IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHAN YOUNG LEE, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No. 02C-10-280(CHT)
	:	
CHOICE HOTELS INTERNATIONAL INC.,	:	
	:	
Defendant/Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
P.T. MARINA CITY DEVELOPMENT and P.T. QUALITA INDAH HOTELS,	:	
	:	
Third-Party Defendants.	:	

OPINION AND ORDER

On Defendant's Motion to Dismiss on the Grounds of *Forum Non Conveniens*

Submitted: October 27, 2005
Decided: March 21, 2006

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STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

The facts underlying this litigation are fairly straight forward. On May 4, 2001, the Lees, Bo Hyun Lee and Wan Ki Kim, his wife, along with their two sons, Young Min Lee (then age 9) and Chan Young Lee (then age 7), residents of Seoul, South Korea, embarked upon a vacation tour of Southeast Asia. The tour was arranged by a South Korean travel agency, Freedom Travel. The tour was to include an afternoon and one night at the Quality Resort Waterfront City, Batam, Indonesia, ("Waterfront City"). Those accommodations were chosen by Wan Ki based upon the recommendation of an agent employed by Freedom Travel.[1] Of particular interest to the Lees was the large free form pool with a sunken bar which was connected to a children's pool. The resort was advertised as "family friendly".

[1] It appears that Ms. Kim also reviewed the descriptions/advertisements provided on the website sponsored by Choice as well. Apparently she viewed the website one day before their departure which was obviously after the purchase.

Waterfront City was owned by P.T. Marina City Development ("P.T. Marina"). That entity acquired the right to operate the facility as a Quality Inn and Resort through a franchise agreement with P.T. Qualita Indah Hotels ("P.T. Qualita"). P.T. Qualita had in turn been vested with the authority to enter into such agreements by Choice Hotels International, Inc.

On May 6, 2001, the family arrived at Waterfront City. Shortly thereafter, they went to the large pool which was crowded. Bo Hyun entered that pool with his sons who could not swim, and instructed them how to do so. The instruction ceased after a brief period of time so that the family could take pictures in the pool area. Chan Young and Young Min apparently became bored with that activity and were granted permission by their parents to return to the large pool.

The boys ultimately entered the pool behind their parents, but became separated. Young Min last saw Chan Young splashing around the water and thought he was practicing swimming. Less than five minutes later, Bo Hyun and Wan Ki went looking for Chan Young. Bo Hyun

found him at the bottom of the large pool unconscious. No lifeguard was seen on duty during this period of time and no other staff assisted in finding Chan Young.

When Chan Young was pulled from the pool, he was given emergency medical treatment and revived as a result. Notwithstanding those efforts, he suffered brain damage and is in a permanent vegetative state. Unfortunately, Chan Young will need medical treatment and constant care for the rest of his life. Thus far, that care has been rendered in South Korea.[2]

Choice is incorporated in the State of Delaware and is the largest hotel operator in the United States. It does business directly as well as through franchise agreements and/or relationships as, among other hotel/motel brands, Quality Inns and Resorts. Choice is also a worldwide corporation with more than 5,000 hotels and resorts in at least forty-two countries. Of that number, fifteen are in Delaware and eleven are in Indonesia. Its main or principal headquarters is in

[2] It further appears that some of the treatment would have been rendered in Indonesia immediately following his removal from the pool.

Silver Spring, Maryland.

As a part of its franchise relationships, Choice directed the selection and training of its franchisees as well as supervised the design and construction of its Quality Inns and Resorts. This included advertising and other promotional activities on behalf of those resorts. Their operation post design and construction was also subject to continuing oversight. There was overt assistance in every phase of the hotel operation including continuing promotional activities, training of staff and other quality assurance measures. If the standards imposed as a part of the franchise agreement were not met, there would be sanctions, including litigation to enforce the terms of the relationship or termination of the franchise agreement if compliance was not otherwise achieved.

In terms of its franchise relationships outside the continental United States, Choice would enter into a master franchise agreement with an international partner and that partner would solicit and/or choose the individual franchisees. In the instant situation, P.T.

Qualita, as the international partner, entered a franchise agreement with P.T. Marina in 1996. At the very least, the agreement required bi-annual inspections, which did in fact take place in 1997 and 2000. There were no such inspections in 1998, 1999 or 2001. In any event, no deficiencies or problems were noted with the pool area prior to the injury suffered by Chan Young. Since that incident, the pool area was substantially renovated.[3]

Bo Hyun and Wan Ki filed their complaint in their individual capacities as parents of Chan Young, as well as on his behalf, on October 30, 2002. The sole defendant was Choice. No claim was or has been initiated against either P.T. Marina or P.T. Qualita.

The complaint sets forth six causes of action which may be grouped into three categories. The first alleges that Choice was vicariously negligent by virtue of the actions of P.T. Marina and/or P.T. Qualita Indah Hotels

[3] Pictures of the area immediately before the event were taken and retained by the Plaintiffs. Other views of the pools taken during the renovations were preserved via photography by or at the direction of the Plaintiffs' expert witness, Thomas C. Ebro.

based upon the Doctrine of Attractive Nuisance. The second area of negligence referenced allegations that Choice was negligent in the selection, retention, supervision and training of franchisee, P.T. Marina. Lastly, the Lees have alleged that the pool area was negligently designed and approved.

Choice denied it was in anyway negligent. In addition to raising certain affirmative defenses, Choice also filed a third-party complaint against P.T. Marina and P.T. Qualita Indah Hotels. That complaint was followed the by instant motion to dismiss on January 16, 2004. The Court continued the motion on February 20, 2004, without prejudice, so that the parties could conduct additional discovery. Further discovery was conducted and supplemental memoranda filed.

The basis of Choice's motion is that Delaware is not the appropriate forum within which to litigate the matter. There is no connection between the litigation and this state. Nor do the factors set forth in *General Foods Corp. v. Cryo-Maid, Inc.*[4] support the continuance of

[4] 198 A.2d 681 (1964).

the litigation in Delaware. The Lees counter that if not in Delaware, where could the litigation be resolved. They argue, citing *United Phosphorus, Ltd. v. Micro-Flo*,[5] that the burden is on Choice to show "overwhelming hardship" if the case is allowed to continue in Delaware. Further, the forum choice made by the Plaintiffs, must be given great weight and the problems cited by Choice, would be the same no matter where the case was presented. Accordingly, dismissal on *forum non conveniens* grounds would be inappropriate.

DISCUSSION

The Doctrine of *Forum Non Conveniens*

The doctrine of *forum non conveniens* was conceived in Scotland and has become part of the common law of many States.[6] The principle is simply that a court may refuse the imposition of its jurisdiction even when that

[5] 808 A.2d 761 (Del. 2002).

[6] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (citing Braucher, *The Inconveneint Federal Forum*, 60 Har. L. Review 908, 909-12 (1947)).

jurisdiction is permitted by the letter of a general venue statute.[7] Courts are empowered to decline jurisdiction when litigation within the host forum would be inconvenient, expensive or otherwise inappropriate.[8] The decision to stay or dismiss an action based on *forum non conveniens* lies within the sound discretion of the Court.[9]

Overwhelming Hardship

A recent survey of Delaware *forum non conveniens* jurisprudence was undertaken and memorialized in *In re Asbestos Litigation.*[10] The relevant portions of that opinion which provide a concise view of the philosophy underlying the application of that doctrine in this state, read:

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[7] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

[8] *See Gulf Oil*, 330 U.S. at 507-08; and *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 577 A.2d 305, 306 (Del Super. Ct. 1989) (citing *Gulf Oil*).

[9] *Williams Gas Supply Co. v. Apache Corp.*, 1991 WL 18901, at *1 (Del. Super.).

[10] *In re Asbestos Litigation*, Del. Super., C.A. No. 05C-05-246, Slights, J. (March 8, 2006) (Mem. Op.) at 7. Although the decision consolidates multiple claims, for ease of reference only the lead case is cited.

> The standards that govern motions to dismiss for *forum non conveniens*, although now well-settled, have evolved in Delaware after much litigation in both the trial and appellate courts.[11] A series of cases, where the Delaware Supreme Court reversed trial court orders granting motions to dismiss for *forum non conveniens*, allowed our highest court to articulate a clear preference in favor of a plaintiff's choice of forum, particularly where there are no previously filed actions pending elsewhere.[12] This preference has been expressed in the form of a "presumption" that the plaintiff's choice of forum will be respected unless the defendant carries the "heavy burden" of establishing that Delaware is not an appropriate forum for the controversy.[13] To meet its burden, the defendant must establish that it would endure "overwhelming hardship" by litigating in Delaware.[14] Stated differently, the defendant must "demonstrate that this 'is one of the rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant.'"[15] This burden is

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[11] *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 777-78 (Del. 2001).

[12] *See e.g. Candlewood Timber Group v. Pan Am. Energy, LLC*, 859 A.2d 989 (Del. 2004); *Ison v. E.I. du Pont de Nemours & Co.*, 729 A.2d 832 (Del. 1999); *Mar-Land*, 777 A.2d 774; *Taylor v. LSI Logic Corp.*, 689 A.2d 1196 (Del. 1997).

[13] *Mar-Land*, 777 A.2d at 777-78.

[14] *Id.*

[15] *Id.* (quoting *Ison*, 729 A.2d at 842).

> intended to be substantial but not preclusive.[16]

It is, therefore, Choice's burden to prove inconvenience and hardship by demonstrating that the combination and weight of the appropriate factors in a traditional *forum non conveniens* analysis weigh overwhelmingly in favor of its motion to dismiss the Lees' action.[17]

In deciding whether a defendant has met this heavy burden of establishing overwhelming hardship, the Delaware Supreme Court has set out the factors the Court must consider in deciding the question in the seminal case of *General Foods Corp. v. Cryo-Maid*.[18] The so-called *Cryo-Maid* factors are as follows:

> (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of a view of the premises; (4) whether the controversy is dependent upon the application of Delaware law which Delaware courts more properly should decide than those of another jurisdiction; (5) the pendency

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[16] *Ison*, 729 A.2d at 842.

[17] *Williams Gas Supply*, 594 A.2d at 36.

[18] *General Foods Corp. v. Cryo-Maid*, 198 A.2d 681, 684 (Del. 1964); *See also Warburg, Pincus Ventures, L.P. v. Schrapper,* 774 A.2d 264, 267 (Del. 2001).

> or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.

It is insufficient that all of the *Cryo-Maid* factors may favor a defendant.[19] The defendant must show "with particularity" that one or more of the factors, individually or together, imposes an "overwhelming hardship."[20] Absent such a showing the plaintiff's choice of forum will be upheld.[21] Furthermore, arguing that an alternative forum would be more convenient or perhaps a better location is irrelevant.[22] The Court is not charged with picking the best possible site.[23]

Applying The *Cryo-Maid* Factors

Having concluded that Choice must meet the heavy burden of establishing overwhelming hardship, it is now

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[19] *Taylor*, 689 A.2d at 1197.

[20] *Ison*, 729 A.2d at 837-38.

[21] *Id.*

[22] *Taylor*, 689 A.2d at 1197.

[23] *Aetna Casualty & Surety Co. v. CertainTeed Corp.* Del. Super., C.A. No. 93C-06-125, Del Pesco, J. (Feb 22, 1994) Order at 4 (citing *ANR Pipeline Co. v. Shell Oil Co.*, 525 A.2d 991 (Del. 1987)).

proper to consider its contentions in light of the *Cryo-Maid* framework. The Court will weigh the factors *ad seriatim*.

The first factor to be addressed is the relative ease of access to proof. It is undisputed that some evidence relevant to this case is dispersed amongst three countries i.e., the United States, South Korea and Indonesia. Choice correctly submits that all medical records and providers are located in South Korea or Indonesia; the records from the unnamed travel agent will presumably be found in South Korea; and maintenance and business records of the Resort are in Indonesia. Choice argues that the litigation will be hampered if commenced in Delaware because the evidence is so widely dispersed and it is not maintained by persons or entities under the control of either party. The question then is whether the extent of that "hampering" equates to an overwhelming hardship. The Lees contend that the location of some evidence outside of the United States cannot be the grounds for moving the action to another jurisdiction, since the very same problem would arise in Indonesia,

South Korea, or Maryland, where Choice's home office is located. It is also argued that much of the evidence in support of the claims made in the Lees' complaint is located in the United States, i.e., Choice's business records and management personnel.

The proximity of the evidence to the proposed forum is an important consideration under the access to proof factor, and may in fact support a finding of overwhelming hardship,[24] but it is by no means dispositive. Over four decades have passed since the Supreme Court's decision in *Cryo-Maid* and during that span the Court has never found overwhelming hardship based solely on the location of evidence.[25] In fact, the Delaware Supreme Court has declined to reach that conclusion even in cases where the vast majority of the relevant evidence is situated in a foreign locale and likely could be accessed only through the "cumbersome" procedures set forth in the Hague

[24] *In re Asbestos Litigation*, Del. Super., C.A. No. 05C-05-246, at 14 (citing *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 553 (Del. Ch. 1999)).

[25] *See Taylor*, 689 A.2d at 1199.

Convention.[26]

Lastly, incurring significant expense will be certain as a result of litigating in Delaware, but that is immaterial since the same expense will be incurred no matter the venue.[27] No matter how it is viewed, any hardship so imposed places an equal burden on both sides. This factor must therefore be weighed against the proposed transfer.

With respect to the second factor, availability of compulsory process for witnesses, Choice argues that not one prospective witness is subject to Delaware's jurisdictional reach. It is further argued that the choice of forum precludes the Defendant from joining indispensable parties i.e., P.T. Qualita and P.T. Marina. The Court's response is similar to that made in discussing the first factor given the interrelation between the two. The same process and joinder difficulties will arise no matter where this litigation

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[26] *See Ison*, 729 A.2d at 843; *See also Warburg*, 774 A.2d at 270-71; and *Michaud v. Fairchild Aircraft Inc.*, 2001 WL 1456788, at *3 (Del. Super.).

[27] *See Admiral*, 577 A.2d at 308.

is pursued.[28] That being the case, it is generally assumed that "these mirror-image difficulties cancel out each other."[29] Stated another way, there would be "no clear advantage or disadvantage to litigating" in Delaware or an alternative forum.[30]

Further, Delaware law requires that Choice identify specifically the witnesses not subject to compulsory process and the specific substance of their testimony.[31] Choice simply references "all medical providers" and "all employees of the P.T. Marina City Development Corporation,"[32] alluding generically to what relevant testimony the aforementioned may present. Even when construing the law liberally, it is hard to conclude that the generalizations made by Choice are sufficient to meet its burden. In addition, it appears that the most significant liability and damage witnesses either have

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[28] *In re Asbestos Litigation*, Del. Super., C.A. No. 05C-05-246, at 17 (citing *Admiral*, 577 A.2d at 309).

[29] *Id.* at 18 (citing *Taylor*, 689 A.2d at 1199).

[30] *Id.*

[31] *Id.* at 17 (citing *Sequa Corp. v. Aetna Cas. and Sur. Co.*, 1990 WL 123006, at *5 (Del. Super.). *See also Fres-Co Sys. USA, Inc. v. The Coffee Bean Trading-Roasting, LLC*, 2005 WL 1950802, at *3 (Del. Super.).

[32] Def. Mot. to Dismiss, D.I. 24, at 3.

been deposed and/or have indicated that they will voluntarily appear at trial. As a result, this argument, along with the process and joinder concerns, are unpersuasive.

The third factor, a need for a view of the premises, also fails to support the position being advanced by Choice. Choice represents that a trip to Indonesia would been so prohibitively expensive for counsel and the parties that it is tantamount to no opportunity to view the premises at all. In the first instance, this argument ignores all technological alternatives to an actual view of the premises i.e., video, photographs, or other audiovisual aids. It also ignores the fact that the pool area apparently underwent substantial renovations following the instant accident in 2001. In any event, Delaware courts have consistently recognized that little is lost in the way of examining a scene when those alternative mediums are used.[33] For those reasons, the Court concludes that this factor, in light of the

[33] *See Ison*, 729 A.2d at 837; *See also Michaud*, 2001 WL 1456788 at *3; and *Schafer v. Wall-Mart Stores, Inc.*, 2001 WL 1456697, at *3 (Del. Super.).

circumstances existing in this case, does not support the claim of undue hardship.

With regard to the fourth factor, applicability of Delaware law, Choice simply does not articulate what hardship, if any, would ensue. The entirety of Choice's contention in this regard is that:

> [T]his Court should conclude that the substantive law of the State of Delaware is not controlling vis-à-vis the claims relating to parental negligence, vicarious liability, or damages. Delaware has little interest in the outcome of [these claims].[34]

The point of the argument is unclear, but it appears that, Choice is arguing that the fact Delaware law does not apply (at least according to Choice), is yet another example of the lack of connection between this litigation and Delaware. However, Choice fails to recognize that Delaware courts regularly interpret and apply the laws of other jurisdictions, nationally and internationally. Moreover, they have consistently held that the "need to apply another state's law will not be substantial

[34] Def. Mot. to Dismiss, D.I. 24, at 4.

deterrent to conducting litigation in this state."[35] Hence, to the extent that this Court may have to apply the law of another jurisdiction, be it of another state or country, does not constitute overwhelming hardship.

The fifth factor, the pendency or nonpendency of a similar action in another jurisdiction, balances most heavily against dismissal. The absence of a prior pending action in another jurisdiction "is an important, if not controlling consideration," when considering whether to dismiss a motion on *forum non conveniens* grounds.[36] Judicial discretion is to be exercised sparingly in favor of dismissal when no prior filing of a related action is pending.[37] It is undisputed that no prior actions related to the matter at bar are pending in any alternate forum. This fact weighs heavily against dismissal.

Finally, Choice has failed to demonstrate the

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[35] *In re Asbestos Litigation*, Del. Super., C.A. No. 05C-05-246, at 20 (citing *Sequa*, 1990 WL 123006, at *4).

[36] *Id.* at 22 (citing *States Marine Lines v. Domingo*, 269 A.2d 223, 226 (Del. 1970)).

[37] *Id.* (citing *Taylor*, 689 A.2d at 1199; and *Fres-Co*, 2005 WL 1950802, at *3).

existence of other practical considerations which would make litigating the matter in Delaware more difficult or expensive. Choice maintains that the required travel, interpreters and translation of medical records/documents/bills will not only make litigating the matter in Delaware expensive, but confusing for an empaneled jury. Again this argument is unpersuasive. There are no practical considerations militating against litigating in Delaware that would not be present if the litigation were removed to a different jurisdiction. For this reason, any further discussion of this factor is not necessary.

Taken individually, none of the *Cryo-Maid* factors lead the Court to conclude that Choice is entitled to the relief sought. Viewed collectively, the result is the same. Not only is the Court unable to conclude that litigating the claims raised by the Lees here constitutes an overwhelming hardship, it would be difficult under these facts to find one forum more advantageous than another.

CONCLUSION

For the foregoing reasons, the Court must conclude that the claims raised by the Plaintiffs should not be dismissed based upon the doctrine of *forum non conveniens.* The Defendant, Choice Hotels International, Inc., has failed to establish that it will suffer overwhelming hardship if the litigation were to continue in this forum. Accordingly, the motion to dismiss must be, and hereby is, **DENIED.**

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TOLIVER, JUDGE

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oc: Prothonotary