

Stay in Your Lane: Fifth Circuit Sends Dispute over Self-Driving Cars to Israel

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In *OSR Enters. AG v. REE Auto., Ltd.*, the Fifth Circuit recently ruled that, under the doctrine of *forum non conveniens*, a trade secret dispute originally filed in federal district court in Texas will have to be decided by an Israeli court. The Court's decision is a good reminder that while there is a strong presumption in favor of litigating a dispute in the plaintiff's chosen forum, a court has discretion to dismiss the case when an alternative forum has jurisdiction and would be a fairer and/or more convenient venue.

Forum non conveniens is a common-law doctrine that aims to promote a convenient forum for litigation. To determine whether to dismiss a case for *forum non conveniens*, the district court must first assess whether there is an adequate and available alternative forum. If there is, the district court must then conduct a balancing test based on private-interest and public-interest factors, with the defendant bearing the burden. The private-

interest factors in this analysis include: (1) the ease of access to evidence; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) the possibility of a view of the property, if applicable; and (5) any other practical factors that make trial expeditious and inexpensive. The public-interest factors in a *forum non conveniens* analysis include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies resolved at home; (3) the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty.

The question before the Fifth Circuit in *OSR Enters. AG v. REE Auto., Ltd.*, was whether the plaintiff's chosen forum in Texas federal court was appropriate for a dispute between foreign companies where the primary events took place in Israel.

In this case, the plaintiff, OSR – made up of two entities that are incorporated in Israel and Switzerland – spent almost a decade developing an AI-driven central computer for autonomous and smart vehicles called “EVOLVER.” In September 2019, OSR's then head of research and development, Ohad Stauber, copied the source code for EVOLVER to an external drive and then resigned to join the defendant, REE, an Israeli corporation, two months later. But less than a year into Stauber's tenure at REE, it quickly transitioned from offering suspension systems for wheelchairs to unveiling its own AI computer processor with similar capabilities to EVOLVER.

In February 2021, REE announced a merger that would make it publicly traded on the NASDAQ. It later announced it had partnered with a Texas-based company, and REE's U.S. entity had signed a ten-year lease for its headquarters and integration center in Texas. Based on these Texas connections, OSR sued REE in 2022 in the U.S. District Court for the Western District of Texas under the Defend Trade Secrets Act and the Texas Uniform Trade Secrets Act, in addition to claims for unfair competition and for injunctive relief. REE then moved to dismiss the Texas suit under the doctrine of *forum non conveniens*. The district court agreed, dismissing OSR's claims in favor of resolution by a court in Israel.

OSR appealed, arguing that Israeli law could not provide a fair remedy. OSR's main arguments were that (1) an Israeli court is unlikely to prevent REE from using OSR's trade secrets in the United States (where REE is currently working to produce an electric van), (2) OSR's unfair competition claim would be unavailable in an Israeli court, and (3) REE's employees would have additional rights against self-incrimination in Israel that they would not have in Texas.

The Fifth Circuit nonetheless sided with REE and affirmed the trial court's dismissal. OSR did not dispute that Israel was an available forum, and thus the Court's review focused on the remaining aspects of the *forum non conveniens* analysis. Courts generally presume that foreign laws and courts are adequate. Thus, when a party argues that a foreign court is inadequate, the party must demonstrate more than mere differences in procedural rights and remedies. Rather, the foreign court must be shown

to provide *no remedy at all*—a high bar that is difficult to clear.

The Court was presented with dueling Israeli-law expert opinions. The Fifth Circuit took issue with OSR's arguments because OSR's expert found that an Israeli court was *unlikely* to provide OSR's preferred remedy, not that there was *no remedy*. Further, the possibility that OSR's unfair competition claim would be unavailable in Israel fell short of the necessary showing that OSR would have *no claim at all* under Israeli law. Finally, the Court found that, even if REE's employees had additional rights against self-incrimination in an Israeli court, a court in Texas would have trouble compelling those Israel-based employees to fly half-way across the world to testify *at all*.

In addition to determining whether an Israeli court would be adequate to decide this case, the Fifth Circuit, with an eye toward practical considerations, explained that an Israeli court is also better suited to handle this case. Specifically, the Fifth Circuit was concerned that electronically stored documents concerning REE's contracts and hiring practices are managed in Israel, many important non-party witnesses are based in Israel and thus could not be compelled to attend a trial in Texas, and OSR had not shown any reason that vehicles manufactured in Texas would need to be delivered for direct inspection by an Israeli court.

Finally, the Fifth Circuit noted that, according to REE: it has no employees in the United States, its American subsidiaries have no principal office in the United States, and the "integration center" Texas is not operational. Thus, the Court reasoned that REE's plans in Texas create little or no local interest in having this case resolved in Texas.

Every forum is different, and savvy litigants do their best to get in front of the one that will maximize their chances of a favorable outcome. But this case is a reminder that courts have discretion to determine that another available forum is more suitable when the original forum is inappropriate based on a balancing of the *forum non conveniens* private- and public-interest factors.