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(Excessive?) Deference to Legal Tradition in International Civil Procedure: The Actor Sequitur Forum Rei Principle

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Stefano Dominelli
Researcher in International Law, University of Genoa

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Overview

- Certainty and foreseeability
- The principle of *actor sequitur forum rei*
- Elevation to «formal» principle requires methodological consistency to be justified
- Consequences following the elevation to «formal» principle
- Should we give up on the *actor sequitur forum rei*?
- An “honest” view of the *actor sequitur forum rei* rule as (one possible) model-indicium



Certainty and foreseeability

- Certainty and foreseeability in conflict of laws: *«Europeans tend to criticize all the new theories for granting judges a measure of freedom that goes beyond the limits of appropriate judicial discretion»* (Vitta, 1982, p. 3)
- *Pre-determination of rules vs. choice influencing considerations*
- *«The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile»* (Recital 15, Brussels Ia)



The principle of *actor sequitur forum rei*

- «*Formal*» vs. «*material*» principles (Pfeiffer, 1995): which one is the *actor sequitur forum rei*?
- No obligation under current customary public international law on the dominant role of the *actor sequitur forum rei*
 - *Forum actoris*
 - *Transient jurisdiction*
 - ...
- Current *status* of the principle: general rule – additional fora constructed as «exception»
 - Cf AG Geelhoed: «Article 16(4) forms an exception to the general principle of Article 2 of the Brussels Convention ... Thus, the object of Article 2 is to protect the rights of the defendant. In accordance with the settled case-law of the Court, because of the general nature of the principle of Article 2 derogations from it must be given a restrictive interpretation» (Case C-4/0, para 4)



Elevation to «*formal*» principle requires methodological consistency to be justified

- Natural justice and *actor sequitur forum rei*: the prejudice of material considerations in framing pre-emptive jurisdictional rules
- Foreseeability, and domicile in Brussels Ia
 - Domestic notions / uniform concurring notions
 - Multiple domiciles: principles of “submission”, closest link, and “enforcement” considerations to justify the *actor sequitur forum rei*
 - Domicile, closest link, and *perpetuatio fori*
 - “Objective” vs. “subjective” foreseeability, and certainty of international civil procedure



... continues

- Domicile of the defendant, proximity and sound administration of justice: the relevant set(s) of additional rules
 - Contracts / torts / ...
 - Connected and related actions
 - Party autonomy
 - Disadvantaged parties in contractual matters
 - Rights *in rem*
- Is the *forum rei* intrinsically and inherently suited to fulfil its goals (is the elevation of the *rule* to “constitutional general” PIL *principle* methodologically coherent)?



Consequences following the elevation to «formal» principle

- Supra-ordination leads to
 - Requiring qualified (subjective or objective) links between the (non-domicile) court and the case
 - “Necessary” restrictive interpretation of additional rules on jurisdiction (which may be subject to restrictive interpretation on other grounds)
- Acquisition of non renounceable *status* for the purposes of art. 71 Brussels Ia?
- “Spill-over” effect of narrow interpretation to other EU acts under art. 67 Brussels Ia?
 - Directive 96/71/EC
 - Regulation 6/2002
 - Regulation (EU) 2016/679



Should we give up on the *actor sequitur forum rei*?

- Not necessarily – adherence though should be grounded on wide acceptance of the rule, rather than on a pure “traditions reserves respect” reasonings (SCHRÖDER, 1971, 232)
- “Downgrade” from “formal” to “material” principle and ordinary operative rule as an hermeneutic approach



An “honest” view of the *actor sequitur forum rei* rule as (one possible) model-indicium

- “Choice influencing considerations” as reactions to formalistic and mechanical approaches
- Possible critiques to lack of rules in terms of “certainty” and “foreseeability”
- Uncertainties (and *actor sequitur*) in Brussels Ia: Is the EU “model” both “certain” and “flexible”?
 - Cf “reversed” *perpetuatio fori* approaches
 - Cf defamation: Shevill C-68/93 and eDate C-509/09 and C-161/10
- Does it have any methodological relevance?



Thank you for your attention!

stefano.dominelli@unige.it