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A Hague Convention on Parallel Proceedings

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A HAGUE CONVENTION ON PARALLEL PROCEEDINGS

Paul Herrup and Ronald A. Brand

Abstract

The Hague Conference on Private International Law has engaged in a series of projects that, if successful, could provide the framework for critical aspects of trans-national litigation in the Twenty-first Century. Thus far, the work has resulted in the 2005 Hague Convention on Choice of Court Agreements and the 2019 Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters. Work now has begun to examine the need, desirability and feasibility of additional instruments in the area, with discussions of an instrument that would either require or prohibit the exercise of jurisdiction by national courts, and of an instrument that would channel parallel proceedings to a “better” forum. The authors of this brief article advance the view that a convention regulating jurisdiction is not a good approach, but that an instrument finding a “better” forum in parallel proceedings, constructed on an open-minded and non-dogmatic basis, is needed, desirable, and feasible.

Keywords: Hague Convention; private international law; international law; treaties; comparative law; European Union Law; international economic law; international trade law; conflict of laws; forum non conveniens, lis pendens; jurisdiction, judgments recognition; Hague Conference on Private International Law

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Paul Herrup and Ronald A. Brand¹

INTRODUCTION

Two of the most recent conventions produced by the Hague Conference on Private International Law create frameworks for transnational litigation in areas that clearly needed development at a global level. The 2005 Hague Convention on Choice of Court Agreements regulates jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in international cases in which an exclusive choice of court agreement has been concluded.² The 2019 Hague Judgments Convention applies to the recognition and enforcement of foreign judgments in civil and commercial matters.³

Both of the existing conventions resulted from a broader project begun in the early 1990's, considering issues of jurisdiction as well as the recognition and enforcement of judgments.⁴ A consensus determination in 2001 that a comprehensive treaty on jurisdiction and judgments recognition

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² Convention on Choice of Court Agreements, concluded 30 June 2005 ("Choice of Court Convention"), available at <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>.

³ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, concluded 2 July 2019 ("Judgments Convention"), available at <https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments>.

⁴ See, Preparatory Work on the Judgments Convention, available at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=61&cid=137>.

was not possible allowed the Hague Conference to focus on specific pieces of that broader project, and led to the two existing Conventions.⁵

The question now facing the Hague Conference is whether further international legal instruments can add to the package in a manner that will solve other significant problems raised by cross-border litigation – and solve them well. It is our view that a Convention that would purport to require or prohibit national court jurisdiction in the first instance (*i.e.*, regulate “direct jurisdiction”) is neither feasible nor desirable. There is a current and growing need, however, for rules that address questions of parallel proceedings by designating a “better forum” when courts in more than one State are seised with the same or related claims *under their own jurisdictional rules*.

GLOBAL MOBILITY AND GLOBAL DISPUTE SETTLEMENT NEEDS

Any transnational litigation convention must be measured against the progress of global communication and transportation over the past quarter-century, and the near certainty that the global mobility these developments demonstrate will accelerate in the future. The resulting combination of enhanced knowledge of opportunities across borders and reduced transaction costs have brought an unprecedented ability of people, goods, ideas, electrons, and even microbes to move across borders, easily and cheaply. This, in turn, has created social, cultural, and economic connections, as well as the inevitable attendant disputes.

Not only is there a far greater number of persons engaged in global activities, but the breadth, flexibility, and plasticity of the relationships has proliferated. This includes new types of family relationships, as well as new variations in commercial relationships such as licensing and other arrangements in areas including intellectual property rights and data transmission.

This democratization of cross-border activities results in an increase in the number of states with a significant connection, legal or factual, to any given transaction or relationship. For example, in the sale of goods, any stage in the stream of commerce might well justify a jurisdictional connection, including the location of the advertisement for sale, the contract offer, the contract acceptance, the initial packaging of the

⁵See, *Response to the preliminary draft convention (2000-2001)* by the Hague Conference Special Commission on General Affairs and Policy, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6840&dtid=61>.

goods, the loading of the first carrier for transit, the export customs territory, the import customs territory, the storage upon arrival in the import customs territory, the unloading from the final carrier for transit, the purchaser's facility at destination, the bank through which payment is made or financing is arranged, the office where payment is received, or other geographic activity one or more of the parties to the transaction. Each of these factors may be considered important to national rules determining judicial jurisdiction, resulting in there being courts in multiple states in which a legal action may be filed when a dispute arises.

A CONVENTION REGULATING DIRECT JURISDICTION

The fact that there may be multiple states in which jurisdiction for judicial settlement of a dispute exist for a single cross-border relationship does not mean that it is either necessary, or even possible, to prepare a convention purporting to require or prohibit the exercise of jurisdiction as a general matter by national courts. To the contrary, any effort to prepare such a convention will fail – and is not needed in order to improve the field of transnational litigation.

Judicial jurisdiction is an attribute of national sovereignty, and reflects differing appraisals of the proper scope and qualities of a particular kind of exercise of state power. Each state touched by an instance of global mobility may have reasonable grounds from its own perspective to vest its courts with jurisdiction over a resulting dispute, which leads to the possibility of multiple reasonable fora. The mere fact that one state's jurisdictional nexus may differ from that in another state does not necessarily make litigation in one of those states better than in the other. Different states may legitimately value different interests in determining access to, and protection in, their courts. Neither access to justice nor due process is a finite, unchanging value, and efforts to create rules that definitively limit either of them for global purposes—regarding jurisdiction or any other concept—are presumptuous at best, and likely to be destructive of the very values they purport to champion in the long run.

Mechanical rules of jurisdiction, especially when based upon nineteenth century notions of physical presence, can result in a highly expensive and cumbersome fragmentation of related litigation, with no guarantee that each piece of the litigation will yield non-overlapping results, and with real risks of inconsistent judgments. The oft-stated claim that transactions require ex ante certainty as to jurisdiction is belied by experience. Levels of economic activity in the United States, whose

jurisdictional rules allegedly are uncertain, compare favorably to those in Europe, which does attempt to provide rigid, ex ante jurisdictional rules.⁶

The European experience shows that, even on a regional basis with a single court in control of interpretation of jurisdictional rules, ex ante certainty cannot be achieved or can be achieved only after extensive litigation and by creating an artificial legal terrain disconnected to commercial and other realities of mobility. One need only survey case activity before the Court of Justice of the European Union (CJEU) in 2020 and 2021 to illustrate and understand this problem in a system of relatively homogenous states in a single region, with a single court to provide definitive interpretation. In April of 2020, Advocate General Campos Sanchez-Bordona issued his Opinion in *Verein für Konsumenteninformation v Volkswagen AG*,⁷ wrestling with tort jurisdiction and the “place where the harmful event occurred” test of Article 7(2) of the Brussels I (Recast) Regulation,⁸ in the “Dieselgate” affair and the resulting products liability actions brought on behalf of automobile purchasers. His recommendation that the place of injury (which applies in addition to the place of act test under CJEU interpretation), be “the place . . . where the victim purchased the product from a third party,” was qualified by a requirement that “the other circumstances confirm the attribution of jurisdiction to the courts of that State.”⁹ Moreover, “[t]hose circumstances must include, at all events, one or more factors which enabled the defendant reasonably to foresee that an action to establish civil liability as a result of his or her actions might be brought against him or her by future purchasers who acquire the product in that place.”¹⁰ In July of 2020, the Court ultimately chose a more limited test, providing that “where a manufacturer in a Member State has unlawfully equipped its vehicles with software that manipulates data relating to exhaust gas emissions before those vehicles are

⁶ See, e.g., 2A HANDBOOK OF MACROECONOMICS, graphs at 24-26 (2016 Elsevier B.V.), available at <http://dx.doi.org/10.1016/bs.hesmac.2016.03.002>.

⁷ Case C-343/19 (2 April 2020) (“AG Dieselgate Opinion”).

⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Recast Regulation), [2012] O.J.E.U. L 351/1, 20 December 2012, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>.

⁹ AG Dieselgate Opinion, *supra* note 8, para 81.

¹⁰ *Id.*

purchased from a third party in another Member State, the place where the damage occurs is in that latter Member State.”¹¹ Even with the rejection of Advocate General Campos Sanchez-Bordona’s more complex test, consider the multiple complex factual predicates to the Court’s rule of interpretation:

- unlawfully
- equipped its vehicles
- with software
- that manipulates data
- relating to exhaust gas emissions
- before those vehicles are purchased
- from a third party
- in another Member State.

One need only think for a minute of how such decisions would be made regarding a convention that applied on a global basis, without the homogeneity of the European region, and where every national judicial system could enter conflicting interpretations. The claimed predictability would be non-existent as the world evolves and new types of claims arise from new problems and new technology.

Other CJEU cases of 2020 and 2021 provide additional examples of this problem. In *LJ and Others v Rina SpA*,¹² the Court entered the sticky area of jurisdiction when companies assert sovereign immunity as a result of sovereign ownership of an otherwise private company. The Court’s conclusion that “[t]he principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law,”¹³ requires very little imagination to realize the problems when expanded to a global treaty context. Similar issues of sovereignty and jurisdiction were raised in *Belgische Staat v Movic BV*,¹⁴ where the

¹¹ Verein für Konsumenteninformation v Volkswagen AG, Case C-343/19, para 41 (9 July 2020).

¹² Case C-641/18 (7 May 2020) (First Chamber).

¹³ *Id.* para 61.

¹⁴ Case C-73/19 (16 July 2020).

question involved whether Belgian authorities, which had brought interlocutory proceedings against a foreign corporation, were acting in a public or private (commercial) manner and thus governed by the jurisdictional rules of the Brussels I (Recast) Regulation.¹⁵

The case of *Mittelbayerischer Verlag KG v SM*,¹⁶ decided on June 17, 2021, again raised interpretation problems with Article 7(2) of the Brussels I (Recast) Regulation, wrestling with where the location of a claim falls for jurisdictional purposes when the claim is that an individual's personality rights have been infringed by content published online on a website. The Court ruled that "the courts of the place in which the centre of interests" of that person bring the claim could claim jurisdiction under Article 7(2) "in respect of the entirety of the alleged damage, . . . only if that content contains objective and verifiable elements which make it possible to identify, directly or indirectly, that person as an individual."¹⁷ One need not be very skilled in constructing hypotheticals to understand how such issues and opinions could affect the uniformity of application normally required in a Hague Convention when multiple courts in contracting states have final interpretive authority.

The *Mittelbayerischer Verlag* case brings to the forefront the problems of the EU system that breaks down mechanical direct jurisdiction connecting factors by separating contract jurisdiction from tort jurisdiction (a process long ago discarded in common law legal pleading and thus alien to common law practice), and prohibiting a court with jurisdiction from granting full compensation for the liability it is authorized to determine. Expanding that process to a global realm and saving any hope that words in a convention will lead to predictability and uniform interpretation is a fool's errand at best.

Perhaps the most telling single case in only the past two years for a demonstration of the potential problems of a global system of direct jurisdiction connecting factors based on the EU model is the *Obala* case, decided on March 25, 2021.¹⁸ That decision provides a triple interpretation hit at potential global uniformity and complexity, determining that:

¹⁵ *See, id.* paras 23-24.

¹⁶ Case C-800/19 (17 June 2021).

¹⁷ *Id.* para 47.

¹⁸ *Obala I lucice d.o.o. v NLB Leasing d.o.o.*, Case C-307/19 (25 March 2021).

- 1) An action for recovery of a parking ticket fee is a “civil and commercial matter” within Article 1(1) of the Brussels I (Recast) Regulation;
- 2) A parking ticket is not a “tenancy of immovable property” within Article 24(1) of the Brussels I (Recast) Regulation; and
- 3) A parking ticket is a contract for the provision of services within Article 7(1)(b) of the Brussels I (Recast) Regulation.¹⁹

The myriad potential problems for predictability and uniformity of interpretation in a global convention with similar rules are more than can be contemplated in the brief length of this discussion.

The list above involves only some of the cases of only the past two years, demonstrating problems of interpretation and technical evolution that would face a global convention built upon wooden application of tests requiring mechanical direct jurisdiction connecting factors. The critical factor for action in the world is not *ex ante* jurisdictional certainty but a reasonable basis of prediction of possible fora.

One of the principal goals of any Hague Convention should be to improve the world of transnational litigation by reducing the time and expense involved. The time and expense wasted by litigants demonstrated in a relatively small number of CJEU cases, from a relatively short period of time, provide clear demonstration of the cliff the world would be jumping off if similar rules of direct jurisdiction are included in any new Hague Convention.

More important in any process of drafting a new legal instrument, a convention purporting to regulate direct jurisdiction is an exercise in solving a problem that has not been identified. Not only can it be easily demonstrated that any convention including direct required bases of national jurisdiction in national courts would create innumerable litigation problems, those championing such a convention have yet to identify any significant problems that have arisen in real-life litigation that they seem to be trying to solve. Indeed, the existence of multiple potential fora does not appear to be a significant deterrent to transnational mobility. The challenge generally is not to specify a single forum *ex ante*, but what to do in those cases in which litigation over the same or related claims materializes in multiple fora. This problem should be explored and investigated from the

¹⁹ *Id.* Para 99.

ground up, rather than starting from well-entrenched positions that are not necessary to the solution of the problem and tend to add time, expense, and confusion in international litigation.

THE NEED FOR A CONVENTION OFFERING ASSISTANCE TO COURTS WHEN PARALLEL PROCEEDINGS DO OCCUR

An increasing irritant in transnational civil litigation is posed by situations in which multiple states assert jurisdiction, each under its own law, over or related to the same claim or set of claims. The traditional solution in many common law countries is to let litigation proceed in multiple countries, with resolution of the matter (or not) coming at the stage of recognition and enforcement of the first judgment issued by the various courts considering the matter. This approach leads to a race to judgment, and may result in duplicative litigation, significant additional expense for litigants, and potential conflicting judgments. These problems may be modulated by application of the doctrine of *forum non conveniens*, which usually requires a court to balance a basket of factors and defer to proceedings in another forum only if the other forum is clearly more appropriate to resolve the dispute.²⁰

The traditional solution in many civil law states is to rigidly prescribe and rank order jurisdictional bases and, if nonetheless jurisdiction might subsist in multiple fora, then apply a strict *lis pendens* rule, that bars consideration of a claim or set of claims if another court was “seised” first. This approach leads to a race to the court-house and very artificial strategic litigation, such as an anecdotally reported proliferation of requests for negative declaratory judgments (e.g., a declaration in favor of a party who expects to be sued in another forum that the party bringing the request has no legal obligations to the other persons).

Both approaches create opportunities and incentives for strategic forum-shopping, and neither approach necessarily directs litigation to the forum most suited to dispute resolution in a particular case. Both add to the advantages that a well-funded party has over a less affluent party.

Parallel proceedings in the courts of two or more states can and do result from jurisdictional rules that (appropriately) provide multiple judicial fora for the resolution of a single cross-border dispute. The differences in

²⁰ See, **Error! Main Document Only. Error! Main Document Only.** RONALD A. BRAND AND SCOTT JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS*, 3 CILE Studies (Oxford University Press 2007).

approaches across legal systems to such parallel litigation suggest the value of an international legal instrument that would move the same or related litigation to a “better forum.” But the determination of the “better forum” does not, and should not, require engaging in the complex and difficult enterprise of mandating or prohibiting pre-existing national jurisdiction rules. At the same time, this determination under such an instrument should be accomplished in a manner that will provide far more direction and specificity than are found in existing common law *forum non conveniens* regimes.

No legal system currently resolves the problem of parallel proceedings with any great distinction, and certainly not in a way that is useful on a global scale. We desperately need fresh thought, unfettered by the shibboleths of past practice or decrepit dogma. The Hague Conference has a once-in-a-generation opportunity to engage in a critical examination of the area, without preconceptions, with due regard to empirical reality, and from the ground up. Whether it will meet that challenge remains to be seen.