

Beyond Choice of Law and Multistate Justice: Substantive Law Approach and Search for a Reasonable Jurisdiction

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Having been invited to discuss Friedrich K. Juenger's leading book *Choice of Law and Multistate Justice* on the occasion of a new edition, eleven years after its initial publication, I would like to propose two general subjects related to this outstanding work. The first one is easily chosen and deals with the Juenger's main contribution to the doctrine of the conflict of laws: the "substantive law approach." The second proposed subject, that of "reasonable jurisdiction," seems in principle more difficult to justify because the book focuses on choice of law rather than "procedural" questions. However, jurisdictional issues are treated in the book. As Juenger stated: "although this book deals with choice of law, it attempts to take into account the role jurisdiction and the recognition of judgments play in multistate cases."¹ And his very thought on this is that "[F]or centuries jurists have drawn a line to separate choice of law, on the one hand, from jurisdiction and the recognition of foreign judgments on the other (...) [F]unctionally, however, the three topics are intertwined."² Furthermore, many of his later contributions show a deep interest in jurisdiction problems and solutions, completing the whole picture of Juenger's doctrine on conflict of laws. This I will apply to comment on how Juenger's ideas on particular situations arose after 1993.³

I. Applications of the Substantive Law Approach

The most important of Professor Juenger's contributions is, without doubt, the development of the foundations of the substantive law approach.

¹ See FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 4 (1993).

² See *id.* at 3.

³ See Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1999) reprinted in FRIEDRICH K. JUENGER, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 181 (2001).

The strength of his conviction led him to criticize both the traditional multilateralism and the “modern” unilateralism in accurate and sometimes caustic terms.⁴ All his works were oriented in that direction⁵ and his magna opus is particularly persuasive on this topic.⁶ In one of his last articles,⁷ Juenger still points out the significance of this doctrine, especially when dealing with commercial transactions: “No doubt, as far as transnational contracts are concerned, the elaboration of a supranational substantive law is preferable to relying on traditional private international law rules.”⁸ Based in this statement, and given the incontestable fact that traditional rules exist in many countries, it is worth considering the relationship of these approaches. In particular, it opens the possibility of building a “true international private law” by employing choice-of-law approaches remains as a question without an answer.⁹ This debate becomes much more than a theoretical discussion since substantive rules are increasingly stipulated by contracting parties, and judges and arbitrators as well often confront this problem. In addition, international organizations promulgate conventions that follow either exclusively or partially the substantive law approach.¹⁰ Problems arise since resulting substantive rules must coexist with conflict rules, although, at least in principle, if substantive rules apply conflict rules are not necessary.

⁴ See Friedrich K. Juenger, *How do You Rate a Century?*, 37 WILLAMETTE L. REV. 89 (2001); *id.*, *Choice of Law: How it Ought Not To Be*, 48 MERCER L. REV. 757 (1997).

⁵ See Friedrich K. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969), and the commentary of Patrick J. Borchers, *A Look Forward, A Look Back: Juenger's First Major Conflicts Article*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM. ESSAYS IN HONOUR OF FRIEDRICH K. JUENGER 3 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

⁶ See Juenger *supra* note 1, at 151-190 (confronting orthodoxies and teleology).

⁷ *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133 (2000).

⁸ See *id.* at 1149. Nevertheless, one should note that this assertion is introduced just to affirm the validity of the substantive law approach to other fields of our discipline. He continues, indeed: “But is the same not equally true of other international transactions? If so, what if there is no quasi-codification along the lines of the UNIDROIT Principles available to serve as a set of norms in, say, tort cases?”

⁹ See *id.*, and Friedrich K. Juenger, *Private International Law or International Private Law?*, 5 KING'S COLLEGE L.J. 45 (1994) *reprinted in* FRIEDRICH K. JUENGER, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 205 (2001).

¹⁰ *E.g.*, 1980 United Nations Convention on Contracts for the International Sale of Goods, 2001 United Nations Convention on Assignment of Receivables in International Trade, 2001 UNIDROIT and ICAO Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific of Aircraft Equipment.

In this vein, I would like to discuss briefly Juenger's major assumption regarding multilateral conventions on applicable law to contracts. The 1980 Rome Convention and the 1994 Mexico City Convention of the Organization of American States, both follow the multilateral approach. The latter represents a less known facet of Professor Juenger's professional life; his work as an international lawmaker. As a delegate of the United States to the 5th Inter-American Conference on Private International Law (CIDIP V), he proposed eliminating the characteristic performance test — a key element of the Rome Convention¹¹ — to determine the applicable law in absence of party choice. Juenger proposed to replace both that controversial test and the general rule of the "closest relationship" with application of "general principles of international commercial law recognized by international organizations." Although the adopted formula did not follow exactly Juenger's proposal,¹² the Mexico City Convention has two provisions that expressly demonstrate the significance of his idea of substantive justice.¹³ In this way, and despite his feelings about the incompatibility of both approaches,¹⁴ Juenger cooperated to create a helpful link between a "traditional" conflicts convention and the substantive approach present in

¹¹ See Friedrich K. Juenger, *Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht. Eine Kritik aus amerikanischer Sicht*, 46 RABELSZ 57, 63 (1982); *id.*, *Two European Conflicts Conventions*, 28 VICTORIA U. OF WELLINGTON L. REV. 527, 540-01 (1998) reprinted in FRIEDRICH K. JUENGER, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 361 (2001).

¹² Indeed, after the formula "[I]f the parties have not selected the applicable rule, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties" included in article 9(1), article 9(2) says: "The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations." See Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 391 (1994) reprinted in FRIEDRICH K. JUENGER, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 377 (2001).

¹³ The other one is article 10, which establishes that "[I]n addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply *in order to discharge the requirements of justice and equity in the particular case*" (emphasis added). In addition, article 15 states that "[T]he provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person."

¹⁴ See JUENGER, *supra* note 1, at 152-53 ("A methodological pluralism, however, has its drawbacks. Because it explains everything, it explains nothing, and it adds further confusion to an already confused subject").

texts like the UNIDROIT Principles.¹⁵ The introduction of this mixed approach could give support to the idea that parties can even choose a non-domestic law.¹⁶ The strict Mexico City Convention wording on the one hand and strong a positivist tradition on the other reduces the scope of that autonomy. What seems clear, however, is that judges and arbitrators are entitled to apply transnational commercial principles in the absence of a choice by the parties.¹⁷

All these features imply, according to Juenger, that the OAS Convention is a remarkably “superior product” to the European model.¹⁸ This proves that Juenger qua author is consistent with Juenger qua lawmaker; the remaining question is whether he was right in both of these roles. In order to resolve this question, several facts should be considered. Some of them support his point of view. First of all, the Rome Convention approach is being submitted to “official” debate because of its shift from an international convention to a European Community instrument.¹⁹ The Commission expressly recognizes that some academics “would prefer the choice of non-state law to constitute a choice of law for the purposes of Article 3 of the Rome Convention.”²⁰ It also assumes that the characteristic

¹⁵ See Juenger, *supra* note 12, at 392, and also Juenger, *supra* note 7, at 1149-50.

¹⁶ See Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 204-05 (1997).

¹⁷ This could be seen as a paradox but conflict of laws has plenty of them. One is not a positivist by observing that American courts tend to interpret rules by their literal wording. Here “American” means not only Latin-American but also North-American. See, e.g., *Kreimerman v Casa Veerkamp*, 22 F.3d 634 (5th Cir. 1994), interpreting the 1975 Inter-American Convention on Letters Rogatory.

¹⁸ See Juenger, *supra* note 12, at 393, and *id.*, *supra* note 16, at 207-08 (1997). Some European scholars clearly agree. See, e.g., MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW – THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 122-23 (1994); Katharina Boele-Woelki, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts*, UNIFORM L. REV. 652, 675 (1996); but see also ALEXANDER GEBELE, DIE KONVENTION VON MEXIKO – EINE PERSPEKTIVE FÜR DIE REFORM DES EUROPÄISCHEN SHULDVERTRAGSÜBEREINKOMMENS? 198-206 (2002).

¹⁹ See *Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization* (EU document COM/2002/0654 final).

²⁰ See Boele-Woelki, *supra* note 18, at 659-70; Michael Joachim Bonell, *Verso un codice europeo dei contratti?*, EUROPA E DIRITTO PRIVATO 181, 190-91 (1998); Ole Lando, *The*

performance test does not work very well.²¹ Secondly, there exists a significant contradiction in denying to judges what is allowed to arbitrators in many countries, namely, the application of the *lex mercatoria*. From a strictly legal point of view, the rejection of this denial should not come as a surprise. Instead, the question is whether it is advantageous and systematically coherent in the European context. The Commission quotes two well-known decisions of the Dutch Supreme Court in which the parties' choice of the rules of the 1980 Vienna Convention was accepted.²²

Other facts, nevertheless, do not seem to support Juenger's principal thesis. Since only two countries have ratified it in the ten years after its approval, the Mexico Convention has clearly failed as an international treaty. Despite Juenger's efforts, not even the United States ratified.²³ As has happened with other Inter-American conventions, the possible reception of the Mexico Convention by Latin American legislatures remains open²⁴ but, until now, this Convention seems too audacious. Even party autonomy is still seen as a dilemma in several Latin American countries.²⁵

II. The Search for a Reasonable Jurisdiction

Jurisdiction is Juenger's other main subject, especially after the publication of his landmark book. He expresses strong criticism of the jurisdictional approach by American courts.²⁶ Anytime he compares

Principles of European Contract Law and the lex mercatoria, in LIBER AMICORUM KURT SIEHR 394, 402-03 (2000).

²¹ Reforms proposed to the Rome Convention by the European Group of Private International Law do not reflect any accommodating approach. See <http://www.drt.ucl.ac.be/gedip/>.

²² See *supra* note 19.

²³ Although some problems with the English version in fact exist (see Juenger, *supra* note 12, at 393 n. 53, the American attitude did not seem very receptive.

²⁴ Venezuela, one of the two contracting States, has also incorporated the key solutions of the Mexico Convention into its Private International Law Act of 1998. The Argentinian Project of the Justice Department of 2003 is also influenced by it.

²⁵ See Friedrich K. Juenger, in THE UNIDROIT PRINCIPLES: A COMMON LAW OF CONTRACTS FOR THE AMERICAS? 89 (1998).

²⁶ See Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907 (1981); *id.*, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993); *id.*, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995) reprinted in FRIEDRICH K. JUENGER, SELECTED ESSAYS ON THE CONFLICT OF LAWS 71 (2001) ("There is no longer any doubt:

American principles to the European “Brussels system,”²⁷ the conclusions favor to the European model.²⁸ From his point of view, it appears that the “functional and pragmatic European approach” is preferable to the American reliance on an “imprecise inquiry.”²⁹ What deserves praise in the European system is the narrow zone it leaves to judicial discretion. The reason is that jurisdiction is closely linked to fundamental rights, as the European Court of Justice has strongly indicated.³⁰ Nevertheless, one stain sullies the good reputation of this model: the discrimination that the “Brussels system” mandates with regard to outsiders, who can be sued before the courts of EU Member States on exorbitant bases that are not allowed when the defendant has his domicile in a Member State.³¹ Moved both by his sense of justice and by his devotion to common sense, Juenger condemned this unfair practice. Even though there may be exceptions, the unreasonable character and the lack of justice usually present in exorbitant fora make it easy to share Juenger’s complaint.

But, as Juenger points out, exorbitant grounds of jurisdiction are also available in the courts of the United States, and here against every

American jurisdictional law is a mess”); *id.*, *The American Law of General Jurisdiction*, U. CHI. LEGAL F. 141 (2001).

²⁷ We use the terms “Brussels system” to generally refer to all the texts (conventions and EU regulations) dealing with jurisdiction and recognition of foreign judgments in civil and commercial matters, adopted in the frame of the European integration (in a broad sense, *i.e.*, including EU and EFTA). That means: the 1968 Brussels Convention, the 1988 Lugano Convention, and Regulation 44/2001 which “communitarizes” the Brussels Convention. There are two more Regulations also related to jurisdiction and recognition but in family matters (Regulation 1347/2000 and Regulation 2201/2003 which replaces the former).

²⁸ See Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1210-11 (1984) reprinted in FRIEDRICH K. JUENGER, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 87 (2001) (“the comparison between the jurisdictional rules of the Brussels Convention and our own awkward approaches suggests that the Europeans are ahead of us”).

²⁹ *Id.* at 1212 (quoting *Calder v. Jones*, 104 S. Ct. 1482, 1487 (1984)).

³⁰ *Id.* at 1209. See more recently Case C-7/98, 28 March 2000, *Krombach*, [2000] ECR I-1935.

³¹ See Friedrich K. Juenger, *La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale. Réflexions d’un américain*, REV. CRIT. DIP 37, 41-51 (1983). The Brussels Convention discriminatory provision survives in the EU Regulation 44/2001.

defendant.³² Analyzing the consequences of one of the leading American cases on jurisdiction, Juenger stated that “another shortcoming of the *Shoe* opinion is that it left intact tag jurisdiction, to which the Court gave a new lease on life in *Burnham v. Superior Court* (...) As a consequence, we now have two types of exorbitant general jurisdiction: tag jurisdiction and ‘doing business’ jurisdiction, the second of which cannot even be defined.”³³ The hallmark of an exorbitant forum is the fact that the connecting element taken into account to determine competence is not essential to the legal relationship and can be merely accidental. Secondly, but no less important, the main purpose of an exorbitant forum is often to favor the party with a local connection, with a link to the country whose legal system includes the exorbitant jurisdiction rule, in spite of the foreign party. The lack of reasonableness, which by definition characterizes exorbitant fora, cannot be justified by the needs of a State’s sovereignty.³⁴ Therefore, exceptionally — and in only very special situations — does such an exercise of verdict contribute to fairness.³⁵

In principle, as far as “*così fan tutte*,”³⁶ a good way to eliminate the use and abuse of exorbitant fora could be an international convention. That is the lesson of the European experience. Thus, extending the European solution could have been one of the goals of the American proposal to draft a Hague worldwide convention on jurisdiction and recognition. Nevertheless, the American delegation first managed to impose a model of a “mixed” convention, a hybrid composed of three categories of bases of jurisdiction.³⁷ Then, after long and tortuous negotiations, the American

³² See especially *Pennoyer v. Neff*, 95 US 714 (1877), and *International Shoe Co v. Washington*, 326 US 310 (1945). See Juenger, *The American Law of General Jurisdiction*, *supra* note 26, at 147-48.

³³ See Friedrich K. Juenger, *Traveling to the Hague in a Worn-out Shoe*, 29 PEPP. L. REV. 7, 9 (2001). See also Juenger, *The American Law of General Jurisdiction*, *supra* note 26, at 149-53, and the leading decision of the US Supreme Court in *Helicópteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1994).

³⁴ See JUENGER, *supra* note 1, at 160-61.

³⁵ For instance in cases related to violation of human rights. See Juenger, *Traveling to the Hague in a Worn-out Shoe*, *supra* note 33, at 13.

³⁶ Juenger, *The American Law of General Jurisdiction*, *supra* note 26, at 160.

³⁷ A “white” list of approved fora which would render a judgment enforceable in all contracting States; a “black” list with the bases of jurisdiction none may invoke against a defendant domiciled in a contracting State (the enforcement abroad of a judgment rendered in a forum of this list is totally blocked); and, in between, a shapeless “gray” list of “idiosyncratic” fora which would not assure recognition. For a critique of this model, see

Government found the inclusion of American traditional exorbitant fora in the list of outlawed bases unacceptable.³⁸ That and other reasons³⁹ spelled the end of the project. No other solution being possible, the American attitude with regard to exorbitant fora is hard to understand. Tag jurisdiction, present in the British tradition, was already prohibited by the European system. Unlike this basis, which was familiar in Europe at least since the United Kingdom joined the EU, “doing business” is an oddity even for American scholars and courts.⁴⁰ It is hard to blame our European counterparts for being skeptical of it as well.⁴¹

Juenger’s skepticism concerning the Hague Project⁴² proved to be well-founded. The ambitious American proposal became a project simply dealing with judgments adopted on the basis of the choice-of-court agreements.⁴³ Nobody knows what the future of this project will be, but if it becomes a convention, European States could finally respect procedural rights of non-European defendants, and American courts could take cases on a more objective basis. In the meanwhile, these goals could be achieved even though Hague Convention has not succeeded, since the work already accomplished by the Hague Conference could in any event be used at a national or regional level.⁴⁴ There is, for instance, an attempt to federalize

Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT’L L. 111, 118-20 (1998).

³⁸ See Juenger, *The American Law of General Jurisdiction*, *supra* note 26, at 163-65 (quoting the testimony of the Assistant Legal Adviser for Private International Law of the Department of State before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, June 29, 2000). See also Juenger, *Traveling to the Hague in a Worn-out Shoe*, *supra* note 33, at 12-13.

³⁹ In addition, Europeans fear certain American legal tools like availability of discovery, contingency fees, class actions, *lis pendens*, *forum non conveniens*, and punitive damages.

⁴⁰ See Juenger, *Traveling to the Hague in a Worn-out Shoe*, *supra* note 33, at 10 (“Fifty-five years after *Shoe*, we still do not know when states may assert general jurisdiction over nonresident corporations”). See also Juenger, *The American Law of General Jurisdiction*, *supra* note 26, at 155-57.

⁴¹ See Juenger, *Traveling to the Hague in a Worn-out Shoe*, *supra* note 33, at 11 (“It was as if we tried to sell to other nations the institution of an Electoral College”).

⁴² See Juenger, *supra* note 37, *passim*.

⁴³ See <http://www.hcch.net/e/workprog/jdgm.html>.

⁴⁴ Juenger’s proposal dealing with a “bilateral” agreement between European countries and the United States would not fare much better than the Hague Project. See Friedrich K. Juenger, *Amerikanische Praxis und europäische Übereinkommen*, in Festschrift für

the American law of judgments recognition. But Juenger was not optimistic about this possibility.⁴⁵ At least, according to him, “it seems that only the Supreme Court can remedy the situation it has created.”⁴⁶ Whatever solutions might be out there, Juenger’s work on jurisdiction will be an indispensable instrument in finding them.

ULRICH DROBNIG 299, 304 (Jürgen Basedow, Klaus K. Hopt, and Hein Kötz ed., 1998). About the possibility to draft a jurisdiction convention in an Inter-American context, see Diego P. Fernández Arroyo, *Acerca de la necesidad y las posibilidades de una convención interamericana sobre competencia judicial en casos de derecho internacional privado*, in LIBER AMICORUM DIDIER OPERTTI BADÁN (2004).

⁴⁵ See Juenger, *The American Law of General Jurisdiction*, *supra* note 26, at 166-67.

⁴⁶ *Id.* at 167.