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Jurisdiction, foundations

I. Introduction

1. Terminology and concepts

Jurisdiction, literally (the power of) saying what the law is, is at the same time the most important and the most complex area of private international law. The complexities begin with terminology. Jurisdiction, in common law parlour, encompasses two meanings that are at least partly distinct in principle, even if they sometimes overlap in practice. These terminological and conceptual differences mar many comparative law analyses; they also make it difficult to develop a general theory.

In one way, jurisdiction describes the outer limits of an institution's reach. In this sense, the concept is not confined to adjudication but applies to the activities of all three branches of government and beyond. Besides jurisdiction to adjudicate there is also jurisdiction to prescribe and jurisdiction to enforce, which limit, respectively, the spaces in which a country can legislate and enforce its own laws and decisions. The meaning of jurisdiction as the scope of a court's power is encompassed within the term jurisdiction also in some other languages, thus in Italian (*giurisdizione*) and Austrian German (*Jurisdiktion*); in Germany, the term, insofar as courts are concerned, is *Gerichtsbarkeit* or *Gerichtshoheit*.

In another sense, jurisdiction describes the allocation of adjudicatory competences *vis-à-vis* the (potentially) competing competence of other states' courts. Insofar, Germany and Austria use the term *internationale Zuständigkeit*, the French speak of *compétence internationale*. In English, one could speak of international venue. Jurisdiction in this latter sense is frequently narrower than in the former sense.

The terminological differences show that, for purposes of theory and comparison, a functional definition is necessary. Functionally, for purposes of private international law, the law of jurisdiction can be defined as those rules and principles that determine the circumstances under which a court is entitled to adjudicate and render a substantive judgment with regard to the international and/or interstate connections involved.

2. International jurisdiction and subject matter jurisdiction

Where the jurisdiction of courts is at stake, we must distinguish what can be called international jurisdiction on the one hand from subject-matter jurisdiction on the other hand. What I call here international jurisdiction encompasses personal jurisdiction and jurisdiction *in rem*. Personal jurisdiction is jurisdiction over a person, most importantly over a defendant. Jurisdiction *in rem* was once understood to be jurisdiction over a thing based on its presence in the court's territory. Today, *in rem* jurisdiction is also understood ultimately to be jurisdiction over a person; the presence of the thing merely provides the basis for the jurisdiction.

Subject matter jurisdiction on the other hand is, in principle, not about international jurisdiction. Instead, it determines the subject matters about which a court is entitled to adjudicate. Nonetheless, subject matter jurisdiction can determine international limits of jurisdiction as well. This is the case, for example, when US federal courts derive their subject matter jurisdiction from the applicability of a federal statute (so-called federal question jurisdiction). In this case, courts have sometimes translated the territorial limits of the applicable federal statute into subject matter jurisdiction limits of the court. The US Supreme Court has recently suggested, however, that this should be treated as a question of substance (*Morrison v National Australia Bank*, 561 U.S. 247, 254 (2010)).

3. Direct and indirect jurisdiction

The issue whether a court has adjudicatory jurisdiction can become relevant at two very different stages in an international litigation. The first stage concerns the proceedings before the court that renders the decision, hereinafter called the rendering court. The rendering court will not hear a case, much less render a decision, unless it determines that it has jurisdiction to do so. If it renders a decision despite the lack of jurisdiction, an appellate court may declare the decision void. The second stage concerns the proceedings before the court, often in a different state, requested to recognize and/or enforce the rendering court's decision, hereinafter the requested court (Recognition and enforcement of judgments). The requested court will not recognize or enforce the decision of the rendering court unless it determines that the rendering court had jurisdiction.

Although they are sometimes treated as though they were similar, the issue of jurisdiction as a requirement for adjudication is analytically different from the issue of jurisdiction as a requirement for recognition. The first is governed by the law of the rendering state, the second by the law of the requested court. Neither the rendering court, nor the recognizing court, is necessarily bound to the standards of the other. In French law, the first is called direct jurisdiction, the second indirect jurisdiction. This terminology is more exact than the German terminology (*Entscheidungszuständigkeit* and *Anerkennungszuständigkeit*) and certainly preferable to the English and American tendency to draw no terminological distinction at all.

Direct and indirect jurisdiction are also different in policy terms. It may well be the case that the rendering court is justified to assert jurisdiction under its own standards,

and the recognizing court is similarly justified to deny recognition to the ensuing judgment for lack of jurisdiction under its own standards.

II. Levels of regulation

With the functional concept of jurisdiction developed earlier, it is possible to distinguish three levels of jurisdictional regulation. A first level, found primarily in higher law like international or constitutional law, lays down outer limits of jurisdiction. This higher law only constrains jurisdiction, it does not constitute a basis for jurisdiction. Such a basis can be found on a second level that provides the rules on which jurisdiction can actually be based. A third level, finally, concerns judicial discretion for the individual case, either in the application of the rules from the second level, or in special discretionary doctrines. Here, the question is whether jurisdiction that exists should be exercised.

These levels facilitate a structural comparison between different jurisdictional regimes; they reveal that the levels do not play the same role in different legal systems, and they help to understand and classify different styles of jurisdiction regulation. Importantly, in particular, civil law systems rely almost entirely on the second level, while all but ignoring the first and third level. US law, by contrast, uses almost only the first and third level; actual rules of jurisdiction are largely based on findings from the first level.

1. First level: higher law constraints

a) Public international law

At the highest level of analysis lie higher law constraints that determine the outer boundaries of jurisdiction. Such constraints could in theory come from public international law in two ways. First, public international law limits the exercise of sovereign power *vis-à-vis* the sovereign interests of other states; to the extent that adjudicatory jurisdiction is viewed as an exercise of sovereign power, it could therefore be limited (eg German Federal Court of Justice (BGH), 2 July 1991, 115 BGHZ 90). Second, human rights law lays down certain rights that could be viewed as limiting the exercise of jurisdiction, in particular due process and fair trial rights (art 6(1) ECHR (European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221)). In reality, however, public international law has played a fairly limited role in limiting jurisdiction (Jurisdiction, limits under international law). Where it does, it can play a role both for direct and for indirect jurisdiction.

Public international law can play a role in relation to jurisdiction also in the form of treaties in private international law, especially if such treaties are viewed merely as constraints and not as actual codifications of jurisdictional rules. Where such treaties exist, they are regularly coupled with rules on the recognition and enforcement of judgments; a harmonisation of rules on jurisdiction is viewed mainly as a prerequisite for obligations to enforce foreign judgments. While a number of bilateral treaties exist, multilateral treaties are rare. The most successful examples of such treaties (which are more codifications than constraints) are the Brussels Convention (Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1986] OJ C 298/1, (consolidated version) [1998] OJ C 27/1) and the Brussels II Convention (Council Act of 28 May 1998 drawing up, on the basis of

Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C 221/01) that were later turned into EU Regulations (Brussels I Regulation (Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1) (Brussels I (Convention and Regulation), Brussels IIa Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L 338/1)), and the Lugano Convention (Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2007] OJ L 339/3). By contrast, negotiations towards a comprehensive worldwide Hague Recognition and Enforcement Convention were so far unsuccessful; a new project is currently underway Among several problems, one was that Americans and Europeans viewed the character of such a Convention differently: while Americans thought of it as a mere constraint on possible rules of jurisdiction, Europeans thought of it as a comprehensive codification of rules on jurisdiction. This different attitude can explain why Europeans opposed, for such a long time, the inclusion of categories of jurisdiction as neither required nor forbidden (a so-called grey list).

b) Constitutional law

A practically more important higher law which limits jurisdiction is the Constitution. In US law in particular, the law of jurisdiction has been developed almost entirely on the basis of the Constitution, especially the due process clauses of the 5th and 14th

Constitutional Amendments (1 Stat. 97 (1789); 14 Stat. 358 (1866)). Courts, including the US Supreme Court, have distilled a whole array of specific rules and principles from these rather abstract clauses. The fact that so much of the law of jurisdiction has been constitutionalized has made the development of the law unpredictable. The Supreme Court of Canada has also begun to constitutionalize the Canadian law of jurisdiction, suggesting that principles of federalism require, for jurisdiction to be constitutional, a real and substantive connection (*Club Resorts v Van Breda* [2012] SCC 17).

Some civil law constitutional norms also provide jurisdictional rules, such as in § 59 of the old Swiss Federal Constitution of 1874 (AS 1 1, abolished in 1998, AS 1999 2556, 2609). Mostly, however, the Constitution becomes relevant only occasionally, for example for jurisdictional rules that prioritize husbands over wives (Federal Constitutional Court of Germany (BVerfG), 3 December 1985, 71 BVerfGE 224).

2. Second level: specific rules

Higher law, on the first level, lays down only the outer limits of jurisdiction, but does not lay down its bases. This is done instead on a second level of rules on jurisdiction.

In civil law countries, this second level is by far the most important level. The European legislator has laid down mostly strict rules on jurisdiction in the so-called 'Brussels' regime of a number of regulations on jurisdiction and the recognition and enforcement of judgments. Member States retain residual rules that apply outside the scope of the Brussels Regulations. In many civil law countries, jurisdiction is based entirely on domestic rules. For some time, countries that had no special rules for jurisdiction applied their rules on venue, either by analogy or as implicit rules on international jurisdiction (eg German Federal Court of Justice (BGH), 14 June 1965, 44

BGHZ 62; Cass Civ 1re, *Scheffel*, 30 Oct 1962; Recueil Dalloz 1963, 109) or developed principles on the basis of abstract considerations like fairness, efficiency, etc. (Japanese Supreme Court, 16 Oct 1981, Minshû 35-7-1224). Now, more and more countries have moved to codify their law on jurisdiction and thereby put it on firmer ground.

Many common law countries also rest jurisdiction on detailed rules, at least beyond traditionally accepted bases of jurisdiction such as jurisdiction based on service of process within the territory. Due to the different nature and role of service of process, some of these rules are phrased as rules granting leave to serve outside the territory. Statutory rules exist also in the United States as so-called Long Arm Statutes, but their practical relevance pales in comparison to that of the constitutional constraints: many such rules largely codify existing case law on constitutional constraints, or even merely grant jurisdiction up to the limits of the US Constitution.

3. Third level: discretion on a case-by-case level

Even where jurisdiction is not constrained by higher law and is based on a specific rule that authorizes it, the judge may nonetheless, because of characteristics of the individual case, decline to exercise it. Such judicial discretion is more common in the common law, but it exists also in civil law systems.

a) Common law, especially *forum non conveniens*

Whether or not jurisdiction exists, is, in common law systems, frequently a matter of case-by-case analysis of the individual case, which helps administer justice in the individual case but reduces predictability and certainty. Some such elements are built into jurisdictional tests. Thus, in US law, the court has to determine, as part of the

jurisdictional test, whether the exercise of jurisdiction is reasonable. In US and English law, the court may decline jurisdiction to ensure the application of mandatory forum laws.

The most important discretionary basis for declining jurisdiction is the doctrine of *forum non conveniens*. First developed in Scottish law, this doctrine has now been adopted in many common law systems. Under this doctrine, a judge will decline to exercise jurisdiction when the forum is inappropriate, and an available alternative forum in another legal system is clearly better suited than the forum. Doctrinally, *forum non conveniens* is not a jurisdictional provision, because its application leaves the existence of jurisdiction in the case intact and goes merely to the exercise of such jurisdiction. Functionally, however, existence and exercise of jurisdiction are closely related. This proximity is the reason why the ECJ refused the applicability of the doctrine in the realm of the Brussels I Regulation (Case C-281/02 *Owusu v NB Jackson and others* [2005] ECR I-1445), and the French Cour de Cassation has argued similarly for the Montreal Convention (Convention of 28 May 1999 for the unification of certain rules relating to international carriage by air, 2242 UNTS; Cass Civ 1re, 7 December 2011, *Recueil Dalloz* 2012, 254).

b) Discretion in civil law systems

In contrast to the common law, which traditionally leaves a high degree of discretion to courts in matters of jurisdiction, the traditional civilian approach rejects such discretion and requires strict application of formal rules. *Forum non conveniens* is, as a consequence, rejected. However, discretion in the application of individual bases is sometimes accepted. This holds true in view of parallel litigation (arts 33 and 34

Brussels I Regulation (recast) (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1)), but also in the application of open-ended terms, such as 'closely connected' in arts 8(1) and 30(3) Brussels I Regulation (recast).

III. Interests, theories, and paradigms

Scholars from different legal traditions have paid very different degrees of attention to the development of theories for the law of jurisdiction. German scholarship has focused not so much on theories as on uncovering the policy interests underlying the law of jurisdiction. While US scholars have long worked on theories, in part fuelled by the need to rationalize a seemingly erratic Supreme Court case law, other common law jurisdictions have largely preferred pragmatism over the development of general theories. In other civil law countries, theories have been developed but have played a lesser role.

1. Interests

Following *Gerhard Kegel*'s (Kegel, Gerhard) focus on interests in choice of law, German scholars developed a list of such interests for the law of jurisdiction. Common law doctrine does something comparable when developing relevant factors for *forum non conveniens* dismissal. The individual interests and factors carry different weight in different legal regimes.

a) Party interests/private factors

A first set of interests underlying the law of jurisdiction are party interests. To some extent, these interests are antagonistic: everything else being equal, defendants and plaintiffs are typically each interested in litigating at home. Plaintiffs have an interest in access to court; defendants have an interest in not being required to defend themselves far from home. Civil law validates especially the defendant's position: plaintiffs can only exceptionally sue at a place other than the defendant's home ('*actor sequitur forum rei*'); at the same time, the defendant cannot unilaterally avoid the jurisdiction of its home court. The common law allows such avoidance through the *forum non conveniens* doctrine; on the other hand, especially US law often starts from the assumption that plaintiffs have a legitimate interest in suing at their own home and asks to what extent this can be allowed.

Plaintiffs have an interest in litigating at a place where the defendant has assets, because this facilitates enforcement. This interest can be used to justify not only *in rem* jurisdiction, but especially *quasi in rem* jurisdiction. It does not, by itself, justify the assertion of unlimited jurisdiction at a place where the defendant has some assets but not enough to fulfil the plaintiff's claim, such as in § 23 German Code of Civil Procedure (Zivilprozessordnung of 5 December 2005, BGBl. I 3202, as amended, henceforth German CCP) or § 99 Austrian Court Jurisdiction Act (Jurisdiktionsnorm of 1 August 1895, Reichsgesetzblatt no 111/1895, last amended by Bundesgesetzblatt no I 78/2014, henceforth Austrian JN). These provisions are therefore considered exorbitant.

Certain types of parties are deemed worthy of particular protection: this is the case, at least in civil law systems, for employees and consumers, for whom it would be more burdensome to litigate away from their home than for a corporate party. As a consequence, some laws of jurisdiction protect these parties by allowing them to sue

and be sued exclusively at their home place or, in the case of employees, in the place where they habitually carry out their work (eg arts 18, 21 Brussels I Regulation (recast)).

Parties also have common interests in the predictability of the venue for litigation. The law acknowledges this interest by enforcing choice of court agreements, with regard to both prorogation and derogation. Exceptions exist for the protection of either specific types of parties (like, again, consumers and employees, arts 19, 23 Brussels I Regulation (recast)) or exclusive bases of jurisdiction.

In addition, parties have an interest in availability of witnesses and other evidence and records. This can suggest establishing jurisdiction at a place in proximity to the subject matter of the litigation, for example the place of the injury for tort litigation (eg art 7(3) Brussels I Regulation (recast)).

b) Court interests/public factors

Another set of interests is held by the court, both as an institution and as a representative of its state. A first interest is in maintaining a manageable court load. This interest mandates against jurisdiction over cases that have only scant connections to the court. On the other hand, courts may have an interest in attracting litigation that brings money to the local bar and enhances the court's reputation and standing; such interests are pursued particularly in courts trying to attract commercial litigation, for example New York, London, and Singapore.

Another interest that is specific to the court is ease of application of law. Everything else being equal, it is easier for a court to adjudicate if it can apply its own law than if foreign law is applicable (lex fori). Some have suggested this interest to be so

overwhelming that applicable law and jurisdiction should always coincide ('*lex fori in foro proprio*'). In some situations, such coincidence does occur because the connecting factors for jurisdiction and for choice of law are the same. Applicability of foreign law is a powerful factor in favour of *forum non conveniens* dismissal. By contrast, applicability of domestic law can be the basis for jurisdiction, as is the case for federal question jurisdiction in the US (*supra*).

Finally, a state's regulatory interests can serve as a basis for jurisdiction. A state that wants to make sure that certain of its mandatory rules are applied will frequently ensure this by giving its own courts jurisdiction, and by providing that parties cannot opt out of this jurisdiction through a choice of court agreement. As a legislative mechanism this has become common. It is more doubtful, especially under the Brussels I Regulation, whether courts are entitled to disregard a choice of court agreement in order to protect mandatory rules without an explicit jurisdictional basis.

c) Structural interests/interests of the international system

A third set of interests concerns the international system – whether a real system (as in the European Union with its widely unified law of jurisdiction) or an imagined one (as on a global level). There is, arguably, a global interest in jurisdictional certainty and harmony, suggesting that litigation should be channelled to the most appropriate forum (the *forum conveniens*). Within the European Union, this is guaranteed, to some degree, through unified jurisdictional rules on a European level, which reduce opportunities for forum shopping, without eliminating them altogether. On a global level, a similar harmonisation could be brought about through a treaty, but ambitious attempts to draft a

worldwide Hague Recognition and Enforcement Convention have so far been unsuccessful.

A global interest in harmony is further evident through rules on *lis alibi pendens*: a court will, under this approach, deny jurisdiction in view of litigation that is pending elsewhere, or in view of a (recognizable) judgment from the courts of another state. Civil law systems used to have rather strict rules in this regard, which enabled strategic forum shopping. Common law systems take a more flexible approach and allow courts to decline to exercise their own jurisdiction in view of the foreign proceedings (*forum non conveniens*), and sometimes attempt to discourage a party from proceeding with litigation started elsewhere by granting antisuit injunctions. Although antisuit injunctions are directed against a party and not a foreign court, they are part of the law of jurisdiction in a functional sense.

2. Theories

Different theories of jurisdiction have been developed. Here, a focus lies on theories developed especially in the US context.

a) Power theories

The power theory is famously encapsulated in *Justice Holmes'* assertion that '[t]he foundation of jurisdiction is physical power.' The basis of the theory is the relationship of domination and submission between the court and the defendant. In ancient England, this meant actual power. Jurisdiction was asserted over the defendant by physical arrest, to ensure his presence at the trial. Since then, the assertion of power has changed from actual to symbolic; the public and actual assertion of power is now privatized and symbolized in service of process by the plaintiff or its attorneys, at least in common law

systems. When service of process is considered sufficient for the existence of jurisdiction, unconstrained by fairness considerations or the need of other connections (eg *Maharanee of Baroda v Wildenstein*, (1972) 2 QB 283 (CA); *Burnham v Superior Court of California*, 495 U.S. 604 (1990)), this is best justified on the basis of a power theory.

b) Relational theories

Closely related are relational theories of jurisdiction. A relational theory gives jurisdiction to a sovereign's courts if and because the defendant owes the sovereign allegiance. The clearest example can be found in feudal relations, where the lord's jurisdiction over his fee-holders was based on the feudal relation between the two. Although feudalism no longer exists, there are remnants of such theories: for example, arts 14 and 15 French Civil Code (Code Civil of 21 March 1804; henceforth French CC), which base jurisdiction by French courts on the parties' French nationality, can be explained by reference to relational theory.

c) Fairness theories

Today. the main focus of a fairness theory is not the power of the court over the defendant, but rather whether it would be inconvenient for the defendant to defend itself in a forum it did not choose. The US Supreme Court formulated a two-prong test in *International Shoe v Washington* (326 U.S. 310 (1945)), relying on minimum contacts and substantial fairness to the defendant; a third requirement of reasonableness was added later (Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987). Fairness theories focus on the relationship between the litigants and the forum,

as well as that between the underlying controversy and the forum, but unlike relational theories, the question is one of fairness regardless of sovereignty considerations.

Although much has been made of the difference between power and fairness theories, the difference is smaller than is sometimes assumed. Both theories see power as necessary for jurisdiction. They differ merely on whether power is also sufficient, or whether additional factors of fairness and reasonableness must be present.

3. Paradigms

A different way of arranging for different approaches to jurisdiction is to order them by paradigms. With some simplification, two paradigms can be contrasted. Continental European law stands for the first, US law stands for the second. Traditional English law stands, in many regards, somewhere between both paradigms, which helps explain some of its clashes with the European system.

a) 'Us or Them' – the European paradigm

The European paradigm can be called 'us or them'. First, this paradigm is horizontal: European jurisdictional thinking focuses on the horizontal relations between countries rather than on the vertical relation between the court and the parties. The real question of jurisdiction in Europe is neither whether there are sufficient vertical contacts between the defendant and the country whose courts are seized, nor whether such contacts exist between that country and the controversy. The real question is which of several states' courts are the most appropriate to deal with a type of litigation. Jurisdiction is justified *vis-à-vis* other states with a plausible claim to jurisdiction, not *vis-à-vis* the defendant and its interest in protection from the court.

Secondly, as a consequence, jurisdictional thinking in the European tradition is multilateral and international. This is so not just for the Brussels Regulations: even in national laws, jurisdiction is allocated according to principles that are at least potentially universal. The main criteria for jurisdiction are consent and the closest connection.

Thirdly, the paradigm is apolitical: matters of private litigation are considered apolitical; the state's only task is to provide a forum. Matters of private litigation are considered apolitical; the state's only task is to provide a forum. The reason is that although the focus of jurisdiction is international, its goal is the correct adjudication of relations between the parties, where state interests are thought to be largely absent.

b) 'In or Out' – the US paradigm

By contrast, the US jurisdictional paradigm can be called 'in or out'. First, this paradigm is vertical: regardless of whether jurisdiction is based on the power of the court over the defendant, the relations between the court and the defendant, or the fairness of asserting jurisdiction over the defendant, nearly all attention goes to the vertical relation between the court and the defendant.

Second, the paradigm is unilateral and domestic. This means that jurisdiction is viewed as a local issue, determined by the limits that national (or state) law sets for its own courts, not the appropriateness of the jurisdiction of other states' courts. The question is whether the dispute brought to the court lies within, or outside, the state's boundaries, inside or outside the state's legal order. Unlike in an international paradigm, in a domestic paradigm it is largely irrelevant whether the courts of other states would more appropriately exercise jurisdiction. Matters of jurisdiction are domestic matters; foreign national interests are relevant only insofar as they can be translated into such

domestic matters. (Note that this is true only for the law of jurisdiction proper. The appropriateness of jurisdiction elsewhere is considered in the *forum non conveniens* test, to some extent also in the reasonableness requirement.)

Thirdly, the paradigm is political. Since the exercise of jurisdiction is viewed along a vertical dimension as a public intrusion into the defendant's freedom, the individual has a negative right to be free from state intervention unless this intervention is justified. This is why justification for jurisdiction often occurs with reference to political philosophers dealing with the justification for governmental authority, be they *Hobbes* and *Locke* or *Rawls*, *Hart*, and *Nozick*.

IV. Bases

Although jurisdictional rules display a plethora of criteria, these criteria can be grouped into three different categories of bases: consent, proximity, and extraordinary bases.

1. Consent

A first basis of jurisdiction is consent (Choice of forum and submission to jurisdiction). Such consent is least problematical when the defendant submits to the jurisdiction during litigation. A defendant can consent to the jurisdiction either explicitly or implicitly, by pleading on the merits. Mere pleading on jurisdiction is not usually viewed as submission to the jurisdiction on the merits.

Prior consent, through a choice-of-court agreement, is in principle no different. A defendant who consents to the jurisdiction of a court cannot complain that the exercise of that jurisdiction violates its rights and interests, whether *vis-à-vis* the court or *vis-à-vis* the plaintiff. For some time, consent jurisdiction was suspicious because it seemed to

oust another court of its jurisdiction; today, jurisdiction based on consent is widely accepted. Limitations emerge from general contract law, from the desire to protect weaker parties (like consumers and employees), and from the need to maintain exclusive jurisdiction for certain areas (for example litigation over land).

2. Proximity

The large majority of bases of jurisdiction are based on proximity, some connection that exists between the court and either the transaction or the parties. Both civil and common law distinguish between general and specific jurisdiction (though with slight variations in definition). General jurisdiction is party-related and is comprehensive – it exists, untechnically spoken, at the defendant's home. Specific jurisdiction, by contrast is based on a connecting factor and limited to issues related to this factor, for example jurisdiction in tort at the place of the tort, etc.

Existing bases of jurisdiction can be grouped, parallel to the three traditional elements of the state, as those pertaining to territory, citizenship (personality) and government (state interests).

a) Territoriality

Territoriality is an important – for many, the dominant – basis of jurisdiction. The most important territorial connection in the law of jurisdiction is a party's domicile (eg arts 4, 5 Brussels I Regulation (recast)) or its habitual residence (eg arts 3, 8 Brussels IIa Regulation). In the common law, mere presence in the jurisdiction is sufficient as a ground for jurisdiction. For natural persons, this is physical presence; for corporations, it was long, in the United States, 'doing business' in the jurisdiction, until the Supreme

Court significantly curtailed this basis (*Goodyear Dunlop Tires Operations, SA v Brown*, 131 S.Ct. 2846; *Daimler AG v Bauman*, 134 S.Ct. 746 (2014)). Many bases of specific jurisdiction are also based on a certain place – the place of conduct or of injury for torts, the place of entering into a contract or of performance for contracts, and so on.

Territorial factors can be justified under power considerations, because the state has power over its territory and everything that goes on in it. Similarly, they can be justified under fairness considerations: an individual who avails himself of the benefits of a state can be required to submit to its jurisdiction. Problems of fairness arise where someone enters a territory involuntarily, or where effects on a territory were unforeseeable, as can be the case for product liability when a product creates an injury outside the market in which it was first sold (*Asahi Metal Ind Co v Sup Ct*, 480 U.S. 102 (1987), different insofar the plurality in *McIntyre Machinery Ltd v Nicastro*, 131 S.Ct. 2780 (2011)), and for internet defamation occurring at a faraway place (see German Federal Court of Justice (BGH), 2 March 2010, 184 BGHZ 313).

Under conditions of globalization, territoriality changes its meaning. Some authors think that territoriality should lose its importance for the law of jurisdiction. Others argue the opposite: precisely because borders become more permeable, the law has to use territorial borders to delineate jurisdictional competences (thus eg the US Supreme Court in *F Hoffmann-La Roche Ltd v Empagran*, 542 U.S. 155 (2004)). Even if the latter view prevails, territoriality still shifts its meaning: it is concerned less with considerations of power and fairness, and more with the need for formal and easily administrable criteria of jurisdictional allocation.

b) Personality

Not all jurisdictional criteria are territorial. Some systems are explicitly based on criteria of citizenship, thus for example French law in arts 14 and 15 French CC. These provisions are considered exorbitant. But for many other regimes of jurisdiction and *forum non conveniens*, the parties' nationality plays a role. This is so especially in family law; the Brussels IIa Regulation provides for divorce jurisdiction on the basis of either habitual residence or nationality (art 3(1)). Jurisdiction based on nationality can be justified by a state's interest in regulation and protection of its own citizens. In common law countries, domicile plays a somewhat similar role of affiliation. Altogether, the existence of such bases of jurisdiction demonstrates that territoriality is not exclusive.

c) State interests

Finally, the third element of the state, namely a functional government, translates into governmental or state interests as the basis of jurisdiction. This can have a positive and a negative aspect. Positively, as was discussed earlier, a state may base its jurisdiction on the desire to make sure that particularly important regulatory interests are enforced. But state interests can also have a negative impact: another state's strong regulatory interests may be a reason for a court to decline exercising its jurisdiction. In reality, it appears that courts are more willing to assert jurisdiction on the basis of their own state's regulatory interests than to decline its exercise in view of such regulatory interests elsewhere. Indeed, such foreign regulatory interests can frequently be accommodated through application of the foreign state's laws.

3. Extraordinary bases

a) Exorbitant jurisdiction

Several bases of jurisdiction in domestic systems are viewed as exorbitant and therefore considered unjustified. Other states do not accept the exercise of jurisdiction on these bases as justified for purposes of enforcement; scholars hope for their abolition also for domestic purposes. The Brussels I Regulation abolishes these exorbitant bases in Member States' systems with regard to defendants from within the EU, but does not interfere with them with regard to defendants outside the EU (see arts 5(2), 6(2) Brussels I Regulation).

Among the bases of jurisdiction considered exorbitant are: jurisdiction based on the plaintiff's nationality (art 14 French CC), unlimited jurisdiction based on the presence of assets belonging to the defendant (§ 23 German CCP, § 99 Austrian JN); general jurisdiction based on a corporation's doing business. Jurisdiction based on service of process is sometimes considered exorbitant by civilians, although it is the main traditional basis of jurisdiction in the common law. This demonstrates the extent to which what is considered exorbitant is often a matter of perspective.

b) Jurisdiction of necessity

Such exorbitant bases appear less shocking once one recognizes their broader function. Especially at a time when travelling to a foreign court would have been cumbersome, and the recognisability and enforceability of foreign judgments was uncertain, these bases provided a local basis of jurisdiction which, although based on a rather tangential connection, was vital in order to provide plaintiffs with access to court.

Viewed as such, exorbitant jurisdiction is closely related to so-called jurisdiction of necessity. Under this doctrine, a court may, exceptionally, assume jurisdiction even absent the normal connecting factors if this is necessary to provide the plaintiff with access to court (eg art 3 Swiss Private International Law Act (Bundesgesetz über das Internationale Privatrecht of 18 December of 18 December 1987, 1988 BBl I 5, as amended); § 28(1) Austrian JN; art 3136 Code civil (Quebec) (SQ 1991, c 64.). Such necessity is thought to exist especially if no other competent court is available, either because other courts do not have or will not exercise jurisdiction, or because these other courts are incapable for other reasons of providing justice. Jurisdiction of necessity has always been contested, as to both its existence and its limits. Nowadays, it has arguably become less important: existing jurisdictional bases provide plaintiffs with a broader set of options, litigating abroad has become easier (though not always easy), and increased mutual recognition of judgments makes foreign judgments more valuable. Nonetheless, the doctrine still plays a practical role.

c) Universal jurisdiction

Universal jurisdiction is arguably a specific type of such jurisdiction of necessity. Under this doctrine, every court in the world has jurisdiction at least potentially, even without the need of either the parties' consent or proximity. It is granted (if at all) for claims of violation of certain rules of international law. Originally developed in international criminal law, the doctrine has been expanded into the area of private international law. In the United States, such civil universal jurisdiction could be claimed, for some time, under the US Alien Tort Statute (28 U.S.C. § 1350). In recent years, the US Supreme Court has severely restricted applicability of the statute for private litigation (*Sosa v*

Alvarez-Machain 542 U.S. 692 (2004); *Kiobel v Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013)). Whether such civil universal jurisdiction exists in other legal systems is doubtful. In many cases, existing bases of jurisdiction suffice to achieve the goals of universal civil litigation, namely to provide victims of human rights abuses with a forum.

Ralf Michaels

Literature

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Keywords
Forum non conveniens
Jurisdiction, direct and indirect
Jurisdiction, exorbitant
Jurisdiction general and specific
Jurisdiction, in personam and in rem
Jurisdiction, interests
Jurisdiction, levels of regulation
Jurisdiction of necessity
Jurisdiction, subject matter
Jurisdiction, theories
Lis alibi pendens
Personality
Territoriality

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Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1

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Kiobel v Royal Dutch Petroleum, 133 S.Ct. 1659 (2013)

Abbreviations

AS Amtliche Sammlung des Bundesrechts (Switzerland)

SQ Statutes of Quebec