New Jersey resident, sued a New Jersey corporation for a wrongful death caused in New Jersey.

In refusing to require the exercise of jurisdiction the court stated:

As a question of policy, it is intolerable that our courts should be impeded in their administration of justice, and that the people of the state should be burdened with expense, in redressing wrongs committed in another state, for the benefit, solely of its citizens, and where the remedy is in the enforcement of its statutes.

\textit{Id.} at 499, 91 N.E. at 122.

\textit{See also} Goldman v. Furness, Withy & Co., 101 F. 467 (S.D.N.Y. 1900).


would accrue to the state if its courts were available to resolve business disputes. One consequence of this attitude was the acceptance of jurisdiction over actions wholly unrelated to the forum. However, New York courts generally refused to entertain actions concerning the internal operations of a foreign corporation or title to real property situated in another jurisdiction, or to enforce foreign law which conflicted with state policy. Additionally, the courts could decline to exercise jurisdiction when a party sought to invoke a right created by a foreign statute, if that statute provided an exclusive remedy to be enforced in a particular way or before a particular tribunal.

Whereas it was clear that forum non conveniens was available where all parties were nonresidents and the cause of action arose without the state, there was disagreement as to the court's power to refuse jurisdiction in an action between nonresidents when the cause of action arose.


191 Wertheim v. Clergue, 53 App. Div. 122, 65 N.Y.S. 750 (1st Dep't 1900) (some of the transactions regarding the contract in issue arose in New York).


194 E.g., Alger v. Alger, 31 Hun 471 (3d Dep't 1884).


in New York.\textsuperscript{197} In \textit{Hunter v. Hosmer},\textsuperscript{198} a court denied a motion to dismiss under the doctrine, on the ground that there was no discretion because the accident, which was the basis of the litigation, occurred in New York.\textsuperscript{199} Yet, in the same year, in \textit{Gainer v. Donner},\textsuperscript{200} another court refused the same type of case, on the ground that it would be more convenient to litigate in the home state of the parties.\textsuperscript{201} In \textit{Malak v. Upton},\textsuperscript{202} a third court noted both prior decisions and concluded that a nonresident is entitled to sue a nonresident in New York if the cause of action arose in the state.\textsuperscript{203}

Any question as to that status of suits based upon foreign torts was resolved by the Court of Appeals in \textit{De La Bouillerie v. De Vienne}.\textsuperscript{204} Therein, the rule was laid down that the courts are bound to try actions concerning foreign torts if either party is a resident,\textsuperscript{205} but may refuse such actions between nonresidents.\textsuperscript{206} In \textit{Ivy v. Stoddard},\textsuperscript{207} this rule was interpreted as permitting dismissal of actions between nonresidents under appropriate circumstances, even though the cause of action arose in New York.\textsuperscript{208}

\textit{Forum Non Conveniens in New York Since 1950}

The scope of \textit{forum non conveniens} has been substantially expanded during the third quarter of the twentieth century. In the area of

\begin{itemize}
  \item \textsuperscript{197} It was established early that the New York courts favored retention of any actions arising here. Palmer v. Dewitt, \textit{47 N.Y.} 532 (1872). \textit{Accord}, Robinson v. Oceanic Steam Nav. Co., \textit{112 N.Y.} 315, 324, 19 N.E. 625, 627 (1889):
    
    Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose, or the subject-matter of the litigation is situated within this state.
  
  \item \textsuperscript{198} \textit{142 Misc.} 382, 254 N.Y.S. 635 (Sup. Ct. Tioga County 1931).
  
  \item \textsuperscript{199} \textit{Id.} at 383, 254 N.Y.S. at 636-37.
  
  \item \textsuperscript{200} \textit{140 Misc.} 841, 251 N.Y.S. 713 (Sup. Ct. Cattaraugus County 1931).
  
  \item \textsuperscript{201} \textit{Id.} at 842, 251 N.Y.S. at 715.
  
  \item \textsuperscript{202} \textit{166 Misc.} 817, 3 N.Y.S.2d 248 (Sup. Ct. Erie County 1933).
  
  \item \textsuperscript{203} \textit{Id.} at 819, 3 N.Y.S.2d at 250. Additionally, the court observed that it would have retained the action if the exercise of jurisdiction were a matter of discretion. \textit{Id.}
  
  \item \textsuperscript{204} \textit{300 N.Y.} 60, 89 N.E.2d 15 (1949), \textit{reargument denied}, \textit{300 N.Y.} 644, 90 N.E.2d 496 (1950).
  
  
  \item \textsuperscript{206} \textit{300 N.Y.} at 62, 89 N.E.2d at 15-16, \textit{citing} Wedemann v. United States Trust Co., \textit{258 N.Y.} 515, 179 N.E. 712 (1932).
  
  \item \textsuperscript{207} \textit{147 N.Y.S.2d} 469 (Sup. Ct. N.Y. County 1955).
  
  \item \textsuperscript{208} \textit{Id.} at 472. This was an action based upon libel in regard to events which occurred in Illinois. Plaintiff's reputation was centered there, and neither party resided here. Trial in New York would have been inconvenient and defendant would have been greatly handicapped by certain presumptions. The libel was published in New York but had been most widely circulated in Illinois. The court dismissed upon condition.
\end{itemize}
contract actions, for example, the doctrine has undergone significant change. Prior to 1950, our courts were bound to entertain any contract action. In 1951, however, the Appellate Division, First Department, in *Schlesinger v. Italian Line*,\(^\text{209}\) opined that a court could refuse to hear a contract action between nonresidents where the contract was made and breached without the state, where special circumstances exist and justice can be better served by adjudication in another jurisdiction.\(^\text{210}\)

During the following year the Court of Appeals handed down the landmark decision of *Bata v. Bata*.\(^\text{211}\) An action had been brought by the widow and son of a Czechoslovakian citizen against his half-brother. The plaintiffs alleged that the defendant became executive director of the decedent's company (one corporation of which was in New York) and violated his duty to the plaintiffs by wrongfully asserting ownership of decedent's property. While accepting jurisdiction, the court acknowledged that contract cases and other types of property actions could be refused.\(^\text{212}\)

As contract actions may be rejected, so too may provisions calling for settlement under a specific law be disregarded, though not without justification. In *National Equipment Rental Ltd. v. Graphic Art Designers Co.*,\(^\text{213}\) which concerned a contract made in New York between foreign corporations, the court determined the validity of a provision that New York be the forum of litigation. In upholding said provision, it declared that "[e]xpress stipulations in furtherance of business convenience or necessity and voluntarily made should not be lightly dis-


\(^{212}\) Id. at 56, 105 N.E.2d at 625-26. This change in judicial philosophy marked a partial return to the position espoused in *DeWitt v. Buchanan*, 54 Barb. 31, 33 (N.Y. Sup. Ct. 1868):

Unless for special reasons, non-resident foreigners should not be permitted the use of our courts to redress wrongs or enforce contracts, committed or made within their own territory.

This discretion conferred in *Bata* has been exercised. Central Publishing Co v. Wittman, 283 App. Div. 492, 128 N.Y.S.2d 769 (1st Dep't 1954); Winmil Co v. American Cent. Ins. Co., 35 Misc. 2d 187, 230 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1962) (conditional dismissal of action on insurance policy by foreign corporation against foreign corporation doing business in New York); Catapodis v. Onassis, 2 Misc. 2d 234, 151 N.Y.S.2d 39 (Sup. Ct. N.Y. County 1960) (action dismissed in light of the facts that the parties and certain key witnesses resided in France, a similar suit was being prosecuted there by the plaintiff, and the contract was allegedly breached there).

regarded." But, in *Arsenis v. Atlantic Tankers Ltd.*, a provision in a contract executed in Greece, which designated that country as the exclusive forum for disputes arising out of the contract, was held void as against public policy by the New York court. Also noteworthy here are contract stipulations specifying venue in a particular county in New York. The rules in this regard are much the same as those governing other contract provisions. "Stipulations in contracts which provide that any action brought under the contract must be brought in a specified county will be sustained where no question of public policy is involved."

It must be remembered that a person may have more than one residence, and that the defendant seeking to avoid the exercise of jurisdiction on the ground that a party is not a resident, has the burden of establishing that fact. If the plaintiff was a resident of New York, he was almost certainly immune from dismissal based upon *forum non conveniens*. Dismissal was available only for the reasons heretofor mentioned. Indeed, actions otherwise dismissible might be retained in light of special circumstances. For example, in *Fuss v. French National*

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214 Id. at 444, 234 N.Y.S.2d at 63.
217 Syracuse Plaster Co. v. Agostini Bros. Bldg. Corp., 169 Misc. 566, 567, 7 N.Y.S.2d 897, 900 (Sup. Ct. Onondaga County 1939) (action by plaintiff-assignee on claim arising out of a contract which included a provision that any action be brought in New York County). *See also* Frontier Excavating, Inc. v. St. Paul Fire & Marine Ins. Co., 50 Misc. 2d 232, 269 N.Y.S.2d 782 (Sup. Ct. Erie County 1966) (action by a contractor against a surety on a contractor's bond was transferred to New York County since subcontractors provided that any action be tried there).

CPLR 501 states: "Subject to the provisions of subdivision two of section 510, written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial."


Additionally, Business Corporation Law § 1314(a) provides that a New York resident or corporation may sue a foreign corporation on any cause of action.

Railroads, where the rights of the litigant involved regulation and management of the internal affairs of a foreign corporation, the court nonetheless declined to dismiss in light of all the circumstances, including the fact that the plaintiff was seriously injured and unable to bring suit in France. The case illustrates the willingness of the courts to exercise jurisdiction under exceptional circumstances when dismissal would otherwise be warranted.

A second exception, under which the courts retain a case which otherwise would be dismissed, has also been established. It applies to a stockholder's derivative action for the benefit of a foreign corporation. In Ackert v. Ausman, a Missouri resident brought suit in New York against a Minnesota corporation with its principal place of business in that state. The defendant moved to dismiss, on the grounds that the action involved the internal affairs of a foreign corporation and that the plaintiff had no reason to sue in New York. The plaintiff justified his selection of forum on the grounds that the defendant was licensed to do business in and had an office in New York. The court, relying on Goldstein v. Lightner, concluded that forum non conveniens is inapplicable to stockholder's derivative actions.

The crucial nature of residence in the determination of whether jurisdiction shall be retained gave rise to conjecture as to the effect of two important New York cases—Seider v. Roth and Simpson v.
Loehmann—upon the exercise of forum non conveniens. In both actions the plaintiff was a New York resident who acquired quasi in rem jurisdiction over a nonresident defendant by attaching the defendant's insurance policy with a company doing business in New York. To what extent is the attachment procedure available for the purpose of acquiring jurisdiction? This question was answered in part, in Vaage v. Lewis, by the Appellate Division, Second Department. The court held that in rem jurisdiction over a nonresident in favor of a nonresident plaintiff may not be obtained by attachment of a debt owed to the former by a foreign insurer during business in New York. Concluding that the exercise of such jurisdiction would deprive the defendant of due process, the court declined to hear the case.

The rule regarding actions between nonresidents based upon a cause of action accruing without the state has remained the same. Essentially two questions present themselves in every case involving suits between nonresidents on causes of action having no significant nexus with this State. The first is whether, despite the general policy which militates against burdening the courts of this State with such actions, the circumstances are such that the interests of justice or other significant policy considerations warrant the retention of jurisdiction. The second consideration is whether—assuming the case is one of the kind described above—it is practically more feasible to try the action here rather than in another jurisdiction.

Whether jurisdiction is to be exercised is a determination which must be made by the court based upon the individual circumstances of each case. The Legislature has chosen not to establish specific guidelines concerning the application of forum non conveniens. Its approach in this regard is exemplified by section 1314(b) of the Business Corporation Law, which states in part that

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230 Id. at 318, 288 N.Y.S.2d at 524-25.

231 Id. at 318, 288 N.Y.S.2d at 524-25.


233 See generally Note, The Effect of the Common-Law Doctrine of Forum Non Con-
an action... against a foreign corporation may be maintained by another foreign corporation... or by a nonresident... only:

(5) where the defendant is a foreign corporation doing business in this state.

The above subsection, like its predecessors, is permissive only; retention of jurisdiction is not mandated and no enumeration of considerations upon which a decision shall be made is provided. Consequently, contradictory decisions have resulted.

Since 1966, five major cases have significantly affected and altered the doctrine of forum non conveniens. The first of these was Export Insurance Co. v. Mitsui Steamship Co., in which an action was brought in the right of a Japanese corporation by a New York insurer against a second Japanese corporation, for alleged damage to goods caused by the defendant carrier. The goods had been purchased from a Mexican company and were shipped from Mexico to Japan. The contract of carriage contained a provision to litigate any dispute in Japan.


However, the court apparently must accept jurisdiction of an action against a foreign corporation:

(1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.

(2) Where the subject matter of the litigation is situated within this state.

(3) Where the cause of action arose within this state, except where the object of action or special proceeding is to affect the title of real property situated outside this state.

(4) Where, in any case not included in the preceding subparagraphs, a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules.


The civil court dismissed the action as constituting an unreasonable burden on commerce under the commerce clause of the Federal Constitution. Appellate term reversed this decision, and defendant appealed. Two issues were presented to the Appellate Division, First Department. The commerce clause objection was immediately rejected, but the second issue —

whether the record establishe[d] a substantial factual basis for the exercise of discretionary power to refuse jurisdiction of this action and thus preclude plaintiff, a New York corporation, from access to the courts of New York — was resolved in favor of the defendant. Upon consideration of (1) the nature of the plaintiff's business in New York and its relationship to the acts which created the cause of action; (2) the lessening of the inconvenience of appearing in foreign jurisdictions as a result of the expansion of international trade; and (3) potential reciprocity from foreign jurisdictions vis-à-vis New York residents, the court concluded that contractual provisions depriving New York courts of jurisdiction, while not binding, could be honored. While acknowledging that "in the technical sense [the doctrine] is not available against a resident and hence is not applicable," the First Department clearly indicated that a defense in the nature of *forum non conveniens* could be upheld. The decision of the appellate term was affirmed "with leave to renew the motion to dismiss on discretionary grounds on a complete record showing all cogent facts and circumstances..." A doctrinaire holding that agreements to oust New York jurisdiction are void was rejected in favor of a flexible role permitting courts to honor these agreements in appropriate situations. This disposition illustrates the increasing

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238 U.S. Const. art I, § 8, cl. 3.  
239 26 App. Div. 2d at 437, 274 N.Y.S.2d at 979.  
240 Id.  
241 Id. at 437-38, 274 N.Y.S.2d at 980. Declining jurisdiction in deference to a contractual provision was not an unheard of exercise of judicial discretion. There had been dictum indicating that such a disposition could be appropriate. There may conceivably be exceptional circumstances where resort to the courts of another state is so advisedly convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction.  
242 The *Mitsui* court acknowledged "an increasing disposition on the part of courts to recognize the existence of such exceptional circumstances and to give effect to it." 26 App. Div. 2d at 438, 274 N.Y.S.2d at 980.  
243 Id. at 439, 274 N.Y.S.2d at 981.  
tendency of the courts to recognize the existence of "exceptional circumstances" under which dismissal by reason of forum non conveniens is justified.

A second important decision based upon the specific facts of this case was Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig). 245 Therein, a wrongful death action was commenced in New York against Varig, a Brazilian corporation doing business in New York, its New York subsidiary, and the Boeing Company, a Delaware corporation also doing business in New York. The cause of action arose in Peru, and all plaintiffs and their decedents were foreign residents. Upon the nonresident defendants' motion for dismissal on the ground of forum non conveniens, the Supreme Court, New York County, found that New York was the only forum in which both these defendants could be joined and that other suits were presently pending here. It concluded that these special circumstances warranted retention of the action. 246 The Appellate Division, First Department, reversed; it held that the absence of an alternative forum wherein the defendants could be joined, and the convenience of the plaintiffs, were not sufficient to warrant retention of the action. 247 The inconvenience to the court was considered the decisive factor. 248

While recognizing both the right to bring the action under section 1314(b)(5) of the Business Corporation Law and judicial discretion to refuse to exercise its jurisdiction, the Court of Appeals reversed. 249 Relying on its decision in Bata v. Bata 250 and the United States Supreme Court's decision in Gulf Oil Corp. v. Gilbert, 251 it reasoned that

248 Id., 277 N.Y.S.2d at 579. The court quoted Bata v. Bata, 304 N.Y. 51, 56, 105 N.E.2d 623, 626 (1952) ("[I]t is the 'convenience' of the court, and not of the parties, which is the primary consideration."); Pietrarola v. New Jersey & H.R. Ry. & Ferry Co., 197 N.Y. 434, 439, 91 N.E. 120, 122 (1910) ("As a question of policy, it is intolerable that our courts should be impeded in their administration of justice, and that the people of the state should be burdened with expense in redressing wrongs committed in another state, for the benefit, solely, of its citizens . . ."); and Aetna Ins. Co. v. Creole Petroleum Corp., 27 App. Div. 2d 518, 275 N.Y.S.2d 274, 275 (1st Dep't 1966) (mem.) ("It is the general policy of the courts of this state, in the absence of special circumstances, to reject actions between nonresidents founded on tort, where the cause of action arises outside the state."). See also Williams v. Seaboard Air Line R.R., 9 App. Div. 2d 266, 193 N.Y.S.2d 588 (1st Dep't 1959); White v. Boston & Me. R.R., 283 App. Div. 482, 129 N.Y.S.2d 15 (3d Dep't 1954).
249 22 N.Y.2d at 338, 239 N.E.2d at 545, 292 N.Y.S.2d at 674.
among the pertinent factors to be considered and weighed, in applying the doctrine of forum non conveniens, are, on the one hand, the burden on the New York courts and the extent of any hardship to the defendant that prosecution of suit would entail and, on the other, such matters as the unavailability elsewhere of a forum in which the plaintiff may obtain effective redress and the extent to which the plaintiff's interests may otherwise be properly served by pursuing his claim in this State.\textsuperscript{253}

In this regard, the Court concluded that the absence of another forum in which the defendants could be joined was a circumstance which the appellate division was bound to consider.\textsuperscript{253}

It is obvious that the New York courts must draw a line separating those actions which they will hear from those which they will decline to entertain. Presumably, the delineation fell before actions between nonresidents over a foreign cause of action, but after actions between nonresidents which arise out of acts or omissions in New York.\textsuperscript{254} In light of this, it is clear that new ground was broken by the Appellate Division, First Department, in \textit{Hernandez v. Cali, Inc.},\textsuperscript{255} the third major case.

\textit{In Hernandez}, the plaintiff was a citizen of Colombia who had signed on as a carpenter with a Panamanian vessel, the owners of which were citizens and residents of Panama. Under the contract of employment, it was specifically agreed that all the rights and obligations of the parties were to be governed exclusively by the laws of and determined in Panama. In November 1966, the plaintiff sustained certain injuries on board while the ship was docking in New York. He eventually brought suit in New York to recover damages, and the defendants moved for dismissal on the ground of forum non conveniens.\textsuperscript{256} At issue

\textsuperscript{252}22 N.Y.2d at 338, 239 N.E.2d at 544, 292 N.Y.S.2d at 673.


\textsuperscript{256}Defendants asserted that individuals having personal knowledge of the occurrence are either residents of the Republic of Colombia or of the Republic of Panama; that all defendants who have appeared herein stipulate to appear in the courts of the Republic of Panama, to refrain from challenging plaintiff's capacity to sue or to plead the Statute of Limitations, and to furnish adequate security for the payment of any judgment.
\textit{Id.} at 194, 301 N.Y.S.2d at 399.
was whether the exercise of jurisdiction over an action between non-residents, based upon a maritime tort which occurred within the territorial waters of New York, could be declined in light of the agreement for exclusive jurisdiction in a foreign country. Special term dismissed the action, and the appellate division affirmed the order. Applying the guidelines formulated in \textit{Gulf Oil Corp. v. Gilbert}, it concluded that "no good reason appears why this case should not be tried in the Republic of Panama." It viewed the difficulty of enforcing a foreign law and the fact that the plaintiff had voluntarily signed the articles and was able to return to Panama as the decisive factors in determining whether to exercise jurisdiction.

Judge Nunez dissented. He noted that "[t]he accident occurred in New York, the medical witnesses are in New York, the fact witnesses either reside in New York or are members of the crew of the vessel which comes to New York frequently." These factors, coupled with the precedent for retaining actions which arise in this State, convinced him that the case should be tried here. That the majority decided otherwise indicates a greater judicial willingness to apply \textit{forum non conveniens} and a diminution in the strength of the showing necessary to convince the court to honor a contractual provision for trial in another jurisdiction.

Viewed in light of \textit{Mitsui} and \textit{Varkonyi}, the fourth significant decision — \textit{Pharo v. Piedmont Aviation, Inc.} — is not too surprising.

\textsuperscript{257} 330 U.S. 501 (1947). The private considerations enumerated by the Court include 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 the premises . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive. \textit{Id.} at 508.

\textsuperscript{258} 32 App. Div. 2d at 195, 301 N.Y.S.2d at 401.


\textsuperscript{260} 32 App. Div. 2d at 197, 301 N.Y.S.2d at 402 (Nunez, J., dissenting).

Therein, an Ohio resident brought suit against the airplane manufacturer, the instrument manufacturer, and the operator allegedly responsible for an airplane crash in West Virginia. Of the three defendants, only Kollsman, which supplied the instruments, was a New York corporation. The nonresident defendants, who were “doing business” in New York, moved to dismiss under the doctrine of forum non conveniens, and all defendants agreed to be sued in West Virginia. This stipulation, the pendency of similar actions in West Virginia, the presence of witness there and the availability of the United States as a party to the action there convinced the Appellate Division, First Department, to reverse the lower court and to dismiss upon condition as to the nonresident defendants.262 The Court of Appeals affirmed.263

The logical nature of the disposition in Pharo belies its significance. Judge Capozzoli’s dissent in the appellate division highlights the inconsistency between previous authority and present thinking. Kollsman was a New York resident, and the rule was that “our courts are bound to accept actions for a foreign tort where either plaintiff or defendant is a resident of this state.”264 Since the court was obliged to hear the


Dean McLaughlin has observed:

If only one party [defendant] in a multi-party litigation is a New York resident, then, theoretically, the court may dismiss the action as to the others. Yet, the fact that the court must entertain the action as to the resident is a factor strongly militating against dismissal as to the others. There is no point in multiplying lawsuits. Michels v. McCrory Corp., 1964, 44 Misc. 2d 212, 253 N.Y.S.2d 485.

7B McKinney’s CPLR 301, commentary 4, at 13 (1972).


The circumstance that, in this action brought by a nonresident plaintiff, one of the defendants is a domestic corporation does not require that this State entertain the suit insofar as other foreign corporations and other nonresidents are concerned.

Id. at 712, 275 N.E.2d at 334, 325 N.Y.S.2d at 751.


Cases retained in the exercise of discretion include: Burdick v. Freeman, 120 N.Y. 429, 24 N.E. 949 (1890) (action had been pending for a year before objection was made at the close of the trial); McHugh v. Paley, 63 Misc. 2d 1092, 314 N.Y.S.2d 208 (Sup. Ct. N.Y. County 1970) (plaintiff could not have afforded to prosecute an action in the Bahamas and resident defendant would have been prejudiced by dismissal as to nonresident defendant); Gilbert v. Burnside, 16 Misc. 2d 1089, 177 N.Y.S.2d 202 (Sup. Ct. Kings County 1958) (plaintiff resided here, defendant corporations did business here, and defendants could not be joined elsewhere); Royal China v. Regal China Corp., 304 N.Y. 309, 107 N.E.2d 461 (1952) (per curiam) (defendant could not be served in the other possible forum); Zucker v. Raymond Laboratories, Inc., 74 N.Y.S.2d 7 (Sup. Ct. N.Y. County 1947) (plaintiff would have been otherwise required to commence his action in Minnesota); Williamson v. Palmer, 181 Misc. 610, 43 N.Y.S.2d 592 (Sup. Ct. Westchester County 1943) (plaintiff would have been subject to the defense of statute of limitations
action as to Kollsman, retention of the entire case was generally expected. This decision appears to shift the burden to the plaintiff to prove the appropriateness of his choice of forum, rather than requiring the defendant to show excessive unfairness to himself.265

The four previous decisions indicated that the discretionary doctrine of forum non conveniens had been significantly liberalized in recent years. Numerous factors, including the plaintiff's ability to sue elsewhere, the court's convenience, the defendant's position, the nature of the cause of action and the relief sought, any contractual provisions concerning the adjudication of disputes, and possible special circumstances, were to be weighed as the court determined whether to exercise jurisdiction.266

and defendants had appeared generally); De Flammercourt v. Ascer, 167 Misc. 473, 3 N.Y.S.2d 461 (Sup. Ct. N.Y. County 1933) (commercial action); Buonanno v. Southern Pac. Co., 121 Misc. 99, 205 N.Y.S. 791 (Sup. Ct. N.Y. County 1923) (defendant was doing business in New York and some of the acts in question were performed here); State of Yucatan v. Argumedo, 92 Misc. 547, 157 N.Y.S. 219 (Sup. Ct. N.Y. County 1919) (action was essentially contractual and plaintiff was otherwise without remedy).


265 The United States Supreme Court and the New York Court of Appeals have stated that the plaintiff's choice of forum should rarely be disturbed "unless the balance is strongly in favor of the defendant . . . ." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Bata v. Bata, 304 N.Y. 51, 56, 105 N.E.2d 623, 626 (1952).

266 The doctrine leaves much to the discretion of the court to which plaintiff re-
The vast increase and extension of international trade and international communications... had the effect of lessening the inconvenience of appearance in foreign jurisdictions and abating the concept that such proceedings expose the foreign litigant to injustice or oppression.267

It had become possible for contract actions to be dismissed, even though they arose in the state. Cognizant of reciprocity,268 our courts had become willing to honor voluntary agreements selecting a forum wherein all issues were to be resolved.

Additionally, there had been a proposal by the New York Judicial Conference to substantially broaden the scope of forum non conveniens by adding a new section 327 to the CPLR.269 Under this proposed section, the courts would be authorized to accept or reject an action without regard to the residences of the parties, upon finding that justice would be best served by trial in another jurisdiction.270 In urging its enactment, the Judicial Conference had deemed it necessary to "bring a sorely needed balance to jurisdictional reform in this State."271

After the Legislature had declined for three consecutive years to enact the above proposal, the Court of Appeals in effect did so,272 in 1972, by overruling De La Bouillerie v. De Vienne273 in Silver v. Great American Insurance Co.274 Therein, a nonresident plaintiff had sued a...
New York corporation on a cause of action which arose in Hawaii. The plaintiff had commenced other actions pertaining to the same subject matter in Hawaii, where the convenience of witnesses would have been served best and to whose jurisdiction the defendant had agreed to submit. However, under stare decisis, the fact that the defendant was a New York corporation—apparently New York's sole contact with the controversy—deprived the lower courts of any discretion regarding the exercise of jurisdiction over the matter. The Appellate Division, First Department, lamented that "there is no choice but to accept the suit here," and then urged reconsideration of the rule by both the Legislature and the Court of Appeals.

Under such reconsideration, the Court of Appeals reversed and remanded. It boldly stated:

Further thought persuades us that our current rule—which prohibits the doctrine of forum non conveniens from being invoked if one of the parties is a New York resident—should be relaxed. Its application should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties. Although such residence is, of course, an important factor to be considered, forum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation.

It has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary.

Fully cognizant of the broad jurisdictional basis created by CPLR 302 and the resultant increase in litigation, the Court acknowledged the need for "a greater degree of forebearance in accepting suits which have but minimal contact with New York." It observed that forum non conveniens was developed by the courts

276 Id. at 318, 316 N.Y.S.2d at 187.
278 29 N.Y.2d at 362, — N.E.2d at —, N.Y.S.2d at —.

Our courts should not be under any compulsion to add to their heavy burdens
"to justify stay or dismissal in situations in which it was found that, on balancing the interests and conveniences of the parties and the court, the action could better be adjudicated in another forum."

The legitimate interest in preventing undue burden on or harassments of defendants was specifically stressed.

Should the courts have the broad discretion just conferred in Silver? We believe that this flexibility is required to insure fairness to all litigants.

The arbitrary rule under which judicial discretion was foreclosed if either party was a resident of New York at the time of the action can be counterproductive to "the just, speedy and inexpensive determination of every civil judicial proceeding," which is the mandate of the CPLR and the essence of efficient administration of justice. The forum non conveniens doctrine developed during a time when physical presence was the basis for jurisdiction. The availability of CPLR 302 in conjunction with CPLR 313 obviated the need for a rigid rule requiring all actions involving New York residents to be triable here, and congested calendar conditions necessitated relief.

In light of the additional fact that reasonable conditions may be imposed in dismissing an action under forum non conveniens, the con-
clusion that broad discretion should have been given to or assumed by the courts was irresistible.

**Conclusion**

Courts are no longer obliged to hear actions which clearly should be tried elsewhere. First, the scope of *forum non conveniens* was enlarged, in *Bata*, to encompass contract and other types of property actions. Second, the courts determined, in *Mitsui* and in *Hernandez*, that agreements for adjudication in another jurisdiction could be honored. Third, in *Pharo*, conditional dismissal, as to nonresident defendants, of a cause of action accruing without the State was upheld, even though the court was obliged to exercise jurisdiction as to a resident defendant if the nonresident plaintiff insisted on prosecuting his action here. Finally, in *Silver*, the Court of Appeals has overruled *De La Bouillerie*, so that the New York residence of either party no longer provides talismanic immunity from dismissal under *forum non conveniens*. All these developments are welcome ones: our courts should have, and do have, the discretion to dismiss, with or without conditions, when another forum is clearly more appropriate for disposition of a cause of action.