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ACCESS-TO-JUSTICE ANALYSIS ON A DUE PROCESS PLATFORM

*Ronald A. Brand**

*Response to: Christopher A. Whytock & Cassandra Burke
Robertson, Forum Non Conveniens and the Enforcement of Foreign
Judgments, 111 Colum. L. Rev. 1444 (2011)*

INTRODUCTION

“As a moth is drawn to the light, so is a litigant drawn to the United States.”¹ Lord Denning was not the only person outside the United States to believe that litigation in U.S. courts is a gold mine with no risk of failure for plaintiffs. Now, Professors Whytock and Robertson, in *Forum Non Conveniens and the Enforcement of Foreign Judgments*, tell us that we need doctrinal restructuring that will change rules that are too pro-defendant.² Has the pendulum swung that far?

In their Article, Whytock and Robertson provide a wonderful ride through the landscape of the law of both forum non conveniens and

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1. *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (A.C.) at 733 (Eng.). Lord Denning goes on to elaborate:

If [the plaintiff] can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case “on spec” as we say, or on a “contingency fee” as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 per cent. of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40 per cent. before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.

Id. at 733–34.

2. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 *Colum. L. Rev.* 1444, 1449–50 (2011) (“If the forum non conveniens doctrine is applied to deny the plaintiff court access in the United States and, in the same dispute, the judgment enforcement doctrine is applied to deny the plaintiff a remedy based on a foreign judgment, the plaintiff may be denied meaningful access to justice.”).

judgment recognition and enforcement. They explain doctrinal development and current case law clearly and efficiently, in a manner that educates but does not overburden the reader. Based upon that explanation, they then analyze both areas of law and offer suggestions for change. Those suggestions, they tell us, are necessary to close the “transnational access-to-justice gap” that results from apparent differences between rules applied in a *forum non conveniens* analysis and rules applied to the question of recognition of foreign judgments.³

Whytock and Robertson’s Article is worthwhile reading for any lawyer interested in the evolution of the doctrine of *forum non conveniens* and the law of recognition and enforcement of judgments. Recent developments, such as the Chevron/Ecuador litigation,⁴ have highlighted what can happen when a case is (1) filed in a court in the United States, (2) dismissed on the grounds of *forum non conveniens*, (3) refiled in a foreign court in which judgment is granted, and (4) returned to the United States in the form of a request for recognition and enforcement of that foreign judgment. Claims that the foreign court was the more appropriate forum for litigation of the dispute turn into claims that the foreign court has denied fundamental rights and that the resulting judgment should be denied effect in the United States.

It is easy to respond to such cases by seeing a “gap” in the plaintiffs’ access to justice. After all, must not every right (even a right determined by a foreign court) be followed by a remedy (even if remedy is available only in a U.S. court because the assets are here)?⁵ But Whytock and Robertson do not take this easy approach in their analysis. They raise legitimate and well-reasoned concerns about the interplay of the law of *forum non conveniens* and the recognition and enforcement of judgments. They also respond to other commentators who have taken differing positions. And they suggest specific solutions designed to close the “access-to-justice gap.” This response points to two issues that the otherwise thorough and well-argued Article fails to adequately address. First, the Article’s foundational assumptions omit a key distinction between jurisdiction under U.S. law and under the law of other countries. Second, the rationale behind Whytock and Robertson’s solution does not sufficiently consider how it might exacerbate imbalances in jurisdictional rules across international borders.

3. *Id.* at 1450.

4. See *id.* at 1447–48 & nn.8–12 (discussing series of cases in Chevron/Ecuador litigation applying U.S. *forum non conveniens* doctrine (citing *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff’d as modified*, 303 F.3d 470 (2d Cir. 2002) and *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), vacated sub nom. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998))).

5. *Id.* at 1448 n.189 and accompanying text (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), for rule that “for every violation of a right, there must be a remedy”).

I. FOUNDATIONAL ASSUMPTIONS

At the core of the Whytock and Robertson thesis is the conclusion, based on the analysis found in Part II of their Article, that there exists a “transnational access-to-justice gap.”⁶ Like other such assumptions, what one observes depends on one’s vantage point. The language used by Whytock and Robertson is itself significant from a comparative law perspective, and suggests reason for further examination of their analysis.

While the Article provides a good historical review of the doctrine of forum non conveniens, including reference to recent cases that intersect with questions of judgment recognition, like most articles on these matters, it does not acknowledge how other legal systems deal with the problems addressed by the two doctrines it describes. Forum non conveniens is one approach to the problem of parallel litigation that arises when the courts of more than one state have jurisdiction to decide a matter.⁷ If only one court had jurisdiction over every case, such problems would not occur. But that would require a single rule of jurisdiction (such as “all defendants may be sued only in the courts of the defendant’s state of habitual residence”), and most legal systems have both rules of general jurisdiction (allowing suit to be brought where the defendant is—often defined as the defendant’s state of domicile) and rules of specific or special jurisdiction (allowing suit to be brought in courts other than the defendant’s home court).⁸ The major difference between the United States and other countries (particularly civil law countries) on jurisdictional analysis comes in how courts conceptualize jurisdiction itself.

In the United States, the jurisdictional question has been, since *Pennoyer v. Neff* in 1877,⁹ a constitutional matter based on the right of a defendant to “due process of law” in any question involving life, liberty, or property (i.e., any question that arises in litigation). Thus, the analysis of jurisdiction depends on the due process rights of the defendant, and requires a three-way nexus among the court, the defendant, and the claim.

In civil law countries, questions of jurisdiction are not so much questions of a defendant’s rights as they are questions of what court is “competent” to hear the case. Thus, for example, the rules of special jurisdiction found in the Brussels I Regulation of the European Union rely

6. *Id.* at 1450.

7. For discussion of related doctrines in civil law systems, see Ronald A. Brand & Scott R. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* 101–19 (2007).

8. For a comparison of U.S. and European approaches to jurisdictional analysis, see Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 *U. Pitt. L. Rev.* 661, 664–701 (1999) [hereinafter Brand, *Due Process*].

9. 95 U.S. 714 (1877). “Rightly or wrongly, *Pennoyer v. Neff*, linked American jurisdictional law with the Fourteenth Amendment’s Due Process Clause, and however questionable that linkage may be, it has become part of American conventional wisdom.” Friedrich K. Juenger, *Constitutionalizing German Jurisdictional Law*, 44 *Am. J. Comp. L.* 521, 521 (1996) (book review).

on a two-way nexus between the court and the claim.¹⁰ The resulting rules allow jurisdiction that would be held to violate due process in the United States.¹¹

The result of this distinction between the United States and the rest of the world is that the United States focuses on the due process rights of the defendant, while the rest of the world focuses on access to justice—the plaintiff’s right to have his or her day in court.¹² The former is a clear defendant-protection approach, and the latter is a clear plaintiff-protection approach. The difference is fundamental, but it is more than that. It also draws into question a substantial part of the basis for Lord Denning’s view of the U.S. judicial system. With Denning’s own country now firmly ensconced in the legal realm of the European Union, including its rules of jurisdiction, at least in this part of the law the civilian/European approach is much more plaintiff-friendly than that of the United States. By using the civil law “access-to-justice” terminology, Whytock and Robertson risk transplanting one system of analysis of the exercise of judicial jurisdiction into another, without acknowledging fundamental differences of approach. The U.S. system of jurisdiction *is* defendant-friendly precisely because our Supreme Court has made jurisdiction a constitutional issue based on the due process “rights” of the defendant.¹³ Any analysis of rules that affect that exercise of jurisdiction in U.S. courts must begin (and end) with that reality. While a plaintiff’s access-to-justice interest is important, it is the defendant’s right to due process that is enshrined in our Constitution as it has been interpreted to apply to jurisdictional analysis.

II. RATIONALE FOR SOLUTION

There is a second comparative law distinction that is relevant in any

10. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5, 2001 O.J. (L 12) 1, 4 (EC) [hereinafter Brussels I Regulation] (establishing special jurisdiction rules based on claim-court nexus), amended by Commission Regulation 1496/2002 of 21 August 2002, 2002 O.J. (L 225) 13 (EC).

11. See, e.g., Brand, *Due Process*, supra note 8, at 689–701 (describing several jurisdictional rules in civil law countries that violate due process).

12. See, e.g., Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, at 3, COM (2010) 748 final (Dec. 14, 2010) [hereinafter Regulation Proposal] (“Access to justice in the EU is overall unsatisfactory in disputes involving defendants from outside the EU.”).

13. This aspect of U.S. jurisprudence was extended further in the most recent Supreme Court decisions on jurisdiction. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852, 2857 (2011) (holding North Carolina courts did not have jurisdiction over foreign subsidiaries of U.S. parent corporation based on fact that small percentage of tires manufactured by subsidiaries were distributed in North Carolina by other U.S. affiliates); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (finding manufacturing company could not be sued in New Jersey, although it had agreed to sell machines in United States, attended trade shows in several other states, and sold four machines that ended up in New Jersey, as it had not “engaged in any conduct purposefully directed at New Jersey”).

discussion of the doctrine of *forum non conveniens*, one that is directly related to the question of parallel litigation and how we treat the possibility of multiple potential forums for a single dispute. The doctrine of *forum non conveniens*, developed in common law jurisdictions, favors equitable analysis over efficient rules and gives courts discretion in determining the most appropriate forum for a dispute.¹⁴ By contrast, civil law states generally address the “problem” of parallel litigation through predictable rules found in code-type instruments. The ordinary rule is the concept of *lis alibi pendens*, by which the first court seised retains jurisdiction and all subsequent courts in which an action involving the same issues and parties is brought dismiss the case.¹⁵

Neither approach to parallel litigation is wholly satisfactory. The civil law approach (*lis pendens*) favors efficiency and predictability (values focused on societal interests) over equity and fairness (values focused on individual interests). The result is a race to the courthouse that can interrupt (and perhaps prevent) rational negotiated resolution of disputes before tensions are raised by formal legal proceedings. The common law approach (*forum non conveniens*) requires that courts be given discretion (something disfavored in civil law systems) and brings with it significant uncertainty.

If we are to properly consider the intersection of the doctrine of *forum non conveniens* and the law applicable to foreign judgment recognition, we must take into account more than just our own legal system. We must also consider the legal systems in countries whose courts may receive cases dismissed on the basis of *forum non conveniens* and generate judgments for which recognition may be requested. This requires an understanding of the fundamental choice made at the outset in

14. See generally, Brand & Jablonski, *supra* note 7, at 1–100 (presenting current status of common law *forum non conveniens* doctrine in United Kingdom, United States, Canada, and Australia).

15. Article 27 of the Brussels I Regulation states this concept:

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Brussels I Regulation, *supra* note 10, art. 27. In the European Commission’s proposed recast of the Brussels I Regulation, because the jurisdictional rules would apply to defendants domiciled outside the EU as well, there has been added in Article 34(1) the following language to modify the *lis pendens* rule when the other court is outside the EU:

1. Notwithstanding the rules in Articles 3 to 7, if proceedings in relation to the same cause of action and between the same parties are pending before the courts of a third State at a time when a court in a Member State is seised, that court may stay its proceedings if:

(a) the court of the third State was seised first in time;
(b) it may be expected that the court in the third State will, within a reasonable time, render a judgment that will be capable of recognition and, where applicable, enforcement in that Member State; and
(c) the court is satisfied that it is necessary for the proper administration of justice to do so.

Regulation Proposal, *supra* note 12, at 3.

approaches to the questions of jurisdiction and parallel proceedings. In the Whytock and Robertson analysis, this means that we should start with the understanding that *forum non conveniens* is not the only game in town, and that other legal systems (with the exception of a few common law systems) do not defer either to foreign courts or to defendants (domestic or foreign) in the same manner as do U.S. courts. This difference in legal systems must also be considered when we turn to the “end game” of recognition of judgments coming from those foreign courts.

U.S. courts traditionally have been much more liberal in recognizing foreign judgments than courts in other legal systems, particularly those in civil law countries that require near relitigation of the case if no treaty creates reciprocal rights of recognition.¹⁶ Because the United States still has no such treaty with any other country, this is a significant matter.

Whytock and Robertson suggest that, once the adequacy determination is made at the *forum non conveniens*, it need not be made again at the recognition and enforcement stage (with limited exceptions). This creates two problems, one of analysis and one of global-political reality.

First, the Whytock and Robertson analysis fails adequately to acknowledge that the two stages involve two separate and different determinations. What is appropriate in determining the most appropriate forum for the initial trial in the case is one matter. What is appropriate in determining whether, in light of all relevant circumstances, that forum’s decision should be given full faith and credit is something very different.

Second, Whytock and Robertson, in arguing for the application of *forum non conveniens* standards of deference to foreign courts at the stage of recognition and enforcement of judgments, advocate the type of unilateral concession that hampered the U.S. delegation at the Hague Conference on Private International Law when, in the 1990s, efforts were made to negotiate a global convention on jurisdiction and the recognition and enforcement of judgments.¹⁷ The facts are that only a few other common law legal systems grant that type of deference to foreign courts at the jurisdiction stage of litigation, and even fewer grant such deference to foreign courts on the question of the recognition of judgments. While it may seem coherent in a vacuum that assumes legal perfection to unify rules on deference to foreign courts at the jurisdiction and the judgment recognition stages, it simply is not consistent with reality, and would

16. See, e.g., *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (“Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.”). See generally, Ronald A. Brand, *Enforcing Foreign Judgments in the United States and United States Judgments Abroad* (1992) (providing primer on enforcing foreign judgments in United States, obtaining judgments enforceable abroad, and enforcing U.S. judgments abroad).

17. Cf. Ronald A. Brand, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View from the United States*, in *The Hague Preliminary Draft Convention on Jurisdiction and Judgments* 3, 11–12 (Fausto Pocar & Constanza Honorati eds., 2005) (describing role of U.S. “unilateral disarmament” on judgment recognition in failure of negotiations).

create free-rider problems that would likely hamper the United States in any future negotiation of conventions related to issues of jurisdiction and the recognition of judgments. Any argument to make U.S. judgment recognition rules more liberal than they already are faces real problems of international balance. Simply acknowledging that U.S. courts are more likely than their foreign counterparts to defer to foreign courts at the jurisdiction stage does not, in itself, justify making U.S. courts more likely than their foreign counterparts to defer to foreign courts when receiving the results of foreign litigation.

FINAL COMMENTS

Whytock and Robertson claim that the U.S. legal system, through doctrines related to jurisdiction (*forum non conveniens*) and the recognition and enforcement of judgments, errs on the side of favoring defendants in civil actions. This runs counter to common assumptions made about the U.S. legal system by persons outside the United States. While the analysis is clear, and nicely supported, it is open to a challenge based on a comparative analysis of legal systems' approaches to jurisdiction and parallel proceedings.

By beginning with the assumption of an "access-to-justice gap," Whytock and Robertson fail to acknowledge that jurisdictional rules in the United States are ultimately based not on access-to-justice (as is the case in most of the civil law world), but rather on protecting the due process rights of the defendant. Moreover, courts in the United States apply different tests in cases that defer to foreign courts on the basis of *forum non conveniens* than they do in cases that refuse recognition of the resulting judgment when a defendant demonstrates bases for nonrecognition grounded in the specific events of the specific case. In doing so, those decisions are wholly consistent with the constitutional underpinnings of U.S. jurisdictional jurisprudence, the manner in which U.S. courts treat the problem of parallel available forums, and the approach of other countries to the recognition and enforcement of foreign judgments. While the change in the direction offered by Whytock and Robertson may be justifiable internally, it would further unbalance jurisdiction and judgment recognition in an already tilted global system.

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