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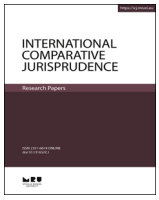

Interaction between the doctrines of forum non conveniens, judgment enforcement, and the concept of the rule of law in transnational litigation in the United States

Mantas Pakamanis [1]

Professional Legal Partnership Motieka & Audzevicius, Gyneju str. 4, LT-01109 Vilnius, Lithuania

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ABSTRACT

This article analyses the application of the forum non conveniens and the judgment enforcement doctrines in the United States courts and questions its conformity with the concept of the rule of law. The concept of the rule of law, the general principle of international law, inter alia requires accessibility of law, that questions of legal right should be decided by law not discretion, and compliance by the state with its obligations in international law. The systematic analysis by the author of this article shows that the application of the two doctrines in the same dispute firstly might deny accessibility of law and later restrict the possibility to find a solution. Such application by the United States courts can create a lacuna in access to justice. Thus, the following denial of effective access to justice, applying the two doctrines, might not obey the concept of the rule of law.

1. Introduction

"The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency" (Kofi Annan, 2004).

At the World Summit, the Heads of State and Government of States members of the United Nations acknowledged that "good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger"; they further recognized that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and reaffirmed their commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States" (United Nations Resolution, 2005).

E-mail address: m.pakamanis@gmail.com

[1] Mantas Pakamanis (LL.M), associated lawyer at Professional Legal Partnership Motieka & Audzevicius.

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Today globalization entails increasingly frequent interactions between the United States and foreign citizens, leading to increasingly more transnational disputes (Bell, 2003, p. 335). In the world of international dispute resolution, location became very important. The United States has substantive and procedural laws that are more advantageous to claimants than the laws of most other countries. There are two features of the United States legal system that encourage claimants to bring transnational disputes to the United States. Firstly, the United States employs a permissive approach to personal jurisdiction, giving claimants – both domestic and foreign – broad access to the United States courts. Secondly, the judges in the United States have a strong tendency to apply the American substantive law that claimants often prefer, even in lawsuits arising out of events occurring in foreign countries. However, advantages that make litigation in the United States so attractive to foreign claimant may not exist in the courts of that claimant's country, making litigation there uneconomical and impractical. This is the reason why the amount of transnational litigation filed in the United States is growing (Petrossian, 2007, p. 1257-1258).

The *forum non conveniens* doctrine and the judgment enforcement doctrine are fundamentals of transnational litigation in the United States courts (Born & Rutledge, 2007, chapters 4, 12). The *forum non conveniens* doctrine gives United States courts discretion to dismiss a transnational claim in favor of a more appropriate and convenient foreign judiciary, if it is an available and adequate alternative forum (Heiser, 2005, p. 1161-1168; Gulf Oil Corp. v. Gilbert, 1947; Piper Aircraft Co. v. Reyno, 1981). The judgment enforcement doctrine determines whether a United States court will enforce a judgment of a foreign country's court against a defendant's assets in the United States (Born & Rutledge, 2007, chapters 4, 12).

A motion to dismiss on grounds of *forum non conveniens* has become the primary response of domestic defendants to tort actions brought by foreign claimants in the United States courts (Birnbaum & Dunham, 1990, p. 241-243; Reynolds, 1992, p. 1663-1665). When they do so, the defendants argue that the proposed alternative forum is available, adequate and more appropriate than the United States court for adjudicating the claim (Born & Rutledge, 2007, chapters 4, 12). The result is that most of the times they forum shop out of the United States into a foreign legal system with a more defendant friendly environment (Delgado v. Shell Oil Co., 1995). However, the relief may be only temporary, if a claimant refiles the claim in a foreign country and a foreign court adopts a pro-claimant judgment. Subsequently, the claimant seeks enforcement of the foreign judgment against the defendant's assets in the United States. The defendant may then argue that the judgment or the foreign legal system has drawbacks that should preclude enforcement (Osorio v. Dole Food Co., 2009). Obviously, if a court denies enforcement, it will create a transnational lacuna[2] in access to justice. In the authors opinion this contradicts the concept of the rule of law.

This paper analyses the application of the two doctrines in the United States courts and questions its conformity with the concept of the rule of law.

2. The concept of the rule of law

The concept of the rule of law can be found at the national as well as at the international level (McCorquodale, 2010). To understand the substantive components of the rule of law it is helpful to consider international human rights instruments, because many of them set out important elements of the rule of law.

The notion of the rule of law appears in the Preamble to the 1948 Universal Declaration of Human Rights. Moreover, the UN General Assembly has accepted a remarkable number of resolutions that treat the rule of law as the primary subject.[3] Andre Nollkamper notes that together, these resolutions merely underline the general importance of the rule of law, rather than explicitly clarifying the content of the principle, their relevance for international law is nevertheless high since they support the view that the rule of law is increasingly becoming a general principle of international law (Nollkaemper, 2009, p. 74).

Furthermore, perhaps Tom Bingham, honorable British judge and jurist, who served in the highest judicial offices of the United Kingdom, gives the best definition of the rule of law:

"All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts" (Bingham, 2011, p. 8–17).

Tom Bingham notes that the rule of law includes these elements: (i) accessibility of the law; (ii) questions of legal right should be normally decided by law and not discretion; (iii) equality before the law; (iv) power must be exercised lawfully, fairly and reasonably; (v) human rights must be protected; (vi) means must be provided to resolve disputes without undue cost or delay; (vii) trials must be fair; (viii) compliance by the state with its obligations in international law as well as in national law (Bingham, 2011, p. 8–17).

In conclusion, it is evident that the concept of the rule of law is a general principle of international law.

[2] A lacuna is an empty space in the law with no regulations applicable or an absent part in a law (TransLegal, 2009).

[3] *See* United Nations Resolutions on strengthening of the rule of law: 20 December 1993A/RES/48/132, 23 December 1994A/RES/49/194, 22 December 1995A/RES/50/179, 12 December 1996A/RES/51/96, 12 December 1997A/RES/52/125, 9 December 1998A/RES/53/142, 4 December 2000A/RES/55/99, 18 December 2002A/RES/57/221. United Nations Resolutions on the rule of law at the national and international levels: 4 December 2006A/RES/61/39, 6 December 2007A/RES/62/70, 11 December 2008A/RES/63/128, 16 December 2009A/RES/64/116.

3. The forum non conveniens doctrine

International dispute settlement is a relatively new field of academic study that increasingly combines private and public international law and raises enduring issues of global importance.

The *forum non conveniens* doctrine provides guidelines for determination of a court between countries in transnational disputes (Stein, 1985, p. 781–786; Robertson, 1994, p. 353–370). Consequently, the doctrine gives the United States court discretion to dismiss a transnational claim in favor of the defendant's preferred foreign court, if the foreign court is the more appropriate and convenient forum for judging the dispute and the foreign court is an available and adequate alternative forum (Heiser, 2005, p. 1161–1168).

3.1. The objective of the forum non conveniens doctrine

Paxton Blair noted that the objective of the *forum non conveniens* doctrine is to prevent a claimant from pressing the proceedings at an inconvenient place for an adversary, in order oppress the defendant (Blair, 1929).[4] In the United States courts practice it could be found that the objective of the doctrine is to ensure that the proceedings are convenient (Piper Aircraft Co. v. Reyno, 1981). The implication is that the doctrine's objective is to induce the end of justice in a transnational dispute (Brand and Jablonski, 2007, p. 44-45).

3.2. The requirements to apply the forum non conveniens doctrine

To apply the doctrine, a court applies a two part evaluation: determination of whether there is an available and adequate alternative forum, and the balancing of a variety of private and public interest factors to determine whether the court should dismiss the claimant's claim in favor of alternative forum (Wright, Miller, & Cooper, 2007, p. 633-634).

A *forum non convenience* dismissal is not allowed, unless the defendant demonstrates that his proposed alternative forum is available and adequate (Davis, 2002, p. 314).[5] The alternative forum is considered practically always available, if the defendant is subject to jurisdiction there (Wright et al. 2007, p. 633-634).[6] It is easy for defendants to satisfy this requirement in transnational disputes (Davis, 2002, p. 314).

The second element of the alternative forum requirement is foreign judicial adequacy (Wright et al. 2007, p. 633-634).

According to the United States Supreme Court:

The defendant's proposed alternative forum is adequate unless the potential remedy it offers is so clearly inadequate that it is no remedy at all (Piper Aircraft Co. v. Reyno, 1981).

Consequently, the adequacy requirement is also simply satisfied (Tuazon v. R.J. Reynolds Tobacco Co., 2006; Lockman Found v. Evangelical Alliance Mission, 1991).

Moreover, another important characteristic of the *forum non conveniens* doctrine's foreign court's adequacy requirement is that it is claimant focused – it examines only the foreign court's adequacy for the claimant, not the defendant.[7]

Furthermore, the *forum non conveniens* doctrine's adequacy requirement is *ex ante*, it is applied to a foreign judiciary before foreign proceedings have begun and before a judgment has been initiated (Whytock, 2011a, 2011b, p. 1460).

After the alternative forum requirement is satisfied, the court must then balance a variety of private and public interests associated with the litigation (Davis, 2002, p. 314).[8] In Gulf Oil Corp. v. Gilbert case the United States Supreme Court indicated many private and public interest factors.

Firstly, the United States Supreme Court indicated the private interest factors, which affect the convenience of the litigants: (i) relative ease of access to the source of proof; (ii) availability of a compulsory process for the attendance of the unwilling; (iii) the cost of obtaining attendance of the willing and witnesses; (iv) option to view the premises, if appropriate to the action; (v) all other practical problems that make trial of a case easy, expeditious and inexpensive (Piper Aircraft Co. v. Reyno, 1981).

Secondly, the United States Supreme Court indicated the public interest factors, which affect the convenience of the forum: (i) administrative difficulties arise for courts when litigation is piled up in congested centers instead of being handled at its origin; (ii) jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation; (iii) in cases which effect the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only; (iv) there is a local interest in having localized controversies decided at home; (v) there is

[4] Later, Paxton Blair was quoted in Case Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[5] Martin Davies also notes that the first step in any *forum non conveniens* analysis is a determination of whether an adequate alternative forum exists to hear the dispute in another country; If there is no adequate alternative forum, the question of dismissal should proceed no further.

[6] Wright, C. A., Miller, A. R. and Cooper, E. H. also notes that an alternative forum generally is deemed available if the case and all of the parties come within that court's jurisdiction.

[7] In case Osorio v. Dole Food Co. court stated that forum non conveniens focuses on whether proposed alternative forum would be adequate to claimants, not on whether it would be adequate to defendants.

[8] Martin Davies notes that if the court is satisfied that there is an adequate alternative forum in another country, it moves on to determine whether the case should be tried in that alternative forum.

appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself (Piper Aircraft Co. v. Reyno, 1981).

Consequently, according to the explications of the United States Supreme Court, there should usually be a substantial ground in favor of the claimant's choice of forum. However, the United States courts grant defendants' *forum non conveniens* motions more than 60% of the time when the claimants are foreign (Whytock, 2011a, 2011b, p. 503).

4. The judgment enforcement doctrine

The United States is not party to any bilateral or multilateral convention regarding the enforcement of judgment from another country. It should be noted that the Hague Conference on Private International Law on 30 June 2005 concluded the Hague Convention on Choice of Court Agreements (HCCCA). According to the data provided in official website of HCCCA (2015), in 2009, the United States signed the HCCCA, however, the United States has not yet ratified the HCCCA.

The main objective of the judgment enforcement doctrine is to avoid re-litigation of affairs which have already been litigated (Brand, 1991, p. 266). The essence of the doctrine: (i) avoiding wasteful duplication of proceedings; (ii) protecting successful claimants from unfair tactics by defendants seeking to avoid satisfying a judgment; (iii) preventing conflicting court judgments (Von Mehren & Trautman, 1968, p. 1601–1604). However, as will be demonstrated further, there are many grounds for non-enforcement of foreign judgments in the United States that raise questions regarding the domestic public policy and the rights of defendants.

In general, a United States court will not enforce a foreign judgment unless it first recognizes that judgment (Lamm, 2004, p. 537). No federal statute governing the recognition and enforcement of foreign judgments exists in the United States. Although the United States Constitution requires each state to give full faith and credit to the judgments of other states (Art. IV of the United States Constitution), the requirement does not extend to the enforcement of foreign judgments (Hilton v. Guyot, 1895). Consequently, state law typically governs the recognition and enforcement of foreign judgments in the United States courts (Lamm, 2004, p. 537-538).

In 1962, the Uniform Law Commissioners promulgated the Uniform Foreign Money-Judgments Recognition Act (UFMJRA). The UFMJRA has been enacted in 32 states (Uniform Law Commission). To meet the increased needs for enforcement of foreign country money-judgments, the Uniform Law Commissioners have promulgated a revision of the 1962 Uniform Act with the 2005 Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) (Uniform Law Commission).

Furthermore, the United States Supreme Court doctrine formulated in Hilton v. Guyot case (the *Hilton doctrine*) has strong influence on state courts (Bermann, 2003, p. 333). Under the *Hilton doctrine*, a state court may recognize a foreign judgment where: (i) the judgment was rendered in a fair trial before a court of competent jurisdiction; (ii) the defendant received proper notice of the proceedings or appeared voluntarily, (iii) the foreign court is part of a legal system that is likely to secure an impartial administration of justice; (iv) no evidence exists showing prejudice on the part of the court of fraud in the procurement of the judgment; (v) no other reason for non-recognition exists (Bermann, 2003, p. 333; Hilton v. Guyot, 1895).

The UFMJRA and UFCMJRA have the same principal rule that final foreign-country money judgments should be conclusive between the parties, then, they are generally entitled to enforcement (UFMJRA para. 3, UFCMJRA paras. 4, 7). However, there are plenty of mandatory and discretionary exceptions to this principal rule.

The UFMJRA has three mandatory exceptions for non-enforcement:

(i) The judgment was rendered under a system which does not provide an impartial tribunal or procedures compatible with the requirements of due process of law, (ii) the foreign court did not have personal jurisdiction over the defendant, (iii) the foreign court did not have jurisdiction over the subject matter (UFMJRA para. 4(a)).

The UFCMJRA has the same three mandatory exceptions (UFCMJRA para. 4(b)).

The UFMJRA discretionary grounds for non-enforcement are:

(i) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend, (ii) the judgment was obtained by fraud, (iii) the cause of action on which the judgment is based is repugnant to the public policy of this state; (iv) the judgment conflicts with another final and conclusive judgment, (v) the proceedings in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court, (vi) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action (UFMJRA para. 4(b)).

The UFCMJRA has two additional discretionary grounds for non-enforcement: (i) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; (ii) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law (UFCMJRA para. 4(c)).

In conclusion, the judgment enforcement doctrine, like the *forum non conveniens* doctrine, requires United States courts to assess the appropriateness of foreign legal systems. Compared to the *forum non conveniens* doctrine's foreign judicial

appropriateness rules, the judgment enforcement doctrine's foreign judicial appropriateness rules are rigorous[9], defendant focused[10] and *ex-post.*[11]

5. The application of the *forum non conveniens* and the judgment enforcement doctrines in the same dispute might not obey the concept of the rule of law

As it was indicated above the concept of the rule of law *inter alia* requires accessibility of law, questions of legal right should be decided by law not discretion, and compliance by the state with its obligations in international law. Moreover, effective access to justice requires a remedy when a person is legally entitled to one (Morpugro, 2011, p. 381).

Furthermore, if a United States court uses its discretion to dismiss a transnational claim in favor of a foreign judiciary, it will allow the defendant to forum shop out of the United States. However, the claimant may refile the claim in a foreign country and a foreign court may adopt a pro-claimant judgment. Subsequently, the claimant will seek enforcement of this judgment in the United States. However, the defendant may then argue that the judgment or the foreign legal system has drawbacks that should preclude enforcement. As it was indicated above compared to the *forum non conveniens* doctrine's foreign judicial appropriateness rules are different, the judgment enforcement doctrine's foreign judicial appropriateness rules are rigorous, defendant focused and *ex post*. Whereas the rules are different, the same foreign judiciary may be appropriate at the *forum non conveniens* stage but inappropriate at the judgment enforcement stage (Dhoode, 2009, p. 14). Thus, the interaction between the *forum non conveniens* doctrine and the judgment enforcement doctrine can create a transnational lacuna in access to justice (Casey and Ristroph, 2007, p. 22, 51).

Defendants and their lawyers had success using the differences of the *forum non conveniens* doctrine and the judgment enforcement doctrine in the same transnational dispute. For instance, in cases where Latin American and Caribbean claimants sued Shell Oil Co., Dole Food Co. and other companies for injuries caused by the effects of the chemical dipromochloropropane (DBCP).

5.1. The application of the forum non conveniens and the judgment enforcement doctrines in transnational disputes in action

The first example is Delgado v. Shell Oil Co case (1995). Claimants in *Delgado* case were residents of Costa Rica, Nicaragua and Panama. They originally filed suit in the 212th District Court of Galveston County, Texas, against Shell, Chiquita Brands, Chiquita Brands International, Inc., Del Monte Fresh Produce, N.A., Del Monte Tropical Fruit Co., Dole Food Co., Inc., Dole Fresh Fruit Co., Dow Chemical Co., Occidental Chemical Corp., Standard Fruit Co., and Standard Fruit & Steamship Co. In this case the defendants successfully dismissed the suit on *forum non conveniens* grounds.

Subsequently, Nicaraguan claimants refiled claims in Nicaragua. However, Shell Oil Co. responded by filing a complaint against the Nicaraguan claimants in the United States District Court for the Central District of California seeking a declaration that the Nicaraguan judicial system does not provide impartial tribunals.[12] The court held that the Nicaraguan judgment was unenforceable.

Another example is Osorio v. Dole Food Co case (2009). This was an action to enforce a 97 million USD Nicaraguan judgment under the Florida Uniform Out-of-country Foreign Money-Judgments Recognition Act (Florida Recognition Act), Claimants were 150 Nicaraguan citizens alleged to have worked on banana plantations in Nicaragua between 1970 and 1982, during which time they were exposed to the chemical compound DBCP. Defendants were Dole Food Company and The Dow Chemical Company, both Delaware corporations, Dow manufactured DBCP from 1957 until 1977, and Dole used DBCP on its banana farms in Nicaragua until the farms were expropriated by the Sandinista regime that came to power in 1979. The judgment in this case was rendered by a trial court in Chinandega, Nicaragua, the trial court awarded claimants approximately 97 million USD under Special Law 364, enacted by the Nicaraguan legislature in 2000 specifically to handle DBCP claims, the average award was approximately 647 000 USD per claimant.

The United States District Court for the Southern District of Florida denied enforcement of the Nicaragua court judgment.

In conclusion, these denials of effective access to justice by the United States courts applying the *forum non conveniens* and the judgment enforcement doctrines in transnational disputes reveals that such application might not obey the concept of the rule of law.

[9] Concerns about lack of impartiality or due process in a foreign judiciary are explicitly made part of analysis.

[10] The analysis asks whether the alternative forum is adequate for the defendant, not the claimant.

[11] It is *ex-post* in the sense that it is applied after the foreign proceedings have occurred.

[12] Shell Oil Co. argued that the Nicaragua judicial system does not provide impartial tribunals and that its system of laws denies due process. This argument was absolute contrary to its earlier argument in the previous case that the Nicaraguan judiciary was more appropriate and convenient forum for the DBCP litigation.

6. Conclusions

1. The rule of law is a general principle of international law. The rule of law together with human rights and democracy are the core values and principles of the United Nations. The UN General Assembly has accepted many resolutions which induce the rule of law.
2. The concept of the rule of law inter alia requires accessibility of law, questions of legal right should be decided by law not discretion, compliance by the state with its obligations in international law.
3. Globalization entails increasingly frequent interactions between the United States and foreign citizens, leading to increasingly more transnational disputes. In such disputes the United States courts apply the doctrines of forum non conveniens and judgment enforcement.
4. The forum non conveniens and the judgment enforcement doctrines are applied at different stages of the transnational litigation process. Thus, defendants argue that the foreign judiciary is appropriate at the forum non conveniens stage while later they argue that the foreign judiciary is inappropriate at the judgment enforcement stage.
5. The judgment enforcement doctrine's foreign judicial appropriateness rules are more rigorous than the forum non conveniens doctrine's rules. This is the reason why defendants have a chance to successfully use the differences of the two doctrines in the United States courts.
6. Examples in so-called DBCP cases show that when the forum non conveniens and the judgment enforcement doctrines are applied in the same dispute, they can produce a transnational lacuna in access to justice.
7. Denials of effective access to justice by the United States courts applying the forum non conveniens and the judgment enforcement doctrines in transnational disputes reveals that such application might not obey the concept of the rule of law inter alia the accessibility of law and later restrict a possibility to get a remedy.
8. Also, it is important for legal practitioners to be aware of the interaction between the forum non conveniens and the judgment enforcement doctrines in transnational litigation in the United States, in order to accurately evaluate litigation perspectives.

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