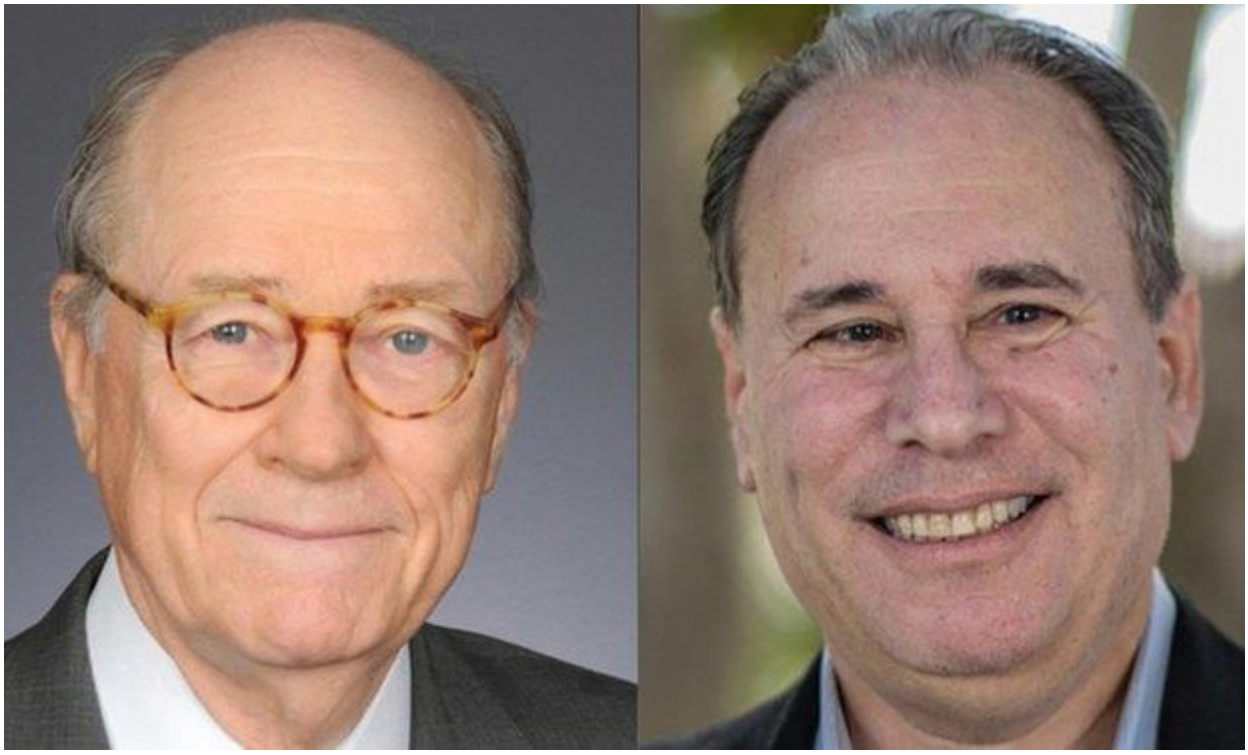
New York Law Journal

You Don’t Need Personal Jurisdiction To Decide Forum Non Conveniens

In their International Litigation column, Lawrence W. Newman and David Zaslowsky look at the interesting issue of whether a court faced with a motion requesting dismissal on grounds of lack of personal jurisdiction and forum non conveniens must first decide that it has personal jurisdiction before it is competent to consider the forum non conveniens issue.

By **Lawrence W. Newman and David Zaslowsky** | March 23, 2022 at 12:15 PM



As you review the complaint that was just served on your client, you realize that your possible defenses include both lack of personal jurisdiction and forum non conveniens. You wonder. Does the court first have to decide that it has personal jurisdiction before it is competent to consider the forum non conveniens issue? A recent decision by the New York Court of Appeals held that the court may address the forum non conveniens issue before the personal jurisdiction issue. In doing so, it followed a decision of the U.S. Supreme Court to like effect about 15 years earlier. See Sinochem Intl. Co. v. Malaysia Intl. Shipping, 549 U.S. 422 (2007) (Sinochem).

‘Estate of Margaret Kainer’

Background. In the 1930s, the Nazi regime stole an Edgar Degas painting entitled Danseuses from Margaret Kainer, a resident of Germany, which painting is the subject of the lawsuit, Estate of Margaret Kainer, et al. v. UBS AG, 2021 N.Y. Slip. Op. 07056 (Dec. 16, 2021). Plaintiffs are Kainer’s estate and 11 putative heirs who allege that Kainer’s estate passed to them under the relevant intestacy law. Defendant Norbert Stiftung (the Foundation) is a foundation allegedly provided for in the 1927 will of Kainer’s father, to be established in the event that she died without children or grandchildren. Plaintiffs assert that, after Kainer’s death, the predecessor

of defendants UBS AG and UBS Global Asset Management (Americas) created the Foundation as a Swiss public entity under UBS's direction and control, and improperly obtained all of Kainer's assets.

It is alleged that, in 2000, the Foundation, acting in its capacity as heir, registered Danseuses as stolen in lost and looted art databases. In 2009, defendant Christie's contacted the Foundation, seeking to facilitate a private sale of the painting by a Japanese gallery. The Foundation entered into a Restitution Settlement Agreement with the gallery in which it renounced its rights to the painting in exchange for 30% of the proceeds from the private sale, receiving approximately $1.8 million. A few days later, Christie's offered the painting at public auction in New York where it sold for $10.7 million. Plaintiffs commenced a suit against in the New York Supreme Court, alleging conversion, unjust enrichment, and conspiracy, based on the sale of Danseuses.

Two defendants moved to dismiss based on lack of personal jurisdiction and all three moved on the ground of forum non conveniens. Plaintiffs responded by saying that jurisdictional discovery was needed before the court could decide the personal jurisdiction portion of the motion, and that the court could not address the forum non conveniens prong of the motion until it first established that there was jurisdiction. The trial court referred to two long-standing, conflicting lines of authority in New York on this threshold issue. The first holds that the court must address the jurisdictional issue before deciding whether dismissal is warranted based on the forum non conveniens doctrine because, if a court lacks jurisdiction over a defendant, it is without power to issue a binding forum non conveniens ruling as to that defendant. The second holds that a court "presuming, without deciding jurisdiction," may address the issue of whether the action should be dismissed on the forum non conveniens ground.

According to the trial court, the weight of authority in New York favored the former view. However, the court ruled that the second line of cases was more persuasive. In doing so, it relied on the U.S. Supreme Court's decision in Sinochem, which it noted had not been discussed by the courts in the first line of cases.

'Sinochem Intl. v. Malaysia Intl. Shipping'. Sinochem concerned a contract under which Sinochem, a Chinese state-owned importer, agreed to purchase steel coils from Triorient, which would be paid under a letter of credit upon producing a valid bill of lading certifying that the coils had been loaded for shipment to China. Ultimately, a Chinese court ordered the arrest of the ship carrying the coils based on an allegation that the bill of lading had been improperly backdated. Malaysia International, the ship owner, filed an action in a U.S. district court, asserting that Sinochem's arrest petition to the Chinese court contained misrepresentations, and seeking compensation for losses sustained in the ship's arrest. Sinochem moved to dismiss on several grounds, including lack of subject-matter and personal jurisdiction and the doctrine of forum non conveniens.

The district court determined it had subject-matter jurisdiction over the cause, concluded it lacked personal jurisdiction over Sinochem under Pennsylvania law, conjectured that limited discovery might reveal that it had personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), but dismissed on forum non conveniens grounds, finding that the case could be adjudicated adequately and more conveniently in the Chinese courts. On appeal, the Third Circuit agreed that there was subject-matter jurisdiction and that personal jurisdiction could not be determined without discovery. But the Third Circuit reversed, holding that the district court could not dismiss the case under the forum non conveniens doctrine unless and until it determined definitively that it had both subject-matter and personal jurisdiction.

The Supreme Court granted certiorari in order to resolve a split in the circuits on whether forum non conveniens could be decided prior to a court's dealing with matters of jurisdiction.

The Supreme Court explained that Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998), clarified that a federal court generally may not rule on the merits of a case without first determining that it has subject-matter jurisdiction and personal jurisdiction. As the court said there, without jurisdiction, a court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case.

Although Steel Co. confirmed that jurisdictional questions ordinarily must precede merits determinations in dispositional order, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584,(1999) held that there is no mandatory "sequencing of jurisdictional issues." In appropriate circumstances, Ruhrgas decided, a court may dismiss for lack of personal jurisdiction without first establishing subject-matter jurisdiction.

Both Steel Co. and Ruhrgas recognized that a federal court has leeway "to choose among threshold grounds for denying audience to a case on the merits." Ruhrgas, 526 U.S. at 585; Steel Co., 523 U.S. at 100-01, n. 3. Similarly, the Supreme Court said in Sinochem, a forum non conveniens dismissal denies audience to a case on the merits; it is, rather, a determination that the merits should be adjudicated elsewhere. One could posit that the Supreme Court might have held that a court could skip over deciding personal jurisdiction (which is any way waivable), but not subject matter jurisdiction. In fact, though, the Supreme Court made no such distinction. It 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 warrant.

Application of 'Sinochem'. In Kainer, the trial court focused on the portion of Sinochem that said that, if a court could readily determine that it lacks jurisdiction, the proper course would be to dismiss on that ground—which the U.S. Supreme Court expected would be the situation in most cases. However, where subject-matter or personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal on that ground, a court can go directly to that issue. In Kainer, the court said that jurisdictional discovery would be unduly burdensome. Because it could not be decided easily, the court turned to forum non conveniens and dismissed on those grounds.

On appeal, the Appellate Division affirmed. It agreed with the trial court's analysis that the Sinochem reasoning should govern and that "where personal jurisdiction is difficult to determine, and forum non conveniens considerations clearly militate in favor of dismissal, a court may dismiss on the latter ground." It also agreed with the trial court that, since it could not readily determine, without allowing significant discovery, that it had personal jurisdiction over all the defendants, it properly considered the defendants' arguments that New York was an inconvenient forum.

On further appeal to the Court of Appeals, appellants relied on a single argument—the holding of the Court of Appeals in Ehrlich-Bober & Co. v. Univ. of Houston, 49 N.Y.2d 574, 579, where, according to appellants, the Court of Appeals ruled that the doctrine of forum non conveniens "has no application unless the court has obtained in personam jurisdiction of the parties." The Court of Appeals made short shrift of that argument, saying in a single sentence that the quoted statement from Ehrlich-Bober was dictum. The Court of Appeals then said: "We did not hold in Ehrlich-Bober that a court invariably must resolve any outstanding personal jurisdiction issue prior to addressing forum non conveniens, decline to adopt such a rule in this case, and conclude that the court here did not abuse its discretion in that regard" (while referring to the Supreme Court's decision in Sinochem).

Practical Implications

The practitioner should recognize that forum non conveniens is not the only preliminary issue that a federal court may decide without the first determining that it has jurisdiction. As an example, under 28 U.S.C. §1367, district courts that have original jurisdiction may assert supplemental jurisdiction over related state claims unless they decline to exercise such supplemental jurisdiction on the basis of the factors noted in §1367(c). A district court declining to adjudicate state-law claims on discretionary grounds need not first determine whether those claims fall within its pendent jurisdiction. See Moor v. County of Alameda, 411 U.S. 693 (1973). As another example, a federal court need not decide whether the parties present an Article III case or controversy before abstaining under Younger v. Harris. See Ellis v. Dyson, 421 U.S. 426 (1975). As the Seventh Circuit explained, the principle

underlying decisions such as these is that "jurisdiction is vital only if the court proposes to issue a judgment on the merits." Intec USA v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006).

The New York Court of Appeals has not yet adopted as broad a concept as has the U.S. Supreme Court. But this much is now clear. Fifteen years ago, the Supreme Court resolved a federal court split and held in Sinochem that courts may, in appropriate circumstances, dismiss a case on forum non conveniens grounds without first deciding if the court had personal or subject matter jurisdiction. The Court of Appeals has now resolved a split in the New York state courts and given trial courts the leeway to follow Sinochem.

Lawrence W. Newman *is of counsel and* **David Zaslowsky** *is a partner in the New York office of Baker McKenzie. They can be reached at* **lawrence.newman@bakermckenzie.com** *and* **david.zaslowsky@-bakermckenzie.com** *, respectively.*