

The Good Word(s) From Fritz Juenger

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Fritz Juenger, for whom English was a second (or perhaps third) language, became an exemplar of its usage. Even casual readers of his scholarship on conflict of laws will be struck by his extraordinary mastery of both substance and writing style.

The following sets of quotations from Fritz's *Selected Essays on the Conflict of Laws* (2001)¹ provided a framework for discussion during the Friedrich K. Juenger Colloquium. After each set of quotations is a brief annotation related to either of two communications during the last week in the life of the esteemed colleague whom the Colloquium and these papers honor. One of these communications was a message Fritz left for me on my voice mail, and the other was a talk, read by a colleague, that Fritz had prepared for the first International Law Weekend-West that week.²

Preface / Conflicts History

If there is any pervasive theme to my work, it is the effort to break the stranglehold of interest analysis and the hope that American conflicts law will ultimately distance itself from this unhelpful doctrine. Currie's approach is sadly at odds with the openness to foreign sources and ideas that used to characterize American conflicts law. To escape the stagnation that currently prevails we need to return to the urbane and cosmopolitan attitude that has informed the subject ever since Story wrote his path-breaking treatise. (viii)

While choice of law lies in shambles because of doctrinal aberrations, jurisdiction has fallen victim to the Supreme Court's

¹ Published posthumously in 2001. The quotations from Fritz's writing are organized according to the chapters in *SELECTED ESSAYS*. Each quotation is followed by the number of the page from which it is drawn.

² This two-day program of the American Branch of the International Law Association was held January 26-27, 2001 at the Pepperdine University School of Law. Fritz died the first day of the program.

attempts to deduce from the Fourteenth Amendment's Due Process Clause rules and principles that no one put there. (ix)

In other words, when conflicts rules were first conceived, law was still cosmopolitan. The existence of overarching principles and institutions made the particularistic tendencies implicit in such rules more bearable than they are in our statist and positivist times. (13)

[C]onsistency and uniformity are surely not the only values in the law. The responses to multistate problems in antiquity were informed by the desire to do substantial justice, and that consideration has never been wholly absent from the conflict of laws. If our discipline, like any other, must pay attention to results, how can that constraint be reconciled with the ideal of decisional harmony? (42)

Surely a next step in the conflicts history of the United States should be an accelerated codification of choice-of-law rules — if not at the federal level, then at least on a state-by-state basis.³ Fritz's telephone message to me in January, 2001 followed up on conversations we had had about Oregon's project to that effect.⁴ By the time of his call, Fritz knew that the first phase of the project, pertaining to contracts, was on its way to the state legislature. Not surprisingly, he warmly endorsed the pending bill's rejection of interest analysis, with its inducement to "doctrinal aberrations," in favor of positive rules "informed by the desire to do substantial justice" as an eventual premise for decisional harmony.

Jurisdiction

There is no longer any doubt: American jurisdictional law is a mess. Split opinions, loaded footnotes, and convoluted opinions larded with a fanciful vocabulary that attempts to give half-baked concepts an aura of reality by dressing them up as political

³ Symeon Symeonides pioneered in this endeavor as Reporter of Louisiana's choice-of-law rules and as Co-Rapporteur of a similar project in Puerto Rico. See James A.R. Nafziger, *Oregon's Project to Codify Choice-of-Law Rules*, 60 LA. L. REV. 1189, 1190 (2000).

⁴ See OR. REV. STAT. §§ 81.100-135 (2003). The author serves as Reporter of this project. See James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397 (2002). An earlier version of this article appears under the same title at III Y.B. PRIVATE INT'L. L. 391 (2001). See also Symeon Symeonides, *Codifying Choice of Law for Contracts: The Oregon Experience*, 67 RABELSZ 726 (2003).

science or presenting them in the garb of folksy similes, signal the Justices' inability to devise a satisfactory approach to the simple question of where a civil action may be brought. While scholars — unlike practitioners — revel in uncertainty, even in academic circles the applause and admiration for the Court's forays into the field of jurisdiction have long ago given way to a distinct disenchantment. (71)

Yet, the fact that we are saddled with a chaotic law inhibits us from pursuing a transnational jurisdictional and recognition compact. This is too bad, not only for us, but for our potential treaty partner. Though the European Union's jurisdiction and enforcement scheme is superior to ours, it is by no means free from flaws. The Brussels Convention is marred, above all, by xenophobia. (85)

The remarks Fritz prepared for the inaugural International Law Weekend-West — his last piece of scholarship — once again found him observing the crippled wanderings of jurisdictional doctrine. In "Traveling to the Hague in a Worn-Out *Shoe*,"⁵ Fritz lamented both the inadequacy of doctrinal vocabulary — "purpose availment," "minimum contacts," and so on — as well as the willingness of the United States to sacrifice a global harmonization of jurisdictional rules on the altar of traditional "doing business" and service-of-process ("tag") bases of jurisdiction.

Choice of Law

Moving from puritanic rigidity to psychedelic abandon, the conflict of laws, as Rheinstein foresaw, has once again been led into a dead-end alley. The harsh conceptualism that Cardozo described has been replaced by shallow sophistry. Currie's theories and terminology pervade American conflicts jurisprudence to such an extent that it may not be possible to discard them without a change of our legal language. For all the gallons of ink and tons of print lavished on the subject, current American conflicts law remains a rhubarb. If anything Currie said should be taken seriously it is his admonition to "clear away the apparatus that creates false problems and obscures the nature of the real ones." (179-80)

⁵ 29 PEPPERDINE L. REV. 7 (2001) [hereinafter *Shoe*]. Fritz's earlier critique of jurisdictional doctrine, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995), was reproduced in his SELECTED ESSAYS ON THE CONFLICT OF LAWS 71 (2001).

Taking a little bit of this, a little bit of that, and a tad of the other, scholars and judges have devised composites that they find more appealing than any plain vanilla choice-of-law methodology. There is, of course, nothing wrong with borrowing the best elements of various theories and combining them in some coherent fashion to create a new approach. The users and promoters of the various “mish-mash” or “kitchen sink” methodologies, however, tend to overlook that the four basic approaches reflect rather different ideologies and incompatible purposes, and therefore do not mix well. At any rate, for analytical purposes at least, it seems appropriate to keep the varying methodologies apart, even if it is true that no particular approach has ever prevailed, to the exclusion of all others, in the history of our discipline. (189)

In this fashion, a number of factors combined to give the conflict of laws a strangely ethnocentric quality. Twenty-five years ago, an eminent German conflicts scholar already concluded that American authors are “stewing in their own juice.” This is a serious matter. In consequence of our self-imposed insularity, we are in danger of losing touch with the rest of the world. Nor does such insular conflicts scholarship particularly please the judiciary. The theoretical refinements American scholars developed in splendid isolation are not especially helpful in deciding interstate and international cases; in fact, it seems that the judges do not even take them seriously. (198)

The term “private international law” has inspired much discussion, with practically everybody who talks about it taking the position that it is a misnomer on several scores. (205)

In the first, contracts-related phase of Oregon’s codification project,⁶ the legacy of Fritz is apparent. His persistent advocacy of material justice and a substantive approach to choice of law helped shape the Oregon statute’s general rule. Instead of a reliance on either unilateralist or multilateralist techniques, the new rule directs courts and others to apply the “appropriate law,” as informed by substantive policies that are stipulated in the rule. Although these policies are not entirely new, what is new is their freedom from a framework of governmental interest analysis and assessment

⁶*See supra* note 4.

of the relative significance of connecting factors between a rule and sovereign territory. Fritz's powerful writings helped inspire a shift of focus in Oregon's law from sovereignty to substance.

Judgments Recognition

Today, the potential for a consensus on recognition rules that are responsive to international exigencies is within reach. The notion of sovereignty no longer casts the spell it once did, and an ever increasing flow of multinational transactions calls for workable solutions to problems that, by their very nature, cannot be confined to a particular territory. Trends in domestic laws and treaty practice, as well as the standards set by federal and quasi-federal systems, make it possible to discern the outlines of emerging international standards. (319)

The Holy Grail of a Hague Convention on Judgments is still far off. Fritz's optimism about harmonization of recognition rules may therefore seem a bit misplaced. In "Traveling to the Hague"⁷ Fritz himself expressed frustration with the failure of courts in the United States, even in the nineteenth century, to take into account developments abroad. On the other hand, the American Law Institute's International Jurisdiction and Judgments Project⁸ offers a more cosmopolitan alternative to the insularity of United States rules. The rich lode of foreign examples already embedded in the A.L.I. project will help both Bar and Bench to "discern the outlines of emerging international standards" for application in the United States. Fritz would be pleased with the open-minded approach that the A.L.I. has adopted for this work in progress.

Conflict of Laws Conventions

As we approach the end of this millennium, we may well witness a return to the comparative law tradition that used to be the hallmark of American conflicts law. According to [Quintín] Alfonsín, none of the existing conflicts approaches, *i.e.* application of the parties' personal law, the *lex loci contractus*, or the *lex loci solutionis*, can satisfactorily resolve what is in essence a substantive multistate problem. He maintained that the law governing international transactions should, in his termin-

⁷ See Shoe, *supra* note 5.

⁸ American Law Institute, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, Tentative Draft (Revised) (2004).

ology, be a true “international private law” of an “extra-national” nature. The fundamental obstacle to the emergence of such a supra-national law of contracts he perceived was the lack of a body of law formulated with sufficient specificity. (386)

It is submitted, however, that if one compares [the Mexico City and Rome Conventions], the Americas have amply justified their codificatory efforts by using the comparative method to create a superior product. (389)

Better than even the best regional convention is global consensus on choice-of-law rules. Fritz’s enthusiasm for the UNIDROIT Principles of International Commercial Contracts influenced the drafting of the Comments to the Oregon statute. The Comments twice encourage parties to international transactions to consider incorporating the UNIDROIT Principles by reference in their contracts.⁹ That is Fritz’s sensible voice speaking through this Reporter in the codification project, and eventually through the Oregon Law Commission and Oregon Legislature.

⁹ See *Conflicts Law Applicable to Contracts*, 2001 OR. LAWS CH. 164, O.R.S. §§ 81.120-135 (2003), Comments, reproduced in Nafziger, *supra* note 4, at 421-424.