Choice of Law in the American Courts in 2023

The thirty-seventh annual survey on choice of law in the American courts is now available on SSRN. The survey covers significant cases decided in 2023 on choice of law, party autonomy, extraterritoriality, international human rights, foreign sovereign immunity, adjudicative jurisdiction, and the recognition and enforcement of foreign judgments. So, on this leap day, we thought we would leap into the new month by looking back at the old year.

Choice of Law

The Eighth Circuit applied Mexican law to a suit against General Motors over a car crash in Mexico, while an Ohio state court applied South African law to invalidate a marriage. A Washington state court interpreted an Irish forum selection clause to require dismissal of statutory claims against Microsoft despite the facts that Microsoft was not party to the agreement and the clause arguably did not cover statutory claims. Meanwhile the Fifth Circuit enforced a forum selection clause in an insurance contract choosing British Virgin Island courts despite evidence that the claims stood little chance in those courts.

Extraterritoriality

The Supreme Court decided two important extraterritoriality cases. In *Yegiazaryan v. Smagin*, the Court interpreted civil RICO's "domestic injury" requirement to apply to a domestic judgment confirming a foreign arbitral award, a decision that brings another tool to bear to help enforce foreign awards and judgments. In *Abitron Austria GmbH v. Hetronic International, Inc.*, the Court held that the Lanham Act applies only to domestic conduct infringing U.S. trademarks and, in so doing, provided important guidance about how to apply the federal presumption against extraterritoriality.

Meanwhile, lower courts struggled with how to fit the Supreme Court's 1922 decision in *United States v. Bowman*, which addresses the scope of federal criminal statutes, into its current extraterritoriality framework. The Eleventh

Circuit held that *Bowman* provides an alternative framework that courts may apply instead of the current presumption to determine the reach of criminal statutes, whereas the Ninth Circuit held that *Bowman*could be considered part of the relevant "context" at step one of the Court's present two-step framework. As Bill has explained, both solutions seem doubtful, and the issue may be headed to the Supreme Court.

International Human Rights

In an important decision, the Ninth Circuit held that Chinese practitioners of Falun Gong could sue Cisco Systems and some of its executives for aiding and abetting their torture by designing and building a surveillance system for the Chinese government. The court held that plaintiffs had alleged sufficient conduct in the United States to support their Alien Tort Statute (ATS) claim and that the Tort Victim Protection Act (TVPA) permitted aiding and abetting claims against the corporate executives. Meanwhile, the Supreme Court interpreted the aiding and abetting provision of the Anti-Terrorism Act (ATA) in *Twitter, Inc. v. Taamneh* to require conscious and culpable participation, thereby shielding social media platforms from liability based on the use of their platforms by terrorist groups.

Foreign Sovereign Immunities Act

In *Tu?rkiye Halk Bankasi, A.S. v. United States*, the Supreme Court held that the Foreign Sovereign Immunities Act (FSIA) does not apply to criminal prosecutions. The Court remanded for further consideration of Halkbank's claim of immunity under federal common law.

In *Bartlett v. Baasiri*, the Second Circuit held that a foreign company can acquire immunity under the FSIA if it becomes majority-owned by a foreign government *after* a lawsuit is filed. That decision is in some tension with the Supreme Court's decision in *Dole Food Co. v. Patrickson* (2003) holding that status as an agency or instrumentality of a foreign state is determined at the time of filing.

Adjudicative Jurisdiction

In *Fuld v. Palestine Liberation Organization*, the Second Circuit held that the Promoting Security and Justice for Victims of Terrorism Act is

unconstitutional because it permits the assertion of personal jurisdiction based on an activity—making payments to terrorists and their families—that cannot be understood as consent to jurisdiction. The court applied the Supreme Court's newest personal jurisdiction decision, *Mallory v. Norfolk Southern Railway Co.* (2023), which is also discussed in the survey. Congress could not, the court held, simply take an activity and label it consent to jurisdiction without providing something in return.

In *Lewis v. Mutond*, the D.C. Circuit dismissed a U.S. citizen's torture claim against officials of the Democratic Republic of Congo, rejecting an argument that the vitality of the TVPA as a statutory scheme should factor into the court's personal jurisdiction analysis. The court also reiterated the D.C. Circuit's position that the limits imposed on federal courts by the Fifth Amendment are the same as those imposed on state courts by the Fourteenth, with Judge Rao suggesting in a concurring opinion that the court should reconsider that position en banc.

Interpreting the doctrine of forum non conveniens, the Tenth Circuit held that a foreign forum is not available if only the moving party, but not the other defendants, has consented to jurisdiction there. In another case, the Fourth Circuit held that a foreign forum was not adequate because it could not address the plaintiff's American trademark claims.

Recognition and Enforcement of Foreign Judgments

Virginia has adopted the Uniform Foreign-Country Money Judgments Recognition Act, but because that act applies only to money judgments, the Fourth Circuit had to apply Virginia common law to decide whether to recognize a Ghanaian divorce decree. The court held that Virginia's common law requirements were met, even though Virginia might not have granted a divorce under the same circumstances. Meanwhile, a Texas state court held that a Canadian judgment did not violate Texas public policy even though it awarded speculative damages.

Finally, the Tenth Circuit (applying Colorado law) joined the growing number of courts that have held that a court may order a debtor or third-party garnishee to bring assets held abroad into the United States if the court has personal jurisdiction over the debtor or third-party.

Conclusion

The annual survey on choice of law was admirably maintained by Symeon Symeonides for three decades. The present authors are pleased to have extended this tradition for the last three years.

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[*This post is cross-posted at Transnational Litigation Blog*]