

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HAIDEE IRAGORRI,)	
)	
<i>Plaintiff</i> ¹)	
)	
v.)	<i>Docket No. 98-236-P-H</i>
)	
INTERNATIONAL ELEVATOR, INC.,)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

Pursuant to the doctrine of *forum non conveniens*, the defendant, International Elevator, Inc., a Maine corporation doing business only in the country of Colombia, moves to dismiss this action, which has been transferred to this district from the District of Connecticut due to a lack of personal jurisdiction over the defendant corporation in that district. I recommend that the court grant the motion.

I. Factual and Procedural Background

The plaintiff, the widow of Mauricio Irigorri and the ancillary administratrix of his estate,

¹ The amended complaint and the papers filed in this action by the plaintiff speak in terms of multiple plaintiffs but in fact there appears to be only one plaintiff. Haidee Irigorri brings this action on her own behalf and in her capacity as ancillary administratrix of the estate of her late husband on behalf of his survivors, including their two children. Amended Complaint (Docket No. 9) ¶ 4. For that reason I will treat this action as one involving a single plaintiff and all references in this recommended decision will be in the singular.

is domiciled in Florida, as are the two children of her marriage to Mr. Iragorri. Amended Complaint ¶¶ 2, 4. On October 3, 1992 Mauricio Iragorri fell to his death in an elevator shaft in an apartment building in Cali, Colombia. *Id.* ¶¶ 11, 19-20. The Iragorris were all naturalized United States citizens at the time of Mr. Iragorri's death. Responses to Defendants' First Set of Interrogatories and Requests for Production, Exh. 1 to Memorandum in Support of Renewed Motion to Dismiss Re: Forum Non Conveniens ("Defendant's Memorandum"), attached to Motion to Dismiss (Docket No. 8), at 5. The plaintiff and the two children were living in Colombia at the time in order to allow the children to spend a year in school there. Affidavit of Haidee Iragorri-Smith, Exh. F to Plaintiffs' Appendix in Opposition to Defendant's Motion to Dismiss ("Plaintiff's App."), filed with Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss Based on Forum Non-Conveniens ("Plaintiff's Memorandum") (Docket No. 13), ¶ 3.

During the evening of October 2, 1992 an employee of the defendant endeavored to repair the elevators at the Cali apartment building where Mr. Iragorri met his demise. Amended Complaint ¶ 14. The employee opened at least one of the doors to the elevators on the fifth floor in the course of his attempted repair. *Id.* ¶ 16. He left without completing the repairs, and neither elevator was operable that night. *Id.* ¶ 17; Testimony of Gerardo Ortiz Osorio ("Ortiz Test."), Tab 2 to Affidavit of Brenda Feliciano, Exh. C to Plaintiff's App., at 1. Mr. Iragorri visited his mother's apartment on the fifth floor of the apartment building after midnight that night. Amended Complaint ¶ 19. A screwdriver belonging to the defendant's employee was found wedged in the track of the open doors to an elevator shaft on the fifth floor immediately after the accident. Testimony of Danilo Osorio Garcia, Exh. B to Affidavit of Edgar Alvarez, Exh. B to Plaintiff's App., at 2; Ortiz Test. at 2-3.

The plaintiff brought this action against International and two other defendants in the District

of Connecticut in September 1994. Complaint (Docket No. 1-B) at 1-2. Finding that it lacked personal jurisdiction over International, the Connecticut court transferred the case against International to the District of Maine by order dated May 15, 1998. Docket No. 1-C. The case remains pending in the District of Connecticut against the remaining two defendants. *Id.* The amended complaint alleges wrongful death based on negligence and “recklessness,” and loss of consortium, in six counts.

II. Applicable Law

“A district court may dismiss a case if there is an adequate alternative foreign forum that is fair and substantially more convenient for the parties and the courts.” *Scott v. Jones*, 984 F. Supp. 37, 47 (D. Me. 1997). “The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). The burden is on the defendant to prove the availability of an adequate alternative forum “and that considerations of convenience and judicial efficiency strongly favor litigating the claim in the alternative forum.” *Nowak v. Tak How Inv., Ltd.*, 94 F.3d 708, 719 (1st Cir. 1996).

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; possibility of view of premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Gilbert, 330 U.S. at 508. These are often called the “private interest” factors applicable to the

doctrine.

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

Id. at 508-09. These are sometimes called the “public interest” factors applicable to the doctrine.

A plaintiff may not defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternate forum is less favorable to the plaintiff; that factor should not be given substantial weight in the inquiry unless the remedy provided by the alternate forum is “so clearly inadequate or unsatisfactory that it is no remedy at all.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247, 254 (1981). There is a strong presumption in favor of a plaintiff’s forum choice, *Nowak*, 94 F.3d at 719, but the plaintiff’s choice of forum deserves less weight when it is not his home forum, *Reyno*, 454 U.S. at 255-56. The deference accorded the plaintiff’s choice of forum is enhanced when the chosen forum is one in which the defendant maintains a substantial presence. *Mercier v. Sheraton Intern., Inc.*, 981 F.2d 1345, 1354 (1st Cir. 1992) (“*Mercier II*”). The First Circuit has directed district courts to ask “Is the relation between the chosen forum and the lawsuit so attenuated that conducting the case in the chosen forum seems an ‘imposition’ on the court?” *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 947 (1st Cir. 1991).

“[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the

ends of justice.” *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947).

III. Discussion

The only tie between this case and the state of Maine is the fact that the defendant is a Maine corporation and has been since 1924. Articles of Incorporation, Exh. D to Plaintiff’s App. None of the potential witnesses identified by either side resides in Maine, none of the events giving rise to the action occurred in Maine, and Maine law will not apply. The plaintiff argues that Florida law will apply; the defendant contends that the law of Colombia is applicable. I assume that the plaintiff did not bring this action in Florida, a jurisdiction that would be physically more convenient and more appropriate under many of the *Gilbert* criteria than is the District of Maine, due to a likely lack of personal jurisdiction over the defendant in that forum.

The defendant provides support through the affidavit of Carlos Umaña, a Colombian attorney, for its argument that the remedies provided by Colombia, the alternative forum which it contends provides the basis for dismissal of this action, are neither so inadequate nor so unsatisfactory that they constitute no remedy at all, the test established by *Reyno*. Affidavit of Carlos Umaña (“Umaña Aff.”), Exh. 8 to Defendant’s Memorandum, ¶¶ 2, 4-10. The defendant also argues that Connecticut, not Maine, was the plaintiff’s chosen forum, so that the choice-of-forum factor should bear no weight in this court’s consideration of its motion to dismiss.

With regard to the “private interest” factors set forth in *Gilbert*, the defendant argues that the sources of proof concerning the accident and the plaintiff’s claims are in Colombia; that most of the potential witnesses speak only Spanish and that most if not all of the relevant documents are written in Spanish; that none of the Colombian witnesses are subject to the compulsory process of this court;

that the financial burden of transporting witnesses from Colombia to Maine and providing translation is unduly high; that it will be disadvantaged by the need to present most of its case to a Maine jury by videotape, assuming the voluntary compliance of witnesses in Colombia; that there can be no view of the scene if the case is tried in Maine; and that it will be unable to implead other potentially responsible parties, all of whom are Colombian residents, in an action in Maine.² Addressing the *Gilbert* “public interest” factors, the defendant contends that Colombian law applies to the plaintiff’s claims and that Maine and its residents who would be called to serve on the jury to try this case have no relation to the litigation.

The plaintiff argues in response that the court must defer to her choice of forum as an American citizen when the alternate forum is in a foreign country; that the focus of analysis should be on the connections that her claims (brought on her own behalf and on behalf of her children) have with the United States, not with Maine; that the defendant was owned until 1988, when it was sold for a nominal amount, by the now-named Otis Elevator Company, a Connecticut corporation that does business in the United States and for which the defendant acts as an agent and distributor; that a limitation on damages in Colombian courts, as well as the unavailability of a jury trial, renders those courts inadequate as an alternate forum; that the plaintiff’s expert witnesses reside in New Hampshire and Florida and will likely be unwilling to travel to Colombia to testify; that she may call fact witnesses who reside in Connecticut; that the defendant, if found liable, may seek contribution from the Colombian third parties that it would not be able to join in this action in a subsequent action

² This latter factor clearly favors the defendant’s position. *Reyno*, 454 U.S. at 259.

in the Colombian courts; that Florida, not Colombian, law applies to her claims;³ and that it would be “tremendously inconvenient, oppressive, expensive and dangerous for the Plaintiffs to have to litigate this case in Colombia,” Plaintiff’s Memorandum at 12, primarily due to the danger to Americans in Colombia expressed in a travel warning issued by the United States Department of State dated March 26, 1998, Exh. I to Plaintiff’s App.

The defendant’s arguments concerning the *Gilbert* “public interest” factors are valid, although none of those arguments, either alone or taken together, is necessarily dispositive. The defendant is also correct in its assertion that jury duty in this case, if it were tried in Maine, would be imposed upon the residents of a forum that has no relation to the litigation. Whether Florida’s or Colombia’s substantive law applies,⁴ it is also true that if this court were to try this case it would have to “untangle problems in conflict of laws” and that it is not “at home with the . . . law that must govern the case.” *Gilbert*, 330 U.S. at 508-09. *Gilbert*’s concern in this regard, however, must be modified by the experience of the federal courts in the past forty-one years. Federal courts are experienced in applying foreign law and the burden of doing so is not very significant. *In re Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980*, 540 F. Supp. 1141, 1153 (D.D.C. 1982) (Saudi Arabian law). This factor is given little weight in analysis of *forum non conveniens* motions in the

³ In support of this point, and several others, the plaintiff cites unreported decisions of various United States courts. The defendant appropriately objects to this use of unreported case law as authority. Defendant’s Reply Memorandum (Docket No. 16) at 3 n.1. The First Circuit has directed that unpublished opinions are never to be cited in unrelated cases, including litigation before district courts. *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.5 (1st Cir. 1988). This court thus cannot rely on such opinions, even as persuasive authority. *People’s Heritage Sav. Bank v. Recoll Management*, 814 F. Supp. 159, 163 n.8 (D. Me. 1993).

⁴ This court need not decide this issue in order to rule on the application of the doctrine of *forum non conveniens*. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 771 (9th Cir. 1991).

First Circuit due to the familiarity of federal courts with the task of deciding foreign law. *Nowak*, 94 F.3d at 721.

The plaintiff is correct in pointing out that the defendant may seek relief against third parties in Colombia in a separate action after the conclusion of this lawsuit, assuming that there will be no problems with statutes of limitations or recognition of an American court judgment.⁵ The plaintiff's remaining assertions require some discussion.

First, the plaintiff is not a resident of Maine and has chosen Maine as a forum only because the court in the District of Connecticut determined that it did not have personal jurisdiction over the defendant. The only sense in which Maine can be said to be a "convenient" forum for the plaintiff is that it is a forum in the United States, as opposed to Colombia. The plaintiff relies on *Mercier v. Sheraton Intern., Inc.*, 935 F.2d 419 (1st Cir. 1991) ("*Mercier I*"), to support her argument that the court must defer to her "choice" of Maine as a forum because the alternative forum is foreign. The First Circuit in *Mercier I* did conclude that the district court erred in comparing the forum state's interest in the litigation with that of Turkey, the alternate forum, when the plaintiffs were not residents of the forum state but were United States citizens, as was the corporate defendant.⁶ 935 F.2d at 429-30. However, the First Circuit clearly did not hold in *Mercier I* that a district court *must* defer to a plaintiff's choice of forum under such circumstances. Indeed, after remand the district court again granted the motion to dismiss in favor of Turkey as an appropriate forum, and the First

⁵ Such separate proceedings are not favored. *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993).

⁶ The plaintiff's arguments concerning past ownership of the defendant or its role as the agent in Colombia of another American corporation are irrelevant with respect to this or any other point to be made in the analysis required by *Gilbert*.

Circuit upheld that decision. *Mercier II*, 981 F.2d at 1354-58. In addition, the First Circuit in *Mercier II* specifically rejected the interpretation of *Mercier I* urged by the plaintiff here — that the district court may not consider the attenuated connection between the matter in litigation and the particular forum selected in the United States. To the contrary, “the trial court may weigh, as a subsidiary consideration, any attenuated connection between the particular United States forum and the matter in litigation.” 981 F.2d at 1355.

The plaintiff next argues that Colombia does not provide an adequate forum because it imposes a limit on damages,⁷ an assertion disputed by the defendant, and does not provide a jury trial. To support this assertion she submits evidence of two wrongful death cases tried in Colombian courts, one in 1993 and one in 1995, in which damages of approximately \$1,100 and \$457 were awarded, and a case in which the award was \$4,574 to a plaintiff who “had his leg shortened and lost a testicle.” Plaintiff’s Memorandum at 8. Nothing in the material submitted to the court suggests whether this selection of cases is typical or representative or whether the factual circumstances in these cases were comparable to those presented by the instant case. In any event, the possibility of a lesser recovery in the foreign forum does not render that forum inadequate. *Reyno*, 454 U.S. at 255 (fact that potential damages award to decedent’s relatives may be smaller does not create danger that they will be deprived of any remedy or treated unfairly); *Alcoa Steamship Co. v. M/V Nordic Regent*,

⁷ The plaintiff’s assertion that the affidavit she submitted in support of her argument on this point “states that in civil actions, not based upon breach of contract, damages are limited to fifteen thousand dollars (\$15,000) in U.S. monies,” Plaintiffs’ Memorandum at 8, misrepresents the content of that affidavit. In fact, the affiant states “In Colombia, recovery for pain and suffering is limited to U.S. \$15,000.00.” [Affidavit of Hugo Escobar Sierra], Exh. L to Plaintiffs’ App., ¶ 5. The affidavit submitted by the defendant establishes that recovery for pain and suffering is only one of two types of damages available on such claims in Colombia, the other being “material damages” for economic loss. *Umaña Aff.* ¶¶ 6-10.

654 F.2d 147, 159 (2d Cir. 1980) (prospect of recovering \$570,000 in Trinidad courts rather than \$8,000,000 in Southern District of New York did not render foreign forum inadequate), cited with approval in *Howe*, 946 F.2d at 952. Similarly, the fact that the foreign forum does not provide a jury trial does not mean that the forum is inadequate. *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996) (upholding dismissal of action; alternate forum France); *Lockman Found.*, 930 F.2d at 768 (action brought in California; alternate forum Japan).

The plaintiff next argues that she may call unidentified fact witnesses who reside in Connecticut and expert witnesses who reside in New Hampshire and Florida⁸ and that these witnesses may not be willing to travel to Colombia to testify. The plaintiff has provided insufficient information concerning the potential fact witnesses to allow the court to evaluate the possible relevance and materiality of their proposed testimony and those witnesses can accordingly not be considered further in the evaluation of this motion. The convenience of expert witnesses is of little significance in consideration of a motion invoking *forum non conveniens*. *Dwyer v. General Motors Corp.*, 853 F. Supp. 690, 693 (S.D.N.Y. 1994) (motion to transfer).⁹

The plaintiff's argument based on the State Department travel advisory for Colombia is perhaps the strongest one she presents. All other things being equal, an American citizen should not

⁸ The plaintiff's representation that she may call an expert witness who resides in Maine, Plaintiff's Memorandum at 13, is unsupported by any information in the materials submitted by the plaintiff to the court in connection with this motion. The source cited in support of this statement, the affidavit of Anthony J. Natale ("Natale Aff."), Exh. N to Plaintiff's App., lists two mental health care providers in Florida and two potential experts who are "located" in New Hampshire. *Id.* ¶¶ 3-5.

⁹ If the plaintiff does bring this claim in the Colombian courts, she may endeavor to secure expert witnesses, other than treating medical professionals, in Colombia. If she prefers to use the American liability experts with whom her counsel has been in contact with respect to this negligence claim, she may presumably present their testimony through written or videotape deposition if they are in fact unwilling to travel to Colombia.

be relegated to a forum in which her life may be endangered in order to obtain redress against a tortfeasor that is also available in a safer forum. The plaintiff relies on *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 712 F. Supp. 383, 393 (S.D.N.Y. 1989), to support her argument. However, in that case the court specifically noted that the “alleged civil and political chaos in Bolivia,” which had also been invoked by the defendant to justify its failure to make timely responses, was not controlling and resolution of the parties’ dispute on that point was “not strictly necessary” in order for it to rule on the motion to dismiss in favor of Bolivia as an alternate forum. *Id.* Further, in the case at hand, all other things are not equal.

In *Mercier I*, the plaintiff had fled Turkey, where she was charged with assault, and would probably be arrested if she reentered that country. 935 F.2d at 422. The First Circuit “share[d] the district court’s doubts that [the plaintiff’s] personal difficulties with the Turkish system — as opposed to a showing of Turkish justice’s systematic inadequacy — can provide an appropriate basis for a finding that Turkey is an inadequate forum.” *Id.* at 427. In *Shields v. Miryung Const. Co.*, 508 F. Supp. 891 (S.D.N.Y. 1981), the plaintiff, a resident of Arizona, objected to the South Korean defendant’s motion to dismiss in favor of Saudi Arabia as a forum on the grounds, *inter alia*, that his safety would be endangered in Saudi Arabia and that he would be detained in Saudi Arabia pending resolution of the legal dispute. *Id.* at 892, 896. The court rejected these concerns in the absence of supporting evidence. *Id.* at 896. Here, not only is there no expert opinion offered on the likelihood of danger to the plaintiff and her children should they reenter Colombia, but also the plaintiff and her children resided in Colombia for at least fifteen months in 1991 and 1992, despite the existence of a State Department travel advisory in existence at that time, albeit one cast in somewhat less urgent terms, Exh. 9 to Defendant’s Memorandum; the plaintiff has close relatives

who are resident in Colombia; the plaintiff and at least one of her children were Colombian nationals before becoming United States citizens; the plaintiff's children lived in Colombia in 1991-92 so that they could become fluent in the language; and the plaintiff has made no showing of personal danger, as compared to generalized danger to Americans traveling in Colombia. These factors make the State Department directive a less compelling factor in this case than it might otherwise be.

The plaintiff has also suggested, in passing, that she and the estate she represents have "far fewer financial resources than" the defendant. Plaintiff's Memorandum at 10. This assertion is not supported by any evidence, but even if it were established, that fact that the financial resources of the plaintiff and the estate are less than those of the defendant is not relevant unless the plaintiff shows that she and the estate are financially unable to proceed in the alternate forum. *See Mercier II*, 981 F.2d at 1353; *Howe*, 946 F.2d at 953 (*Gilbert* "public interest" and "private interest" factors substantially outweighed plaintiff's suggestion in his affidavit that he would find it financially difficult to litigate in foreign forum).¹⁰ The plaintiffs have made no such showing.

"[I]nability to bring [witnesses] here for live cross-examination before a factfinder" is "[p]erhaps the most significant problem" making adjudication in a United States court inappropriate. *Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978), quoted with approval in *Howe*, 946 F.2d at 951-52. It is apparent that the fact witnesses with the most material testimony are located in Colombia.¹¹ It is also apparent that, at least in the case of Ortiz, the defendant's employee who

¹⁰ In this regard, it is significant that the cost of translation and the delay inherent in translation would be lessened in a Colombian court, a factor that "militates strongly in favor of [the foreign forum] as a more appropriate forum for this litigation." *Blanco v. Banco Industrial de Venezuela*, 997 F.2d 974, 982 (2d Cir. 1993).

¹¹ *See, e.g., Thomson Info. Servs., Inc. v. British Telecomm.*, 940 F. Supp. 20, 24 (D. Mass. 1996) (inquiry must focus not on number of witnesses resident in foreign forum but on materiality

inspected the elevators on the night of the incident giving rise to this action and who may or may not have left the elevator doors open on the fifth floor and may or may not have left his screwdriver wedging one of those doors open, and Osorio, the security guard who may or may not have said that the decedent appeared intoxicated shortly before he fell, witness credibility is a major issue. It is for this reason that the plaintiff's reliance on Fed. R. Civ. P. 28(b) and 28 U.S.C. § 1781, which deal with the use of process to require the taking of depositions in a foreign country, are unavailing as the basis for her assertion that the defendant's argument based on the inability of this court to issue process binding the Colombian witnesses should be ignored. *Mercier II*, 981 F.2d at 1355-56 (where credibility of pivotal witness is crucial, deposition testimony and letters rogatory are less than satisfactory substitutes for in-person testimony). *See also Howe*, 946 F.2d at 952.

In this case, the *Gilbert* "private interest" factors favor the defendant, as do the "public interest" factors, although to a lesser extent. The principal factors in favor of the plaintiff's position are the "strong presumption favoring the American forum selected by American plaintiffs," *Mercier II*, 981 F.2d at 1355, and the possible risk of danger to the plaintiff and her children inherent in litigating their claims in Colombia. The reality is that it is likely that, in either forum, certain witnesses will not appear in person. Under these circumstances, it is particularly important that those witnesses whose credibility is already in issue and whose testimony is central to the plaintiff's claim appear in person before the finder of fact. While neither forum alternative in this case is particularly satisfactory, I conclude that the defendant's motion to dismiss should be granted, conditioned on the defendant's willingness to stipulate that it will satisfy any judgment rendered by the Colombian courts and that it will submit to the jurisdiction of the Colombian courts. *See Baumgart v. Fairchild*

and importance of their anticipated testimony).

Aircraft Corp., 981 F.2d 824, 836 n.13 (5th Cir. 1993).

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED**, provided that the defendant first stipulates in writing that it will submit to the jurisdiction of the courts of the country of Colombia and satisfy any judgment that may be rendered against it by those courts in any action brought against it by this plaintiff and/or her children (on their own behalf and/or on behalf of Mauricio Iragorri's estate) for damages resulting from the death of Mauricio Iragorri.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of October, 1998.

*David M. Cohen
United States Magistrate Judge*