

No. 01-7492

(HEARD IN TANDEM WITH 01-7488)

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SPRINGWELL NAVIGATION CORP.,

Plaintiff-Appellant,

v.

THE CHASE MANHATTAN BANK,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

**PETITION FOR REHEARING OR REHEARING EN BANC
OF APPELLANT SPRINGWELL NAVIGATION**

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STATEMENT OF CONFLICT AND IMPORTANCE

Reconsideration is required because the panel decision conflicts with this Court's *en banc* decision in *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 72 (2d Cir. 2001), and with decisions from the United States Supreme Court and other courts of appeals.

Reconsideration also is required because the issues raised are of exceptional importance in that the panel opinion renders deference analysis circular or meaningless by conflating it with the subsequent merits of the forum analysis. The decision also effectively shifted the burden of proof to foreign plaintiffs, misinterpreted the U.S.-Liberian treaty in a way that will adversely affect numerous other treaties, and altered the law as to various elements of the *forum non conveniens* balancing test.

STATEMENT OF THE CASE

The panel affirmed a dismissal on *forum non conveniens* grounds in favor of an English forum despite the undisputed facts that: plaintiff's home forum was conceded to be less convenient than New York for this case; defendant's world headquarters is located in New York and controlled and directed all of the conduct in this case; and many of the wrongful acts and omissions alleged in the Amended Complaint were by defendant's New York personnel. Springwell Br. 23-25, 40-41, 46-51, 55-56; Springwell Reply Br. 3-5, 10, 22-25.

The panel reached this startling result by endorsing a severe reduction in deference accorded to a non-resident foreign plaintiff notwithstanding a U.S.-Liberian treaty providing “freedom of access to the courts,” and despite New York being defendant’s home forum while London is home to *neither* party. Regarding the *Gilbert* balance itself, the panel concluded that the district court “properly weighed the prescribed private and public interest factors.” Slip Op. 19 (attached). It offered no explanation as to the reasoning behind such conclusion.

ARGUMENT

I. THE PANEL ALTERED THE STANDARDS FOR DEFERENCE.

A. Whether Deference Should Be Analyzed According to Likely Forum Shopping by Either Plaintiff or Defendant Rather Than Severely Discounted for Plaintiff’s Foreign Residence?

In effectively eliminating deference, the panel incorrectly focused on plaintiff’s own non-residence and limited connections with the forum, ignoring the substantial connection of *this case* with the forum and plaintiff’s *bona fide* reasons, despite non-residence, for choosing New York in circumstances where its own home fora were indisputably inconvenient for other reasons. The panel thereby confined the deference inquiry to a residence or presence analysis, eschewing the other aspects of the *motive* analysis set out in *Iragorri*. Indeed, the panel held that “[e]ven absent those forum shopping considerations, there is still no reason to assume a U.S. forum is convenient for a foreign plaintiff’s suit.” Slip. Op. at 10.

Such a holding vitiates deference based on residence alone, regardless of other considerations relevant to motive and is in conflict with, and thus retrenches on, the analysis set out in *Iragorri*. See 274 F.3d at 71-72, 75.

Springwell, of course, established its legitimate motivations through a plethora of *bona fide* connections with the case. Springwell Br. 5-10, 26-27, 46-52 (discussing phone calls, correspondence, conduct and misconduct by New York managers and employees, supervision and execution of Springwell's investment, risk monitoring and suitability determinations, post collapse negotiations, and continuing wrongdoing in the handling of Springwell's assets still in Chase's possession). Springwell also offered numerous unrebutted motives based on convenience that explained its preference for New York over London. Springwell Br. 27-30. Springwell's desire for greater access to hostile New York witnesses and its reasonable preference for more appropriate U.S. counsel were never credibly challenged. Furthermore, while Springwell's interest in efficient and inexpensive discovery in New York is an entirely valid motive based on litigation *convenience*, Springwell Br. 41-42, Chase's desire to hinder discovery through inconvenient and restrictive English disclosure rules constitutes a tactical motivation that is the epitome of disfavored forum shopping.¹

¹ While practical litigation concerns do not render a forum *inadequate*, they certainly bear upon whether it is less *convenient*.

By ignoring plaintiff's undisputed and legitimate reasons for coming to New York, and focusing solely upon plaintiff's limited *physical* connections with the forum, the panel eliminated much of *Iragorri*'s motive analysis and returned to a mechanical rule based primarily on residence.

B. Whether Suit in Defendant's Home Forum Requires Significant Baseline Deference?

The panel excluded from its deference analysis the fact that defendant was sued in its home forum and sought transfer to a forum that was home to *neither* party. It held that that while a plaintiff's choice of its own home forum can be assumed to be motivated by convenience, the "choice of the defendant's home forum provides a much less reliable proxy for convenience." Slip. Op. at 17. The panel continued that the "fact that New York is Chase's home jurisdiction does not show that plaintiffs' decision to bring suit here was driven by considerations of convenience." *Id.* at 18.

But deference to a choice of *either* party's home forum derives not merely from defendant's amenability to suit at home, but also from the presumed-convenience to *either* party of being in its own home forum and the symmetrical analysis suggested by this Court for examining the motives and potential forum shopping of *both* plaintiffs and defendants. *See Iragorri*, 274 F.3d at 75.

By asking whether the choice of a defendant's home speaks to plaintiff's convenience, the panel ignored the very point of the symmetry principle, which is that deference to plaintiff's choice and skepticism of defendant's motion are two sides of the same coin. Suit in defendant's home forum is relevant not because what it says about *plaintiff's* motivations, but because it should be presumed convenient to the defendant and casts presumptive doubt upon the *defendant's* motivations in seeking transfer to a third forum not home to *either* party. Deference to plaintiff and skepticism of defendant slide along the same scale and should equally raise the bar for a *forum non conveniens* motion. By holding otherwise, the panel came into conflict with this Court's analysis in *Iragorri* as well as with the approach taken by other circuits.²

C. Whether the U.S.-Liberian Treaty Accords Less Than "Equal" or "National" Access to the Courts?

In addressing the relevance of the U.S.-Liberian Treaty of Friendship, Commerce, and Navigation on the deference question, the panel ruled that the "freedom of access" to courts language in that treaty "stops well short of granting the nationals of both countries" *equal* access and hence "the Liberian treaty does

² See *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 609 (10th Cir. 1998) ("a forum resident should have to make a stronger case than others for dismissal based on *forum non conveniens*"), *cert. denied*, 526 U.S. 1112 (1999); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991) ("where the forum resident seeks dismissal, this fact should weigh strongly against dismissal").

not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen. Slip Op. at 13-14.

The panel further discounted any deference potentially due from equal "citizen" status absent U.S. residence, arguing that such claimed deference "impermissibly conflates citizenship and convenience, and assigns an artificial weight to citizenship." Slip Op. 15. The court concluded by holding that "Plaintiffs are only entitled, at best, to the lesser degree of deference afforded a U.S. citizen living abroad who sues in a U.S. forum." Slip Op. 16.

But the conclusion that "freedom of access" means less than equal access ignores the context of the treaty, which throughout its structure is intended to put the citizens of each signatory on equal footing. Numerous other treaties use the same wording and the panel decision threatens to diminish them all.

And even as to the deference due from equal "citizen" status, the panel dismissed without analysis Springwell's arguments as to why such deference must be significant. Springwell Br. 32-34. Numerous cases have found citizenship itself important.³

³ See, e.g., *Burt v. Isthmus Development Corp.*, 218 F.2d 353, 357 (5th Cir.1955) ("courts should require positive evidence of unusually extreme circumstances ... before exercising any such discretion to deny a citizen access to the courts of this country"), *cert. denied*, 349 U.S. 922 (1955); *Reid-Walen*, 933 F.2d at 1394 ("the relevant distinction is whether or not the plaintiff who has selected the federal forum is a United States citizen").

II. THE PANEL ALTERED OR ELIMINATED PARTS OF THE *GILBERT* ANALYSIS.

A. Whether the Compulsory Process Element of the *Gilbert* Balance Requires a Showing that Witnesses Would Be Otherwise Unavailable for a Court To Ascertain Demeanor?

Regarding the private interest factors, the panel recognized that the only private interest factor relied upon by the district court was the compulsory-process-for-unwilling-witnesses factor. The sum total of the panel’s ruling on that point was to note that the district court

observe[d] that Chase identified several key witnesses whose testimony can be compelled only in England while plaintiffs have not demonstrated that any material witnesses would be unavailable there. Thus, she ruled that this factor weighs heavily in favor of dismissal. Our review of that record does not show any private interest factors’ findings to be clearly erroneous.

Slip Op. 21. That ruling either eliminates the requirement that the witnesses at issue must be “unwilling” to appear in the initial forum, or it shifts the burden of proof on such element to the plaintiff.

Contrary to the panel’s suggestion that Springwell did “little to contest these findings other than to suggest” a need for discovery regarding New York witnesses, Springwell made a host of legal objections to the analysis of the compulsory process factor.⁴ For example, plaintiff argued, and it was never

⁴ The panel dismissed the discovery issue by claiming that “[p]laintiffs have not articulated any persuasive reason for us to believe that the sought after discovery would have yielded additional support for their position.” Slip Op. 21. That

disputed, that defendant failed to show *any* unwillingness of friendly English witnesses to appear for trial in New York, instead discussing only the mere “whereabouts” of certain witnesses. Chase Br. 45. But whether friendly Chase witnesses such as Mellis, Ferrazzi, or Sheehan are within range of New York’s compulsion is non-responsive to whether such compulsion would be necessary. By endorsing the district court’s analysis without evidence anywhere in the case that Chase’s friendly witnesses would be unavailable or “unwilling to testify” in New York, the panel’s holding conflicts with decisions from the Supreme Court, prior panels of this Court, and other circuit courts.⁵

Springwell also argued that given the trial-demeanor basis of the compulsory-process element, the availability of video depositions and England’s reliance on written, rather than live, testimony for the case-in-chief meant that this factor had no significant weight against a New York forum and instead should

holding is in tension with the notion that plaintiffs are being penalized for their inability to name witnesses at Chase headquarters who cannot be identified by name *precisely* because of the lack of discovery.

⁵ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (“availability of compulsory process for attendance of *unwilling*, and the cost of obtaining attendance of *willing*, witnesses”) (emphasis added); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996) (“unwilling to testify”); *Polythane Systems, Inc. v. Marina Ventures Intern., Ltd.*, 993 F.2d 1201, 1207 (5th Cir. 1993) (“no showing of necessary witnesses residing in Maryland who would be unable to attend the trial in Texas”), *cert. denied*, 510 U.S. 1116 (1994); *Contact Lumber Co.*

have weighed in favor of a New York forum. Springwell Br. 36-39; Springwell Reply Br. 17-19. The factual aspects of this argument were undisputed, hence the panel's decision can only constitute a rejection of the *legal* relevance of the demeanor-focused basis of this factor. That rejection constitutes an alteration of the prior law in this Circuit. *See, e.g.*, Springwell Br. 38-39 (citing cases regarding letters rogatory); *Iragorri*, 274 F.3d at 75 (factor bears upon the trier-of-fact's ability to assess witness demeanor.).

Even more startling about the panel's unexplained rejection of the demeanor-basis of this factor is that it did so despite Chase's *de facto* concession of the point in response to Springwell pointing out that several of Chase's "English" witnesses for which process was supposedly necessary were no longer living in England at all and hence not subject to English compulsion either. Chase's reply was to note that their testimony could be obtained outside of England by deposition, Chase Br. 46, which not merely concedes, but in fact adopts *Springwell's* arguments on the irrelevance of this factor.

The error of the panel decision was further compounded by the fact that England, as a forum, was at an intrinsic disadvantage regarding witness demeanor regardless of which witnesses could or could not be compelled to appear there.

v. P.T. Moges Shipping Co. Ltd., 918 F.2d 1446, 1451 (9th Cir. 1990) ("compulsory process to obtain the attendance of *hostile* witnesses") (emphasis added).

While a New York court could assess witness demeanor – either live or on tape – at all phases of the trial, Chase’s own expert suggested that in England virtually all “evidence in chief” or “direct evidence” from witnesses is introduced in the form of *written* statements. [A263] New York thus would afford greater opportunity to assess witness demeanor *regardless* of where the witnesses were located and thus this factor actually *favours* a New York forum. It was only by rejecting the demeanor-based significance of this factor that the panel could have endorsed the opposite conclusion.

B. Whether Practical Considerations of Litigation Convenience Must Be Weighed in the Private Interest Balance?

The panel’s endorsement of the private interest conclusion below necessarily rejects Springwell’s private interest in the greater efficiency and convenience of discovery in a New York Forum as compared to an English forum. Springwell Br. 41-42. Given that there can be no serious dispute that such discovery will in fact be more convenient to Springwell, the panel’s holding can only be a rejection of the significance of such practical considerations in the *Gilbert* balance. Of course, that rejection is in conflict with a variety of other cases. *See Gilbert*, 330 U.S. at 508 (“all other practical problems that make trial of a case easy, expeditious and inexpensive”); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1246-47 (7th Cir. 1990) (“inconvenience for [defendant] ... must be balanced against the

disadvantageous procedures available in the Cayman Islands for the Wilsons”), *cert. denied*, 499 U.S. 947 (1991).

C. Whether Application of Foreign Law Merits Significant Consideration in a Mixed-Law Case Where Both Fora Will Apply Some Foreign Law?

Regarding the choice of law issue, the panel merely recounted the district court’s findings on the law supposedly applicable to various claims and then noted the district court’s conclusion that with English law applicable to a majority of the claims, “choice of law considerations strongly tipped in favor of litigation in England.” Slip Op. 23. That conclusion was simply endorsed with the unelaborated general comment that “our review has not convinced us that the trial court abused its discretion.” *Id.* at 23-24.

There was no dispute in this case, however, that both English and New York Courts would be required to apply a mixture of English and New York law to this case. *Compare* Springwell Br. 53-55 *with* Chase Br. 42-44. Springwell had contended that this factor was therefore a wash regardless of the greater or lesser proportions of New York or English law to be applied. *Compare* Springwell Br. 53-55 *with* Chase Br. 44.

In endorsing the district court’s contrary holding that this factor “strongly tipped in favor of litigation in England,” the court gave legal significance to this factor in a manner contrary to prior decisions in this Circuit. *See DiRienzo v.*

Philips Serv. Corp., 294 F.3d 21, 31 (2d Cir.) (foreign-law factor “[did] not favor either forum” notwithstanding imbalance in amounts of Canadian and U.S law to be applied), *cert. denied*, 123 S. Ct. 556 (2002). And as held by numerous circuits, the need to apply foreign law is not a sufficient basis to dismiss a case not otherwise substantially inconvenient. See *Gschwind*, 161 F.3d at 609 (unfamiliarity with alternative forum’s law not dispositive); see also *Springwell Br. 57* (citing cases). The relevance of this factor is particularly limited where the “foreign” law is the historically familiar and frequently applied law of England. *Byrne v. British Broadcasting Corp.*, 132 F. Supp.2d 229, 238 (S.D.N.Y. 2001); cf. *Reid-Walen*, 933 F.2d 1390 at 1401 (Jamaican substantive law descended from Great Britain, contained concepts akin to American law, legal matters were not complex, and no language barrier to understanding of Jamaican law).

III. THE PANEL OPINION FAILS TO ADJUDICATE THE ARGUMENTS PRESENTED TO THE COURT.

With some reluctance, petitioner is compelled to offer a final question for this Court’s consideration: Whether, in connection with the elements of the *Gilbert* analysis, the panel opinion’s failure to give a reasoned explanation of its disposition of the legal arguments at issue represents a failure of adjudication that requires this Court’s supervisory attention?

Despite extensive arguments on the *Gilbert* factors, both in *Springwell*’s briefs and at oral argument, the panel’s treatment of those factors consists of barely

more than five pages, the vast majority of which do no more than recount the decision below. Slip Op. 19-24. The only discussion of the panel's views consist of the following conclusory statements:

As our analysis below indicates, the district court ... properly weighed the prescribed private and public interest factors that supported its decision to dismiss the complaints. [at 19]

* * *

Our review of that record does not show any private interest factors' findings to be clearly erroneous. Slip Op. 21.

* * *

Plaintiffs have not articulated any persuasive reason for us to believe that the sought after discovery would have yielded additional support for their position. Slip Op. 21.

* * *

Although appellants maintain that the findings with respect to the public interest factors are erroneous and that these findings, when coupled with deference and private interest analysis, erroneously led the district court to dismiss their suit on the grounds of forum non conveniens, our review has not convinced us that the trial court abused its discretion. As a consequence, we see no reason on the facts or the law to disturb its dismissal of plaintiffs' complaints on grounds of forum non conveniens. Slip Op. 23-24 (emphasis added).

Those statements barely acknowledge that plaintiffs did anything more than make an abstract objection to the district court's opinion, and certainly do not provide a reasoned resolution of the many specific arguments raised. With due respect, such preemptory conclusions do not fulfill the judicial function in a case

involving hundreds of millions of dollars, years of litigation, and arguments that were anything but frivolous.

The importance of reasoned explanation is not merely to satisfy the curiosity of the litigants but rather to ensure that the *decision itself* is adequately reasoned.

As Judge Coffin once wrote,

[a] remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into the sunlight [W]e may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." *The act of writing tells us what was wrong with the act of thinking.*

F. Coffin, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 57 (1980) (emphasis added); *see also* Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975) ("The necessity for justification is a powerful preventive of wrong decisions.").

Karl Llewellyn similarly observed that the written opinion

has as one of its major offices to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability.

K. Llewellyn, *THE COMMON LAW TRADITION* 26 (1960).

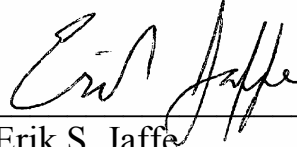
In a case involving allegations of fraud by a New York bank causing hundreds of millions of dollars in damages, and at a time where the public and the international community are rightly skeptical of the integrity of such U.S. entities, it behooves this Court to ensure that the reasoning behind its decision holds together and that such reasoning is laid out plainly for the litigants, the public, and other courts. Providing reasoned explanations of how legal arguments were resolved is not merely informational; it is a substantive component and an essential disciplinary element of the process by which such decisions are reached. To eschew providing reasons thus diminishes the Court's own confidence in the correctness of its decisions as well as diminishes its credibility with the public and litigants.

As an exercise of its supervisory authority, therefore, the Court should rehear the case and determine whether the decision can withstand the rigor of written justification.

CONCLUSION

The Court should grant rehearing or rehearing *en banc*.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of May, 2003, I caused two copies of the foregoing Petition for Rehearing or Rehearing *En Banc* to be served by overnight commercial carrier for Next Day delivery on:

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