

## The New York Appeal: An Analysis of the Forum Non Conveniens Doctrine in U.S. Letter of Credit Litigation

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### Introduction

The modern transaction is not your father's transaction. Today, transactions are increasingly international.<sup>1</sup> Consider this common scenario: John, a widget maker in Macau, contracts with Jane, a factory owner in Omaha, for the sale of widgets. However, John wants insurance that he will receive payment, so he requests the credit of a New York bank, ABC, as an independent guarantee of payment.<sup>2</sup> If Jane still wants to purchase John's widgets, she will have to obtain issuance of a letter of credit by ABC. ABC pays John once he presents conforming documentation specified in the letter of credit,<sup>3</sup> including evidence of shipment of the widgets to Jane. ABC then seeks reimbursement from Jane, who takes the conforming documentation and retrieves her widgets.<sup>4</sup>

However, suppose that John presented documentation specified in the letter of credit, but ABC was dissatisfied with the presentation and refused to honor the credit.<sup>5</sup> John sues ABC for wrongful dishonor, but in

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<sup>1</sup> See Kimberly Hicks, Note, *Parallel Litigation In Foreign and Federal Courts: Is Forum Non Conveniens the Answer?*, 28 REV. LITIG. 659, 662 (2009) ("Parallel litigation has always been present, but it has become more prevalent over the last twenty-five years for two main reasons: more interaction across sovereign borders and more liberal personal jurisdiction rules.").

<sup>2</sup> See *infra* notes 58–66 and accompanying text.

<sup>3</sup> See *infra* note 63 and accompanying text.

<sup>4</sup> See *infra* notes 65–66 and accompanying text.

<sup>5</sup> Common reasons why an Issuer would be dissatisfied with a Beneficiary include fraud, late or inadequate notice, or non-compliance of the terms and conditions of the letter of credit. See, e.g., *Banco General Runinahui, S.A. v. Citibank Int'l*, 97 F.3d 480, 483 (11th Cir. 1996) (Issuer refused to honor Beneficiary's request because the documents submitted contained several discrepancies); *Avery Dennison Corp. v. The Home Trust & Savs. Bank*, 2003 WL 22697175, at \*2 (N.D. Iowa Nov. 7, 2003) (Issuer refused to honor Beneficiary's demand because it fell outside the deadline, which stated that 3:00 PM on Fridays was Monday business); *Amwest Sur. Ins. Co. v. Concord Bank*, 248 F. Supp. 2d 867, 872 (E.D. Mo. 2003) (Issuer dishonored Beneficiary's draft because, allegedly, it violated a letter of credit condition that stated Beneficiary would not be released of liability by its obligees).

which forum should he file his action? At least three come to mind—Macau, a federal district court in New York, or a federal district court in Nebraska. Alternatively, suppose that Jane sued ABC for wrongful honor of the letter of credit. Where should she file her claim? Moreover, assuming in either suit that ABC moved to dismiss on forum non conveniens grounds, would a court likely grant or deny the motion?

Because letter of credit transactions stretch parties across continents, its litigation generates a steady flow of actions that turn on the doctrine of forum non conveniens. This Comment will survey how U.S. courts interpret the doctrine in letter of credit litigation. Case law reveals two attitudes that courts have embraced, in whole or in part, when they are confronted by this type of litigation: (1) for denying (or dismissing) the application of forum non conveniens, because the court's forum, and thus its financial market, has superseding interest in the letter of credit litigation;<sup>6</sup> or (2) for granting (or upholding) the application of forum non conveniens, because the limited contacts presented by plaintiff would otherwise open a flood gate and turn the forum into a melting pot for complex foreign issues.<sup>7</sup>

Both attitudes are legitimate and important, especially considering that the United States, particularly New York, is home to substantial sums of international letter of credit business.<sup>8</sup> This Comment will first provide the necessary background for understanding forum non conveniens and letters of credit. It will also delve into the governing framework of letter of credit transactions for choices of law and forum; that is, the UCP and revised U.C.C. Article 5. The Comment will then begin analyzing, what it calls, the 'New York' effect. The financial backdrop of a forum, at least in part, can induce courts to protect litigation from being heard in alternate forums. No contact is more substantial than the market itself and, therefore, no other forum has greater interest to hear litigation born out of, and affecting, that market.<sup>9</sup> The Comment will counter this analysis with, what it also calls, the 'melting pot' effect. When facts primarily occurred in a

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<sup>6</sup> See, e.g., *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975) ("New York has an overriding and paramount interest in the outcome of this litigation."); *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 383–84 (1969) ("The Legislature intended to protect not only its own residents but also those who come into New York and take advantage of its position as an international clearing house and market place.").

<sup>7</sup> See *infra* note 126 and accompanying text.

<sup>8</sup> See *First Union Nat'l Bank v. Paribas*, 135 F. Supp. 2d 443, 453 (S.D.N.Y. 2001) ("This Court is quite mindful [of New York] as a world financial capital . . .").

<sup>9</sup> See *infra* note 78 and accompanying text.

foreign country by mostly foreign participants, but the plaintiff is belaboring minimal U.S. contacts, while the defendant is pointing to foreign law or, better yet, to a foreign forum, a cluster of complex issues begins melting before the court. It is the court's job to wade through the relative interests melting in the pot and determine *which* contact is the most substantial and *where* it is the most substantial. This comparison is untapped in the letter of credit community and will yield beneficial analysis for practitioners and scholars alike.

## I. Background

Background commentary proceeds in two sections. The first section highlights matters that are relevant to understanding forum non conveniens for purposes here. The section introduces the procedural effects of the *Gulf Oil*<sup>10</sup> and *Piper*<sup>11</sup> decisions, particularly how each continues to force its impression on current interpretation of procedural law. Special attention is also devoted to actions involving foreign plaintiffs, as these are common in letter of credit litigation. Finally, the section overviews scholarly interpretation of the public and private interests attached to reviewing a motion for forum non conveniens.

The second background section discusses the fundamentals of a letter of credit transaction. By their nature, letters of credit draw together foreign parties and transnational dealings. This is why a letter of credit and the doctrine of forum non conveniens, incongruous as they are, actually draw relevant connections. The section breaks down the parties and multiple contracts that are associated with a letter of credit transaction. Finally, the section discusses the standard governing frameworks of a letter of credit—the UCP and the U.C.C.

### A. Forum Non Conveniens

Forum non conveniens is an important doctrine of American procedural law. Under 28 U.S.C. § 1404(a), Congress authorized that, “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”<sup>12</sup> This doctrine holds that a forum, although appropriate under the law, may divest itself from hearing an action if, out of convenience for litigants and witnesses, the action proceeded in an alternate

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<sup>10</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>11</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

<sup>12</sup> 28 U.S.C. § 1404(a) (1996).

forum where it could—or, perhaps, *should*—have originally been brought.<sup>13</sup> In federal court, however, § 1404(a) applies only when the alternate forum is within the United States.<sup>14</sup> In this respect, § 1404(a) is a “statutory substitute”<sup>15</sup> for the common law expression *forum non conveniens*. The doctrine truly applies in federal court only when the alternate forum is in a foreign territory.<sup>16</sup>

Today, when deciding a *forum non conveniens* motion, courts primarily assess three criteria: (1) availability of an alternate forum; (2) degree of deference to plaintiff’s chosen forum; and (3) where public and private interests will best be served.<sup>17</sup> In *Gulf Oil Corp. v. Gilbert*,<sup>18</sup> the U.S. Supreme Court materialized the doctrine of *forum non conveniens* when it held that courts should defer to plaintiff’s private choice of forum unless this deference grossly disadvantaged the defendant, such as imposing excessive expenses on his defense.<sup>19</sup> In assessing the impact on private interests, a court was to weigh the parties’ accessibility to evidence; the availability of willing and unwilling witnesses, as well as the cost and convenience associated with each one attending trial; and the enforceability of a final judgment.<sup>20</sup> Additionally, the Court held for the consideration of public interests when applying *forum non conveniens*.<sup>21</sup> One interest was the backlog of the chosen forum’s case docket, regardless of whether the action originated in the chosen forum.<sup>22</sup> A second interest was that, if plaintiff requested a jury trial, the Court discouraged citizens from hearing and ruling on an action that did not affect their community, especially if their ruling impinged upon another community.<sup>23</sup>

The Court expanded on this latter consideration in *Piper Aircraft Co. v. Reyno*.<sup>24</sup> Plaintiff represented the estates of Scottish citizens, who were killed in an airplane crash over Scotland.<sup>25</sup> Plaintiff brought wrongful

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<sup>13</sup> BLACK’S LAW DICTIONARY 544 (8th ed. 2005).

<sup>14</sup> *Ravelo Monegro v. Rosa*, 211 F.3d 509, 512–13 (9th Cir. 2000) (explaining that § 1404(a) “serves as a statutory substitute for *forum non conveniens* in federal court when the alternative forum is within the territory of the United States.”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 513.

<sup>17</sup> John Fellas, *Choice of Forum in International Litigation*, 721 PLI/LIT 261, 291 (2005).

<sup>18</sup> 330 U.S. 501 (1947).

<sup>19</sup> *Id.* at 508.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 508–09.

<sup>24</sup> 454 U.S. 235, 260 (1981).

<sup>25</sup> *Id.* at 238.

death actions against defendant-plane manufacturer,<sup>26</sup> which were combined and transferred to federal district court in Pennsylvania.<sup>27</sup> Defendant quickly moved to dismiss given that an alternative forum existed in Scotland.<sup>28</sup> The district court granted dismissal, but the Third Circuit reversed, in part on grounds that forum non conveniens should not ““result in a change in the applicable law.””<sup>29</sup> Forum non conveniens was justifiable only if American law was inapplicable, or if the foreign jurisdiction, by its own choice of law, gave plaintiff “the [same] benefit of the claim to which she [was] entitled . . . .”<sup>30</sup> The Supreme Court disagreed and reversed.<sup>31</sup>

The Supreme Court held that if forum non conveniens (a) changed applicable law and (b) disadvantaged plaintiff, these, by themselves, were insufficient to prevent dismissal.<sup>32</sup> Had the Court held differently, trial courts would have to perform “complex exercises in comparative law.”<sup>33</sup> The exercises would include a determination of what law applied to the plaintiff’s chosen forum and to the alternate forum and, if different, a comparison of the rights, remedies, and procedures available under each applicable law.<sup>34</sup> A dismissal based on forum non conveniens would be appropriate only if the alternate forum afforded plaintiff as much favor as his chosen forum.<sup>35</sup> Having these exercises would burden trial courts and render forum non conveniens “virtually useless.”<sup>36</sup>

The superseding point to draw from *Gilbert* and *Piper* is that forum non conveniens was partly designed to save courts the burden and expense

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 164 (3d Cir. 1980) (holding that “a dismissal for forum non conveniens, like a statutory transfer, ‘should not, despite its convenience, result in a change in the applicable law.’” (quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977))), *rev’d*, 454 U.S. 235 (1981).

<sup>30</sup> *Id.*

<sup>31</sup> *Piper*, 454 U.S. at 238.

<sup>32</sup> *Id.* (“[T]he possibility of an unfavorable change in law should not, by itself, bar dismissal . . . .”).

<sup>33</sup> *Id.* at 251.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 250 (The Court explained that since requirements for jurisdiction and venue are easy for plaintiffs to satisfy, plaintiffs can typically choose from several legitimate forums, but will be inclined to select the forum “whose choice-of-law rules are most advantageous.” Therefore, “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.”).

of comparative exercises<sup>37</sup> and, instead, to have them rely more on discretion. Public interest concerns suggest dismissal when a court is “required to ‘untangle problems in conflict of laws, and in law foreign to itself.’”<sup>38</sup> However, this complexity captures the essence of today’s forum non conveniens motion. A foreign plaintiff, who is looking to file his action in a plaintiff-friendly American court, will do so in a forum that is convenient for defendant because, most likely, it is defendant’s home forum.<sup>39</sup> The *Piper* court held that a foreign plaintiff’s choice of forum “deserves less deference.”<sup>40</sup> The Ninth Circuit, however, clarified that “less deference is not the same thing as no deference.”<sup>41</sup> The clarification points toward the “conventional wisdom”<sup>42</sup> that choice-of-law doctrine does not substantially influence a court’s choice-of-law decisions.<sup>43</sup> The decisions, instead, are more likely motivated by biases that favor American law before foreign law,<sup>44</sup> American “over foreign litigants, and plaintiffs over defendants.”<sup>45</sup> These biases, however, do not diminish the one constant of the forum non conveniens doctrine: that no case today, which involves foreign parties in a transnational dispute, “is immune from the forum non conveniens battle.”<sup>46</sup>

Since *Piper*, scholars have argued that public and private interests should be less of a balancing test and more of a hierarchical checklist, where public interests are considered only after private interests favor

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<sup>37</sup> *Id.* at 251 (construing that “[t]he doctrine of *forum non conveniens* . . . is designed in part to help courts avoid conducting complex exercises in comparative law.”).

<sup>38</sup> *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

<sup>39</sup> See *Ravelo Monegro v. Rosa*, 211 F.3d 509, 513 (9th Cir. 2000) (“[F]oreign plaintiffs typically bring such suits in the quintessentially convenient forum for the defendant[—]the defendant’s home forum.”).

<sup>40</sup> *Piper*, 454 U.S. at 256.

<sup>41</sup> *Ravelo*, 211 F.3d at 514; see also Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1150 (2006) (admitting that even with the Ninth Circuit’s holding, “it is not at all clear what the forum non conveniens standard is.”).

<sup>42</sup> Christopher A. Whytock, *Myth or Mess? International Choice of Law Action*, 84 N.Y.U. L. REV. 719, 721 (2009) (citing Stewart E. Stark, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951 (1994); Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View “From the Trenches”*, 43 AM. J. COMP. L. 1, 2 (1995)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (citing Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 59 (1989); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT’L L.J. 559, 560 (2002)).

<sup>45</sup> *Id.* (citing Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398 (1980)).

<sup>46</sup> Lear, *supra* note 41, at 1150–51.

granting the motion.<sup>47</sup> Otherwise, if the motion transferred an American plaintiff's action out of an American court, he would be deprived of access to the American legal system out of respect for administrative inconvenience.<sup>48</sup> Professor Martin Davies argues that this substantial result should be carried out, not by the court's decree, but only "if it is dictated by the convenience of the parties themselves or by the complete absence of any connection between the dispute and the U.S. forum."<sup>49</sup> Emily Derr adds that *Gilbert* did not outline public interest considerations for an "international context."<sup>50</sup> Therefore, public interest factors should be reserved under an analysis of jurisdictional and venue rules, and should defer to forum non conveniens only when these rules prove insufficient.<sup>51</sup>

### B. Letter of Credit Transactions

Despite Davies' and Derr's insistence that courts should stray from interpreting the doctrine with practical, public interest underpinnings,<sup>52</sup> courts still tend to do so. This is why actions where defendants move to dismiss on forum non conveniens grounds commonly involve foreign litigants in global disputes.<sup>53</sup> To be sure, two foundational elements of many letters of credit are foreign parties and international commercial transactions. Therefore, the availability of a forum non conveniens motion can be an important factor in U.S. letter of credit litigation.

The Uniform Commercial Code (U.C.C.), which is an "integrated model law"<sup>54</sup> adopted in some version by all U.S. territories and "regarded

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<sup>47</sup> See, e.g., Emily J. Derr, Note, *Striking a Better Public-Private Balance In Forum Non Conveniens*, 93 CORNELL L. REV. 819, 822 (2008) (construing that "judges should approach the forum non conveniens analysis with the understanding that the public interest factors are merely supplementary: a court should consider the public interest factors only if a private interest factor also weighs in favor of dismissal.").

<sup>48</sup> Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 373 (2002); see also Derr, *supra* note 47, at 842 (construing that "[a]dministrative inconvenience is an insufficient reason to deprive American citizens of their legitimate expectation that a U.S. forum will hear their disputes that satisfy jurisdictional rules and do not inconvenience the parties.").

<sup>49</sup> Davies, *supra* note 48.

<sup>50</sup> Derr, *supra* note 47, at 842.

<sup>51</sup> *Id.* at 845.

<sup>52</sup> See *supra* notes 47–51 and accompanying text.

<sup>53</sup> See Lear, *supra* note 41, at 1150–51 (construing that "it is not at all clear what the forum non conveniens standard is. What is clear is that virtually no case involving a transnational event is immune from a forum non conveniens battle.").

<sup>54</sup> LC RULES & LAWS: CRITICAL TEXTS 137 (James E. Byrne ed., 4th ed. 2007) [hereinafter LC RULES & LAWS].

by federal courts as declaratory of federal common law,<sup>55</sup> defines a letter of credit as:

[A] definite undertaking that satisfies the requirements of [U.C.C. §] 5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item or value.<sup>56</sup>

A traditional letter of credit transaction involves two distinct contracts and normally three separate parties.<sup>57</sup>

First, in simplest contract terms, a buyer contracts with a seller for goods or services. This contract is the original, underlying transaction of the letter of credit.<sup>58</sup> If the seller wants assurance that he will receive payment for his goods or services, because the buyer is foreign, unproven, or unreliable, then the seller may request “the credit of a third party, usually a bank, as an independent guarantee of payment to protect the parties.”<sup>59</sup> The buyer, in contracting with this seller, in effect promises to establish a letter of credit with the third party-bank for the purchase price amount.<sup>60</sup> In this respect, the buyer is called the *Applicant*, or the “person at whose request or for whose account a letter of credit is issued.”<sup>61</sup> The third party-bank is called the *Issuer* or *Issuing bank*, because it issues the letter of credit for the buyer-applicant in favor of the seller.<sup>62</sup> In doing so, the issuing bank promises to pay the seller once he presents appropriate documentation as

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<sup>55</sup> *Id.*

<sup>56</sup> U.C.C. § 5-102(a)(10) (1995).

<sup>57</sup> *Cf.* In re Graham Square, Inc., 126 F.3d 823, 827 (6th Cir. 2004) (explaining that a letter of credit transaction comprises three distinct contracts: first, the underlying contract, between the buyer and seller; second, a so-called *contract* between the buyer-applicant and the third party-bank issuing the letter of credit; and third, the letter of credit issued by the bank in favor of the seller-beneficiary). For simplicity, this Comment excludes the business dealings between the buyer-applicant and third party-bank as representative of a third contract in the letter of credit transaction.

<sup>58</sup> Nobel Ins. Co. v. The First Nat'l Bank of Brundige, 821 So. 2d 210, 215 (Ala. 2001).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> U.C.C. § 5-102(a)(2) (1995); see also International Chamber of Commerce, *The Uniform Customs and Practice for Documentary Credits (UCP600)*, art. 2, ICC Publication No. 600 (July 1, 2007) [hereinafter UCP600] (defining *Applicant* as “the party on whose request the credit is issued.”).

<sup>62</sup> U.C.C. § 5-102(a)(9) (1995); see also UCP600, *supra* note 61 (defining *Issuing bank* as “the bank that issues a credit at the request of an applicant or on its own behalf.”).



specified in the letter of credit.<sup>63</sup> The letter of credit, therefore, is the second, overlying transaction, independent of the underlying transaction, and one that is between the issuing bank and seller or *Beneficiary*, called so because “under the terms of the letter of credit [he] is entitled to have its complying presentation honored.”<sup>64</sup> Once the seller-beneficiary presents the appropriate documentation to the third party-issuing bank, the bank pays the seller and then seeks reimbursement from the buyer-applicant.<sup>65</sup> The buyer then retrieves the seller’s goods and reimburses the bank.<sup>66</sup>

Primarily the U.C.C. or the Uniform Customs and Practice for Documentary Credits (UCP) govern choice of law and forum in U.S. letter of credit transactions. The UCP is propagated by the International Chamber of Commerce (I.C.C.) in Paris, France, and is not law.<sup>67</sup> However, given that the majority of financial institutions select the UCP as the governing framework of letter of credit transactions, the UCP has “the same binding effect as the law.”<sup>68</sup>

Revised U.C.C. § 5-116(c) defers the U.C.C. to the UCP. Parties will be governed by the UCP “to which the letter of credit, confirmation, or other undertaking is expressly made subject.”<sup>69</sup> Additionally, revised U.C.C. § 5-116(a) states that parties may choose the law governing the transaction, but that their decision must be mutually agreed upon.<sup>70</sup> The law of the chosen jurisdiction also “need not bear any relation to the transaction.”<sup>71</sup> Note, though, that just because parties select New York as

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<sup>63</sup> *Nobel Ins. Co.*, 821 So. 2d at 215.

<sup>64</sup> U.C.C. § 5-102(a)(3) (1995); *see, e.g.*, *New Orleans Brass, L.L.C. v. Whitney Nat'l Bank*, 818 So. 2d 1057, 1060 (La. Ct. App. 2002) (explaining “[i]n a letter of credit there are no less than three parties: an applicant (e.g. a buyer or lessee, etc.), an issuer (e.g. bank), and a beneficiary (e.g. a seller or lessor, etc.)”); *see also* UCP600, *supra* note 61 (defining *Beneficiary* as “the party in whose favour a credit is issued.”).

<sup>65</sup> *Nobel Ins. Co.*, 821 So. 2d at 215.

<sup>66</sup> *Id.*

<sup>67</sup> Franck Chantayan, Note, *Choice of Law Under Revised Article 5 of the Uniform Commercial Code - § 5-116*, 14 SAINT JOHN'S J. LEGAL COMMENT. 199, 206 (1999) (citing *E&H Partners v. Broadway Nat'l Bank*, 39 F. Supp. 2d 275, 281 (S.D.N.Y. 1998); *Calgarth Invs. Ltd. v. Bank Saderat Iran*, 1996 WL 204470, at \*7 (S.D.N.Y. Apr. 26, 1996), *aff'd*, 108 F.3d 329 (2d Cir. 1997) (unpublished table decision); *Mennen v. J.P. Morgan & Co., Inc.*, 653 N.Y.S.2d 1010, 1013 (A.D. 4th Dept. 1997)); *see also* LC RULES & LAWS, *supra* note 54, at 1 (UCP600 is promulgated by the Paris-based ICC).

<sup>68</sup> Chantayan, *supra* note 67, at 205-06.

<sup>69</sup> U.C.C. § 5-116(c) (1995).

<sup>70</sup> U.C.C. § 5-116(a) (1995); *see also* Chantayan, *supra* note 67, at 212 (stating that “[a]lthough the issuer generally makes the choice of law, under the existing law, [§] 5-116(a) of Revised Article 5 requires that both parties agree to the governing law.”).

<sup>71</sup> U.C.C. § 5-116(a) (1995).

their governing law, does not necessarily mean that the case will be tried in the New York forum. Therefore, coupled with § 5-116(a) is § 5-116(e), which holds that parties may choose the forum in the exact same manner as expressed for choice of law in § 5-116(a).<sup>72</sup> In application, subsection (e) can sometimes yield parties more power than the choice of law provision itself.<sup>73</sup> However, the most important subsection of § 5-116 is subsection (b). If parties do not reach agreement on law or forum, § 5-116(b) states that the law of the jurisdiction where the parties are located will govern the transaction.<sup>74</sup> Therefore, if an issuing bank has more than one branch—for example, one in Iran and another in New York<sup>75</sup>—the governing law will be from the jurisdiction where the branch that issues the letter of credit is located.<sup>76</sup>

## II. Analysis

The Comment's analysis proceeds in two sections. The first section explains why New York and international commercial transactions are synonymous with each other. The discussion merits a close reading of twentieth century financial history and the competition between London and New York, which subsequently made New York *New York*. This understanding is important because it helps to explain why courts began defending the interest of the New York forum, at least in part, as “overriding and paramount”<sup>77</sup> to the outcome of litigation. When a plaintiff argues that none of his contacts with the New York forum is more substantial than his vested presence in the market itself, he is persuading the New York court to hear litigation that could affect its own market.<sup>78</sup>

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<sup>72</sup> James E. Byrne, *Contracting Out of Revised U.C.C. Article 5 (Letters of Credit)*, 40 LOY. L.A. L. REV. 297, 307 (2006).

<sup>73</sup> *Id.*

<sup>74</sup> U.C.C. § 5-116(b) (1995); *see* Chantayan, *supra* note 67, at 212.

<sup>75</sup> *Calgarth Invs. Ltd. v. Bank Saderat Iran*, 1996 WL 204470, at \*1 (S.D.N.Y. Apr. 26, 1996) (Defendant Bank Saderat Iran, the state bank of Iran, which also managed a New York branch office, successfully moved to dismiss the action from the New York forum), *aff'd*, 108 F.3d 329 (2d Cir. 1997) (unpublished table decision).

<sup>76</sup> *Id.* (“BSI issued the first of the eight L/C's on December 1, 1992, and the last on October 31, 1993.”); *see also* Chantayan, *supra* note 67, at 212 (construing that “[i]n the event the issuing, advising or confirming bank has more than [sic] one branch, the governing law will be that of the jurisdiction of the branch that deals with the letter of credit transaction.”).

<sup>77</sup> *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975) (citing *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 383–84 (1969)).

<sup>78</sup> *See Auten v. Auten*, 308 N.Y. 155, 161 (1954) (“[T]he merit of its approach is that it gives to the place ‘having the most interest in the problem’ paramount control over the

Therefore, no other forum can be said to have a greater interest than New York. This perspective also sheds light on why New York courts sometimes perceive themselves as protectors of the “justified expectations”<sup>79</sup> of contracting parties.

The second section chips away at the centrality of the New York market. This section considers the American forum itself; that is, its popularity with foreign parties and courts’ response to this popularity. Today, commercial transactions commonly force courts to balance the interests of several legitimate forums.<sup>80</sup> The section considers alternative reactions to the forum race, such as forum pre-selection.<sup>81</sup> However, if parties do not reach agreement on law or forum, U.C.C. § 5-116(b) states that the law of the jurisdiction where the parties are located will govern the transaction.<sup>82</sup> In such cases, New York can be a tail end-finisher in a multi-forum race.<sup>83</sup> If the court does not grant the forum non conveniens motion, it could be faced with applying foreign law and inconveniencing parties and witnesses, for an action that has equal or greater interest in being heard overseas. Thus, melting before the court, from every direction, is a cluster of complex issues pointing toward applying the doctrine.

#### A. The New York Effect

*If I can make it there, I'll make it anywhere,  
It's up to you, New York, New York.*<sup>84</sup>

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legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction ‘most intimately concerned with the outcome of [the] particular litigation’ . . . .” (quoting Barbara Page, Note, *Choice of Law Problems in Direct Actions Against Indemnification Insurers*, 3 UTAH L. REV. 490, 498 (1952–1953)).

<sup>79</sup> *J. Zeevi & Sons*, 37 N.Y.2d at 227.

<sup>80</sup> See *Calgarth*, 1996 WL 204470, at \*7 (weighing the New York forum among five legitimate forums).

<sup>81</sup> See *infra* notes 116–19, 146–49 and accompanying text.

<sup>82</sup> U.C.C. § 5-116(b) (1995); see Chantayan, *supra* note 67, at 212.

<sup>83</sup> See, e.g., *Am. Express Bank Ltd. v. Banco Español de Crédito, S.A.*, 597 F. Supp. 2d 394, 399 (S.D.N.Y. 2009) (before dismissal from the New York forum, the court explained that the legal dispute “provoked legal proceedings in four jurisdictions: Switzerland, Spain, Pakistan, and the United States.”); *Calgarth*, 1996 WL 204470, at \*7 (holding that “New York arguably is no less convenient than Iran, as between inferior alternatives to any European forum, but this proves at best only that New York finishes fourth in a five-forum race.”).

<sup>84</sup> FRANK SINATRA, Theme Song from *New York, New York*, on TRILOGY: PAST, PRESENT, FUTURE (Reprise Records 1980).

The closing lines to Frank Sinatra's timeless song have renewed meaning in international commercial transactions. In the early 1920s, following the end of the First World War, European financial centers squandered to rehabilitate their international presence.<sup>85</sup> London, the world's pre-eminent financial center at the time, competed with New York in restoring control over the international gold standard.<sup>86</sup> Each city vied to be the major "reserve currency"<sup>87</sup> center, where foreign countries deposited their gold in exchange for interest-earning bills.<sup>88</sup> The reserve center then linked "the exchange system to gold by retaining its own reserves in that metal."<sup>89</sup> The result of all this strengthened the center's "balance-of-payments"<sup>90</sup> position and encouraged a dollar-sterling parity in favor of whatever city wore the hat.<sup>91</sup> For New York, the distinction was critical to gaining international economic prestige.<sup>92</sup> For London, the distinction was necessary to reclaiming its prestige.<sup>93</sup> Ultimately, a multitude of concerns<sup>94</sup> led Britain to overvalue the sterling by ten percent in relation to the dollar.<sup>95</sup> London's decision persuaded financial authorities in foreign countries to confer significant attention upon America's structuring of interest rates and prices, which quietly began transferring financial power to the shores of Manhattan.<sup>96</sup>

In the years that followed the changing of the guard, New York banks steadily increased their management of large volumes of international commercial transactions, because now their facilities and foreign connections were precisely adaptable to this field.<sup>97</sup> By the 1960s, the New York Court of Appeals accepted as common knowledge that New York City was "a national and international center for the purchase and sale of businesses and interests therein."<sup>98</sup> The court further interpreted state legislature as not protecting just state residents, but also foreigners who

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<sup>85</sup> See M.W. Kirby, *The Decline of British Economic Power Since 1870*, at 24–25, 37 (Routledge 2006) (1981).

<sup>86</sup> *Id.* at 37.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See generally *id.* at 24–43 (discussing Britain's return to the gold standard).

<sup>95</sup> *Id.* at 39–40.

<sup>96</sup> *Id.*

<sup>97</sup> 29 N.Y. Jur. 2d *Credit Cards and Letters of Credit* § 43 (2009).

<sup>98</sup> *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 383 (1969).

utilized New York's market as a clearinghouse for international transactions.<sup>99</sup>

This is true because of all the jurisdictions involved, New York law affords the foreign principals the greatest degree of protection against the unfounded claims of brokers and finders. This encourages the use of New York brokers and finders by foreign principals and contributes to the economic development of our State. Our brokers and finders need only ensure that their agreements for compensation comply with the Statute of Frauds to receive the benefits of New York's position as a business center.<sup>100</sup>

Underneath this rationale was an inherent interest among New York courts to be the chosen forum for disputes arising out of New York's financial market.

This rationale hinged (and continues to hinge) on the sufficiency of contacts. For the courts, no contact was more sufficient than the presence of the financial market. New York was, and remains, "a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions."<sup>101</sup> Ignoring the presence of the market ignores the white elephant in the room, and the State has substantial interest in applying its policy to litigation that would affect its marketplace.<sup>102</sup> In fact, such an interest is "overriding and paramount"<sup>103</sup> in the outcome of litigation. Secondly, this interest is superseding on contractual foundations. After all, rooted in every transaction is a contract. A court that dismisses a forum non conveniens motion often cites to this simplicity, because it perceives its role as protecting the "justified expectations"<sup>104</sup> of the contracting parties.

In *Kossick v. United Fruit Co.*,<sup>105</sup> which involved a dispute over an alleged oral agreement, the U.S. Supreme Court held that the *where* is

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<sup>99</sup> *Id.* at 383–84.

<sup>100</sup> *Id.* at 384.

<sup>101</sup> *J. Zeevi & Sons*, 37 N.Y.2d at 227 (citing *Intercontinental Planning*, 24 N.Y.2d at 383–84).

<sup>102</sup> See cases cited *supra* note 6.

<sup>103</sup> *J. Zeevi & Sons*, 37 N.Y.2d at 227 (citing *Intercontinental Planning*, 24 N.Y.2d at 383–84).

<sup>104</sup> *Id.*

<sup>105</sup> 365 U.S. 731 (1961).

important to the extent that validity should be judged by the laws from wherever the agreement was made.<sup>106</sup>

Considering that sailors of any nationality may join a ship in any port, and that it is the clear duty of the ship to put into the first available port if this be necessary to provide prompt and adequate maintenance and cure to a seaman who falls ill during the voyage . . . it seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made.<sup>107</sup>

Cross-applying this holding to commercial transactions, a court would ask why a contract, that is born out of the benefits of the New York marketplace, should be denied the laws of New York.<sup>108</sup> What other forum could have greater interest and, thus, capture control of the resulting legal issues? The question is harder than it reads. Such are the beginnings of a melted court.

### B. The Melting Pot Effect

The melting pot is policy testing in a “substantial contacts” outfit. The New York Court of Appeals captures it as giving “to the place ‘having the most interest in the problem’ paramount control over the legal issues arising out of a particular factual context.”<sup>109</sup> The purpose is to determine which contact is the most substantial, but a simple mechanical formula is often suppressive.<sup>110</sup> In a commercial dispute, the court will likely be asked to balance the relative interests of several forums,<sup>111</sup> all of which may have equal or greater interest in applying their law over New York’s. As to this complexity, the U.S. Supreme Court explains:

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<sup>106</sup> *Id.* at 741.

<sup>107</sup> *Id.*

<sup>108</sup> *See, e.g., J. Zeevi & Sons*, 37 N.Y.2d at 227 (holding that “[s]ince New York has the greatest interest and is most intimately concerned with the outcome of this litigation, its laws should be accorded paramount control over the legal issues presented . . .”).

<sup>109</sup> *Auten v. Auten*, 308 N.Y. 155, 161 (1954) (citing *Page*, *supra* note 78).

<sup>110</sup> *See Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161–62 (1946) (“In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law.”).

<sup>111</sup> *Cf. Auten*, 308 N.Y. at 161 (explaining that a court’s weighing of significant contacts enables it “to reflect the relative interests of the several jurisdictions involved,” and to give the forum that is most interested in the action and the outcome of its litigation paramount control over the action. (citing *Vanston*, 329 U.S. at 161–62; *Page*, *supra* note 78)).

Certainly the part of this transaction which touched New York, namely, that the indenture contract was written, signed, and payable there, may be a reason why that state's law should govern. But apparently the bonds were sold to people all over the nation. And Kentucky's interest in having its own laws govern the obligation cannot be minimized. For the property mortgaged was there; the company's business was chiefly there; its products were widely distributed there; and the prices paid by Kentuckians for those products would depend, at least to some extent, on the stability of the company as affected by the carrying charges on its debts.<sup>112</sup>

Adding to this sentiment, the Southern District of New York has cited that the importance of its forum as a world financial capital does not alone deny a *forum non conveniens* motion.<sup>113</sup> Nor will “some tangential connection to New York”<sup>114</sup> merit a denial. The concern lies with using the connection, however minimal, as a trumpet to be played whenever a contracted party “seeks to use [American] courts for a lawsuit with little or no apparent contact with New York or the United States.”<sup>115</sup>

One solution that parties utilize, so as to avoid sounding like trumpets, goes back again to contractual basics. In *LaFarge Canada, Inc. v. Bank of China*,<sup>116</sup> the Southern District dismissed a *forum non conveniens* motion not because New York had vested interest in the litigation, but “because the parties selected ‘United States law’ to govern the contract.”<sup>117</sup> Therefore, the court was not burdened “with applying foreign law or dealing with complicated conflicts of law issues.”<sup>118</sup> This reasoning harkens back to courts’ perception of their roles as protecting the “justified expectations”<sup>119</sup> of the contracting parties.

However, it should be noted again that, per revised U.C.C. § 5-116(a), pre-selection of governing law does not automatically imply that the

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<sup>112</sup> *Vanston*, 329 U.S. at 162.

<sup>113</sup> *First Union Nat'l Bank v. Paribas*, 135 F. Supp. 2d 443, 453 (S.D.N.Y. 2001) (“[T]he existence of a letter of credit with some tangential connection to New York does not alone require the denial of a *forum non conveniens* dismissal . . .”).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 2000 WL 1457012 (S.D.N.Y. Sept. 29, 2000).

<sup>117</sup> *Id.* at \*2.

<sup>118</sup> *Id.*

<sup>119</sup> *J. Zeevi & Sons*, 37 N.Y.2d at 227.

case will be tried in the jurisdiction whose law was chosen.<sup>120</sup> Rather, the important point of pre-selection is that, by specifically committing the contract to American law, parties legitimize their appearance before the bench. That is to say, parties who contract without selecting a governing law leave their fate in the hands of a backlogged and overburdened court. On the other hand, parties who pre-select New York as their governing law place less weight on their “tangential connection to New York,”<sup>121</sup> and also defer greater respect to their “justified expectations.”<sup>122</sup> Furthermore, parties’ pre-selection does not burden courts with having to (a) answer what foreign law applies, and then applying it, and (b) ironing out conflicts of law.<sup>123</sup>

Basically, all roads lead to New York because financial services represent “nearly the only thing left in which America still excels globally.”<sup>124</sup> Courts will deny a motion for forum non conveniens when the forum’s contacts are not simply substantial but *overriding* and, thus, must be recognized by the *forum’s* decisional law.<sup>125</sup> But perhaps, this country excels too well. Although New York has interest in the litigation, there is an equally important interest in preventing the forum from melting into an international court.<sup>126</sup> The fear is that applying foreign law to a plethora of

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<sup>120</sup> U.C.C. § 5-116(a) (1995).

<sup>121</sup> First Union Nat’l Bank v. Paribas, 135 F. Supp. 2d 443, 453 (S.D.N.Y. 2001).

<sup>122</sup> *J. Zeevi & Sons*, 37 N.Y.2d at 227.

<sup>123</sup> *LaFarge*, 2000 WL 1457012, at \*4.

<sup>124</sup> George Steven Swan, *The Law and Economics of Interprofessional Frontier Skirmishing*: Financial Planning Association v. Securities and Exchange Commission, 16 U. MIAMI BUS. L. REV. 75, 89 (2007). To be more specific, it can be argued that all roads lead to New York because the medium for payment of reserve currencies is in United States dollars. In the event of legal action, the dollar transaction allows parties to sink a hook into the New York market. *See, e.g.*, Hanil Bank v. PT. Bank Negara Indonesia (Persero), 148 F.3d 127, 130 (2d Cir. 1998) (plaintiff instructed defendant in Indonesia to remit payment owed to it under the letter of credit in United States dollars to its New York account); *J. Zeevi & Sons*, 37 N.Y.2d at 227 (holding that “[t]he parties, by listing United States dollars as the form of payment, impliedly . . . set up procedures to implement their trust in our policies.”).

<sup>125</sup> *See J. Zeevi & Sons*, 37 N.Y.2d at 227 (New York “is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law”).

<sup>126</sup> *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. at 480, 490 (1983) (citing to Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary on H.R. 11315, 94th Cong. 31 (1976) (testimony of Brunon A. Ristau) (“The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world”)); *Calgarth Invs. Ltd. v. Bank Saderat Iran*, 1996 WL 204470, at \*7 (S.D.N.Y. Apr. 26, 1996) (concluding that “New



sufficient actions will be as harmful to the forum as dismissing one necessary action. The applications will maximize inefficiency, burden the court, and distract it from transactions that will actually affect the forum.

In a letter of credit transaction, the parties are usually sophisticated corporations. The underlying transaction might engage an American corporation with a foreign entity in continuous international dealings.<sup>127</sup> Suppose, too, that the American corporation is capable of assuming the burdens attached to litigating in a foreign forum.<sup>128</sup> Professor Mary Kay Kane admits that courts may be less quick to grant a forum non conveniens motion when the only alternative forum exists in a foreign country.<sup>129</sup> However, she counters that courts should not dismiss this motion “without undertaking a careful analysis of the facts as they relate to the actual convenience of those [parties] involved.”<sup>130</sup>

For example, in *Calgarth Investments Ltd. v. Bank Saderat Iran*,<sup>131</sup> Calgarth Investments, an Irish corporation headquartered in London, sued Bank Saderat Iran (BSI), the state bank of Iran, and its New York branch (BSI-NY), for wrongful dishonor of eight documentary letters of credit.<sup>132</sup> Under the terms of the credits, BSI issued them in dollar currency payable at Ceskoslovenska Obchodni Bank, A.S. (COB), a Czech bank located in Prague and the de facto advising and negotiating bank.<sup>133</sup> Strojimport Foreign Trade Co. (Stroji), a Czech corporation, transferred its rights as beneficiary to Calgarth under an agreement providing that terms would be subject to the Obligations Law of Switzerland.<sup>134</sup> However, when Calgarth requested payment from BSI-NY, BSI refused.<sup>135</sup> Stroji had informed BSI that its assignment to Calgarth stopped being valid after Calgarth failed to

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York [finished] fourth in a five-race forum”), *aff'd*, 108 F.3d 329 (2d Cir. 1997) (unpublished table decision).

<sup>127</sup> See Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 412 (1982) (“[T]hese concerns do not always compel denial of dismissal as, for example, when the plaintiff is an American corporation engaged in a continuous international business and is fully capable of assuming the burdens of litigating in a foreign forum.”).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 1996 WL 204470 (S.D.N.Y. Apr. 26, 1996), *aff'd*, 108 F.3d 329 (2d Cir. 1997) (unpublished table decision).

<sup>132</sup> *Id.* at \*1.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at \*1–2.

perform contractual obligations.<sup>136</sup> When Calgarth sued BSI and BSI-NY for wrongful dishonor, defendants moved to dismiss under sovereign immunity and forum non conveniens.<sup>137</sup>

The Southern District of New York recognized the *Piper* holding when it stated that substantially less deference would be given to a foreign plaintiff who brought suit in an American forum, because his choice, by its very nature, less reasonably assumed that he chose the forum out of convenience.<sup>138</sup> The court, finding inconvenience instead, explained as follows:

This lawsuit arises from events occurring primarily in the Czech Republic. The important characters in the story reside in the Czech Republic, Iran, and England, far from the United States. The law that will determine the competing rights of Calgarth and BSI . . . is the Obligations Law of Switzerland. The court is unable to identify any interest this jurisdiction holds in the present controversy, other than that a trial here would generate revenue for the New York hotels and restaurants that would host inconvenienced witnesses forced to travel here from England, Iran, and the Czech Republic. But that interest is not a public interest in the “outcome of the litigation.”<sup>139</sup>

It was not that Calgarth had established insufficient contacts to legitimize the New York forum; it was that the other forums were more appropriate and that, at best, “New York [finished] fourth in a five-forum race.”<sup>140</sup>

Under Professor Kane’s analysis, the fact that BSI represented the state would be additional fodder for denying the motion, but principally if Calgarth were an American corporation.<sup>141</sup> Following the adoption of the Foreign Services Immunities Act (FSIA) in 1976,<sup>142</sup> American plaintiffs

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<sup>136</sup> *Id.* at \*1.

<sup>137</sup> *Id.* at \* 2.

<sup>138</sup> *Id.* at \*5 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981)).

<sup>139</sup> *Id.* at \*7.

<sup>140</sup> *Id.*

<sup>141</sup> Kane, *supra* note 127 (“The fact that the defendant is a foreign government raises additional concerns that argue against dismissal.”).

<sup>142</sup> 28 U.S.C. § 1330. The Act gives district courts original jurisdiction, regardless of the amount in controversy, in any civil bench action against a foreign state “as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity,” 28 U.S.C. § 1330(a).

had the right to sue foreign states in American courts.<sup>143</sup> This policy inherently favored a plaintiff's choice of an American forum over a foreign one when evidence suggested that fairness and impartiality would be compromised abroad.<sup>144</sup> The presence of a defendant-state will not mechanically deny a motion of forum non conveniens; however, as Kane suggests, the presence will more likely oblige courts to raise standards for granting defendant's motion.<sup>145</sup>

Moreover, if parties in *Calgarth* explicitly contracted to be governed by American law, regardless of their foreign allegiance, the Southern District would have been harder pressed to grant defendants' motion. For example, in *Eckert International v. Government of Sovereign Democratic Republic of Fiji*,<sup>146</sup> the Fourth Circuit recognized that the contracting parties—a Virginia corporation and the government of Fiji—clearly intended for Virginia to be the forum when they drafted a specific agreement attesting to this preference.<sup>147</sup> Generally, the FSIA recognizes waivers of sovereign immunity where a foreign state agrees to arbitrate in another country; or agrees that the law of a particular country will govern the contract; or files a responsive pleading in a suit without raising a defense of sovereign immunity.<sup>148</sup> Here, by entering into a contract with a Virginia corporation, which included the aforesaid choice of law provision, Fiji very plainly intended to waive its immunity.<sup>149</sup>

In *Calgarth*, BSI moved to dismiss the New York action on grounds of sovereign immunity and forum non conveniens.<sup>150</sup> The dual motion meant that before the court could dismiss the action by forum non conveniens, it had to address subject-matter jurisdiction.<sup>151</sup> Specifically, the court answered whether BSI was subject to suit under its waiver of

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<sup>143</sup> Kane, *supra* note 127.

<sup>144</sup> *Id.* (“Given this policy, the presumption favoring [an American] plaintiff's choice of an American tribunal over a foreign one seems even stronger than in other types of actions, especially when there is reason for concern about the fairness or impartiality of litigating against a foreign state in its own tribunals.”).

<sup>145</sup> *Id.*

<sup>146</sup> 32 F.3d 77 (4th Cir. 1994).

<sup>147</sup> *Id.* at 80; *see also* Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987) (holding that “a sovereign party has waived immunity where a contract *specifically* states that the laws of a jurisdiction within the United States are to govern the transaction.”).

<sup>148</sup> *Id.* at 79 (citing 28 U.S.C. § 1605).

<sup>149</sup> *Id.* at 77.

<sup>150</sup> *Calgarth Invs. Ltd. v. Bank Saderat Iran*, 1996 WL 204470, at \*2 (S.D.N.Y. Apr. 26, 1996), *aff'd*, 108 F.3d 329 (2d Cir. 1997) (unpublished table decision).

<sup>151</sup> *Id.*

immunity in an international agreement<sup>152</sup> or, if it was not, whether the FSIA's *commercial activity* provision exempted BSI.<sup>153</sup> Had *Calgarth* been tried today, the court could have sidestepped subject-matter jurisdiction and, instead, cited to *Sinochem International Co. v. Malaysia International Shipping Corp.*<sup>154</sup> *Sinochem* arose out of a letter of credit transaction, and the procedural holding by the U.S. Supreme Court is broadly valuable: A district court "may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant."<sup>155</sup>

The seller, Trorient Trading, Inc., sub-chartered a vessel from Malaysia International for transport of steel coils to the buyer, Sinochem International (a Chinese state-owned importer).<sup>156</sup> Under the terms of the letter of credit, Trorient would be paid after it produced to the Issuer "a valid bill of lading certifying that the coils had been loaded for shipment [from Philadelphia] to China on or before [a specified date]."<sup>157</sup> Sinochem later alleged that Malaysia falsely backdated the bill of lading, resulting in Sinochem's unwarranted payment under the letter of credit.<sup>158</sup> Sinochem petitioned a Chinese admiralty court to arrest the vessel, but before the court could act, Malaysia filed a concomitant action in federal district court.<sup>159</sup> The complaint asserted that Sinochem's petition to the admiralty court negligently misrepresented Malaysia's reliability to transport steel coils.<sup>160</sup> Sinochem motioned for dismissal under (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) international comity; and (4) *forum non conveniens*.<sup>161</sup>

The Court, citing from the Seventh Circuit, characterized jurisdiction as "vital only if the court proposes to issue a judgment on the

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<sup>152</sup> *Id.* at \*3–5. After exhaustive consideration, the court concluded that BSI was "subject to suit on the basis of consent under an international agreement," *id.* at 5.

<sup>153</sup> *Id.* at \*3 (citing 28 U.S.C. § 1605(a)(2)). The *commercial activity* provision provides that a foreign state will not be immune to United States jurisdiction in any case where "the action is based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. § 1605(a)(2).

<sup>154</sup> 549 U.S. 422 (2007).

<sup>155</sup> *Id.* at 423.

<sup>156</sup> *Id.* at 426.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 427.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

merits.”<sup>162</sup> Dismissal of an action on the ground of forum non conveniens “is a determination that the merits should be adjudicated elsewhere.”<sup>163</sup> Therefore, it is not necessary for a court to consider questions of subject matter or personal jurisdiction, if the court has already determined that another forum is better suited to hear the merits of the case.<sup>164</sup>

Comparably, *American Express Bank Ltd. v. Banco Español de Crédito, S.A.*<sup>165</sup> reinforces the *Sinochem* holding that an action belongs in an appropriate forum, and questions as to the chosen forum’s adequacy should be among the very first that the court answers. *American Express* also underscores the *Calgarth* complexity of the forum in letter of credit litigation. The transaction at issue involved four parties spanning across four foreign jurisdictions—Switzerland, Spain, Pakistan, and the United States (Southern District of New York).<sup>166</sup> In this forum race, the United States finished last,<sup>167</sup> but the facts strongly suggested that the action had no business whatsoever of even being tried in a United States forum. That is why the most puzzling aspect of the court’s decision was that it did not at all turn on forum non conveniens.

The parties in the underlying contract, Isolux (a Spanish engineering firm) and the Pakistan Water and Power Development Authority (WAPDA), expressly agreed that in the event of a dispute, they would submit their claims to the I.C.C. International Court of Arbitration in Switzerland, where “[t]he award of the majority of the [arbitrators] [would] be final and binding on both parties.”<sup>168</sup> At WAPDA’s request, Isolux also obtained two demand guarantees, which are commonly used in international construction contracts and “provide a simple way for a buyer to obtain cash for substitute performance if a contractor defaults.”<sup>169</sup> The Pakistani branch of American Express Bank (AEB) executed guarantees in favor of WAPDA, while Banco Español de Crédito (Banesto) issued counter-

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<sup>162</sup> *Id.* (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

<sup>163</sup> *Id.* at 432 (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988)).

<sup>164</sup> *Id.* at 425.

<sup>165</sup> 597 F. Supp. 2d 394 (S.D.N.Y. 2009).

<sup>166</sup> *Id.* at 399.

<sup>167</sup> *Id.* at 396 (dismissing AEB’s complaint without prejudice “to the filing of a new action following further developments in Pakistan.”).

<sup>168</sup> *Id.* at 397.

<sup>169</sup> *Id.* (citing David J. Barru, *How to Guarantee Contractor Performance on International Construction Projects: Comparing Surety Bonds with Bank Guarantees and Standby Letters of Credit*, 37 GEO. WASH. INT’L L. REV. 51 (2005)).

guarantees in AEB's favor in the event that AEB incurred liability under the guarantees.<sup>170</sup>

Details of the underlying contractual disputes between Isolux's performance and WAPDA's payment obligations are not relevant to this analysis. What matters first is that the disputes provoked legal proceedings in multiple forums.<sup>171</sup> What matters second is that, in light of the facts provided, the action filed in the Southern District did not turn foremost on forum non conveniens.<sup>172</sup> In the first legal proceeding, which was requested by Isolux, the I.C.C. arbitral tribunal ordered WAPDA to cancel the guarantees and pay Isolux approximately U.S. \$788,066.<sup>173</sup> This decision and award was "final and binding as a matter of Swiss law upon notification to the parties."<sup>174</sup> In the second proceeding, Isolux concurrently obtained an injunction from a Spanish court (1) enjoining WAPDA from demanding payment on AEB's guarantees and (2) instructing Banesto to dishonor any requests for payment of guarantees or counter-guarantees.<sup>175</sup> In the third proceeding, but contrary to the arbitral decision against it, WAPDA sued AEB in Pakistan to recover against alleged wrongful dishonor of the guarantees.<sup>176</sup> Coupled with this action was a fourth proceeding, filed in the Southern District, wherein AEB insisted that Banesto pay out the counter-guarantees, despite that AEB had not paid the guarantees to WAPDA.<sup>177</sup> To establish contact with New York, AEB cited to Banesto's office there, as well as to an account agreement executed with AEB New York:

Banesto is already present in this jurisdiction. It has an office for the regular transaction of business at 521 Fifth Avenue, New York, New York. Banesto's relationship with American Express is centered in New York, governed by the New York Account Agreement. Since at least 1980, Banesto has maintained an account with American Express in New York, and the terms of that account (the Account Agreement), serve

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<sup>170</sup> *Id.* at 397–98.

<sup>171</sup> *Id.* at 399.

<sup>172</sup> *See id.* at 401 (“[T]here is no need to resolve [the choice of forum law] now. The complaint and the three memoranda of law submitted by AEB assume that New York law applies. If the complaint does not state a claim under New York law, it necessarily fails to state a claim upon which relief can be granted and Banesto's motion to dismiss must be granted.”).

<sup>173</sup> *Id.* at 400.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 399.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 399–400.

as an umbrella agreement governing the global relations of the parties. Accordingly, there is a *bona fide* connection between this forum and the parties and this dispute. As such, plaintiff's choice of forum in its home forum should be given great deference.<sup>178</sup> (Textual footnotes excluded.)

The Southern District, however, did not resolve AEB's choices of forum and law and, instead, assumed New York applied.<sup>179</sup> That is to say, the court held that AEB's complaint did not state a claim under New York law upon which declaratory relief could be granted.<sup>180</sup> The court thus granted Banesto's Rule 12(b)(6) motion.<sup>181</sup>

What remains troubling, though, is that an action never reasonably belonged in a United States forum. Applying *Calgarth* reasoning, AEB's suit in New York arose out of events that occurred in Pakistan, by parties who resided in Pakistan and Spain, as well as arbitration that occurred in Switzerland under Swiss law.<sup>182</sup> In its Memorandum in Support of the Motion to Dismiss, Banesto highlighted that:

[N]ot a single event giving rise to this action took place in New York. The sole, tangential connection of this case to New York [was] the fact that AEB Pakistan's corporate parent [was] headquartered there. That fact deserves little weight, however, given that the transactions at issue involved AEB's Pakistani branch, rather than the corporate parent. AEB emphasizes that Banesto operates a New York branch . . . but that branch had nothing to do with the transactions at issue, which entirely involved Banesto Madrid.<sup>183</sup>

Second, AEB's request for declaratory relief wholly relied on assumptions that the Pakistani proceeding would (1) rule for WAPDA (2) in a way that required AEB to pay WAPDA's guarantees, and (3) also triggered Banesto's duty to pay AEB's counter-guarantees.<sup>184</sup> Finally, the Spanish proceeding,

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<sup>178</sup> Plaintiff's Memorandum in Support of Motion for Summary Judgment at 19-20, *Am. Express Bank*, 597 F. Supp. 2d at 401 (No. 06 CV 3484).

<sup>179</sup> *Am. Express Bank*, 597 F. Supp. 2d at 401. See parenthetical explanation cited *supra* note 167.

<sup>180</sup> *Id.* at 405.

<sup>181</sup> *Id.* at 406.

<sup>182</sup> See *supra* notes 139, 165-77 and accompanying text.

<sup>183</sup> Defendant's Memorandum in Support of Motion to Dismiss at 27, *Am. Express Bank*, 597 F. Supp. 2d at 401 (No. 06 CV 3484).

<sup>184</sup> *Am. Express Bank*, 597 F. Supp. 2d at 406.

whose injunction prohibited Banesto from honoring counter-guarantees, already estopped AEB's request.<sup>185</sup> Because Banesto was already subject to this forum, for the matter at issue, Spain was an adequate alternative to AEB's inadequate forum selection.<sup>186</sup>

### Conclusion

Consider John and Jane's hypothetical transaction from the introduction. Indeed, as commercial transactions like this one grow increasingly international,<sup>187</sup> forum non conveniens will grow increasingly important for litigators. This Comment introduced the contours of forum non conveniens in letter of credit litigation. The case law discussed revealed two general attitudes that courts embrace, in whole or in part, when they are confronted by this type of litigation: (1) for denying (or dismissing) the application of forum non conveniens, because the court's forum, and thus its financial market, has superseding interest in the letter of credit litigation;<sup>188</sup> or (2) for granting (or upholding) the application of forum non conveniens, because the limited contacts presented by plaintiff would otherwise open a flood gate and turn the forum into a melting pot for complex foreign issues.<sup>189</sup>

The financial backdrop of a forum, at least in part, can induce courts to protect litigation from being heard in alternative forums. However, if a foreign plaintiff, like John (but, perhaps, with more disposable resources), can cite only a "tangential connection to New York,"<sup>190</sup> then any argument boasting the forum's need to hear the action, simply because of its financial milieu, should fail.<sup>191</sup> Moreover, John has to question whether it is in his best interest to elevate even legitimate contacts to New York, to sue ABC there, and then return to his home forum in Macau and try to enforce a favorable decision. Alternatively, if John and ABC pre-selected New York as their governing law, John ends up placing less weight on his connections,

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<sup>185</sup> *Id.* at 399.

<sup>186</sup> Defendant's Memorandum in Support of Motion to Dismiss at 28, *Am. Express Bank*, 597 F. Supp. 2d at 401 (No. 06 CV 3484) ("Banesto has already been subjected to a Spanish court injunction relating to the Counter-Guarantees at issue in this case. Because Banesto is subject to suit in Spain and a cause of action for breach of contract is available there, Spain is clearly an adequate alternative forum for this litigation." (citing *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003))).

<sup>187</sup> Hicks, *supra* note 1.

<sup>188</sup> See cases cited *supra* note 6.

<sup>189</sup> See cases cited *supra* note 126.

<sup>190</sup> *First Union Nat'l Bank v. Paribas*, 135 F. Supp. 2d 443, 453 (S.D.N.Y. 2001).

<sup>191</sup> See *supra* note 139 and accompanying text.



and also invokes greater respect for both parties' "justified expectations."<sup>192</sup> Revised U.C.C. § 5-116(a) holds that pre-selection does not assume the case will be heard in the New York forum.<sup>193</sup> If both parties are insistent on this forum, then they must pre-select it under § 5-116(e).<sup>194</sup> At least from a court's perspective, though, the best test for locating the appropriate forum in letter of credit litigation is under § 5-116(b), which states that, without an agreement, the law of the jurisdiction where the Issuer is located will govern the transaction.<sup>195</sup> As in *Calgarth*, where the Issuer had two addresses, one in Iran and one in New York,<sup>196</sup> the address where the undertaking was issued mattered most.<sup>197</sup> If *Calgarth* had shown that the undertaking was instead issued at BSI's New York branch, or that the New York branch was intimate enough with the issuance or management of the letter of credit, then it would become a powerful § 5-116(b) argument.

The plaintiff's hurdles arise in full force when defendant can show that facts primarily occurred in a foreign country by mostly foreign participants, and when the court must choose which among several legitimate is the most applicable. Melting before the court is a cluster of complex issues. If the court does not grant the forum non conveniens motion, it could be faced with applying foreign law and inconveniencing parties and witnesses, for an action that has equal or greater interest in being heard overseas.

Traditionally, American courts show substantially less deference to foreign plaintiffs that bring suit in an American forum, because the choice, by its very nature, assumes that plaintiff chose the forum for reasons other than convenience.<sup>198</sup> However, less deference still implies *some* deference.<sup>199</sup> Foreign plaintiffs must be mindful that it is usually not enough to *just* establish sufficient contacts in the New York forum.<sup>200</sup> More important for courts is whether other legitimate forums are better suited to

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<sup>192</sup> *J. Zeevi & Sons*, 37 N.Y.2d at 227.

<sup>193</sup> U.C.C. § 5-116(a) (1995).

<sup>194</sup> U.C.C. § 5-116(e) (1995).

<sup>195</sup> U.C.C. § 5-116(b) (1995); see Chantayan, *supra* note 67, at 212.

<sup>196</sup> *Calgarth Invs. Ltd. v. Bank Saderat Iran*, 1996 WL 204470, at \*1 (S.D.N.Y. Apr. 26, 1996), *aff'd*, 108 F.3d 329 (2d Cir. 1997) (unpublished table decision).

<sup>197</sup> *Id.* ("BSI issued the first of the eight L/C's on December 1, 1992, and the last on October 31, 1993."); see U.C.C. § 5-116(b) (1995) ("If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued.").

<sup>198</sup> *Calgarth*, 1996 WL 204470, at \*5 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)).

<sup>199</sup> *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000); see *Lear*, *supra* note 41.

<sup>200</sup> *Calgarth*, 1996 WL 204470, at \*7.

hear the action, apply relevant law, and conveniently cater to parties and witnesses.<sup>201</sup> Courts' discretionary power here, under the doctrine of forum non conveniens, is a calculated unpredictability. However, this does not lessen the fact that New York remains a mecca for substantial sums of international letter of credit business. If a party truly wishes to have his action decided in New York, then he will be wise to consider this analysis before framing his transaction.

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<sup>201</sup> *Id.* (Switzerland and England “would be vastly more convenient than New York. New York arguably is no less convenient than Iran, as between inferior alternatives to any European forum, but this proves at best only that New York finishes fourth in a five-forum race.”).