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## Legal Transplants v. Transnational Law: Lessons From the Israeli Adoption of Public Factors in Forum Non Conveniens

Ido Baum

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**LEGAL TRANSPLANTS V.  
TRANSNATIONAL LAW: LESSONS  
FROM THE ISRAELI ADOPTION OF  
PUBLIC FACTORS IN FORUM NON  
CONVENIENS**

*Ido Baum\**

INTRODUCTION.....	358
I. INTERNATIONAL JURISDICTION IN CIVIL LITIGATION.....	364
II. THE ANGLO-AMERICAN DIVIDE .....	367
<i>A. The Emergence of Public Factors in the United States ..</i>	368
<i>B. U.S. Public Factors from a Critical Perspective .....</i>	373
<i>C. The View from England.....</i>	376
<i>D. Interim Observations .....</i>	379
III. ISRAELI FORUM NON CONVENIENS AND PUBLIC FACTORS.	380
<i>A. The Initial Discussion—obiter dicta .....</i>	380
<i>B. The Grassroots Ascent of Public Factors in Israel.....</i>	384
IV. A CRITICAL PERSPECTIVE ON PUBLIC FACTORS IN ISRAEL	392
<i>A. Vagueness, Moral Values and Procedure.....</i>	393
<i>B. International Comity .....</i>	396
<i>C. The Costs and Benefits of Bias .....</i>	399
<i>D. Court Congestion and Types of Action .....</i>	402
<i>E. The Passive Role of the Court .....</i>	403

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CONCLUSION .....	403
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## INTRODUCTION

If a gun appears in the first act of the play it is hardly surprising that one of the characters is shot in one of the final scenes. The victim's identity and that of the shooter remain key elements with which the playwright instills suspense. Legal transplants behave in a similar fashion.<sup>1</sup> The introduction of a legal transplant into a legal system is bound to change legal outcomes, and it is usually adopted to facilitate a certain purpose. However, it is not entirely foreseeable whether the legal transplant will in fact serve its intended purpose and what would be its future results beyond its initial purpose.

Legal transplants are an artifact of globalization, in that legal knowledge transcends borders and enables lawmakers, regulators, judges and lawyers to discover and import legal solutions for local problems in the global market of legal ideas.<sup>2</sup> However, it is hasty to assert that legal transplants necessarily promote the globalization or the trans-nationalization of law. This paper argues some legal transplants should be viewed more suspiciously than others, particularly in a world in which it is essential to enhance international comity and forge a network of globally committed national courts that will further effective transnational litigation.

Legal transplants regarding procedural law that bear on foreign plaintiffs' access to local judicial systems should raise concern. This paper will demonstrate the dangers of jurisdiction

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1. By the term "legal transplant" I refer to the adoption and reception of legal concepts, models or institutions from one legal system to another. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2nd ed. 1993); See also Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006). All the sources cited in this article are in English, unless otherwise indicated, except for Israeli case law citations in which I refer to the Hebrew source unless an English translation is available.

2. Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 AM. SOC'Y INT'L L. PROC. 465, 465 (2010) (asserting "transnational judicial dialogue has emerged as an important force in the development of international human rights law and in the emergence of domestic courts as transnational actors.")

transplants by analyzing the haphazard path in which Israeli courts adopted and implemented the U.S. mechanism of weighing public factors in the application of the forum non conveniens doctrine. Forum non conveniens is a doctrine used by common law courts to determine whether there is another forum in which a dispute should be adjudicated even though the deciding forum has seized personal jurisdiction.<sup>3</sup> Defendants often raise the forum non conveniens doctrine as a threshold defense, and aim to bring about the dismissal of civil claims, in particular those filed by foreign plaintiffs,<sup>4</sup> to force the plaintiffs to re-file their lawsuits in other jurisdictions.

Courts apply the doctrine by examining a variety of factors, usually relating to the private interests of the parties.<sup>5</sup> In the United States, so-called “public factors” are also among the factors used in order to determine the merits of a forum non conveniens defense.<sup>6</sup> The U.S. and the English legal systems diverge in their approaches to the treatment of forum non conveniens defense claims. Notably, U.S. courts adopt public factors to reject mass-tort foreign claimants, whereas English courts reject the use of public factors and welcome transnational civil disputes.<sup>7</sup>

Several observations and clues appear in the Israeli play’s first act that foreshadow the unintended consequences of the Israeli adoption of public factors. These observations may also serve to explain and warn against enigmatic legal transplants elsewhere.

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3. Michael M. Karayanni, *The Myth and Reality of a Controversy: “Public Factors” and the Forum Non Conveniens Doctrine*, 21 WIS. INT’L L.J. 327, 331 (2003) (“In very broad terms, the doctrine empowers a court that considers itself an inappropriate forum for litigation due to its geographical and national identity to decide not to adjudicate the case.”) (internal quotations omitted). See also ALBERT V. DICEY & JOHN H.C. MORRIS, *DICEY AND MORRIS ON THE CONFLICT OF LAWS* 396-97 (Lawrence Collins et al. eds., 13th ed. 2000); PETER M. NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH’S PRIVATE INTERNATIONAL LAW* 336-37 (13th ed. 1999).

4. See discussion *infra* chapter II.

5. See discussion *infra* chapter II.

6. Karayanni, *supra* note 3, at 327–28 (“United States courts go out of their way to make clear that ‘public interest’ factors, as enunciated by Justice Robert Jackson in the landmark decision of *Gulf Oil Corp. v. Gilbert*, are very relevant to the considerations of the forum non conveniens doctrine.”).

7. *Lubbe v. Cape PLC*, [2000] 1 W.L.R. 1545 at 1567 (Eng.) (explicitly rejecting U.S. courts’ public interest considerations in forum non conveniens); Karayanni, *supra* note 3, at 327; see also discussion *infra* chapter II.

First, it is important to consider where the transplanted mechanism originates. The further from the transplant's originating legal system, the more justifications and examinations are required for borrowing it. The same holds true when the characteristics of the transplant's borrowed system are fundamentally different from those of the borrowing system.

The Israeli courts' choice to follow the U.S. transplant approach rather than the English approach should have aroused suspicion for the following reasons: First, the Israeli law of civil procedure is based almost entirely on the English system;<sup>8</sup> Second, due to some characteristics of the Israeli legal system—its small size and geopolitical location, its congested court system, its unique language, Hebrew, the lack of jury trials and punitive damage awards, and the existence of a “loser pays” legal fees rule—Israel is not an attractive forum for foreign plaintiffs searching for a plaintiff-friendly court.<sup>9</sup> In other words, the courts in Israel are generally not concerned with a possible uncontrolled foreign plaintiff influx. Israeli courts do suffer from intense case congestion,<sup>10</sup> but it is entirely due to local reasons.

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8. STEVEN GOLDSTEIN, IDO BAUM, NILI KARAKO & YUVAL MERIN, CIVIL PROCEDURE IN ISRAEL 21 (2013) (“It should be noted further that while the Rules of Civil Procedure are, therefore, an independent product of the Israeli legal system, they continue to be based primarily on the English rules. Thus, it is not surprising that in interpreting these Rules, the Israeli courts continued to be influenced by – though not bound by and at a diminishing rate – English precedents that interpret parallel provisions of the English Rules”); *But cf.* Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQ. L. 723, 727 (2009) (“The literature on transplants received widespread attention among comparativists because it showed that legal systems can accommodate a plurality of models, though most transplants probably still occur across legal systems that already have much in common”). One may argue that public factors may be seen as a natural evolution of the common law legal doctrine of *forum non conveniens*. However, the English doctrine of *forum non conveniens* has been adopted in many common law jurisdictions including New Zealand, Canada, Hong Kong, Singapore, Ireland, and Australia, none of which developed or adopted U.S.-style public factors. As for England itself, its application of the civil-law driven Brussels Convention, discussed *infra* in chapter II.C only emphasizes to which of the two distinct paradigms of personal international jurisdiction England is drawn. See Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1006 (2006) (“U.S. and European approaches remain remarkably different, and mutual understanding remains difficult.”).

9. See discussion *infra* in chapter IV.

10. Raanan Solichiano-Keinan, Amnon Reichman & Eran Vigoda-Gadot, *Court Congestion on legal Systems: A Comparative Study of 17 Countries*

Third, Israel, like England, has strived to become an international, or at least a regional, financial center by lowering the barriers to entry for international accounting and legal firms and promoting the expertise of its legal dispute resolution institutions.<sup>11</sup> Hence, the adoption of public factors in the forum non conveniens doctrine from the U.S.—constructed to resist the tidal wave of plaintiffs seeking redress in U.S. courts—seems counterproductive. Furthermore, this paper argues the actual implementation of public factors is inconsistent with the stated desire to globalize the legal and the financial systems.

A chronological analysis of Israeli case law that adopts public factors unveils the true motives behind the legal transplantation of public factors in Israel. This paper will argue ulterior, political motives lie beneath the procedural rhetoric. The fact that the main judicial discussion with regards to the potential adoption of this U.S. doctrine took place in a series of obiter dicta within cases concerning claims filed by Palestinian residents of the Occupied Territories indicates Israeli courts were concerned Palestinian plaintiffs would seek redress in the Israeli civil court system.<sup>12</sup>

Israeli courts and in particular the highly congested Israeli Supreme Court were willing to entertain a flood of litigation from Palestinians on matters concerning state actions and military

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(Haifa University 2007) (Isr.) (finding that Israel is second only to Ireland in terms of court congestion among the 17 examined countries, including the United States and England).

11. Several legal reforms, spearheaded by a government committee headed by then Director General of the Ministry of Finance Yarom Ariav, were pushed through as of 2008 in order to promote the viability of Israel as an international financial center. See Moti Bassok, *Ariav's Dream: Turn Israel into a Global Financial Center*, HAARETZ (Mar. 24, 2008, 12:00 AM), <http://www.haaretz.com/print-edition/business/ariav-s-dream-turn-israel-into-a-global-financial-center-1.242427>; *Israel Trying to Become Int'l Financial Center*, ARUTZ SHEVA (Feb. 28, 2008, 9:42 AM), <http://www.israelnationalnews.com/News/Flash.aspx/142367#.VDBcky5dXZg>. The Israeli Securities Authority, as a part of the committee, was the driver behind a 2010 amendment of the Israeli Law of the Courts [Combined Version], 1984, that established a special court division, based on the Delaware Court of Chancery, and dedicated to fast tracking and resolving financial and corporate disputes. See also OECD, WHAT MAKES CIVIL JUSTICE EFFECTIVE? 5 (2013), available at <http://www.oecd.org/eco/growth/Civil%20Justice%20Policy%20Note.pdf>. (Israel is first among the examined developed countries in the budget allocated to the court system as a ratio of GDP).

12. See discussion *infra* chapter III.A.

actions in the Occupied Territories. Moreover, the Israeli court system is proud of its unprecedented decision to open its gates to Palestinians on matters concerning the scrutiny of governmental and military activities in the Occupied Territories. Dozens of petitions by Palestinians have flooded the High Court of Justice in Israel every year since the early 1970s.<sup>13</sup> However, the courts have been unwilling to open the Israeli civil court system for Palestinian civil disputes.

This paper argues the evidence of accepting more Palestinian civil claims, albeit circumstantial, indicates the contemplation of public factors was the Israeli Supreme Court's way of legitimizing a fundamentally political decision. The ulterior political motive in rejecting civil disputes initiated by Palestinians can be attributed to the Israeli desire to preserve a functioning internal system of governance in the Occupied Territories after its occupation in 1967, following the so-called "Six Day War."<sup>14</sup> While the Israeli judicial system went to great lengths to scrutinize the Israeli government's actions and its army in their capacity as administrators in the Occupied Territories, it has refrained from intervening in civil disputes instigated by Palestinians in Israeli courts for what seemed to be a search for a comparatively plaintiff-friendly forum.

It is noteworthy that in spite of the fact that the Israeli Supreme Court entertained the possibility of adopting public factors in order to stop civil Palestinian plaintiffs, there is no indication that such a wave of claimants ever arrived. Hence, there was no need to actually adopt public factors at the time. Indeed, a careful analysis of Israeli Supreme Court case law shows the entire discussion between the judges was obiter dicta and that public factors were not formally adopted at that time. However, the seed for adoption was planted, or, as the metaphor goes, the gun had been left on the table as the curtain dropped on the first

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13. H CJ 337/71 *The Christian Association for the Holy Places v. Minister of Defense* 26(1) PD 574 [1971] (Isr.); *Quasme v. Minister of Defense* 25(3) PD 113 [1981]. See also Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISRAEL Y.B. HUM. RTS. 262, 272–73 (1971) (noting that the Attorney General did not raise an objection to application by Palestinian from the Occupied Territories to the High Court of Justice in Israel in spite of international precedents to the contrary).

14. See generally "Six Day War", ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/850855/Six-Day-War> (last updated Nov. 12, 2014).

act. Public factors were picked up later on by other judges, who implemented them without due consideration of the original U.S. criteria of judicial discretion and thereby creating severe procedural uncertainty.

The late and haphazard adoption of public factors can be criticized not just for its ambiguity but also for disregarding the now extant critical literature in the U.S. about the doctrine and its application. This paper argues the adoption of public factors was faulty because: the adoption was completed in a manner inconsistent with their application in the United States; it included incomplete and overly broad criteria, leaving room for an application that masks the judge's personal preferences; it contradicted the need for certainty; and it has implications on the efficiency of the court system and on its position in a transnational judicial network. Furthermore, evidence indicates the *forum non conveniens* doctrine enables courts to maintain a persisting bias towards lawsuits filed by foreign plaintiffs against local defendants in Israel, whereas local plaintiffs are treated differently.<sup>15</sup> As will be discussed, the discretionary nature of public factors in *forum non conveniens* may serve to enhance this dangerous trend.

The first chapter of this paper briefly describes how jurisdiction is seized by the Israeli court in civil litigation and the role of the *forum non conveniens* doctrine. The second chapter delineates the Anglo-American divide regarding the use of public factors in the application of the *forum non conveniens* doctrine. This is followed by a survey of the critical literature regarding the U.S. courts' application of public factors in determining *forum non conveniens* assertions. The third chapter examines the judicial deliberations regarding the adoption of public factors into the Israeli *forum non conveniens* doctrine, and presents evidence underlying the argument that political considerations motivated the legal transplant. The chapter then goes on to show how the Israeli Supreme Court abandoned public factors and how they later reemerged in a grassroots process as means of protecting local plaintiffs. The fourth chapter analyzes and criticizes the application of public factors in the Israeli *forum non conveniens* doctrine and explains how their application undermines globalization and transnational litigation. The paper con-

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15. See *infra* chapter IV.



cludes with general observations from the particular case of public factors in Israel and recommends a more candid and straightforward approach for courts to stifle unwanted litigation at the source.

## I. INTERNATIONAL JURISDICTION IN CIVIL LITIGATION

An Israeli court may seize international and personal jurisdiction over a civil defendant by several means.<sup>16</sup> One method is the personal service of process on the defendant or a person which is deemed highly likely to inform the defendant about the complaint according to the Israeli Rules of Civil Procedure, 1984 (RCP).<sup>17</sup> The other method occurs when the plaintiff requests leave from the court to serve the defendant without the state, meaning the court agrees to seize international jurisdiction and extend it to the defendant despite the fact that the defendant is located outside of the state court's territorial sovereign jurisdictional borders.<sup>18</sup>

Regardless of how an Israeli court seizes jurisdiction, the defendant summoned before the court may assert the Israeli forum is not the appropriate forum to adjudicate the dispute by raising the forum non conveniens defense, even when the Israeli forum has lawfully acquired international personal and subject matter jurisdiction over the dispute.<sup>19</sup> The defense can be raised by a foreign defendant summoned before an Israeli court or by an Israeli defendant sued by a foreign plaintiff in the Israeli forum.

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16. Parties may preselect a mutually agreed forum. Forum selection clauses are outside the scope of this article.

17. Rules 475-499 of the Rules of Civil Procedure, 1984 (RCP) indicate the preferred method of service of a complaint is personal service but international and personal jurisdiction are also assumed when the service of process is performed in other methods enumerated in the said RCP. GOLDSTEIN ET AL., *supra* note 8, at 78 ("[T]he basic principle in this regard is that international jurisdiction is based either on service of process on the defendant, either personally or through construed service of process, or on his agreement to adjudicate in the State.").

18. Rules 500-503 of the RCP empower the court to authorize service of process without the state in particular disputes and situations enumerated in Rule 500 RCP. *See id.* at Rules 500-503. Even if the plaintiff's request for leave of service without the state falls within the ambit of one of the situation enumerated in Rule 500 RCP and then plaintiff has met the burden of proving prima facie that the Israeli forum is the convenient forum for adjudicating the dispute. The court has final discretion whether to authorize service without the state. *See generally* GOLDSTEIN ET AL., *supra* note 8, at 81-84.

19. Civil Appeal 45/90 Abade v. Abade 48(2) PD 77 [1994] (Isr.).

In some circumstances the defense may even be raised by an Israeli defendant sued by an Israeli plaintiff when there are international elements in the dispute that tie it to another forum.<sup>20</sup> Naturally, a foreign defendant sued by a foreign plaintiff may also raise this threshold defense.

The forum non conveniens doctrine originated in Scottish law,<sup>21</sup> but it is actually an extension of the traditional venue doctrines of English law. The latter reflected concern with the possible abusive choice of forum as a result of the power granted to plaintiffs to choose the venue in which to file their complaints.<sup>22</sup>

The criterion for ejecting a lawsuit on the basis of forum non conveniens in Israel depends on whether the Israeli forum is the appropriate forum to adjudicate the dispute or whether a more appropriate forum exists.<sup>23</sup> If a competing forum is proposed by the defendant, the court applies the “most factors test” to determine which forum has the closest association to the dispute.<sup>24</sup> The burden of proof at this stage lies with the defendant seeking the dismissal of the case to show most factors point at another, more appropriate forum. The burden is tougher than the familiar preponderance of evidence.<sup>25</sup> The defendant must show a clear and substantial connection to the other forum.<sup>26</sup> The trend in the Israeli Supreme Court, as dictated by the oft-quoted decision in *Hageves A. Sinai v. Lockformer*,<sup>27</sup> is to increase the defendant’s burden to show another forum is appropriate in light

20. A survey of 78 cases in which the forum non conveniens defense was raised in Israel between 2007 and 2010 found at least ten such cases. *See infra* chapter IV.B.

21. John Bies, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 492–94 (2000) (“The origin of the doctrine of forum non conveniens, though uncertain, is typically traced to early Scottish decisions.”).

22. *Id.* The historic development of the doctrine and the Anglo-American divide will be discussed *infra* in chapter II.

23. Leave of Civil Appeal 9810/05 *Hecke v. Pimcapco*, ¶ 10 (Aug. 30, 2009) (Chief Justice Grunis opinion) (Isr.).

24. *Id.* *See also* Leave of Civil Appeal 10250/08 *Katziv v. ZAO Raiffeisenbank*, ¶ 4 (Mar. 18, 2010) (Chief Justice Grunis’ opinion) (Isr.).

25. Leave of Civil Appeal 2705/97 *Hageves A. Sinai v. The Lockformer Co.*, 52(1) PD 109, 114 [1998] (Isr.) (holding that, when the Israeli court weighs the “most factors” test, it should start by assuming that it has seized jurisdiction and only when the most factors test inclines “clearly and significantly” toward the foreign forum will the court determine that the foreign forum is the forum of convenience to adjudicate the dispute).

26. *See Hecke*, *supra* note 23; *Abade*, *supra* note 19 at 82–84.

27. *Hageves*, *supra* note 25.

of the modern means of communications and transportation which make it simpler and cheaper to litigate away from one's home country.<sup>28</sup>

When implementing the most factors test, Israeli courts traditionally focused on the "private" factors (i.e., factors concerning the litigating parties).<sup>29</sup> These factors include the accessibility of evidence, the ability to compel the appearance of witnesses, the cost of bringing witnesses to the court, the ability to pay a visit to locations associated with the dispute, potential of enforcement of the verdict, the expectations of the parties regarding the forum in case of a dispute and the applicable law governing the case.<sup>30</sup>

However, the dawn of a new millennium marked a significant decrease in the importance of most of the "private" factors.<sup>31</sup> The prognosis by some scholars has been that this trend would lead to an increase in litigation with loose ties to the Israeli forum,<sup>32</sup> as "forum shopping" became popular,<sup>33</sup> territorial service of process enabled relatively easy and at times random acquisition of

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28. Hageves, *supra* note 25, at 114. This is the most quoted ruling on the matter of the ease of global litigation in the age of modern transportation and telecommunications. GOLDSTEIN ET AL., *supra* note 8, at 81–82 (“[I]n recent years the Israeli courts have both been much more receptive to plaintiffs who seek to serve without the State and, in doing so, have blurred the historic distinction between forum non conveniens and the determination that Israel is a convenient place for the litigation in the context of service abroad . . . they have been less inclined to stay cases on the basis of forum non conveniens. In attempting to justify this increasing receptivity to plaintiffs as to international jurisdiction, the courts have emphasized that in the current age of technology witnesses may not have to come physically to court and thus the argument that there will be a great burden on foreign defendants if the case is tried in Israel loses much of its force.”).

29. See generally, Civil Appeal 74/83 Rad v. Hai, 40(2) PD 141 [1986] (Isr.).

30. These factors were adopted from the American case law. *Id.* at 149.

31. Most notably in the Hageves decision. See Katziv, *supra* note 24.

32. GOLDSTEIN ET AL., *supra* note 8, at 83 (“In the past, Israeli case law conformed with English case law in the approach that only private considerations of the parties should be considered in examining the issue of forum non conveniens . . . . Consequently, Israeli courts find themselves burdened with claims that are less connected to Israel.”).

33. Forum shopping is often criticized in the United States but it is far from discouraged in England. Alan Reed, *To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 74 (2000) (“Forum shopping should generally be viewed in a neutral, not a hostile, sense” and noting that “hostility to forum shopping in the United States has been combined with antipathy toward the contingency

international jurisdiction,<sup>34</sup> and the ability of the courts to eject cases to other forums declined. To complement the trend, new case law makes it easier for plaintiffs to acquire international jurisdiction over defendants located outside the state.<sup>35</sup> Given this setting, it should come as no surprise that Israeli Supreme Court justices thought it useful to reflect on the adoption of means to stifle litigation at source and looked for such methods abroad.

## II. THE ANGLO-AMERICAN DIVIDE

To better understand the problematic aspects of the transplantation of public factors from the United States, it is useful to explore the roots of the doctrine and the Anglo-American divide over the use of public factors. The following subsection describes the inception of public factors and their application by U.S. courts. Subsection B discusses the critique of the application of public factors in the United States, followed by an analysis of the English treatment of forum non conveniens arguments. Subsection D offers interim observations.

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fee lawyer. This attitude ignores the fact that many high-profile product liability disputes, where industrial accidents have transpired in less developed countries, could only be funded abroad (in the defendant's home forum) on a contingency fee basis."); ANDREW KLEIN, FOREIGN PLAINTIFFS, FORUM NON CONVENIENS, AND CONSISTENCY 8, 9, 13 (2007), *available at* works.bepress.com/cgi/viewcontent.cgi?article=1000&context=andrew\_klein.

34. URI GOREN, ISSUES IN CIVIL PROCEDURE 48 (10th ed., 2009) (Isr.) (expecting that the willingness of courts to uphold forum non conveniens defenses will decrease, but observing that the private factor regarding the private expectation of the parties with respect to the forum remains in force and has not weakened).

35. For example, the Israeli court shows flexibility in seizing jurisdiction pursuant to service of process within the state even when the service is to persons that are not the defendant when these persons are deemed to be sufficiently connected to the defendant and likely to inform the defendant about the process. The most prominent example is the application of Rule 482 RCP, which states that service within the state can be made to a person that manages the business of the defendant if the defendant is without the state. In Leave of Civil Appeal 2652/94 Tandler v. Le Club Mediterane Ltd (Aug. 25, 1994) (Isr.), the court held that RCP 482 can be widely interpreted such that the person served with process does not have to be an actual manager of the defendant's business and it would be sufficient to show that the person served had an intensive business connection with the defendant at the time.

*A. The Emergence of Public Factors in the United States*

United States federal and state courts maintain personal jurisdiction quite liberally over defendants, even when these defendants are outside the territorial jurisdiction of the forum. U.S. federal courts apply the “Minimum Contacts” doctrine, which sets the conditions for a court to have personal jurisdiction over the defendant.<sup>36</sup> The relative ease with which personal jurisdiction is seized obliged U.S. courts to develop filtering mechanisms to moderate plaintiff litigation. The forum non conveniens doctrine served this purpose.<sup>37</sup>

Historically, the forum non conveniens doctrine applied mostly to admiralty cases in which a court could seize personal jurisdiction over a defendant located outside the country whose ship is docked in a U.S. port. In 1929, a law review article by Paxton Blair launched a new interpretation of the doctrine.<sup>38</sup> Blair proposed broadening the use of the doctrine for the purpose of “relieving calendar congestion by partially diverting at its source the flood of litigation by which our courts are being overwhelmed.”<sup>39</sup> The U.S. Supreme Court adopted this idea in *Gulf*

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36. *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, et. al.*, 326 U.S. 310 (1945) and its progenies, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The minimum contacts doctrine makes it relatively easy for a plaintiff to impose personal jurisdiction over a defendant even if the latter is located outside the state compared to the English and the Israeli law in which the principle of territoriality requires that service of process without the territorial jurisdiction of the state would be done only with the court's permission.

37. Bies, *supra* note 21, at 489 (observing that the flood of litigation in the United States followed World War II and the intensification of global trade); Reed, *supra* note 33, at 35–36.

38. For Blair's text, see Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Bies, *supra* note 21, at 495–96 (“[T]he phrase ‘forum non conveniens’ rarely appears in the decisions of American courts prior to the publication of Paxton Blair's seminal article.”) (internal citations omitted).

39. Blair, *supra* note 38, at 1; John Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L. J. 659, 673 (2004) (“[T]he critical event in the modern history of forum non conveniens appears to be a 1929 law review article by Paxton Blair, a New York attorney.”) (internal citations omitted).

*Oil v. Gilbert*,<sup>40</sup> in which the Supreme Court laid down the mechanism for exercising the court's judicial discretion in applying the forum non conveniens doctrine.<sup>41</sup> In *Gulf Oil*, the Court outlined two types of factors—private and public—for courts to consider as it applies to the forum non conveniens doctrine.<sup>42</sup> It is noteworthy that Justice Jackson did not rank the factors, because neither public nor private factors trump the other.

Private forum non conveniens factors include the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses and the cost of attendance of willing witnesses; the possibility to view the physical sites relevant to the lawsuit; and all other practical considerations that make the trial of a case easy, expeditious and inexpensive.<sup>43</sup>

When addressing public factors, the Court pointed out:

[A]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.<sup>44</sup>

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40. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); See also Emily J. Derr, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 823 (2008) and *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (viewing the forum non conveniens doctrine as a “supervening venue provision.”).

41. *Gulf Oil* concerned inter-state jurisdiction. In 1948 Congress abolished the forum non conveniens doctrine in federal matters but the ruling remains applicable in matters of international jurisdiction. See Bies, *supra* note 21, at 500.

42. *Gulf Oil*, 330 U.S. at 508–09.

43. *Id.* at 508.

44. *Id.* at 508–09. It should be noted that a court will not eject a case on the basis of a single public factor. See Derr, *supra* note 40, at 825 (observing that “[a] single public interest factor probably could not support a valid forum non conveniens dismissal.”).

The U.S. Supreme Court's articulation of the forum non conveniens doctrine in a lawsuit filed by a foreign plaintiff would normally be implemented in several stages. First, the court would examine whether there exists a valid alternative forum for adjudicating the lawsuit. Second, the court would weigh the private and public factors of the parties.<sup>45</sup> Finally, even if the public factors weigh in favor of the alternative forum, the court would examine whether the plaintiff might be impaired by such a ruling and take measures to mitigate such potential consequences.<sup>46</sup>

In *Gulf Oil* the Court emphasized the plaintiff's right to choose his or her forum of convenience, in spite of the belief that the plaintiff's choice clearly reflects the plaintiff's assumption that the material and procedural law of the chosen forum gives the plaintiff an advantage.<sup>47</sup> It would not be unreasonable to assume this approach was adopted because the parties in the case were both U.S. residents. This approach changed in *Piper Aircraft v. Reyno*, in which the Supreme Court held that a foreign plaintiff's choice of the United States as the forum for filing a lawsuit should not receive the same weight given to the choice of a U.S. plaintiff.<sup>48</sup>

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45. Initially, courts applied private factors first and then proceeded to weigh public factors where necessary. *See, e.g., Pain v. United Technologies Corp.*, 637 F.2d 775, 784–85 (D.C. Cir. 1980). However, courts later declined to follow the *Pain* ruling and now prefer weighing private and public factors together. *See, e.g., Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1185 (R.I. 2008). *See also Klein, supra* note 33, at 3.

46. *See Pain*, 637 F.2d at 85 (“the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.”).

47. *See Gulf Oil*, 330 U.S. at 508; *Reed, supra* note 33, at 48 (“the test was markedly skewed in favor of the plaintiff's choice of forum which was rarely to be disturbed unless abuse of process was evident”); *Wilson, supra* note 39, at 677–79 (noting that according to *Piper Aircraft* (*see infra* note 48), “forum non conveniens is an entirely common-law doctrine, so there is no requirement that the plaintiff's choice of substantive law be preserved, the Court noted.”).

48. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In this case, the estate of a person killed in an aircraft accident in Scotland sued the aircraft producer in its home turf, the United States. The court upheld a forum non conveniens defense in spite of the fact that it seems privately more convenient for the defendant to litigate in the United States rather than in a forum that is connected to the plaintiff. *See Reed, supra* note 39, 58–59. Some state courts rejected the *Piper Aircraft* ruling. *See Christine Russel, Should Florida be a “Courthouse for the World?”: The Florida Doctrine of Forum Non Conveniens and Foreign Plaintiffs*, 10 FLA. J. INT'L L. 353, 362–63 (1996). The reason for the dismissive

*Piper Aircraft* indicates a paradigm shift in the forum non conveniens doctrine's application in the United States. The inclination to favor the local forum, based on a restrained policy to interfere in the plaintiff's forum choice only when the choice was made with an intention to harass the defendant, was replaced by a structured preference against the choice of forum by the non-U.S. plaintiff.<sup>49</sup>

Indeed, *Piper Aircraft*'s shift should be understood against the backdrop of the attractive qualities of the U.S. legal and judicial system. Foreign plaintiffs are attracted to the United States because of its pro-plaintiff negligence law, pro-plaintiff civil discovery rules, the availability of risk-reducing litigation fee arrangements, as well as relatively high damage awards.<sup>50</sup>

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approach toward the foreign plaintiff's choice of forum in *Piper Aircraft* has to do with the ruling in *Koster v. Lumbermens Mut. Cas. Co.* See *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). This case was handed down in temporal proximity with *Gulf Oil*. It concerned a plaintiff's derivative action against a corporation, with the latter being the real beneficiary of the action. In spite of the fact that the plaintiff was a resident of the forum, the court did not give the plaintiff's choice of forum significant weight. The court actually noted that in derivative litigation, the cause of action belongs to the corporation and thus federal law allows serving such a suit in any district in which such a corporation resides or may be found. *Id.*, 523, at footnote 2. *Piper Aircraft* seems to have followed this approach without giving due attention to the unique nature of the circumstances in *Koster*.

49. See Wilson, *supra* note 39, at 660–61, 688 (noting that some courts rejected the *Piper Aircraft* approach). See also Michael T. Lii, An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens, 8 RICH. J. GLOBAL L. & BUS. 513, 526, 534 (2009) (noting that the court upheld 52 percent of the forum non conveniens dismissal motions filed by U.S. defendants).

50. See *Piper Aircraft*, 454 U.S. at 252; Bies, *supra* note 21, at 500 (“For both substantive and procedural reasons, American courts are particularly attractive to foreign plaintiffs.”); on the influx of litigation in U.S. courts see also Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT’L ECON. L. 141 (1998) and on tort actions particularly see Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369 (1991). There is also the following famous quip by Lord Denning:  
As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side.  
*Smith Kline & French Laboratories, Ltd. and Others v. Bloch*, [1983] 1 W.L.R. 730 at 733 (Eng.).



While some scholars described the use of public factors in the forum non conveniens doctrine by U.S. courts as inconsistent and capricious<sup>51</sup> it is in fact highly consistent when it comes to applying the doctrine to foreign plaintiffs, particularly in mass-plaintiff litigation such as class actions. A significant portion of class action lawsuits are consistently expelled from U.S. forums on the grounds of forum non conveniens. In an illustrative example, English plaintiffs who filed a lawsuit in the United States against local pharmaceutical corporations for harm caused by the consumption of medication bought and consumed in England. The plaintiffs were subsequently expelled from the American forum on the grounds of forum non conveniens, although they had shown that filing the same lawsuit in England would be significantly more inconvenient due to procedural difficulties that increased the financial risk of mounting the same litigation in the plaintiffs' home forum.<sup>52</sup>

Conversely, some U.S. courts show empathy towards local plaintiffs when forum non conveniens assertions are raised by foreign defendants in a U.S. forum. This is particularly true when the local plaintiffs are tourists. When public factors were weighed in such circumstances, a U.S. court held that court congestion is not an overwhelming factor and that the local forum, as well as the competing forum, has an equal interest to adjudicate the case.<sup>53</sup> It followed that the U.S. forum prevailed in view of the plaintiff's expectation to have the case tried before a jury

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51. See Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985) (reviewing the application of U.S. court doctrine, which yielded a "crazy quilt of ad hoc, capricious, and inconsistent decisions.").

52. There are two prominent examples, both concern claims filed by British claimants against the U.S. pharmaceutical company Merck for alleged damages caused by the consumption of the medication Vioxx after the company withdraw the medication from the market following several events of death. *In re Vioxx Litigation*, 395 N.J. Super. 358, 368 (App. Div. 2007); *Gullone v. Bayer*, 408 F. Supp. 2d 569 (N.B. III., 2006) *aff'd*, 484 F.3d. 951 (7th Cir. 1990). In both cases the U.S. courts ruled that the English forum is more appropriate to adjudicate the claims even though the English forum lacked pro-plaintiff contingency legal fee arrangements and the risk-increasing "loser pays" costs rule. For a critical review of these decisions, see also Michael McParland, *Forum Non Conveniens in the US: Are the Courtroom Doors Finally Shut?*, 1 J. PERS. INJ. 58 (2008).

53. See *supra* note 47 and accompanying text.

and to enjoy a contingency fee scheme, both of which were unavailable in the other forum.<sup>54</sup>

However, court deference to local plaintiff's forum choice is not always honored. A particular exception occurs in medical malpractice lawsuits. Medical malpractice lawsuits by U.S. citizens claiming damages for harm caused by medical treatments abroad, focusing mostly on "medical tourism" in Latin America, do not enjoy the warm hospitality of their local courts when the defendants raise forum non conveniens as a threshold defense. This approach is explained by the concern of U.S. courts that imposing U.S. standards of liability and compensation on foreign medical services would increase the costs of such services to U.S. citizens who are unable to pay for costly medical treatments in the United States, and therefore resort to cheaper services abroad.<sup>55</sup>

#### *B. U.S. Public Factors from a Critical Perspective*

More than sixty years have passed since *Gulf Oil* outlined the criteria for examining a forum non conveniens defense, but the doctrine remains controversial.<sup>56</sup> Criticism of the doctrine remains controversial, but can be broadly organized into three categories: it is nebulous, its logic is faulty, and it allows corporations to abuse consumers in countries with weaker norms.

The first category critiques *Gulf Oil* for being nebulous and over-broad, which translates to uncertainty and unpredictability

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54. *Doe v. Sun Int'l Hotels*, 20 F. Supp. 2d 1328, 1330 (S.D. Fla. 1998) (rejecting a forum non conveniens defense by a hotel operating company in the Bahamas sued by the U.S. plaintiff who was raped during her stay at the hotel).

55. Philip Mirrer-Singer, *Medical Malpractice Overseas: The Legal Uncertainty Surrounding Medical Tourism*, 70 *LAW & CONTEMP. PROBS.* 211, 230–31 (2007) (arguing that imposing higher liability standards by allowing patients to sue at their own forum would decrease the phenomenon of medical tourism. "[S]ince medical tourism's main attraction is the cost savings, many medical tourists would then simply forego the firms' services.").

56. See Derr, *supra* note 40, at 820–21 (providing a brief overview of the scholarly critique of the forum non conveniens doctrine in the United States).

from the perspective of potential litigants, particularly plaintiffs.<sup>57</sup> Professor Michael Karayanni, an eminent scholar of comparative civil procedure, points out that the distinction between the public and private factors in *Gulf Oil* is vague.<sup>58</sup>

The second category of criticism focuses on the internal logic of the public factors and the validity of their justifications. The public factors enumerated in *Gulf Oil* are the only known example in which an examining court is given discretion to refuse to adjudicate a case's material questions on a basis that is external to the case at stake, e.g., court congestion.<sup>59</sup> Arguably, the doctrine is especially attractive to lower courts as it empowers judges with wide discretion to remove cases at the threshold, thereby enabling a relatively swift reduction of caseload.<sup>60</sup> Karayanni rejects the use of court congestion as a legitimate criterion for removing lawsuits, given its overwhelming ignorance of the facts or the merits of the cases, although he does recognize the need to combine an element of procedural justice to justify the rejection of certain cases from congested courts.<sup>61</sup>

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57. *Id.* at 821 ("The standards courts currently apply when considering the public interest factors are unclear, and courts apply the doctrine in inconsistent ways."); HANNO VON FREYHOLD, CROSS-BORDER LEGAL INTERACTIONS IN NEW YORK COURTS IN FOREIGN COURTS: CIVIL LITIGATION IN FOREIGN COUNTRIES 44, 109–12 (Volkmar Gessner ed., 1996) (arguing on the basis of an empirical survey of the New York State courts that the only reliable indicator for a success forum non conveniens defense is the identity of the judge ruling on the matter).

58. Karayanni, *supra* note 3, at 330 (asserting private factors have public aspects and vice versa, e.g., the question whether the forum has an interest in adjudicating a certain matter arises when a particular individual plaintiff has a private right which he seeks to enforce).

59. Derr, *supra* note 40, at 827 ("A basic, if not obvious, complaint about the current formulation of the forum non conveniens doctrine is that it allows judges to dismiss suits on the basis of seemingly illegitimate reasons. When a judge uses considerations such as docket congestion as a basis for dismissal, the judge fails to carry out the primary business of courts: adjudication.")

60. *Id.* at 820, 829 (arguing that there is no justification to dismiss lawsuits with international elements on grounds of court congestion when there are other types of lawsuits that overload the judicial system and are not being rejected although the public interest in their adjudication is not necessarily larger than the former).

61. Karayanni, *supra* note 3, 341–43 (justifying forum non convenience as a procedural mechanism to avoid the injustices of modern-day court congestion given the arbitrary nature of the territorial criterion as a test for assuming personal jurisdiction in most countries).

Furthermore, there is the issue of applying foreign material law. *Gulf Oil's* explanation that applying a foreign law burdens the court is dubious in the modern age of international litigation.<sup>62</sup> Courts may be required to apply a foreign law regardless of the implicated forum and parties may agree and bind the court to applying foreign law. In fact, the applicability of a foreign law to a dispute actually unburdens the court because the parties themselves, rather than the judge, spend time and resources to find and present the law in such cases.<sup>63</sup>

The third type of criticism addresses the international implications of how courts apply public factors. In particular, public factors enable the courts to aggressively expel forum non conveniens cases in a manner that creates an uneven distribution of commercial transnational norms. Some scholars claim the U.S. courts' ejection of cases against U.S. defendants based on public factors enables U.S. corporations to conduct their business in foreign countries with a standard of care that would have been unacceptable in their country of origin. This turns developing countries into a backyard of either low quality or experimental products.<sup>64</sup>

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62. *Id.* at 351–52.

63. *Id.*

64. Following the 1984 gas plant disaster in Bhopal, India, and the death of more than 2,000 victims, the plant owner Union Carbide has been sued in the United States. The court stressed the international principle of comity among states in declaring that the Indian forum is more appropriate than the U.S. forum to adjudicate the claim, in spite of the fact that the claim was filed on behalf of the victims by the Indian government. *See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd* 809 F.2d 195 (2d Cir. 1987). The court held that there is an interest in having the claim adjudicated according to "Indian law and Indian values." *Id.* at 867. The claim was eventually settled in India for approximately \$470 million USD. Robertson shows that dispersing the settlement amount among the families of 2,660 dead victims, and about 40,000 severely wounded victims, would mean an average compensation of \$11,000 USD each, without compensating more than 200,000 lightly wounded victims. *See* David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 372–73 (1994). *See also* Reed, *supra* note 39, at 60–62 (opining that the Union Carbide case promotes abusive behavior by U.S. corporations operating in developing countries). For a different opinion, see Stephen L. Cummings, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 GA. J. INT'L & COMP. L. 109 (1986).

*C. The View from England*

English law has abandoned its historically restrictive approach towards *forum non conveniens* assertions by foreign plaintiffs. According to this historical approach, only an abusive, oppressive and vexatious choice of the English forum by the plaintiff justifies an ejection based on a *forum non conveniens* defense.<sup>65</sup> This strict approach was replaced by a new method of examination, when a court determines which is the "natural" forum to adjudicate the case according the "most factors" test.<sup>66</sup>

In *Spiliada*, the House of Lords held a defendant's *forum non conveniens* defense prevails if another forum that is "most appropriate" for the dispute is shown.<sup>67</sup> Furthermore, proving that the plaintiff's choice was an abuse of process would be insufficient to uphold *forum non conveniens*. The burden of proof lies with the defendant and the court will apply the most factors test, but, if the factors end up in equilibrium, the defendant's motion is denied.<sup>68</sup>

The orientation of this approach remains Anglo-centric. This is because even when an English court finds there is another forum more appropriate to adjudicate a case, it has the authority to consider whether in the interest of justice the case should be tried in an English court. For example, a court might not eject a

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65. See e.g., *Maharanee Seethadevi Gaekwar of Baroda v Wildenstein*, [1972] 2 Q.B. 283, 288 (Eng.) (holding that service of the suit on the French defendant during a brief visit to England, where parties both resided in France, the applicable law was French law and the subject matter was a French painting sold in France, all were insufficient to justify ejecting the claim); and see generally Peter Gad Naschitz, *Forum Non Conveniens in Israel, England, and the United States: A Comparative Note*, 19 J. MAR. L. & COM. 551 (1988) (discussing the early English approach to *forum non conveniens* and the adoption of the Anglo-American approach by Israeli courts).

66. *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] 1 A.C. 460, 465 (H.L.) (appeal taken from Eng.).

67. *Id.* at 477.

68. *Id.* at 477-78 (holding that it is up for the defendant to prove that the alternative forum is more appropriate for adjudicating the dispute by showing that the "connecting factors" point at the alternative forum. When the defendant meets that burden, it is up for the plaintiff to convince the court otherwise or to show evidence that the justice might not be obtained in the foreign jurisdiction).

case if the foreign forum provides the plaintiff with a significantly different relief than the one available in the English forum.<sup>69</sup>

Generally, English courts, as opposed to U.S. courts, embrace foreign plaintiffs. The foreigner-friendly approach that persists today may be rooted in the historical colonial background of the British Empire.<sup>70</sup> English courts view attracting foreign litigation as an advantageous phenomenon. Essentially, attracting foreign litigation is an unwritten public factor driving the English courts to maintain their relatively dismissive approach towards forum non conveniens defense claims.<sup>71</sup> Evidently, English courts place a high level of importance on maintaining their reputation as an attractive professional venue for international commercial dispute resolution. However, these disputes are by no means similar to the mass-tort cases attracted to the U.S. forum, but rather they are disputes that attract high-wealth individuals and multinational corporations which may eventually contribute to the British economy.<sup>72</sup>

Naturally, English jurisdiction is not immune from the mass-tort litigation that concerns the American system. This explains why the English rules of procedure include a particular instruction requiring courts to consider court congestion. However, the House of Lords expressly refrained from using this rule to justify the use of public factors.<sup>73</sup>

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69. Reed, *supra* note 39, at 86–87; Bies, *supra* note 21, at 495 (noting that, in the past, upholding a *forum non conveniens* by the English court required the showing that all parties were foreign, that there exists an alternative court which has jurisdiction over the dispute and that the alternative forum resides in a “civilized” country).

70. Karayanni, *supra* note 3, 365–66 (noting that the English approach can be explained by the concern that a strict territorial approach would have enabled potential defendants to easily avoid litigation by leaving the territory of the British islands).

71. *Id.* at 344–45.

72. Reed, *supra* note 39, at 79 (“The transnational litigation attracted to England tends to be of high quality, and is valuable from an economic standpoint. In Scotland, their courts have expressly disapproved of court congestion as a basis for staying proceedings. In any event, there is still a pervading feeling of judicial self-esteem that foreign corporations rely on the English Commercial Court as the trial venue.”).

73. *Lubbe v. Cape PLC*, [2000] 1 W.L.R. 1545 at 1566 (Eng.). Lord Hope observes that “the principles on which the doctrine of forum non conveniens rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of

The use of the *forum non conveniens* doctrine in England was further limited by the U.K.'s signature to the Brussels Convention. The Brussels Convention restricts the ability of defendants to eject lawsuits filed in the English forum.<sup>74</sup> In the matter of *Group Josi Reinsurance Co. S.A. v. Universal General Ins. Co.*, the European Court of Justice held that when the defendant in a lawsuit filed in a signatory state is domiciled in that state *forum non conveniens* is inapplicable and the dispute should be adjudicated by that forum.<sup>75</sup> This conclusion is in accordance with Article 2 of the Brussels Convention, which states that "persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."

Reacting to a request from the English court in the matter of *Owusu v. Jackson*,<sup>76</sup> the European Court further clarified the application of the *forum non conveniens* doctrine within the Brussels Convention's framework. In *Owusu*, the Court held rejecting

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justice in the case which is before the court." *Id.* at 1566. Contrast this with Rule 1.1(2)(e) of the Civil Procedure Rules 1997 which states that in deciding a procedural issue pertaining to a dispute the court should consider among other things "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases." Civil Procedure Rules, 1998, 3132, §1.1(2)(e)(Eng.). The *Lubbe* case concerned an action by more than 3000 South African employees against the English parent company of their employer for damages caused by exposure to Asbestos. The House of Lords first held that the appropriate forum was the South African forum but then noted from the perspective of justice that the South African forum abolished financial aid to plaintiffs in this type of litigation and that the cost and complexity of the action might stifle its filing in the alternative forum and bar the plaintiffs from exercising their material right. Thus, the *forum non conveniens* defense was eventually rejected. Lord Hoffman agreed in spite of the fact that in an earlier case, *Connelly v. RTZ Corporation Plc.*, [1998] A.C. 854 (H.L.) 876 (appeal taken from Eng.), he had warned against a flood of similar litigation. See also Edwin Peel, *Forum Non Conveniens Revisited*, 117 L.Q. REV. 187, 191-92 (2001) (Eng.); Karayanni, *supra* note 3, 330, 369-76 (arguing the private factors rhetoric of the English courts masks public considerations).

74. See Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J (L 299) 32 (EC); see also Fabrizio M. Buonaiuti, *Lis Alibi Pendens and Related Actions in Civil and Commercial Matters within the European Judicial Area*, 11 Y.B. PRIVATE INT'L L. 511, 535 (2009) ("A discretionary evaluation . . . which would be familiar to common law jurists as intrinsic to the doctrine of *forum non conveniens* is totally unknown within the system of the Convention.").

75. Case C-412/98, *Grp. Josi Reinsurance Co. S.A. v. Universal General Ins. Co.*, 2000 E.C.R. I-5925.

76. Case C-302/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383.

the forum non conveniens doctrine is justified and suitable in light of the Convention's aim to create procedural certainty and because defendants are best prepared to defend themselves against lawsuits in the state of their domicile.<sup>77</sup> Furthermore, defendants might be unprepared should they not foresee with a reasonable likelihood the jurisdiction within which litigation against them will be initiated.<sup>78</sup>

The traditional English approach has been described as imperialistic and paternalistic towards other judicial systems.<sup>79</sup> However, the *Lubbe v. Cape PLC* decision reflects a more complex attitude: On the one hand, the willingness of an English court to entertain a lawsuit filed by a large plaintiff class is not devoid of paternalism towards the alternative forum, in this case the South African courts. On the other hand, the House of Lords' application of developed English law, including its more demanding standards, to the activities of English corporations in countries with less developed legal standards where defendants' standards are less cumbersome is noteworthy. This may reflect a deeper understanding by the English court of its role as a transnational actor, compared to U.S. courts' evasion from undertaking such a role.

#### *D. Interim Observations*

To summarize, both the U.S. and traditional English law extend broad discretion to their respective courts in applying the forum non conveniens doctrine. However, the legal systems diverge in applying judicial discretion. The English court system does not resort to using public factors and seized jurisdiction

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77. *Id.* ¶ 40 (“the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued.”).

78. *Id.* ¶ 42 (holding that legal protection of persons established in the Community would be undermined if “a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued.”).

79. See *The Atlantic Star*, [1974] A.C. 436, 453, [1973] 2 All E.R. 175, 181 (HL) (Eng.) (Lord Reid's reference to proponents of the traditional English forum non conveniens approach as relevant to an era when “inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.”).



over a dispute whenever the defendant failed to show a significantly more suitable forum existed or even when the balancing of the private factors of the parties was in equilibrium. In contrast, in equilibrium, the U.S. courts resort to public factors, and are inclined to dismiss the case particularly when the plaintiff is foreign.

### III. ISRAELI FORUM NON CONVENIENS AND PUBLIC FACTORS

Because Israeli civil procedure is founded on English civil procedure, the Israeli Supreme Court's decision to turn to the U.S. public factor analysis is noteworthy. This section examines the developments leading to its adoption and implementation of public factors analysis in the forum non conveniens doctrine in Israeli case law. The following section describes the slightly reticent discussion of public factors and the final decision not to adopt the factors. Section B then expands on the unusual ascent of public factors from the lower courts to the front stage.

#### A. *The Initial Discussion—obiter dicta*

The Israeli Supreme Court first entertained the concept of public factors in forum non conveniens cases in *Abu-Atiya v. Issa Yussef Arabtisi*.<sup>80</sup> *Abu-Atiya* concerned a lawsuit filed by a Palestinian residing in the West Bank, in the Occupied Territories, who was injured in a work-related accident. The plaintiff sued his employers, also from the Occupied Territories, and their foreign insurer, both argued that the case should be tried before the civil court system in the Occupied Territories.<sup>81</sup>

On appeal to the Israeli Supreme Court, Justice Tova Strassberg-Cohen proposed adopting what she defined as new developments in "Anglo-American" law with respect to forum non conveniens. Namely, she advocated applying public factors in deciding the suitability of the Israeli forum.<sup>82</sup> Her two fellow justices on the panel were not enthusiastic.<sup>83</sup> Justice Aharon Barak<sup>84</sup> disagreed and Justice Moshe Beisky concurred with Barak. Justice

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80. CA 300/84 Eiman Ali Abu Atiya v. Issa Yussef Arabtisi, 29(1) PD 365 [1985] (Isr.).

81. *Id.*

82. *Id.* at 376–78.

83. The Israeli Supreme Court usually sits in panels of three, although in some cases, such as requests for leave to appeal, decisions are rendered by a single Supreme Court justice.

84. Barak later became Chief Justice.

Barak remarked that U.S. courts generally weigh public factors only when the private factors are in equilibrium and added the following: "I am in doubt, whether giving such weight to public factors is justified, but I prefer to leave the matter for further discussion in the future since in this case the private factors of the parties are not in equilibrium."<sup>85</sup> The discussion among the justices was *obiter dictum*.

In the matter of *Abu Jakhle v. The East Jerusalem Electricity Company Ltd.*, the Israeli Supreme Court addressed the public factor issue once again.<sup>86</sup> The appellant, a Palestinian resident of the Occupied Territories, sued the Israeli Electricity Company which operated in Israel and in the Occupied Territories. The plaintiff claimed to have suffered injuries in the Occupied Territories from a torn and exposed electricity cable.<sup>87</sup> The defendant asserted the claim should be ejected since the courts in the Occupied Territories were a more appropriate forum. The Magistrate Court rejected the forum non conveniens defense but the District Court overturned the decision on appeal and dismissed the case, a decision which subsequently led to the plaintiff's appeal to the Supreme Court.<sup>88</sup>

Writing for the court, Chief Justice Meir Shamgar surveyed the recent *Gulf Oil* decision and observed the dichotomy between the private and public factors.<sup>89</sup> He went on to examine the U.S. *Piper Aircraft* case and the decline of a favorable approach towards the plaintiff's choice of forum when the plaintiff is foreign to the U.S. court.<sup>90</sup> Finally, Chief Justice Shamgar interpreted the *Pain* ruling as stating public factors should be weighed only when an examining court cannot render a decision based on the private factors of the parties.<sup>91</sup>

Furthermore, Chief Justice Shamgar turned to English case law. He noted the *Spiliada* decision requires a defendant to show not only that a plaintiff's forum choice was an abuse of process,

85. Abu Atiya, *supra* note 80, at 386. Observe that U.S. case law later adopted a clearer position on weighing public and private factors together. See *supra* note 45.

86. Civil Appeal 2705/91 Abu Jakhle v. The East Jerusalem Electricity Company Ltd, 48(1) PD 554 [1993] (Isr.).

87. *Id.*

88. *Id.* at 556.

89. *Id.* at 560.

90. *Id.* at 562.

91. *Id.* at 563.

but also that there exists another forum clearly or distinctly more suitable for the case.<sup>92</sup> However, the alternative forum's appropriateness is considered according to the traditional most factors test, which focuses on the private interests of the parties and does not include public factors.<sup>93</sup>

Chief Justice Shamgar drew general conclusions about the Anglo-American use of the forum non conveniens doctrine. His opinion contends the doctrine is not applied as a routine matter but is instead reserved for cases where "there exists a significant inferiority of the local forum compared to the alternative forum."<sup>94</sup> Chief Justice Shamgar's grouping together of the U.S. and the English systems in this way is evidently wrong, as the U.S. courts use frequently the doctrine, especially when the plaintiff is foreign.<sup>95</sup>

The Israeli Supreme Court's holding in *Abu Jakhle* rests on the expectations of the parties.<sup>96</sup> Chief Justice Shamgar ruled most factors, including the private expectations of the parties, point to the alternative forum, namely the Palestinian court. Hence, Chief Justice Shamgar explicitly left the public factor issue as *obiter dictum*.<sup>97</sup> Chief Justice Shamgar did note there is no reason not to adopt public factors when the most factors test is in equilibrium. Specifically, Chief Justice Shamgar stressed in such cases the issue of the burden on the court system regarding time and costs should have weight.<sup>98</sup>

Yet another *obiter dictum* is found in the matter of *Zrikat*.<sup>99</sup> Here, a Palestinian taxi driver from the West Bank who was not an Israeli citizen who shuttled passengers between the West

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92. *Id.* at 568.

93. *Id.* The single exception of the law that will apply to the case which is a factor considered by English courts and deemed to be a public factor according to *Gulf Oil. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

94. *Id.* at 573.

95. *Lii, supra* note 49, at 526 (indicating that forum non conveniens assertions in the United States succeed in more than 50 percent of the times they are raised).

96. *Abu Jakhle, supra* note 86, at 577 (the reasonable expectations of a service company, and especially a company providing electricity, are to litigate in the forum in which the service is provided and to set its standards and level of care to the laws of that forum).

97. *Id.*

98. *Id.*

99. Leave of Civil Appeal 4716/93 *The Arab Company for Insurance Nablus v. Abed Zrikat*, 48(3) PD 265 [1994] (Isr.).

Bank and Jerusalem sued his West Bank-based insurance company for damages pursuant to a car accident.<sup>100</sup> The defendant insurer had no branches in Israel. In her opinion, Justice Tova Strassberg-Cohen mentioned many Palestinians tend to file their claims in Israeli courts hoping to obtain higher damage awards, and that the appropriate forum for such claims should be a West Bank court.<sup>101</sup> This remark reveals the Supreme Court's motives in considering the adoption of public factors. In this case, the Supreme Court incorrectly stated both U.S. and English courts apply public factors after considering the most factors test, among other inaccuracies.<sup>102</sup> In this case, again, the court notes there is no reason not to adopt public factors but eventually finds the most factors test distinctly points to the forum of the West Bank.<sup>103</sup> This means the discussion regarding the public factors remains as *obiter dictum* once again.<sup>104</sup>

*Zrikat* is the last case where the Supreme Court discussed the public factors doctrine with respect to Palestinian plaintiffs. Later, in a matter concerning a commercial dispute between Israeli and Brazilian firms, the Supreme Court clarified the previous line of cases leaves undecided the issue of whether "systemic factors" should be an independent consideration within the forum non conveniens doctrine in Israel.<sup>105</sup>

In sum, this paper has discussed public factors, which are looked upon favorably in two Israeli cases and unfavorably in another, yet they were never adopted in Israel at this stage. The *obiter dicta* discussions occurred almost entirely within the

100. *Id.*

101. *Id.* at 268.

102. *Id.*

103. *Id.* at 274.

104. *Id.* at 274 (Justice Strassberg-Cohen: "If I had thought that the private factors were in equilibrium—and I do not think they are—I would have considered the desired policy considerations. In my opinion, the conclusion from this policy is that disputes among residents of the occupied areas concerning events that occurred in that area should be transferred to the court system of the area for the public factors noted beforehand. We should respect the policy of the state of Israel and its intention to maintain the court system in the area to serve its residents. There is no reason to burden the Israeli court system with claims that should not naturally be resolved within its territory. Weight should be given to the benefit of having local disputes resolved in their natural environment.").

105. Leave of Civil Appeal 3144/03 *Elbit Hadmaya Refuit v. Harefuah Serviços de Saude S/C Ltda.* 57(5) PD 414, 421 [2003] (Isr.).

framework of lawsuits filed by Palestinians in Israel.<sup>106</sup> While the Supreme Court in *Zrikat* observed Palestinian plaintiffs had an interest in filing suit in Israeli courts, it is not entirely clear from that decision why the Supreme Court thought it undesirable to adjudicate such disputes in the Israeli forum. On one hand, applying the Israeli courts' comparatively higher standards of care to cases such as *Zrikat*, in which both parties were domiciled in the West Bank, would have contributed to increasing the standard of care in the Occupied Territories. On the other hand, this application would amount to a paternalistic judicial approach, a position which the Israeli courts generally avoid.

### *B. The Grassroots Ascent of Public Factors in Israel*

More than ten years after the Supreme Court abandoned the inconclusive discussion of public factors, the issue re-emerged in an unusual grassroots process, making its way bottom-up from lower courts back to the Supreme Court. In 2006, two cases adjudicated by the District Court in Tel Aviv utilized public factors in spite of the fact that these considerations were never received formally into Israeli law by the Supreme Court.

The first case, *Conference of Jewish Material Claims Against Germany, Inc. v. Amos Perry*, considered a lawsuit filed by heirs of Holocaust survivors against the "Claims Committee," a fund primarily based in Germany which determined restitution of Jewish property looted during the Nazi era.<sup>107</sup> Here, the plaintiffs asserted the defendant was negligent in its treatment of their restitution claims and demanded compensation.<sup>108</sup> The defendant contested the Israeli court's jurisdiction on the basis of

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106. Civil Appeal 74/82 Rad v Hai 40(2) PD 141 [1986] (Isr.) is an exception. In this relatively early case the court rejected a *forum non conveniens* assertion in a dispute between Jewish U.S. residents after the lower courts affirmed service of process without the state. Vice Chief Justice Miriam Ben Porat surveyed developments in U.S., Scottish, and English law on the matter, including the public factors adopted in Gulf Oil but she focused primarily on the English law and eventually clarified that she does not propose adopting any of the foreign legal developments and that they are irrelevant to the specific decision at hand. *Id.* at 149–50.

107. District Court (Tel Aviv) 5730/06 Conference of Jewish Material Claims Against Germany, Inc. v. Amos Perry (May 30, 2006).

108. *Id.* at 3.

forum non conveniens, and pointed to the organization's location, in Germany to justify adjudicating the case in a German forum.<sup>109</sup>

In *Perry*, the court appears to have been influenced by the parties' balance of powers. The plaintiffs were depicted as individuals with limited resources, whereas the defendant was an international organization perceived to be stronger financially. The Court held:

[A]bove all, the contention that the location of the fund in Germany is a parameter that should lead to a conclusion that the German forum is the natural forum means that any potential lawsuit against the defendant dealing with matters of property handled by the Frankfurt office should be adjudicated in Germany, which is an illogical outcome . . . . One cannot require Holocaust survivors and their offspring to adjudicate the entire lawsuit in Germany only because the fund, in some uncertain part of its activities, is located there.<sup>110</sup>

Furthermore, the court stated it was implausible that the German forum would be the best forum for such claims from a "judicial policy perspective."<sup>111</sup> The court noted it would be costly for Israeli parties that require the services of the Claims Committee in Germany to wage litigation in Germany given the costs of litigating a lawsuit abroad. The court concluded "intuitively" that the defendant, as an organization representing the interests of Holocaust survivors and their heirs, and with regards to its private expectations as to the forum in which it might be required to litigate, should have close contact with Israel.<sup>112</sup> According to the *Gulf Oil* dichotomy, these are all private factors.<sup>113</sup>

109. *Id.* at 3–4 (also arguing that the case should be ejected because the assets were located in Germany, the claims were adjudicated according to German law and the witnesses were German).

110. *Id.* at 9.

111. *Id.* at 11.

112. *Id.* at 14. This is a particularly problematic statement by the court, which indicates that the court may have substituted the defendant's reasonable expectations with its own. It is hardly "intuitive" for the defendant to expect to litigate in Israel. The government of Israel was not the leading entity in promoting the restitution of private Jewish property. This was a process driven mostly by international Jewish organization, with U.S. support. Furthermore, there are as many Jewish living outside of Israel as there are in Israel and the defendant in this case may be sued by any one of them in their home country.

113. See *supra* text accompanying footnote 43.

The Court additionally justified its decision with a public factor. It declared that the Israeli forum has an institutional interest in adjudicating the dispute because Israeli courts have an interest in adjudicating claims that raise issues unique to the Jewish people.<sup>114</sup> The Court ruled foreign forums—even if they adjudicate the matter properly and provide the appropriate remedy—“will lack an understanding of the deeper broad significance and the particular importance” of the matter.<sup>115</sup> This was the first, but not last, step in the re-emergence and ascent of public factors.

In the matter of *MasterCard*, an Israeli company selling pharmaceutical products via the internet in the United States sued the American company MasterCard in the Israeli District Court of Tel Aviv.<sup>116</sup> Here, the plaintiff alleged MasterCard ordered its Israeli agent not to collect payments for the plaintiff, while MasterCard asserted forum non conveniens. The court found the private factors for the Israeli and U.S. forums were balanced.<sup>117</sup> The court therefore resorted to examining a set of public factors similar to those used in *Gulf Oil*, and disregarded the fact that these factors had never been adopted into Israeli case law.<sup>118</sup> Eventually, the court accepted the forum non conveniens defense, concluding the U.S. forum had a greater public interest in adjudicating the legal issues arising from the case.<sup>119</sup>

The two latter cases lay at the heart of the Israeli Supreme Court's decision in *Arbel v. TUI AG*, which is a turning point in the Supreme Court's treatment of the forum non conveniens defense.<sup>120</sup> In this case, the plaintiff was an Israeli tourist who was injured during a vacation at a Turkish resort club.<sup>121</sup> The plaintiff sued several defendants including Israeli and German tourism and booking companies as well as the Turkish resort itself. The defendants asserted a forum non conveniens defense and

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114. District Court (Tel Aviv) 5730/06 Conference of Jewish Material Claims Against Germany, Inc. v. Amos Perry, at 14 (May 30, 2006).

115. *Id.*

116. File No. 25370/05 DC (TA), MasterCard International Inc. v. R.X. Payments (Israel) Ltd. (June 15, 2006), Nevo Legal Database (by subscription) (Isr.).

117. *Id.* ¶¶ 12, 15.

118. *Id.* ¶ 11.

119. *Id.* ¶¶ 17–20.

120. Leave of Civil Appeal 2737/08 Uri Arbel v. TUI AG (Jan. 29, 2009).

121. *Id.* ¶ 1.

claimed the lawsuit should have been filed in Turkey. The Magistrates' Court rejected this forum non conveniens claim, but this decision was overruled on appeal to the District Court.<sup>122</sup> The District Court concluded adjudicating the case in Israel raises a difficulty, as it would require a reciprocal recognition of possible claims by foreign tourists visiting Israel in the tourists' country of origin if the circumstances happened to be the reverse of *Arbel's*.<sup>123</sup>

On further appeal, the Supreme Court addressed the forum non conveniens defense and held proper analysis required three tests: (1) the most factors test, (2) the parties' reasonable expectations regarding the forum that would adjudicate the dispute, and (3) public factors, of which the most compelling should be the forum with the most interest in adjudicating the case.<sup>124</sup> Clearly, the Court's observation was inaccurate, as earlier noted that the Israeli Supreme Court has not adopted public factors, certainly not as an independent test.

In the *Arbel* case, the most factors test did not point convincingly to Turkey as the best suited forum.<sup>125</sup> Turning to the expectations of the parties, the Court held that increases in international trade so increases the reasonable expectation of litigating abroad, and stressed that entities dealing with international trade take this into their financial viability considerations when operating internationally.<sup>126</sup>

The Court relied on an analogy to a precedent, *Hageves*.<sup>127</sup> *Hageves* dealt with a lawsuit filed by an Israeli company against the U.S. provider of a machine manufactured in the United States and then supplied to and set up in Israel, where it subsequently malfunctioned. Are the expectations of tourism service providers analogous to those of international manufacturers and traders? It is doubtful whether the Court's analogy from trade to tourism services holds water. Tourism services are generally provided in the provider's own country whereas international trade anticipates crossing geographical borders. The assumption that a tourism service provider, including the international booking agency, reasonably expects to be sued in the tourist's

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122. *Id.* ¶ 3.

123. *Id.*

124. *Id.* ¶ 17.

125. *Id.* ¶ 18.

126. *Id.* ¶ 19.

127. *See Hageves, supra* note 25, at 116.



forum deserved a deeper analysis and examination of the facts, which were lacking in *Hageves*.<sup>128</sup>

Furthermore, the Court surprisingly relied on the *Abu-Jakhle* decision and on the two District Court decisions, *Perry* and *MasterCard*, by adding public factors to his analysis. In applying public factors, the Court noted Turkey is a popular tourist destination for Israeli citizens and therefore reasoned the Israeli forum had an interest in relieving the burden on Israeli tourists injured in Turkey and wishing to file their claim in Israel.<sup>129</sup> The court further justified the outcome by referencing the waning of the forum non conveniens doctrine analysis in light of the relative ease in litigating abroad due to modern transportation and telecommunications.<sup>130</sup>

As noted earlier, *Abu-Jakhle* did not adopt public factors. Furthermore, the *Abu-Jakhle* decision stressed public factors should be used only when the private factors test is balanced, which means the Court had little reason to use the test after determining the private expectations of the parties are conclusive. In that sense, the *Arbel* and the District Court ruling in *Perry* have much in common.

Only seven months after the *Arbel* decision, the Supreme Court addressed the issue again. In the matter of *Hecke v Pimcapco*,<sup>131</sup> a group of foreign companies sued their investment advisor. The defendant was a German citizen residing in Germany but he was served with process in Israel when he arrived in the country to testify in a criminal trial.

Writing for the court, Chief Justice Grunis observed that in deciding forum non conveniens issues, less weight is given to private convenience factors whereas more emphasis is put on factors such as the reasonable expectations of the parties and the forum's interest in adjudicating the dispute.<sup>132</sup> In *Hecke*, both the most factors test and the expectations of the parties test

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128. The ease with which the Israeli court assumes that a foreign plaintiff should expect to litigate in Israel is deplorable. Compare it with the assumption in the Brussels Convention, and the European Court in *Group Josi*, that a defendant is most likely to expect to litigate in his home country. *Grp. Josi*, *supra* note 75.

129. *Arbel*, *supra* note 120, ¶ 20.

130. *Id.* ¶ 21.

131. *See Hecke*, *supra* note 23.

132. *Id.* ¶ 11.

pointed to the German forum rather than the Israeli forum.<sup>133</sup> Nevertheless, Chief Justice Grunis addressed what he termed “systemic factors” and stated given the limited resources of the judicial system, adjudicating disputes with a weak connection to Israel might come at the expense of parties and disputes that have a stronger connection to the forum.<sup>134</sup> Unlike the Court in the *Arbel* decision, Chief Justice Grunis confronted directly the ambiguity regarding adopting public factors in *Hecke*. He weighed into the discussion by asking whether the “systemic factors” should be an “independent factor for the rejection or affirmation of a forum non conveniens assertion” and clarified that in his view the systemic factors “should definitely be an additional factor that the court must examine within the criteria for determining the appropriate forum.”<sup>135</sup>

The systemic factors were thus bundled with other factors reviewed by the court in a forum non conveniens dispute. In so holding, Chief Justice Grunis departed from the early U.S. approach in which the public factors are generally weighed only if the private factors yield an inconclusive outcome.<sup>136</sup> Furthermore, in *Hecke* and *Arbel*, there was no need for the court to resort to the systemic or public factors tests as the most factors test and the expectations of the parties were sufficiently conclusive to rule on forum non conveniens.

In the *Hecke* case, the weak link between the parties and the state of Israel explains the court’s outcome regardless of the public factors, given that the plaintiffs were foreign companies and the defendant was German.<sup>137</sup> However, Chief Justice Grunis added:

regarding the “systemic” factor, it is evident that the interest of the Israeli judicial system in adjudicating a claim of the sort filed by the plaintiffs is relatively small . . . also considering the fact that the plaintiffs are not companies incorporated in Israel and therefore there is no essential justification to make it easier for them to litigate in Israel.<sup>138</sup>

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133. *Id.*

134. *Id.*

135. *Id.*

136. The early U.S. approach was preferred by Chief Justice Shamgar in *Abu Jakhle*. See text accompanying *supra* note 90.

137. See *Hecke*, *supra* note 23, ¶ 2.

138. *Id.* ¶ 11 (noting that CJ Grunis relied on the *Elbit Hadmaya* decision, *supra* note 105, in which the court did not broadly adopt systemic factors).

The latter consideration echoes the anti-foreign approach of the U.S. court in *Piper Aircraft*.

After the *Hecke* ruling, the issue was further addressed in *Katziv v. ZAO Raiffeisenbank*.<sup>139</sup> In *Katziv*, the bias against the foreign plaintiff was much more evident. The plaintiff, a Russian bank, alleged the defendants, a married couple who emigrated from Russia to Israel, stole its funds. At the lawsuit's filing, both the husband and wife defendants were under detention in Russia. The plaintiff bank preferred to sue in Israel, possibly because according to the bank, this was the current location of the embezzled funds. The defendants moved to dismiss the lawsuit for forum non conveniens.<sup>140</sup>

As in *Hecke*, Chief Justice Grunis first addressed the parties' private factors, such as the private expectations of the parties, and then the interest of the Israeli legal system in adjudicating the case.<sup>141</sup> The Court held the latter consideration pulled the case towards the Russian forum, given the limited resources of the Israeli legal system.<sup>142</sup>

The use of the public factors such as court congestion in *Katziv* corresponded to the application of these factors in U.S. case law. In another similarity, *Katziv* and *Hecke* featured foreign plaintiffs whose choice of forum is given less weight in comparison with the choice of a local plaintiff in the United States.

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139. *Katziv*, *supra* note 24, ¶ 4.

140. *Id.* ¶ 2.

141. *Id.* ¶ 7.

142. *Id.* CJ Grunis relied on the decisions in Abu Atiya, Abu Jakhle and Zrikat, all which did not explicitly adopt public factors and then reflected an ongoing debate as to whether they should be adopted. Notably, CJ Grunis weighed public and private factors together and not sequentially as CJ Shamgar proposed in Abu-Jakhle.

The *Katziv* ruling was applied by lower courts instantaneously.<sup>143</sup> Of special interest are the decisions in the cases of *Spiegel*<sup>144</sup> and *Shamir*,<sup>145</sup> which demonstrate the unique weight given to moral considerations within the public factors criteria.

In conclusion, Israeli case law has adopted public factors into the judicial doctrine of forum non conveniens without detailed analysis of many critical components, including the public factors' development in the United States and the reasons for their implementation; the nature of cases in which public factors are implemented in their country of origin; and the particular nature of each public factor. Nor has the Israeli Supreme Court outlined the content of the public factors for the sake of clarity and certainty of future plaintiffs. Consequently, Israeli courts

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143. Magistrate Court (Tel Aviv) 13773-09-09 Pickel v. Atlas Management Company LTD (May 13, 2010); District Court (Jerusalem) 5081/10 Molecular v. Lavi Representatives for Industry and Medicine Ltd (Mar. 22, 2010) (adding the "systemic" factor to private factors drawing the claim to Israel in spite of the fact that the court would have to apply U.S. law in resolving the dispute. The court maintained that applying U.S. law would not cause hardship); District Court (Jerusalem) 3251/09 Burgers Bar Five Towns LLC v. Burgers Bar Hamoshava LTD (May 30, 2010) (systemic factors added to private factors in holding that the U.S. is a more appropriate forum for a claim by an Israeli food chain against an Israeli citizen and an American fast food company); District Court (Tel Aviv) Michael Ellen Harris v. Fisher Derma Wipes Ltd (June 1, 2010) (rejecting the English defendants forum non conveniens assertion against an action filed in Israel by an Israeli plaintiff for contract performance failure).

144. District Court (Jerusalem) 3543/09 Spiegel Verlag Rudolf Augstein GmbH & Co. KG v. Gil Kopatch (Jan. 16, 2011). The plaintiff in the Spiegel case was an Israeli satirical actor who filed a defamation lawsuit against a German newspaper and website for publishing his photo-shopped photograph with Nazi motifs. The service of process was made to the German newspaper's correspondent in Israel. The newspaper argued forum non conveniens. The court noted that the private factor were near equilibrium because the report was published in Germany, in a German newspaper and website, in the German language and was directed at German readers, whereas its only connection to Israel was the identity of the plaintiff. The court then examined the public factors and held that the state of Israel has an interest in adjudicating the case in view of the "special importance and sensitivity" of the term "Nazi" and its "unique negative magnitude" in the Israeli public sphere. The court rejected the forum non conveniens defense.

145. District Court (Tel Aviv) 1145/08 Sicurta Di Adriatica Riunione Ras v. Ilana Shamir (July 12, 2010) (rejecting the assertion that the Swiss forum is more appropriate than the Israeli forum to adjudicate the plaintiff's claim against the insurance company that provided life insurance to her father prior to his death during the Second World War).

weigh the “interest” of the forum in adjudicating a dispute, but seem to infuse various meanings into this term, including judicial caseload, difficulty of applying foreign law, moral interest of the Israeli court in adjudicating the dispute, and the importance of protecting certain types of party.<sup>146</sup>

The following section analyzes the problems arising from this negligent transplant of public factors into Israeli case law.

#### IV. A CRITICAL PERSPECTIVE ON PUBLIC FACTORS IN ISRAEL

The jumbled re-emergence of public factors in forum non conveniens cases should not be looked upon lightly. This section outlines the problems associated with the public factors eventually adopted by Israeli courts. Section A discusses the implications associated with the vague nature of public factors adopted by the Israeli court. Section B shows, using an empirical survey of case law, that the application of the doctrine undermines international comity by creating a structural bias against foreign litigants, followed by a discussion of the advantages and disadvantages of this bias in section C. Section D questions the use of court congestion as a public factor and section E concludes with a discussion of the incompatibility of public factors with the passive role of courts regarding international choice of venue.

The overall impression is that the court has supplanted the approach where the forum non conveniens doctrine focused on finding the optimal forum regarding the private factors of the parties, to instead a formula that gives more weight to systemic efficiency or moral considerations. In terms of efficiency, this new approach is congruent with the general trend in Israeli civil procedure to give more weight to caseload management.<sup>147</sup> However, this approach may impinge on the material rights of parties because: systemic efficiency factors are given more weight when the parties are foreign and less weight when the parties

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146. For example, individuals versus companies or international organizations.

147. See GOLDSTEIN ET AL., *supra* note 8, at 71–72 (“most of the proposals for change in the general court system to date are focused on surmounting the case load problem and increasing the efficiency of the courts”). In an attempt to reduce case load, the Israeli Court Administration proposed to overhaul the Israeli RCP in 2015, including a mandatory pre-action conference of the parties, limitations on the length of submissions and stricter sanctions for violations of the RCP. See Proposed Rules of Civil Procedure, 2014 (Isr.).

are local;<sup>148</sup> the amorphous content of public factors yields contradictory decisions; and public factors might serve to bring about particular substantial outcomes and not mere procedural outcomes, which starkly contrasts the aim of procedural law to lay down the rules rather than to resolve the substantive dispute.<sup>149</sup>

Comparing the implementation of public factors by Israeli courts to U.S. courts is noteworthy because Israel's courts transplanted the doctrine from the United States. While both courts use the congestion argument in the same manner (i.e., to eject claims) they use the forum's interest differently. In the few Israeli congestion cases, courts used the latter argument to anchor the lawsuits in Israel, whereas U.S. courts tend to find the alternative foreign forums have a stronger interest in the dispute and subsequently eject the lawsuit.<sup>150</sup> Only in very few cases and with very weak language has the Israeli court relied on the interest of the foreign forum to eject a lawsuit.<sup>151</sup>

#### *A. Vagueness, Moral Values and Procedure*

The nature of public factors remains vague, particularly with respect to moral considerations and the interplay between the latter and the systemic congestion factor.

*Perry* may serve as a case study. As a moral consideration, the court held that it is better for an Israeli court rather than a German court to adjudicate claims by Holocaust survivors and their heirs, although the court admits forthrightly there is no reason to claim the German court cannot adjudicate such cases or that they lack the competence to do so.<sup>152</sup> In reality, plaintiffs may be better off in Germany and receive a swifter decision given the congestion problem in the Israeli court system. Furthermore, the

148. As observed in *Perry*, *Spiegel* and *Arbel*, the growing weight of public factors is manifested by taking into account moral or consumer-oriented considerations that give weight to local parties rather than foreign parties.

149. Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 979 (2009) (arguing procedural jurisdictional decisions mask material outcomes).

150. See e.g., the Union Carbide case discussed *supra*, note 56.

151. See e.g., *Burgers Bar Five Towns LLC*, *supra* note 143.

152. In the matter of *Perry*, *supra* note 107, at 14, the court clearly states that "the State of Israel has 'moral' intrinsic interest in adjudicating claims unique to the Jewish people and foreign courts—although they will surely adjudicate the case appropriately and provide the proper redress—will nevertheless be unable to feel the deeper meaning and principled importance of the matter."

*Perry* decision assumed the procedural swiftness of justice would be served best if the case of Holocaust survivors or their heirs against a bureaucratic organization charged with recovery of property were adjudicated by an Israeli court. In reality, there is some evidence to the contrary. Israel has not performed better or any more quickly than other countries in its efforts to encourage restitution of Jewish property the fate of whose owners after the Second World War was unknown.<sup>153</sup> I do not mean to say that the court should be so paternalistic as to send plaintiffs to another forum just because the court believes that the other forum will deal with the case faster than the congested local forum.<sup>154</sup> My critique merely shows that different public factors, may be contradictory and thus there may be merit in more guidance as to the practical implementation of potentially contradictory interests.

What exactly was the moral consideration leading the court to reject the *forum non conveniens* assertion in *Perry*, *Spiegel* and *Shamir*? It might be the belief that an Israeli institution is better attuned to verify justice has been done in the case of Holocaust survivors and their heirs. But there are other moral factors that may point to other forums. For example, the State of Israel itself

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153. For example, on 26 January 1999 the major Swiss banks UBS and Credit Suisse settled a lawsuit filed in New York and agreed to enable a search of dormant pre-World War II bank accounts and the restitution of funds to their rightful owners. The settlement agreement is available online. See EXHIBIT 1 TO PLAN OF ALLOCATION: CLASS ACTION SETTLEMENT AGREEMENT, CLAIMS RESOLUTION TRIBUNAL OF THE HOLOCAUST VICTIM ASSETS LITIG. AGAINST SWISS BANKS AND OTHER SWISS ENTITIES, available at [www.crt-ii.org/court\\_docs/Settleme.pdf](http://www.crt-ii.org/court_docs/Settleme.pdf) (last visited Oct. 4, 2014). While this restitution activity has already ended, Israel has only passed the Law of Holocaust Victims Property (Restitution to Heirs and Funding of Assistance and Memorial Activities) in 2006. Only after the passage of the law a government corporation was established to implement the law and only in 2010 a first list of located assets whose owners are possibly Holocaust victims was made public. The slow treatment of the issue by the Israeli government was criticized by the State Comptroller in his annual report in 2011. Special Report on the Treatment of Holocaust Victims' Assets (Jan. 3, 2011), available at

[www.mevaker.gov.il/serve/showHtml.asp?bookid=591&id=2&frompage=60&contentid=11564&parentcid=11564&filename=2.htm&bctype=2&startpage=0&sw=1280&hw=730](http://www.mevaker.gov.il/serve/showHtml.asp?bookid=591&id=2&frompage=60&contentid=11564&parentcid=11564&filename=2.htm&bctype=2&startpage=0&sw=1280&hw=730).

154. *But see* *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995) (arguing that case congestion in the foreign forum may justify resolving the dispute in the local forum even if its links to the local forum are weak).

may be interested in deepening the understanding of the Holocaust and its consequences in other countries, which is a process that might be served by having Holocaust-related legal proceedings adjudicated by jurisdictions other than the Israeli forum.<sup>155</sup>

From a comparative perspective, applying a moral consideration in Israel might lead to an unequal material outcome. To understand why, imagine the following scenario. The desire of the Israeli forum to protect Holocaust survivors and their heirs might enable a wealthy Israeli Holocaust survivor to litigate in Israel whereas a poor Holocaust survivor residing in another country may be required to litigate in Germany, as his local court may accept the *forum non conveniens* defense in the absence of a similar moral consideration. Thus the latter plaintiff might have to waive the right to sue due to an inability to finance the litigation in Germany. However, it would be unreasonable to require a particular court to consider the public factors of foreign courts when adjudicating a particular private dispute.

The emphasis here is only that the public factors implemented by a court may in fact serve as a useful procedural instrument

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155. The trial of Nazi war criminals by their countries of origin manifests this argument and the trial of John (Ivan) Demjanjuk in Israel is a case in point. Demjanjuk was a Ukrainian-born U.S. citizen who was extradited to Israel from the United States in 1986 and accused of war crimes according to the Israeli Law for the Punishment of Nazis and their Collaborators, 1950. According to the indictment, Demjanjuk served as a concentration camp guard in the Nazi death camp of Treblinka where he was known as “Ivan the Terrible” and was involved in numerous murders of prisoners. Demjanjuk was found guilty and sentenced to death by the Israeli District Court but later acquitted by the Supreme Court that found on the basis of new evidence that there was reasonable doubt regarding the identification of Demjanjuk as the guard from Treblinka. The court noted Demjanjuk was identified as a guard who committed similar crimes in the camp of Sobibor but that this was not part of the indictment. CrimA 347/88 Demjanjuk v. State of Israel 47(4) PD 221 [1993] (Isr.). The Israeli Attorney General later decided not to indict Demjanjuk for crimes committed at Sobibor. The Supreme Court denied a petition by survivors to compel the Attorney General to final such an indictment. For a summary of the decision in English, see [www.mfa.gov.il/mfa/aboutisrael/history/holocaust/pages/decision%20of%20israel%20supreme%20court%20on%20petition%20conce.aspx](http://www.mfa.gov.il/mfa/aboutisrael/history/holocaust/pages/decision%20of%20israel%20supreme%20court%20on%20petition%20conce.aspx). After returning to the United States, Demjanjuk was extradited to Germany and convicted by a court in Munich for the assisted murder of 29 thousand victims. The case attracted significant media attention as possibly “one of the last major Nazi war crimes trials.” Jack Ewing & Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, N.Y. TIMES, May 12, 2011, [www.nytimes.com/2011/05/13/world/europe/13nazi.html](http://www.nytimes.com/2011/05/13/world/europe/13nazi.html).



to promote particular material outcomes and interests under the façade of objective and equitable criteria.

### *B. International Comity*

The issue of comity is central to the application of the forum non conveniens doctrine. Comity means a certain horizontal respect of one court to the court of another jurisdiction in a way that will prevent a one-sided aggressive action by the court. The Israeli courts' decisions on forum non conveniens are characterized by ongoing provinciality and lack of comity.

Empirical data supports the idea that Israeli courts will use public factors to further entrench an embedded bias against foreign parties and in favor of local parties. A hand-collected sample of decisions by District Courts over a period of four years is not large enough to produce robust statistical observations, but indicates there is a correlation between the identity of the party asserting a forum non conveniens defense and the court's decision on the matter.<sup>156</sup>

In collecting the data it was assumed that the majority of forum non conveniens claims will be rejected.<sup>157</sup> Therefore, bias will be proven if the rejection rate for a defense assertion by foreign parties is higher than the average rate of rejection and the rate of rejection for the assertion by a local party is lower than the average rate. In this timeframe we have located 119 cases in which forum non conveniens was raised and decided.<sup>158</sup>

Decisions with multiple parties where there was uncertainty as to the foreign or local nature of the parties themselves were redacted from the dataset,<sup>159</sup> as well as decisions based on forum selection clauses, due to the tendency of the court to enforce such

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156. The dataset included all District Court decisions in Israel reported by the online case law database "Nevo" between 2007 and 2010.

157. In congruence with the general trend decreasing the weight of the forum non conveniens defense.

158. The dataset includes forum non conveniens decision of the District Courts as first instance and as a court of appeals over rulings of the Magistrate Court since on appeal the issue is examined de-novo.

159. The dataset includes only cases in which the Israeli or foreign identity of the parties could be clearly ascertained from the facts of the decision.

clauses regardless of the appropriateness of the forum.<sup>160</sup> The final dataset included 78 decisions and is summarized in the following chart:

The Parties		forum non conveniens	
Defendant	Plaintiff	Rejected	Accepted
Foreign	Local	44	6
Foreign	Foreign	1	1
Local	Local	6	4
Local	Foreign	9	7
Total:		60	18

As expected, foreign parties tended to raise the forum non conveniens defense twice as much as local parties. On average the forum non conveniens defense succeeded in only 23 percent of the cases, which is expected given the case law trend. One finding that confirms the bias assumption is that the average rate of rejection of forum non conveniens is 88 percent when the defense is asserted by a foreign party against a local party. Hence, the success rate of the claim in such settings is only 12 percent, which is half the average success rate of the defense. This is significant since most claims in the dataset are raised by foreign parties. Indeed, when the claim is raised by a local party against a foreign party the success rate is 43.75 percent, almost double the overall average. This data indicates that courts use the forum non conveniens not simply to eject lawsuits with weak links to the Israeli forum but particularly favor the defense when initiated by local parties and reject such claims when raised by foreign parties. The wide discretion embodied in public factors may serve to amplify this bias under the guise of judicial discretion.

Coming back to international comity, it might be unreasonable to contend one state would be offended if a foreign court allowed its citizens to sue in a foreign forum.<sup>161</sup> This reasoning justifies

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160. Civil Appeal 601/82 Bank Leumi Le'Israel Ltd v. Continent Israel Schiffahrts g.m.b.h.-c.i.s, 40(2) PD 673, 678–79 [1986] (Isr.).

161. Reed, *supra* note 39, at 69–70 (“In reality, concerns over respect for the feelings of foreign governments are tactically abused in U.S. courtrooms as a

rejecting the comity argument espoused by the U.S. court in the *Bhopal* case in ejecting and referring back to India a lawsuit by Indian plaintiffs.<sup>162</sup>

The *Perry* and *Spiegel* cases exemplify a different argument: will the court of the forum will be offended if the foreign court does not attribute the correct moral importance to the case filed by the plaintiffs from the local forum, for example by not offering the right amount of compensation? According to *Perry* and *Spiegel*, such concerns may drive the court to justify the retention of the dispute in the local forum which will supposedly attribute the correct moral value to the adjudication of the case. That, of course, is a provincial attitude. Recalling the words of Lord Ellenborough,<sup>163</sup> following such public factors and entrenching the local bias may eventually downgrade the Israeli verdicts in the eyes of foreign courts, particularly when these courts are required to enforce Israeli judgments.<sup>164</sup>

Globalization increases plaintiffs' ability to shop for a preferred forum for procedural and material advantages. The forum non conveniens doctrine is one method courts use to handle the case congestion problem arising from this phenomenon, particularly in countries preferred by forum shoppers.<sup>165</sup> In such cases, it may sound acceptable to assert some preference be given to the local plaintiff, at least in the procedural sense.<sup>166</sup> However, in the age of globalization and transnational litigation, courts

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makeweight behind the real forum non conveniens issues; Machiavellian games are played to obfuscate genuine concerns. Ironically, the Indian government entered an appearance in the Bhopal case as a party in New York arguing that the action proceed and be determined not in India, but before the designated U.S. court.”).

162. *Id.*; *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd* 809 F.2d 195 (2d Cir. 1987).

163. Lord Ellenborough remarked “[C]an the Island of Tobago pass a law to bind the rights of the whole world?” in *Buchanan v. Rucker*, (1808) 103 Eng. Rep. 546 (K.B.) 547; 9 East 192.

164. This concern is somewhat diminished when the foreign plaintiff is an international entity that is exposed to enforcement in the forum state, but this concern is significant when the verdict must be enforced against a party which has no presence in Israel and can only be subject to enforcement procedures in its own country.

165. J.J. FAWCETT, *General Report, in DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW* 1, 20–21 (1995).

166. See J.J. Fawcett, *Trial in England or Abroad: The Underlying Policy Considerations*, 9 OXFORD J. LEGAL STUD. 205, 219–20 (1989).

must also create a legal environment that promotes the unbiased resolution of disputes that implicate international aspects and transnational litigants.<sup>167</sup> Courts must therefore be transnationally conscious towards foreign claimants seeking redress in forums outside their jurisdiction. This approach received some international attention in terms of actions promoting procedural harmonization.<sup>168</sup> In particular, attention has been given to the protection of consumers and plaintiffs with relatively small monetary claims,<sup>169</sup> but also to the obligation of national courts to offer neutral treatment to national and international parties.<sup>170</sup>

Finally, reliance on public factors empowers judges with the authority to influence matters that are normally in the domain of state foreign policy.<sup>171</sup> The result is that court influence may spill over to matters about which the court has no expertise or knowledge. For example, in *Arbel*, the decision may have had an effect on the bilateral relationship between Israel and Turkey. The court did not consider this potential effect, nor is it reasonable to expect the court to consider such matters when adjudicating a civil dispute between private parties. However, in *Arbel* the court specifically structured its ruling on the basis of the tourism-industry relationship between the two states, knowing full well that the decision aimed to influence those relations.

### *C. The Costs and Benefits of Bias*

Another characteristic of the value-related forum non conveniens judgments in Israel is they deal with individual plaintiffs claiming damages from foreign or international entities. There are two potential consequences that follow from the decision to compel foreign defendants to bear the relatively higher costs of

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167. Volkmar Gessner, *The Institutional Framework of Cross-Border Interaction*, in FOREIGN COURTS: CIVIL LITIGATION IN FOREIGN COUNTRIES 15, 19–24 (Volkmar Gessner ed., 1996).

168. Catherine Kessedjian, *Global Unification of Procedural Law*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM 227, 231–32 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

169. *Id.* at 231.

170. *Id.* at 232.

171. Derr, *supra* note 40, at 822 (proposing to consider public factors only when private factors lean toward dismissing the lawsuit on grounds of forum non conveniens thereby using public factors only as means of retaining disputes as opposed to dismissing them).

litigating far away from their local forum. One potential result is that such defendants might contractually predefine the forum in future forum selection clauses, setting the forum at their own convenience. Alternatively, potential defendants might pass litigation costs to their consumers, perhaps specifically to the consumers of the country whose jurisdiction was imposed on them.

It therefore follows that in the case of *Arbel*, the court, which aimed to protect Israeli tourists travelling to Turkey, may not have improved their situation. The cost of such vacations may have risen as a consequence of the decision.<sup>172</sup> Similarly, in *Perry*, the increased cost of litigation imposed on the German-based restitution organization would inevitably be deducted from the organization's budget which—as is common in such organizations—is drawn from the recovered assets. Hence, the decision simply disperses the cost of litigation among Holocaust survivors and their heirs.

If *Arbel* leads Turkish tourist service providers to stop catering to Israeli tourists in order to avoid litigation in Israel, it means the Israeli tourist's vacation choice would be diminished by the same decision that aimed to protect the Israeli tourist on their vacation.<sup>173</sup> Basing the *Arbel* decision on the fact that Turkey is a particularly attractive tourist destination for Israeli tourists is almost bizarre. What will the court do if an Israeli tourist wishes to sue a tourist service provider in a less prominent tourist destination? Should the popularity of the tourist

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172. This is under the assumption that other states compete with Turkey over Israeli tourists and therefore a Turkish tourism service provider earns only the market competitive profit and cannot raise prices to reflect the additional costs of litigating abroad.

173. Compare with *Wright v. Yackley*, 459 F.2d 287, 290–91 (9th Cir. 1972) (rejecting the attempt of a plaintiff in the forum state to seize personal jurisdiction over a physician that prescribed medicine during the stay of the plaintiff in another state on the grounds that such a ruling may discourage physicians from treating out-of-state patients.). See also *Mirrer-Singer*, *supra* note 55, at 215 (observing that “the court opined that the interest in physician access for its citizens when they travel out of state trumps any additional deterrence of malpractice that might be gained by asserting jurisdiction over non-resident physicians” but on the other noting that in the medical tourism context “the plaintiff's home state has a much stronger interest in deterring foreign medical malpractice than in deterring malpractice in other states because, for example, a Kansas court can rely on the Missouri courts to punish negligent doctors, but it cannot always place so much faith in foreign legal systems.”).

destination determine the appropriateness of the forum? A better approach would be to locate the party that is able to disperse or insure against the potential harm in the most efficient way.

Protecting the Israeli tourist in Turkey by allowing him to sue in Israel lies entirely in the domain of the private expectations of the parties, and should not be confused with public factors.

In *Arbel*, the Court ignored the potential reciprocal case of Israeli tourist service providers that may be sued abroad by consumers, a matter at the heart of the District Court's decision.<sup>174</sup> If other countries reciprocate and base their rulings on the *Arbel* decision, Israeli service providers will have to reject business from foreign customers, or struggle to enforce a forum selection clause. Otherwise, they will be unable to handle the costs of litigation abroad.

It would also make sense to distinguish between two types of exporters or service providers. A provider of goods or services to be consumed or used in a foreign country expects to be sued in a foreign country whereas a provider of goods or services to customers solely in his own country should not expect to be sued abroad.<sup>175</sup> Indeed, English courts have accepted a forum non con-

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174. *Arbel*, *supra* note 120, ¶ 3.

175. One possible way to strike a balance between the interests of local consumer-plaintiffs and the interests of foreign service providers is to take into account the conscious effort undertaken by the provider to seek clients in the foreign country, e.g., by advertising the service in the foreign country. This approach was used in some cases in the United States with respect to lawsuits filed by plaintiffs claiming compensation for medical malpractice as part of the medical tourism phenomenon. *See, e.g.*, *Mirrer-Singer*, *supra* note 55, at 213. Applying this rationale to the *Arbel* case, it would have been possible to justify the outcome if the foreign tourism service provider had advertised its services in Israel. This could have counted as an additional element in the private expectations of the parties with regards to the forum in which they would expect to litigate. Another possible solution is placing the liability on middle-agents such as travel agencies. In the case of *Arbel*, the booking agency was also a defendant. Middle agents are convenient targets for litigation as they are often international entities or at least entities with transnational activity, which makes it easier for courts to presume that they privately expect to be sued outside their home forum. But then these agents may be required to supervise the level of care taken by the service providers in various countries which would increase the costs of the intermediary's service. *Id.* at 215–16. This may induce some tourists to purchase the service directly from the foreign provider in the foreign country, thereby decreasing the tourist's ability to sue the service provider in the tourist's home country—an outcome which is exactly converse to the result that the *Arbel* court intended to promote.

veniens defense by foreign defendants against consumer-claimants, which runs contrary to the usual inclination of the English forum not to ignore lawsuits by their local claimants.<sup>176</sup>

#### *D. Court Congestion and Types of Action*

The U.S. court system's use of public factors is meant to moderate the stream of tort actions that seek to exploit the inherent benefits of the U.S. forum. The underlying notion is that complex commercial litigation promotes legal expertise and also contributes to the improvement of commercial law, thereby promoting commerce itself. However, the contribution to commerce or to the improvement and accuracy of legal standards by tort actions filed by foreign plaintiffs and focusing on harm caused in foreign countries is limited but certainly increases court congestion. It follows that the public interest in adjudicating mass tort actions is often contrary to the public and systemic interests in relieving court congestion. Indeed, this public factor is used by the U.S. forum as a means of ejecting cases, as opposed to the English forum that is not as congested, perhaps because it does not offer the advantages available in the United States. Additionally, the English court is perceived to be a forum for sophisticated commercial "quality" parties that create positive systemic spillover effects when they litigate in England.

The decisions in the Israeli cases *Arbel*, *Perry* and *Spiegel* do not consider congestion and caseload factors. These rulings open the floodgates to tort actions and make court congestion possible. These rulings stand in stark contrast to the application of public factors in *Katziv* and *Hecke*, which emphasized congestion as an important systemic factor. In the long run, an overload of low-tech cases, e.g., standard personal injury cases, may reduce a court's commercial expertise and induce even local parties to send complex commercial litigation to private arbitrators or to foreign courts rather than to slow and inexperienced local courts. This would create a market for low-tech lawyering, focused on tort litigation, but decrease the market for expert commercial lawyers.<sup>177</sup> Court efficiency and expertise are an important consideration of sophisticated international commercial parties in

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176. Prior to signing the Brussels Convention. Brussels Convention, *supra* note 74.

177. Compare with Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 17, 20–21 (2008) (this kind of self-

selecting the forum for dispute resolution, especially in the age of globalization. Dispute resolution tribunals compete over quality commercial disputes and consequently over the quality of the parties.<sup>178</sup> If there is an argument to use public factors to eject certain lawsuits, it is to boost the quality of commercial disputes and dispute resolution expertise so as to attract quality disputes to the forum. It therefore makes sense to use public factors to eject disputes that do not contribute to the expertise and global reputation of the forum, which would increase the forum's attractiveness amongst quality commercial parties.

### *E. The Passive Role of the Court*

The rule in Israeli civil procedure is that it is up to the parties and not the court to invoke the issue of international jurisdiction or the lack thereof.<sup>179</sup> This rule is inconsistent with the adoption of public factors because a party might raise a forum non conveniens defense and succeed due to public factors, whereas another dispute, which may be even less appropriate in terms of forum and should be ejected because of public factors, would remain in the forum as long as the parties do not assert forum non conveniens. Indeed, the court system's passive approach in this regard should be re-examined.

## CONCLUSION

The legal transplant of a procedural mechanism that limits a court's jurisdiction should not be taken lightly. In fact, it is doubtful whether such a transplant should be a matter left entirely to judicial discretion. Adopting public factors in forum non conveniens cases illustrates a dubious legal transplant. In retrospect, the signs of a problematic experiment were there from the outset.

For example, adopting a single mechanism from a legal system with clear procedural differences from the adopting system should have sounded an alarm bell. At the very least, adopting a mechanism that stands in stark opposition to the historic

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help by courts to tackle congestion will damage the attempt to have the issue tackled by the legislature).

178. *See supra* note 70.

179. As opposed to subject matter jurisdiction, which the court must raise independently of the parties. *See Goren, supra* note 34, at 17.



origin of the adopting legal system is cause for suspicion. Furthermore, the adoption of a doctrine driven primarily by judicial discretion into a system that is primarily rule-based should in itself raise an eyebrow.

The initial judicial discussion on adopting public factors raises the possibility that the Supreme Court was concerned with Palestinian plaintiffs flooding Israeli courts with litigation. However, a court congestion argument is odd considering the Supreme Court willingly opened its doors to countless Palestinian administrative and civil actions against the activities of the State of Israel and its military forces in the Occupied Territories. It therefore follows that transplanting public factors may have been the Supreme Court's way to legitimize the potential expansive dismissal of Palestinian civil claims.

Public factors thus may serve as a tool for ejecting disputes on technical rather than material grounds even when the private interests of the parties would not otherwise allow such maneuvers.<sup>180</sup> Although Israeli courts are amongst the most congested in the western world, the discussion of the congestion problem in terms of public factors in *forum non conveniens* is shallow. There is no consideration of the types of dispute that the court wishes to attract and those that the court wishes to eject, nor is there an analysis of the types of party that the court wishes to protect.

Both judicial certainty and public interests would be clearer if public factor considerations were promulgated by the legislature, rather than the courts. Legislatures and courts moderate and even block lawsuits at the source for material reasons, rather than for court congestion. The dialogue between courts and legislatures in the shaping of such laws, even when such acts eventually reflect a preference against foreign plaintiffs, are better than vague judicial discretion, which foreign plaintiffs cannot foresee at the initial stages of their lawsuits.

The recent U.S. Supreme Court case of *Morrison v. National Australia Bank* offers an example.<sup>181</sup> Here, publicly traded corporations were granted *de facto* immunity from securities civil actions initiated by foreign plaintiffs, and even by U.S. security holders in connection with securities purchased outside the

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180. Klein, *supra* note 33, at 5.

181. *Morrison v. National Australia Bank*, 561 U.S. 247 (2010).

United States.<sup>182</sup> While this approach is far less tacit than using the forum non conveniens doctrine, it is better suited to the purpose of stifling waves of litigation at their origins.

Another recent U.S. Supreme Court ruling, *Kiobel v. Royal Dutch Petroleum Co.*, is likely to stifle litigation by foreign plaintiffs in the United States. Here, the Supreme Court held the Alien Tort Statute does not apply to conduct occurring in the territory of a foreign sovereign.<sup>183</sup> In that case, the Court rejected a claim by Nigerian asylum seekers alleging oil corporations were involved in human rights violations in Nigeria. By rejecting the cause of action, the Supreme Court sealed off the possibility of applying U.S. human rights enforcement in foreign countries through private litigation.

Although invoking the presumption against extraterritoriality in *Morrison* and *Kiobel* was a judicial act, it allows the legislature to control litigation inflow by determining which causes of action are extraterritorially applicable. Shortly after *Morrison*, the Dodd-Frank Act was enacted, which, in part, guaranteed the Securities Exchange Commission's ability to conduct extraterritorial enforcement, while maintaining the limitation on parallel private enforcement by acquirers of securities outside the United States.<sup>184</sup>

In Israel, courts have struggled with the rights of Palestinians from Occupied Territories to claim compensation for injuries suffered as a result of actions of Israeli soldiers. In July 2012, the Israeli Parliament, the Knesset, approved a bill which denies Palestinians the right to receive compensation for damage caused by Israeli security forces.<sup>185</sup> This law not only relieves the Israeli government of a potential financial obligation to compensate would-be plaintiffs, but also enables the immediate denial of numerous claims filed in Israeli courts.<sup>186</sup>

182. *Id.* at 273 (holding that section 10(b) of the Securities Exchange Act 1934 does not apply to plaintiffs that suffered damages as a result of extraterritorial transactions).

183. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (holding that the presumption of extraterritoriality "constrain[s] courts considering causes of action that may be brought under the Alien Tort Statute").

184. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864-1865 (2010) (codified as amended at 15 U.S.C.A. § 77v, 78aa, 80b-14).

185. The Civil Damages (State Liability) (Amendment No. 8) Law 2012.

186. *Id.* Sections 1 and 3 authorize courts to deny, at the preliminary stage, a claim filed by a plaintiff who is not a citizen of the state if it concerns an

The latter three examples demonstrate legislative and judicial candor with respect to their political motivation. These examples are a better alternative than dismissing claims by foreign plaintiffs on the grounds of vague public factors that conceal the real intent behind the decisions. While the barriers to bringing claims in these examples may be disputed, the transparency of their underlying motivation should be encouraged.<sup>187</sup> Only then can such limitations on the rights of otherwise potential plaintiffs be duly scrutinized in the public arena.<sup>188</sup> While they may face international, political or judicial criticism, these examples represent a more honest, certain and foreseeable treatment of jurisdictional obstacles posed before plaintiffs in their attempt to seek redress in a foreign country.

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action of “combative” nature regardless of whether the plaintiff was the target of the action or a bystander.

187. Michaels, *supra* note 8, at 1057 (“[R]ecall that the U.S. paradigm is political. Jurisdiction over defendants must be justified in political terms, especially if those defendants are not part of the community that asserts jurisdiction. On the flipside of this argument, courts have a political responsibility to provide protection for their own citizens’ rights, and therefore to open their courts to them, even where they would not open them to others.”).

188. For a political critique of the Israeli Civil Damages (State Liability) (Amendment no. 8) Law, 2012, see, for example, Joint Written Statement submitted by the Palestinian Centre for Human Rights, the Arab Organization for Human Rights and the International Association of Democratic Lawyers, Non-governmental Organization in Special Consultative Status, UNITED NATIONS (May 21, 2013), <http://unispal.un.org/UNISPAL.NSF/0/00E3FE934BE0C7FD85257B7F004C2715>.