A Critique of the Doctrine of Forum Non Conveniens

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Introduction

The doctrine of *forum non conveniens* allows a court (whose jurisdiction is established under the applicable rules)\(^1\) to decline to hear a case if it finds that it is an inappropriate forum (or that another forum would be more appropriate).\(^2\) *Forum non conveniens* is applied almost exclusively in common law countries such as the United States, the United Kingdom,\(^3\) Australia, and Canada;\(^4\) it is not recognized, and even frowned upon, in most civil law jurisdictions.\(^5\)

In recent years, *forum non conveniens* has been the subject of increasing criticism (including from common lawyers). Various authors have observed that *forum non conveniens* leads to inconsistent results,\(^6\) and that courts occasionally rely on it in order to pursue inappropriate

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1 The traditional and prevailing view is that a case can only be dismissed on *forum non conveniens* grounds if the court’s jurisdiction is established under the relevant rules of jurisdiction (otherwise, there would be no need to invoke this doctrine). However, recently, the idea that a court may rely on *forum non conveniens* to dismiss a case prior to any jurisdictional inquiry has notably been accepted by the U.S. Supreme Court. The reason given for this new course is that the jurisdictional analysis may be inappropriately time-consuming and cost-generating. See *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1190 (2007). See also Nathan Viavant, *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.: The United States Supreme Court Puts Forum Non Conveniens First*, 16 Tul. J. Int’l & Comp. L. 557 (2007-2008).

2 As this attempt to define *forum non conveniens* illustrates, there is no universally accepted “threshold” for the application of this doctrine. While *forum non conveniens* dissmissals are, in all legal systems concerned, based on a comparison of the respective appropriateness of the forum seized and the alternative forum, the question of how much more appropriate this alternative forum must be in order for a *forum non conveniens* plea to be successful does not receive a unanimous answer. For more details on the question of the threshold of *forum non conveniens*, see infra, Part II.A.3.

3 In the United Kingdom, the application of the doctrine of *forum non conveniens* has been limited significantly as a result of the accession of the UK to the Brussels-Lugano Conventions and the adoption of EC Council Regulation 44/2001 incorporating these Conventions into EU law. In fact, the ECJ has clarified that the doctrine of *forum non conveniens* is incompatible with the regime established under Regulation 44/2001. English courts may thus not invoke this doctrine in cases falling within the scope of the Regulation, i.e. in all cases in which the defendant is domiciled in a member state of the EU. For relevant commentary, see, e.g., Christopher D. Bougen, *Conflicting Approaches to Conflicts of Jurisdiction: The Brussels Convention and Forum Non Conveniens, 33 Victoria U. Wellington L. Rev. 261 (2002); Gilles Cuniberti, Current Developments – Private International Law, I. Forum Non Conveniens and the Brussels Convention, 54 Int’l & Comp. L. Q. 973 (2005).*


objectives (such as the protection of domestic corporations, for example). Others have questioned the legitimacy of the judicial discretion inherent to *forum non conveniens*, especially from a constitutional law point of view. A number of scholars have taken issue with the nature of the *forum non conveniens* test and, more particularly, with the distinction between, and respective weight attributed to, public and private interests. Finally, several writers have objected to the most appropriate forum threshold, applied in the majority of *forum non conveniens* jurisdictions.

While all of these contributions highlight specific individual flaws or problem areas of *forum non conveniens*, none of them critically examines the theoretical foundations of this doctrine. Even Zhenjie, to my knowledge the only author who has offered a comprehensive – and compelling – critical analysis of *forum non conveniens*, focuses on issues arising from the actual application of this doctrine by the courts (e.g. delays, manipulation, and discrimination). All of those

Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 Tul. L. R. 309 (2002-2003), at 378 (arguing that “it would be helpful if the United States Supreme Court were to restate the test or tests to be applied when considering the Gilbert [Gilbert is the first case in which the Court expressly recognized the doctrine of *forum non conveniens*] factors, because there is considerable variation in practice among the federal courts.”); Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. Davis L. Rev. 559 (2007-2008), at 603 (concluding that “[f]ederal forum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard.”)


8 See, e.g., Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 Netherlands International Law Review 143 (2001), at 153 (asking the question: “[h]ow can judges take away what lawmakers have given to the plaintiff?”)


10 See Karayanni, supra note 9 (explaining that UK courts do not take into account public interests when deciding *forum non conveniens* cases); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Calif. L. Rev. 1259 (1986) (arguing, in essence, that public interests should not be taken into account for the purposes of the *forum non conveniens* inquiry, but that those interests should serve to establish whether the United States has “prescriptive” jurisdiction, i.e. whether U.S. laws apply to the merits of the dispute).

11 See, e.g., Prince, supra note 4 (arguing that the most suitable forum test applied in the U.S. and in the UK is inappropriate and that the more restrictive approach notably followed by Australian courts is preferable).

12 See Zhenjie, supra note 8, at 157-158.

13 Id. at 159-160.
writings thus suggest that the way in which \textit{forum non conveniens} is applied is, for some reason, not ideal (not “the way it should be”). The question that is left unanswered, though, is whether \textit{forum non conveniens} could at all, assuming it were applied “correctly”, be a useful legal doctrine. This is the question of the legitimacy or appropriateness of the theory of \textit{forum non conveniens}.

The reader will have understood that such an exploration of the theoretical accuracy of \textit{forum non conveniens} is the object and purpose of this article. In order to assess the theoretical validity of this doctrine (and, generally, any doctrine), it is necessary to determine whether (i) it pursues legitimate interests or objectives; (ii) whether it is able to serve those interests or achieve those objectives; and (iii) whether there are alternative doctrines/legal rules that would be more efficient. In this article, I show that, although several of the objectives pursued by \textit{forum non conveniens} are adequate, it is ultimately unable to achieve those objectives. Also, and even more importantly, \textit{forum non conveniens} is in any event unnecessary as the function assigned to it can be performed more adequately by suitable jurisdictional rules.

In Part One of this article, I examine the objectives pursued by \textit{forum non conveniens} and distinguish between legitimate (efficiency, protection of defendants from abusive forum selection)\textsuperscript{15} and illegitimate (reduction of courts’ caseloads, protection of domestic defendants)\textsuperscript{16} objectives. In order to draw such a distinction, I rely on the observation that \textit{forum non conveniens} is of jurisdictional nature (i.e. it functions as a jurisdictional rule) and that, therefore, its valid objectives are necessarily of the same nature.\textsuperscript{17} Importantly, I show that those objectives should primarily reflect the private interests of the litigants since the allocation of jurisdiction in international cases does not, strictly speaking, involve any “public” interests.

In Part Two, I discuss the inability of \textit{forum non conveniens} to achieve its legitimate objectives. In this respect, I emphasize the difficulties of translating those objectives into a workable rule or “test”,\textsuperscript{18} as well as the risks of errors and abuses inherent to any doctrine based on judicial discretion.\textsuperscript{19} In Part Three, I explain that the doctrine of \textit{forum non conveniens} is unnecessary. Specifically, I show that \textit{forum non conveniens} emerged as a tool to remedy the undesired effects of rules of exorbitant jurisdiction and that, in the absence of such rules, \textit{forum non conveniens} has no – or only a very limited – role to play. I also highlight that jurisdictional rules are able to

\textsuperscript{14} \textit{Id.} at 163-165.

\textsuperscript{15} \textit{See infra}, Part I.C.

\textsuperscript{16} \textit{See infra}, Part I.D.

\textsuperscript{17} \textit{See infra}, Part I.B.

\textsuperscript{18} \textit{See infra}, Part II.A.

\textsuperscript{19} \textit{See infra}, Part II.B.
ensure a high degree of efficiency and fairness, and that there is no need for a posteriori adjustments involving judicial discretion.

I. The objectives of the doctrine of forum non conveniens

A. The dogma of judicial discretion and fairness in the individual case

Forum non conveniens is, essentially, a doctrine based on the presumed virtues of judicial discretion. As such, it is hardly surprising that it can only be found in common law legal systems which, as is well known, expressly recognize the law-making role of the courts. In addition, common law legal systems generally embrace the idea that, even though a legal issue is governed by a statute, judicial discretion to interpret (“twist”) or even deviate from a particular legislative norm may be necessary to ensure the fairness of judicial rulings. Common law theory assumes that even the best laws sometimes (exceptionally) lead to undesirable results and that, therefore, courts should possess the necessary discretionary powers to ensure “fairness in the individual case”.

The doctrine of forum non conveniens can be regarded as a specific application of the idea that judicial discretion helps to ensure fairness in individual cases.\(^{20}\) In fact, the rationale underlying forum non conveniens consists of the assumption that jurisdictional rules do not always produce appropriate results. More particularly, since forum non conveniens is based on the idea of discretionary dismissals of specific cases, this doctrine postulates that jurisdictional rules are sometimes too broad, i.e. that they allocate jurisdiction to a court which is not an appropriate (or not the most appropriate) forum.

The dogma of judicial discretion and fairness in the individual case is, of course, not uncontroversial. It is hardly necessary to recall that, at least as a matter of theory, civil law countries are opposed to the idea of judicial discretion. They are founded upon a firm belief in the value of legal codification and strict (a common lawyer would use the pejorative term “rigid”) adherence to rules of law. Civil law theory thus prefers predictability and accepts exceptional unfairness as the price to pay for such predictability (the interesting question of whether predictability itself constitutes but one aspect of the broader concept of fairness unfortunately exceeds the scope of these preliminary remarks). As regards the doctrine of forum non conveniens, several authors have rightly pointed out that arguments in favor and against this doctrine are articulated around the basic – conflicting – requirements of fairness and predictability.\(^{21}\)

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\(^{20}\) See Ruth B. Ginsburg, *Faculty Comment – The Competent Court in Private International Law: Some Observations on Current Views in the United States*, 20 Rutgers L. Rev. 89 (1965-1966), at 89 (referring to forum non conveniens as “a means of mitigating the unfairness that might result from rigid application of rules of competence found in internal law.”)

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\(^{21}\)
These preliminary observations on judicial discretion are not, strictly speaking, necessary to understand the main arguments developed in this article, but they usefully introduce the discussion of the objectives of the doctrine of *forum non conveniens*. In addition, it is important to emphasize that *forum non conveniens* rests upon a rule of judicial discretion, especially for the purposes of this critique. In fact, as I shall discuss *infra*, any doctrine based upon judicial discretion inevitably generates a potential for judicial errors and abuses.\(^22\)

B. The jurisdictional nature of the *forum non conveniens* doctrine and its impact on the determination of its objectives

The explanations contained in this Section are fundamental since they lay the ground for, and establish the correctness of, the principal arguments put forward in this article. In particular, they provide a conceptual basis for the distinction between legitimate and illegitimate objectives pursued by the doctrine of *forum non conveniens*.\(^23\) They also constitute the foundation of the idea that *forum non conveniens* is an unnecessary doctrine.\(^24\)

1. *Forum non conveniens* as a jurisdictional doctrine

First of all, it is crucial to understand that the doctrine of *forum non conveniens* is, in fact, a jurisdictional rule. This jurisdictional nature of *forum non conveniens* is somewhat obscured by the fact that the *forum non conveniens* analysis is generally carried out separately from the jurisdictional inquiry, i.e. a court first establishes whether it has (personal and subject-matter) jurisdiction and, in the affirmative, it will then examine whether the doctrine of *forum non conveniens* may justify a dismissal of the case. Hence, the recourse to the doctrine of *forum non conveniens* is generally regarded as falling outside of the scope of a court’s determination of its jurisdiction.

Such a distinction is, of course, excessively formalistic. Ultimately, the effect of the application of the doctrine of *forum non conveniens* is that a court will decline to exercise jurisdiction. In reality, *forum non conveniens* forms part of the jurisdictional analysis. This is evidenced by the fact that it is possible to include *forum non conveniens* in the formulation of the relevant

\(^21\) See, e.g., Martine Stückelberg, *supra* note 5, at 949 (explaining that *forum non conveniens* “brings flexibility to the conflict of jurisdiction analysis but conflicts with the civil law idea that jurisdictional issues must be certain and predictable”). See also Brand, *supra* note 4, at 494 (observing that the common and civil law approaches are both “aimed at legitimate goals, but neither provides a perfect combination of predictability, efficiency, and equity in all cases.”)

\(^22\) See *infra*, Part II.B.

\(^23\) See *infra*, Parts I.C. and I.D.

\(^24\) See *infra*, Part III.
jurisdictional rules. In fact, in a jurisdiction that applies *forum non conveniens*, all jurisdictional rules can be stated as follows: “court A will have jurisdiction if criteria X, Y or Z are met, unless court A considers that another court would be a (clearly) more appropriate forum”.

Some may object that jurisdictional rules establish whether a particular court *has* jurisdiction, whereas the doctrine of *forum non conveniens* merely relates to the question of whether that court will *exercise* jurisdiction. This is wrong. At the end of the day, both jurisdictional rules strictly speaking and *forum non conveniens* relate to whether a court will exercise jurisdiction. The fact that the *forum non conveniens* “branch” of the jurisdictional inquiry is more flexible and involves a higher degree of discretionary appreciation is irrelevant in this respect (also, in an ideal scenario, such discretion should be limited since courts ought to follow a clearly formulated *forum non conveniens* test).

The fact that *forum non conveniens* constitutes a jurisdictional rule has received some support in judicial rulings (I do, of course, not mean to suggest that its jurisdictional nature “depends” on such rulings). In *Sinochem*, the United States Supreme Court expressly authorized *forum non conveniens* dismissals prior to any “jurisdictional inquiry”, implying that *forum non conveniens* is more appropriately considered as one specific aspect of the more general jurisdictional issue. In *Amchem*, several years earlier, the Canadian Supreme Court recognized that “the test for establishing jurisdiction and the test for deciding whether or not to exercise jurisdiction are the same”, thus suggesting complete overlap between jurisdiction and *forum non conveniens*. The jurisdictional nature of *forum non conveniens* is also expressly recognized in Justice Scalia’s observation in *American Dredging Co. v. Miller* according to which this doctrine is “nothing more or less than a supervening venue provision, permitting displacement of ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.”

2. The primary relevance of private interests

Having established the jurisdictional nature of *forum non conveniens*, it is necessary to determine the objectives that *forum non conveniens* – as a jurisdictional rule – should pursue (i.e. its “legitimate” objectives). Hence, it is necessary to examine the nature of the interests involved in

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29 *Id.* at 453.
matters of (international) jurisdiction. This is an issue of some contention and controversy, especially insofar as the distinction between “private” and “public” interests is concerned. As I shall demonstrate, jurisdictional rules primarily, if not exclusively, involve private interests, and the pursuit of objectives based on perceived public interests is thus inadequate.

The relevance of private interests is not generally contested. Various authors acknowledge that international jurisdiction involves interests such as the litigants’ reasonable expectations and their interest in minimizing private costs. Also, in all jurisdictions concerned, the forum non conveniens tests take such interests into account. In Gulf Oil Corp. v. Gilbert, for example, the US Supreme Court expressly recognized the pertinence of “private interests” (and provided a non-exhaustive list of corresponding factors to be taken into account). In other countries, the litigants’ common interest in the efficient conduct of the proceedings and the defendant’s interest in not being vexed or harassed by the plaintiff’s forum selection form integral part of the forum non conveniens analysis.

The relevance of public interests in relation to issues of international jurisdiction is, however, controversial. It is true that a number of authors affirm the validity of such interests. Keyes, for example, argues that the question of international jurisdiction notably involves the State’s interests in the effective resolution of disputes and the minimization of public costs. As far as the application of the doctrine of forum non conveniens is concerned, the relevance of public interests is not unanimously accepted, to say the least. While such relevance has been expressly recognized by the US Supreme Court, English and Australian courts deny the appropriateness of taking into consideration public interests.

30 See, e.g., Mary Keyes, JURISDICTION IN INTERNATIONAL LITIGATION 200 (2005).
31 Id. at 206.
33 Id. at 508.
34 Keyes, supra note 30, at 209.
35 Id. at 213.
36 See Gilbert, supra note 32, at 509 (observing that “[f]actors of public interest also have a place in applying the doctrine.”)
37 See Lubbe v. Cape PLC, 4 All E. R. 268 (H.L. 2000). For commentary, see Karayanni, supra note 9, at 327 (explaining that the House of Lords held that “a court dealing with the forum non conveniens doctrine should not take into consideration factors of public interest” (international quotation marks omitted).
38 Voth v. Manildra Flour Mills Pty. Ltd. (1990) 97 A.L.R. 124, 134 (Austl.) (Mason, C.J., Deane, Dawson, and Gaudron, JJ.). Voth illustrates that Australian courts only grant forum non conveniens dismissals if the defendant can
This approach (i.e. the approach adopted by English and Australian courts) is the right one. In fact, jurisdictional issues do not, or only to a very limited extent, involve public interests. Any arguments to the contrary are flawed, essentially for two reasons. First, those arguments rest on a fundamental misconception of the term “public interests”. In fact, they adopt an inappropriately broad definition of public interests which leads to recognizing the involvement of those interests whenever private interests are concerned. They (wrongly) assume that, when a particular private interest is at stake, then the State necessarily has a corresponding – public – interest in ensuring the protection of this private interest. This is not reasonable since it blurs the distinction between public and private interests (even though, of course, it does not exclude the existence of public interests which are independent of private interests).

As Professor Kegel has put it so accurately in his article comparing European and American conflict of laws methodology, “in private law [which notably includes conflict of laws and jurisdiction], which the state promotes for justice between individuals, the State does not pursue aims of its own, but only acts as patron”. As far as issues of international jurisdiction are concerned, as I shall explain, the applicable rules should aim to ensure fairness and efficiency (in the interest of the parties). It would be inappropriate to qualify those objectives as pertaining to public interests because States do not have a public interest in the effective resolution of disputes which is independent of the underlying private interests. It is thus inaccurate to speak of public interests in this respect.

Second, arguments suggesting that jurisdictional matters involve public interests are also flawed because they apply too low a threshold of the concept of “interest”. I do not deny that the way in which a State regulates the scope of jurisdiction of its courts over international cases may have an impact on that State’s finances (although a more extensive scope does not necessarily entail a greater burden) or that it may have a delaying effect on the judicial resolution of disputes. However, those consequences are mere secondary “effects”, rather than “interests” which should be translated into legislative objectives. For instance, it would be unreasonable to argue that it is (or should be) one of the purposes of rules on international jurisdiction to limit the public costs associated with the administration of international cases.

In fact, rules on international jurisdiction determine in what circumstances one’s domestic courts have jurisdiction over international disputes (in the context of an international convention, the relevant rules determine before the courts of which member states specific disputes can be brought). The immediate addressees or beneficiaries of such rules are private litigants.

establish that the plaintiff’s choice of forum is oppressive, vexatious or abusive. Hence, only the private interests of the defendant are taken into account.

Jurisdictional rules must, therefore, first and foremost take into account the (private) interests of those litigants. Public interests are not directly involved; they may only be indirectly affected and should not, therefore, be taken into account in the elaboration of jurisdictional rules, including *forum non conveniens* rules.

C. Legitimate objectives of the doctrine of *forum non conveniens*

As I have shown, *forum non conveniens* constitutes a jurisdictional rule and should, therefore, pursue objectives that are properly associated with such rules. I have also demonstrated that those proper objectives should primarily take into account “private” interests. As I explain in this Section, the relevant private interests in matters of international jurisdiction are “efficiency” and “fairness” (I explain the meaning of both concepts *infra*). As far as fairness is concerned, I highlight that it does not involve the perceived fairness of the actual outcome (substantive fairness), but merely fairness in terms of “equal convenience” of the forum. Specifically, this type of fairness may require that defendants be protected from “abusive” forum selection.

1. Efficiency

Efficiency constitutes a fundamental and legitimate objective of rules of international jurisdiction. Efficiency relates, first of all, to the efficiency of the proceedings. Proceedings will be “efficient” if they do not waste resources, in particular time and money (the waste of the latter being partly a consequence of the inefficient use of the former). Efficiency of the proceedings also relates to the ability of the relevant court to render a “correct” decision. Under a broader approach, efficiency also includes the efficiency of the actual decision, i.e. (the ease of) its enforcement. It is clear that, in international disputes, some courts will be more efficient fora than others and that, therefore, jurisdictional rules should be aimed at ensuring a high degree of efficiency.

Jurisdictional rules generally take into account the desirability of promoting efficiency. This can notably be illustrated by the rules contained in EC Council Regulation 44/2001, which is applied by the courts of all member states in all international disputes in which the defendant is domiciled in the EU. Under the Regulation, the applicable rules ensure efficiency by allocating jurisdiction to the courts of the country which presents the closest connection with the material facts underlying the dispute. Thus, for example, the Regulation provides that contract claims may be heard by the courts “for the place of performance of the obligation in question [the obligation which the plaintiff alleges has been violated]”\(^\text{40}\) and that tort claims may be heard by the courts “for the place where the harmful event occurred or may occur”.\(^\text{41}\)

\(^{40}\) *See* Article 5(1)(a) of the Regulation.

\(^{41}\) *See* Article 5(3) of the Regulation.
In addition, as a general matter, the Regulation allows a plaintiff to bring his claim in the courts of the defendant’s domicile, i.e. in the defendant’s “home courts”.\textsuperscript{42} This latter norm, which constitutes not only the basic principle enshrined in the Regulation, but also a rule of virtually universal application\textsuperscript{43}, seeks to ensure the forum’s convenience for the defendant. However, in addition, it also benefits the efficiency of the decision. In fact, by obtaining a decision in the defendant’s home forum, the plaintiff will not be required the seek enforcement of the decision abroad (since it can be assumed that – at least part of – the defendant’s assets are located in his home jurisdiction).

Insofar as efficiency constitutes a legitimate objective of jurisdictional rules, it also represents a legitimate concern in the context of the application of the doctrine of forum non conveniens. As a matter of practice, there are several reasons why a court may perceive itself to be a rather inefficient forum. First, it may be that the court’s jurisdiction is based on a rule of exorbitant jurisdiction (for example, on the defendant’s temporary presence in the forum country),\textsuperscript{44} i.e. a rule that is not based on any considerations of efficiency. Second, if the plaintiff has brought his claim in a court of the defendant’s home jurisdiction, then that court may consider that the proceedings would be handled more efficiently in a forum that bears a connection with the actual facts of the dispute (and not only with one of the parties).

That the doctrine of forum non conveniens serves as a tool to ensure efficiency is expressly recognized by scholarly writers and the courts of various countries. Hill, for example, argues that the U.S. Supreme Court appropriately takes into account “judicial economy” in its forum non conveniens jurisprudence.\textsuperscript{45} Professor Karayanni, who is otherwise critical of American judicial approaches, recognizes that, in the context of the forum non conveniens inquiry, it is essential to take into account “ litigation efficiency”.\textsuperscript{46}

As far as judicial rulings are concerned, the U.S. Supreme Court has affirmed the crucial relevance of efficiency, emphasizing the need to take into account “all practical problems that make trial of a case easy, expeditious and inexpensive”, as well as the issue of the judgment’s

\begin{footnotesize}
\textsuperscript{42} See Article 2(1) of the Regulation.


\textsuperscript{44} For a more detailed analysis of the origin and effects of rules of exorbitant jurisdiction, see infra, Part III.A.

\textsuperscript{45} J. Stanton Hill, Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts, 41 VAND. J. TRANSNAT’L L. 1177 (2008), at 1195 (referring to “judicial economy” as one of the recurring themes in the U.S. Supreme Court’s jurisprudence).

\textsuperscript{46} See Karayanni, supra note 9, at 331.
\end{footnotesize}
enforceability. Similarly, in the United Kingdom, the House of Lords has acknowledged that the *forum non conveniens* analysis revolves around the determination of the “natural forum”, which is the one that has the “most real and substantial connection” with the case. A similar approach is followed by the Supreme Court of Canada.

2. Protection of defendants against abusive forum selection

While efficiency relates to a common interest of the litigants in the efficient conduct of the proceedings and in the efficiency of the judgment, fairness pertains to the idea of the equal treatment, or position, of those litigants. In theory, rules on international jurisdiction may impact two forms of fairness: the fairness of the actual outcome which ultimately results from the application of the jurisdictional rule (“substantive fairness”) and fairness in terms of the equal convenience of the forum (measured by factors such as distance, travel expenses, travel restrictions, linguistic barriers etc).

As I show *infra*, the pursuit of substantive fairness is not a legitimate objective for jurisdictional rules. Hence, those rules should only be aimed at ensuring fairness understood as equal convenience. As a practical matter, considering that the plaintiff enjoys the benefit of selecting a forum among two or several options, jurisdictional rules should be concerned with the protection of the defendant against “unfair” forum selection. The idea that *forum non conveniens* (as a jurisdictional rule) serves as a means to protect defendants is undeniable: the doctrine of *forum non conveniens* can, in fact, only be relied upon by defendants and, ultimately, only those defendants may benefit from its application.

The relevance of the need to protect defendants also clearly emerges from the historical evolution of this doctrine. Various authors have pointed out that the doctrine of *forum non conveniens* originated from the perceived necessity to correct the inadequate effects of exorbitant rules of jurisdiction. Rules of exorbitant jurisdiction (such as, for example, jurisdiction based on the


49 *See also* Amchem, *supra* note 26. *See also* Brand, *supra* note…, at 483 (stating that the Canadian Supreme Court “adopted the forum non conveniens test announced by the House of Lords in Spiliada”).

50 *See infra*, Part I.D.2.

51 *See* Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, at 386 (1947) (stating that “[a]nother, and it is believed more promising, attempt to solve the problem [caused by rules of exorbitant jurisdiction] is being made in some jurisdictions by application of the doctrine of *forum non conveniens*”); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289 (1955-1956), at 312 (stating that “American courts are developing a common law of forum non conveniens as a corrective of the serious shortcomings in a law of personal jurisdiction based on mere personal service”).
mere presence of defendant-owned assets in the forum country) arguably constitute a response to
the phenomenon of “elusive” defendants,\textsuperscript{52} i.e. defendants who attempt to “escape” a lawsuit by
removing their assets from their home jurisdiction or by moving to another country. While those
exorbitant rules may have solved one problem (elusive defendants), they have created another
one by enabling plaintiffs to sue defendants in particularly inconvenient jurisdictions.

\textit{Forum non conveniens} decisions – especially earlier ones – reflect the relationship between this
doctrine and the “unfair” effects of exorbitant jurisdictional rules. Old Scottish cases arguably
required that the defendant establish being unfairly disadvantaged by the plaintiff’s forum
selection.\textsuperscript{53} In the United Kingdom, traditionally, courts only granted \textit{forum non conveniens}
dismissals where the defendant was able to establish that “the continuance of the action would
work an injustice because it would be \textit{oppressive} or \textit{vexatious} to him (emphasis added)”.\textsuperscript{54} In the
United States, the Supreme Court also recognized (and continues to recognize) the significance of
this need to protect defendants against abusive forum selection,\textsuperscript{55} albeit only as one of several
private interests which courts should take into account (i.e. the US threshold has always been
lower than the “vexatious or oppressive forum selection” requirement).

In more recent years, the emphasis of the doctrine of \textit{forum non conveniens} has, in several
jurisdictions, shifted to the objective of efficiency. As a result, the vexatious and oppressive
forum standard (also referred to as “abuse of process” standard) has notably been relinquished by
the English courts.\textsuperscript{56} To date, it only continues to be applied in Australia.\textsuperscript{57} This does not mean,
however, that the protection of defendants has become irrelevant.\textsuperscript{58} Significantly, situations
where courts may consider a forum selection to be vexatious or oppressive frequently pose issues
of lack of efficiency and may thus be addressed in reliance on the pursuit of such efficiency.

\begin{itemize}
\item \textsuperscript{52}\textit{See} Barrett, \textit{supra} note 51, at 380 (observing that the rule allocating jurisdiction to the courts of the defendant
“would permit the defendant to avoid his obligations in many cases by the simple expedient of permanently
removing himself and his property from the jurisdiction of the courts of the states where the venue is laid. The patent
injustice of such a result has led common-law courts to devise venue rules designed primarily to assist the plaintiff in
his pursuit of an elusive defendant” (internal quotation omitted).
\item \textsuperscript{53}\textit{See} Brand, \textit{supra} note 4, at 469.
\item \textsuperscript{54}\textit{See}, \textit{e.g.}, St. Pierre v. S. Am. Stores (Gath & Chaves) Ltd., [1936] 1 K.B. 382, 398 (Eng. C.A. 1935).
\item \textsuperscript{55}\textit{See} Gilbert, \textit{supra} note..., at 508 (approving the often-held view according to which “the plaintiff may not, by
choice of an inconvenient forum, vex, harass, or oppress the defendant by inflicting upon him expense or trouble not
necessary to his own right to pursue his remedy” (internal quotations omitted).
\item \textsuperscript{56}\textit{See}, \textit{e.g.}, MacShannon v. Rockware Glass Ltd., 1 A.C. 795 (H.L. 1978), at 812 (formulating the new test which is
based on the requirement that a \textit{forum non conveniens} dismissal “must not deprive the plaintiff of a legitimate
personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court”).
\item \textsuperscript{57}\textit{See}, \textit{e.g.}, Gray, \textit{supra} note 4.
\item \textsuperscript{58}In the United States, the need to protect defendants against abusive forum selection – expressly mentioned in
\textit{Gilbert} – has not been formally abolished.
\end{itemize}
D. Illegitimate objectives of the doctrine of *forum non conveniens*

When applying the *forum non conveniens* doctrine, some – in particular American – courts pursue, whether openly or not, illegitimate objectives. The two principal examples are the desire of those courts to limit their respective caseloads and the protection of the interests of domestic litigants. While the first objective disqualifies itself by the mere fact that it relates to a – largely irrelevant – public “interest”, the second one is illegitimate not only because it discriminates against foreign litigants, but also – and more fundamentally – because any taking into account of likely outcomes (even in an effort to ensure “substantive” fairness) is inappropriate in the context of a *forum non conveniens* inquiry.

1. Reduction of courts’ caseloads

Courts in the United States and the United Kingdom have dismissed cases on the grounds that they are overburdened. Significantly, the first public interest factor referred to by the U.S. Supreme Court in Gilbert consists of “[a]dministrative difficulties [which] follow for courts when litigation is piled up in congested centers instead of being handled at its origin.”\(^{59}\) In the context of the widely debated Bhopal disaster litigation, a New York District Court judge observed that his court sat in “one of the busiest districts in the country” and that he saw “no reason why this Court, with its heavy burdens and responsibilities, should be burdened with cases like these.”\(^{60}\) In *MacShannon*, the English House of Lords dismissed a case on *forum non conveniens* grounds, relying, *inter alia*, on “the strain that would be put on England’s resources if large numbers of… personal injury cases came to be tried in England.”\(^{61}\)

A number of writers also consider that this “docket congestion” argument is appropriate. In what constitutes probably the first scholarly discussion of *forum non conveniens*, Paxton Blair observes that “the relief of calendar congestion in the trial courts” is a serious issue and that “an… effective method of dealing with the problem lies in the wider dissemination of the doctrine… of *forum non conveniens*”.\(^{62}\) In a more recent contribution, Alexander Reus discusses “crowded dockets” as a reason underlying recourse to *forum non conveniens*, a justification that he implicitly considers as valid.\(^{63}\)

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\(^{59}\) *Gilbert, supra* note…, at 509.


\(^{61}\) *MacShannon, supra* note…, at 795.


\(^{63}\) Reus, *supra* note 4, at 471.
Such decisions and views are inappropriate since, as I have explained, the taking into account of public interests for the purposes of *forum non conveniens* analysis is wrong. It is, to some extent, less problematic in a purely domestic context, which writers such as Blair probably focus on. In fact, domestic *forum non conveniens* constitutes a means to “transfer” a case from one domestic court to another, *inter alia* in order to achieve a reasonably balanced geographical allocation of cases. In the international context, however, it is inappropriate to speak of a “transfer” since it is uncertain whether the plaintiff will at all file a new claim and whether, in the affirmative, the alternative forum will exercise jurisdiction. Also, it would be inappropriate for the courts of country A unilaterally to decide issues of allocation of cases at the international level.

2. Protection of the interests of domestic litigants

Before going into details, it is necessary to understand how the application of *forum non conveniens* can result in a preferred treatment of domestic parties (and thus discrimination against foreign parties). The American experience provides a useful illustration. In the United States, as far as so-called “foreign cases”\(^ {64}\) are concerned, courts are more likely to dismiss claims brought by foreign plaintiffs (against U.S. defendants) than claims filed by domestic plaintiffs (against foreign defendants). In other words, in comparable cases, American plaintiffs will more often have access to American courts than their foreign counterparts.

The idea that more extensive access to U.S. courts constitutes preferential treatment is based on the assumption that, for plaintiffs, it is advantageous to litigate in American courts. Although such a view may not be unproblematic, it is not wrong that the procedural rules in force in the United States offer plaintiffs several comparative advantages.\(^ {65}\) Those notably relate to the access to legal representation (contingency fees), the process of obtaining relevant evidence (discovery), alleged pro-plaintiff bias (jury trials), and the possibility of more substantial damages awards (notably due to the availability of punitive damages).

If American courts are well aware of the discriminatory nature of many of their *forum non conveniens* decisions, they do not generally acknowledge that this preferential treatment of

\(^{64}\) The term “foreign case” is often used to describe cases that involve claims brought by foreign plaintiffs against American defendants in relation to incidents that have occurred abroad. Technically, it is inappropriate to speak of “foreign” cases since any case that bears a connection to more than one country is an “international” case. In reality, the term “foreign case” (or “foreign suit”) constitutes a rhetorical tool used to legitimate the idea that such cases are more appropriately tried abroad. See Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT’L ECO. L. 141 (1998), at 142 (noting that the doctrine of *forum non conveniens* seeks to protect American multinational corporations from “the burdens of defending foreign suits in the United States”) (emphasis added). See also Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT’L L. J. 501 (1993), at 525 (arguing that “litigation by foreign plaintiffs of claims arising abroad should not be brought in United States courts”).

domestic parties constitutes an actual rationale for those decisions. In fact, their rhetoric habitually emphasizes different justifications or objectives. In *Piper Aircraft Co. v. Reyno*, for example, the U.S. Supreme Court held that “a foreign plaintiff’s choice [of a U.S. forum] deserves less deference [than an American plaintiff’s choice of the same forum]” because it is less reasonable to assume that the foreign plaintiff’s choice is “convenient”. In reality, this is not only a bad, but even a completely distorted *forum non conveniens* argument. In fact, as I have shown, the “convenience” or rather appropriateness of a forum is established on the basis of how well it ensures efficiency and fairness. In particular, a forum’s appropriateness depends on whether it protects defendants from abusive forum selection, i.e. on whether it ensures that the forum chosen by the plaintiff is convenient for the *defendant*. The Piper Court’s holding implies, illogically, that *forum non conveniens* is concerned with a forum’s convenience for the *plaintiff*.

In addition to the idea that a foreign plaintiff’s choice of a U.S. forum deserves “less deference”, American courts, when dismissing cases brought by foreign plaintiffs, also put forward considerations of “anti-chauvinism” and “comity”. In *Bhopal*, where a number of Indian plaintiffs filed cases against a U.S. corporation in connection with the explosion of a chemical plant in Bhopal, India (which were consolidated in the Southern District of New York), the District Court judge considered that it would be “sadly paternalistic” and a form of “imperialism” to retain jurisdiction.

3. The pursuit of ideals of substantive fairness

The preferential treatment of domestic litigants in connection with the application of *forum non conveniens* (as reflected notably in *Piper* and *Bhopal*) relies on a comparative examination of likely outcomes in the home and the alternative forum. Such comparison of likely outcomes may also be performed on a non-discriminatory basis. In fact, a court may choose to inquire whether, as a general matter, dismissal on *forum non conveniens* grounds would serve the interests of “substantive” justice (i.e. the fairness of the actual outcome), irrespectively of the nationality, domicile or residence of the parties involved.

The courts of several countries take into account such general considerations of substantive fairness. In the UK, for example, the House of Lords has held that a *forum non conveniens* dismissal “must not deprive the plaintiff of a legitimate personal or juridical advantage”. In a

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67 *Id.* at 255-256.
69 *Id.* at 867.
more recent decision, the same Court has emphasized that, before dismissing a case on *forum non conveniens* grounds, it is necessary to ensure that “the plaintiff will obtain justice in the foreign jurisdiction.”71 In the United States, such considerations may not play a central role, but they are nonetheless part of the *forum non conveniens* inquiry. In *Piper*, the Court opined that “[t]he possibility of a change in substantive law [and thus a possible change of the outcome] ordinarily should not be given conclusive or even substantial weight”.72 However, the Court also held that, “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all… the district court may conclude that dismissal would not be in the interests of justice.”73

This taking into account of the interests of substantive fairness is wrong because the pursuit of such fairness does not constitute a legitimate objective of jurisdictional rules, including the doctrine of *forum non conveniens*. Professor Kegel has demonstrated that, in the area of the conflict of laws, considerations of substantive fairness should not have any impact on the determination of the applicable law. He has shown that the purpose of the conflict of laws is to determine the “spatially” most appropriate, and not the substantively “best”, law and that, therefore, conflict of laws justice prevails over material justice.74

There is no doubt that Professor Kegel’s observation can be applied, by analogy, to jurisdictional rules. Those rules, like any rules of law, necessarily pursue ideals of justice (or fairness). However, they do not aim to ensure “material” or “substantive” justice, i.e. the fairness of the way in which a particular substantive law question is solved (in simple terms: the fairness of the outcome). In fact, jurisdictional rules do not themselves provide answers to any substantive legal issues; they merely determine which courts should provide those answers. Hence, the fairness of jurisdictional rules relates to their ability to designate the “spatially” or “geographically” most appropriate courts (and not those that will eventually render the substantively fairest decision) in light of various factors that connect a particular dispute to one or several countries.

Therefore, if the legal system of country A considers it appropriate (or “fair”) for a specific international dispute to be heard by the courts of country B, then the legal system of country A should necessarily acknowledge that any outcome that results from the exercise of jurisdiction by

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70 MacShannon, *supra* note…, at 812.

71 Lubbe, *supra* note…, at 1554.

72 *Piper*, *supra* note…, at 247.

73 *Id.* at 254. It should be noted that some (state) courts have deviated from the *Piper* holding and taken the view that the application of a less favorable substantive in the alternative forum should be taken into consideration. *See* Holmes v. Syntex Laboratories, Inc., 156 Cal. App. 3d 372, 382 (1984). For commentary, *see* Harry Litman, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CAL. L. REV. 565 (1986).

the courts of country B (and notably from the application of the procedural and conflict of laws
norms in force in country B) must also be considered as appropriate (or “fair”). Hence, adapting
Professor Kegel’s views to the jurisdictional context, it can be said that jurisdictional justice
prevails over (or precedes) material justice.

That jurisdictional justice prevails over material justice is, for practical purposes, best illustrated
by an “extreme” example. X, a resident and national of country A, brings a claim alleging
tortious conduct in country A against Y, another resident and national of country A, before a
court of country B. The court of country B holds that it lacks jurisdiction and thus dismisses the
case. When making such a determination, the court of country B does not inquire whether the
decision that it may render would be substantively fairer than the decision that the competent
court of country A is likely to hand down. This result is “obvious”. However, problems may arise
when the dispute also bears a connection with country B because, in that case, this particular
connection may be misunderstood as legitimating some degree of “interference” with the
resolution of the dispute. That is, of course, wrong. If the connection with country B is
sufficiently strong, than the courts of country B will have jurisdiction. If it is not, then they
should not. In neither case is it necessary or appropriate to examine issues of substantive fairness.

The taking into account of substantive considerations not only exceeds the scope of an
appropriate jurisdictional inquiry, but it is also highly impracticable. If such considerations were,
in fact, relied upon in order to determine issues of jurisdiction, then there would no longer be any
general rules of jurisdiction; each jurisdictional question would be decided on a case-by-case
basis (depending on a comparative analysis of likely outcomes resulting from the exercise of
jurisdiction by various courts potentially having jurisdiction). The relevant analysis would be
excessively burdensome and, moreover, tentative. Also, in the absence of general rules,
jurisdictional rulings would be largely unpredictable.

Unfortunately, the inappropriateness of comparing likely outcomes in the context of jurisdictional
analysis (including forum non conveniens) is not always well understood. It is almost ironic that a
number of authors who have criticized Bhopal do so not because they are opposed to the idea of
outcome-dependent jurisdictional findings, but because they consider that the court did not take
into account the appropriate substantive considerations. Those authors argue that substantive
fairness requires that American multinational companies be tried in the United States for
wrongful conduct abroad because this is ultimately in the interest of American consumers and
public safety, the basic assumption being that, if tried abroad, those companies may “escape
liability”. However, in reality, such outcome-dependent jurisdictional determinations are
inappropriate and the reliance on “public” interests in specific outcomes is particularly unhelpful.

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75 See, e.g., Lear, supra note…, at 590 (mentioning “significant U.S. interests in deterrence” in relation to foreign
injury claims brought by foreign plaintiffs in the American courts) and at 601 (arguing that “protecting multinational
defendants imperils the safety of American residents”). See also Stephen J. Darmody, An Economic Approach to
II. The inability of the doctrine of *forum non conveniens* to achieve its legitimate objectives

A. Difficulty to translate the objectives of the doctrine of *forum non conveniens* into a workable rule

Several of the actual difficulties arising in the context of the application of the doctrine of *forum non conveniens* are due to the fact that its objectives are not clearly spelled out (and that some objectives pursued, as I have shown, are wrong ones). However, even if the doctrine only pursued legitimate objectives, it would still be difficult to formulate a workable rule or “test”. In fact, assuming that appropriate criteria can be established, it is difficult to provide clear guidance as to how these criteria should be applied in practice. Also, the *forum non conveniens* test supposes agreement on a particular threshold of appropriateness (for the alternative forum) or inappropriateness (for the chosen forum). The determination of such threshold poses considerable problems.

1. Difficulties arising in the application of the relevant criteria for a *forum non conveniens* test

As I have explained, *forum non conveniens* may legitimately pursue objectives of efficiency and equal convenience of the parties (i.e. protection of defendants from abusive forum selection). While the former can be achieved by taking into account factors such as the localization of evidence (documentary evidence, witnesses), the law governing the merits (to some extent), and, more generally, the “close connection” of the facts underlying the dispute with a particular forum, the latter necessarily focuses on the residence/domicile of the parties, specifically in relation to the localization of the forum.

Courts in countries such as the United Kingdom, the United States, and Canada recognize the meaningfulness of these criteria. Both English and American courts expressly recognize the relevance of the availability of witnesses (and more generally of proof). The importance of the applicable substantive law has been acknowledged by English and Canadian courts. The more general idea that a “close connection” should exist with the forum is expressly relied upon in all these countries. English and Canadian courts also clearly affirm the relevance of the

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76 See *Spiliada*, supra note…, at 478 (holding that “the court must look at… the availability of witnesses”); *Gilbert, supra* note…, at 508 (observing that []important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses”).

77 *Spiliada*, at 478 (stating that courts must take into account “the law governing the relevant transaction”); *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, No C982737 (B.C. Nov. 25, 1998) (Can.).
localization of the parties’ respective residences and places of business. US courts also consider, for better or worse, issues of enforceability of the judgment.

While the determination of appropriate criteria is rather uncontroversial, their application in practice poses two types of problems. First of all, the relevant inquiries may be excessively time consuming and costly since it will frequently be necessary to examine merit-related issues. For instance, in order to evaluate whether specific individuals can be considered as material witnesses, courts not only have to determine whether those individuals are in a position to testify with regard to particular facts, but they also have to identify what the relevant facts are. Similarly, the determination of the applicable substantive law may be a difficult and time-consuming process.

The application of the criterion of “enforceability” (expressly recognized in the United States), in addition to involving a complex and lengthy examination, may ultimately be largely unreliable in light of the difficulty to assess enforceability at the jurisdictional stage. In fact, in the event that the chosen forum is not the defendant’s home forum, an appreciation of the likelihood of enforcement of a prospective decision requires, first of all, that potential enforcement fora be determined. It also supposes an analysis of the procedural and substantive rules governing enforcement of foreign judgments in those jurisdictions and, most importantly, of the grounds upon which such enforcement may be denied. Lastly, it may also necessitate an early assessment of factors (notably linked to the substance of the decision likely to be rendered) which may constitute such grounds for denial of enforcement.

The second difficulty regarding the application of forum non conveniens criteria relates to the practical necessity of solving situations where different criteria suggest different appropriate fora. In fact, it frequently happens that the criteria pertaining to efficiency and those pertaining to fairness (in the sense of equal convenience) lead to different results. The former may, for example, indicate that the most appropriate forum would be in country A, while the latter leads to the conclusion that litigation in country A would be unfair to the defendant. Such “conflicts” may also occur within a single category of criteria. For example, as far as the determination of the most efficient forum is concerned, the applicable substantive law may be the law of country A (where the damage occurred), while all material witnesses may be located in country B.

78 Brand, supra note…, at 473, citing Beaumont (mentioning the “geographical place with which the dispute is closely connected” as a relevant factor); Westec, supra note 77 (holding that one factor to be considered is “the jurisdiction where the cause of action arose and where the damage was suffered”).

79 Spiliada, supra note…, at 478 (noting that courts must examine “the places where the parties reside or carry on business”); Westec, supra note…, (a court must consider “the parties’ residences and places of business”).

80 Gilbert, supra note…, at 508.
In such situations, it is necessary to determine the respective weight of the basic objectives of efficiency and fairness, as well as of the individual factors that are taken into account. Such determinations are not easy. For example, while there may be reasons to argue that efficiency should be considered as the primary purpose of *forum non conveniens*, there are also factors that suggest that its basic aim should be the prevention of abusive forum selection by plaintiffs. Also, as far as individual criteria are concerned, it is virtually impossible to rationalize the determination of their respective significance.

2. Difficulty to determine an adequate threshold

A workable doctrine of *forum non conveniens* not only requires a determination of objectives, applicable criteria, and respective weight of those criteria (to the extent possible), but also the establishment of a specific “threshold”. In fact, the doctrine of *forum non conveniens* is based on a comparison of the relative suitability of the chosen and the alternative forum or fora. It is thus necessary to determine the specific “degree” of superior appropriateness of the relevant alternative forum that will justify a *forum non conveniens* dismissal. This is the question of the applicable threshold.

Determining an appropriate threshold is not an easy task. Essentially, one may distinguish two possible approaches. Under the first one, a court will dismiss a case under the doctrine of *forum non conveniens* whenever a more appropriate forum exists – even if that forum is only “marginally” more appropriate. Such an approach is not helpful. In fact, under such a test, *forum non conveniens* no longer constitutes a corrective mechanism applying in those exceptional circumstances in which jurisdictional rules produce inadequate results. On the contrary, it may lead to dismissals in a large number, or even the majority, of cases. Indeed, it must be remembered that, in international cases, plaintiffs almost always benefit from the availability of two or several competent fora. Since, by implication, all of these have – as a matter of principle – jurisdiction, plaintiffs have no incentive to attempt to determine the “most appropriate” one from a *forum non conveniens* perspective. Their forum selection will, therefore, frequently not meet this standard.

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81 See, as far as the American experience is concerned, Davies, *supra* note 6, at 365 (observing that “[t]he Gilbert court gave very little indication of how the factors are to be used or, in particular, how they are to be weighed against one another.”).

82 It is true that some approaches (especially the approach followed in Australia) focus on the “inappropriateness” of the forum selected by the plaintiff, rather than on a comparison with other potential fora. However, ultimately, the home forum’s inappropriateness necessarily is a “relative” inappropriateness (relative to other fora).

83 As is well known, those considerations are largely absent from a plaintiff’s forum selection, which generally reflects the pursuit of procedural and substantive advantages.
Under the second approach, courts apply a “higher” or “more demanding” threshold, i.e. they will only dismiss cases on *forum non conveniens* grounds if the superior appropriateness of the alternative forum is “qualified”. Courts may, for example, require that the alternative forum be “significantly” or “considerably” more appropriate than the chosen forum. The determination of such a more demanding threshold is not unproblematic. As the examples of the UK, Hong Kong, and the U.S. illustrate, courts are frequently reluctant to explain what particular threshold they are applying. Also, even though they formally adopt a more demanding threshold, they tend to fall back on the more appropriate forum test applicable under the first approach.

In the United Kingdom, a *forum non conveniens* dismissal requires that the alternative forum be “clearly more appropriate for the trial of the action”\(^84\) or “clearly or distinctly more appropriate than the English forum” (emphasis added).\(^85\) Courts in Hong Kong also follow this approach and have held that forum non conveniens may only apply if “there is another available forum which is clearly or distinctly more appropriate than Hong Kong” (emphasis added).\(^86\) In the United States, the applicable threshold is reflected in the courts’ principled deference to a plaintiff’s choice of forum. In *Gilbert*, the Court observed that, “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”\(^87\) In *Koster* (decided the same day as *Gilbert*), the Court similarly emphasized the deference that a plaintiff’s choice of forum deserves, stating that “there is a good reason why it [the dispute] should be tried in the plaintiff’s home forum if that has been his choice.”\(^88\)

Both the requirement that the alternative forum be “clearly” more appropriate and the idea of deference to a plaintiff’s forum selection seem to suggest that, in the jurisdictions concerned, *forum non conveniens* dismissals require more than mere superior appropriateness of the alternative forum. However, in reality, it is impossible to verify what thresholds courts actually apply. In fact, when courts conclude that the alternative forum is “clearly” more appropriate, they do not generally explain what is to be understood by “clearly”. Actually, the clearly more appropriate forum test could even be viewed as falling under the first approach. The adverb “clearly” could, in fact, be understood as a mere evidentiary requirement (i.e. it must be “clear” that the alternative forum is more appropriate), rather than an expression of a higher threshold of appropriateness. Significantly, a number of authors are of the view that the courts in countries such as the UK, Hong Kong, and the U.S. can precisely be considered as adopting a “most

\(^{84}\) Spiliada, *supra* note…, at 478.

\(^{85}\) Lubbe, *supra* note…, at 1554.

\(^{86}\) Ahiguna Meranti (Cargo Owners) v. Adhiguna Harapan (Owners) [1987] HKLR 904, 907. See also Svantesson, *supra* note 4, at 396-401.

\(^{87}\) Gilbert, *supra* note…, at 508.

suitable forum” test,\textsuperscript{89} which has repeatedly been criticized for being too “liberal”\textsuperscript{90} and, more particularly, for lending itself to “exploitation by multinational companies seeking to limit or escape liability”.\textsuperscript{91}

Unlike their peers in other \textit{forum non conveniens} jurisdictions, Australian courts apply a more restrictive test under which a dismissal requires that the plaintiff’s initial choice of forum be “vexatious” or “oppressive” to the defendant.\textsuperscript{92} A number of writers consider that this test, which represents the historical approach in all \textit{forum non conveniens} countries (including the U.S. and the UK), is the better one since it permits to avoid excessive recourse to this doctrine, notably in the form of discriminatory practices.\textsuperscript{93}

The lack of agreement on a single approach to the question of the threshold of \textit{forum non conveniens} illustrates the problematic nature of this aspect. In particular, it highlights the tension between the systematic pursuit of efficiency and fairness, on the one hand, and the exceptional nature of the \textit{forum non conveniens} rule, on the other. It also reflects the difficulty to weigh expected benefits of \textit{forum non conveniens} dismissals (notably increased efficiency) against the “cost” of such decisions (loss of time and money invested in the dismissed lawsuit).

\textbf{B. Inherent risk of inconsistent application and abuses}

As a doctrine based on judicial discretion, \textit{forum non conveniens} suffers from the defects typically associated with such discretion. Specifically, \textit{forum non conveniens} carries an inherent risk of judicial errors, leading to overall inconsistency in the application of the doctrine. In addition, \textit{forum non conveniens} can be easily “abused”, i.e. courts can resort to this rule for illegitimate purposes.

1. Potential for inconsistent application of the doctrine

\textsuperscript{89} As far as the United States is concerned, see Duval-Major, \textit{supra} note…, at 679 (stating that “forum non conveniens is no longer an inquiry into whether a particular defendant suffers true inconvenience, but rather whether a more “suitable” forum exists”). As far as the UK is concerned, see, \textit{e.g.}, Brand, \textit{supra} note…, at 474 (concluding that, “as the twenty-first century begins, the English law of \textit{forum non conveniens} applies a most appropriate forum concept”). \textit{See also} Gray, \textit{supra} note…, at 233 (referring to the “more appropriate forum standard” as “the broad approach taken in the UK and US”).

\textsuperscript{90} \textit{See} Duval-Major, \textit{supra} note…, at 680 (arguing that courts should “steer away from the inclination to impose a most-suitable-forum standard.”).

\textsuperscript{91} Prince, \textit{supra} note…, at 597.

\textsuperscript{92} Voth, \textit{supra} note 38.

\textsuperscript{93} Prince, \textit{supra} note…, at 597.
If there is one point that even the most fervent supporters of the doctrine of *forum non conveniens* concede, it is its inconsistent or incoherent application. Numerous writers, especially in the United States, have emphasized this particular shortcoming of *forum non conveniens*. Professor Davies, for example, notes that “there is considerable variation in practice among the federal courts”,\(^94\) while Professor Robertson observes that “[t]he federal courts reach diametrically opposing conclusions in virtually identical forum non conveniens cases.”\(^95\) Professor Stein refers to American *forum non conveniens* “case law” as “a crazy quilt of ad hoc, capricious, and inconsistent decisions.”\(^96\)

Illustrative examples of the inconsistent application of the doctrine of *forum non conveniens* abound. As far as air crash litigation is concerned, some cases brought against American manufacturers (by similarly composed groups of plaintiffs) in connection with foreign accidents have been dismissed,\(^97\) while others have not.\(^98\) As regards a series of cases arising from injuries allegedly caused by a drug manufactured by an American pharmaceutical company, the said company successfully moved for a *forum non conveniens* dismissal vis-à-vis English plaintiffs,\(^99\) while its request was denied in relation to a claim brought by Canadian plaintiffs.\(^100\)

Some of the inconsistencies in the application of *forum non conveniens* can certainly be cured. In fact, the lack of uniformity of *forum non conveniens* decisions is partly due to a poor understanding of the objectives of this doctrine and of the relevant criteria. Thus, fuller awareness of the function performed by *forum non conveniens* (to ensure efficiency and protect defendants from abusive forum selection) and of the irrelevance of so-called “public” interests could help to improve the overall coherence of *forum non convenience* rulings.

Other inconsistencies are more difficult to avoid. In fact, those that are linked to divergent appreciations of the relative weight of the various *forum non conveniens* factors and those that stem from varying interpretations of the relevant threshold are, to a large extent, inevitable. As I

\(^94\) Davies, *supra* note…, at 378.

\(^95\) Robertson, *supra* note…, at 362.


\(^98\) See Macedo v. Boeing Co., 693 F.2d 683, 691 (7th Cir. 1982).


have shown, the uncertainty surrounding these aspects of forum non conveniens is an inherent theoretical weakness of this doctrine. In addition, inconsistencies often flow from arbitrary or abusive decisions, i.e. from situations in which individual courts use their discretion to achieve purposes other than those that forum non conveniens should aim to achieve.

2. The risk of judicial pursuit of illegitimate objectives

As I have shown supra, a number of courts resort to the doctrine of forum non conveniens with a view to achieving illegitimate objectives and, most significantly, in order to protect the interests of domestic litigants. As I have explained, U.S. courts are applying discriminatory standards whereby a foreign plaintiff’s choice of a U.S. forum is less likely to be upheld than a domestic plaintiff’s selection of such a forum. When dismissing claims brought by foreign plaintiffs, as I have shown, American courts also rely on questionable considerations of comity and anti-chauvinism.

That, as a matter of positive law, forum non conveniens is frequently used for such improper purposes has been pointed out by a number of writers. Commenting on the consequences of the U.S. Supreme Court’s decision in Piper, Professor Lear observes that “[f]oreign plaintiffs [injured abroad] find their claims almost uniformly dismissed.”\textsuperscript{101} Zhenjie argues that “US courts have in fact been manipulating the doctrine [of forum non conveniens] to dismiss the actions which they ‘do not want brought’ in them”.\textsuperscript{102} Even authors who are essentially in favor of forum non conveniens have acknowledged that, in the United States, “the doctrine is being applied in what can best be described as a discriminatory manner.”\textsuperscript{103}

While it would be wrong to contend that forum non conveniens is necessarily applied in a discriminatory manner, it cannot be denied that the possibility of discriminatory decisions is difficult to avoid. In fact, the discretion that courts are afforded under the forum non conveniens doctrine allows them to conceal the true rationale underlying their decisions. Moreover, the relative vagueness of the applicable test makes it difficult to determine whether a particular decision is “right” or “wrong”.

As is well known, judicial discretion is a double-edged sword. In an ideal world, it serves to correct the occasional injustice caused by the application of statutory norms. In the real world, it frequently has the opposite result, i.e. it leads to an overall decrease in decisional fairness. In the specific context of international litigation, abuses of judicial discretion (notably for discriminatory purposes) are likely to occur since courts may perceive public interests to be a

\textsuperscript{101} Lear, supra note 6, at 561.

\textsuperscript{102} Zhenjie, supra note…, at 159.

\textsuperscript{103} Svantesson, supra note 4, at 412.
stake. Under the *forum non conveniens* doctrine, as I have shown, courts may (wrongly) regard the reduction of their caseloads or the protection of domestic litigants (and especially defendants) to be valid concerns.

III. The lack of necessity of a doctrine of *forum non conveniens*: the ability of jurisdictional rules to prevent *forum non conveniens* problems

In the preceding Section I have shown that the doctrine of *forum non conveniens*, even if properly designed, ultimately fails to achieve the objectives assigned to it. In this Section, I explain that, in addition, *forum non conveniens* is in any event an unnecessary doctrine. Indeed, even if the doctrine of *forum non conveniens* were able adequately to promote efficiency and protection of defendants from abusive forum selection, it would still not be necessary since those objectives can be attained more effectively through the adoption of appropriate (non-discretionary) jurisdictional rules.

First of all, inasmuch as *forum non conveniens* constitutes a tool to correct the detrimental effects of rules of exorbitant jurisdiction, the abrogation of such rules (which, as I shall show, do not have any particular usefulness) removes the perceived need to resort to *forum non conveniens*. Second, more generally, jurisdictional rules are able to achieve *forum non conveniens* objectives; if properly drafted, they produce adequate results even in “unusual” situations.

A. Lack of usefulness of a doctrine of *forum non conveniens* in the absence of rules of exorbitant jurisdiction

As I have shown in Section I, the legitimate objectives of the doctrine of *forum non conveniens* comprise efficiency and the protection of defendants from abusive forum selection (a particular aspect of fairness). In many cases, the perceived need to resort to *forum non conveniens* will stem from the fact that the relevant court’s jurisdiction is based on a rule of exorbitant jurisdiction. In fact, such jurisdictional rules are particularly “liberal” and do not necessarily require a close connection with the facts of the dispute or any of the parties. It can thus be said that, to a large extent, *forum non conveniens* constitutes a response to the inadequacies of such jurisdictional rules. And, importantly, in the absence of rules of exorbitant jurisdiction, *forum non conveniens* would only have a very limited role to play.

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104 See supra, Part I.C.

105 See Barrett, supra note..., at 386. See also Ehrenzweig, *supra* note..., at 312.

106 See Zhenjie, *supra* note..., at 165 (arguing that, in order to “completely solve the problem of inconvenient forum, the best and only way is the claim international jurisdiction reasonably and abolish the exorbitant jurisdictional bases... If those excessive jurisdictional rules are no longer in use, the number of inconvenient fora will substantially be reduced.”)
Broadly speaking, there are two categories of exorbitant rules. First, there are norms that create “jurisdictional privileges” for domestic parties. For example, Articles 14 and 15 of the French Civil Code provide, in essence, that French nationals have a general right of access to French courts, whether as plaintiffs or defendants. These provisions are notably problematic because they allocate jurisdiction to the plaintiff’s home courts (Article 14), a rule that is generally regarded as exorbitant. They reflect the – outdated – idea that a State has a legitimate interest in having all disputes involving its nationals tried by its domestic courts.

The second category of exorbitant rules consists of those that arguably assist plaintiffs in their efforts to obtain and enforce a judgment. In this respect, several authors have argued that such rules aim to “catch” “elusive” defendants, i.e. defendants who remove their assets (or themselves) from their home jurisdictions in order to escape or limit their liability. Rules that presumably allow such defendants to be “caught” notably include service jurisdiction and attachment jurisdiction. Under the former, the courts of country A will have jurisdiction over a defendant if that defendant has been served with the notice of claim in country A. Under the latter, the courts of country B will have jurisdiction if the defendant owns assets in country B and if those assets have been attached.

Rules of exorbitant jurisdiction pose evident problems in terms of efficiency and fairness (understood as equal convenience). In fact, allocating jurisdiction to the plaintiff’s home courts (which notably results from the application of Article 14 of the French Civil Code) may prove particularly inconvenient for the defendant. Also, rules establishing jurisdiction on the basis of personal service do not ensure any meaningful link between the dispute and the relevant court (in those cases in which the defendant’s presence is merely temporary). Similarly, attachment jurisdiction does not either imply the existence of a significant connection with the facts or the parties. The solution to all these problems – at least in some countries – arguably lies in the doctrine of forum non conveniens.

In reality, however, the solution must be found elsewhere. The adequate approach consists not of an a posteriori correction of the unwanted effects of exorbitant rules, but in the abolishment of

107 Article 14 provides that “[a]n alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he may be called before the courts of France for obligations contracted by him in a foreign country towards French persons.” According to Article 15, “French persons may be called before a court of France for obligations contracted by them in a foreign country, even with an alien.”

108 See Barrett, supra note..., at 380 (explaining that common law courts have adopted “venue rules designed primarily to assist the plaintiff in his pursuit of an elusive defendant”).

109 Id.

110 Juenger, supra note..., at 554-557 (discussing service and attachment jurisdiction as rules enabling litigants to “forum shop”).
such rules. In fact, rules of exorbitant jurisdiction are neither necessary, nor useful. Contrary to a widespread assumption, there is no genuine need to ensure that “elusive” defendants are brought to justice by means of jurisdictional rules based on attachment or service. If a defendant removes assets from his home jurisdiction, the plaintiff may bring his claim in another jurisdiction (where assets owned by the defendant are located). If he does not, he may still be able to enforce the judgment in those foreign countries where assets are situated. If a defendant “removes” himself, it is similarly possible to sue him in the jurisdiction where he has established his new domicile or residence. Alternatively, the plaintiff may seek enforcement abroad of any default judgment rendered in the defendant’s original home jurisdiction.

Also, rules of exorbitant jurisdiction are based on obsolete theoretical foundations. In fact, they reflect so-called “power” theories of jurisdiction according to which a court’s jurisdiction will depend on whether it is “in a position to exercise power over the defendant or his property.” 111 Such views have been steadily eroded in recent years, and approaches emphasizing “convenience, fairness, and justice” 112 as theoretical foundations of jurisdictional principles have gained increasing recognition. This is in line with the idea (which I have exposed in Section I) that issues of international jurisdiction do not, generally speaking, involve public interests.

The fact that rules of exorbitant jurisdiction are inappropriate and unnecessary receives increasing recognition from domestic courts and legislators – interestingly, though, not the corresponding idea that the forum non conveniens doctrine is similarly flawed. In the United States, for example, Shaffer v. Heitner outlaws quasi in rem or “attachment” jurisdiction, 113 if the constitutional minimum contacts requirement established in International Shoe Co. v. Washington 114 is not met. According to some authors, the same decision also puts an end to service jurisdiction (again absent minimum contacts). 115

An even better example of rejection of rules of exorbitant jurisdiction is provided by EC Council Regulation 44/2001. Under the Regulation, as I have mentioned supra, the basic principle is that a defendant should be brought before the courts of his domicile. 116 In addition, the Regulation provides for rules of special jurisdiction for various specific types of disputes. It provides, for

111 Von Mehren, supra note…, at 23-24.

112 Id. at 25.

113 433 U.S. 186 (1977), at 207, 212.

114 326 U.S. 310 (1946). Under the minimum contacts test, 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.

115 See Juenger, supra note…, at 557 (stating that “Justice Marshall’s opinion in Shaffer also suggests that jurisdiction premised solely on personal service within the state is no longer proper.”)

116 See Article 2(1) of the Regulation.
instance, that contract claims may be brought before the courts “for the place of performance of
the obligation in question”\(^\text{117}\) and that tort claims may be heard by the courts “for the place
where the harmful event occurred or may occur”.\(^\text{118}\) Hence, plaintiffs may choose either between the
defendant’s home courts or a court that has jurisdiction under the applicable special rule.

Importantly, the Regulation does not recognize attachment or service as valid bases for
jurisdiction. In fact, the Regulation provides that jurisdiction may not be based on any ground not
expressly recognized in the Regulation itself.\(^\text{119}\) Significantly, the Regulation excludes reliance
on domestic jurisdictional rules that are incompatible with the legal framework it establishes,\(^\text{120}\)
i.e. on rules of exorbitant jurisdiction. Articles 14 and 15 of the French CPC are amongst those
excluded rules.\(^\text{121}\)

Since the Regulation neither contains nor tolerates rules of exorbitant jurisdiction, there is no
need for a \textit{forum non conveniens} doctrine as a tool to avoid the detrimental effects of those rules.
Not only does the Regulation not provide for \textit{forum non conveniens}, but also, and more
importantly, the ECJ has expressly held that courts may not resort to this doctrine in cases falling
within the scope of the Regulation. Practically speaking, the question of the compatibility of
\textit{forum non conveniens} with the Regulation only arises (or arose) in relation to the UK (the UK
being the only European country to apply this doctrine). As early as 1992, the English Court of
Appeal recognized that \textit{forum non conveniens} was not available under the Convention (which
was later adopted as Regulation 44/2001), reserving however the possibility to apply this
principle when the alternative forum is not located in a contracting state.\(^\text{122}\) In its 2005 decision in
\textit{Owusu v. Jackson},\(^\text{123}\) however, the ECJ decided that, even where the alternative forum is situated
in a third country, \textit{forum non conveniens} may not be applied.

**B. The ability of jurisdictional rules to achieve \textit{forum non conveniens} objectives**

Proponents of the doctrine of \textit{forum non conveniens} may argue that the correction of the adverse
impact of rules of exorbitant jurisdiction constitutes only one aspect of the functions performed

\(^{\text{117}}\) See Article 5(1)(a) of the Regulation.

\(^{\text{118}}\) See Article 5(3) of the Regulation.

\(^{\text{119}}\) Article 3(1) of the Regulation provides that “[p]ersons domiciled in a Member State may be sued in the courts of
another Member State only by virtue of the rules set out in [the Regulation]”.

\(^{\text{120}}\) See Article 3(2) of the Regulation.

\(^{\text{121}}\) See Annex I.

\(^{\text{122}}\) See \textit{In re Harrods (Buenos Aires) Ltd.}, 1992 Ch. 72, 73.

\(^{\text{123}}\) Case C-281/02. For commentary on this decision, \textit{see, e.g.}, Cuniberti, \textit{supra} note 3.
by this doctrine and that issues of inefficiency and abusive forum selection may also arise as a result of the application of “ordinary” (i.e. non-exorbitant) jurisdictional rules. While such views are not wrong as such, they do not necessarily imply, however, that forum non conveniens should constitute the preferred tool to ensure efficiency and fairness. In fact, jurisdictional rules necessarily pursue identical objectives and, when properly drafted, those rules are capable of achieving comparable, if not better, results – without any of the defects of the discretionary forum non conveniens doctrine.

1. The pursuit of forum non conveniens objectives by jurisdictional rules

As I have already explained, forum non conveniens constitutes a jurisdictional doctrine or principle, and it thus pursues the same objectives that jurisdictional rules seek to attain. It would, therefore, be erroneous to maintain that there is an inherent “conflict” between rules of jurisdiction and forum non conveniens, or that they play different roles. Similarly, it would be wrong to argue that jurisdictional rules do not take into account all the interests that forum non conveniens aims to preserve. As I have shown, both jurisdictional rules and forum non conveniens are (or should be) primarily concerned with the private interests of the litigants in efficiency and fairness.

Using EC Council Regulation 44/2001 as an example, I have already highlighted that jurisdictional rules are, to a significant extent, based on considerations of efficiency. Rules allocating jurisdiction to the courts of the place of performance (as far as contract claims are concerned)\(^{124}\) and the courts of the place where the damage occurred (as far as tort claims are concerned)\(^ {125}\) are illustrative. The pursuit of fairness (and, more particularly, the need to protect defendants from abusive forum selection) is reflected in the rule conferring jurisdiction upon the courts of the defendant’s domicile or residence.\(^{126}\)

There is, of course, no “perfect” court in which an international dispute can be heard, as there is – in reality – no “natural” forum. A perfect forum only exists for domestic disputes since there can be no doubt that those are best administered in the courts of the relevant country. In international cases, no forum will be perfectly convenient for both (or all) parties, and at least one party is likely to have to cope with the burden of litigating abroad. Similarly, the pursuit of efficiency may lead to allocating jurisdiction to a court that may be inconvenient to the defendant, the plaintiff, or both. Conversely, where the protection of the defendant is prioritized, this may adversely impact the efficiency of the chosen forum.

\(^{124}\) See supra note 40.

\(^{125}\) See supra note 41.

\(^{126}\) See supra note 42.
The inexistence of what could be considered a “perfect” forum explains why virtually all countries recognize alternative jurisdictional bases. In the context of Regulation 44/2001, this leads to the adoption of alternative rules of jurisdiction (i.e. a single set of norms provides for the jurisdiction of the courts of different countries for one and the same dispute). Under the Regulation, as I have shown, those alternative rules strike a reasonable balance between the interests of efficiency and fairness.\textsuperscript{127}

Importantly, the absence of a “perfect” or “natural” forum also puts the \textit{forum non conveniens} doctrine into perspective. In fact, courts applying \textit{forum non conveniens}, especially in the UK, rely on the idea of the “natural forum” and will dismiss a case if they identify an alternative forum as the “natural” one.\textsuperscript{128} For example, many courts have a tendency to consider that the courts of the place where the tortious conduct occurred are the natural fora, which leads to dismissals in cases where the lawsuit is brought in the defendant’s home courts. However, as I have shown, considerations of efficiency are not the only ones that condition the appropriateness of a forum, and the most “efficient” forum is not \textit{ipso facto} the “natural” one.

2. The ability of jurisdictional rules to ensure efficiency and fairness

Advocates of the doctrine of \textit{forum non conveniens} maintain that, insofar as they are general and abstract, jurisdictional rules are unable to take into account the specific characteristics of individual cases and that those rules, therefore, sometimes produce inadequate results. In essence, they argue that it is necessary to make certain “adjustments” to jurisdictional rules at the judicial level to correct those inappropriate results. However, in reality, there is no such necessity.

First of all, it must be noted that, in the absence of rules of exorbitant jurisdiction, the actual potential for inadequate outcomes is limited. In fact, the non-exorbitant jurisdictional bases habitually relied upon only rarely fail to achieve their purposes. This is so because the assumptions underlying the adoption of specific criteria (e.g. residence of the defendant, place where the harmful event occurred etc.) almost always prove accurate. In fact, litigating in the defendant’s home forum will virtually always prevent any unfair treatment of the defendant, while litigating in the courts of the place where the harmful event occurred will generally be most efficient. Jurisdictional issues are thus adequately solved by abstract jurisdictional rules, i.e. rules that do not require the specific facts of individual cases to be taken into account.

\textsuperscript{127} While the basic rule providing for the jurisdiction of the defendant’s home courts ensures protection of the defendant from abusive forum selection, the rules of “special” jurisdiction promote efficiency.

\textsuperscript{128} Spiliada Mar. Corp. v. Cansulex Ltd., 1 A.C. 460, 478 (H.L. 1987) (the House of Lords acknowledges, however, that “not every case presents a ‘natural forum’”).
Second, to the extent required, it is possible to draft jurisdictional rules that take into account “unusual” or exceptional circumstances (which would arguably justify recourse to the doctrine of forum non conveniens). As another writer has rightly pointed out, the courts of the place where the harmful event occurred, for example, may not always be the most efficient fora. As that author has shown, this may notably be the case when, while travelling in Arizona, one German tourist suffers physical injury due to the negligence of another German tourist, and all other participants (and thus material witnesses) are also German nationals permanently residing in Germany. The courts of the place where the harmful event occurred (the Arizona courts) may indeed not be the most efficient ones.

However, such rather unusual circumstances may be taken into account in the drafting of jurisdictional rules – making forum non conveniens unnecessary. The rule providing for the jurisdiction of the courts where the harmful event occurred, for example, could be amended to include an exception in the event in which plaintiff and defendant are domiciled in the same foreign country (with the effect that the courts of that foreign country have jurisdiction). If deemed necessary, one could restrict the scope of the exception, for example by requiring that, prima facie, most of the relevant evidence be located in the same foreign country.

It is, of course, debatable whether such a removal of the plaintiff’s right to bring proceedings in the courts where the harmful event occurred is always appropriate. To some extent, it may not be necessary to include such derogatory rules applying in exceptional circumstances since the plaintiff will frequently not have any incentive to select a forum that is inconvenient for him. In the German tourists’ hypothetical, an Arizona court would most likely be inconvenient for the German plaintiff. One – and probably the main – incentive for the said plaintiff to bring his case in an Arizona court would be the possibility to be awarded punitive damages (since such damages are not available in Germany). However, considering that a punitive damages award would not be enforced in Germany, the German plaintiff has no reasonable incentive to initiate proceedings in Arizona.

Third, assuming, for the sake of argument, that neither the ability of jurisdictional rules to take into consideration exceptional circumstances, nor the plaintiff’s incentive to choose an efficient forum entirely preclude the possibility of inappropriate results, it would nevertheless be wrong to argue that judicial discretion by means of forum non conveniens would be the solution. As I have shown in Section II, any forum non conveniens test is inherently vague, and the appropriateness of a given forum difficult to establish. If one adds the courts’ natural tendency to pursue

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129 See Stückelberg, supra note…, at 949.

130 Id.

illegitimate objectives, it is unreasonable to argue that forum non conveniens constitutes an appropriate or useful legal doctrine.

Conclusion

Forum non conveniens constitutes an illegitimate and unhelpful legal doctrine. Not only is it frequently applied in an incoherent, arbitrary, and discriminatory manner, but, more fundamentally, it is also inherently unable to live up to its expectations. As I have shown, even an ideally designed theory of forum non conveniens ultimately fails to achieve the basic objectives it should pursue (efficiency and protection of defendants from abusive forum selection). Moreover, even if forum non conveniens were able adequately to fulfill the functions assigned to it, it would still be preferable, and more efficient, to solve the forum non conveniens “problems” by suitable jurisdictional rules, notably by abolishing rules of exorbitant jurisdiction.

Supporters of the forum non conveniens doctrine invoke the necessity for courts to have a certain amount of flexibility when determining jurisdiction. As I have shown, no such flexibility is needed. American lawyers and scholars may also argue that forum non conveniens is necessary in light of the particular attractiveness of American courts and the resulting fact that those courts are “flooded” with cases that could also be brought before other courts. However, as long as jurisdictional requirements are met, it is inappropriate to “close the door” to foreign litigants on the grounds of the alleged necessities of a more balanced international distribution of cases. Not only is the validity of this concern (and, at the very least, its significance relative to the parties’ private interests) debatable, but issues of case allocation at the international level are in any event more appropriately tackled at that same level.

In the UK, as I have discussed, under the influence of EC Council Regulation 44/2001, the doctrine of forum non conveniens only survives in those rare cases that are not governed by the Regulation. In Australia, courts apply a restrictive forum non conveniens test, and the application of this doctrine is thus rather exceptional. In Canada, and even more so in the United States, the doctrine is very much alive and frequently applied. However, as I have shown in this article, forum non conveniens is uncalled for and should thus be abolished. While, admittedly, it is unlikely that such a drastic solution should be followed by the legislators of the jurisdictions concerned (to the extent this is at all possible), this would nevertheless be in the interest of the efficiency and fairness of international litigation.

With this article, I hope to have created, or contributed to, increased awareness of the fact that there is no need for a doctrine of forum non conveniens. In particular, there is no (whether legitimate or not) proven public interest in a forum non conveniens doctrine that would be protective of domestic defendants. Also, significantly, discriminatory application of this doctrine
may back-fire and lead to the adoption of retaliatory legislation,\textsuperscript{132} as well as to problems in the area of international judicial cooperation.

If \textit{forum non conveniens} cannot, for practical or political reasons, be abolished, it should at least be applied in accordance with a coherent theory. Under such a theory, as I have shown, \textit{forum non conveniens} should (i) be concerned primarily, or exclusively, with the litigants’ private interests, (ii) not be applied in a discriminatory fashion (in the U.S., \textit{Piper} should notably be overruled), (iii) not pursue ideals of substantive justice (i.e. not be based on a comparison of likely outcomes), and (iv) follow a more demanding threshold than the one contained in the most appropriate forum test.