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

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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.

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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.[1] Because of legislative developments, the common law doctrine of forum non conveniens now is constrained almost exclusively to the realm of transnational litigation.[2] 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.[3] 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.[4] 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.

2. *See* Sinochem Int'l Co., Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430 (2007).

3. *See, e.g.,* Lin Lee-Huei v. Ortho-McNeil Pharm., Inc., No. 3:10 OE 40033, 2011 WL 3566855 (N.D. Ohio Aug. 12, 2011).

4. *See* RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (Oxford Univ. Pr. 2007); Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COLUM. L. REV. 1 (1929).

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 process in the other jurisdiction."[9] Still, courts have enjoyed "wide ambit to interpret" the inadequacy criterion, resulting in inconsistent decisions 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, 1948, Pub. L. No. 80-773, 62 Stat. 869, 937 (codified at 28 U.S.C.§ 1404(a) (2006)); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

6. *Piper*, 454 U.S. 235. For a three-step version of the test, *see* Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs., 421 F. Supp. 2d 741 (S.D.N.Y. 2006).

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 parties; (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 Convention and Progress in national Law,* 49 AM. J. COMP. L. 203, 212 (2001).

these factors tipped "strongly in favor of the defendant."[13] Today this presumption applies to domestic, but not foreign plaintiffs.[14]

Forum non conveniens motions are standard fare—and are increasingly successful—in transnational litigation.[15] 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.[16]

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.[17] Some appellate courts have even endorsed the use of conditions as a substitute for more rigorous application of the forum non conveniens factors.[18] The Supreme Court has never addressed the use of conditions in the context of forum non con-

13. *Id.* at 508.

14. *Piper*, 454 U.S. at 254.

15. *See generally* Cassandra Burke Robertson, *Transnational Litigation and institutional Choice,* 51 B.C. L. REV. 1081, 1092-93 (2010) (describing the increase in forum non conveniens decisions); Donald Earl Childress, III, *When* Erie *Goes International,* 105 NW. U. L. REV. (forthcoming 2012), available at: http://ssrn.com/abstract=1691799 (finding dismissal rates of 62%).

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.

17. Bank of Credit & Commerce Int'l (Overseas) Ltd. v. Bank of Pak., 273 F.3d 241, 247-48 (2d Cir. 2001); Zekic v. Reading & Bates Drilling Co., 680 F.2d 1107 (5th Cir. 1982) (encouraging the use of conditional dismissals).

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).

veniens dismissals; it has reviewed cases involving conditions, but did not address their validity.[19]

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.[20] 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.[21]

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-

19. *Piper*, 454 U.S. at 242.

20. *See generally* James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769 (1999).

21. *See generally* Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369 (2006); John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489 (2000); Richard D. Bertram, Note, *Conditional Orders of Dismissal for Forum Non Conveniens are Appealable "Final Decisions" Under 28 U.S.C. § 1291—Koke v. Phillips Petroleum Co.*, 9 MAR. LAW. 297 (1984).

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]

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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.").

23. *See, e.g.,* Banco De Serguros Del Estado v. J.P. Morgan Chase & Co., 500 F. Supp. 2d 251, 266 (S.D.N.Y. 2007); Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkasse, 535 F. Supp. 2d 403, 413 (S.D.N.Y. 2008).

24. *See supra* notes 20-21 and accompanying text.

25. *See* infra notes 32-33 and accompanying text.

26. *See, e.g., In re* Fantome, S.A., 232 F. Supp. 2d 1298, 1312 (S.D. Fla. 2002) ("Petitioners shall pay the expenses of all U.S. witnesses."); Nipuna Devi Dasi v. Air-India, No. 79 Civ. 4898 (RWS), 1981 U.S. Dist. LEXIS 9404, at *17 (S.D.N.Y. Jan. 26, 1981) ("[D]ismissal will be conditioned upon the payment of a reasonable sum of money to cover plaintiffs' counsel fees and travel expenses directly connected to the instant motions and immediate preparations for what was to be imminent."); Carney v. Singapore Airlines, 940 F. Supp. 1496, 1505 (D. Ariz. 1996)

Translation costs-Because litigation in the foreign forum may require plaintiff to incur translation costs, the defendant agrees to bear all of this expense.[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.[28]

Security-Because the foreign forum may require plaintiffs to post a bond as a condition of filing, the defendant waives this requirement.[29]

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

("Defendant will reimburse Plaintiffs for reasonable travel and lodging of the U.S. resident non-party witnesses in the event the Indonesian court will only allow live testimony.").

27. Bitton v. TRW, Inc., 93 Civ. 7407 (PKL), 1994 U.S. Dist. LEXIS 10881, at *10 (S.D.N.Y. Aug. 5, 1994) (defendants stipulate to provide translations of relevant documents "at their expense"); Duha v. Agrium, Inc., 340 F. Supp. 2d 787, 801 (E.D. Mich. 2004) (defendants agree to "translate, at their expense, all relevant documents into the Spanish language"); *In re* Air Crash Over the Taiwan Strait on May 25, 2002, 331 F. Supp. 2d 1176, 1213 (C.D. Cal. 2004) ("Defendants must bear the cost of translating English-language documents and witness testimony in Mandarin Chinese as necessary."); *In re Fantome, S.A.*, 232 F. Supp. 2d at 1310 ("Petitioners shall . . . bear the costs of translation."); Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 689-90 (S.D. Tex. 2004) ("The court's dismissal is conditioned on the Defendant's agreement to bear any translation-related expenses concerning the testimony of English-speaking witnesses at trial."); In re Air Crash Near Athens, Greece on August 14, 2005, 479 F. Supp. 2d 792, 805 (N.D. Ill. 2007) ("Defendant shall bear the cost of translating English-language documents in its custody or control into Greek as necessary.").

28. *See, e.g.*, Abouchalache v. Hilton Intern. Co., 464 F. Supp. 94, 95 (S.D.N.Y. 1978) (conditioned upon presentation to court of undertakings by defendants that they would waive claims for costs and attorney fees should they prevail in litigation in England); Gross v. Bbc, 02 Civ. 5251 (AKH), 2003 U.S. Dist. LEXIS 2211, at *2211 (S.D.N.Y. Feb. 14, 2003) (defendant required to waive "any right it might have under U.K. law as a prevailing party to seek costs and attorneys' fees from plaintiff"); McLane v. Marriott Int'l, 777 F. Supp. 2d 1302, 1321 (S.D. Fla. 2010) (defendants "waive any entitlement to costs and attorney's fees under Costa Rica law should it be the prevailing party."); Morse v. Sun Int'l Hotels Ltd., No. 98-7451-CIV-JORDAN, 2001 U.S. Dist. LEXIS 23488, at *28 (S.D. Fla. Feb. 26, 2001) (defendant "waive any entitlement to costs and attorneys fees under Bahamian law should they be the prevailing party, and shall waive their right to request that [plaintiff] post bond or security to cover the same.").

29. *See, e.g.*, Amermed Corp. v. Disetronic Holding AG, 6 F. Supp. 2d 1371, 1377 (N.D. Ga. 1998) ("all defendants agree to waive the bond for attorneys' fees permitted under Swiss law"); Erausquin v. Notz, Stucki Mgmt., 09 Civ. 7846 (WHP), 2011 U.S. Dist. LEXIS 95346, at *226 (S.D.N.Y. Aug. 25, 2011) (defendant agreed to waive the filing fees and bonds imposed by Swiss courts); Graf von Spee v. Graf von Spee, 558 F. Supp. 2d 223, 226 (D. Conn. 2008) ("Defendants agree to waive their right to demand that Plaintiffs post a bond before commencing any suit against them in Germany.") *See also* Gross v. BBC, 02 Civ. 5251 (AKH), 2003 U.S. Dist. LEXIS 2211, at *1 (S.D.N.Y. Feb. 14, 2003); Wiwa v. Royal Dutch Petroleum Co., 96 Civ. 8386 (KMW)(HBP), 1999 U.S. Dist. LEXIS 22352, at *3 (S.D.N.Y. Jan. 26, 1999) (defendants agree to "waive any security bond that might be required [in English courts]").

missal may require the defendant to "refrain[ ] from any interference with plaintiff's efforts to obtain an attorney on a contingency basis."[30]

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.[31]

Evidence-Because documentary evidence may be given different weight under an alternative procedural system, the defendant will stipulate to certain evidentiary matters.[32]

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30. *Gross*, 2003 U.S. Dist. LEXIS 2211, at *1.

31. Matson Nav. Co. v. Stal-Laval Turbin AB, 609 F. Supp. 579, 583 (N.D. Cal. 1985) ("Defendants agree to consolidate all proceedings in these disputes . . . into one action."); Syndicate 420 at Lloyd's London v. Early Am. Ins. Co., 796 F.2d 821, 829 (5th Cir. 1986) (dismissal conditioned "upon willingness of British court to permit joinder or intervention of the injured parties in the pending British litigation involving the insurers."); *see also id.* at 830-31.

32. Khan v. Delta Airlines, Inc., 10 Civ. 2080 (BMC), 2010 U.S. Dist. LEXIS 82293, at *32 (E.D.N.Y. Aug. 12, 2010) ("Defendants shall stipulate in the Canadian action that plaintiff's daughter requested of defendants' agent in New York to include a note in plaintiff's ticketing portfolio to request a wheelchair in Toronto, and the agent failed to do so."); Morse v. Sun Int'l Hotels Ltd., No. 98-7451-Civ-Jordan, 2001 U.S. Dist. LEXIS 23488, at *28 (S.D. Fla. Feb. 26, 2001) (defendant stipulates "to the authenticity and admission of [plaintiff's] Florida medical records); Purac, Inc. for Benefit of Firemen's Fund Ins. Co. v. Trafpak Services, Ltd., 694 F. Supp. 476, 477 (N.D. Ill. 1988) (defendant "consent to have the evidence originating in the U.S. producible and admissible pursuant to the liberal provisions of the Federal Rules of Civil Procedure and of Evidence . . . in the Netherlands."); Ionnidis/Riga v. M/V Sea Concert, 132 F. Supp. 2d 847, 848 (D. Or. 2001) ("stipulation by [defendant] that all depositions of witnesses and other documentary evidence obtained in the United States are admissible in a foreign court in lieu of live testimony."); Bitton v. TRW, Inc., No: 93 Civ. 7407 (PKL), 1994 U.S. Dist. LEXIS 10881, at *5 (S.D.N.Y. Aug. 5, 1994) (defendants "stipulate to the contents of the police and fire department records"); Ashley v. Dow Corning Corp., 887 F. Supp. 1469, 1479 (N.D. Ala. 1995) ("Each such defendant will not object to evidence offered in such tribunal that, if offered in federal courts of the United States, would have been admissible against it."); Feinstein v. Curtain Bluff Resort, 1998 U.S. Dist. LEXIS 11925, at *25 (S.D.N.Y. Aug. 5, 1998) (defendant concedes to "presentation [in Antigua] of the plaintiffs' medical testimony at trial by videotape); Gullone v. Bayer Corp., 408 F. Supp. 2d 569, 591 (N.D. Ill. 2006) ("Defendants agree to advise the U.K. court that they have no objection to the admissibility of depositions taken in the U.S. or other materials obtained in discovery in the U.S. simply on the basis that the depositions or other materials were obtained outside the U.K.); *In re* Air Crash near Peixoto De Azeveda, 574 F. Supp. 2d 272, 290 (E.D.N.Y. 2008) ("upon request by plaintiffs, defendants shall produce any witnesses or documents within their control presently located beyond the subpoena power of the Brazilian court, and such witnesses will appear for live testimony in Brazil if required by the Brazilian court, with the exception of [the pilot-witnesses] who may appear by videotaped or transcribed deposition, or letters rogatory if preferred by plaintiffs or the Brazilian courts."); Lleras v. Excelaire Servs., 08-3823-cv, 2009 U.S. App. LEXIS 27590, at *5 (2d Cir. Dec. 16, 2009) (defendants *will* submit to videotaped depositions in the United States and Defendants "will not object in Brazilian proceedings to the admissibility of those depositions on the basis of either (1)

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,

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the fact that the depositions were conducted in the United States or (2) the format of the testimony.").

33. Core Software Tech., Inc. v. ImageSat Int'l N.V., 08 Civ. 7017 (DC), 2010 U.S. Dist. LEXIS 1648, at *12 (S.D.N.Y. Jan. 5, 2010) (defendants "acknowledge their obligation to preserve all potentially relevant documents, including electronic documents."); Wilson v. ImageSat Int'l N.V., 07 Civ. 6176 (DLC), 2008 U.S. Dist. LEXIS 57897, at *28 (S.D.N.Y. July 30, 2008) (defendant agreed "to preserve documents and electronically stored information pending the filing of an Israeli action and for a reasonable time thereafter").

34. Sec. Ins. Co. of Hartford *ex rel.* JT Intern. Holdings, B.A. v. Old Dominion Freight Line, Inc., No. 02 Civ. 5258(GEL), 2003 WL 22004895, at *13 (S.D.N.Y. Aug. 22, 2003) ("[defendant] agreed that United States law will apply to this dispute" to be litigated in a Canadian court).

35. Bouvy-Loggers v. Pan Am, 15 Av. Cas. (CCH) P17,153, 1978 U.S. Dist. LEXIS 18792, at *8 (S.D.N.Y. Mar. 27, 1978) (defendants "concede liability for compensatory damages"); *In re* Air Crash over the Taiwan Strait on May 25, 2002, 331 F. Supp. 2d at 1213 ("Defendants may not contest liability for compensatory damages in any action refiled. . .."); *In re* Disaster at Riyadh Airport, Saudi Arabia, on Aug. 19, 1980, 540 F. Supp. 1141, 1147 (D.D.C. 1982) (defendants agreed to concede liability upon transfer [sic] to foreign forum); Jennings v. Boeing Co., 660 F. Supp. 796, 809 (E.D. Pa. 1987) (defendant will "not contest its liability for compensatory damages"); Leon v. Millon Air, Inc., 251 F.3d 1305, 1308 (11th Cir. 2001) (defendant concedes "primary liability for damage caused" by the crash); Orr v. Boeing Co., 15 Av. Cas. (CCH) P17,153, 1979 U.S. Dist. LEXIS 12786, at *13 (C.D. Cal. July 10, 1979) (defendant agrees not to contest liability); Pain v. United Techs. Corp., 637 F. 2d 775, 780 (D.C. Cir. 1980) (defendant agrees "to proceed directly to trial only on the issue of damages without contesting liability); Esheva v. Siberia Airlines, 499 F. Supp. 2d 493, 501 (S.D.N.Y. 2007) (defendant to "concede liability"); *Chhawchharia, v. Boeing Co.*, 657 F. Supp. 1157, 1163 (S.D.N.Y. 1987) (directing defendant not to contest liability if the foreign forum rejected its defense of release).

36. Marnavi Splendor GmbH & Co. KG v. Alstom Power Conversion, 706 F. Supp. 2d 749, 755-56 (S.D. Tex. 2010) (dismissed on the condition that all defendants to the French litigation stipulated to the full amount of the owner's damages).

the condition may be structured to cull those which will be litigated abroad from those which will not.[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.[38]

Immunity-Because the defendant may be immune to suit in the foreign forum, defendants agree to waive that defense.[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.[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.[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.[42]

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

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).

38. *See, e.g.,* Watson v. Merrell Dow Pharms., 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.").

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. . ..").

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.").

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. . ..").

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.[43]

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.[44] 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.[45]

43. Pain v. United Techs. Corp., 637 F.2d 775, 785 (D.C. Cir. 1980), *cert. denied,* 454 U.S. 1128 (1981).

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

45. *See, e.g.,* Dominguez v. Gulf Coast Marine & Assocs., No. 9:08-cv-200 (TJW), 2011 U.S. Dist. LEXIS 42703, at *51 (E.D. Tex. Apr. 20, 2011) ("Defendants agree to submit to discovery in the Mexican forum in accordance with the procedural rules of the Mexican court. . .. Defendants agree that they will make all relevant witnesses and documents available in Mexico to the extent consistent with Mexican law. . .. Defendants further agree that they will make any employee witness available for trial in Mexico to the extent consistent with Mexican law."); Carmejo v. Ocean Drilling & Exploration, 838 F.2d 1374, 1376 (5th Cir. 1988) ("Defendants agree to participate in discovery in accordance with Brazilian law."). *See also* German Free State of Bavaria v. Toyobo Co., 480 F. Supp. 2d 948, 957 (W.D. Mich. 2007) (defendant to "allow[ ] the widest possible use of discovery materials permissible under German law."); *In re* Air Crash at Madrid, Spain, 2011 WL 1058452 at * 9 (C.D. Cal. March 22, 2011) (defendants agree to "make available in Spain all evidence and witnesses located in the U.S. within their possession, custody, or control that the Spanish court deems relevant); Ministry of Health, Province of Ont., Can. v. Shiley, Inc., 858 F. Supp. 1426, 1491 (C.D. Cal. 1994) (defendant has assured compliance with discovery orders of the Canadian court. . . . Agreement to make documents in their possession in the United States available for inspection in Canada, as required by Canadian law, at defendants' expense.); Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 689 (S.D. Tex. 2004) ("The court's order of dismissal is conditioned on the Defendant's agreement to submit to discovery in the Venezuelan forum per its procedural rules."); STM Group, Inc. v. Gilat Satellite Networks Ltd., SACV 11-0093 DOC (RZx), 2011 U.S. Dist. LEXIS 79039, at *26 (C.D. Cal. July 18, 2011) (defendant agrees to "make available any evidence and witnesses within its control that Peruvian courts properly deem discoverable and relevant"); Taylor v. TESCO Corp. (US), 754 F. Supp. 2d 840, 849 (E.D. La. 2010) (dismissal conditioned on "defendants' agreement to submit to discovery in the Mexican forum in accordance with the procedural rules of the Mexican court."); Wiwa v. Royal Dutch Petrol. Co., 96 Civ. 8386 (KMW)(HBP), 1999 U.S. Dist. LEXIS 22352, at *3

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.[46] Naturally, not objecting to the introduction of otherwise inadmissible evidence could affect the outcome of the foreign proceeding.[47]

Further, some courts require defendants to agree to *ongoing* discovery in the United States as a complement to the foreign proceeding.[48] And still further, the condition may require that the defendant

(S.D.N.Y. Jan. 26, 1999) (defendants agree to "comply with all applicable discovery rules [in the English courts]"); Penwest Dev. Corp. Ltd. v. Dow Chem. Co., 667 F. Supp. 436, 443 (E.D. Mich. 1987) ("Dow allows the widest possible use of discovery materials from the Sarabond data base permissible under Canadian law or the Federal Rules of Civil Procedure, subject of course to the discretion of the Canadian courts.").

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.").

47. *See generally* Thomas O. Main, *The Procedural Foundation of Substantive Law,* 87 WASH. U. L. REV. 801, 824 (2010) (explaining consequences of mismatch between substantive and procedural law).

48. *See, e.g.,* Dowling v. Hyland Therapeutics Div., Travenol Laboratories, Inc. 767 F. Supp. 57, 60 (S.D.N.Y. 1991) ("defendants will afford plaintiffs discovery in the United States by any of the methods permitted by Rule 26 of the Federal Rules of Civil Procedure for actions conducted in the United States."); Patrickson v. Dole Food Co., No. 97-015161998 U.S. Dist. LEXIS 23661 at *83 (D. Haw. Sept. 9, 1998) (contemplating "expedited discovery in the United States under

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.[49] Because American discovery has more techniques and a broader scope than any other legal

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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.").

49. *See, e.g.,* Duha v. Agrium, Inc., 340 F. Supp. 2d 787,801 (E.D. Mich. 2004) (defendants agree to "allow discovery in the Argentine court of any materials that would be available under the Federal Rules of Civil Procedure in a United States court"); Amermed Corp. v. Disetronic Holding Ag, 6 F. Supp. 2d 1371, 1377 (N.D. Ga. 1998) ("Each defendant agrees to make available in the Swiss forum all relevant witnesses, depositions, and documents within its possession, custody, or control to the same extent they would be available in this forum."); Boskoff v. Transportes Aeroes Portugueses, No. 79 C 4771,1983 U.S. Dist. LEXIS 16547 at *10, 13 (N.D. Ill Jun. 1, 1983) ("defendants submit to Portuguese jurisdiction . . . and submit to pretrial discovery governed by American rules."); Guimond v. Wyndham Hotels, No. 95 Civ. 0428 1996 U.S. Dist. LEXIS 7255 at *16 (S.D.N.Y May, 28, 1996) (defendant concedes to "applicability of the Federal Rules of Civil Procedure to discovery if this action is refiled in Jamaica); I.P.I.C., GSP, S.L. v. ruhrpumpen, Inc., No. 08-CV-0510-CVE-PJC, 2009 U.S. Dist. LEXIS 117557 at *30 (N.D. Okla. Dec. 17, 2009) ("Defendants shall make available for use in the Mexican court any discovery materials available in this Court."); In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 847 (S.D.N.Y. 1986) (defendants to be "subject to discovery under model of United States Federal Rules of Civil Procedure after appropriate demand"); Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1358 (1st Cir. 1992) ("defendants shall make available in the Republic of Turkey all evidence within their control, including testimony of their officers and employees, at least to the extent that such evidence would have been available to plaintiffs in the district court proceedings in the District of Massachusetts."); Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 (11th Cir. 2001) (defendant agrees to "conduct all discovery in accordance with the Federal Rules of Civil Procedure, and voluntarily producing documents and witnesses within the United States."); Stewart v. Dow Chemical Co., 865 F.2d 103, 104-105 (6th Cir. 1989) (defendant to "allow discovery in the Canadian court of any materials which would be available under the Federal Rules of Civil Procedure in a United States court."); AmerMed Corp. v. Disetronic Holding AG, 6 F. Supp. 2d 1371, 1377 (N.D. Ga. 1998) ("Each defendant agrees to make available in the Swiss forum all relevant witnesses, depositions, and documents within its possession, custody, or control to the same extent they would be available in this forum.").

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.

53. *See, e.g.,* BBC Chartering & Logistic GmbH & Co. k.g. v. Siemens Wind, 546 F. Supp. 2d 437, 451 S.D. Tex. 2008); Amermed, *supra* note 49, at 1377; Banco Latino v. Gomez Lopez, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998); Bougioukas v. E.N. Bisso & Son, Inc., No. 87-3993, C/W 88-1198 1988 U.S. Dist. LEXIS 13097 at *10 (E.D. La. Nov. 7, 1988)) ("[T]he defendants formally agree to . . . make available in [the Greek forum] all relevant witnesses or, in lieu thereof, to schedule depositions at a reasonable time and place, and to make available any documents within their control. . .."); Dawson v. Compagnie Des Bauxites De Guinee, 593 F. Supp. 20, 28 (D. Del. 1984) ("[B]ecause there is a slight possibility there may be evidence unknown located in the United States under [defendant's] control which must be made available to plaintiff for a fair adjudication, the defendant must agree to make available at its own expense any such documents, witnesses or other evidence which may be needed for a fair adjudication in the Republic of Guinea."); De Lourdes Ruelas Aldaba v. Michelin N. Am., Inc., No. C 04-5369 (MHP), 2005 U.S. Dist. LEXIS 37934 at *32 (N.D. Cal. Dec. 22, 2005) (defendant agrees to "make all of its witnesses and evidence available for the proceedings in Mexico."); De Melo v. Lederle Laboratories, Div. of American Cyanamid Corp., 801 F.2d 1058, 1059 (8th Cir. 1986) (defendants "agree to make available any documents or witnesses within its control necessary for the fair adjudication of [plaintiff's] claim."); Farma-Tek Ilac San. Ve Tic Ltd. STI v. Dermik Labs, No. 09-3705, 2011 U.S. Dist. LEXIS 34965 at *11 (E.D. Pa. March 31, 2011) (defendant "stipulate[s] to produce in Turkey witnesses and documents under their control in Pennsylvania"); Fredriksson v. Sikorsky Aircraft Corp., No. 3:08 CV40 (WWE), 2009 U.S. Dist. LEXIS 89443 at *65 (D. Conn. Sept. 2, 2009) ("defendants [will] make available for discovery and for trial, at their own ex-

foreign court order the production? Must the plaintiff demand the production? Which jurisdiction's defenses to production (e.g., the law of privilege) apply? Even more imprecise is the condition that defendant will "comply with all reasonable discovery requests."[54] Similarly, the defendant may enter the court with the condition that she "will exercise its best efforts to expedite discovery."[55]

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pense, any documents, or witnesses, including retired employees, within their control that are needed for a fair adjudication of the plaintiffs' claim."); Gambra v. Int'l Lease Fin. Corp., 377 F. Supp. 2d 810, 828 (C.D. Cal. 2005) (defendant to "make available in [the contemplated French action] any evidence and witnesses in their possession, custody, or control in the United States that the French courts properly deem discoverable and relevant to the resolution of any issue before them."); In re Air Crash Over the Taiwan Strait on May 25, 2002, 331 F. Supp. 2d 1176, 1213 (C.D. Cal. 2004) ("Defendants must provide plaintiffs with access to all evidence and witnesses in their custody or control, whether located in the United States or elsewhere, that are relevant to liability and/or damages issues raised in subsequent actions filed by plaintiffs. . .."); Lie v. Boeing Co., 2004 , No. 04C 2460, 2004 U.S. Dist. LEXIS 11978 at *8(N.D. Ill. June 28, 2004) (defendant agrees "to make witnesses who have relevant knowledge and who are within [defendant's] control available not only during a trial in Indonesia but also, prior to trial, at such times and in such fashion as Indonesian law permits."); Miller v. Boston Sci. Corp., 380 F. Supp. 2d 443, 457 (D.N.J. 2005) ("Defendant agrees to make available, at its own expense, any documents or witnesses within its control needed for fair adjudication of any action brought in Israel by the Plaintiffs."); Pinder v. Moscetti, 666 F. Supp. 2d 1313, 1321 (S.D. Fla. 2008) ("Defendants must provide [plaintiff] with access to all evidence and witnesses in their custody or control, whether located in the United States or elsewhere, that are relevant to any action arising from the accident in question filed in the Bahamas by [plaintiff]."); Pirkko Onverva Kopperi v. Sikorsky Aircraft Corp., No. 3:08CV451 (WWE), 2009 U.S. Dist. LEXIS 129857 at *64 (D. Conn. Sept. 2, 2009) ("Defendants make available for discovery and for trial, at their own expense, any documents, or witnesses, including retired employees, within their control that are needed for a fair adjudication of the plaintiffs' claims."); Watson v. Merrell Dow Pharmaceuticals, Inc., 769 F.2d 354, 769 (6th Cir. 1985) ("Defendant must agree to make available any documents or witnesses within its control that are necessary for fair adjudication of any action brought in the United Kingdom by the plaintiffs on their claims."); BBC Chartering & Logistic GmbH & Co. K.G. v. Siemens Wind Power A/S, 546 F. Supp. 2d 437, 451 (S.D. Tex. 2008) ("Defendants shall make available in the German court proceedings all relevant documents and witnesses within their control."); In re Air Crash Near Athens, Greece on August 14, 2005, 479 F. Supp. 2d 792, 805 (N.D. Ill. 2009) ("Defendant shall provide plaintiffs with access, in Cyprus or Greece, to all evidence and witnesses in their custody or control that are relevant to any issue raised in actions refiled in Cyprus or Greece").

54. Micro Agri-Equipment v. Sperry-New Holland Div. of Sperry, Inc., No. 85-5397, 1985 U.S. Dist. LEXIS 13038 at *1 (E.D. Pa. Dec. 9, 1985). *See also* Taylor v. Daimler Chrysler Corp., 196 F. Supp. 2d 428, 435 (E.D. Tex. 2001) (defendants agree to "produce in Nuevo Leon, Mexico all reasonable discovery requests by the plaintiffs.").

55. Neo Sack, Ltd. v. Vinmar Impex, Inc., 810 F. Supp. 829, 832 (S.D. Tex. 1993). *See also* Orr v. Boeing Co., No. 79-526, 1979 U.S. Dist. LEXIS 12786 at *13 (C.D. Cal. Apr. 25, 1979) (assurance that "airline would go to trial promptly on the issue of damages."); Purac, Inc. for Benefit of Firemen's Fund Ins. Co. v. Trafpak Services, Ltd., 694 F. Supp. 476, 477 (N.D. Ill. 1988) (defendant to "proceed expeditiously"); Simcox v. McDermott Intern., Inc., 152 F.R.D. 689, 701 (S.D. Tex. 1994) *disagreed with*, 879 F. Supp 464 (1995) (defendants to "exercise best efforts to expedite a trial setting in the foreign proceeding."); Tjontveit v. Den Norske Bank ASA, 997 F. Supp. 799, 813 (S.D. Tex. 1998) (Defendant "shall exercise its best efforts to expedite a trial setting in the Norwegian proceeding. . ..").

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.[56] 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.[57] 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.[58] Similarly, other courts condition the dismissal on assurance of insurance policy coverage for any eventual judgment.[59]

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.[60] And conditions can change the procedural law that would govern the foreign proceeding—by redefining the corpus of evidence

56. Dominguez-Cota v. Cooper Tire & Rubber Co., 284 F. Supp. 2d 444, 454 (N.D. Miss. 2003), *vacated by* 396, F.3d. 650 (2005).

57. *See generally* McCAFFREY & MAIN, *supra*, at 613-631.

58. *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 Transpapel, 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.NY. 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 Phillipine 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.").

59. 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.").

60. *See* Main, *supra* note 47, at 803.

and/or restructuring litigation incentives.[61] 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[62]

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.[63] 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.[64] This assumption allows us to focus on the

61. *See id. at 822.*

62. This part relies heavily on my prior work. *See* Thomas O. Main, *Judicial Discretion to Condition,* 79 TEMPLE L. REV. 1075 (2006).

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).

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]

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discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."); *Alfadda v. Fenn,* 159 F.3d 41, 45 (2d Cir. 1998) (concluding that review is "severely cabined").

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,[67] insensitive to foreign policies and procedures,[68] or "r[a]n afoul of a basic principle of forum non conveniens law."[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.[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-

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).

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.").

69. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW) (HBP) 1999 U.S. Dist. LEXIS 22352 at *4 (S.D.N.Y. Jan. 20, 1999).

70. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738-745 (2001) (noting that federal courts' powers come from positive legislative grant, inherent authority, and consent).

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.

71. *See* Elizabeth T. Lear, *Congress, The Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 Iowa L. Rev. 1147, 1196 (2006).

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.

79. 28 U.S.C. § 1782.

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

80. FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 37 (1994).

81. Daniel J. Meador, *The Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805 (1995).

82. *See* Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380, 388 (1947).

83. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)) (emphasis added).

84. Degen v. United States, 517 U.S. 820, 823 (1996), *superseded by statute,* 617 F. Supp. 2d. 103 (2007) (citing *R*oadway Exp., Inc. v. Piper, 447 U.S. 752, 764 (1980) *superseded by statute,* 749 F.2d 217 (1984)).

85. Young v. United States ex rel. Vuitton, 481 U.S. 787, 819-820 (1987) (Scalia, J., concurring).

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.[87] The Justices have generally avoided the larger constitutional questions by focusing on the individual inherent power involved in each case.[88] The parameters of inherent judicial authority seem narrow given the "necessity" definition and the Court's frequent admonition that it be exercised cautiously.[89] 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.[90]

Although unclear in its scope, the authority to "manage litigation" is often listed among the inherent powers of federal courts.[91] This authority is usually traced to *Link v. Wabash Railroad*,[92] 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.[93] In upholding the district court's inherent authority, the Supreme Court described the district court's power to dismiss as one of "ancient origin."[94] The Court found that the power to dismiss was "necessary in order to prevent undue delays in the disposition of

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jurisdiction, and operations. Third, . . . Congress makes federal law, both substantive and procedural, which judges merely interpret and apply.

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

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)).

92. 370 U.S. 626 (1962).

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

94. *Id.* at 630.

pending cases and to avoid congestion in the calendars of the District Courts."[95] 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."[96]

It is under this "managing litigation" rubric that federal courts have the inherent authority to dismiss a case on forum non conveniens grounds.[97] 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.[98] 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.[99]

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."[100] 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.

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95. *Id.* at 629.

96. *Id.* at 630-31.

97. American Dredging Co. v. Miller, 510 U.S. 443, 453 (1994).

98. Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 Iowa L. Rev. 1147 (2006).

99. *Id.*

100. Chambers v. NASCO, Inc., 501 U.S. 32, 63 (1991) (Kennedy, J., dissenting).

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.

102. *See generally* JOSEPH RAZ, LEGITIMATE AUTHORITY, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 3, 19-25 (1976) (discussing necessity of distinction to prevent "endless confusion" on questions of legitimacy).

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

104. *See* Robert O. Keohane & Joseph Nye, Jr., *Power and Interdependence in the Information Age*, 77 FOREIGN AFF. 81, 86-88 (1998) (distinguishing between "hard" power exercised through threats and rewards and "soft" power exercised through persuasion). *See generally* STEVEN LUKES, POWER: A RADICAL VIEW (1974).

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.[105] 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.[106] 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.[107]

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.

105. *See* David L. Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. REV. 543, 577-78 (1985).

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.