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CPLR 327: Entertainment of Actions Involving Foreign Corporations' Internal Affairs Determined by Forum Non Conveniens Doctrine

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CPLR 327: Entertainment of actions involving foreign corporations' internal affairs determined by forum non conveniens doctrine

Under the forum non conveniens doctrine, a court with jurisdiction over an action has discretion to dismiss the case when justice and fairness dictate that another forum would be more convenient, even when a resident or domiciliary is a party to the action.[1] At one time the New York rule was quite restrictive, and dismissal on the ground of forum non conveniens was unavailable when one of the litigants was a resident or domiciliary of the state.[2] When a corporation organized outside of the state was a liti-

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[1] *See* CPLR 327 (1967). CPLR 327(a) provides in pertinent part:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Id. "A court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent." Gibb, INTERNATIONAL LAW JURISDICTION 212, 213 (1926); *see* Williams v. Green Bay & W. R.R., 326 U.S. 549, 554 n.4 (1946). However, when a court determines, in the interest of convenience, that another forum is better suited to adjudicate an action, it will dismiss under the doctrine of forum non conveniens. SIEGEL § 28, at 27 (1978); 1 WK&M ¶ 327.01, at 3-469; *see, e.g.*, De La Bouillerie v. De Vienne, 300 N.Y. 60, 62, 89 N.E.2d 15, 15 (1949) (dismissal for forum non conveniens of action brought by non-resident for tort committed without the state), *overruled*, Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); Carey v. Southern Peru Copper Corp., 29 App. Div. 2d 744, 745, 287 N.Y.S.2d 599, 600 (1st Dep't 1958) (New York forum inappropriate where nexus to forum non-existent). *See generally* SIEGEL § 28, at 28-29; 1 WK&M ¶ 327.01, at 3-471; CPLR 301, commentary at 13-16 (McKinney 1967). This inflexible doctrine was overruled in Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361, 278 N.E.2d 619, 621-22, 328 N.Y.S.2d 398, 402 (1972). The forum non conveniens doctrine now "turn[s] on considerations of justice, fairness and convenience, and not solely on the residence of one of the parties." *Id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402. The rule laid down in *Silver* was codified in CPLR 327 (1972). In addition to the residence of the parties, the court, in exercising its discretion, will consider as factors the place where the cause of action arose, the availibility of witnesses, the burden imposed on the defendant, and the convenience of the courts. *See* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 3 (1970); 1 WK&M ¶ 327.01, at 3-469.

[2] *See, e.g.*, De La Bouillerie v. De Vienne, 300 N.Y. 60, 62, 89 N.E.2d 15, 15 (1949) (New York courts must try case where either plaintiff or defendant is resident of forum), *overruled*, Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); Burk v. Sackville-Pickard, 29 App. Div. 2d 515, 515, 285 N.Y.S.2d 214, 215 (1st Dep't 1967) (trial court has no discretion to dismiss for forum non conveniens when defendant is New York resident at commencement of action). *See generally* SIEGEL § 28, at 28-29; 1 WK&M ¶ 327.01, at 3-471; CPLR 301, commentary at 13-16 (McKinney 1967). The Court of Appeals overruled the inflexible doctrine that required a court to hear a case if a party to the action was a resident or domiciliary of New York. *See infra* note 5.

Prior to 1972, New York's forum non conveniens doctrine evolved slowly on a case by

gant, however, courts were able to dismiss the action if the internal affairs[3] of the corporation were at issue.[4] Despite the liberalization

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case basis. *See, e.g.*, Pharo v. Piedmont Aviation, Inc., 29 N.Y.2d 710, 712, 275 N.E.2d 333, 334, 325 N.Y.S.2d 750, 751 (1971) (jurisdiction refused where one of multiparty defendants was sole connection to New York); Bata v. Bata, 304 N.Y. 51, 56, 105 N.E.2d 623, 626 (1952) (forum non conveniens doctrine extended to contract and property cases); Gregoris v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 159, 139 N.E. 223, 225 (1923) (forum non conveniens only applicable to torts cases), *overruled*, Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); Hernandez v. Cali, Inc., 32 App. Div. 2d 192, 195, 301 N.Y.S.2d 397, 400-01 (1st Dep't 1969) (dismissal of action involving New York resident when parties contractually agree to settle disputes in another forum), *aff'd*, 27 N.Y.2d 903, 265 N.E.2d 921, 317 N.Y.S.2d 625 (1970). *See generally* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 12-18 (1929) (development of forum non conveniens doctrine).

[3] The Restatement (Second) of Conflicts of Laws, defines internal affairs simply as "the relations inter se of the corporation, its shareholders, directors, officers or agents." RESTATEMENT (SECOND) CONFLICTS OF LAWS § 313 comment a (1971); *see* Ackert v. Ausman, 29 Misc. 2d 974, 976-77, 218 N.Y.S.2d 814, 817-18 (Sup. Ct. N.Y. County 1961). The courts have found it difficult to determine what actions constitute the internal affair of the corporation. *See Ackert*, 29 Misc. 2d at 976-77, 218 N.Y.S.2d at 817-18. Many jurisdictions follow the Maryland position that if the act complained of is the act of a corporation and affects the plaintiff only in his capacity as a member of the corporation, then the act is an internal affair of the corporation. North State Copper & Gold Mine Co. v. Field, 64 Md. 151, 152, 20 A. 1039, 1040 (1885); *see* Frank v. American Commercial Alcohol Corp., 152 Misc. 123, 126, 273 N.Y.S. 622, 625 (Sup. Ct. N.Y. County 1934).

[4] *See* Cohn v. Mishkoff-Costello Co., 256 N.Y. 102, 105, 175 N.E. 529, 530 (1931); Mook v. Berger, 26 App. Div. 2d 925, 925, 274 N.Y.S.2d 855, 856 (1st Dep't 1966); Adolph Meyer Inc. v. Florists' Tel. Delivery Ass'n, 36 Misc. 2d 566, 566-67, 232 N.Y.S.2d 913, 914 (Sup. Ct. Queens County 1962); W. FLETCHER, CYCLOPEDIA OF CORPORATIONS § 8429 (perm. ed. 1977); Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 143-44 (1955). In Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933), the Supreme Court restated the long-settled internal affairs rule:

> a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile.

Id. at 130. In addition, the *Rogers* Court stated that every owner of stock in a corporation impliedly agrees to have internal affairs settled in this manner. *Id.* However, the Supreme Court has moved away from a strict application of the internal affairs rule and has held that the internal affairs of a foreign corporation are merely a factor in a forum non conveniens determination. *See* Kostler v. American Lumberman's Mut. Casualty Co., 330 U.S. 518, 527 (1947); William v. Green Bay & W. R.R., 326 U.S. 549, 553-57 (1946).

New York courts have viewed the internal affairs rule as a discretionary rule based on considerations of convenience and expediency, rather than a blackletter doctrine. *See, e.g.*, Sternfeld v. Toxaway Tanning Co., 290 N.Y. 294, 297, 49 N.E.2d 145, 145 (1943) (convenience, efficiency and justice considered by court); Travis v. Knox Terpezone Co., 215 N.Y. 259, 264, 109 N.E. 250, 251 (1915) (jurisdiction declined only in interests of convenience, efficency, or justice); Gilbert v. Burnside, 6 App. Div. 2d 834, 834, 175 N.Y.S.2d 989, 992 (2d Dep't 1958) (no abuse of discretion to refuse jurisdiction of action involving internal affairs of corporation); Levy v. Pacific E. Corp., 153 Misc. 488, 489-90, 275 N.Y.S. 291, 295-96 (Sup. Ct. N.Y. County 1934) (court refused to exercise jurisdiction based on convenience rather

of the forum non conveniens doctrine,[5] some New York courts have continued the strict application of the internal affairs rule, thereby raising questions as to the current efficacy of that test.[6] Recently, in *Broida v. Bancroft*,[7] the Appellate Division, First Department, held that in determining whether to entertain jurisdiction over a matter concerning the internal affairs of a foreign corporation, the case would be heard unless forum non conveniens principles dictated otherwise.[8]

In *Broida*, the directors of a Delaware corporation, Dow Jones & Co., Inc. (Dow), attempted to reorganize the corporation through a stock recapitalization plan that would enable the majority shareholder group to sell a substantial part of its holdings yet retain control of the corporation.[9] Several New York shareholders instituted a derivative action seeking a permanent injunction to prevent this reorganization. [10] Relying solely on the internal affairs

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than lack of power).

As a result of New York caselaw, early commentators recognized New York as one of the first jurisdictions to equate the internal affairs rule with the forum non conveniens doctrine. *See* Latty, *supra*, at 143-45; Note, *Forum Non Conveniens as a Substitute for the Internal Affairs Rule*, 58 COLUM. L. REV. 234, 247 (1958) [hereinafter cited as Note, *Substitute*]; Note, *Forum Non Conveniens and the "Internal Affairs" of a Foreign Corporation*, 33 COLUM. L. REV. 492, 499 (1933); Note, *The Doctrine of Forum Non Conveniens*, 34 VA. L. REV. 811, 816 (1948). Recently, however, there has been inconsistency in the interpretation of the rule by the courts. *Compare* Prescott v. Plant Indus. Inc., 88 F.R.D. 257, 261 (S.D.N.Y. 1980) (strict application of "well settled" New York internal affairs rule) *with* Burton v. Exxon Corp., 536 F. Supp. 617, 624-26 & n.1 (S.D.N.Y. 1982) (internal affairs rule viewed as one aspect of forum non conveniens in New York).

[5] *See* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 361-63, 278 N.E.2d 619, 621-22, 328 N.Y.S.2d 398, 402-04 (1972). The forum non conveniens doctrine now "[t]urns on considerations of justice, fairness and convenience, and not solely on the residence of one of the parties." *Id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402; *see infra* note 20 & accompanying text. The *Silver* rule was codified in CPLR § 327 (1972). In addition to the residence of the parties, the court, in exercising its discretion, will consider as factors the place where the cause of action arose, the availability of witnesses, the burden imposed on the defendant, and the convenience of the courts. *See* H. WACHTELL, *supra* note 1, at 3; 1 WK&M ¶ 327.01, at 3-469.

[6] *See* Mantei v. Creole Petroleum Corp., 61 App. Div. 2d 910, 910, 402 N.Y.S.2d 922, 923 (1st Dep't 1978); *see also* Prescott v. Plant Indus., Inc., 88 F.R.D. 257, 261-62 (S.D.N.Y. 1980) (federal court applied "well-settled" New York internal affairs rule).

[7] 103 App. Div. 2d 88, 478 N.Y.S.2d 333 (2d Dep't 1984).

[8] *Id.* at 91, 478 N.Y.S.2d at 335-36.

[9] *Id.* at 89, 478 N.Y.S.2d at 334. The stock-split reorganization plan called for the issuance of one share of a new class B common stock for every two shares of existing common stock. *Id.* The new class B stock carried with it 10 voting rights as opposed to the single voting right of the existing common stock. *Id.* Thus, the majority shareholder group, a single family in need of capital, could retain control despite selling one-half of their holdings. *Id.*

[10] *Id.*

rule, the Supreme Court, Suffolk County, granted the defendant's motion to dismiss, and the plaintiff shareholders appealed.[11]

In reversing the order for dismissal, Justice Titone, writing for the court, noted the modern trend to treat the internal affairs rule as one facet of the forum non conveniens doctrine.[12] Given Dow's substantial nexus to New York, and its lack of contacts to its state of incorporation, the court declared that to refuse jurisdiction was an injudicious use of discretion.[13] Justice Titone observed that New York courts have a special duty to protect citizens of this state from the questionable activities of pseudo-foreign corporations.[14] Moreover, the court noted that since the defendant corpo-

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[11] *Id.* at 90, 478 N.Y.S.2d at 334.

[12] *Id.* at 91, 478 N.Y.S.2d at 335. Over the years, many exceptions permeated the internal affairs rule, allowing the courts to avoid a strict application of the rule when New York was the most convenient forum. *See, e.g.*, Travis v. Knox Terpezone Co., 215 N.Y. 259, 264, 109 N.E. 250, 251 (1915) (internal affairs rule inapplicable when action involves transfer of shares or corporate books); November v. National Exhibition Co., 10 Misc. 2d 537, 540, 173 N.Y.S.2d 490, 494 (Sup. Ct. N.Y. County 1958) (waste and mismanagement issue not internal affairs); Hayman v. Morris, 36 N.Y.S.2d 754, 761 (Sup. Ct. N.Y. County 1942) (substantial contacts to state exception to internal affairs doctrine). Derivative actions also have been declared to be outside of the internal affairs rule. *See, e.g.*, Goldstein v. Lightner, 266 App. Div. 357, 358, 42 N.Y.S.2d 338, 339 (1st Dep't 1943) (forum non conveniens inapplicable to derivative suit to recover damages for breach of fiduciary duty), *aff'd mem.*, 292 N.Y. 670, 56 N.E.2d 98 (1944); Ackert v. Ausman, 29 Misc. 2d 974, 976, 218 N.Y.S.2d 814, 817-18 (Sup. Ct. N.Y. County 1961) (stockholders derivative action does not involve internal affairs of corporation in whose behalf it is brought); Samuelson v. Starr, 28 Misc. 2d 479, 480, 213 N.Y.S.2d 889, 891 (Sup. Ct. Queens County 1961) (jurisdiction retained in suits for breach of fiduciary duty resulting in waste of corporate assets); Note, *Substitute*, *supra* note 4, at 241-42. However, courts have relied upon the rule in refusing to exercise jurisdiction over actions by shareholders objecting to the reorganization of a corporation. *See* Langerfelder v. Universal Laboratories, Inc., 293 N.Y. 200, 204, 56 N.E.2d 550, 552-53 (1944); Note, *Substitute*, *supra* note 4, at 243-44. *Broida* is a derivative action concerning a corporate reorganization. *See supra* text accompanying notes 9 & 10.

[13] *Broida*, 103 App. Div. 2d at 89, 478 N.Y.S.2d at 334. Justice Titone stated that "it was an improvident exercise of discretion to decline jurisdiction." *Id.* Dow's contacts with New York included the location of its principle place of business, its books and records, the trading of its stock on the New York Stock Exchange, the holding of shareholders' and directors' meetings and Dow's previous use of the New York court system. *See id.* at 92, 478 N.Y.S.2d at 336. *But cf.* Bader & Bader v. Ford, 66 App. Div. 2d 642, 646, 414 N.Y.S.2d 132, 135-36 (1st Dep't 1979) (existence of stock traded on New York Stock Exchange and fact that corporation invoked jurisdiction of New York court in unrelated actions is irrelevant as to issue of forum non conveniens), *appeal dismissed*, 48 N.Y.2d 649, 421 N.Y.S.2d 199, 396 N.E.2d 481 (1979). Delaware's status as the state of incorporation was Dow's sole link to that state. *Broida*, 103 App. Div. 2d at 93, 478 N.Y.S.2d at 336.

[14] 103 App. Div. 2d at 92, 478 N.Y.S.2d at 336. Pseudo-foreign corporations are essentially local in nature but are incorporated in another state to avoid strict local laws. *See* Latty, *supra* note 4, at 143-45; *see also* Note, *Jurisdiction to Liquidate the Affairs of a Foreign Corporation on a Stockholder's Bill*, 44 HARV. L. REV. 437, 438 (1931) (pseudo-

ration did not establish New York as an inappropriate or inconvenient forum, the plaintiff's choice of a New York court should be upheld.[15]

While a rigid application of the internal affairs doctrine can produce unjust results, it is suggested that the policies behind the rule are still relevant and should play a significant role in the determination of the forum non conveniens issue.

The Court of Appeals, in *Silver v. Great American Insurance Co.*,[16] limited the consideration of a party's residence to only one factor in determining whether New York was a convenient forum.[17] It is suggested that strict application of the internal affairs doctrine is inconsistent with the Court of Appeals' decision to require the consideration of multiple factors in forum non conveniens cases. It is submitted that *Broida* will promote policies of justice similar to those espoused in *Silver* by relegating the internal affairs rule to a non-dispositive factor, and forcing courts to consider many factors in approaching questions of jurisdiction over the affairs of a foreign corporation.

It is submitted, however, that the *Broida* decision was deficient because the court failed to incorporate many of the important policies behind the internal affairs rule. It is urged that, in relegating the rule to a non-dispositive factor, courts should not

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foreign corporations are also known as "tramp" corporations and are typically incorporated in Delaware or Arizona).

[15] *Broida*, 103 App. Div. 2d at 92, 478 N.Y.S.2d at 336. On a motion to dismiss on grounds of forum non conveniens, the moving party has the burden of proving that the forum is an inconvenient one and that another jurisdiction would be more appropriate. *See* Roman v. Sunshine Ranchettes, Inc., 98 App. Div. 2d 744, 744, 469 N.Y.S.2d 449, 450 (2d Dep't 1983); Laurenzano v. Goldman, 96 App. Div. 2d 852, 853, 465 N.Y.S.2d 779, 780-81 (2d Dep't 1983); Bader & Bader v. Ford, 66 App. Div. 2d 642, 645, 414 N.Y.S.2d 132, 134 (1st Dep't 1979).

In addition to noting Dow's failure to establish New York as an inconvenient forum, the *Broida* court acknowledged Dow's previous assertion that New York was an appropriate forum in another case, and stated that "[i]t ill behooves Dow to now urge the contrary." 103 App. Div. 2d at 93, 478 N.Y.S.2d at 336.

[16] 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

[17] *Id.* at 361-63, 278 N.E.2d at 622-23, 328 N.Y.S.2d at 402-04; *see* 1 WK&M ¶ 327.01. In *Silver*, the Court held that it was time for the courts to relax the inflexible forum non conveniens rule, since "[t]he great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation." *Silver*, 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402-03; *see* Martin v. Mieth, 35 N.Y.2d 414, 417-18, 321 N.E.2d 777, 779-80, 362 N.Y.S.2d 853, 856-57 (1974) (dismissal on forum non conveniens grounds notwithstanding cause of action arising in New York); *supra* note 5 (discussion of *Silver* case).

lose sight of such important considerations as: the court's ability to enforce a judgement;[18] the potential for confusion in interpreting the laws of the state of incorporation;[19] and the possibility that the state of incorporation could better adjudicate the issue.[20] By addressing these concerns, the courts will preserve the value of the internal affairs rule as an element in forum non conveniens determinations.[21]

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CPLR 6501: Notice of pendency improper in action involving contract for the sale of stock representing the beneficial ownership of real property

Section 6501 of the CPLR permits a plaintiff to file a notice of pendency in any action if the title, possession, use or enjoyment of real property may be affected by the judgment demanded.[1] The filing of a notice of pendency[2] gives constructive notice of the liti-

[18] *See* Sternfeld v. Toxaway Tanning Co., 290 N.Y. 294, 297, 49 N.E.2d 145, 145 (1943); 17 W. FLETCHER, *supra* note 4, at § 8426; Note, *The Development of the "Internal Affairs" Rule in the Federal Courts and its Future Under Erie v. Tompkins*, 46 COLUM. L. REV. 413, 415-16 (1946).

[19] *See* Adolph Meyer, Inc. v. Florists' Tel. Delivery Ass'n, 36 Misc. 2d 566, 567-68, 232 N.Y.S.2d 913, 915 (Sup. Ct. Queens County 1962).

[20] *See* Langfelder v. Universal Laboratories, Inc., 293 N.Y. 200, 204, 56 N.E.2d 550, 552 (1944).

[21] *See generally* Reese & Kaufmann, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1124-28 (1958); Latty, *supra* note 4, at 143-62; Note, *Substitute*, *supra* note 4, at 249-50.

[1] *See* CPLR 6501 (1980). Section 6501 of the CPLR provides in pertinent part:

> A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.

Id.; *see, e.g.*, Braunston v. Anchorage Woods, Inc., 10 N.Y.2d 302, 304-05, 178 N.E.2d 717, 718, 222 N.Y.S.2d 316, 317-18 (1961) (notice of pendency inapplicable when suit concerns encroachment); Sourian v. Saleh, 50 App. Div. 2d 756, 756, 376 N.Y.S.2d 166, 167 (1st Dep't 1975) (action to prevent landowner from committing wrong on plaintiff not proper subject of notice of pendency); General Property Corp. v. Diamond, 29 App. Div. 2d 173, 175, 286 N.Y.S.2d 553, 554 (1st Dep't 1968) (filing proper when judgment would affect possession).

[2] A notice of pendency is sometimes called a lis pendens. 7A WK&M ¶ 6501.04, at 65-9