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Expert Analysis

Conditioning Forum Non Conveniens Dismissals: The Limitations of Judicial Discretion

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The doctrine of forum non conveniens (FNC) permits a federal district court to dismiss an action on the ground that another court, even one in a foreign jurisdiction, "is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Int'l Co. v. Malaysia Int'l Shipping*, 549 U.S. 422, 425 (2007). Among other factors relevant to the FNC analysis, courts must consider the adequacy of an alternate forum to hear the plaintiff's claims. See, e.g., *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003); *Bank of Credit & Com. Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001). Other considerations include the degree of deference due to the plaintiff's forum choice and whether the dismissal is just upon balancing private and public interest factors. See *Iragorri v. United Techs.*, 274 F.3d 65, 72 (2d Cir. 2001); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981). Imposing conditions on an FNC dismissal can, in some cases, permit dismissal even if a court is unsure that an alternate forum is adequate, although "[c]onditions cannot transform an inadequate forum into an adequate one." Id. at 247-48; see also *Norex Petroleum Ltd. v. Access Indus.*, 416 F.3d 146, 159-60 (2d Cir. 2005). A recent decision from the Third Circuit limiting the extent to which district courts may condition FNC dismissals raises the question of whether the Second Circuit would impose similar limits.

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How Far Can a District Court Go in Fashioning Conditions?

Many motions to dismiss on FNC grounds are granted conditionally. See Thomas Orin Main, *Toward a Law of "Lovely Parting Gifts": Conditioning Forum Non Conveniens Dismissals*, 18 Sw. J. Int'l L. 475, 480–85 (2012) (collecting the subjects of conditions). Imposing conditions can ensure the case will be heard on the merits in the alternate forum. See *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 984 (2d Cir. 1993) ("forum non conveniens dismissals are often appropriately conditioned to

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protect the party opposing dismissal"). In a seminal case, the U.S. Supreme Court explained that flexibility must be afforded to a court in fashioning its FNC dismissal. *Piper Aircraft Co.*, 454 U.S. at 249-50 ("[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable"). The court suggested a district court may condition dismissal upon a defendant's agreeing to provide all relevant records. Id. at 257 n. 25 (noting "in the future, where similar problems are presented, district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims"). Other common conditions include the defendants' agreements to waive any statute-of-limitations defenses, accept service or consent to payment of judgment. See *Owens v. Turkiye Halk Bankasi A.S.*, No. 20CV02648 (DLC), 2021 WL 638975 (S.D.N.Y. Feb. 16, 2021), appeal docketed, No. 21-610 (2d Cir. March 17, 2021); *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 968 (2d Cir. 1980); *Farmanfarmaian v. Gulf Oil*, 588 F.2d 880, 881 (2d Cir. 1978). If plaintiffs refuse to agree to the conditions imposed, a district court may remove the conditions and dismiss the case outright. Order, *Aenergy, S.A. v. Republic of Angola*, No. 20-cv-03569 (S.D.N.Y. June 19, 2021), ECF No. 136. And a reviewing court can add conditions even if the district court did not. See *USHA (India), Ltd. v. Honeywell Int'l*, 421 F.3d 129 (2d Cir. 2005) (modifying dismissal to provide that plaintiffs could seek reinstatement of litigation and making dismissal contingent on the defendants' waivers of statute-of-limitations defenses).

The recent case of *Behrens v. Arconic*, No. 20-3606, 2022 WL 2593520 (3d Cir. July 8, 2022), provides an example of how a district court may overreach when imposing conditions on an FNC dismissal. In the aftermath of a 2017 fire that engulfed Grenfell Tower, a London high-rise apartment, several estates and survivors brought a products liability action in the United States seeking to recover from three corporate defendants: Arconic, Arconic Architectural Products and Whirlpool. The District Court held that plaintiffs' claims should proceed in the United Kingdom and conditionally dismissed the action on FNC grounds. Under Condition 2(h), plaintiffs could reinstate the case domestically for further proceedings on damages if the foreign court concluded that U.S. law governed the damages issue. Such a ruling could permit jury-awarded punitive damages against the U.S.-based defendants, which would not be available under English law. The Third Circuit affirmed the FNC dismissal but struck Condition 2(h) for abuse of discretion. It concluded that such a condition would effectively bifurcate litigation into damages and liability phases between two different courts. That procedure would inconvenience the parties and thwart the purposes of the FNC doctrine. The Third Circuit explained it would not endorse a condition that imposes inconvenience and costs that outweigh any potential benefit (of an American jury) to the parties. It noted, however, that there exists "precious little authority" on what constitutes an abuse of a court's discretion in the context of conditioning an FNC dismissal. *Behrens*, 2022 WL 2593520, at *4.

How Does the Second Circuit View Conditional FNC Dismissals?

The *Behrens* case raises the broader question of how far courts can go in fashioning conditions to a dismissal based on FNC, and for New York practitioners, the specific question of whether the Second Circuit would agree with the Third Circuit's approach in *Behrens*. District courts in the Second Circuit are unlikely to impose conditions that would: (1) encourage judge or forum shopping, *Ruth v. Purdue Pharma Co.*, 225 F.R.D. 434 (S.D.N.Y. 2004) (declining to impose the condition that action could be refiled only in a federal court); (2) intrude on policy judgments of the alternate forum, *Gross v. Brit. Broad.*, 386 F.3d 224, 235 (2d

Cir. 2004) (urging district courts "not to impose conditions on parties that may be viewed as having the effect of undermining the considered policies of the transferee forum"); or (3) alter substantive rights, *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (KMW)(HBP), 1999 U.S. Dist. LEXIS 22352 (S.D.N.Y. Jan. 20, 1999) (refusing to condition a dismissal upon defendants' waiving certain defenses in English law). The Second Circuit has also excised conditions that it deemed unnecessary or unfair. See, e.g., *In re Union Carbide Gas Plant Disaster at Bhopal, India in Dec. 1984*, 809 F.2d 195, 204-05 (2d Cir. 1987) (rejecting conditions that defendants consent to enforceability of the foreign judgment and to broad discovery in foreign court without a parallel condition on the plaintiff).

Yet courts in the Second Circuit have imposed somewhat extensive conditions. In one case, the district court granted FNC dismissal on the condition that the defendant not contest liability (although the defendant was willing to agree to that condition). *Chhawchharia v. Boeing Co.*, 657 F. Supp. 1157, 1160, n. 1, 1163 (S.D.N.Y. 1987) (dismissing case on the condition that defendant "not to contest liability if an Indian court rejects its defense of release"). In admiralty practice, courts have imposed conditions to protect the plaintiff's right to remedy. See *The Ivaran*, 121 F.2d 445 (2d Cir. 1941) (dismissing "without prejudice to renewal of the suit in the event that the remedy available to the seaman by presentation of his claim to the Norwegian Consulate in New York should prove to be non-existent"); see also Alexander M. Bickel, *The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 Cornell L. Rev. 12, n. 69 (1949) (discussing admiralty cases granting conditioned FNC dismissals in suits by seamen for recovery for personal injuries).

Some other circuit courts have crafted bright line rules. The Fifth Circuit has held that "the failure to include a return jurisdiction clause in an FNC dismissal constitutes a per se abuse of discretion." *Robinson v. TCI/US West Communications*, 117 F.3d 900, 907 (5th Cir. 1997). However, there is little consensus on the issue. The Ninth Circuit has expressly declined to follow *Robinson*. *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) ("*Robinson*'s bright line test […] contradicts the Supreme Court's observation [that FNC determinations need flexibility.]"). The Second Circuit has not yet weighed in.

Conclusion

As discussed above, courts can dismiss a case only when an adequate alternate forum is available. Conditions on an FNC dismissal may be imposed to safeguard certain procedural rights. The question of what conditions must be imposed rests on what rights are indispensable. And the question of what conditions must not be imposed involves a rather complicated question of judicial power. *Behrens* teaches that conditions are susceptible to challenge when they bifurcate litigation to safeguard a right that is untethered to the availability or convenience of the forum. *Behrens* restrains courts' powers to creatively fashion conditions. Whether the Second Circuit would follow suit remains an open question.