2012

Toward a Law of "Lovely Parting Gifts": Conditioning Forum Non Conveniens Dismissals

Thomas O. Main

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: https://scholars.law.unlv.edu/facpub

Part of the Litigation Commons, and the Transnational Law Commons

https://scholars.law.unlv.edu/facpub/786

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.
TOWARD A LAW OF "LOVELY PARTING GIFTS": CONDITIONING FORUM NON CONVENIENS DISMISSALS

Thomas Orin Main*

I. INTRODUCTION ............................................ 475
II. FORUM NON CONVENIENS DISMISSALS .................. 476
III. SUBJECTS OF CONDITIONS ............................. 479
IV. THE FRAMING OF CONDITIONS .......................... 485
V. AUTHORITY TO CONDITION ............................... 491
   A. Legislative Authority ................................ 493
   B. Inherent Authority .................................. 495
   C. Consent .............................................. 498
VI. CONCLUSION .............................................. 499

I. INTRODUCTION

In the vernacular of classic television game shows, the losing contestant usually received some “lovely parting gifts.” This consolation prize would be a year's supply of Rice-a-Roni, a set of luggage, or a play-at-home board game version of the show. There is a similar phenomenon afoot in the context of transnational litigation.

Forum non conveniens dismissals deny plaintiffs the grand prize that they seek when filing a civil action: access to United States courts and laws. Yet these would-be plaintiffs often receive something of a consolation prize as they depart the courthouse stage, because the orders dismissing their cases may include certain conditions. Although these plaintiffs whose claims are dismissed must refile their actions in some alternative foreign forum, conditions are like lovely parting gifts that are designed to make that foreign litigation cheaper, faster, fairer, or more effective for plaintiffs.

* Professor of Law, University of the Pacific McGeorge School of Law. I owe thanks to Austen Parrish and Chris Whytock for inviting me to participate in this symposium, to fellow-panelist Paul Dubinsky for his comments, and to Kim Tran, Hans van Horn, Anna Semerdjian for their research assistance.
This essay is part of a symposium panel on the issue of judicial discretion in transnational litigation. The paper has two objectives: first, to describe the judicial practice of conditioning forum non conveniens dismissals; and second, to question the judicial authority to condition. I suggest that even when a judge may have the discretion to deny or to grant a motion to dismiss on grounds of forum non conveniens, the discretion is not necessarily so broad as to permit a conditional grant. Simply put, the greater does not include the lesser.

Part II offers a very brief overview of the forum non conveniens doctrine. Parts III and IV survey how courts have conditioned forum non conveniens dismissals. And Part V identifies and evaluates the sources of authority to condition.

II. FORUM NON CONVENIENS DISMISSALS

The motion to dismiss on grounds of forum non conveniens is a doctrine that gives courts discretion to decline to exercise jurisdiction that otherwise exists. The doctrine runs counter to the general principle that a court that is vested with jurisdiction must exercise it. Because of legislative developments, the common law doctrine of forum non conveniens now is constrained almost exclusively to the realm of transnational litigation. In one classic example of the doctrine, a foreign plaintiff is injured abroad, sues an American company in an American court, and then has their case dismissed on grounds of forum non conveniens. The conceit is that the plaintiff will refile the action in a foreign forum.

The history of the forum non conveniens doctrine is documented elsewhere. The contemporary doctrinal construct is a two-part test:

1. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 716 ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.") (citing cases). These arguments usually arise in the context of abstention doctrine. See generally Martin H. Redish, Abstention, Separation of Powers, and the Limits of Judicial Function, 94 Yale L.J. 71 (1984); Michael Wells, Why Professor Redish is Wrong About Abstention, 19 Ga. L. Rev. 1097 (1985). Abstention and forum non conveniens doctrines have distinct historical pedigrees yet proceed from a similar premise. Quackenbush, supra, at 722-723.
First, there must be an alternative forum that is adequate.\(^5\) Second, if
the alternative forum is adequate, the court should weigh public and
private interest factors to determine whether the case should be
dismissed.\(^6\)

Both parts of the test have some relevance to the subject of this
paper so a brief overview may be helpful. First, a foreign forum is
inadequate if, for example, "the remedy offered by the other forum is
clearly unsatisfactory."\(^7\) The forum is not inadequate, however, simply
because the foreign law is different or plaintiff's possible recovery is
inferior.\(^8\) "Ordinarily, th[e] requirement [that an adequate alternative
forum exists] will be satisfied when the defendant is amenable to pro-
cess in the other jurisdiction."\(^9\) Still, courts have enjoyed "wide ambit
to interpret" the inadequacy criterion, resulting in inconsistent deci-
sions by—and a wide range of approaches from—lower courts.\(^10\)

The second part of the test contemplates an evaluation of a range
of private and public interest factors. The private interests focus on
practical factors that provide for a speedy, inexpensive, expeditious,
and efficient trial.\(^11\) The public interests include court concerns, such
as crowded court dockets, delays of domestic trials, the burden of tax
and jury duties upon community members despite the lack of local
interest in the outcome of the trial, and the uncertainty of applying
foreign law.\(^12\) Evaluation of these factors is supposed to point the
court to the more appropriate of the two adequate fora. Originally the
plaintiff was entitled to their choice of forum unless the balance of

\(^5\) Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947), superseded by statute, Act of June 25,

\(^6\) Piper, 454 U.S. 235. For a three-step version of the test, see Strategic Value Master

\(^7\) Piper, 454 U.S. at 254 n.22 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07
(1947)).

\(^8\) See, e.g., Piper, 454 U.S. at 262.

\(^9\) Piper, 454 U.S. at 254 n.22 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07
(1947)).

\(^10\) Joel H. Samuels, When Is An Alternative Forum Available? Rethinking the Forum Non
Conveniens Analysis, 85 Ind. L.J. 1059, 1071 (2010).

\(^11\) These practical factors include: (1) the focal point of the facts; (2) the relative ease of
access to sources of proof; (3) the availability of compulsory process for attendance of unwilling
witnesses; (4) the cost of obtaining attendance of willing witnesses; (5) the possibility of viewing
the premises; (6) the choice of law clauses and the applicable law; (7) the residence of the part-
ties; (8) the potential abuse of process in terms of vexation or oppression by the plaintiff; and (9)
the ability to obtain a just judgment. Gulf Oil, 330 U.S. at 508.

\(^12\) Id. at 508-9. For a discussion of the role that a state's regulatory interest also plays in the
decisional calculus, see Stephen B. Burbank, Jurisdictional Equilibrium, the Proposed Hague
these factors tipped "strongly in favor of the defendant." Today this presumption applies to domestic, but not foreign plaintiffs.

Forum non conveniens motions are standard fare—and are increasingly successful—in transnational litigation. Defendants often have much to gain from a dismissal even though the action can be refiled in a foreign forum: delay can be useful to a defendant, the substantive or procedural law applied in the foreign forum may favor the defendant, the dismissal could lead the plaintiff to accept a modest settlement, or the plaintiff may abandon the claim altogether.

Many motions to dismiss on grounds of forum non conveniens are granted conditionally. Conditions often require the defendant to agree to waive objections or defenses that they might otherwise assert in the foreign forum once the case is refiled there. Other conditions require some element of cooperation on the part of the defendant. Appellate courts have encouraged the use of conditions to provide protections for plaintiffs. Some appellate courts have even endorsed the use of conditions as a substitute for more rigorous application of the forum non conveniens factors. The Supreme Court has never addressed the use of conditions in the context of forum non con-

13. Id. at 508.
16. See generally David W. Robertson, Forum Non Conveniens in America and England: "A Rather Fantastic Fiction," 103 Law Q. Rev. 398, 418 (1987). Professor Robertson mailed surveys to the lawyers in 180 reported cases dismissed by federal courts and received 85 responses. Of these, eighteen plaintiffs abandoned further effort, in twelve cases the lawyer did not know what happened, and in three the lawyer had not yet decided on a next step. Thirty-six cases settled; of these fifteen settled for less than 30% of their estimated value, seven settled for between 31% and 50% of their estimated value, nine settled for more than 50%, and five were for an unspecified amount. Ten cases were pending in a foreign court and three in a state court. Three cases had been lost in foreign courts, and none had been won in either a foreign or a state court. Id. at 418-19.
18. See, e.g., Ford v. Brown, 319 F.3d 1302, 1310-11 (11th Cir. 2003) ("Since the district court's dismissal is conditional, it may reassert jurisdiction in the event that the foreign court refuses to entertain the suit. There would be little point in approving of this device while simultaneously requiring proof that the foreign jurisdiction will reach the merits of the case. . . . [F]urther inquiry into the foreign jurisdictional law really is needless since it is so easily obviated by the use of the typical conditional dismissal device.") (quotation omitted).
Various administrative issues can arise in the context of conditional dismissals. Most notably, enforcement can be problematic. If the conditions are not performed, another action may need to be filed to recommence the suit. And once the court reasserts jurisdiction, parallel litigation can introduce a host of complexities. Even more troubling, performance of the condition may be beyond the control of the moving party. Imagine, for example, that a motion to dismiss on grounds of forum non conveniens is granted on the condition that the defendant waives its statute of limitations defense in the foreign forum. The foreign forum may refuse to recognize the waiver and may instead issue a judgment in favor of the defendant. Perhaps this can be addressed, if clumsily and inefficiently, when defendant asks the American court to recognize the judgment. But on what basis will the foreign judgment not be recognized in the American forum? Does the foreign forum's lack of cooperation make the judgment void as against public policy? Enforcement problems such as these have led some courts to issue stay orders, as opposed to dismissal orders, and to impose conditions that operate as conditions precedent rather than as conditions subsequent. But this practice, in turn, has led to thorny issues regarding the appealability of the order. Issues of enforcement and appealability, however, are not the subject of this essay, as they have been addressed elsewhere.

This essay instead focuses on the issue of judicial authority to enter a conditional order of this sort. The subjects and the framing of these conditional orders are explored in the next two parts of this essay.

III. Subjects of Conditions

Courts routinely impose conditions on forum non conveniens dismissals. This section demonstrates the broad range of subjects that courts have addressed through conditions. Bulleted lists are used to streamline the presentation of this information. These lists are grouped into categories, but these categories overlap and the classifi-
cation itself is not part of the thesis. The appropriateness or legality of these conditions is addressed later.

The four most common conditions regard the following topics:

**Statutes of limitations**—Because the statute of limitations in the foreign forum may have run while the action was pending in the United States, as a condition for the forum non conveniens dismissal, the defendant waives any statute of limitations defense that they might otherwise assert in the foreign forum.\(^{22}\)

**Jurisdiction and service of process**—Because there may be an issue regarding whether the defendant will be subject to suit in the foreign forum, the defendant waives service of process.\(^{23}\)

**Enforcement of judgments**—Because there may ultimately be a problem recognizing and enforcing the foreign judgment, the defendant agrees to satisfy any final judgment entered by the foreign court.\(^{24}\)

**Discovery**—Because litigation in the foreign forum may limit the plaintiff’s access to witnesses and documents, the defendant makes certain assurances to the court regarding the availability of evidence.\(^{25}\)

Other conditions are intended to minimize the plaintiff's expense of pursuing litigation in the foreign forum.

**Travel and lodging expense**—Because plaintiff and/or plaintiff's witnesses may be located outside the foreign forum, the defendant agrees to reimburse the plaintiff for these expenses.\(^{26}\)

---

\(^{22}\) See, e.g., Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 506 (S.D.N.Y. 2005) (“Defendant . . . waives any statute of limitations defense that may be available to it in [the alternative forum].”); First Union Nat’l Bank v. Banque Paribas, 135 F. Supp. 2d 443, 454 (S.D.N.Y. 2001) (“will not assert or rely upon the passage of time from the date of commencement of plaintiff’s action against it in this Court to and including [__ days forward from the present date] by way of defense based in whole or in part on the timeliness of an action against it by plaintiff in [the alternative forum] . . . .”). See also Compania Naviera Joanna S.A. v. Koninklijke Boskalis Westminster NV, 569 F.3d 189, 205 (4th Cir. 2009) (dismissed “[s]ubject to condition that [defendants] not raise or assert defense based on statute of limitations or court-imposed deadline in response to any claim against them.”).


\(^{24}\) See supra notes 20-21 and accompanying text.

\(^{25}\) See infra notes 32-33 and accompanying text.

Translation costs—Because litigation in the foreign forum may require plaintiff to incur translation costs, the defendant agrees to bear all of this expense.\textsuperscript{27}

Fee-shifting—Because the foreign forum may have a fee-shifting regime that enables a prevailing party to recover costs and attorney fees from the losing party, the defendant waives any right to recover under that foreign provision.\textsuperscript{28}

Security—Because the foreign forum may require plaintiffs to post a bond as a condition of filing, the defendant waives this requirement.\textsuperscript{29}

Access to a contingent fee attorney—Because the ability to obtain legal representation in the foreign forum may be uncertain, the dis-


missal may require the defendant to “refrain[ ] from any interference with plaintiff’s efforts to obtain an attorney on a contingency basis.”

Conditions are often designed to tailor the mechanics of the foreign procedure. In addition to the procedural matters already listed above, consider subjects related to:

**Joinder**—Because the foreign forum may be inclined to divide or separate claims or parties that the plaintiff would rather be joined, the defendant assents to a particular trial package.

**Evidence**—Because documentary evidence may be given different weight under an alternative procedural system, the defendant will stipulate to certain evidentiary matters.

---


Preservation—Because relevant evidence may be lawfully destroyed prior to (or even after) the initiation of the foreign action, the defendant assures the court that it will preserve all relevant evidence.33

Other conditions are intended to alter the substantive law applied (or the substantive outcome reached) by the foreign forum:

Choice of Law—Because the substantive law that the foreign court will apply may be uncertain, the defendant stipulates to the applicability of a particular jurisdiction’s law.34

Concessions of Liability—Because the plaintiff may have difficulty proving liability in the foreign forum, the defendant concedes that element.35

Concessions of Damages—Because the plaintiff may have difficulty proving damages in the foreign forum, the defendant concedes that plaintiff suffered a specific amount of damages.36

Specific Causes of Action—Because the foreign forum may recognize certain theories of liability that the U.S. court would rather it not,
the condition may be structured to cull those which will be litigated abroad from those which will not.\textsuperscript{37} Similarly, because it may be unclear whether the foreign forum will recognize a particular action, the dismissal may be conditioned on the viability of a particular cause of action.\textsuperscript{38}

**Immunity**—Because the defendant may be immune to suit in the foreign forum, defendants agree to waive that defense.\textsuperscript{39}

Judges have imposed a number of conditions in addition to the types already mentioned. Three additional examples follow:

- Plaintiffs who feared to travel to the foreign forum have seen their U.S. cases dismissed on the condition that defendants will assist with plaintiff's safe travel.\textsuperscript{40}
- Courts have dismissed a U.S. case on the condition that the defendant would propose the appointment of a new trustee in the foreign bankruptcy proceeding.\textsuperscript{41}
- In an aggregation of cases involving domestic and foreign plaintiffs, courts dismissed the claims by foreign plaintiffs on the condition that the defendant waive damage limitations on the claims asserted by the remaining domestic plaintiffs.\textsuperscript{42}

Review of more than five hundred opinions involving conditional orders upon forum non conveniens motions did not reveal a single

\textsuperscript{37} Ilusorio v. Ilusorio-Bildner, 103 F. Supp. 2d 672, 681 (S.D.N.Y. 2000) (defendants waived all jurisdictional defenses, "except as to criminal liability for libel" in connection with any new case commenced in the Philippines against defendants).

\textsuperscript{38} See, e.g., Watson v. Merrell Dow Pharm., Inc., 769 F.2d 354, 356 (6th Cir. 1985) ("If the courts of the United Kingdom should find that the infant plaintiffs have no cause of action for prenatal injuries, upon final dismissal of their claims on this ground by a court of the United Kingdom, any of these plaintiffs so dismissed shall have the right to reinstate his or her action in Southern District of Ohio."); Bonzel v. Pfizer, Inc., 439 F.3d 1358, 1365 (Fed. Cir. 2006) ("The dismissal is conditioned on the following: That Plaintiff actually has a cause of action that may be brought in Germany.").

\textsuperscript{39} Galustian v. Peter, 570 F. Supp. 2d 836, 839 (E.D. Va. 2008) (defendant to provide "a waiver of immunity from Iraqi legal process. . .").

\textsuperscript{40} Sussman v. Bank of Isr., 990 F.2d 71, 71-72 (2d Cir. 1993) (court conditioned the dismissal on "an undertaking from appropriate Israeli officials that [plaintiff] would not be detained in Israel in connection with a suit by the [defendant] Bank's liquidator, now pending in Israel, if Sussman traveled there to initiate his own lawsuit against the Bank."); Tisdale v. Shell Oil Co., 723 F. Supp. 653, 659 (M.D. Ala. 1987) ("defendants do everything within their power and authority, both direct and indirect, to assure that, should it be necessary for the Tisdales to return to Saudi Arabia to pursue this lawsuit, they may do so safely.").

\textsuperscript{41} Blanco v. Banco Indus. De Venezuela, S.A., 997 F.2d 974, 983 (2d Cir. 1993) ("We modify the judgment of the district court to condition dismissal upon defendants proposing to the Venezuelan Bankruptcy Court a mutually acceptable successor Trustee. . .").

\textsuperscript{42} In re Air Crash Over the Taiwan Strait on May 25, 2002, 331 F. Supp. 2d 1176, 1213 (C.D. Cal. 2004) ("Defendants must waive any applicable limitation on compensatory damages for those cases governed by Article 28 of the Warsaw Convention that will remain in this court.").
instance of a conditional denial of that motion. Rather, in every instance the conditions accompanied granted motions. One court referred to a condition as the defendant’s “price” for the forum non conveniens dismissal.\footnote{Pain v. United Techs. Corp., 637 F.2d 775, 785 (D.C. Cir. 1980), \textit{cert. denied}, 454 U.S. 1128 (1981).}

\textbf{IV. THE FRAMING OF CONDITIONS}

For each of the subjects mentioned above, the condition imposed by the judge can have an aim that is more or less ambitious, an effect that is more or less interventionist, and text that is more or less precise. This Part will demonstrate the range of approaches on each of these measures.

Consider discovery conditions, for example. Because litigation in the foreign forum may limit the plaintiff’s access to witnesses and documents, the court will often assist the plaintiff in efforts to obtain evidence for use in the foreign proceeding.\footnote{See, \textit{e.g.}, Lleras v. Excelaire Servs., 08-3823-cv, 2009 U.S. App. LEXIS 27590, at *4. \textit{See also In re Factor VIII or IX Concentrate Blood Prods. Litig.}, 531 F. Supp. 2d 957, 973-83 (N.D. Ill. 2008).} But this level of assistance varies. Near one extreme, judges impose a condition that defendants must comply with the discovery procedures of the foreign forum.\footnote{Pain v. United Techs. Corp., 637 F.2d 775, 785 (D.C. Cir. 1980), \textit{cert. denied}, 454 U.S. 1128 (1981).}

\footnote{See, \textit{e.g.}, Lleras v. Excelaire Servs., 08-3823-cv, 2009 U.S. App. LEXIS 27590, at *4. \textit{See also In re Factor VIII or IX Concentrate Blood Prods. Litig.}, 531 F. Supp. 2d 957, 973-83 (N.D. Ill. 2008).}

\footnote{See, \textit{e.g.}, Lleras v. Excelaire Servs., 08-3823-cv, 2009 U.S. App. LEXIS 27590, at *4. \textit{See also In re Factor VIII or IX Concentrate Blood Prods. Litig.}, 531 F. Supp. 2d 957, 973-83 (N.D. Ill. 2008).}
This is a modest condition since the defendant is subject to the discovery procedures of the foreign forum even without this condition. It is also a deferential condition in light of the fact that performance of the condition does not interfere with the mechanics of, nor alter the likely result, in the foreign judicial proceeding.

Courts can dial a discovery condition to progressively higher levels of intensity. Some courts require defendants to agree not to object to the admissibility of evidence in the foreign proceeding that was already produced in the U.S. proceeding prior to the forum non conveniens dismissal. Naturally, not objecting to the introduction of otherwise inadmissible evidence could affect the outcome of the foreign proceeding.

Further, some courts require defendants to agree to ongoing discovery in the United States as a complement to the foreign proceeding. And still further, the condition may require that the defendant

---

46. See, e.g., Abad v. Bayer Corp., (In re Factor VIII or IX Concentrate Blood Prods. Litig.), 531 F. Supp. 2d 957, 964 (N.D. Ill. 2008); Ashkenazi v. Bayer Corp. (In re Factor VIII or IX Concentrate Blood Prods. Litig.), Nos. MDL 986,93 C 7452, 05 C 2793, 2008 U.S. Dist. LEXIS 94306, at *35 (N.D. Ill. June 4, 2008) (“Defendants agree to advise the Israeli court that they have no objection to the admissibility of depositions taken in the United States or other materials obtained in discovery in the United States simply on the basis that the depositions or other materials were obtained outside Israel”); Dunsby v. Transocean, Inc., 329 F. Supp. 2d 890, 896 (S.D. Tex. 2004) (“defendants shall make available for use in the Australian court proceeding any discovery materials produced in this action”); Fatkhiboyanovich v. Honeywell Int’l Inc., No. 04-4333, 2005 U.S. Dist. LEXIS 23414, at *24 (D.N.J. Oct. 5, 2005) (defendants “[c]onsent to be bound by their responses to discovery requests served upon them to date by Plaintiffs. Once the proceedings in Barcelona, Spain contemplated by this Order have been commenced, additional discovery will be governed by the applicable rules and procedures of the local Court in Spain.”); GE Healthcare v. Orbotech, Ltd., No. 09-C-0035, 2009 U.S. Dist. LEXIS 72221, at *54 (E.D. Wis. July 2, 2009) (defendant “agrees to advise the Israeli court that it has no objection to the admissibility of the depositions taken in the United States or other materials obtained in discovery in the United States solely on the basis that the depositions or other materials were obtained outside Israel”); Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 690 (S.D. Tex. 2004) (“The court’s dismissal is conditioned on the Defendant’s agreement to allow the use of all discovery obtained thus far in proceedings in the United States in the subsequent Venezuelan suit.”).


agree to make available in the foreign proceeding all relevant witnesses and documents to the extent that they would be available under the Federal Rules of Civil Procedure. Because American discovery has more techniques and a broader scope than any other legal procedure.

the supervision of this Court within 90 days after this Order is filed.

Paolicelli v. Ford Motor Co., No. 06-13688, 289 Fed. Appx. 387, 2008 WL 3855042 (11th Cir. 2008) (“The district court provided that [defendant] would provide access to discovery in its multidistrict litigation proceedings related to the design and manufacture of the products that are alleged to be defective.”); In re Complaint of Fantome, S.A., 232 F. Supp. 2d 1298, 1312 (S.D. Fla. 2002) reversed, 58 Fed. Appx 835 (“All discovery that place in the United States shall be conducted in accordance with the procedures established by the Federal Rules of Civil Procedure.”); Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours, 896 F. Supp. 1197, 1204 (M.D. Fla. 1995) (defendant agreed “to provide the plaintiffs with access to Du Pont’s document depository and depositions of all Du Pont employees from prior Benlate related litigation in the same manner as these materials are provided to domestic litigants.”); Sherkat Tazamoni Auto Internash v. Hellenic Lines, Ltd., 277 F. Supp. 462, 463 (S.D.N.Y. 1967) (“Respondent will consent to the taking of the deposition of its Traffic manager in New York and of such other witnesses as libellant seeks to depose here with respect to the shipment and condition of the cargo in dispute, on the understanding that any such depositions may be used by either side in any proceeding instituted with respect to the subject matter in Iran or Greece.”).

system in the world, this condition is rather ambitious and, if actually realized in the foreign forum, interventionist.50

Conditions tend to be rather imprecise. Appreciate that even the most modest discovery condition—"to comply with the foreign law's discovery rules"—introduces interpretive problems. First, some legal systems do not use the word *discovery*, and others assign a different meaning to the term.51 Query, then, what is included within the scope of the condition? Second, it is unclear what compliance by the defendant would entail. For example, in some civil law systems where judges have a limited power of contempt, parties may not abide by an order to produce evidence; and under these circumstances the consequence is that the court will draw an adverse inference.52 If that practice is common in the foreign jurisdiction, and defendant pursues this course of action, is this a party in compliance with the foreign law or not?

There are many discovery conditions that are plagued with the pathogen of vagueness. Frequently courts impose as a condition that a defendant will "produce witnesses and documents within its control," but the court does not clarify exactly what that entails.53 Must the

50. For the uniqueness of American discovery procedure, see THOMAS O. MAIN, GLOBAL ISSUES IN CIVIL PROCEDURE 33-37 (2006); STEPHEN C. MCCAFFREY and THOMAS O. MAIN, TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE 429-440 (Oxford 2010). When foreign substantive law is applied with procedures from another legal system, the substantive mandate can be over-enforced or under-enforced. See Main, *supra* note 47, at 802.
51. See generally Thomas O. Main, Word Commons (forthcoming) (draft on file).
52. See Main, *supra* note 47, at 824.
Consider also conditions regarding enforcement of the anticipated foreign judgment. Ordinarily the condition provides that the defendant will “satisfy any final judgment” made by the foreign court.\(^5\)

The court may impose this condition even though it is not clear how this promise interacts with the grounds for resisting the enforcement of a foreign judgment.\(^5\) Nor is it clear whether any court, other than the dismissing court, is bound by the defendant’s concession. There are also more ambitious approaches with regard to enforcement-of-judgment conditions. Some courts impose as a condition maintenance of a surety to ensure collection on the foreign judgment.\(^5\) Similarly, other courts condition the dismissal on assurance of insurance policy coverage for any eventual judgment.\(^5\)

Of course many of the subjects described in Part III can be very ambitious and interventionist. Conditions can affect the applicable substantive law—by forcing a choice-of-law determination and/or requiring the defendant to concede elements of their case, for example.\(^6\) And conditions can change the procedural law that would govern the foreign proceeding—by redefining the corpus of evidence


\(^5\) See generally McCaffrey & Main, supra, at 613-631.

\(^5\) See, e.g., Aracruz Trading Ltd. v. Japaul Oil & Mar. Servs., PLC, No. A-H 92-3014, 2009 WL 667298 at *8 (S.D.N.Y. 2009) (conditioning dismissal on maintenance of an attachment “to protect the plaintiff and assure any judgment in Nigeria is collectable.”); C.A. Seguros Orinoco v. Naviera Transapel, 677 F. Supp. 675, 687 (D.P.R. 1988) (“Defendants are to file a surety bond to guarantee any judgment, plus interest and costs, that may be obtained by plaintiff [in the courts of Venezuela] relative to this matter.”). See also Cargill v. ESAL, Ltd., No. 84 Civ. 0841 (WK), 1984 U.S. Dist. LEXIS 17839 at *4 (S.D.N.Y. Apr. 6, 1984); Contract Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446,1448(9th Cir. 1990), declined to extend, 588 F. 3d 1201 (dismissal conditioned upon fact that defendant “issued a letter of guaranty that a Philippine judgment, if rendered, will be satisfied.”); Neo Sack, Ltd., supra note 55, at 840 (“[Defendant] shall post with the Registry of the Court a $200,000 cash deposit or surety bond from one of the sureties approved by the Southern District of Texas payable to [Plaintiff] to secure the payment of any final judgment entered by the Indian court.”); Fajardo v. Tidewater, Inc., 707 F.2d 858, 863 (5th Cir. 1983) overruled, 821 F.2d 1147 (1987) (defendant “to post surety bond to assure their appearance at Spanish proceedings and to satisfy any award which might be rendered against them.”); Brillis v. Chandris (U.S.A.) Inc., 215 F. Supp. 520, 524 (S.D.N.Y. 1963) (condition dismissal “upon the agreement of defendants to . . . post[ ] $20,000 as security for any judgment that may be awarded in Greece.”).

\(^5\) Philipps v. Talty, 555 F. Supp. 2d 265, 273 (D.N.H. 2008) (Defendant must “produce a letter of guaranty from the insurance carrier providing his defense stating that a judgment by the St. Martin court, if rendered, will be satisfied subject to the applicable policy limits.”). See also Syndicate 420 at Lloyd’s London v. Early American Ins. Co., 604 F. Supp. 1443, 1450 (E.D. La. 1985) (condition that defendant’s “underwriters consent to be bound by the decision or decisions of the English courts as to their liability to indemnify for the errors and omissions of [defendant] and the decision of this Court against KBS, if such decisions are rendered.”).

\(^6\) See Main, supra note 47, at 803.
and/or restructuring litigation incentives.\footnote{61. See id. at 822.} Changing the applicable substantive and procedural law can dramatically affect the process and outcome of the foreign litigation.

These examples demonstrate three simple observations. First, depending upon the wording of the conditional order, the lovely parting gift can be extravagant or meager. Second, the gift may not be entirely for the dismissing court to give away, as when the condition interferes with the mechanics of the foreign court. And finally, the condition may be sufficiently vague that it is unclear what the lovely parting gift is.

V. Authority to Condition\footnote{62. This part relies heavily on my prior work. See Thomas O. Main, Judicial Discretion to Condition, 79 Temple L. Rev. 1075 (2006).}

The exercise of judicial discretion to grant or deny a motion to dismiss presents two extreme options. If the motion is granted, the case ends; yet a sympathetic judge may worry that the plaintiff will not find justice elsewhere.\footnote{63. In certain contexts, the grant of a motion could be the death knell for the litigation. David W. Robertson, Forum Non Conveniens in America and England: "Rather Fantastic Fiction," 103 Law Q. Rev. 398, 418 (1987).} If the motion is denied, a complicated case involving foreigners and foreign law is added to the docket; yet a conscientious judge may worry that the case is not the best use of the shared limited resource that is public dispute resolution. The desire to find some middle ground between the extreme positions urged by the parties on any particular motion is a noble and worthwhile effort. Conditions present courts with such a middle-ground option: dismiss the case, but make it more likely that the plaintiff will find justice elsewhere.

Courts have very broad discretion on forum non conveniens motions, and we will assume for purposes of this discussion that courts would have the discretion to deny the motion outright or to grant the motion unconditionally.\footnote{64. For a discussion of the broadly discretionary nature of the forum non conveniens inquiry see Cassandra Burke Robertson, Transnational Litigation and Institutional Choice, 51 B.C. L. Rev. 1081, 1106 (2010); Allan R. Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L. Rev. 781, 785 (1985). See also American Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (Scalia, J.), not followed on state law grounds, 668 N.W.2d 313 (referencing that the great discretion that district judges have in deciding whether to dismiss, combined with the "multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible"). For a discussion of the highly deferential nature of appellate review of forum non conveniens dismissals see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("The forum non conveniens determination is committed to the sound
role of the condition. When a court has the authority to grant the motion to dismiss unconditionally, it might seem to follow that the court could also grant the motion with conditions. In other words, one might expect the greater to include the lesser, or the whole to include the parts.65

But if the authority to condition were always subsumed entirely within the authority to decide the motion, the judge should be able to introduce any condition without incurring reversal. All would surely agree as a matter of intuitive judgment that some conditions could go too far. Indeed, some of the conditions described in Parts II and III may go too far. Or, at least appellate courts think so; they have reversed dismissal orders when certain conditions were unnecessary,66

---

65. This deduction is a focal point of debate in several legal contexts. Typically, the reasoning is that whenever the State can deny a privilege absolutely, then the State may impose any condition on the exercise of that privilege. Justice Holmes, in particular, is identified with this argument. See Western Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) (“Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.”); Commonwealth v. Davis, 162 Mass. 510, 511 (1895) (“For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house . . . . [T]he Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.”); Frost & Frost Trucking co. v. Railroad Comm’n, 271 U.S. 583, 602 (1926) (Holmes, J., dissenting) (quoting Packard v. Banton, 264 U.S. 140, 145 (1924) (“[T]he power to exclude altogether generally includes the lesser power to condition . . . .”)); City and County of Denver v. Denver Union Water Co., 246 U.S. 178, 196-97 (1918) (Holmes, J., dissenting) (holding that city may require water company to close altogether; therefore, it may set water rates at any price). The syllogism has been disproven in many contexts. See generally Mitchell N. Berman, Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,” 55 Vand. L. Rev. 693 (2002); Thomas Reed Powell, The Right to Work for the State, 16 Colum. L. Rev. 99, 106-12 (1916); Michael Herz, Justice Byron White and the Argument that the Greater Includes the Lesser, 1994 BYU L. Rev. 227, 238-49 (1994); Robert M. O’Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 Calif. L. Rev. 443, 456-63 (1966); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1428-56 (1989); Peter Westen, Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another, 66 Iowa L. Rev. 741, 745-53 (1981); Peter Westen, The Rueful Rhetoric of “Rights,” 33 UCLA L. Rev. 977, 1010-18 (1986); John D. French, Comment, Unconstitutional Conditions: An Analysis, 50 Geo. L.J. 234, 236-48 (1961).

66. In re Union Carbide Gas Plant Disaster, 809 F.3d 195 (2d Cir. 1987) (finding condition that defendants consent to the enforceability of an Indian judgment in error because it was based on an erroneous legal assumption that such a judgment would otherwise be unenforceable in U.S. courts.)
unfair,\textsuperscript{67} insensitive to foreign policies and procedures,\textsuperscript{68} or "r[a]n afoul of a basic principle of forum non conveniens law."\textsuperscript{69} At this point it does not matter which conditions would be problematic nor why, but rather that some conditions could exceed the judge’s authority. An absurd example may reinforce those who remain skeptical: surely, a court could not condition an order of dismissal on the defendant’s willingness to adopt a rescued greyhound dog. The important observation is that the authority to condition is not necessarily derivative of the authority to decide the motion itself.

A judge’s discretion in a given instance might be sufficiently broad either to grant in full or to deny outright a motion to dismiss on grounds of forum non conveniens, but not necessarily so broad as to permit a conditional grant or denial. Of course, the disaggregation of the authority to condition from the authority to decide the motion does not necessarily mean that all conditions are impermissible. Whether a particular conditional order is permissible depends upon whether the authority to impose the condition can be independently sourced. The authority to condition must be derived, if at all, from one of three primary sources of judicial authority: legislative authorization, the inherent authority of courts, or consent.\textsuperscript{70}

A. Legislative Authority

Authority to condition an order can be conferred through legislative action. There are two types of this authority: the authority to condition could explicitly or implicitly be part of the legislatively-

\textsuperscript{67} Id. (finding condition requiring the defendant to consent to broad discovery, in India, under the Federal Rules of Civil Procedure violated principles of equal treatment when the court did not have the power to impose a parallel condition on the plaintiff).

\textsuperscript{68} Mercier, supra note 50, at 1352 (rejecting a condition that the defendant be required to "facilitate discovery" and that defendant waive a requirement in the foreign forum that plaintiff post a cost-bond to cover the defendant's legal fees if they lose the case.); Gross v. British Broadcasting Corp., 386 F.3d 224 (2d Cir. 2004) ("There is a point at which conditions cease to be a limitation on the defendant and become instead an unwarranted intrusion on the transferee forum's policies governing its judicial system. By applying conditions that implicate the British legal system's rules on fee-shifting and the availability of contingent fees, the district court effectively stepped into the middle of Britain's policy debate on those issues. Principles of comity demand that we respect those policies. We urge the district courts to be cognizant of the prudential choices made by foreign nations and not to impose conditions on parties that may be viewed as having the effect of undermining the considered policies of the transferee forum.").


conferred authority to decide the underlying motion, or the authority to condition could be traceable to some other legislation.

The first of these two types is irrelevant here. The authority to decide a forum non conveniens doctrine is judge-made law that is not legislatively-conferred.\(^71\) Accordingly, there could be no derivative legislative authority to condition the order. Contrast this situation with many of the Federal Rules of Civil Procedure, for example, which expressly authorize conditions: in a class action, a court may “impos[e] conditions on the representative parties;”\(^72\) discovery orders may be issued “subject to conditions;”\(^73\) orders upon voluntary dismissals may be conditional;\(^74\) subpoenas may issue “upon specified conditions” to ensure the compensation of witnesses;\(^75\) new trial motions may be granted or denied with conditions;\(^76\) and courts may grant a motion staying the execution of judgment with “conditions for the security of the adverse party.”\(^77\) In these instances, authority to impose (at least some) conditions are embedded in the legislative authorization to decide the motion itself. Such is not the case for the common law doctrine of forum non conveniens.

The second type of legislative authority to condition contemplates legislation that stands apart from the authority to decide the underlying motion. The legislative authority conferred to courts is then manifest in the form of a condition. The best (and perhaps only\(^78\)) example of this from those conditions surveyed in Parts II and III may be a discovery condition that contemplates ongoing discovery in the United States as a complement to the foreign proceeding. Section 1782 allows courts to do exactly this.\(^79\) The condition, then, is an expression of judicial authority that already exists.

But with one or two exceptions, legislative authority cannot justify the contemporary practice of conditioning forum non conveniens dismissals. Most of the contemporary conditions affect the litigation behavior of parties in foreign courts—and to some extent the behavior of foreign courts themselves. These are not matters over which the legislature has authorized judicial action.


\(^72\). FED. R. CIV. P. 23(d)(3).

\(^73\). FED. R. CIV. P. 26(c).

\(^74\). FED. R. CIV. P. 41(d)(2).

\(^75\). FED. R. CIV. P. 45(c)(3).

\(^76\). FED. R. CIV. P. 50(c)(1).

\(^77\). FED. R. CIV. P. 62.

\(^78\). Enforcement of judgments may be a second example.

B. Inherent Authority

Authority to condition an order can be sourced to the inherent authority of courts. Inherent authority means that the scope of authority conferred upon a trial court is not expressly authorized by the constitution, statute, or written rule.80 This authority flows from the powers possessed by a court simply because it is a court; it is authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction.81 The doctrine of forum non conveniens itself is sourced in the inherent authority of courts.82 The authority to condition, then, could be but an extension of the inherent authority to dismiss the case. But the narrow parameters of this jurisprudence make it a possible but dubious source of authority to condition.

The Supreme Court has long defined “inherent powers” as those, which “cannot be dispensed with . . . because they are necessary to the exercise of all others.”83 The Court has often cautioned that “the extent of these [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority.”84 Accordingly, inherent powers extend only to those instances “necessary to permit the courts to function.”85

The Court has never reconciled precisely how the Constitution simultaneously limits federal courts (especially as compared to Congress), yet authorizes them to exercise “inherent authority.”86 Indeed, the Constitution provides little or no guidance as to how the judiciary

86. As one commentator has argued:
Any judicial invocation of inherent power . . . seems to clash with three principles of constitutional structure that the Court has long endorsed. First, the American government is founded upon a written Constitution that enumerates and limits the powers of each department, with particularly stringent restrictions placed on the judiciary. Second, the . . . Constitution vests Congress with full power over the judiciary’s structure,
should go about exercising its authority in the ordinary course. The Justices have generally avoided the larger constitutional questions by focusing on the individual inherent power involved in each case. The parameters of inherent judicial authority seem narrow given the "necessity" definition and the Court's frequent admonition that it be exercised cautiously. Yet federal judges have repeatedly cited "inherent powers" as a catch-phrase to rationalize a wide range of actions that may be beneficial but are not truly essential to the proper exercise of judicial authority.

Although unclear in its scope, the authority to "manage litigation" is often listed among the inherent powers of federal courts. This authority is usually traced to Link v. Wabash Railroad, a case in which the district court invoked inherent authority to dismiss the case when the plaintiff's counsel failed to appear at a pre-trial conference. In upholding the district court's inherent authority, the Supreme Court described the district court's power to dismiss as one of "ancient origin." The Court found that the power to dismiss was "necessary in order to prevent undue delays in the disposition of jurisdiction, and operations. Third, ... Congress makes federal law, both substantive and procedural, which judges merely interpret and apply."

---

87. EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 16 (1914) (regarding "what the [judicial] power is, what are its intrinsic nature and scope, [the Constitution] says not a word").

88. Pushaw, supra note 70, at 739-40.

89. See, e.g., Degen, supra note 84, at 823 ("Principles of deference counsel restraint in resorting to inherent power . . . .").

90. See, e.g., Pushaw, supra note 70, at 778; Lear, supra note 71 at 1159. See also William W. Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 LAW & CONTEMP. PROBS. 102, 113 (1976) (noting that the tone of opinions evaluating "helpful or appropriate" uses of the inherent power, versus those claiming to be rooted to a specific constitutional grant, is not "legal"; there is very little "law" to speak of and the decisions "read no more "judicially" than a good congressional committee report, because is essentially what [they are]").

91. See, e.g., James Wheaton, California Business and Professorial Code Section 17200: The Biggest Hammer in the Tool Box?, 16 J. ENVTL. L. & LITIG. 421, 433 (2001); Daisy Hurst Floyd, Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement, 26 ARIZ. ST. L.J. 45, 58 (1994); Andrew J. Simons, The Manual for Complex Litigation: More Rules or Mere Recommendations, 62 ST. JOHN'S L. REV. 493, 497-98 (1988) ("The creators of the Manual [for Complex Litigation] remind us that 'it is not binding law. It has no binding effect. It is only as good as the credibility of the authors and the utility of the materials.' The Manual asserts that its recommendations, like the Federal Rules, are examples of the court's inherent authority to manage litigation.") (quoting MANUAL FOR COMPLEX LITIGATION (SECOND) § 20.1, at 6 (2d ed. 1985)).


93. Link, 370 U.S. at 633.

94. Id. at 630.
pending cases and to avoid congestion in the calendars of the District Courts." The Court found this inherent power to dismiss "governed not by rule or statute by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

It is under this "managing litigation" rubric that federal courts have the inherent authority to dismiss a case on forum non conveniens grounds. But this is controversial. Professor Elizabeth Lear, for example, argues that the Court should abandon the forum non conveniens doctrine as an unconstitutional usurpation of congressional power. Her argument is that the inherent authority of courts exists within a very narrow bandwidth of circumstances and that, in any event, congressional action in the context of venue and jurisdiction legislation precludes any judge-made law in this field.

Conditional dismissals would seem to push the envelope even further. When a motion to dismiss is granted with conditions, the court (1) dismisses an action that was otherwise properly filed in an American court—raising the constitutional questions posed by Professor Lear and others; and also (2) changes the outcome of litigation in a foreign proceeding through various substantive, procedural, and other conditions. It hardly seems "necessary" for a court in the American legal system to dictate, say, the rules of evidence that apply in a foreign proceeding.

This essay does not undertake to define the boundaries of the inherent authority to condition. Rather, it is to shed light on possible limitations. Inherent authority may authorize certain conditions in particular instances, but it fails as a broad source of authority for two reasons. First, the jurisprudence of inherent powers is purposely narrow: "[I]nherent powers are the exception, not the rule, and their assertion requires special justification in each case." Second, even if one assumes a broader view of the inherent authority of courts, that authority can be preempted by legislative interference. Accordingly, if the authority to dismiss on grounds of forum non conveniens is questionable, the inherent authority to condition is even more suspect.

95. Id. at 629.
96. Id. at 630-31.
99. Id.
C. Consent

The authority to condition may be sourced to the moving party’s consent. This approach suggests that even if the court had neither the legislative nor inherent authority to introduce the condition, the parties may nevertheless consent to the terms of the conditional order. After all, a party moving to dismiss could refuse to accept the conditions in the order of dismissal. However, because consent may not be voluntary in these contexts, inducing conditions without institutional authority makes consent a dubious source of authority.

Consent is valid only if it is not coerced. Judges enjoy significant leverage over the parties in the context of a pending motion, and thus can extract concessions that may be only nominally voluntary. Moving parties who accept conditions would likely do so because the alternative to the condition is that their motion will be denied outright.\(^{101}\) From this perspective, the conditional order looks like an offer most movants would be silly to refuse. For this reason, most conditional offers probably are “accepted.” But acceptance here is a product of the court’s power, not its authority.\(^{102}\)

Consider this simple non-legal example. A student asks a former professor to accompany her to lunch. The professor responds that she will join upon the condition that the student pay. The professor has no authority to require that the student pay.\(^{103}\) Yet the circumstances present the opportunity for the professor to assert power that could affect that result.\(^{104}\) The conditional offer may be “accepted” by the student, but the use of power without authority may have been exploited. The use of power is a form of arm-twisting that casts doubt on the voluntariness of that consent.

In the judicial context, the situation is even more troubling since the exercise of judicial power is not only the exercise of power without authority, but also a failure to exercise delegated authority. By introducing a condition that a court is not authorized to induce, the judge avoids (and both the movant and the non-movant are denied) an up-

---

101. Of course, for nonmoving parties who “accept” conditional denials the threat is that their adversary’s motion will be granted in full.


103. Authority is a form of leverage generated by a demonstrably valid right or justification.

or-down determination on the motion itself. Passing judgment on the motion is a part of the judicial function that the judge should not escape; judicial inaction is not within the judge’s discretion. By granting or denying the motion with conditions, the judge is, in some sense, ruling on a motion that the parties didn’t file. More importantly, it is not ruling on the motion that one of the parties did file. Even if consenting to the conditional order, the movant has not consented to not having a ruling on her motion.

Moreover, consent is a dubious basis because conditional orders may also not even provide a meaningful opportunity to reject the offer. Consider a motion to dismiss on grounds of forum non conveniens that is granted with the condition that defendant waive their statute of limitations defense if the case is re-filed elsewhere. If the defendant finds these conditions unacceptable, he cannot simply abandon the motion. Of course, the defendant could move to withdraw his (“successful”) motion or move to vacate the judgment that was entered on his motion, but either approach would require further litigation and also the court’s permission. The failure to take these affirmative steps—which would also involve returning the partial victory for the chance at a complete victory—is at best a foundation for waiver, but not consent.

VI. Conclusion

The practice of conditioning forum non conveniens dismissals is common because it allows more cases to be dismissed, but with less hardship to the plaintiffs. Hence, the lovely parting gifts. But the practice lacks legitimacy unless the authority to impose the condition is grounded in legislation, the inherent authority of courts, or the parties’ consent. And for many conditions, that seems unlikely.

106. The withdrawal of a motion ordinarily would require the court’s permission.
107. To bring these issues into further relief, consider the conditional denial of a motion. Imagine that the motion to dismiss on ground of forum non conveniens is denied on the condition that the litigation will proceed according to a timetable that is more convenient for the defendants. Is anything short of an “objection” going to constitute “consent”? Again, the rational act of risk aversion is a rather dubious foundation for consent.