

INTERNATIONAL

November 2011

IN THIS ISSUE

The authors examine the forum non conveniens issues that often arise in cases involving foreign plaintiffs and American defendants, and approaches that defendants in such situations may utilize.

Global Litigation Turns the Spotlight on the *Forum Non Conveniens* Doctrine When Foreign Plaintiffs Sue U.S. Corporations in U.S. Courts

ABOUT THE AUTHORS



Val H. Stieglitz is a Member in Nexsen Pruet's Columbia, South Carolina office. He has a broad practice that has included working with clients in China, Germany, Ireland, the U.K., Mexico, and Canada in various litigation matters. He can be reached at vstieglitz@nexsenpruet.com.



Sima B. Patel is an Associate in Nexsen Pruet's Greenville, South Carolina office, and previously worked in Washington, D.C. Nexsen Pruet has an active international practice. She can be reached at spatel@nexsenpruet.com.

ABOUT THE COMMITTEE

The International Committee is the core international group in IADC and serves those members who have an interest in transnational or international legal matters including transactions, litigation, and arbitration. Thus any member, whether in the USA or abroad, who does cases with a foreign element (inbound or outbound) will find involvement in this committee extremely useful. Many of the members of the committee are from outside the USA, and this provides a rich mix of experiences and expertise as well as great networking opportunities. The committee does a number of newsletters every year and sponsors or co-sponsors major CLE programs. On those occasions, international litigation and arbitration and the enforcement of judgments or awards seem particularly relevant. The International Committee also organizes European Regional Meetings and contributes to the International Corporate Counsel College. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact either:



Henning Moelle
Co-Vice-Chair of Newsletters
Taylor Wessing
+49 69 971 300
h.moelle@taylorwessing.com



Santiago Nadal
Co-Vice-Chair of Newsletters
SNAbogados
+34 93 362 1697
snadal@snabogados.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

In the recent case of *Tang v. Synutra Int'l Inc.*, the Court of Appeals for the Fourth Circuit affirmed the District Court's dismissal – on grounds of *forum non conveniens* – of a case brought by citizens and residents of China who were allegedly injured when they consumed melamine-contaminated infant formula in China. The defendant, a corporation with its principal place of business in Maryland, had a Chinese subsidiary that manufactured and distributed the infant formula in China. As the world's economies continue to integrate, legal disputes such as those in *Tang v. Synutra Int'l Inc.*, which involve parties from different countries, continue to rise. Federal District Courts in the United States have seen a rise in cases where foreign plaintiffs allege wrongdoing that took place outside the United States, but which allegedly involves an American entity. Foreign plaintiffs often prefer to bring suit in the United States because its judicial system maintains liberal discovery rules and provides for potentially generous damages awards, as compared to the judicial systems in many other countries.

This article examines the *forum non conveniens* issues that often arise in these cases, and approaches that defendants in such situations may utilize.

1. STATE OF THE LAW

In cases involving foreign plaintiffs and American defendants, the defendant will often file a motion to dismiss or transfer based on grounds of *forum non conveniens*. As a threshold matter, the mere fact that the case involves conduct that took place abroad, or plaintiffs who are not American citizens, does not warrant dismissal. Instead, a Court will evaluate the motion under the following standard: (i) did the defendant meet its burden of establishing that an adequate

alternative forum is available, and (ii) did the defendant provide the Court with sufficient information to determine whether the private and public factors at play weigh in favor of dismissal.

A. Adequate Alternative Forum

To satisfy the first element, the U.S. Supreme Court has held that an adequate alternative forum is available where the defendant is willing to accept service of process in the foreign jurisdiction. Moreover, if the defendant is willing to stipulate to jurisdiction or waive statute of limitation defenses, this will tend to demonstrate that an adequate alternative forum is available in the foreign country.

Second, an adequate forum must provide the plaintiffs some remedy for the alleged wrong. Only in the rare circumstance where the alternative forum's remedy is clearly inadequate or unsatisfactory, will the Court find that an adequate alternative forum does not exist. As such, it is not dispositive that the law of the alternative forum is less favorable to the plaintiff, or that the plaintiff could not bring an identical law suit in the alternative forum; instead, a foreign forum will likely be adequate unless it does not provide *any practical remedy* for the plaintiff. The alternative remedy, though, be it administrative or judicial, must allow the plaintiff to personally recover.

For instance, Courts have held that an adequate alternative remedy exists where the foreign jurisdiction's laws did not allow a similar tort action, but did provide an administrative compensation remedy, albeit less liberal than what the American judicial remedy might have been. Similarly, in *Tang*, the Court found that an adequate alternative remedy existed where Chinese Courts were

willing to preside over similar claims, even if such claims were discouraged, and where plaintiffs could access a “settlement” fund. The *Tang* Court held that it was irrelevant that plaintiffs would have to waive their right to sue in order to access the compensation fund; the pertinent factor was that a remedy did exist to compensate their losses.

Defendants must also demonstrate that the foreign forum will hear the claims arising from the conduct alleged. For example, one Court reversed and remanded a District Court’s dismissal on *forum non conveniens* grounds after Mexican Courts declined to exercise jurisdiction over the claims.

B. Private versus Public Factors

If an adequate alternative forum does exist, then the Court will evaluate the private and public factors to see if they weigh in favor of dismissal on grounds of *forum non conveniens*. If the weight favors dismissal, then the Court will grant the motion to dismiss.

The Court will review any or all of the *private* factors listed below, and give them appropriate deference: “(1) the residence of the parties and the witnesses; (2) the forum’s convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.”

Similarly, the Court will review and analyze the following public factors “(1) the local interest in the lawsuit, (2) the Court’s familiarity with the governing law, (3) the burden on the local courts and juries, (4)

congestion in the Courts, and (5) the costs of resolving a dispute unrelated to a particular forum.”

When evaluating these factors, it is important to note that in cases involving foreign plaintiffs, the foreign plaintiff’s choice of forum receives less deference than would exist for a plaintiff who was an American citizen. With regard to private factors, Courts have found the following types of information weigh in favor of dismissal: (i) where the American defendant is willing to make discoverable witnesses and documents within their control in the foreign forum; and (ii) where the defendant demonstrates that the remedy in the alternative forum will be enforceable by agreeing to comply with any non-appealable judgment in the foreign forum.

2. DEFENSE STRATEGIES

A review of recent cases suggests that defendants who wish to direct resolution of an action in a foreign forum should approach a motion to dismiss on *forum non conveniens* grounds by doing the following:

- Stipulate to service of process in the foreign forum.
- When appropriate, waive any statute of limitations defenses that may exist in the foreign forum.
- Provide affidavits and declarations from experts that explain in detail why the alternative foreign forum is available and how it provides an adequate alternative remedy.
- Where the alternative remedy is not judicial, the defendant should be ready to illustrate that the availability remedy will compensate the plaintiff directly.

- Demonstrate that any non-appealable judgment will be enforceable, either through a stipulation or agreement.
- Make available in the foreign jurisdiction any witnesses and documents that are within its control.
- Where appropriate, the defendant should highlight that the underlying conduct took place abroad, the interest in litigation in the United States is minimal as compared to the foreign jurisdiction, the United States will not be able to use compulsory process to force witnesses to testify, and show the heavy burden on the United States' Court to adjudicate the matter.

3. CONCLUSION

As globalization continues to increase, foreign plaintiffs will increasingly file suits in United States Courts. Defendants invoking the *forum non conveniens* doctrine must be able to offer an alternative forum, not necessarily judicial, but one that provides the plaintiff a direct remedy. Moreover, defendants should take certain steps to highlight the availability of the foreign forum, such as by agreeing to service and jurisdiction in the foreign forum. Lastly, defendants must put forth evidence demonstrating that the private and public factors at play weigh in favor of dismissal. The outcome will always be fact-specific, but consideration of these steps should help advance the defendant's position.



PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

SEPTEMBER 2011

Revision of the European Regulation "Brussels I": What U.S. Companies and Lawyers Should Keep in Mind

Thomas Rouhette and Christelle Coslin

JULY 2008

A Closer Look at Two Intriguing Cases

Michael Dobias

JUNE 2008 – 2nd Edition

European Litigation Trends

Adam Barker

JUNE 2008

A New Step Towards Class Actions in Europe

Emmanuele Lutfalla

APRIL 2008

U.S. Technology Protection Issues in Litigation: Foreign National Corporate, Fact and Expert Witnesses

Michael H. Gladstone

MARCH 2008

The New Italian Collective Actions

GianBattista Origoni and Matteo Fusillo