

REFLECTIONS ON THE PAST DECADE OF TRANSNATIONAL LITIGATION

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The past decade of transnational litigation has seen a consolidation of the trend towards disputes about venue. Increasingly, transnational litigation takes the form of a battle about where the battle is to be fought. The proposed *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*¹ would have created a multilateral system of cooperation between countries about the exercise of jurisdiction, similar to that which exists within the European Union under *EC Regulation 44/2001*.² Its failure means that disputes about the selection and settlement of venue will continue, for the foreseeable future, to be decided using the traditional tools of *forum non conveniens* stays (or dismissal, in some countries), anti-suit injunctions and some more exotic variants such as negative declarations, anti-anti-suit injunctions and even anti-anti-anti-suit injunctions.³ The focus on venue means that time, money and intellectual energy are spent on questions that are, at best, only indirectly related to the merits of the case, and often completely unrelated to them.

The outcomes of the skirmishes about jurisdiction and venue often effectively determine the case, not by resolving anything on the merits but by establishing who has the upper hand in settlement negotiations. For example, in *Armacel Pty Ltd v Smurfit-Stone Container Corp*,⁴ an Australian company sued an American company in the Federal Court of Australia, alleging breach of contract and breach of the *Trade Practices Act 1974* (Cth). The American company had previously brought an action in the United States seeking negative declaratory relief. The US District Court for the Middle District of Pennsylvania held that a forum selection clause in the contract submitting disputes to the jurisdiction of New South Wales courts was non-exclusive and so, did not preclude action in the US.⁵ The American company then successfully sought a stay of the Australian proceedings on *forum non conveniens* grounds. The Australian company's application for an anti-suit injunction restraining the continuation of the American proceedings was refused by the Federal Court of Australia.

After several years of litigation in two countries, involving five law firms (three in the US and two in Australia) and eight counsel (two Australian Senior Counsel and two juniors; and four attorneys on the briefs in the US), the parties

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¹ Hague Conference on Private International Law, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Preliminary Document No 7, April 1997), available from <<http://hcch.e-vision.nl>>.

² *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] OJ L 12/1.

³ Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) 196–8.

⁴ (2008) 248 ALR 573.

⁵ *Smurfit-Stone Container Corp v Armacel Pty Ltd*, No 4:07-CV-1822 (Pa D, 27 December 2007).

had an answer to where the merits of the case must be heard. However, the only consideration of the merits was the Australian Court's decision that the Australian applicant had made out a prima facie case, a conclusion subsequently rendered moot by the Court's order to stay the proceedings. Having paid for four of the eight counsel and two of the five law firms, the Australian company had learned only that it would now have to pursue its claim in the US District Court for the Middle District of Pennsylvania. (It had also learned that its clause that provided for a choice of jurisdiction of New South Wales courts was not as well drafted as it might have been.) Even the bravest of optimists would now surely consider settling the case rather than fighting on.

Disputing parties who would prefer a decision on the merits would do well to consider arbitration as a means of settling their disputes. International commercial arbitration is not always as economical and efficient as it proclaims, but it does at least have the advantage that the outcomes are based on the merits of each case, rather than a settlement after a war of attrition over venue. A survey of participants in American Arbitration Association ('AAA') international arbitrations in 2002 showed that 'an overwhelming majority' of respondents believed that a fair and just result was 'the most important attribute' of arbitration as a dispute resolution mechanism. This criterion was ranked 'even above [the] receipt of a monetary award, speed of outcome, cost, [confidentiality] or arbitrator expertise'.⁶ It seems that an answer on the merits has some value, after all.

Most international arbitration takes place because the parties agreed in advance on that particular method of dispute resolution.⁷ It is, of course, possible for disputing parties to make an ad hoc arbitration agreement after a dispute has arisen.⁸ Nevertheless, it is often observed that it is unlikely that parties who are already in dispute will be ready and willing to agree on a method of dispute resolution. Although this is obviously true to some extent, the attitude of the parties might nonetheless be different if their legal advisers were to cast the implications of the alternatives in a clearer and harsher light. It is understandable for legal advisers to focus on litigation when there is no prior agreement to arbitrate, but it is not the only option. If the choice were to be phrased as being between *forum non conveniens*, anti-suit injunctions (and anti-anti-suit injunctions and anti-anti-anti-suit injunctions) and negative declarations on the

⁶ Richard Naimark and Stephanie Keer, 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People — A Forced-Rank Analysis' (2002) 30 *International Business Lawyer* 203.

⁷ In an AAA-funded survey conducted in 2003, and titled 'Dispute-Wise Business Management', 91 per cent of respondents gave the answer '[i]s required by contract' as their principal reason for using arbitration as a dispute resolution mechanism: Loukas Mistelis, 'International Arbitration: Corporate Attitudes and Practices — 12 Perceptions Tested: Myths, Data and Analysis Research Report' (2004) 15 *American Review of International Arbitration* 525, 542.

⁸ Indeed, under Islamic law, an ad hoc agreement is often the only kind of arbitration agreement that can be made, as many arbitration clauses regarding future disputes are unenforceable because they are *gharar* (uncertain) for the purposes of Shari'a law. For further information, see S Breckenridge Thomas, 'International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria and Saudi Arabia' (2007) 17 *American Review of International Arbitration* 183, 207; David Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (1992) 25 *George Washington Journal of International Law and Economics* 131, 164.

one hand, and arbitration on the merits on the other, the disputing parties might be more inclined to find a compromise on dispute resolution, even if they remain at odds on the merits of the alternative dispute resolution mechanisms. Of course, in these days when law firms have replaced their Commercial Litigation groups with Dispute Resolution and Contested Business groups, it is entirely possible that clients are being given a neutral, open-ended choice between alternative methods of dispute resolution. Nevertheless, there are surely some lawyers who still choose litigation to resolve transnational disputes without fully exploring the alternatives, because litigation seems the obvious alternative when there is no prior agreement about dispute resolution.

It is equally possible that clients and their advisers choose litigation simply *because* it provides a means of altering the strength of bargaining positions. A party with a weak position on the merits may have a stronger position in relation to forum selection, because of such issues as the location of evidence and other factors relevant to venue questions. Such a party can improve its position in settlement negotiations by adopting an aggressive strategy focused on litigation. 'Forum shopping' is usually used pejoratively, but it has often been observed that it is no more than an attempt to secure the maximum advantage permitted by the various laws relevant to a transnational dispute — in other words, lawyers undertaking their professional duty to find the best position for their clients.

The legal principles governing venue have become more and more complex and abstract as tactical device has been piled upon tactical device. Frankly, that makes the field of transnational litigation tremendously enjoyable and intellectually stimulating for lawyers, as well as being an attractively challenging field for law students to contemplate entering. It is worth reflecting, however, that lawyers seldom have that much fun using their own money. At some point, litigating about venue ceases to be cost-effective, particularly when one remembers those AAA respondents hankering after a fair and just result above all else.