

Panamanian Conflict Rules Trump Forum Non Conveniens

I am grateful to Brian A. Ratner, a partner at Hausfeld LLP, for contributing this report.

Panamanian Supreme Court of Justice.

August 3, 2010.

MSD, Inc. Petitioner of the Cassation Challenge in the Case of Sara Grant Tobal, Josefina Escalante Romero et al. v. Multidata Systems International Corp. et al.

This Panama Supreme Court decision relates to U. S. defendant corporations that manufactured X-ray machinery used at the Hospital Oncológico of Panama. Because of technical defects attributed to the manufacturers, these machines emitted excessive radiation which caused serious radioactive burns to a number of patients undergoing treatment in that hospital.

Plaintiffs, all Panamanian citizens, filed a lawsuit for damages in St. Louis, Missouri, USA, where some of the defendants were domiciled. On January 8, 2004, the U.S. court dismissed the case on forum non conveniens grounds, accepting defendants' premise that Panama was an available, and therefore, alternative forum.

Plaintiffs complied with the U.S. court order and re-filed their case in Panama. On June 9, 2006, the Panamanian District Court dismissed the case due to lack of jurisdiction and competence ("falta de competencia y jurisdicción").

Defendants appealed this ruling. On March 17, 2009, the Panamanian Appellate Court affirmed the lower court's decision. On August 3, 2010, the Supreme Court affirmed the Appellate Court's decision, dismissed the Defendants' cassation challenge and determined the amount of costs to be 200 Balboas.

Defendants had challenged the Panamanian District Court ruling on the grounds that it "had abstained from exercising its jurisdiction". In particular, defendants argued that the following principles of Panamanian law had been breached:

1. The injury had taken place in Panama.
2. Pendency in a foreign court is an extraneous event, which should not be taken into account in determining the existence of Panamanian jurisdiction.
3. The ancient rule of “locus regit processum” was disregarded.
4. Pendency before a foreign court does not exclude Panamanian jurisdiction.
5. The principle of right of protection by the courts (“tutela judicial efectiva”) was ignored.
6. Panamanian sovereignty was violated by holding that pendency of a lawsuit abroad blocks national jurisdiction.

The above arguments were supported by the Defendants (“Movants”) with articles 259, 231, 232, 238 and 464 of the Panamanian Code of Civil Procedure (“Código Judicial”).

The record reveals that the District Court as well as the Appellate Court in Panama held that since the case had been previously filed in the U.S.; Panamanian jurisdiction had been dissolved due to preemptive jurisdiction (“competencia preventiva”).

The Supreme Court in Panama agreed with the lower court rulings finding that filing an action abroad, where defendants are domiciled means that “*the present case has sufficient foreign elements, rendering possible a conflict of international jurisdiction.*” This is because, the Supreme Court reasoned, plaintiffs are Panamanian, the facts originating the case happened in Panama, but the defendants are American corporations.

These international elements, known in international jargon as connecting factors (puntos de conexión) lead this Division to analyze the cassation challenge, under the special rules of Private International Law.

The record shows that the Panamanian courts took cognizance of the fact that the case was filed first in the U.S.; and was subsequently dismissed on forum non conveniens grounds.

Movants alleged strongly that Art. 259 of the Code of Civil Procedure grants Panamanian jurisdiction when the injury takes place in Panama:

However, as we have stated previously, the instant case should be viewed under the special rules of Private International Law, so this controversy must be solved according to the special conflict rules.

In that sense, our Code of Civil Procedure includes special rules for the resolution of international disputes in the area of Private International Law, which are directly applicable to this case, such as article 1421-J of the Code of Civil Procedure, the effectiveness of which was reinstated by Law 38 of 2008. Such rule, against what Petitioners plead, establishes the lack of jurisdiction of national courts to hear the present case, stating as follows:

*Art. 1421-J. In cases referred to in this chapter, national judges **lack jurisdiction if the claim or the action filed in the country has been previously rejected or dismissed by a foreign judge applying forum non conveniens**. In these cases, national judges must reject hearing the lawsuit or the action due to reasons of a constitutional or preventive jurisdiction nature. (Emphasis added by this Court).*

Therefore, although plaintiffs previously filed in Missouri, USA, where the case was ultimately dismissed on forum non conveniens grounds, the transcribed rule bars future jurisdiction in Panama under the doctrine of preemptive jurisdiction.

This case is noteworthy because it so purposefully imposes a conflict-of-laws standard to an international case. Due to Panama's unique conflict of law doctrine- i.e. "preemptive jurisdiction", the forum non conveniens standard in the U.S., which encourages cases to be heard in otherwise able jurisdictions, ultimately bars Panamanian plaintiffs from bringing claims it otherwise could have brought had no forum non conveniens ruling been made.

It seems that the article of forum non conveniens under Panamanian law was briefly repealed, but that it later was restored by Law 38, of June 30, 2008. An English version of the text is available [here](#).

Note. *The Panamanian statute on procedural conflict-of-laws, on which the previous decision is based, was enacted as Law 32, of 2006. This law adopted the Latin American Model Act for International Litigation. The USA / Spanish / Argentine attorney Henry Saint Dahl drafted both the Model Law and the*

Panamanian statute. These two texts cover issues such as service abroad, evidence, damages, and statute of limitations.