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What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice

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Introduction

Forum shopping, both domestic\(^1\) and international, has been and remains a controversial subject. There are, in fact, at least three distinct scholarly positions as regards the appropriateness or legitimacy of forum shopping.\(^2\) The prevailing view seems to be (or to have been) that forum shopping is necessarily “bad” and should thus be avoided or prohibited.\(^3\) For instance, several authors deplore the fact that uniform law conventions have been unable to “eliminate” forum shopping opportunities,\(^4\) implying that such practice is undesirable. A number of other writers

\(^1\) Domestic forum shopping usually involves choices between courts of different territorial subdivisions and, where applicable, between federal and state courts. To a lesser extent, it may involve a choice between different “types” of courts (e.g. between a civil and a criminal court). In some countries (and notably the United States), domestic forum shopping receives significantly more attention than its international counterpart. For contributions that address both types of forum shopping from an essentially American perspective, see, e.g. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553; Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, Tex. Int’l L.J. 559 (2002).

\(^2\) Every categorization of doctrinal viewpoints is necessarily simplistic and fails to reflect the complexity and specificities of the opinions of the various authors. However, it is useful to highlight the basic differences between their respective approaches.

\(^3\) That the traditionally prevailing opinion is critical of forum shopping is notably illustrated by the various attempts to refute this point of view. See infra notes 7-9. A number of authors have questioned the basic assumption that forum shopping is undesirable. See, e.g., Richard Maloy, *Forum Shopping? What’s Wrong With That?*, 24 QLR 25, (2005-2006) (objecting to the “rhetoric [which] simply proclaim[s], almost ipse dixit, that forum shopping [is] wrong, without the slightest explanation as to why.”) (internal quotation omitted)

\(^4\) See Franco Ferrari, *‘Forum Shopping ’ Despite International Uniform Contract Law Conventions*, 51 Int’l & Comp. L.Q. 689 (2002) (stating that “[o]ne of the asserted advantages and goals of the unification of substantive law lies in the prevention of ‘forum shopping’” and that “the entry into force of international uniform contract law conventions… cannot prevent ‘forum shopping’”). However, Professor Ferrari does not himself express a final opinion on whether forum shopping is problematic or undesirable. Instead, he acknowledges that, “instead of criticising and condemning ‘forum shopping’”, it would be more useful to study “the reasons underlying the policy against ‘forum shopping’”. *Id.* at 707. See also Franco Ferrari, *International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini, 26 November 2002*, 23 J.L. & COM. 169 (2003-2004); Stéphanie Grignon-Dumoulin, *Forum shopping – Article 31 de la CMR*, 11 Unif. L. Rev. 609, 609-610 (2006) (deploring the fact that, under the CMR Convention, a fundamental question such as the determination of default “considered as equivalent to willful misconduct” is governed by the domestic law of the court seized, rather than by uniform rules and stating that the availability of a variety of fora inevitably leads to forum shopping and, therefore, inequalities and lack of legal security).
implicitly condemn forum shopping through their approval of the doctrine of *forum non conveniens*,\(^5\) allegedly the principal tool to “combat” forum shopping.\(^6\)

A second group of scholars take issue with this traditional perception and argue that there is nothing “wrong”\(^7\) with forum shopping because litigants merely avail themselves of legal options that arise from the relevant jurisdictional rules. Any lack of decisional uniformity which may result from forum shopping is not only unavoidable, but even “desirable”.\(^8\) For lawyers, helping their clients locate the most favorable forum is not unethical. On the contrary, they would not be fulfilling their legal duties towards their clients if they failed to make use of jurisdictional options.\(^9\)

A third category of writers, not always easily distinguishable from the second,\(^10\) are less unconditional in their approval of forum shopping. Those authors argue that, depending on the


\(^7\) Professor Juenger explicitly poses the question: what is wrong with forum shopping? His rather categorical answer is that there is nothing wrong with this practice. See Friedrich K. Juenger, *What’s Wrong with Forum Shopping?*, 16 SYDNEY L. REV. 5, 13 (1994) (concluding that “there must be a stop put to the customary, almost ritualistic, condemnation of forum shopping). *See also* Maloy, supra note 3.

\(^8\) Juenger, *supra* note 7, at 10 (considering that the quest for decisional uniformity is “futile” and that it fails to produce good results because the “application of choice-of-law rules that are blind to substantive values” leads to a “massive influx of subsstandard foreign substantive rules.”)

\(^9\) *See* Mary Garvey Alergo, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 81 (1999) (observing that, if an attorney does not seek the most advantageous venue for his client, he could face a malpractice claim).

\(^10\) It is not always clear to what extent individual writers tolerate or support the practice of forum shopping. Even a fervent advocate of forum shopping such as Professor Juenger accepts the idea that, “[i]n egregious cases… the forum non conveniens doctrine or injunctions to restrain foreign proceedings offer redress to those seriously inconvenienced”. *See* Juenger, *supra* note 7, at 13.
particular circumstances, forum shopping may be either “good” or “bad”.\textsuperscript{11} They attempt to define at what point forum selection can be considered as “unfair” or inappropriate in order to distinguish permissible from impermissible forum shopping.\textsuperscript{12} To this end, they rely on a number of judicial precedents where courts have either allowed or disallowed particular instances of forum shopping.\textsuperscript{13}

What these diverging opinions reveal is that, first of all, there seems to be no agreement on the exact meaning of the concept of forum shopping. Some authors suggest that forum shopping consists of “the parties attempting to bring the case in a forum that will be advantageous to them”\textsuperscript{14} or “the act of seeking the most advantageous venue in which to try a case”.\textsuperscript{15} Though sensible, those definitions are inappropriately broad because they hardly leave any room for a distinction between forum “shopping” and mere forum “selection”. In fact, any plaintiff who has a choice between two or several fora, will – normally – opt for the “most advantageous” one.

Other scholars take the view that, in order for a practice to be considered as forum shopping, it must involve some element of “unfairness”. Professor Juenger, for example, observes that “counsel, judges and academicians employ the term “forum shopping” to reproach a litigant who, in their opinion, unfairly [emphasis added] exploits jurisdictional or venue rules to affect

\begin{itemize}
\item \textsuperscript{11} See, e.g., Maloy, supra note 3, at 25 (stating that, “like cholesterol and trolls, forum shopping can be good, and forum shopping can be bad”).
\item \textsuperscript{12} Id. at 33-44 (discussing permissible forum shopping) and 44-50 (discussing impermissible forum shopping). Professor Dowling distinguishes between “forum selection” and “forum shopping”. See Donald C. Dowling, Jr., Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses, 7 PACE INT’L L. REV. 465, 467 (1995). However, his distinction is not based on whether a particular practice can be considered as fair or appropriate, but rather on the idea that what a plaintiff regards as legitimate forum selection may be perceived as “forum shopping” by the defendant.
\item \textsuperscript{13} See, e.g., Maloy, supra note 3, at 33-50.
\item \textsuperscript{14} See Patrick J. Borchers, Punitive Damages, Forum Shopping, and the Conflict of Laws, 70 L.A. L. REV. 529, 530 (2009-2010).
\item \textsuperscript{15} See Algero, supra note 9, at 79. Courts have sometimes adopted similar definitions. A California court, for example, has defined forum shopping as “the practice of choosing the most favorable jurisdiction … in which a claim might be heard”. See California v. Posey, 82 P.3d 755, 774 n.12 (Cal. 2004) (quoting Black Law Dictionary 666 (7th ed. 1999)).
\end{itemize}
the outcome of a lawsuit.”\textsuperscript{16} Similarly, Professor Maloy submits that “forum shopping is the taking of an unfair [emphasis added] advantage of a party in litigation.”\textsuperscript{17}

In my opinion, the more adequate definition of forum shopping is the second, more restrictive one. In fact, if forum shopping is to be a useful concept, it must have a meaning that is different from mere “forum selection”. Assuming that certain practices of forum selection are indeed “bad” (for example, because they are “unfair”, as Professors Juenger and Maloy suggest), then the term “forum shopping” would adequately apply as a concept that characterizes only specific forms of forum selection. If there is no such thing as “bad” forum selection, then the term forum shopping simply would have no legitimacy and should be avoided. In other words, either forum shopping is different from forum selection, or it does not exist at all.

The second lesson to be learnt from the discrepancies between scholarly opinions on forum shopping is that there seems to be no clear, agreed upon answer to the question: “what, if anything, is wrong with forum shopping?”\textsuperscript{18} The opponents of forum shopping are unable or unwilling to point out what exactly it is that makes this practice undesirable or “bad”. The argument put forward by its advocates that forum shopping cannot possibly be “bad” since it is authorized by law is simplistic and notably fails to explain the contradiction that exists between the apparent authorization of forum shopping and doctrines aimed at curtailing such practice.\textsuperscript{19} The authors of the “golden middle” have shown that courts tolerate certain types of forum shopping (more adequately, forum selection) and not others,\textsuperscript{20} but have not (yet) offered a test, let alone a theory, allowing to separate forum selection from forum shopping.

\begin{footnotesize}
\begin{enumerate}
  \item Juenger, \textit{supra} note 1, at 553.
  \item Maloy, \textit{supra} note 3, at 28.
  \item This is, it is recalled, the question posed by Professors Juenger and Maloy in their respective articles. \textit{See supra} notes 3 and 7.
  \item The principal doctrine aimed at rendering attempts to forum shop ineffective is the doctrine of \textit{forum non conveniens}. In very simplistic terms, this doctrine allows a court, in certain circumstances, to decline to exercise jurisdiction if a more “convenient” or “appropriate” forum exists. For basic commentary on this doctrine, \textit{see}, e.g., Brand, \textit{supra} note 5. For an excellent critical examination of \textit{forum non conveniens}, \textit{see} Hu Zhenjie, \textit{Forum Non Conveniens: An Unjustified Doctrine}, 48 \textsc{Netherlands International Law Review} 143 (2001).
  \item Unfortunately, courts use the term forum shopping not only when they disapprove of a particular forum selection (which generally causes them to dismiss the case), but also when they consider that a plaintiff’s choice of forum should be tolerated. \textit{See}, e.g., Ferens v. John Deere Co., 494 U.S. 516, 520 (1990). In this case, a farmer who was injured while working on his farm in Pennsylvania failed to bring a claim in Pennsylvania within the two year statutory time limit and thus filed negligence and product liability claims in a Mississippi federal district court. In
\end{enumerate}
\end{footnotesize}
In this article, bearing in mind Professor Ferrari’s proposal for further inquiry, I intend to make a step forward in understanding why and how forum selection can be “bad”. A better and more profound understanding of this question is indeed vital as it is necessary not only in order to design appropriate policies to address forum shopping (if at all necessary), but also in order to assess current practices. While this article is primarily concerned with international forum shopping, references are made to decisions and commentary relating to domestic forum shopping (especially in the United States) to the extent that those can adequately be transposed to the international level.

In the first part of this article, I attempt to identify the “criteria” by which the potentially detrimental impact of forum selection can be measured. Other writers have addressed some of those criteria, generally in an isolated fashion, but– to my knowledge – none have provided an all-encompassing analysis or “conceptualization” of the potential problems caused by forum selection. On the basis of this determination of potential problem areas, I analyze the nature and extent of the possible adverse effect of forum selection. The latter is more limited than most critical writers habitually think, and some traditional criticisms are fundamentally ill-conceived.

In the second part of this article, I explore how significant or “real” the potentially adverse impact of forum selection is as a matter of practice. To this effect, I discuss two factors which contribute to limiting the actual detrimental effect of forum shopping. First, I show that the very raison d’être of forum shopping opportunities, namely the availability of jurisdictional alternatives, is beneficial to the international dispute resolution “system”. In other words, the existence of opportunities to forum shop is “deliberate” and, in this sense, unavoidable. Second, I explain that, from the point of view of prospective plaintiffs, there are incentives to refrain from forum shopping – for them, forum shopping frequently represents a “Damocles sword”.

I. An analysis of the potentially detrimental impact of forum selection

--addition, he moved for the case to be transferred to Pennsylvania on forum non conveniens grounds. Although the court found that such behavior constituted “forum shopping”, it nevertheless granted the request.

21 See Ferrari, Forum Shopping, supra note 4, at 707. Professor Ferrari calls for “a study of the reasons underlying the policy against ‘forum shopping’”, as well as for an examination of whether those reasons are “valid ones”. In this article, I undertake the analysis contemplated by Professor Ferrari. I also examine whether, in addition to the problems he lists, there may be other factors that would justify a policy prohibiting forum shopping.
When attempting to determine the potentially adverse consequences of forum selection, it is helpful to consult the writings of scholars who have discussed the issue of “forum shopping”. In addition, useful insights can be gained from judicial applications of the doctrine of *forum non conveniens*, as well as from scholarly discussions of this principle. In fact, as I have already mentioned, the doctrine of *forum non conveniens* allows a court to dismiss a case even though it would “normally” have jurisdiction because of the “inconvenience” (or inappropriateness) of the chosen forum. This inconvenience is, in fact, substantially identical to what I refer to as the detrimental impact of forum shopping.

A combined reading of the writings on forum shopping and those on *forum non conveniens* suggests that the two principal problems that forum selection may cause are (i) unfairness and (ii) lack of efficiency. I will define the exact meaning of these fundamental notions *infra*. In addition, one cannot avoid discussing the issue of lack of decisional uniformity which is probably the most commonly mentioned drawback of forum shopping. Even though lack of uniformity is partly related to the issue of fairness, it is a more complex issue, and I will thus examine it separately.

One may of course identify other or additional problems that forum shopping may cause. Two related issues that have been identified are (i) the fact that forum shopping may overburden certain courts and (ii) the fact that forum shopping creates unnecessary expenses (ultimately born

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22 *See especially* the references contained in notes 1, 3, and 4.


24 The term “inconvenience” does probably not constitute the most accurate description of situations which may trigger the application of *forum non conveniens*. On this point, *see, e.g.*, Lord Goff’s opinion in Spiliada Mar. Corp. v. Cansulex Ltd., 1 A.C. 460, 474 (H.L. 1987) (expressing “doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction”).

25 *See infra*, I.A and I.B.

26 *See infra*, I.C.
by the taxpayers) because cases may not be brought before the courts which are most closely connected to the facts of the dispute.\textsuperscript{27} While I do not deny the relevance of these issues, I do not address them in this article because they reflect essentially public interests which, in my opinion, are not the most vital ones when it comes to international litigation.

A. Unfairness of forum selection

Very few people would disagree with the idea that international litigation should be “fair” and that the plaintiff’s selection of a forum should not contravene this basic objective. Professor Maloy considers that unfairness is the distinguishing feature of forum shopping (as opposed to mere forum selection).\textsuperscript{28} American courts addressing the question of forum shopping have similarly recognized that this practice may lead to unfair results, in particular because it undermines equal protection of the law.\textsuperscript{29} Forum non conveniens decisions also suggest that forum selection may be unfair. In its first decision expressly dealing with this matter, the U.S. Supreme Court considered that a plaintiff’s choice of forum “should not “vex”, “harass”, or “oppress” the defendant by inflicting expense or trouble not necessary to his own right to pursue his remedy.”\textsuperscript{30} Courts in the UK\textsuperscript{31} and Australia\textsuperscript{32} have applied, and continue to apply (to some extent),\textsuperscript{33} similar standards.

\textsuperscript{27} See, e.g., Ferrari, Forum Shopping, supra note 4, at 707.

\textsuperscript{28} Maloy, supra note 3, at 28.

\textsuperscript{29} Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (dealing with domestic forum shopping). In this case, the Court departed from the principle established in Swift v. Tyson (41 U.S. 1 (1842)) according to which federal diversity suits are governed by federal common law, which had led to a situation where outcomes varied within a single state depending on whether the case was brought in a state or a federal court. According to the Court, the Swift doctrine “had prevented uniformity in the administration of the law of the state” and, thus, “rendered impossible equal protection of the law.” (at 75)

\textsuperscript{30} Gilbert v. Gulf Oil Corp., 330 U.S. 501, 508 (1947). However, today, forum non conveniens dismissals in the United States do no longer require a showing that the plaintiff’s forum selection was vexatious or oppressive. See notably Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

\textsuperscript{31} This was the traditional approach in the UK. For early decisions affirming this rule, see, e.g., Logan v. Bank of Scotland, [1906] 1 K.B. 141 (Eng. C.A. 1905); St. Pierre v. South American Stores (Gath & Chaves) Ltd., [1936] K.B. 382, 398 (Eng. C.A. 1935) (holding that in order for a forum non conveniens plea to be successful the defendant must notably prove that “the continuance of the action would work an injustice because it would be oppressive or vexatious to him”).
Although forum shopping is regularly linked to the concept of “unfairness”, neither court rulings, nor academic discussions have clarified what exactly this means. In order better to understand how forum selection may “unfairly” disadvantage the defendant and what kind of unfairness may be at stake, it is necessary to start from the basic idea that fairness requires equal treatment of the parties to a dispute. Two aspects of such equal treatment can be distinguished. First, the parties should be equal with regard to the applicable laws (both substantive and procedural). Second, they should also be equal with regard to a number of other factors that may cause a particular forum selection to be, from a more practical point of view, more or less “convenient”.

1. Unfairness as far the applicable (substantive and procedural) laws are concerned

Let us first examine unfairness as far as the applicable laws are concerned. In forum shopping debates, it is generally acknowledged that forum selection may (unduly) favor the plaintiff (and thus disadvantage the defendant) when it comes to governing laws. In fact, divergences between conflict of laws norms of possible fora (which lead to the application of different substantive laws), as well the “advantageousness” of the procedural rules of particular jurisdictions, are commonly regarded as the reasons underlying a significant portion of “forum shopping cases”.

32 Brand states that “Australian courts have chosen to stay with the traditional theory of forum non conveniens requiring proof of process that is oppressive, vexatious or abusive, rather than the more modern approach in other common law countries that focuses on the concept of the appropriate forum.” See Brand, supra note 5, at 486.

33 However, in the UK, more recent decisions do not seem to require that the plaintiff’s forum selection be oppressive or vexatious. See notably Spiliada Maritime Corp. v. Cansulex Ltd., 1 A.C. 460 (H.L. 1987).

34 See Borchers, supra note 14, at 529 (arguing that plaintiffs “forum shop” in order to be awarded punitive damages and that they therefore examine whether the conflict norms of potential fora designate a substantive law which authorizes the allocation of such damages). See also Juenger, supra note 1, at 558 (stating that “[c]hoice-of-law doctrines present yet another incentive to the forum shopper”); Whitten, supra note 1 (agreeing with Professor Juenger’s views).

35 At least in the United States, most writers concur that the differences between procedural rules are a more significant factor causing forum shopping than discrepancies between conflict norms. See Juenger, supra note 1, at 573; Whitten, supra note 1, at 564 (stating that “U.S. conflicts law is not the dominant incentive in domestic forum shopping”); Silberman, supra note 5, at 502 (observing that “[c]ourts in the United States attract plaintiffs… because they offer procedural advantages beyond those of foreign forums”). On the procedural law reasons causing forum shopping more generally, see ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 26-36 (2003).
Thus, there may be instances where the result achieved by a particular forum selection may, at first sight, appear to be unfair. This may be the case, for example, where a resident of state A, who was injured in State A, files a lawsuit in State B because he omitted to bring a claim within the time limit stipulated under the laws of State A.\(^{36}\) One may react in a similar way to a case where, in the aftermath of an airplane crash that occurred in country A and that involved a plane owned by an airline of country B, the heirs of the victims brought product liability cases in country C, notably in order to escape the otherwise applicable damages ceiling.\(^{37}\) But what exactly makes (or could make) the behavior of these plaintiffs unfair?\(^{38}\)

The first, most immediate, answer to this question is: nothing, really. In both cases, the basic question is whether a particular procedural (statute of limitations) or substantive (amount of damages) rule is unfair. This requires a comparative analysis of (the outcomes produced by) the rule applied by the court and those that may be applied by other courts potentially having jurisdiction. And, in reality, any statement suggesting that a law or rule of country A is fairer than a law or rule of country B is highly problematic. In particular, simplistic views equating the availability of a remedy with superior fairness are largely unjustified,\(^{39}\) because they are generally based on an undue preference for one’s domestic laws.

More fundamentally, both from a public international law and a conflict of laws point of view, the affirmation that a specific law of country A is “fairer” than, or superior to, a law of country B is hardly tenable. It would be incompatible with the basic notion that all states (and hence their


\(^{37}\) These were the relevant facts of a number of lawsuits filed in relation to a crash of a DC-10 owned by a Turkish airline which occurred near Paris, France. See generally S. SPEISER, LAWSUIT 420-69 (1980).

\(^{38}\) Both Ferens and the airplane crash case are usually cited as examples of forum shopping. However, the relevant courts did not find that such forum shopping was unfair or unacceptable.

\(^{39}\) However, such views are sometimes expressed by courts, notably in the United States and England. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (stating that, “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight”); Lubbe v. Cape PLC, [2000] 1 W.L.R. 1545, 1554 (H.L.) (appeal taken from Eng.) (observing that a stay on the basis of forum non conveniens will be granted if “the plaintiff can establish that substantial justice will not be done in the appropriate forum”). It should be noted that, in both cases, the question was not whether the plaintiff’s choice of forum was fair, but rather whether dismissal on forum non conveniens grounds would be unfair. However, it nevertheless usefully illustrates how the question of the applicable substantive law may be perceived as affecting the fairness of the outcome.
laws) must be regarded as equal. More importantly, it would also run counter the classical understanding of the conflict of laws that the most appropriate law governing an international relationship is not determined by reference to the actual substance or “quality” of the laws concerned, but on the basis of considerations of “spatial” justice. The conflict of laws knows, of course, exceptions whereby foreign laws that are considered contrary to fundamental notions of justice or “public policy” may be disregarded. However, this public policy exception assesses a law’s unfairness from the perspective of the legal system of the forum, whereas the question here is whether it is possible to assert that a particular law may be unfair in “absolute terms”. It is difficult to see how an affirmative answer can be given to this question.

There may, however, be a way to argue that a particular law of country A is unfair. One could, indeed, rely on the idea of “international standards” and assert that, where a particular law deviates from accepted international standards, such law may be considered as “unfair”. If, for example, the law of country A allows a plaintiff to receive full compensation even though he has contributed to his damage by his own negligence, while all (or the vast majority of) other laws either exclude or limit recovery, then this law of country A may, under such an approach, be regarded as unfair.

However, in reality, such an analysis is flawed, mainly because it does not actually overcome the above-mentioned public and private international law obstacles. Though implicit in numerous writings, allegations of unfairness of the applicable substantive or procedural rules are thus unjustified or, at the very least, highly controversial. Interestingly, this conclusion is in conformity with the way in which the courts of several countries apply the doctrine of *forum non conveniens*. Unfairness, under this doctrine, is essentially equated with practical inconvenience, rather than unfairness of the applicable laws. Quite to the contrary, courts usually tolerate a certain degree of substantive unfairness, i.e. the fact that a plaintiff derives “a legitimate personal or juridical [emphasis added] advantage” from his forum selection. More generally, courts are

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40 As is well known, this traditional approach has been challenged by a number of American writers during the so-called “conflict revolution” of the 1950s and 60s. Those authors advocated a variety of outcome-based conflict approaches. For a recent discussion of their theories, see, e.g., Markus A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 Mich. St. J. Int’l L. 453, 466-69 (2010).

41 See the references contained in notes 15 and 16 where the respective authors define forum shopping as an unfair manipulation of the outcome and the taking of an unfair advantage, thus implying that the application of particular laws (obtained precisely by the act of forum shopping) may be “unfair”.

usually reluctant to attach great significance to a change of the applicable substantive law when examining *forum non conveniens* pleas.43

A last issue that should be looked at when examining whether the application of a particular substantive or procedural law may be unfair is predictability. This can notably be illustrated by *Asahi Metal Industry v. Superior Court*.44 In this case, a motorcyclist suffered damage as a result of a collision with a tractor in California. He filed claims against various parties, including the Taiwanese manufacturer of the tire tube. The latter filed a claim for indemnification against several codefendants and joined Asahi, the Japanese manufacturer of the tube’s valve assembly. Could Asahi reasonably predict that it would face a lawsuit in California and that California law would govern? If not, is the application of California law unfair?45

The answer to this question is, once again, negative. In fact, if one argues that the application of the law of country A is unfair because it could not be reasonably predicted by the defendant (either because he could not predict the forum in which the plaintiff would bring his case or because he could not foresee the choice-of-law determination of the court seized), the issue is not the substantive unfairness of the said law. Rather, the perceived “problem” will generally stem from the fact that the selected court is not the “natural” forum (which was the case in *Asahi*)46 and/or that the conflict norms applied are “unusual”. The fairness of the applicable laws is not directly at stake.

2. Unfairness in terms of unequal convenience

43 *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981) (holding that “[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.”)


45 The issue in *Asahi* was not whether the case should be dismissed on *forum non conveniens* grounds, but whether the relevant California court at all had jurisdiction over Asahi. The Supreme Court held that it was unreasonable and thus unconstitutional to require a Japanese defendant who did not market a product directly in the United States to defend a claim brought by another foreign manufacturer. *Id.* at 113-116.

46 In fact, a California court can hardly be considered as the “natural” forum for a claim filed by a Taiwanese plaintiff against a Japanese defendant, merely because the claimant himself is a defendant in a connected lawsuit brought in that court. On the emergence and the meaning of the concept of “natural” forum, *see* BELI, *supra* note 35, at 86-129.
Having concluded that forum selection does not (not even potentially) cause any fairness problems in terms of the applicable substantive and procedural laws, we can now turn to the second aspect of potential unfairness, i.e. the inconvenience caused by the plaintiff’s choice of forum. It is undeniable that, in certain circumstances, the selected forum may be less convenient for the defendant than for the plaintiff. This may occur, for example, when the plaintiff sues a foreign defendant in his (i.e. the plaintiff’s) home jurisdiction or, more generally, when the forum selection causes considerable expense or practical difficulties (such as the difficulty to obtain the necessary visas to travel to the forum country).

That forum selection may unfairly inconvenience the defendant has been recognized by a number of courts examining *forum non conveniens* claims. Those courts have held that a case may be dismissed on *forum non conveniens* grounds when the forum selection by the plaintiff is vexatious or oppressive to the defendant.\(^47\) However, it is not always clear whether, in a particular case, the dismissal is based on such unfair inconvenience or, rather, on considerations of efficiency.\(^48\)

More generally, the basic evolution of the *forum non conveniens* doctrine (in the countries that apply this principle) indicates that an – even significant – imbalance in terms of the relative convenience of a forum for the parties only plays a very limited role. In the UK and Canada, for example, the “vexatious and oppressive” test has been expressly abandoned.\(^49\) Significantly, in the United States, Section 1404(a) of Title 28 of the U.S. Code, which codifies the *forum non

\(^{47}\) See the cases referred to in notes 31. and 32.

\(^{48}\) In *Gilbert*, for example, the plaintiff, a Virginia resident, alleged that the defendant, a Pennsylvania corporation doing business in Virginia, had negligently caused the destruction of a warehouse owned by the plaintiff in Virginia. Rather than bringing his case before a court in Virginia or Pennsylvania, he filed suit in a New York district court. The U.S. Supreme Court upheld the dismissal of the claim on *forum non conveniens* grounds. However, it can reasonably be argued that the Court’s decision may not have been based on the practical inconvenience that litigating in New York represented for the defendant, but rather on the overall “inappropriateness” of that forum, notably in light of the multiple ties with the state of Virginia.

\(^{49}\) As far as the UK is concerned, see note 33. As regards Canada, see, e.g., 472900 B.C. Ltd. v. Thrifty Can. Ltd., [1998] 168 D.L.R. 4\(^{th}\) 602, 617-618 (Can.) (stating that “[t]here is now no burden on the applicant to establish that the action would be vexatious, oppressive and/or an abuse of the process of the court.”)
conveniens doctrine for domestic purposes, refers to the “convenience of parties”, rather than to an inconvenience caused to the defendant.\textsuperscript{50}

This trend suggests that the possibility of unfair inconvenience may have been overestimated in the past and that it does not pose a significant problem in current international litigation. There may be a number of reasons for this. Generally, it is unrealistic, in any international litigation, to expect that the forum will be equally convenient for the parties because many cases are brought either in the defendant’s or in the plaintiff’s home jurisdiction. Also, improved international judicial cooperation (notably regarding the taking of evidence abroad)\textsuperscript{51} and the use of modern technologies help reducing the cost and inconvenience of litigating in foreign fora.

B. Lack of efficiency ensuing from the plaintiff’s forum selection

A plaintiff’s forum selection may potentially have an adverse impact on “efficiency”. This term refers, in the first place, to the efficiency of the proceedings. What is meant is that the proceedings are, or ought to be, conducted in such way as to avoid unnecessary cost and delay. It also implies that the court is enabled to render a “correct” decision. As can easily be understood, forum selection may impact the efficiency of the proceedings. For example, if the trial takes place in a jurisdiction that is only loosely connected to the material facts, this may generate a variety of additional costs\textsuperscript{52} and slow down the proceedings.\textsuperscript{53} Difficulties to obtain and examine relevant evidence may complicate the fact-finding task of the court and ultimately affect the accuracy of its decision.

\textsuperscript{50} 28 U.S.C. § 1404(a) (1990): For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.’’

\textsuperscript{51} Among the international instruments that have facilitated such judicial cooperation one should mention the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters and, at the European level, Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

\textsuperscript{52} Those costs may include \textit{inter alia} travel and accommodation expenses for both parties, their legal representatives, experts, and witnesses; translation and interpretation costs (if the language of the forum is different from the language of the contract and/or other relevant documents); costs flowing from the need to locate and compensate foreign counsel; and costs associated with the need to familiarize oneself with the rules and procedures of the foreign forum.

\textsuperscript{53} Litigating in a foreign forum renders the process more complex, which may ultimately lead to an increase in the duration of the proceedings.
There are a number of specific reasons that may cause a plaintiff’s forum selection detrimentally to impact efficiency. First and foremost, a plaintiff will frequently seek the most advantageous forum in terms of the governing substantive and procedural law. Hence, considerations of efficiency may only play a secondary role in his choice. As the Paris airplane crash case illustrates, a plaintiff may be attracted to a particular forum because it offers the best chances of recovery (and higher amounts of compensation) and may thus attach limited importance to choosing a forum that is closer connected to the facts underlying the dispute.

Lack of efficiency constitutes probably the most significant issue for the purposes of the application of the *forum non conveniens* doctrine. Classical examples include (i) the dismissal of a claim brought in a U.S. court by a Danish seaman against a Danish sea captain for back wages, (ii) the dismissal of a claim brought in a federal district court in New York by a Virginia resident against a Pennsylvania corporation for damage suffered as a result of the destruction of a warehouse in Virginia, and (iii) the dismissal of a wrongful death action filed in a California state court by Scottish plaintiffs against defendants from Pennsylvania and Ohio arising from an airplane crash in Scotland.

The second aspect of efficiency relates to the enforceability of the decision. Enforcement may in fact be an issue where the decision is rendered by a court of a jurisdiction in which the defendant does not own assets. In this case, it will be necessary to seek enforcement of the decision abroad. A plaintiff’s forum selection may potentially complicate such enforcement because, as has already been mentioned, other considerations relating to the applicable procedural and substantive rules may receive more attention. Plaintiffs may thus not always contemplate enforcement issues when initiating proceedings and may notably fail to examine the applicable legal framework(s) to possible enforcement actions.

Also, there are two specific reasons why the pursuit of strategic advantages through forum selection may lead to enforcement problems. First of all, if a plaintiff chooses a particular forum

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54 *See supra* note 37.


(forum A) in order to obtain a more favorable decision, then there is a possibility that such
decision may be considered as substantively “unfair” in potential enforcement fora (fora B and
C). Under the laws of most countries, foreign decisions may in fact be refused (recognition and)
enforcement if they violate the enforcement forum’s public policy. In other words, if the
plaintiff succeeds in securing the expected advantage and if this advantage is “excessive”, then
this may ultimately work to the plaintiff’s detriment.

The second reason relates to the fact that, when choosing a favorable forum, plaintiffs may
(intentionally) fail to take into account efficiency, i.e. the closeness with the material facts of the
dispute. If, in addition, the plaintiffs rely on very “liberal” jurisdictional grounds of the chosen
forum, then this may ultimately cause the decision to be denied enforcement by foreign courts. In
fact, under the laws of a number of countries, foreign decisions will only be enforced if the court
which rendered the decision had jurisdiction under the rules of the enforcement court. If, for
example, the jurisdiction of country A is based on the mere fact that the defendant was
temporarily present in country A and served with a notice during this time (“service-
jurisdiction”), and if such jurisdictional basis is not recognized in country B, then it is possible
or likely that the decision rendered in country A will not be enforced in country B.

58 As far as the United States is concerned, see, e.g., Cedric C. Chao and Christine S. Neuhoff, Enforcement and
Recognition of Foreign Judgments in United States Courts: A Practical Perspective, 29 PEPP. L. REV. 147, 157-159

59 A good example would be a case involving two parties from civil law countries (which oppose the granting of
punitive damages as a matter of public policy) which the plaintiff decides to bring before a U.S. court, precisely in
order to be awarded punitive, in addition to compensatory, damages. Such a decision (or at least the punitive
damages award) would not be enforceable in most countries, including the defendant’s home jurisdiction. See also infra, II.B.1.

60 See, as far as the United States is concerned, Chao and Neuhoff, supra note 58, at 156 (stating that “[w]hen a
defendant asserts that the foreign court lacked personal jurisdiction, United States courts generally inquire whether
the foreign court’s exercise of personal jurisdiction conformed to standards of due process as recognized in the
United States”). In France, as far as non EU judgments are concerned, enforcement similarly requires that the
foreign court had jurisdiction in accordance with the views of the French enforcement court. See the decision of the
French Cour de cassation of January 7, 1964 in Munzer (JCP 1964 II 13590).

61 Service-jurisdiction is notably recognized in a number of U.S. states. In Wisconsin, for example, Section 801.05
affirms the personal jurisdiction of the local courts vis-à-vis defendants who were “present within this state [i.e.
Wisconsin] when served”. However, Professor Juenger has pointed out that service-jurisdiction may no longer be
compatible with constitutional requirements. See Juenger, supra note 1, at 557 (discussing Shaffer v. Heitner, 433
U.S. 186 (1977), and observing that Justice Marshall’s opinion “suggests that jurisdiction premised solely on
personal service within the state is no longer proper”).
C. Lack of uniformity of decisions

A number of writers recognize that forum shopping may lead to an undesirable lack of decisional uniformity. Without taking a final position on its “undesirability”, Professor Ferrari acknowledges that forum shopping “goes against the principle of consistency of outcomes, apparently a fundamental tenet of virtually any legal system”. In his article defending the practice of forum shopping, Professor Juenger exclusively focuses on the issue of “decisional harmony”, thus implying that this is its only (or, at the very least, main) adverse consequence. Grignon-Dumoulin associates decisional variations with “inequalities” and “a threat to legal security”.

Before attempting to examine why lack of uniformity may be detrimental, i.e. what interests may be affected, it is necessary to clarify the nature of the situations concerned. In fact, lack of decisional uniformity must not be (mis)understood as the existence of two contrasting decisions regarding the same (or rather a substantially identical) lawsuit. In fact, a forum shopper generally chooses the most favorable forum and litigates in that forum only. Practices that consist of initiating proceedings in several countries (with the hope to prevail at least somewhere) are rather exceptional and not, as such, an integral part of the basic concept of forum shopping.

Hence, the lack of decisional harmony here only exists at the level of the domestic or international legal order (depending on whether it is domestic or international forum shopping). At the party level, it is merely “hypothetical”. If a plaintiff brings his claim in forum A and achieves result A, while he would have obtained result B in forum B, then there is no actual lack of uniformity because there exists only one decision. However, if another plaintiff, in a comparable case, decides to sue in forum B, then there will be a situation in which the same (or a similar) matter will have been decided differently, simply because the plaintiffs chose different

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62 Ferrari, *Forum Shopping*, supra note 4, at 707 (internal footnote omitted).

63 Juenger, *supra* note 7, at 6-12.

64 Grignon-Dumoulin, *supra* note 4, at 610.

65 In fact, such practices would be highly problematic for the plaintiffs concerned. Amongst other things, they are excessively onerous (the plaintiff bears the cost not of one, but of two or several trials) and create enforcement problems when a court dismisses the plaintiff’s case and when such decision is then either (i) sought to be recognized in the enforcement jurisdiction or (ii) relied upon to object to the enforcement of another judgment which is favorable to the plaintiff.
fora. At the level of the relevant legal order, this results in inequalities between parties, and especially defendants, who are essentially in the same situation.

Lack of uniformity understood in this sense potentially raises two issues. The first one is precisely the question of the lack of fairness arising from the dissimilar treatment of similar parties. Is it unfair if similar defendants will be subjected to varying obligations to compensate, depending on the particular fora in which the respective plaintiffs have brought their cases? Is it unfair if the claims of some plaintiffs are successful, while those of similar plaintiffs are not, merely because the formers’ choice-of-forum was “wiser”?

This is a difficult question. Common sense would suggest that it should be preferable to avoid situations where legal subjects who are in similar situations receive different treatment. But, ultimately, this may not be a valid proposition at the international level. It does make sense to argue that, within a given domestic legal order, there should be uniformity of decisions and thus equal application of the law.66 However, is this reasonable at the international level? Is it unfair if, in purely domestic cases, a defendant in Germany pays X damages for certain tortious conduct, while another defendant in the United States pays X plus a significantly higher amount in punitive damages? The answer to this question is no because the relevant laws reflect notions of justice and fairness of the respective communities and because, as I have highlighted above, it is highly problematic to assert that the laws of country A are fairer than those of country B.

Of course, forum shopping does not involve purely domestic cases that are brought before the respective domestic courts, but international (or inter-state) cases that may be heard in the courts of several countries (or states). However, the analysis is the same. If we agree that neither the application of law A by court A, nor the application of law B by court B is, as a matter of principle, unfair, then differences in treatment between similar defendants cannot be regarded as unfair either.

66 There are two reasons why decisional uniformity should be a greater concern at the domestic level. First of all, from a practical point of view, decisional uniformity can much more easily be achieved at the domestic than at the international level. In fact, domestic laws are presumably applied in a uniform fashion within any given domestic legal system (leaving the problems caused by federalism aside). Second, from a purely legal point of view, it should be noted that, in many countries, the principle of “equality before the law” constitutes a constitutional norm.
The second issue raised by lack of decisional uniformity is probably the more pressing one. It is the issue of predictability. The basic argument is that, since the eventual outcome of a given dispute may depend on the plaintiff’s forum selection (which is unknown to the defendant), such outcome is not reasonably predictable for the defendant. At first sight, this seems to be a very plausible argument. It is frequently referred to as a problem affecting “legal security” or “security of transactions.”

However, a closer look reveals that the equation forum shopping (or forum selection) equals unpredictability of outcome is debatable, if not misleading. First of all, forum selection only makes predictability more difficult; it does not necessarily undermine it. In fact, for any international dispute, more than one forum is generally available and, depending on the specific connections of the transaction (or event giving rise to the dispute) with different countries, those alternative fora may be identified without too much hassle. Similarly, gaining basic information pertaining to the applicable conflict norms in those fora, as well as to peculiarities of the respective substantive laws, does not necessarily require excessive efforts.

More importantly, the assumption that, in the absence of forum shopping, defendants can perfectly predict the outcome is unrealistic. This view implies that each case has only one “natural” forum, which is not generally the case in international litigation. Also, it assumes that parties are perfectly familiar with the conflict and substantive norms of this “natural” forum (or their home forum, if the comparison is with domestic litigation), which, again, is questionable. Moreover, perceived unpredictability frequently stems not so much from the plaintiff’s choice of a particular forum, but rather from the unpredictability of the facts or incident giving rise to the dispute. Lastly, but there may be several other relevant factors, predictability issues can, as far as contractual disputes are concerned, easily be solved through the conclusion of choice-of-law and/or forum selection clauses.

67 See Grignon-Dumoulin, supra note 4, at 610.

68 This is largely due to the fact that most countries recognize that a court’s jurisdiction in international cases may be based on a plurality of grounds. For a more detailed analysis of this issue, see infra, II.A.1.

69 How can a manufacturer know where a consumer – with whom he has no contractual relationship – will be injured by one of his products? How can parties know where tortious conduct will occur, or where the effects of such conduct will be produced?
None of the above arguments should be understood as suggesting that it is not desirable to achieve greater harmonization of conflict and substantive norms at the international level, especially as far as the law governing business transactions is concerned. However, as I have shown, the problems of unfairness and unpredictability that the absence of uniformity may cause are far less severe than is often assumed. In fact, the very existence of such problems is questionable.

II. The reality of the detrimental impact of forum selection

In the first part of this article, I have examined the adverse “potential” of forum selection in international litigation, i.e. the question of whether, as a matter of principle, forum selection can have a detrimental impact. I have identified the various criteria by which such impact may be measured and concluded (i) that unfairness is not a “real” issue as far as the applicable laws are concerned, (ii) that, however, unfairness in terms of unequal convenience may potentially be a (rather minor) problem, (iii) that lack of uniformity is merely hypothetical at the level of the parties to a given dispute and thus not significant as a factor reducing (again) fairness and predictability, and (iv) that lack of efficiency may be the most serious “danger” of forum selection.

In this second part, I analyze the extent to which the potentially detrimental impact of forum selection affects the actual practice of international litigation. Rather than focusing on empirical data (which would be hard to find and interpret), I discuss two factors that suggest that the already limited “detrimental potential” of forum selection is not generally fully “exploitable” in practice. Those factors are (1) the fact that the availability of alternative fora (the reason why we have forum shopping) is generally conducive to the achievement of fairness and efficiency and (2) the existence of incentives for plaintiffs to refrain from engaging in forum shopping practices.

70 Thus, while I agree with Professor Juenger that the international unification of conflict norms is unrealistic, I respectfully disagree with his view that it is also undesirable or “futile”. See Juenger, supra note 7, at 10.

71 Indeed, it is difficult to locate decisions involving forum shopping because courts may not necessarily employ that expression and because it is generally difficult to distinguish between forum shopping and mere forum selection. Also, the exact impact that a plaintiff’s choice in a given case has on the achievement of fairness and efficiency is almost impossible to determine with any accuracy.
A. The availability of alternative fora: forum shopping opportunities as a “necessary evil”

Forum shopping would not be a practical and academic issue if litigants did not have the possibility to choose between two or several alternative fora. It is sometimes argued that the availability of more than one forum is caused by the “alternative” nature of the relevant jurisdictional rules. At the international level, this is not entirely accurate because the availability of alternatives does not stem from the jurisdictional rules of a given country, but from the interplay between the jurisdictional rules of several countries. If, for example, a French plaintiff is entitled to sue a German defendant in Germany (the place of residence of the defendant) and France (the place where the defendant’s tortious conduct occurred), then this is the combined result of German and French jurisdictional rules. While the existence of alternative jurisdictional rules is thus not a necessary prerequisite for options at the international level (divergences between the various domestic rules would suffice), evidently, it significantly enhances their likelihood and number.

When a legal system applies alternative jurisdictional rules in the domestic sphere, it generally recognizes that, at the international level, its courts’ jurisdiction may similarly be based on a plurality of connecting factors (such as, for example, the domicile or nationality of the defendant, the place of the conclusion or performance of the contract etc.). There is, of course, a reason behind this. In fact, alternative jurisdictional rules, both at the domestic and at the international level, are aimed at contributing to the fairness and efficiency of the litigation process. In other words, alternative rules pursue precisely those objectives that may be undermined by the practice of forum shopping. Overall, as I shall explain, the potentially negative effect of alternative rules (i.e. of jurisdictional options) is outweighed by their advantages. Moreover, any alternative

\[\text{\textsuperscript{72}}\text{Only where an international instrument establishes common norms for States parties does it make sense to use the term “alternative rules”. With regard to EC Council Regulation 44/2001, it is thus appropriate to state that it establishes a system based on alternative rules of jurisdiction.}\]

\[\text{\textsuperscript{73}}\text{In this specific case, both the German and the French rules would be found in Regulation 44/2001, which is directly applicable in all member states and takes precedence over any other domestic norms pertaining to matters falling within the scope of the Regulation. The jurisdictional options in this hypothetical case would thus derive from the application of Articles 2(1) and 5(3) of the Regulation.}\]

\[\text{\textsuperscript{74}}\text{In France, for example, absent an international agreement governing the issue, the jurisdiction of French courts in international disputes is determined by way of a “transposition” of the domestic jurisdictional rules contained in Articles 42-48 of the Code de Procédure Civile.}\]
system that would be based on exclusive jurisdictional rules would not only be unrealistic, but also a source of problems.

1. Fairness and efficiency of alternative jurisdictional rules

Virtually all legal systems recognize that, in international disputes, the jurisdiction of their courts may be based on a plurality of connecting factors. As far as specific types of disputes are concerned, however, exclusive jurisdictional rules may exceptionally apply. The real differences between the various countries only relate to the question of how many such alternative factors are recognized. Those that are not based on a significant connection with the parties or the facts underlying the dispute (and are not widely applied) are habitually referred to as “exorbitant” grounds. Overall, however, there is rather widespread agreement on basic jurisdictional principles.

Within the EU, for example, all disputes involving a defendant who resides or is domiciled in a member state of the EU are governed by EU Council Regulation 44/2001, which transforms the Brussels-Lugano Convention into a piece of EU legislation. Under this Regulation, the basic principle is that the plaintiff is required to bring his claim before the courts of the defendant’s domicile. In addition, the Regulation provides for a number of rules of “special jurisdiction” which plaintiffs have the right to rely upon.

In contractual matters, for example, the Regulation allows a plaintiff to bring his claim before the courts “for the place of the performance of the obligation in question [i.e. the obligation which

75 See infra, II.A.2.

76 For a recent discussion of such exorbitant grounds, see Guiditta Cordero Moss, Between Private and Public International Law: Exorbitant Jurisdiction as Illustrated by the Yukos Case, 32 REVIEW OF CENTRAL AND EAST EUROPEAN LAW 1 (2007).

77 For an examination of the ways in which the Regulation modified the legal regime established under the Brussels-Lugano Conventions, see Astrid Stadler, From the Brussels Convention to Regulation 44/2001: Cornerstones of a European Law of Civil Procedure, 42 C.M.L. REV. 1637 (2005).

78 See Article 2(1) of the Regulation: “… persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”
the plaintiff alleges has been violated].” In tort cases, claims may be brought in the courts “for the place where the harmful event occurred or may occur”. Where the defendant’s tortious conduct occurred in State A and the plaintiff suffered damage in State B, the action may be brought before the courts of both countries.

In the United States, the basic approach is not dissimilar. American courts generally have no difficulty asserting jurisdiction over “local” defendants. Hence, they recognize that the defendant’s domicile or residence constitutes a proper jurisdictional basis. The fact that other jurisdictional grounds are acknowledged is illustrated by a wide range of cases which involve foreign (or non-resident) defendants. In those cases, the courts focus on whether they have “personal” jurisdiction over the foreign entity or individual. In most states, this question is governed by so-called long-arm statutes, which – generally – either provide for a number of specific bases for jurisdiction (not unlike Regulation 44/2001) or incorporate the requirements of the constitutional Due Process Clause.

The meaning of those requirements, which apply throughout the United States, has been clarified by a number of Supreme Court decisions in which the Court established two tests to determine

79 Article 5(1) of the Regulation.

80 Article 5(3) of the Regulation.


82 See Silberman, supra note 5, at 516 (stating that “[f]ormal jurisdiction over these defendants [American or other multinational manufacturers] almost always exists”).


84 See Ronald A. Brand, Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention, 24 BROOK. J. INT’L L. 125 (1998-1999), at 132 (stating that “[t]he process of applying a list-type long-arm statute is not unlike the application of the jurisdictional rules of the Brussels Convention [which has been adopted, with minor changes, by Regulation 44/2001]”).

85 Of particular relevance in this respect is the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.
whether, in a given case, a U.S. court may validly affirm jurisdiction over a non-resident or foreign defendant. Under the first such test, the minimum contacts requirement laid down in *International Shoe Co. v. Washington*\(^86\) (and developed further in *Helicopteros Nacionales de Colombia v. Hall*\(^87\) and *Asahi Metal Industry Co. v. Superior Court of California*\(^88\)), a U.S. court may have jurisdiction over a foreign defendant if (i) he conducts a certain threshold of activities in the relevant State or if (ii) the cause of action arises from an activity of the defendant in that State, even if it merely constitutes an isolated activity. Under the second test, the reasonableness requirement laid down in *World-Wide Volkswagen Corp. v. Woodson*,\(^89\) the exercise of jurisdiction must be “reasonable” in light of the relationship between the defendant and the forum.\(^90\)

This very basic overview of American jurisdictional rules illustrates that U.S. courts recognize a variety of factors as grounds upholding their jurisdiction in international cases. As I have already mentioned, the domicile or place of business of the defendant is one such factor, and U.S. courts therefore generally hold that they have jurisdiction over cases brought against defendants who are domiciled or residing in the U.S. As regards cases involving foreign defendants, courts take into account a number of different aspects relating to the defendant’s presence in, or connection with, the U.S. Not unlike Regulation 44/2001, the American legal system thus embraces the idea of alternative rules of jurisdiction.

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\(^86\) 326 U.S. 310 (1946). The Court ruled that the Washington state courts had jurisdiction over a Delaware corporation having its principal place of business in St. Louis, Missouri because it employed between 11 and 13 salesmen who resided in Washington. The Court held that “due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair-play and substantial justice.” (at 313)

\(^87\) 466 U.S. 408 (1984) (denying jurisdiction of the Texas state courts over a claim brought against a Colombian corporation on the basis of a helicopter crash in Peru).

\(^88\) 480 U.S. 102 (1987) (denying jurisdiction of California courts over a Japanese manufacturer in a product liability case involving an allegedly defective valve stem sold to a Taiwanese tire manufacturer and ultimately incorporated into a motorcycle sold and used in California).

\(^89\) 444 U.S. 286 (1980).

\(^90\) Id. at 292 (stating that “[t]he relationship between the defendant and the forum must be such that it is reasonable … to require the corporation to defend the particular suit which is brought here” (internal quotations omitted) and holding that the Oklahoma courts do not have jurisdiction over a product liability suit brought by New York residents who had purchased a car in New York from a New York corporation merely because the accident occurred while the plaintiffs were driving through Oklahoma).
By recognizing alternative jurisdictional bases, legal systems (and notably the American and European legal systems) promote fairness (especially equality between the parties) and efficiency of international litigation. Alternative jurisdictional rules are fair because they achieve an adequate balance between the interests of the parties. On the one hand, the rule allocating jurisdiction to the defendant’s home courts, a principle of virtually universal application,\(^{91}\) is protective of the interests of defendants.\(^{92}\) On the other hand, alternative rules also take into account the interests of plaintiffs by offering them the possibility to choose between two or several options.

In order for those options not to create an imbalance that would disadvantage the defendant, the relevant rules must be crafted carefully. Importantly, save for exceptional circumstances,\(^{93}\) the plaintiff’s domicile or residence (or nationality) should not constitute a connecting factor. If it did, plaintiffs would systematically bring most lawsuits in their home courts, which would clearly disfavor defendants. Therefore, alternatives to the defendant’s home courts should bear a material connection with the dispute since this ensures both (a certain degree of) predictability for the defendant and overall efficiency.

If jurisdictional rules do indeed limit alternative fora to those that are connected to the dispute, then they also help ensuring a certain degree of efficiency. As I have discussed earlier, the closeness of the forum to the relevant facts underlying the dispute enhances speed and cost-effectiveness of the process. In addition, it must not be forgotten that the basic rule allocating jurisdiction to the defendant’s home courts also benefits one particular aspect of efficiency, namely the enforceability of the prospective decision.\(^{94}\)

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\(^{92}\) Von Mehren, *supra* note 91, at 30 (acknowledging that litigating in the defendant’s forum favors the defendant, at least as far as “accessibility and familiarity with cultural, legal, and social traditions” are concerned). However, this author also rightly emphasizes that such general statements are inappropriate as far as substantive and procedural matters are concerned. He observes that “[t]he defendant’s domicile may well turn out to favour… plaintiffs while the plaintiff’s domicile favours defendants.” *Id.* at 29.

\(^{93}\) Exceptional circumstances that may warrant allocating jurisdiction to the plaintiff’s home courts may consist of contractual relationships involving parties with unequal bargaining powers. Article 16(1) of EC Regulation 44/2001, for example, expressly authorizes a consumer to bring claims before the courts of his domicile.

\(^{94}\) In fact, if the plaintiff obtains a favorable decision from a court of the defendant’s domicile/residence, then it will not be necessary to seek enforcement abroad.
Finally, the fact that alternative jurisdictional rules are inherently flexible probably also constitutes an advantage. Flexibility is, of course, not a per se objective, but it enables the plaintiff to avoid solutions that would be particularly unfair or inefficient. Where, for example, an exclusive jurisdictional rule would lead to allocating jurisdiction to the courts of a country whose judicial system is particularly inefficient (and where trials are excessively long), alternative rules provide a remedy. Similarly, where such rule would lead to the courts of country A deciding a dispute under the laws of country B (which may be inconvenient), an alternative rule providing for the jurisdiction of the courts of country B may be in the common interest of the parties.

2. Exclusive jurisdictional rules: an unrealistic and problematic alternative

The alternative to the current legal regime which is based on jurisdictional options for plaintiffs would be a system that removes those options and establishes rules of exclusive jurisdiction. At present, most legal systems actually apply exclusive jurisdictional rules, but only with regard to specific categories or types of disputes. Those exceptional rules reflect the existence of exclusive jurisdiction of specialized public law bodies in certain matters and the public interests involved in others.

The system that is contemplated here is very different. It is based on a general application of exclusive jurisdictional rules for all possible disputes (and on their uniform application at the international level). Such a system would certainly present some advantages. For one, it would ensure a high degree of predictability and limit, or even exclude, litigation relating to jurisdictional issues. Second, it would – at least in theory – produce the best results in terms of efficiency since all rules of jurisdiction could be formulated with a view to achieving this particular objective.

95 See, e.g., EC Council Regulation 44/2001, Article 22.

96 In accordance with Article 22(4) Council Regulation 44/2001, for example, disputes concerning the validity of intellectual property rights can only be heard by the courts of the place where the relevant rights have been deposited or registered.

97 The vitality of those interests notably explains why disputes regarding rights pertaining to immovable property are generally considered to fall within the exclusive jurisdiction of the courts of the place where the relevant property is located. See, e.g., Article 22(1) Council Regulation 44/2001.
However, such a system seems difficult, if not impossible, to establish. In fact, it requires general agreement at the international level on what those exclusive jurisdictional rules should be. In the absence of such international uniformity, jurisdictional conflicts would be inevitable. There would be, first of all, “positive” conflicts, i.e. situations where the courts of two or several countries would assert jurisdiction over a particular claim — a situation that constitutes a return to alternative rules. Second, this may be more problematic, a non-uniform system of exclusive jurisdictional rules may lead to “negative” conflicts, i.e. scenarios where no court considers that it has jurisdiction over a particular dispute.

The effectiveness of such a model thus depends on international consensus regarding the precise contents of the various rules of (exclusive) jurisdiction. That the achievement of international agreement on jurisdictional rules is generally rather problematic, to say the least, is notably illustrated by the negotiations conducted under the auspices of the Hague Conference on Private International Law in relation to the drafting of a multilateral convention on jurisdiction and the recognition and enforcement of judgments. As Brand had predicted, basic differences between American and European approaches, as well as mutual lack of understanding, have proven to be an insurmountable stumbling block in this context.

Moreover, many countries may be opposed to the very idea of exclusive jurisdiction. The adoption of rules of exclusive jurisdiction would mean that, as a practical matter, many claims brought against defendants domiciled in country A may not be heard in the courts of country A (provided that one adopts a closest-connection approach). This, however, stands in contrast with a deeply-rooted “tradition” according to which States allege to have an interest in having their domestic courts hear claims involving their nationals. In some countries, this has historically led to the recognition of “jurisdictional privileges” affording nationals systematic access to their

98 The drafting of such a convention was initially proposed by the United States back in 1992 and notably led to the adoption of a first draft in 1999. Due to irreconcilable differences between the negotiating parties, the project was eventually narrowed down to cover only the issue of choice-of-court agreements. See generally Samuel P. Baumgartner, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS, TRANS-ATLANTIC LAWMAKING FOR TRANSTATIONAL LITIGATION (2003).

99 Brand, supra note 84, at 127 (acknowledging that “[t]he successful negotiation of a multilateral treaty on jurisdiction and the recognition and enforcement of judgments will not be an easy task.”

100 In France, for example, those “privilèges de juridiction” are found in Articles 14 and 15 of the Code civil which provide for the right of both French plaintiffs and French defendants to have their cases heard by French courts. On Article 14, see Bell, supra note 35, at 10.
home courts. While this may no longer be a prevalent approach, remnants of this philosophy may create obstacles to the acceptance of rules of exclusive jurisdiction.

Assuming that an international system based on exclusive jurisdictional rules is achievable, it would not, however, be the best solution. First of all, the benefits mentioned above (predictability and efficiency) are only relative. Even if, formally, a rule provides for the exclusive jurisdiction of a particular court, the formulation of the connecting factor which the rule is based upon may create options. If, for example, the rule provides that tort claims must be brought in the courts of the country “where the harmful event occurred”, this may include both the place of the causal event and the place where the actual damage is suffered. Moreover, both the causal event and the damage may occur in more than one country, which again creates additional jurisdictional options. Hence, exclusive rules seem unable to prevent alternatives that are the result of factually complex situations.

Also, the achievement of efficiency via exclusive jurisdictional rules may be questionable in individual cases. In fact, it may be difficult abstractly to elaborate a rule that ensures the greatest possible efficiency in a large majority of cases. Again, the hypothetical rule stated in the preceding paragraph (jurisdiction of the courts of the place where the harmful event occurred) is illustrative. While, as a general rule, relevant evidentiary documents and witnesses are likely to be located in the country “where the harmful event occurred”, this may not always be true. For example, in a case where one German tourist negligently causes physical harm to another German tourist while on a trip in Arizona, and where all witnesses are also German tourists, the exclusive jurisdiction of the courts of Arizona would not be the most efficient solution.

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101 Jurisdictional privileges are hardly compatible with international comity and practical necessities. Thus, in France, for example, courts have recognized the possibility to “waive” these privileges. Moreover, Articles 14 and 15 do not apply where international law obligations provide otherwise. Most notably, as far as disputes involving defendants domiciled in the European Union are concerned, those provisions are superseded by the regime established under EC Council Regulation 44/2001.

102 As I have already mentioned, this is precisely the situation under Regulation 44/2001. See case 21/76, Bier v. Mines de Potasse d’Alsace, [1976] E.C.R. 1735.

103 This example is borrowed from Martine Stückelberg, Lis Pendens and Forum Non Convenience at the Hague Conference, 26 BROOK. J. INT’L L. 949, 949 (2000-2001). Admittedly, this is a rather exceptional scenario. Also, I do not deny the possibility for an exclusive jurisdictional rule to take such exceptional circumstances into account. The hypothetical rule on jurisdiction over tort matters could thus allocate jurisdiction to the courts of the place where the harmful event occurred (or where the effects are produced), unless both the plaintiff and the defendant are domiciled in the same foreign state.
The adoption of an internationally uniform set of rules of exclusive jurisdiction is thus not only highly unrealistic, but most probably even undesirable. Undeniably, it is appropriate to limit the number of grounds (or connecting factors) upon which a court’s jurisdiction may be based in an international case. In this respect, the exclusion of “exorbitant” rules is particularly helpful. However, the availability of alternatives to the defendant’s home courts, provided that those are based on considerations of efficiency, is the better solution.

B. Incentives for plaintiffs not to forum shop

As has certainly become evident by now, in international (but also domestic) disputes, a plaintiff’s forum selection is frequently based on the pursuit of specific strategic interests. However, this pursuit of advantages may turn out to be counter-productive and have “undesired” side-effects. In fact, for a number of reasons, the plaintiff may ultimately be deprived of the benefits of a favorable decision when he seeks to have that decision enforced abroad. Inasmuch as it may complicate enforcement of the decision, forum shopping thus plays the role of a Damocles sword hanging over the plaintiff’s head.

This Damocles sword creates an incentive for the plaintiff to refrain from attempting to obtain results that would be considered grossly unfair in the likely enforcement jurisdiction. It also prompts the plaintiff to select a forum whose jurisdiction will be recognized by the enforcement court. In other words, it creates an incentive for the plaintiff not to forum shop. In addition, the plaintiff has an evident personal interest in selecting an “efficient” forum, which contributes to limiting actual forum shopping practices.

1. Incentive to avoid outcomes that would be considered grossly unfair in potential enforcement jurisdictions

The logic of this Damocles sword is simple. The plaintiff selects a forum that is, \textit{a priori}, not the most appropriate one, but the one that allows him to obtain a particularly favorable decision. He sues the defendant in a country other than the latter’s home country and will ultimately need to have the decision enforced in the defendant’s home jurisdiction. If the decision handed down is
perceived to be grossly unfair or inadequate by the enforcement court, then enforcement may be
denied on the basis of a violation of the enforcement court’s public policy.\textsuperscript{104}

A classical example of such situations is provided by punitive damages cases.\textsuperscript{105} A European
plaintiff sues a European defendant in an American court because of the prospect of being
awarded punitive damages. The facts of the case are not directly linked to the United States, but
the court decides that it has jurisdiction, rules in favor of the plaintiff and awards punitive
damages. When the plaintiff attempts to have the decision enforced in the defendant’s home
jurisdiction, the competent court refuses enforcement on the grounds that punitive damages are
contrary to its domestic public policy.\textsuperscript{106}

Hence, in such cases, rational plaintiffs will refrain from seeking the “advantage” of punitive
damages as they will only incur additional cost without any actual benefit. As this example
illustrates, plaintiffs have an incentive not to seek particularly favorable outcomes if such
outcomes would be contrary to the basic notions of fairness and justice of probable enforcement
jurisdictions. This incentive will be particularly effective if the defendant does not own any
assets in jurisdictions other than his home jurisdiction.\textsuperscript{107}

2. Incentive to select a court whose jurisdiction is based on international standards

As I have already pointed out, the pursuit of strategic interests may prompt a plaintiff to consider
a large number of potential courts and to select a forum that is only loosely connected to the
parties or the facts underlying the dispute. Sometimes, the jurisdiction of the chosen court may
be based on an “exorbitant” ground of jurisdiction such as the presence of defendant-owned

\textsuperscript{104} See supra, note 58.
\textsuperscript{105} See generally Borchers, supra note 14.
\textsuperscript{106} Virtually all European States consider punitive damages awards to be contrary to public policy. For an insightful

\textsuperscript{107} If, in the above example, the defendant also owns assets in the United States (or more generally in any country
that enforces punitive damages awards), then the incentive for the plaintiff not to forum shop will me (much) more
limited.
assets\textsuperscript{108} or the temporary presence of the defendant himself\textsuperscript{109} which allowed him to be served in the jurisdiction concerned.

Here, again, this may lead to enforcement problems. In fact, under the laws of many countries, one of the requirements that need to be met in order for a foreign court decision to be enforced is that the jurisdictional basis relied upon by that court is recognized in the enforcement jurisdiction.\textsuperscript{110} In other words, country A will only enforce judgments rendered in country B, if the exercise of jurisdiction by the relevant court of country B is in accordance with country A’s own rules on international jurisdiction. If, for example, the jurisdiction of a court is only based on the presence of assets owned by the defendant, then the judgments rendered by this court may be refused enforcement in those countries that do not recognize this particular jurisdictional ground.

These potential enforcement problems constitute an incentive for plaintiffs to refrain from bringing claims in courts whose jurisdiction would be based on “unusual” or exorbitant grounds. Thus, they contribute to narrowing the scope of jurisdictions in which a plaintiff can reasonably be expected to initiate proceedings. By limiting the number of practical options, this incentive helps limiting forum shopping strategies.

3. Plaintiffs’ interest in efficiency

As I have explained supra, one of the potential detrimental consequences of forum selection is lack of, or limited, procedural efficiency. However, the achievement of such efficiency is, obviously, in the interest of the plaintiff. Therefore, he will only choose an inefficient forum if the loss of efficiency is compensated by advantages pertaining to the actual outcome, to practical convenience or to the ease of enforcement. The interest that the plaintiff has in an efficient conduct of the proceedings thus constitutes another factor that limits recourse to forum shopping tactics.

\textsuperscript{108} On this attachment-jurisdiction, see Juenger, supra note 1, at 554.

\textsuperscript{109} See supra, note 61.

\textsuperscript{110} See supra, note 60.
Conclusion

In this article, I have shown that the concept of forum shopping can only be useful if it is distinguished from the broader term forum “selection”. Accordingly, forum shopping can adequately define those instances of forum selection where the actual choice made by the plaintiff adversely affects the legitimate objectives pursued by rules on international jurisdiction. In essence, those objectives are fairness and efficiency (as defined supra).

The basic conclusion of this article is that the potentially detrimental impact of forum selection is limited. Contrary to what numerous writers argue, tactics aimed at benefiting from favorable procedural or substantive laws are not detrimental to the achievement of “fairness” and should not, therefore, be considered as forum shopping. Also, the lack of decisional uniformity caused by forum selection practices is not, as such, problematic – not because of the reasons put forward by Professor Juenger (essentially the desirability of applying the substantively superior lex fori), but because lack of uniformity does not directly impact the equality between the parties (fairness). Thus, the real issues that forum selection may cause are issues of efficiency and, to a more limited extent, issues of unequal convenience.

Importantly, I have also shown that, at the international level, forum shopping is inevitable as long as litigants are offered jurisdictional options or alternatives. I have also shown that the availability of such alternatives, though it generates forum shopping opportunities, is ultimately beneficial to the interests of international litigation inasmuch as it strikes a reasonable balance between efficiency and fairness, on the one hand, and the interests of the plaintiff and those of the defendant, on the other. Finally, I have also emphasized that, as a practical matter, litigants have incentives to refrain from forum shopping, which contributes to limiting the practical significance of this problem.

The identification of potential problems caused by forum selection, as well as the overall conclusion that the magnitude of such problems is limited, should be borne in mind when elaborating policies addressing forum shopping, or when assessing current approaches. In particular, it may usefully inform the rather controversial debate surrounding the objectives pursued by the doctrine of forum non convenience.