

**FORUM NON CONVENIENS AFTER SINOCEM: WHERE
LITIGANTS STAND AFTER THE SUPREME COURT'S
RECENT RULING**

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Forum non conveniens has long been an important tool utilized by aviation defense lawyers to keep plaintiffs from litigating cases in the United States that have a tenuous or non-existent connection to the United States. Typically, a motion to dismiss on *forum non conveniens* grounds is warranted when a foreign plaintiff commences litigation in the United States for an accident that occurred outside of the United States and where the majority of witnesses, evidence and parties are also located outside the United States. Frequently, United States residents will be named as defendants for the sole purpose of establishing a connection with the United States that would not otherwise exist. While plaintiffs will always concoct a hodgepodge of reasons why the case belongs in the United States, the simple reality is plaintiffs want access to the notoriously generous U.S. jury system, liberal discovery rules and risk-free litigation that does not require the loser to pay fees and costs.

Traditionally, much deference is paid to a plaintiffs' choice of venue and the defendant has the very heavy burden of proof with respect to changing venue via a motion to dismiss on *forum non conveniens* grounds. In order to prevail on a *forum non conveniens* motion, as set forth in the seminal case of *Piper Aircraft Co. v. Reyno*², a defendant must establish that there is an "available and adequate alternative forum" and that a weighing of both public

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² 454 U.S. 235 (1981)

and private factors favors the available and alternative foreign forum. In short, a forum is “available” if it has jurisdiction over all the parties and claims, and “adequate” if the plaintiff can make a meaningful recovery. While the weighing of private and public interests is a fact sensitive process unique to every case, ultimately the focus is on selecting a forum where the “trial will best serve the convenience of the parties and the interests of justice.”³

As aviation cases ripe for a *forum non conveniens* motion to dismiss almost always involve complicated jurisdictional issues due to the international element of the claims, courts have traditionally been split with respect to whether jurisdiction must first be established before the court can decide a motion to dismiss on the grounds of *forum non conveniens*. A recent decision by the Supreme Court of the United States in *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*⁴ has cleared the path for federal courts to rule on motions to dismiss on *forum non conveniens* grounds without having to first tackle jurisdictional issues.

BEFORE SINOCEM

Prior to the Court’s holding in *Sinochem*, there was a split amongst the Circuit Courts with respect to the issue of the court first establishing jurisdiction before issuing a decision on a *forum non conveniens* motion. Some Circuit Courts held that courts may grant *forum non conveniens* dismissals without conclusively establishing jurisdiction⁵, while others required that jurisdiction be established prior to deciding a *forum non conveniens* motion⁶. This inconsistency stems from a prior Supreme Court decision that held courts cannot make decisions on the merits of a case without first being assured they have jurisdiction.⁷ This was interpreted by some

³ *Koster v. Am. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527 (1947).

⁴ 127 S. Ct. 1184 (2007).

⁵ *In re Papandreou*, 139 F.3d at 255-256.

⁶ *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005).

⁷ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998).

Courts to mean that jurisdictional questions must be answered first, in every case, regardless of the existence of other non-merits issues. However, problems arose when courts were faced with complex jurisdictional questions and a relatively simple *forum non conveniens* question.

SINOCHEM—PAVING THE WAY TO SIDESTEPPING JURISDICTION

In *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, decided March 5, 2007, the Supreme Court unanimously held that a district court may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant. Essentially, the rationale behind the decision was that the issue of jurisdiction only needs to be addressed when the Court is going to issue a judgment on the 'merits'—the actual contentions regarding the subject matter of the litigation. Courts may address certain non-merits issues, such as *forum non conveniens*, without first considering their own jurisdiction. As a *forum non conveniens* dismissal is a determination that the merits of the case should be adjudicated elsewhere, the issue of jurisdiction does not need to be resolved for a court to render a decision with respect to a *forum non conveniens* motion.

The case involved a Chinese state-owned importer (Sinochem), which purchased steel coils from an American corporation (Triorient). These coils were to be paid under a letter of credit by producing a valid bill of lading certifying that the coils had been loaded for shipment to China on or before April 30, 2003. Triorient subchartered a vessel owned by Malaysia International to transport the coils. The dispute between Sinochem and Malaysia International arose over the bill of lading, which Sinochem alleged was falsely backdated. Sinochem petitioned a Chinese court, which subsequently ordered the ship arrested. After unsuccessfully arguing before the Chinese court, Malaysia International filed suit in a United States District Court in Pennsylvania, seeking compensation for losses sustained due to the ship's arrest.

Consequently, Sinochem moved to dismiss on several grounds, including lack of jurisdiction and *forum non conveniens*. The arguments raised during these motions resulted in this matter being appealed to the 3rd Circuit Court of Appeals and, finally, to the Supreme Court of the United States.

Ultimately, the Court held that “a district court has discretion to respond at once to a defendant’s *forum non conveniens* plea, and need not take up first any other threshold question. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.”⁸

SINOCHEM’S EFFECTS ON LITIGATION

The unanimous ruling in *Sinochem* indicates the Supreme Court’s intention to promote judicial economy by providing district courts with the means to avoid congesting their dockets with cases that will clearly be litigated elsewhere. *Sinochem* will benefit the aviation defense lawyer who frequently files motions to dismiss on *forum non conveniens* grounds, as no longer will jurisdictional hoops need to be jumped in order to get resolution on such a motion. Additionally, as the federal courts are now alleviated from having to devote resources to addressing jurisdictional issues, decisions on *forum non conveniens* motions will likely be issued at a quicker pace. Although future decisions will determine whether the *Sinochem* ruling will achieve this goal, its present application is limited, for purposes of *forum non conveniens*, to matters involving foreign plaintiffs.

The Court in *Sinochem* explicitly noted that its decision would not address conditional *forum non conveniens* dismissals. A conditional dismissal is granted when the court agrees with the

⁸ *Sinochem*, 127 S. Ct. at 1188.

defendant's contention that the merits of the case should be litigated elsewhere but, in order to provide the plaintiff with some degree of protection, the court imposes certain conditions along with the dismissal. Generally, these conditions require the defendant to voluntarily submit to the jurisdiction of the foreign court, to accept service of process or to waive statute of limitations defenses. By requiring a conditional dismissal, the plaintiff is safeguarded from 1) the foreign tribunal opting to not hear the case or 2) potentially unsavory tactics by the defendant that would deny the plaintiff an opportunity to have the case adjudicated. Thus, should the defendant fail to abide by the dismissing court's conditions (e.g., by refusing to appear in the foreign jurisdiction), the plaintiff can petition the court to rehear the case.

In contrast, one compelling reason for a court to grant an unconditional *forum non conveniens* dismissal, as was the case in *Sinochem*, is the defendant's involvement in ongoing proceedings in a foreign tribunal that are directly related to the subject matter at issue in the case before the United States court. In such cases, which are often referenced as 'textbook' *forum non conveniens* situations by the courts, the plaintiff is protected because the defendant already submitted to the foreign tribunal's jurisdiction and there is no doubt as to whether the foreign tribunal will hear the case.

Thus, *Sinochem's* most immediate impact will be the savings in judicial resources and time and litigation costs for the parties in 'textbook' *forum non conveniens* cases. These savings will be realized as federal courts now have the means of bypassing non-meritorious issues (e.g., jurisdiction), that often involve extensive litigation, where the resolution of those issues is futile and unnecessary given the fact that the case is ultimately destined to be litigated elsewhere. Moreover, the *Sinochem* decision further illustrates that, as between non-meritorious issues such as jurisdiction and *forum non conveniens*, there is no order of preference, and judicial economy would dictate tackling whichever issue ensures the most efficacy.

Nonetheless, one important factor to consider with regard to the *Sinochem* ruling is its potentially limited scope and application. *Sinochem* provides a clear rule only in situations where multiple non-meritorious issues need be addressed and one such issue can be resolved with minimal effort while the other issue is more complex and will require greater scrutiny and judicial resources. As such, when the former is resolved in a manner favoring dismissal, then the case can be dismissed without having to address the latter, thereby saving time and costs. However, potential issues can arise in defining what constitutes a ‘complex issue’, thereby leaving open an avenue for potential inconsistencies in *Sinochem’s* application. More importantly, the Court’s decision to not address jurisdictional requirements in cases involving conditional dismissals leaves the door open for jurisdictional challenges of a dismissing court’s order. The common argument raised with regard to a conditional order issued without first resolving jurisdiction is that a court cannot exercise power (e.g., by requiring the defendant to submit to a foreign jurisdiction) over a party when the issue of whether that party is subject to court’s jurisdiction has yet to be resolved. In other words, the court should not issue orders when its authority to do so has not yet been established. Therefore, until it is addressed by the United States Supreme Court, lower courts are likely to continue to disagree on this issue.

CONCLUSION

Forum non conveniens will continue to be a valuable tactic for defendants to use against plaintiffs engaged in “forum shopping.” While *Sinochem* might be limited in application, it will ultimately prove to be an important tool in promoting judicial economy and saving parties the costs of unnecessary discovery and litigation on jurisdictional issues. The judiciary can now resolve simple *forum non conveniens* motions without having to address complex jurisdictional issues in a case that will ultimately be decided in a foreign venue. Hopefully, this will lead to quick decisions on *forum non conveniens* motions that will not only maximize judicial resources but spare the parties the unnecessary costs of litigating complex jurisdictional issues in cases that are in any event destined for adjudication in a foreign venue.