Loyola of Los Angeles Law Review

Volume 40
Number 4 *Developments in the Law: Transnational Litigation*

Article 1

6-1-2007

I. Foreword: The Last Frontier—Transnational Litigation

Georgene M. Vairo

I. THE LAST FRONTIER

FOREWORD

*Professor Georgene M. Vairo**

Forum selection is an increasingly important characteristic of civil litigation.[1] During the first year of law school, Civil Procedure professors typically spend months teaching their students about personal jurisdiction, which leads students-turned-lawyers to file suit in a state in which the defendant has sufficient contacts to make it fair for the courts of that state to exercise jurisdiction over the defendant.[2] In many cases, lawyers will have a choice among states that have personal jurisdiction over the defendant or defendants.[3] Thus, plaintiffs' lawyers will typically file a case in the state in which they believe their clients will be awarded the highest damages.[4]

Additionally, Civil Procedure professors spend a great deal of time on the arcane rules of federal subject matter jurisdiction: diversity jurisdiction, federal question jurisdiction, supplemental jurisdiction, and removal. The law of federal jurisdiction determines

---

* Professor of Law & William M. Rains Fellow, Loyola Law School, Los Angeles. I wish to thank the student contributors and their editors for their excellent work on this Developments issue.

1. *See e.g.*, Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and The All Writs Act*, *in* 2 CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS § J-1, at 1269 (Sol Schreiber et al. eds., 8th ed. 1998); *see also* Gita F. Rothschild, *Forum Shopping*, LITIG., Spring 1998, at 40 ("Choice of forum can mean joyous victory or depressing defeat. A wrong selection and it's enemy territory: a jurisdiction where the prevailing law, available remedies, courtroom procedures, and juror attitudes are inimical to your client. A correct choice and, as Don Corleone once said, 'They will fear you.'"); Edward M. Mullins & Rima Y. Mullins, *You Better Shop Around: Appellate Forum Shopping*, LITIG., Summer 1999, at 32–33 (discussing the various forum-shopping opportunities available to plaintiffs and defendants).

2. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–19 (1945) (setting forth the minimum contacts test).

3. *See* Emil Petrossian, Developments, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1259–60 (2007).

4. *Cf. id.* at 1266 (discussing foreign plaintiffs' incentives to file in the United States, which is viewed as a "haven for plaintiffs").

whether a plaintiff, by filing a diversity or federal question suit, or a defendant, through a removal statute, can litigate in federal court in one of the states where there is personal jurisdiction over the defendants.[5] In cases where the federal courts lack subject matter jurisdiction, litigants must rely on state courts.

Forum selection rules—for determining personal jurisdiction, federal subject matter jurisdiction, and venue—boggle the minds of first-year law students. However, these students quickly learn the importance of forum selection. Just ask a defendant who is hit by a judgment for billions of dollars from a state court in a "Judicial Hellhole." Just ask a plaintiff whose case is removed to federal court from state court, or transferred to another court within the federal or state system, or tossed to a different jurisdiction under the doctrine of forum non conveniens.

Trying to stay in one court and out of another may appear manipulative, but it is nothing new.[6] Lawyers should not be chastised and punished unless they bring frivolous claims, or the forum they choose plainly lacks jurisdiction over the case.[7] Rather, they should be applauded for engaging in the appropriate and necessary practice of forum selection. Forum shopping is bad and evil only if we use the phrase to mean the bringing of frivolous claims in an improper forum.

Although some forum selection cases typically used in the first year Civil Procedure course involve a foreign party, rarely is the "transnational" aspect of the case closely examined. Because developments in technology, communication, and transportation have led to a shrinking global marketplace, an increasing number of cases involve one or more foreign parties. Whether a contract or tort

---

5. *See* Brooke L. Myers, Developments, *Treaties and Federal Question Jurisdiction: Enforcing Treaty-Based Rights in Federal Court*, 40 LOY. L.A. L. REV. 1449, 1478–80 (2007) (discussing subject matter jurisdiction in federal courts).

6. Baddie v. Berkeley Farms, Inc., 64 F.3d 487, 490 (9th Cir. 1995) ("A plaintiff is entitled to file both state and federal causes of action in state court. The defendant is entitled to remove. The plaintiff is entitled to settle certain claims or dismiss them with leave of the court. The district court has discretion to grant or deny remand. Those are the pieces that comprise plaintiffs'' allegedly manipulative pleading practices. We are not convinced that such practices were anything to be discouraged.").

7. *See* Sussman v. Bank of Isr., 56 F.3d 450, 457-59 (2d Cir. 1995) (holding that it was not sanctionable to file colorable claims in a proper but inconvenient forum for the purpose of exerting settlement pressure on a related case).

case, increasingly, there is a likelihood that one or more parties to a civil dispute will be from different nations.

The purpose of this Developments issue is to introduce U.S. attorneys and judges to some of the problems and issues raised by the increasingly complex forum selection problems that arise when a dispute involves foreign and domestic parties. This Developments issue assumes that many of its readers are familiar with the personal jurisdiction and federal jurisdiction rules referred to above, but that they are not as familiar with the quirks that arise when a foreign litigant is added to the mix. We hope to provide such readers with a primer that will guide them through the basics of transnational litigation. By "transnational," we mean a case containing an international flavor, either because one or more parties to the dispute are from different nations, or because of the existence of some relevant international rule of law.

The five student Developments articles will help the reader solve various problems that arise in transnational litigation. First, Emil Petrossian's article, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*,[8] provides an excellent introduction to transnational forum selection. Petrossian demonstrates why most transnational cases warrant particular scrutiny of jurisdictional issues. Such issues may impact not only the outcome of a case but also recognition and enforcement of that jurisdiction's judgment in a foreign country. Accordingly, Petrossian's article focuses on personal jurisdiction, forum non conveniens, and the recognition and enforcement of foreign judgments, analyzing their connections to forum selection in private transnational civil disputes in the United States and England. After reading this article, the reader will be able to answer the various questions raised by the following hypothetical:

> In August 2004, BK Ltd., a manufacturer of high-end movie recording equipment based outside of London, England, entered into a long-term contractual agreement with Studio L.A., a privately held Los Angeles, CA corporation that sells and leases movie equipment to studios and production companies. Under the contract, the parties agreed that, over the next three years, Studio L.A. would

8. Petrossian, *supra* note 3.

purchase six XG-800 movie cameras from BK, for the purchase price of $15,000.00 per camera.

In May 2006, Studio L.A. entered into a separate agreement with a local production company, ABC Films, to lease out all of the equipment that the production company would need to film a moderately priced movie. ABC was to begin filming in late-2006, and Studio L.A. had agreed to deliver the leased equipment to the location of the movie set by November 15, 2006.

By October 1, 2006, Studio L.A. had already paid for and received three XG-800s from BK. On that date, it sent payment for a fourth camera, which it intended to lease out to ABC along with two of the cameras Studio L.A. had already purchased. Typically, BK would fax a confirmation of receipt of payment to Studio L.A. within a week of receiving payment. However, on this occasion, BK's chief sales manager contacted Studio L.A.'s president to notify her that, as a result of large-scale growth of the film industry in foreign markets such as India and Iran, markets in which BK had become a big player within the past couple years, BK would not be able to provide Studio L.A. with any additional XG-800s until early-2008.

Because Studio L.A. was unable to honor its contract with ABC, ABC sued Studio L.A. and the case settled for an undisclosed amount. Now, Studio L.A. would like to sue BK for breach of contract, and seeks both actual and consequential damages.

Will filing suit in a particular forum afford Studio L.A. a better chance of prevailing on its breach of contract claim than in other fora? What advantages, if any, do U.S. courts offer that would be absent or reduced in the courts of England and other nations? Do English courts offer any advantages that U.S. courts do not afford?

Furthermore, can any U.S. courts exercise personal jurisdiction over BK in this dispute? If so, can BK nevertheless raise a legitimate personal jurisdiction challenge that will require additional time and expense to litigate? How much weight should one give this consid-

eration at this early stage of the dispute? What if Studio L.A. files suit in England—will the exercise of personal jurisdiction be an issue then?

Similarly, can BK raise a potentially successful motion to dismiss on forum non conveniens grounds? If so, what are the possible implications for Studio L.A.'s case? Does it make more sense for Studio L.A. to file in a forum in which BK cannot move for dismissal on forum non conveniens grounds?

Now, suppose that BK's only assets are located in England. Studio L.A. files suit in the United States and prevails at trial. Can it enforce the judgment against BK? What factors will English courts focus on when determining whether to recognize and enforce a foreign judgment? How will the issue of personal jurisdiction in particular color the English court's analysis in this regard? Would Studio L.A. have been better off simply filing suit in England to begin with, even if U.S. courts offer more litigation advantages? What if the situation was reversed, and Studio L.A. prevailed in an English court but had to enforce the judgment in the United States.?

Of course, many of our readers are aware that forum selection problems can be obviated through contractual forum selection devices that require the parties to arbitrate their dispute rather than litigate in court. Winston Stromberg's article, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*[9] delves into the important area of international arbitration. His article also discusses emerging areas such as mediation and conciliation in the international context. His article will assist the reader in parsing the following hypothetical:

KB Co., a Cayman Island corporation that builds electric generating stations using geothermal sources, enters into a contract with PPM, an oil, gas, and geothermal energy company owned by the Republic of Indonesia, to

9. Winston Stromberg, Developments, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV 1337 (2007).

develop geothermal energy sources in a remote area of Indonesia.[10] Under the terms of the contract, PPM is to manage the project and receive the electricity generated. The contract contains a multi-tiered dispute resolution clause, which first requires the parties to attempt to resolve any dispute by conducting mediation under the International Conciliation Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). If the dispute cannot be resolved through mediation, the clause requires the parties to arbitrate in Geneva, Switzerland under the UNCITRAL's International Arbitration Rules.

After a financial crisis in Indonesia, PPM shuts down the energy plant. KB Co. claims "force majeure" and seeks damages for breach of contract. Mediation is unsuccessful, so KB Co. initiates arbitration proceedings and appoints an arbitrator pursuant to the dispute resolution clause of the contract. PPM fails to appoint an arbitrator; thus an appointing authority, as specified in the contract, must appoint one on its behalf. The two arbitrators then select a third arbitrator as chairman, and the panel is set. The arbitration hearings take place in Paris, and both parties submit extensive witness statements.

Ultimately, the arbitrators render an award in favor of KB Co. PPM seeks to have the award annulled in Switzerland, but the Swiss courts reject the appeal. Simultaneously, KB Co. files suit in federal district court in Texas to enforce the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). PPM attempts to resist enforcement of the award by bringing various defenses under Article V of the New York Convention.

The district court finds no merit in PPM's defenses and grants summary judgment in favor of KB Co. While PPM appeals to the Fifth Circuit, it also institutes annulment

10. Most but not all of the facts and legal issues in this hypothetical are drawn from *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).

> proceedings in Indonesian courts, attempting to have the award vacated under Indonesian annulment standards. The Indonesian court annuls the award. On review in the Fifth Circuit, the court refuses to find any validity to the Indonesian court's annulment of the award and affirms the judgment of the trial court.

The next article turns to the hot button issue of the application of foreign law by U.S. federal courts. The U.S. Supreme Court has been criticized for referencing foreign and international law in some of its more controversial cases, such as death penalty cases and cases involving gay rights. Janella Ragwen's article, *The Propriety of Independently Referencing International Law*,[11] explores this controversy. Her article parses the debate about the use of foreign law to frame how courts should decide whether to use foreign law in the following context:

> John is currently an attorney working for the county of Los Angeles. He wants to get health benefits for himself and his long-time same-sex partner. However, the county only offers health benefits to legally married couples, and California does not recognize marriages between same-sex couples.
>
> John brings a claim in federal court in California, arguing that California's failure to recognize marriages between same-sex couples denies him Due Process and Equal Protection under the Fourteenth Amendment. First, to determine whether John is being denied his Fourteenth Amendment rights, the district court must decide whether the right of same-sex partners to marry is a fundamental right. To decide whether same-sex couples have a fundamental right to marry, the court must determine whether the right is deeply rooted in the nation's history and tradition.
>
> The court identifies national approval of the right of all persons to marry by looking at such cases as *Loving v. Virginia*[12] and *Zablocki v. Redhail*,[13] both of which

11. Janella Ragwen, Developments, *The Propriety of Independently Referencing International Law*, 40 LOY. L.A. L. REV. 1407 (2007).

12. 388 U.S. 1, 2 (1967) (holding that a statutory scheme prohibiting couples of different races from marrying violated the Fourteenth Amendment).

> recognize a fundamental right to marry. After determining that there is a national consensus in favor of protecting same-sex couples' right to marry, should the district court then survey international law to see whether recognizing a right to same-sex marriage is consistent with international opinion? If the court finds that most countries protect the right to marry for same-sex couples, should the court use this international consensus in conjunction with the national consensus to rule that the right to same-sex marriage is a deeply rooted right in the United States?

The issue then turns to an emerging topic in the area of forum selection: the use of international law to provide subject matter jurisdiction in federal courts. Brooke Myers' comprehensive article, *Treaties and Federal Question Jurisdiction: Enforcing Treaty-Based Rights in Federal Court*,[14] serves as a primer on how federal courts are looking at international texts such as treaties to determine whether they have federal question jurisdiction. Her article provides the basics for understanding how a federal court would deal with the following problem:

> Sex tourism is a booming business. As the international tourist trade has expanded, so have the instances of sexual exploitation of children by those tourists. Typically, tourists from wealthy countries travel to poor countries either with the purpose to, or the added "benefit" of, having sex with children. But because of the significant role such tourism plays in otherwise weak domestic economies, many poor countries have turned a blind eye to the problem. On the other hand, even if the will to confront the issue head-on existed, the poverty of the country and its citizens makes enforcement difficult. As a result, it is estimated that more than two million children worldwide are engaged in the sex trade. Furthermore, it is estimated that approximately twenty-five percent of sex tourists are Americans.
>
> Moreover, even though the United States criminalized international travel for the purpose of committing a sex act

13. 434 U.S. 374, 383–84 (1978) (holding that a statute prohibiting persons who owe child support from marrying was unconstitutional because the right to marry is a fundamental right).

14. *Supra* note 5.

> with a child in 1994, prosecutions have been infrequent. So, in an effort to allow victims of the child sex trade to share in the wealth that enables the trade to exist, imagine that the international community negotiates a new treaty. The treaty's purpose is to give the victims of child sex exploitation the right to sue their abusers for money damages. By hitting the sex tourists "where it hurts," the ratifying countries hope to "price them out of the market."
>
> Then imagine that an American citizen is prosecuted in the United States for traveling to a foreign country to engage in sex with children. His victims are identified by a non-governmental organization, which successfully petitions the U.S. government for their legal immigration. Upon arrival in the United States, the non-governmental organization determines the identity of the sex tourist and helps his victims sue him for damages under this new treaty.

Myers's article discusses three treaties and their treatment in U.S. federal courts, and presents a framework within which to analyze this type of claim. She explains doctrines such as self-execution, primary rights, private rights of action, and subject matter jurisdiction, which must all be considered but kept analytically distinct.

The final article examines the important issue of personal jurisdiction in the Internet context. Jeffrey Jensen's article, *Personal Jurisdiction in Federal Courts over International E-Commerce Cases*,[15] provides a survey of the development of the personal jurisdiction rules pertaining to companies involved in selling products over the Internet. Jensen also provides a compelling analysis for how courts ought to answer the following hypothetical:

> Suppose an Indian company sells books from an Internet website. Some of the bookseller's products violate the copyright of a Virginia author, and the author wishes to sue in Virginia.
>
> The author alleges state law claims, as well as a federal copyright claim. The author can establish that the

15. Jeffrey M. Jensen, Developments, *Personal Jurisdiction in Federal Courts over International E-Commerce Cases*, 40 LOY. L.A. L. REV. 1507 (2007).

> bookseller has sold and shipped books to customers in Virginia on at least two occasions. However, nothing other than those isolated sales indicates that the defendant purposefully solicited sales from Virginia.
>
> The bookseller's conduct does, however, indicate an intention to sell to the United States in general. Indeed, its website is written in English and has a ".com" domain name. Moreover, links on the site aid U.S. customers in finding local Western Union offices so they can wire money to the bookseller for payment.
>
> The website is not sophisticated. It describes the products and prices, but does not accept orders or payments. Rather, customers must complete transactions through the mail or email.

As the reader can see, transnational disputes raise a myriad of difficult issues. The student articles provide ideas, research, analysis, and doctrine to assist an attorney dealing with a transnational lawsuit. As the global economy booms, more and more litigators will be confronted with these important issues.