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SECOND CIRCUIT REVIEW
FORUM NON CONVENIENS

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In this month's column, we discuss two decisions issued earlier this month by the United States Court of Appeals for the Second Circuit, both addressing the doctrine of forum non conveniens. In the first, the Second Circuit, en banc, determined the degree of deference appropriately accorded a plaintiff's choice of a United States forum where that forum differs from the one in which the plaintiff resides. In the second decision, the Court clarified what constitutes an "adequate alternative forum" in the forum non conveniens analysis.

Plaintiff's Forum Choice

A. Deference to a Plaintiff's Forum Choice. In *Iragorri v. United Technologies Corp.*,[1] the Second Circuit, in an en banc opinion written by Judge Pierre N. Leval and Judge Jose A. Cabranes, vacated a district court order dismissing the action on forum non conveniens grounds and remanded for reconsideration in light of the court's holding that the district court had not accorded plaintiffs' choice of forum — motivated by legitimate reasons — sufficient deference in granting defendants' motion to dismiss on forum non conveniens grounds.[2]

On Oct. 3, 1992, Mauricio Iragorri, a domiciliary of Florida since 1981 and a naturalized United States citizen since 1989, fell five floors to his death down an elevator shaft in an apartment building in Cali, Colombia. Plaintiffs, Iragorri's widow and two children, have resided in Florida since 1981. At the time of the accident, the Iragorris were temporarily living in Bogota, Colombia, while the children were on an exchange program sponsored by their Florida school.

On Sept. 30, 1994, plaintiffs filed suit in the United States District Court for the District of Connecticut against defendants Otis Elevator Co. (Otis), a New Jersey corporation with its principal place of business in Connecticut; Otis' parent, United Technologies Corp. (United), a Delaware corporation also with its principal place of business in Connecticut; and International Elevator Inc. (International), a Maine corporation doing business since 1988 solely in South America. The crux of the Irragories' claim was that an employee of International had negligently left the elevator shaft exposed, that International was acting as the agent of Otis and United, and that Otis and United were further liable under Connecticut's products liability statute for the alleged defective design and manufacture of the elevator.

In February 1998, the claims against International, having been transferred to the District of Maine, were dismissed on forum non conveniens grounds, a decision later affirmed by the First Circuit. Otis and United also moved to dismiss in Connecticut district court on forum non conveniens grounds, asserting that the suit should proceed in Cali, Colombia, the site of the accident. On March 31, 1999, the district court granted the

motion to dismiss on the condition that Otis and United agree to appear in the courts in Cali, Colombia.

A panel of the Second Circuit vacated the district court dismissal and remanded to the district court for reconsideration in light of the Second Circuit's recent trilogy of forum non conveniens decisions.[3] The Second Circuit then issued an order to rehear the case en banc "not out of dissatisfaction with the Panel's disposition, but because [the Court] believed that it would be useful for the full court to review the relevance of a plaintiff's residence in the United States but outside the district in which an action is filed when the defendants seek dismissal for forum non conveniens."[4] Specifically, the Court convened to answer the question of what degree of deference should be accorded by the district court "to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides" — the fact pattern at issue and previously considered by the Second Circuit, but not directly addressed by Supreme Court precedent.

The en banc panel began with the general principle that, under Supreme Court forum non conveniens precedent, "a court reviewing a motion to dismiss for forum non conveniens should begin with the assumption that the plaintiff's choice of forum will stand unless the defendant meets the burden of demonstrating" that the balance of certain forum non conveniens factors lie strongly in its favor.[5] The court nevertheless cautioned that this deference is not "dispositive" and may be "overcome" should "the balance of conveniences suggest[] that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court."

Degree of Deference

The court noted that "the degree of deference given to a plaintiff's forum choice varies with the circumstances" and is "generally entitled to great deference when the plaintiff has sued in the plaintiff's home forum," while "a foreign resident's choice of a U.S. forum should receive less consideration." Reasoning that the deference accorded a plaintiff's choice of a home forum results because the forum is presumed to be convenient, the court contrasted the situation where a foreign plaintiff chooses a U.S. forum. The court explained that, in such a situation, there is "little reason to assume that it is convenient for the plaintiff, and, thus, "a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries."[6] Dismissal is therefore proper the "more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons — such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum."

Accordingly, the court acknowledged the need to focus on the motivation behind the forum choice in defining the appropriate level of deference owed. The Second Circuit advised that the "more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." In other words, "the greater the plaintiff's or

the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for forum non conveniens."[7] The court also identified additional factors that counsel against forum non conveniens dismissal, including "the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance and other reasons relating to convenience or expense."

Recognizing that "one of the factors that necessarily affects a plaintiff's choice of forum is the need to sue in a place where the defendant is amenable to suit," the court concluded that "where a U.S. resident leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit, this would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant" — a conclusion the court deemed "all the more true where the defendant's amenability to suit in the plaintiff's home district is unclear."[8]

Deference to Plaintiff

Accordingly, the court concluded that greater deference is due a plaintiff's forum choice to the extent that it was "motivated by legitimate reasons, including the plaintiff's convenience and the ability of a U.S. resident plaintiff to obtain jurisdiction over the defendant," while less deference is owed a forum choice "motivated by tactical advantage."

In view of the fact that the determination of the appropriate level of deference constitutes "only the first level of inquiry," the court observed that the district court must also conduct the forum non conveniens analysis set forth by the Supreme Court in, among other cases, *Gulf Oil Corp. v. Gilbert*.[9] To that end, a court should first consider whether an adequate alternative forum exists. If so, a court must balance two sets of factors to ascertain the proper forum in which the case should be adjudicated. The first such set of factors is comprised of the so-called "private interest factors" — concerning the convenience of the litigants — including the 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 to view the premises; and all other practical problems that make trial of a case easy, expeditious and inexpensive. The second set of factors consists of "public interest factors," such as congestion of courts, the interest in having the controversy decided in the local arena, and the relationship of the forum to the governing law.

Synthesizing the degree of deference with the *Gilbert* factors, the court instructed that, "the greater the degree of deference to which the plaintiff's choice of forum is entitled, the stronger a showing of inconvenience the defendant must make to prevail in securing forum non conveniens dismissal."[10] The court further noted that "the greater the degree to which the plaintiff has chosen a forum where the defendant's witnesses and evidence are to be found, the harder it should be for the defendant to demonstrate inconvenience." Thus, the Second Circuit suggested that courts "arm themselves with an

appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum," and warned courts to "be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of forum non conveniens not because of genuine concern with convenience but because of similar forum-shopping reasons."

Applying these principles to the case at bar, the Second Circuit emphasized that the decision to dismiss a case on forum non conveniens grounds "lies wholly within the broad discretion of the district court" and may be overturned only if that discretion has been clearly abused.

Second Circuit Holding

Notwithstanding that high hurdle, the Second Circuit held that the district court had not accorded appropriate deference to the plaintiff's chosen forum. In so ruling, the court concluded that "so far as the record reveals, there is little indication that the plaintiffs chose the defendants' principal place of business for forum-shopping reasons." To the contrary, plaintiffs chose the Connecticut forum apparently in an effort to obtain jurisdiction over all three original defendants and because that was where witnesses and relevant documentary evidence are located. The Second Circuit further found that the inconvenience and difficulty imposed on plaintiffs if forced to litigate in Cali would be great in light of plaintiffs' fear for their safety in Cali and concern that witnesses may be unwilling to travel there — concerns, if warranted, the court deemed to be highly relevant to the forum non conveniens inquiry.

Accordingly, the court remanded the case to the district court to determine the degree of deference to which plaintiffs' choice of forum is entitled, the balance of hardships to the respective parties as between the competing fora, and the public interest factors involved.

Alternative Forum

B. Adequate Alternative Forum. In *Bank of Credit and Commerce International (Overseas) Ltd. v. State Bank of Pakistan*,[11] the Second Circuit, in a decision issued days before *Iragorri* and written by Judge Guido Calabresi and joined by Judge Jon O. Newman and Judge Robert D. Sack, addressed another aspect of the forum non conveniens consideration — the adequate alternative forum. In so doing, the court vacated and remanded a district court order granting a motion to dismiss on forum non conveniens grounds so that the district court could reconsider its finding that Pakistan constituted an adequate alternative forum in view of a subsequent change in Pakistani law.

BCCI Overseas is one of a group of closely affiliated international banks known together as "BCCI" or the "BCCI Group." In 1991, the BCCI Group collapsed in one of the largest bank failures in history. In 1997, the court-appointed fiduciaries of BCCI Overseas brought suit in New York state court to seek repayment of an alleged $50 million loan made in 1991 to State Bank, the central of bank of Pakistan. After the action was

remanded to federal court, State Bank moved to dismiss on forum non conveniens grounds, arguing that Pakistan would be a more appropriate forum.

Vigorous debate ensued between the parties as to the adequacy of Pakistan as an alternative forum. The core issue in dispute was whether BCCI Overseas' claim would be barred in Pakistan by a statute of limitations; State Bank claimed that a Pakistani statute — the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act of 1997 (the "Banking Act of 1997") — would revive the claim. The district court granted the motion to dismiss on forum non conveniens grounds, subject to (1) State Bank's agreement in writing to waive any available statute of limitations defense in Pakistani courts; (2) the Pakistani court's not refusing to hear the case on statute of limitations grounds; and (3) State Bank's agreement in writing to allow BCCI Overseas to remove any judgment from Pakistan.

BCCI Overseas appealed the forum non conveniens dismissal. Subsequently, and on the eve of appellate oral argument, counsel for State Bank advised the court and BCCI Overseas that Pakistan had promulgated a new Banking Act, which repealed and, with certain modifications, reenacted the Banking Act of 1997. After oral argument, BCCI Overseas filed a motion to vacate the district court's decision in light of this change in law, which BCCI Overseas claimed was relevant to the forum non conveniens analysis in that it impacted BCCI Overseas' ability to bring its claim.

Alternative Forums

Considering both the appeal and the motion at the same time, the Second Circuit focused on the adequate alternative forum analysis. In so doing, the court instructed that "an alternative forum is generally adequate if: (1) the defendants are subject to service of process there; and (2) the forum permits litigation of the subject matter of the dispute."[12] Importantly, the court observed that "an adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum." The court further explained that, "after concluding that an adequate alternative forum exists, the court must weigh the public and private interests" identified by the Supreme Court in *Gilbert* in order to determine "which forum will be most convenient and will best serve the ends of justice."

Turning to the instant case, the Second Circuit deemed it "prudent to vacate the district court's dismissal order and remand, so that the district court can consider the implications of the new statute to its forum non conveniens analysis."[13] The Court so decided in view of the district court's reliance on the meaning of the Banking Act of 1997 in finding the existence of an adequate alternative forum in Pakistan.

Also troubled by the "potentially serious problem of congestion and delay in Pakistan's courts," the Second Circuit instructed the district court, should it decide on remand to dismiss the case, to condition dismissal on the acceptance of jurisdiction over the case by the Banking Court — apparently a less trafficked route — in Pakistan, allowing BCCI Overseas to proceed in the district court should the Banking Court determine it lacks jurisdiction.

After observing that the district court based its decision to dismiss, in part, on its "justifiable belief" that the Pakistani courts would not decline to hear the case, the Second Circuit clarified "the type of finding that the district court should make regarding the adequacy of an alternative foreign forum in a case in which foreign law or practice is at issue, and in which the case is dismissed conditionally."[14] To that end, the Second Circuit said that, notwithstanding case law allowing a court to dismiss on forum non conveniens grounds conditionally if it cannot make a definitive finding on adequacy of the foreign forum, the district court should engage "in a full analysis of those issues of foreign law or practice that are relevant to its decision."

Elaborating on "precisely how certain the court must be regarding the existence of an adequate alternative foreign forum," the court explained that such degree of certainty "will necessarily depend on how protective of the nonmoving party the conditional dismissal will in fact be." Accordingly, "in any case in which the condition on which dismissal depends fails significantly to protect the non-movant" — for example, if a prejudicial amount of time would pass between the conditional dismissal and eventual reinstatement of the suit in the district court — "the court should either be more sure of its finding as to the uncertain question of foreign law or practice, and therefore as to the adequacy of the alternative foreign forum, or frame the condition differently, if that is possible, in order to minimize the risk."

Finally, the court cautioned that, notwithstanding the fact that the "conditional dismissal device can help to protect the non-moving party in circumstances where the district court remains concerned about the accuracy of its justifiable belief as to a foreign forum's adequacy," the mechanism "cannot transform an inadequate forum into an adequate one."[15] Because the court vacated and remanded on the question of the adequate alternative forum, it did not review the district court's balancing of the *Gilbert* factors.

Conclusion

The issue of forum non conveniens is one that arises in this circuit with great regularity. In the past five years alone, the Second Circuit has issued at least 15 published, and at least 12 unpublished, forum non conveniens decisions, and district courts in the circuit have issued more than 175 forum non conveniens decisions. Although seemingly straightforward, the forum non conveniens doctrine is highly nuanced and susceptible to idiosyncratic application by district courts, as the en banc decision in *Iragarri* underscores. It will be interesting to monitor how district courts go about divining a plaintiff's "motivation" in selecting a particular forum, an issue that now has become pivotal in the forum non conveniens analysis.

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case referenced in Irigarri, *and as to which an en banc petition has been pending since November 2000.*

[1] No. 99-7481, 2001 WL 1538928 (Dec. 4, 2001).

[2] Id. at *3.

[3] See *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *DiRienzo v. Philip Services Corp.*, 232 F.3d 49 (2d Cir. 2000).

[4] 2001 WL 1538928, at *1.

[5] Id. at *2.

[6] Id. at *3.

[7] Id.

[8] Id. at *4.

[9] 330 U.S. 501 (1947).

[10] 2001 WL 1538928, at *6.

[11] No. 99-7568, 2001 WL 1517034 (2d Cir. 2001).

[12] Id. at *3.

[13] Id.

[14] [Not supplied]

[15] [Not supplied]