Not Reported in F.Supp., 1993 WL 462853 (N.D.Ill.)
(Cite as: 1993 WL 462853 (N.D.Ill.))

United States District Court, N.D. Illinois, Eastern Division.
Doris E. MARTIN, Executrix of the Estate of Scott Edward Martin, Plaintiff,
v.
Joseph VOGLER, Administrator of the Estate of LAWRENCE F. FORSTER, Defendant.
No. 93 C 3870.

Nov. 9, 1993.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

***1** Plaintiff Doris E. Martin, the Executrix of the Estate of Scott Martin, her son, brings this three count wrongful death and survival action against the Estate of Lawrence Forster.[FN1] Presently before the Court is Joseph Vogler's (the Administrator of Forster's Estate) motion to dismiss this action under the doctrine of forum non conveniens. For the following reasons, we grant the motion.

I. Factual Background

In 1991, both Scott Martin ("Martin") and Lawrence Forster ("Forster") were stationed in Germany on active duty for the United States Army. Martin was a citizen of Connecticut, as is the plaintiff executrix of his estate, while Forster haled from Illinois, as does his father, the defendant administrator of his estate. On June 29, 1991, Martin was a passenger in Forster's car as it headed east on a four-lane, undivided highway near Ansbach, Germany. In attempting to pass another eastbound car, Forster's car crossed the center line and collided head on with a westbound car. Plaintiff alleges that Forster was inebriated at the time of the collision and that as a result of his condition, he negligently failed to control his car, causing the accident.

Both Forster and the driver of the oncoming car died at the scene of the accident. Martin, on the other hand, survived the initial crash and was taken to nearby Ansbach City Hospital for treatment, only to die the next morning approximately ten hours after the accident. Plaintiff now moves to dismiss this case, arguing that Germany presents a more convenient forum for litigation.

II. Discussion

Pursuant to the doctrine of forum non conveniens, a federal district court may decline to exercise jurisdiction over a case "where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting this choice." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 249, 102 S.Ct. 252, 262, 70 L.Ed.2d 419 (1981). In exercising its discretion under the doctrine of forum non conveniens, a district court must determine whether an adequate alternative forum exists, and, if so, must balance the relevant public and private interest factors while giving due deference to a plaintiff's choice of forum. *Macedo v. Boeing Co.,* 693 F.2d 683, 686-90 (7th Cir.1982).

A. Adequate Alternative Forum

As a threshold matter, before dismissing for forum non conveniens, it must be clear that an adequate alternative forum is available. Defendant argues that Germany provides such a forum. Indeed, in light of defendant's agreement to submit to the jurisdiction of the German courts, we conclude that Germany is an available forum for this litigation.

Plaintiffs contend, however, that even if a German forum is available, it is not adequate. The Supreme Court has observed that "if the remedy provided by

the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight." *Piper Aircraft,* 102 S.Ct. at 265. This remark, however, came in the wake of the Court's holding that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry," for "[i]f substantial weight were given to the possibility of an unfavorable change in law, ... dismissal might be barred even where trial in the chosen forum was plainly inconvenient." [FN2] *Id.* at 261-62.

***2** Here, plaintiff argues that the remedy available under German law is sufficiently unsatisfactory as to render Germany an inadequate forum. To be sure, plaintiff's relief in Germany is severely curtailed by a "guest statute" that allows a plaintiff in Martin's position-i.e. a passenger injured as a result of the driver's negligence-to recover only funeral expenses. While the remedy is obviously deficient in the plaintiff's eyes, it is indisputable that Germany does recognize the cause of action at issue and that *some* remedy is available. Of added significance, the remedy afforded comports with that recoverable in numerous American jurisdictions with similar guest statutes on their books. Accordingly, the unfavorable change of law presented here shall not be given dispositive or even substantial weight. *See Martinez v. Nalco Chemical Co.,* 1989 WL 75439 (N.D.Ill. June 27, 1989). Under these circumstances, then, we find that Germany represents an adequate alternative forum.[FN3]

B. Convenience

Having met the threshold requirement that an adequate alternative forum exists, Vogler, taking into account the private and public interests at stake, must demonstrate that litigation in Germany would be substantially more convenient than litigation in the Northern District. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed.2d 1055 (1947). We note that defendant's burden is significant-higher than the burden a defendant must shoulder in seeking a transfer under 28 U.S.C. § 1404(a). *See, e.g., Chapman Associates General Business, Inc. v. Justak,* 734 F.Supp. 828 (N.D.Ill.1990) (district courts have considerably more discretion to transfer cases than to dismiss on forum non conveniens grounds). In deciding whether to dismiss an action on forum non conveniens grounds, courts give great deference to a plaintiff's choice of forum. This is especially true where, as here, both parties are United States citizens and the alternative forum lies in another country.[FN4] *See, e.g., Vanity Fair Mills, Inc. v. T. Eaton Co.,* 234 F.2d 633, 646 (2d Cir.1956) ("[W]here, as here, application of the doctrine of forum non conveniens would force an American citizen to seek redress in a foreign court, courts of the United States are reluctant to apply the doctrine."), *cert. denied,* 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed. 76 (1956). *See also Macedo v. Boeing Co.,* 693 F.2d 683, 688, 690 (7th Cir.1982) (reversing district court's dismissal on forum non conveniens grounds for failure to consider the hardship to American plaintiffs in bringing suit in Portugal, particularly given the heightened deference due an American plaintiff's choice of an American forum); *Aigner v. Bell Helicopters, Inc.,* 86 F.R.D. 532, 543 (N.D.Ill.1980). Moreover, it is particularly difficult for a defendant to demonstrate that proceeding in the chosen forum would be inconvenient where, as here, plaintiff has brought suit in the defendant's own back yard. *See, e.g., Gassner v. Stotler & Co.,* 671 F.Supp. 1187, 1191 (N.D.Ill.1987). With the scope of defendant's burden firmly in mind, we consider the private and public interests at hand.

(i) Private Factors

***3** The private interests routinely considered by courts in deciding motions to dismiss pursuant to forum non conveniens are as follows: the relative ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the cost of ensuring the attendance of willing witnesses at trial, enforceability of the judgment, and the op-

portunity to view the accident site. *Gilbert,* 330 U.S. at 508-09, 67 S.Ct. at 843. Of these, the most significant is the convenience of witnesses and access to sources of proof. Because the accident occurred in Germany, it is beyond question that the relevant evidence is, almost without exception, located and more readily available there. Reports from the German and military police investigations, along with medical reports, are all in Germany. All of the key liability witnesses and some damage witnesses are in Germany, including: Oliver Wieselhuber (the driver of the car travelling in the same direction as Forster), Dr. Lorenz (the emergency room doctor in Ansbach, Germany who treated Martin), Mr. Thielcke (a police vehicle expert who inspected the accident scene to determine the location of the cars at impact), and Officer Willer (the Ansbach police officer who prepared the accident report), as well as various United States Army officers stationed in Germany who can testify to Forster and Martin's pre-accident conduct.[FN5]

While we acknowledge that written police and medical reports can be obtained via mail and fax with relative ease,[FN6] witnesses are not so readily accessible. Here, the location of the witnesses poses two problems to a Northern District action. First, German witnesses are beyond the scope of this Court's compulsory process. Second, even if the witnesses were willing to appear in Illinois, it would be quite costly for the parties to fly them here.

Plaintiff argues that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which Germany was a party, governs the taking of international depositions and goes a long way toward eliminating potential problems of gaining evidence abroad. They further claim that with the advent of video depositions, it would be unnecessary for German witnesses to travel to the United States. Despite the arguable merit of these contentions, plaintiff's portrayal of litigation in this forum is overly optimistic. The risk of losing key testimony due to an inability to compel cooperation would still remain if this suit were to proceed in the Northern District. Moreover, for obvious reasons, video testimony is often less desirable than live testimony.

In sum, we conclude that, regardless of where it is heard, preparing and trying this international suit is bound to be expensive for the parties. Having said that, we nonetheless conclude that adjudicating this case here poses certain unique logistical difficulties-such as access to and presence of witnesses and translation of documents-as well as heightened expense. On the whole, therefore, the private interests clearly point to litigating in Germany.

(ii) Public Factors

***4** In deciding whether to dismiss an action for forum non conveniens, courts consider the public impact on trying a case in the chosen forum. Namely, courts evaluate the relative congestion of the proposed forums, the relationship of the chosen forum to the litigation, and the choice of law. Of these factors, the most important is what law will apply to the controversy.

At the outset we note that it is unclear whether the Northern District's court calendar is busier than that of Germany, since neither party has submitted evidence on the subject. Moreover, we agree with plaintiff that Illinois, as the home state of defendant's decedent, bears a sufficient connection with the action to justify calling Illinois residents to jury service on the matter. However, with respect to the relevant choice of law, we must conclude that German law most likely governs this dispute.

Under *Klaxon v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed.2d 1477 (1941), this Court applies Illinois' choice of law rules. In tort cases, Illinois courts apply the law of the place where the injury occurred, unless Illinois has a more significant interest in the outcome. *See Ingersoll v. Klein,* 46 Ill.2d 42, 45, 262 N.E.2d 593, 595 (1970)., Without deciding whose law would apply,

we observe that Illinois' interest does not seem to overbear that of Germany.[FN7] Both the relevant conduct and injury occurred in Germany, the parties were stationed in Germany, and the locus of the decedents' relationship was in Germany. Only the fact that Forster was an Illinois citizen argues at all in favor of applying Illinois law. Standing by itself, however, Forster's connection with Illinois does not seem to warrant application of Illinois law. Accordingly, it is more likely that German law will apply should this case proceed in the Northern District. While the application of foreign law alone does not suffice to justify dismissal for forum non conveniens, *Piper Aircraft,* 102 S.Ct. at 268 n. 29, it imposes a heavy burden on American courts and renders litigation substantially more inconvenient.

Taken together, the private and public interests strongly favor litigating this matter in Germany. The fact that both parties are American citizens cannot overcome the reality that this was a German accident, that virtually all relevant evidence lies in Germany, and that German law will likely apply. These cold truths direct a finding that this is one of the rare cases warranting dismissal on the grounds of forum non conveniens.[FN8]

III. Conclusion

For the foregoing reasons, we grant defendant's motion to dismiss. It is so ordered.

FN1. Count I arises under Connecticut law, while Counts II and III are brought pursuant to Illinois law.

FN2. In explaining its ruling, the *Piper* Court noted that forum non conveniens is, at core, a flexible doctrine, whose purpose would be eviscerated by effectively prohibiting courts from dismissing an action in the face of a potential change in law. *Id.* at 263. Moreover, practically speaking, courts would become bogged down in choice-of-law analyses, which would necessarily drive decisions under the doctrine, and American courts, with their attractive recoveries, would witness an influx of foreign litigation. *Id.* at 263-64.

FN3. Additionally, because German law would most likely apply were litigation to proceed in this forum (see discussion below), the remedy available in Germany would be no less than that available here. Germany, then, is every bit as "adequate" a forum as the Northern District.

FN4. Defendant incorrectly asserts that plaintiff's choice of forum is not entitled to any special deference because the Northern District is not her "home" forum. When the alternative forum is abroad, any domestic forum constitutes a "home" forum for purposes of forum non conveniens analysis. *Interpane Coatings, Inc. v. Australia & New Zealand Banking Group Ltd.,* 732 F.Supp. 909, 915 (N.D.Ill.1990) ("in forum non conveniens cases involving a potential reference to a foreign court, the relevant distinction is whether or not the plaintiff who has selected the federal forum is an American citizen, not whether he resides in the particular district where the case was brought").

FN5. Plaintiffs point out that defendant has not provided affidavits from the potential witnesses to evidence their current whereabouts. Admittedly, such an oversight weakens defendant's argument, but it is reasonable to assume that the German-born witnesses remain in the country. As for the Army personnel, even if they are not still in Germany, there is no evidence or reason to believe that they are in Illinois.

FN6. We note, however, that American litigation would force the parties to obtain translations of any written discovery propounded in Germany, an expense that

might well be obviated by proceeding in a German court.

FN7. In tort cases, Illinois courts consider the following contacts: (1) place of the injury, (2) place of the conduct causing injury, (3) domicile of the parties, (4) place where the relationship of the parties was centered. *Id.*

FN8. While we are troubled by the fact that, given the expense of litigating in Germany and the slim recovery available there, it is highly doubtful that plaintiff will proceed with this case, we are mindful of the fact that our application of German law provides no greater incentive to proceed with inescapably costly litigation in the Northern District.

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