MARTINEZ v. DuPONT: A LOOK AT THE FUTURE OF *FORUM NON CONVENIENS* IN DELAWARE COMMERCIAL LITIGATION[*]

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ABSTRACT

For over fifty years, foreign plaintiffs found Delaware to be a safe forum when brining a lawsuit against a Delaware entity, in part because of the State's strict forum non conveniens *doctrine. But, as a result of the Delaware Supreme Court's decision in* Martinez v. E.I. DuPont de Nemours & Co.*, the burden placed on defendants under the doctrine has been eased. The Supreme Court used* Martinez *as an opportunity to adjust the overwhelming-hardship standard in a way that will arguably lead to a more practical application of the* forum non conveniens *doctrine. In light of the case history and prior decisions, however, it is equally likely that this case will produce discord in the application of the doctrine by allowing trial courts to retain jurisdiction over corporate and commercial disputes while clearing their dockets of "less desirable" suits. The judiciary may be able to resolve this discord, should it arise, by turning to public interest factors.*

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I. INTRODUCTION

Delaware corporations and trial court judges commonly thought it was next to impossible for Delaware's corporate citizens to argue for dismissal on *forum non conveniens* grounds successfully in their home state.[1] Then, in February 2014, the Delaware Supreme Court in *Martinez v. E.I. DuPont de Nemours & Co.* gave trial courts and the corporate community a new perspective on the doctrine when it ruled that DuPont faced an overwhelming hardship in defending a toxic tort case in Delaware.[2] The dissent noted, "Not surprisingly, the DuPont company has never before argued *forum non conveniens* successfully [in Delaware]"[3] and claimed that the majority in reaching its conclusion had fundamentally changed Delaware's common law *forum non conveniens* doctrine.[4] The dissent correctly observed changes to the law and, indeed, the majority conceded there are subtle changes to the doctrine's application moving forward.[5] However, the decision is far from a fundamental shift in the "settled" doctrine.[6] Although the *Martinez* court's changes are mild, they have the potential to promote the inconsistent application of the *forum non conveniens* doctrine by allowing courts to retain jurisdiction over corporate and commercial disputes while clearing their dockets of "less desirable" suits.

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[1]"[O]n several occasions [the Delaware Supreme Court] has reversed a trial court determination that the overwhelming hardship standard was satisfied. The experience in those cases have led some trial judges to conclude that term 'overwhelming hardship' suggests an insurmountable burden for the defendants." Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1105 (Del. 2014).

[2]*See id.* at 1108, 1113.

[3]*Id.* at 1117 (Berger, J., dissenting).

[4]*Id.* at 1115 (Berger, J., dissenting) ("The majority rewrites decades of precedent, saying that it must resolve 'tension' in the existing law. But there was no tension in this Court until now.").

[5]*See Martinez*, 86 A.3d at 1111-13.

[6]*But see id.* at 1115 (Berger, J., dissenting).

Prior to *Martinez*, Delaware, in addition to being home to many of the world's largest corporations,[7] was also considered a safe bet for plaintiffs when choosing a forum for litigation in part due to its strict application of the *forum non conveniens* doctrine.[8] Delaware courts had no issues with maintaining lawsuits over disputes that had little to no causal nexus to the State,[9] and the overwhelming hardship requirement was, in application, an extremely high bar for Delaware corporations to reach.[10] But, *Martinez* makes it clear that foreign plaintiffs should not get too comfortable in Delaware if the controversy is not substantively based in the State or its law.[11] The court showed that going forward there is going to be greater consideration given to the application of Delaware law to the controversy and public interest factors when performing its *forum non conveniens* analysis,[12] particularly when a significant portion of the parties or the facts of the dispute are foreign.[13]

In light of *Martinez*, when will Delaware courts be more inclined to retain jurisdiction over disputes involving foreign parties and foreign events? The answer lies in the nature of the dispute and specifically whether the dispute is based on corporate or commercial law.[14] Given

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[7]*See* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 565-68 (2002) (observing that 57.75% of publicly traded companies and 59.46% of Fortune 500 companies are incorporated in Delaware); *see also* LEWIS S. BLACK, JR., DEL. DEP'T OF STATE, DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007).

[8]*See* Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 62, 104-06 (2009); *see also* Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*, 90 TEX. L. REV. 743, 756-57 (2012) ("Delaware courts have strictly construed the overwhelming-hardship standard and have repeatedly denied motions to dismiss for *forum non conveniens* . . . . Delaware has remained an extremely friendly forum for foreign plaintiffs . . . .").

[9]This was expressly acknowledged as far back as 1965. Kolber v. Holyoke Shares, Inc., 213 A.2d 444, 446 (Del. 1965) ("It is quite ordinary for Delaware courts to determine causes in which all persons involved are non-residents of Delaware and in which none of the events involved occurred here. These factors alone are not, in our opinion, sufficient to warrant interference with the plaintiff's usual choice of forum.").

[10]*See supra* note 1 and accompanying text; *see also* Smith, *supra* note 8, at 755-57.

[11]The Court emphasized that prior decisions gave "inadequate weight" to the application of Delaware law to the controversy. Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1111 (Del. 2014). The Court then went on to state that "plaintiffs who are not residents of Delaware, whose injuries did not take place in Delaware, and whose claims are not governed by Delaware law have a less substantial interest in having their claims adjudicated in Delaware." *Id.*

[12]*Id.* at 1111-13.

[13]*See id.*

[14]*See* Martinez v. E.I. DuPont de Nemours & Co., 82 A.3d 1, 33-34 (Del. Super. Ct. 2012) (discussing the importance of Delaware courts providing a neutral forum for litigating commercial disputes as opposed to other types of disputes).

Delaware's unique position in the world of business law,[15] its courts will be more willing to retain jurisdiction over corporate and commercial disputes as opposed to other controversies.[16]

While DuPont was able to avoid the costs and uncertainties of litigation by successfully arguing for dismissal on *forum non conveniens* grounds,[17] other Delaware corporations should not expect the same result. When a foreign plaintiff brings a lawsuit against a Delaware corporation for a corporate or commercial dispute, particularly one involving a novel issue, the courts will most likely seize the opportunity to adjudicate the claim and maintain Delaware's influence in the world of corporate and commercial law.[18]

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[15]*See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000) ("The large volume of business litigation in Delaware, coupled with Delaware's specialized court system, results in a well developed collection of corporate law precedents. Commentators have argued that this collection may account both for Delaware's competitive success and the inability of other states to duplicate that success."); Bebchuk & Hamdani, *supra* note 7, at 565-68; BLACK, *supra* note 7, at 1-2; Caithness Res., Inc. v. Ozdemir, 2000 WL 1741941, at *5 (Del. Ch. Nov. 22, 2000) ("[A]ccess to our judicial system is a factor that leads many companies to choose this state as their home.").

[16]*See Martinez*, 82 A.3d at 33-34, 38-39 (suggesting that the court was more inclined to grant dismissal because the case involved "non-commercial and non-corporate garden-variety toxic tort disputes"); *see also* Stevelman, *supra* note 8, at 62, 104-06.

[17]There is no question that litigation is time consuming and can be extraordinarily expensive. The greatest value of a *forum non conveniens* dismissal is that the instant litigation is terminated and the alternative forum may not provide the plaintiff with remedies as significant as those provided by the original forum, thus reducing a defendant's exposure to liability. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 240 (1981) (noting that the plaintiff's decision to file suit in the United States was because U.S. law recognized strict liability, and Scottish law did not). Even if the plaintiff obtains a judgment in the alternative forum, the next issue that arises is whether that judgment can be enforced allowing the plaintiff to collect. *See, e.g.*, Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L L. & POL. 965, 965-68 (2013); Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1318-19 (2007); Soc'y of Lloyd's v. Turner, 303 F.3d 325, 329-30 (5th Cir. 2002).

[18]Delaware courts have a strong interest in "mak[ing] available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 1000 (Del. 2004); *see also* Taylor v. LSI Logic Corp., 689 A.2d 1196, 1196-1201 (Del. 1997) (reversing grant of dismissal in a case involving a foreign shareholder of a foreign corporation that brought suit for an injunction against a Delaware corporation); Aveta, Inc. v. Colon, 942 A.2d 603, 615 (Del. Ch. 2008) (finding stay for *forum non conveniens* appropriate and noting that "[this] is not a dispute between Fortune 500 companies incorporated in Delaware, and it is not a dispute between corporations at all."). There is no doubt that the courts will retain jurisdiction over disputes involving novel issues of Delaware law. *See, e.g.*, Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 451 (Del. Ch. 2007). They will even retain jurisdiction over corporate disputes that involve "novel and important issues" of another state's law. Berger v. Intelident Solutions, Inc., 906 A.2d 134, 137 (Del. 2006); *see also* Kolber v. Holyoke Shares,

In general, this Comment discusses the growth of Delaware's *forum non conveniens* doctrine in light of the *Martinez* decision and how the decision will affect commercial litigation. After reviewing the role of the *forum non conveniens* doctrine in Delaware, this Comment compares corporate, commercial, and tort law disputes in an effort to determine when the courts will be more likely to retain jurisdiction.[19] Part II discusses the Delaware *forum non conveniens* doctrine leading up to the *Martinez* decision.[20] It also discusses the doctrine's origins in federal common law and its use of the "overwhelming hardship" requirement.[21] Part III discusses *Martinez* and analyzes the areas of the *forum non conveniens* doctrine that changed as a result of the decision.[22] Specifically, Part III discusses changes to the overwhelming hardship requirement, the application of Delaware law as a *Cryo-Maid* factor, and the use of public interest factors.[23] Part IV analyzes how changes in the doctrine's application will affect commercial litigation and ultimately Delaware's corporate community.[24] Part IV also discusses the potential for discord in the doctrine's application and how that discord may be resolved.[25]

II. THE *FORUM NON CONVENIENS* ANALYSIS PRIOR TO *MARTINEZ*

The doctrine of *forum non conveniens* is a common law creation[26] that allows a court to dismiss a case if it determines that retaining jurisdiction will be unjust or inequitable due to the severe inconvenience that will arise from litigating in that forum.[27] Delaware's *forum non conveniens* doctrine is governed by the *Cryo-Maid* analysis (or "*Cryo-Maid* factors") which was established by the Delaware Supreme Court in 1964.[28] Delaware's particular approach to the *forum non conveniens*

Inc., 213 A.2d 444, 446 (Del. 1965) ("It is not unusual, of course, for Delaware courts to deal with open questions of the law of sister states or of foreign countries.").

[19] *See infra* Part IV.A.

[20] *See infra* Part II.

[21] *See infra* Part II.

[22] *See infra* Part III.

[23] *See infra* Part III.B.

[24] *See infra* Part IV.A.

[25] *See infra* Part IV.B.

[26] *See, e.g.*, *In re* Asbestos Litig., 929 A.2d 373, 380 (Del. Super. Ct. 2006).

[27] *See* Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 527-28 (1947) ("[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. . . . [J]urisdiction will be declined whenever considerations of convenience, efficiency, and justice point to the courts of [another] state . . . .").

[28] Gen. Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 684 (Del. 1964).

doctrine is somewhat unique.[29] However, its roots trace back to the United States Supreme Court's decisions in *Koster v. Lumbermens Mutual Casualty Co.*[30] and *Gulf Oil Corp. v. Gilbert*.[31] This Part discusses the origins of Delaware's current *forum non conveniens* doctrine beginning with the standards set forth by the U.S. Supreme Court.[32] It then discusses the doctrine's application leading up to the Delaware Supreme Court's ruling in *Martinez*, and in doing so, it will briefly consider a line of decisions from the Delaware Supreme Court, Delaware Court of Chancery, and Delaware Superior Court.[33]

A. *Origins in Federal Common Law*

The Delaware Supreme Court in *Cryo-Maid* credits the U.S. Supreme Court with devising the factors that became part of the State's *forum non conveniens* analysis.[34] Six years before *Cryo-Maid*, it was the Delaware Superior Court in *Winsor v. United Air Lines, Inc.* that paved the way for the State's adoption of the federal *forum non conveniens* factors.[35] The Superior Court relied on *Gilbert* and *Koster* in establishing its standard.[36]

In *Koster*, the plaintiff brought a derivative action as a member and policyholder of defendant, Lumbermens Mutual, alleging that certain executives and managers breached their fiduciary duties.[37] Justice Jackson, writing for the majority, set forth the two general considerations for the *forum non conveniens* analysis which are (1) whether litigating in the forum would cause "oppressiveness and vexation" to the defendant in such a way that outweighs any convenience to the plaintiff and (2) whether the administrative burdens placed on the court make trial in that forum inappropriate.[38] The Court also addressed the differences in

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[29]Unlike many other jurisdictions, Delaware's *forum non conveniens* analysis requires that the defendant show an "overwhelming hardship" will result from having to litigate in the forum. *See infra* Part II.B.

[30]*Koster*, 330 U.S. at 524.

[31]Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

[32]*See infra* Part II.A.

[33]*See infra* Part II.B.

[34]Gen. Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 683-84 (Del. 1964).

[35]*See* Winsor v. United Air Lines, Inc., 154 A.2d 561, 563-65 (Del. Super. Ct. 1958).

[36]*See id.* at 564 ("I have made a study of the factors listed in the *Gulf* case and those most often considered in the leading state cases on *forum non conveniens*, and I have attempted to apply the facts of this case thereto.").

[37]*Koster*, 330 U.S. at 519-20. This was a diversity suit brought in New York by a New York resident against defendants who were Illinois residents and corporations. *Id.* at 519. The defendants filed a motion to dismiss for *forum non conveniens*, the district court granted the defendants' motion, and that decision was upheld by the court of appeals. *Id.* at 520-21.

[38]*Id.* at 524.

the analysis in the context of derivative actions[39] and matters involving the internal affairs of foreign corporations.[40] "*Koster* remains the most authoritative word from the U.S. Supreme Court on the appropriate scope of judicial deference to the state of incorporation in *forum non conveniens* motions."[41]

That same day, the Supreme Court issued its decision in *Gilbert* and set forth the federal standard for addressing a motion to dismiss for *forum non conveniens*.[42] Justice Jackson again delivered the majority opinion and crystallized the federal *forum non conveniens* standard.[43] The Court set forth two groups of factors to be considered in the analysis: private interest factors and public interest factors.[44] The private interest factors are as follows:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[45]

The Court stated that these factors should be evaluated to achieve fairness and justice, but "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[46]

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[39]The Court noted that a plaintiff's forum interest in a derivative action is "considerably weakened" when compared to the traditional two-party dispute. *Koster*, 330 U.S. at 524.

[40]The Court discussed the *forum non conveniens* analysis in the context of actions that are centered on the internal affairs of a corporation and the interest of having the corporation's home state decide the case, and it stated that this factor is certainly relevant to the analysis but "does not have the same significance . . . in all settings." *Id.* at 526. The Court also noted that corporations are often domiciled in states where their only presence is a registered agent, and in those circumstances this factor should not be given any significant weight. *Id.* at 527-28.

[41]Stevelman, *supra* note 8, at 79-80.

[42]In *Gilbert*, the plaintiff brought suit against Gulf Oil for damages caused by an explosion that occurred while Gulf Oil agents were delivering gasoline to plaintiff's warehouse in Virginia, where the plaintiff owned and operated his business. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 502-03 (1947). The defendant was a Pennsylvania corporation "qualified to do business in both Virginia and New York." *Id.* at 503. The lawsuit was filed in the Southern District of New York, and thereafter the defendant filed a motion to dismiss for *forum non conveniens* claiming that lawsuit should be litigated in Virginia. *Id.* at 502-03. The district court granted the motion, which was then reversed by the court of appeals. *Id.* at 503.

[43]*Gilbert*, 330 U.S. at 508.

[44]*Id.*

[45]*Id.*

[46]*Id.*

The Court then set forth the public interest factors, which involve the court's administrative difficulties, the burdens of jury duty on people who have no interest in the litigation, and conflicts of law.[47] The evaluation of these factors and final determination are left to the trial court's "sound discretion."[48]

It is the private interest factors established by the Supreme Court in *Gilbert* that the Delaware courts eventually adopted as the core of their *forum non conveniens* analysis[49] which still remain today.[50] Delaware would, however, branch off and create its own standard.[51]

B. *Delaware* Forum Non Conveniens *and the "Overwhelming Hardship" Requirement*

In 1964, the Delaware Supreme Court set forth the official factors governing the State's *forum non conveniens* doctrine, which are the "*Cryo-Maid* factors."[52] These factors, however, are only one part of the analysis—the other part is the "overwhelming hardship" requirement.[53]

Cryo-Maid involved a contractual dispute between General Foods and Cryo-Maid over "an allegedly novel and secret" freeze-drying process developed by Cryo-Maid.[54] General Foods, a Delaware corporation,[55] was the first party to commence litigation and filed a declaratory judgment action in Delaware.[56] Then Cryo-Maid, a small Illinois company,[57] filed a separate action in Illinois and also filed a motion with the Delaware Court of Chancery to dismiss, or in the

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[47]*Gilbert*, 330 U.S. at 508-09.

[48]*Id.* at 511.

[49]"[T]he Delaware Supreme Court historically has not considered 'public interest' factors when reviewing motions to dismiss based on *forum non conveniens*. At the same time, however, [it] has not expressly rejected the 'public interest' factors either." *In re* Asbestos Litig., 929 A.2d 373, 389 (Del. Super. Ct. 2006).

[50]*See* Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1104 (Del. 2014).

[51]The "overwhelming hardship" requirement has been a defining feature of Delaware's *forum non conveniens* doctrine. *See infra* notes 66-70 and accompanying text.

[52]"These factors are consistently employed by the Delaware courts in adjudicating *forum non conveniens* motions. Based on these factors, defendants' *forum non conveniens* motions are almost universally denied in Delaware." *See* Stevelman, *supra* note 8, at 106.

[53]*See infra* notes 66-70 and accompanying text.

[54]Their agreement fell apart, and the parties failed to reach a compromise after "extensive negotiations" and arbitration. Gen. Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 682 (Del. 1964).

[55]*Id.* at 684 ("General Foods is a large corporation operating throughout the United States with its principal office in the environs of New York City.").

[56]*Id.* at 682.

[57]*Id.* at 684 ("Cryo-Maid is a relatively small, locally-established corporation with its sole plant in Illinois, at which the preliminary process under the contract between the parties took place.").

alternative stay, the Delaware action so it could proceed with its Illinois action.[58] On appeal, the Delaware Supreme Court analogized Cryo-Maid's motion to stay to a traditional motion to dismiss for *forum non conveniens*[59] and stated the following:

> Thus proper to be considered are the following matters: (1) The relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises, if appropriate, and (4) all other practical problems that would make the trial of the case easy, expeditious and inexpensive. *We add a further factor—whether or not the controversy is dependent upon the application of Delaware law* which the courts of this State more properly should decide than those of another jurisdiction.[60]

The *Cryo-Maid* decision thus established Delaware's *forum non conveniens* approach by adopting the federal private interest factors and adding its own.[61] Since this case involved the pendency of similar actions in another jurisdiction,[62] the court did not make it a point to add that to its list of factors.[63] However, pendency of similar actions is considered a "*Cryo-Maid* factor."[64] Ultimately, the court upheld the decision to stay proceedings in favor of Cryo-Maid.[65]

The following year in *Kolber v. Holyoke*, the Delaware Supreme Court introduced the overwhelming hardship requirement,[66] which was to be used instead of a simple balancing of factors.[67] The Supreme Court expanded on *Kolber* in *Chrysler First Business v. 1500 Locust Ltd.* and explicitly stated that a defendant must establish "overwhelming hardship

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[58]The Court of Chancery granted Cryo-Maid's motion to stay, but with certain stipulations. *Cryo-Maid, Inc.*, 198 A.2d at 682.

[59]*Id.* at 683-84.

[60]*Id.* at 684 (emphasis added).

[61]*Id.* at 683-84.

[62]*Cryo-Maid, Inc.*, 198 A.2d at 682-83.

[63]*See id.* at 684.

[64]Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1104 (Del. 2014).

[65]*Cryo-Maid*, 198 A.2d at 685.

[66]"The dismissal of an action on the basis of the doctrine, and the ultimate defeat of the plaintiff's choice of forum, may occur only in the rare case in which the combination and weight of the factors to be considered balance *overwhelmingly* in favor of the defendant." Kolber v. Holyoke Shares, Inc., 213 A.2d 444, 447 (Del. 1965) (emphasis added).

[67]*Compare id.*, *with* Hahn v. Diaz-Barba, 125 Cal. Rptr. 3d 242, 249-51 (Cal. Ct. App. 2011) (applying a balancing test in deciding a motion to dismiss for *forum non conveniens*).

and inconvenience."[68] The fact that one or all factors weigh in favor of a defendant is insufficient to invoke the doctrine without a showing of overwhelming hardship.[69]

The Delaware Supreme Court from that point forward used the overwhelming hardship requirement to retain jurisdiction over cases involving foreign parties, foreign events, foreign laws, and foreign languages.[70] Two cases that illustrate this point are *Warburg, Pincus Ventures, L.P. v. Schrapper*[71] and *Candlewood Timber Group, LLC v. Pan American Energy, LLC*.[72]

Warburg involved a breach of contract dispute between a German doctor and Warburg, Pincus Ventures, L.P, a Delaware company.[73] The plaintiff and Warburg's U.K. subsidiary agreed to start a joint venture in the German healthcare industry and conducted extensive negotiations in England and Germany.[74] Their agreement ultimately fell apart.[75] "[T]he only connection this case [had] to Delaware [was] Warburg's status as a Delaware limited partnership."[76] It was likely that German law would govern the case, but if not, then it would be English law.[77] Despite all *Cryo-Maid* factors weighing in favor of the defendants, the Supreme Court held that they failed to show overwhelming hardship.[78]

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[68]Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship, 669 A.2d 104, 108 (Del. 1995).

[69]*Id.* ("Those factors provide the framework for an analysis of hardship and inconvenience. They do not, of themselves, establish anything. Thus, it does not matter whether only one of the *Cryo-Maid* factors favors [a] defendant or all of them do.").

[70]*See* Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 991-92, 1003-04 (Del. 2004); Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P., 777 A.2d 774, 780-82 (Del. 2001); Warburg, Pincus Ventures, L.P. v. Schrapper, 774 A.2d 264, 266-67 (Del. 2001); Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 835-36 (Del. 1999); Taylor v. LSI Logic Corp., 689 A.2d 1196, 1197 (Del. 1997).

[71]*See Warburg*, 774 A.2d at 266-67.

[72]*See Candlewood*, 859 A.2d at 991-92, 1003-04.

[73]*Warburg*, 774 A.2d at 266-67:

> Schrapper's complaint seeks recovery under theories of breach of contract, "tortious breach of contract," "breach of the covenant of good faith and fair dealing," "*quantum meruit*," "tortious interference with existing business relationships," "tortious interference with prospective economic advantage," "promissory estoppel," and "fraudulent inducement and misrepresentation." Schrapper alleges, in essence, that Warburg intentionally led Schrapper along, using confidential and proprietary information Schrapper supplied to form another venture without him. His complaint seeks damages "of at least DM 261,816,500" based on lost compensation, termination of business relationships in reliance on Warburg's alleged promises, and various other costs and damages.

[74]*Id.*

[75]*Id.*

[76]*Id.* at 267.

[77]*Warburg*, 774 A.2d at 267, 271.

[78]*Id.* at 271-72.

Specifically addressing the defendant's concerns that the case involved foreign law and a foreign language, the court stated that "the expense and inconvenience of translating pertinent legal precedent (assuming German law applies), retaining foreign lawyers, and producing foreign law experts to testify at trial" should be given little weight in the *forum non conveniens* analysis.[79]

The Supreme Court in *Candlewood* continued this strict application of the overwhelming hardship requirement.[80] *Candlewood* involved a breach of contract and tort dispute between Delaware and Argentine companies.[81] All events took place in Argentina,[82] and it was likely that Argentine law would govern the case.[83] Like the defendant in *Warburg*, the defendant in *Candlewood* argued that it faced an overwhelming hardship in part because the case was governed by foreign law, and, like all relevant documents, the law was written in a foreign language.[84] The court dismissed this concern and stated that the defendant

> failed to articulate any hardship that would result from a Delaware court applying Argentine law. The expense and inconvenience of translating pertinent legal precedent, of retaining foreign lawyers, and of producing foreign law experts to testify at trial, has not been shown to be of material weight in an overwhelming hardship analysis in this particular case.[85]

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[79]*Id.* at 271. The Supreme Court specifically stated that the trial court did not err "in giving little weight to this argument in the context of the overwhelming hardship analysis." *Id.* But the Supreme Court's analysis shows that it essentially adopted the trial court's position. *See id.* at 271-72.

[80]Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 998-1004 (Del. 2004).

[81]Candlewood was a Delaware company doing business in Argentina through its wholly owned Argentine subsidiary, FSB. *Id.* at 991. Pan American was a Delaware company and "the second largest hydrocarbon producer in Argentina." *Id.* Pan American obtained permission from FSB, at Candlewood's direction, to extract oil and gas from underneath FSB's land. *Id.* at 992. "Thereafter, according to Candlewood's complaint, Pan American violated those obligations by undertaking a drilling program that inflicted massive unremediated property damage to FSB's land." *Id.*

[82]*Id.* at 992, 1001-02.

[83]*Id.* at 1002-03.

[84]*Candlewood*, 859 A.2d at 1002-03.

[85]*Id.* The Supreme Court reversed the Court of Chancery's order granting the defendant's motion to dismiss for *forum non conveniens* on the basis that "the Court of Chancery's assessment of the *Cryo-Maid* factors, and its conclusion that those factors establish overwhelming hardship, are not adequately supported by the record." *Id.* at 1003.

Warburg and *Candlewood* show that the Supreme Court placed an extremely stringent burden on Delaware companies when performing the overwhelming hardship analysis.[86] So long as the defendant was a Delaware company, the court was reluctant to find overwhelming hardship even if it meant adjudicating a case involving foreign parties, foreign events, foreign law, and a foreign language.[87]

Like the Supreme Court, the Court of Chancery also had no problem with maintaining jurisdiction over disputes that had little to no causal nexus to the State.[88] The Superior Court has also consistently failed to find overwhelming hardship in cases with similar circumstances.[89]

Delaware's *forum non conveniens* jurisprudence leading up to the *Martinez* decision shows that the courts were content with adjudicating claims that involved foreign plaintiffs, foreign events, foreign laws, and foreign languages.[90] Companies located in Delaware had an extremely difficult time persuading the courts that they would face an overwhelming hardship by defending claims in their home state.[91] But, in light of *Martinez*, Delaware corporations now have a much better chance to argue *forum non conveniens* successfully, at least in the context of tort claims brought by foreign plaintiffs.[92]

III. THE *MARTINEZ* DECISION AND A NEW APPROACH TO *FORUM NON CONVENIENS*

The *Martinez* decision altered the State's *forum non conveniens* doctrine in three respects. First, the court relaxed the "overwhelming hardship" requirement and lessened the burden of proof placed on defendants.[93] Second, there was more weight given to "the application of

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[86] *See* Warburg, Pincus Ventures, L.P. v. Schrapper, 774 A.2d 264, 267 (Del. 2001); *Candlewood*, 859 A.2d at 998-1004.

[87] *See supra* notes 73-85 and accompanying text.

[88] *See* QVT Fund LP v. Eurohypo Capital Funding LLC I, 2011 WL 2672092, at *16-17 (Del. Ch. July 8, 2011); Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp., 2009 WL 3465984, at *4-7 (Del. Ch. Oct. 28, 2009); Sprint Nextel Corp. v. iPCS, Inc., 2008 WL 2737409, at *15-18 (Del. Ch. July 14, 2008); E.I. du Pont de Nemours & Co. v. Bayer CropScience, L.P., 2008 WL 2673376, at *4-5 (Del. Ch. July 2, 2008).

[89] *See* Lettman v. Greenwood Gaming & Entm't, Inc., 2010 WL 5825344, *1-3 (Del. Super. Ct. Dec. 22, 2010); Smith v. Freescale Semiconductor, Inc., 2010 WL5140751, *1-3 (Del. Super. Ct. Dec. 13, 2010); *In re* Asbestos Litig., 929 A.2d 373, 378-80 (Del. Super. Ct. 2006).

[90] *See, e.g.*, *Candlewood*, 859 A.2d at 998-1004; *Warburg*, 774 A.2d at 267-72.

[91] *See* Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1104-05 (Del. 2014).

[92] *See id.* at 1104-13.

[93] *Id.* at 1105-06.

Delaware law" as a *Cryo-Maid* factor.[94] Third, the court considered "public interest factors" as an appropriate part of a trial court's analysis.[95] All three of these changes are consistent with Delaware law[96] and arguably necessary for a more practical application of the *forum non conveniens* doctrine.[97]

The issue, however, is that the court's changes will likely lead to the doctrine's inconsistent application by allowing Delaware courts to retain corporate and commercial disputes while dismissing "garden-variety" tort claims.[98] This was essentially what the Superior Court argued in favor of when ruling on DuPont's motion to dismiss in the decision below.[99]

A. *The Decision Below*

The Superior Court determined that DuPont would face an overwhelming hardship if forced to litigate this toxic tort case in Delaware.[100] Whether the ultimate conclusion was right or wrong, the court incorrectly applied the *forum non conveniens* doctrine and made clear that, at least in the trial judge's opinion, Delaware favors corporate and commercial disputes over tort claims brought by foreign plaintiffs.[101] The court's decision shows that it will engage in legal contortions in order to free its docket of burdensome tort suits.[102]

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[94]*Id.* at 1111.

[95]*Martinez*, 86 A.3d at 1112-13.

[96]The *Martinez* court's construction of "overwhelming hardship" is based on prior Supreme Court and Court of Chancery decisions. *Id.* at 1105-06. Before *Martinez*, overwhelming hardship was, in all practical matters, a near absolute bar to Delaware corporations arguing for dismissal on *forum non conveniens* grounds. *See supra* Part II.B. The increased consideration given to "the application of Delaware law" is the most substantial change to the analysis, but it is also based in prior decisions. *Compare* Taylor v. LSI Logic Corp., 689 A.2d 1196, 1200 (Del. 1997), *with* Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 442 (Del. Ch. 2007). *Martinez* more or less reins in courts from the extreme where this factor was almost non-existent. *See supra* Part II.B. Finally, the use of public interest factors is also soundly based in *forum non conveniens* jurisprudence and Delaware common law; it just was not expressly authorized as an official part of the *Cryo-Maid* analysis. *See supra* note 49.

[97]Delaware's application of the *forum non conveniens* doctrine has been criticized as being unreasonably strict and showing a lack of comity. *See* Stevelman, *supra* note 8, at 62; Smith, *supra* note 8, at 756-58.

[98]Martinez v. E.I. DuPont de Nemours & Co., 82 A.3d 1, 38-39 (Del. Super. Ct. 2012).

[99]*Id.* at 33-34, 38-39.

[100]*Id.* at 39-40.

[101]*Id.* at 33-34, 38-39.

[102]In conducting its *forum non conveniens* analysis, the Superior Court spent a significant amount of time discussing irrelevant issues, including DuPont's argument that it

The *Martinez* case was one of approximately thirty asbestos cases brought by Argentine nationals.[103] The case involved an Argentine national who was exposed to asbestos while working for a "great-great grand subsidiary" of DuPont in Argentina.[104] Like *Candlewood* discussed in Part II.B, all relevant events occurred in Argentina, all evidence was located in Argentina,[105] and Argentine substantive law governed the case.[106] The court decided to use this particular case as a "test case" because of the plaintiff's unique theories of liability, and "if the *Martinez* case cannot survive a motion to dismiss, the remaining cases will likely be subject to dismissal as well . . . ."[107]

DuPont filed a motion to dismiss on several grounds including failure to join an indispensable party, failure to state a claim, and *forum non conveniens*.[108] Throughout its analysis, the court intensely focused on DuPont being the "wrong" defendant[109] and also expressed concerns that this case would be the start of a "new wave" of asbestos claims,[110] which ultimately tainted its decision.[111] The court repeatedly stated that

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was improperly named as a defendant and this case. *See infra* notes 109-13 and accompanying text.

[103] *Martinez*, 82 A.3d at 3.

[104] *Id.*

[105] Plaintiff's deceased husband was exposed to asbestos while working at a textile plant in Argentina, he was diagnosed in Argentina, and he was treated in Argentina. *Id.* at 3, 32.

[106] *Id.* at 33.

[107] *Martinez*, 82 A.3d at 4 ("This new 'direct participant' theory of liability, pled only in the *Martinez* case, in addition to all of the other various claims and theories of liability, renders this particular case the most viable 'test' case.").

[108] *Id.* at 6.

[109] *Id.* at 36, 39-40:

> [I]t is all but impossible to ignore the prejudice to DuPont by being named as the wrong party when considering the *forum non conveniens* issue as well.
>
> . . . .
>
> The fact of the matter is that DuPont should not be placed in the position of having to defend this type of lawsuit in Delaware, or in Argentina, or anywhere. DuPont has been wrongly identified as Rocha's former employer . . . . Viewed in this context, the burden of litigating in this forum is so severe as to result in overwhelming hardship to DuPont.

[110] *Id.* at 27 (discussing how asbestos litigation is becoming unmanageable for the courts).

[111] By holding that DuPont faces overwhelming hardship because it is the wrong party, the Superior Court "imported into its analysis a consideration that is legally irrelevant and untethered" to *forum non conveniens*. Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 998 (Del. 2004). Naming the wrong party is an independent reason for dismissal, but the Superior Court "erred by injecting the ['wrong party'] issue into a *forum non conveniens* analytic framework." *Id.* at 1000. The court's concern about future asbestos suits burdening the docket also has no place in deciding whether the moving defendant faces an overwhelming hardship, and such a concern is "illusory at best." *In re* Asbestos Litig., 929 A.2d 373, 389-90 (Del. Super. Ct. 2006).

the "real reason" DuPont faced overwhelming hardship is because it is the "wrong party."[112] While this supports an argument for dismissal, it is irrelevant to the doctrine of *forum non conveniens*.[113] The court then drifted further away from the appropriate standard and stated that dismissal on *forum non conveniens* grounds is appropriate because this is a "non-commercial and non-corporate garden-variety toxic tort dispute[] . . . ."[114]

While there was a detailed discussion of the *Cryo-Maid* factors,[115] any merit to the court's *forum non conveniens* decision was called into question by its injection of irrelevant issues into the analysis[116] and its acute concern that new asbestos claims may overcrowd its docket.[117] Even if dismissal under *forum non conveniens* were proper, the court's arrival at that decision most certainly was not.[118]

B. *The Delaware Supreme Court's Reexamination of* Forum Non Conveniens

The decision below provided the Supreme Court with a prime opportunity to reevaluate Delaware's *forum non conveniens* analysis and set a refined standard.[119] The intent behind the court's decision is unclear, but its effects are not. Delaware businesses will now have a much lower bar to reach when arguing for dismissal on *forum non conveniens* grounds against foreign plaintiffs in tort suits. The question

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[112] *Martinez*, 82 A.3d at 36, 39-40. This point is in dispute. While DuPont may have been the wrong party for certain counts of the complaint, other counts alleged that DuPont was liable for independent acts of negligence. *Id.* at 5-6; *see also* Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1116 (Del. 2014) (Berger, J., dissenting).

[113] Both the majority and dissenting opinions on appeal agreed that this issue has no place in deciding a motion to dismiss for *forum non conveniens*. *Martinez*, 86 A.3d at 1108, 1114-15.

[114] *Martinez*, 82 A.3d at 38-39.

[115] *Id.* at 28-38.

[116] *See supra* note 111; *see also Candlewood*, 859 A.2d at 999-1000 ("By injecting an irrelevant factor into the *forum non conveniens* analysis, the Court of Chancery lowered the applicable standard.").

[117] *Martinez*, 82 A.3d at 25-27.

[118] *See supra* notes 109-17 and accompanying text.

[119] It is very interesting that the Supreme Court chose to analyze solely the *forum non conveniens* argument when there were independent and adequate grounds for upholding dismissal that were much less controversial. *See* Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1103-04 (Del. 2014). The fact that the court chose to address only the *forum non conveniens* argument shows that it saw this case as an opportunity to reassess the doctrine. Perhaps the facts of the case provided the appropriate backdrop for reevaluating the *forum non conveniens* framework.

explored later is whether the bar is equally low when foreign plaintiffs bring commercial disputes.[120]

Martinez appealed the Superior Court's decision on several grounds, but the Supreme Court decided that the *forum non conveniens* dismissal was a proper exercise of the trial court's discretion and only addressed that issue on appeal.[121] After discussing the standard of review[122] and *Cryo-Maid* factors,[123] the court reexamined the "overwhelming hardship requirement"[124] that has been the defining criteria of Delaware's *forum non conveniens* doctrine.[125]

Justice Holland, writing for the majority, discussed the overwhelming hardship requirement's role in the analysis and how many believed that it posed an "insurmountable burden" to Delaware companies.[126] The Supreme Court rejected this interpretation and took the opportunity to set a definition of "overwhelming hardship" that will lead to a more practical application of the *forum non conveniens* doctrine.[127] The court looked to a Court of Chancery opinion delivered by then-Vice Chancellor Strine, which stated, "a more restrained meaning is at the essence of the [overwhelming hardship] standard."[128] Overwhelming hardship was then defined as a "stringent" standard that required the balance of factors to weigh "strongly" in favor of dismissal.[129] The court left no doubt that, under this construction, the

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[120] *See infra* Part IV.A.

[121] *Martinez*, 86 A.3d at 1104.

[122] The trial court's decision was reviewed under the abuse of discretion standard. *Id.* But, it arguably should have been subject to a *de novo* review since the trial court considered irrelevant issues in its analysis and did not correctly apply the established legal principles. *See, e.g.*, Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P., 777 A.2d 774, 777 (Del. 2001) ("Whether the trial court applied the appropriate legal standard in considering a motion to dismiss, however, presents this Court with a question of law that is reviewed *de novo*."); Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 999-1000 (Del. 2004) ("By injecting an irrelevant factor into the *forum non conveniens* analysis, the Court of Chancery lowered the applicable standard.").

[123] *See* Gen. Foods Corp. v. Cryo-Maid, Inc. 198 A.2d 681, 684 (Del. Ch. 1964).

[124] *Martinez*, 86 A.3d at 1104-06.

[125] *Id.*

[126] *Id.* at 1105 ("The experience in those cases have led some trial judges to conclude that term 'overwhelming hardship' suggests an insurmountable burden for defendants. That perception, although understandable, is not accurate.").

[127] *Id.* at 1105-06.

[128] IM2 Merch. & Mfg., Inc. v. Tirext Corp., 2000 WL 1664168, at *7 (Del. Ch. Nov. 2, 2000) ("While the outcomes in recent cases and the term 'overwhelming hardship' itself may suggest an insurmountable burden that can only be met if a defendant were to be rendered impecunious by the procession of litigation in Delaware, a more restrained meaning is at the essence of the standard.").

[129] *Martinez*, 86 A.3d at 1106.

overwhelming hardship requirement is certainly within the reach of Delaware companies.[130]

The Supreme Court held that the trial court did not abuse its discretion in finding overwhelming hardship after "conduct[ing] a detailed analysis of each of the *Cryo-Maid* factors" and considering the burdens that would be placed on "DuPont and the courts of Delaware."[131] The issues the court found central to the overwhelming hardship requirement were (1) the plaintiff was a foreign national, and she was entitled to less deference in her choice of forum, (2) practically all relevant events occurred in Argentina, (3) the case involved (among other claims) an unsettled issue of Argentine law,[132] and (4) the applicable law was in Spanish, not English.[133] Even though the trial court thought that DuPont faced overwhelming hardship because it was the wrong defendant,[134] the Supreme Court explicitly and correctly left this out of the analysis,[135] but nonetheless supported the trial court's ultimate findings.[136]

The simple fact that DuPont satisfied the overwhelming hardship requirement is astounding considering prior decisions.[137] Before this decision, the Supreme Court did not typically find the involvement of foreign parties, foreign events, foreign laws, and foreign languages as sufficient to show overwhelming hardship.[138] The bar has been lowered. From this point forward, Delaware companies can successfully meet the overwhelming hardship requirement by showing that the *Cryo-Maid* factors "strongly" support dismissal.[139]

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[130] *Id.*

[131] *Id.*

[132] Both the trial court and Supreme Court focused on the plaintiff's "direct participant" allegations against DuPont and how this is an unsettled area of Argentine law. *Id.* at 1108; Martinez v. E.I. DuPont de Nemours & Co., 82 A.3d 1, 9-10, 13-14 (Del. Super. Ct. 2012). While this is certainly a factor that weighs in favor of dismissal, the plaintiff also alleged that DuPont was liable for independent acts of negligence, which did not involve an unsettled area of law. *See supra* note 112. Furthermore, before *Martinez*, it was not unusual for Delaware courts to decide unsettled issues of another sovereign's law. *See infra* note 144.

[133] *Martinez*, 86 A.3d at 1106-08.

[134] *See supra* notes 109-13 and accompanying text.

[135] *Martinez*, 86 A.3d at 1108 ("We do not premise our affirmance on a conclusion that the Superior Court correctly decided that DuPont was not a proper defendant.").

[136] *Id.* at 1106-11. *But see supra* note 122 (discussing the abuse of discretion versus *de novo* standards and why the *de novo* standard was arguably the proper standard).

[137] *See supra* Part II.B.

[138] *See supra* notes 70-85 and accompanying text.

[139] Overwhelming hardship now has a much "more restrained" meaning. Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1105 (Del. 2014) (quoting IM2 Merch. & Mfg., Inc. v. Tirext Corp., 2000 WL 1664168, at *7 (Del. Ch. Nov. 2, 2000)).

The court then proceeded to address "the application of Delaware law" as a *Cryo-Maid* factor that was previously given "inadequate weight."[140] It found that not only was the application of Delaware law a key factor, but so was the broader consideration—"the right of all parties . . . to have important, uncertain questions of law decided by the courts whose law is at stake . . . ."[141] Delaware substantive law was not involved in this case, and the plaintiff was, in certain counts of the complaint, asking Delaware courts to decide an unsettled area of Argentine law.[142] The court essentially stated that Delaware courts, from this point forward, are not likely to adjudicate claims brought by foreign plaintiffs over foreign events if Delaware law is not involved.[143] As a matter of comity, just as Delaware appreciates deference from foreign courts over areas of corporate law, Delaware courts are now called to be more conscious of foreign courts' interests in the dispute before them.[144]

The last major reexamination concerned the role of public interest factors in determining whether dismissal is appropriate.[145] Public interest factors, such as consideration of the administrative burden on the courts, were not required under the *Cryo-Maid* analysis and sometimes were never discussed.[146] The Supreme Court in *Martinez*, however, stated that public interest factors are appropriate in a trial court's *forum non conveniens* analysis and fall under the "other practical considerations" factor.[147] It declined "to adopt a broad mandate" requiring consideration of public interest factors in all cases,[148] but stated that in cases like *Martinez*, it is within the discretion of the trial court to weigh such

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[140] *Martinez*, 86 A.3d at 1111.

[141] *Id.* This is also addressed earlier in the decision. *Id.* at 1109-10.

[142] *Id.* at 1110-11. Adjudicating claims that involved unsettled issues of foreign law was commonplace in Delaware's jurisprudence before *Martinez*. *See infra* note 144.

[143] "[P]laintiffs who are not residents of Delaware, whose injuries did not take place in Delaware, and whose claims are not governed by Delaware law have a less substantial interest in having their claims adjudicated in Delaware." *Martinez*, 86 A.3d at 1111.

[144] This marks a significant change in the doctrine's application moving forward. *See, e.g.*, Berger v. Intelident Solutions, Inc., 906 A.2d 134, 137 (Del. 2006) (retaining jurisdiction over case involving the application of "novel and important issues of Florida corporate law"); Taylor v. LSI Logic Corp., 689 A.2d 1196, 1200 (Del. 1997) ("It is not unusual for courts to wrestle with open questions of the law of sister states or foreign countries. The application of foreign law is not sufficient reason to warrant dismissal under the doctrine of *forum non conveniens*."); Kolber v. Holyoke Shares, Inc., 213 A.2d 444, 446 (Del. 1965) ("This leaves the reason that unsettled New York law governs the case. This factor is not sufficient reason, in our opinion, for dismissal under the doctrine of *forum non conveniens*, either alone or in combination with the other factors mentioned. It is not unusual, of course, for Delaware courts to deal with open questions of the law of sister states or of foreign countries.").

[145] *Martinez*, 86 A.3d at 1112-13.

[146] *See id.*; *see also In re* Asbestos Litig., 929 A.2d 373, 388-90 (Del. Super. Ct. 2006).

[147] *Martinez*, 86 A.3d at 1112-13.

[148] *Id.*

considerations.[149] The court's discussion of public interest factors was limited to "efficient administration of justice,"[150] and it did not address other common public interests such as the stake that the state's citizens (or jurors) may have in the litigation.[151] This area is, for now, left open for trial courts to interpret.

C. *Cause for Concern?*

Justice Berger delivered a spirited dissent and warned that the majority's opinion was a "cause for concern."[152] The dissent argued that despite years of consistent *forum non conveniens* application by trial courts and the Supreme Court, the majority decided to revamp the State's standard for the purpose of protecting Delaware's corporate franchise.[153] The *Martinez* case history lends support to the dissent.[154]

The trial court displayed an overt bias against asbestos suits and seemed wholly opposed to the idea of foreign nationals bringing new claims against Delaware corporations in Delaware.[155] At the same time, the trial court emphasized that the major role of Delaware courts is deciding corporate and commercial disputes.[156] It is no surprise that when the majority did not address the trial court's fixation on the burdens imposed by "garden-variety" tort suits the dissent inferred that the majority agreed with the trial court in that respect.[157] According to the dissent, the majority's "real point" is that "Delaware corporate law should

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[149] *Id.* at 1113.

[150] *Id.*

[151] *Martinez*, 86 A.3d at 1112-13.

[152] *Id.* at 1113 (Berger, J., dissenting).

[153] "The majority says that it is resolving 'tension' in the law, when there was neither tension nor any other acceptable reason to change the law. It then reverses decades of this Court's consistent law without even a nod to the doctrine of *stare decisis*. The majority strains to recast the trial court's decision, and the law, in order to make the point that other jurisdictions should not interfere with the Delaware corporate franchise." *Id.* at 1117 (Berger, J., dissenting).

[154] *See supra* Part III.A.

[155] The Superior Court began its *forum non conveniens* analysis by addressing how the plaintiff's attorneys were planning on filing new claims on behalf of other foreign nationals. Martinez v. E.I. DuPont de Nemours & Co., 82 A.3d 1, 25-27 (Del. Super. Ct. 2012). The court then went on to say that "the burden on the one judge assigned to the asbestos docket is barely manageable." *Id.* at 27. As mentioned earlier, this has no place in the *forum non conveniens* analysis. *See supra* notes 109-17 and accompanying text.

[156] *Martinez*, 82 A.3d at 33, 38-39.

[157] Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1116-17 (Del. 2014) (Berger, J., dissenting).

be decided in Delaware and that other jurisdictions should 'stay in their lane.'"[158] The majority expressly rejected such a motive.[159]

The truth of the matter is that Delaware's *forum non conveniens* doctrine was, in application, almost "non-existent" prior to *Martinez*.[160] In terms of strictly following precedent, the *Martinez* court decided the case incorrectly.[161] But, in terms of giving the *forum non conveniens* doctrine practical effect, the court succeeded. If anything, Delaware is now more closely aligned with federal common law,[162] which shows that the court's changes to the doctrine are mild. Before *Martinez*, *forum non conveniens* was barely a theoretical option for Delaware corporations.[163] Now, Delaware corporations have a viable defense to suits brought by foreign plaintiffs.[164] While the court's changes to the *forum non conveniens* doctrine are innocuous in the abstract, the question remains whether the doctrine will be applied consistently to all disputes—tort, corporate, and commercial—brought by foreign plaintiffs. Prior decisions suggest not.[165]

IV. *FORUM NON CONVENIENS* IN COMMERCIAL LITIGATION AND THE POTENTIAL FOR DISCORD

It is no secret that corporations like Delaware,[166] and Delaware likes corporations.[167] The State's interest in corporate and commercial

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[158] *Id.* at 1116 (Berger, J., dissenting).

[159] *Id.* at 1113 (Berger, J., dissenting).

[160] *Martinez*, 82 A.3d at 26 ("Indeed, a thorough review of Delaware cases applying the [overwhelming hardship] standard would seem to suggest that the doctrine of *forum non conveniens* is all but non-existent in this state.").

[161] *See supra* Part II.B; *see also supra* note 144 and accompanying text.

[162] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238-40, 260-61 (1981). *Piper* involved a wrongful death action arising from a plane crash in Scotland, which was brought on behalf of foreign nationals. *Id.* at 238-40. The U.S. Supreme Court held that dismissal on the basis of *forum non conveniens* was appropriate despite the fact that the suit was being litigated in defendant Piper's home forum where the subject plane was manufactured. *Id.* at 239.

[163] *See supra* Part II.B.

[164] *See Martinez*, 82 A.3d at 38-39; *Martinez*, 86 A.3d at 1104-13.

[165] The Superior Court made clear that Delaware courts favor corporate and commercial disputes when it dismissed the *Martinez* case and stated, "These are non-commercial and non-corporate garden-variety toxic tort disputes . . . ." *Martinez*, 82 A.3d at 38-39. Prior decisions discussing Delaware's interest in corporate and commercial disputes are addressed more fully at note 18.

[166] *See* Bebchuk & Hamdani, *supra* note 7, at 565-68; *see also* BLACK, *supra* note 7, at 10:

> Why do corporations incorporate in Delaware? There is not one answer but many. They include a modern and nationally recognized corporation statute and a well-developed case law that facilitates business planning; the respected Court of Chancery to deal with corporation law issues should they arise; an efficient and user-friendly Secretary of State's Office; and a legislature that

law is deeply ingrained in its history and economy.[168] Delaware courts have attained great prestige in the world of business law[169] and have historically played an important role in resolving corporate and commercial disputes.[170] Not only is Delaware preeminent in the field of corporate law, but it is also one of the most globalized economies in the United States.[171]

As Delaware's role in the global economy increases, so does the likelihood that disputes will arise between Delaware companies and foreign entities. Delaware's businesses should be aware of potential litigation exposure associated with such disputes as well as how to minimize that exposure. One such method of minimizing exposure is dismissal through *forum non conveniens*.[172]

The *Martinez* decision shows that Delaware companies, and corporations in general, do have some degree of protection through *forum non conveniens* against foreign plaintiffs bringing tort claims arising from foreign events, in the event Delaware law does not govern the dispute.[173] Unlike the Superior Court, the Supreme Court in *Martinez* did not draw a distinction between tort claims and commercial

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puts a high priority on corporation law matters and is committed to keeping Delaware's business laws current.

[167]"Delaware collects more than $1 billion each year in annual 'franchise taxes' that businesses pay for incorporating there, said [Richard J. Geisenberger, director of Delaware's Division of Corporations]." Peter Frost, *New Walgreen Holding Company to be Incorporated in Delaware*, CHI. TRIB. (Sept. 26, 2014), *archived at* http://perma.cc/3VKN-NT3A. "No other state enjoys the scale of revenues derived from Delaware's Corporate Franchise Tax (CFT). At the state level, the CFT comprises nearly 25% of Delaware's revenues." FINAL REPORT OF THE DEFAC ADVISORY COUNCIL ON REVENUES 8 (2015), *archived at* http://perma.cc/3G24-34QJ.

[168]*See, e.g.*, Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts*, BUS. L. TODAY, Mar.-Apr. 2008, at 21; *see also* ROBERT D. ATKINSON & SCOTT ANDES, INFO. TECH. & INNOVATION FOUND., THE 2010 STATE NEW ECONOMY INDEX: BENCHMARKING ECONOMIC TRANSFORMATION IN THE STATES 21-22 (2010), *archived at* http://perma.cc/JJ2G-7VW6 (reviewing economic data for the United States including Delaware).

[169]*See* BLACK, *supra* note 7, at 7 ("The case law, created over the years by the Court of Chancery and the Delaware Supreme Court, is the tangible evidence of Delaware's corporation law expertise. It is this highly developed body of case law, more than the statute, which is 'the Delaware corporation law.'"); Parsons & Slights, *supra* note 168, at 21-25; Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 25-28 (2015) (discussing the influence of Delaware's judiciary).

[170]*See* BLACK, *supra* note 7, at 5-8; Parsons & Slights, *supra* note 168, at 21-25.

[171]*See* ATKINSON & ANDES, *supra* note 168, at 22.

[172]As mentioned earlier, *forum non conveniens* is a valuable defense because it effectively terminates the instant litigation, and the alternative fora my not provide the plaintiff with the same remedies. The defendant's potential exposure may be greatly diminished. *See supra* note 17.

[173]*See supra* Part III.B.

disputes.[174] But, in light of prior decisions, it is unlikely that the *forum non conveniens* doctrine will be applied consistently in all cases.[175] Commercial disputes have a much greater chance of remaining in Delaware.[176]

A. *The Ultimate Impact on Commercial Law and Delaware's Corporate Community*

This section discusses three areas of civil liability that Delaware corporations face when conducting business outside the country. The first area is liability arising from various torts, such as products liability and toxic torts.[177] The second area is liability arising in the commercial law context, including breach of contract claims.[178] The third area is liability arising in the corporate law context, such as shareholder disputes.[179] *Martinez* has diminished liability exposure for torts significantly.[180] Corporate law disputes will remain largely unaffected for the reasons discussed below.[181] Commercial disputes, however, constitute a gray area.[182] There is arguably a forum dispute spectrum with tort cases on one end and corporate disputes on the other. In the middle lie the various forms of commercial disputes.

1. Tort Law Disputes

Companies that export products throughout the world will be glad to know that they have a strong *forum non conveniens* defense to tort claims brought by foreign plaintiffs in Delaware.[183] *Martinez* has provided greater protection to companies in that respect.[184] *Martinez* and prior Delaware Supreme Court decisions suggest that commercial and

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[174] *Compare* Martinez v. E.I. DuPont de Nemours & Co., 82 A.3d 1, 38-39 (Del. Super. Ct. 2012), *with* Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1108-11 (Del. 2014).

[175] *See, e.g.*, Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 1000 (Del. 2004); *Martinez*, 82 A.3d at 33-34, 38-39; Aveta, Inc. v. Colon, 942 A.2d 603, 615 (Del. Ch. 2008).

[176] *See supra* note 18.

[177] *See, e.g.*, *Martinez*, 82 A.3d at 25-26; Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 835-36 (Del. 1999).

[178] *See, e.g.*, *Candlewood*, 859 A.2d at 992-93; Warburg, Pincus Ventures, L.P. v. Schrapper, 774 A.2d 264, 266-67 (Del. 2001).

[179] *See, e.g.*, Taylor v. LSI Logic Corp., 689 A.2d 1196, 1200 (Del. 1997).

[180] *See supra* notes 163-65 and accompanying text.

[181] *See infra* Part IV.A.2.

[182] *See infra* Part IV.A.3.

[183] *See supra* notes 143, 163-64 and accompanying text.

[184] *See supra* note 17 (discussing the benefits of *forum non conveniens* to defendants).

corporate disputes are a better use of judicial resources than tort claims that backlog the dockets.[185] Indeed, the Superior Court emphasized the burden that asbestos litigation places on its docket and how the role of Delaware courts is to provide a neutral forum for commercial disputes.[186] The Superior Court could not help but express an aversion to the idea of a "new wave" of asbestos suits brought by foreign nationals.[187] *Martinez* removed an obstacle to dismissal in burdensome tort disputes—including the anticipated asbestos claims discussed in the Superior Court's decision—by relaxing the *forum non conveniens* standard.[188]

It is only natural to infer that Delaware companies will enjoy the same *forum non conveniens* protections in similar tort claims. The areas where the analysis will hinge are the application of Delaware law and public interest factors.[189] This was how the Supreme Court repackaged the trial court's grant of dismissal.[190] The application of Delaware law may have played an inconsequential role in prior decisions,[191] but it will be an important consideration in the future and may serve as a justification for dismissing "garden-variety" tort suits.[192] Furthermore, there are likely to be public interest factors that correlate with the application of foreign law.[193] If foreign law governs the dispute, this may also mean that a foreign language permeates the various aspects of the case.[194] The parties and the court may bear significant burdens and expenses from having to translate documents and legal authorities.[195]

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[185] *See* Martinez v. E.I. DuPont de Nemours & Co., 82 A.3d 1, 27 (Del. Super. Ct. 2012) ("[W]ith the multitude of asbestos cases now before it, the burden on the one judge assigned to the asbestos docket is barely manageable."); *see also* BLACK, *supra* note 7, at 6 (quoting Chief Justice William Rehnquist as stating that tort and criminal cases create huge backlogs in judicial systems).

[186] *Martinez*, 82 A.3d at 25-27, 33.

[187] *Id.* at 27.

[188] This does not suggest that the Delaware courts have a blanket aversion to all tort claims, but they have certainly made dismissal easier for Delaware defendants facing claims brought by foreign nationals. *See* Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1111 (Del. 2014); *Martinez*, 82 A.3d at 38-39.

[189] *Martinez*, 86 A.3d at 1111-13.

[190] *Id.* at 1108 (affirming the Superior Court's decision but parting from its analysis).

[191] *See supra* Part II.B; *see also supra* note 144.

[192] *See Martinez*, 86 A.3d at 1111.

[193] The application of foreign law may create burdens for the parties and the courts, and it may also be an indication that the jury, if there is one, will have no interest in having the case decided in its state. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 (1981).

[194] *Martinez* is an example of such a situation. *See supra* Part III.A-B.

[195] *See supra* Part II.B. However, neither case that discussed the costs involved with translations found that such a consideration should be given significant weight. *Martinez* suggests that this consideration, like the application of Delaware law, should be given more weight in future decisions. *Martinez*, 86 A.3d at 1113 ("[These issues] may constitute not only

This is yet another justification for dismissing a case for *forum non conveniens* given new force by *Martinez*.[196]

The arguments above are not absolute, and there is no doubt that the courts' ultimate goal is to achieve fairness and justice. There may even be situations where public interest factors weigh in favor of keeping a tort dispute in Delaware despite it involving foreign plaintiffs and foreign law.[197] Those situations will likely be the exception. The large majority of tort cases involving foreign plaintiffs, foreign events, and foreign law will not survive a motion to dismiss for *forum non conveniens*.

2. Corporate Law Disputes

Defendants in the common forms of corporate litigation—direct and derivative shareholders suits or "books and records"[198] disputes—will likely face the same challenging burdens imposed by the *forum non conveniens* analysis before *Martinez*.[199] First, and most importantly, any matter that "involves the internal affairs of a Delaware corporation [is] an area where Delaware's interests are paramount."[200] Second, the burden of accessing proof and witnesses in corporate disputes has been minimized significantly by "modern means of communication and transportation."[201] Delaware corporations will most likely be unsuccessful in arguing *forum non conveniens* if there is an alleged breach of fiduciary duty, and any

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serious hardship to the defendant, but also concomitant, serious, and practical problems that would make it [burdensome and expensive] for the Delaware court to retain jurisdiction.").

[196] *See supra* note 195.

[197] If the case involves wrongful conduct on the part of a Delaware corporation, Delaware has an interest in providing a remedy to the injured party and preventing future harms. *See, e.g.*, Ison v. E.I. DuPont de Nemours & Co., 729 A.2d at 832, 844 (Del. 1999) ("The home countries have a significant interest in setting the safety standards by which a product sold in their country will be judged."); Hamilton Partners, L.P. v. Englard, 11 A.3d 1180, 1213 (Del. Ch. 2010) ("[Delaware's interests include] overseeing the conduct of particular classes of actors and policing against particular types of wrongdoing.").

[198] "Books and records" disputes are not always brought in the forum where the corporate defendant is incorporated. *See, e.g.*, Matthew D. Stachel, *Understanding and Mitigating the Risks Involved When Stockholder Books and Records Actions Are Asserted Outside of Delaware*, BUS. L. TODAY, July 2014, at 1, 1-3. Delaware courts may not be overly sympathetic to foreign corporate defendants facing books and records actions in Delaware. *See infra* note 201 and accompanying text.

[199] *See supra* note 18.

[200] *Hamilton Partners*, 11 A.3d at 1213.

[201] *Id.*; *see also* Wilmington Sav. Fund Soc'y, FSB v. Caesars Entm't Corp., 2015 WL 1306754, at *9 (Del. Ch. Mar. 18, 2015) ("I take judicial notice, however, that the Courthouse in Wilmington is separated from Pennsylvania Station in Manhattan by a five-minute walk and 125 miles of shiny steel rails, which may be traversed in the comfort of the business section of an Acela train in an hour and a half. In that light, litigation in Delaware is less manifest hardship than inconvenience.").

company that is involved in a document dispute will likewise lack compelling reasons necessary to justify dismissal.[202]

There is no doubt that Delaware has an exceptionally strong interest in retaining jurisdiction over corporate disputes.[203] As discussed above, the State's budget is dependent on corporate franchise taxes and filing fees.[204] Also, the judiciary enjoys unmatched prestige in the world of corporate law as the result of adjudicating "many of the most important corporate law cases in recent history."[205] Professor Faith Stevelman describes these as Delaware's "monetary and nonmonetary stakes . . . in the continued preeminence of the state's corporate law."[206] One method by which the judiciary maintains preeminence in the field of corporate law is the strict application of forum doctrines, including *forum non conveniens*.[207] This is not likely to change anytime soon.

Although Delaware courts have a strong interest in adjudicating corporate disputes, they will not always go out of their way to retain jurisdiction over every corporate dispute.[208] Professor Stevelman suggested that while the courts will keep many high-profile cases, they are open to granting a stay or dismissal when the benefits to the judiciary's reputation are outweighed significantly by the risks of negative publicity.[209] Also, Chief Justice Strine, while Vice Chancellor, showed that the courts will give due respect to other jurisdictions, especially when the matter involves the internal affairs of foreign companies.[210] While there are instances where the courts will not retain jurisdiction, those will likely be rare exceptions.[211]

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[202] *See supra* notes 18, 200-01 and accompanying text.

[203] *See* Stevelman, *supra* note 8, at 59-66.

[204] *See id.* at 67:

> Since Delaware is a comparatively small state, the franchise taxes and filing fees paid annually by Delaware-incorporated entities make up a sizeable percentage of the state's annual tax revenue. For recent years, the figures vary from a low of sixteen percent to a high of twenty-five percent—with twenty percent being average.

[205] *Id.* at 72.

[206] *Id.* at 137.

[207] *See* Stevelman, *supra* note 8, at 62, 105-07. The other forum doctrine related to *forum non conveniens* is the *McWane* doctrine, which applies in parallel proceedings where the Delaware action is commenced after a related action is filed in a different forum. *See* McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283-84 (Del. 1970); *see also* Stevelman, *supra* note 8, at 62.

[208] *See* Stevelman, *supra* note 8, at 128-29.

[209] *Id.*

[210] Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 452 (Del. Ch. 2007):

> If we expect that other sovereigns will respect our state's overriding interest in the interpretation and enforcement of our entity laws, we must show reciprocal respect. In particular, that means giving more respect to the shared

3. Commercial Law Disputes

Defendants in commercial disputes have a stronger argument in favor of dismissal for *forum non conveniens* than they did pre-*Martinez*, at least in theory. In application, however, they may find that little has changed. As mentioned earlier, Delaware courts have a strong interest in providing a neutral forum for corporate and commercial disputes.[212] They also have a strong interest in adjudicating claims that involve Delaware corporations in matters that concern corporate or commercial law.[213] Had the *Martinez* case been a commercial dispute, all other circumstances remaining the same, dismissal for *forum non conveniens* may never have been granted at the trial level.[214]

Access to proof in many commercial disputes, like corporate disputes, is a "largely insignificant" factor in the *forum non conveniens* analysis.[215] In some cases involving a breach of contract for the sale of goods or services, however, access to proof can be just as complex and crucial as in tort law disputes.[216] This is particularly true when the case

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> expectations of the owners and managers of a business entity that their internal affairs should governed by expert determinations made by jurists in the domicile of the entity, and much less to the desires of a plaintiff who for tactical reasons seeks to have a Delaware judge make a determination of foreign law.

This theme was carried forward by Chancellor Bouchard in *Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014), which was decided in the context of forum selection bylaws. David J. Berger, *Delaware Court of Chancery Upholds Forum Selection Bylaw*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 15, 2014), *archived at* http://perma.cc/7NAV-H9MC:

> Chancellor Bouchard ended his analysis by noting that his conclusions were further supported by "important interests of judicial comity." Indeed, he remarked that just as Delaware expects that other jurisdictions, after [*Boilermakers v. Chevron*], will enforce forum selection provisions designating Delaware as the selected forum, so too should Delaware courts enforce bylaws designating another jurisdiction, lest the Delaware courts "stray too far from the harmony that fundamental principles of judicial comity seek to maintain."

[211] *See* Stevelman, *supra* note 8, at 62, 105-07; *see also* Berger v. Intelident Solutions, Inc., 906 A.2d 134, 137 (Del. 2006) (retaining jurisdiction over case involving the application of "novel and important issues of Florida corporate law").

[212] *See supra* note 18.

[213] *See supra* note 18.

[214] The Superior Court made a point of emphasizing that the case was a tort dispute and not a corporate or commercial dispute, implying that the case may not have been dismissed on *forum non conveniens* grounds if it were a corporate or commercial dispute. Martinez v. E.I. DuPont de Nemours & Co., 82 A.2d 1, 33-34, 38-39 (Del. Super. Ct. 2012).

[215] Hamilton Partners, L.P. v. Englard, 11 A.3d 1180, 1213-14 (Del. Ch. 2010).

[216] *See supra* notes 80-82 and accompanying text.

involves a construction project or industrial operation.[217] When considering *Martinez* on its own, it appears that the *forum non conveniens* doctrine would apply equally to these situations,[218] but that is doubtful. There is a general tendency to favor commercial disputes and retain jurisdiction over disputes involving Delaware companies.[219] Also, prior cases, although called into question by *Martinez*, support retaining jurisdiction in those situations.[220] There is probably a line drawn somewhere in the world of commercial disputes between cases that will be adjudicated in Delaware and those where the connection to Delaware is far too tenuous and the burdens of litigation are overwhelming. Where that line is and what facts are needed to move from one side to the other is uncertain.

There is no doubt that any case involving a novel issue of Delaware commercial law will be retained by Delaware courts.[221] Given the unique position and expertise of the Court of Chancery and Supreme Court,[222] the judiciary may also be interested in retaining cases that involve commercial issues novel to Delaware but governed by foreign law.[223] It does not appear that the application of Delaware law will be a significantly weighty factor in those circumstances given the judiciary's policy favoring commercial litigation.

This does not suggest that Delaware courts, regardless of the circumstances, will retain all commercial disputes. One key factor may be whether the facts of the dispute are based in documents or are based in nonverbal materials located abroad.[224] The more that the qualities of specific events or materials inseparable from a foreign location are central to a dispute, the greater the chance of dismissal.[225] In those

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[217] *See supra* notes 80-82 and accompanying text.

[218] *See supra* note 174 and accompanying text.

[219] *See supra* notes 18, 214.

[220] *See supra* note 18.

[221] *See, e.g.*, Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 451-52 (Del. Ch. 2007).

[222] *See* Stevelman, *supra* note 8, at 71-74.

[223] *See, e.g.*, Berger v. Intelident Solutions, Inc., 906 A.2d 134, 137 (Del. 2006).

[224] *Compare* Warburg, Pincus Ventures, L.P. v. Schrapper, 774 A.2d 264, 266-67 (Del. 2001), *with* Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 992 (Del. 2004). In both cases the Delaware Supreme Court denied motions to dismiss for *forum non conveniens*. *See* Part II.B. Moving forward from *Martinez*, however, there is a stronger argument for dismissal in cases similar to *Candlewood* versus those similar to *Warburg* because the central element to the *Candlewood*-type dispute heavily involves foreign territory. *Candlewood*, 859 A.2d at 992 ("[The plaintiff suffered] massive unremediated property damage . . . .").

[225] For example, this would occur in a commercial dispute involving a construction project where the facts and proof central to the case are located in a foreign jurisdiction. *See*

circumstances, a commercial law case would be closer to a tort case on the forum dispute spectrum.[226] Conversely, the more that a commercial law case is based in documents or can be reduced to paper, the less likely a defendant will be able to obtain dismissal.[227] These cases would be closer to corporate law cases on the spectrum.

Indeed, *forum non conveniens* may be a viable defense for defendants involved in commercial litigation. Unlike tort cases, however, a party's status as a Delaware corporation may ultimately be enough reason for the courts to retain jurisdiction.[228]

B. *Resolving Discord*

After reviewing the Superior Court's decision in *Martinez*, it is hard to believe that there will not be discord in the *forum non conveniens* doctrine when it is applied to tort claims as opposed to commercial claims. The apparent discord can be resolved by turning to public interest factors.

The public interest factors include several considerations such as the efficient administration of justice and the public's desire to have a claim litigated in its forum.[229] Delaware's corporate community has become a defining characteristic of the State,[230] and the State's economy is largely dependent on companies choosing to incorporate there.[231] Delaware corporate preeminence is extremely intertwined with corporate and commercial law,[232] and the judiciary's relationship with commercial law has been characterized as "symbiotic."[233] Delaware's history and economy are so inseparable from corporate and commercial law that the

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supra note 224. Based solely on the Supreme Court's decision in *Martinez* and not considering prior decisions, there is a strong argument for dismissal in this type of situation. *See* Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1113 (Del. 2014) ("[Litigation] would be extraordinarily expensive, cumbersome, and inconsistent with the efficient administration of justice . . . .").

[226]Regarding relative ease and access to proof, there is very little difference between *Martinez* and *Candlewood*. *Compare* Martinez v. E.I. DuPont de Nemours & Co., 82 A.3d 1, 30 (Del. Super. Ct. 2012), *with Candlewood*, 859 A.2d at 995, 1001.

[227]This type of dispute is conceptually indistinguishable from a derivative or books and records corporate dispute and the *forum non conveniens* analysis would most likely be the same. *See supra* Part IV.A.2.

[228]*See supra* Part IV.A.2; *see also Warburg*, 774 A.2d at 266-67.

[229]*See supra* text accompanying note 47.

[230]*See* Stevelman, *supra* note 8, at 71-74; *see also* Parsons & Slights, *supra* note 168, at 21-25; BLACK, *supra* note 7, at 1.

[231]*See supra* note 167; *see also* Stevelman, *supra* note 8, at 67.

[232]*See* Stevelman, *supra* note 8, at 71-74.

[233]*See* BLACK, *supra* note 7, at 5.

State and its citizens have a particularly significant interest in Delaware courts favoring corporate and commercial disputes.

An argument can be made that Delaware's stake in corporate and commercial law is a public interest factor. The Supreme Court in *Martinez* left consideration of public interest factors open to the trial courts' discretion.[234] Although the courts have not come straight out and stated that Delaware's stake in corporate and commercial law is a public interest factor, prior decisions show that it functions as such in practical application.[235] Based on federal common law[236] and Delaware's unique circumstances,[237] there is a strong argument for considering this as a public interest factor. In fact, it might be the only way to resolve an inconsistent application of the *forum non conveniens* doctrine.

V. CONCLUSION

Martinez marks a change of course in Delaware's application of the *forum non conveniens* doctrine.[238] The days of the overwhelming hardship requirement posing an "insurmountable burden" to Delaware corporations are over.[239] The Delaware Supreme Court has construed "overwhelming hardship" in a way that alleviates the burden of proof significantly.[240] The application of Delaware law, which was once not a major concern, is now going to be given greater consideration. Trial courts are free to consider public interest factors in the *forum non conveniens* analysis, and the limits of their discretion are undefined at this time.

Before *Martinez*, Delaware's *forum non conveniens* doctrine was almost non-existent if the defendant was a Delaware corporation. Although *Martinez* deviated from years of precedent, it did so in a way that created a practical *forum non conveniens* doctrine. The issue that has yet to be seen is whether the Supreme Court's changes will lead to the doctrine's inconsistent application.[241]

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[234] Martinez v. E.I. DuPont de Nemours & Co., 86 A.3d 1102, 1112-13 (Del. 2014).

[235] *See supra* note 18.

[236] Federal common law considers the citizens' interests in having the dispute litigated in that particular forum. *See supra* text accompanying note 47. Delaware citizens certainly have a strong interest in corporations choosing to incorporate in their state.

[237] *See* BLACK, *supra* note 7, 1-9; *see also* Stevelman, *supra* note 8, at 66-74.

[238] *See Martinez*, 86 A.3d at 1106.

[239] *See id.*

[240] *See id.*

[241] Since the time that this Comment was submitted for publication, the Court of Chancery had an opportunity to cite *Martinez* in *Wilmington Savings Fund Society, FSB v. Caesars Entertainment Corporation*, 2015 WL 1306754, at *7-8 (Del. Ch. Mar. 18, 2015).

Based on prior decisions and Delaware's interest in corporate and commercial law, the doctrine will likely be applied inconsistently. Courts will use *forum non conveniens* to clear their dockets of burdensome "garden-variety" tort claims while retaining jurisdiction over corporate and commercial disputes. *Martinez* will likely create discord in the doctrine's application.[242] But, the discord can be resolved by considering Delaware's stake in corporate and commercial law as a public interest factor.

There are two areas of particular interest moving forward. The first is how the courts in deciding issues that are novel to Delaware but governed by foreign law will use the application of Delaware law as a *Cryo-Maid* factor, and whether that factor will have the same weight in commercial disputes as it does in tort cases. The other is whether Delaware's interest in corporate and commercial law will be considered a public interest factor. Only further litigation will provide answers.

The case involved claims for breach of contract, breach of fiduciary duty, and fraud. *Id.* at *3. After the Delaware action was filed, a parallel action was filed in New York. *Id.* at *3. The Court of Chancery denied the defendants' motion to dismiss or stay for *forum non conveniens*. *Id.* at *7-9. The court closed its analysis with the following:

> Finally, under *Cryo-Maid*, I am to consider "all other practical considerations that would make the trial easy, expeditious, and inexpensive." The Defendants argue that this factor weighs in favor of New York; they assert that the majority of relevant parties and witnesses are located in that jurisdiction. I assume that is the case. I take judicial notice, however, that the Courthouse in Wilmington is separated from Pennsylvania Station in Manhattan by a five-minute walk and 125 miles of shiny steel rails, which may be traversed in the comfort of the business section of an Acela train in an hour and a half. In that light, litigation in Delaware is less manifest hardship than inconvenience. The *Cryo-Maid* factors, taken together, do not support dismissal or stay of this matter.

Id. at *9. Most recently, the Delaware Supreme Court had the opportunity to cite *Martinez* in *Hazout v. Tsang Mun Ting*, __ A.3d __, 2016 WL 748490, at *3 (Del. Feb. 26, 2016) ("Our precedent makes clear that even Delaware corporations can avoid facing suit in Delaware, where the connection between the claims at issue and Delaware are attenuated and the defendant corporation faces an undue burden.").

[242]The few cases applying *Martinez* indicate that this is indeed a possibility. *Compare* VTB Bank v. Navitron Projects Corp., 2014 WL 1691250 (Del. Ch. Apr. 28, 2014), *with* Abrahamsen v. ConocoPhillips Co., 2014 WL 2884870 (Del. Super. Ct. May 30, 2014).