Time to Say Goodbye to Forum Non Conveniens?

Author : Robin J. Effron

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Maggie Gardner, *Retiring* Forum Non Conveniens, 92 **N.Y.U. L. Rev.** (forthcoming 2017), available at SSRN.

The doctrine of *forum non conveniens* is a mainstay in the modern defendant's procedural arsenal in transnational cases. Under this common law doctrine, which the Supreme Court first recognized at the federal level in 1947, a judge may consider a number of private and public factors to decide whether a lawsuit over which it otherwise has jurisdiction should be dismissed and (at the plaintiff's initiative) relitigated in another, non-U.S. forum. In her thorough and thought-provoking article, Maggie Gardner goes beyond the multitude of scholars who have called for the doctrine to be refined, reformed, or limited, and instead calls for its retirement from federal procedural law altogether.

Gardner recognizes the enormity of this task, and suggests jettisoning *forum non conveniens* only after presenting a careful history of the doctrine and a thorough canvassing of the critiques and reform proposals that have dotted the lower-court and scholarly landscapes over the past few decades.

Gardner identifies several problems with *forum non conveniens,* both in the doctrine and the proposed reforms. She argues that the doctrine, once rooted in notions of international litigation and principles of comity, was refashioned for the domestic context before it mutated again to its current role in transnational litigation. This meandering doctrinal path has left *forum non conveniens* with an odd assortment of vestiges of domestic and international concerns that are no longer meaningfully relevant to modern transnational litigation. In addition to these doctrinal mismatches, Gardner argues that the doctrine focuses an outsized lens on the issue of availability of evidence in long-distance situations – a problem that does not plague modern litigation, where the feasibility of access to evidence is facilitated by modern technology and ease of travel. The doctrinal difficulties are linked to the problems with proposed reforms. Because reform efforts take the doctrine's existence and multi-factored test as their starting point, they tend to only add more complexity to the doctrine. But as Gardner ably shows, it is the layers of complexity that created the problems in the first place.

Other difficulties stem from *forum non conveniens*' status as a common law doctrine. *Forum non conveniens* became an exclusive tool of transnational litigation because its more general domestic application was edged out by statutes such as 28 U.S.C. § 1404(a), which allows for transfer of venue within the federal system. The changing nature of litigation, and particularly transnational litigation, makes the general test for *forum non conveniens*, as adopted in 1947 and reconfigured for the transnational context in 1981, an awkward fit. One would think that a discretionary common law doctrine would be precisely what this situation calls for – that the evolutionary nature of common law reasoning would provide the necessary adaptability to a new litigation landscape and that the discretionary nature of the doctrine would allow judges to use it as a flexible backstop. But Gardner convincingly argues that the standard itself is the wrong test and that reforms, which should be easy to generate within a common law doctrine, are "partial, inconsistent, and generally unsuccessful." Due to the awkward fit of well-intentioned but inconsistent reforms with the wrong test, a true reform of *forum non conveniens* becomes "difficult, perhaps impossible."

I am skeptical, however, that retiring *forum non conveniens* would ameliorate many of the doctrinal problems she identifies. One of Gardner's insights is that *forum non conveniens* analysis is redundant in light of the inquiries made under several other procedural doctrines such as personal jurisdiction, the presumption against extraterritoriality, and the enforcement of forum-selection clauses. With the "safety valve" of *forum non conveniens* gone, courts would rely more on these other doctrines for policing the outer boundaries of transnational litigation in U.S. courts. There is no guarantee that the sloppiness of *forum non conveniens* would not simply reappear as problematic inconsistencies in

their new doctrinal homes. Personal jurisdiction is already notorious for its lack of clarity. And because personal jurisdiction carries the weight of constitutional due process, the boundaries of the availability of an American forum for transnational litigation might become simultaneously more unforgiving and more unpredictable. Gardner recognizes this objection and argues that the redundant focus of comity and "exorbitant" exercises of jurisdiction in transnational cases in both *forum non conveniens* and personal jurisdiction is part of what has enabled the Supreme Court to keep generating imprecise and inconsistent opinions in both arenas. Narrowing the inquiry to one doctrine might nudge the Court towards a more narrowly tailored and coherent personal jurisdiction doctrine in both international and domestic cases.

But it may be that *forum non conveniens* is more rhetorical flourish than anything else, and that the difficulties and vagaries of personal jurisdiction, particularly as applied to foreign defendants, will continue even without the doctrinal distraction of *forum non conveniens*. Moreover, relocating to personal jurisdiction many of the doctrinal fights over the propriety of the use of American forums for resolution of transnational disputes may have some unfortunate consequences for personal jurisdiction doctrine. Many of the doctrines that govern ordinary access by ordinary parties to ordinary U.S. courts already are driven by outlier fact patterns and defendants, frequently foreign or remote defendants. When this fight must now occur almost entirely within the boundaries of personal jurisdiction doctrine, I fear that the contours and rhetoric of personal jurisdiction will be further driven by an outsized focus on the transnational, rather than an orderly and measured focus on the typical.

Gardner's article concludes with the suggestion that the most promising way to retire *forum non conveniens* is through legislative intervention. Gardner suggests that the federal government pursue reinvigorated negotiations for a harmonized judgments treaty, which would then be implemented by statute into domestic law. She envisions that such legislation would limit *forum non conveniens* to "exceptional circumstances" and would focus exclusively on a refined private-interest analysis. I believe that she is correct in identifying this as the strongest path forward, and would suggest that its success would be bolstered by simultaneous legislative intervention into the doctrines of personal jurisdiction and forum selection clauses. Without a holistic legislative approach, the problems that Gardner so aptly identifies will only live to see another day as residents of new doctrinal arenas.

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