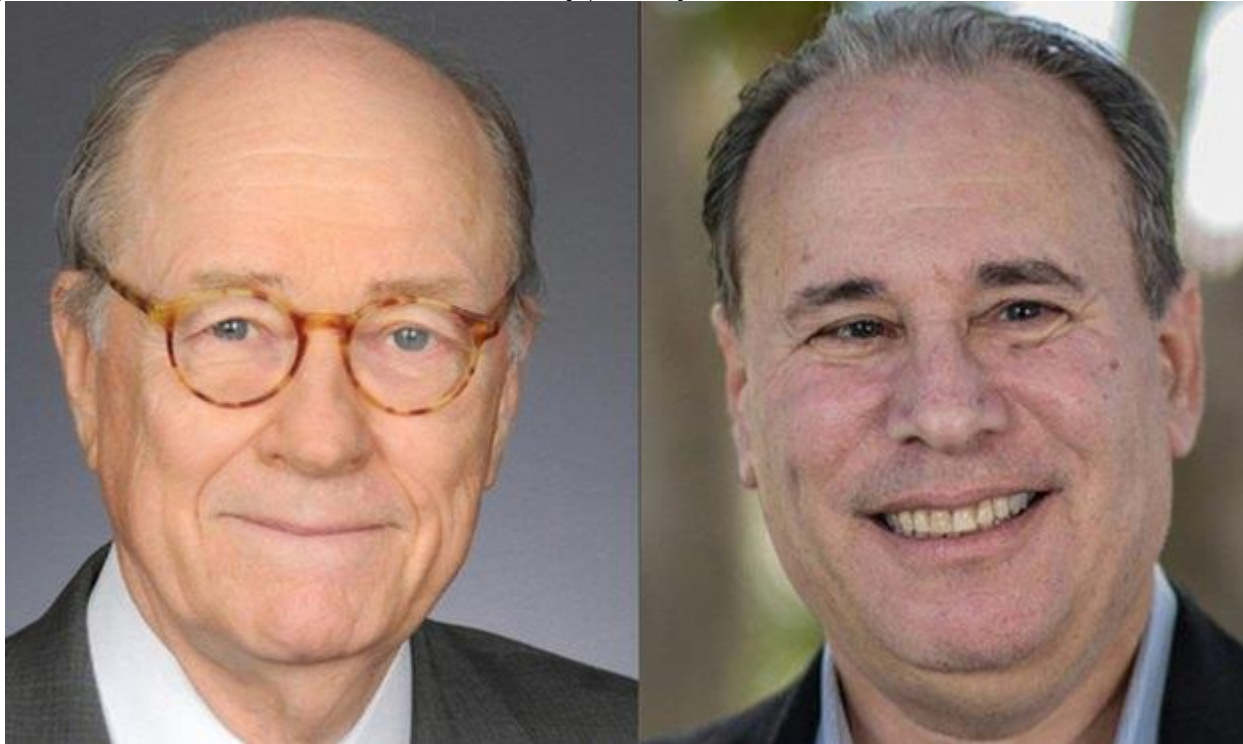


New York Law Journal

Fear of Foreign Courts: Corruption and Forum Non Conveniens

In this article, the authors look at the difficult task of trying to persuade a court to successfully resist a forum non conveniens motion on grounds of foreign court corruption

By **Lawrence W. Newman and David Zaslow** | January 29, 2025 at 11:00 AM



Your U.S. client has been doing business in a foreign country, but relations with the counterparty have soured and there is now a dispute that cannot be settled. The foreign party has sued in its home court.

Your client has brought its own lawsuit in a local U.S. court. There appears to be a basis for personal jurisdiction in both courts. Your client has received a motion by the counterparty to dismiss the U.S. lawsuit in favor of the foreign counterparty's courts on grounds of *forum non conveniens*.

Of course, the parties to the agreement leading to the dispute could have provided for arbitration or agreed on a mutually acceptable court to hear disputes. In the absence of such a contractual provision, the client is left with the possibility that it will have to deal with the dispute in a court in a foreign country where, although it conducted business, it may have avoided involvement in local courts because of its perception that they are corrupt. What is likely to happen with the motion to dismiss?

In deciding whether to dismiss the case on the basis of *forum non conveniens*, the court must consider the two factors set out in *Gulf Oil Corp. v. Gilbert* 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno* 454 U.S. 235 (1981): (1) whether an adequate alternative forum exists; and (2) whether a balance of private and public interest factors favors dismissal.

The client may wish to call the adequacy of the foreign forum into question by presenting evidence showing the nature and extent of corruption in the foreign country's courts and the effect of such corruption on the resolution of the dispute.

About a quarter century ago, the authors were involved in what became a landmark case involving such issues. We were counsel to Eastman Kodak and Juan Jose Carballo, a Kodak employee, plaintiffs in *Eastman Kodak Company v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997). The case arose out of the termination by Kodak of the Kavlin company, Casa Kavlin, which had been the exclusive distributor of Kodak products in Bolivia for some 70 years without a written agreement.

Kavlin responded by commencing a civil lawsuit in Bolivia and (as permitted under Bolivian law) a criminal prosecution against Kodak and Carballo. In the latter action, an investigating judge, on the basis of a spurious charge of sabotage, ordered that Carballo be incarcerated without bail in the notoriously harsh San Pedro prison in La Paz, Bolivia. He was only released some eight to ten days later, after a lawyer agreed on Kodak's behalf to certain coerced conditions requested by Casa Kavlin.

As Judge Ryskamp of the Southern District Court in Florida recounted in his decision, the arrest and incarceration of Carballo had been engineered by Kavlin's lawyer, Juan Carlos Zegarra, who had a close personal relationship with the judge who ruled that Carballo had to be imprisoned rather than permitted to post bail.

It later transpired that Carballo, the lawyer for Kodak who had arranged Carballo's release from jail, and two other Kodak employees were charged and convicted in a Bolivian court of sabotage. They were sentenced by a second judge, who was the ex-husband of Zegarra's sister, to five years' imprisonment. All proceedings were initiated and carried out in absentia without notice to any of the defendants.

Kodak and Carballo then sued Casa Kavlin (and its principal, Susana Kavlin) in federal court in Florida. The defendants moved to dismiss the case on, among other grounds, *forum non conveniens*. In opposing dismissal in favor of Bolivia, the plaintiffs presented evidence both concerning the above activities and on corruption generally in the Bolivian courts.

This included opinions of two U.S. law school professors and of a practicing lawyer from Bolivia. The plaintiffs also called the court's attention to a recent public statement by the then-current Minister of Justice of Bolivia deploring the practice in Bolivia of litigants using the criminal courts to extort advantages in civil disputes.

Ryskamp began his opinion with the observation that the "alternative forum is too corrupt to be adequate" argument had not "enjoy[ed] a particularly impressive track record" and noted that he had been unable to locate any published opinion fully accepting such an argument.

Nevertheless, in denying the *forum non conveniens* motion, the court concluded that the plaintiffs could not, under the corrupt circumstances described by Kodak, receive justice in the courts of Bolivia and, therefore, the defendants had "not met their burden of proving the existence of an adequate alternative forum to hear plaintiffs' claims." 978 F. Supp. 1078, 1087.

In so ruling, Ryskamp relied not only on the lurid facts of the case but also on the expert opinions and the admission of the Minister of Justice concerning corruption more generally in the Bolivian courts.

Since the *Kavlin* decision, dozens of court decisions have referred to it when parties opposing *forum non conveniens* motions to dismiss have tried to liken their cases to the *Kavlin* case and argue that corruption in the judicial system of the proposed transferee country meant that it was not an "adequate alternative forum."

The *Kavlin* decision has, since it was issued in 1997, been referred to in hundreds of publications and about 70 cases. About 30 of the cases discussed *forum non conveniens* and corruption. In none of them did the courts find

that allegations of corruption rose to the level that dismissal on *forum non conveniens* grounds should be denied for there not being an “adequate alternative forum.”

One of those opinions was by Ryskamp, who, in ruling on allegations of corruption in another *forum non conveniens* case, used a modification of the test he had employed in the *Kavlin* case, and found that the courts of Argentina were an adequate forum. In *Warter v. Boston Securities, S.A.*, 380 F. Supp. 2d 1299 (S.D. Fla. 2004), he discussed the facts in the *Kavlin* case but made no mention of the expert opinions concerning the inadequacy of the Bolivian courts on which he had relied when he found that the Bolivian courts were not an adequate forum.

Instead, the judge applied a slightly different test: “Only *evidence of actual corruption in a particular case* will warrant a finding that an alternate forum is inadequate [italics in original].” After referring in detail to the facts in the *Kavlin* case, he concluded, “Plaintiffs have failed to show that, were this action to be re-filed in Argentina, Defendants would similarly manipulate the Argentine justice system to their advantage.” Thus, Judge Ryskamp emphasized the importance of showing corrupt activity (“actual corruption”) that has an impact on the particular case.

Two years later, in *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179–80 (9th Cir. 2006), the Ninth Circuit said it was aware of only two cases where the court held that an alternative forum was inadequate because of corruption. One case was *Kavlin*, about which the court said the “proof offered was both specific and sordid.”

In contrast, in the case before it, the plaintiff offered State Department Country Reports that referred to corruption, judicial bias and inefficiency in the courts in Argentina, and the potentially improper influence that corporate defendants wield over the judicial process.

The court recognized that this evidence indeed raised issues about human rights and the criminal justice system but “such a general indictment provides insufficient substance to condemn the adequacy of Philippine courts.” Thus, the plaintiff had not adequately demonstrated that the Philippines was not an adequate forum.

The other decision the Ninth Circuit referred to as meeting the corruption standard was *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995). In fact, though, that was not a case concerning corruption. Rather, the court there considered the issue of 25-year delays in Calcutta's courts before a case is resolved and held that that delays of such magnitude rendered the alternative forum “inadequate.”

Anyone making the “courts are corrupt” argument should understand that it enters the arena with a huge obstacle to overcome. As the Eleventh Circuit has said, U.S. courts must be mindful to “avert unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1226 (9th Cir. 2011). It is for that reason that courts regularly decide, as in *Warter* and *Tuazon* above, that the allegations of corruption are too general.

Harp v. Airblue Ltd., 879 F.Supp.2d 1069 (C.D. Cal. 2012) is another example. Plaintiffs cited human rights reports from non-governmental organizations, U.S. State Department reports and Pakistani newspaper articles, among other things, to try to establish that the Pakistani courts were corrupt.

In holding that the plaintiffs had not met their burden of proof, the court commented that most of the information plaintiffs cited was generalized, anecdotal or simply irrelevant. Similarly, in *Wilmot v. Marriott Hurghada Management Inc.*, 2016 WL 2599092 (D. Del. May 5, 2016), the plaintiff relied on short news stories and news headlines, as well as various human rights reports from non-governmental organizations, such as Transparency International, and United States State Department reports in arguing that the Egyptian courts were corrupt.

The court ruled that “generalized, anecdotal complaints of corruption” are not sufficient for a federal court to conclude that a foreign nation's legal system is so corrupt that it cannot be considered as an adequate forum.

What emerges from the unsuccessful oppositions to *forum non conveniens* motions is the repeated failure of parties opposing these motions to present more than general allegations of foreign court corruption. They similarly fail to show how the corruption could, or would have, an injurious effect on them, as Ryskamp emphasized in his second opinion.

Evidence of “actual corruption” in a particular case is especially important when there have been prior judicial rulings confirming the adequacy of the courts in question. Such a prior “bill of health” of the courts of a country may prove difficult to overcome, and will certainly require persuasive evidence of particularized corruption impacting the plaintiff opposing the *forum non conveniens* motion.

In the *Kavlin* case, we had the time and resources to gather and present factual and expert evidence of corruption, which, in fact, did exist. It may be that, with more time and resources, some plaintiffs could have ferreted out specific instances of corruption reflecting how non-local defendants had in fact been treated in the courts of the foreign country.

But we also understood instinctively that even this would probably not be sufficient. That, in order to have a chance of prevailing, we would have to tell the court a story so that, at a gut level, the judge would feel that our particular case could not be fairly tried in Bolivia. We were able to do that because one of the plaintiffs, Carballo, had actually been imprisoned in a notorious jail in Bolivia.

He submitted an affidavit to the court that recounted that experience. There was additional factual backstory as well, which led the judge to begin his opinion with the following: “Plaintiffs tell a gripping story filled with international corporate intrigue, corrupt South American judges presiding over kangaroo courts, rat-infested prisons where survival depends on bribery, and a Bolivian judge's tawdry affair resulting in an embarrassing love child.”

As the numerous cases decided in the more than 25 years since the *Kavlin* decision reflect, corruption in foreign courts is a difficult argument to make successfully in defending against *forum non conveniens* motions. But court corruption reputedly continues to exist and evidence of it in particular cases will continue to be considered by U.S. courts in *forum non conveniens* cases.

The practice guideline that can be said to emerge is that corruption, to be a persuasive factor in *forum non conveniens* cases, must be shown to have an impact beyond what comes from general assertions. Corruption must be shown to have played a negative role in the plaintiff's experience in the foreign country.

It is also necessary to provide specific facts to allow a judge to feel in her gut that justice demands that this particular plaintiff should not be sent to the courts of that particular country. And strong evidence will have to be produced to show that prior rulings by U.S. courts regarding the adequacy of the courts in a foreign country are not applicable in the case at hand.

The *Kavlin* decision still stands as a paradigmatic example of what it takes to successfully resist a *forum non conveniens* motion on grounds of foreign court corruption.

Lawrence W. Newman is of counsel and **David Zaslowsky** is a partner in the New York office of Baker McKenzie. They are grateful to **Rory Flynn** of the London office for her able assistance in the preparation of this article.