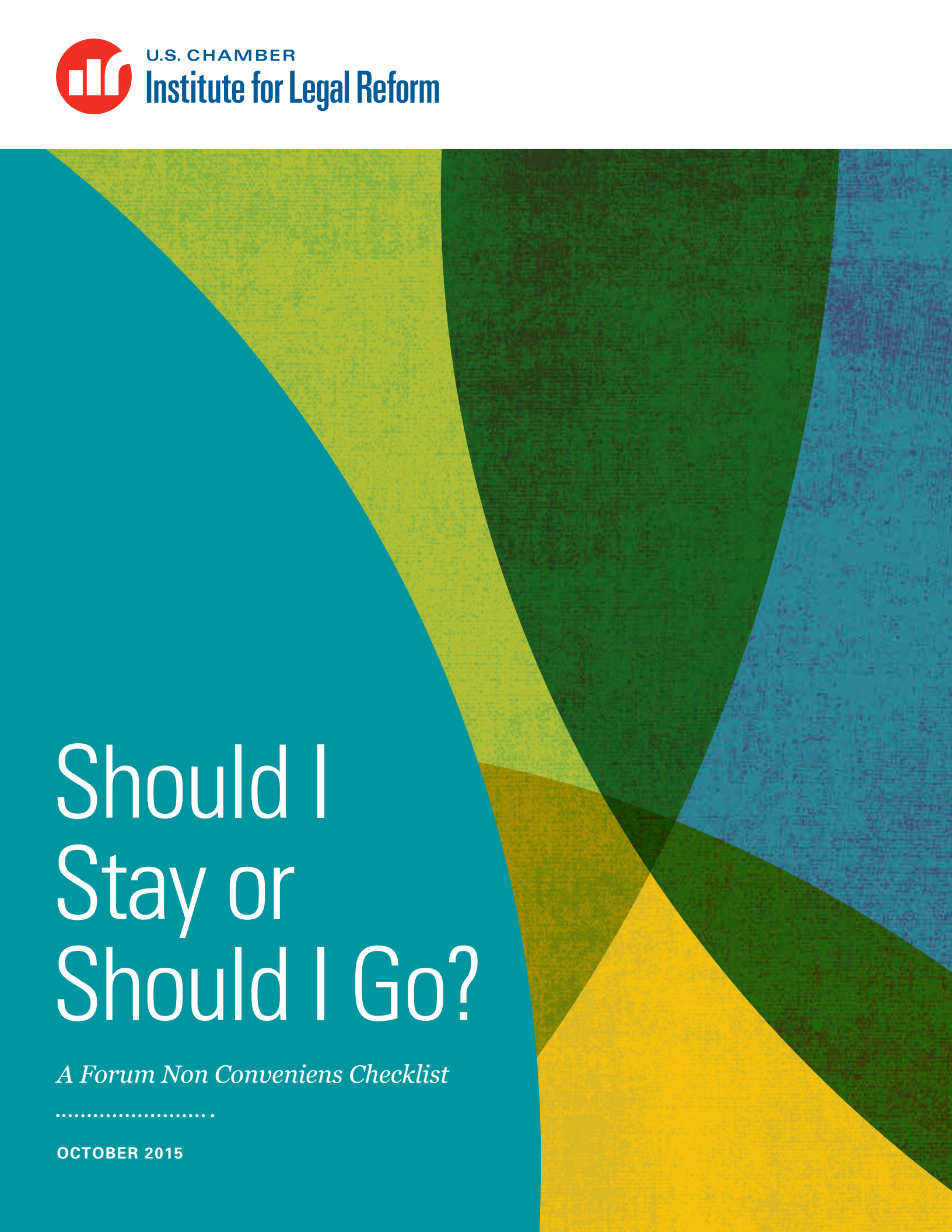

Should I Stay or Should I Go?

A Forum Non Conveniens Checklist

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Prepared for the U.S. Chamber Institute for Legal Reform by

John B. Bellinger, III and R. Reeves Anderson*
Arnold & Porter LLP

Should I Stay or Should I Go? A *Forum Non Conveniens* Checklist

Punitive damages. Strict liability. Liberal discovery. Contingency fees. These are some of the distinctively American, plaintiff-friendly features of the U.S. legal system that attract plaintiffs to file lawsuits in U.S. courts, even when foreign courts are better suited to hear their cases.

It would seem logical that defendants should embrace an equal and opposite reaction—pressing to avoid litigation in U.S. courts in favor of litigation abroad. This conventional wisdom has driven defendants to routinely seek dismissal of lawsuits under the common-law doctrine of *forum non conveniens* (FNC, for short), which gives U.S. courts discretion to decline jurisdiction in favor of an alternative, more convenient foreign forum to resolve a dispute.

Defendants might be well-served, however, to question their reflexive instinct to avoid U.S. courts. Recent trends in international litigation, including foreign laws that discriminate against U.S. defendants and foreign courts that award substantial judgments, raise new questions about whether defendants should be so eager to prefer foreign tribunals in lieu of U.S. courts. We offer below some practical tips to help defense counsel navigate the evolving FNC landscape.

As its name imparts, the *forum non conveniens* doctrine is designed to identify which country's forum is most convenient to resolve a particular dispute. U.S. courts have developed a three-part test to answer that question.

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First, the defendant must show the existence of an alternative forum in a foreign country that is both *available and adequate*. An alternative forum is "available" if "the entire case and all the parties can come within the jurisdiction of the forum."[1] A foreign forum is considered "adequate" when "the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy all the same benefits as they might receive in an American court."[2]

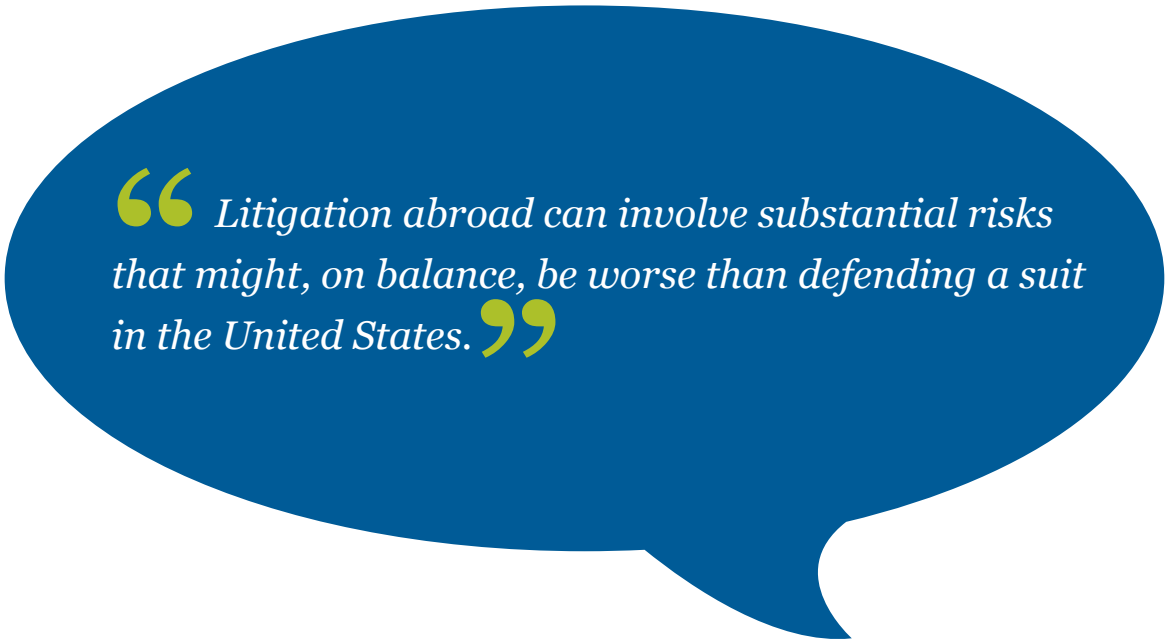
Second, the court must *balance the private and public interests* to determine if dismissal is appropriate. Private interests (that is, the interests of the particular litigants) include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling [witnesses] and the cost of obtaining attendance of willing [witnesses]; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive."[3] Public interests factors include congestion of courts, burden on jurors, and, most important, choice-of-law considerations.

Third, the court must determine the degree of deference to afford the *plaintiff's choice of forum*. An American plaintiff's choice of a U.S. forum is generally accorded considerable deference by the court, whereas a foreign plaintiff is entitled to less deference.

If, on balance, these factors lead a court to conclude that a foreign forum is superior to the United States for litigating the dispute, the lawsuit should be dismissed on FNC grounds.

Practice Pointers

If a particular case satisfies the criteria for dismissal on FNC grounds, why would a defendant *not* seek dismissal? The short answer is that litigation abroad can involve substantial risks that might, on balance, be worse than defending a suit in the United States. Chevron and Dole Food Company suffered these consequences when they were later hit with multi-billion-dollar judgments in Ecuador and Nicaragua, respectively, after securing FNC dismissals in the United States.[4] The following practice tips are designed to gauge when and how to seek FNC dismissal.



ASSESS THE STRENGTH OF OTHER DEFENSES

Does the case present other promising defenses that could dispose of the lawsuit on the merits? Not all dismissals are equal; a successful merits-based defense can end a lawsuit with prejudice, resolving the case once and for all. As such, a solid defense based on, for example, clear contract language or a statute of limitations might be preferable to an FNC dismissal. Defendants can, of course, argue alternative grounds for dismissal, but this strategy gives the court discretion to choose how to dispose of the case. If you have a 40-caliber defense, you don't want the judge choosing the 9mm alternative.

ACCOUNT FOR THE PLAINTIFFS' BURDEN

Sometimes the *relative* inconvenience of litigating in the United States can be more burdensome for the foreign plaintiff than for the U.S. defendant. For example, foreign plaintiffs in a mass-action case could face considerable hardship if required to appear in the United States for depositions or to procure and prepare foreign witnesses for trial. In extreme cases, these burdens can inhibit the ability of plaintiffs' attorneys to prosecute their cases altogether, setting the stage for dismissal or at least a favorable settlement.

ASSESS THE ODDS THAT THE PLAINTIFF WILL REFILE ABROAD

Most cases are never refiled in the alternative forum after dismissal on FNC grounds. Several factors can affect the likelihood that a plaintiff would continue to litigate abroad. For example, a plaintiff that is represented by foreign counsel in connection with the U.S. case is more likely to continue the litigation in the foreign forum. Plaintiffs with claims for physical injuries, such as wrongful death claims, and well-established liability theories similarly are more likely to continue pursuing remedies after FNC dismissal compared to plaintiffs with intangible injuries or novel claims. Assessing the likelihood of refiling is critical to determining the anticipated benefit of FNC dismissal—whether it might end the case completely or just delay resolution.

DO YOUR DUE DILIGENCE

Research the applicable foreign laws and procedures before filing an FNC motion. Does the foreign country have laws that discriminate against foreign defendants or make it impossibly difficult to achieve a fair trial (as in Nicaragua)?[5] Have courts in the foreign country issued sizable judgments that rival U.S. awards (as have been rendered recently in Ecuador and Spain)?[6] Is the foreign country a party to a judgment-enforcement treaty that could

> *"Sometimes the relative inconvenience of litigating in the United States can be more burdensome for the foreign plaintiff than for the U.S. defendant."*

facilitate the swift recognition of an adverse judgment? A thorough assessment will also consider the conditions of the foreign judicial system generally—that is, do courts abide by the rule of law? Foreign country reports and indices published by the State Department, Transparency International, and TRACE, for example, can help defendants assess the likelihood that a foreign trial could be infected with corruption or other extrajudicial influence.

This investigation process might require the advice of a foreign practitioner, but the time invested in researching the foreign law usually will be well spent because an FNC motion ordinarily requires a preliminary assessment of the plaintiff's ability to recover under the foreign law. Just as important, due diligence can prevent unwanted surprises. The satisfaction derived from having a case dismissed on FNC grounds could quickly turn to regret upon discovering that the foreign law is even worse.

PAY ATTENTION TO CHANGING CIRCUMSTANCES

Staying put can sometimes be the right choice, especially when the foreign forum appears to be taking a turn for the worse. A good example is Pfizer's strategic about-face in a long-running lawsuit brought in New York by Nigerian citizens alleging that Pfizer had conducted nonconsensual medical testing in Nigeria in the early 2000s. After securing FNC dismissal from the district court, "a tectonic change . . . altered the relevant political landscape" in Nigeria, causing "the federal government of Nigeria [to] sue[] Pfizer and several of its employees, seeking $7 billion in damages."[7] Although Nigeria arguably still constituted an available and adequate alternative forum to litigate the dispute, Pfizer's prospects for prevailing on the merits looked grim. As a result, Pfizer notified the Second Circuit "that in light of these recent developments, which it believed required further consideration by the district court, it would not seek affirmance on the basis of forum non conveniens." Pfizer settled the case for an undisclosed amount shortly thereafter.

WEIGH THE RISK OF SETTING BAD PRECEDENT

Corporate defendants often face multiple lawsuits in their home jurisdiction that could be eligible for FNC dismissal. Such repeat players should be aware of the possibility that a single adverse FNC decision could establish harmful precedent that limits the defendant's FNC chances in future cases. For example, the Boeing Company, with its corporate headquarters in Chicago, lost an FNC motion seeking to dismiss a product liability suit filed in Illinois by survivors of an airplane crash that occurred in Peru.[8] Citing that adverse decision, other courts in Illinois have since concluded that it would not be inconvenient for Boeing to litigate in Illinois—creating almost a *de facto* presumption against Boeing in FNC cases filed in Chicago.[9] Repeat players thus should pursue FNC motions with caution; once a court finds that the forum is not inconvenient, it becomes easy for the next court to do the same.

"Once a court finds that the forum is not inconvenient, it becomes easy for the next court to do the same."

If, after considering these factors, FNC seems like a good option, then:

OFFER CONDITIONS, BUT CAREFULLY

Many courts attach conditions to FNC dismissal, such as requiring the defendant to consent to jurisdiction in the foreign forum and waive any statute of limitations defense. Preemptively offering such concessions could forestall additional, more onerous conditions. Whether a defendant should stipulate to additional conditions, such as enhanced discovery or merits concessions, depends on the unique factual circumstances of each case. In contrast, defendants should rarely, if ever, consent to the recognition and enforcement of a future foreign judgment because defendants may later be able to resist recognition of particularly egregious foreign judgments.

CONSIDER A “LAYOVER” VENUE

Not all jurisdictions within the United States are equally receptive to FNC defenses. The Third and Ninth Circuits generally are perceived to be less amenable to FNC than courts in the Fifth and Seventh Circuits. A defendant in an unfavorable jurisdiction should try to transfer the case to a more favorable venue within the United States and then seek FNC dismissal.

Conclusion

Doctrinally, FNC is all about convenience; but practically, it is more about calculated risk. While the risks of U.S. litigation are relatively well known (if not easily quantified), rapidly changing circumstances make it more difficult to assess the risks of litigating abroad. However, by following the practical tips described above, defendants can decrease the likelihood that they will end up with forum shopper’s remorse.

Endnotes

* John Bellinger is a partner and Reeves Anderson is an associate at Arnold & Porter LLP.

1 *Saqui v. Pride Cent. Am., LLC,* 595 F.3d 206, 211–12 (5th Cir. 2010).

2 *Galustian v. Peter,* 591 F.3d 724, 731 (4th Cir. 2010).

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

4 *See Chevron Corp. v. Donziger,* 974 F. Supp. 2d 362 (S.D.N.Y. 2014); *Osorio v. Dole Food Co.,* 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

5 *Osorio v. Dole Food Co.,* 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

6 An Ecuadorian court issued a judgment for $18.6 billion against Chevron for environmental damage, later reduced to $9.5 billion. *Chevron Corp. v. Donziger,* 974 F. Supp. 2d 362 (S.D.N.Y. 2014). A Spanish court awarded a historic judgment of $14 million in connection with the crash of Bashkirian Airlines Flight 2937 after the case was dismissed by a U.S. court on FNC grounds.

7 *Abdullahi v. Pfizer, Inc.,* 562 F.3d 163, 172 (2d Cir. 2009).

8 *Vivas v. Boeing Co.,* 911 N.E.2d 1057, 1059 (Ill. App. 2009).

9 *See, e.g., Arik v. Boeing Co.,* 968 N.E.2d 1064 (Ill. App. 2012) (citing *Vivas* in denying FNC dismissal in favor of a Turkish forum).

Notes

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U.S. CHAMBER
Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com