

Dispute Resolution

(Resolution of Private International Disputes)

Session 4: The US approach to jurisdiction / Legal situation in Vietnam

FTU Master Program

2018

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Jurisdiction in the United States

Introduction

Court system in the U.S.

The United States = federation, comprised of

- 50 States
- Washington D.C. (“District”)
- Some “Territories”
 - E.g. Puerto Rico = territory associated with U.S., with no foreign policy, U.S. citizenship, but limited rights for citizens under U.S. constitution
 - Recently Puerto Ricans have voted in a referendum to become a proper state of the U.S.

Court system (2)

State courts

- “Lower” courts (Superior Courts in California, Circuit Courts in Oregon etc.)
- Courts of Appeal(s)
- State Supreme Court (California Supreme Court etc.)

Federal courts

- District courts
 - E.g. U.S. District Court for the Southern District of NY
 - Located in all states
- 12 Courts of Appeals
 - E.g. U.S. Court of Appeals for the 9th Circuit (next slide)
 - Circuits comprise more than one state

Supreme Court (nine judges), Washington

Circuit map – 9th Circuit



Quelle:
http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135

Subject matter jurisdiction of federal and state courts

What is subject matter jurisdiction?

- Power to decide cases of a particular nature or relating to a specific subject matter
- To be distinguished from jurisdiction over a person or territorial jurisdiction
- Note: a court needs to have both subject-matter + personal jurisdiction to have the power to decide a case!

Subject matter jurisdiction of federal courts?

Complex issue, very simplified answer:

- Jurisdiction based on “**federal question**”
 - E.g. case invokes questions regarding the U.S. Constitution or federal laws
- Jurisdiction based on “**diversity of citizenship**”
 - Litigants come from different U.S. states or from different countries
 - Background: ensuring fair trial for out-of-state litigant
 - Federal courts are only competent to hear cases involving high amounts of potential damages (more than USD 75,000).
 - Not covered: family and probate matters

Subject matter jurisdiction of state courts?

Complex issue, very simplified answer:

- Only state law is involved and litigants are from the same state
- Or: specific type of disputes which are handled in state courts
- Typical matters decided by state courts:
 - Divorce and child custody cases
 - Probate and inheritance matters
 - Contract disputes and tort cases as far as not falling within the subject matter jurisdiction of the federal courts

Personal jurisdiction (complex issue, simplified answer for state courts)

In personam jurisdiction over the parties/defendant may flow from various bases, two important bases are:

- **General jurisdiction (all purpose jurisdiction = not claim-related):**
 - *Individuals*: general jurisdiction at domicile
 - *Corporations*: equivalent place as domicile, place “in which the corporation is fairly regarded at home” (*Goodyear Dunlop Tires v. Brown; Daimler v. Bauman*) – e.g. place of incorporation / principal place of business
- **Specific jurisdiction (= linked to specific conduct / claim):** Can be exercised when the suit “arise[s] out of or relate[s] to the defendant’s contacts with the forum” (case-based analysis) (*Helicopteros Nacionales de Colombia v. Hall*)
- **General requirements (in addition to the above requirements)**
 - Authorization by statute of the state in which the proceeding is brought
 - Constitutional limitations (Due Process Clause) apply

Other bases

Jurisdiction in rem

- Jurisdiction of a court over things located in its territory or a (marital) “status” of a person

Service of process (in the forum)

- Service of process on an individual physically present in the forum state (even if presence is of temporary nature, as is the case when a person passes through a state) is seen as a sufficient basis for that state to exercise personal jurisdiction (“transient/tag jurisdiction”).

Appearance

- “Consent” (ex ante) = forum selection clause
- “Waiver” (of the right to object to jurisdiction) (ex post)

Limitation of jurisdiction by U.S. Constitution

- **U.S. Constitution** sets forth general limits to the exercise of jurisdiction.
- 14th Amendment, sec. 1 (enacted 1868 after end of Civil War) reads in part:
 - “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;” (Due Process)
- There must exist “**minimum contacts**” between the defendant and the court state so that the exercise of jurisdiction “does not offend ‘traditional notions of fair play and substantial justice.’” (*International Shoe Co. v. Washington*, 326 U.S. 316 (1945))
- If there are no minimum contacts with the forum state, the **Due Process Clause** of the 14th Amendment prohibits the exercise of jurisdiction over a person or a thing (*Shaffer v. Heitner*, 433 U.S. 186 (1977)).

Limitation of jurisdiction by U.S. Constitution

- **Crucial issue** in all transnational cases: Which facts may establish personal jurisdiction in the U.S.?
 - P 1: Whether there is a constitutional basis for personal jurisdiction depends heavily on the facts of the case and it is often difficult to assess the outcome of the court's decision!
 - P 2: Courts were sometimes generous to assume jurisdiction based on “long arm statutes”

Jurisdiction in the United States

Special Jurisdiction

- California’s Code of Civil Procedure (§ 410.10) states as follows:
 - “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”
- “Long arm statute” – courts may exercise jurisdiction provided that constitutional factors limiting jurisdiction are met.
- Under which conditions is an outsider amenable to justice in the US based on specific jurisdiction? Two categories (*Int’l Shoe*):
 - The outsider’s activity in the forum state is “**continuous and systematic**” and gave rise to the episode-in-suit.
 - The commission of “**single or occasional acts**” in a state may also be sufficient to assume jurisdiction.
- For an application of these rules in a product liability case, see *Asahi Metal Industry Co. v. Superior Court of California, Solano County*.

Asahi Metal Industry

Asahi Metal Industry Co. v. Sup. Ct. of Cal., Solano County, 480 U.S. 102 (1987)

Facts

Mr. Zurcher lost control over his Honda motor bicycle and was injured. He filed a product liability action in California and alleged that the accident was caused by a defective rear tire. Zurcher named, inter alia, the Taiwanese manufacturer of the tube, Chen Shin, as defendant.

Chen Shin filed a cross-complaint seeking indemnification from its codefendants, inter alia, Asahi Metal, the Japanese manufacturer of the tube's valve assembly. Asahi sold the valve assemblies to Chen Chin in Taiwan. Zurcher settled with Chen Shin leaving only Chen Shin's indemnity action against Asahi to be decided. Asahi has no offices, property or agents in California. Jurisdiction?

Issue

Is awareness that products manufactured & sold outside U.S. may reach the forum state in stream of commerce sufficient for establishing jurisdiction over producer?

Asahi Metal Industry (2)

- **Court of Appeals:** Jurisdiction (-): It “would be unreasonable to require Asahi to respond in California solely on the basis of ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world, including California.”
- **California Supreme Court:** Jurisdiction (+): because minimum contacts arise from stream of commerce: Asahi was aware that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in California, and Asahi benefited indirectly from the sale in California of products incorporating its components.

Asahi Metal Industry (3)

U.S. Supreme Court: reversed Cal. Supreme Court

General considerations in the analysis whether contacts with forum state are sufficient to establish jurisdiction over the defendant:

- Burden on the defendant to litigate in forum state?
- What are the interests of the forum state in the litigation?
- What is the interest of the plaintiff in obtaining relief in the forum state?
- Would jurisdiction help the efficient judicial resolution of the dispute?
- Is jurisdiction sensible to further fundamental social policies?

Asahi Metal Industry (4)

Dispute: How to analyze minimum contacts in commercial cases?

(Justice O'Connor joined by 3 other justices): “purposeful availment test”

- “[T]he ‘substantial connection’ between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.”
- Asahi did not “purposely avail itself of the California” market. It does not do business or have an office, agents, employees, or property in California. It did not control the distribution system that brought its assemblies to California.

Asahi Metal Industry (5) – Concurring opinion

Alternative concept: Stream of commerce theory based on concept of foreseeability (Justice Brennan, joined by 3 other Justices) (9th Justice did not follow neither of the doctrines)

- The defendant’s ability to anticipate suit is the touchstone of jurisdiction:
“[J]urisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause,” for “[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” (480 U. S., at 117)
- Defendant who has placed goods in the stream of commerce benefits economically from the sale of the final product in the forum State. Asahi has therefore purposely availed itself of the market in California.
- However, here jurisdiction (-) because other nations have more reason to decide a dispute whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan.

Requirements of Due Process Clause in a nutshell

Considerations in the analysis whether contacts with forum state are sufficient to establish jurisdiction over the defendant:

- Burden on the defendant to litigate in forum state?
- What are the interests of the forum state in the litigation?
- What is the interest of the plaintiff in obtaining relief in the forum state?
- Would jurisdiction help the efficient judicial resolution of the dispute?
- Is jurisdiction sensible to further fundamental social policies?

In commerce cases (after *Asahi*)

- Purposeful availment test (Justice O'Connor) (more than “mere awareness”)
- Stream of commerce test based on concept of foreseeability (Justice Brennan)

McIntyre Machinery v. Nicastro

J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011)

Facts

Mr. Nicastro seriously injured his hand when working with a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. The accident occurred in New Jersey. The manufacturer of the machine is incorporated in England and operated from there. McIntyre did not market goods in New Jersey directly or ship them there. Yet up to four machines ended up in New Jersey as McIntyre sold the machines in the U.S. via an independent distributor. Nicastro sued the manufacturer before a state court in New Jersey for damages. Personal jurisdiction over foreign manufacturer?

Issue

How to apply the stream-of-commerce principle in products liability cases to establish specific jurisdiction over a foreign producer that has an exclusive distribution agreement with an independent company in the United States? Does a nationwide distribution system provide sufficient contacts to make the manufacturer amenable to justice in a state which he has not explicitly targeted?

McIntyre Machinery v. Nicastro (2)

New Jersey Supreme Court (relying in part on *Asahi*)

New Jersey courts have jurisdiction over McIntyre under the stream-of-commerce-theory:

- The injury occurred in New Jersey.
- The manufacturer knew or reasonably should have known that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states, including New Jersey.
 - McIntyre sold the machines via an independent distributor in the U.S.
 - McIntyre's representatives were present in their official capacity at scrap recycling conventions for advertising purposes that took place in various U.S. States, but never in New Jersey.
- And: Petitioner failed to take some reasonable step to prevent the distribution of its products in New Jersey.

McIntyre Machinery v. Nicastro – Supreme Court

Opinion (Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia and Thomas) = 4 judges = no majority

- “Justice Brennan’s concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court’s precedents make clear that it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.”
- “[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”
- “Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State” (like NJ).
- Conclusion: Personal jurisdiction may be assumed if purposeful availment (+), consistent with Justice O’Connor’s opinion in *Asahi*.

Application of the test advocated by the 4 Justices: jurisdiction (-)

- McIntyre had an intent to serve the U.S. market, but Nicastro has not established that McIntyre engaged in conduct purposefully directed at NJ. No activities that reveal an intent to invoke or benefit from the protection of laws of NJ:
 - McIntyre officials attended trade shows in several states but not in NJ.
 - The British manufacturer had no office in New Jersey
 - It neither paid taxes nor owned property there.
 - It neither advertised in, nor sent any employees to, NJ.
 - Only up to four machines ended up in NJ
- Stream-of-commerce metaphor cannot supersede the limits on judicial authority imposed by the Due Process Clause.
- Policy reasons such as NJ's strong interest in protecting its citizens from defective products cannot overcome restraints set forth by the Constitution.
- **P:** Can federal courts hear the case?

Concurring opinion (Justice Breyer joined by Justice Alito)

- Jurisdiction can be determined by relying on precedent (*World-Wide Volkswagen, Asahi* etc.).
- No need to announce a new apparently stricter general rule as the lead opinion wants. New rule might be necessary to deal with new developments in commerce (internet advertising etc.) which played no role in this case.
- Working changes into the law as the lead opinion or the NJ Supreme Court suggest should not be done without a better understanding of the relevant contemporary commercial circumstances (which are not present here).
- Based on the facts found by the New Jersey court, Breyer concludes, Mr. Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over McIntyre. Precedents show that single isolated sales do not establish minimum contacts with that state.
- Agreement with the lead opinion as to the outcome of this case, but no agreement as to its reasoning.

Dissenting opinion (Justice Ginsburg, joined by Justices Sotomayor, Kagan)

- Jurisdiction of NJ court was proper.
- McIntyre purposefully availed itself of the U.S. market, including NJ. Sufficient contacts with NJ:
 - NJ is a center of the scrap metal industry.
 - McIntyre officials attended U.S. sales fairs + McIntyre sold anywhere in the U.S. via its distributor.
 - Machine was bought by Nicastro’s employer who learned about the machine at a U.S. sales fair. Machine did not end up randomly in NJ.
 - Machine has a substantial value (over 20,000 USD).
 - Precedents do not counsel against the assertion of jurisdiction
 - Application of long-arm statute makes sense in such a case.
- “Splintered majority today ‘turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.’”

Jurisdiction in the United States

General jurisdiction

Concept of “general jurisdiction”

- “All purpose jurisdiction” = i.e. not claim-related
- How to localize?
 - Need for “continuous and systematic” contacts/affiliation with a forum
- General idea
 - *Individuals*: general jurisdiction lies at their domicile
 - *Corporations?*
 - Equivalent to domicile?
 - Supreme Court: Place “in which the corporation is fairly regarded at home” – e.g. place of incorporation / principal place of business

Goodyear Dunlop Tires Operations, S.A. v. Brown

Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846 (2011)

Facts

Two boys from North Carolina died in a bus accident outside Paris/France. Their parents attributed the accident to a defective tire of the bus manufactured in Turkey at the plant of a foreign subsidiary of Goodyear USA and filed an action for damages in a North Carolina state court. They named as defendants: Goodyear USA, an Ohio corporation, and three of its subsidiaries, organized and operating, respectively, in Turkey, France, and Luxembourg.

Goodyear USA had plants in North Carolina and regularly engaged in commercial activity there. This firm therefore did not contest that the North Carolina court had jurisdiction over it. Goodyear USA's foreign subsidiaries maintained that they are not amenable to justice in North Carolina. Jurisdiction?

Issue

How to determine general jurisdiction of companies? Are foreign subsidiaries of a U.S. parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum state?

Goodyear Dunlop Tires Operations, S.A. v. Brown

North Carolina Court of Appeals

- North Carolina has personal jurisdiction over foreign subsidiaries
- Some of the tires made abroad by Goodyear's foreign subsidiaries reached North Carolina through “the stream of commerce” in a highly-organized distribution process involving various subsidiaries, and Goodyear USA made no attempt to keep these tires from reaching the North Carolina market.
- In addition, North Carolina's interest in providing a forum in which its citizens are able to seek redress for their injuries is high as it would be difficult for those plaintiffs to litigate their claims in France, a country to which they have no ties.
- This connection was regarded as sufficient by Court of Appeals so as to assume general jurisdiction over the three foreign corporations.

Goodyear Dunlop Tires Operations, S.A. v. Brown

Supreme Court

- Case decided together with *McIntyre Machineries v. Nicastro* in 2011.
- Ginsburg J. delivered the opinion for a unanimous court (no split as in *McIntyre*).

Reasoning

- NC Court had confused “tests” to determine general and specific jurisdiction
 - Specific jurisdiction covers instances “when the suit arises out of or relates to the defendant's contacts with the forum” (= case specific).
 - “General jurisdiction may be assumed when the continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities” (= all-purpose jurisdiction).
 - Stream of commerce metaphor shapes special jurisdiction, not general jurisdiction.

Reasoning of the Supreme Court (continued)

- When can general jurisdiction be assumed?
 - “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile.”
 - For a corporation, it is the place “in which the corporation is fairly regarded as at home” because there are “continuous and systematic” contacts with that state (principal place of business, incorporation).
- Precedents: *Perkins*, *Helicopteros*
 - Measured against these precedents, NC cannot assert general jurisdiction over Goodyear’s foreign subsidiaries.
 - Unlike the defendant in *Perkins*, whose wartime business activity was conducted in Ohio, foreign subsidiaries conduct no business in NC.
 - Subsidiaries also have no “continuous and systematic general business contacts” as demanded in *Helicopteros* “to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to NC.”
- Conclusion: no general (and also no specific) jurisdiction over foreign firms

Jurisdiction in the United States

General Jurisdiction & Due Process (human rights litigation)

- In the U.S., there exist an old statute, the Alien Tort Statute (ATS or Alien Tort Claims Act), which allows victims of international crimes, to sue the tortfeasors in the US for damages.
 - “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”, 28 U. S. C. §1350.
- Originally this statute was directed against acts of piracy that often occurred in international waters.
- In the 1990s this Act was “rediscovered” to bring human rights violation that happened abroad before U.S. courts. Cases concerned, inter alia,
 - Nazi crimes in Europe
 - Support of foreign corporations for the apartheid regime in South Africa
- In 2013: the US Supreme Court limited jurisdiction under the ATS -> *Kiobel v. Royal Dutch Petroleum Co.*

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

Issue

Under what circumstances may courts recognize a cause of action under the ATS for violations of the law of nations occurring within the territory of a foreign sovereign state?

Facts

A group of Nigerian nationals from “Ogoniland” now living in the U.S. sued Dutch, British and Nigerian corporations in a federal court in the US under the ATS for aiding the Nigerian government in committing violations of the law of nations in Nigeria (violent oppression of protests against oil exploitation).

The District Court dismissed several portions of the complaint and the Court of Appeals of the Second Circuit dismissed the complaint in its entirety, as corporate liability is not recognized under the law of nations.

Kiobel (2)

Supreme Court (opinion of Justice Roberts; Justices Kennedy, Alito & Breyer concurring in separate opinions)

- The Supreme Court unanimously dismissed the action as the ATS does not cover conduct occurring in the territory of a foreign sovereign state.

Reasons

- Under US law there is a general presumption that statutes do not have extraterritorial effect.
- The presumption serves to protect against unintended clashes between U.S. laws and those of other nations to avoid international discord.
- The presumption also applies to claims under the ATS. It is not rebutted by the text, history or purposes of the ATS.

Kiobel (3)

- The ATS was originally directed against piracy. Applying U.S. law to pirates does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another state. Therefore, it carries less direct foreign policy consequences.
- ATS was not passed to make the United States the “world court” for the enforcement of international norms.
- Extraterritorial reach of ATS would imply that other nations could in return hale U.S. citizens into their courts for alleged violations of the law of nations occurring in the U.S., or anywhere else in the world.

Can human rights violations abroad be brought before U.S. courts based on general jurisdiction?

- Again an example from California
- As we have learned when discussing *Asahi*: California's Code of Civil Procedure (§ 410.10) grants jurisdiction provided that the minimum contacts threshold is met.
- For an application of that rule in a case regarding **general jurisdiction** for human rights violations committed outside the U.S., see *Daimler AG v. Bauman*

Daimler AG v. Bauman, 134 S.Ct. 746 (2014)

Issue

Is a foreign parent company subject to general jurisdiction for human rights violations committed by its foreign subsidiary outside the U.S. based on business activities of its U.S. subsidiary in the U.S.?

Facts

Mercedes Benz (MB) Argentina is alleged to have collaborated with state security forces during 1976–1983 to kidnap, detain, torture and kill MB Argentina workers, among them, plaintiffs or persons closely related to them.

The District Court granted Daimler AG's motion to dismiss for lack of jurisdiction.

The Ninth Circuit asserted personal jurisdiction determining that MB USA acted as Daimler AG's agent for jurisdictional purposes.

Daimler (2)

The **Supreme Court** unanimously held that there was **no** general jurisdiction (all-purpose jurisdiction) over Daimler AG in California for injuries allegedly caused by conduct of MB Argentina that took place entirely outside the United States.

Reasons (Opinion delivered Justice Ginsburg)

- **Agency theory** would extend general jurisdiction to foreign corporations whenever they have an in-state subsidiary or affiliate. This approach is too broad.
- To justify **all-purpose jurisdiction** a corporation's affiliations with a U.S. state needs to be so continuous and systematic "as to render it essentially at home in the forum State". The "home state" is usually at a corporation's **principal place of business** or its **place of incorporation**.
- Expansive view of general jurisdiction poses risks to **international comity**.

Daimler (3)

- Disregarding more restrictive European approach to general jurisdiction will impede **negotiations of international agreements** on the reciprocal recognition and enforcement of judgments.

Consequences

- *Daimler* limits the possibility to sue corporations for claims that do not relate to business done in the U.S.
- The operation of a branch does not justify suing the company on claims that have nothing to do with the company's actual activities in the U.S.
- *Daimler* is likely to increase requirements on how plaintiffs have to plead in order to establish personal jurisdiction over non-resident companies having affiliated companies in a forum.

Forum non conveniens

General remarks

- The doctrine of forum non conveniens allows a court to **decline jurisdiction**, even though it is entitled to exercise jurisdiction by statute.
- Courts thus have **discretion** to exercise their jurisdiction: If a foreign forum is deemed to be in a much better position to resolve the dispute, the proceeding may be stayed or the action dismissed.
- The doctrine was originally developed by Scottish courts and is today widely found in **common law jurisdictions**, as the U.S. or England
 - Serves in part as a balance to “transient jurisdiction” based on mere presence of defendant
 - Limits forum shopping (what does that mean?)
- What are the guiding principles for U.S. judges for a jurisdictional deference? -> ***Gulf Oil + Bhopal cases***

General principles

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947)

US Supreme Court

“This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in **exceptional circumstances**. As formulated by Mr. Justice Brandeis the rule is:

'Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the **litigation is between foreigners**. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is **between aliens or nonresidents**, or where for kindred reasons the litigation **can more appropriately be conducted in a foreign tribunal.**”

The Bhopal gas plant disaster

In re Union Carbide Gas Plant Disaster at Bhopal,
634 F. Supp. 842 (S.D.N.Y, 1986)

Issue

Application of forum non convenience doctrine

Facts

In 1984 a major industrial disaster occurred at the town of Bhopal in India caused by a leak in a chemical plant operated by Union Carbide India Ltd (UCIL). More 2,000 people died and over 200,000 people were injured. UCIL was incorporated under Indian law. 50.9% of its stock was owned by Union Carbide Corporation (UCC), a New York corporation. With the help of US lawyers thousands of Indians filed a lawsuit in New York. The actions were joined and assigned to the Southern District of New York. Jurisdiction?

The Bhopal gas plant disaster (2)

Why did the plaintiffs from India sue in the U.S.?

How could U.S. lawyers support the victims?

Why did the defendant object to litigation in NY even though the company's headquarters was located in NY?

Which factors were considered when deciding the motion to dismiss?

Whose inconvenience did the court consider? Was it inconvenient for the defendant? Or for the plaintiffs? But wouldn't the latter be the plaintiffs' problem?

Why are public interests of importance?

Would a court in Europe have had jurisdiction if the defendant was domiciled there?

Do you agree with the reasoning of Judge Keenan? Do you consider the outcome of the proceeding as just and fair?

Appeal (2nd Cir.), 809 F.2d 195

Court of Appeals (2nd Cir.) affirmed forum non conveniens + limited the lower court's judgment:

1. **District Court** ordered UCC to consent to enforcement of Indian judgment.

Court of Appeals: the general rules must apply to enforcement, so that UCIL has the same rights as any other party.

2. **District Court:** ordered UCC to consent to broad discovery by the plaintiffs under the Federal Rules of Civil Procedure as discovery under Indian law was more limited.

Court of Appeals: Both parties do need to have the same rights to ensure fair trial. Therefore, discovery under FRCP only if both sides agree to mutual discovery.

Forum non conveniens in Europe

Forum shopping (England)

The Atlantic Star [1972] 3 All ER 705, 709 (CA) per Lord Denning

“No one who comes to these courts asking for justice should come in vain. He must, of course, come in good faith. ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this ‘forum shopping’ if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.”

Forum shopping/forum non conveniens in Europe

Forum non conveniens in England

- Doctrine of forum non conveniens accepted
- Early case law
 - A stay of proceedings could only be granted under very narrow circumstances
 - The suit must have been "oppressive, vexatious or an abuse of process" and "the stay would not cause an injustice to the plaintiff"
Maharanees of Baroda v Wildenstein [1972] 2 All ER 689 (CA).
- Doctrine was later widened considerably by decisions of the House of Lords (now: Supreme Court).

Lubbe v. Cape PLC, [2000] 1 W.L.R.1545 (H.L.)

- In Lubbe v. Cape PLC, the British House of Lords (now: Supreme Court) denied a forum non conveniens motion (in favor of litigating in South Africa).
- It rejected the American approach (in part) and held that

"the principles on which the doctrine of forum non conveniens rests leave no room for consideration of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the court."
- Under this standard, should the Bhopal case have been dismissed?

- In European law **forum shopping** is accepted but **not** the **principle of forum non conveniens** (ECJ, Case C-281/02 – Owusu v. Jackson).
- If courts are competent to decide a dispute, they must do so. Background:
 - Legal certainty
 - Plaintiff is entitled by law to seek justice in the court chosen.

Forum selection clauses

Introduction



- For a long time, U.S. courts gave (exclusive) forum selection clauses (jurisdiction agreements, choice-of-court agreements) in favor of foreign courts very little weight.
- Such agreements were analyzed from a forum non conveniens perspective and often not enforced.
- Consequence: Legal certainty was hampered
- Things changed with Supreme Court from the 1970s onwards

The Bremen (1972)

M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1 (1972)

Facts

Towage contract between a German towage company and the U.S. firm Zapata. The contract obliged the German company to tow Zapata's oil rig from the U.S. to Italy. As often in maritime matters, the contract contained a jurisdiction agreement in favor of English courts (neutral forum with high reputation in shipping law). Shortly after the tow began, a storm came up which damaged the oil rig. The tug boat was ordered to enter the nearest port (Tampa/Florida). Zapata seized the opportunity to bring an action for damages in a federal district court in Florida (admiralty matter) against the German towing company for negligent towage. The German company objected to jurisdiction and argued that the case should be brought before a court in England. Trial court + Court of Appeals refused to enforce the jurisdiction agreement and stay proceedings as Florida was seen as the proper forum.

The Bremen (2)

Supreme Court

- Reversed and remanded. The Court held:
- Jurisdiction agreements concluded between commercial actors should be enforced unless it is unreasonable.

“There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power ... should be given full effect.”

- If litigation were allowed in another forum, uncertainty and possibly great inconvenience could arise to both parties.

“The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”

Carnival Cruise Lines (1991)

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)

Issue

Jurisdiction agreements concluded with consumers

Facts

Mr. and Mrs. Shute had purchased in Washington a ticket for a passage on a ship from the Florida-based company Carnival Cruise Lines. They boarded the ship in Los Angeles and went to Mexico. Off the coast of Mexico, Mrs. Shute suffered injuries when she slipped on a deck mat. The Shutes filed suit in Washington. The tickets contained a jurisdiction clause in favor of the courts of Florida. The cruise line therefore objected to jurisdiction.

The Court of Appeals for the Ninth Circuit held that the jurisdiction agreement should not be enforced under the rule voiced in *The Bremen* because

- It was not “freely bargained for,” +
- Such an agreement would bar consumers from pursuing their rights in court due to the lack of financial resources necessary to conduct litigation in Florida.

Carnival Cruise Lines (2)

Supreme Court

- The Court of Appeals erred in refusing to enforce the forum selection clause.
- Even though the clause was not “freely bargained for” (as the cruise passenger had to accept the standard contract), the Court was convinced that it is permissible to include a reasonable forum clause in such a form contract:
 - Cruise Co. is operating worldwide + avoids expensive litigation in different fora.
 - Spares litigants time/expense & conserves judicial resources.
 - Consumers might benefit from such a clause as the Cruise line might pass savings resulting from such a clause onto consumers in the form of lower ticket prices.

Carnival Cruise Lines (3)

In addition:

- Cruise line did not choose alien forum.
- Given the venue of the accident, neither Washington nor Florida are in a better position to decide on the case.
- There are no indications that petitioner selected Florida to discourage cruise passengers from pursuing legitimate claims or that it obtained the Shutes' accession to the forum clause by fraud or overreaching.

The Vietnamese approach to jurisdiction

Introduction



- Vietnamese Code of Civil Procedure of 2015 (in force since July 2016) (VCCP) does contain some rules on „international cases“

Article 469 VCCP: General jurisdiction (for disputes having an international character)

1. Vietnamese courts are competent to hear disputes in civil matters having an international character provided that:
 - a) the defendant is a natural person that is residing, working or permanently living in Vietnam;
 - b) the defendant is a foreign organization having its principal seat in Vietnam or having an agency or offices in Vietnam for disputes concerning the activities of these agencies or offices;
 - c) the defendant has property located on the territory of Vietnam;
 - d) the dispute concerns a petition to divorce and one of the parties is a Vietnamese national or all parties are foreigners but residing, working or working permanently in Vietnam;
 - e) the dispute concerns [...] an obligation that has to be executed in Vietnam;

[...]

Article 464(2) VCCP – international character

A dispute has an international character when

- a) at least one party is a foreigner, be it a natural person or an foreign organization;
- b) all parties are from Vietnam but the establishment, modification, execution or extinction [of the right/obligation in question] is produced abroad
- c) all parties are from Vietnam, but the object [of the dispute] is located abroad.

Article 470 VCCP – Exclusive jurisdiction

1. The courts of Vietnam are exclusively competent to hear the following enumerated disputes possessing an international element:
 - a) in disputes which have as their object rights in rem in immovable property located on the territory of Vietnam;
 - b) [...]
 - c) In disputes arising from a relationship in which the parties can prorogate and have prorogated the courts of Vietnam in line with Vietnamese law and international treaties Vietnam is a party to;

[...]

Art. 35 VCCP – Local jurisdiction of courts

1. The local jurisdiction of courts to adjudicate cases in civil matters shall be determined as follows:
 - a) In disputes concerning [civil and commercial cases] prescribed in Articles 25, 27, 29 and 31 of this Code, the courts of the localities where the defendants reside or work have jurisdiction to adjudicate, if the defendant is an individual. Where the defendant is a legal person (“agency or organization”), the courts at its headquarter have jurisdiction to adjudicate.
 - b) The involved parties shall have the right to agree with each other in writing to request the courts of the localities where the plaintiff resides or works, if the plaintiff is an individual; or where the plaintiff has its headquarter, if it is an agency or organization, to adjudicate civil, marriage and family-related, business, trade or labor disputes prescribed in Articles 25, 27, 29 and 31 of this Code;
 - c) In disputes concerning a right [in rem?] over an immovable property, the courts of the district in which the immovable property is situated.

(all translations on this slide and the following slides were downloaded from www.noip.gov.vn and slightly adapted)

Art. 36 VCCP – Jurisdiction of courts selected by a plaintiff



1. The plaintiff has the right to select courts for resolution of civil, marriage and family-related, business, trade or labor disputes in the following cases:

a) If the plaintiff does not know where the defendant resides or works or where its headquarter is located, he may ask the court of the district where the defendant had last resided or worked or had its headquarter to adjudicate the dispute [...].

b) If a dispute arises from the operations of a branch, the plaintiff may ask the court of the district where the organization's head-office is located or where its branch is located to adjudicate the dispute;

c) If a defendant is not domiciled in Vietnam, does not work here or has no headquarter in Vietnam or the case concerns a dispute over alimony, the plaintiff may ask the courts of the district where (he or she] resides or works to adjudicate the dispute;

d) If the dispute concerns compensation for non-contractual damage, the plaintiff may ask the courts of the district where he resides, works or is headquartered or where the damage is caused to adjudicate the dispute;

Article 36 VCCP (2)

e) If the dispute concerns a labor matter (compensation upon termination of a labor contract, social insurance, the rights and/or interests in relation to the contract for work, wages and other working conditions) and the plaintiff is an employee, he may ask the court of the district where he resides or works to adjudicate the dispute;

f) [...]

g) If the dispute arises from a contractual relation, the plaintiff may ask the court of the district where the contract is performed to adjudicate the dispute;

h) If the defendants reside, work or are headquartered in different places, the plaintiff may ask the court of the district where one of the defendant resides or works or is headquartered to adjudicate the dispute;

i) If a dispute concerns rights over immovable property located in different districts, the plaintiff may request the court of the district where one of these properties are located to adjudicate the dispute. [...]

Questions, discussion, quick quiz

- Any questions?
- What do you think about the structure of the rules on jurisdiction in Vietnam?
- Compare the EU rules and the Vietnamese rules on jurisdiction

Thank you very much for your attention!