INTERNATIONAL FORUM SELECTION AND FORUM NON CONVENIENS

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International forum selection clauses are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,"98 Ever since the Supreme Court's seminal 1971 decision in M/S Bremen v. Zapata Off-Shore Co.,99 U.S. courts have generally enforced such provisions based upon international comity, public policy, and contract law.100 International forum selection clauses may be challenged only on very limited grounds upon a clear showing that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."101 In contrast to forum selection clauses, which are by nature contract based, the doctrine of forum non conveniens more broadly permits courts to "resist imposition upon [their] jurisdiction"102 if there is an "adequate alternative" forum103 and the balance of trial conveniences (including private and public interest factors) strongly favors the alternative forum.

The year before the new millennium witnessed a relative paucity of important international forum selection and forum non conveniens developments. Federal appellate and trial courts together issued less than forty reported decisions based upon international forum selection provisions or forum non conveniens considerations. Nearly half of the federal cases originated in New York. Similarly, state appellate panels considered international for-urn selection clauses or forum non conveniens issues in less than twenty-five reported opinions. Despite the relatively small number of decisions in 1999, several federal and state opinions merit further scrutiny.

A- 1999 DEVELOPMENTS ON INTERNATIONAL FORUM SELECTION CLAUSES104

1. Federal Developments

The Second Circuit Court of Appeals confirmed the very limited nature of interlocutory appellate review of forum issues in United States Fidelity and Guaranty Co. v. Braspetro Oil Services Co. 105 At the trial court level, the defendants unsuccessfully moved to dismiss based on lack of personal and subject matter jurisdiction, a contractual forum selection clause and forum non conveniens. When the defendants appealed the denial of their motion, the Second Circuit substantively considered (and rejected) their challenges to subject matter and personal jurisdiction. 106 The appellate panel, however, refused to review the denial of the forum selection and forum non conveniens motions on an interlocutory basis. Thus, the defendants were left with the unsatisfactory remedy of preserving the forum issues for possible direct appeal after a final judgment.

In a pair of trial level decisions, forum selection provisions that were somewhat ambiguous were construed as permissive rather than mandatory, thus defeating their enforcement. In Hull 753 Corp. v. Elbe Flugzeugwerke GmbH, the clause read: "Place of jurisdiction shall be Dresden."

107

The district court determined that the clause allowed, but did not require, the parties to litigate in Dresden, Germany. In Weiss v. La Suisse, the provision (translated from French and German) stated that the policyholder has "the right to take any dispute between themselves and 'La Suisse' either before the judge of the competent court of their domicile in Switzerland or in front of the civil court in Lausanne."108 The district court found that the provision gave the plaintiffs "die right" to bring a lawsuit in Switzerland but did "not compel them to do so or preclude them from suing elsewhere."109

In Jewel Seafoods, Ltd. v. MIV Peace River,110 a trial court was confronted with a forum selection clause requiring adjudication of disputes in the People's Republic of China. The case arose from an allegedly damaged maritime transaction governed by the Carriage of Goods by Sea Act (COGSA).111 Relying on the Supreme Court's decision in Fimar Seguros y Reaseguros, S.A. v. MIV Sky Reefer,112 the Jewel Seafoods court enforced the Chinese forum selection provision. In so doing, the trial court determined that the application of Chinese maritime law did not diminish the plaintiff's right below what COGSA guarantees. The district court also rejected an attack on the adequacy of the Chinese legal system to resolve disputes involving foreign business issues.

2. State Developments

An Illinois state appellate court reaffirmed the application of Bremen to an international forum selection dispute in Yamada Corp. v. Yasuda Fire and Marine Insurance. Co., Ltd. 113 The case involved the enforcement of a clause providing that "coverage disputes arising out of this insurance shall be subject to Japanese law and forum. 114 The trial court refused to enforce the forum selection clause and entered summary judgment for the plaintiff. On appeal, the Illinois appellate court reversed, confirmed adoption of the Bremen holding in Illinois and approved reliance on federal cases when interpreting international forum selection clauses.115

Remanding for dismissal, the appellate court determined that the forum selection clause should be enforced since it was mandatory, not seriously inconvenient or unreasonable and not against Illinois public policy.

B. 1999 DEVELOPMENTS ON INTERNATIONAL FORUM NON CONVENIENS
American jurists determined that courts of the following foreign nations provided "adequate alternative" fora for international dispute adjudication in forum non conveniens cases: Canada, 116 Cayman Islands, 117 Columbia, 118 France, 119 Germany, 120 Greece, 121 Hong Kong, 122 Liechtenstein, 123 Netherlands, 124 Pakistan, 125 Peru, 126 Switzerland, 127 and the United Kingdom. 128

1. Federal Developments

The Ninth Circuit Court of Appeals reversed a forum non conveniens dismissal in Dickson Marine Inc. v. Panalpina, Inc. 129 In Dickson Marine, Louisiana corporations brought a property damage action against Gabonese and Swiss corporations concerning a ship that capsized in African coastal waters. The trial court dismissed the Gabonese entity for lack of personal jurisdiction and dismissed a Swiss company for inconvenient forum. On appeal, the Fifth Circuit relied upon a well-accepted Supreme Court forum non conveniens precedent: Piper Aircraft Co. v. Reyno 130 and Gulf Oil Co. v. Gilbert. 131 The Fifth Circuit, however, also reiterated its somewhat unusual additional requirement of "conditional" forum non conveniens dismissal: "a district court must ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice and that if the defendant obstructs such reinstatement in the alternative forum that plaintiff may return to the American forum." 132 "Conditional dismissals" or stipulations 133 are routine in practice in many jurisdictions but continue to be mandatory in the Fifth Circuit.

The Ninth Circuit Court of Appeals reversed a forum non conveniens dismissal in Alpha Therapeutic Corp. v. Nippon Hoso Kyokai. 134 American plaintiffs brought claims for, among other things, defamation and conversion against a Japanese company. The appellate court repeatedly reaffirmed that the foreign defendant bears the burden to show an adequate alternative forum and that choice of law and the balance of private and public interest factors favor dismissal. Utilizing an abuse of discretion standard, the Ninth Circuit reversed the trial court for incorrectly shifting the burden from the foreign defendant to the American plaintiff. The appellate court was critical of the trial court's alternative forum analysis. The trial court's conclusion that Japan provided an adequate alternative forum was determined to be "insufficient" since the trial court "failed to explain what evidence it had that Japan was an adequate forum" 135 and instead simply relied on a previous appellate opinion 136 in which the Ninth Circuit noted that it could "not find a single case in which Japan was held to be an inadequate forum." 137 The Alpha Therapeutic case confirms that a solid evidentiary record should be developed to support forum non conveniens dismissal.

Iragorri v. United Technologies Corp. 138 presented an interesting issue concerning the adequacy of Columbia as an alternative forum. In Iragorri, surviving relatives of a Florida resident sued an American elevator manufacturer for wrongful death in connection with an elevator shaft accident in Columbia. Opposing a motion to dismiss for forum non conveniens, the plaintiffs asserted that Columbia was an "inadequate" and "inconvenient" forum because of the extremely high crime rate resulting from guerrilla and drug cartel activity, including physical attacks, kidnappings, murders, and threats against Americans. The plaintiffs bolstered their argument with a recent U. S. State Department Travel Advisory warning U.S. citizens against unnecessary travel to Columbia. The Travel Advisory stated that "U.S. citizens have been the victims of recent threats, kidnapping and murders. U.S. citizens in Columbia are currently targets of kidnapping efforts of guerrilla rebels ... Columbia is one of the most dangerous countries in the world." 139 The district court discounted the Columbia crime and safety issue and, after a cogent analysis of the Gilbert factors, determined that Columbia was an adequate alternative forum and dismissed the case for forum non conveniens.

Finally, the Second Circuit's 1998 decision in Evolution Online Systems, Inc. v. Koninklijke Nederland N.V. 140 found new life on remand in Evolution Online Systems, Inc. v. Koninklijke Nederland N.V. 141 The trial court had originally dismissed the case for forum non conveniens and a mandatory forum selection clause. Troubled by the "brevity and ambiguity of the district court's opinion," 142 the Second Circuit vacated and remanded. On remand, the district court again dismissed on the grounds of forum non conveniens and the mandatory Netherlands forum selection clause in a cogent, longer, and less ambiguous decision. 143

2. State Developments

State appellate courts in Delaware, Washington, and Florida announced interesting interinternational non conveniens decisions in 1999. The Delaware Supreme Court reiterated its unique approach to forum non conveniens analysis in Ison v. E1 Dupont de Nemours and Co., Inc. 143 In Ison, foreign citizens whose children allegedly suffered birth defects from their mothers' prenatal exposure to fungicides in foreign countries brought a product liability action against the fungicide manufacturer in Delaware. Dupont, a Delaware corporation headquartered in Delaware, successfully moved the trial court to dismiss the action in favor of adjudication in the home nations of the plaintiffs (New Zealand, England, Wales, and Scotland). The Delaware Supreme Court reversed. After tracing forum non conveniens developments in a variety of other jurisdictions, the appellate panel endorsed its own unique standard. 144

In Delaware, forum non conveniens decisions must be guided by the so-called Cryo-Maid factors: (a) the relative ease of access to proof, (b) the availability of compulsory process for witnesses; (c) the possibility of a view of the premises; (d) whether the controversy is dependent upon application of Delaware law; (e) the pendency or nonpendency of a similar action in another jurisdiction; and (0 all other practical problems that would make the trial of the case easy, expeditious, and inexpensive. 145 Nevertheless, "it is not enough that all the 0yo-Maid factors may favor defendant" and forum non conveniens dismissal. 146 In Delaware, "the trial court must find 'overwhelming hardship' to the defendant if the case is to be dismissed." 147 According to the Delaware Supreme Court, "overwhelming hardship"is "difficult for a defendant to prove, but it is preclusive." 148 Delaware appears to be the only U.S. jurisdiction that embraces an "overwhelming hardship" threshold. As a consequence, the relatively difficult Delaware foraforum conveniens legal standard may make Delaware state courts attractive venues for foreign litigants pursuing actions against companies incorporated in Delaware. 149
The Washington Court of Appeals did a "tam-about" on the forum non conveniens burden of persuasion. Prior to 1999, Washington case law required the plaintiff to shoulder the burden of proving that the proposed alternative international forum was inadequate. The Washington Court of Appeals reversed this position in Hilt v. wanda Tran Transport Ltd.p> Now, in line with most other jurisdictions, a defendant in Washington "bears the burden of proving an adequate alternative foraforumsts." 

Finally, an intermediate appellate court in Florida faced a novel question in Bacardi v. Lindzon. The case involved fraud claims relating to trusts established in the Cayman Islands and Liechtenstein. The defendant successfully moved the trial court to dismiss the action on forum non conveniens grounds in favor of adjudication in both the Cayman Islands and Liechtenstein. The appellate court affirmed and ruled that the trial court did not abuse its discretion "in dismissing the claims in favor of various alternative jurisdictions." In doing so, the appellate court certified for further appellate review "the following question of great public importance: Does the trial court abuse its discretion if it dismisses an action on forum nonconveniens grounds ... when dismissal requires the plaintiff to refile the claims in more than one alternative jurisdiction?" The Florida Supreme Court recently granted review on this issue.

90. See id. at *5.


100. See id. at 10-15 (noting that enforcement of forum selection clauses "is substantially... followed in other common-law countries," "accords with ancient concepts of freedom of contract," and reflects "presupposed dayercial realities").

101. Id. at 15. Stated another way, forum selection provisions "may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state." Jewel Seafoods, Ltd. v. AIN Peace River, 39 F. Supp. 2d 628, 633 (D.S.C. 1999) (summarizing Bremen).


106. The court considered the challenge to subject matter jurisdiction pursuant to the collateral order exception to the final judgment rule and then exercised pendent jurisdiction over the personal jurisdiction issues.


109. Id. at 456.

110. -7-d Seafoods, 39 F. Supp. 2d 628.

111. 46 U.S.C. App. § 1300 etseq et seq.94).


114. Id. at 929.
115. Id. at 934.


117. See Bacardi v. Lindzon, 728 So. 2d 309 (Fla. Dist. Ct. App. 1999), review granted, 743 So. 2d 11 (Fla. 1999).


121. See Warn v. M/YMaridome, 169 F.3d 625 (9th Cir. 1999), cert. denied, 120 S. Ct. 179 (1999).


123. See Bacardi, 728 So. 2d at 309.


127. See Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 3 31 (5th Cir. 1999).


129. Dickson Marine, 179 F.3d at 331.

130. Piper Aircraft, 454 U.S. at 235.


132. Dickson, 179 F.3d at 342 (quoting In Re "Air Crash Disaster Near New Orleans, Louisiana, 821 F.2d 1147 (5th Cir. 1987)).

133. Conditions for forum non conveniens dismissal often include the defendants consent to suit in a foreign nation, the defendant's waiver of statute of limitations defenses, and/or the defendant's agreement to satisfy a foreign judgment if rendered.

134. Alpha Therapeutic Corp., 199 F.3d 1078.

135. Id. at 1090.

136. See Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764 (9th Cis. 1991).

137. Alpha Therapeutic Corp., 199 F.3d at 1090.

138. Iragarri, 46 F. Supp. 2d at 159.

139. Id. at 166.

140. Evolution Online Systems, 145 F.3d 505. Evolution Online featured prominently in last year's update of forum non conveniens developments.


142. Id. at 448.


145. Ison, 729 A.2d at 838.

146. Id. (quoting Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. Partnership, 669 A.2d 104, 108 (Del. 1995)).

147. Id.

148. Id. at 842.

149. Perhaps concerned that foreign litigants would misuse the Delaware state courts to pursue actions against Delaware corporations maintaining principal places of business outside of Delaware, the Delaware Supreme Court noted several times that Dupont was both incorporated in Delaware and had its principal place of business in Delaware. Further, the Delaware Supreme Court specifically declined to express an opinion whether the result would be different if the defendant's only connection was that it was incorporated in Delaware. See id. at 843.


152. Id. at 669.

153. Bacardi, 728 So. 2d at 309.

154. Id. at 312.

155. Id. at 312-13.

156. Bacardi v. Lindzon, 743 So. 2d 11 (Fla. 1999).