Preemptive Jurisdiction Trumps Forum Non Conveniens in Panama

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

On March 17, 2009, the First Superior Court of the First Judicial District of Panama affirmed a ruling for lack of jurisdiction in *Sara Grant Tobal et al v. Multidata Systems International Corp. et al.*, a lawsuit filed in Panama pursuant to a forum non conveniens (FNC) dismissal order issued by a U.S. court, in Saint Louis, Missouri. Multidata had manufactured and sold X-ray machinery used in a Panamanian hospital. Patients who used this machine were overexposed to radiation and died painfully. A lawsuit was initially filed by relatives of the victims in Missouri, USA, where defendants were domiciled. Defendants raised FNC. In 2003 the case was refiled in Panama, from where it was dismissed for lack of jurisdiction all the way to the Panamanian Supreme Court.

A motion for reinstatement was then filed in August 2005, before the original US court. Defendants argued that the Panamanian case had been manipulated by plaintiffs to secure a dismissal. Defendants argued that the suit was filed in the wrong venue in Panama. American court accepted defendants' arguments and in March 2006 it dismissed the case again, on FNC grounds.

For the second time plaintiffs re-filed in Panama. The Panamanian District Court dismissed for lack of jurisdiction and the Appellate Court, as stated, affirmed the ruling. Defendants classified the case as one about *lis pendens*, raising Art. 232 of the Judicial Code: "*National jurisdiction is not excluded by the pendency of the case, or of a connected case, before a foreign judge.*" Plaintiffs relied on preemptive jurisdiction, contemplated in Art. 238 of the same code, which states: "*Preemptive jurisdiction happens when there are two or more courts with jurisdiction over a case. The first court to hear the matter preempts and precludes the jurisdiction of the other courts.*"

Defendants argued that preemptive jurisdiction only applies to domestic cases. Plaintiffs' position was that preemptive jurisdiction applies internationally as well. The Appellate Court affirmed the District Court's decision finding that preemptive

jurisdiction dissolves Panamanian jurisdiction when the lawsuit is filed first in another country that has jurisdiction according to its own legal system.

This case is interesting because it decides an issue that usually arises in Latin American – US FNC disputes. Sometimes the party raising FNC alleges that preemptive jurisdiction is a misconstruction or a ploy by plaintiffs in order to block Latin American jurisdiction. Actually preemptive jurisdiction has an impeccable pedigree in Roman law where it was known as *perpetuatio iurisdictionis* or *forum praeventionis*, making its way to Latin American jurisdictions through French, Spanish and Italian law (Conf. Chiovenda, Instituciones de Derecho Procesal, Argentina, 2005, p. 46).

In 2006 Panama enacted a statute on international litigation that rejects FNC: "*Lawsuits filed in the country as a consequence of a forum non convenience judgment from a foreign court, do not generate national jurisdiction. Accordingly they must be rejected sua sponte for lack of jurisdiction because of constitutional reasons or due to the rules of preemptive jurisdiction*." (Section 1421). An English copy can be seen here. The decision under analysis did not deem it necessary to reach this source, relying on the traditional rule of preemptive jurisdiction. The clear lesson from this case is that in Panama preemptive jurisdiction denies an alternative forum in a FNC situation. The same is true of Mexico, Costa Rica, Venezuela and other Latina American countries where the issue the issue of FNC has been considered.

The text of the case was facilitated by the Panamanian attorney Ramón Ricardo Arosemena Quintero, Counsel for plaintiffs.