

FORUM SHOPPING IN THE GUISE OF CHOICE OF FORUM: MYTH OR STRATEGY?

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ABSTRACT

Forum Shopping in layman language can be understood to be a concept wherein the plaintiff or litigant files or approaches that court with his case where he believes to be granted an award in his favour. It is the aim of such a party to file a claim in any such court which isn't accessible to the other party. There are many jurisdictions across the globe which are known to be *plaintiff-friendly* and as a natural consequence they tend to attract humongous amounts of suits irrespective of the fact that they do not even have minimalistic nexus between the legal matter and the jurisdiction in which the suit is filed. If we talk about *choice of forum clauses* they can be found in many international contracts. It is nothing but the provisions within the contract that mostly indicates us towards the fact as to where the dispute shall be brought in case a dispute arises. Generally the employers and the employees enter into such kind of agreements it can be a non-competition agreement, confidentiality agreements *etcetera* which contain the choice of forum clauses. Now the conflict arises when it becomes difficult to ascertain whether the parties are trying to unduly benefit themselves while robbing the other party a fair opportunity and intentionally planting hindrances in their path by opting for a favourable jurisdiction or they are genuinely opting towards a certain jurisdiction owing to other material concerns.

The author in this paper initially aims at focusing on the concepts of forum shopping and choice of forum and explore about their origin and then further go on to discussing about the conceptual matrix in detail and eventually analyse the conundrum of both the concepts created because of litigants choosing the court of their choice for extracting undue benefits out of it under the pretext of choice of forum.

Keywords: Forum shopping, choice of forum clauses, international contracts, jurisdiction.

INTRODUCTION

Forum shopping and Choice of forum are two very important conceptual aspects of Private International Law. In a world where individuals and companies enter into transactions and business dealings where under they do not consider distance or time as a factor of hindrance. However, they as a cautionary measure do take into consideration other factors such as the legal framework, economic status etcetera of the foreign country into consideration. This practice has been taken up a level by the parties owing to the harmonisation of the process whereby they now have started filing cases at such jurisdictions where the parties feel they might benefit off the legislative framework in that particular jurisdiction. Therefore, forum shopping as a practice is discouraged in the International society in toto.

DECODING THE HISTORICAL BACKGROUND

Trade activities have taken a huge leap universally especially during the 19th and 20th century. The output of development of this trade amidst the countries is the strengthening of an international arena while harmonising various branches of law.¹ As an obvious consequence all countries have their set of rules and regulations governing a particular subject matter and for this very basic reason there exist plethora of differences amidst the laws of two foreign countries i.e. conflict of laws.² Therefore, it becomes important to understand that how the nations have achieved harmony between them or this way or another it would have continued to cause misery in the relation of the foreign countries and parties fighting over the law that'd govern them as an obvious consequence the trade between the countries would come thrashing down and so would the economies.

Tracing back the steps of *conflict of laws* instantaneously points us towards the Roman laws wherein the parties belonging to different jurisdictional boundaries would present in front of a *praetor perigrinus* in Rome to plead their respective cases. Now the *praetor perigrinus* would dependent on his prerogative put into application such a law that happens to be native

¹RamazanZorlu, *How Conflict of Laws Rules have developed, and may continue to develop, to accommodate the requirements of International Commerce*,

http://www.akellawfirm.com/yayinlar/HOW_CONFLICT_OF_LAWS_RULES_HAVE_DEVELOPED_AND_MAY_CONTINUE_TO_DEVELOP_TO_ACCOMMODATE_THE_REQUIREMENTS_OF_INTERNATIONAL_COMMERCE.pdf

² J.G. Collier, *CONFLICT OF LAWS*, 3rd Edit. Cambridge University Press, 2001, page 378.

to both the parties involved rather than plainly putting into application the law of Rome that might be of comfort to the *praetor* but of difficulty to the foreign parties involved.³

In the English countries the first judicial precedent wherein the concept of conflict of laws was ever discussed was in the case of *Robinson v. Blant*⁴. The Court hereunder held that the law governing the contract entered between parties would be as judged or deciphered as per the intentions of the parties. Lord Mansfield had held that the general rule in application i.e. the law regulating the contract should be decided in accordance with the place where the action is brought. However, this rule is also not absolute so the exception drawn out here is that wherever the parties at the time of making of the contract had a view per say of having a different kingdom.⁵ There have been incidences of case laws in the past wherein the foreign courts have gone ahead to the extent of acknowledging foreign laws or foreign judicial pronouncements. For instance, in the case of *Godard v. Gray*⁶ the Court held the judgement of the foreign Court on applying their domestic law without considering the English conflict of laws. Then in the case of *Zeiss Stiftung v. Rayner Keeler*⁷ the Court of England had gone ahead and recognised the proceedings and foreign judgement.

THEORIES THAT HAVE PAVED THE PATH FOR UNDERSTANDING THE DEVELOPMENT OF CONFLICT OF LAWS

- A. **Theory of vested rights:** Mr. Hubler has been considered as the propounder of this theory. However, the credit for fine tuning the theory has been given to Dicey who belonged to England and Beale who belonged to the United States.⁸ This theory stems from the concept of territoriality. In accordance to this theory a judge has not been bestowed with such powers wherein he can neither directly recognise foreign judgements nor enforce any such foreign judgement. Any such judgement needs to be recognised by its own territorial law⁹ hence; it is the territorial law that must govern any or every case arising within its jurisdiction. Hubler was a firm believer of the fact that the *case laws wherein the law of a particular state has been put into application that same law shall have force at all other places as well*. This simply goes to say that

³Private International Law Lecture One: Introduction to Private International Law, https://www.academia.edu/6766305/PRIVATE_INTERNATIONAL_LAW_LLECTURE_ONE_Introduction_to_Private_International_Law

⁴Robinson v. Blant [1760] 1 Wm BL 234.

⁵ Dicey & Morris, THE CONFLICT OF LAWS, Sweet & Maxwell, 13th Ed., 2000, Chap. 1-015.

⁶Godard v. Gray [1870] L.R. 6 Q.B.139.

⁷Zeiss Stiftung v. Rayner Keeler [1967] 1 A. C. 853.

⁸ PM North JJ Fawcett, PRIVATE INTERNATIONAL LAW, Oxford University Press, 13th Ed., page 20.

⁹RamazanZorlu, *supra* note 1.

the vested right that has been obtained from a country shall be liable to be protected and enforced duly in all other countries as well.

- B. **Theory of local law:** The brain behind this theory was Mr. Walter Wheeler Cook. Mr. Cook was of the opinion that this theory says that the domestic or local Court of a country recognises only the locally vested rights in the parties and not the foreign law into their practice. Having said that the domestic law shall not only be the only law taken into account, the foreign laws shall also be considered.¹⁰
- C. **Theory of comity:** Mr. Story J. propounded this theory during the years of 1779-1845. This has basically been derived from the Huber's theory on comity. According to this doctrine it can be understood that *it is a vital activity to have the foreign element of law to be recognised and applied. As the contrary of the said would constitute as causing disregard to the sovereignty of the said foreign court of law. Hence, displaying lack of comity towards them*¹¹.

The concept of private international law can be said to be a juxtaposition of the concepts and phrases; private law and international law. So, it can be understood as a concept which is voluntarily invoked by the parties or states representing an individual. As **Cheshire** defines Private International Law to be: *“That part of the legal framework where the law comes into action once the issue before the court of law is affecting certain facts, events or a transaction for that matter which is in turn connected to the foreign system of law so as to necessitate the recourse to that system.”*¹²The rationale behind origin of Private International Law owes its existence to the various separate numbers of municipal systems of law.¹³ The national legal structure of countries nationwide reflects their history, socio-cultural values etcetera. *For instance*, The Canadian legal framework is a *bi-jural* one i.e. it is a combination of the common law system along with the Civil law system. Whereas, the United States of America has a common law system that is characterized through the independence of judiciary in opining their decisions.¹⁴ Private International Law is a holistic subject matter which entails the below mentioned and many more in its role:

¹⁰ PM North JJ, *supra* note 9, at 24.

¹¹ J.G. Collier, *supra* note 2, at 379.

¹²Kahn-Freund, O. *The International and Comparative Law Quarterly*, vol. 6, no. 4, 1957, pp. 698–704, *JSTOR*, www.jstor.org/stable/755255.

¹³Cheshire, North and Fawcett, *Private International Law* p.4 (Oxford University Press 14th Edition 2008).

¹⁴SucharitaManjunath, *Private International Law*, 2015,

https://www.lawctopus.com/academike/private-international-law/#_edn3

- *Choice of jurisdiction:* Under what circumstances would the court of law have jurisdiction over those cases which have involvement of foreign elements?
- *Choice of law:* Application of which law shall be assumed in coming to a conclusion on these cases i.e. either the foreign law or the municipal law.
- What would be the circumstances that would require for a Court to acknowledge and order for the execution of a foreign courts decree?¹⁵

The penultimate aim of the author is to point out the discrepancies in the practices off lately being adopted by the parties where under they under the pretext of choice of clause are going ahead with the practice of forum shopping. The author in the coming chapters shall dove in explaining the concepts in depth and then highlighting the potential concerns of the phenomenon of forum shopping amongst the international tribunals.

UNDERSTANDING THE CONCEPTUAL FUNCTIONING OF CHOICE OF FORUM AND FORUM SHOPPING

WHAT IS UNDERSTOOD BY FORUM SHOPPING?

The **Black's Law Dictionary** goes ahead to define the concept of forum shopping as a *situation wherein a party makes an attempt to gets his matter tries before a particularly chosen jurisdiction or court where in his belief he shall receive a decision that favours his odds at winning or simply getting a verdict in his favour.* Forum Shopping is majorly the call of the plaintiff for filing a suit in a particular Court of law over the other obvious potential choice.¹⁶ Forum shopping occurs in a domestic environment majorly when the plaintiff makes a choice between two or more courts within a single country's legal system.¹⁷ However, transnational forum shopping displays a choice made by the plaintiff amidst the court of law of more than one country.¹⁸

Essentially the concept of forum shopping is dependent upon two factors: *firstly*, when there inevitably exist more than one court to choose between from, who potentially are available

¹⁵SucharitaManjunath, *supra* note 14.

¹⁶Friedrich K.Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REv. 553, 554 (1989).

¹⁷Christopher A. Whytock, *The Evolving Forum Shopping System*, Cornell Law Review, Issue 3 March 2011, Volume 96,

<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3195&context=clr>

¹⁸Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment*, Issue, 37 J. LEGAL STUD. 339, 368-74 (2008).

for resolving the plaintiffs claim (this is also known as a concurrent jurisdiction)¹⁹ and *second*, the legal systems between which the plaintiff is to choose from must be heterogeneous in nature.²⁰ Heterogeneity is a vital element because had all legal systems around the globe been similar then the plaintiff would have next to negligible of a reason to prefer one legal system over another. This is because of the concept of heterogeneity the legal system enables the plaintiff to bend the odds into their favour and win in a particular legal framework over the other legal systems. Hence, there exists the reason to forum shop.

As a consequence of a party opting for forum shopping before all, the application of the Private International Law of that state is set into motion.²¹ The plaintiff by opting to choose for the jurisdiction is also enabled to choose as per his convenience the set of rules and regulation of Private International Law those shall be applicable and then what domestic-substantive law shall be put into application.²²

HOW IS FORUM SHOPPING CREATING PROBLEMS?

The most generic question that arises in the mind of a common man is: So how is a lawyer choosing the best possible jurisdiction offering the best available remedy an err on the part of the lawyer? However, Forum shopping isn't that simple of an issue because it involves *manipulation* of the outcome. The point of concern is that of the overlapping legal systems and the forum shopping across the domestic courts has seen an upwards inclination even though it dates back to a long time.²³ Having said that, it is apposite to mention here that the problem of forum shopping is rather relatively new in the International legal system. This is because of the very reason that for the longest time in most cases there was no global institution for the parties to turn to.²⁴ It is a recent development that there has been an

¹⁹ Andrew S. Bell, *Forum Shopping and Venue in Transnational Litigation*, page 5 (2003).

²⁰ *Id.* at 25.

²¹ Franco Ferrari, '*Forum Shopping Despite International Uniform Contract Law Conventions*' (2002) 51.3 *International and Comparative Law Quarterly* 689, II.A. and II.B.

²² Nita Ghei and Francesco Parisi, '*Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*' (2004) 25 *Cardozo Law Review* 1367, 1390; Franco Ferrari, '*International Sales Law and Inevitability of Forum Shopping: A Comment on Tribunale Di Rimini, 26 November 2002*' (2004) 23 *The Journal of Law and Commerce* 169, 180.

²³ Andrew Bill, *Forum Shopping and venture transnational litigation*, 11-12, 25 (2003); Arthur Taylor Von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices in Common- and Civil-Law Systems*, 295 *RECUEIL DES COURS* 9, 34-37, 179 (2002).

²⁴ Gerald Fitzmaurice, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* 437 (1986).

increase in the number of International tribunal's altogether. Hence, giving rise to the multiple, overlapping of the courts.²⁵

Forum shopping creates moral hazards and also incentives for abuse.²⁶ In the opinion of some other academicians it is believed that forum shopping leads to or creates the opportunity of the following scenarios:

- Increases the burden over a particular legal jurisdiction;
- Especially for the defendant a lot of legal uncertainty is created;
- Puts a false phenomenon of equity of legal systems in the minds of parties which is a cause for undermining the authoritative value of substantive state law;
- An additional issue for litigation is added in the list which is why the litigation cost naturally goes up.²⁷

Inconsistent set of rulings seem to be the main cause behind the factor of increase in forum shopping:

- The broader system of functioning of the tribunals can be threatening for the legitimacy and stability of the inconsistent rulings;
- Owing to the fact that there is no hierarchy of the courts the inconsistency in the decisions can be a reason for keeping the dispute unresolved in mid-air.²⁸

An important thing to note here is that even if the case is that no system exists then also the concern regarding stability or legitimacy of the system does not arise and the concern of the parties regarding the inconsistent rulings and of not getting the dispute settled eventually would subsist.²⁹

Two other very important elements to be considered here are regarding the issue of sequential or overlapping of proceedings that take place before the Hon'ble International Tribunals. These key elements often as an obvious consequence cause the International Tribunal to hear such matter that they either have already decided upon or might decide

²⁵ Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, (2003).

²⁶ Guido Rennert, *Is Elimination of Forum Shopping by Means of International Uniform Law and Impossible Mission*, 2 MACQUARIE J. Bus. L. 119 (2005).

²⁷ Nita Ghei, *supra* note 22.

²⁸ Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, Cornell International Law Journal, Volume 42, Issue 1 Winter 2009, <https://www.ilsa.org/Jessup/Jessup2020/Basic%20Materials/Pauwelyn%20%26%20Salles%2C%2042%20Cornell%20Intl%20L.J.%2077.pdf>

²⁹ Gilles Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID REV. FOREIGN INVESTMENT L.J. 381, 419-20 (2006).

upon in the future.³⁰ The *first* element here to be discussed is the International Tribunals who as a customary principle function on the basis of party consent. On the contrary in the domestic law arena the parties function on the basis of statutory authority or the constitutional authority. Herein, if any party bestows the power of deciding the dispute at hand in the hands of an International Tribunal then it becomes an obligatory duty of the forum to decide upon such a matter even though there exists an alternative remedy in the form of a second tribunal that is competent of hearing a sequential proceeding as presented in front of them. Now going by what the parties have asked the forum to do the Tribunal becomes bounded to decide upon the case no matter what.³¹

Second of all comes the concept wherein all the International Tribunals are such that they are limited by their own respective governing instruments and ironically there exists no particular statute that bestows the powers in the authorities with respect to each other. It can be said that there per say exists no top-down division of labour amongst the international tribunals. It is important to highlight here that while practicing in the International Tribunals unlike the practice of Domestic Tribunals³² it specifically is not dependent upon the geographical factors instead is dependent upon the treaty that is being enforced *for instance* the NAFTA panel would agree upon NAFTA and similarly the WTO panels would agree for enforcement of the WTO agreement only. So, basically in a treaty based jurisdiction, the International Tribunals decide upon varied issues of law even though there exists overlapping of jurisdictions. *For instance*, the International Court of Justice sits on a matter to decide the territorial delimitation and the World Trade Organisation decides upon all the matters where the subject matter is trade. However, even if there exists a situation wherein different international tribunals have to decide upon one same issue of law then they are covering or dealing with that issue of law from completely different angles. *For instance*, the concept of National Treatment is seen and treated differently under GATT and NAFTA Chapter 11. Therefore, it can be said that the concept of overlapping jurisdictions amidst the International Tribunals is lesser of a concern relatively, than the overlapping jurisdictions in the domestic arena.³³

³⁰JoostPauwelyn, *supra* note 28.

³¹Contra Nikolaos Lavranos, *The MOX Plant and the IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, 19 LEIDEN J. INT'L L. 223 (2006).

³²Ralf Michaels, *Territorial Jurisdiction After Territoriality*, in GLOBALISATION AND JURISDICTION 105 (PIET JAN SLOT & MIELLE BULTERMAN eds., 2004).

³³JoostPauwelyn, *supra* note 28.

WHAT IS UNDERSTOOD BY CHOICE OF FORUM?

In an ongoing set of proceedings the parties involved in a dispute decide upon litigation in order to decide the location as to where they shall be litigating.³⁴ A choice of forum clause does nothing but enables the parties to the contract to be able to choose the court or the jurisdiction that will be bestowed with the power through the virtue of the Contract to preside over the dispute if any pertaining to the contract.³⁵ Therefore, in the simplest of the terms forum selection provision enables the parties to designate more than one court to adjudicate upon the dispute amongst the parties.

By now we have come to understand that whenever a dispute arises amongst two parties who have entered into a contract, the parties are inclined towards approaching such a forum which has been bestowed with the relevant power to decide upon such a conflict that involves the governing law of the contract. A dispute is most likely to also arise under a circumstance wherein the parties to the contract consent fully submit to a law that shall govern their contract. Now this gives rise to the question whether any national court would permit the parties to opt for foreign law irrespective of existence of a foreign jurisdiction agreement.³⁶ Or it can be said that when there are two companies involved in a dispute then the question that surfaces the most is as to which province's laws would govern the dispute.³⁷ The *governing law* clause within the contract bestows the parties to a commercial contract to choose what the *proper law of the contract* shall be through which the parties intend for the contract to be governed.³⁸ The courts usually while deciphering the appropriate law and forum in absence of the governing law and the choice of forum dive into the deep seated intention of the parties found through the terms of the agreement and/or the relevant surrounding circumstances. Therefore, it is vital for the parties to clearly and expressly mention their choice of forum within the agreement.

Usually there are two doctrines that are behind the selection of a forum for litigation. These doctrines are *lis pendens* and *forum non conveniens*. The doctrine of *lis pendens* basically means a situation where in a suit is pending in another set of jurisdiction. On the other hand the doctrine of *forum non conveniens* can be understood as the discretionary powers of the court

³⁴Spiliada Maritime Corp v Cansulex Ltd [1986] 3 WLR 972; Lord Templeman, 975.

³⁵Cynthia L. Elderkin & Julia S. Shin Doi, BEHIND AND BEYOND BOILERPLATE: DRAFTING COMMERCIAL AGREEMENTS, 3d ed (Toronto: Carswell, 2011) at 81. [Elderkin and Doi].

³⁶Kavya Jha, *Validity of Choice of Law and Forum Selection Clause by Parties to a contract*, 9th February 2020, <http://rsr.in/2020/02/09/validity-of-choice-of-law-and-forum-selection-clause-by-parties-to-a-contract/>

³⁷Larissa Roche, *Governing Law and Choice of Forum Clauses*, 15th February 2016, <https://www.mondaq.com/canada/contracts-and-commercial-law/466048/governing-law-and-choice-of-forum-clauses>

³⁸Cynthia L. Elderkin, *supra* note 35.

for declining the jurisdiction of the court at the convenience of the parties and believes that justice would be met if it is tried at another forum.³⁹

For instance in India, as per Section 9 of Cpc⁴⁰ all the Courts within India have the jurisdictional power for trying all the suits which are of civil nature unless the jurisdiction has been expressly barred or impliedly barred. Then Section 20⁴¹ goes ahead to highlight that a suit can be instituted at a place either where the defendant ordinarily resides or where he carries on his business or at the place where the cause of action arose. Having said that, Section 20 also clarifies that more than one court have been granted with the jurisdictional powers to try a dispute. It can also be the scenario wherein the cause of action arises at multiple jurisdictions then in such a scenario multiple courts would have jurisdiction over it.⁴² Factors that need to be taken into account by the parties before making the choice of forum they should consider the following aspects once:⁴³

- **Home Court Advantage:** The number of benefits entailed with litigating in domestic or home bound forum are enormous. So basically home court is that place where the advocates are well versed with the domestic law and courts of particular jurisdiction. Another angle of this advantage is awareness of the fact that what court would decide upon which issue in their favour. This usually stems from understanding the tendency of a particular judge who is overseeing the proceedings or it can also be dependent upon the kind of jury that would be selected in that particular forum (*for instance*, deciding whether the forum is pro-business, pro-plaintiff or pro-environment etc.)
- **Geographical ease:** It is vital to place emphasis at the early stages itself and consider the geographical location and convenience of the chosen jurisdiction.
- **Additional factors:** another factor that should be considered is of analysing whether the federal or state courts would be better able to handle the dispute at hand in the most favourable manner and if the so chosen jurisdiction should be mandatory or permissive.

³⁹LakshmanMarasinghe, International Litigation: Choice of Forum, 23 U.W. Austl. L. REV. 264 (1993).

⁴⁰Code of Civil Procedure Code, 1908, Section 9.

⁴¹Code of Civil Procedure Code, 1908, Section 20.

⁴²NiveditaShenoy&SharanyaShivarama, *Exclusive Jurisdiction Clauses in a Contract: Key Issues*, 11th September, 2019,

<https://www.barandbench.com/columns/exclusive-jurisdiction-clauses-contract-key-issues>

⁴³ Marks & Evans, PC, *Choice of Law and Forum Selection Provisions*,

<http://www.leaselawyer.com/cases-and-articles/choice-of-law-and-forum-selection-provisions/>

Forum Selection is either exclusive or non-exclusive in nature. *Exclusive* forum selection usually is also known as a *mandatory* forum selection clause. It requires all the issues of litigation to be managed in a particular forum. Those individuals or corporate entities benefit out of this provision who want the flow of things to be predictable and uniform in nature when they have a variety of parties in different states. On the other hand a *non-exclusive* jurisdiction also called as *permissive* forum selection clause. This helps in fetching better terms of flexibility as compared to the exclusive jurisdiction and may end up providing the client with manifold advantages. A non-exclusive clause is beneficial in those cases wherein it is difficult to acknowledge prior as to where the best sited place would be to litigate a particular dispute.⁴⁴

CHALLENGES POSED BY CHOICE OF FORUM AND FORUM SHOPPING IN THE INTERNATIONAL ARENA

CHALLENGES POSED BY FORUM SHOPPING

Forum shopping is such a concept that has attracted brutal analysis in great length and depth and that too from stakeholders at all levels including the judges. The arguendo that arises here is that whenever there arises a chance of even one case of forum shopping then the biggest challenge and the act that is condemned is the fact where the party feels like *controlling* the result of the dispute at hand by hand picking the forum of their choice hence, posing moral hazards for abuse. An essential subject of law, which has pulled unforgiving analysis with respect to the maltreatment of forum shopping opening, is the Tort law. In this particular field of law the party choosing for this practice especially feel drawn towards the United States of America for the very reason that a higher level of compensation can be achieved there. Master Denning in my view very aptly summarises here that: “*as a moth is attracted to the light similarly a disputant feels attracted towards the United States of America.*”⁴⁵The reason as to why a plaintiff would try to get the case tried at a place other than his home state is the underlying question of forum shopping under Private International Law. In the case of *In Re Ski Train Fire in Kaprun case*⁴⁶ the petitioners in this case had had sued the Austrian, German and American ventures within a government area court in New York. Now if we go into looking of the intention of the parties who chose this course of action of suing in the city

⁴⁴*Id.*

⁴⁵Dignath Raj Sehgal, *Forum Shopping: Challenges in Private International Law*, March 16 2020, <https://blog.ipleaders.in/forum-shopping-challenges-private-international-law/>

⁴⁶*In Re Ski Train Fire in Kaprun*, Austria on Nov. 11, 2000, 198 F. Supp. 2d 420 (S.D.N.Y. 2002).

of New York in a case which involved multiple countries comes down to the following aspects:

- The size in normal days of awarding damages;
- Aiming to foresee the potential outcomes of insight of impacting these variables through the procedural methodologies;
- The liberty provided by the forum through their obligations rules.⁴⁷

Now this is accompanied with the predominant presumption assumed globally that the undeniable and the undoubted expectation of the court of laws applying their own substantive laws. It is the underlying principle of Private International law to accommodate the criteria of deciding the law that needs to be put into application. Therefore, the plaintiff looks at two aspects before indulging into forum shopping i.e. *whether that particular court has jurisdiction and if it is in actuality applying the most ideal law.*⁴⁸

There are a few reasons as to why forum shopping as a concept is condemned throughout as a practice:

- *Firstly* and most importantly the reason that forum shopping consciously and unconsciously tries to undermine the authority that substantive law withholds;
- *Second*, the burden on certain number of courts gets multiplied by manifolds and makes pointless costs as prosecutors seek after the most ideal, as opposed to the least difficult or nearest, gathering;
- *Thirdly*, forum shopping as a practice is capable of making a negative mainstream observation regarding the authoritative value of the legitimate framework of the jurisdiction of the Courts.⁴⁹

FUNDAMENTAL ISSUES OF FORUM SHOPPING/ DRAWBACKS OF THE CONCEPT

Forum shopping is not a concept that is illegal per say however it has since forever been a condemnable act. The Plaintiff would recover the totally inadequate damages in its natural forum or it completely would be unable of enforcing the judgement obtained here; then in such a case it is extremely difficult to blame the plaintiff or the other concerned party to go to an alien forum instead.⁵⁰ To simplify it further the compensation that plaintiff would be receiving in an English jurisdiction court that might be regarded as an adequate compensation

⁴⁷Dignath Raj Sehgal, *supra* note 45.

⁴⁸Dignath Raj Sehgal, *supra* note 45.

⁴⁹*Id.*

⁵⁰*An In-Depth Analysis of Forum Shopping in India*, December 27, 2017
<https://www.vakilno1.com/legal-news/depth-analysis-forum-shopping-india.html>

within the natural forum but he finds that he can recover a greater amount of compensation at some other jurisdiction then it is adequate reasoning enough for the plaintiff to desire to go for the jurisdiction offering the maximum damages.⁵¹

Forum shopping raises the below mentioned fundamental issues towards the stakeholders and other policies:

- **Interest of the Public:** Lord Keith in *Mac Shannon* has said that there is no interest of the public in putting a pause to such actions and hence, the existence of such relevant facts needs to be considered while taking into consideration the merits of the matter at hand. Now, irrespective of the strong denial from the side of the judiciary there have been number of arguments seen in various jurisdictions like that of England in favour of public interest when the natural forum happens to be elsewhere.⁵²
- **Unfairness caused towards the defendant:** This malpractice increases the burden on the shoulders of the defendant manifold in case a trial has to take place in an alien forum. In one of many cases i.e. in an extreme of a situation this can be the case wherein a defendant has so much difficulty in presenting and defending the case in a foreign jurisdiction that he is disabled from even putting up an adequate defence. The defendant has a loss-loss situation from all angles wherein in case the plaintiff wins the actions whose probability is higher then in such a case the plaintiff earns such an advantage that he wouldn't have at any other given jurisdiction. *For instance*, a suit filed for enhancement or higher assessment of damages received. Therefore, the defendant can witness a double fold disadvantage wherein he would have to defend himself at a foreign forum and especially it acting as a disadvantaged forum for him. *So, the concept of forum shopping acts as an evil.* Even though in India there is no exclusive definition of the concept per say however, the judiciary has indulged into a lot of interpretation of the same.⁵³ The Indian judiciary has all throughout condemned the practice of forum shopping be it domestic or global forum shopping. In the case of *M/s Chetak Construction Ltd. v. Om Prakash &Ors.*⁵⁴ the Supreme Court was for the first time seen condemning the practice of forum shopping carried on by the parties. The Court in this case has said that, *any such attempts made by the parties of going to*

⁵¹Dignath Raj Sehgal, *supra* note 45.

⁵²Dignath Raj Sehgal, *supra* note 45.

⁵³*Supra* note 50.

⁵⁴*M/s Chetak Construction Ltd. v. Om Prakash &Ors.*1998(4) SCC 577.

the lengths of forum shopping cannot be allowed. And that such a practice must be suppressed with a heavy hand. Certain set of factors that have come around as the major reasons of litigants being encouraged to opt for forum shopping have been discussed by the Supreme Court in the case of *Union of India &Ors. v. Cipla Ltd. &Ors.*⁵⁵The Apex Court had decoded the below mentioned to be the various kinds of categories wherein forum shopping is taking place:⁵⁶

- In a situation wherein the litigant approaches a court seeking a certain relief however on achieving so he approaches another court with an aim of getting the same relief;⁵⁷
- Wherein a party specifically created circumstances for the purposes of forum shopping;⁵⁸
- Taking into advantage the difference of stand assumed by two High Courts on the same matter;⁵⁹
- Filing of bail applications before different judges until an order in their favour is not received;⁶⁰
- Under such circumstances wherein the litigant is making such allegations of a perceived conflict of interest against a judge in order to rescue the judge from the proceedings for the very reason that the matter can be transferred to another judge;⁶¹
- Trying to reach out to different court of laws with an aim of seeking a favourable relief by making a minor change in the prayer clause of the petition.⁶²

So, it can be concluded that forum shopping before the international tribunals raises relatively lesser concerns than the domestic jurisdictions mostly because of the fact that there are relatively lesser international courts to begin with. However, this traditional approach holds not much of value in the author's opinion because *status quo* suggests that there is a variety

⁵⁵Union of India &Ors.v. Cipla Ltd. &Ors.[VIII (2016) SLT 114].

⁵⁶*Supra* note 50.

⁵⁷Rajiv Bhatia v. Govt. of NCT of Delhi; (1999)8 SCC 525.

⁵⁸World Tanker Carrier Corporation v. SNP Shipping Services Pvt. Ltd. &Ors.; (1998)5 SCC 310.

⁵⁹Ambica Industries v.Commissioner of Central Excise, (2007) 6 SCC 769.

⁶⁰JagmohanBahl and Another v. State (NCT of Delhi) and Anr., 2014) 16 SCC 501.

⁶¹Supreme Court Advocates on Record Association v. UOI (Recusal Matter), (2016) 5 SCC 808.

⁶²UdyamiEvam Khadi Gramodyog Welfare Sanstha and Another v. State of Uttar Pradesh,(2008)1 SCC 560.

of International courts present globally today.⁶³ The problem of forum shopping has arisen prominently and might continue to arise if the following changes aren't adapted to:⁶⁴

- A shift from specific to general jurisdiction;
- A radical shift of strictly consensual to mandatory/compulsory jurisdiction;
- A shift from regime to system approach;
- A shift from party- focus to legality focus approach.

SOLUTIONS THAT CAN BE DWELLED UPON FOR EVADING THE ARISING PROBLEM OF FORUM SHOPPING:

A. Situations that can be looked for in the Domestic law itself: In a situation wherein *sequential* proceedings are taking place in which one court has already seized of a dispute which another court of law has already decided earlier. In such circumstances the principle of *res judicata* is put into application under both civil and common laws. Second; when the Court finds itself in the situation of parallel proceedings where under Court of one jurisdiction is already looking at a dispute and another court in a different jurisdiction is approached to look at it. Then under such a situation the doctrine of *lis pendens* the principle of combining cases on *related actions*⁶⁵ is put into application by the Civil laws. On the other hand the common law systems put into application the principle of *forum non conveniens* or any such abstention doctrines. Thirdly; in a situation wherein *alternative proceedings* i.e. where one court is asked to decide a dispute over which another court also has jurisdiction but the second court has not yet or never will be seized. Under such circumstances, most of the civil law jurisdictions would not have the doctrine of *forum non conveniens*⁶⁶ and where they find jurisdiction; the civil courts would not normally have the discretion to decline from exercising it-notwithstanding the presence of an alternative forum.⁶⁷

B. Alternatives for an International judge: In such situations of forum shopping where it presents to itself several options which necessarily aren't mutually exclusive shall be open to the International judges. *Firstly*; a more liberal or adventurous judge could go ahead and think out of the box that is to say out of *lex fori* and analyse on the fact

⁶³<https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-courts-and-tribunals/>

⁶⁴Joost Pauwelyn, *supra* note 28.

⁶⁵SGS SocietEG~n&ale de Surveillance S.A. v. Republic of the Philippines, ICSID (W. Bank) Case No.ARB/02/6.

⁶⁶SGS SocietEG~n&ale de Surveillance S.A. vRepublic of Pakistan, ICSID (W. Bank) Case No.ARB/01/13.

⁶⁷Joost Pauwelyn, *supra* note 28.

that whether there exist general principles of law or certain domestic analogies on whom the Court can rely⁶⁸ in order to work out a solution to the problem.⁶⁹ *Second*; the International judge could also expressly limit himself to the rules that are explicitly agreed upon by the parties within the forum that they were operating. *For instance*, a WTO panel would look upon only at the Dispute Settlement Understanding Rules.⁷⁰ *Thirdly*; in a similar situation like that of the earlier option the international judges as per this option also indulge in relying upon only the party agreed solutions however here they would also be looking upon the solutions outside of their forum. In other words the judges could examine whether the parties have consensually agreed upon the forum selection or conflict clauses through an external treaty that has created forum shopping a problem in the first place.⁷¹

WHAT HAPPENS WHEN CHOICE OF FORUM GUISES FORUM SHOPPING?

The desire behind choosing the forum and law governing the contract stems in the brain of the parties because of their want of certainty. Parties wish to know before hand as to where they shall litigate in future in case of a dispute and what law shall be applicable to the same.⁷² In case a forum selection clause is drafted with utmost attention to the minutest of the details then it leaves a little room for error. *For instance, the courts of France shall have exclusive jurisdiction over any and all claims related to the contract, including, without limitation, any statutory or tort claims,” there is little interpretative wiggle room. The parties clearly intended the clause to be mandatory, since they expressly used the term “exclusive.” And they clearly intended for the clause to be construed very broadly to cover all claims, including statutory and tort claims. If a party files suit in New York in contravention of the clause, the court would likely have little difficulty enforcing the clause by dismissing the action.*⁷³

⁶⁸Factory at Chorz6w (F.R.G. v. Pol.), 1927 P.C.IJ.(ser. A) No. 9, at 31 Uuly 26); Gab-ikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.CJ. 7, 76 (Sept. 25).

⁶⁹Panel Report, Mexico- Tax Measures on Soft Drinks and Other Beverages, WT/ DS308/R (Oct. 7, 2005).

⁷⁰Kyung Kwak& Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the World Trade Organization and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 465, 483.

⁷¹Joost Pauwelyn, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?: Questions of Jurisdiction and Merits*, 37 J. WORLD TRADE 997 (2003).

⁷²Tanya J. Monestier, *When Forum Selection Clauses meet Choice of Law Clause*, 69 Am. U. L. Rev. 325 (2019).

<http://www.aulawreview.org/when-forum-selection-clauses-meet-choice-of-law-clauses/>

⁷³*Id.*

It is alleged by many jurists and academicians that not interpreting the forum selection clause in accordance to the parties chosen law then it can lead to encouragement of forum shopping.⁷⁴ To explain it further it can be understood as: where one party is looking for avoiding selection of an exclusive forum selection clause would look for such a forum that interprets such clauses restrictively so that it continues to hear the dispute at hand notwithstanding the forum selection clause. Forum shopping is usually as a practice invoked as a policy rationale for or against a certain position. Forum shopping is governed by plethora of factors and interpretation of choice of forum clause in accordance with the law chosen by the parties is one of those factors.⁷⁵

INCENTIVES TO THE PARTIES TO OPT FOR FORUM SHOPPING

By now it has been made evidently clear that any party opting to forum shop is motivated by its pursuit of specific strategic interests. Having said that the pursuit of these advantages in most chances can turn out to being counter-productive and consequently have undesirable effects. Also, many times the plaintiff can ultimately be deprived of the benefits of the favourable decision which they seek to get the same decision enforced abroad. This is said to complicate the situation and forum shopping here plays a role of a *Damocles sword hanging over the plaintiffs head*.⁷⁶ The Damocles sword thereby creates an incentive for the plaintiff to refrain from obtaining any such result that would end up being grossly unfair in the likely enforcement jurisdiction. Hereby, promoting the plaintiff to choose such a forum that shall also be recognised by the enforcement court.

- A. Incentive to avoid any such outcome that might prove to be of disadvantage at the potential enforcement jurisdictions:** The plaintiff in such conditions mostly opts for a forum that might offer him the most favourable decision and not the one that is the most appropriate one. The plaintiff chooses to sue the defendant not in his home country but in such a country wherein he would be at an advantageous position however ultimately he will have to get it enforced in the defendant's home country only.⁷⁷ In most of the cases the defendant's home jurisdiction is either not bound to cooperate and recognize the decision of other jurisdiction or

⁷⁴Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. Int'l L. & Foreign Aff. 43, 47 (2004).

⁷⁵Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. Rev. 333, 345–46 (2006).

⁷⁶Markus Petsche, *What's wrong with Forum shopping? An attempt to identify and assess the real issues of a controversial practice*, *The International Lawyer*, <https://core.ac.uk/download/pdf/216908585.pdf>

⁷⁷*Id.*

they find such a decision to be against their public policy hence, they decline enforcement of such a decision.⁷⁸ A classic example is that of punitive damages.⁷⁹

B. Incentive to select such a Court which has jurisdiction that is based on International standards: Sometimes the jurisdiction preference is also based on the exorbitant ground of jurisdiction such as the presence of the defendant owned assets⁸⁰ or even the temporary presence of the defendant himself which shall be allowed to be served in the jurisdiction concerned.⁸¹

CONCLUSION

Forum shopping since its inception has been associated with maligned practices. Reflecting upon what the various jurists and academicians have had to say about the concept of forum shopping has also been one of the factors which have made it obtain a negative reputation. However, the foreign plaintiffs need to be estopped from taking advantage of the more favourable procedural and substantive laws in order to be at an advantaged position. It is highly recommended to the Courts that they should not indulge into lightly accusing the lawyers and litigants of employing malafide and abusive litigation tactics when parties indulge in forum shopping. Forum shopping has the capability of indulging abusive litigation practices. However, the idea of bad faith in litigation should be approached towards with *caution in an adversarial system, lest restrictions thwart zealous advocacy and global forum shopping's virtues*.⁸² In the opinion of the author to put a hold to such practices the Courts should put into application doctrines like *forum non conveniens* into lesser usage and instead consider the forum choices of the plaintiffs or later these choices start to reflect egregious forum shopping causes.⁸³ Academicians like Pamela K. Bookman are of the opinion that the concept of global forum shopping is not bad all together instead it has certain attributes

⁷⁸ Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 157- 59 (2001-2002); Council Regulation 44/2001, art. 34(1), 2001 OJ.(L 12) 1 (EC).

⁷⁹Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529, 530 (2010).

⁸⁰Friedrich K Juenger, *Forum Shopping, Domestic and International*, 63 Tu.. L. REV. 553, 553 (1989); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INr'L L.J. 559, 559 (2002).

⁸¹Shaffer v. Heitner, 433 U.S. 186 (1977).

⁸²Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, Notre Dame Law review, Volume 92, Issue 2,

<https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4689&context=ndlr>

⁸³Iragorri v. United Techs.Corp., 274 F.3d 65, 75 (2d Cir. 2001) (en banc).

attached to it which go unappreciated. These attributes such as *forum shopping aiding in protecting parties access to justice, facilitation of law reform and promotion of regulatory enforcement*. So, it is safe to say that forum shopping is in a way inevitable within the international market. This is so because there exists various alternatives at the disposal of the parties to choose between. Such opportunities even though create chances of forum shopping are at the end of the day beneficial for the interests of international litigation as it not only helps strike a balance between the efficiency and fairness but also balances the interests of the plaintiffs and the defendants. The author would like to *conclude* on the note that even though all aspects have a positive and a negative attributes attached to them. But the concept of forum shopping simply displays all negative aspects whenever a party chooses to go down this lane beginning form creating an additional burden on certain courts to creating additional burden on the defendants and increasing the litigation costs for no good reason. The Courts can avoid this as discussed above mostly by acknowledging the parties choice to forum and by cautiously distinguishing between a case of forum choice or forum shopping. In case at any given point in time policies governing the malpractice of forum shopping is introduced at an international platform then in such a case the problems caused by the phenomenon would obviously be kept in mind but also what should be kept in mind would be the magnitude of these problems.

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