

Drahozal on the Economics of Comity

Christopher Drahozal (University of Kansas Law School) has posted *Some Observations on the Economics of Comity* on SSRN.

Comity is the deference one State shows to the decisions of another State. Comity is manifested in an array of judicial doctrines, such as the presumption against the extraterritorial application of statutes and the presumption in favor of recognition of foreign judgments. Comity does not require a State to defer in every case (it is not “a matter of absolute obligation”), but determining when comity requires deference poses difficult doctrinal and theoretical issues.

This paper offers some observations on the economics of comity in an attempt to provide insights into those issues. It first describes the (largely unsatisfactory) attempts to define comity and identifies the various judicial doctrines that are based on comity. Generalizing from the existing literature, which uses game theory (most commonly the prisoners’ dilemma game) to analyze legal doctrines based on comity, the paper then sets out a basic and tentative economic analysis of comity. Comity often serves a cooperative function: courts rely on comity as the basis for doctrines that enhance cooperation with other States. In such cases, refusing to grant comity to a decision of another State constitutes defection from the cooperative solution. But if the original decision itself constitutes defection — such as a State opportunistically entering a judgment against a foreign citizen — refusing to grant comity would not be defection but would instead be an attempt to sanction the other State’s defection. Thus, the central inquiry when a court decides whether to grant comity can be framed as whether the State decision being examined constitutes cooperation or defection. Further, given the uncertainty courts face in making such a determination, comity itself then can be seen as establishing a default presumption that a particular type of State decision constitutes cooperation (or, in cases in which courts refuse to grant comity, as a default presumption of defection).

The paper then argues that any rule a court adopts on the basis of comity should be treated as a default rule rather than a mandatory rule. The argument

in favor of default rules over mandatory rules is a familiar one, and seems to apply well here. Thus, as U.S. and U.K. courts have held — but contrary to decisions of the European Court of Justice — comity concerns should not preclude a court specified in an exclusive forum selection clause from entering an anti-suit injunction against foreign court litigation. An arbitration clause, by comparison, provides a much weaker case for finding that the parties contracted around the comity-based default. Finally, the paper suggests possible avenues for future research: in particular, examining the importance of rent-seeking and judicial incentives in the economics of comity.

The paper is forthcoming in *The Economic Analysis of International Law* (Eger & Voigt eds, 2013).