Realism in Private International Law

Address in response to the award of the title of Doctor *honoris causa*
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Distinguished colleagues, students, friends, I am very mindful of the great honour you do me by bestowing upon me the title of Doctor *honoris causa*. I can only express my sincerest and most respectful gratitude to have been honoured in this way by so great an institution, and in the presence of scholars of such eminence. I am touched by the kind and generous sentiments expressed today, which I take as a signal of the value of my subject, private international law, and of English law's contribution to its evolution. That you have honoured a common lawyer in this way is also a reminder that private international law is not merely international in its subject matter. The subject's concerns transcend borders, just as its practitioners from around the world speak a common language and belong to a community of scholars which is truly international.

Your generosity in awarding me this honour reflects an internationalist spirit so I wanted to respond by considering the common goals, the principles, the aspirations – I will here call them values – which underpin our subject.

In order to identify these values we must, however, first step back and focus the enquiry. We must remind ourselves that like all values the values of private international law may be approached from different perspectives. In particular I would suggest that they may be approached from a position of idealism or of realism. We may see these values as perfect abstractions untarnished by the realities of the legal process, as elements in a perfect, parallel universe. Or we may see them through the lens of realism, in the context of the disputes which give them life, and as practical guides to action.

In making this suggestion I hope that I may be forgiven for my temerity in invoking respectively Plato and Aristotle, though homage to both in present circumstances is surely apt. But the idealism I have in mind is more that of Savigny (and indeed of the Court of Justice of the European Union) than of the Symposium. And the realism I reference today is less that of the Ethics, more that of Walter

Wheeler Cook, that great exponent of American Legal Realism who was also (no accident I say) one of the greatest scholars of private international law.

We must also remind ourselves that our subject may be international but it is not homogeneous. The very realism which I intend to endorse requires that we recognise that different legal traditions and different legal systems approach these issues with different assumptions and different goals. Otherwise we fall prey to the empty dilution of reductionism, the worst kind of idealism. It is not because of parochialism therefore but out of realism that I adopt here the stance of the English lawyer, and indeed of the English commercial lawyer. This is not to say that the values I will identify are not generally held. I believe that they are. It is rather that we must all inevitably interpret them in our ways, ways appropriate to our own legal systems.

So what might these be, these values of private international law?

Let me start with a deletion. It is customary to prize uniformity above all other values in private international law, at least in the area of choice of law - in the application of the substantive law governing a given issue. The aspiration is that the rules for choice of law will lead to the application of the same law to a given set of facts irrespective of the forum in which the dispute is heard. But to privilege uniformity is to worship at the feet of a false idol. No doubt we may have *normative* uniformity, in the sense of uniform rules of private international law, as most conspicuously within the European Union. But *decisional* uniformity, uniformity of result, is an illusion.

Suppose a universe in which all courts uniformly apply the same law to a given set of facts. A uniform outcome in those courts is likely to be prevented for three important reasons:

First, the choice-of-law disputes which the principle of uniformity is said to control are rare. Indeed in the world I inhabit, the world of international commercial litigation, they are almost unknown. Cross-border disputes very often settle by agreement between the parties long before the application of foreign law is required, so costly and cumbersome are such disputes likely to be. They terminate usually once it is clear that in which court the dispute will be heard.

Second (a related point) the majority of cross-border disputes concern jurisdiction or the grant of interlocutory orders. But these matters are procedural and within the province of the single court addressing them. In that context uniformity is irrelevant, and indeed improper.

Third, where the application of foreign law is indeed required we encounter the Achilles heel in the principle of uniformity. It is unlikely that one court could effectively apply another country's laws. The foreign law problem is the crux of the choice-of-law process and requires some elaboration.

Consider an example. Suppose that the law of Greece governs a given contract, or a tort, or a marriage. Suppose that a dispute arises in the English courts. Suppose again that the English court would identify the law of Greece as the applicable law. Does this mean that the law of Greece will be applied in the same way in both the English and the Greek courts? No. Or at least not in those cases which really arise, in which almost by definition the content of foreign law is contested even in the foreign system concerned. Of course some propositions of foreign law are readily known and applied; but not those which are likely to become the subject of litigation. In such hard cases, in which a court may find itself addressing a question which has yet to be answered in the relevant foreign system, all cases are hard cases. In this context, the process whereby a Greek court applies its own law is quite different from the process whereby the English court applies that law. In applying Greek law the English court is a novice, not only unaware of the law of Greece but of the assumptions, principles, and cast of mind which inform legal reasoning in a Greek court. Again, the argument before the English court is one between English lawyers representing and critiquing the opinions of experts. It is quite different from the informed, engaged argument of Greek lawyers before a Greek court. Although possible, there is (to put the point at its weakest) no guarantee that the decision as to the content Greek law would be the same in both courts. This may occur, but accidentally and by coincidence.

It should be added that the difficulty here is not that English law, like all common law systems, treats issues of law as issues of fact not law. It matters not how we characterise issues of foreign law; it is the foreign-ness of foreign law which creates the difficulty. Nor do I mean to say that the application of foreign law is ineffective or unfair. It is as effective and fair as any evidential process. My point rather is that the goal of uniformity is subverted by the realities of proving foreign law. Realism, inevitably, dents the ideal.

But if uniformity is not amongst them, what are the values which we conflicts lawyers should serve?

Our first primary value, a distinctive value in international law, must be respect for comity. What comity means is notoriously elusive. Broadly we may understand the principle of comity as the obligation to respect the laws and legal institutions of foreign states. But as it stands this is vacuous and the value of comity cannot be defined in the abstract. What then does it mean in practice?

Consider an especially clear case where comity is starkly an issue. Consider the circumstances in which a court is entitled to grant an injunction to restrain a claimant from pursuing foreign proceedings, for example where an English court prohibits foreign proceedings by granting an antisuit injunction. A spectrum of responses is possible. A strong theory of comity would forbid such relief in any circumstances. To order a claimant to cease foreign proceedings might be viewed as invariably an infringement of comity because such an order trespasses on the foreign

court's sovereign control of its process. But such purity – such idealism – is misplaced. It ignores the reality of cross-border litigation in which claimants often sue for tactical reasons, to pressurize an opponent into surrender, or in breach of emphatic jurisdiction or arbitration agreements. This reality requires that remedies such as the antisuit injunction should be available to prevent abuse of process and enforce contractual rights. The strong view of comity makes this impossible, however (save perhaps where the foreign court has exercised an exorbitant jurisdiction, so forfeiting the protection of comity).

The strong view further ignores the reality that in a mature system of values such ideals as comity and justice may conflict and must be calibrated to accommodate both. Hence the need I would suggest for a more textured approach to comity. In such an approach antisuit injunctions do not invariably infringe comity, but it is recognised that they may do so, and it becomes necessary to ask in any given case whether such an infringement would occur. In English law, for example, it is recognised that comity may be infringed if the English court lacks the jurisdictional authority to grant relief, as it would generally if relief is aimed at a party who is not a party to pending English proceedings. It would also be infringed if the foreign court is in a position to control the foreign claimant's conduct itself. It may also be infringed if by granting the injunction the English court is effectively reviewing a decision already made by the foreign law, at least where the principles employed by both courts are the same.

A realistic view of the value of comity requires therefore an approach which reflects the reality of cross-border litigation and the need to prevent injustice.

This leads to discussion of our second primordial value: justice. To say that private international law must serve the ends of justice may seem as empty as it is obvious. But there are particular forms of injustice, immanent in cross-border disputes, which the conflicts lawyer must especially guard against.

So what are the principles of justice in transnational disputes? What in reality are the threats to justice which are posed distinctively in such disputes?

Two of these are threats which courts and legislators must seek to avoid. First, we must guard against the exercise of exorbitant jurisdiction by our own courts. A court must insist upon a connection between the dispute or the defendant, or on submission by the defendant, before asserting its authority over the parties, by ensuring that it has adequate rules of personal and subject-matter jurisdiction. Second, we must guard against subjecting the parties to a substantive governing law to which they have not submitted by agreement, or which has no defensible connection with the issues before the court. In our rules for choice of law we must require that the parties are subject to a given law only when they have agreed to that law or where it has a defensible connection with the issue.

Third, we must guard against the abuse of process that follows where litigants seek to exploit the special features of cross-border disputes arising from their multi-state nature. Private international itself may in this sense by used as an instrument of oppression and such abuse must be prevented. This has several aspects:

We must prevent a party from instituting foreign proceedings which constitute an abuse of the procedural rights of litigants before our courts, or which are otherwise oppressive. Such protection is achieved for example by the antisuit injunctions known in some jurisdictions.

We must guard against attempts by defendants to render themselves judgment-proof by concealing their assets abroad, thereby denying claimants access to effective justice. This may be achieved for example by means of injunctions to freeze those assets.

We must guard against the particular species of abuse of process which occur when one party seeks to evade a contractual agreement to jurisdiction and choice of law, for such agreements are agreements to determine how the process at trial should be conducted. We must give effect to such agreements, perhaps by awarding damages against a party in breach, or specifically by enforcing them by means of protective injunctions.

We must also guard against disproportionate multi-state litigation, insofar as such litigation may have elements (not least, parallel litigation, foreign parties, foreign laws, foreign evidence) which can magnify the scale and cost of litigation, to the prejudice of the less well-funded party. We may avoid this by rigorous case-management, by excising unnecessary elements in a party's case, or by penalising excess by means of punitive orders for costs. Prominently, however, the fundamental principle of proportionate litigation underlies the doctrine of *forum non conveniens* familiar in common law systems. It is sometimes wrongly assumed that the doctrine is a means to prevent tactical forum shopping or to ensure a jurisdictional connection between the court seised and the dispute. But in reality the role of the doctrine, at least in English law, is primarily to ensure that multi-state disputes occur only in the forum where they can most cost-effectively be resolved – which means n turn the forum in which it can most justly be resolved.

This discussion suggests a third fundamental value of private international law (and also why that value matters matters): the value of efficiency. Once again the statement may seem anything but profound. Efficiency in the administration of justice is a goal in any legal system. But the special importance of this requirement in private international law must be recognised. The complexity of the issues arising in cross-border litigation – contesting jurisdiction, serving process abroad, ascertaining the applicable law, proving foreign law, taking evidence abroad – are a recipe for disproportionality, and for the cost and delay this entails. So is the real possibility of parallel proceedings, which may lead to duplication and irreconcilable judgments.

Ensuring efficiency in this sense has particular importance because, as we have seen, inefficiency is itself a source of injustice, especially to a less well-financed party which is less able to absorb the cost of any inefficiency.

There are then particular reasons to guard against inefficiency in multi-state litigation. But there is also a particular way to do so, and here I return to a recurring theme in these remarks. Logic dictates that there will always be one forum in which a given dispute may most cost-effectively be resolved, a reality which animates the doctrine of *forum non conveniens*, the primary tool with which courts in some legal systems seek to maximize the efficiency of litigation and prevent the injustice which inefficiency can create.

These values – efficiency, comity, justice – may be thought of as first-order values. They are values which dictate what other secondary values we must respect. Of these second-order values one stands out and deserves extended treatment here. We must value party autonomy, which in the present context means respect for the parties' contractual agreement as to jurisdiction or the applicable law.

This statement is more controversial than it sounds. What is the value in compliance with contract terms? Does it reflect the moral imperative to keep a promise; is that in turn founded on a moral duty to do so, or on the principle of utility (because the greater good is served)? Such matters are not for today, and not for me. And such a requirement is not of course particular to private international law. But respect for party autonomy has a special resonance here given the importance of agreements to submit contracts to a given jurisdiction or applicable law. For many the first principle of private international law is that such agreements must be honoured.

Moreover there are special and compelling reasons why such agreements should be respected. Cross-border disputes are expensive and time-consuming in a way which is a recipe for inefficiency and which inevitably favours the stronger, better-funded party. In principle, agreements as to jurisdiction and the applicable law reduce cost and delay by foreclosing disputes concerning those matters. This is not merely cost-effective; it contributes to access to justice by easing the burden of litigation on the weaker party.

Such agreements also allow the parties to make rational, informed decisions about whether to engage in a transaction and how that transaction should be priced. They do so by allowing the parties to assess the risks of cross-border litigation. This is not merely economically efficient. It is a matter of justice. A party who has assessed the risk of a transaction on the basis of where and under what law it will be litigated has a right to expect that the financial decisions it has made will be respected and the loss it would otherwise suffer avoided. Again, suppose that I have priced my obligation to you by reference (at least in part) to the reassurance I have that I can effectively enforce my rights against you in what is to me a favourable forum and under a favourable law, and that any judgment against you on that basis

will be enforceable. Is it right that you should benefit from any reduction in price on that basis yet also disavow the contractual terms from which you benefitted? Fairness in that particular sense demands respect for those provisions.

Finally, there is a sense in which disrespect for jurisdiction and applicable law clauses is an abuse of process. Such provisions create substantive rights, which may be vindicated by an action for damages or an injunction. But they also serve a procedural purpose in the sense that they dictate in two respects the basis on which a dispute should be heard. Especially because they serve to reduce the cost and length of proceedings breach of such provisions is in that sense an abuse of process.

In articulating these values however we should avoid two seductive but dangerous traps:

We should not assume that the values of private international law can be reduced into crystalline rules. What they mean on the facts of a given case may depend on interpretation and application. To render the principles into rules may defeat their very purpose. I am conscious that to say this may reflect the assumptions of the common lawyer, for whom a prominent role for the judge and the exercise of discretion are normal. But it is natural for common lawyers to hold that the judicial evaluation and residual discretion associated with ascertaining the most closely connected law, with the grant of equitable injunctions, and famously with the doctrine of *forum non conveniens* are as much necessary responses to the nature of our subject as contingent features of the common law tradition.

Nor should we be beguiled into seeing these principles as immutable, absolute, when in truth they are mutable, qualified, open to compromise. Consider the tension between comity and justice which defines so much cross-border litigation, at least in the English courts. In the real world of litigation comity and the needs of justice may conflict and one or both must be compromised. An antisuit injunction may prevent injustice but does an injunction preventing foreign proceedings not infringe the principle of comity? Again a court may be asked to refuse to decline jurisdiction, in common law systems by staying proceedings, because a claimant would suffer injustice the alternative foreign forum. But when does comity prevent a court from making such a judgment about the foreign proceedings? So too injustice to one party may threaten injustice the other. What if such an antisuit injunction denies the claimant in foreign proceedings a remedy it would not otherwise have?

As this suggests, in the real world of conflicts justice it is not enough to articulate the principles we should respect. A statement of the ideal is not enough. We must be able to adjudicate between them. This cannot however be achieved by a formula. Instead the onus is on the courts to mediate fairly between these values.

As this further suggests respect for the values of private international law requires, as ever perhaps, respect for a higher value, the value of rational adjudication. Again we encounter a proposition which may seem self-evident and so

uninteresting. But the need for flexibility and the demand for sound adjudication have special resonance for private international law. It is a theme in these remarks that cross-border disputes are complex in ways that domestic disputes are not, potentially involving foreign parties, foreign laws, foreign proceedings and foreign assets. Moreover, it seldom happens that two such cases are the same in their facts or in the issues they generate. There is variety enough in domestic cases but the international dimension in multi-state disputes introduces a kaleidoscopic variety of variables which can alter dramatically the nature of the legal issues and the balance of values. From a technical perspective such cases cannot readily be subjected to lapidary rules, and nor can the values which they implicate be applied mechanically. Comity may conflict with justice; justice to the claimant may threaten justice to the defendant; efficiency may be at odds with justice; justice or efficiency may sometimes require the non-enforcement of a jurisdiction or applicable law clause. These tensions and the variety of ways in which they may present themselves in different cases leads to an important conclusion: if any subject calls for case-by-case evaluation and the exercise of principled discretion it is private international law.

But is this to sacrifice idealism entirely to realism? Is it to render these values value-*less*? Does realism mean there are no values left? No it does not. It means that those values have value at all only if they can be applied; they have value only if we understand the need for realism in private international law.

To conclude, I must return to where I began, and offer a final, more general reflection.

Private international law, the subject that I profess, together with so many of my friends and colleagues here today, is a response to legal 'nationalism'. By this I mean the separateness of states, the sovereignty of nations, the distinctness of legal systems, and the territoriality of laws. It is concerned with allocating matters to a state's courts, with ascribing issues to the law of a national legal system. Difference is its watchword; conflict (of laws, at least) is its dynamic. But we as scholars of private international law are in a privileged position. Our discipline surmounts the limits on which it depends. Our concerns, our values, our endeavour, transcend these worldly limitations. Scholarship has no frontiers. Ideas have no boundaries.

That is why for me the award of the title of Doctor *honoris causa* of the University of Athens is the highest personal honour, which I receive with humility, and with gratitude. But I also take it as symbolic of something more. It is a recognition that Private International Law is truly international. And it affirms that our two great Universities, of Athens and Cambridge, are global in their outlook, rooted together in the great tradition of European scholarship.

Thank you again for this great honour.