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Sinochem: The U.S. Supreme Court Distinguishes Gulf Oil And Rules On The Convenience Of Addressing Forum Non Conveniens First

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Commentary

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I. Introduction

On March 5, 2007, the United States Supreme Court held in *Sinochem International Co. Ltd. v. Malaysia Int'l Shipping Corp.*[1] that federal courts may dismiss a case on the ground of forum non conveniens as a preliminary matter — even before deciding whether they have subject-matter and personal jurisdiction. The Court unanimously vested federal courts with the discretion to promptly dismiss cases they believe would be more conveniently and adequately heard by foreign tribunals. This commentary describes the pragmatic approach of the Supreme Court and the application of *Sinochem* in the caselaw.

II. Sinochem Facts

The Parties

Sinochem International Company, Ltd. ("Sinochem"), a Chinese State-owned importer, contracted to purchase steel coils from Triorient Trading, Inc. ("Triorient"), a U.S. company not party to the suit. Pursuant to the agreement, Triorient was to receive payment in the form of a letter of credit by producing a valid bill of lading certifying that the steel coils had been loaded for shipment to China on or before April 30, 2003. Triorient sub-chartered a sea vessel owned by Malaysia International Shipping Corporation ("Malaysia International"), a Malaysian company, to transport the shipment to China, also hiring a stevedoring company to load the shipment in a Philadelphia port. The bill of lading was dated April 30, 2003.

Proceedings In China

On June 8, 2003, Sinochem brought suit against Malaysia International in the Guangzhou Admiralty Court in China seeking the arrest of the vessel that carried the shipment to China, alleging that Malaysia International had falsely backdated the bill of lading. The Chinese tribunal ordered the ship to be arrested. Subsequently, on July 2, 2003, Sinochem filed a complaint against Malaysia International and others in the Guangzhou Admiralty Court claiming that the backdating of the bill of lading resulted in unwarranted payment. The admiralty court and, on appeal, the Guangdong Higher People's Court, rejected Malaysia International's jurisdictional challenges.

Proceedings In The United States

On June 23, 2003, shortly after the Chinese admiralty court ordered the vessel's arrest, Malaysia International filed suit against Sinochem in the District Court for the Eastern District of Pennsylvania, seeking, among other things, compensation for the loss it sustained due to the delay caused by the ship's arrest. Sinochem moved to dismiss the suit on multiple grounds, including lack of subject-matter jurisdiction and personal jurisdiction, forum non conveniens and international comity considerations. The District Court ruled that while limited discovery might reveal that the court had personal jurisdiction over Sinochem, such discovery was not necessary because the case should,

in any event, be dismissed on forum non conveniens grounds, as it would be adjudicated more conveniently in the Chinese courts.[2] On appeal, the Third Circuit held that a forum non conveniens dismissal could not be granted until the court determined that it had both subject-matter and personal jurisdiction.[3]

Venue May Be Addressed Before Jurisdiction

Resolving a Circuit split,[4] the Supreme Court reinstated the decision of the District Court and held that the lower court was not required to resolve whether it had jurisdiction if it determined that "in any event, a foreign tribunal [was] plainly the more suitable arbiter of the merits of the case."[5] Thus, a district court may dismiss a suit on the basis of forum non conveniens "*when considerations of convenience, fairness, and judicial economy so warrant.*"[6] Furthermore, it is entitled to conduct a forum non conveniens analysis as a preliminary matter even if it "need[s] to identify the claims presented and the evidence relevant to adjudicating those issues to intelligently rule on a forum non conveniens motion."[7]

In *Sinochem*, the Supreme Court acknowledged that statements in *Gulf Oil Corp. v. Gilbert*[8] accounted for the Third Circuit's conclusion that a forum non conveniens analysis should come into play only after a domestic court had determined that it had jurisdiction over the action and the parties.[9] In *Gulf Oil*, the Court said that "the doctrine of forum non conveniens can never apply if there is absence of jurisdiction,"[10] and that "[i]n all cases in which . . . forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process."[11] Justice Scalia stated at the hearing that the Court's language in *Gulf Oil* was perhaps less than "felicitously" crafted,[12] and the Court explained in its opinion that the words of the *Gulf Oil* Court derived meaning from "the context in which they were embedded."[13] The question presented in *Gulf Oil* was whether a court fully competent to adjudicate the case could nevertheless dismiss the action under the forum non conveniens doctrine. The Court answered that question in the affirmative. In sum, the *Sinochem* Court concluded that *Gulf Oil* did not address the issue presented by *Sinochem*.[14]

While *Sinochem* gives district courts considerable latitude in addressing non-merits dismissal grounds, it makes clear that courts should begin their analysis with the simpler, or less complicated, dismissal ground. Thus, where it is easily ascertainable that a court lacks subject-matter or personal jurisdiction, presumably the court should dismiss a suit on that ground rather than forum non conveniens. As the Supreme Court stated, "[i]f . . . a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground."[15] By contrast, "where subject-matter or personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course."[16]

Pre-Existing Foreign Proceedings Are Significant

Sinochem applies most strongly where "a foreign tribunal is plainly the more suitable arbiter of the merits of the case."[17] Prior to the U.S. proceedings, Sinochem already had instituted litigation against Malaysia International in Chinese admiralty court. Thus, the existence of an alternative forum was readily ascertainable. Additionally, as noted earlier, both the admiralty court and the appellate court (the Guangdong Higher People's Court) had rejected Malaysia International's jurisdictional challenges. These developments assured the Supreme Court that "Malaysia International face[d] no genuine risk that the more convenient forum [would] not take up the case."[18] Since jurisdiction in the Chinese courts was a certainty, the Supreme Court therefore "need[ed] not decide whether a court conditioning a forum non conveniens dismissal on the waiver of jurisdictional or limitations defenses in the foreign forum must first determine its own authority to adjudicate the case."[19] Accordingly, the issue remains open whether a district court should determine its own jurisdiction prior to dismissing a case on the ground of forum non conveniens if such dismissal is to be made conditional upon the waiver of certain procedural rights in the foreign proceeding.

III. After Sinochem

At least seven cases of interest have been decided in the two months since *Sinochem*. While some courts have adhered to the principle that they must first ascertain their jurisdiction, despite the *Sinochem* position, others have conducted a comparative cost-benefit analysis of the review of all applicable grounds for dismissal. In this respect, the extent of discovery

necessary to determine jurisdiction versus forum non conveniens plays a significant role.

The traditional approach was followed by the Eighth Circuit in *United States v. Bonahoom.*[20] There, the court noted that "[a]s a preliminary matter, we have an independent obligation to examine our own jurisdiction." The court continued, "'[w]ithout jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case.'"[21]

By contrast, a cost-benefit analysis of proceeding with a forum non conveniens analysis instead of determining jurisdiction as a preliminary matter is found in several cases. For example, in *Royal Siam Corp. v. Chertoff*,[22] the issue arose as to whether the circuit court had jurisdiction to hear the appeal under the Immigration and Nationality Act. Understanding that the jurisdictional authority of the court pursuant to the statutory scheme of the Act was a complicated issue, the First Circuit stated that "[i]n the face of these concerns, we believe that this is a case in which we may — and should — bypass the jurisdictional question. We recognize, of course, that federal courts cannot ordinarily exercise hypothetical jurisdiction; that is, a federal court ordinarily may not assume the existence of jurisdiction in order to decide the merits of a case or controversy."[23] The court added, however, that "that principle admits an area of elasticity."[24] The court felt confident bypassing the jurisdictional analysis because "[o]n the one hand, the jurisdictional question is not only thorny but also a matter of statutory, not constitutional, dimension; and its proper resolution is uncertain. On the other hand, the outcome on the merits is foreordained."[25]

In *Deep v. XAC, LLC*,[26] the district court also found that judicial efficiency required that it rule on the venue challenge prior to personal jurisdiction. The case involved several co-defendants, all but one of which asserted that the court lacked personal jurisdiction. The district court held: "Xerox will remain as a defendant even if this court lacks personal jurisdiction over Amici and iDeal. However, if the court were to grant the motion to transfer, this entire case would be transferred to the Northern District of New York, and Amici and iDeal's personal jurisdiction arguments would be mooted because both of those parties are New York residents."[27] Accordingly, the court concluded: "since the court's consideration of venue is inevitable, and its determination of personal jurisdiction is not, judicial economy favors deciding the motion to transfer before the motion to dismiss this action for lack of personal jurisdiction."[28]

Still pursuing judicial economy, another court elected not to bypass the jurisdictional issue precisely because it found that tackling this issue as a matter of priority would be more efficient. The District Court for the District of New Jersey declined to embark upon a forum conveniens analysis in *First Colonial Insurance Co. v. Custom Flooring, Inc.* because it could easily determine whether or not subject matter jurisdiction existed. Relying on *Sinochem*, the district court held while "a court may consider a motion based on forum non conveniens prior to determining whether subject matter jurisdiction exists, determining which issue to address first is left to the discretion of the district court."[29] The court ordered additional briefing on the subject-matter jurisdiction issue.

In *Vivendi, S.A. v. T-Mobile USA, Inc.*,[30] the issue before the court was the scope of discovery permissible prior to the defendants' decision to file a motion to dismiss on jurisdictional and forum non conveniens grounds. This case involved an action brought by Vivendi against several T-Mobile defendants and a Polish citizen alleging that the defendants purportedly defrauded Vivendi out of a $2.5 billion dollar investment in a Polish telecommunications company. Vivendi argued before the district court that its first request for the production of documents was "limited to jurisdictional issues."[31] Defendants, meanwhile, urged the court to address their forum non conveniens argument, viewing this issue as "dispositive" and "requir[ing] no discovery."[32] Relying on *Sinochem*[33] and noting that "[a] motion to dismiss for forum non conveniens does not generally warrant detailed development of the case through discovery,"[34] the *Vivendi* court held that Vivendi could "pursue discovery . . . narrowly tailored to the question of forum non conveniens — i.e. the events and evidence in the United States implicated by this dispute."[35]

Similarly, in *Graf von Spee v. Graf von Spee*, the district court also addressed the issue of the scope of discovery to be granted for the purposes of a forum non conveniens challenge. With respect to documentary discovery, the district court noted that "'[t]he grant

and nature of production with respect to discovery [on the issue of forum non conveniens] is within the discretion of the trial court.'"[36] The court concluded that the plaintiffs' discovery requests were overbroad and clarified the ruling of the magistrate judge delineating the categories of evidence which plaintiffs could request as follows: "discovery is limited to requests that pertain to access to proof, the location and availability of witnesses, and other facts relevant to the forum non conveniens determination."[37] The district court applied the same reasoning with respect to the depositions sought by the plaintiffs.[38] It denied any discovery on issues pertaining to personal jurisdiction.[39]

To conclude, following *Sinochem*, it appears that defendants are entitled to actively pursue a forum non conveniens challenge from the outset of litigation, using discovery tailored to that purpose. Likewise, plaintiffs need to be prepared to vigorously defend their choice of forum, especially where subject-matter and personal jurisdiction would require more substantial analysis and discovery than a determination bearing on the relative adequacy of the U.S. forum.[40] Indeed, the ruling of the Supreme Court has the potential not only to shorten the proceedings at the district court level but also to limit recourses on appeal.[41]

Endnotes

1. 127 S. Ct. 1184 (2007).

2. No. 03-3771, 2004 U.S. Dist. LEXIS 4493, at *38 (E.D. Pa Feb. 27, 2004), vacated, 436 F.3d 349 (3d Cir. 2006), rev'd, 127 S. Ct. 1184 (2007).

3. 436 F.3d 349, 367 (3d Cir. 2006).

4. Compare Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 497-98 (2d Cir. 2002) (holding that courts may pass over jurisdictional questions and decide a forum non conveniens challenge first), and In re Papandreou, 139 F.3d 247, 255-56 (D.C. Cir. 1998) (same), superseded by statute on other grounds, with Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 654 (5th Cir. 2005) (per curiam) (holding that jurisdictional issues take priority). As the Third Circuit noted, "these are the three cases most often referred to, but the Seventh and the Ninth Circuits have also reached the same result as the Fifth Circuit's Dominguez-Cota opinion." Sinochem, 436 F.3d at 358. See Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001), aff'd in part, cert. dismissed in part, 538 U.S. 468 (2003); Kamel v. Hill-Rom Co., 108 F.3d 799 (7th Cir. 1997).

5. 127 S. Ct. at 1188.

6. 127 S. Ct. at 1187 (emphasis added).

7. 127 S. Ct. at 1192.

8. 330 U.S. 501 (1947).

9. Sinochem, 127 S. Ct. at 1193; see also Justice Ginsburg: "But the Gulf Oil case does say that a forum non conveniens dismissal presupposes that the forum is one in which there's personal jurisdiction and one of proper venue. It's just another forum is more appropriate." (Transcript of Oral Argument at 13); Justice Scalia: "The only point of the doctrine is to get rid of the case where you — where you do have jurisdiction. And so you do not have to — but that doesn't mean that you must establish jurisdiction before you can exercise the doctrine. It is a doctrine that overrides the existence of personal jurisdiction. In that sense, it presupposes personal jurisdiction." (Transcript of Oral Argument at 14).

10. Gulf Oil, 330 U.S. at 504.

11. 330 U.S. at 506-07.

12. Transcript of Oral Argument at 14.

13. Sinochem, 127 S. Ct. at 1187.

14. See Gullone v. Bayer Corp., No. 06-1427, 2007 U.S. App. LEXIS 10516, at *8 (7th Cir. May 4, 2007) (noting that the Supreme Court continues to recognize Gulf Oil Corp., 330 U.S. 501, "as the leading case recognizing and delineating the common-law doctrine of forum non conveniens").

15. 127 S. Ct. at 1194.

16. 127 S. Ct. at 1194.

17. 127 S. Ct. at 1188.

18. 127 S. Ct. at 1191. Justice Ginsburg stated during the oral arguments, "There couldn't be any question about the alternate forum taking jurisdiction here, because it, in fact, had." Transcript of Oral Argument at 23.

19. 127 S. Ct. at 1193-94; cf. German Free State of Bavaria v. Toyobo Co., No. 1:06-CV-407, 2007 U.S. Dist. LEXIS 21086 (W.D. Mich. Mar. 26, 2007) (The court conditioned dismissal of the case on forum non conveniens grounds on several grounds, including that the Defendant consent to the jurisdiction of the German courts. Here, however, the district court was confident that it possessed jurisdiction to entertain the suit, and therefore had a jurisdictional basis for issuing a conditional forum non conveniens order.).

20. No. 06-2915, 2007 U.S. App. LEXIS 7803 (8th Cir. Apr. 5, 2007).

21. 2007 U.S. App. LEXIS 7803, at *2 (quoting Sinochem, 127 S. Ct. at 1191, which was explaining its prior jurisprudence that a court may not rule no the merits of a case without ascertaining that it possesses jurisdiction); see also Superior Edge, Inc. v. Maricopa County Cmty. College Dist., No. 06-4165, 2007 U.S. Dist. LEXIS 26002, at*2 (D. Minn. Apr. 6, 2007) (strangely citing Sinochem for the proposition that the court should "first address[] the argument that the Court lacks personal jurisdiction").

22. No. 06-1947, 2007 U.S. App. LEXIS 9579 (1st Cir. Apr. 27, 2007).

23. 2007 U.S. App. LEXIS 9579, at *11-*12.

24. 2007 U.S. App. LEXIS 9579, at *12.

25. 2007 U.S. App. LEXIS 9579, at *13. On judicial efficiency considerations warranting that the court pass over all threshold issues to determine the merits of the case, see U.S. Gypsum Co. v. Lafarge N. Am., Inc., No. 030- C 6027, 2007 LEXIS 25586, at *100 (N.D. Ill. Apr. 3, 2007) ("[W]hen the case can be resolved in a defendant's favor on the merits, it is sometimes appropriate to go directly to the merits.").

26. No. 07-8-C, 2007 U.S. Dist. LEXIS 32897 (W.D. Ky. May 2, 2007).

27. 2007 U.S. Dist. LEXIS 32897, at *5.

28. 2007 U.S. Dist. LEXIS 32897, at *5.

29. No. 06-3998, 2007 U.S. Dist. LEXIS 28856 (D.N.J. Apr. 17, 2007).

30. No. C06-1524JLR, 2007 U.S. Dist. LEXIS 28710 (W.D. Wash. Apr. 18, 2007).

31. 2007 U.S. Dist. LEXIS 28710, at *3.

32. 2007 U.S. Dist. LEXIS 28710, at *3.

33. 2007 U.S. Dist. LEXIS 28710, at *5-6.

34. 2007 U.S. Dist. LEXIS 28710, at *6.

35. 2007 U.S. Dist. LEXIS 28710, at *6.

36. No. 3:05cv1488, 2007 U.S. Dist. LEXIS 36441, at *13 (D. Conn. May 17, 2007) (quoting Fitzgerald v. Texaco, 521 F.2d 448, 451 (2d Cir. 1975)).

37. 2007 U.S. Dist. LEXIS 36441, at *17.

38. 2007 U.S. Dist. LEXIS 36441, at *18-19.

39. 2007 U.S. Dist. LEXIS 36441, at *16 and *19.

40. In addition, it should be remembered that a *forum non conveniens* motion is more likely to be granted where foreign litigants have initiated the proceedings before U.S. courts, as opposed to a U.S. plaintiff choosing it home forum.

41. As one commentator recently noted, forum non conveniens dismissals are reviewed for abuse of discretion while dismissals for lack of jurisdiction are reviewed *de novo*. See Mitchell M. Wong, Forum Non Conveniens: Circumstances After "Sinochem," N.Y.L.J. (Mar. 27, 2007), at 4; see also Piper Aircraft Co. v Reyno, 454 U.S. 235, 254 (1981). ■

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