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Procedure and Private International Law

Wendy Collins Perdue

University of Richmond, wperdue@richmond.edu

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Procedure and Private International Law
Volume I
Private International Law

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Edited by

Wendy Collins Perdue
Dean and Professor of Law
University of Richmond School of Law, USA

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Introduction

Wendy Collins Perdue

These volumes consider a range of procedural issues that have particular salience for international litigation. The first volume begins with a set of chapters addressing where litigation should proceed when there is more than one court that can or is adjudicating a dispute. The rules of judicial jurisdiction, addressed in a separate collection in this series, establish which courts will have authority to hear a case. However, in disputes involving parties or transactions touching on more than one country, there will almost certainly be more than one court that may be able to assert jurisdiction.

The availability of multiple fora introduces the potential for simultaneous litigation involving the same dispute in different courts, as well as the possibility that although suit is pending in only one court, the chosen forum may not be optimal – at least from the perspective of one of the litigants or the court itself. There are a variety of rules and approaches that have been developed to deal with these problems, including the doctrines of forum non conveniens, lis alibi pendens, and anti-suit injunctions. In addition, ex ante, parties to a transaction may also use a forum selection clause.

The volumes then turn to the issues of service of process and discovery, both of which can be particularly challenging in the cross-border context. It next considers class actions and the aggregation of claims. Although class actions were once the exclusive province of the United States, other countries have increasingly begun to adopt procedures allowing for the aggregation of claims from multiple parties. The final section examines the challenges for lawyers practicing in multiple jurisdictions who must navigate different regimes of legal ethics and professional responsibility.

Forum Non Conveniens

This section begins with an article by Professor Juenger addressing the issue of forum shopping (1989, Volume I Chapter 1). Professor Juenger points out that forum shopping is the wholly predictable result of broad jurisdictional authority combined with ‘the pluralism of legal cultures’. The United States, with its system of broad discovery, contingent-fee lawyers, and juries, is frequently the forum of choice for plaintiffs from around the world – a result that has not been entirely welcomed either inside or outside the United States.

Within the U.S. courts have dealt with international forum shopping by embracing and expanding the common law doctrine of forum non conveniens, which allows courts to exercise judicial discretion to decline to hear cases notwithstanding having jurisdiction. In deciding the appropriateness of a forum non conveniens dismissal, U.S. courts apply a multi-part test that considers (1) the presence of an adequate alternative forum, (2) the ‘private interest’ factors such as the ease of access to evidence and witnesses, the enforceability of the judgment, and
whether the plaintiff has sought to ‘vex, harass, or oppress the defendant’, and (3) ‘public interest’ factors such as administrative burdens on the court and whether the dispute has sufficient connection to the forum to justify the demands of jury service being imposed on local citizens. The Reynolds article lays out this test and explains how it is applied by U.S. courts (1992, Volume I Chapter 2).

The U.S. approach to forum non conveniens has both supporters and detractors. Reynolds offers a defense, arguing that the doctrine helps to prevent ‘judicial chauvinism’ inherent when U.S. courts adjudicate disputes that are more closely connected to another country. The Stein article (1985, Volume I Chapter 3), on the other hand, critiques the doctrine on the grounds that forum non conveniens dismissals rarely turn on convenience and more commonly reflect fundamental judgments about the allocation of political authority. These allocative judgments, he argues, are not the types of decisions that should be made ‘in an informal, arbitrary, and inconsistent fashion’.1

Forum non conveniens is not a uniquely American doctrine. Versions of the doctrine are applied by other common law courts, but there are some important differences. British courts, for example, will consider only the interests of the litigants and have expressly rejected considerations of public convenience.2 Australia has adopted an even narrower approach, applying what is fundamentally an abuse of process test under which cases will be dismissed only if the choice of forum is ‘clearly inappropriate’.3 The first article by Brand (2002, Volume I Chapter 4) offers a comparative look at these different approaches to forum non conveniens.

Civil law countries generally reject the use of forum non conveniens, viewing the conferral of jurisdiction as a matter of public policy that cannot be waived by the parties or disregarded by a court. For these countries, the preferred solution to the problem of multiple potential fora is the doctrine of lis pendens under which courts defer to the first court seized of the action. The second Brand article (2013, Volume I Chapter 5) compares forum non conveniens with lis pendens and examines some of the complications of an international system that includes both approaches.

Some civil law countries not only decline to dismiss cases on the ground of forum conveniens, they may also refuse to accept cases that have been filed elsewhere initially and dismissed on these grounds. Indeed, some Latin American countries have even gone so far as to enact blocking statutes providing that the filing of a case in a foreign court extinguishes jurisdiction in the domestic courts. The Figueroa article (2005, Volume I Chapter 6) examines the conflict between the U.S. and Latin American approaches in this area.

Parallel Litigation, Lis Pendens, Anti-Suit Injunction

This section considers the problem of parallel proceeding dealing simultaneously with the same or related claims. The fact of multiple proceedings burdens litigants and the courts, and it runs the risk of inconsistent adjudications and attendant confusion or intergovernmental discord. On the other hand, the possible solutions, which range from doing nothing to issuing anti-suit injunctions, each have their own costs and risks.

The George and Teitz articles (George 2002, Volume I Chapter 7; Teitz 2004, Volume I Chapter 8) provide an overview of the various approaches, relevant treaties and model laws for dealing with parallel proceedings. Within the United States, the treatment of international
parallel proceedings is an unsettled area of law. Much of the U.S. case law and commentary on parallel proceedings has focused on federalism issues and there has been less attention to the unique aspects of international parallel proceedings. The Calamita article (2006, Volume I Chapter 9) argues that cases involving international parallel proceedings should be treated differently than the problems of domestic abstention, with much more systematic attention to international comity. The Bermann article (1990, Volume I Chapter 10) focuses on the use by U.S. courts of anti-suit injunctions in international litigation.

Choice of Court Agreements

Another solution to the problem of multiple potential fora, at least in contract cases, is the inclusion of a choice of court clause. However, as the Aballi, Buxbaum, and Tang articles highlight (Aballi 1968, Volume I Chapter 11; Buxbaum 2004, Volume I Chapter 12; Tang 2012, Volume I Chapter 13), different legal systems approach these clauses differently. Civil law systems, which have strongly embraced party autonomy in contracts, have historically enforced choice of court clauses. In contrast, the United States and English common law systems have been more reticent to enforce these clauses, viewing them as private interference with sovereign jurisdiction and inconsistent with a tradition of judicial discretion in determining the optimal forum in each individual case. Likewise, Chinese courts frequently decline to enforce these clauses.

When a non-designated court retains a case despite a choice of court clause, the selected court must decide how to proceed. Heiser (2011, Volume I Chapter 14) discusses the option of an anti-suit injunction and argues in favor of a rebuttable presumption in favor of such injunctions to enforce an exclusive choice of court agreement. And if the case is first filed in a non-designated court, and the selected forum generally follows a lis pendens approach, the selected forum must decide which principle takes precedence – lis pendens or party autonomy.

Within the European Union, the Brussels I Regulation had been interpreted to give primacy to the lis pendens rule. In the face of this interpretation, a party wishing to avoid litigation in the chosen forum could file a preemptive case in a European country, such as Italy, with a notoriously slow litigation system where it could take years for the court to decide whether the choice of court agreement was valid. In the meantime, the chosen forum was prohibited from taking any action. This practice, which came to be known as the ‘Italian Torpedo’, was the subject of increasing criticism and was addressed in the Recast of Brussels I which went into effect in 2015. Under Article 31 of the Recast, when there is an exclusive choice of court agreement, other courts are required to stay their proceeding until the chosen court has declared that it has no jurisdiction. Kenny and Hennigan (2015, Volume I Chapter 15) discuss the Recast of Brussels I and its impact. They note that it is not clear whether the Recast applies to related actions or only identical ones, and if it applies only to the later ‘[i]t would be an invitation to those who wish to file Torpedo litigation to alter slightly the substance of the claim, or alter the parties involved, and thereby avoid the strictures of Article 31’. It remains to be seen how Recast Article 31 will be interpreted.

Choice of court clauses offer a promise of litigation certainty for the contracting parties that will never be realized without international agreement concerning the enforceability of these clauses. The Hague Convention on Choice of Court Agreements provides an international
framework for enforceability which, if widely adopted, could make choice of court agreements comparable to arbitration agreements in their effectiveness. Talpis and Krnjevic (2006, Volume I Chapter 16) discuss the history and scope of this Convention.

Service of Process

Effective notice and service of process is a basic requirement in any lawsuit, and if the litigation involves a person or entity from outside the forum, providing legally sufficient service can pose challenges. While there is broad acceptance of the need for defendants to have notice of proceedings against them, there are important differences among nations concerning the requirements for effective service of process.

Within the common law tradition, the plaintiff or its agent has responsibility for effecting service of process. This approach is in sharp contrast to the civil law tradition in which service process is understood to be an exercise of sovereign authority that is the obligation of the court, not the parties. This understanding is so deeply imbedded that in some civil law countries, private service of process is viewed as a criminal effort to usurp government authority and, therefore, to avoid criminal prosecution a litigant seeking to serve process in that country must secure judicial assistance. The Miller article (1965, Volume I Chapter 17) compares the approaches of the United States and Switzerland with respect to judicial assistance and explores "the range of difficulties that may arise between nations with divergent legal backgrounds".

In response to the increased volume of international litigation and the recognition of a growing need for international judicial assistance, in 1964 the Hague Conference on Private International Law promulgated the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, which offers several methods for service abroad. These mechanisms include: service through a designated Central Authority, service according to the internal laws of the receiving country, and service through the requesting country’s diplomatic or consular agents. The Convention also allows for the sending of judicial documents "by postal channels" provided the receiving country does not object – a provision that has been much litigated. The Raley article (1993, Volume I Chapter 18) sets out the basic requirements of the Hague Service Convention and compares the notice requirements of several civil and common law countries. Eshleman and Wolaver (2010, Volume I Chapter 19) then examine the use of service by mail as an alternative to using the Hague Conventions formal mechanisms.

The Hague Service Convention addresses service abroad and its provisions are mandatory, but the Convention does not delineate when service abroad is required – that is an issue that is governed by forum law. The United States Supreme Court has held that service on a domestic agent or domestic corporate subsidiary is not service abroad and therefore suffices without resort to the Service Convention. The Buhler article (2002, Volume I Chapter 20) examines United States domestic service requirements under Rule 4 of the Federal Rules of Civil Procedure and the interplay of this rule with the Hague Service Convention.

An emerging issue concerning service of process is the question of whether email or other electronic means of notice should suffice. The Stewart and Conley article (2007, Volume I
Chapter 21) discusses the growing body of case law on this issue from around the world and urges the adoption of international standards for electronic service of process.

Discovery

Among legal systems, there is wide variation in the scope and procedures for gathering evidence once an action is commenced. The U.S. system is litigant-driven, with broad pre-trial discovery — an approach that much of the world, particularly the civil law world, finds at best peculiar and at worse oppressive. Hazard and Subrin (Hazard 1998, Volume II Chapter 1; Subrin 2002, Volume II Chapter 3) each offer a broad overview of the foundational constitutional, structural, and cultural premises that undergird the civil law and U.S. approaches to discovery. The Gerber article (1986, Volume II Chapter 2) fleshes out in more detail the German adjudicatory system, contrasting this with the U.S. What these articles highlight is that the different approaches to discovery reflect profound differences in the structure of the judiciary and the legal profession, the role of judges and juries, and the role of civil litigation in the creation of social policy.

While such differences might be merely academic so long as litigation remains entirely domestic in scope, when one adjudicatory system attempts to reach across borders to carry out its approach, there is great potential for conflict. The Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters was an effort to reduce these conflicts by providing an agreed-upon mechanism for securing evidence abroad, and Prescott and Alley (1988, Volume II Chapter 4) offer a clear exposition of the operation of the Convention. However, the procedural mechanisms of the Convention never resolved the core differences, and, at least within the United States, resort to the Convention is not mandatory. Instead, the United States Supreme Court has held that the U.S. discovery rules can be used to secure evidence located abroad, subject to ‘prior scrutiny in each case of the particular facts, sovereign interest, and likelihood that resort to those procedures [of the Convention] will prove effective’. The second Gerber article (1998, Volume II Chapter 5) and the one by Buxbaum (2003, Volume II Chapter 6) examine how this case-by-case assessment has been and should be applied, particularly where the non-U.S. target of discovery is subject to a domestic blocking statute of privacy or secrecy rules.

The new world of electronic discovery has increased the potential that information relevant to a dispute might be stored outside the United States. Knapp (2010, Volume II Chapter 7) examines some of the issues related to cross-border e-discovery. Finally, Chukwumerije (2005, Volume II Chapter 8) considers the flipside of broad U.S. discovery, that is, the extent to which U.S. courts can be used to assist courts abroad.

Aggregate Litigation and Class Action

Globalization of commerce has increased the likelihood of globalized litigation. Mass torts, securities fraud and antitrust violations all can produce multiple claimants from multiple countries who were victims of the same disputed activity. One procedural device for addressing this phenomena is class action.
The United States has long been the leader and, until relatively recently, the outlier with respect to class actions. Moreover, as Issacharoff explains (1999, Volume II Chapter 10), its approach has been the subject of much criticism, including concerns that class actions encourage litigation that would not otherwise occur, that the rights of claimants may be inappropriately compromised by lawyers who are the primary beneficiaries of the litigation, and that the procedure encourages a particularly manipulative form of forum shopping.

Notwithstanding these criticisms, in recent years a number of other countries have begun to embrace versions of the class action—a phenomenon outlined in the Hensler article (2009, Volume II Chapter 9). The trend seems to reflect at least a modest embrace of the concept of privately initiated regulatory litigation—a phenomenon explored in the Strong article (2012, Volume II Chapter 11).

A recurring and critical issue with respect to class actions is the preclusive effect of any settlement or adjudication. The promise of a single and binding resolution of a multi-claimant dispute cannot be realized if others are not willing to recognize and give effect to that resolution, and around the world there are significant differences in the rules of recognition and preclusion as applied to class actions. The Wasserman article (2011, Volume II Chapter 12) examines European rules of preclusion and the differences between the effect likely given in the U.S. to a U.S. class action and the effect it may be given in Europe. The Simard and Tidmarsh article (2011, Volume II Chapter 13) considers what impact the rules of preclusion should have ex ante on the decision of a U.S. court to certify a class action in the first place. The authors note that, under Rule 23(b)(3) of the Federal Rules of Civil Procedure, a class action can be certified only if allowing the class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Applying this provision, many U.S. courts will exclude foreign claimants from a U.S. class action if the home countries of those claimants would decline to recognize the judgment of a U.S. court. Simard and Tidmarsh take issue with this approach and argue for a more flexible and inclusive approach to the inclusion of foreign nationals as claimants in U.S. class action.

**Multijurisdictional Practice**

Lawyers operating across borders must be attentive to differences in the rules governing lawyers and the practice of law. Although there is much in common with respect to the rules of professional responsibility, there are also significant differences in critical areas such as conflict of interest, the scope of attorney-client privilege, permissible fee arrangements, advertising and solicitation of clients, and what constitutes unauthorized practice of law. The final section of the second volume explores some of the professional responsibility challenges confronting a lawyer whose practice crosses national boundaries.

The Vags article (1999–2000, Volume II Chapter 14) lays the foundation for this topic by outlining some of the differences in both legal structures and lawyers’ professional identity that underlie many of the ethical rules. These include whether lawyers are understood to be a business or a profession, whether they are viewed primarily as agents of their clients or officers of the court, whether the legal system is adversarial or inquisitorial, and the size and homogeneity of the practicing bar within a country. These cultural differences translate into specific differences in ethical requirements that can have significant consequences for
practitioners. As Vagts notes at the end of his article, if a Danish camper were to buy a portable stove in Spain that exploded there and injured a German, and each party were to engage a lawyer from his or her home country, ‘It turns out that only one of the lawyers must carry malpractice insurance, only two of them has confidentiality for client communications, and the rules as to maintaining client funds differ for each.’

Within the U.S., since each state has its own ethical rules, the problem of conflicting ethical obligations has always existed since each state has its own ethical rules. However, most states have adopted some version of the American Bar Association’s Model Rules of Professional Conduct, a fact which limits the range of conflicts likely to occur for lawyers whose practice crosses state lines. Where there is a conflict, Rule 8.5 provides a choice of law rules for addressing the conflict and since 2002 the comments to Rule 8.5 make clear that the Rule is intended to apply internationally. Rule 8.5 appears to offer a straightforward approach. For matters pending before a tribunal, the lawyer is bound by the rules where the tribunal sits. For all other matters the lawyer is bound by the rules where he or she is admitted or principally practices.

The Rogers article (2009, Volume II Chapter 17) examines Rule 8.5 and argues that its choice of law solution is not adequate to address the issues faced by global legal advocates. For example, applying the ethical rules of the place of litigation is highly problematic in the context of litigation before international tribunals where the location, whether in The Hague or some place of convenience, bears no connection to the jurisdiction of the tribunal. Even with respect to adjudications in national (as opposed to international) tribunals, there is room for confusion as well as substantive disagreement as to whether the controlling rules should be the place where the complaint was filed. As Rogers notes, where international judicial cooperation is involved, it is not clear whether the Rule points to the place where the underlying complaint was filed or to where a particular judicial component of the action is pending. Likewise, as a matter of substantive policy, it is not clear that a New York lawyer who has filed a mass tort claim in New York ought to be able to freely advertise for clients in another country in flagrant violation of that country’s rules concerning lawyer advertising.

Whatever the problems of the approach of Rule 8.5, it provides a choice of law solution to what Europeans call ‘double deontology’ – a situation in which a lawyer is subject to the ethical rules and discipline of both her home jurisdiction and a host jurisdiction. The Council of Bar and Law Societies of Europe has addressed the problems of double deontology by adopting the Code of Conduct for Lawyers in the European Community (CCBE Code). Providing a unified code for the disparate legal traditions of Europe proved, not surprisingly, a difficult task. In the end the CCBE Code offered a few overarching and generally applicable principles for all lawyers and then laid out what are essentially a set of conflict of law rules for many of the issues as to which different jurisdictions differ in approach. The two Terry articles (1993, Volume II Chapter 15; 1992–1994, Volume II Chapter 16) provide a comprehensive and thoughtful analysis of the meaning and scope of this important code covering professional ethics.

The final two articles consider two specific sets of problems that can arise in transnational litigation. The articles by Pike (2006, Volume II Chapter 18) and by Griffiths-Baker and Moore (2012, Volume II Chapter 19) offer comparative analyses of the ethical issues of attorney–client privilege and conflict of interest, respectively. The articles highlight that even
as between the common law based systems of the U.S. and U.K., there are significant differences in these areas that can be traps for the inattentive attorney.

Notes

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VOLUME II

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