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Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno

Maria A. Mazzola

Abstract

This Note explores the current, law regarding forum non conveniens for foreign plaintiffs and examines the law in light of *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*⁸ (the *Babylift* case), which was recently decided by the United States Court of Appeals for the District of Columbia.

FORUM NON CONVENIENS AND FOREIGN PLAINTIFFS: ADDRESSING THE UNANSWERED QUESTIONS OF REYNO

INTRODUCTION

Air disaster litigation initiated by foreign plaintiffs in United States courts frequently is met with sophisticated challenges to plaintiffs' choice of forum. Foreign plaintiffs lodging claims against an American aircraft manufacturer may be frustrated by approval of a *forum non conveniens* motion,¹ or temporarily silenced pending appeal.² The likelihood of dismissal on *forum non conveniens* grounds has been enhanced by the holding of the United States

1. The doctrine of *forum non conveniens* originated in Scotland as a common law equitable remedy. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386-87 (1947). The doctrine later became a part of the common law of the United States. See Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 914 (1949) (state courts have applied *forum non conveniens* doctrine since 1817). The doctrine was also employed in admiralty actions to aid in the disposition of difficult cases involving maritime commerce. See Bickel, *The Doctrine of Forum Non Convenience as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949). In 1947, the Supreme Court, in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), confirmed the federal district courts' discretionary power to dismiss suits on the grounds of *forum non conveniens*. Today, however, in examining a motion based on *forum non conveniens*, courts look to the federal transfer statute. 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of the parties and witnesses, and 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." *Id.* Under § 1404(a), a court may transfer a domestic suit to a more convenient federal forum, without dismissing the suit. See *Harrison v. United Fruit Co.*, 141 F. Supp. 35, 36 (1948) (Prior to 1948, the doctrine of *forum non conveniens* required dismissal; Congress enacted § 1404(a) to authorize the less drastic alternative of transfer.). Without the transfer statute, a court would be forced to dismiss a plaintiff's case. Under § 1404(a), a plaintiff may reinstate the action. 28 U.S.C. § 1404(a). The defendant, however, enjoys fewer protections when the alternative forum is a court in a foreign country. In such instances, the transfer statute, which governs only domestic transfer, is inapplicable. Thus, when the alternative forum is a foreign country, a court must dismiss and not transfer. To avoid potential problems of foreign adjudication, courts often condition *forum non conveniens* dismissals on consent by the defendants to the jurisdiction of the foreign fora, and on agreement to pay the foreign judgment. See, e.g., *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1981) (dismissal conditioned on defendants submission to jurisdiction in Trinidad and a letter of guarantee that the foreign judgment would be satisfied); *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1031 (3d Cir. 1980) (defendant's agreement to make witnesses and documents available to plaintiffs militates in favor of a foreign forum). See generally Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 775 (1977).

2. See *infra* note 26.

Supreme Court in *Piper Aircraft Co. v. Reyno*.³ According to *Reyno*, a plaintiff's choice of forum applies with "less than maximum force" when the plaintiff is foreign.⁴

Reyno has not proved to be an airtight means of excluding foreign plaintiffs from United States forums. Some lower courts have not strictly applied its principles.⁵ Moreover, *Reyno* did not consider the jurisdictional provisions of various friendship, commerce and navigation (FCN) treaties which confer upon foreign plaintiffs a jurisdictional footing identical to that of their domestic counterparts.⁶ Given these provisions, non-American plaintiffs may not be "foreigners" for the purposes of *Reyno*. Judicial emphasis on private and public interest factors⁷ has further limited *Reyno*. This Note explores the current law regarding *forum non conveniens* and examines the law in light of *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*⁸ (the *Babylift* case), which was recently decided by the United States Court of Appeals for the District of Columbia.

3. 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982). See also Note, *Forum Non Conveniens Standards for the Dismissal of Actions from United States Federal Courts to Foreign Tribunals*, 5 FORDHAM INT'L L.J. 533 (1982) (discussing the development of the *forum non conveniens* motion, particularly in light of *Reyno*).

4. 454 U.S. at 256. See also *infra* note 18 (discussing the facts of *Reyno*).

5. See, e.g., *Macedo v. Boeing Co.*, 693 F.2d 683 (7th Cir. 1982) (reversing and remanding to district court for abuse of discretion in granting dismissal to Portugal; court noted financial burden on the few American plaintiffs who would have to litigate abroad); *In re Aircrash Disaster Near Bombay, India* on Jan. 1, 1978, 531 F. Supp. 1175, 1181 (W.D. Wash. 1982) (denying the *forum non conveniens* motion on the grounds that it would be highly unlikely that the courts of India would hear the plaintiffs' claim); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pac.*, 528 F. Supp. 1337, 1337-43 (S.D.N.Y. 1982) (complaint would not be dismissed for *forum non conveniens* as Chile was not proven to be an adequate forum, but defendant was a South American corporation and immune from suit under the Foreign Sovereign Immunities Act of 1976); *Fiacco v. United Technologies Corp.*, 524 F. Supp. 858, 861 (S.D.N.Y. 1981) (dismissal denied where one plaintiff was from New York and had a "real and tangible" interest in the forum); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 781 (D. Kan. 1981) (detailed discovery in ascertaining jurisdictional facts and substantial investment of time and money warranted denial of dismissal); *Aboujdid v. Gulf Aviation Co.*, 86 A.D.2d 564, 565, 448 N.Y.S.2d 427, 428 (1982) (dismissal denied for defendant's failure to show a more convenient forum and the interests of New York as a center for world travel).

6. See *infra* notes 76-85 and accompanying text.

7. See *infra* notes 13-17 and accompanying text.

8. 717 F.2d 602 (D.C. Cir. 1983), *aff'g* 497 F. Supp. 313 (D.D.C. 1980).

I. THE LAW REGARDING FORUM NON CONVENIENS AND FOREIGN PLAINTIFFS

A. *The Law Through Reyno*

The seminal case for understanding the doctrine of *forum non conveniens* is *Gulf Oil Corp. v. Gilbert*.⁹ That case held that a court may “resist imposition upon its jurisdiction even when jurisdiction is authorized.”¹⁰ Factors to be considered in the disposition of the *forum non conveniens* motion include those relevant to the convenience of the litigants, and those relevant to the convenience of the forum.¹¹

In *Pain v. United Technologies Corp.*,¹² the Circuit Court for the District of Columbia used a four-part test which applied the *Gilbert* factors.¹³ According to *Pain*, the court must first establish whether an adequate alternative forum exists with jurisdiction over the whole case.¹⁴ The district judge must then consider factors of *private* interest, with a strong presumption against disturbing plaintiffs’ initial forum choice.¹⁵ If the trial judge finds plaintiffs’ and defendants’ private interests to be equally balanced, he must then determine whether factors of *public* interest tip the scales in favor of a trial outside the United States.¹⁶ Finally, if he decides that the balance favors a foreign forum, the trial judge must ensure that the plaintiffs can reinstate the suit in the initial forum without undue inconvenience or prejudice.¹⁷

9. 330 U.S. 501 (1947).

10. *Id.* at 507.

11. *Id.* at 508-09.

12. 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

13. 330 U.S. at 508-09.

14. *Pain*, 637 F.2d at 784-85.

15. *Id.*

16. *Id.* Private interest factors include “relative ease of access to proof; availability of compulsory process of unwilling, the cost of obtaining attendance of willing witnesses; possibility of view of premises . . . and other practical problems that make trial of a case easy, expeditious, and inexpensive.” *Gilbert*, 330 U.S. at 508. The public interest factors include the “local interest in having localized controversies decided at home.” *Id.* at 509.

17. *Pain*, 637 F.2d at 784-85. According to *Pain*,

[a] district judge’s *forum non conveniens* inquiry should proceed in four steps. As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of *private* interest *weighing in the balance a strong presumption against disturbing plaintiffs’ initial forum choice*. If the the trial judge finds this balance of private interests to be in equipoise or near equipoise, he must then

*Piper Aircraft Co. v. Reyno*¹⁸ alters the weighing of private and public interests when the plaintiffs are foreign; it established that choice of forum by foreign plaintiffs is entitled to less weight.¹⁹ As the Supreme Court noted:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.²⁰

Reyno is applicable to foreign plaintiffs who sue American aircraft manufacturers in the United States. Foreign plaintiffs often allege strict liability²¹ hoping to collect large damage settlements from American insurance companies or the large verdicts doled by American juries.²² Realizing the potential ramifications of forum shopping by foreign plaintiffs, the Supreme Court reasoned in

determine whether or not factors of *public* interest tip the balance in favor of trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.

Id. (emphasis added).

18. 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982). The facts in *Reyno* were fairly typical of foreign air crash cases. *Reyno* involved wrongful death actions brought by the American administrator of the estates of several Scottish citizens who were killed in Scotland when their American manufactured aircraft crashed. At the time of the crash, the plane was registered in Great Britain, and was owned and operated by British companies. The United States District Court for the Middle District of Pennsylvania granted the defendants' *forum non conveniens* motion. 479 F. Supp. 727, 738 (M.D. Pa. 1979). The Third Circuit reversed, holding that the plaintiffs' choice of forum deserved substantial weight even though the real parties in interest were non-residents. 630 F.2d 149, 171 (3d Cir. 1980). The United States Supreme Court reversed the Third Circuit and reinstated the district court's dismissal. 454 U.S. at 238.

19. 454 U.S. at 255-56. See *infra* note 26 and accompanying text.

20. *Reyno*, 454 U.S. at 255-56.

21. See, e.g., *Reyno*, 454 U.S. at 240. "Reyno candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than those of Scotland. Scottish law does not recognize strict liability in tort." *Id.*

22. See, e.g., Kohn, *Settlement Completes Litigation Over '77 Collision of Airliners: Tenerife Disaster Accords Total 75 Million*, N.Y.L.J., Mar. 25, 1980, at 1, col. 2; see also S. SPEISER, LAWSUIT (1980) (The author recounts the litigation aspects of the Paris DC-10 crash. The total amount paid in passenger deaths was U.S.\$62,268,750.). *Id.* at 466. For a discussion of the United States dollar awards to the plaintiffs so far in the *Babylift* case, see *infra* notes 59-60, 117. For a discussion of whether insurance companies should be allowed to

Reyno that “[t]he American interest in [aircrash] accident[s] is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case[s] were to be tried here.”²³

Reyno noted that when plaintiffs are foreign, the initial requirement of an alternative forum with jurisdiction over the entire case “will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.”²⁴ The foreign forum, however, will not be considered an adequate alternative when the remedy of that forum is “so clearly inadequate or unsatisfactory that it is no remedy at all.”²⁵

Immediately following *Reyno*, American courts barred foreign claims asserted by non-residents.²⁶ In *In re Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980*,²⁷ for example, only the foreign claimants remained at the time the *forum non conveniens* motion was decided.²⁸ In its decision to dismiss, the district court relied heavily upon the test enunciated in *Pain*,²⁹ and upon the fact that the defendants had stipulated to foreign jurisdiction in Saudi

send letters discouraging litigation and contingent fees, and offering settlement of air disaster claims, see generally Kriendler, *The Letter Should Not Be Sent*, THE BRIEF, Nov. 1982, at 4; Craft, *The Letter Should Be Sent*, THE BRIEF, Nov. 1982, at 4.

23. 454 U.S. at 261.

24. *Id.* at 254 n.22 (citing *Gilbert*, 330 U.S. at 506-07).

25. 454 U.S. at 254.

26. A trend may have existed prior to the Court's holding in *Reyno*. See *Miskow v. Boeing Co.*, 664 F.2d 205 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) (upholding *forum non conveniens* dismissal of actions brought on behalf of Canadian decedents arising out of an aircrash in Canada); *Dahl v. United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980) (upholding dismissal of actions brought on behalf of Norwegian decedents arising out of a crash in Norway). Recent cases following the *Reyno* holding and dismissing foreign claims on the ground of *forum non conveniens* include *Lui Su Nai-Chao v. Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982) (*forum non conveniens* dismissal of actions brought by aliens arising out of a crash in Taiwan); *Lampitt v. Beech Aircraft Corp.*, 17 Av. Cas. (CCH) 17,358 (E.D. Ill. 1982) (*forum non conveniens* dismissal of actions brought by residents of Great Britain and Northern Ireland arising out of a crash in France).

27. 540 F. Supp. 1141 (D.D.C. 1982). The relevant facts are as follows: On August 19, 1980, fire erupted on board a Saudi Arabian Airlines flight between Riyadh and Jeddah, Saudi Arabia. Although the Lockheed 1011 was able to land safely, all of its passengers died as a result of poisonous gas and smoke inhalation because of the failure of the emergency exits to open. Suits were brought by the heirs as next of kin against Lockheed and Trans World Airlines, the company which trained the carriers' personnel in the operation of the aircraft. *Id.* at 1143.

28. *Id.* at 1141.

29. 637 F.2d at 784-85.

Arabia.³⁰ The defendant therefore ensured that an adequate alternative forum would exist, fulfilling the first requirement of *Pain*. The court then applied *Reyno* because all domestic cases had been settled and only the foreign plaintiffs remained at the time of suit.³¹ Less deference was accorded to the foreign plaintiffs' choice of forum, despite the fact that suing abroad was not advantageous for the plaintiffs.³² The interest balancing analysis became an easy task for the court. The defendants' concession of liability, which left only damages at issue, strongly tipped the *Gilbert* and *Pain* analyses of private interest factors in favor of dismissal to a foreign forum.³³ Public interest analysis favored dismissal because American courts had little interest in adjudicating claims arising from the foreign crash.³⁴

Yet, the *Reyno* decision does not guarantee that foreigners will be summarily dismissed to a foreign forum. Approximately two years after the *Reyno* decision, a string of cases now indicates judicial resistance to dismissal on *forum non conveniens* grounds.³⁵ In each case the court searched for some factor that would allow it to retain the case.³⁶

B. Questions Left Unanswered by *Reyno*

Reyno has left two questions unanswered. It did not establish guidelines for identifying foreign plaintiffs. On several occasions, United States courts have utilized jurisdictional provisions in FCN

30. The defendants agreed to stipulate to jurisdiction in any one of three places: the national courts of Saudi Arabia, the courts of each individual plaintiff's domicile, or any other country having jurisdiction over the plaintiffs pursuant to article 28 of the Warsaw Convention. 540 F. Supp. at 1145.

31. *Id.* at 1144.

32. *See id.* at 1145. Such disadvantages included the inability to use a contingent fee arrangement, and the possibility of a smaller damage award. *Id.* at 1145-46.

33. The court stated:

Of course, the liability concession would, if accepted by the court, have an important effect upon [the private interest factors] and its effect must be considered. Basically, defendants' liability concession would remove the first three categories of evidence, which are all liability theory categories, from consideration thereby leaving the ease of access to the fourth category of evidence as the sole consideration under the private interest factor. As noted above, the ease of access analysis for this fourth category of proof strongly favors a foreign forum.

Id. at 1147.

34. *Id.* at 1152.

35. *See supra* note 5.

36. *Id.*

treaties which accord foreign plaintiffs equal access to American forums.³⁷ If foreign plaintiffs are entitled to jurisdictional parity, the application of *Reyno* may result in a violation of United States treaty obligations.

Reyno also did not decide whether dismissal should be granted when the parties in interest include both American and foreign claimants.³⁸ If the courts decide to retain jurisdiction when foreigners sue in conjunction with domestic plaintiffs, an incentive is created for manufacturers to engage in "claim splitting." The defendant will settle the domestic claims and then move for dismissal of the claims by foreigners.³⁹ Furthermore, reverse forum shopping

37. See generally Tompkins & Fucigna, *Barring Foreign Air Crash Cases From American Courts—Update*, FOR THE DEFENSE, Oct. 1982, at 10.

Reyno also should be read cautiously in light of the issue it left undecided—namely, whether dismissal should be granted in cases where the real parties in interest include a few Americans as well as foreign claimants. The presence of a few American claimants may well tip the balance in favor of retention of jurisdiction, as in the *Aboujdid* and *Boskoff* cases.

Id. at 19.

38. This seems to be what Lockheed did in *In re Air Disaster at Riyadh Airport, Saudi Arabia*, on Aug. 19, 1980, 540 F. Supp. 1141 (D.D.C. 1982). At oral argument on the *forum non conveniens* motion, counsel for Lockheed informed the court that the American claims had been settled. At that time, only the foreign claims remained. *Id.* at 1144. See also *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 497 F. Supp. 313 (D.D.C. 1980), *aff'd*, 717 F.2d 602 (D.C. Cir. 1983) (similar actions by Lockheed).

39. See *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir. 1981); *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978). Although both actions were dismissed on *forum non conveniens* grounds, it was noted that the Second Circuit was upholding the discretionary powers of the district judge on *forum non conveniens* motions. Both decisions noted the strong regard the court had for treaty rights. In *Farmanfarmaian*, the court noted: "While we believe that the issue whether the action should have been dismissed is perhaps somewhat closer than . . . suggested, we affirm the dismissal without much pause because a district judge has wide discretion in this area." *Id.* The opinion by the Second Circuit, however, declined to put less emphasis on foreign plaintiffs' choice of forum, as the district court may have suggested, because of the presence of a treaty between the United States and the plaintiffs' home country. The treaty granted nationals of both countries "access to each country's courts on terms no less favorable than those applicable to nationals of the court's country." *Id.* In *Alcoa S.S. Co. v. M/V Nordic Regent*, the court, noting *Farmanfarmaian*, stated:

For the purpose of the *forum non conveniens* motion, . . . the courts [are] obliged to . . . apply the same *forum non conveniens* standard as would have been applied [had] *Farmanfarmaian* [been] an American citizen.

Aside from our concern for the preservation of a uniform standard for determining *forum non conveniens* motions, *Farmanfarmaian* demonstrates another policy reason for adhering to a uniform standard, namely, not to run afoul of treaty obligations of the United States.

654 F.2d at 152.

by the manufacturer could result if the defendant stipulates to jurisdiction abroad and moves for dismissal under *Reyno*.⁴⁰

The problems resulting from the unanswered questions of *Reyno* are illustrated in *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*⁴¹ A close examination of the case reveals the hazards foreign plaintiffs face in opposing a post-*Reyno* *forum non conveniens* motion.

II. THE BABYLIFT CASE

A. Factual Background

On April 4, 1975, just before the silencing of the hostilities in war-tattered Vietnam, an ambitious program was undertaken to save the most innocent victims of the war, its orphans. Under the code name "Operation Babylift," a United States C5A transport plane was commissioned by President Gerald R. Ford⁴² to fly to Saigon, South Vietnam and transport 258 Vietnamese orphans to the United States, and eventually to adoptive homes both in this country and abroad.⁴³

Approximately fifteen minutes after takeoff from Saigon, at an altitude of 23,000 feet, the aft ramp, pressure door, and cargo door fell off the C5A causing an immediate explosive decompression and consequent loss of oxygen.⁴⁴ Inside the aircraft, the orphans, many

Both *Alcoa* and *Farmanfarmanian* demonstrate that at least one circuit may not give less weight to a foreign plaintiff's choice of forum due to a desire to comply with treaty provisions. Both *Farmanfarmanian* and *Alcoa* were pre-*Reyno* decisions. *Reyno* did not consider whether less weight should be given to a foreign plaintiff's choice of forum when there is an applicable treaty provision. The question of whether a treaty provision may provide the foreign plaintiff with jurisdictional parity remains unanswered. In *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 788 (D. Kan. 1981), a post-*Reyno* decision, the court noted the presence of an FCN treaty granting foreign plaintiffs equal footing in American courts. The court noted that "plaintiffs are . . . entitled to consideration equal that of a United States citizen in their choice of a United States forum." *Id.*

40. This provides an opportunity for the defendant to free himself from a large United States settlement or jury award. See *supra* note 21.

41. 497 F. Supp. 313 (D.D.C. 1980), *aff'd*, 717 F.2d 602 (D.C. Cir. 1983).

42. Brief for Appellees (Infant Plaintiffs Below) at 3, *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983) [hereinafter cited as Appellees' Brief II].

43. *Id.* at 6-7. See also *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 838 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982).

44. *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 838 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982).

less than one year old, were strapped two-to-a-seat in the troop compartment.⁴⁵ As the oxygen masks dropped, it became evident to the aircraft personnel that there were not enough oxygen masks, that the babies in the troop compartment were too young to use the masks, and that most of the masks did not work.⁴⁶ After being airborne for ten minutes, the C5A plummeted and crashed into a rice paddy.⁴⁷

Virtually all of the occupants of the cargo compartment were killed in the crash and three children and babies in the troop compartment were killed.⁴⁸ Among the survivors of the crash were approximately 150 Vietnamese orphans.⁴⁹ Immediately after the crash, the children were taken to a Saigon hospital for examination.⁵⁰ On the following day, most of the orphans were flown to the United States.⁵¹ Thereafter, the children were released to adoptive homes or agencies.⁵² The ordeal, however, was not over for the infants, as litigation issues surfaced.⁵³

B. *Friends to the Rescue*

Friends for All Children, Inc. (Friends), a non-profit Colorado corporation, was created in 1973 to provide support for orphaned children in Vietnam.⁵⁴ Through its work, abandoned and orphaned Vietnamese babies and children were placed in foster homes throughout the United States and Europe. It also played a substantial role in planning Operation Babylift.⁵⁵

45. *Id.* "Approximately 152 of the youngest children, primarily infants, were placed in the aft troop compartment and strapped two to a seat. Approximately 106 older orphans were placed in the lower cargo compartment." *Id.*

46. Brief for Appellees (Infant Plaintiffs Below) at 40, *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983) [hereinafter cited as Appellees' Brief I].

47. *Schneider*, 658 F.2d at 839.

48. *Id.*

49. *Id.* at 838.

50. *Id.* at 839.

51. The orphans, on arrival in the United States, were examined at the Presidio, a military medical facility in San Francisco, California. *Id.*

52. *Id.*

53. *Id.*

54. Appellees' Brief II, *supra* note 42, at 8.

55. Despite the "chaotic" conditions existing in Vietnam at the close of the war, Rosemary Taylor (an officer of Friends for All Children), managed to obtain "laissez-passers," or the equivalent of exit permits, from the government of South Vietnam. Thereafter, upon notification of the availability of a plane, Friends for All Children chose the healthiest

On April 2, 1976, Friends for All Children filed a complaint in the United States District Court for the District of Columbia against Lockheed Corporation, on behalf of the 150 children who survived the crash. Friends charged Lockheed with negligence in the design and manufacture of the C5A and based the plaintiffs' right to recover on theories of tort and breach of warranty.⁵⁶

C. Preliminary Findings and Settlement of the Domestic Cases

Medical examination revealed that the children were suffering from an organic brain injury known as Minimal Brain Dysfunc-

children and prepared them for flight. Upon arrival in the United States, many of the orphaned children were placed in temporary homes by Friends for All Children until arrangements could be made for their placement with European families. Appellees' Brief I, *supra* note 46, at 16. Lockheed contends that "[a] number of [the orphans] were cared for in Vietnam by foreign orphanages and the United States office of [Friends for All Children] was not involved in the adoption of foreign [orphans]." Brief for Appellants United States of America and Lockheed Aircraft Corporation at 6, *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983) [hereinafter cited as Brief for Appellants].

56. *Schneider*, 658 F.2d at 839. Lockheed responded with several procedural measures. First, Lockheed filed a third party complaint against the United States alleging that the negligence of United States personnel had proximately caused the accident. *Id.*

Secondly, Lockheed filed a motion for summary judgment on the grounds that plaintiffs lacked the capacity to sue on behalf of the infants. Lockheed claimed that Friends for All Children failed to advise most, if not all, of the parents named in the complaint that suit was being brought. Lockheed pointed to the fact that only after twenty-two months following the filing of the complaint did the organization send letters to the parents of the children notifying them of the pending litigation. These letters advised parents that the children were represented by counsel, and urged the parents to replace Friends as plaintiffs. Prior to these letters, many of the adoptive parents had been unaware of the filing of the complaint. Lockheed, therefore, claimed that Friends was not an authorized legal guardian. Brief for Appellants, *supra* note 55, at 7-8. On February 23, 1979, the District Court for the District of Columbia denied a motion for summary judgment, and appointed Friends as guardians *ad litem* to represent the infant plaintiffs. Furthermore, the adopting parents would be notified that they could substitute themselves as named parties on the complaint in place of Friends or could authorize the guardians to sue on their behalf. "Thereafter, amended complaints were filed by 52 infant plaintiffs who had been adopted by American parents and by 63 infant plaintiffs who had been adopted by foreign parents . . . [there are] 10 other foreign cases in which the parents have not substituted themselves for [Friends for All Children]." *Id.* at 9.

Lockheed's third response was to request the Multidistrict Litigation Panel to transfer all actions to Georgia. In its motion pursuant to 28 U.S.C. § 1407, Lockheed suggested that the Northern District of Georgia would be an appropriate transferee forum because the construction of the ill-fated aircraft occurred in Marietta, Georgia. See *In re Aircrash Disaster Near Saigon, South Viet Nam*, on Apr. 4, 1975, 404 F. Supp. 478, 479 (J.P.M.D.L. 1975). The judicial panel concluded that transfer to the United States District Court for the District of Columbia would "best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *Id.* at 479. The panel went on to note that the

tion⁵⁷ (MBD) which could be traced to the "hypoxia, explosive decompression, and the force of the impact [of the crash]." ⁵⁸ The infant cases that have been tried have resulted in large jury verdicts for the domestic plaintiffs. ⁵⁹ In order to limit its domestic liability and avoid a lengthy appeal process, Lockheed moved to settle the domestic infants' claims. On August 4, 1982, a settlement totalling \$13.5 million was reached for the American infants. ⁶⁰ The settlement does not apply to the seventy-three plaintiffs who were adopted by foreign parents and who now reside in foreign countries. ⁶¹ As to these cases, Lockheed moved to dismiss on *forum non conveniens* grounds.

government agencies from whom discovery would be sought were located in and near the District of Columbia. *Id.* at 480.

57. MBD may manifest itself in the form of developmental disorders and long-term disabilities. These disabilities may include "learning disability, problems with language acquisition, delayed acquisition of motor skills, impulsivity, hyperactivity, disorders of the thinking process, of attention and concentration, perceptual motor impairments, and poor spatial orientation." Appellees' Brief II, *supra* note 42, at 5. According to Lockheed's own expert, Dr. Patricia Quinn, 80% of the children she examined exhibited symptoms of MDB. *Id.* at 6.

58. *Id.* at 5.

59. See *Schneider*, 658 F.2d at 840. In the case of Michael Moses Schneider, the jury awarded the plaintiff U.S.\$500,000 in compensatory damages. *Id.* In the case of Melissa Hope Marchetti, the jury awarded the plaintiff U.S.\$1,000,000 in compensatory damages. *Id.* Lockheed appealed both of the cases. *Id.* at 841. The District of Columbia Circuit thereafter ordered a new trial in the *Schneider* case, *id.* at 845, and considered Marchetti's award excessive. *Id.* at 848. *Marchetti* was later settled on the eve of retrial for U.S.\$850,000. See Appellees' Brief II, *supra* note 42, at 7 n.4.

Zimerly v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981), has been tried twice. In *Zimerly I*, the district court set aside a jury verdict in favor of the defendant, and ordered a new trial. *Id.* at 849. The court found that the jury had been confused with respect to gravity forces caused by the plane's impact, and the last minute settlement of a damage claim for hydrocephalus. *Id.* *Zimerly II* incorporated a Comprehensive Pretrial Order which "[p]revented Lockheed from denying that the accident could have caused plaintiffs injuries." *Id.* at 851. The trial resulted in a verdict for the plaintiff. The District of Columbia Circuit, however, remanded the case for retrial. *Id.*

60. Brief for Appellants, *supra* note 55, at 12. The settlement negotiations have culminated in the resolution of forty-five cases. Lauter, 'Babylift' Settlement Leaves Many Other Cases Unresolved, NAT'L L.J., Sept. 13, 1982, at 3, col. 1. Six other plaintiffs settled through separate negotiations; another case ended in a jury verdict for the defendant. *Id.* col. 2. Note also that three survivors, who were adopted by American families, declined to join the suit. *Id.*

61. Lauter, 'Babylift' Settlement Leaves Many Other Cases Unresolved, NAT'L L.J., Sept. 13, 1982, at 3, col. 1.

D. *The Forum Non Conveniens Motion and the District Court*

As conditions for dismissal, Lockheed agreed to: (1) submit to jurisdiction in each plaintiff's country of residence; (2) treat the applicable statute of limitations as having tolled from the date the action was commenced until the entry of the order dismissing the complaint; (3) forgo contesting its liability for compensatory damages proximately caused by the accident; and (4) submit to the reinstatement of any action in the district court if the courts of the plaintiff's country of residence declined to exercise jurisdiction, or if Lockheed declined to observe any of the foregoing conditions of dismissal.⁶²

The district court denied Lockheed's *forum non conveniens* motion.⁶³ The court noted that several factors weighed against dismissal. These included the heavy presumption in favor of the plaintiffs' chosen forum, the effort already invested by the district court, the familiarity of the court with the stipulations entered into by the parties, the expertise of the lawyers for the plaintiffs, and the availability of a "seasoned cadre" of easily accessible expert witnesses.⁶⁴ The court went on to recognize the "strong public interest" that the United States had in the adjudication of the infants' claims. Furthermore, the system now in place to administer the American plaintiffs' claims could, over time, be adopted to administer the foreign plaintiffs' claims.⁶⁵ In response to the denial of its *forum non conveniens* motion, Lockheed appealed to the United States Court of Appeals for the District of Columbia.⁶⁶

62. Brief for Appellants, *supra* note 55, at 13.

63. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, No. 76 Civ. 0544 (D.D.C. Oct. 2, 1981) (memorandum order). On October 9, 1981, Lockheed moved to certify the dismissal order pursuant to 23 U.S.C. § 1292(b) (1976).

On April 1, 1982, the District Court granted the motion for § 1292(b) certification . . . and on April 12, 1982, Lockheed and the United States filed in [the D.C. Circuit] . . . a joint petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure. . . . [O]n July 6, 1982, [the D.C. Circuit] granted Lockheed's and the United States' joint petition for permission to appeal.

Brief for Appellants, *supra* note 55, at 17.

64. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, No. 76 Civ. 0544 (D.D.C. Oct. 2, 1981) (memorandum order).

65. *Id.*

66. See *infra* text accompanying notes 135-46.

III. THE ARGUMENTS BEFORE THE CIRCUIT COURT

A. Lockheed's Position: The Plaintiffs Are Foreign and an Alternative Forum Is Available

Lockheed argued that the district court had erred in holding that the defendant had a heavy burden in overcoming the presumption favoring plaintiffs' choice of forum. Because the plaintiffs in the instant actions came from foreign countries, Lockheed argued for the application of *Reyno*.⁶⁷ Lockheed did not address the first unanswered question of *Reyno*, whether or not the plaintiffs were in fact foreign, because the remaining plaintiffs were all residents of foreign countries.

Furthermore, because Lockheed had stipulated to jurisdiction abroad, it argued that the availability of an alternative forum was not in doubt.⁶⁸ Lockheed had settled all of the domestic claims, so it appeared unlikely that the foreign plaintiffs could gain access to the American forum under the second unanswered question of *Reyno*.⁶⁹ That question, whether the presence of American claimants allowed the foreign claimants access to the forum, was eliminated by settlement of the domestic claims. Lockheed noted that if the trials were held in the United States, one case would be adjudicated per month for seventy-three months.⁷⁰ Furthermore, precious judicial time would be wasted because the district court did not preclude reassertion of the *forum non conveniens* motion should the cases reach the trial level.⁷¹ The motion could be reasserted "before the

67. The infants reside in Belgium, Great Britain, France, West Germany, Finland, Sweden, Switzerland, and Canada. Brief for Appellants, *supra* note 55, at 29 & n.29. Because all of the foreign infants are from such diverse background and, according to Lockheed, have no contacts with the forum, these cases seem appropriate for an application of *Reyno*.

68. One of the requirements for dismissal of a *forum non conveniens* claim is that there be an initial determination that an alternative forum exists. The *Reyno* Court noted that this requirement will ordinarily be met when the defendant is amenable to process in the other jurisdiction. *Reyno*, 454 U.S. 235, 254 & n.22 (quoting *Gilbert*, 330 U.S. at 506-07).

69. The unanswered question in this case would be whether dismissal should be granted in cases where the parties in interest include Americans as well as foreign claimants. *Tompkins & Fucigna*, *supra* note 37, at 19.

70. Brief for Appellants, *supra* note 55, at 40.

71. The Supreme Court held in *Reyno* that the alleged interest in deterring production of dangerous products by American manufacturers does not require retention of suits arising from foreign accidents because retention would result in an enormous commitment of judicial time and resources. 454 U.S. at 261.

judge to whom each individual case would be assigned.”⁷² Thus, the probable outcome of proceedings in the district court on remand would have been: “(a) further delay in the disposition of the issue . . . (b) the strong possibility that the losing party or parties would appeal, and (c) the possibility of conflicting rulings by trial judges, followed by multiple appeals.”⁷³ For these reasons, Lockheed contended that the circuit court should evaluate the merits of the foreign claims so that the issue of *forum non conveniens* could be decided without further delay.⁷⁴

Finally, Lockheed argued that should foreign forums refuse to retain jurisdiction over the case, it had stipulated that it would not contest reinstatement of any suit in the United States within six months of dismissal by a foreign court.⁷⁵ Because of the reinstatement clause, a federal court would not have to determine in advance that a foreign court would accept jurisdiction by consent, thereby eliminating the need to scrutinize foreign law.

B. *Friends' Position*

1. The Plaintiffs Are Not Foreign

Despite Lockheed's failure to consider the issue, the question remained whether the infant plaintiffs were truly foreign. By treaty, the infants could have been accorded the same right of access to American courts as their domestic counterparts. An examination of a relevant treaty will serve to illustrate this possibility.⁷⁶

On December 21, 1960, the United States and France entered into the Convention of Establishment between the United States and France⁷⁷ which provides in article III:

Nationals and companies of either High Contracting Party *shall be accorded national treatment with respect to access to the*

72. Brief for Appellants, *supra* note 55, at 40.

73. *Id.* at 41.

74. *See id.* at 39-40.

75. *See supra* note 62 and accompanying text.

76. A similar treaty exists with Vietnam, so that the wrongful death plaintiffs should also be considered non-foreign for jurisdictional purposes. *See Treaty of Amity and Economic Relations*, Apr. 3, 1961, United States-Vietnam, art. II(2), 12 U.S.T. 1704, 1706, T.I.A.S. No. 4890.

77. Convention of Establishment, Dec. 21, 1960, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625.

*courts of justice as well as to administrative tribunals and agencies, . . . within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.*⁷⁸

Article IV provides that “[t]he lawfully acquired rights and interests of nationals and companies of *either* High Contracting Party shall not be subjected to impairment, within the territories of the other High Contracting Party, by any measure of a discriminatory character.”⁷⁹

Equal access treaties exist between the United States and the countries in which the “foreign” plaintiffs reside, including Finland,⁸⁰ West Germany,⁸¹ Belgium,⁸² Switzerland,⁸³ Italy,⁸⁴ and Canada.⁸⁵ Each contains language similar to the French treaty.

The United States courts have given weight to the application of such treaty rights. In examining the access rights of Iranian citizens to the courts of the United States, the Second Circuit in *Farmanfarmaian v. Gulf Oil Corp.*⁸⁶ stated:

We feel constrained to comment, however, on statements in the [district] judge’s opinion to the effect that a foreign plaintiff’s “right to sue in the United States is clearly of a lesser magnitude than that of an American citizen.” . . . [W]e think [that proposition] has no application where, as here, a treaty between the United States and a foreign plaintiff’s country allows nationals

78. *Id.* art. III(1) (emphasis added).

79. *Id.* art. IV(1) (emphasis added).

80. Treaty of Friendship, Commerce and Consular Rights, Sept. 24, 1953, United States-Finland, art. I, 4 U.S.T. 2047, 2052, T.I.A.S. No. 2861.

81. Treaty of Friendship, Commerce and Navigation, July 14, 1956, United States-Federal Republic of Germany, art. VI, 7 U.S.T. 1839, 1845, T.I.A.S. No. 3593.

82. Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. III, 14 U.S.T. 1284, 1289, T.I.A.S. No. 5432.

83. Convention of Friendship, Commerce and Extradition, Nov. 25, 1850, United States-Switzerland, art. I, 11 Stat. 587, 587-88. T.S. No. 353.

84. Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. V(4), 63 Stat. 2255, 2262-64 T.I.A.S. No. 1965.

85. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-Great Britain, art. III, 8 Stat. 116, 118, T.S. No. 105.

86. 437 F. Supp. 910 (S.D.N.Y. 1977), *aff’d*, 588 F.2d 880 (2d Cir. 1978). In *Farmanfarmaian*, an Iranian citizen sued an Iranian subsidiary of various American and European oil companies for breach of contract. Because Iranian law governed, and other *forum non conveniens* factors were present, the trial court concluded that *forum non conveniens* dis-

of both countries access to each country's courts on terms no less favorable than those applicable to nationals of the court's country.⁸⁷

Because the treaties expressly provide for access in all aspects of jurisdiction and upon terms no less favorable than those applicable to domestic plaintiffs of the United States, the foreign plaintiffs should receive the same access to the courts as their domestic equals.

A treaty between the United States and a foreign nation is enforceable in United States courts in private litigation to the same degree as an act of Congress.⁸⁸ It could not have been the intention of the Supreme Court in *Reyno* to deny foreigners rights that have been accorded them by treaty. It must also be noted that the existence of an FCN treaty was not an issue in *Reyno* and, consequently, the Supreme Court was not called upon to rule on the issue. The treaties and *Reyno* can co-exist, however, by giving plaintiffs' choice of forum reduced weight only in the absence of an FCN treaty. If this practice were employed, it would eliminate the conflict between *Reyno* and the access provisions of foreign treaties.

2. There Is No Alternative Forum

Friends argued that even if the non-resident plaintiffs were considered foreigners, the court had to examine whether an "adequate alternative forum exists with jurisdiction over the whole case."⁸⁹ Lockheed argued that these cases could be handled much more "conveniently" in a foreign forum.⁹⁰ Lockheed, however,

missal was appropriate. 437 F. Supp. at 923-24. The Second Circuit affirmed, deferring to the broad discretion of the trial judge in deciding *forum non conveniens* motions. 588 F.2d at 882.

87. 588 F.2d at 882 (dictum)(citing *Farmanfarmaian v. Gulf Oil Co.*, 437 F. Supp. 910 (S.D.N.Y. 1977)). The strong support of the Second Circuit for treaty rights has been reaffirmed. See *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir. 1981); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 777-81 (D. Kan. 1981) (denying *forum non conveniens* motion filed in an action, arising out of an aircrash in France, in which the plaintiffs were all French citizens, based upon the Convention of Establishment Between the United States and France). See generally Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20 (1953); Recent Development, *Federal Courts: Forum Non Conveniens*, 20 HARV. INT'L L.J. 404 (1979).

88. *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

89. See *Reyno*, 454 U.S. at 261.

90. Brief for Appellants, *supra* note 55, at 46-55.

admitted that the courts of Sweden and Switzerland would not automatically exercise jurisdiction in the cases of the one Swiss and four Swedish infants.⁹¹ There were also questions of French law which needed to be answered concerning jurisdiction.

Forty-five of the seventy-three non-resident plaintiffs are French citizens. In its interpretation of French law, Lockheed utilized article 46 of the *New Code of Civil Procedure*⁹² which established that jurisdiction in tort claims is "where the injury is sustained."⁹³ According to Lockheed, French courts have interpreted this rule to mean that jurisdiction will exist in the place where "the plaintiff resides."⁹⁴ However, Lockheed was mistaken in its interpretation, because this law has since been changed. Article 46 of the *New Code of Civil Procedure* was amended to change the phrase, "of the place where the damage is suffered," to "of the place where the damage was suffered."⁹⁵ In a tort case, therefore, article 46 vests jurisdiction in a French forum only when the tortious act was committed there or the injury occurred there.⁹⁶

91. In a January 7, 1981 telex, Mr. Lennart Hagberg, Lockheed's Swedish lawyer, advised Lockheed:

Swedish courts do not have automatic jurisdiction in the case at hand. The parties may agree to Swedish jurisdiction but *it is far from certain that a Swedish court will accept jurisdiction in this particular case because following general Swedish principles all claims arising out of the same accident should be decided by the same court.* Otherwise, the result may be absurd. . . . I have to say that the Swedish courts may very well not accept such handling of the case.

Appellees' Brief II, *supra* note 42, at 28 (emphasis added). Similarly, Dr. R. Rippman, Lockheed's Swiss lawyer, advised:

I am not in a position to affirm that courts of Switzerland in general would have to accept jurisdiction for the limited purpose of that particular suit when the Warsaw Convention is not applicable and the only connections with our country are established as being plaintiffs' present residence, domicile or citizenship.

Id.

92. NOUVEAU CODE DE PROCÉDURE CIVILE [N.C. PR. CIV.] art. 46 (73e ed. Petits Codes Dalloz 1981) (Fr.).

93. The old French text read: "la juridiction du lieu du fait dommageable ou celle dans le ressort de laquelle le dommage est subi." *Id.*

94. Appellees' Brief II, *supra* note 42, at 26.

95. N.C. PR. CIV. art. 46 (74e ed. Petits Codes Dalloz 1982) (Fr.) (emphasis added).

96. The exact text of the French *Code of Civil Procedure* now reads: "The claimant can elect to bring the action, aside from the court of the place of the defendant's residence, before . . . in tort matters the court of the place of the fact which induced the damages, or that in the jurisdiction of which the damages were sustained." Affidavit of Antoine A. d'Ornano in support of Appellees' Motion to take Judicial Notice of Amended French Law at 3, *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983). In the motion filed by Friends for All Children, the legislative intent of article 46 was explained:

Lockheed's tortious acts were committed in the United States and the C5A crash occurred in Vietnam. Accordingly, the French courts may not exercise jurisdiction over cases brought against Lockheed on behalf of infants who now reside in France for injuries sustained in Vietnam. In essence, no benefit results from Lockheed's willingness to stipulate to submission to jurisdiction if the French court will not exercise its power to hear the case. Further problems are encountered in determining whether France is an adequate alternative forum. For example, it may take the French courts up to four years to decide the issue of jurisdiction alone.⁹⁷

Other courts have been faced with similar problems. In *In re Aircrash Disaster Near Bombay*,⁹⁸ the court decided not to dismiss on *forum non conveniens* grounds because Indian courts could take ten years to resolve the preliminary issue of whether the Indian statute of limitations was tolled by the filing of the complaint in the United States.⁹⁹ The uncertainty of whether foreign courts will apply their jurisdictional powers should be a strong factor in favor of retention of jurisdiction by the courts of the United States.

Said amendment makes it clear that tort litigation must be filed where the accident occurred, or where the injury was originally sustained, not with the court of the victim's residence or domicile. As a matter of fact, the report submitted to the Prime Minister and attached to the draft decree, was made available to the public, and its language confirms plainly the above construction of the decree and its amendment, thereby setting aside the position taken by Lockheed Aircraft Corporation; the relevant paragraph from this report in English reads as follows:

The amendment of Article 46 (substituting "was" for "is") is aimed at ending a difficulty in interpretation which has produced contradictory results, and caused uncertainty particularly in disputes arising from car accidents. In fact, certain courts have decided that, pursuant to the current text of Article 46, victims may bring their case before the court of their residence. This interpretation is not in conformity with the understanding of the draftsmen of Article 46.

Id. at 3-4 (quoting Report of the Prime Minister Attached to Draft Decree 81-500, *reprinted in* N.C. Pr. Civ. Supp. 18 (Petits Codes Dalloz 1982)(Fr.)). Lockheed countered these arguments by calling attention to article 14 of the *Civil Code*. "This exceptional long-arm statute provides that a French citizen may sue a foreigner in France in any tort action no matter where the tort occurred." Joint Motion for Leave to File an Affidavit in Response to Appellees' Affidavit Filed December 7, 1982, at 2, *Friends for All Children, Inc. v. Lockheed*, 717 F.2d 602 (D.C. Cir. 1983) (citing the CODE CIVIL art. 14 (80e ed. Petits Codes Dalloz 1980-81)(Fr.)). Furthermore, "Lockheed has a business establishment in France, that is sufficient to allow French courts to exercise 'territorial jurisdiction over Lockheed.'" *Id.* at 3.

97. Appellees' Brief II, *supra* note 42, at 27. "The length of this process in France would vary from court to court and a decision in one French infant's case would not be binding on a court in which any of the other 44 French infants' cases was pending." *Id.* at 27-28.

98. 531 F. Supp. 1175 (W.D. Wash. 1982).

99. *Id.* at 1181.

Assuming the foreign courts were to exercise jurisdiction, the choice of law problem remains. American law might apply in a foreign jurisdiction, because foreign courts may look to the choice of law provisions of the Hague Convention on the Law Applicable to Products Liability.¹⁰⁰ The United Kingdom, France, Italy, West Germany, Sweden, and Belgium have all adopted this treaty, and their courts could apply United States law even though the United States was not a signatory of the convention.¹⁰¹ Application of the convention would trigger article 6, which provides in pertinent part:

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.¹⁰²

American law might be applied by a foreign court, if it were to hear the case. This fact should favor retention of jurisdiction in American courts where American law can be applied most easily and expeditiously.

C. Private and Public Interest Analysis

Private and public interest analyses reveal that the infants have many contacts with the United States forum. In contrast, Lockheed's interest analysis emphasized the relative ease with which the cases could be settled abroad since most of the pre-trial depositions and findings could readily be transferred. It did not examine the infants' contacts.

100. Convention on the Law Applicable to Products Liability, Oct. 21, 1972, 11 I.L.M. 1283 (1972).

101. Article 11 states: "The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State." *Id.* art. 11.

102. *Id.* art. 6. Article 4 provides that the court should apply the law of the place of the injury if that state is *also* the place of residence, the place of business, or the place where the product was acquired. *Id.* art. 4. Article 4 would not apply to the instant case.

Article 5 provides that the law of the state of residence of the person suffering the damage will apply if that state is also the principal place of business of the defendant, or the place where the product was acquired. *Id.* art. 5. Article 5 would not apply to the *Babylift* cases.

I. Lockheed's Interests

Lockheed argued that the evidence would be available if the cases were tried in a foreign forum.¹⁰³ Since Lockheed had already admitted to liability,¹⁰⁴ damage issues predominated. As a result, there was no need for proof concerning the design, maintenance, or operation of the aircraft.¹⁰⁵ The evidence of damages is present in the forum where each child now lives, or has already been gathered and is available for use in foreign forums. In general, records of the plaintiffs' conditions before and after the crash were forwarded to them and can be found where each now resides.¹⁰⁶ Evidence concerning the crash itself was already in the hands of the plaintiffs' counsel and would have been available for use in foreign jurisdictions. Similarly, many of the eyewitnesses who were on the plane or who saw the children after the crash had already testified or had been deposed and, in at least some of the forums, that testimony would have been available.¹⁰⁷ Concerning experts, qualified experts would have been available in any of the technologically advanced countries in which the plaintiffs reside.¹⁰⁸

Unlike wrongful death or injury claims, these cases involve injuries that are not subject to objective physical diagnosis.¹⁰⁹ MBD symptoms generally manifest themselves in the form of psychological disorders, learning and speech disabilities and delays in human development.¹¹⁰ The foreign plaintiffs' claims rest upon "each

103. Brief for Appellants, *supra* note 55, at 46. Lockheed noted that, in general, records of the crash were forwarded with the children to the country in which each plaintiff resides. *Id.* Witnesses who were with the children on the plane have already been deposed, and such information would be available to plaintiffs' counsel. *Id.*

104. *Id.* at 30.

105. Friends for All Children maintained that the children's medical records were destroyed in the crash. Appellees' Brief I, *supra* note 46, at 17.

106. *See supra* note 103.

107. *Id.*

108. *See Daisi v. Air India*, 79 Civ. 4898 (S.D.N.Y. 1981) (*forum non conveniens* dismissal was granted for an action arising out of injuries suffered by an American plaintiff at a French airport while en route to India; the convenience of the forum for expert witnesses is entitled to little if any weight).

109. *Schneider*, 658 F.2d at 852. "It is important to note here that MBD is not a readily identifiable ailment, but a syndrome of highly varied and indefinite symptomology." *Id.*

110. Appellees' Brief II, *supra* note 42, at 6. On August 28, 1981, a report was issued which summarized the medical findings of plaintiffs' and Lockheeds' teams of medical experts. The report concluded that of the forty-seven plaintiffs examined, 70% exhibited 16-18 symptoms of MBD. Over half of the children examined were agreed by both sets of experts

child's (1) present medical, psychological, and developmental condition, (2) asserted costs of medical treatment and special education, and (3) on alleged loss of future earnings."¹¹¹ Friends for All Children proposed that examinations of the children be made abroad by doctors and relayed to American experts who would then form their opinions and testify before the jury on the basis of the foreign findings.¹¹² Lockheed contended that this proposal was unacceptable because it meant that the district court would try the crucial issue in each case on the basis of hearsay. In each plaintiff's home forum, competent, direct evidence that could be cross-examined would have been available.¹¹³

Finally, an additional factor pointing towards dismissal to a foreign forum was the interest of the foreign forum in the adjudication. As the district court observed, "each infant would become a

to have "[l]earning problems, expressive or receptive language problems, I.Q. unevenness, fine and gross motor problems, and reading problems." *Id.* While there was disagreement as to the severity of some of the symptoms, both sides agreed that further monitoring and treatment was indicated, and that the symptoms could continue to ripen. *Id.* See also *Friends for All Children, Inc. v. Lockheed Aircraft*, 87 F.R.D. 560, 563 (1980) (Judge Oberdorfer notes that some infant plaintiffs "may be unable to persuade a jury to award compensation at the time of an early trial because their symptoms are too vague, have not been detected, or have not ripened; yet, some months or years thereafter, these infant plaintiffs may suffer from the crash as much or more than others whose symptoms ripened earlier but abated from prompt attention.").

111. Brief for Appellants, *supra* note 55, at 49-50. Appellant Lockheed contended that "[t]he likely sources of such proof—treating physicians teachers, counselors, family friends, and neighbors are all located abroad, and their views on plaintiffs current conditions and future prospects necessarily would rest on cultural foundations that are alien to American doctors, lawyers, and jurors." *Id.* at 50.

112. *Id.* at 52.

113. Lockheed argued:

The proposals for transferring foreign medical opinions over to U.S. doctors who would then formulate their own opinions and testify would likely lead to hearsay objections and inconsistent results as the issue would be parcelled out among different judges of the court. In at least one instance a judge has ruled that, "only doctors who have examined personally this plaintiff may testify."

Id. at 53 n.53 (citing *Camenga v. Lockheed Aircraft Corp.*, No. 80 Civ. 3219 (D.D.C. Mar. 16, 1982) (order)). It is necessary, however, to note that the *Federal Rules of Evidence* would permit an expert to use the opinion of another expert to formulate his own opinion whether or not the underlying opinion is admitted or even admissible into evidence. See FED. R. EVID. 702 advisory committee note. In each case, however, the court must, "as part of its admissibility judgment . . . inquire into an expert's reasonable reliance" on the other expert's opinion. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313, 1325 (E.D. Pa. 1980). This could produce different results as each case comes to trial. In the instant case, the underlying opinions would be gathered by experts retained specifically to render opinions for use in litigations. There would be no opportunity to cross-examine the initial opinion maker.

public charge in his place of residence if he were disabled.”¹¹⁴ Confronted with similar facts, the Southern District of New York dismissed, on the grounds of *forum non conveniens*, an action brought on behalf of a Dutch decedent. The court stated: “The Netherlands has a strong interest in insuring that this Dutch decedent’s heirs are adequately compensated, for if they are not, it is the Netherlands and its citizens who will bear the financial responsibility for supporting them.”¹¹⁵ For the same reasons, Lockheed argued that each of the trials should have been held within the “view and reach” of the citizens of each plaintiff’s country, rather than here, “where they can learn of it by report only.”¹¹⁶

The interest analysis on behalf of Lockheed concentrated on what would have happened once the foreign plaintiffs reached the alternative forum and the ease with which they could have presented their case. It did not consider the work that had already taken place in the United States forum on behalf of the infants, work to which Lockheed had consented, and which it had even supported.¹¹⁷ In the stipulations of September 14, 1979, Lockheed did not reserve the defense of *forum non conveniens*, nor is it clear why Lockheed waited so long to assert it in this case.¹¹⁸ Assuming

114. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, No. 76 Civ. 0544 (D.D.C. Oct. 2, 1981) (memorandum order).

115. *Bouvey-Loggers v. Pan Am. World Airways*, 15 Av. Cas. (CCH) ¶ 17,153, at 17,155 (S.D.N.Y. 1978). The case resulted in the dismissal of an action brought by a Dutch citizen on behalf of a Dutch decedent arising out of a plane crash in the Canary Islands. *Id.* at 17,553.

116. *Gilbert*, 330 U.S. at 509.

117. For instance, one of the September 14, 1979 stipulations provided that “Lockheed would pay the guardians *ad litem* \$5,000 for each legitimate plaintiff, to be used for medical treatment, litigation expenses, and other aids to the individual child.” *Schneider*, 658 F.2d at 840. In accordance with the September 14, 1979 stipulations,

Lockheed has to date paid the guardian *ad litem* approximately U.S.\$600,000, of which about U.S.\$235,000 was paid for children residing in the United States and about U.S.\$365,000 was paid on behalf of non-resident children, to be used by the guardian *ad litem* in his discretion, for litigation expenses and other purposes. . . .

[T]he guardian *ad litem* and plaintiffs’ counsel concluded that it would be necessary, desirable, and appropriate to pool the limited resources of the infant plaintiffs . . . and develop a common trial program adaptable to the unique proof requirements of each particular child’s case.

Appellees’ Brief I, *supra* note 46, at 29-30. Had appellants’ motion been granted, the infants would have been without the benefits of a common trial program which included a number of experienced medical and non-medical experts who had done substantial work on these cases.

118. Lockheed has twice tried to dismiss on the grounds of *forum non conveniens*. The first motion was denied by the district court in an Order dated June 19, 1980. Lockheed’s

that some of the cases had to go to trial abroad,¹¹⁹ the infants would have to prove their damages because Lockheed would assert that the proximate cause of the plaintiffs' MBD was malnutrition or another pre-existing condition.¹²⁰ The infants would also have to litigate complex evidentiary rulings.¹²¹ Lockheed's suggestion that the infants could retain medical and other expert witnesses abroad was rejected by the district court as expensive and impractical because it would only duplicate the evidence available in the United States.¹²² The argument that a family physician would be able to examine the child is misplaced because a family physician is not usually qualified to evaluate this type of brain injury, nor could he testify to the fact that the plane crash caused the injury.¹²³ The district court was therefore correct in concluding that the availabil-

second motion to dismiss was denied in a Memorandum and Order on October 2, 1981. In an Order dated April 1, 1982, the district court granted appellants' motion to certify its denial of Lockheed's *forum non conveniens* motion. Yet, in the years between the *forum non conveniens* motions, the infants have not been compensated, and discovery has proceeded. In *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 781 (D. Kan. 1981), the district court, in deciding not to dismiss for *forum non conveniens*, noted that "[t]here is no time limit on a motion for dismissal *forum non conveniens*. Nevertheless, plaintiffs already have a substantial investment of time and money in this forum, and much discovery was accomplished in ascertaining the jurisdictional facts." *Id.* In the instant case, it would seem reasonable to suggest that the cases should remain in the District of Columbia forum because of the time and money already spent on them. It is apparent at this time that "[t]he ultimate question . . . is whether 'the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it [would be] better to stop the litigation in the place where brought and let it start all over again somewhere else.'" *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975) (citing *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955)).

119. See *supra* notes 91-97 and accompanying text.

120. Appellees' Brief I, *supra* note 46, at 37-48. For example, in the *Marchetti* case, "Lockheed disputed the *severity* and *cause* of Melissa's brain damage. Lockheed's witnesses asserted that Melissa's brain damage might be caused by small birth weight malnutrition, gastroenteritis, or chicken pox." *Id.* at 38.

121. Examples of the evidentiary rulings include the ruling that evidence of injuries sustained by other passengers is admissible, and the ruling that Lockheed was not entitled to relitigate further as to whether each of the 150 plaintiffs was "present" on the C5A when it crashed. Appellees' Brief II, *supra* note 42, at 31-32.

122. The district court concluded that "it would be manifestly unjust to require each plaintiff to mobilize abroad the evidence and representation now available here." *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, No. 76 Civ. 0544 (D.D.C. Oct. 2, 1981) (memorandum order).

123. As Lockheed's own expert stated, "a family physician is not ordinarily qualified to evaluate brain injuries of the type sustained here." Appellees' Brief II, *supra* note 42, at 46.

ity of expert witnesses who have already examined the children should be a factor in favor of retaining jurisdiction.¹²⁴

The United States Government, a party to the action, is not amenable to process abroad and may not be sued in all foreign courts.¹²⁵ Moreover, the C5A flight crew is not amenable to the compulsory process of any foreign forum. If the testimony of the C5A crew were provided by deposition, it would have to be translated into seven foreign languages, a process which would be costly and time consuming.

2. Analysis of "Infant" Interests

A post-*Reyno* decision, *Tokio Marine & Fire Insurance Co. v. Bell Helicopter Textron*,¹²⁶ suggests that foreign plaintiffs may obtain access to the American forum if they have important interest factors in their favor.¹²⁷ Unlike the plaintiffs in *Pain* and *Reyno* the children of Operation Babylift have many important contacts with the forum. Extensive discovery has already taken place in the

Furthermore, "only one local family physician was called to testify in all twelve trials held to date." *Id.* at 44.

124. Referring to the expert witnesses assembled by both sides in the instant proceedings, the district court said: "[T]hey now constitute an experienced and seasoned cadre. With this cadre in place here, it is probably more convenient to bring an individual foreign infant plaintiff to the United States than it would be to organize similar cadres of experts in each of the several countries in which the foreign plaintiffs reside or to send the U.S. cadre there." *Friends for All Children, Inc., v. Lockheed Aircraft Corp.*, No. 76 Civ. 0544 (D.D.C. Oct. 2, 1981) (memorandum order).

125. Under French law, for example, a foreign state government or agent cannot be subject to a suit before a French court. *See Lockheed's Renewed Motion to Dismiss exhibit B-1, Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983). *See also Appellees' Brief II, supra* note 42, at 57. Mr. Legrez, an expert on French law pointed out that, "under French law a foreign state, government or agent cannot be subject to a suit before a French court." *Id.*

126. 17 Av. Cas. ¶ 17,321 (S.D. Tex. 1982).

127. The case involved the crash, in Japan, of a Texas manufactured helicopter owned and operated by Japanese companies. The plaintiff, the Japanese insurer of Asashi Helicopter Company, brought suit against Bell Helicopter-Textron alleging negligence and breach of warranty. In its holding, the court followed the *Reyno* analysis and determined that Japan was an adequate alternative forum. Yet, when the court considered the public and private interest factors of *Gilbert* it found that these factors favored the Texas forum. The court therefore retained jurisdiction. *Id.* at 17,332.

United States.¹²⁸ The exhaustive investigation of the crash and its impact has been conducted by the plaintiffs and Lockheed's Washington-based team of experts in preparation for trial of the non-resident as well as the resident infants' claims.

The required public interest analysis favors trial in a United States forum. At the time of the crash, all of the children were being transported to the United States from Vietnam on the orders of President Ford. Operation Babylift was a product of the Vietnam War and many Americans feel a deep sense of responsibility for the orphaned children of Vietnam.¹²⁹ Thus, the close ties between this controversy, the United States military, and the foreign policy decision-making process make the District of Columbia the most logical forum.

The unavailability of a single foreign forum in which all actions could be consolidated with all parties present is a factor which cannot be "easily ignored."¹³⁰ The District Court for the District of Columbia has already heard previous trials on this issue, and thus has developed considerable expertise concerning the *Babylift* cases.¹³¹ There are, therefore, extra contacts with the forum that were not present in *Pain* and *Reyno*. Because the babies have more than minimal contact with the forum, the court correctly retained the case, as the district court did in *Tokio*.¹³² The weighing of interest factors favors the infant plaintiffs, therefore there is no need to consider the final step of the *Pain* test.¹³³ Nevertheless, even if the court had favored dismissal to a foreign forum, Lockheed

128. The paperwork that was accumulated during these proceedings is phenomenal. In all, there are 6,000 pages of trial exhibits, 59,000 pages of deposition testimony and 23,000 pages of trial testimony. Appellees' Brief II, *supra* note 47, at 52.

129. Appellees' Brief I, *supra* note 46, at 79.

130. *Pain*, 637 F.2d at 791. See also *Islamic Rep. of Iran v. Boeing Co.*, 477 F. Supp. 142, 144 (D.D.C. 1979) (litigation of such claims in the same forum is strongly favored); *S.E.C. v. Page Airways*, 464 F. Supp. 461, 465 (D.D.C. 1978) ("whatever expertise the court might gain in one suit can be applied to the benefit of efficiency in the other"); *Celanese Corp. v. Federal Energy Admin.*, 410 F. Supp. 571, 576 (D.D.C. 1976) ("the wisdom of avoiding duplicitous litigation increases with the complexity of the issues").

131. "From March 1980 through March 1982, twelve jury trials were conducted involving the claims of children who had been adopted by families residing in the United States." Appellees' Brief I, *supra* note 46, at 32.

132. 17 Av. Cas. (CCH) ¶ 17,326 (S.D. Tex. 1982).

133. See *supra* note 17 and accompanying text.

satisfied this step. Following dismissal abroad, Lockheed agreed to reinstatement of the claims in a United States forum.¹³⁴

IV. THE FORUM NON CONVENIENS MOTION AND THE CIRCUIT COURT

The United States Court of Appeals for the District of Columbia conducted a *de novo* review of the *forum non conveniens* motion because it found that the district court had erred in applying a presumption favoring plaintiff's choice of forum.¹³⁵ The circuit court's opinion did not discuss the *Reyno* decision in depth, nor did it examine the availability of alternative fora in which foreign plaintiffs could initiate suit.¹³⁶ Although it noted that the availability of alternative fora was normally a threshold question, the court stated that in the *Babylift* case "[i]t was unnecessary to resolve the question of whether adequate alternative fora were available because, even on the assumption that such fora exist, the other factors make it clear that the *forum non conveniens* motion should be denied."¹³⁷

134. See *supra* text accompanying note 62.

135. The district court had applied the principles articulated in *Koster v. Lumberman's Mut. Casualty Co.*, 330 U.S. 518 (1947). According to *Koster*, "the defendants have a heavy burden in overcoming the presumption favoring the forum selected by the plaintiff." *Id.* at 524. Subsequent to the decision by the district court in the *Babylift* cases, the Supreme Court decided *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982), *reh'g denied*, 455 U.S. 928 (1982). *Reyno* established that "a foreign plaintiff's choice of forum is entitled to less deference." *Id.* at 255-56. Lockheed appealed the ruling of the district court alleging that the district court had applied an improper presumption in favoring plaintiffs' choice of forum and had failed to apply systematically the *Pain* analysis. *Friends of All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 606 (D.C. Cir. 1983). The court of appeals held that the district court had erred in stating that there was a strong presumption favoring plaintiffs' choice of forum. Because this presumption could have affected the district court's reasoning, it conducted a *de novo* analysis. *Id.* at 606-07.

136. The court's discussion of *Reyno* was brief. It noted that the initial step in a *forum non conveniens* inquiry was the availability of alternative fora, and that this requirement would normally be satisfied when the defendant was amenable to process in the foreign jurisdiction. (*Friends*, 717 F.2d at 607 (citing *Reyno*, 454 U.S. at 254 n.22)). The parties, however, vigorously contested the outcome of the threshold question, presenting numerous arguments concerning the availability of foreign fora and the applicability of foreign law. See *supra* notes 89-103 and accompanying text; see also *id.* The circuit court never addressed the issues whether there were alternative fora and whether Lockheed had supplied jurisdiction by stipulating to jurisdiction in a foreign tribunal. The court noted that "[t]he determination of foreign law that would have to be made to evaluate the availability of adequate alternative fora are extremely difficult and would require a great deal of expertise not readily available to us." *Id.*

137. *Id.*

The court proceeded to conduct its own *Pain* analysis in which it examined private¹³⁸ and public¹³⁹ interest factors. Based upon private interest analysis, it found that “[t]he ‘private’ interest of the litigants relating to access of sources of proof heavily favor[ed] retention of jurisdiction in the District of Columbia.”¹⁴⁰ The court noted that factors of public interest were equally balanced, and reiterated that *Pain* did not require a public interest analysis unless the private interest factors were in equipoise or near equipoise.¹⁴¹

138. In addressing the private interest factors, the court focused on one particular factor, the relative ease of access to sources of proof. *Id.* at 607-08. Lockheed contended that because of its stipulation to liability, damage issues predominated over liability issues. *Id.* Accordingly, Lockheed argued that “the relative ease of access to sources of proof favors foreign fora because each infant’s injuries must be evaluated by local doctors who can measure each infant’s handicaps against the culture in which the infant is being raised.” *Id.* The circuit court noted that “[s]tanding alone, the need for evidence of the type [Lockheed] describe[s] might strongly favor granting a *forum non conveniens* motion.” *Id.* at 608. The court, however, held that there were issues other than damages remaining to be resolved. *Id.* Because Lockheed continued to contest causation of the accident, each plaintiff would still have to prove that the crash proximately caused his injuries. *Id.* Furthermore, the court noted that other factors such as the availability of witnesses, and the fact that voluminous documents would have to be translated into numerous foreign languages, weighed in favor of its decision to retain jurisdiction. *Id.* Finally, the circuit court agreed with the district court that “[i]f it is convenient to try the accident over and over again, this Court is now the most convenient place for all concerned to try it. The private interest of the litigants relating to access of sources of proof heavily favors retention of jurisdiction in the District of Columbia.” *Id.* at 609 (quoting Joint App. at 262-63, *Friends*).

139. The public interest factors considered by the court included: The reluctance of the United States to submit to a foreign nation’s courts; the interest of the foreign forum in the litigation; and the amount of judicial time that will have to be spent on the proceedings if they come to trial in the United States. *Id.* at 609-10; *see also supra* notes 70-71, 114-16 and accompanying text. The circuit court found that if the cases were dismissed, the United States would not be subject to a foreign court’s jurisdiction because it had settled on an indemnification formula with Lockheed and had not been made a defendant by the plaintiffs. *Friends*, 717 F.2d at 609. The court noted the contacts the infants had with the forum, and the fact that Operation Babylift was conceived and run by Americans. *Id.* at 610. The presence of such contacts reduced the concern that was present in *Pain* and *Reyno*, namely that the plaintiffs might be involved in forum shopping. *Id.* at 609. On the contrary, the court implied that the United States government might be engaged in reverse forum shopping. The court stated: “[I]ndeed, since the United States has settled with Lockheed by agreeing to a formula for indemnification, it would appear that the government’s most concrete interest is merely in the size of potential judgments.” *Id.* at 610.

140. *Friends*, 717 F.2d at 609.

141. The court stated:

Pain also indicates that . . . public interest factors need not be evaluated when the private interest factors are not “in equipoise or near equipoise” . . . nonetheless, we do so here because the analysis of the public interest factors shows them to be so

The *forum non conveniens* motion was thus dismissed with regard to the entire class of foreign plaintiffs.¹⁴² The court, however, did not preclude reassertion of the motion as each infant's case came to trial, and stated that "[m]ore particularized showings in individual cases might make a case for dismissal more persuasive than has been for dismissal in gross."¹⁴³

The circuit court felt compelled to re-analyze the *Babylift* case in light of *Reyno*.¹⁴⁴ Rather than focusing on the citizenship of the plaintiffs, however, the circuit court noted that *Reyno* had cited *Pain* with approval and examined the *Babylift* case solely in accordance with *Pain*.¹⁴⁵ Furthermore, the circuit court advocated a "non-mechanical" application of *Pain*.¹⁴⁶ Courts may thus balance the *Pain* factors in a liberal fashion. It is therefore likely that courts wishing to retain jurisdiction will be able to avoid *Reyno* by emphasizing private and public interest factors.

V. WHERE DOES THIS LEAVE REYNO?

Since the *Reyno* decision, it has become apparent that the Supreme Court has not precluded all foreign plaintiffs from suing in an American forum. The unanswered questions of *Reyno* have yet to be analyzed.

Regarding the first unanswered question, *Reyno* did not consider the jurisdictional provisions of various FCN treaties which grant foreign plaintiffs equal access to American courts and apply with the force of statutory law.¹⁴⁷ These treaties should be given weight because on a "close" interest analysis the plaintiff may lose the *forum non conveniens* motion because he is foreign. The application of the FCN treaties would eliminate this prejudice and allow the foreigner jurisdictional access equal to that of his domestic counterpart. *Reyno* would still be viable in that its provisions for

nearly in equipoise that they do not affect our conclusion that the private interest factors require dismissal of the *forum non conveniens* motion.

Id. at 609.

142. *Id.* at 608.

143. *Id.*

144. *Id.* at 606-07.

145. *Id.* at 606.

146. *Id.* at 607.

147. *See supra* notes 76-88 and accompanying text.

foreign plaintiffs would apply in the absence of a specific treaty conferring jurisdictional rights.

As it stands now, courts, when considering *Reyno*, examine the law of the alternative forum. In *Reyno*, the Court stated: "Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice."¹⁴⁸ This suggests that in cases like those of the infants the American court will scrutinize the laws of a foreign country to decide whether that country will accept the case. The court might decide to allow access to the American forum to some foreign plaintiffs, but could dismiss other claims because other foreign plaintiffs had adequate laws in their alternative forums.¹⁴⁹ Therefore, under the *Reyno* decision, the result could be an uneven scheme of compensation, in that an American forum will hear the case only if the law of the foreigners' home country is sufficiently inadequate.

Reyno provides defendants with a shield and a sword. Because under *Reyno* "a foreign plaintiff's choice of forum is accorded less deference,"¹⁵⁰ a *forum non conveniens* motion may provide defendants with a shield against multimillion dollar damage recoveries. By stipulating to jurisdiction abroad, defendants supply an alternative forum which may become very attractive to overworked trial courts, especially when the defendant has managed to settle all domestic claims.¹⁵¹ *Reyno* acts as a sword in that the defendant may be able to effectively foreclose the foreign plaintiff's claims by

148. *Reyno*, 454 U.S. at 254.

149. In *Reyno*, the Court held that dismissal may be granted even if the law of the alternative forum is less favorable to the plaintiffs than the law that would be applied in their chosen forum. "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247. This seems to imply that even if one country's law results in a smaller dollar recovery, then the foreign plaintiff should sue at home. If, however, the foreign plaintiff can show that his country's law is completely inadequate, he may be able to come into a United States forum. As a result of feeble law or not having a law at all, one plaintiff will recover in America, while the other plaintiff may have to sue in a forum where there may be no contingent fee system, and which will produce a less favorable result.

150. *Id.* at 255.

151. In effect, what defendants may do in some situations is create jurisdiction by consent. In *Schertenleib v. Traum*, 589 F.2d 1156, 1163 (2d Cir. 1978), the Second Circuit

forcing suit in the plaintiff's home country where it will be more difficult to prove damages.¹⁵² The result is much litigation and little compensation.¹⁵³ This factor alone could compel tired plaintiffs to settle their claims. In practice, *Reyno* provides domestic manufacturers the opportunity to use the *forum non conveniens* shield by

explained why it is desirable for federal courts to respect the jurisdiction of a foreign court which is based on consent.

When the alternative forum is foreign . . . our courts have difficulty discerning whether a non-resident defendant really would be subject to jurisdiction in the foreign country without his consent. Indeed, the court may receive conflicting expert opinions on this issue. If the defendant consents to suit in the foreign alternate forum, and if that appears to be sufficient under the foreign law, why waste the litigants' money and the court's time in what is essentially an unnecessary and difficult inquiry into the further intricacies of foreign jurisdictional law?

Id. (footnote omitted). Other federal courts have also dismissed on *forum non conveniens* grounds where alternative jurisdiction has been created by consent. See *Calavo Growers v. Generali Belg.*, 632 F.2d 963 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981); *Fitzgerald v. Texaco Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Panama Processes, S.A. v. Cities Servs. Co.*, 500 F. Supp. 787 (S.D.N.Y. 1980), *aff'd*, 650 F.2d 408 (2d Cir. 1981). The argument presented in *Hoffman v. Blaski*, 363 U.S. 335 (1960), that consensual jurisdiction amounts to forum shopping, has been rejected by the Second Circuit. The *Hoffman* ruling was based on, and limited to, the specific language of 28 U.S.C. § 1404(a) (1976), which provides that "a district court may transfer any civil action to any other district or division where it might have been brought." *Id.* at 336. *Hoffman* thus had no bearing on the common law doctrine of *forum non conveniens*. Because the doctrine of consensual jurisdiction seems to have found support, where foreign plaintiffs are concerned, it could be used by defendants in conjunction with *Reyno*. In making the *forum non conveniens* inquiry, the district court will look to the availability of an alternative forum. In consenting to jurisdiction, the district court may perceive that the alternative forum, plaintiff's home country, has been provided. Secondly, since *Reyno* affords less weight to foreign plaintiffs' choice of forum, overworked trial courts could easily find other grounds for dismissal. Thus, the device of consensual jurisdiction and *Reyno* might be employed to silence foreign plaintiffs before they even get into the courtroom.

152. Foreign plaintiffs, when relegated to sue abroad, might have to settle out of court because of their inability to take advantage of the contingent fee system of the United States. See *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 67 (2d Cir. 1981) (*forum non conveniens* dismissal denied in part because of plaintiff's practical inability to sue in alternative forum); *Fiorenza v. United States Steel Int'l, Ltd.*, 311 F. Supp. 117, 120-21 (S.D.N.Y. 1969) (*forum non conveniens* denied because of plaintiff's inability to pre-pay retainer and advance costs required in country prohibiting contingent fee arrangements); *Odita v. Elder Dempster Lines, Ltd.*, 286 F. Supp. 547, 550-51 (S.D.N.Y. 1968) (*forum non conveniens* dismissal denied because plaintiff unable to obtain counsel on contingent fee basis in United Kingdom); *Speiser, Resolving Foreign Air Crashes In the American Court System*, NAT'L L.J., Oct. 11, 1982, at 24, col. 1.

153. In a situation like the *Babylift* case, the fatal crash took place on April 4, 1975 and the foreign plaintiffs have yet to receive any relief. Meanwhile, the children continue to require treatment. 87 F.R.D. 560 (D.D.C. 1980).

allowing foreigners to assert their claims here, and then move for dismissal on *forum non conveniens* grounds. This would be followed by litigation of the same issue in the foreign forum and, if the foreign forum does not accept jurisdiction, the possibility that the case will reappear in the United States forum for adjudication. This is a waste of judicial resources on a worldwide basis.

As the Supreme Court noted in *Reyno*, "each case must turn on the facts."¹⁵⁴ The answer to the second unresolved question of *Reyno* depends on whether *Reyno* should be limited to *its* particular facts. In applying *Reyno*, the courts should examine how much judicial time has already been spent on discovery and preliminary hearings, and should closely examine the parties' contacts with the forum. In essence, *Reyno* involved the crash of a small Scottish airplane, which was caused by the error of a Scottish company and was investigated by the British.¹⁵⁵ The lack of connections with the United States forum was overwhelming. This is rarely the case in the crash of an American aircraft abroad. In such a case, the United States would be the most appropriate forum where the plaintiffs could both obtain jurisdiction over all the parties and gain access to a substantial body of evidence. *Reyno* may therefore be distinguished on a factual basis by showing increased contacts with the forum.

Foreign plaintiffs whose claims arise out of the same circumstances as their domestic counterparts should not be discriminated against merely because they are of a different nationality. One way to avoid discrimination against foreign plaintiffs would be to put *more* emphasis on the interest analysis and *less* on the fact that the plaintiffs are foreign. In the *Babylift* case, the children did not choose to be adopted by foreign families.

A compromise between the plaintiffs and the manufacturer would provide the best result.¹⁵⁶ The plaintiffs should be allowed to sue in the United States forum and take advantage of the American

154. 454 U.S. at 249 (citing *Williams v. Green Bay & W. R.R.*, 326 U.S. 549, 557 (1946)).

155. *Reyno*, 424 U.S. at 239.

156. The protection of the manufacturer from liability is something which international aviation conventions have not considered. The central purpose of aviation liability conventions was to help an infant industry compete with other modes of transport by providing limitations on liability. In reflecting on the early days of aviation, it has been noted that "[i]nvestment in aviation was so unsound that governments had to intervene by either

expertise for settling aviation disaster claims. In return, the plaintiffs should agree to sue only for compensatory damages¹⁵⁷ calculated according to the standard of living in their countries of residence. This would eliminate the danger of a windfall recovery while allowing the plaintiff access to the benefits of the American court system. This would provide a fairly certain system of compensation based upon each plaintiff's individualized needs.

investing themselves, establishing protective laws and regulations, or guaranteeing the return of investments." Tobolewski, *Against Limitation of Liability: A Radical Proposal*, 3 ANNALS AIR & SPACE L. 261 (1978). The Warsaw Convention of 1929 limited the amount that could be recovered against an air carrier to 125,000 Poincare French Francs or U.S.\$8,300. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature*, Oct. 12, 1929, art. 22, 49 Stat. 3000, 3019, T.S. No. 876, 137 L.N.T.S. 11. See 1 L. KRIENDLER, AVIATION ACCIDENT LAWS § 11.01 [2] (1982). The Warsaw Convention was later amended in 1955 by the Hague Protocol. Protocol Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371. The Hague Protocol doubled the liability ceiling of Warsaw to 250,000 Poincare Francs or U.S.\$16,000. In 1966, the United States moved to denounce the Hague Protocol because of dissatisfaction with the liability ceiling. In 1966, the International Civil Aviation Organization and 61 airlines met in Montreal and agreed to waive the limitation of liability up to U.S.\$75,000. See Loggans, *Personal Injury Damages in International Aviation: The Plaintiff's Perspective*, 13 J. MAR. L. REV. 541, 546-47 (1980). Nowhere in these agreements have liability ceilings been mentioned against the manufacturer, and the liability limitation defense is available solely to the carrier. Yet, in many instances, it is not the carrier or manufacturer who will eventually pay large damage claims, but the insurance companies.

The bottom line is that all of the world's airlines and aircraft manufacturers are now able to buy as much as U.S.\$500 million of liability insurance coverage in markets where insurers from many nations are scrambling all over each other in order to get the business. The rates have actually been dropping in recent years despite the continued onslaught of worldwide inflation. And the cost to the airline and manufacturers is less than 1 percent of their operating expenses.

Speiser, *Resolving Foreign Air Crashes In the American Court System*, NAT'L L.J., Oct. 11, 1982, at 24, col 1. See generally Note, *Up In the Air Without A Ticket: Interpretation and Revision of the Warsaw Convention*, 6 FORDHAM INT'L L.J. 332 (1983).

157. In order to ensure just compensation, a trial system has been suggested whereby trials would be scheduled in the "order of 'ripeness' of plaintiffs medical condition." *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 87 F.R.D. 560 (1980). Writing in 1980, Judge Oberdorfer noted that "MBD manifests fewer objective symptoms in children who are at the age of plaintiffs than will be the case when they are 8-10 years old and confront the more formidable challenges of third and fourth grades in school." *Id.* at 563. The children have now reached the third and fourth grade level. It was further noted in 1980 that "experts for both parties agree that in three or four years most of those with permanent disability will be more easily diagnosed; those who have suffered no permanent disability can be identified more confidently." *Id.* Because an MBD diagnosis can now be made with greater accuracy, it is likely that damages awarded at this time will not result in a windfall to the plaintiff and its counsel. The parties should consider four suggestions made by Judge Oberdorfer concerning the structure of a possible trial program. The four elements are:

CONCLUSION

This Note has examined both sides of the *forum non conveniens* issue, and pointed out how *forum non conveniens* dismissals may provide a double standard of recovery by allowing American plaintiffs the benefits of a forum in the United States, while relegating foreign plaintiffs to suits in other jurisdictions. The *Reyno* holding and its applicability to foreign plaintiffs may be a reaction to the fact that there is no liability ceiling on air disaster claims against an aircraft manufacturer. Yet, *Reyno's* principles have not been consistently applied to bar foreign plaintiffs from American fora. Often, courts will search for an opening in the unanswered questions, or a strong interest analysis, in order to retain the case. By utilizing a non-mechanical balancing approach, *Reyno* may be virtually disregarded.

Reyno may yield unpredictable, or even unfair results, and gives manufacturers the opportunity to "tire" foreign plaintiffs into settlement. In a situation like the *Babylift* case, strict application of *Reyno* would have been manifestly unjust because all the plaintiffs' claims involved the same crash, the same class of injured persons, the same defendants, and the same evidence; and yet, only those infants adopted by American parents would have recovered.

Maria A. Mazzola

(1) a procedure to evaluate plaintiffs' medical conditions so that the cases are brought to trial when their conditions permit accurate adjudication; (2) provision for diagnosis and observation of *all* plaintiffs for symptoms of brain injury; (3) provision during the period before trial for treatment of those plaintiffs who manifest signs of injury; and (4) establishment of a structure to encourage settlements by providing for the exchange of medical information and offers.

Id. at 564.