IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MANUEL LETRAN LLUERMA and JUANA BAZUELO ORDIALES, his wife,	)	
Plaintiffs,	)	C.A. No. 04C-09-122 ASB
v.	)	
OWENS ILLINOIS INC., et al,	)	
Defendants.	)	

Submitted: March 13, 2009
Decided: June 11, 2009

On Defendant's Renewed Motion to Dismiss Based on *Forum Non Conveniens*.
DENIED.

MEMORANDUM OPINION

Thomas C. Crumplar, Esquire, Jacobs & Crumplar, P.A., Wilmington, DE, Mitchell S. Cohen, Esquire, Locks Law Firm, Philadelphia, PA, Attorneys for Plaintiffs

Paul A. Bradley, Esquire, Maron Marvel Bradley & Anderson, P.A., Wilmington, DE, Attorney for Defendant, Owens-Illinois, Inc.

JOHNSTON, J.

Plaintiff Manuel Letran Lluerma is one of more than 50 Spanish citizens who worked either on United States warships or in the Spanish shipyards where those ships were docked. These workers allege that they were exposed to asbestos and contracted asbestos-related diseases. The asbestos was manufactured in the United States. Defendant Owens Illinois, Inc. is a Delaware corporation.

The issue in this representative motion is whether a Spanish national may maintain a toxic tort action in Delaware. The Court first must examine whether defendant has demonstrated that there is another adequate forum, in this case, Spain. The second part of the analysis is whether this lawsuit should be dismissed on *forum non conveniens* grounds on the basis of overwhelming hardship and inconvenience.

The parties have proffered opposing expert opinions on Spanish law. Whether or not Spain has jurisdiction largely will turn on where plaintiffs were exposed to asbestos. At this stage of the proceedings, there are too many unknown facts to determine whether Mr. Lluerma worked exclusively aboard American warships or in the shipyards. Ships flying the United States flag are considered American soil. Foreign ports generally are part of the sovereign nation's territory. Even if the Court were to find that Spain has jurisdiction over this case, defendant has failed to establish that the *Cryo-Maid*[1] factors warrant dismissal.

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

FACTUAL AND PROCEDURAL BACKGROUND

Manuel Lluerma is one of twenty-five Spanish nationals who have filed suit in Delaware alleging asbestos exposure while working aboard American warships in Spain. Similar cases have been filed by Mr. Lluerma's counsel in New Jersey.[2] The parties have agreed to utilize Mr. Lluerma's claim as a sample case for the Court on the issue of *forum non conveniens*.

On September 15, 2004, Mr. Lluerma and his wife, Juana Bazuelo Ordiales, filed suit in Delaware against Owens-Illinois, Inc. ("O-I"), Garlock, Inc., and Garlock Sealing Technologies, L.L.C. Shortly thereafter, plaintiffs voluntarily dismissed Garlock, Inc. and Garlock Sealing Technologies, L.L.C – leaving O-I as the sole defendant.

The complaint avers that Mr. Lluerma contracted asbestosis and other asbestos-related injuries as a result of exposure to defendant's products while working as an insulator at the United States Naval Base in Rota, Spain. Plaintiffs state that Mr. Lluerma worked as an employee for the United States Navy from 1958 until his retirement in 1991. Plaintiffs assert that Mr. Lluerma's exposure occurred exclusively aboard American warships.

[2] In *Varo v. Owens-Illinois, Inc., et al.*, 948 A.2d 673 (N.J. Super. 2008), the Superior Court of New Jersey, Appellate Division, reversed the lower court, holding that under private and public interest considerations, New Jersey was an adequate forum and defendants had failed to meet their burden to show that the case should be litigated in Spain.

The Rota Naval Base was built in the 1950s as part of a joint venture between the United States and Spain. Under their joint agreement, the United States was permitted full use of the territory and airspace, while Spain retained sovereignty over the property.[3] The naval base was completed in 1958. Prior to its completion, American warships were serviced across the bay, in Cadiz, Spain.

Defendant is a Delaware corporation with its headquarters in Toledo, Ohio. Defendant designed, developed, and manufactured asbestos-containing products known as Kaylo and Kaylo-20. The products consisted of pipe covering, block insulation, and asbestos-containing cement.

Defendant's products were manufactured at two plants in New Jersey. These products were sold to the general public and to the United States military. The United States military used defendant's products aboard American warships.

On April 30, 1958, defendant sold its business to Owens-Corning Fiberglass Corporation. However, plaintiffs assert that defendant's products continued to be sold until defendant exhausted its inventories.

On May 20, 2005, defendant filed a motion to dismiss on *forum non conveniens* grounds. Defendant asserted that plaintiffs' claims lacked any nexus with Delaware. Defendant argued that because plaintiffs lived and worked in

[3] *See* Agreement Concerning Military Facilities in Spain, U.S.-Spain, Sept. 26, 1953, 4 U.S.T. 1895.

Spain and the alleged exposure to asbestos and medical treatment occurred in Spain, Spain was the proper forum.

On November 16, 2005, plaintiffs filed a response opposing the motion to dismiss. Plaintiffs asserted that Spain was not the proper forum because the exposure took place on American soil. Plaintiffs argued that the American warships docked at the Rota Naval Base retained their sovereignty; and as such, exposure on board the ships constituted exposure on American soil.

On April 13, 2006, defendant withdrew its motion. Defendant reserved the right to re-file the motion to dismiss after discovery was completed, as counsel and the Court had agreed at the April 7, 2006 hearing.

On June 1, 2007, defendant renewed its motion to dismiss. On June 13, 2007, plaintiffs responded by adopting their previously-filed response from November 16, 2005. Thereafter, the parties agreed to a briefing schedule.

On November 1, 2007, defendant submitted its opening brief. Plaintiffs filed their response on December 17, 2007. On February 19, 2008, defendant filed its reply brief. The motion was noticed and rescheduled several times. Ultimately, oral argument was heard on February 19, 2009. The parties submitted additional information and argument post-hearing.

THE PARTIES' CONTENTIONS

Defendant

Defendant contends that Spain is the appropriate forum for this case. Defendant cites to Article 22.3.8 of the General Act of Parliament for Judiciary, which states that a Spanish court has jurisdiction over cases "regarding tort obligations when the event giving rise thereto occurs in Spanish territory or the author of the damages and the victim have their normal common residence in Spain." Defendant asserts that because the alleged exposure occurred in Spain and Mr. Lluerma resides in Spain, Spanish courts have jurisdiction over this case. Further, defendant avers that "given that most, if not all, of the needed discovery is located exclusively in Spain and is under the exclusive jurisdiction of Spanish courts, Spain provides a much more suitable forum for Plaintiffs' claims."

Defendant argues that the fact that Mr. Lluerma's exposure may have occurred on board American warships does not alter the conclusion that Spain should be deemed the appropriate forum. Defendant asserts that the Rota Naval Base is Spanish territory and boats docked within its port are subject to Spanish law. Defendant provides an opinion written by a Spanish lawyer that supports this position.

At oral argument, defendant agreed, for purposes of this motion, that if it were found that Mr. Lluerma's exposure occurred while aboard American

warships, then his exposure would be considered to be on American soil. However, defendant asserts that is not what occurred.

Defendant contends that Mr. Lluerma was a Spanish employee. Defendant states that Mr. Lluerma was technically employed by the Spanish Ministry of Defense. To support its claim, defendant provides a letter written by the United States Navy that states all Spanish local employees' records are forwarded to the Ministry of Defense as U.S. technical employees. Further, defendant asserts that Mr. Lluerma worked on the base and not exclusively on the ships.

Defendant asserts that it will suffer overwhelming hardship if it is required to litigate this case in Delaware as opposed to Spain. Specifically, defendant contends that its access to proof is severely limited. Defendant asserts that the bulk of the evidence and witnesses, including the diagnostic and treating physician and records, are located in Spain. Additionally, defendant states that Spain has advised the Hague Conference for Private International Law that it will not grant requests for pre-trial discovery of documents as provided by Article 23 of the Hague Convention.

Defendant asserts that it already has experienced several discovery problems. Defendant explains that it has had difficulties obtaining Mr. Lluerma's employment and medical records. Additionally, defendant states that the language barrier has made it more cumbersome and costly to obtain information. Defendant

asserts that such complications easily could be remedied if the case were litigated in Spain.

Additionally, defendant contends that none of the potential witnesses are amenable to compulsory process. Defendant asserts that over fifty witnesses are located in Spain. Defendant states that it has no reason to believe that the witnesses would travel to Delaware. Defendant contends that the Court could not compel the witnesses to appear because this Court has no jurisdiction over them. Further, defendant asserts that even if the Court could compel the witnesses, the transportation and interpreter costs would be "enormous."

Defendant contends that litigating in Delaware also hinders defendant's ability to implead third party defendants. Defendant asserts that Mr. Lluerma could not have been exposed to defendant's products because Mr. Lluerma did not begin to work at the Rota Naval Base until after defendant sold its business in April of 1958. Therefore, defendant asserts that it must identify the proper companies responsible for Mr. Lluerma's alleged exposure in order to implead them into this action. Defendant asserts that if litigation continues in Delaware it will not be able to implead the proper parties because this Court will lack jurisdiction over those entities.

Defendant contends that if a view of the premises is required, no such view is possible in Delaware. Defendant asserts that Mr. Lluerma's exposure occurred

at the Rota Naval Base in Spain, which would be impossible to view if the case were litigated in Delaware.

Further, defendant contends that Spanish law applies to this case. Defendant asserts that "[t]he parties' relevant contacts with Spain, and the lack of contacts to Delaware, indicate that Spanish, not Delaware, law will govern the tort claims asserted in plaintiffs' complaint." Defendant asserts that Delaware has no interest in interpreting or applying Spanish civil tort law. Defendant states that translating and applying Spanish law will be a drain on the Court's resources and costly to the parties.

Defendant states that there are no similar actions pending in other jurisdictions. Defendant asserts that minimal discovery has been taken. Defendant explains that the discovery that has been received was in Spanish and needed to be translated. Defendant argues that based on the procedural status of the case, the parties would not be burdened by re-starting the litigation in Spain.

Defendant also cites several other practical considerations in support of litigating this case in Spain and not in Delaware. Defendant reiterates that plaintiffs' claims will impose an undue burden on the Delaware courts. Defendant asserts that litigating this case in Delaware would open the "flood-gates" to foreign asbestos plaintiffs seeking United States jurisdiction and limit the options of Delaware corporations.

Finally, defendant has consented to Spanish jurisdiction. Defendant claims that, if the trial were to be relocated to Spain, it would consent to service of process and supply all of the necessary witnesses.

Plaintiffs

Plaintiffs contend that defendant has failed to properly address what they view as the initial issues in this case – whether defendant is amenable to service of process in Spain and whether the remedy offered in Spain is clearly adequate and satisfactory. Plaintiffs assert that such issues must be resolved by the Court prior to analyzing the *Cryo-Maid*[4] factors.

Plaintiffs contend that Spain is not an adequate alternative forum. Plaintiffs argue that Spain lacks jurisdiction and authority to consider plaintiffs' claims. While Mr. Lluerma is a Spanish national, plaintiffs assert that Mr. Lluerma was an employee of the United States Navy. Plaintiffs claim that Mr. Lluerma received and continues to receive all of the benefits of being an employee of the United States Navy. For example, plaintiffs state that Mr. Lluerma's health care is provided by the United States Navy.

Plaintiffs contend that "American law regarding the place of exposure to Kaylo mandates Spain cannot be considered an appropriate, alternate, viable venue." Plaintiffs claim that Mr. Lluerma was not exposed to asbestos on Spanish

[4] *Cryo-Maid, Inc.*, 198 A.2d at 684.

soil. Plaintiffs assert that defendant's tortuous conduct emanated from the State of New Jersey, where defendant manufactured and packaged its products. Further, plaintiffs claim that Mr. Lluerma's exposure to defendant's products occurred exclusively aboard American warships.

Plaintiffs assert that under the Treaty between Spain and the United States, American warships docked in Spanish ports retain their sovereignty. Plaintiffs argue that because Mr. Lluerma's exposure occurred on American soil, the United States has jurisdiction over this case.

Plaintiffs contend that even under Spanish law, Spain lacks jurisdiction to consider this case. Plaintiffs assert that in order for Spanish courts to have jurisdiction over this case, defendant would have to establish several specific conditions precedent. Specifically, Plaintiffs assert that defendant would have to illustrate that the "events giving rise to the torts averred in the Complaint must have either occurred in Spanish territory or the party responsible for causing the damage and the victim harmed by the damage must both have their normal common residence in Spain."

Plaintiffs argue that the events that give rise to the tort occurred on American soil. Plaintiffs claim that the tortuous conduct (manufacturing a harmful product and failing to properly provide warnings) occurred in New Jersey. Further, plaintiffs assert that the exposure occurred exclusively on American soil –

aboard American warships. Plaintiffs allege that defendant has failed to provide any evidence to the contrary.

Additionally, plaintiffs assert that defendant does not have a common residence in Spain. Plaintiffs state that defendant has failed to cite a single case where Spanish courts assumed jurisdiction of a tort claim where the facts giving rise to the tort or exposure occurred in a territory other than Spain. Thus, plaintiffs conclude that Spanish courts lack jurisdiction over plaintiffs' claims, depriving plaintiffs of an adequate and satisfactory remedy.

Although defendant sold its business prior to the time Mr. Lluerma worked at the Rota Naval Base, plaintiffs contend that Mr. Lluerma first came into contact with defendant's products while working on American warships in 1956 at a private shipyard in Cadiz, Spain. Additionally, plaintiffs assert that defendant's products were still being sold, even after the business closed, until inventories were depleted.

Plaintiffs contend that defendant has failed to meet its burden of demonstrating that it would suffer an overwhelming hardship if required to proceed with the litigation in Delaware, where defendant is incorporated. Plaintiffs assert that the *Cryo-Maid* factors weigh in their favor.

Plaintiffs contend that litigating in Spain would place an unfair burden upon them with regard to access of proof. Plaintiffs assert that a "significant number" of

defendant's former employees and numerous volumes of corporate records concerning defendant's Kaylo products are either located within Delaware or easily available to defendant's Delaware counsel. Plaintiffs argue that "[f]rom the standpoint of ease of access to this evidence and the cost required to transport these volumes of documents and records of Defendant to Spain, it would clearly be less expeditious and rather prohibitive for Plaintiffs to have to shoulder this burden."

Plaintiffs argue that litigating in Delaware would not place an overwhelming burden on defendant with regard to access to proof. Plaintiffs assert that defendant's request for documents was not denied because of the Hague Convention, but rather, because defendant's request was insufficient. Plaintiffs claim that a significant number of Mr. Lluerma's medical records are available directly from the United States government because Mr. Lluerma was a United States Navy employee.

Plaintiffs assert that document translation is not a real issue because regardless of where the case is litigated, the documents will have to be translated. Further, plaintiffs state that witnesses from Spain may be deposed through the use of readily available technology through a video-conference from defendant's office in Delaware. Plaintiffs conclude that, at best for the defense, defendant and plaintiffs' burdens with regard to access to proof are neutral. Thus, plaintiffs' choice of forum should go undisturbed.

Plaintiffs contend that ample compulsion exists for witnesses to testify. Plaintiffs state that 24 of 51 of Mr. Lluerma's co-workers are plaintiffs in their own right. Additionally, plaintiffs explain that 39 of the co-workers are represented by plaintiffs' counsel's law firm. Plaintiffs urge that these facts are the "strongest motivating factor anyone would need." Further, plaintiffs assert that the Court has the ability to impose appropriate sanctions should compulsion become necessary. Plaintiffs contend that "[a]lthough the compulsion in this case is not founded on traditional legal principles of jurisdiction or venue, it is irrelevant because the end result is identical."

Plaintiffs contend that it would be impossible for a jury or fact finder in either Spain or Delaware to view the relevant premises. Plaintiffs assert that the only premises upon which Mr. Lluerma was exposed to defendant's products was aboard American warships. Plaintiffs state that they do not know whether these warships are still in existence. Further, plaintiffs argue that even if viewing the Rota Naval Base or port in Cadiz were helpful, the two sites have been significantly reconfigured since the 1950s. Plaintiffs claim that because the Rota Naval Base is a military institution engaged in supporting the nation's war efforts, a request to view the base would not be granted.

Plaintiffs contend that Spanish law is inapplicable to this case. Instead, plaintiffs argue that New Jersey law should apply. Plaintiffs claim that under

Spanish law, the applicable law is determined based upon where the event took place. Plaintiffs assert that the event (the tort) took place in New Jersey, where the product was manufactured and improperly packaged. Further, plaintiffs assert that Delaware courts regularly interpret and apply the laws of other states.

Plaintiffs contend that there are no similar actions pending in another jurisdiction. Plaintiffs assert that the fact no actions are pending elsewhere weighs "heavily" against dismissal.

Plaintiffs also assert several other practical considerations as to why this case should be litigated in Delaware. Plaintiffs contend that defendant (unlike plaintiffs) possesses substantial financial resources, which prevent it from suffering overwhelming hardship by litigating in Delaware.

Additionally, plaintiffs assert that it would be more cost effective to litigate in Delaware. Plaintiffs claim that based upon the value of the U.S. Dollar against the Euro, it would cost between 35% and 42% more to litigate in Spain.

Finally, plaintiffs contend that defendant's argument -- that this case would open the "floodgates" to foreign litigation – is incorrect. Plaintiffs assert that such an argument has been met with little favorable acknowledgement and is greatly disfavored as a basis for dismissal of cases.

DISCUSSION

Motion to Dismiss Based on Forum Non Conveniens *Standard*

The Court may decline to hear a case, despite having jurisdiction over the subject matter and the parties,[5] if "considerations of convenience, expense, and the interests of justice dictate that litigation in the forum selected by the plaintiff would be unduly inconvenient, expensive or otherwise inappropriate."[6] In Delaware, a plaintiff's choice of forum is presumed to be proper, even if the plaintiff is not a resident of Delaware.[7] In order to overcome such a presumption, defendants "must show with particularity that litigating in Delaware will cause them 'overwhelming hardship and inconvenience.'"[8] The determination of whether to dismiss a case based on *forum non conveniens* grounds is left to the discretion of the Court.[9]

As an antecedent condition to applying the doctrine of *forum non conveniens*, there must be at least two forums in which the defendant is amenable to process.[10] The doctrine itself furnishes the criteria for choosing between the

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[5] *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'tship*, 669 A.2d 104, 106 (Del. 1995).
[6] *Monsanto Co. v. Aetna Cas. and Surety Co.*, 559 A.2d 1301, 1304 (Del. Super. 1988).
[7] *See Ison v. E.I. DuPont de Nemours and Co.*, 729 A.2d 832, 835 (Del. 1999) (finding that "[t]he fact that the plaintiffs are foreign nationals does not deprive them of the presumption that their choice of forum should be respected. Although that presumption is not as strong in the case of a foreign nation plaintiff as in the case of plaintiff who resides in the forum, we need not rest our decision on that issue because of the defendant's weak showing of hardship."); *see also Pena v. Cooper Tire & Rubber Co., Inc.*, 2009 WL 847414, at *4 (Del. Super.) (stating that "[t]he fact that plaintiff is not a resident of Delaware does not deprive him of the presumption that his choice of forum should be respected.").
[8] *Pena*, 2009 WL 847414, at *4.
[9] *In re Asbestos*, 929 A.2d 373, 380 (Del. Super. 2006) (citing *Williams Gas Supply Co. v. Apache Corp.*, 1991 WL 18091, at *1 (Del. Super.)).
[10] *Pena*, 2009 WL 847414, at *1 (quoting *Harry David Zutz Ins. v. H.M.S. Assoc. Ltd.*, 360 A.2d 160, 165-66 (Del. 1976)).

forums.[11] The forums are reviewed at the time plaintiff filed suit.[12] "A defendant's offer to appear voluntarily in the supposedly more convenient forum does not change the situation."[13]

Review of Spain as an Alternate Forum

The first step in analyzing a motion to dismiss based on *forum non conveniens* is to determine whether an alternative forum exists.[14] Defendant proffers that Spain is an available and adequate alternate forum. Plaintiffs contend that Spain lacks jurisdiction and authority to hear their case.

Defendant submitted an expert opinion to support its contention that "Spanish law will apply and Spanish courts will assume jurisdiction if the facts from which the damages derived took place in the Spanish territory."

> 5. CONCLUSIONS
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> 5.1 The claim brought is a civil action based on a non-contractual relationship between the Plaintiff and the Defendant, by virtue of which the latter is accused of causing damages to the former.
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> 5.2 In order to determine the applicable law and the competent Jurisdiction, the relevant link is the place where the event, from which the damages derived, took place. It is considered that the events took place in Spain if they occurred in any following: (i) in shipyards in Cadiz; (ii) in the Rota Naval base; or (iii) in the docks. If the events had only occurred

[11] *Id.*
[12] *Id.*
[13] *Id.* (internal punctuation omitted).
[14] *Id.*

within the military vessel, the Law of the flag should apply.

5.3 If the events took place in Spain, Spanish law applies and the Spanish Court are competent.

5.4 The same conclusion in 5.2 above if there was a mixed exposure to damages and part of the events took place in Spain and the other part in a military vessel.

5.5 First Instance Court of Rota would be the competent Court.

Defendant asserts that Spain has jurisdiction over this matter because the exposure occurred in Spain – both on the base and on the American warships, which defendant argues lost their sovereignty when they docked at the Rota Naval Base. At oral argument, defendant stated that "[f]or purposes of this motion, I'm agreeing that, if [Mr. Lluerma] was on a U.S. Navy ship and that was his sole exposure … you could consider that U.S. territory, in essence." However, defendant asserts that Mr. Lluerma's exposure occurred both on the base and on board the ships in Spain.

Plaintiff's Spanish legal expert disagreed, concluding: "Spanish Civil Courts would not have jurisdiction over this case." However, Defendant's expert based his opinion on his "understanding that the key facts which lead to the damage suffered by the plaintiff, that is, his exposure to the asbestos allegedly

manufactured by the defendant, occurred in US territory rather than Spanish territory, that is, on board a US warship."

Plaintiffs contend that under American law, the place of harm controls the issue of jurisdiction. Plaintiffs assert that the harm occurred in New Jersey, where the product was manufactured and improperly packaged.

Plaintiffs assert that Mr. Lluerma's exposure occurred exclusively aboard American warships. Plaintiffs claim that under the agreement between the United States and Spain, American ships docked within the Rota Naval base retained their sovereignty. Therefore, plaintiffs claim that Mr. Lluerma's exposure occurred exclusively on American soil.

At this juncture, without Mr. Lluerma having been deposed, it is almost impossible to determine whether the facts support plaintiffs' contention that Mr. Lluerma worked exclusively aboard American warships. Viewing the facts in the light most favorable to plaintiffs, the Court finds that Spain may lack jurisdiction over this case. Further, defendant's offer to submit to Spanish jurisdiction does not itself confer jurisdiction upon Spain.[15] Absent Spanish jurisdiction, Spain cannot be considered an available alternate forum. However, even if this Court were to find that Spain also has jurisdiction over this case, defendant has failed to show that litigating in Delaware would result in an overwhelming hardship.

[15] *Pena*, 2009 WL 847414, at *2 (holding that defendants' unilateral offer to submit to Mexican jurisdiction was insufficient where defendants were not subject to service of process in Mexico when plaintiffs brought their suit.)

Application of the Cryo-Maid Factors

To evaluate whether defendant has made a showing of overwhelming hardship, the Court must consider the following factors:

(1) the applicability of Delaware law;

(2) the relative ease of access of proof;

(3) the availability of compulsory process for witnesses;

(4) the pendency or nonpendency of a similar action in another jurisdiction;

(5) the possibility of a need to view the premises; and

(6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.[16]

Defendant need not demonstrate all or a majority of the factors. Defendant must establish that one or more of these factors would actually cause significant hardship and inconvenience.[17] When making such a determination, the Court may not "compare Delaware, the plaintiff's chosen forum, with an alternate forum and decide which is the more appropriate location for the dispute to proceed."[18] Such comparisons are irrelevant to the ultimate issue. Rather, the Court must base its determination exclusively upon "whether any or all of the *Cryo-Maid* factors establish that defendant will suffer overwhelming hardship and inconvenience if

[16] *Id.* at 5; *Cryo-Maid.*, 198 A.2d at 684.
[17] *Chrysler*, 669 A.2d at 107-08.
[18] *In re Asbestos Litigation*, 929 A.2d at 381 (internal quotations omitted) (quoting *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 779 (Del. 2001)).

forced to litigate in Delaware."[19] Absent such a showing, a plaintiff's choice of forum will go undisturbed.[20]

Defendant contends that it would suffer overwhelming hardship if forced to litigate this case in Delaware. Plaintiffs strongly disagree and assert that their choice of forum should go undisturbed because the *Cryo-Maid* factors weigh in their favor.

1. *Applicability of Delaware Law*

Defendant argues that Delaware law does not apply and that the law of Spain governs. Defendant asserts that Spanish law is applicable because the parties' relevant contacts occurred in Spain and because the bulk of the witnesses and evidence are located in Spain.

Plaintiffs contend that New Jersey law is applicable to this case. Plaintiffs assert that Spain has no jurisdiction over this matter because the alleged grievances occurred on American soil. Plaintiffs argue that New Jersey law applies because the asbestos-containing products were manufactured and packaged in New Jersey.

This Court has yet to determine which law will apply to this case. While it is premature for the Court to make such a determination, the Court can say that U.S. law may be applicable. However, even if the Court were to ultimately rule that Spanish law applies, this factor does not weigh overwhelmingly in favor of

[19] *Id.* (internal quotations omitted) (quoting *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997)).
[20] *Id.*

defendant.[21] Delaware courts are experienced in applying foreign law; and the application of foreign law is insufficient to warrant dismissal under the doctrine of *forum non conveniens*.[22]

2. *Relative Ease of Access to Proof*

Defendant contends that its access to proof is severely limited in Delaware. Defendant asserts that litigating in Spain would be less cumbersome because the bulk of the evidence and witnesses are located in Spain. Additionally, defendant states that the Hague Convention is insufficient to remedy access to proof issues because Spain has advised the Hague Conference that it will not grant requests for pre-trial discovery of documents. As evidence of such problems, defendant cites problems obtaining Mr. Lluerma's records from Spain.

Plaintiffs contend that litigating in Spain would place an unfair burden upon them with regard to access to proof. Plaintiffs state that defendant's contention – that the bulk of the evidence is in Spain – is inaccurate. Plaintiffs assert that many of defendant's former employees and numerous volumes of corporate records are either located within Delaware or are easily accessible to defendant's Delaware counsel. Additionally, plaintiffs assert that defendant's access to proof has not been impeded by Spain's comments to the Hague Conference. Plaintiffs argue that

[21] *See Pena*, 2009 WL 847414, at *6 (finding that regardless if U.S. or Mexican law applied, Delaware courts are experienced in applying foreign law and holding that such a factor would not weigh overwhelming in favor of defendants).
[22] *Id.*

defendant's request for records was not denied because Spain will not grant such a request, but rather because defendant's request itself was insufficient.

This factor does not weigh heavily in favor of defendant. While defendant has cited some issues with procuring records from Spain, it has not provided evidence that the denial was definitive and not simply a determination that the request was insufficient. Defendant has failed to establish that it will be completely unable to procure discovery through the use of the Hague Convention procedures. "Although such 'circuitous routes to accessing evidence are somewhat cumbersome,' and would place most of the burden on defendants, this factor does not present defendants with an overwhelming hardship."[23] Further, defendant's arguments ignore the fact that its corporate and manufacturing records, as well as, several manufacturing and product witnesses are either in Delaware or easily accessible from Delaware or via electronic discovery. The Court finds that defendant has failed to establish that access to proof in Spain amounts to an overwhelming hardship.

[23] *Pena*, 2009 WL 847414, at *6 (quoting *Ison v. E.I. Dupont de Nemours and Comp., Inc.*, 729 A.2d 832, 843 (Del. 1999)).

3. *The Availability of Compulsory Process for Witnesses*

Defendant contends that most of the potential witnesses are not amenable to compulsory process by Delaware. Defendant asserts that because most of the witnesses are Spanish nationals living in Spain, Delaware lacks jurisdiction over them. Defendant states that it "has no reason to believe any of these witnesses would travel to Delaware." Additionally, defendant contends that litigating in Delaware will hinder its ability to implead third party defendants because the Court also would lack jurisdiction over them.

Plaintiffs contend that it is irrelevant that several of the witnesses are not amenable to compulsory process. Plaintiffs assert that the witnesses, many of whom are also plaintiffs in other actions, are more than willing to testify in Delaware. Plaintiffs assert that the Court has sanctions that it could utilize to compel witnesses. Additionally, plaintiffs assert that evidence and depositions may be received from Spain via readily available technology.

"To justify dismissal under this factor, Delaware law requires a defendant to identify *specifically* the witnesses not subject to compulsory process and the specific substance of their testimony."[24] Defendant generally asserts that 51 of Mr. Lluerma's co-workers are witnesses who are expected to testify regarding his work

[24] *In re Asbestos*, 929 A.2d at 385 (emphasis added).

at the Rota Naval Base and onboard the American warships. Defendant also identifies Mr. Lluerma's Spanish doctor and asserts that he would testify to Mr. Lluerma's illnesses.

Defendant's general reference to Mr. Lluerma's former co-workers and specific reference to Mr. Lluerma's doctor raises valid issues. However, the Court is satisfied that the witnesses have sufficient incentive to testify, provide depositions and cooperate with the defense. Most of the witnesses are plaintiffs in their own right. In order to put forth their best case, all of the witness/plaintiffs must cooperate with one another. The Court finds that this factor does not weigh overwhelmingly in favor of defendant.

With regard to impeding defendant's ability to implead third parties, the Court finds no overwhelming hardship. This case has been pending for more than 56 months, and defendant has not acted to implead any Spanish defendants. Defendant has not even named any potential third-party Spanish defendants. Defendant has failed to demonstrate that an inability to implead Spanish third parties would result in overwhelming hardship.[25]

[25] *See Pena*, 2009 WL 847414, at *7 (finding that the defendants had failed to demonstrate overwhelming hardship for their alleged inability to implead third party defendants when the litigation had been pending for over 21 months and defendants had not acted to implead anyone).

4. *Pendency or Non-pendency of Other Actions*

Both parties assert that no similar actions are pending in other jurisdictions. The fact that no similar actions are pending elsewhere is a serious consideration for the Court. "If not dispositive, this fact weighs *heavily* against dismissal."[26]

5. *View of the Premises*

Defendant contends that if litigation were to continue in Delaware, it would be impossible to view the premises. Defendant asserts that the relevant location is the Rota Naval Base in Spain. Defendant does not state whether the use of modern technology would be insufficient to enable the fact-finder to view the premises.

Plaintiffs argue that viewing the premises would be impossible whether this litigation proceeded in Spain or Delaware. Plaintiffs claim that the relevant locations are the American warships. Plaintiffs state several of the ships have been recommissioned, decommissioned, or their fate is unknown. Additionally, plaintiffs assert that if viewing the Rota Naval Base became a necessity, it is doubtful a request to view the base, which is currently actively involved in military efforts, would be granted. Further, plaintiffs assert that the base and the ships have undergone significant changes since the 1950s.

[26] *In re Asbestos*, 929 A.2d at 387 (emphasis in original).

This Court is not persuaded that a view of the American warships or the Rota Naval base, as they are today, would benefit the factfinder. A view of the premises could be achieved through electronic or digital means.[27] The Court finds that this factor does not weigh in favor of defendant.

6. *Other Practical Considerations*

Defendant contends that litigating in Delaware will impose an undue burden on Delaware courts. Defendant claims that translating and applying Spanish law will be an unnecessary drain on the Court's resources and extremely costly to the parties. Further, defendant asserts that allowing this litigation to move forward in Delaware would open the "flood-gates" to foreign asbestos plaintiffs seeking United States jurisdiction and limit the options of Delaware corporations.

In response, plaintiffs contend that regardless of where the matter is located, documents and testimony will have to be translated. Plaintiffs assert that defendant has failed to explain how the language issues would be eliminated if this matter were transferred to Spain. Plaintiffs disagree with defendant's conclusion that litigating in Delaware will be more costly based upon the difference in currency. Further, plaintiffs state that litigating in Delaware would not be an unreasonable drain upon the Court's resources. Plaintiffs argue that defendant has failed to meet

[27] *See Pena*, 2009 WL 847414, at *6 (holding that if a view of the premises is desirable or needed a digital or photographical display is sufficient for the fact-finder).

its burden to show that it will suffer overwhelming hardship and inconvenience if plaintiffs' choice of forum is upheld.

Both Delaware and Spain would have to deal with the same difficulties regarding the language issue. "[I]t is generally accepted that 'these mirror-image difficulties cancel out each other.' Stated differently, there would be 'no clear advantage or disadvantage to litigating' in Delaware or another forum."[28] Therefore, the Court finds that the language consideration is insufficient to warrant dismissal of plaintiffs' claims.

Defendant's position that litigating this matter in Delaware would be a hardship to Delaware is irrelevant to the *Cryo-Maid* analysis. The inquiry under *Cryo-Maid* is whether the *defendant* will suffer overwhelming hardship, not whether *the Court* will suffer hardship.[29] Further, this Court has ruled that the "asbestos litigation in Delaware neither encumbers nor overwhelms the Court's judicial or administrative faculties in a manner that would adversely affect the Court's ability to administer justice efficiently and effectively…"[30]

CONCLUSION

The Court finds that defendant has failed to establish that Spain is an available alternate forum. Further, even if it had, the Court finds that defendant has not established that it will suffer overwhelming hardship and inconvenience if

[28] *In re Asbestos*, 929 A.2d at 385 (quoting *Taylor*, 689 A.2d at 1199.).
[29] *See id.* at 387.
[30] *Id.* at 389.

made to continue litigation in Delaware. It is insufficient for defendant to simply illustrate that it will suffer some hardship. Thus, the Court upholds plaintiffs' choice of Delaware as the forum for this litigation.

THEREFORE, Defendant's Renewed Motion to Dismiss Based on *Forum Non Conveniens* is hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston