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What a Difference a Case Makes: *Forum Non Conveniens* Decisions in Russian Matters Before and After Iragorri

by David E. Miller

Under the common law doctrine of *forum non conveniens*, a federal court with jurisdiction over a case may refrain from hearing it if another, significantly more appropriate forum exists. Since the collapse of the Soviet Union in late 1991, district courts of the Second Circuit have considered motions to dismiss on *forum non conveniens* grounds in eight cases involving Russian parties. The court held for plaintiff in the first three matters, but dismissed the following five cases. One reason for this shift in outcomes is a new step in the relevant analysis, which was added by the Second Circuit in 2001 in *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001).

The *Forum Non Conveniens* Standard

Prior to *Iragorri*, courts in the Second Circuit were required to consider two issues when considering motions to dismiss on *forum non conveniens* grounds: (1) the availability of an alternate forum[1] and, (2) if another forum were available, the balance of private and public interests (Gilbert factors), as weighed against the plaintiff's choice of forum.[2]

In Iragorri, the Second Circuit added a preliminary inquiry regarding the deference to be accorded plaintiff's choice of forum to this two-step analysis.[3] One important result of this change is that it has become easier for defendants to prevail on motions to dismiss based on *forum non conveniens* grounds.

Forum Non Conveniens *Decisions Before Iragorri*

Prior to Iragorri, the Southern District denied motions to dismiss in *Firma Melodiya v. ZYX Music*, 882 F.Supp. 1306 (S.D.N.Y. 1995), *Central Principal Dwelling Board of the Ministry of Defense of the Russian Federation v. New Hampshire Ins. Co.*, 904 F.Supp. 203 (S.D.N.Y. 1995), Parex Bank v. Russian Savings Bank, 116 F.Supp.2d 415 (S.D.N.Y. 2000), and *Pavlov v. Bank of New York Co., Inc.*, 135 F.Supp.2d 426 (S.D.N.Y. 2001), vacated on other grounds, 25 Fed.Appx. 70, 2002 WL 63576 (2d Cir. 2002).

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The results of these four decisions are summarized in Table 1.

There is no apparent pattern in these results, save for the fact that plaintiff prevailed on three of the four motions to dismiss. As demonstrated below, however, the Iragorri decision appears to have tilted the analysis in defendants' favor, at least when it appears that plaintiffs' forum choice is motivated by tactical considerations.

After Iragorri

After *Iragorri*, the Southern District granted motions to dismiss on *forum non conveniens* grounds in *Varnelo v. Eastwind Transport, Ltd.*, 2003 WL 230741 (S.D.N.Y. 2003), *Base Metal Trading S.A. v. Russian Aluminum*, 253 F.Supp.2d 681 (S.D.N.Y. 2003), aff'd, 98 Fed.Appx. 47, 2004 WL 928165 (2d Cir. 2004), *Tarasevich v. Eastwind Transport Ltd.*, 2003 WL 21692759 (S.D.N.Y. 2003), and *Norex Petroleum Ltd. v. Access Industries, Inc.*, 304 F.Supp.2d 570 (S.D.N.Y. 2004).

In *Varnelo*, the widow of a Russian sailor brought suit against the owners and operators of a ship for negligently causing her late husband's death while the ship was in Chinese waters.

The court noted that "plaintiff has pointedly conceded that her recovery in Russia would be, at best, a small fraction of her recovery in this forum . . . One could hardly hope for a more forthright admission of forum shopping."

Applying *Iragorri*, the court noted that "plaintiff has pointedly conceded that her recovery in Russia would be, at best, a small fraction of her recovery in this forum….*One could hardly hope for a more forthright admission of forum shopping*."[4] The court concluded that plaintiff's choice of forum deserved little deference.

Varnelo asserted that Russia was an inadequate alternate forum because (1) Russian courts would not assert jurisdiction over defendants, even with defendants' consent, and, (2) even assuming such jurisdiction, any recovery in Russia would be inadequate. With regard to the first of these assertions, the court noted that defendants had consented to jurisdiction in writing and found that, while both parties' submissions on the issue were largely unintelligible, the court could and did condition dismissal on such consent, the Russian court's acceptance of the case, and defendants' agreement to stay any U.S. statute of limitations pending the outcome of a Russian lawsuit. As for the second assertion, the court held that "[u]nder well-settled case law, lower recovery in Russia would not render that forum inadequate….[t]he remedy in Russia is not so inadequate that it is no remedy at all."[5]

Having determined that Russia was an adequate alternative forum, the court turned its attention to the Gilbert factors and found that both private and public interests strongly favored trial in Russia. Having

completed its analysis, the court dismissed on *forum non conveniens* grounds.

In *Base Metal*, plaintiffs sued defendants for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., intentional interference with contract, and conversion in connection with the allegedly illegal takeovers of Russia's leading producers of aluminum and vanadium. None of the original plaintiffs were United States citizens or residents. However, after the defendants had filed motions to dismiss on several grounds, including *forum non conveniens*, the original plaintiffs amended the complaint to include seven new plaintiffs, including three United States corporations, and their new claims, which were wholly unconnected to the original plaintiffs' prior claims. As a result, the

At least in the Second Circuit, any indication of forum-shopping is almost certain to result in a dismissal.

court found that "[l]ittle deference should be given to the plaintiff's' choice of forum in this case. As this litigation was originally brought, not one plaintiff was a citizen or resident of the United States."[6] The court further noted that there was "scant information in the record about the American plaintiffs' ties to the United States….The submission is telling for how little information it provides about the American plaintiffs."[7] Citing *Iragorri*, the court concluded that "[t]his type of *forum shopping* is the antithesis of the bona fide connection to the plaintiffs' chosen forum that would cause the Court to defer to the plaintiffs' desires."[8]

The court then went on to determine that Russia was an available alternative forum, given that all 20 defendants had explicitly consented to

Table 1: Pre-Iragorri

Name of Case	Russian Party's Position	Was there an adequate alternative forum?	Were the public interest factors decisive?	Were the private interest factors decisive?	Was the motion successful?
Firma Melodiya	Plaintiff	No	[Discussed, but irrelevant]	[Discussed, but irrelevant]	No
Cent. Principal Dwelling Bd.	Plaintiff	Yes—Finland	Yes—for plaintiff	Yes—for plaintiff	No
Parex Bank	Defendant	No	[Not discussed]	[Not discussed]	No
Pavlov	Plaintiff	Yes—Russia	Yes—for defendant	Yes—for defendant	Yes

jurisdiction, and that Russia would provide adequate judicial remedies, notwithstanding the alleged corruption of Russian courts.

With regard to the Gilbert factors, the court held that both the public and private interest factors favored the Russian forum. Based on its three-step analysis, the court dismissed on *forum non conveniens* grounds; the Second Circuit subsequently affirmed this decision.

In *Tarasevich*, a Russian sailor sued the owner, the manager and the management service of a ship for injuries he had incurred as the result of a boiler explosion. Applying the *Iragorri* test, the court held that "[i]n this

"[U]nder well-settled case law, lower recovery in Russia would not render that forum inadequate."

case, there are few reasons for choosing New York, *aside from the possibility of a more favorable outcome*….deference to [p]laintiff's choice of forum falls on the lesser end of the sliding scale."[9]

The court then reviewed both sides' expert witnesses' affidavits, and concluded that Russia provided an adequate alternative forum.

Finally, the court reviewed the Gilbert factors. Having found that neither the public nor the private interest factors favored suit in the United States, the court stressed the fact that "….the very fact that there are not practical reasons for trying the case here indicates that *[p]laintiff's choice of this forum is primarily motivated by forum-shopping reasons* and not for convenience of the plaintiff."[10] Again, the court dismissed the case on *forum non conveniens* grounds.

In *Norex*, the plaintiff, a company organized under the laws of Cyprus, having a representative office in Canada, and owned by a company organized under the laws of California, alleged multiple violations of RICO by numerous defendants, which included certain United States citizens or those who conducted business in the United States, as part of a massive racketeering and money laundering scheme to take over a significant portion of Russia's petroleum industry.

The court began its analysis by considering the level of deference it should give to plaintiffs' choice of forum as required by *Iragorri*. In particular, the court, having focused its inquiry on the "nexus between the plaintiff and the chosen forum," concluded that "plaintiff's choice [of law was] entitled to less than substantial deference…."[11]

With respect to the availability of an adequate alternative forum, the court began by noting that defendants had expressed their willingness to consent to the jurisdiction of the Russian courts. The court then went on to discuss the parties' expert witnesses' opinions on the adequacy of the Russian courts, and, particularly, the availability of an appropriate cause of action under Russian law. In its analysis, the court stressed the fact that in an earlier, related Russian case, "*Norex*…declined to participate in those proceedings even to contest the court's jurisdiction, and allowed the time periods for normal ap-

peals and collateral attack to lapse before filing the instant case in this District….[12] The court noted that *Norex's* decision to forego making such a collateral attack "appears to be the product of [p]laintiff's strategic choice to allow the time to lapse" so that it could bring that attack before the Southern District.[13] Having discussed and rejected two other arguments raised by plaintiff (the adequacy of court procedures and corruption), the court held that defendants had carried their burden of showing the existence of an adequate alternative forum.

The court then turned to the Gilbert factors, and found that both the public and private interests weighed significantly in favor of the Russian forum. Having completed its three-step analysis, the court granted defendants' motion to dismiss on *forum non conveniens* grounds.

The four post-*Iragorri* cases are summarized in Table 2.

Conclusion

In 1994, the Supreme Court noted that "the discretionary nature of the [*forum non conveniens*] doctrine, combined with the multifariousness of the factors relevant to its application...make uniformity and predictability almost impossible."[14] In *Iragorri*, the Second Circuit added a preliminary inquiry regarding the degree of deference to be given the plaintiff's choice of forum to the procedure used in considering motions to dismiss on *forum non conveniens* grounds. While some commentators have suggested that this decision made application of the doctrine even less uniform and predictable,[15] it appears, in fact, to have had the opposite result; as the plaintiffs in *Varnelo, Base Metal, Tarasevich* and *Norex Petroleum* now know, any indication of forum-shopping is almost certain to result in a dismissal.

Table 2: Post-Iragorri

Name of Case	Russian Party's Position	Was plaintiff's choice of forum worthy of deference?	Was there an adequate alternative forum?	Were the public interest factors decisive?	Were the private interest factors decisive?	Was the motion successful?
Varnelo	Plaintiff	No—forum shopping	Yes	Yes	Yes	Yes
Base Metal	Defendant	No—forum shopping	Yes	Yes	Yes	Yes
Tarasevich	Plaintiff	No—forum shopping	Yes	Somewhat—limited discussion	Somewhat—limited discussion	Yes
Norex	Plaintiff	Somewhat	Yes, but plaintiffs chose to wait until certain time limits expired so that they could proceed in the Southern District, i.e., forum-shopped	Yes	Yes	Yes

[1]With regard to the first step, an alternate forum was generally considered adequate if the defendant were subject to process there and the forum permitted a satisfactory remedy. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), reh'g denied, 454 U.S. 928, 102 S.Ct. 1296 (1982).
[2]*Firma Melodiya v. ZYX Music*, 882 F.Supp. 1306, 1317 (S.D.N.Y. 1995), citing *Gulf Oil v. Gilbert*, 330 U.S. 501, 506-07, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), reh'g denied, 454 U.S. 928, 102 S.Ct. 1296 (1982).
[3]*Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001).
[4]*Varnelo v. Eastwind Transport, Ltd.*, 2003 WL 230741, *9 (S.D.N.Y. 2003) (emphasis added).
[5]Id. at *17-18.
[6]*Base Metal Trading S.A. v. Russian Aluminum*, 253 F.Supp.2d 681, 694 (S.D.N.Y. 2003).
[7]Id. at 695.
[8]Id. at 697 (emphasis added).
[9]*Tarasevich v. Eastwind Transport Ltd.*, 2003 WL 21692759, *2 (S.D.N.Y. 2003) (emphasis added).
[10]Id. at *3 (emphasis added).
[11]*Norex Petroleum Ltd. v. Access Industries, Inc.*, 304 F.Supp.2d 570, 576 (S.D.N.Y. 2004), citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 70-72 (2d Cir. 2001).
[12]*Norex*, 304 F.Supp.2d at 578.
[13]Id.
[14]*Am. Dredging Co. v. Miller*, 510 U.S. 443, 455, 114 S.Ct. 981 (1994). Some commentators have gone much further in their critique. See, e.g., Martin Davies, Time to Change the Federal *Forum Non Conveniens* Analysis, 77 Tul. L. Rev. 309, 312 (December, 2002) ("The factors are anachronistic; the test is imprecise and incoherent.").
[15]C. Ryan Reetz and J. Martinez-Fraga, *Forum Non Conveniens* and the Foreign Forum: A Defense Perspective, 35 U. Miami Inter-Am. L. Rev. 1, 2 (Winter-Fall 2003-2004) (alleging that"[i]n applying the doctrine [of *forum non conveniens*], the courts are asked to make subjective determinations of how much, if any, 'deference' to give to a plaintiff's choice of forum, and to engage in 'balancing' an only partially-articulated array of so-called 'public and private interest factors.'"). ❑

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