'A Good Place to Shop': Choice of Forum and the Conflict of Laws

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Dans cet article, l'auteur réévalue la pratique de la « recherche d'un tribunal favorable », qui a été régulièrement critiquée par les juges anglais et les juges canadiens parce qu'elle constituait un abus de procédures. Les tribunaux anglo-canadiens ont, jusqu'à tout récemment, critiqué les parties dont les choix de ressort semblaient opportunistes. Mais l'auteur soutient que cette attitude découle plus de préjugés que d'un examen raisonné de la pratique de la « recherche d'un tribunal favorable ». Cependant, ces dernières années, les juges du Royaume-Uni ont adopté une approche plus objective de cette pratique et ont conclu qu'elle était en soi moralement neutre et acceptable dans certaines circonstances, pourvu qu'il y ait des restrictions pour prévenir les abus éventuels. La Cour suprême du Canada semble avoir adopté cette nouvelle approche dans plusieurs arrêts récents, mais l'auteur est d'avis que la Cour n'a pas pleinement apprécié le réexamen de cette pratique par les tribunaux anglais, ni les conséquences de certaines de ses propres décisions portant sur la compétence des tribunaux. L'auteur discute ensuite de plusieurs arguments à l'appui du choix opportuniste qui proviennent de la jurisprudence anglaise.

In this article, the author reassesses the practice of forum-shopping, which has been routinely criticized by English and Canadian judges as an abuse of process. Anglo-Canadian courts have, until quite recently, been critical of litigants whose choice of jurisdiction seemed opportunistic, but it is the author's contention that this attitute stems more from prejudice than from a reasoned consideration of the practice of forum-shopping more objectively, concluding that it is morally neutral per se *and an acceptable practice in certain circumstances, as long as there are limitations against potential abuses. The Supreme Court of Canada seems to have adopted this new approach in a number of recent decisions, but in the author's view the Court may not have fully appreciated the English re-evaluation of forum-shopping, or the consequences of some of its own decisions with respect to issues of jurisdiction. The author then discusses several arguments in favour of opportunistic choice of forum that flow from the English jurisprudence.*

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I. INTRODUCTION

In a world where every aspect of human affairs is increasingly international, it is only natural that opportunities for private litigants should be correspondingly globalized. This phenomenon has led, in fact, to frequent complaints in the latter half of the twentieth century that private litigation has become *too* internationalized, and that plaintiffs are seeking justice in courts outside their own 'natural' jurisdictions in order to gain procedural or substantive advantages in a way that is at least vexatious, at worst oppressive. The term to describe this is, of course, 'forum-shopping' (also sometimes referred to as 'law-shopping'), and legal anecdote is full of examples of the tort victim who arrives in Tennessee or Texas to file suit against a defendant, typically a large corporation, for compensatory and punitive damages on an enormous scale, far out of proportion to the relatively minor injury suffered by the plaintiff. Lord Denning M.R. described the practice of forum-shopping with characteristic vividness in *Smith Kline & French* v. *Bloch*:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case "on spec" as we say, or on a "contingency fee" as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can readily be forced into a settlement. The plaintiff holds all the cards.[1]

Put this way, forum-shopping sounds like an unmitigated evil. Anglo-Canadian courts have certainly tended to treat it as one, although I would like to argue in this essay that condemnation of the practice is often misguided and unthinking. There may, in fact, be compelling justifications for allowing a plaintiff to choose a jurisdiction whose law is most likely to result in a favourable—or, more to the point, a just—outcome in a given case. Although there will be instances where forum-shopping is truly oppressive, it should be pointed out that common law courts, including those in the United States, have created ways to exclude litigants whose connection to their jurisdiction is so slight that it would be grossly unfair to allow them to proceed, thereby reducing the potential for abusive forum-shopping. The principal device that has arisen in conflict of laws to deal with the wrong kind of forum-shopping is the doctrine of *forum non conveniens*, but there are other jurisdiction-limiting techniques as well: for example, the doctrine of *renvoi*, which can lob a dispute back over the net whence it came; the process of characterization, whereby a court may decline jurisdiction based on its conclusions about the nature of the legal issues; or the restraint of foreign proceedings by means of an anti-suit injunction.[2] Resort to these 'escape devices' suggests that a sophisticated

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[1] *Smith Kline & French Laboratories Ltd* v. *Bloch*, [1983] 2 All E.R. 72 at 74, 1 W.L.R. 730 (C.A.) [hereinafter *Smith Kline* cited to All E.R.].

[2] See J. Swan & V. Black, *Materials on Conflict of Laws* (Toronto: Faculty of Law, University of Toronto and Dalhousie Law School, 1995) at i. 171-215; J.J. Fawcett, "Forum Shopping — Some Questions Answered" (1984) 35 *Northern Ireland Law Quarterly* 141 at 147-50; F. Juenger,

inter-jurisdictional mechanism has developed for deciding the proper forum of a legal dispute. The other side of this coin is that jurisdictions now actually compete for legal disputes, almost in the way that they do for business and investment, at both the international level and between jurisdictions in federal states.

This essay is informed by the debate on competitive federalism in the United States and Canada, a debate that is unlikely ever to be fully resolved — to the extent that one accepts or rejects arguments about competitive federalism as a matter of faith — but that is clearly relevant to a consideration of forum-shopping. The debate has tended to focus on competition in corporate law, but has also been applied to other areas of law and regulation. In a seminal article, William L. Cary criticized the low standards of fiduciary duty that Delaware corporate law exacted of directors with respect to shareholders, on the grounds that this created inappropriate incentives for management. Subsequent empirical work by Roberta Romano has shown, however, that the effect of incorporation in Delaware is an *increase* in the share prices of most companies. This suggests that the interests of management and of shareholders are more in convergence than otherwise, and the Mandevillean proposition that the seemingly self-interested pursuit of private goals has wider economic and social benefits.[3] Competition produces a concentration of corporate charters where it is most efficient to do so, thereby contributing to the benefit of shareholders and, by extension, of society as a whole. Although there may seem to

"American and European Conflicts Law" (1982) 30 Am. J. Comp. L. 119 at 124; Note, "Forum Shopping Reconsidered" (1990) 103 Harv. L. Rev. 1677 at 1691-92; J. Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 Can. Bar Rev. 271 at 319; W.S. Maslechko, "Revolution and Counter-revolution: An Examination of the Continuing Debate Over 'Interest Analysis' in the United States and its Relevance to Canadian Conflict of Laws" (1986) 44 U.T. Fac. L. Rev. 57.

[3] W.L. Cary, "Federalism and Corporate Law: Reflections upon Delaware" (1974) 83 Yale L.J. 663; R. Romano, "The State Competition Debate in Corporate Law" (1987) 8 Cardozo L. Rev. 709; B. de Mandeville, *The Fable of the Bees: Or, Private Vices, Publick Benefits*, 2 vols, ed. by F.B. Kaye (Oxford: Clarendon Press, 1924).

See also C.M. Tiebout, "A Pure Theory of Local Expenditures" (1956) 64 J. Pol. Econ. 416; R.K. Winter, "State Law, Shareholder Protection, and the Theory of the Corporation" (1977) 6 J. Legal Studies 251; P. Dodd & R. Leftwich, "The Market for Corporate Charters: 'Unhealthy Competition' versus Federal Regulation" (1980) 53 J. Bus. L. 259; T.O. McGarity, "Multi-Party Forum Shopping for Appellate Review of Administrative Action" (1980) 129 U. Pa. L. Rev. 302 at 318-19; F.H. Easterbrook, "Antitrust and the Economics of Federalism" (1983) 26 J. Law & Econ. 23; B. Baysinger & H. Butler, "The Role of Corporate Law in the Theory of the Firm" (1985) 28 J. Law & Econ. 179; R. Romano, "Law as a Product: Some Pieces of the Incorporation Puzzle" (1985) 1 J. Law Econ. & Org. 225; J.R. Macey & G.P. Miller, "Toward an Interest-Group Theory of Delaware Corporate Law" (1987) 65 Tex. L. Rev. 469; D.R. Fischel *et al.*, "The Regulation of Banks and Bank Holding Companies" (1987) 73 Va. L. Rev. 301; Deloitte Haskins & Sells International, *Treaty Shopping: An Emerging Tax Issue and Its Present Status in Various Countries* ed. by H. Becker & F.J. Wurm (Deventer, Netherlands: Kluwer Law & Taxation Publishers, 1988) (critical of tax-reduction by means of shopping for jurisdictions with favourable tax treaties); W.E. Oates & Robert M. Schwab, "Economic Competition among Jurisdictions: Efficiency Enhancing or Distortion Inducing?" (1988) 35 J. Pub. Econ. 333; Note, "To Form a More Perfect Union? — Federalism and Informal Interstate Competition" (1989) 102 Harv. L. Rev. 842; L.M. LoPucki & W.C. Whitford, "Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies" (1991) 13 Wisc. L. Rev. 11 at 40; L.A. Bebchuk, "Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law" (1992) 105 Harv. L. Rev. 1435; B.L. Hay, "Conflicts of Law and State Competition in the Product Liability System" (1992) 80 Georgetown L.J. 617; R. Revesz, "Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation" (1992) 67 N.Y.U.L. Rev. 1210; F. Juenger, "What's Wrong with Forum Shopping?"

be a 'race to the bottom' in the short term, competition amongst states actually encourages uniformity amongst jurisdictions in the long term, because other states will want to emulate the régime that produces optimum efficiency and attracts the most out-of-state custom. Ronald Daniels has made this argument about inter-provincial competition in corporate charters in Canada, observing that

> ...when competitive processes are examined more closely, it can be demonstrated that they are capable of producing surprisingly uniform provincial laws. Indeed, it can be argued that the more vigorous the level of inter-governmental competition in a state, the greater the likelihood that uniform laws will be generated.[4]

Although competitive federalism has been a rallying cry of the decentralists (in whose camp I would place myself), the tendency of competition to produce uniformity may also be compatible with the view of those who, like Robert Howse, wish to promote economic mobility within defined limits and a more centralist vision of Canadian federalism.[5] If an analogy may be drawn from the context of the market for corporate charters, the effect of forum-shopping in litigation, I would like to argue, will not be a patchwork of highly diverse legal régimes, with different attitudes towards plaintiffs, but a fair degree of uniformity from one forum to the next. This will in turn reduce the extent to which forum-shopping actually takes place and will limit the extent to which gross abuses can occur. The effect, then, of forum-shopping will be to promote greater harmonization of laws, rather than the ever-increasing divergence of laws that its critics usually predict. As a general approach, I would like to suggest that the traditional criticism of forum-shopping has focused on its costs and its dangers, but that these disadvantages are not only now significantly limited by controls like the doctrine of *forum non conveniens*, but also outweighed by important benefits — not the least of which is the ability to seek justice in the forum that is most likely to render it, even if it is not necessarily the 'natural' or 'home' jurisdiction.

In Part II of this essay I shall examine briefly the traditional judicial hostility to forum-shopping, before turning in Part III to an examination of a change in attitude that has taken place in English jurisprudence. Part IV will consider the extent to which this new view of forum-shopping as a morally neutral practice has been accepted by the Supreme Court of Canada. In Part V, I shall suggest some further defences of forum-shopping that flow from the English jurisprudence, and that may not have been taken fully into account by our own Supreme Court.

(1994) 16 Sydney L. Rev. 5 at 7.

[4] R.J. Daniels, "Should Provinces Compete? — The Case for a Competitive Corporate Law Market" (1991) 36 McGill L.J. 130 at 133-34. J.I. MacIntosh makes a similar case for the desirability of competition, but concludes that Daniels overstates the extent to which it has actually taken place in Canada: see "The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law: A Second Look", Law & Econ. Working Paper Series 18 (Toronto: Faculty of Law, University of Toronto, 1993). See also Swan, *supra* note 2 at 319-20; *Jensen* v. *Tolofson, Gagnon* v. *Lucas*, [1994] 3 S.C.R. 1022 at 1059, 1 W.W.R. 609 at 634, [hereinafter *Jensen* cited to S.C.R.]; *Muduroglu Ltd* v. *T.C. Ziraat Bankasi*, [1986] 1 Q.B. 1225 at 1246, 3 All E.R. 682 (C.A.) [hereinafter *Muduroglu* cited to Q.B.].

[5] See R. Howse, *Economic Union, Social Justice, and Constitutional Reform: Towards a High but Level Playing Field*, Background Studies of the York University Constitutional Reform Project,

II. The Unreasonable Prejudice Against Forum-Shopping

It is not an overstatement to say that the case against forum-shopping is not so much made as asserted, as a few examples from Ontario will illustrate. All of them involve the paradigmatic Canadian conflict of laws problem of the out-of-province driver injured in a car accident, compounded by the fact that one of the provinces in question has a no-fault insurance scheme, while the other does not. In *Going* v. *Reid Brothers Motor Sales*, Henry J. expressed a general unwillingness to encourage forum-shopping, on the assumption that it would allow an Ontario plaintiff, injured in Quebec, to recover once under Quebec's compensation scheme and again under Ontario law.[6] Such duplication of litigation and recovery is at issue in *Prefontaine* v. *Frizzle*, where Griffiths J.A. was at pains to point out that "...the determination of the governing law in a tort case should not depend on the skill of the plaintiff in selecting a favourable forum."[7] With respect, this is an approach that misses the point entirely: there is no reason to prefer one province's policy choice about automobile insurance over another's, and no reason why a plaintiff should not be able to top up the award under Quebec's no-fault compensation scheme if an additional amount will afford just compensation to the plaintiff in the eyes of Ontario law. This was the conclusion of Grange J.A. in *Lewis* v. *Leigh*, where the plaintiffs were not prevented from seeking just such a topping-up.[8] Double recovery is not the fault of forum-shopping, and it is an uncritical assumption to say that forum-shopping must lead to unfair results. As Grange J.A. demonstrates, a court with its eyes open to all the implications of a case can guard against unfair results without precluding recourse to the plaintiff's forum of choice. Another Ontario decision to the same effect is *Manufacturers Life Insurance Co.* v. *Guarantee Co. of North America*, where O'Driscoll J. was willing to accept that forum-shopping is a valid way for a party to pursue legitimate interests, but who intervened when the conduct of the shopping expedition began to work unfairness on the defendant.[9]

It is hardly surprising, however, that Ontario courts should sometimes make knee-jerk reactions at the mention of the term 'forum-shopping', given the common law's deep-seated prejudice against opportunistic choice of jurisidiction. In *Penn* v. *Lord*

Study No. 9 (North York, Ont.: York University Centre for Law and Public Policy, 1992) at 101-34.

[6] *Going* v. *Reid Brothers Motor Sales Ltd.* (1982), 35 O.R. (2d) 201 at 213-14, 136 D.L.R. (3d) 254.

[7] *Prefontaine* v. *Frizzle* (1990), 71 O.R. (2d) 385 at 395, 65 D.L.R. (4th) 275 (C.A.). See also *Grimes* v. *Cloutier* (1989), 69 O.R. (2d) 641, 61 D.L.R. (4th) 505 (C.A.).

For examples of commentators who assume without much proof that forum-shopping is bad, see D.G. Baird, "Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren" (1987) 54 U. Chic. L. Rev. 815; H.J. Friendly, "Averting the Flood by Lessening the Flow" (1974) 59 Cornell L. Rev. 634; U.M. Henninger, "The Plaintiff's Forum Shopping Gold Card: Choice of Law in Federal Courts after Transfer of Venue under Section 1404(a) — *Ferens v. John Deere Co.*" (1991) 26 Wake Forest L. Rev. 809; M.B. Rodden, "Is 28 U.S.C. § 1404(a) a Federal Forum-Shopping Statute?" (1991) 66 Wash. L. Rev. 851; R. Schuz, "Controlling Forum-Shopping: The Impact of *MacShannon* v. *Rockware Glass Ltd*" (1986) 35 Int'l & Comp. L.Q. 374.

[8] (1986), 54 O.R. (2d) 324 at 330, 26 D.L.R. (4th) 442, 17 C.C.L.I. 26 (C.A.).

[9] (1987), 62 O.R. (2d) 147 at 153 (H.C.J.). Both parties to the action were Ontario companies. The plaintiff had sued in California and Utah to recover losses under a life insurance company's blanket bond. When the defendant disputed the jurisdiction of the American courts, the plaintiff commenced proceedings in Ontario. The plaintiff then moved to stay its own proceedings in Ontario, until the determination of the jurisdictional questions in California and Utah. O'Driscoll J., in dismissing the motion to stay proceedings, held that while the plaintiff was entitled to shop for favourable law, it was

Baltimore, a boundary dispute between the lords proprietor of the colonies of Pennsylvania and Maryland, Lord Hardwicke L.C. was prepared to hear the case on the narrow ground that a case involving feudal seigniors could be heard only in the courts of the Sovereign, rather than in the courts of the seigniors themselves; but he made the general observation that "it would be improper to have a decree in this court for quiet enjoyment of lands in *America*; which would occasion continual applications to this court for contempts, *&c....*", which seems to be a prohibition against opportunistic and inappropriate choices of forum.[10] As a distinct concept, however, forum-shopping is modern, having entered the legal lexicon some time in the 1920s.[11]

Ontario courts are probably taking their lead in condemning the practice from the decision of the House of Lords in *Chaplin* v. *Boys*, a famous case involving an English plaintiff injured in a road accident in Malta. Under Maltese law, he could recover only for losses directly suffered, while English law allowed recovery for pain, suffering and loss of amenities. The plaintiff therefore brought suit in England for the £53 in damages recoverable under Maltese law, plus £2,250 in general damages recoverable under English law. In rejecting the plaintiff's claim that English law should apply, four of the five Lords of Appeal expressly criticized forum-shopping, with the fifth concurring. According to Lord Donovan, "considerations of public policy would justify a court here in rejecting any such future case of blatant 'forum-shopping'", a justification echoed in the speech of Lord Pearson.[12] Lord Hodson is critical of 'bare-faced' forum-shopping, while Lord Wilberforce also condemns inducements to engage in it.[13] It is worth pointing out that not much more is given in the way of reasons against forum-shopping than in *Going* v. *Reid Brothers* or *Prefontaine* v. *Frizzle*, but it seems fair to say that the House of Lords was motivated by the concerns that are most frequently expressed in the scholarly literature. These are well rehearsed elsewhere, but are worth repeating briefly here: (i) that forum-shopping is unfair to defendants, who may be put to unwarranted expense and inconvenience in defending actions brought somewhere other than the 'natural' forum of the dispute; (ii) that it is biased in favour of plaintiffs, who are likely to choose fora that will be sympathetic to their versions of events; (iii) that it is an inefficient use of judicial resources, tending to clog the courts of the selected jurisdiction with 'foreign' actions; (iv) that it creates doubts about the fairness of the justice system when opportunism, rather than justice, seems to be the determining factor in litigation; (v) that it creates uncertainty of judicial result; and (vi) that, in a federal system of government or in an international context, it creates tensions between jurisdictions by

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unfair "to put the defendant 'on hold' until the plaintiff has shopped the world" (*ibid.*).

[10] (1750), 1 Ves. Sen. 444 at 455, 27 E.R. 1132. See also *Mostyn* v. *Fabrigas* (1775), 1 Cowp. 161at 173, 98 E.R. 1021 at 1028 *per* Lord Mansfield [hereinafter *Mostyn*, cited to E.R.].

[11] The earliest usages of the term in reported cases seem to date from the early 1950s: see *Covey Gas & Oil Co.* v. *Checketts*, 187 F.2d 561 at 563 (9th Cir. 1951); and *Helene Curtis Industries* v. *Sales Affiliates*, 105 F. Supp. 886 at 902 (S.D.N.Y., 1952), aff'd 199 F.2d 732 (2d Cir., 1952). The phrase 'shopping for a forum' is used in *Mills* v. *Illinois Central Railroad*, 315 U.S. 698 at 706 (1942); and the concept of forum-shopping, whatever one calls it, was clearly at issue in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). See F.K. Juenger, "Forum Shopping, Domestic and International" (1989) 63 Tulane L. Rev. 553 at 553; "Forum Shopping Reconsidered", *supra* note 2 at 1677. Juenger suggests, *ibid.*, that 'forum-shopping' was discussed in American university conflicts lectures as early as the 1920s.

[12] [1971] A.C. 356 at 383 and 406, [1969] 2 All E.R. 1085 (H.L.) [hereinafter *Chaplin* cited to A.C.].

[13] *Ibid.* at 380, 389; also 378. *Machado* v. *Fontes*, [1897] 2 Q.B. 231 (C.A.) is cited as the

undermining the policy choices of one of them in preference to those of the other.[14] These are clearly valid concerns, but as I hope to demonstrate in Part V, the consequences of forum-shopping may be neutral in these respects rather than negative, as a result of the limits that modern courts have placed on the practice, or may lead to benefits that outweigh some of the disadvantages typically marshalled against a free choice of forum. In the mean time, it is worth pointing out that there is a certain degree of disingenuousness, even hypocrisy, on the part of courts in citing the dangers of forum-shopping, for it could be argued that they do so only when it suits them.

To cite an Ontario example again, in *Pindling* v. *National Broadcasting Corp.* the High Court was faced with what could certainly have been characterized as forum-shopping, but which Montgomery J. declined to acknowledge as such. Sir Lynden Pindling, the Prime Minister of the Bahamas, brought suit in Ontario for defamation arising from a television programme on NBC that alleged that he had received payments from drug-smugglers.[15] The broadcast was received in Ontario *via* U.S. border affiliates of NBC, and further broadcast in Ontario by Ontario cable and satellite stations, who were also defendants in the action. Sir Lynden sued in the Bahamas, but NBC declined to appear before the courts there. If the Prime Minister had sued in the United States, he would have been obliged, as a public figure, to establish 'actual malice' on the part of NBC according to the standard in *New York Times Co.* v. *Sullivan* — that is, knowledge of the falsity of the allegedly defamatory statements, or reckless disregard as to their truthfulness.[16] In contrast, under Ontario law all he needed to show was that the statements were objectively defamatory, regardless of the actual intent of the defendant.[17] In refusing to accede to the defendants' motion to dismiss the action, Montgomery J. stated that "[a] plaintiff has a *prima facie* right to choose his own forum", and that "[h]is action should not be stayed or set aside unless continuance of the Ontario actions would be oppressive, vexatious or abusive of the process of the court".[18] His Lordship was presumably unwilling to say that Ontario's conscious choice in refusing to adopt the *New York Times* standard of liability was one that could be ignored by an Ontario court, and that a plaintiff who came to the doors of his court was not to be turned away as a result of seeking redress under well-considered and well-established Ontario defamation law. This is fair enough, but there is really no difference in principle between Sir Lynden and the injured plaintiff in *Chaplin* v. *Boys*; the distinction is that in *Pindling* the court is

quintessential example of the badness of forum-shopping: see *Chaplin, ibid.* at 383, 389, 406.

[14] P. Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law" (1929) 29 Colum. L. Rev. 1; G.D. Brown, "The Ideologies of Forum Shopping — Why Doesn't a Conservative Court Protect Defendants?" (1993) 71 N. Carolina L. Rev. 649 at 666-68; Fawcett, *supra* note 2 at 144-45; Friendly, *supra* note 7 at 641; LoPucki & Whitford, *supra* note 3 at 34-40; McGarity, *supra* note 3 at 312-18; "Forum Shopping Reconsidered", *supra* note 2 at 1684; B.R. Opeskin, "The Price of Forum Shopping: A Reply to Professor Juenger" (1994) 16 Sydney L. Rev. 14 at 22-25. See also *infra*, text accompanying note 40.

[15] *Pindling* v. *National Broadcasting Corp.* (1984), 49 O.R. (2d) 58 (H.C.) [hereinafter *Pindling*].

[16] 376 U.S. 254 (1964).

[17] See *Toogood* v. *Spyring* (1834), 1 Crompton Meeson & Roscoe's Report 181 at 193, 149 E.R. 1044; *Campbell* v. *Spottiswoode* (1863), 3 Best & Smith's Reports 769 at 777, 122 E.R. 288; *Arnold* v. *The King-Emperor*, [1914-15] All E.R. 779 (K.B.D.); *Drew* v. *Toronto Star Ltd*, (1947), O.R. 730 at 752, 4 D.L.R. 221 at 235-6 (C.A.), aff'd [1948] 4 D.L.R. 465 (S.C.C.); *Douglas* v. *Tucker*, [1952] 1 S.C.R. 275, 1 D.L.R. 657; *The Globe & Mail* v. *Boland*, [1960] S.C.R. 203 at 208; *Hill* v. *Church of Scientology* (1994), 18 O.R. (3d) 385 at 412-14 (C.A.), aff'd [1995] 2 S.C.R. 1130.

[18] *Pindling*, *supra* note 15 at 64-65.

concerned about what seems to be an unscrupulous defendant, while in *Chaplin* it is the plaintiff who is the object of the court's opprobrium.

A more extreme example, indeed a tragic one, is the case of the Bhopal disaster, where the decision of the New York District Court not to allow the Indian government to sue Union Carbide in the United States on behalf of the victims of the disaster is patently unjust — even though it is a decision that prevents the old, supposed evil of forum-shopping.[19] As an anonymous note in the *Harvard Law Review* observes,

> A court will call a practice "forum shopping" when it wishes to paint it as an unsavory machination designed to thwart public policy and achieve an unmerited goal. By contrast, it will avoid the label when it considers the reasons behind the forum selection reasonable or justified.[20]

If such an inconsistency exists, then surely it is right to re-examine forum-shopping to see if its purported dangers have any foundation in fact, and if there might indeed be some benefits in allowing plaintiffs to shop for favourable jurisdictions.

III. The English Reconsideration of Forum-Shopping

It is not surprising that such a re-examination was suggested by Lord Denning M.R., that clearer-away of precedential lumber, who made this famous comment in *The "Atlantic Star"* about the right to justice of all comers in the courts of England:

> This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.[21]

The Court of Appeal held in that case that the Dutch plaintiffs, whose barge had been damaged in the River Scheldt by the Belgian defendants, could bring an action *in rem* against another vessel owned by the defendants and about to arrive in Liverpool.[22] The House of Lords reversed. Lord Reid clearly expressed a sense of post-colonial discomfort with Lord Denning's "rather insular doctrine", saying that it "seems to...recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races." In Lord Reid's view, English law had to reflect a different and modern conception of the world.[23]

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[19] *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y., 1985). See also U. Baxi, "Introduction: Towards the Revictimization of the Bhopal Victims" in Indian Law Institute, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Tripathi Bombay: Bombay, 1986), at 1-34. For a similar example, see Juenger, *supra* note 2 at 129; and Juenger, *supra* note 11 at 570-71.

[20] "Forum Shopping Reconsidered", *supra* note 2 at 1683. See also E. Edinger, "The MacShannon Test for Discretion: Defence and Delimitation" (1986) 64 Can. Bar Rev. 283 at 293-5; Fawcett, *supra* note 2 at 152; Juenger, *supra* note 2 at 128-29; P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992) at 230.

[21] (1972), [1973] 1 Q.B. 364, [1972] 3 All E.R. 705 at 709 (C.A.) [hereinafter *Atlantic Star* (C.A.), cited to All E.R.].

[22] *The "Atlantic Star"*, [1974] A.C. 436, [1973] 2 All E.R. 175 (H.L.) [hereinafter *Atlantic Star* (H.L.) cited to All E.R.].

[23] *Ibid.* at 181.

It was therefore appropriate to leave the courts of Belgium to resolve the issue of liability, rather than to assume that England was somehow a better place for its determination. It is worth noting, however, the dissenting speech of Lord Simon of Glaisdale, who made the following comments about forum-shopping:

> 'Forum-shopping' is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.[24]

Although Lord Denning's judgment was reversed, and Lord Simon's speech was in dissent, the effect of their discussion of forum-shopping was surely to confront the House of Lords with the fundamental inconsistency of allowing access to the courts of one's own or another jurisdiction when one approves of the plaintiff, but of condemning choice of forum when one does not, without any underlying principle. What emerges from the House of Lords' decision in *Atlantic Star* and subsequent English cases is a response to Lord Denning's challenge to the conventional wisdom about forum-shopping, a response that is principled as well as sensitive to both legitimate advantages and undesirable consequences.

Such a balancing exercise was not completely new, for nineteenth-century English judges also considered the relative merits of allowing and staying actions where concerns were raised about opportunistic choice of jurisdiction. In *McHenry* v. *Lewis*, Jessel M.R. refused to stay proceedings in England that were initiated after the plaintiff had already commenced an action in California arising from an alleged breach of fiduciary duty in a corporate reorganization, on the grounds that it was not vexatious *per se* to pursue different remedies in different jurisdictions:

> ...we know that in foreign countries various laws apply, as regards the remedies, of a totally distinct character from the laws regulating the remedies in this country, so that it is by no means to be assumed in the absence of evidence that the mere fact of suing in a foreign country as well as in this country is vexatious. It seems to me that you must make out a special case....[25]

Cotton L.J. concurred, saying that it would be unwise to lay down any strict definition of what was vexatious or oppressive conduct on the part of a forum-shopping plaintiff, preferring to state "the general principle that the Court can and will interfere whenever there is vexation or oppression to prevent the administration of justice being perverted for an unjust end", depending on the circumstances of the case.[26]

In a case decided in the same year, *Peruvian Guano Co.* v. *Bockwoldt*, the Court of Appeal applied the decision in *McHenry* with respect to vexation and oppression. There is similar emphasis in *Peruvian Guano* on not depriving the plaintiff of "a real substantial advantage" in the form of "additional remedies beyond those obtainable in *England*".[27] In *Atlantic Star*, the House of Lords also discusses the case of *St Pierre* v.

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[24] *Ibid.* at 197.

[25] (1882), [1883] 22 Ch. D. 397 at 401 (C.A.).

[26] *Ibid.* at 408.

[27] [1883] 23 Ch. D. 225 at 230 (*per* Jessel M.R.) and 234 (*per* Bowen L.J.), [1881-85] All E.R. Rep. 715 (C.A.). See also *Hyman* v. *Helm* (1883), 24 Ch. D. 531 at 536-39 (C.A.), *per* Brett M.R. (as he then was).

South American Stores (Gath & Chaves) Ltd, which was relied upon by Lord Denning in the Court of Appeal. In *St Pierre*, Scott L.J. held that an English court should deter forum-shopping by granting a stay of proceedings only under limited circumstances:

> The true rule...may I think be stated thus: (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (*a*) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (*b*) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.[28]

It is important to note that the English court is *not* to weigh mere expense or convenience, but should instead assess the more serious implications of granting or refusing a stay, namely whether the result would be unjust to any of the parties. In the *Atlantic Star* case, the House of Lords undertook a similar exercise, although concluding that access to the Queen's courts was more limited than in Scott L.J.'s (or Lord Denning's) view:

> ...a key to the solution of the problem may be found in a liberal interpretation of what is oppressive on the part of the plaintiff. The position of the defendant must be put in the scales. In the end it must be left to the discretion of the court in each case where a stay is sought, and the question would be whether the defendants have clearly shown that to allow the case to proceed in England would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the defendant.[29]

(At the same time, the House of Lords declined to adopt the Scottish doctrine of *forum non conveniens*, which was in Lord Reid's view too novel a proposition.[30]) Lord Wilberforce called this the "critical equation" of balancing the advantages to the plaintiff against the disadvantages to the defendant.[31] The equation is further refined in *Rockware Glass Ltd* v. *MacShannon*, where the House of Lords placed limits on the ability of plaintiffs to seek a favourable forum, in this case Scots injured in industrial accidents in Scotland, but who sued on tenuous grounds in England. The Court of Appeal refused a stay of proceedings (Lord Denning M.R., dissenting). The House of Lords reversed, granting a stay of proceedings in England.[32] In the House of Lords, Lord Diplock clarified the *St Pierre* test by restating its second branch in this way:

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[28] (1935), [1936] 1 K.B. 382 at 398, [1935] All E.R. Rep. 408 (C.A.) [hereinafter *St Pierre* cited to K.B.]. The defendants had been sued in Chile for rents owed there to the plaintiffs. All parties were resident in France and in Chile. The defendants contended that Chilean government approval was required before they could make payment under the lease. The plaintiffs thereupon sued in England. The Court of Appeal upheld the trial judge's dismissal of the defendant's motion for a stay of proceedings in England.

See also *Re Norton's Settlement*, [1908] 1 Ch. 471 at 482 (C.A.).

[29] *Atlantic Star* (H.L.), *supra* note 22 at 181, *per* Lord Reid.

[30] *Ibid.*

[31] *Ibid.* at 194. See also B. Currie, "Change of Venue and the Conflict of Laws" (1955) 22 U. Chicago L. Rev. 405 at 421, for a similar balancing.

[32] [1978] A.C. 795, [1978] 1 All E.R. 265 (H.L.) [hereinafter *Rockware* cited to A.C.].

> (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (*a*) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (*b*) the stay 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.[33]

(Lord Diplock also admitted that this restatement probably brought English law close to the point of accepting the Scottish doctrine of *forum non conveniens*, which he finally accepted as the law of England three years later in *The "Abidin Daver"*.[34]) The emphasis, then, is less on what is 'vexatious' or 'oppressive' (terms the House of Lords found either unhelpful or misleading), and more on whether justice will be served by allowing forum-shopping or by staying proceedings as a means to curb it.[35]

This development was continued in *Spiliada Maritime Corp.* v. *Cansulex Ltd*, where the House of Lords also applied *forum non conveniens* as the law of England.[36] Lord Goff of Chieveley held there that the question is "at bottom...to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice."[37] What results is a weighing of all the factors involved: first of all, the "connecting factors" that suggest a natural forum, including "factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction...and the places where the parties respectively reside or carry on business"; and also, perhaps more importantly, "circumstances which go beyond those taken into account when considering connecting factors with other jurisidictions", for example the possibility that "the plaintiff will not obtain justice in the foreign jurisidction...."[38] It could be argued that this is no different from what the Ontario judges were criticized in Part II for doing: using the pejorative label 'forum-shopping' when they wish to condemn a plaintiff's conduct but avoiding the term when the plaintiff is seen as being within his or her rights. At one level this is true, but the speeches in *Spiliada* do what an *ad hoc* approach never can, which is to lay down principles, of the highest authority, to guide lower courts in weighing a variety of factors on both sides of a dispute, even while admitting a necessary degree of flexibility in their application.

Above all, the House of Lords in *Spiliada* declined to say that opportunism on the part of plaintiffs is always wrong, or always right, but held instead that its appropriateness must be determined case by case. If there are sufficient factors to connect the plaintiff to a particular forum, then the plaintiff's choice will not be disturbed, unless there are compelling reasons to support the defendant's contention that this will work injustice. On the other hand, in the absence of sufficient connection to a particular jurisdiction, even the loss of some distinct advantage to suing there will not be enough to make a court

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[33] *Ibid.* at 812.

[34] *Ibid.* And see *The "Abidin Daver"*, [1984] A.C. 398 at 411 (H.L.) [hereinafter *Abidin Daver*].

[35] *Ibid.* at 819, *per* Lord Salmon; at 823-24, *per* Lord Fraser of Tullybelton; at 820-21, *per* Lord Keith of Kinkel.

See also *St Pierre, supra* note 28 at 398; *Trendtex Trading Corp.* v. *Crédit Suisse*, [1980] 3 All E.R. 721 (C.A.); *Kuwait Oil Co. (K.S.C.)* v. *Idemitsu Tankers K.K. (The "Hida Maru")*, [1981] 2 Lloyd's Rep. 510 at 521, *per* Lord Denning M.R.; *Maharanee of Baroda* v. *Wildenstein*, [1972] 2 All E.R. 689 at 694, [1972] 2 Q.B. 283 (C.A.) [hereinafter *Maharanee of Baroda* cited to All E.R.].

[36] [1987] A.C. 460 at 477, [1986] 3 All E.R. 843 (H.L.) [hereinafter *Spiliada* cited to A.C.].

[37] *Ibid.* at 480; also at 476.

[38] *Ibid.* at 478.

accede to the plaintiff's choice of forum.[39] An application of the *Spiliada* test will answer all of the criticisms that are typically levelled against forum shopping:[40] (i) & (ii) there is no unfairness to a defendant, and no bias in favour of the plaintiff, because the appropriate forum will be connected to both parties; (iii) the courts of any given jurisidiction will not be clogged with 'foreign' actions, because any case without enough connecting factors will be summarily rejected at an early stage, or will be deterred by the expectation of such rejection; (iv) the integrity of the system will by enhanced by the weeding out of inappropriate cases; and (v) the principle of comity is respected because the courts of different jurisdictions will defer to each other's application of the doctrine of *forum non conveniens*.

On the last point, interjurisdictional comity, the decision in *Spiliada* was elaborated in *SNI Aérospatiale* v. *Lee Kui Jak*, a decision of the Judicial Committee of the Privy Council, on appeal from the courts of Brunei Darussalam.[41] The Board reversed the Brunei Court of Appeal and ordered an anti-suit injunction with respect to proceedings in Texas by the estate of a passenger killed in a helicopter crash in Brunei. The helicopter, manufactured in France by a French company, was owned by an English company but operated by its Malaysian subsidiary, and hired to Sarawak Shell (the Brunei subsidiary of Shell, the Anglo-Dutch multinational). The plaintiff sued in both Brunei and Texas, in the latter forum on the grounds that the defendant manufacturer did business there. The Privy Council held that Brunei was the natural forum for the dispute, and found that proceedings in Texas were oppressive since the defendants might be unable to seek contribution against the Malaysian subsidiary in the courts of Texas. Lord Goff of Chieveley, speaking for the Board, reiterated the point made in *McHenry* v. *Lewis* that, on its own, "it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff", more being required to demonstrate injustice to the defendant in allowing the plaintiff's action to proceed.[42] He went on to point out that the *Spiliada* analysis has built-in checks against truly reprehensible forum-shopping: "[i]n normal circumstances, application of the very now widely recognised principle of *forum non conveniens* should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction...."[43] In the rare instances where this is unlikely to happen, or where assets in a foreign jurisidiction cannot be protected by a stay on terms in the domestic courts, an anti-suit injunction is available as a last resort.[44] Lord Goff goes on to caution, however, that the principle of comity demands a considerable degree of deference to foreign fora, refusing to interpret *Spiliada* as saying that

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[39] An example of this aspect of *Spiliada* is the case of *Dampierre* v. *Dampierre*, [1988] A.C. 92 (H.L.), a divorce action between Comte and Comtesse Elie de Dampierre. M. de Dampierre, who was living in England for business reasons, initiated divorce proceedings in France; in response, Mme de Dampierre, who had lived only briefly with him in England before moving to New York, sued for divorce in England. The House of Lords ordered a stay of her English proceedings, on the grounds that Mme de Dampierre was only tenuously connected to England but very closely connected to France. The fact that an English court would probably grant her maintenance regardless of fault, in contrast to a French court (which would probably deprive her of it because of fault), was no reason to refuse a stay of proceedings.

[40] See *supra*, text accompanying note 14.

[41] [1987] 3 All E.R. 510 (P.C. (Brunei)) [hereinafter *SNI*].

[42] *Ibid.* at 520.

[43] *Ibid.* at 521.

[44] *Ibid.*

> ...in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute.[45]

To do so would, in Lord Goff's view, violate the principle of comity and "disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require."[46] This refinement of *Spiliada* is significant, for it states clearly that courts should properly allow a good deal of forum-shopping on the part of plaintiffs, subject only to the requirements that their choices must meet the test of connecting factors and will not result in unjust outcomes. These controls mean that there has been some whittling down of the principle of legitimate personal or juridical advantage in *St Pierre*, thus reducing any opportunity for a forum-shopping free-for-all; but English courts have clearly recognized that the practice of forum-shopping is not to be rejected out of hand, and can be a reasonable and acceptable form of opportunism, in appropriate circumstances. Forum-shopping as a concept is redeemed, as long as it stays within the clear, if flexible limits established by Lord Goff's earlier judgment in *Spiliada*.

The *SNI* decision is significant in a Canadian context because it is applied (subject to a caveat) as the law of this country in the Supreme Court's decision in *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)* — although, as I shall argue in Part IV, not with perfect consistency.[47]

IV. Canadian Law Since *Spiliada*: Conflicting Signals?

As a result of the House of Lords' decision in *Spiliada*, the Supreme Court of Canada has had occasion to reconsider its own position on the subject of forum-shopping. The Supreme Court had applied the doctrine of *forum non conveniens* in a decision that pre-dated *Spiliada*, when it considered the case of *Antares Shipping Corp.* v. *The Ship "Capricorn"*.[48] The Liberian plaintiff pursued a claim against two other Liberian companies for the ownership of a Liberian vessel, which had been arrested in port in Canada. The disputed contract of sale was between Italian and English ship-brokers, and was registered in the United States. In the opinion of the majority of the court, the proper law of the contract was either U.S. or English law.[49] The plaintiff sought leave to serve the defendants *ex juris*. The majority found that

> there is no factual basis for concluding that any one of the foreign jurisdictions to which reference has been made would provide a forum in which the facts could be assembled and the issue tried without causing inconvenience to one or more of the parties...[,][50]

concluding that the bond posted in the Federal Court by the defendants was a sufficient connection to Canada, as it represented "the only fund now available anywhere to

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45 *Ibid.*

46 *Ibid.* at 522.

47 [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96 [hereinafter *Amchem* cited to S.C.R.].

In *Amchem*, Sopinka J. points out a further consequence of *SNI*: "it was made clear that...the liberalized principles formulated in *Spiliada*...in the context of an application of a stay of proceedings[,] were not to apply to anti-suit injunctions because to do so would be inconsistent with the principles of international comity and would disregard the fundamental requirement that an injunction will only be available where it is required to address the ends of justice" (*ibid.* at 924).

48 [1977] 2 S.C.R. 422, (1976) 65 D.L.R. (3d) 105 [hereinafter *Antares* cited to S.C.R.].

49 *Ibid.* at 448-49, *per* Ritchie J.

50 *Ibid.* at 454.

respond to a judgment against [them]...."[51] Laskin C.J.C. dissented, because he was not convinced that Canada was the appropriate forum, but he too applied a test of connecting factors.[52] The case may be said, therefore, to endorse a view of forum-shopping within the kind of limits proposed by the House of Lords in the line of cases beginning with *Atlantic Star* and culminating in *Spiliada*.

The Supreme Court did not revisit the doctrine of *forum non conveniens* or the practice of forum-shopping until the recent case of *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*.[53] Amchem and a number of other American manufacturers of asbestos products had been sued in Texas by individual British Columbia plaintiffs (to which claims the provincial Workers' Compensation Board was subrogated). Amchem and the other defendants then sought to enjoin the Texas action in British Columbia. There are several interesting aspects of the judgment of Sopinka J., who delivered the judgment of the Court. The first of these is his Lordship's conclusion that the trial judge placed too much emphasis on the fact that Texas has abolished by statute the doctrine of *forum non conveniens* (a point I shall return to in greater detail below).[54] More important is the adoption of the *Spiliada* analysis as the law of Canada. Sopinka J. traces the evolution of the test in English law up to *SNI* (on the assumption that *SNI* is a fair statement of English as well as Brunei law on the doctrine of *forum non conveniens*), concluding that English law on the point should apply here as well.[55] His only reservation about *SNI* is that it needlessly reintroduces the terms "vexatious" and "oppressive", which he, like some of the speeches in *Rockware*, finds unhelpful.[56] In Mr Justice Sopinka's opinion, "unjust" is more appropriate, both for its flexibility and for its use in statutes providing injunctive relief.[57] Sopinka J. does endorse, however, the discussion of comity that is found in *SNI*, which he echoes without actually citing.[58]

This brings us to a further interesting aspect of the decision in *Amchem*, which is the Court's position on forum-shopping. It would be consistent with both *Spiliada* and *SNI* if the judgment were to treat forum-shopping as neither an unmitigated evil nor an unlimited bonanza, given the acceptance of the redeemed version of forum-shopping that resulted from those two cases. There are some indications in *Amchem* that this acceptance has been made on this side of the Atlantic as well. For example, there are Mr Justice Sopinka's remarks on comity, where he requires deference "when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the *forum non conveniens*...."[59] His judgment also acknowledges that in a situation like that in *Antares*, there may be no one appropriate forum, and that an old-fashioned attitude of parochialism is no longer justifiable in a modern world.[60] As well, his Lordship seems to make *Spiliada*'s crucial distinction between unregenerate and redeemed forum-shopping:

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[51] *Ibid.* at 455.

[52] *Ibid.* at 439-44.

[53] *Amchem, supra* note 47.

[54] *Ibid.* at 934-40; and see *supra* text accompanying note 2, and *infra* text accompanying notes 130-31.

[55] *Amchem, supra* note 47 at 915, 925, 931-34.

[56] *Ibid.* at 931-34; and see *supra*, text accompanying note 34.

[57] *Amchem, supra* note 47 at 933-34.

[58] *Ibid.* at 933-35. Compare *SNI, supra* note 41, at 521-22.

[59] *Amchem, supra* note 47 at 934.

[60] *Ibid.* at 911-12.

> If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as 'forum shopping'. On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.[61]

This, at least, is to the same effect as the ratio in *Spiliada*. At the same time, however, there is the statement towards the beginning of the judgment that the modern approach, tolerant of other legal systems and rejecting the parochialism of an earlier age, "does not mean...that 'forum shopping' is now to be encouraged".[62] Sopinka J. goes on to say,

> [T]he choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others.[63]

Inasmuch as this anticipates the discussion of both *Antares* and *Spiliada* that follows later in the judgment, it does not run counter to the new view of forum-shopping, as a thing neutral in itself, that has arisen in English jurisprudence since *Atlantic Star*. But that opening flush about not wanting to encourage forum-shopping suggests that Sopinka J. may not want to encourage it all, and that he does not fully recognize the effect of *Spiliada* in giving new respectability, in limited circumstances, to the practice. Even if this is not the case, and Sopinka J. wishes only to criticize abusive exercises in forum-shopping, it may be that Canadian judges, with their deep-seated prejudice against forum-shopping, may still feel warranted in applying the label when gut reaction tells them that something is wrong, rather than conducting the more sophisticated and reasoned analysis that is mandated in *Spiliada* and elsewhere in *Amchem* itself. This suspicion is borne out by J.-G. Castel, who seems to suggest in the 1994 (post-*Amchem*) edition of *Canadian Conflict of Laws* that an anti-shopping bias remains in Canadian law.[64] To the extent that this is the case, and in the interests of clearing up any remaining doubts about forum-shopping, it is worth turning to some additional defences of choices of forum by plaintiffs.

V. In Further Defence

I should have thought that the system of checks and balances that emerges from the recent House of Lords and Privy Council jurisprudence would be dispositive of the case of forum-shopping, in that it provides for choice that is free yet fair. This position, while

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61 *Ibid.* at 920.

62 *Ibid.* at 911-12.

63 *Ibid.*

64 J.-G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto & Vancouver: Butterworths, 1994) at 228. See also J.P. McEvoy, "International Litigation: Canada, Forum Non Conveniens and the Anti-Suit Injunction" (1995) 17 Advocates' Q. 1 at 20-29, where it is suggested that Canadian courts have not yet fully digested *Amchem*, and still apply pre-*Spiliada* analysis in jurisdiction cases.

not clearly accepted in Canada (if what has been said about *Amchem* is true), has been endorsed in Europe, where forum-shopping amongst member states has been positively mandated by the European Union in legislation concerning patents and products liability.[65] It has also been pointed out that international conventions encourage forum-shopping as a way of protecting children and of enforcing child maintenance obligations.[66] I shall discuss other justifications at greater length below.

A. *Comity Revisited: Recent Canadian Constitutional Cases on Jurisdiction*

In the Canadian context, the arguments in favour of comity are all the more compelling. John Swan suggests that "[t]he essence of a federal system is the power of the component parts (consistently with the power conferred on them by the Constitution) to differ on how they resolve similar problems."[67] Difference of result from province to province, for example in motor vehicle cases, is thus "simply the inevitable consequence of Canada being a federal state."[68] In Vaughan Black's view, the nature of a federation requires a mutual respect amongst sub-state jurisdictions that is greater than that demanded between sovereign states in the international sense, a point also made by Lord Goff in *Spiliada*, where he remarked that federal states must necessarily give "strong preference...to the forum chosen by the plaintiff upon which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions."[69] Recent decisions of the Supreme Court of Canada have endorsed this view, notably *Morguard Investments Ltd.* v. *De Savoye.*[70] In that case, mutual enforcement of judgments from one province to the next was elevated by La Forest J., speaking for the Court, to a principle of constitutional law, consistent with modern sensitivity to inter-jurisdictional comity.[71] His Lordship does not go so far as to read an American-style 'full faith and credit' clause explicitly into our own 'Peace, Order and good Government', but the effect of the judgment is surely something similar.[72] It follows that forum-shopping will be a natural consequence of reciprocal enforcement of judgments, if a Canadian plaintiff can choose the optimal jurisdiction within the federation in which to

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[65] See A. Geddes, "Forum Shopping in the EEC" (1988) 138 New L.J. 542; Juenger, *"American and European Conflicts Law", supra* note 2 at 128-29; Juenger, "Forum Shopping, Domestic and International", *supra* note 11 at 566-69; D. Young & C. Birss, "Forum Shopping under the Community Patent Convention" (1992) 10 Eur. I. P. Rev. 361.

[66] F.K. Juenger, "Forum Shopping: A Rejoinder" (1994) 16 Sydney L. Rev. 28 at 28 (Hague Convention on Jurisdiction and the Law Applicable in the Field of the Protection of Minors, Hague Convention on Child Maintenance Obligations). Juenger points out, however, that forum-shopping in this area of law has an ugly side as well, namely child-abduction: see Juenger, *supra* note 11 at 558.

[67] Swan, *supra* note 2 at 318. See also H.G. Maier & T.R. McCoy, "A Unifying Theory for Judicial Jurisdiction and Choice of Law" (1991) 39 Am. J. Comp. L. 249 at 291.

[68] Swan, *supra* note 2 at 318.

[69] *Spiliada, supra* note 36 at 476-77; V. Black, "The Antisuit Injunction Comes to Canada" (1988) 13 Queen's L.J. 103 at 124. See also R.W.R., "Antisuit Injunctions and International Comity" (1985) 71 Va L. Rev. 1039 at 1064-70; C.R. Schwartz, "Conflicts of Law — Shopping for a Statute of Limitation — *Sun Oil Co. v. Wortman* [108 S. Ct 2117 (1988)]" (1989) 37 U. Kans. L. Rev. 423 at 441; S. Walker, "Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws" (1989) 23 Akron L. Rev. 19; D. Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92 Colum. L. Rev. 249.

[70] [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *Morguard* cited to S.C.R.].

[71] *Ibid.* at 1095-99.

[72] *Ibid.* at 1100-01.

sue, and then rely on the courts of any other province to enforce the judgment obtained. This kind of forum-shopping does not bother the Supreme Court, as long as the court that rendered judgment "...has properly, or appropriately, exercised jurisdiction in the action".[73] The proper or appropriate limits on jurisdiction are the classic requirements for sufficient contacts and due regard for the idea of *forum conveniens*.[74] Within these boundaries, reciprocal enforcement is seen, in fact, as a way to curb a more pernicious kind of opportunism:

> It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?[75]

While Sopinka J. is mindful of the reasoning of *Morguard* in his decision in *Amchem*, it is submitted that La Forest J. is more sensitive in the former to the implications of federal comity on choice of jurisdiction. Mr Justice La Forest allows considerable scope for choice of jurisdiction, within the kind of limits imposed by the *Spiliada* line of cases in the House of Lords, but without his colleague's residual prejudice against the practice of forum-shopping. In *Morguard*, forum-shopping is regarded as it should be, neutral on its own and to be encouraged or discouraged only after due consideration of the way in which it is used by the parties. As La Forest J. puts it,

> I am aware of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions *in rem* now. In any event, this consideration must be weighed against the fact that the plaintiff under the English [enforcement] rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a "power theory" or a single *situs* for torts or contracts for the proper exercise of jurisdiction.[76]

This is surely the right way to approach the question of forum-shopping. Although Mr Justice Sopinka's judgment in *Amchem* is generally consistent with these principles, it is unfortunate that it retains some elements of the older, unthinking prejudice against choice of forum and leads one to conclude that it fails to appreciate all of the consequences of the new approach enunciated in *Spiliada*.

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[73] *Ibid.* at 1102.
[74] *Ibid.* at 1103-04, 1109-10.
[75] *Ibid.* at 1102-03.

La Forest J. expanded on *Morguard* in *Hunt* v. *T&N plc*, where he attempted to find a "workable balance between diversity and uniformity" in what he calls "our decentralized world legal order".[77] He accepted there that diversity was an inevitable consequence of life in a federal state, but that any legal ill-effects could be cured by devices like *forum non conveniens* and by the "unifying jurisdiction" of the Supreme Court.[78] His Lordship observed that the application of jurisdictional controls "must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections".[79] This refusal to think mechanically presumably applies to the concept of forum-shopping as well, for La Forest J. is at pains to allow Canadian plaintiffs free access to any court that might properly take jurisdiction. The judgment is concerned with the specific issue of discovery of documents in response to extra-provincial orders, but it clearly has wider implications. "It is inconceivable," he says, "that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that common market."[80]

Although the combined appeals in *Jensen* v. *Tolofson, Gagnon* v. *Lucas* were more concerned with choice of law than choice of jurisdiction, the reasons for judgment of La Forest J. in those cases are also important for the purposes of the present discussion.[81] The judgment adopts the *lex loci delicti* as the governing principle in torts cases with geographically complex facts, overruling the notorious case of *McLean* v. *Pettigrew*.[82] The result of the rule in *McLean* v. *Pettigrew* was that the court of one province or country could assume jurisdiction where a tort had been committed elsewhere, applying its own law to the determination of the issue as long as the tort was actionable if committed within that jurisdiction, and provided the wrong was not 'justified' in the place where it occurred. La Forest J. points out that this meant in practice "that the courts of different countries would follow different rules in respect of the same wrong, and invite forum shopping by litigants in search of the most beneficial place to litigate an issue".[83] This may at first sound like Mr. Justice Sopinka's discussion of forum-shopping in *Amchem*, but it is clear from other passages in *Jensen* that La Forest J. has considered the question of choice of forum in the spirit of *Spiliada*, free of the traditional preconceptions — something that is not clear from the judgment of his colleague in *Amchem*. For La Forest J., the problem is not forum-shopping *per se*, but the possibility of lawsuits without sufficient points of contact to the forum in which they are pursued. His concern is that a rule other than *lex loci delicti* will "have the underlying effect of inhibiting mobility", in that individuals may be subjected to lawsuits in provinces only slightly connected to a wrong, and may thus wish to confine their activities as closely

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[76] *Ibid.* at 1108-09.

[77] [1993] 4 S.C.R. 289 at 295-96, 109 D.L.R. (4th) 16 [hereinafter *Hunt* cited to S.C.R.].

[78] *Ibid.* at 315-19, 327-30.

[79] *Ibid.* at 326.

[80] *Ibid.* at 330. See also P. Finkle & C. Labrecque, "Low-Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard*" (1993) 22 Can. Bus. L.J. 58 at 59-62, 85-86.

[81] *Jensen, supra* note 4.

[82] [1945] S.C.R. 62, 2 D.L.R. 65, considered and overruled in *Jensen, supra* note 4 at 1043-55.

as possible to the home jurisdiction to avoid uncertain and potentially wide liability arising from minimal contacts elsewhere.[84]

If the concern is for mobility, La Forest J. cannot mean forum-shopping in the unregenerate sense, as he makes clear earlier in the judgment: "...individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience. This fosters mobility and a world economy."[85] At the same time, His Lordship is in favour of "a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country", which suggests that he may approve of forum-shopping only where there is some guarantee that it will not lead to widely divergent results from province to province — a control, perhaps, on what he may regard as the vagaries of an interprovincial market for jurisdiction over lawsuits.[86] In its own way, this may be a recognition of the principles enunciated in *Spiliada*, which probably lie behind Mr Justice La Forest's insistence in the judgment on the proper application of the contacts test and the doctrine of *forum non conveniens* as guides in deciding the issue of jurisdiction.[87] Seen in this light, his Lordship's later remarks about forum-shopping are consistent with the English courts' principled reappraisal of forum-shopping after many years of unreasoned condemnation. This could, from my point of view, have been made more explicit in *Jensen*, but a careful reading of the judgment makes it clear enough. In the end, Sopinka J. may be engaged in the same sort of exercise in *Amchem*, but I suspect that there is in that case a greater degree of residual hostility to forum-shopping, and a little less recognition of all the implications of *Spiliada* — including its conclusion that forum-shoping is worthy of condemnation only when warranted by the facts of an individual case.

B. *Arguments against the 'Race to the Bottom'*

In *Amchem*, *Morguard*, *Hunt* and *Jensen*, comity was accepted as a canonical principle of Canadian law. The price of comity, of course, is that there will always be significant differences from jurisdiction to jurisdiction. This can be regarded as healthy diversity, but it may have a darker aspect if there is an unseemly flight to the jurisdiction with the lowest standards and the worst law, the so-called 'race to the bottom'. It is argued that standards remain forever low in the jurisdiction that is the destination of the race, that there is inefficient concentration of activity there and that the result of this asymmetry is injustice as between fora. This argument applies not only to forum-shopping by litigants, but also to a wide variety of other choices of jurisdiction — for example, by corporations seeking lax environmental controls on their operations or low standards of corporate fiduciary duty; tax-payers seeking optimal tax-treaty arrangements; criminals trying to find places that will not extradite them back to justice at home or where they can launder their money.

I do not intend to minimize the very serious problems posed by some of these types of law-shopping, but it should be pointed out that forum-shopping in the context of

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[83] *Jensen, supra* note 4 at 1052-53. See also 1054-55.

[84] *Ibid.* at 1054-55. But compare S. Roussel, "Fini le magasinage: seule la loi du lieu de l'accident s'appliquera", *National* (April 1995) at 7-8.

[85] *Jensen, supra* note 4 at 1048-49.

[86] *Ibid.* at 1064-65.

[87] *Ibid.* at 1049-55, 1064-65.

litigation is probably the least socially dangerous of these practices, and one that has some definite benefits. And with respect to efficiency, I would like to suggest that forum-shopping may not have quite the effect that is often attributed to it. It is my contention that competition amongst jurisdictions, including tolerance of forum-shopping by litigants, promotes harmonization of laws from jurisdiction to jurisdiction and higher, rather than lower standards. The effect, then, of *Morguard* and *Hunt* should be to promote greater uniformity of laws, rather than widening divergence.

If this seems counter-intuitive, some historical examples may help to illustrate the point. When Lord Hardwicke's *Marriage Act* of 1753 put an end to clandestine marriages by requiring the publication of banns or the obtaining of a licence, and the solemnization of marriages in churches or public chapels, thus precluding those conducted on the sly by disreputable parsons attached to the Fleet Prison in London, determined couples with disapproving parents engaged in forum-shopping by eloping to Scotland.[88] The English *Marriage Act* did not of course apply there, and a thriving business in hurried weddings grew up at Gretna Green, one of the first villages over the Scottish-English border. In addition to formal weddings similar to those in England, Scots law recognized 'irregular' marriages without clergy, witnesses, licence or banns, the only requirement being an expression by the parties of present intention to be married. This could be expressed in writing, orally or by signs. Marriages of the irregular type were supervised at Gretna Green by the local inn-keeper or even the blacksmith, in return for a fee. The practice thrived until 1856, when Parliament amended Scots matrimonial law to require three weeks' residence in Scotland by at least one of the parties.[89] A desire to curtail forum-shopping brought Gretna Green marriages to an end, which suggests that while innovative individuals may for a time be able to exploit legal discrepancies between jurisdictions, in doing so they create pressure to iron out those differences in substantive and procedural law.

Another example of legislative change in response to forum-shopping concerns divorce rather than marriage: in the early part of this century, when most North American jurisdictions made divorce as difficult as possible, forum-shoppers took themselves to Nevada or Mexico for quick dissolution of matrimony. The realization that people would simply opt out of the matrimonial laws of their own jurisdictions, and head for Reno or Tijuana if they could, was surely one of the reasons behind the liberalization of access to divorce in North America in the second half of this century.

Both of these matrimonial examples involve situations where legislative change was a response to citizens who left their own jurisdictions for some more favourable forum, but the impetus for greater uniformity can also come from within the destination of choice, as a result of pressures placed upon its legal system by forum-shoppers from somewhere else. Although restoring the doctrine of *forum non conveniens* is itself unlikely to be a central issue in future Texas elections, the congestion of domestic courts in the state could certainly become a political question if Texans begin to feel that their access to justice is being impeded by an enormous foreign case-load. This has already happened, in fact, for part of the Republican Party's Contract with America involves legal reforms aimed at reducing the litigiousness of American society and the burden on American courts.

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[88] 26 Geo. II, c. 33. See also Sir W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1765-69) at 439.

[89] *Encyclopædia Britannica*, vol. 17, 11th ed. (Cambridge: University Press, 1910) at 757-58, and *ibid.* vol. 12, at 583.

In March 1995, the House of Representatives passed three bills in this area: the *Common Sense Product Liability Act*, which would limit punitive damages in most civil suits to $250,000 (U.S.) or three times the damages suffered by the plaintiff, and require either clear and convincing evidence of an intent to harm or a 'flagrant indifference' to safety; the *Securities Litigation Reform Act*, which would raise the standard of liability in shareholder actions for fraud, and make a plaintiff who launches a frivolous suit liable for the costs of the defendant; and a third bill that would require a victorious plaintiff to pay the other side's costs if he or she rejects an offer to settle that turns out to be more than the award at trial. The bills have now been considered by the Senate, and passed with amendments.[90] A final example of this type is the doctrine of *forum non conveniens* itself, which was borrowed from Scots law as a way of coping with what was seen as an excessive number of foreign plaintiffs (including Scots) in English courts.[91]

C. *The Acceptable Face of Jingoism*

If comity requires respect for diversity, it follows that one should accept any tendency of plaintiffs to gravitate towards a forum that offers particular advantages or expertise. In spite of Lord Reid's evident embarrassment at Lord Denning's dicta on forum-shopping in the *Atlantic Star* case,[92] which are at best insular and at worst jingoistic, there is a sense in which Lord Denning was right that forum-shopping is an acceptable consequence of specialization. English courts have considerable experience with many aspects of commercial litigation and arbitration, particularly as they concern shipping and maritime insurance (which is why foreign parties often choose English law as the law of their contracts, and base their insurance policies on Lloyd's); Belgian and South African courts are presumably well versed in disputes involving the diamond trade, given that Antwerp and Johannesburg are the global centres of this trade; the courts of New York, Hong Kong and Japan have special expertise in securities law; German, Swiss, Luxembourg and Bermuda courts in banking law; Canadian courts in mining law.

To say this need not be interpreted as imperialism, for there is nothing to prevent other jurisdictions from having or acquiring expertise in the same fields. Nor, as Lord Salmon points out in *Rockware*, is it mere "insular pride" but genuine superiority in specialized areas.[93] Friedrich Juenger suggests that forum-shopping allows parties to

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[90] D. Fagan, "U.S. Legal Reforms Face Tough Ride", *The* [Toronto] *Globe & Mail* (13 March 1995) at B3. The *Private Securities Litigation Reform Act* was passed, with amendments, by the Senate, subsequently sent to a House-Senate conference, and approved by both houses; the *Act* was vetoed by President Clinton, but this veto was overridden on 20 December 1995 in the House and 22 December 1995 in the Senate: United States Information Service, United States Embassy, Ottawa (15 February 1996). The *Product Liability Fairness Act of 1995* was passed, with amendments, on 23 June 1995, and is currently being considered by another House-Senate conference (*ibid.*). The *Attorney Accountability Act of 1995* has not been voted on by the Senate yet (*ibid.*).

[91] See *Rockware*, *supra* note 32.

[92] See *supra*, text accompanying notes 21-23.

[93] *Rockware*, *supra* note 32 at 819-20. See also *R. Pagnan & Fratelli* v. *Corbisa Industrial Agropacuaria Limitada*, [1971] 1 All E.R. 165 at 166 (C.A.), *per* Salmon L.J. (as he then was); North & Fawcett, *supra* note 20 at 230; Lord Devlin, *Samples of Lawmaking* (London: Oxford University Press, 1962) at 29-30; Fawcett, *supra* note 2 at 146; LoPucki & Whitford, *supra* note 3 at 40; but compare *Amin Rasheed Shipping Corp* v. *Kuwait Insurance Co.*, [1984] A.C. 50 (H.L.) at 67-68 *per* Lord Diplock, and at 72-73 *per* Lord Roskill [hereinafter *Amin Rasheed*]; Schuz, *supra* note 7 at 386.

avoid jurisdictions with what he is not shy in calling "sub-standard law".[94] Although this formulation veers dangerously close to the jingoism one should seek to avoid, Juenger provides an example that illustrates his point without being offensive: the Paris air disaster of 1974, in which 330 passengers and 13 crew-members were killed when a Turkish-owned DC-10 crashed at Ermenonville, on the outskirts of Paris. Choice of jurisdiction by the families of victims allowed adequate compensation for the injuries sustained, rather than obliging what Juenger calls "the absurdly low recovery limits imposed by the Warsaw Convention".[95]

There is, of course, no reason to make an automatic assumption right at the outset that a plaintiff's home (or 'natural') jurisdiction will provide an adequate and just measure of recovery. Justice surely demands some inquiry whether the plaintiff is legitimately seeking advantages in a foreign court, based on the facts of the particular case. English courts have been willing to consider 'sub-standard' law and procedure in their weighing of factors, but have been careful to do so only within limits allowed by the principle of international comity that is now firmly entrenched in House of Lords jurisprudence. This sense of care may serve at once to remove the taint of jingoism, and to give examples of when it may be necessary in the interests of justice to allow a foreign plaintiff to choose to commence an action elsewhere than at home. In *Amin Rasheed Shipping Corp.* v. *Kuwait Insurance Co.*, Lord Diplock was mindful of the need to avoid invidious comparisons between English and foreign legal systems (in this instance, the civil law of Kuwait), even when dealing with a subject matter like maritime insurance that is an area of English expertise:

> In my opinion, it would have been wholly wrong for an English court, with quite inadequate experience of how it works in practice in a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has long been adopted by a large number of both developed and developing countries in the modern world.[96]

In a case decided later the same year, however, Lord Diplock was prepared to say that there could be circumstances in which it would be proper to consider the deficiencies of foreign legal systems, for

> [t]he possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies.[97]

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[94] Juenger, "American and European Conflicts Law", *supra* note 2 at 128; see also Juenger, "What's Wrong with Forum Shopping?", *supra* note 3 at 8-9, 10, where he uses the more elegant tag *statuta odiosa*.

[95] Juenger, "Forum Shopping, Domestic and International", *supra* note 11 at 570-71. The Convention's ceiling for damages was $20,000 (U.S.). Survivors of victims sued the American manufacturers of the aeroplane in various U.S. courts. The defendants unsuccessfully argued *forum non conveniens*. Only one jury award was made in the U.S., for $1.5 million (U.S.) (nearly forty times the Warsaw limit), but it set the standard for out-of-court settlements with other plaintiffs.

[96] *Amin Rasheed*, *supra* note 93.

[97] *Abidin Daver*, *supra* note 34 at 411.

Lest this prompt a return to the 'judicial chauvinism' that international comity has properly replaced, Lord Diplock goes on to say in *Amin Rasheed* that there must be "positive and cogent evidence", not just "tenuous innuendoes" that justice will not be done in the foreign forum.[98] On the facts of the case, which concerned a collision in the Bosphorus between two ships, one Cuban and one Turkish, and the subsequent arrest in England of a sister ship of the Turkish defendant, the House of Lords found that Turkey was the natural forum of the dispute, and was unwilling to say that justice would not be done by bringing an action there.[99]

English courts have been prepared to recognize various factors that may be grounds for acceptable forum-shopping, although it must be borne in mind that each of them is only one of the totality that must be weighed in staying or allowing proceedings in the English court, or in granting or refusing an anti-suit injunction with respect to proceedings elsewhere. One factor that will tend to justify forum-shopping by a foreign plaintiff is the possibility of being subject to substantial delay in his or her home courts. This was cited as a reason to allow proceedings in England in *The Vishva Ajay*, where Sheen J. found, on the evidence presented to him by counsel, that it would take between six and ten years for the courts of India to determine the issue (liability for a collision between two Indian vessels in Indian waters).[100] Another factor cited in that decision was the fact that a successful litigant in India would have to bear most of his own costs.[101]

In the *El Amria* case, the unavailability in a foreign court of "a particular remedy sought by the plaintiffs, such as an interlocutory or final injunction...." was cited as reason enough to allow them to forum-shop in England.[102] A bar to recovery in the foreign jurisdiction might also be determinative, as it was in *Banco Atlantico S.A.* v. *British Bank of the Middle East*.[103] The Spanish bankers of a citizen of the United Arab Emirates, who had defaulted on payments under a share-purchase agreement (believing himself to have been defrauded by the seller of the shares), initiated proceedings against the seller and his bank in the Emirate of Sharjah. The defendant bank, which had guaranteed promissory notes under the agreement, was ordered by the Sharjah court not to make payment. The plaintiffs accordingly sued in England for $175,000 (U.S.) in damages. In response, the defendants applied to have the English action stayed. The trial judge acceded, but Bingham L.J. reversed this judgment, holding that he "could not...regard it as conducive to justice to require Banco [Atlantico], as a party with an arguable claim...[,] to litigate, if at all, in a jurisdiction where it would be bound on the evidence to face summary rejection of its claims."[104]

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98 *Ibid.* See also *Aratra Potato Co. Ltd* v. *Egyptian Navigation Co. (The "El Amria")*, [1981] 2 Lloyd's Rep. 119 at 127 (C.A.) *per* Brandon L.J. [hereinafter *El Amria*]; *Aldington Shipping Ltd* v. *Bradstock Shipping Corp. and Mabanaft GmbH (The "Waylink" and "Brady Maria")*, [1988] 1 Lloyd's Rep. 475 at 482 (Gibraltar C.A.), *per* Fieldsend J.A. [hereinafter *Waylink*].

99 *Abidin Daver*, *supra* note 34 at 422-25.

100 *The "Vishva Ajay"*, [1989] 2 Lloyd's Rep. 558 at 560 (Q.B. (Adm. Ct)) [hereinafter *Vishva Ajay*]. The connection with England was the plaintiffs' arrest of and service *in rem* on another ship owned by the defendants, while it was in port in England.

See also *Maharanee of Baroda*, *supra* note 35 at 694, *per* Lord Denning M.R.; *El Amria*, *supra* note 98 at 127; *Kahalasi* v. *Scindia Steam Navigation Co. Ltd (The "Jalakrishna")*, [1983] 2 Lloyd's Rep. 628 at 630 (Q.B. (Adm. Ct)) [hereinafter *Jalakrishna*].

101 *Vishva Ajay*, *supra* note 100, *loc. cit.*

102 *El Amria*, *supra* note 98 at 127.

103 [1990] 2 Lloyd's Rep. 504 (C.A.).

104 *Ibid.* at 509; also at 511, *per* Nourse L.J.

If one forum offers substantially more in the way of damages, this may also be sufficient to tip the balance in favour of the plaintiff's choice of forum: in the *Jalakrishna* case, Sheen J. held that it would be a "very great hardship" and "grave injustice" to oblige the plaintiff, severely mutilated as a result of a maritime accident, to be content with an Indian damage award approximately £17,500 lower than that which he was likely to recover in England.[105] From the opposite perspective, that of anti-suit injunction, Lord Scarman held in *Castanho* v. *Brown & Root (U.K.) Ltd* that it was an "irrelevancy" to argue that an injunction should be granted on the grounds that the plaintiff could recover substantially larger damages in Texas than in England; as long as an action in Texas would not be positively unjust (which in this case it was held not to be), there was no reason to restrain the plaintiff from continuing his proceedings there.[106]

Where the lack of a specialist court in another jurisdiction will work injustice, it may also be appropriate to allow forum-shopping, but this does not mean that courts can be too ready to second-guess the administration of justice by foreign legal systems; as *Amin Rasheed* makes clear, there will have to be compelling reasons to believe so.[107] In some cases, serious defects in foreign procedure will also be sufficient justification for a plaintiff's jurisdictional choice.[108]

Finally, it is appropriate in extreme cases to consider the political or social conditions of the foreign jurisidiction. As Mustill L.J. oberves in *Muduroglu Ltd* v. *T.C. Ziraat Bankasi*: "the court must not be too unworldly. It must recognise that there are parts of the world where things are very badly wrong...."[109] This must be right, for one would seriously doubt the ability of a plaintiff to obtain justice in a jurisdiction where the rule of law does not prevail (Burma, for example) or where political and civil order is in total collapse as in Somalia or Rwanda. Lord Justice Mustill is careful, however, not to pass judgment too easily on the foreign court in question, in this case the Turkish. He rejects as unfounded the criticisms levelled against the commercial courts of Turkey, although he suggests that he might decide otherwise if the dispute (over a breach of a procurement contract) were to be heard by a Turkish military tribunal rather than a civil court. Also, with comity in mind, he refuses to be swayed by the fact that if the plaintiff is obliged to pursue his rights in Turkey, he is at some risk of a criminal prosecution for taking action against the Turkish state, and for *scandalum magnatum* with respect to his

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[105] *Jalakrishna*, *supra* note 100 at 631.

[106] [1981] A.C. 557 at 576, 1 All E.R. 143 (H.L.) [hereinafter *Castanho* cited to A.C.].

Lord Scarman also refused to consider conduct by the plaintiff's American lawyers that was arguably unethical by the standards of their own jurisdiction: "these matters are for the American authorities, and not for your Lordships' House" (*ibid.* at 577).

[107] *Islamic Arab Insurance Co.* v. *Saudi Egyptian American Reinsurance Co.*, [1987] 1 Lloyd's Rep. 315 at 319-20; *Coast Lines* v. *Hudig & Veder Chartering N.V.*, [1972] 2 Q.B. 34; *Seashell Shipping Corp.* v. *Mutualidad de Seguros del Instituto Nacional de Industria (The "Magnum ex Tarraco Augusta")*, [1989] 1 Lloyd's Rep. 47 at 53; *Kloeckner & Co. A.G.* v. *Gatoil Overseas Inc.*, [1990] 1 Lloyd's Rep. 177 at 207.

For an older, but less acceptable view of the same problem, see the two cases cited by Lord Mansfield in *Mostyn*, *supra* note 10 at 1032, where his Lordship observed: "There are no local Courts among the Esquimaux Indians of the Labrador coast; and therefore whatever any injury had been done there by any of the King's officers would have been altogether without redress, if the objection would have been held."

[108] *El Amria*, *supra* note 98 at 127; *Maharanee of Baroda*, *supra* note 35 at 693 (difficulties in compelling English experts in France, and in having their testimony admitted there).

[109] *Muduroglu*, *supra* note 4 at 1248.

statements about the involvement of a former Prime Minister of Turkey in the dispute.[110]

The two guiding principles in all of these cases are that the advantages or disadvantages to the plaintiff are only part of the equation, and must be seen in relation to the position of the defendant; and that any deficiencies abroad must be demonstrated with Lord Diplock's "positive and cogent evidence", so as not to violate the principle of comity amongst jurisdictions that is now supposed to reign in international affairs. As long as these conditions are met, a court may accept the plaintiff's choice of what might otherwise appear to be an unnatural forum for the determination of matters in dispute. And it should go without saying that a foreign court ought to apply the same criteria in its assessment of proceedings brought in England.

D. *The Internationalized Dispute*

In light of the emphasis placed by the House of Lords and by the Supreme Court of Canada on international comity, it is worth considering the interjurisdictional context of disputes in greater detail. Nature now seems to imitate art, for ordinary transactions take on the appearance of examination questions on the conflict of laws. It is not beyond credence to imagine a ship owned through a Cayman Islands holding company by Turkish Cypriots resident in Germany, registered in Panama, with a Turkish contract of insurance based on Lloyd's standard policy and a multinational crew, colliding in the high seas with another vessel with equally complicated contacts. In such a world, forum-shopping may be the only rational or practical response to a large number of connecting factors of more or less equal weight. This is, as Lord Goff observed in *Spiliada*, "particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions...or in Admiralty, in the case of collisions on the high seas."[111] Lord Simon makes a similar point in his dissenting speech in *Atlantic Star*:

> 'Forum shopping' is, indeed, inescapably involved with the concept of maritime lien and the action *in rem*. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.[112]

Or, as Elizabeth Edinger points out, "a conflicts case seldom has a 'natural forum'. Diversity of contacts is the essence of a conflicts case."[113]

Although commercial and maritime cases are the most obvious example of situations where the international nature of trade will result in factors connecting a dispute to any number of jurisdictions, the same is true of products liability or personal injury suits brought against multinational corporations. This was the case in *SNI*, in which Texas (where the defendant had operations, but not its headquarters) and Brunei (where the crash took place) would have been equally appropriate fora for the determination of liability for defective manufacture of the helicopter — had it not been for the inability to seek contribution in Texas from the Malaysian subsidiary, which

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110 *Ibid.* at 1248-49.

111 *Spiliada, supra* note 36 at 477. See also *European Asian Bank A.G.* v. *Punjab and Sind Bank*, [1982] 2 Lloyd's Rep. 356; *Abidin Daver, supra* note 34 at 409; *Dubai Electricity Co.* v. *Islamic Republic of Iran Shipping Lines (The "Iran Vojdan")*, [1984] 2 Lloyd's Rep. 380 at 387-88 (Q.B. (Comm. Ct)); *Waylink, supra* note 98 at 482.

112 *Atlantic Star* (H.L.), *supra* note 22 at 198.

113 Edinger, *supra* note 20 at 293.

tipped an otherwise equal balance in favour of the Brunei court.[114] Similarly, in *Castanho* it was held by Lord Scarman that "Texas is as natural and proper a forum for suing a group of Texan-based companies as England — even though England, as the scene of the accident, is also a natural and proper forum."[115]

Another type of internationalized case is suggested by *Maharanee of Baroda*, in which H.R.H. Maharanee Sethadevi Gaekwad of Baroda sued Daniel Wildenstein, the art dealer, over the sale of a painting which he had certified on the writing paper of his London gallery as an authentic work by François Boucher, but which two English experts later declined to attribute to the painter.[116] Both parties to the action were resident in France, but both had racing and social associations with England. The Maharanee served her writ on the defendant as he attended the Ascot races. The defendant claimed that since the sale was completed in Paris, France was the appropriate forum. Lord Denning M.R. refused to find that the plaintiff's service was vexatious or oppressive, even though both parties were only on brief visits to England at the time. There was some concern that the Maharanee's two experts were unwilling to testify on her behalf, and that only an English court could compel them. It was also uncertain that a civilian court in France would accept the evidence of outside experts, not appointed by the court.[117] But the decisive factor was that the dispute itself was international, with no one 'natural' forum. As Lord Denning put it,

> ...here the main issue is whether this painting was a genuine Boucher or not. That issue is one of fact which is crucial to the case in French law as well as in English law. It is not solely a French issue. The art world is so international in character today that this issue has itself something of an international character.[118]

Exposure to lawsuits in various jurisdictions is simply the price of doing business in them, or of organizing one's personal and commercial affairs across many boundaries: a point well illustrated by Sir Nicholas Browne-Wilkinson V.C. (as he then was) when he observed in *Kingdom of Spain* v. *Christie, Manson & Woods Ltd*, another international art case, that England was as good a jurisdiction as any other, given co-defendants who were "a cosmopolitan body of people spread over many jurisdictions, Liberia, British Virgin Islands, Channel Islands and Paris."[119]

The corollary of the dispute which has many obvious fora is that which has *no* obvious forum, because the connections to the possible jurisidictions are equally fragile. It may also be that while more than one jurisdiction could in theory hear the dispute, circumstances might mean that it is effective to sue only in a forum that does not strike a court as the 'natural' or most likely one. In these situations, a court that is too quick to condemn the plaintiff for forum-shopping may thereby deprive him or her of justice

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[114] *SNI, supra* note 41 at 524-27.

[115] *Castanho, supra* note 106 at 576.

[116] *Supra* note 35.

[117] *Ibid.* at 693-94, *per* Lord Denning M.R.

[118] *Ibid.* at 693.

[119] [1986] 3 All E.R. 28 at 37 (Ch. D.). The case involved a sale of a painting by Francisco Goya at Christie's, on behalf of the 'cosmopolitan body'. The Spanish government contended that the painting had left Spain with forged export documents.

For remarks to the same effect, see the judgment of Rehnquist J. *per curiam*, in the well-known American case of *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 at 781 (1984), 104 S. Ct 1473.

in declining to hear the case, or in enjoining proceedings elsewhere.

The Supreme Court of Canada recognized these possibilities in *Antares*, where the only Canadian elements in the dispute had been brought about by forum-shopping: the arrest in Canada of a sister ship of the vessel that was the subject of the dispute, and the subsequent posting of a bond by the defendants in the Federal Court. The majority of the Court came to the conclusion that all of the possible fora involved inconvenience to one or both parties, and that the bond constituted the only fund available anywhere in the world to respond to a judgment against the defendants.[120] The plaintiff had engaged in what the House of Lords in *Chaplin* would probably have called blatant forum-shopping, but to decline to hear the case on that basis would do more than merely force the plaintiff to settle for a less desirable, but still adequate forum. It would deprive the plaintiff of recovery altogether.

The American case of *Islamic Republic of Iran* v. *Pahlavi* illustrates the effect that a reflex action against forum-shopping may have on a plaintiff.[121] In dismissing an action by the revolutionary government of Iran to recover American assets of the late Shah on the grounds that Iran, rather than New York, was the *forum conveniens* for the dispute, the New York Court of Appeals effectively left the plaintiff without recourse. As Elizabeth Edinger observes: "The phenomenon of the 'right' forum may leave the plaintiff with no forum."[122] One is tempted to suppose that the New York court's interpretation of the doctrine of *forum non conveniens* may have had something to do with the fact that the Islamic Republic commenced proceedings at the height of the U.S.-Iran hostage crisis, and to some extent one's sense of the fairness of highly politicized decisions may depend on individual conclusions or preconceptions about the parties. Questions of politics aside, the *Pahlavi* case does suggest, however, that there are situations in which forum-shopping will be the only way a plaintiff can pursue his or her rights with any degree of success, and that automatic rejection of a plaintiff's opportunism may actually promote injustice. From this perspective, forum-shopping is merely what any good lawyer would do to further the legitimate interests of a client.[123]

E. *Questions of Fairness*

The issue of fairness to plaintiffs that is raised in *Islamic Republic of Iran* v. *Pahlavi* itself has a corollary; the prevention of forum-shopping by the plaintiff may amount to nothing more than forum-shopping by the defendant. Presumably one of the reasons that the Shah of Iran removed assets to the United States in the first place was to make it as difficult as possible for any eventual revolutionary government to lay its hands on them. Unless courts are willing to regard forum-shopping as a practice that is morally neutral *per se*, and to evaluate the fairness of its application case by case, they may simply be allowing defendants to dodge fora where they will be held to account for their actions and to shift disputes to jurisdictions where, for whatever reasons, they will not. Even if there is not the institutional bias of common-law courts against plaintiffs that has been suggested by some scholars, there is no reason to frown on forum-shopping by plaintiffs

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120 *Antares*, *supra* note 48 at 453-55, *per* Ritchie J.

121 62 N.Y. 2nd 474, 467 N.E. 2d 245, 478 N.Y.S. 2d 597 (1984), cert. denied 105 S.Ct 783 (1985) [hereinafter *Pahlavi*].

122 Edinger, *supra* note 20 at 295. See also J.A. Blank, "*Islamic Republic of Iran v. Pahlavi*: A Novel Application of *Forum Non Conveniens*" (1985) 49 Albany L. Rev. 528.

123 "Forum Shopping Reconsidered", *supra* note 2 at 1691; Castel, *supra* note 64 at 228.

while unwittingly sanctioning its use by defendants.[124] This point was made by Lord Diplock in *British Airways Board* v. *Laker Airways Ltd*, where the House of Lords refused to enjoin Laker Airways from continuing an anti-trust, combination and conspiracy suit in the United States against various other airlines. His Lordship rejected the argument that an anti-suit injunction should be granted because the claims were not justiciable in England:

> For an English court to enjoin the claimant from having access to that foreign court is, in effect, to take upon itself a one-sided jurisdiction to determine the claim upon the merits *against* the claimant but also to prevent its being decided upon the merits *in his favour*.[125]

An opportunistic plea of *forum non conveniens* by a defendant, a kind of forum-shopping in reverse, also seems to be the target of Edmund Davies L.J. in *Maharanee of Baroda*, when he compares the apparent motivations of the parties:

> Both in taking it [the writ] out and serving it (albeit when the defendant was only fleetingly on British soil) she was doing no more than our law permits, even though it may have ruined his day at the races. Some might regard her action as bad form; none can legitimately condemn it as an abuse of legal process....[126]

In other words, the disingenuous defendant cannot plead *forum non conveniens* merely as a tactic to put the plaintiff to further expense and inconvenience in having to start all over again in the supposedly more appropriate forum, so that the defendant may buy time to make himself or herself as judgment-proof as possible, or to send the dispute somewhere the defendant suspects may be less inclined to find for the plaintiff. When the Supreme Court of the United States formally adopted the doctrine of *forum non conveniens*, in the case of *Gulf Oil* v. *Gilbert*, the dissenting judgment of Black J. expressed concern that the doctrine itself might be an inducement to unscrupulous behaviour by defendants: "It will be a poorly represented multi-state defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient."[127] It is my view that the *Spiliada* test reduces the scope for abuse of *forum non conveniens*, but the danger identified by Mr Justice Black is a real one if courts fail to undertake a careful weighing of all the circumstances in jurisdiction cases, and the implications of the judgments they render — in short, if they are too quick to condemn forum-shopping as an evil inconsistent with some unspecified and unexplained public policy. This brings me back to a point made about *Pahlavi* at the beginning of this section: parties who have some expectation of lawsuits against them might be able to structure their affairs in such a way that *forum non conveniens* could be a useful deflecting device. It is not implausible to suggest that one of the reasons Union Carbide might have located its manufacture of methyl isocyanate at Bhopal in the Indian state

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[124] On a possible pro-defendant bias, see Brown, *supra* note 14 at 684-85; Note, *supra* note 2 at 1688-89; Blank, *supra* note 122 at 556-57.

[125] [1985] A.C. 58 at 80, [1984] 3 All E.R. 39 (H.L.) [hereinafter *British Airways* cited to A.C.]. See also *Bank of Tokyo Ltd* v. *Karoon*, [1987] A.C. 47 (C.A.).

[126] *Maharanee of Baroda*, *supra* note 35 at 694. See also *Pindling*, *supra* note 15 at 66; *Peruvian Guano*, *supra* note 27 at 230; *Atlantic Star* (H.L.), *supra* note 22 at 198; *Smith Kline*, *supra* note 1 at 84, *per* Ackner L.J.

[127] 330 U.S. 501 at 516 (1947), 67 S. Ct 839 [hereinafter *Gulf Oil* cited to U.S.].

of Madhya Pradesh was a sense of relative security with respect to tort suits should anything go wrong at the factory, as it ultimately did.

This problem of incentives is further demonstrated by two of the actions involving maritime accidents that are cited previously, the *Jalakrishna* and *Vishva Ajay* cases.[128] Factors connnecting both disputes with England were slight, but in light of the long delays and substantially lower rates of recovery that were likely if the issues were tried in the more 'natural' Indian forum, the English courts were prepared to assume jurisdiction. To have done otherwise might have had unfortunate consequences in creating an incentive for commercial parties to choose shipping companies and crews from countries where tort damages are difficult to obtain, and disappointing even if one is successful. Forum-shopping may thus be the only way to *prevent* injustice.

If there is still concern that forum-shopping is too favourable to plaintiffs, as a final matter it should be pointed out that there are checks and balances, in addition to those articulated in the *Spiliada* line of cases, that may serve to reduce any undesirable incentives on the plaintiff's side of the equation. In this context, it is worth remembering Lord Denning's metaphor of the moth drawn to the flame, for the plaintiff who is lured to Texas by contingency fees, punitive damages and generous juries may end up with singed wings—or worse. Whatever the outcome of the case, the plaintiff will have to bear the expenses of transporting witnesses and evidence to the chosen forum, in the absence of an English-style costs rule. If the plaintiff loses, which is a possibility even in Texas, the burden of these expenses will be heavier; the less likely and more distant the forum, the greater still these potential costs.

There is also the risk that a foreign court will apply its own law, under its choice of law rules, or that foreign counsel will be unfamiliar with the plaintiff's home law, in the event that it is applied. Common sense, then, may well militate against the initiation of proceedings in a jurisdiction that is far from home, or very different from it.[129] There is also the possibility that the jurisdiction of choice will itself apply the doctrine of *forum non conveniens*, and decline to assert jurisdiction. As was pointed out in *Amchem*, this will not happen in Texas, which has abolished the doctrine by statute, but even in that jurisdiction there was an equivalent in the 'due process' clause. It is safe to assume that most jurisdictions, common law or otherwise, will apply some analogous control on their own process, given that the phenomenon of forum-shopping does not respect borders between legal systems, and is something with which every legal system must therefore come to terms. Some jurisdictions will have less strict controls than others, but the principle of comity demands respect for the choices that foreign fora have made in dealing with the question. *Forum non conveniens* is in this sense the same kind of exercise as other 'escape devices' (for example, characterization or *renvoi*), invoked by courts when they see a need to exclude cases which are not properly brought before them. In extreme cases, there is also the anti-suit injunction, which restrains foreign proceedings by parties within the jurisdiction of the enjoining court in order to prevent injustice.[130] As Lord Goff stated in *SNI*, "[i]n normal circumstances, application of the now very widely recognised principle of *forum non conveniens* should ensure that the foreign

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[128] See *supra* note 100.

[129] M. Youssef & P. Finkle, "Cross-Border Shopping, Consumer Remedies and Long-Arm Legislation: To Reach out and Touch Someone" (1993) 15 Advocates' Q. 1 at 4. See also *Gulf Oil*, *supra* note 127 at 508, *per* Jackson J.

[130] See *supra* note 2.

court will itself, where appropriate, decline to exercise its own jurisdiction...."[131]

In the unusual event that a jurisdiction lacks any controlling device like *forum non conveniens*, as Sopinka J. suggests in *Amchem*, this is just one factor to be considered in the balancing exercise; it was not enough on its own, in that case, to outweigh other factors suggesting "sufficient contact with Texas...."[132] The presence or absence of *forum non conveniens* is therefore only one of the things to be considered in Lord Wilberforce's "critical equation", and not something that can be said to dispose of the issue without further inquiry.

VI. Conclusion

It is possible that there may once have been good reason to condemn forum-shopping as an abuse of the courts, but I think it more likely that there have always been at least as many reasons for it as against. Certainly commercial disputes have long been highly international in character, as an examination of nineteenth-century English cases tends to suggest. If one accepts the fairness arguments levelled against forum-shopping (ignoring for the moment that they are themselves unfair), then perhaps there is a valid point to be made. In any event, the very careful and sophisticated weighing of factors by the House of Lords in *Atlantic Star*, *Rockware*, *Spiliada* and *SNI* takes the sting out of much of the critique of forum-shopping, for if a court applies the principles enunciated in that line of cases, there should be no problem about the forum-shopping dangers that are typically cited. The "critical equation" will favour neither plaintiffs as a group nor defendants, but will be sensitive to issues of fairness to both sides in individual cases. While a court will be required to determine whether there are enough points of contact to justify the assertion of jurisdiction, this will not result in a log-jam of 'foreign' actions in its dockets; those cases which are not summarily rejected under the doctrine of *forum non conveniens*, or deterred by this prospect in the first place, will not be foreign at all

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[131] *SNI*, *supra* note 41 at 521. See also *Amchem*, *supra* note 47 at 111-12; *Ang* v. *Trach* (1987), 57 O.R. (2d) 300 at 311, [1986] 33 D.L.R. (4th) 90, *per* Henry J.; *Atlantic Star* (H.L.), *supra* note 22 at 194, *per* Lord Wilberforce; *Smith Kline*, *supra* note 1 at 77, *per* Lord Denning M.R. And see Law Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict* (L.C. Working Paper 87, S.L.C. Consultative Memorandum 62) (London: H.M.S.O., 1984) at 81; D. Boyce, "Foreign Plaintiffs and Forum Non Conveniens: Going Beyond *Reyno*" (1985) 64 Texas L. Rev. 193; Castel, *supra* note 64 at 228-29; Fawcett, *supra* note 2 at 147-50; Schuz, *supra* note 7 at 375-76, 400-08; E.R. Hayes, "*Forum Non Conveniens* in England, Australia and Japan" (1992) 26 U.B.C.L. Rev. 41, (which explores the functional equivalence of legal doctrine in three jurisdictions, in spite of slight formal differences); V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993) 22 Can. Bus. L.J. 4 at 11, 24-25.

[132] *Amchem*, *supra* note 47 at 937-39; also generally at 934-39. Sopinka J. was satisfied that Texas's application of the 'due process' clause of the 14th Amendment would be a sufficient check on overly broad 'long-arm' jurisdiction. See also V. Black, "The Standard for Issuing Antisuit Injunctions in Canada" (1991) 44 C.P.C. (2d) 30 at 31-32.

Quebec was, until recently, another jurisdiction where the doctrine of *forum non conveniens* did not apply, although it has been argued that Quebec cases implicitly endorsed it, and that only judicial stubbornness refused to acknowledge it: see M.G. Peacock, "Doctrine of Forum Non Conveniens in Ontario and Quebec: The Two Solitudes" (1987) 47 R. du B. 111; P. Normandin, "Les Pouvoirs inhérents de la Cour supérieure et la doctrine 'forum non conveniens'" (1987) 47 R. du B. 469. Any doubts were resolved by the formal adoption of the doctrine in the *Civil Code of Quebec*, c. 64 C.C.Q. (P.L. 125); and see Youssef & Finkle, *supra* note 129 at 9.

but adequately and properly connected to the jurisdiction.

This new view of forum-shopping should promote certainty and uniformity of result, rather than the opposite, because it provides clear rules in place of *ad hoc* determinations based on preconception or prejudice. And if we are to pay more than lip-service to the principle of comity between nations, and within federal states, forum-shopping must be accepted as an aspect of diversity that, in Lord Simon of Glaisdale's words, "should be a matter neither for surprise nor for indignation".[133] It can be argued, furthermore, that forum-shopping is merely one facet of competitive federalism (or competitive internationalism) that may, in the end, create incentives for harmonization rather than the chaos and confusion that are sometimes predicted. The achievement of the *Spiliada* line of cases is to meet the challenge made by Lord Denning in *Atlantic Star*, and to re-evaluate forum-shopping in a way that recognizes modern realities, the legitimate interests of all parties and the demands of justice.

The adoption of *Spiliada* by the Supreme Court of Canada in *Amchem* is therefore a welcome development, as it will require a more sophisticated and more closely-reasoned approach to jurisdiction on the part of Canadian judges. In his discussion of choice of law in *Jensen*, Mr Justice La Forest describes the old way of thinking and its inadequacies. With only slight modification, his words would be equally apt in the context of forum-shopping:

> What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of "fairness" about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law.[134]

The decisions of the Supreme Court in *Amchem*, *Morguard*, *Hunt* and *Jensen* are significant in imposing a rational system where only vague instinct had governed before, and this is as much of an achievement as *Spiliada* itself. It is regrettable, however, that Sopinka J. in *Amchem* (and, to a lesser extent, La Forest J. in *Jensen*) could not resist making comments about forum-shopping that reflect the old approach rather than the new, and which seem to fail to take the implications of *Spiliada* fully into account. It would be helpful, therefore, if subsequent judgments came to terms with forum-shopping as a practice that is morally neutral on its own, to be encouraged or prevented only as demanded by the merits of a particular case — but the practical effect of *forum non conveniens* and reciprocal enforcement of judgments may necessitate this revisionist version of forum-shopping anyway. The Supreme Court has, in any event, made significant (if not complete) progress in rethinking an old and unjustifiable *idée fixe* and in responding, in its own way, to the challenge raised by Lord Denning.

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133 *Atlantic Star* (H.L.), *supra* note 22 at 197.

134 *Jensen*, *supra* note 4 at 1046.