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

Joseph J. Pash Jr.
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-


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).


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).

of the forum non conveniens doctrine, 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. Recently, in *Broida v. Bancroft*, 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.

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. Several New York shareholders instituted a derivative action seeking a permanent injunction to prevent this reorganization. Relying solely on the internal affairs

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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 f 327.01, at 3-469.


7 Id. at 91, 478 N.Y.S.2d at 335-36.

8 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.\(^1\)

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.\(^2\) 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.\(^3\) 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.\(^4\) Moreover, the court noted that since the defendant corpo-

1. Id. at 90, 478 N.Y.S.2d at 334.
2. 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. Auman, 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 243-44. 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.


4. 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]f it behooves Dow to now urge the contrary." 103 App. Div. 2d at 93, 478 N.Y.S.2d at 336.

\(^{16}\) *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).

\(^{17}\) *Silver*, 29 N.Y.2d at 361, 278 N.E.2d at 619, 328 N.Y.S.2d 398 (1972).

In *Silver*, the Court held that it was the 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 judgment;\textsuperscript{18} the potential for confusion in interpreting the laws of the state of incorporation;\textsuperscript{19} and the possibility that the state of incorporation could better adjudicate the issue.\textsuperscript{20} By addressing these concerns, the courts will preserve the value of the internal affairs rule as an element in forum non conveniens determinations.\textsuperscript{21}

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\textbf{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.\textsuperscript{1} The filing of a notice of pendency\textsuperscript{2} gives constructive notice of the liti-


\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{2} A notice of pendency is sometimes called a \textit{lis pendens}. 7A WK&M ¶ 6501.04, at 65-9