

Whytock and Robertson on Forum Non Conveniens and the Enforcement of Foreign Judgments

Christopher A. Whytock (Irvine School of Law) & Cassandra Burke Robertson  (Case Western Reserve University School of Law) have published Forum Non Conveniens and the Enforcement of Foreign Judgments in the last issue of the *Columbia Law Review*.

When a plaintiff files a transnational suit in the United States, the defendant will often file a forum non conveniens motion to dismiss the suit in favor of a court in a foreign country, arguing, as the forum non conveniens doctrine requires, that the foreign country provides an adequate alternative forum that is more appropriate than a U.S. court for hearing the suit. Some defendants, however, experience “forum shopper’s remorse”: Having obtained what they wished for—a dismissal in favor of a foreign legal system with a supposedly more pro-defendant environment than the United States—they encounter unexpectedly pro-plaintiff outcomes, including substantial judgments against them. When this happens, a defendant may argue that the foreign judiciary suffers from deficiencies that should preclude enforcement of the judgment—an argument seemingly at odds with the defendant’s earlier forum non conveniens argument that the same foreign judiciary was adequate and more appropriate. This Article shows that under current doctrine, these seemingly inconsistent arguments are not necessarily inconsistent at all. The forum non conveniens doctrine’s foreign judicial adequacy standard is lenient, plaintiff-focused and ex ante, but the judgment enforcement doctrine’s standard is relatively strict, defendant-focused, and ex post. Therefore, the same foreign judiciary may be adequate for a forum non conveniens dismissal, but inadequate for purposes of enforcing an ensuing foreign judgment. However, these different standards can create a transnational access-to-justice gap: A plaintiff may be denied both court access in the United States and a remedy based on the foreign court’s judgment. This Article argues that this gap should be closed, and it proposes doctrinal changes to accomplish this.

The article can be freely downloaded here.