

THE BETTER PART OF HARMONIZING JURISDICTIONAL LAW

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Legal diversity can be a tool for protectionism. Whether or not an interest group will support or oppose harmonization depends on whether its members fear foreign competition and wish to maintain monopoly power through institutional advantages. The incentive to promote legal diversity may become an incentive to promote harmonization when the interest group is no longer concerned with maintaining legal differences because its members have opportunities to further their interests in other jurisdictions.¹² Lawyers in this respect are no different from bankers, insurers, telecommunications firms and other service providers.

Some criticize harmonization because private legislatures are not elected and special interests tend to dominate their membership. The entire public choice edifice is built upon the foundation that the public interest model of government fails to predict accurately why laws are made or why public policy takes the shape it does. Political economics does not analyze the legitimacy of government, but rather its efficiency. Whether a particular rule-making body is elected is only one of a number of institutional features that must be analyzed. Elected officials are subject to interest group pressures and voting markets, which may also result in the production of inefficient law. Political economists do not merely ask *whether* the members of a particular body are elected or appointed, but *how* they are elected or appointed.

PROPOSALS

Public choice theory has been used negatively, to critique harmonization, but not positively, to suggest institutional reform. Here are three suggestions:

- Require commentaries to demonstrate how the law is efficient.
- Randomly select scholars, practitioners, and jurists to review proposed laws. One eligibility requirement could be that the reviewer not be involved in harmonization projects. Make this a rule of professional responsibility.
- Develop international courts. Complaints about divergent interpretation of international conventions are arguments *for* harmonization. Applying the public choice perspective to its logical end, domestic courts lack institutional incentives to promote uniformity. We should work directly on institutional design rather than on trying to perfect harmonized texts, since absolute precision in language is an illusory goal.

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*by Janet Walker**

A fine European thinker once said that courage is not bravery but knowing what is and is not to be feared.¹ From this we have derived the maxim, "Discretion is the better part of valor." Truer words have never been spoken. If the search for uniform solutions is a good (and not just an inevitable) thing, then ultimately, "Why (Not) Seek Uniform Solutions?" is a matter of understanding what should and should not be harmonized.

More recently, a fine American thinker said, "Legal scholars have a distinct capacity to shed insight on the relationship between lawmaking structures and the products of those structures. If we pick the right structures the outcomes we desire should follow."² These equally true words are those of Paul Stephan, who has made the important

¹² Basedow, *supra* note 8.

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¹ PLATO, PROTAGORAS.

² Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999).

observation that in any harmonization project, it is only by appreciating the dynamic relationship between the process and its product that we can hope to achieve a happy outcome. I would add only that sometimes, when you unpack things in this way, you discover profound differences in views that you had not fully appreciated on matters such as what constitutes “a happy outcome.”

I take as my starting point the different views about what constitutes a happy outcome, and will work my way back through “process and product” to a conclusion about what should and should not be harmonized.

Professor Stephan has provided an account of three possible happy outcomes of harmonization projects: (1) managing legal risk, (2) improving the law, and (3) developing intermediaries.³ The first and the third outcomes are closely related. Managing legal risk is about making sure that we are on the same page. If a single legal rule governs an aspect of our dealings, and if we both understand that legal rule—better yet, understand it in the same way—there is less chance that a dispute will arise between us in connection with that feature of our dealings. Transaction costs caused by uncertainty⁴ about the legal rule are reduced. There is less friction. That is a happy outcome. It may come at a cost, but it is a happy outcome.

Professor Stephan describes the third outcome—developing intermediaries—as improving the common fund of specialized knowledge for giving legal advice. The improved common understanding of the law that comes about as a byproduct of any harmonization project is also, I would suggest, a happy outcome.⁵ It is about making sure that more people are on the same page. It too reduces friction and transaction costs, particularly in the field of law reform. In this way, it is a happy outcome.

However, that leaves the second of Professor Stephan’s outcomes—improving the law—which he describes as consisting of the adoption of “rules that improve on the status quo with respect to some normative social goal, such as redistributive justice, or enhancing economic welfare.”⁶ I take issue with this outcome,⁷ but not because normative social goals, particularly those aimed at redistributive justice or enhancing economic welfare, can readily be challenged. The project of harmonizing jurisdictional law is a special kind of harmonization project, one that poses challenges that call for “discretion as to what can and cannot be harmonized.”

Harmonizing jurisdictional law is a special kind of project because the law of jurisdiction reflects, like no other area of the law, the aspirations of particular legal systems for private law adjudication. Substantive legal rules evolve over time; they are imposed by legislation; they are articulated well on some occasions and badly on others; yet none of this shakes our basic confidence in the law or in the courts’ ability to resolve disputes fairly. In contrast, changes in jurisdiction have the capacity to affect our basic trust in the civil justice system, even at the level of individual cases. When a court gets the substantive law wrong or reaches a bad result, it is unfortunate. But when a court is asked to exercise jurisdiction over a dispute that it should not decide, we call that an abuse; and when a court declines to hear a case that it should decide, we call that a denial of justice. Both these situations call into question the integrity of the system.

³ *Ibid.*

⁴ I am not speaking here of flexibility that would permit the consensual pursuit of alternative outcomes—just uncertainty.

⁵ Professor Stephan considers whether this objective might be sought by legal experts more to enhance their own importance than for the good of the general public, but harmonized law is not necessarily more complex or obscure than unharmonized law, nor does it necessarily determine the need for professional legal advice, so I will not debate that here.

⁶ Stephan, *supra* note 3, at 748.

⁷ Though not with Professor Stephan’s nuanced appreciation of it.

This is because the law of jurisdiction has a special relationship to our understanding of what private law adjudication is and what it does. In some legal systems, like that of the United States, private law adjudication is not only about resolving disputes and managing legal risk but equally about improving or reforming the law; in other legal systems, private law adjudication is primarily about resolving disputes—and, in the course of that, about clarifying the law so as to help to make legal risk manageable—but it is only secondarily, as a byproduct, about improving or reforming the law.

In both kinds of legal systems, the legislative branch is active in making affirmative changes to the law, but only in a system like that of the United States does this also constitute a primary function of private law adjudication.⁸ In these legal systems, persons who feel that they have been unjustly treated by the law itself (rather than by other persons) are encouraged to make their case in a civil action for better laws. The law of jurisdiction in such a legal system reflects this in a variety of ways. For example, if the law is inadequate in one place but better in another, the law of jurisdiction facilitates the choice of a better forum and encourages plaintiffs to seek it out so as to bring about an improvement in the law.⁹

However, in a legal system where private law adjudication is mainly about resolving disputes, certainty and stability are of primary importance. Encouraging, or even facilitating, an outcome-determinative choice of forum is an anathema. It is seen as an abuse¹⁰ because it undermines the legal certainty, the “Rechtssicherheit” principal,¹¹ in private law adjudication for the sake of a role—improving the law—that is otherwise seen as secondary or incidental. Flexibility and choice in jurisdiction are still important in such legal systems. For example, in Canada and Australia, there is tremendous flexibility and choice in jurisdiction. But it has been acknowledged in both places,¹² particularly in Canada,¹³ that this necessitates sufficient certainty in the applicable law and uniformity of procedure to ensure that such flexibility is provided to promote access to justice and to prevent multiplicity, and not to affect the balance of rights and obligations between the parties. In other words, flexibility can exist in a system as long as the same result occurs in any forum.

Does this mean that any harmonization project of the law of jurisdiction is doomed to failure, that no rapprochement is possible in situations of diversity? Fortunately, it does not. However, if representatives of both kinds of legal systems are to continue to seek to “manage legal risk” as a central goal of private law adjudication, of the law of jurisdiction, and of the harmonization project, it might be necessary to forego or at least forestall the pursuit of the additional objective of improving the law.

Of course, these contrasts between legal systems are based on idealized typologies. In every legal system some areas of the law are inherently remedial; they seek to “improve on the status quo with respect to some normative social goal, such as redistributive justice, or enhancing economic welfare.”¹⁴ Many such areas were excluded from the outset from the harmonization of the law of jurisdiction process at the Hague simply by defining the project as one relating to jurisdiction and judgments in *civil and commercial*

⁸ The reference procedure to the European Court of Justice may be an exception to this distinction.

⁹ See, e.g., Fritz Juenger, *What's Wrong with Forum Shopping?* 16 SYDNEY L. REV. 5 (1994).

¹⁰ See, e.g., Brian R. Opeskin, *The Price of Forum Shopping: A Reply to Professor Juenger*, 16 SYDNEY L. REV. 14 (1994).

¹¹ See Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 22 TEXAS INT'L L. J. 463 (1998).

¹² See, e.g., Breavington v. Godleman (1988) 169 C.L.R. 41, 80 ALR 362.

¹³ Tolofson v. Jensen [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.

¹⁴ *Supra* note 2.

matters. Further restrictions are now being proposed to confine the project to matters in which the substantive and the jurisdictional law is normatively more neutral.¹⁵

Nevertheless, even within the narrow scope, roughly speaking, of claims in tort and contract, there remains a divide on the role of private law adjudication and the extent to which it should seek to improve the law. This divide can be bridged only with varying degrees of difficulty, depending on the extent to which the participants' approaches are challenged in each instance. This is illustrated by the debates over damages awards and over "business activities" jurisdiction.

The consensus proposal in Article 33 of the interim text¹⁶ to permit the review of excessive damages awards by enforcing courts seems to have overcome fairly handily what at first appeared to be a difficult impasse. In legal systems in which improving the law is not a function of private law adjudication, large damages awards that provide incentives for private attorneys general and that are generally designed to deter and punish wrongful conduct are not a regular feature of the determination of damages. Accordingly, the determination of compensation is integral to the adjudication of the particular case and damages awards can no more be reviewed than can the merits of the case. Yet despite this nonreviewability—or perhaps because of it—large damages awards, which if made in domestic cases would be struck down for reasons of public policy,¹⁷ have become a source of much concern in situations in which the enforcement of foreign judgments has been resisted.¹⁸ Consequently, in Canada large damages awards would seem to pose a serious and possibly intractable problem for the enforcement of judgments.

Perhaps, though, in the harmonization process, the interests in facilitating and resisting the international enforceability of large damages awards has proved less problematic than expected because it is less integrally related to the core values of jurisdiction and private law adjudication than it appears. The interests of a legal system like that of the United States, where large awards are designed to encourage the participation of litigants seeking to improve the law, is not seriously impaired by requiring litigants to forego these benefits of securing higher damages in exchange for the opportunity to enforce their judgments abroad.

A very different situation emerged, though, with respect to the business activities jurisdiction in Article 9 of the interim text.¹⁹ It might well be incomprehensible to many in the United States why a business that has regular and systematic contacts with a particular place should not be regarded as present there and subject to the general jurisdiction of its courts. However, in other parts of the world, that view might be equally incomprehensible. Despite this discrepancy, the distinction is surprisingly subtle for one that has been so contentious.

The explanation for this lies not in the disparity in approaches to the rule itself but in the different underlying rationales for each approach to the rule. In a legal system where the remedial capacity of private law adjudication is emphasized, defendants must face unpredictable standards of liability arising from a plaintiff's choice of forum. This

¹⁵ See Hague Conference on Private International Law, Permanent Bureau, *Preliminary Document 16, Some Reflections on the Present State of Negotiations On the Judgments Project in the Context of the Future Work Programme of the Conference* (Feb. 2002); *Preliminary Document 18, Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text* (Feb. 2002), available at <<http://www.hcch.net/e/workprog/jdgm.html>>.

¹⁶ Hague Conference on Private International Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Oct. 1999, rev'd June 2001), (as adopted by the Special Commission), available at <<http://www.hcch.net/e/workprog/jdgm.html>>.

¹⁷ The seminal case is *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

¹⁸ For Canadian examples, see *Kidron v. Grean*, [1996] 48 O.R.3d 775; *Beals v. Saldanha*, [1998] 42 O.R.3d 127, rev'd, [2001] 54 O.R.3d 641.

¹⁹ *Supra* note 13.

is a necessary compromise that must be tolerated. But in a legal system in which improving the law is not primarily the function of private law adjudication, unpredictable liability is not to be tolerated. Thus, there is a fundamental divergence in approaches to the rule, one that apparently cannot be reconciled and so calls for a difficult compromise.²⁰ Thus, the potential for rapprochement will depend on whether in this context the gains that come from the benefits to managing legal risk from harmonizing jurisdictional standards will be seen to outweigh the need to insist that private law adjudication play a role in improving the law.

This brings me back to “process and product.” If the product we seek, the happy outcome on which we agree, is harmonization for the sake of managing legal risk, then it might be necessary to give more emphasis to the deliberative process. The deliberative process should be deployed not just as a means of ensuring uniform interpretation, as is proposed in Articles 38–40 of the interim text (which is currently regarded as a matter that is subsequent and ancillary to an agreement), but as a primary means of consensus-building. We should be asking delegations not merely to vote for or against specific rules such as “business activities jurisdiction,” but to provide a rationale for their endorsement or rejection of them. We should be asking participants to offer their considered views on why or why not adopting particular approaches in well-known situations would or would not comport with their legal traditions. In situations of profound diversity such as have emerged in the context of the negotiations at the Hague, the reason for a particular outcome in any debate is more likely to persuade than the mere strength of the bargaining power that supports it.

The recent update from the Hague, “Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference,”²¹ suggests that there is concern that too much has been invested in the negotiations to be happy with less than a complete draft. However, the process of developing consensus norms is the better measure of progress. It is the deliberation over legal rules, not merely the bargaining over them, that is productive. In this regard, the third of Professor Stephan’s happy outcomes—developing intermediaries, or getting more of us onto the same page—is critical to harmonization in general, and to the success of this project in particular.

To feel compelled to press ahead to reach agreement on particular legal rules in this project is to mistake bravery for courage. The better part of harmonizing jurisdictional law is not the establishment of a fixed cadre of jurisdictional rules that can be imposed on national courts as a basis for the mutual recognition and enforcement of judgments. Jurists are likely to ignore or misinterpret fixed legal rules that do not articulate a suitable means of arriving at a just result. The better part of harmonizing jurisdictional law is the increased dialogue that is fostered in the process and the improved understanding of the reasons for both the common and the diverse approaches to jurisdiction—an understanding that will foster a more rational approach to foreign judgments.

We should be encouraged by the progress that is being made.

²⁰ In April 2002, in its *Paris/New Delhi Principles on Jurisdiction over Corporations*, available at <<http://www.ila-hq.org>>, the International Law Association proposed that a corporation be subject to the jurisdiction of the courts of a state where “its business, or other professional activity is *principally* carried on” (emphasis added). It remains to be seen whether this formulation would be acceptable to those who might otherwise insist on business activities jurisdiction.

²¹ Hague Conference on Private International Law, Permanent Bureau, *Preliminary Document 16, Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference* (Feb. 2002), *supra* note 12.