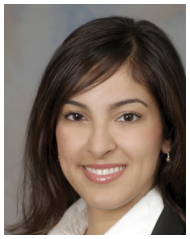
A Tale of Two Doctrines

This article first appeared in *The New York Law Journal,* January 14, 2013

by Edward Flanders, Ranah L. Esmaili and Peter Ostrovski

Edward Flanders
Litigation
+1.212.858.1638
edward.flanders@pillsburylaw.com



Ranah L. Esmaili
Litigation
+1.212.858.1526
ranah.esmaili@pillsburylaw.com

Peter Ostrovski
Litigation
+1.212.858.1464
peter.ostrovski@pillsburylaw.com

It's 5 p.m. on a Friday and you are packing up to leave on a long-planned weekend getaway...when the phone rings. The caller ID displays the familiar number of a client, the general counsel of a New York corporation. She has what she suggests is a quick legal question for which she needs a quick answer. Her company has a lawsuit pending against a French corporation in French court, but progress on it has been slow. Her company is considering bringing suit in New York federal court as well, without abandoning the French proceedings. Would she be able to do so, or would a challenge to the action lead to its dismissal from a New York federal court?

Consider These Doctrines

Two doctrines, international comity abstention and forum non conveniens, provide guidance for determining the answer. Your client would likely face a motion to dismiss based on both. While the two look to similar factors for guidance, an analysis under each can lead a judge to reach opposite, and seemingly inconsistent, conclusions. For instance, a judge examining the same set of facts could find that the policy underlying the international comity abstention doctrine supports keeping the case in New York while at the same time dismissing the case pursuant to the policy goals of forum non conveniens. This may lead to unpredictability in results and put litigants in a state of uncertainty as they attempt to ascertain whether their case can be brought in New York federal court and whether it will remain there. To understand the roots of this tension, it may help to review each doctrine.

The international comity ab-stention doctrine arises from respect for the courts of foreign nations, but also fairness to litigants and judicial efficiency. District courts thus have an obligation to exercise jurisdiction where they can and to only surrender it when "exceptional circumstances" exist. In conducting such an analysis, courts weigh a number of factors and look at the totality of the circumstances. Issues to consider include, but are not limited to, the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction. See, e.g., *Royal and Sun Alliance Ins. Of Canada v. Century Intern. Arms*, 466 F.3d 88, 93-95 (2d Cir. 2006)

Forum non conveniens focuses on convenience of the parties while according respect to a plaintiff's choice of forum. The examination

thus begins with a presumption in favor of the plaintiff's choice, with the strength of that presumption tied to the plaintiff's and the lawsuit's connection to the United States. Courts next examine the availability of an adequate alternate forum, a benchmark satisfied when the defendant is subject to service of process in the foreign court and whether the court allows litigation of the subject matter at issue.

Finally, courts consider numerous private interest and public interest factors. For private interests, they look at the ease of access to the evidence, the availability of compulsory process for the attendance of unwilling witnesses, the cost of willing witnesses' attendance, and any other factors that might make the trial quicker or less expensive. On the public side, courts give weight to administrative difficulties associated with court congestion, the unfairness of imposing jury duty on a community with no relation to the litigation, the local interest in having localized controversies decided at home, and avoiding difficult problems regarding conflict of laws and the application of foreign law. See, e.g., *DiRienzo v. Philip Services*, 294 F. 3d 21, 29-31 (2d Cir. 2002).

Similar Factors, but Results May Differ

A comparison with the factors listed in the international comity abstention discussion reveals a significant amount of overlap. Both consider ties between the litigation and the United States and the foreign jurisdiction. The forum non conveniens analysis in fact does this twice—once when considering how much weight to afford the plaintiff's choice of forum and then again when considering its public interest factors. Similarly, the potential prejudice and party convenience elements of international comity abstention look to the same facts that underlie an analysis of the private interest factors of forum non conveniens. Moreover, both doctrines gauge the adequacy of the alternative forum. In fact, the only point of division comes from the abstention doctrine's focus on whether there is a parallel litigation and thus the similarity of the parties and issues, along with the order in which the actions were filed.

The two doctrines have yielded conflicting results at least once in recent years. In *Kitaru Innovations v. Chandaria*, the plaintiff faced a motion to dismiss on both grounds from defendants who were U.S. citizens residing in Kenya. 698 F. Supp. 2d 386 (S.D.N.Y. 2010). The plaintiff in *Kitaru* was a corporation in Barbados that already had a lawsuit pending in Canada, regarding the same subject matter, a U.S. patent. The district court first analyzed a potential dismissal under an abstention approach and found that it should retain jurisdiction. While the parallel Canadian proceeding involving the same parties and essentially the same issues would potentially prejudice defendants by forcing them to litigate in two forums simultaneously, the court found that these concerns are present with any parallel action and are not enough to meet the "exceptional circumstances" requirement. Nevertheless, the district court declined jurisdiction on forum non conveniens grounds: Plaintiff's initial choice of forum was given only minimal deference (plaintiff was from Barbados and the contract at issue was executed in Kenya and did not invoke New York law), and the district court found that Canada served as an adequate alternative forum, none of the evidence or witnesses were in the United States and most were in Canada, and the public interest factors highlighted the lack of connection between New York and the litigation. The court thus dismissed the case on the basis of forum non conveniens notwithstanding the fact that consideration of many of the same underlying facts did not rise to the level of "exceptional circumstances" to decline jurisdiction under the international comity abstention doctrine.

Analysis and Application

So what do you tell your client? For starters, you would tell her that, if the potential defendant invokes both doctrines on a motion to dismiss, courts may potentially engage in completely separate analyses without consideration of the overlap between them, as was the case in *Kitaru*. The fundamental consequence of this approach would be to effectively negate the "exceptional circumstances" threshold under the international comity abstention doctrine in favor of dismissal under the less stringent forum non conveniens doctrine. Put differently, the defendant would face an uphill battle trying to meet the "exceptional circumstances" threshold of international comity

abstention but may have an easier time showing that private interest and public interest factors point toward dismissal. This could lead to a perverse result, where a judge might uphold the jurisdiction of the court to hear a case in one breath, yet immediately take it away in the next.

The good news for your client is that the interplay between the differing standards of the two doctrines has yet to be substantively addressed by any federal court, and is ripe for consideration. Indeed, there is a good argument for why the court should consider the intersection of the two doctrines and engage in a meaningful analysis of such interplay in deciding whether to dismiss the case. For example, even if the court is inclined to dismiss the action on forum non conveniens grounds, it should evaluate the impact of a dismissal on the court's charge to maintain jurisdiction whenever possible under the international comity abstention doctrine.

Moreover, international comity abstention looks to the potential prejudice of either party, which should encourage courts to look beyond the hardships a party would face from litigating in two actions but also consider the judicial prejudice a party may face from litigating in the foreign forum, as the doctrine demands. For instance, a party may commence an action abroad and even make some progress there, only to discover the level of prejudice it faces within that judicial system. Despite such prejudice, the forum non convenience doctrine's focus on other factors may point to a dismissal in favor of the foreign proceeding, even though the plaintiff might face prejudice in the foreign forum that would militate against dismissal under the international comity abstention doctrine.

This is particularly the case because forum non conveniens, in its typical incarnation, applies to dismissing an action in favor of a *potential* foreign proceeding; the analysis should change when there is already a foreign litigation pending. The existence of parallel proceedings calls for the application of the doctrine more suited to deal with multiple proceedings, namely international comity abstention.

A strong argument exists as well that parties to an action deserve predictability in their results and an understanding of the law that will be applied to their case. The current scheme, in which two almost identical doctrines have differing thresholds and can lead to opposite results, undermines this desired clarity. In addition, defendants can attempt to game the system by invoking the doctrine that is easiest to satisfy, thus slowly eroding the force and effectiveness of the other.

The answer to your client's question (given Monday morning after cancelling your weekend plans and reading dozens of cases and treatises) is that there is no easy answer. Rather, the answer will likely depend on the particular facts of your case, and the willingness of the assigned judge to engage in a thorough analysis of competing doctrines of law in order to come to the best decision.

Edward Flanders *is a partner at Pillsbury Winthrop Shaw Pittman, where he leads the New York litigation practice and co-leads the firm's financial services litigation team.* ***Ranah L. Esmaili*** *is counsel and* ***Peter Ostrovski*** *is an associate at the firm.*

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 1.877.323.4171

Pillsbury Winthrop Shaw Pittman LLP