BOOK REVIEW

THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS BY ARTHUR T. VON MEHREN

Reviewed By Patrick J. Borchers†

Reviewing Professor Arthur von Mehren's brilliant book[1] brought to mind the stretch we spent in the Hague in June of 1996. Professor von Mehren was there in the most visible of roles as a prominent member of the United States delegation to the Hague Conference on Private International Law. I was there in the most invisible of roles as a Recording Secretary to the Special Commission that began the investigation of the possibility of a convention on international jurisdiction and the effects of foreign judgments in civil and commercial matters.

The confluence is significant because *Theory and Practice of Adjudicatory Authority* is the printed version of the General Course that Professor von Mehren gave the next month at the Hague Academy. In part, his lectures were designed to set a framework for mutual understanding of the jurisdictional boundaries of each major tradition. The printed version, however, did not appear until late 2002 (and then in separate book form in 2003) and the intervening six years proved to be interesting ones indeed.

To begin with his Epilogue, von Mehren casts some important light back on the reasons that the Hague Conference project has stalled. Many judgments conventions are single, or "simple," conventions, regulating the exercise of adjudicatory authority only at the recognition stage. These conventions are the easiest to conclude because they accomplish the least. They do nothing to directly restrain the exercise of adjudicatory authority. Essentially all they do is to provide advance notice of the circumstances under which the courts of one nation will enforce the judgments of another. Even a court operating

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1. ARTHUR T. VON MEHREN, THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE DOCTRINE, POLICIES AND PRACTICES OF COMMON- AND CIVIL-LAW SYSTEMS (Martinus Nijhoff Publishers 2003).

under the most exorbitant of jurisdictional rules is unconstrained if the judgment can be enforced without the aid of any other court.

At the other end of the spectrum lie double conventions. Double conventions are the most ambitious and difficult to conclude, because they operate both directly and indirectly. They limit directly the exercise of jurisdiction by the courts of a signatory state and regulate the recognition practices of courts. The Lugano and Brussels Conventions (the latter now mostly replaced by an E.U. Regulation) are the best known examples of double conventions. In effect, the U.S. operates internally under a de facto double convention because the due process and full faith and credit clauses have been interpreted to directly and indirectly regulate jurisdiction.

As Professor von Mehren notes, the Hague negotiations labored in the shadow of Brussels and Lugano. He observes that the original Brussels Convention might not have come to exist as a double convention but for the historical forces that harmonized the legal traditions of the six original Member States: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Had the United Kingdom and its common law tradition been part of the original mix, the resulting product might have looked considerably different. Brussels, of course, became the model for the Lugano Convention's extension to some non-Member States. Brussels itself survived reasonably intact as new Member States were added and then through its eventual transformation to a Regulation.

Brussels's relative success, and the success of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is essentially also a double convention, created a heavy presumption that the Hague Convention should be double. As Professor von Mehren pointed out from the beginning, however, there was another option, that of a "mixed convention." A mixed convention would contain a "black list" of exorbitant jurisdictional bases that all signatory states agreed not to exercise against domiciliaries of other states, a "white list" of jurisdictional bases that all agreed were permissible and mandate a judgment's recognition, and a "gray list" where nobody makes any promises. As things stand now, all judgments from or to U.S. courts are on the gray list because America is not a party to any judgments conventions.

Professor von Mehren thought all along that a mixed convention offered the only realistic hope of concluding a world-wide convention. He was right. In retrospect, such a convention might have been very modest. It might have included a "black list" of only the most outlandish of jurisdictional bases: U.S. and U.K. "tag" jurisdiction, German "assets" jurisdiction under Section 23 of the ZPO, French nationality

jurisdiction under Article 14, and perhaps a few more. The "white list" might have been similarly small: perhaps an individual's domicile and a corporation's principal place of business and even then with the right to re-examine damages that the recognizing country considers to be beyond reasonable compensation.

It is a fair point that such a convention might not have accomplished much, at least immediately. But it would have accomplished something. It would have limited to some degree the vast, unregulated gray list that governs now. It might have set the stage for further bilateral conventions that would further shorten the gray list. But the dogged insistence that the convention be a double one, and only a belated and grudging acceptance by the Conference of the possibility of a mixed convention, doomed whatever hopes the project might have had. The perfect became the enemy of the good.

The good news is that we still have this fantastic book. In a long and almost unbelievably distinguished career, this is Professor von Mehren's most seasoned and complete comparative exposition of common and civil law adjudicatory authority. Many of the concepts will be familiar to those who have followed his career. There are some new theoretical developments, however.

One of the most important is the introduction of a type of jurisdiction he calls "category specific." Professor von Mehren's most important and influential contribution to the law of jurisdiction was the introduction in 1966, in an article that he co-authored with his late colleague Donald Trautman, of the dichotomy between "general" and "specific" jurisdiction. "General" jurisdictional bases are those like domicile or in-state service where the forum claims the right to adjudicate essentially all types of controversies involving such a defendant. "Specific jurisdiction" is an assertion of jurisdiction that depends upon claim-related activities in the forum. Thus it is "specific" to the particular controversy between the parties.

Category-specific jurisdiction, as Professor von Mehren describes it, shares some features of each. It is like general jurisdiction in that the claim need not bear any direct relationship to the forum. But, unlike true general jurisdiction where the defendant's connection to the forum is unrelated in any way to the category of claims against him, category specific jurisdiction is limited. Professor von Mehren cites section 29 of the German ZPO which provides for jurisdiction in contractual disputes in the place "where the disputed obligation is to be performed" as an example of category-specific jurisdiction. Other examples might include tort jurisdiction in the place of the injury, jurisdiction in support matters in the creditor's home state, and so on.

The introduction of this terminology may pave the way for future jurisdictional reform efforts. Category-specific jurisdictional bases offer the hope of some reasonable predictability without the excessiveness of true general jurisdiction. If the U.S. ever sees a return to meaningful jurisdictional statutes, one might expect category-specific bases to offer the hope of reasonable drafting clarity and an accommodation of the competing interests of plaintiffs and defendants.