

JURISDICTIONAL EQUILIBRATION AS A MEANS TO RESOLVE JURISDICTIONAL CONFLICT

Stephen B. Burbank
University of Pennsylvania

The desire both to offer some reflections on “jurisdictional conflict” stimulated by Professor Posch’s paper and to fulfill Professor Silberman’s promise suggests that I might best consider the current role and future prospects of the Latin twins, *forum non conveniens* and *lis pendens*, as jurisdictional equilibration devices in litigation to resolve international business disputes.

Professor [Mr.?] Posch’s interesting paper lays firmly at the door of disagreements about appropriate rules of adjudicatory jurisdiction the difficulties that delegates to the Hague Conference have experienced in crafting a global convention on jurisdiction and judgments. In his view, certain grounds of jurisdiction accepted in the United States but regarded as exorbitant under the Brussels Convention and its replacement regulation, combined with the American Rule on cost (including attorney fee) shifting, the availability of contingency fee representation, and the right to jury trial in civil cases, prompt overreaching by entrepreneurial American plaintiff’s lawyers and risk aversion in foreign defendants. The latter are therefore often led either to settle rather than to litigate once a lawsuit has been commenced in the United States, or to anticipate and try to avoid that dilemma through a forum selection (including an arbitration) clause.

According to this account, the dissonance in jurisdictional conceptions that prevents agreement at the Hague overwhelms other differences in the rules and practice applicable in the United States and EU countries that Professor Posch discusses, including differences regarding forum selection clauses and the recognition and enforcement of foreign judgments.

I agree with much of what Professor Posch says in his paper, and I deem particularly important his conclusion that sociological differences are probably more important than legal differences to an understanding of the “jurisdictional conflict” he describes. For present purposes, it may be useful to highlight one such difference that has obvious and consequential legal impact.

In many developed countries in the western world the State directly affords, or provides administrative or other mechanisms that afford, assistance to those who have been injured to a far greater degree than in the United States, where as a result litigation picks up the slack. The same is true of mechanisms to vindicate important regulatory interests. These differences reflect in turn fundamental differences in attitudes towards the proper role of the State and of private initiative in ordering social life, with predictable effects on general attitudes towards not only litigation but also the status quo and how, if at all, it should be altered.

From this perspective, however regrettable the contingency fee, the American Rule on cost-shifting, and the institution of the jury trial in civil cases may appear to a European, they are logical incidents of a system that distrusts government, that leans heavily on private litigation to

compensate for injury and to enforce important social norms, but that does not provide legal aid that is worthy of the name.¹ And from this perspective it is not only the self-interest of entrepreneurial American plaintiff's lawyers that prompts resistance to attempts to reduce the availability of litigation forums in the United States when an American alleges injury for which a foreign enterprise may be legally responsible and/or where the activities of that foreign enterprise are alleged to trigger an important American regulatory interest. Forced to pursue vindication thousands of miles from home, and without alternative (that is, non-litigation) means of vindication, our putative American plaintiff might lose not only favorable substantive law but that which experience suggests may be more important in many cases, to wit, the ability to secure representation and to develop evidence necessary to establish liability (discovery).

That said, it is probably equally important for this discussion to note that the current, plaintiff-friendly regime of jurisdictional rules in the United States is a relatively recent phenomenon. For much of our history jurisdictional law and the nature of the society whose needs it served constrained forum shopping. "[T]he greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping and, coupled with loose federal control of state choice of law, the incentives of both litigants and state courts to run a race to judgment, creating a [domestic] market for litigation" Moreover, just as, early on, United States courts in effect assimilated internationally foreign judgments to interstate judgments for purposes of recognition and enforcement,² so have they assimilated internationally foreign actors to domestic actors for purposes of applying jurisdictional rules. That has meant that, with the increase in global commerce following the Second World War, the market for litigation enabled in large part by the contemporaneous expansion of acceptable jurisdictional bases in the United States became a global market as well.

¹ Any doubt on that score as to the contingency fee should forever have been banished when our friends in England, who for more than a century derided contingency fee litigation as "litigation on spec," adopted its gentile cousin, the conditional fee, as a direct result of inability any longer adequately to fund legal aid.

² In seeking an explanation for the assimilation of internationally foreign judgments to interstate judgments for purposes of recognition and enforcement, I have noted that "the history of both interjurisdictional recognition and jurisdictional equilibration since the founding [of the United States] has been a history of accommodating the perceived needs of sovereignty under constitutional language long on aspiration but short on details," and I have suggested that it "was easier for such a country and its constituent states to treat other countries like other constituent states than it was or would be for countries without a history of and experience in accommodating internal sovereign claims."

The use of American jurisdictional law to draw the world into our courts has put in relief failures of imagination that are evident even in domestic cases. One such failure has been that of the Supreme Court to take a dynamic and comparative view of jurisdiction when adjusting federal constitutional limits on its exercise. Thus, for example, although the Court used the vehicle of *International Shoe* to abandon fictions that had previously bridged the gap between a perceived territorial imperative and the needs of an increasingly mobile society, it has never made clear whether there is a continuing need and hence a proper place in the new order for one of them, the fiction of corporate presence in a state through the conduct of systematic and continuous business activities.³ There is a strong argument to be made that, with the advent of the grounds of activity-based or specific jurisdiction that *International Shoe* made possible, and given the continued acceptance of domicile (including state of incorporation) as a basis of general jurisdiction, doing business jurisdiction should never be permitted in the case of a domestic defendant.

The same argument is harder to carry in a case involving a foreign defendant precisely because such a defendant has no domicile or seat in the United States. Yet, to say that such a defendant is subject to jurisdiction because, and only because, it is doing systematic and continuous business in this country implies that the claim does not arise out of that activity and hence that there is lacking the sort of connection between the underlying transaction and the forum that is so evidently the goal of continental jurisdictional rules and the result of grounds of specific jurisdiction in the United States. It is one thing to say that an individual or a corporation should not be heard to complain if sued in the place that is its legal home. It is quite another endlessly to proliferate such homes, in the process neglecting the fact that the original fiction was “presence” not “domicile.”

Until such time as the Court does approach the constitutional inquiry from a dynamic and comparative perspective, however, the best hope for moderation may be the application to this ground of general jurisdiction of a second order reasonableness analysis now firmly part of the constitutional evaluation of grounds of specific jurisdiction -- analysis that, its provenance suggests, is particularly apt in a case involving a foreign defendant. Certainly, such an analysis could quickly put an end to the worst excesses of doing business jurisdiction in transnational litigation, namely those occurring when the contacts of a domestic subsidiary (or related entity) are imputed to the foreign defendant through an alter ego or agency theory.

This discussion brings to light another failure of imagination in American jurisdictional law, or at least federal constitutional law, which unfortunately has largely displaced state law in fact and in American legal thinking about jurisdiction. That is the failure to recognize a possible need for different rules depending on the characteristics of the litigants. “Th[e] disposition to assimilate international to domestic interjurisdictional cases has been reinforced by the very

³ The *Perkins* decision casts little if any light because the foreign defendant in that case did essentially all of its limited business during and immediately after World War II in Ohio, and because there may not have been an alternative forum available to the plaintiff. The *Helicopteros* decision, although not repudiating this ground of general jurisdiction, found that it could not be exercised constitutionally on the facts of the case.

powerful impulse of modern American procedural law, including for these purposes, choice of law, to apply the same rules to all cases. American courts have pursued domestic doctrinal uniformity even when doing so resulted in international disuniformity, as in the interpretation of treaties.” Yet, as Professor Posch reminds us, one should not neglect the possibility that a sociological explanation may cast as much light on this phenomenon as does a legal explanation. Indeed, it would be surprising if the same foundational attitudes towards the proper roles of the State and of private initiative in social ordering were not operating in and on the rules of adjudicatory jurisdiction.

It was perhaps easier for continental jurisdictional jurisprudence, with its focus on the links between a transaction or legal relationship and the forum, to anticipate a need for, and to create, special rules for consumers and employees, than it was for its American constitutional counterpart, with its focus on the relationship between the defendant, the forum and the litigation.⁴ Yet, the logic behind that thought quickly confronts the utter failure of contemporary American jurisdictional law to protect those who are predictably disadvantaged in that corner of jurisdictional law where the likelihood of such disadvantage is plain for all to see, to wit, when a case involves a contractual choice of forum (including arbitration) clause.

The Supreme Court’s approach to choice of court clauses in *Carnival Cruise Lines* is redolent with a notion of freedom of contract that, however much one might like to confine it to the turn of the twentieth century, evidently reflects an enduring strain of American thought bound up with belief in individual freedom and responsibility and a fear of paternalistic government. The Court’s approach to the interpretation of the Federal Arbitration Act, in turn, deprives the states of the United States of the power to protect those thought to be vulnerable to overreaching unless they are willing to change their entire law of contracts in order to address particular problems arising out of contracts to arbitrate.

Ironies abound here, including the fact that American law regarding both choice of court clauses and arbitration clauses underwent fundamental change in response to the perceived requirements of international commerce, with those changes then translated to domestic commerce. Another irony lies in the possibility, suggested by historical research, that the traditional hostility of American courts to both choice of court and arbitration clauses was based, at least in some quarters, not simply on a formalistic refusal to permit the ousting of the court’s jurisdiction, but on concern about overreaching of those less advantaged. Yet a third irony appears when one realizes that some states and state courts have tried to distinguish among disputants in their rules concerning the enforcement of arbitration clauses but have been thwarted by the Supreme Court’s interpretation of the supposed requirements of the Federal Arbitration Act. Thus, American courts have traveled (even if unwillingly) from one extreme to the other, failing to note the middle ground that is staked out in the law of many countries and

⁴ The “purposeful availment” aspect of minimum contacts analysis only crudely effects such a distinction. Of course, states remain free to distinguish among litigants in fashioning their rules of jurisdiction, but many of them have simply abdicated to federal constitutional law, explicitly or implicitly, thus yielding to a prisoner’s dilemma in which good policy yields to the desire not to disadvantage local litigants and lawyers.

that one might have hoped the phenomenon of international litigation, and the invitation to comparative law that it presents, would have brought to their attention.

One aspect of American jurisdictional law that has famously departed from the norm of refusing to distinguish among litigants lies in the differential treatment of American and foreign plaintiffs for purposes of the application of the forum non conveniens doctrine. I would be happy to see that distinction in its current form disappear – indeed, I have argued that it should disappear – if only because its treatment in the 1999 Hague draft signals that other countries regard it as invidious.⁵ But in my view that is a small point at which to stick in the reformation of a jurisdictional equilibration device that has lost its way.

However ancient its lineage, forum non conveniens as a general tool of jurisdictional equilibration dates to the 1940's, to the very period, that is, when the Supreme Court was empowering states to broaden their jurisdictional reach. Originally (re)invigorated to deal with wholly domestic litigation (in a very big country), forum non conveniens quickly became relevant in federal litigation only in cases where the alternative forum was outside of the United States. Moreover, although that is not true of all candidates for a forum non conveniens dismissal in state courts,⁶ federal law has continued to provide the model for most state law on the subject.

There is one aspect of the differential treatment of domestic and foreign plaintiffs for these purposes that reveals what is fundamentally wrong with the doctrine: it was built, or at least is sustained, on fictions, if not hypocrisy. Thus, the justification given for such differential treatment is that a U.S. forum chosen by a domestic plaintiff is likely to be convenient whereas no such confidence is warranted as to a U.S. forum chosen by a foreign plaintiff. The notion that in this world of global commerce, transport and communications, the lawyers for any plaintiffs, domestic or foreign, are interested in convenience as opposed to litigation advantage is equaled in naivete only by the notion that the quest for convenience prompts defense lawyers to file forum non conveniens motions.

Similarly, the notion that an adequate alternative forum is a necessary condition for a forum non conveniens dismissal cannot be taken seriously. That is not only because the Supreme Court has made clear that “adequate” means not so clearly inadequate as to deprive the plaintiff of any remedy. American courts with few exceptions have refused either to bring within their purview the constellation of legal rules and arrangements that determines whether a putative plaintiff has access to court and to means of proof essential to gain a remedy or, if they do so, to demand more than the sort of self-serving presentation about foreign law that justifiably gives

⁵ There is irony here as well, as those who liken American courts to a light drawing to them moths from around the world would have us regard as invidious discrimination an attempt to control the swarm by privileging the claims of American plaintiffs.

⁶ American courts, unlike other common law courts that employ forum non conveniens, typically dismiss rather than stay the case, one of the aspects of American practice that, I have argued, should be changed.

American-style “expert testimony” a bad name.

The most noxious fiction of all, however – and the rotten core of contemporary forum non conveniens doctrine – is the notion that it is (and should be) impervious to regulatory interest triggered by policies underlying rules of substantive law. That, of course, is a possible message of the Supreme Court’s *Piper* decision, where even the prospect of a consequential change in the governing substantive law was said to be irrelevant. It is a message that is difficult (but not impossible) to square with the Court’s articulation of relevant “public interest” factors and one that, in any event, lower courts have had great difficulty heeding. For good reason.

American legal thought and practice has traditionally regarded jurisdiction and choice of law as different problems requiring discrete analysis. That traditional posture came under pressure in a series of Supreme Court decisions, where distinguished justices argued unsuccessfully that a state’s interest in applying its law to a dispute should count for something in assessing the constitutionality of an assertion of jurisdiction in its courts. Moreover, the traditional view has long been regarded as unsatisfactory in the legal literature. Still, assuming minimum contacts on the part of a defendant, specific jurisdiction at the constitutional level is likely to guarantee at least the potential for regulatory interest in the forum.

In a domestic case, when the courts of a state the law of which could constitutionally be applied to a dispute are found not to have jurisdiction to adjudicate, the case can usually be refiled in another state, where there is still a possibility that the law of the first state will be applied, where, if not, the substantive law is likely to be similar, and where in any event the plaintiff will have available the same or very similar arrangements for gaining access to court and the proof necessary to establishing her claim (if it can be established at all). The same is true if a state court dismisses a domestic case within its jurisdiction under the forum non conveniens doctrine.

In a transnational case, on the other hand, both a dismissal for lack of jurisdiction and a forum non conveniens dismissal portend, as we have seen, not just the application of substantive law that is likely to be very different (and far less favorable to the plaintiff), but, as an anterior matter, barriers to bringing or pursuing suit that are often insuperable. Until there is another paradigm shift on the order of *International Shoe*, that is a cost that American institutions must bear when the defect is lack of jurisdiction. But it is a self-inflicted wound – inflicted, moreover, by institutions with only a tenuous claim to power -- when there *is* jurisdiction but the domestic forum is challenged as inconvenient.

One cannot reach a judgment whether American jurisdictional law is exorbitant without a normative measuring rod. Comparative jurisdictional inquiry suggests as an appropriate measure the extent to which rules of jurisdiction tend to assure the existence of a regulatory interest in the underlying dispute. By that standard, certain jurisdictional rules currently applied in American courts *are* exorbitant. Particularly in a world where litigation convenience is a predominating concern chiefly of courts, it should be the office of forum non conveniens doctrine to achieve the balance that is lacking in American law because of the traditional separation of jurisdiction and choice of law. That in fact is what many courts are doing today, when, although they speak of convenience and inconvenience, their eyes seem fixed on the presence or absence of a domestic

regulatory interest.

It remains, of course, to bring that consideration to center stage, a process that reflection about both the sociological differences and the rampant hypocrisy of current law discussed earlier can only facilitate. When that occurs, it will be apparent that differential treatment of domestic and foreign plaintiffs, far from constituting invidious discrimination, can represent the rational and consistent implementation of an equilibration device that confines the exercise of jurisdiction to cases in which there is likely to be a domestic regulatory interest. Thinking about the doctrine in that way should also prompt a reassessment of even such a hallowed jurisdictional ground as domicile (or habitual residence), as it should of the illegitimate child of a transitional fiction, doing business jurisdiction. Finally, giving regulatory interest its proper role in the forum non conveniens analysis should put an end to those cases brought under regulatory statutes such as the antitrust or securities laws in which courts dismiss on forum non conveniens grounds even though there is both adjudicatory jurisdiction and jurisdiction to prescribe.